

TOWNSHIP OF READINGTON, a  
municipal corporation of the  
State of New Jersey,  
Plaintiff,

-vs.-

SOLBERG AVIATION CO., a New  
Jersey partnership, JOHN  
HROMOHO, THOR SOLBERG, JR.,  
WATERS MCPHERSON McNEILL,  
P.C., FOX, ROTHSCHILD, O'BRIEN  
& FRANKEL, LLP, THOR SOLBERG  
AVIATION, JOHN DOE NOS. I  
THROUGH 20, JOHN DOE  
CORPORATION NOS. I THROUGH 20,  
NEW JERSEY DEPARTMENT OF THE  
TREASURY, DIVISION OF  
TAXATION, TOWNSHIP OF  
READINGTON,  
Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUNTERDON COUNTY

DOCKET NO.: HNT-L-468-06

CIVIL ACTION

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BRIEF ON BEHALF OF PLAINTIFF TOWNSHIP OF READINGTON  
IN SUPPORT OF ORDER TO SHOW CAUSE AND  
ENTRY OF FINAL JUDGMENT AND IN OPPOSITION TO  
MOTION TO INTERVENE

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### PRELIMINARY STATEMENT

These condemnation proceedings were commenced by the Township of Readington (the "Township") for the purpose of preserving open space and critical natural resources surrounding and within property owned by Solberg Aviation Company (sometimes referred to as the "Company"), a portion of which is operated as a recreational airport (the "Airport"). Many courts of this State have held that such purposes are for the public benefit in sustaining similar condemnations. Indeed, the importance of open space and natural resources have been emphasized in recent years by the State Legislature and appropriate State agencies, as the pressures from development increase in rural parts of the State. In addition, the importance of the particular open space and natural resources at issue here have been recognized by local, county and State planning documents for many years. The public benefit of the preservation sought by the Township cannot be questioned.

Relying on sparse case law, Solberg Aviation Company challenges the preservation effort represented by this condemnation action, claiming that it is pretextual and that the Township already has sufficient open space. This argument ignores the several other public purposes served by the Township's preservation measures, including preservation of wetlands, natural heritage sites, historic sites and critical habitat areas, as well as protection of water quality, each

alone a sufficiently important interest to justify this action even without consideration to the preservation of open space. Importantly, municipally-owned and preserved open space represents a small percentage of the Township's land area, and local, county and State planning documents encourage the preservation of large amount of open space. The Legislature has made the policy determination that preservation of "as much open space as possible" is in the public's interest.

Solberg Aviation Company also trumpets the services rendered by the Airport. However, the Company fails to explain how the Township's preservation of the surrounding open space and natural resources will compromise the Airport's operations. In fact, this condemnation will not obstruct the operation of the Airport for, among other reasons, the Township has specifically provided for modernization of the existing facilities. Indeed, preservation of the airport is an express reason (among others) for this acquisition.

Solberg Aviation Company is unable to sustain its heavy burden of demonstrating a bad faith motive for this condemnation. For this reason and those set forth at length below, the Township's condemnation decision is entitled to deference, and final judgment should be entered finding that the Township has properly exercised its sovereign power of eminent domain.



## STATEMENT OF FACTS

### History of the Airport

Solberg Airport was founded in 1939 by Thor Solberg. Today, the Airport is operated by Solberg Aviation Company. The Airport is designated as a general aviation airport in the Federal Aviation Administration's ("FAA") National Plan of Integrated Airport Systems. General aviation airports are intended to function as alternatives to congested commercial airports for smaller aircraft.

The Airport has grown modestly through the years, with the most significant expansion occurring in the early 1990's when the main runway was extended from 1,800 feet to 3,000 feet. See Certification of Julia Allen ("Allen Certif."), ¶16. The Airport presently has two operational runways, a primary runway measuring 3,000 feet long by 50 feet wide (with an additional unpaved length of 735 feet), and an unpaved turf cross-winds runway that is 3,440 feet long and 200 feet wide. See Allen Certif., ¶17. In addition to the runways, the existing Airport facilities include a terminal building, an open-bay hangar constructed, and a maintenance hangar. Id.

In early 2000, the New Jersey Department of Transportation ("NJDOT") commissioned an Environmental Assessment to evaluate the possible environmental impacts of certain alternatives for development of the Airport. Although this report was never

EA draft  
rpt

completed, a preliminary draft concluded that expansion would "involve substantial wetland impacts, farmland impacts, increased aircraft noise, and larger Runway Safety Areas". See Allen Certif., Ex. 4. In light of these adverse impacts, "many members of the community expressed their disapproval of the development plan" and expansion alternatives were dismissed from further study. Id. To the best of the collective knowledge of the Township Committee of the Township of Readington (the "Committee"), Solberg Aviation Company has not acted in furtherance of these plans. See Allen Certif. ¶19.

Condition of the Airport and Analysis of Need for Expansion

According to reports and inspections prepared by the FAA, NJDOT, and/or GRA, Inc., the aviation consultants retained by the Township ("GRA"), the Airport currently requires numerous maintenance and repair issues to be corrected. According to the FAA Airport Master Record for the Airport, based on a September 14, 2004, inspection, with respect to Runway 4-22 (the main runway) the 736 foot extension of turf at the south end of the runway is noted as being "extremely rutted and unusable." See Allen Certif., Ex. 16. NJDOT's Inspection Report, based on an August 10, 2006 inspection, noted the same condition as well as other repair and maintenance issues, with the date of the inspection listed as August 10, 2006. See Allen Certif., Ex. 17. A report prepared by GRA titled, *Analysis of the Benefits*

FAA  
Master  
Plan  
Record

of Readington Township's Ownership of Solberg Airport (the "GRA Analysis"), noted that private airport owners are on some occasions forced to "skimp" on maintenance because of economic pressures, with failure to clear obstructions, lack of maintenance, poor lighting, deteriorated tie-downs and deteriorating paved surfaces all being signs of a marginal operation, some of which exist at the Solberg Airport. See Allen Certif., Ex. 14.

GRA  
PAT

A second document prepared by GRA, a Memorandum titled, *Valuation Issues*, dated May 3, 2006 (the "GRA Memorandum"), reviewed the existing financial condition of the Airport, including expenditures for maintenance and repair. See Allen Certif., Ex. 27. The GRA Memorandum found that while the Airport generates a positive cash flow, almost no money was being reinvested into maintaining or upgrading the Airport. Id. The latest financial information available for the Airport, included in the GRA Memorandum, disclosed that in 1998, \$975.00 was listed under "Airport Maintenance," and \$474.10 and \$6,735.87 was listed for 1999 and 2000, respectively. Id.

GRA  
MOMO

Based on a review of the Airport's activities and operations, as well as the Airport Master Plan, the GRA Report also concluded that the expansion of Solberg Airport proposed in the Airport Master Plan is unneeded and unjustified. This conclusion was based on GRA's analysis of the flawed premises

underlying the demand forecasts in the Airport Master Plan, and the Airport Master Plan's unsupported assertions that the runway expansion is necessary to service a very small number (3) of aircraft that do not currently use the Airport. GRA further noted that there are several other viable options available nearby, such as Trenton and Lehigh Valley Airport. Id.

### Planning

Following is a summary of the various Township planning objectives (as well as State and County planning objectives) that would be advanced by the acquisition by the Township of fee interest in the approximately 624 acres of open space surrounding the Airport facilities (the "Open Space Parcel") and of development rights to the approximately 102 acres on which the Airport facilities are located (the "Airport Facilities Area") (the Open Space Parcel and Airport Facilities Area are collectively referred to herein as the "Property").

The Township of Readington 1990 Master Plan, (the "1990 Master Plan"), established specific goals and policies for agricultural preservation, environmental protection, recreation, and historic preservation. See Allen Certif., Ex. 1. In the Amendment to the Master Plan of the Township, dated November 23, 1998 (the "1998 Master Plan Amendment"), the existence of the open space at the Property was cited as a reason for Readington Village (which is listed on the National Register of Historic

1990  
MP

Places) having maintained its traditional and historic rural character, and accordingly in furtherance of preserving such character the Township set forth the goal of maintaining as much land around Readington Village as possible. See Allen Certif., Ex. 7. In addition, the Township's 1999 Open Space Plan included the Property among other farmland and open space identified for acquisition by the Township, and the Amendment to the Master Plan of the Township, dated July 9, 2001 (the "2001 Master Plan Amendment"), identified the Property as a priority for preservation. See Allen Certif., Ex. 11.

1999  
Open  
Space  
Plan

The Township's planning considerations and objectives for the Property are more particularly described in a report titled *Evaluation of Block 48, Lot 23, Block 55, Lot 33, Block 56, Lots 1, 3, 6 & 8 and Block 67, Lot 2 for Municipal Acquisition*, prepared by Clark, Caton Hintz, P.P., dated June 28, 2001, and updated May, 2006 (the "Evaluation"). See Allen Certif., Ex. 10.

CCH  
Rpt

The Evaluation concluded that "Municipal acquisition of the [Property] would result in an interwoven series of benefits that could be greater than the sum of the individual parts."

Open Space and Farmland Preservation -

The first of the Township's Planning objectives, open space and farmland preservation, is memorialized in numerous Township planning documents including: the Readington Township Open Space Master Plan, 1979 (the "1979 Open Space Master Plan"), which

1979  
Open  
Space  
Master  
Plan

identified certain factors for assessing lands for farmland and open space preservation priority, and concluded that such factors applied to large portions of the Property (including being a large block of contiguous farmland containing high quality soil). See Allen Certif., ¶7. In addition, in 1978 the Township became the first township in New Jersey to hold an Open Space Referendum, in which the voters of the Township overwhelmingly voted to issue bonds in the amount of \$1 million for open space preservation. See Allen Certif., ¶6. Readington's Farmland Preservation Plan, dated December 30, 1999, expresses the goal of preserving as much farmland as possible. See Allen Certif., ¶12.

Additional planning documents calling for open space and farmland preservation include: the 1990 Master Plan which adopted as a policy the preservation of large agricultural areas; the 1998 Master Plan Amendment, which strengthened the Township's commitment to preservation and conservation by increasing minimum lot sizes and open space set asides in the majority of the Township and specifically endorsed fee simple acquisition of land to accomplish the same; the 1999 Open Space Plan, which included the Property among other farms and open space lands identified for future municipal acquisition; and the 2001 Master Plan Amendment, which specifically recommended preservation of the open space at the Property, as it

constitutes one of the largest remaining open space areas in the Township. See, e.g., Allen Certif., Exs. 1, 2, 3, 7 and 11.

2001  
Open  
Space  
Committee  
RPT

The Report of the Readington Township Open Space Committee, dated June 2001 (the "2001 Open Space Committee Report") concludes that the Township's protection of large, contiguous blocks of grasslands, forests, and wetlands is necessary to "assure the survival, over the long term, of diverse, healthy ecosystems and rare species." See Allen Certif., Ex. 3. One of the four (4) areas designated by the 2001 Open Space Committee Report as a priority for preservation in Readington's Open Space Plan is identified as the Readington Village Natural Heritage Priority Area, which includes a large portion of the Property. Id. One of the open space characteristics that the 2001 Open Space Committee Report listed as contributing to the importance of this area was that "it is important for the safe operation of the airport that areas adjacent runways and in the vicinity of runways be maintained as open space" and that "preservation of this large area would prevent inappropriate and incompatible development from encroaching on the airport." Id. The 2001 Open Space Committee Report noted that at that time there were 287 acres preserved or under contract to be preserved directly contiguous to the Readington Village Natural Heritage Priority Area. Id.

Hunterdon County has also pursued open space and farmland preservation (particularly of large, contiguous areas) as has the State of New Jersey, as evidenced and described in the Hunterdon County Farmland Preservation Plan, dated July of 2000, and prepared by the Hunterdon County Agriculture Development Board. See Allen Certif., Ex. 13.

Recreation -

The Property includes areas that are well-suited for recreation, a large portion of which may be suitable for passive recreation such as hiking, with one 36-acre tract suitable for active recreational development. The Township's development of recreational facilities would advance a purpose of the Municipal Land Use Law, and various policies of the State support the provision of recreational lands and facilities as set forth in the State Development and Redevelopment Plan, adopted on March 1, 2001 by the State Planning Commission (the "State Plan").

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See Allen Certif., Ex. 12.

Natural Resource Protection -

Included within the Property are large areas of agricultural lands, wetlands, streams, forests, and grasslands, which constitute natural resources which are recognized as valuable assets by the Township, Hunterdon County, and the State. The Township's policies on natural resource protection are set forth in numerous planning documents.



The 1979 Open Space Master Plan provided that stream corridors and woodlands should be protected to maintain water quality levels and to provide access corridors between open spaces for wildlife movement and passive recreation (both Chambers Brook and Holland Brook or their tributaries which are located on the Property are cited in the Plan). See Allen Certif., ¶7. The 1990 Master Plan set forth as a policy of the Township the conservation and protection of "as many environmentally sensitive areas as possible," and the development of a Township wide "greenbelt" system, incorporating "natural areas, stream corridors, environmentally sensitive areas and areas of scenic beauty in order to connect various parts of the Township through an open space network." See Allen Certif., Ex. 1. The 1990 Master Plan identified as critical environmental impact areas steep slopes (15% or greater), flood hazard areas and wetlands (which cover portions of the Property as depicted within the 1990 Master Plan) as they offer natural protection from soil erosion, excessive flooding, poor air quality and depletion of wildlife habitat. More recently the 1998 Master Plan Amendment adopted as a policy the conservation and protection of "as many environmentally sensitive areas as possible." See Allen Certif., Ex. 7. In addition, the State Plan specifically lists the preservation of natural resources and systems as a planning goal. See Allen Certif., Ex. 12.

### Freshwater Wetlands -

The Property contains approximately 78 acres of freshwater wetlands and wetland transition areas. See Allen Certif., Ex. 10. The 1998 Master Plan Amendment states that "freshwater wetlands are considered environmentally sensitive and should not be developed." See Allen Certif., Ex. 7. The State Legislature has found that wetlands protect and preserve drinking water supplies and serve as a natural means of protection against flood and storm damage, retard soil erosion, and provide essential habitat for wildlife, and accordingly passed the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. This condemnation will advance the public policy behind the preservation of wetlands as contemplated by the Freshwater Wetlands Protection Act. Township control of the Open Space Parcel would ensure that decisions regarding such lands be made in a manner that ensures protection of existing wetlands and wetland transition areas.

### Water Quality -

The 1998 Master Plan Amendment listed quality of groundwater resources as the Township's major concern regarding future water supply, with groundwater drawn from wells being the primary source of potable water for residents of the Township. See Allen Certif., Ex. 7. The State Plan includes the express goal of protecting water resources, with amendments to the NJDEP

Statewide Water Quality Management and Planning Rules (at N.J.A.C. 7:15-1 et seq.), as well as stormwater rules and regulations recently established by NJDEP (N.J.A.C. 7:14A et seq.) intended to further such goals. See Allen Certif., Ex. 12. See also In the Matter of Stormwater Management Rules, 384 N.J. Super. 451 (App. Div.), *certif. denied*, \_\_ N.J. \_\_ (2006) (deferring to NJDEP's strong public policies favoring protection of natural resources).

#### Farmland Soils -

The United States Department of Agriculture ("USDA") has adopted a classification system for soils, the two most prominent of which are present at the Property, Prime Farmland Soils (397 acres) and Farmland Soils of Statewide Importance (276 acres). See Allen Certif., Ex. 10. According to the USDA Natural Resources Conservation Service, such soils are particularly well suited to agriculture use. The preservation of such soils would advance the purposes of the Municipal Land Use Law regarding natural resource protection.

#### Wildlife -

With respect to wildlife preservation, the Readington Township Environmental Resource Inventory (the "Environmental Resource Inventory"), prepared by the Readington Township Environmental Commission and dated April 2001, identified several threatened and endangered wildlife species within the

Township. See Allen Certif., ¶31. The Environmental Resource Inventory makes reference to the New Jersey Natural Heritage Database, which has identified the Property as a priority site for the conservation and protection of rare and endangered species as well as natural communities. The report titled, *Critical Habitats In Readington Township*, prepared by the Readington Township Environmental Commission, dated April, 2001, and incorporated into the Township Master Plan identified the Property as one of only two tracts within the Township of a contiguous mass large enough to function as a significant grassland habitat. Id. In addition, NJDEP has classified the majority of the Property as a Natural Heritage Priority Site, which are sites within the State of critical importance to the preservation of biological diversity. See Allen Certif., Ex. 10.

The New Jersey Division of Fish, Game & Wildlife's 1994 Landscape Project, with a goal of protecting New Jersey's biological diversity by maintaining and enhancing rare wildlife populations within healthy, functioning ecosystems, identified "critical habitat areas" which support rare species and that are adjacent to other critical habitats that already have been preserved, which would maintain large, contiguous blocks of rare species habitat. See Allen Certif., Ex. 10. Mapping from the Landscape Project (which was included in the Natural Resource

Inventory) indicates that over 94% of the Property is classified as critical habitat areas. Preservation of these habitat areas within the Property would be consistent with Township and State policies regarding wildlife protection. In fact, the Township Master Plan provides that wildlife habitats and Natural Heritage Priority Sites are considered the highest priority for preservation. The *Hunterdon County Open Space, Farmland, and Historic Preservation Trust Fund Plan* (the "Hunterdon County Trust Fund Plan") includes a map prepared by the Hunterdon County Planning Department which depicts the portion of the Property included as a Natural Heritage Priority Site, and notes that Natural Heritage Priority Site are considered top priorities for preservation of biological diversity. See Allen Certif., Ex. 13. According to the American Planning Association, acquisition of land by a public agency is one of the most effective ways to preserve wildlife habitat.

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Historic Preservation -

There are four historic sites adjacent to the Property, Readington Village which is listed on the National Register of Historic Places, and three sites identified in the Township's 1990 Master Plan as being of historic interest. See Allen Certif., Ex. 1. The Township's policies with respect to Readington Village were set forth in the 1998 Master Plan Amendment, which stated that the maintenance of the historic

character of Readington Village was attributable, among other factors, to the large areas of adjacent open space associated with the Airport, and that the preservation of the open space around Readington Village was a Township land use goal. See Allen Certif., Ex. 7. Township ownership of the open space located at the Property would ensure its preservation and its continued contribution to the maintenance of the historic character of Readington Village. In addition, the State Development and Redevelopment Plan calls for the preservation and protection of historic assets and maintenance of historic corridors. See Allen Certif., Ex. 12.

Community Character -

The community character of the Township is predominantly rural and agricultural, with extensive farmlands, narrow winding lanes and wooded stream corridors, dotted with relatively dense villages, such as Readington Village. The 1998 Master Plan Amendment and the Township Planning Board's 2000 Photographic Tour of the Agricultural Residential Zone acknowledge the value of protecting the Township's community character, which character is expressed by the patterns of open space and farmland found within the Township. See Allen Certif., Ex. 7. The State Development and Redevelopment Plan also supports the protection of scenic landscapes and scenic corridors, including by easement and fee simple purchase. See Allen Certif., Ex. 12.

### Township Action Concerning the Property

In an effort to satisfy these critical public interests, the Township Committee decided in 1999 to try to acquire the Property. In 1999, the Township notified the owners of the Property of the Township's interest in acquiring the Property. See Allen Certif., Ex. 20. In 2001, the Township Committee authorized proceedings to acquire a fee simple or lesser interest in the Property for public use. Id. The Township had determined that the public interest would be served by acquisition of the entire Property for public use and purposes, including, without limitation open space and farmland preservation, land for recreational uses, conservation of natural resources, wetland protection, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation, potential municipal ownership and control of airport operations and preservation of community character. Id.

On October 17, 2001, the Township's initial offer letter to acquire the Property for \$9,250,00.00 was sent to Solberg Aviation Company. On January 14, 2001, Solberg Aviation Company presented a counteroffer to the Township for the sale of the Property for a purchase price of \$40,000,000. Negotiations followed, however, the Township Committee ultimately determined

that the parties were too far apart on the question of the valuation of the Property. See Allen Certif., ¶20.

Apparently, during the same period that Solberg Aviation Company was negotiating with the Township for the sale of the Property, it also was negotiating with NJDOT regarding a possible sale of the Property to NJDOT. As more particularly described below, NJDOT eventually entered into a contract with Solberg Aviation Company for the purchase of the Property. See Allen Certif., ¶21. The Township expressed concern regarding NJDOT's intentions, but received the written assurance of the Commissioner of NJDOT in a letter dated October 29, 2002 that following the acquisition by the State, the Property would be devoted to airport preservation, correction of substandard safety conditions, that the NJDOT would not extend the runway beyond 3,700 feet, and that the portion of the Property not required for airport purposes would be set aside as open space and conveyed to the Township. See Allen Certif., Ex. 28.

In addition, in a press release, NJDOT acknowledged that local residents had expressed their desire to preserve the open space and not to extend the runway at the Property, and agreed with these desires, stating that as a result of NJDOT acquisition of the Property "Readington gets to preserve the airport and the open space, the state preserves a valuable aviation facility and needed safety improvements will be made."



See Allen Certif., Ex. 25. As a result of NJDOT's written agreement with Solberg Aviation Company and NJDOT's assurances to the Township that its acquisition and planned improvements to the Airport would allow for the preservation of the open space surrounding the Airport in accordance with the Township's goals, the Township Committee rescinded the authorization for acquisition of the Property by Ordinance No. 56-2002. See Allen Certif., ¶20.

In August 2001, Solberg Aviation Company confirmed to NJDOT that it agreed to forthwith proceed in good faith to negotiate and enter into a contract of sale for the Property with NJDOT. See Allen Certif., ¶21. On April 11, 2002, NJDOT entered into an Agreement of Sale with Solberg Aviation Company to acquire the entire Property. Id. After protracted negotiations over the purchase price (which had been left open in the agreement), NJDOT notified Solberg Aviation Company of its intent to terminate the agreement. Id. Ultimately, NJDOT and Solberg Aviation Company mutually agreed that the Agreement of Sale had expired. Id.

In late 2004, NJDOT's Director of the Division of Aeronautics requested a meeting with representatives of the Township to discuss the future of the Airport. At a meeting on November 5, 2004, Director Tom Thatcher and Rick Gimello, NJDOT's Director of Intermodal Transportation, noted that the

State and the Township shared common goals with respect to the Airport and requested that the Township assume the lead responsibility in preserving the Airport and the natural resources and open space surrounding it. See Allen Certif., ¶22. Mr. Thatcher then arranged a meeting with representatives of NJDEP at which the parties discussed the method for achieving the Township's preservation efforts. Representatives of NJDEP expressed support for these efforts. Id.

Following these meetings, the Township Committee introduced a bond ordinance on July 18, 2005 to provide for up to \$22,000,000 in funding to be used to negotiate an agreement with Solberg Aviation Company to preserve the open space and natural resources at the Property. Following a meeting with representatives of the Company, the Committee voted to withdraw the bond ordinance and, instead, elected to pursue new negotiations with Solberg Aviation Company in hopes of working toward an agreement that would preserve the open space and natural resources. See Allen Certif., ¶23.

Six (6) negotiating sessions between representatives of the Township Committee and Solberg Aviation Company were held over a five (5) month period beginning on September 9, 2005, and ending on January 2, 2006. See Allen Certif., ¶24. At the final meeting, representatives of Solberg Aviation Company unilaterally terminated negotiations and asked the

representatives of the Committee to leave, having advised them that expansion of the Airport into open space was a required condition of any agreement. Id.

Following the negotiations, the Township Committee held an informational meeting on January 17, 2006 in an attempt to keep the public fully informed of the Township Committee's efforts to reach an agreement with Solberg Aviation Company. At this meeting, the points of disagreement between the Airport owners and the Committee were outlined. In addition, five (5) consultants made presentations to the Committee and the assembled public, including an environmental, aviation, planning, acoustical and wildlife consultant. The presentations provided information about the likely effects of expansion of the Airport into the surrounding open space. See Allen Certif., Ex. 18.

Although the Committee offered representatives of Solberg Aviation Company time at the meeting (in addition to the opportunity for question and comment open to members of the public) to present their position, the offer was not acted upon.

On February 6, 2006, the Township Committee introduced a bond ordinance authorizing the borrowing by the Township of up to \$22,000,000 dollars to fund the acquisition of the open space and/or development rights to the airport facility areas. See Allen Certif., Ex. 5. At a subsequent public Township Committee

meeting held on February 21, 2006, the Township Committee approved the bond ordinance.

Following the Township Committee's approval of the bond ordinance, a petition drive organized by the Company garnered the necessary number of signatures to require a municipal referendum on the bond issuance. On May 16, 2006, a special election on the bond ordinance was held, which resulted in the voters of Readington approving the bond measure by a vote of 3,470 to 2,775. See Allen Certif., ¶26.

Given the lack of response from Solberg Aviation Company, the Township Committee adopted Ordinance No. 25-2006 on July 11, 2006, which authorized acquisition of the Open Space Parcel and development restrictions on the balance of approximately 102 acres comprising the Airport Facilities Area. See Allen Certif., Ex. 6. On August 7, 2006, the Township Committee authorized an offer to Solberg Aviation Company for the acquisition of these interests in the Property. Accordingly, by letter dated August 8, 2006, the Township offered to acquire such interests for \$21,738,000, the higher of the two (2) appraisal amounts obtained by the Township, and requested that the Township be notified within fifteen (15) days if Solberg Aviation Company intended to accept the offer. The letter again expressed the Township Committee's desire to resolve the matter in a voluntary fashion.

After requesting an extension of time, Solberg Aviation Company, by letter from Lawrence S. Berger, Esq., notified the Township that the Company was prepared to negotiate as long as the Township was "willing to entertain a reasonable modernization plan for the Airport," but stated that freezing the Airport in place (as Mr. Berger characterized the Township's proposal) and limiting its use as previously proposed by the Township was not an option.

As of this date, the last specific proposal from Solberg Aviation Company was made in or around December 2005, which was to lengthen the main runway to 5,000 feet and construct 500,000 square feet of new hangar space within the areas the Township seeks to preserve.

Given the failure of Solberg Aviation Company to respond with a reasonable proposal, a Verified Complaint was filed in Hunterdon County Superior Court on September 15, 2006 to commence these proceedings, and an Order to Show Cause was entered by Judge Yolanda Ciccone on September 22, 2006. Subsequently, an Order was entered allowing the Township to deposit funds and record a Declaration of Taking. The Township recorded and filed a Declaration of Taking as permitted by the Eminent Domain Act, and simultaneously deposited the appropriate sum with the Trust Fund Unit of Superior Court.

LEGAL ARGUMENT

POINT I

THERE EXISTS A VALID PUBLIC PURPOSE FOR THIS  
CONDEMNATION

A. Courts Are To Take a Liberal Approach in Assessing the  
Public Purpose For a Condemnation and Defer to  
Condemning Authorities in Doing So

A use is presumed to be public if a legislative body has declared it to be. 2A Nichols on Eminent Domain §7.03[11][b] (3d ed. 1988) [hereinafter Nichols] (citing Albright v. Sussex County Light & Power Commission, 71 N.J.L. 303 (E. & A. 1904)). A court must therefore defer to a legislature's judgment when assessing a use for its public purpose. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 81 L.Ed.2d 186, 104 S.Ct. 2321 (1984). "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." United States v. Welch, 327 U.S. 546, 552, 90 L.Ed. 843, 66 S.Ct. 715 (1946). Accord Old Dominion Co. v. United States, 269 U.S. 55, 66, 70 L.Ed. 576, 46 S.Ct. 39 (1925) (holding that deference to the legislature's "public use" determination is required absent a showing of impossibility); United States v. Gettysburg Electric R.R. Co., 160 U.S. 668, 680, 40 L.Ed. 576, 16 S.Ct. 427 (1896) (holding that a substitution of

judgment is not warranted "unless the use be palpably without reasonable foundation").

The Supreme Court enunciated the reasons for this deference in Midkiff: "Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." 467 U.S. at 244 (footnote and citation omitted) (emphasis added). See also Berman v. Parker, 348 U.S. 26, 38, 99 L.Ed. 27, 75 S.Ct. 98 (1954), ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.")

In addition to the United States Supreme Court, courts of this State have recognized the need for deference on the subject of public purpose:

Great discretion is usually granted to condemning authorities in determining what property may be taken for public purposes. Burnett v. Abbott, 14 N.J. 291, 291, 102 A.2d 16 (1954); Texas East. Trans. Corp. v. Wildlife Preserves, 48 N.J. 261, 269, 225 A.2d 130 (1966). This is because our courts recognize that it is for the Legislature to determine what constitutes a "public use." Lanza, supra, 27 N.J. at 530, 143 A.2d 571.

Essex Fells v. Kessler Institute for Rehabilitation, Inc., 289 N.J. Super. 329, 336-37 (Law Div. 1995). Thus, decisions by condemning authorities such as Readington Township merit great

deference with respect to the public purposes of their duly approved projects.

In Township of West Orange v. 769 Associates, L.L.C., 172 N.J. 564, 571-73 (2002), the Supreme Court of New Jersey engaged in a comprehensive survey of accepted case law on the subject and noted that New Jersey courts have long adhered to a flexible, deferential approach to the public purpose question. In that case, the Supreme Court deferred to local findings regarding the need for a new public road. Id. at 576, 579. The Court noted that notions of public purpose may change with time or may be different from one community to the next. See also Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 729 (Ch. 1832) ("The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being"); 2A Nichols §7.02 (noting flexible approach to public use inquiry).

"Practically any acquisition meets the public use test if it serves a public purpose, confers a benefit on the public, or furthers the state's police powers." 2A Nichols §7.01[1] (footnote omitted). As long as that public benefit exists, a court "need not make a specific factual determination as to whether the condemnation will accomplish its objectives". Midkiff, 467 U.S. at 242-243, 81 L.Ed.2d at 581. See also



National Railroad Passenger Corp. v. Boston & Maine Corp., 503

U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52, 69 (1992).

**B. Preservation of Open Space and Natural Resources  
Constitutes a Public Use for Condemnation**

The record supporting this condemnation makes clear that its purposes are manifold: preservation of open space, preservation of wetlands and other natural resources, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation, and preservation of community character. While each of these purposes is important and could stand alone in supporting this condemnation, Solberg Aviation Company challenges only the preservation of open space. Nevertheless, each of these purposes will be addressed herein.

The principle is well-accepted that the power of eminent domain may be exercised for the purpose of preserving open space. In Mount Laurel Tp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358 (App. Div. 2005), *certif. granted*, 186 N.J. 241 (2006), the Appellate Division gave a comprehensive explanation of the legislative initiatives of this State with the goal of preserving open space. Relying on many and various legislative initiatives, including the several Green Acres statutes and the Garden State Preservation Trust Act, the Appellate Division recently recognized that preservation of open space has been at the forefront of this State's planning strategies for many years:

Our Legislature has long recognized that preservation of open space constitutes a public use, and therefore municipalities may utilize the eminent domain power to acquire property for this purpose. As early as 1917, the Legislature enacted the "Home Rule Act," L. 1917, c. 152, art. XXXVI, § 1, now codified in N.J.S.A. 40:61-1, which provides that a municipality may acquire property for "open spaces" by exercise of the power of "condemnation."

In short, there are multiple statutory enactments that confer authority upon municipalities to acquire land by eminent domain for preservation of open space and land conservation.

Id. at 371-73. See also Dolan v. Borough of Tenafly, 75 N.J. 163 (1977).

As noted by the Appellate Division, the Legislature made the following findings as far back as 1961 in passing the Green Acres Land Acquisition Act:

The Legislature hereby finds that:

(a) The provision of lands for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare and is a proper responsibility of government;

(b) Lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come;

(c) The expansion of population, while increasing the need for such lands, will continually diminish the supply and tend to increase the cost of public acquisition of lands available and appropriate for such purposes;

(d) The State of New Jersey must act now to acquire and to assist local governments to acquire substantial quantities of such lands as are now available and appropriate for such purposes so that they may be used and preserved for use for such purposes; . . . .

N.J.S.A. 13:8A-2. See also N.J.S.A. 13:8A-20, 36; N.J.S.A. 40:12-15.1.

In 1998, following a constitutional amendment approved by the voters of the State of New Jersey, the Legislature repeated these findings with the passage of the Garden State Preservation Trust Fund Act:

The Legislature finds and declares that enhancing the quality of life of the citizens of New Jersey is a paramount policy of the State; that the acquisition and preservation of open space, farmland, and historic properties in New Jersey protects and enhances the character and beauty of the State and provides its citizens with greater opportunities for recreation, relaxation, and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; that the open space and farmland that is available and appropriate for these purposes will gradually disappear as the costs of preserving them correspondingly increase; and that it is necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes.

. . . .

The Legislature further finds and declares that there is growing public recognition that the quality of life, economic prosperity, and environmental quality in New Jersey are served by the

protection and timely preservation of open space . . . ; that the protection and preservation of New Jersey's water resources, including the quality and quantity of the State's limited water supply, is essential to the quality of life and the economic health of the citizens of the State; that . . . the conservation of adequate habitat for endangered, threatened, and other rare species is necessary to preserve this biodiversity; . . . and emphasizing the importance of preserving open space, sensitive environmental areas, critical wildlife habitat, farmland, and historic resources.

The Legislature further finds and declares that the citizens of the State have indicated their very strong support for open space, farmland, and historic preservation efforts . . . .

The Legislature therefore determines that it is in the public interest to preserve as much open space and farmland, and as many historic properties, as possible within the means provided by the 1998 constitutional amendment; that of the open space preserved, as much of those lands as possible shall protect water resources and preserve adequate habitat and other environmentally sensitive areas; that, . . . it is a worthy goal to preserve one million more acres of open space and farmland in the Garden State in the next decade to protect the quality of life for New Jersey residents; . . . .

N.J.S.A. 13:8C-2 (emphasis added). See also Cedar Grove v. Stanzone, 122 N.J. 202, 213, 216 (1991); In the matter of Amendment to Recreation and Open Space Inventory of the City of Plainfield, 353 N.J. Super. 310, 329 (App. Div. 2002).

Many of these legislative and judicial declarations have recognized that, as the population of the State increases, the

need for open space increases commensurately, but the supply of open lands declines and the cost of acquiring such land increases. Thus, the policy of this State is, at present, to preserve as much open space as possible. In light of the importance of open space preservation, the Legislature has time and again determined that counties and municipalities should be able to use any lawful means to acquire such lands, including use of the power of eminent domain. See, e.g., N.J.S.A. 13:8C-3; N.J.S.A. 13:8A-8, 26, 42. Given the increasing stresses on the ability to preserve open space, the use of condemnation to preserve open spaces has become increasingly important.

In addition to the preservation of open space, this condemnation is intended to preserve the wetlands and other natural resources found on the Open Space Parcel. Approximately 78 acres of the entire Airport property is comprised of freshwater wetlands and regulated transition areas. As with open space, the preservation of wetlands has long been a chief objective of the State. As enunciated by the State Legislature with the passage of the Freshwater Wetlands Protection Act in 1987:

The Legislature finds and declares that freshwater wetlands protect and preserve drinking water supplies by serving to purify surface water and groundwater resources; that freshwater wetlands provide a natural means of flood and storm damage protection, and thereby prevent the loss of life and property through the absorption and storage

of water during high runoff periods and the reduction of flood crests; that freshwater wetlands serve as a transition zone between dry land and water courses, thereby retarding soil erosion; that freshwater wetlands provide essential breeding, spawning, nesting, and wintering habitats for a major portion of the State's fish and wildlife, including migrating birds, endangered species, and commercially and recreationally important wildlife; and that freshwater wetlands maintain a critical baseflow to surface waters through the gradual release of stored flood waters and groundwater, particularly during drought periods.

The Legislature further finds and declares that . . . the public harm from freshwater wetland losses, are distinct from and may exceed the private value of wetland areas.

N.J.S.A. 13:9B-2 (emphasis added). See Morich v. New Jersey Dept. of Environmental Protection, 269 N.J. Super. 240, 242 (App. Div.), *certif. denied*, 133 N.J. 428 (1992) (noting conservation objectives of the Freshwater Wetlands Protection Act).

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Similar legislative findings have been made relative to historic preservation, preservation of threatened and endangered species habitats, preservation of natural heritage, and water quality protection, all purposes for which the Township seeks to preserve the Open Space Parcel and secure development rights to the Airport Facilities Area. See, e.g., N.J.S.A. 13:1B-15.146 (legislative finding of threat to State's natural heritage from economic and industrial pressures); N.J.S.A. 13:1B-15.147

(creating Natural Heritage Program identify the most critically important natural areas in the State for protection purposes); N.J.S.A. 23:2A-2 (finding need to assist in preservation of endangered species); N.J.S.A. 58:10A-2 (expressing the policy of this State to preserve the integrity of its waters); and N.J.S.A. 58:11A-2 (finding that "the people of the State have a paramount interest in the restoration, maintenance and preservation of the quality of the waters of the State for the protection and preservation of public health and welfare") The public importance of these purposes is beyond cavil.

**C. Solberg Aviation Company Cannot Sustain Its Burden Of Showing That The Township's Condemnation Is In Bad Faith**

Despite the colorful arguments of Solberg Aviation Company, the true motives of the Township are not to destroy the Airport or control its operations. The motives of the Township Committee as a unified body are not found in political campaign materials or in surgically excised quotes attributed to single members of the Committee. Rather, the true motives of the Township are found in the ordinance which serves as the legislative statement of the purposes for this acquisition: preservation of open space, preservation of wetlands and other natural resources, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation, and preservation of community character.

Courts are "reluctant to find bad faith in determining public purpose and thus overturning a decision to condemn. The evidence should be strong and convincing." Borough of Essex Fells, 289 N.J. Super. at 342 (emphasis added and citations omitted). Solberg Aviation Company cannot sustain its heavy burden of demonstrating that the motives are anything but those set forth on the face of this ordinance.

First, it is worth noting that if the Township were truly motivated by an unexplained desire to "destroy" the Airport, the Township could simply condemn the Airport in its entirety pursuant to N.J.S.A. 40:8-1 *et seq.* Indeed, the Committee had passed an ordinance in August 2005 which would have raised funds to acquire the entire Airport. However, after much public debate and opposition from Solberg Aviation Company, the Committee decided not to proceed with that acquisition. After protracted negotiations with the Solberg Aviation Company, the Township decided to instead proceed with a modified acquisition, which would avoid acquisition of the Airport Facilities Area and allow the Company to retain ownership and control of the Airport.

In addition, the deed restriction placed on the Airport Facilities Area specifically allows for a substantial expansion of the current improvements and operations in an effort to retain the Airport at its current size and configuration while



allowing it to modernize. Indeed, the Committee encourages such modernization of the Airport, given its documented safety problems and deferred capital improvements. These are not the actions of a body seeking to "destroy" the Airport.

In the face of overwhelming legal authority supporting the use of eminent domain to preserve open space and natural resources, Solberg Aviation Company relies principally on an unpublished opinion with distinguishable facts. In Township of Allamuchy v. Progressive Properties, Inc., Docket No. A-987-02T3 (App. Div. July 16, 2004),<sup>1</sup> the Township of Allamuchy was found to have improperly utilized the power of eminent domain to scuttle a new residential development that already had received preliminary approvals. Unlike Readington, over 90% of the total land area in Allamuchy consisted of vacant or agricultural lands, wooded area, or State parks, with an additional 1.41% dedicated as open space. Thus, approximately 95% of Allamuchy's total land area was undeveloped. By comparison, approximately 6.4% of Readington's land area is municipally-owned preserved open space, with a total of approximately 25% being preserved open space or farmland.

In the Allamuchy case, the property owner already had procured preliminary major site plan and subdivision approval for the construction of 47 single-family homes and 324

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<sup>1</sup> The Allamuchy opinion should not be given any precedential effect or weight given that it is unpublished. N.J.R. 1:36-3.

townhouses. The site in question had few environmental constraints, consisting solely of some steep slopes, but no freshwater wetlands or other protected areas. In addition, the site was to remain largely open space, as nearly 70% would remain undisturbed through conservation restrictions. After approvals were granted, the township moved to condemn the property.

In finding that the condemnation was for an improper purpose (namely, the prevention of residential development), first the trial court then the Appellate Division were moved by the fact that the site had been granted development approvals, with a sudden "about-face" on the part of the township. The courts also found important the fact that the site had not been designated for preservation of open space in the township's master plan documents. Furthermore, Allamuchy had not tried to acquire other properties for open space preservation.

.....  
Contrary to the facts in Allamuchy, there are no development approvals for the Airport site which would evidence an intent to prevent development. In addition, while Readington enjoys a fair amount of open space already, it is not on par with the 95% of vacant and open space in Allamuchy. Readington Township, unlike Allamuchy, has actively pursued a program of open space preservation for years and has preserved many acres, demonstrating that it is not pursuing this condemnation with

discriminatory intent. Indeed, the Airport has been designated for several years as a site to be preserved in the Township's planning documents. Given the disparate fact patterns, the Allamuchy case cannot be used to suggest that Readington has abused its power of eminent domain with respect to the Airport site.

For the same reasons, Solberg Aviation Company's reliance on Essex Fells is likewise misplaced. The Law Division's holding in Essex Fells was that the borough filed its condemnation action "in order to prevent [the property owner] from establishing a rehabilitation facility in the community". 289 N.J. Super. at 331-32. Trying to shoe-horn its case into the fact pattern in Essex Fells, Solberg Aviation Company suggests that the Township has acted in an effort to prevent the modernization of the Airport. The record reflects otherwise.

Indeed, this condemnation will provide ample funding for Solberg Aviation Company to undertake a needed capital improvement program, and the deed restriction will allow for substantial modernization. The Committee also has expressed its support for expansion of the runway to its full licensed length, something the owner of the Airport has never done for unexplained reasons. In this regard, the actions of the Readington Township Committee are vastly different than those of Allamuchy and Essex Fells.

Several material facts distinguish Essex Fells from this case. First, the Borough of Essex Fells is substantially smaller than Readington (832 acres compared to 30,000 acres) and is located in a far more urbanized part of the State. In addition, most of Essex Fells is in State Planning Area 1,<sup>2</sup> whereas the Airport falls within Planning Area 4B, which contemplates large quantities of preserved open space.

Importantly, officials of Essex Fells had actively sought development of the site in question, 289 N.J. Super. at 332-33, 340, compared to the Readington Township Committee, which has for years advocated the preservation of the Open Space Parcel. The Borough of Essex Fells purchased a portion of the site in question for a soccer field and stated that its need for additional recreational space had been satisfied by that acquisition. Id. at 339. Thereafter, the balance of the site was listed for sale for two years, during which the borough expressed no interest in acquiring it for open space purposes. Id. Moreover, borough officials were on record suggesting that the site should be sold to the "right people". Id.

A few years prior to Kessler's application for land use approvals, a planning consultant for Essex Fells had prepared a report concluding that use of the site for either educational purposes or residential purposes would be appropriate. Id. at

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<sup>2</sup> State Planning Area 1 is intended to provide for much of the state's future redevelopment and to promote growth. See Allen Certif., Ex. 12 at 186.

333. To the contrary, Readington's consultants have long recommended preservation of the Open Space Parcel. Furthermore, the Kessler site did not include the same environmental and related characteristics as the Open Space Parcel, namely, wetlands, critical species habitat, steep slopes, and natural heritage significance.

After Kessler applied for its approvals, the borough retained another planner and a land use attorney, who both concluded that Kessler's proposed use of the site was appropriate and consistent with the borough's master plan and zoning ordinance. Id. at 334. Subsequently, the borough's council moved forward with the adoption of an amended ordinance that would permit Kessler's project. Id. In an open letter to residents, the borough's officials indicated support for the Kessler project. Id. Such facts are absent from the case at hand.

However, following an informal poll of residents, the borough took measures to acquire the site from Kessler, culminating in an ordinance authorizing the condemnation of the site for public use, "specifically, park land and recreational use". Id. at 335-36. Kessler challenged the taking as having been commenced in bad faith.

Quoting a substantial body of case law, the Law Division noted,

Ordinarily, when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid and entitled to great deference. . . . Courts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use. . . . However, the decision to condemn shall not be enforced where there has been a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain.

Id. at 337 (citations omitted). The court thus found itself constrained to consider whether the condemnation was in bad faith, meaning for a "dishonest purpose", with "furtive design" or motivated by ill will. Id. at 338.

Failing to find any New Jersey case law finding a condemnation to have been in bad faith, the Law Division looked to other jurisdictions. Id. at 338. Relying on out-of-State cases, the court held, "where a condemnation is commenced for an apparently valid, stated purpose but the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside". Id. at 339.

Among the foregoing facts (which are absent from this case), the court was moved by a statement of a borough official during a public hearing suggesting that the borough would have to manufacture a public purpose to justify the condemnation, id. at 339-40, egregious and notorious to be sure, but likewise lacking in the present case. In addition, during the same time

period, the borough rejected an offer to purchase vacant land adjacent to the Kessler site, further demonstrative of the artificial need for open space. Id. at 340. On the contrary, Readington has actively sought to preserve open space for years. The Law Division's decision was particularly impelled by the borough's reliance on the informal questionnaire, which the judge apparently found to improperly delegate decision-making to those residents who responded. Id. at 340-41.

One critical distinction between the present case and the analyses in Essex Fells and Allamuchy is that any future development of the Open Space Parcel is speculative: Solberg Aviation Company's development plans are inchoate relative to those of the property owners in Essex Fells and Allamuchy and have not gestated to a level of certainty as in these other cases. The conclusion should be clear that Readington Township has not commenced this condemnation in direct response to imminent development. Thus, the link between the stated public purpose and the subject of the alleged bad faith does not exist in this case. Readington's conduct is not remotely like the shocking conduct at issue in Essex Fells and Allamuchy. Given the absence of many material facts that were central to the courts' analysis in those cases, they do not apply to demonstrate that Readington Township was motivated by any kind of ill will.

Trying to ride the legal coattails of Kessler, Solberg Aviation Company seems to argue that Readington already has enough open space and that there no longer is a need for open space in that community and the only possible motive is animosity directed to the Airport's owner. However, even the Law Division in Essex Fells noted that "nothing prevents a municipality from exceeding the recommended standards" for open space preservation. Id. at 341. In that particular case, however, given the obvious and egregious conduct of borough officials, the court held that the borough failed to present a "credible, ascertainable public need or plan" for the open space. Id. Readington, however, has such a plan, as has been documented for years on no less than three levels of government, and so the only reasonable conclusion is that Readington's preservation efforts are "rationally related to a conceivable public purpose" unlike those in the cases cited by Solberg Aviation Company. See Midkiff, 467 U.S. at 240-41, 81 L.Ed.2d at 581.

It is well established that if a conceivable public purpose has been expressed by a governmental body enacting legislation, the fact that there may be collateral impacts provides no basis for setting aside the governmental action. Kirby v. Bedminster, 341 N.J. Super. 276, 288-90 (App. Div. 2000). As long as just compensation will be paid and the condemnation will not cause an



inequitable result, the power to condemn should not be enjoined. Deland v. Township of Berkeley Heights, 361 N.J. Super. 1, 19-20 (App. Div.), *certif. denied*, 178 N.J. 32 (2003). Thus, the Township's power should not be enjoined in this instance.

Solberg Aviation Company's claim that Readington has enough open space is not only myopic and parochial, but it is contrary to well-accepted principles of eminent domain jurisprudence, which make clear that if a government body finds "substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use". Midkiff, 467 U.S. at 244, 81 L.Ed.2d at 199. Accord 769 Associates, 172 N.J. at 572, 576 ("Judicial deference is required because . . . legislatures are better able to access what public purposes should be advanced by an exercise of the taking power[.]") (quoting Midkiff). Thus, where there is a well-documented program of preservation pre-existing efforts to condemn, a court should defer to the public purpose of that program. In this case, that public purpose has been found by the Township, its elected officials and its residents, which is where the decision should rest.

Solberg Aviation Company's argument that Readington has enough open space is likewise contrary to both professional planning documents relied upon by the Committee and State policy to preserve "as much open space . . . as possible". See

N.J.S.A. 13:8C-2 (emphasis added).<sup>3</sup> See also Mipro Homes, 379 N.J. Super. at 373 (quoting N.J.S.A. 13:8C-2).

At present, the Township owns 1,925 acres of preserved open space, approximately 6.4% of the total land area of Readington. The State owns 681 acres of preserved open space, and the County of Hunterdon owns another 873 acres, collectively accounting for another 5.2% of the total land area. Thus, only 11.6% of the Township's total land area is dedicated open space. Another 4,106 acres (13.7%) is preserved farmland but, because it is actively farmed, this land should not be included in the open space calculations as suggested by Solberg Aviation Company's planning consultant in his effort to artificially inflate the numbers, since it does not serve the goals of environmental preservation or recreational use as does dedicated open space.

As far back as 1979, the Township's Master Plan recognized the importance of the open space and natural resources surrounding the Airport. Subsequent iterations of the Master Plan repeated these findings and, in 1998, a Master Plan Amendment strengthened the Township's commitment to preserving open space. Indeed, Readington was the first township in New Jersey to have an open space preservation referendum, doing so

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<sup>3</sup> The Essex Fells decision was rendered three years before the passage of the Garden State Preservation Trust Act and, therefore, three years before this pronouncement of an aggressive State-sanctioned policy of preserving as much open space as possible. See Lenzer, 16 N.J. at 470, and Scudder, 1 N.J. Eq. at 729 (both noting that the concept of public purpose must be flexible to meet the changing needs of society).

in 1998, at which time the residents overwhelmingly voted in favor of bonding for open space preservation. In its 1999 Open Space Plan, the Township designated the Airport lands (among others) for future municipal acquisition. The 2001 Master Plan specifically recommended preservation of the open space surrounding the Airport, as it constitutes one of the largest remaining open space areas in the Township. It is clear that the Township is not now acting on a whim and a lark in seeking to acquire the Open Space Parcel, as in the cases relied upon by Solberg Aviation Company.

It is noteworthy that not only the Township, but also the County of Hunterdon and the State have promulgated planning and environmental documents counseling for the preservation of the Open Space Parcel. For example, the State Plan designates most of the Property for preservation of open space, and the Property is included in Planning Area 4B of the former State Planning Map. Hunterdon County also has recognized the importance of preserving open space. Thus, the acknowledgement of the public need has been made not just by the Township, but by other governmental bodies.

Furthermore, in a letter dated October 29, 2002, then-Commissioner James Fox of NJDOT committed to limit the length of the runway to its licensed length of approximately 3,700 feet and to preserve the open space surrounding the Airport. See

Allen Certif., Ex. 26. Likewise, Commissioner Fox expressed the State's policy of preserving the open space in a statement announcing NJDOT's doomed agreement with Solberg Aviation Company. See Allen Certif., Ex. 25.

One of the primary goals of the State Plan is to conserve the State's natural resources. See Allen Certif., Ex. 12 at 36. Most of the Airport lands fall within the State's Rural/Environmentally Sensitive Planning Area (4B). As noted by the State Plan, those lands within Planning Area 4B contain "valuable ecosystems or wildlife habitats". Id. at 214. As part of the larger Rural Planning Area (PA4), the State Plan recognizes that such areas "serve as the greensward for the larger region" and encourages "maintaining and enhancing our rural areas" in the face of "greater development pressure". Id. at 205-06. The Township's preservation effort with respect to the Open Space Parcel will certainly advance these State-recognized interests.

The State already has made a policy determination with regard to the preservation of the Open Space Parcel by agreeing to partially fund its acquisition through the Environmental Infrastructure Trust, N.J.A.C. 7:22, and the Green Acres Program, N.J.A.C. 7:36. As noted by the NJEIT,

Open space preservation is essential to protecting and enhancing the quality of life in New Jersey's communities. Uncontrolled,

haphazard development is rapidly devouring  
New Jersey's open space.

See Allen Certif., Ex. 21. Such development threatens the quality of the State's waters. Id. See also In the Matter of Stormwater Management Rules, 384 N.J. Super. at 457-58. Only acquisition programs that demonstrate a water quality benefit qualify for NJEIT funding. See Allen Certif., Ex. 21. According to NJEIT, "[h]eadwaters, stream corridors, wetlands, watershed protection, and aquifer recharge areas are among the types of land that would qualify". Id. Given the NJEIT commitment, it is clear the NJEIT highly values the preservation of the Open Space Parcel in light of its water quality characteristics.

Likewise, Green Acres' involvement reflects the public significance of this preservation project. As noted by N.J.A.C. 7:36-1.1, the purposes of the Green Acres Program include: (1) to ensure that there is access to and an adequate supply of lands for either public outdoor recreation or conservation of natural resources, or both; (2) to increase and preserve permanent outdoor recreation areas for public use and enjoyment, and conservation areas for the protection of natural resources such as waterways, wildlife habitat, wetlands, forests, and viewsheds; (3) to establish the procedures to acquire lands that have significant recreation and conservation attributes; and (4) to establish the procedures by which the Department will provide

funding for the development of land to provide outdoor recreation opportunities and to conserve natural resources for the current population and future citizens of the State; among others. The involvement of the Green Acres Program in this acquisition is irrefutable evidence that these important public purposes are being served by the acquisition.

Solberg Aviation Company's reliance on Essex Fells and Allamuchy also ignores that valid reasons other than open space preservation justify preservation of the Open Space Parcel, including preservation of wetlands, critical species habitat, and heritage sites, among others. See, e.g., N.J.S.A. 13:1B-15.146; N.J.S.A. 13:1B-15.147; N.J.S.A. 23:2A-2; N.J.S.A. 58:10A-2; and N.J.S.A. 58:11A-2. These other factors, each of which is independently important and would be sufficient to justify acquisition of the Open Space Parcel, were lacking in Essex Fells and Allamuchy.

Factually, Solberg Aviation Company puts all of its eggs in a basket woven from statements made in the context of political campaigns. However, such statements are neither prejudicial nor demonstrative of the sentiment and motive of the governing body as a unified whole. In Kramer v. Board of Adjustment, 45 N.J. 268 (1965), the Supreme Court was unmoved by similar statements made in the context of land use proceedings. Though the Court found the statements left "a reasonable mind . . . with little

doubt as to where the Mayor's sentiments lay . . . the campaign literature, the statements to the press, and all other official statements represent no more than the views of the public officials pertaining to a matter of deep moment to the community." Id. at ~~279~~<sup>282</sup>. The statements were insufficient indication of prejudice or prejudgment because, "the interest . . . is a personal or private one, and not such an interest as he has in common with all other citizens or owners of property." Id. Thus, the Supreme Court has recognized the lack of value of such statements in ascertaining the intent of a government body. See also Lincoln Heights Assoc. v. Planning Board, 314 N.J. Super. 366 (Law Div. 1998) (holding that support of a general proposition during a prior political campaign does not taint subsequent action of a government body).

Omitted from the papers of Solberg Aviation Company are the many statements of members of the Committee extolling the virtues of preserving the Open Space Parcel in its current condition as well as preserving the Airport. Following are just a sampling:

1. In November 2002, then-Deputy Mayor Frank Gatti wrote to James Fox, then-Commissioner of NJDOT, to emphasize the importance to the Committee of the preservation of the open space. The same letter expressed the Committee's pleasure at NJDOT's commitment to preserve

the Airport in its existing condition. See Allen Certif., Ex. 28.

2. In a letter to residents dated August 5, 2005, then-Mayor Frank Gatti expressed the Committee's desire to preserve the Airport in its current condition and to preserve the open space and critical natural resources around the Airport. See Allen Certif., Ex. 29.
3. Mayor Gerard Shamey wrote a letter to the editor of the Courier-News on March 21, 2006 in which he referenced the acquisition of the open space surrounding the Airport and the protection of open space and natural resources. See Allen Certif., Ex. 30.
4. At the February 21, 2006 hearing, Mayor Shamey stated, "consistent with longstanding policies of the Township, it has always been the goal of this Township for years, if not decades, for preservation of this tract and preservation of the 650 acres of open space surrounding the airport". See Allen Certif., Ex. 19 at 13:11-16. Describing the Township's efforts to acquire the Open Space Parcel, Mayor Shamey continued, "Both the airport and the site's considerable natural resources would be protected under this scenario." Id. at 17:7-9. Committeewoman Allen seconded that



notion: "I would like to say that Readington Township has a long history over two decades of preserving open space as a way of protecting farmland, wildlife habitats, water quality, the historic character, and I think protecting the airport. There is a reason to preserve open space in out township." Id. at 157:15-20.

5. At a public meeting in January 2006, Mayor Shamey and other members of the Committee iterated those same objectives, including preservation of the Airport. See Allen Certif., Ex. 18 at 7:6 to 8:3; 10:20 to 11:9; 21:25 to 22:6.
6. When introducing Ordinance No. 25-2006 on July 11, 2006, Mayor Shamey recited its purposes, including preservation of open space, farmland, and natural heritage sites. See Allen Certif., Ex. 20 at 5:2-16.

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Based on the foregoing, the conclusion is clear that preservation of open space, natural resources and a heritage site is an accepted public purpose that serves as a "reasonable foundation" for this condemnation, see Midkiff, 467 U.S. at 241, 81 L.Ed.2d at 581 (quoted in 769 Associates, 172 N.J. at 571), that these goals were at the forefront of the Township's efforts, that these lands are "available and appropriate" for

preservation, see N.J.S.A. 13:8A-2(d), and that there exists no bad faith motive for the taking.

**D. The Public Use Associated With This Condemnation Will Not Interfere With The Operations Of The Airport Or With Federal Jurisdiction Over Avigation**

Solberg Aviation Company does not argue, as it cannot support, that the Township is motivated by animus or discriminatory intent, the true benchmark of bad faith condemnation. Its only argument is that the Township seeks to control the Airport and render it unprofitable. Nothing in the selective documents presented by the Company suggests such an objective. However, it is paramount to understand that the condemnation will not change or alter in any way the current configuration or operation of the Airport and will not compromise its profitability. Noticeably absent from the Company's opposition papers is any sworn statement to the contrary. Even Arlene Feldman cannot say that the acquisition of the Open Space Parcel or the development rights will negatively affect the Airport, which has operated under this same configuration for many years. She fails to suggest how this condemnation will inhibit the Airport's ability to reduce congestion at overcrowded airports and to enable efficient rescue and emergency response services or to serve the other functions noted in the Aviation Study Report. Indeed, members of the Committee have gone on record supporting modernization of

the Airport, provided such modernization is consistent with the public goal of preservation. As reflected in the pleadings, the condemnation will allow significant modernization and enhancement of the airport facilities and will allow the Airport to better serve the functions identified by Ms. Feldman and in the Aviation Study Report. Therefore, this condemnation cannot be said to interfere with federal interests.

While asserting that the Airport provides public benefits, Solberg Aviation Company does not articulate this argument under the prior public use doctrine, perhaps because that doctrine does not apply to these facts, even if it is assumed that the Airport constitutes a public use. First, this ancient doctrine does not appear to have survived the passage of the Eminent Domain Act. N.J.S.A. 20:3-6 expressly permits a condemning authority to acquire "public property already devoted to public purpose". Furthermore, this argument disregards N.J.S.A. 40:8-1 which allows a municipality to condemn and operate a private airport. See also N.J.S.A. 20:3-41 (acknowledging ability of municipality to condemn an airport). These legislative initiatives betray any argument that an airport cannot be condemned because it already serves a public purpose. Of course, the Township does not seek to take title to the Airport Facilities Area itself.

Furthermore, to the extent the prior public use doctrine survives in this State, that doctrine never applied for the benefit of a private landowner without the power of eminent domain. See Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 26, 267-68 (1966). Thus, the particular use to which private land is put is irrelevant to the prior public use analysis, even if the land contributes to a public use or function. Id. at 268. The sole inquiry is whether the condemnee is a governmental or private entity with the power of eminent domain. Id. Even a "public-spirited" use conducted by a private enterprise cannot invoke the doctrine if that enterprise lacks the power to condemn. Id. at 267. Given this strict standard, any comparison of "competing" public uses is inappropriate. Id. at 267-68.

Moreover, the federal government does not have exclusive jurisdiction over land uses relating to airports, its exclusive jurisdiction being limited to aviation and use of air space. This condemnation will not interfere with such jurisdiction. The sole case cited by Solberg Aviation Company support this point. In Gustafson v. City of Lake Angelus, 76 F.3d 778 (6<sup>th</sup> Cir. 1996), the Circuit court held that the jurisdiction of the Federal Aviation Administration is not concerned with local land use issues: "The FAA has . . . made clear that although FAA regulations preempt local law in regard to aircraft safety, the

navigable airspace, and noise control, the FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use in regard to the location of airports or plan landing sites—whether for airplanes, helicopters or seaplanes.” Id. at 786. Accord Daniel Hoagland et als. V. Town of Clear Lake, 415 F.3d 693, 695-98 (7<sup>th</sup> Cir. 2005) (holding that land use matters involving airports were “clearly left to local control”); Faux-Burhans v. County Commissioners, 674 F.Supp. 1172 (D. Md. 1987), *aff’d*, 859 F.2d 149 (4<sup>th</sup> Cir. 1988) (holding that locale of operations and other matters involving a private airfield were not federally preempted and were subject to local regulation since they did not inhibit the free transit of navigable airspace); Birkett v. City of Chicago, 329 Ill.App.3d 477, 480-81, 487, *rev’d in part on other grounds*, 202 Ill.2d 36 (2002) (citing to FAA policy statement that acknowledged local control over airport land uses).

New Jersey State courts have issued similar holdings. In Garden State Farms v. Bay, 77 N.J. 439 (1978), the Supreme Court held that New Jersey’s Aviation Act of 1938 expressed a legislative intent to leave certain land use decisions to municipalities in relation to aeronautical facilities. Id. at 452. Similar holdings were obtained in Ridgewood Air Club v. Board of Adjustment, 136 N.J.L. 222 (1947), and Yoemans v. Hillsborough Twp., 135 N.J.L. 599 (Sup. Ct. 1947). Likewise, in

Tanis v. Township of Hampton, 306 N.J. Super. 588 (App. Div. 1997), the Appellate Division held that a municipality's authority to regulate a proposed landing strip was not preempted by federal or State law. Id. at 600.

Based on the strength of these and other holdings, Solberg Aviation Company's argument that the condemnation interferes with federal aviation jurisdiction is without merit. If a municipality can exercise zoning controls to limit airport development, it can most certainly acquire unused vacant land surrounding an airport. Furthermore, the Company's position is eviscerated by then-Commissioner Fox's October 29, 2002 letter in which NJDOT notes the importance of the Airport and pledges to preserve the surrounding open space and dedicate it to the Township. See Allen Certif., Ex. 26. Given NJDOT's stated commitment to preserve the open space, it cannot be said that the preservation of open space is inconsistent with NJDOT regulations pertaining to the operation of the Airport.

POINT II

READINGTON TOWNSHIP WILL CONSENT TO THE STAY  
OF POSSESSION CONTEMPLATED BY N.J.S.A.20:3-  
11, HOWEVER THE DECLARATION OF TAKING SHOULD  
NOT BE VACATED

Readington Township will consent to a stay of possession of the Open Space Parcel through final appellate review of the Township's right to condemn that Parcel, as contemplated by N.J.S.A. 20:3-11. However, the Declaration of Taking should remain of record, as it was properly recorded as authorized by N.J.S.A. 20:3-17. That provision allows for a condemning authority to file a declaration of taking "[a]t any time contemporaneous with or after the institution of an action and service of process". This authorization is not limited by N.J.S.A. 20:3-11, nor does that section of the Eminent Domain Act state that its effect is to vacate or nullify declarations of taking that are filed prior to a challenge of the power to condemn. To vacate the Declaration of Taking at present would be contrary to the express terms of the Act.

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POINT III

THE MOTION FOR LEAVE TO INTERVENE FILED BY  
KEVIN DEVINE AND TAXPAYERS ALLIANCE OF  
READINGTON SHOULD BE DENIED

- A. This Court Should Deny the Motion to Intervene Filed By Kevin J. Devine and Taxpayers Alliance of Readington Because Movants Do Not Have An Interest In The Condemnation Action and Any Interest They Do Have Is Adequately Represented by The Existing Parties

Certain residents of Readington Township seek the extraordinary relief of leave to intervene in a condemnation suit. These residents seek to intervene, not to challenge the condemnation, but to limit the amount to be paid for the condemned property. Such relief would not only be a first in this State, it would upset, confuse and frustrate these summary proceedings. These residents cannot sustain their burden of demonstrating a sufficient interest to permit intervention.

New Jersey Court Rule 4:33-1 sets forth the standard for intervention, requiring that the applicant show a sufficient interest in the property at issue and be so situated "that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." In the instant matter, the movants have failed to demonstrate that they satisfy the criteria for intervention as of right. Specifically, movants have failed to demonstrate an interest in the property that is the subject of this



condemnation action and have failed to show that their interests are not being adequately represented by the Plaintiff.

**1. Movants Do Not Have an Interest in the Property which is the Subject of the Condemnation Litigation**

Movants contend that as taxpayers of Readington Township they have a "direct pecuniary interest in the outcome of this litigation sufficient to justify intervention." Clearly, the movants have no title or other interest in the property being condemned. Their alleged pecuniary interest arises solely from the bond ordinance which was already passed through municipal referendum by a majority of the voters of the Township. The bond's financial impact on taxpayers is hardly sufficient to give movants a direct pecuniary interest in the outcome of this condemnation action, but if it were, the proper method of challenging the referendum would have been through a timely suit.

Moreover, the movants' entire argument is based upon speculation that the condemnation action will result in an award greater than \$22,000,000. The just compensation to be paid will not be established for some time, so the movants' claim is unripe and is presently non-justiciable. In addition, movants presume that the Township will be solely responsible for any monies in excess of \$22,000,000. However, the bond ordinance does not limit the Township's authority to raise funds through other means, such as another bond ordinance, or to seek funding

from other public sources, such as State Green Acre funds. The Township already has applied for State funds to assist in this acquisition, and funds already have been committed through the State's Green Acres and New Jersey Environmental Infrastructure Trust programs. Even if it is presumed that the total cost to acquire the property would exceed \$22,000,000, the conclusion does not necessarily follow that the Township's portion of that obligation would exceed the authorized funds.

Regardless, movants are completely speculating at this point in time that the total cost to condemn the Subject Property will exceed \$22,000,000. Movants' arguments are directed to the means for which the Township would pay any condemnation award and is not a challenge to the actual taking. Thus, movants should not be permitted to intervene and disrupt the summary course of the condemnation proceedings based upon complete speculation and conjecture.

**2. Movants Have Failed to Sustain Their Burden of Establishing Inadequate Representation By Plaintiff Township of Readington**

Even if movants were able to establish a cognizable interest in the property and the instant matter, adequacy of interest alone is not sufficient grounds for granting movants' motion for intervention. Pursuant to Rule 4:33-1, movants bear the burden of showing that existing parties are inadequately protecting their pecuniary interests. This heavy burden of

establishing inadequate representation rests on the proposed intervenor. See Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L.Ed.2d 686 (1972). It is frivolous for movants to suggest that the Plaintiff cannot adequately represent the interest of its taxpayers and cannot adequately advance the public interest which is involved in this litigation. With respect to the just compensation to be paid to Solberg Aviation Company, the Township Committee and its residents are surely of a common interest.

In City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1 (App. Div. 2006), the court held that a private redeveloper could not intervene either as of right or permissively in a condemnation action despite the fact that the redeveloper was contractually obligated to pay all costs associated with the eminent domain action. Id. at 4. The court found that the redeveloper made no showing that the municipality did not adequately represent its interests. Id. The redeveloper moved to intervene in all aspects of the litigation claiming it had a unique and unprotected interest in defeating the challenge to the condemnation and assuring the redevelopment plan is implemented. Id. at 7. The court found that the municipality had a vested interest in redevelopment and implementation of the redevelopment plan and has more than adequately represented the redeveloper's interests. Id. at 8.

The court recognized that "there is a prima facie presumption that the power and discretion of governmental action has been properly exercised" and "the good faith of public officials is to be presumed; their determinations are not to be approached with a general feeling of suspicion." Id. at 11. The court further found that the redeveloper "provided no factual basis to support its speculative and conclusory assertion that the City might not seek to acquire the subject parcel at the best price obtainable within the legal parameters of the fair market value requirements in condemnation proceedings." If permitted to intervene, the redeveloper would not only be able to participate in the plenary proceedings but would also have the ability to reject a settlement and could withhold consent to a stipulation of dismissal of the condemnation action. Id. at 13.

In addition, cases construing Federal Rule of Civil Procedure 24 are instructive with regard to the showing of inadequate representation requirement.<sup>4</sup> A presumption of adequate representation arises where an existing party is a governmental body or officer charged by law with representing the interests of the proposed intervenor. Commonwealth of Pa. v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976), cert. denied sub nom. Fire Officers Union v. Pa., 426 U.S. 921, 96 S. Ct. 2628,

49 L.Ed.2d 375 (1976) (citing 7A C. Wright and A. Miller, Federal Practice and Procedure §1909, at 528-29 (1972)); Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa., 674 F.2d 970, 973 (3d Cir. 1982) (holding that when a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of its citizens).

Based on the established case law, the Township is presumed to adequately represent the interests of the movants. Thus, movants cannot sustain their heavy burden. In fact, movants failed to even argue that the Township cannot adequately represent its interests. In a weak attempt to suppress the presumption of adequate representation, movants instead argue that the defendants cannot adequately represent their interests. (Movants' brief at 12). Because the Township Committee can adequately represent the fiscal interests of the movants, their motion should be denied.

**B. This Court Should Deny The Motion To Intervene Filed By Kevin J. Devine And Taxpayers Alliance Of Readington Because Movants' Application Is Untimely**

The factors to be considered by a court in ruling upon a motion for permissive intervention under N.J.R. 4:33-2 include the promptness of the application, whether or not such relief will result in further undue delay, whether or not such relief

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<sup>4</sup> New Jersey Courts recognize that the New Jersey Court Rule regarding intervention was derived from Fed. R. Civ. P. 24. See State By Bontempo v.

will eliminate the probability of subsequent litigation, and the extent to which such relief may further complicate litigation which is already complex. Grober v. Kahn, 88 N.J. Super. 343 (App. Div. 1965), *modified*, 47 N.J. 135 (1966). Each of these factors counsels against intervention.

**1. Movants' Application for Intervention is Untimely and Will Prejudice the Parties By Resulting in Undue Delay**

If movants' application for intervention is granted for the reason of limiting the Township's condemnation rights, undue delay of this litigation will ensue, thereby prejudicing the right of the parties to an efficient and timely resolution of this summary action. Such extraordinary relief would (in this case and others) hamstring condemnation efforts, interfere with municipal governance and usurp the statutory mechanism for determining just compensation.

N.J.R. 4:73-1 provides that actions for condemnation are to be brought in the Superior Court in a summary manner pursuant to N.J.R. 4:67. Specifically, N.J.R. 4:67-4(a) provides that "[n]o counterclaim or cross-claim shall be asserted without leave of court." "The filing of a counterclaim would unduly complicate and delay the outcome of a condemnation action." Casino Reinvestment Development Authority v. Price, Docket No. ATL-L-320-94 (Law Div. November 14, 1994).<sup>5</sup> In Price, a condemnation case, the court found that the defendant's counterclaim, cross

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Lanza, 74 N.J. Super. 362, 370 (App. Div. 1962).

claim, third party complaint and claim under the Public Entities Act must be brought in a separate action. The court held that "the policy prohibiting counterclaims in condemnation actions is based on the premise that the condemnation commissioners have limited jurisdictional authority under the Eminent Domain Act, N.J.S.A. 20:3-12, and would not have the authority to address the other issues." If no party files an appeal from the commissioners award, the award becomes a final judgment and the counterclaim would become the only remaining part of the action. Id. In addition, "discovery in a condemnation proceeding is limited to the exchange of expert reports and comparable sales and leases ... to allow parties to file counterclaims would require further discovery which is not permitted under the rules governing condemnation proceedings." Id.

In the instant matter, movants should not be permitted to intervene for the same reasons that counterclaims and third-party claims are not permitted in condemnation actions. Permitting movants to intervene in the action would interfere with the summary nature of the condemnation action. If movants are permitted to intervene, it will disrupt the resolution of the issue of the Township's right to condemn. In addition, movants would likely want to pursue discovery, which is limited in a condemnation action. Permitting movants to intervene in a

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<sup>5</sup> See Certification of James P. Rhatican ("Rhatican Certif."), Exhibit B..

condemnation action would improperly delay what is supposed to be a summary action.

**2. Movants Have Already Instituted A Separate Action Against the Township**

Movants' real intention in seeking to intervene in this condemnation action is to challenge the adequacy of the bond ordinance, the results of the referendum, and the interpretive statement. In fact, Movants have instituted a separate action against the Township raising these challenges. See Rhatican Cert., Ex. A. However, pursuant to statute and court rule, movants are out of time to raise these challenges in any forum, let alone in a summary condemnation proceeding.

The bond ordinance was passed on February 21, 2006 and the date of first publication was February 25, 2006. Pursuant to N.J.R. 4:69-6(b)(11), the limitations period for an action in lieu of prerogative writs to challenge the bond ordinance expired 20 days from February 25, 2006, or March 17, 2006. Likewise, the referendum took place on May 16, 2006 and the results of the referendum were first published on June 8, 2006. See Allen Certif., ¶26. N.J.S.A. 40:49-11 (in operation with N.J.S.A. 40:49-27b) limits the time to challenge a referendum to 20 days from publication of the results thereof. Pursuant to that mandatory statutory limitations period, any challenge to the referendum itself must have been brought no later than June 28, 2006. Movants clearly were aware of these events, however,



their complaint was not filed until September 1, 2006, and their motion to intervene in this case was filed even later. Therefore, their challenge is time-barred.

Movants are using this condemnation action as an alternative platform from which to challenge the bonding procedure, knowing that its challenges are well out of time. Permitting the movants to challenge the interpretive statement and the bond ordinance in this condemnation action would be giving movants an unfair opportunity to challenge municipal action out of time which would be judicially improper and would disrupt municipal finance and governance.

Accordingly, movants' motion for permissive intervention should be denied.

POINT IV

SOLBERG AVIATION COMPANY'S COUNTERCLAIM AND  
THIRD-PARTY COMPLAINT AGAINST INDIVIDUAL  
MEMBERS OF THE TOWNSHIP COMMITTEE SHOULD BE  
SEVERED FROM THIS SUMMARY CONDEMNATION  
ACTION

The counterclaim and third-party complaint filed by Solberg Aviation Company are not properly before this court. N.J.R. 4:67-4(a) requires leave of court before a counterclaim can be filed in a summary action such as this. By definition, summary actions are intended "to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment." Pressler, Current N.J. Court Rules, comment to N.J.R.4:67-1 (2006). Solberg Aviation Company has not sought the leave of court to file its counterclaim or the third-party complaint, nor should these claims be included within the summary condemnation action. Therefore, they should be severed from this action.

.....  
Permitting Solberg Aviation Company to file a counterclaim in this action will undermine the very purpose of a summary action: it will serve to prolong and confuse a matter that could and should otherwise be disposed of on an expedited basis. As cited above, this issue was addressed in Casino Reinvestment Development Authority v. Price, in which Judge Williams refused to allow counterclaims and third-party claims in a condemnation case, noting that "a counterclaim would unduly complicate and delay the outcome of the condemnation action". Furthermore, as

with the motion to intervene, the discovery burdens arising from these ancillary claims would fall beyond the scope contemplated by the Eminent Domain Act. See id.

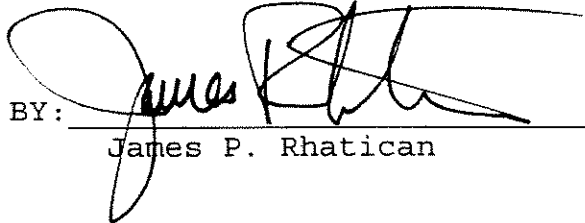
The counterclaim and relief requested by Solberg Aviation Company are too broad to fall within the limited parameters of this summary action. Thus, Solberg Aviation Company should not now be permitted to file a counterclaim or third-party complaint as part of this action. A third-party claim would unduly complicate the limited issues at this stage of the litigation, would delay resolution of a summary dispute, and unduly prejudice the Township's public objectives.

For these reasons, Solberg Aviation Company's counterclaim and third-party claim should be severed from this condemnation matter.

CONCLUSION

For the reasons stated herein, the Township of Readington respectfully requests that the Court enter final judgment finding that it has properly exercised its power of eminent domain to acquire the open space and development rights set forth in the Verified Complaint and related pleadings.

CONNELL FOLEY LLP  
Attorneys for Plaintiff  
Township of Readington

BY:   
James P. Rhatican

Dated: *October 30, 2006*