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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CIVIL PART
HUNTERDON COUNTY
DOCKET NO. HNT-L-458-06

TOWNSHIP OF READINGTON,

Plaintiff,

vs.

VIDEO TRANSCRIPT
OF
MOTIONS

SOLBERG AVIATION CO.,
et al.,

Defendants.

PLACE: Somerset County Courthouse
20 North Bridge Street
Somerville, New Jersey
DATE: November 03, 2006

BEFORE:

HONORABLE YOLANDA CICCONE, AJSC

TRANSCRIPT ORDERED BY:

James P. Rhatican, Esq.

APPEARANCES:

JAMES RHATICAN, ESQ.
And JOSEPH MURPHY, ESQ.
For Plaintiff

LAWRENCE B. ORLOFF, ESQ.
And PHILIP E. MAZUR, ESQ.
For Solberg Aviation Company

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 3 STEVEN FIRKSER, ESQ.
 4 For Kevin Devine, et al.
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1
 2 INDEX TO PROCEEDINGS
 3
 4
 5
 6
 7 Motion Proceedings
 8 Colloquy Page 4
 9
 10
 11
 12
 13
 14
 15
 16
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 18
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 22
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 24
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Colloquy

1
2 THE COURT: HNT-L-468-06.
3 Counsel, this is the Township of
4 Readington's order to show cause, defendant Solberg's
5 motion to vacate the order to show cause and
6 declaration of taking and third-party Kevin Devine and
7 the Tax Payers Alliance of Readington's motion to
8 intervene.
9 Counsel, appearances, please.
10 MR. RHATICAN: For plaintiff James
11 Rhatican, R-H-A-T-I-C-A-N, Connell Foley law firm.
12 I have with me Joseph Murphy from my
13 office, as well.
14 (Videocamera for defendants' table is not
15 operative. Audio transcription only.)
16 MR. ORLOFF: Good morning, your Honor.
17 Lawrence B. Orloff, Orloff, Lowenbach
18 Stifelman & Siegel. With me is my associate Philip
19 Mazur.
20 We represent Solberg Aviation Company and
21 Tor Solberg New Jersey.
22 MR. FIRKSER: And Steven Firkser,
23 F-I-R-K-S-E-R, from Greenbaum, Rowe, Smith & Davis for
24 intervenor Kevin Devine and Taxpayers Alliance of
25 Readington.

Colloquy

1 THE COURT: This is an eminent domain
2 action that was commenced by the Township of
3 Readington with the filing of condemnation complaint
4 on September 15th, 2006. On September 22, 2006, I
5 issued an order to show cause returnable today.
6 Along with the order to show cause I also entered an
7 order for deposit of monies into court as well as a
8 declaration of taking, all filed by the plaintiff.
9 On October 18th, Solberg Aviation filed a
10 motion, also returnable today, asking to vacate the
11 declaration of taking, withdraw the monies deposited
12 into court, pending full discovery of other relief,
13 and on October 20th we had third-party plaintiffs
14 Kevin Devine, Taxpayers Alliance of Readington also
15 filed a motion to intervene intervene-- excuse me-- as
16 a defendant and vacate the court's order of September
17 15th.
18 Mr. Rhatican, I'll hear you on your
19 motion.
20 MR. RHATICAN: Thank you, your Honor.
21 Our application is one for the entry of
22 final judgment with regard to the Township's right to
23 condemn the subject property. The facts and details
24 are set forth in our briefs.
25 I think it is clear, your Honor, that the

Colloquy

1 property is being condemned for preservation
 2 purposes. It will result in the preservation of
 3 substantial amount of open space as well as other
 4 natural resources including wetlands. It is a Natural
 5 Heritage Site. And there is a nearby site that has
 6 been designated a National Historic Site, as well.

7 There are a host of reasons why this site
 8 should be preserved.

9 I want to start with the premise, your
 10 Honor, that public purposes are to be construed
 11 broadly. I don't think there is any dispute with
 12 regard to that legal fact.

13 The courts of this state, the courts of the
 14 federal system, and the United States Supreme Court
 15 have all acknowledged a very flexible approach to
 16 evaluating public purposes.

17 With that premise, we next consider a legal
 18 fact that preservation of open space and conservation
 19 of natural resources is a well-accepted public
 20 purpose. I don't think that can be disputed.

21 There are ample cases and in fact
 22 legislative intent, which makes clear a desire, and a
 23 public policy of this State to preserve open space.

24 In fact the Legislature has noted, your
 25 Honor, that it is the policy of this State to preserve

Colloquy

1 as much open space as possible.

2 And I would cite, your Honor, to the Dolan
 3 and the Deland (phonetic spelling) cases that we refer
 4 to in our briefs.

5 The fact is that, your Honor, that this
 6 condemnation is rationally related to those public
 7 purposes and I would refer you to the United States
 8 Supreme Court of Midkif (phonetic spelling) for that
 9 test. The rational relationship test. And it cannot
 10 be denied, I think, that there exists a rational
 11 relation between this Township's conduct and activity
 12 with regard to the condemnation case and the public
 13 purposes to be served by that.

14 I don't think any of that is in dispute.
 15 We may hear differently from Mr. Orloff. I don't
 16 think that's in dispute. Nor is I think any dispute
 17 that courts generally defer to legislative findings of
 18 public purpose.

19 In Midkif the United States Supreme Court
 20 noted that legislatures-- and that would include
 21 municipal legislatures-- governing bodies are better
 22 suited to determine what is in the public interest and
 23 are better suited to determine what is a purpose. And
 24 Midkif tells us that courts must defer to legislatures
 25 with regard to those types of findings.

Colloquy

1 On the State level the West Orange case and
2 the Deland case stand for the same proposition.

3 Now, a finding that a condemnation is
4 intended to advance a public purpose can only be
5 disrupted by a court on a finding of bad faith, fraud,
6 ill will, if you will, and the burden, which is a very
7 strong burden and heavy burden, lies with a
8 challenger-- a party challenging the condemnation to
9 prove by strong and convincing evidence, your Honor.

10 That's the language from the Essex Fells
11 opinion.

12 Strong and convincing evidence of bad
13 faith.

14 Courts -- the Essex Fells opinion goes on
15 to note that courts are reluctant to find bad faith
16 and couple that, your Honor, with the standard that,
17 generally, municipal action is presumed to be lawful.

18 The Bryant case out of Atlantic City notes
19 that a party challenging municipal action bears a
20 heavy burden to challenge any municipal action.

21 In fact, your Honor, the Bryant case says
22 that an action can be vacated only if the challenger
23 can show that there exists no set of facts which could
24 justify that municipal conduct.

25 And I think it is clear, given the very

Colloquy

1 lengthy history of the open space measures, the open
2 space preservation efforts of the Township, that there
3 exists a very real set of facts on which this decision
4 was made. Acknowledged by the way not only by the
5 municipality here, but by the County, which has
6 designated this site as a Priority Preservation Site,
7 by the State of New Jersey, which has put this site in
8 the planning area of 4B of the State Development and
9 Redevelopment Plan, which the name of that planning
10 area is Rural Environmentally Sensitive.

11 So this is a site in which the State has
12 made a policy decision that this is an area of the
13 State where property should be preserved. Open space
14 should be preserved. And I think that's critical,
15 your Honor. This is not just a municipality acting on
16 its own. This is a municipality acting with reports
17 prepared by its own professionals and based on
18 planning documents prepared by other levels of
19 government.

20 This is not a unilateral decision, so to
21 speak, on the part of the Committee of the Township of
22 Readington.

23 The Kirby case, which we cite in our brief,
24 is interesting, because it speaks of this heavy burden
25 in challenging municipal action and says, well that

Colloquy

1 burden never shifts. In that case a plaintiff is
 2 challenging a zoning ordinance and the plaintiff
 3 presented inadequate, in the eyes of that court,
 4 proofs to challenge that zoning ordinance and the
 5 court said, well, the plaintiff needs to do more
 6 than-- the party challenging the ordinance needs to do
 7 more than present some meager proofs. They need to--
 8 and this is consistent with the Essex Fells opinion--
 9 they need to present strong and convincing evidence.

10 THE COURT: Excuse me one minute.

11 Will all of you please sit down? You are
 12 blocking the exits.

13 Everyone.

14 Thank you.

15 THE COURT: Go ahead Mr. Rhatican.

16 I am sorry to interrupt you.

17 MR. RHATICAN: That's okay.

18 I'll take a moment. I don't think we cite

19 -- I mentioned the Bryant case earlier. I don't

20 believe that was cited in the brief. It's an
 21 Appellate Division opinion, 309 N.J. Super 596.

22 Again, an Appellate Division opinion from 1998.

23 So what the Kirby opinion tells us is that
 24 the burden doesn't shift back to the municipality in
 25 this type of a challenge. The burden stays with the

Colloquy

1 property owner or the challenger and it is a very
 2 heavy burden. And it is only in the rarest of cases
 3 and it is not met in this case.

4 What is the public purpose here? I
 5 mentioned them earlier. Some of them anyway.
 6 Preservation of open space. Preservation of
 7 wetlands. Preservation of critical specious habitat.
 8 Preservation of Natural Heritage Site. Preservation
 9 of water resources. And also, your Honor,
 10 importantly, preservation of the airport. This is not
 11 exclusive of the airport. The condemnation and the
 12 development rights that the municipality has sought on
 13 the airport would allow for substantial modernization
 14 of the airport. Substantial, frankly, increase in the
 15 facilities at the airport. And it is in the
 16 community's interest to see this airport survive.
 17 This is not an effort, as Solberg Aviation would
 18 suggest, to destroy the airport. The Township on two
 19 prior occasions could have condemned the entire
 20 airport, if they wished. They are not doing that
 21 here. This is not an effort to destroy the airport,
 22 to wipe it off the face of the earth.

23 This is an opportunity to preserve the open
 24 space and the natural resources surrounding the
 25 airport and to do it in a manner that is least -- has

Colloquy

1 the least impact on the airport and has no, I think,
2 part, frankly, on its operations.

3 The Solberg Aviation Company suggests this
4 is a bad faith taking, your Honor. There is no --
5 there can be no motive to destroy the airport, as I
6 said. But public officials have gone on record
7 speaking in favor of preserving the airport. The --
8 as I said, the Township could condemn the entire
9 airport if it wishes. But scaled back its
10 preservation efforts in an effort to allow the owners
11 of the airport to retain ownership, control and we
12 have from Solberg Aviation Company a certification of
13 Arlene Feldman a former employee of the FAA, and
14 strikingly absent from that certification, your Honor,
15 I think is any suggestion that there will be a
16 negative impact to the operations of this airport
17 resulting from this condemnation.

18 And I would see even if there were some
19 impact that would not -- it would not win the day for
20 the Solberg Aviation Company. But they cannot say
21 anywhere that this condemnation would negatively
22 impact the operations of the airport. And they don't
23 say that. There will be no physical changes.

24 This is not a situation where a condemning
25 authority is trying to take a property to construct a

Colloquy

1 road or a public building, a municipal building. This
2 property is not going to change. It is going to
3 remain in its current state. It is going to remain as
4 open space and that's the reason for the preservation
5 and that's the effect of the preservation, as well.

6 And, candidly, the condemnation will
7 provide funding to the owners of the airport. This
8 airport, it is noted in some FAA documents we have
9 submitted, as well as the report of the consultant
10 retained by the municipality and in N.J.D.O.T. press
11 release we submitted to the court, that this airport
12 suffers -- somewhat substandard. There have not been
13 a lot of capital improvements to the airport in recent
14 years. This condemnation will allow modernization and
15 a little bit of an upgrade to the airport by providing
16 funding to that.

17 That's another objective here, your Honor,
18 is to frankly make this a safer airport.

19 The suggestion that bad faith is reflected
20 in campaign materials, I think, is not well placed.
21 The campaign materials I would suggest and would show
22 your Honor are of recent vintage. We have had some
23 -- this is not submitted necessarily in opposition
24 of the order to show cause but in support of the
25 third-party complaint and counterclaim submitted by

Colloquy

1 Solberg Aviation Company. But I'll address it.
2 There are campaign materials which Solberg
3 Aviation suggest are demonstrative of bad faith or ill
4 motive in trying to condemn the property. Those
5 campaign materials are-- one set is from a November
6 election in 2005. Another set is from a primary
7 election in June of this year. A long time after the
8 municipality made the decision to preserve this
9 property and a long time after the municipality --
10 the County and the State found this property to be a
11 property worthy of preservation. And so I think that
12 it's kind of putting the cart before the horse to
13 suggest that these campaign materials are
14 demonstrative of ill motive when they postdate all the
15 of the relevant documentation and reports.
16 Frankly, as a matter of law the statements
17 are of no consequence. The language of significance,
18 your Honor, the language of consequence in this case,
19 is contained in a legislative document itself, which
20 is the ordinance. We don't look beyond the four
21 corners of the ordinance for the intent of the
22 legislative body, and I would cite to an old case from
23 1948, Bernson verses Evans, which says that the intent
24 of the law giver is found in the language used. 137
25 N.J. Law 511, 1948. Case of the Supreme Court.

Colloquy

1 The cases we cite in our brief, Kramer and
2 Lincoln Heights, Kirby all stand for the same
3 proposition, your Honor. These are cases in which
4 there are public comments made by members of public
5 bodies, which might be deemed to be prejudicial or
6 somehow have an effect on conduct or actions of a
7 municipal body. And in each of those cases the courts
8 have said that people are entitled to their opinions.
9 And when they express an opinion, perhaps, they are
10 wearing one hat. But when they sit on a legislative
11 body, a board of adjustment, and sit on a planning
12 board, we presume they are acting in a professional
13 and ethical capacity. And because they make public
14 comments or campaign statements, that does not
15 prejudice or foreclose action of the board on which
16 those people sit. Because the board acts as a unified
17 body.
18 In this case the Township Committee acts as
19 unified body. Expressions and campaign materials of
20 individual members of that body are of no moment, your
21 Honor.
22 There is a case too, by the way, U.S.
23 verses Morgan, U.S. Supreme Court case, 311 U.S. 409.
24 1941, deals with comments with the Secretary of
25 Agriculture with regard to regulations that were being

Colloquy

1 implemented and there was an allegation that a private
 2 letter of the Secretary of Agriculture would have
 3 prejudiced those regulations and their effect. The
 4 Supreme Court said that's of no moment. In fact the
 5 exact language of the court I think is pertinent
 6 here. That he -- referring to the Secretary of
 7 Agriculture -- he not merely held but expressed
 8 strong views on matters believed by him to be an issue
 9 did not unfit him for exercising his duty in
 10 subsequent proceedings ordered by this court.
 11 Demonstrative of the fact that public comments are not
 12 pertinent to issues -- pertinent to the conduct of
 13 the board as a whole.

14 THE COURT: Are you about to conclude your
 15 comments?

16 MR. RHATICAN: Okay. Well, I am sorry,
 17 your Honor. I think this is a matter of significant--

18 THE COURT: I just said do you think you
 19 can sum up?

20 MR. RHATICAN: I will sum up, your Honor.
 21 There are a lot of emotions that arise in
 22 the context of eminent domain cases. There is a lot
 23 of controversy in some cases. And a lot of passions
 24 are inflamed often times in these type of cases and
 25 rightly so. But the law is impassioned, your Honor.

Colloquy

1 The law permits this condemnation to proceed and we
 2 ask that the court enter final judgment on the order
 3 to show cause.

4 I presume we'll be hearing argument on the
 5 motion. I don't know if you want my argument on the
 6 motion to intervene at the present time or my argument
 7 --

8 THE COURT: I am going to call on Mr.
 9 Orloff now for his argument.

10 I'll hear you counsel in support of your
 11 motions.

12 MR. ORLOFF: Thank you, your Honor.

13 I'll address only the order to show cause
 14 at the moment.

15 THE COURT: I'd like you to address your
 16 motions also.

17 MR. ORLOFF: Okay.

18 I'll start, if I may, with a response to
 19 Mr. Rhatican.

20 THE COURT: Sure.

21 MR. ORLOFF: The court has to, I would
 22 suggest, see where we are procedurally in this case.
 23 I don't say that by way of retreating one inch from
 24 the statements that were made under oath in the papers
 25 that we filed in response to the verified complaint.

Colloquy

1 This is a return of an order to show cause
2 and it's a status that reads essentially as follows:

3 We have in accordance with Section 23-11 of
4 the statute contested, and contested at some length
5 and in some detail, the authority of the plaintiffs to
6 condemn this property.

7 Now we started with an order to show
8 cause. No brief. A complaint and, obviously, if
9 there had been no contest to the authority, presumably
10 your Honor would appoint commissioners today. We
11 submitted our response. We then got --

12 THE COURT: You think so?

13 MR. ORLOFF: We submitted our response.

14 I would like to think a good part of that
15 is from Mr. Rhatican.

16 THE COURT: No. Wrong.

17 MR. ORLOFF: Well, in any event we were
18 served Monday night because your Honor gave the
19 plaintiff a chance to reply.

20 THE COURT: Um hmm.

21 MR. ORLOFF: We don't have the kind of a
22 record at this stage of this case, quite frankly, that
23 could lead, I would respectfully submit, that could
24 lead to a decision that everything Mr. Rhatican says,
25 as a matter of law, is true because he put something

Colloquy

1 in his papers and cited some cases.

2 A submission to which we had no opportunity
3 to respond.

4 Now where we are in this case is there is
5 substantial factual and legal disputes. There is a
6 body of case law, and while they try to distinguish
7 it, the fact of the matter is that there is
8 substantial evidence not just in the form of campaign
9 literature, although that is relevant I would submit
10 to your Honor, also in the form of public statements
11 on the public record by the public officials who voted
12 for the bond ordinance and voted for the condemnation
13 ordinance to enable the town to go forward.

14 Our evidence, if it is accepted, could well
15 lead the court to conclude that in line with the body
16 of law that is expressed in the Essex Fells case, in
17 the Allamuchy case, and approved as a body of law at
18 least in passing in the Micro case, which is currently
19 before the Supreme Court, that this is a pretextual
20 taking.

21 Now what does that mean?

22 That means that the purpose, although
23 stated to be open space -- and let's face it. In
24 every one of these pretextual cases-- but in fact
25 we'll show, and we should be given a chance to show,

Colloquy

1 that notwithstanding all the talk about open space,
2 what they really are doing here-- and we are talking
3 about the purpose behind condemning hundreds of acres
4 of property that my clients have had in their family
5 for many, many years and including development rights
6 to this airport-- which in fact, as our papers show
7 and as we should have an opportunity to demonstrate in
8 greater detail to your Honor -- as our papers show
9 would effectively and ultimately result in the demise
10 of the airport.

11 The theme song that has pervaded the
12 actions and words of this town is not just political
13 literature. Stop the jetport. And by the way,
14 jetport, itself, is a rather fiery term. The notion
15 stop the jetport is what caused this taking to take
16 place. Not a taking of the acres of land that are
17 outside of the perimeter of the jetport, outside of
18 what is necessary under law for this jetport. But a
19 taking of land that is within that perimeter and a
20 limitation on development rights. If hemming in and
21 constraining the airport were not part of the purpose
22 underlying this taking, why do we have in the taking
23 documents-- a limitation on the length of the runway,
24 itself, a problem for the owners? Why do we have a
25 limitation on what can be put on that airport space?

Colloquy

1 Why don't we just have a taking of the lands that are
2 outside of the airport if open space is what they
3 want? Because we all know -- and I think your Honor
4 can take notice of this -- that there is probably no
5 more open space -- if that's your real goal -- than
6 the open space comprising the land around the airport
7 and forming part of the airport property.

8 Now what our papers show and what we are
9 prepared to prove in greater detail at a plenary
10 hearing in this matter is that this taking in the form
11 that it takes will have the effect of so hemming in
12 the owners of this property that this airport will not
13 be preserved, as they say they want to do it. The
14 airport will be destroyed. Maybe slowly. But it will
15 be destroyed. It will be unable to operate for much
16 longer with the runways constricted as they are and
17 with no possible expansion. And we are not talking
18 here about building a Newark Airport. We are talking
19 about a facility that will service the State and the
20 region and, indeed, form part of the airport network
21 that is so vital.

22 What we also have in this case, your Honor,
23 which we had in some of the other cases -- certainly,
24 in the Essex Fells case -- the Kessler case -- and
25 it is important and we are not saying that, per se,

Colloquy

1 because our property-- our airport serves a vital
2 public purpose -- and it does -- that that means
3 that we win automatically. But that is an important
4 element in the ultimate determination as to whether
5 the taking was pretextual. It was part of the court's
6 reason in the Essex Fells case and it was mentioned
7 even by the Appellate Division in the Micro case,
8 which is in the Supreme Court now, where the court
9 said that the taking was allowed by Mt. Laurel to
10 avoid additional residential housing, but that if that
11 property had been utilized as had been discussed at
12 one point for assisted living, it might be very
13 different and that Kessler might dictate a different
14 result.

15 So what we have in this case is a taking,
16 which in fact not only is pretextual but it is a
17 taking which will have the effect of destroying,
18 ultimately, a facility which serves an enormous public
19 purpose.

20 Now the fact that Readington Township may
21 have had open space proposals and plans on record for
22 many, many years doesn't change it. With an
23 opportunity, if we get into that part of it, we'll
24 show that the stop the jetport notion has been going
25 on for many years. The airport has always been the

Colloquy

1 target of trying to take this particular property.
2 The case -- the cases that are cited --
3 and I am not going to go through all of them, your
4 Honor. Obviously, we didn't have a chance to reply to
5 Mr. Rhatican's brief. But he talks about the Kirby
6 case. And while Kirby upheld the municipal action,
7 Kirby did, as Essex Fells did, as Allamuchy did, they
8 looked at the purpose of the legislation and did not
9 simply accept the statements of the legislators or the
10 statements in the ordinance, itself, as to why they
11 were doing the taking.

12 One does go behind the statements,
13 particularly where, as here, there are statements by
14 public officials.

15 We have one other aspect of this, your
16 Honor, and it is tied into our separate defenses and
17 to our counterclaim and third-party complaint. In
18 fact, as part of this design and purpose, which
19 culminated in this taking, municipal officials in
20 Readington Township, as we allege, and as I don't
21 think can be denied, deliberately have refused to
22 adopt the implementing ordinance and ordinances
23 required by state law and we have cited to your Honor
24 statements at public hearings by at least the mayor,
25 who is running the hearing, that never will he ever

Colloquy

1 vote for such an ordinance.

2 And so we have here is a degree of
3 lawlessness in that respect on the one hand and on the
4 other hand an effort to make us believe that open
5 space is the goal and the jetport is just some loose
6 talk.

7 Your Honor, this case cries out for an
8 orderly and limited but focused creation of a record.
9 It may well be that after a record is created and that
10 after some amount of discovery is taken, we'll be back
11 here. We may be back here on cross-motions for
12 summary judgment. But at least at that point we'll
13 have the full record that will enable the court, as we
14 see it, to determine that this taking is in fact, as
15 we say, pretextual.

16 Unless your Honor has any questions of me.

17 THE COURT: I don't have -- I have read
18 all the papers. I don't have any questions.

19 MR. ORLOFF: Shall I deal with my motion?

20 THE COURT: Yes.

21 MR. ORLOFF: Your Honor, I know you know
22 from having read the papers the motion is really
23 addressed to two things. It is addressed to the issue
24 of possession while this matter is pending and that
25 was an issue that I had hoped to work out with Mr.

Colloquy

1 Rhatican without involving the court. We couldn't
2 work it out, because after first advising me -- and I
3 am not blaming Mr. Rhatican. He's representing his
4 clients. After first telling me my clients could have
5 possession, he then came back and said they can have
6 possession along with everybody else in town. And
7 this is at a point in time when we are contesting the
8 authority--

9 THE COURT: It mentions in his brief they
10 would give consent, not to use the land.

11 MR. ORLOFF: Yes.

12 And I explain to your Honor that we replied
13 to that brief and I did it, frankly, for two reasons.
14 One, out of an abundance of caution because, again, I
15 wasn't sure what the brief meant. I think what it
16 meant and Mr. Rhatican can confirm to us -- I think
17 what he's saying is that our clients have exclusive
18 possession while this matter is pending until it is
19 resolved on the appellate level.

20 That's what I believe he said. That's
21 fine. And that answers the possession issue.

22 And the only other issue, your Honor, is
23 whether they should remain with technical title to
24 this property while this matter is pending. And I
25 would suggest to the court that something is amiss not

Colloquy

1 in what the court did. The court was given an order
 2 to show cause. The court was given an order for
 3 declaration of taking. The statute seems to permit
 4 it. But the fact of the matter is-- and when we said
 5 it was ex parte, we were not reflecting on your
 6 Honor. We were simply reflecting on the fact that we
 7 were never heard. My clients got served with the
 8 order to show cause and, thereafter, they got served
 9 with the order for taking and it had been entered
 10 without any prior notice or a chance to be heard.

11 I would suggest to your Honor that the
 12 statutory scheme is, perhaps, a little imperfect here,
 13 because it seems to allow the entry of the order, for
 14 deposit of monies and declaration of taking before the
 15 respondent has a chance to or is obligated to file
 16 their response, which may contest the authority. The
 17 declaration of taking was filed before our time even
 18 under the original order to show cause to answer had
 19 even been reached.

20 I suppose if we had sent a letter the day
 21 the order to show cause arrived, and said we contest
 22 the authority, I am not sure what would have happened
 23 at that point because they already had the order. One
 24 has to question, anticipating a challenge to the
 25 authority, and then receiving it, why Readington is so

Colloquy

1 intent upon filing this declaration and putting this
 2 money into court at this particular time and,
 3 therefore, we are asking your Honor to vacate that
 4 order and direct them to rescind the declaration of
 5 taking.

6 I am pleased, however, that they,
 7 apparently, at least as to possession recognize that
 8 we are entitled to exclusive possession.

9 I do think the whole question of title gets
 10 complicated if the town has title while this is
 11 pending and I don't understand why they have done it
 12 and I think they should undo it. They seem to say
 13 they are entitled to it because the statute allows
 14 it. I would submit the statute also allows the court
 15 to vacate that if the court feels it was prematurely
 16 entered in view of the contest that has arisen here.

17 Thank you.

18 THE COURT: Thank you.

19 Mr. Firkser.

20 MR. FIRKSER: Good morning, your Honor.

21 There are many troubling issues raised in
 22 this condemnation in Mr. Orloff's papers regarding the
 23 relations between the Township and the Solberg Airport
 24 over the years.

25 But our focus and our motion to intervene

Colloquy

1 is to address a fundamental limitation on the
2 Township's authority to condemn with respect to the
3 September 22 order permitting the deposit of funds and
4 a declaration of taking.

5 Over the past decade there has been a
6 history of efforts by Township officials to acquire
7 this airport and the most recent being the beginning
8 of this year when a bond ordinance was adopted for
9 authorizing \$22,000,000 to acquire.

10 The citizens petitioned to have a
11 referendum on that bond ordinance. A special election
12 took place on May 16th on the referendum to determine
13 whether that bond ordinance should be ratified. In
14 the process the Township officials and their public
15 relations representatives sold this to the public with
16 representations that the purchase price was not to
17 exceed \$22,000,000.

18 This representation was a foundation of the
19 referendum and a limitation on the Township's
20 authority.

21 The citizens were aware that in previous
22 condemnation efforts the airport had issued an
23 appraisal for the value of the property at
24 \$40,000,000, double the amount of what was being
25 offered. And that was a foundation in terms of the

Colloquy

1 vote.

2 Now in August it comes -- the Township
3 gets its appraisal at \$21,738,000, which is pretty --
4 which is butting up against \$22,000,000 tap. So it is
5 inconceivable at that point that the ultimate cost is
6 going to be less than \$22,000,000.

7 But to compound this they then proceeded
8 quickly in this condemnation to deposit the funds,
9 which commits the Township to proceed with this
10 condemnation to its conclusion at whatever cost is
11 determined by the commissioners.

12 It is a blank check beyond the \$22,000,000
13 authority. And what is most confounding is that there
14 has been no justification as to why the deposit needs
15 to be made now. There is no requirement for a deposit
16 in court. You can wait until the end of the
17 condemnation proceeding before making the deposit and
18 there has been no showing of necessity, no eminent
19 danger as to why the deposit needs to be made and
20 subject the Township to much higher value that is
21 going to be paid by the citizens. And that's not the
22 way it works. You don't go to court, get your amount
23 and then go to the citizens, well the court ordered we
24 have to pay \$30,000,000. You get your authorization
25 before you move. You get your appropriation before

Colloquy

1 you spend the money. And here the authorization and
2 the representation to the public is limited to
3 \$22,000,000.

4 We have presented a prima facie case of the
5 Township's violation of this representation. The
6 explanatory statement was very clear in terms of the
7 limit of the purchase price and a foundation of the
8 decision. And the Township has denied -- has not
9 denied this or rebutted this. And we believe and we
10 are requesting the court to vacate its September 22
11 order, so that the Township and its citizens are not
12 subjected to an amount beyond the limits of the
13 authorization.

14 To briefly go into the standards for
15 intervention, which we meet, applications for
16 intervention are liberally granted. The limit we are
17 seeking for intervention is just to address the
18 September 22 order. The Township admits that the
19 taxpayers' suit is a related action in its
20 certification. The Township -- well the Township
21 says the taxpayers have to interest in what the
22 ultimate cost is. It is the ultimate pecuniary
23 interest in terms of what the taxpayers were paying.
24 The representation made were \$55 a year, no more.
25 That is an interest in each taxpayer's pocket. The

Colloquy

1 taxpayers are not represented by the existing
2 parties. The Solbergs can take that deposit tomorrow
3 and they don't care where the money is coming from.
4 And the Township --

5 THE COURT: I don't think the Solbergs want
6 to take that money tomorrow.

7 Right, Mr. Orloff?

8 MR. ORLOFF: Correct.

9 MR. FIRKSER: But they can.

10 And the Township officials are violating an
11 express promise made to the taxpayers.

12 And, finally, this is a timely
13 application. We are here on the return date of the
14 order to show cause. No prejudice has been served by
15 presenting our papers. It is a timely challenge and
16 the citizens' action that was filed previously is a
17 timely action because this action did not ripen until
18 August when the number became 21,738,000 and the
19 threat of exceeding the \$22,000,000 limitation became
20 all too real.

21 Thank you.

22 THE COURT: Mr. Rhatican, did you want to
23 respond?

24 MR. RHATICAN: I'd like to.

25 I'll start by responding if I can to the

Colloquy

1 intervenor's motion, your Honor.

2 Mr. Firkser says that's not how this is
3 done, to go back to the community and say we need more
4 money.

5 That's exactly how it is done. And the
6 communities where that happens may not be happy with
7 that in many cases. But that's how it is done.

8 And everything was done appropriately
9 here. You get the money first to do the bond before
10 you go through the condemnation efforts. And the
11 Dolan case, we cite in our brief, is exactly on
12 point.

13 It is a Supreme Court case where the
14 Borough of Tenafly was trying to condemn property for
15 the preservation of open space and this issue came up
16 and the Supreme Court quotes the trial court's opinion
17 here on page 172 of its opinion.

18 "It is rare that a municipality knows
19 exactly what it has to spend to purchase a certain
20 item. The value of condemned land is commonly seen
21 under our cases not to be usually fixed until all
22 avenues of appeal have been exhausted or there has
23 been a settlement. It is not intended where there
24 were good faith proceedings to demand rigid adherence
25 to initial calculations which are no more than

Colloquy

1 preliminary statements. Nor can the governing
2 officials be second-guessed at every stage of the
3 litigation in the determination of what proceedings
4 should or should not be taken," etcetera.

5 And so the answer is this is what happens.
6 This is how it works.

7 If intervenors are allowed to contest the
8 amount to be paid for a piece of property, it is going
9 to deter eminent domain. It is going to deter
10 condemnation because every resident of every community
11 or the State of New Jersey when it condemns property
12 will be able to make the same argument and, frankly, I
13 am perplexed as to what role the intervenors would
14 play in this particular case if they were allowed to
15 intervene. What would their function be in this
16 case? We submit that they have none. I won't get
17 into it. It is in our papers.

18 We submit they have not met the standards
19 for intervention. This is an effort to enjoin
20 litigation, which is not favored. I will cite the
21 Dolan case for that proposition. And it is an effort,
22 your Honor, to usurp the statutory function of the
23 commissioners in condemnation cases and to usurp the
24 statutory function of a jury in determining how much
25 is to be paid.

Colloquy

1 If the problem is, well, the town may have
2 to pay more than \$22,000,000 for this property, that
3 is true. It is speculative. But it may be the case.
4 That should not deter this matter from proceeding and
5 the intervenors have no legal basis to make that
6 claim.

7 And we also say in our papers that there is
8 State money that is available for this condemnation.
9 So while the price ultimately may be above \$22,000,000
10 there is no telling -- there is no predicting at this
11 point what the Township's share of that might be. So
12 it is completely premature.

13 On the other hand this claim is way out of
14 time. This is really challenging a bond ordinance in
15 a referendum that occurred not a long time ago but
16 earlier this year. They have a very specific finite
17 period of time to make these challenges and they are
18 trying to get around that by trying to intervene in
19 this litigation.

20 Your Honor, if the residents of Readington
21 are concerned about statements that were made-- and I
22 don't think that there were any promises about what
23 was going to be paid. There were no representations
24 that this would never go above \$22,000,000. But there
25 is a political remedy for that and it is not a legal

Colloquy

1 remedy to intervene in this case.

2 Responding to the motion of Mr. Orloff, I
3 am surprised to get his reply brief. I thought we
4 were clear that we would consent to the stay of
5 possession and that the Solbergs could obtain
6 exclusive possession to the property.

7 The statute allows a condemning authority
8 to file a declaration of taking at any time. That it
9 was done early in this case-- in fact it could have
10 been done earlier with the filing of the complaint.
11 Because it was done early in this case is of no
12 moment. The declaration of taking should stay of
13 record although we would consent, as I said in the
14 brief, to the Solberg's exclusive possession of the
15 property.

16 I hope that moots at least the main thrust
17 of that motion.

18 I just want to respond to Mr. Orloff's
19 suggestion that discovery should be granted in this
20 case and, first of all, I haven't heard yet what
21 discovery would help in this case. I think the record
22 -- you have a substantial pile of documentation in
23 front of you. The record is clear that there is a
24 lengthy history of preservation effort not just on the
25 municipality's part with regard to this property. I

Colloquy

1 don't know what discovery would reveal. We haven't
2 been told what discovery would reveal.

3 There are cases that suggest that there
4 is-- litigants should not be entitled to look into or
5 evaluate or take discovery on the deliberative process
6 of municipal bodies or governing bodies. I am not
7 sure what the nature is of the discovery they would
8 seek or how it would change the facts, as they are
9 before you on the record.

10 We are here on the return date on an order
11 to show cause. If the property owner wants a plenary
12 hearing, they have to make a prima facie case today
13 that there is strong and convincing evidence that
14 something is rotten in Denmark and if your Honor
15 doesn't think that is the case, there is no need for
16 discovery.

17 I'll close with this, your Honor, because I
18 think this is important. There is a case called Gallo
19 v. Council of Lawrence Township, an Appellate Division
20 decision from 2002. 328 N.J. Super 117 is the
21 citation. And at page 127 of that opinion the court
22 is asked to address a zoning ordinance and there was
23 an allegation there of ill will in the passage of the
24 zoning ordinance and citing the Supreme Court's Riggs
25 opinion. This Appellate Division says:

Colloquy

1 "Courts generally will not inquire into
2 legislative motive to impugn a facially valid
3 ordinance but will consider evidence about the
4 legislative purpose when the reasonableness of the
5 enactment is not apparent on its face. Moreover, if a
6 particular ordinance serves two purposes, one lawful
7 abandon one unlawful, a court should not inquire into
8 which purpose the municipality intended the ordinance
9 to serve. The presence of a lawful purpose will be
10 sufficient."

11 Your Honor there is a lawful purpose here
12 and we ask that you enter final judgment.

13 Thank you.

14 THE COURT: Mr. Orloff, do you want to be
15 heard any further?

16 MR. ORLOFF: The only thing I would say,
17 your Honor, if you want to get into the issue of
18 discovery, there is discovery to be taken in this case
19 and discovery was taken in most if not all of the
20 cases we cited. The pretext cases. And the discovery
21 does include discovery of public officials not as to
22 their thinking process but as to what happened and
23 what was said. The Township in this case spent a lot
24 of taxpayer money on public relations people. They
25 are a subject of discovery. And this was all directed

Colloquy

1 towards the bond ordinance and stop the jetport. And
2 we'll give your Honor the cases if we get into this
3 discovery, if there is a question. The public
4 officials are not immune from giving some discovery.
5 And we are not out to keep them on the stand for days
6 or something. We would have a very focused discovery
7 effort. But there is a lot of things that were said
8 and done that we are entitled to find out and to get
9 their position on. There is documentation. We don't
10 have every last document here. The town has been
11 gathering and preparing this for some period of time.
12 They went through a start several years ago and then
13 it stopped, as you have read in their papers. There
14 was brief litigation then. I wasn't involved in it.
15 I don't think Mr. Rhatican was. There apparently was
16 some deposition discovery allowed by the court before
17 that matter came to an end without any resolution.

18 So there is considerable but focused
19 discovery to be taken in this case and we would like
20 the opportunity to do it. Frankly, I have put into my
21 motion a request for a case management conference
22 because I assumed if your Honor granted our position
23 we would sit down and lay out the kind of discovery
24 and the timetable that we wanted. As I have also said
25 both in my motion and in my reply papers, we are not

Colloquy

1 looking to drag this thing out indefinitely. Whatever
2 track this case may technically be on, we are prepared
3 within reason to get it to the point as quickly as
4 possible where your Honor will either hear dispositive
5 motions, probably, made on both sides, and if they can
6 not be granted for either side, try the matter.

7 There is a lot of material in what Mr.
8 Rhatican filed. Some of it is hearsay, some of the
9 reports he is relying on. We have a chance to talk to
10 -- we may not have to depose them -- the authors of
11 these reports. There are experts to be presented to
12 the court. So this is a case and I know Readington
13 would like to have this as a case -- an in and out
14 kind of case. It is not that kind of case. It has
15 not evolved that way and it is not fair that it
16 proceed that way in an area such as this where most of
17 the regulation comes from the federal and state
18 authorities.

19 THE COURT: That goes to my question that I
20 have for both counsel in this matter.

21 Having read all of this, it is apparent to
22 me that at least the New Jersey Department of
23 Transportation has some say in the regulation of
24 airports.

25 MR. ORLOFF: They have a large say. They

Colloquy

1 have the bulk of the say.

2 THE COURT: But they are not a party in
3 this action and there is a lot of discussion on either
4 part -- on either side about can the airport continue
5 in this way or not continue in this way. Should they
6 be added as a party? What is your view?

7 MR. ORLOFF: I don't think they have to be
8 a party. The town is the condemning party and we are
9 the owners of the land. But do I think that the
10 Department of Transportation has a role to play in
11 terms of their authority and where they are going?
12 Absolutely. And, frankly, that's part of the
13 discovery process. It may not have to be formal in
14 the form of depositions. It may be in the form of
15 interviews. But it may well be in the form of witness
16 testimony before your Honor. Because at the end of
17 the day the DOT is the number one regulator of what
18 should happen here and what has really happened here,
19 as we indicated in our papers, is that the town has,
20 essentially, tried to high-jack that function.

21 THE COURT: Mr. Rhatican.

22 MR. RHATICAN: Your Honor, thank you.

23 I am very glad you brought that up.

24 Because, as you probably know from our papers, the
25 Department of Transportation had a contract to

Colloquy

1 purchase this property from Solbergs.

2 THE COURT: Yes.

3 MR. RHATICAN: Part of which the DOT was
4 going to preserve open space around the airport and
5 that's reflected in correspondence which we have
6 submitted with our papers, etcetera.

7 So the DOT when its negotiations with the
8 Solbergs failed, ultimately, over price came to the
9 Township and said if you want to preserve this open
10 space, you go ahead. And if you want to preserve this
11 airport, you go ahead. The DOT is very aware of what
12 is going on here today. Maybe not today in this
13 courtroom. But they are aware of these condemnation
14 proceedings. And if they wanted to intervene they
15 could. The DOT, its interest, as is the federal
16 government's, is somewhat restricted in the sense that
17 while the DOT and the federal -- FAA have an interest
18 in air navigation, the land use restrictions in some
19 respect still remain with the municipality. Now there
20 was a reference to the Airport Zoning Safety Act.
21 That's a zoning issue. And I think the Township is
22 very aware that if the Solbergs wanted to change or
23 modify the use -- I am sorry. Change or modify the
24 airport, maintaining the same use as an airport, the
25 Township would not be able to stop that. Because the

Colloquy

1 Airport Safety Zoning Act would require. But the DOT,
2 itself, its interest is really limited to air
3 navigation and making sure that the airports -- even
4 the general aviation airports of the State remain
5 safe. The DOT has noted this airport is substandard.

6 So I think that the DOT, while they don't
7 need to be a party, is very much aware and, perhaps,
8 their silence is an indication of their position.

9 THE COURT: I intend to reserve on this
10 matter.

11 I'll issue a letter opinion by November
12 14th at four o'clock.

13 Thank you, counsel.

14 MR. ORLOFF: Thank you, your Honor.

15 MR. RHATICAN: Thank you.

16 (Proceedings concluded.)
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CERTIFICATE

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8 I, ROBERT B. GROSSMAN, C.S.R., the assigned
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