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

Plaintiff,

v.

SOLBERG AVIATION CO., a New Jersey partnership; JOHN HROMOHO, THOR SOLBERG, JR.; WATERS McPHERSON McNEILL, P.A.; FOX, ROTHSCHILD, O'BRIEN & FRANKEL, LLP; THOR SOLBERG AVIATION; JOHN DOES NOS. 1 THROUGH 20; JOHN DOE CORPORATION NOS. 1 THROUGH 20; NEW JERSEY DEPARTMENT OF THE TREASURY, DIVISION OF TAXATION, TOWNSHIP OF READINGTON,

Defendants.

SOLBERG AVIATION COMPANY,

Defendant-Counterclaimant and Third-Party Plaintiff,

and

THOR SOLBERG, JR., SUZANNE SOLBERG NAGLE and LORRAINE SOLBERG,

Third-Party Plaintiffs,

v.

TOWNSHIP OF READINGTON,

Counterclaim Defendant,

and

GERALD J. SHAMEY, THOMAS AURIEMMA, JULIA C. ALLEN, FRED C. GATTI, and BEATRICE MUIR,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUNTERDON COUNTY

DOCKET NO. HNT-L-468-06

Civil Action

BRIEF ON BEHALF OF DEFENDANT SOLBERG AVIATION COMPANY IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT ON BEHALF OF PLAINTIFF TOWNSHIP OF READINGTON

OF COUNSEL:
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ON THE BRIEF:
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Thor Solberg, Jr., and Third-Party Plaintiffs
Suzanne Solberg Nagle and Lorraine Solberg

BRIEF ON BEHALF OF DEFENDANT SOLBERG AVIATION COMPANY IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT ON BEHALF OF PLAINTIFF TOWNSHIP OF READINGTON

[Emphasis Ours Unless Otherwise Noted]

PRELIMINARY STATEMENT

This brief is submitted on behalf of Solberg Aviation Company ("Solberg") in opposition to the motion of Readington Township ("Readington") for summary judgment. As the Court is aware, Solberg has filed its own motion for summary judgment[1] based upon the assertion that -- utilizing the Brill standard -- there are insufficient genuine material facts to refute the conclusion that the taking in this case was pretextual -- i.e., that the taking was not for the purpose of preserving "open space" but rather for the clear purpose of constraining the airport operation so that Solberg will be unable to effectively expand or modernize it and it will thereafter likely wither and die.

Readington's motion is predicated upon both a factual and legal misconception and, if accepted, would totally eviscerate the established and accepted body of law that discusses pretextual takings. Readington's simplistic approach would have this Court believe that (i) the Court is bound by, and cannot look behind, the statement of purpose placed in the enabling ordinance by the legislative body -- here the Township Committee -- no matter what other extrinsic evidence might show as to the facts and circumstances which led to the ordinance, (ii) since the stated public purpose in this ordinance is "open space" preservation, and since preservation of "open space" and

[1] We ask, of course, that the Court consider and incorporate by reference Solberg's own summary judgment motion and briefs, and the extensive evidence cited and provided therein, as part of its opposition to Readington's instant summary judgment motion.

"natural resources" is a recognized public use, the inquiry must end there and the validity of the condemnation confirmed, and (iii) once the foregoing is established, the "objective purpose" of the Township's actions cannot be contradicted by anything else its members may have said or done because any such words or conduct amount to nothing more than irrelevant "motive".

Readington's approach, if accepted, would nullify all of the existing case law regarding pretextual takings and would substitute for it the incredible proposition that no matter what its underlying purpose, and no matter what public interests and public welfare goals (here, outside of Readington's jurisdiction) of the existing and projected use are being knowingly frustrated by the legislation, a statement by the governing body accompanying the taking ordinance trumps all else and defeats all efforts to attack the authority of the condemnor.

This Court has already recognized that the law in this area does not support Readington's approach. Readington made essentially the same arguments in its October, 2006, presentation to the Court wherein it sought summary disposition of the matter on the return date of the Court's Order to Show Cause. It presented, in slightly abbreviated fashion, essentially the same historical data surrounding Readington's interest in "open space" and its eventual effort to package the "open space" approach as the rationale for halting any expansion or modernization of the airport.

In its letter opinion of November 14, 2006, this Court determined that, notwithstanding Readington's assertion that "its purpose for this taking is an effort to preserve open space as well as other natural resources," the Court must assess whether

there was an "ulterior motive for the proposed taking" and whether it was "purely pretextual and in bad faith" with the real purpose being "to prevent Solberg Aviation from expanding or modernizing" *** but at the same time "masking this taking as an attempt to preserve open space as well as other environmental considerations" ***. Relying at that stage upon the limited record of admissions available to Solberg, this Court nonetheless concluded that the evidence then before it was "sufficient to create a prima facie showing that the purpose of this condemnation action is pretextual and/or will result in an inverse condemnation greatly reducing the value of defendant's airport."

Far from turning up nothing of substance, the discovery conducted by Solberg has further revealed and confirmed the extensive campaign and crusade, over many years, of Readington to preclude and prevent expansion of the Airport, and its conscious and calculated use of its perceived eminent domain power to prevail in that campaign -- a power it chose to use when all other efforts to "stop the jetport" appeared to be frustrated.

The issue, therefore, is not whether preservation of open space and natural resources is, in the abstract, a laudable public goal. If that were the only issue, the answer has long been established. The real issue, however, is whether that was and is the primary goal and purpose of Readington in this case, or whether it is in reality a disguise for the real purpose of constraining the airport. If the question is so framed, as it should be, not only should Readington be denied summary judgment, but the evidence is overwhelmingly in favor of Solberg, even given the general burdens imposed upon it by the case law.

The Court, we respectfully submit, should ask itself this rhetorical question: But for the existence of the airport, and its potential for growth as an airport, would Readington have attempted to exercise its awesome powers of eminent domain with respect to this 736 acres of bucolic land, largely farmland, and located in a zone that effectively mandates substantial open space even if developed? The answer, we suggest, is obvious and, bolstered by the extensive evidence, leads to the correct result.

No second-guessing of Readington's purported "open space" judgment is necessary for this Court to determine that Readington's real purpose has nothing to do with open space. While Solberg devotes a portion of this brief to challenging Readington's numerous experts on the purported open space and ecological benefits that Readington contends will be furthered by the acquisition, Solberg does so because both the weakness -- and the timing -- of those expert opinions and purported justifications further demonstrate Readington's efforts to conceal the pretextual nature of the taking by arguing that the Airport Property has unique ecological attributes, which is not the case. Readington has retained an army of experts, requiring Solberg to respond in kind, but in what may in fact be an unnecessary distraction to the resolution of this matter.

Based on the record presented by the competing summary judgment motions, this Court can determine that Readington's expressed open space purpose is nothing more than a sham and that the history and context in which this condemnation attempt takes place is overwhelming proof of Readington's real purpose. Readington's attempt in its brief to rely upon non-pretext cases in an effort to avoid the facts surrounding its determination to condemn, cannot erase those facts demonstrating a

systematic effort to do whatever it can to control the size and runway length of Solberg Airport.

In addition to the decades-long effort by Readington to avoid relinquishing zoning control over the Airport pursuant to state law, its systematic effort to use condemnation as a tool to control the Airport sprung to life in 1999, after Readington learned that the Solberg Master Plan had been conditionally approved and an extended runway became a potential imminent reality. Not until then, when condemnation counsel was retained, did Readington specifically identify this property as an "open space" candidate and begin to retain a horde of experts seeking to identify natural resource indicia on the airport property.

As discussed in detail below, the case law addressing pretext makes it clear that the facts that Readington seeks to avoid are probative of Readington's purpose and should be reviewed by this Court in determining Readington's real purpose.

Accordingly, this Court should decline Readington's invitation to avoid an examination of the long history underlying this dispute and, in view of those facts and the other circumstances in this case, deny Readington's motion for summary judgment.

COUNTER-STATEMENT OF FACTS

A. INTRODUCTION

Solberg Airport is a **commercial** airport and the Ordinance dated February 3, 1941 gave airport founder Thor Solberg, Sr. the express "permission . . . for the operation of a commercial airport" in Readington. [Certification of Philip E. Mazur dated November 21, 2007 ("Mazur Opposition Cert.") Ex. A].

The events since that time, which are laid out in detail in Solberg's October 26, 2007 motion papers, show that interest in the Airport Property as a parcel to be preserved for open space did not begin until some time in 1999, when modernization, and more particularly, lengthening of the runway at the airport, appeared imminent with the conditional approval of the Solberg Airport Layout Plan and the Airport Master Plan.

A very telling dichotomy exists with respect to Readington's "open space" objective regarding the subject property pre- and post-1999 (before and after Readington became aware of the ALP and Master Plan conditional approval). Prior to that timeframe, although Readington may have endorsed the general concept of preserving open space, the Airport Property was not a specific target of that concept. Of course, when Readington became aware that the ALP and Solberg Master Plan had received conditional approval, and that the potential expansion of the airport operation was a distinct possibility, it retained eminent domain counsel and embarked on the crusade of endeavoring to develop an "open space" rationale for seizing the Solberg land.

By way of illustration:

- The Airport Property was not specifically identified for public acquisition for open space in any pre-1999 documents, including: the 1979 Open Space Master Plan, [Mazur Opposition Cert. Ex. B 451:13-458:3], the 1990 Master Plan, [Mazur Opposition Cert. Ex. B 458:7-460:19], the 1995 Greenways Work Plan, [Mazur Opposition Cert. Ex. B 461:5- 462:25], or the 1998 Master Plan Amendment [Mazur Opposition Cert. Ex. B 463:1-466:8].

- There is no designation of the Airport Property in the 1995 Open Space Inventory. [Rhatican Cert. Ex. 14 p. 6].[2]

- The "Airport" section of the 1990 Readington Master Plan demonstrates, by way of prelude, Readington's real purpose, to restrict the growth of the airport, including the runways:

> Solberg Airport is . . . flanked by existing single family detached homes. Readington Township is concerned about the **land use compatibilities which arise from operating an airport in the midst of a large single family detached housing district. It is Readington Township's desire that the airport not grow beyond being a local recreational airport. Any expansion or significant improvements proposed to the airport facilities (including runways) should be approved by the Planning Board so the impact of the expansion on surrounding land uses and the municipal infrastructure can be properly evaluated.**

[Mazur Opposition Cert. Ex. D p. 125]. This document is conspicuously silent with respect to open space and other ecological concerns regarding the Airport property.

- The 1998 Readington Master Plan Amendment, as well as the 1995 Open Space Inventory, rather than targeting the property for acquisition for open space purposes, note that the existence of the airport already helps to preserve open space.

[2] Any general references to the Airport Property in the pre-1999 documents to which Readington refers can be explained by the fact that Readington was concerned with the Airport Master Plan and ALP that was provided to N.J.D.O.T. in early 1997. [Mazur Cert. Ex. 55; Mazur Opposition Cert. Ex. C]. For that reason, Readington sent a twelve page letter to N.J.D.O.T. in 1997 objecting to the Airport Master Plan that Solberg submitted, and apparently believing that the Airport Master Plan and ALP would not be approved, received the news of approval in 1999 with "shock and disbelief". [Id.]. Of course, general concern over airport modernization began even long before that, as explained in Solberg's moving brief.

[Certification of Philip E. Mazur dated October 26, 2007 ("Mazur Cert.")[3] Ex. 141 VIII-13; Rhatican Cert. Ex. 14 p. 6].

- Even as late as September 1998, when an Open Space Preservation Report was issued by the Readington Township Planning Board, Readington continued to maintain the position that the "existence of the airport stabilizes 700 acres of open space". [Mazur Opposition Cert. Ex. E p. 20]. Interestingly, in the January 1, 1999 Township Committee Meeting minutes listing goals going forward, "preserving open space" is listed as a separate bullet point from "continuing to hold the line against airport expansion". [Mazur Cert. Ex. 53 p. 12].

However, once Readington became aware of the conditional approval of the ALP and Solberg Master Plan, its efforts to give this condemnation the appearance of a legitimate undertaking intensified. Thereafter, the Township planning documents begin to make explicit and specific reference to the Airport Property and to specifically target it for acquisition, using at times the veneer of "open space" and related considerations, notwithstanding a continuing inability to completely disguise the real purpose.

That is why, in describing pre-1999 policies and events in its moving papers, Readington is compelled to resort to equivocal language, referring to general objectives and asserting that those general objectives will be furthered by acquisition of the parcel. The effort is plain; it is to confuse the plain fact that none of the supposed "policies" or "events" dating from that timeframe discuss "open space" benefits specific

[3] The Mazur Cert. was filed with Solberg's papers in support of its motion for summary judgment. In an effort to reduce the confusion involved with the substantial number of exhibits and multiple certifications, the exhibits to the Mazur Cert. are designated with numbers and the exhibits to the Mazur Opposition Cert., filed with these opposition papers, are designated with letters.

to this parcel. This approach is apparent in Readington's brief (at pages 5-6) where it is unable to demonstrate that any documents specifically identify the Airport Property until the 1999 Open Space Master Plan, created after Readington became aware of the Solberg Master Plan and ALP approval.

Readington's efforts to retain experts to conjure up a justification for taking the property began in or around the summer of 1999, when the Township retained Jack Buonocore, Esq. of McKirdy & Riskin, well-known condemnation attorneys. [Mazur Cert. Ex. 70].

Therefore, Readington saw to it that documents created in 1999 and later, such as the July 2001 Master Plan Amendment, specifically identify the Airport Property. [Rhatican Cert. Ex. 5]. By that time, Readington had concluded that the environmental assessment conducted by Clough Harbour would find no significant impact in connection with one or more lengthened primary runway modernization proposals, and therefore was preparing for the condemnation it would authorize in October 2001. [Mazur Cert. Ex. 75 p. 6; Ex. 76 p. 15-16; Ex. 77 p. 39:16-20].

Against that background, it is nothing short of incredible for Readington to assert that it "relied on the reports of its planning and environmental consultants" in passing the Ordinance authorizing acquisition. [Plaintiff's Brief p. 1]. Rather, the army of experts was engaged **after** the Township retained Mr. Buonocore in a sophisticated and concerted effort to make it appear that the condemnation is for a permissible public purpose. The whole thing was engineered to "draw the line in the sand, and not only to stop [particular expansion plans], but to do something to ensure . . . that this will never

become a jetport or the things that we fear in terms of heavier and larger aircraft coming in and out of Solberg." [Mazur Cert. Ex. 2 p. 18:8-15].

Not only that history, but also the weakness of Readington's purported open space justifications, serve to expose Readington's pretext.

B. THE LATEST N.J.D.O.T. INSPECTION REPORT DEMONSTRATES THAT THE AIRPORT IS WELL MAINTAINED, WITH NO SIGNIFICANT DEFICIENCIES.

Readington tries to assert, at pages 15-17 of its brief, that the airport is in an unsatisfactory condition. The September 21, 2007 Inspection Report and cover letter from N.J.D.O.T. provides that the department "conducted an annual safety and security inspection" at the airport. [Mazur Opposition Cert. Ex. F]. The N.J.D.O.T. "found the airport to be in an overall good condition, with no discrepancies noted." [Id.]. The issues and discrepancies cited by Readington in its papers (none of which ever caused the airport to cease operations at any time) have been remedied to N.J.D.O.T.'s satisfaction. Therefore, there is no mention of them in the most recent cover letter and attached report.

Solberg continues to be well-maintained, despite the fact that the operations of the airport, even in the eyes of Readington's expert, allow it to do no more than "break even, at best" [Mazur Cert. Ex. 138 p. 11,14], despite the years-long wasteful dispute with Readington Township and despite the cloud of Readington's numerous threats to condemn made over the past seventeen years which has hung over the airport and its operations. That Solberg has managed to maintain the airport in "overall good condition" and operating under the circumstances (questionable if not negative economic reward and

incessant hostility by the host Township) attests to the owner's devotion to aviation and the public benefits that aviation provides.

C. OFFICIAL N.J.D.O.T. AND F.A.A. APPROVED DOCUMENTS DEMONSTRATE THAT THE AIRPORT IS APPROXIMATELY 714 ACRES IN SIZE.

N.J.D.O.T. and F.A.A. approved documents delineate the official Airport boundary and provide that the Airport Property "acreage" is 714.04 acres [Mazur Cert. Ex. 128]. Readington tries to argue that the Airport only consists of approximately 70 acres and that the remainder of the property is unnecessary for airport operations. [Readington Brief p. 4]. N.J.D.O.T. and F.A.A. disagree, and no less than five separate N.J.D.O.T. documents submitted to the Court by Readington in support of its motion expressly state that the airport consists of 721 acres. [Rhatican Cert. Exs. 27, 28, 29, 30 and 31].

Additional evidence also demonstrates that the Airport is far larger than Readington contends. As described in more detail in Solberg's papers in support of its motion for summary judgment, the Solbergs and N.J.D.O.T. had reached a tentative agreement to sell the property to N.J.D.O.T., at which time Readington sought certain "assurances" as to the length of the runway (which is Readington's primary concern in this condemnation suit). [Solberg Brief p. 29-31]. At the time Readington received its runway "assurance", which N.J.D.O.T. described as a "policy decision" (which would not necessarily continue in perpetuity[4]), N.J.D.O.T. also stated that a certain portion of the Airport Property "not required for airport operations" would "be set aside as open

[4] Readington officials were aware that a change in administration could result in a change in that policy. [Mazur Opposition Cert. Ex. G 145:18-150:7].

space and conveyed to the Township". [Rhatican Cert. Ex. 34]. **The number of acres that N.J.D.O.T. had proposed to set aside as open space was approximately 200 acres, and not the 600-plus acres that Readington now seeks to take in fee simple.** [Rhatican Cert. Ex. 34].

Regardless, as explained in detail in Solberg's moving papers, the airport cannot operate in an economically viable manner indefinitely on the approximately 101 acres that Readington intends to leave Solberg for airport use, and that constriction will eventually choke the airport out of business. [Mazur Cert. Exs. 136 and 137].

D. READINGTON NEVER CONDUCTED ANY STUDY OF MUNICIPAL AIRPORT OPERATION DURING THE TIMES IT WAS SEEKING TO CONDEMN THE ENTIRE AIRPORT.

Readington argues that if it wanted to eliminate the airport or cause it to shut down, it could condemn the entire airport pursuant to N.J.S.A. 40:8-1. [Readington Brief p. 42-43]. Readington did, in fact, seek to take the entire airport in 2001 and introduced an ordinance to that effect in 2005. [Mazur Cert. Ex. 75 p. 6; Ex. 76 p. 15-16; Ex. 77 p. 39:16-20]. Readington expressly stated at those times that it was proposing "municipal ownership and control of the airport". [Mazur Cert. Ex. 88; Ex. 75 p. 6].

Although Readington was then proposing to "own" and "control" the airport, it did not conduct any study or engage any experts to examine the logistics of operating an airport, thus evidencing that it had no realistic intention of continuing the airport in business and "preserving" it. [Mazur Opposition Cert. Ex. G 422:21-425:3]. Readington did not examine any of the economics that municipal operation would

involve, except for the cursory conclusion contained in a single report it engaged, which stated in essence that the Township would be able to operate the airport at a loss, if it chose, with subsidization by public monies. [Id.; Mazur Opposition Cert. Ex. H].

That same report does state, however, that acquisition of the entire airport by Readington would allow it to control the operations in their entirety to "protect" the community and "make the airport a better neighbor". [Mazur Opposition Cert. Ex. H p. 10]. For example, if Readington desires to "discourage turbine-powered aircraft from operating [it] can decide not to sell jet fuel." [Id.]. If the Township wants to "discourage after dark operations" it "can eliminate airport lighting". [Id.]. "As owner, Readington can tailor Solberg's operations to fit the community's quality-of-life goals." [Id.].

Certainly, Readington would have commissioned a pre-acquisition in-depth analysis of what municipal operation would involve and would have explained the details to the public if it was seriously interested in assuring that the airport continue to operate upon acquiring it.

In any event, the statute to which Readington refers, N.J.S.A. 40:8-1, et seq., permits municipal acquisition in order to **create and preserve airports**. See N.J.S.A. 40:8-1 (twice expressly stating that acquisition is allowed for "airport purposes", not to let them die). It does not give Readington carte blanche in connection with the airport property, and certainly cannot be construed as condoning the constraints and eventual demise which will result from Readington's proposed taking.

E. CLOUGH HARBOUR DID NOT "FIND" THAT A LENGTHENED RUNWAY WOULD CAUSE SIGNIFICANT ENVIRONMENTAL IMPACTS.

Readington misstates the reason that the Clough Harbour draft environmental assessment of October 2002 did not examine a modernization option involving a lengthening of the runway was because a lengthening would have had certain environmental impacts. [Readington Brief p. 20-21]. The evidence produced in discovery shows otherwise, and more specifically, shows that Clough Harbour, following its scientific analysis of impacts, was prepared to issue a finding of no significant impact in connection with a modernization option providing for a 4300' primary runway.

Prior to Readington's successful efforts to lobby N.J.D.O.T. with respect to runway length, drafts of the Environmental Assessment from earlier in 2002 examined more significant expansion options consistent with the Solberg ALP and Airport Master Plan. [Mazur Opposition Cert. Ex. I p. 3-5, 3-9].

Not only was a lengthened runway option considered, but Clough Harbour was poised to issue a finding of no significant environmental impact in connection with that option. In an e-mail from March 18, 2002, Catherine Bujak of Clough Harbour stated that "it is our opinion that a FONSI (finding of no significant impact) could be issued for the Modified No-Build or Phase IA Alternatives." [Mazur Opposition Cert. Ex. J]. The attached memorandum states that the Phase IA Alternative, for which Clough Harbour was prepared to issue a FONSI, involved lengthening the primary runway to 4300'. [Id. at p. 4].

However, political maneuvering by Readington caused that option to be deleted from subsequent drafts. On March 26, 2002, John Kaiser of N.J.D.O.T. told Clough Harbour to "refrain from further progress on the Solberg EA Study, until further notice" because the "Commissioner or Transportation is currently exploring options which necessitate this action." [Mazur Opposition Cert. Ex. K]. Accordingly, the change in the options considered were not driven by any environmental findings by Clough Harbour, but rather, were directed by N.J.D.O.T. This is stated expressly in a July 12, 2002 e-mail to Clough Harbour, where John Kaiser of N.J.D.O.T. directed Clough Harbour to "restart the Solberg EA Study, with the following considerations", including a "'restated' alternative as indicated by the Commissioner's ideas", which "'new' alternative may improve [the] overall 'acceptability' of the proposed project[.]". [Mazur Opposition Cert. Ex. L].

Politics -- Readington's political lobbying -- eliminated a lengthened runway from consideration, not some kind of scientific finding.[5]

F. RESPONSE TO READINGTON'S PRETEXTUAL JUSTIFICATIONS.

(i) Overview.

If this Court finds it necessary to examine Readington's "open space" related justifications, it will conclude that those justifications are flawed, confirming that they are part and parcel of the construction of the pretext. The only unique thing about the Airport Property is the fact that it contains an airport of sufficient size and shape to

[5] In any event, the fact that N.J.D.O.T. was engaged in analyzing environmental impacts, with the invited input of Readington, only serves to show that N.J.D.O.T. has authority over those issues, not Readington.

support the improvement and modernization required to meet the public need now and in the future which, as demonstrated by Solberg's moving papers, Readington has desperately tried to control for years in violation of state law.

- The Airport Property is comprised of 4.7% wetlands and Readington as a whole is comprised of 7.3% wetlands;
- the Property is 21% forest and Readington as a whole is comprised of 32% forest;
- the Property is 64% agriculture and Readington as a whole is comprised of 26.5% agriculture; and
- the Property contains 54.8% Prime Agricultural Soils, as does 42% of the acreage in Readington.

[Mazur Opposition Cert. Ex. M p. 2].

The Airport Property has the same general characteristics as the Township as a whole. [Mazur Opposition Cert. Ex. M p. 2; Mazur Opposition Cert. Ex. N p. 2]. The statistical overview demonstrates that the property is typical of those found elsewhere in Readington.

An examination of the details behind Readington's pretextual justifications leads to the same conclusion.

(ii) Readington Has Substantial Grassland Habitat, And Moreover, Readington Is A Poor Steward Of The Grassland It Already Possesses Or Controls.

The existence of certain grassland birds is not unique to this property, and there is no need to take the property to protect grassland birds.

- None of the species known to use the airport are Federally listed, meaning that they are not at risk nationwide. [Mazur Opposition Cert. Ex. O p. 1].
- There are at least five other parcels in the Township where State-listed grassland birds have actually been documented. [Mazur Opposition Cert. Ex. M p. 2].
- Ten other parcels in the Township have the same habitat suitability ranking for grassland species. [Mazur Opposition Cert. Ex. M p. 3].
- The Township currently owns or controls 3,289 acres of open space and preserved farmland that consist of suitable grassland habitat for threatened and endangered species. [Mazur Opposition Cert. Ex. P p. 9].
- Throughout New Jersey there are 8,577 patches of grassland habitat suitable for threatened or state listed grassland birds. [Mazur Opposition Cert. Ex. O p. 1].
- In addition, grassland habitat is easily created, and therefore, it can be replicated on any other large agricultural property or assemblage of property in the Township. [Mazur Opposition Cert. Ex. M p. 2].
- Moreover, any grassland species on the Airport property are there as a result of the property being maintained as an airport because grassland in this region is not self sustaining, and must be managed by human intervention; otherwise the grassland will eventually be overcome by woody species if not periodically cleared. [Mazur Opposition Cert. Ex. O p. 3; Mazur Opposition Cert. Ex. P p. 15].

- To contend with the ephemeral nature of grassland habitats, grassland birds are notoriously efficient at finding and colonizing remote grassland parcels as they come into existence and therefore, if suitable grassland habitat is created in any reasonably proximate location, it is likely to be colonized by grassland species. [Mazur Opposition Cert. Ex. O p. 3].

- For those reasons, airport operations and maintenance requirements are consistent with, and do not detract from, grassland bird habitat, and in fact, a number of airports have already successfully instituted habitat management plans for grassland birds. [Mazur Opposition Cert. Ex. O p. 4].

- By contrast, the Township is a poor steward of those grassland sites that it currently possesses. [Mazur Opposition Cert. Ex. M p. 3; Mazur Opposition Cert. Ex. P p. 15].

- Many Township controlled grassland parcels have been overgrown and rendered unsuitable for grassland birds by succession. [Mazur Opposition Cert. Ex. M p. 3; Mazur Opposition Cert. Ex. P p. 15; Mazur Opposition Cert. Ex. O p. 5-6].

- The Township has also facilitated farming on such parcels without requiring management for grassland birds. [Mazur Opposition Cert. Ex. M p. 3; Mazur Opposition Cert. Ex. P p. 15; Mazur Opposition Cert. Ex. O p. 5-6].

- The Township recently planted shrubs on one grassland parcel, which completely undermines the value of the land as a grassland habitat. [Mazur Opposition Cert. Ex. O p. 5-6].

- The interest in grasslands seems to be focused on the Solberg property, and the Township does not require applicants for developments regulated under the Township's Land Use Regulations to protect or manage similar wildlife habitats. [Mazur Opposition Cert. Ex. P p. 2, 11].

- In sum, Readington's "grassland preservation" justification falls apart under scrutiny, and there is no evidence that Readington would manage the Airport Property for the benefit of grassland birds better than the Solbergs currently do and have been doing for 65 years. [Mazur Opposition Cert. Ex. O p. 9-11].

(iii) The "Pretty Common Soils" At The Property Are The Same As Those Found In The Vast Majority Of The Township.

- Although Readington now tries to imply otherwise, Readington's purported soils expert admitted that Prime Agricultural Soils and Soils of Statewide Importance are "pretty common soils". [Mazur Opposition Cert. Ex. R p. 75:9].

- In fact, taken together 75% of the land in Readington consists of one or the other type of soil, or, stated another way, approximately 22,715 acres of land throughout Readington consist of those soil types. [Id.; Mazur Opposition Cert. Ex. N p. 2].

Therefore, there is nothing unique about the soils at the Airport Property to justify the taking.

(iv) The Aquifer Geologic Formation Underlying The Airport Also Resides Under 96-97% Of The Township.

- The Brunswick Formation, which constitutes the aquifer to which Readington refers in its papers, is extremely large and "stretches . . . from New York through New Jersey into Pennsylvania." [Mazur Opposition Cert. Ex. R p. 63:2-4].

- The majority of the Township resides above that formation, and Readington's purported expert admitted that "the airport sits over the primary geologic formation that you find throughout the town." [Id. at 63:5-13].

- Indeed, "96, 97 percent of the township sits over the Brunswick formation". [Id.; see Mazur Opposition Cert. Ex. P p. 12-13].

- There is also nothing unique about the groundwater recharge rate of the Airport Property. The recharge rate in Readington ranges from zero (0) to twenty three (23) inches, and the majority of the Airport Property has a recharge rate ranging between one (1) to eleven (11) inches per year. [Mazur Opposition Cert. Ex. P p. 13].

- For those reasons, development at this parcel would not raise any aquifer related issues that would not be implicated by the development of nearly any other parcel in the Township because nearly all of the Township resides over the same formation. [Mazur Opposition Cert. Ex. P p. 13].

- In any event, because of the existence of the aquifer, any project on the Airport Property using federal funds (such as F.A.A. funds) would be subject to United States Department of Environmental Protection review. [Mazur Opposition Cert. Ex. P p. 13].

(v) Any Environmental Impacts Caused By A Proposed Modernization Are Controlled By The State And Federal Authorities.

Readington's focus on wetlands and similar characteristics of the Airport Property is misplaced because the authority to protect those features is allocated to the state and federal government. As an initial matter, the Clough Harbour draft environmental assessment and the various meetings that took place at Raritan Valley Community College in late 1999 into 2001 (after the Solberg Master Plan and ALP received preliminary approval) show that the State, and not Readington, has authority over those issues. [Mazur Cert. Ex. 74; see Solberg Brief p. 27-29].

Indeed, that preliminary environmental assessment procedure, which resulted in the creation of the Clough Harbour report drafts and lasted over a year, was described by Mayor Shamey as a "cruel joke" and "non participatory" because the "process was insulting at best" and the outcome was a "self-fulfilling prophesy". [Ex. 77 p. 40:14-41:13; see Solberg Brief p. 28-29]. As described in more detail in Solberg's moving papers, it was the fear that the Master Plan would receive final approval that prompted the Township in October 2001 (shortly after those Raritan Valley Community College meetings) to enact an Ordinance authorizing it to condemn the Airport Property.[6] [Mazur Cert. Ex. 75 p. 6; Ex. 76 p. 15-16; Ex. 77 p. 39:16-20].

In short, Readington became dissatisfied with the allocation of authority over those environmental issues (including state authority over wetlands and similar

[6] Despite the allegation on page 18 of Readington's brief, Solberg never reached any firm agreement in 2001 to sell the Airport Property to the Township contingent on an agreement as to price. The assertion by Readington to the contrary is made without any citation or reference to factual support, and Solberg denies that it ever agreed to sell to the Township. Moreover, Solberg vigorously opposed the condemnation attempt that Readington made at that time.

environmental characteristics), and shortly thereafter effectively sought to usurp that authority via its earlier condemnation attempt.

Beyond the allocation of authority evidenced by the Clough Harbour report, it is also well-known that the state extends stringent protections to wetlands, and therefore, any effect on wetlands caused by proposed improvements would undergo substantial scrutiny. [Mazur Opposition Cert. Ex. O p. 11]. New Jersey has some of the most stringent wetland regulations in the nation. [Mazur Opposition Cert. Ex. O p. 10]. Other than *de minimis* impacts allowed under General Permits, any proposed impact to wetlands would require a comprehensive analysis of alternatives, minimization of any impacts, and replacement of any lost wetlands area at a 2 to 1 ratio in order to obtain an Individual Permit. [Mazur Opposition Cert. Ex. O p. 8, 10]. An Individual Permit will not be granted if the proposed activity would jeopardize or adversely modify documented habitat for threatened or endangered species. [Mazur Opposition Cert. Ex. O p. 8]. The public would be notified of any request and public comment on the application would be encouraged by N.J.D.E.P. [Mazur Opposition Cert. Ex. O p. 8].

Therefore, Readington's reference to its 1998 Master Plan, which states generally that "freshwater wetlands . . . should not be developed" is without any real significance, except to show that prior to 1999, it must try to fit its airport control agenda into an open space disguise by resort to generalities.

A finding of lack of authority in this case will not result in some kind of instantaneous disturbance of wetlands. To the contrary, if a proposal to disturb wetlands were to be made, then the proper authorities would consider the proposal under the

appropriate mandatory guidelines described above and Readington's input would be considered.[7]

New Jersey law also requires that wetlands be regulated uniformly. [Mazur Opposition Cert. Ex. O p. 8]. The Freshwater Wetlands Protection Act, at N.J.S.A. 13:9B-30, precludes local and regional government agencies from imposing restrictions that are more stringent than those imposed under state law:

> 13:9B-30. Local regulation preempted
>
> It is the intent of the Legislature that the program established by this act for the regulation of freshwater wetlands constitute the **only program for this regulation in the State except to the extent that these areas are regulated consistent with the provisions of section 6 of this act.** To this end no municipality, county, or political subdivision thereof, shall enact, subsequent to the effective date of this act, any law, ordinance, or rules or regulations regulating freshwater wetlands, and further, this act, on and subsequent to its effective date, shall supersede any law or ordinance regulating freshwater wetlands enacted prior to the effective date of this act. Between the enactment and effective date of this act, no municipality, county, or political subdivision thereof shall enact any law, ordinance, or rule and regulation requiring a transition area adjacent to a freshwater wetland; provided however, that any such law, ordinance, or rule and regulation adopted prior to the enactment of this act shall be valid until the effective date of this act.

[N.J.S.A. § 13:9B-30; Mazur Opposition Cert. Ex. O p. 8].

Therefore, all wetlands and transition areas on the property are already regulated under the exclusive N.J.D.E.P. standards, and permits are required before any

[7] Stated simply, protections already exist with respect to wetlands. This is similar to the manner in which **Readington's AR zoning of the property already assures that at least 70 percent of the developed property must be set aside as open space in the event the property is developed**, and therefore, municipal ownership is unnecessary to preserve open space. [See Solberg Brief p. 66].

regulated activity can proceed. [Mazur Opposition Cert. Ex. O p. 8]. In addition to all of the above, existing regulations already serve to protect groundwater resources, protect from flooding and erosion and to assure the quality of stormwater runoff. [Mazur Opposition Cert. Ex. P p. 15]. And as noted above, because of the existence of the aquifer, any federally funded project on the Airport Property would be reviewed by U.S.D.E.P. [Mazur Opposition Cert. Ex. P p. 13].

(vi) Readington's Purported Goal Of Preserving Readington Village Lacks Any Semblance Of Detail.

Readington's argument that the condemnation of the Airport Property would help preserve some historical feature of Readington is so devoid of detail or support that it strains credibility. As an initial matter, various Township planning documents (at least those dating from before 1999) recognize that open space is stabilized by the existence of the airport. One such document states that "[a]s long as the airport exists, the open space associated with it in this area [of Readington Village] is somewhat stable." [Rhatican Cert., Ex. 14 at 6]. Another Township planning document provides that it is the "existence of the airport" that "stabilizes over 700 acres of open space" and "thus serves as a greenbelt". [Mazur Cert. Ex. 141 VIII-13; Rhatican Cert. Ex. 14 p. 6]. An Open Space Preservation Report from September 1998 says the same thing. [Mazur Opposition Cert. Ex. E p. 20]. Therefore, according to Readington itself, far from threatening the Village, the goal of preserving the Village of Readington is already served by the Airport.

- It is undisputed that no historic sites or structures are located within or upon the Airport Property and that any such sites, including Readington Village, are located outside of the property. [Rhatican Cert. Ex. 9 p. 71 (and map depicting Village and Airport Property on following page); Ex. 5 VIIII-43 through VIIII-44].

- The airport is not directly adjacent to the Village, but rather, is only nearby a very small part of the Readington Village to the north, and nowhere does the circle depicting the Village on Readington's map touch the Airport Property border. [Mazur Opposition Cert. Ex. S p. 81:22-82:24; Rhatican Cert. Ex. 9 map following p. 71].

- More importantly, Readington's purported expert on the subject, Michael Sullivan, could not identify the nature of any of the historic structures located in Readington Village, and could only state that some of them have a so-called "historical character". [Mazur Opposition Cert. Ex. S p. 77:24; 78:20-24].

- Readington's purported expert also could not identify the nature of the properties and structures that exist adjacent to or nearby the Village in other directions, including whether they consist of modern architecture. [Mazur Opposition Cert. Ex. S p. 82:10-84:8].

- In fact, Mr. Sullivan was asked the following: "the structures that exist in every direction pretty much, except to the north, do you know whether those are historical structures that are consistent with what you've referred to as the 'historical character' of the properties and structures within the circle?", to which he responded "I couldn't say" and "I don't know". [Mazur Opposition Cert. Ex. S p. 83:25-84:8].

The paucity of evidence supporting Readington's alleged "historic preservation" purpose shows that Readington is desperate to disguise its pretext.

ARGUMENT

I. THE EVIDENCE DEMONSTRATES THAT THE CONDEMNATION ACTION WAS BROUGHT TO CONTROL THE AIRPORT AND ITS OPERATIONS; READINGTON'S REQUEST FOR SUMMARY JUDGMENT SHOULD THEREFORE BE DENIED.

A. Introduction.

Readington's legal argument in support of its purported authority to take rests upon two arguments with equally tenuous foundations.

First, Readington urges this Court to refuse to substitute its own judgment for that of Readington's Township Committee. This presumes from the outset that Readington's purpose here is, in fact, "open space" and follows with the obvious proposition that this Court should not weigh the wisdom of that "open space" judgment. Readington's argument totally disregards the overwhelming evidence that this condemnation is Readington's ultimate weapon, which it has long been threatening to use, in its fight to control the airport and to prevent it from modernizing, contrary to state and federal law. No analysis of the merits of "open space" is necessary for the Court to reach that conclusion.

Secondly, Readington tries to preclude inquiry into the real purpose of the taking by drawing a distinction between "purpose" and "motive". The inconsistencies and lack of clarity in this argument are manifest; they suggest nothing more than a desperate attempt by Readington to distract this Court from the history behind the

enactment and the context in which it was adopted, all of which should be examined by this Court according to the relevant authorities.[8]

B. A Holding That The Expressed Purpose Is Pretextual Is Not A Substitution Of The Court's Judgment For That Of The Township Committee.

Readington's argument that the Court must defer to the judgment of its Township Committee presumes that that judgment genuinely was promoted by Readington's need for open space - the public purpose or "object" that Readington asserts. It therefore urges this Court to refrain from conducting its own evaluation as to the desirability and utility of open space. However, Solberg is not asking that this Court assess Readington's general policies with respect to "open space". Readington seeks to take the property to control the airport and its operations, and to ensure that it never becomes a "jetport". As demonstrated in Solberg's moving papers, that authority clearly rests with the state and federal authorities, and therefore, a finding that that purpose for the taking is illegitimate does not in any way involve this Court substituting its judgment for that of Readington's officials.[9]

This is demonstrated by the non-pretext case law and authorities cited by Readington.

[8] Indeed, Readington ultimately showcases its inconsistencies by virtually conceding that this Court will examine the history and context surrounding the condemnation.

[9] Moreover, the weaknesses in Readington's "open space" and related justifications are further evidence of the pretext.

C. Solberg Is Not Asking This Court To "Weigh" Readington's Determination To Preserve Open Space But Rather To Brand That "Determination" Pretextual

Solberg is not asking the Court to gauge the "importance and utility" of open space or whether open space may be "considered a public use or benefit". [Readington Brief p. 27 (citing Scudder v. Trenton Delaware Falls Co., 1 N.J.Eq. 694, 729 (Ch. 1832))]. Rather, Solberg asserts that the evidence shows that Readington's purpose is to control the airport and its operations, and to constrain it to the point where it will eventually cease operations.

Therefore, the principles set forth in Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984), have nothing to do with this case, because it is not a pretext case like the instant matter. In Midkiff, the Hawaii Housing Authority had enacted legislation that allowed it to condemn property in order to transfer ownership of the property from the owners to existing property lessees. The Housing Authority found that the majority of the land in the state was owned by relatively few persons. The legislation was enacted for the purpose of eliminating that land oligopoly, along with its negative social and economic consequences. Id. at 232-33.

The landowners attacked the constitutionality of the legislation on the basis that the stated purpose was not a valid public purpose, not on the basis that the stated purpose was pretextual. The United States Supreme Court commenced its analysis with the deferential principle that "[o]nce **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". Id. at 240. The legislation before the Court addressed social ills and sought to eliminate "artificial deterrents" to the normal function of the land market. Id. at 241. The Court refused to debate the wisdom of that goal or the means chosen to achieve it. Rather, because the right of the Authority to address those issues -- in other words, the "object" -- was within the Housing Authority's police powers, the legislation was valid. Id. at 241.

The other United States Supreme Court cases relied upon by Readington are similarly distinguishable. In United States v. Welch, 327 U.S. 546, 548-50 (1946), landowners sought to prevent the Tennessee Valley Authority ("TVA") from condemning their property, which the government needed for the express purpose of access in connection with dam construction. There was no allegation that the purpose of the condemnation was for some other unauthorized or illegal purpose, and the Court refused to second guess the TVA in its chosen method for fulfilling its statutory duties. Id. at 551-54. In Old Dominion Land Company v. U.S., 269 U.S. 55, 66 (1925), the Court reached the easily established conclusion that the Secretary of War had the clear authority to condemn previously leased real property for "military purposes". In another case, the Court refused to examine the wisdom of condemning a portion of Gettsyburg battlefield property for preservation and for a cemetery, United States v. Gettysburg Electric Railway Company, 160 U.S. 668, 683 (1896), holding generally that the "government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored." In Berman v. Parker, 348 U.S. 26, 34-35 (1954), the Court found that the District of Columbia Planning Commission had the authority to condemn

and commence a plan to redevelop an entire blighted area, and rejected the argument that the specific parcel at issue was salvageable. Id. at 34.

Township of West Orange v. 769 Associates, L.L.C., 172 N.J. 564 (2002), cited by this Court in its 2006 opinion, demonstrates the same principles. As construed by Readington in its papers, the Supreme Court in 769 deferred to local findings regarding the need for a new public road." [Readington Brief p. 26]. "Courts have long held that the condemnation of private property for use as a public road fulfills the public use requirement", 172 N.J. at 573. Because it "has never been doubted that land might be taken for the purpose of laying out, extending or widening a public highway", the Court found that the taking was valid. Id. at 574. Although there was no pretext issue, **the Court reiterated "the established principle that where the real purpose of the condemnation is other than the stated purpose, the condemnation may be set aside."** Id. at 578 (citing Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 346 (Law Div.1998)).

None of the landowners in those cases asserted that the stated purpose was not the true purpose, but rather they questioned the wisdom of the stated purpose itself and/or the means selected to achieve it. There was no unlawful ulterior motive as there is here.

Cases involving "pretext" are different than ordinary cases addressing authority to condemn. This is demonstrated by the fact that some of the principles that Readington presents in its brief simply cannot be applied to the pretext inquiry that this Court must undertake. For example, Readington cites to Hutton Park Gardens v. Town

Council of the Town of West Orange, 68 N.J. 543 (1975) for the principle that in order to prevail Solberg must show that "there exists no set of facts that would justify the action" (emphasis in original). Hutton involved an attack on a rent control ordinance, a traditional police power. Because the authority to control rent traditionally resides in the legislature and no ulterior motive was alleged, the stringent "rational basis" test was applied to the attack on the ordinance because the Court refused to make its own determination as to how to best achieve that lawful goal of rent control. Id. at 564-65.

Here, Readington has no lawful authority over the airport under state law. Therefore, although Solberg acknowledges that it bears the burden to prove pretext, such sweeping descriptions of the burden do not apply, and in fact, it is difficult to understand how the "no set of facts" principle would apply in this pretext case. That principle would only apply if this Court was being asked to examine the value and wisdom of open space preservation, which it need not do to determine that the condemnation is being brought for another unlawful purpose altogether.

The decision in Mount Laurel v. MiPro Homes, L.L.C., 188 N.J. 531 (2006), cert. den. 128 S.Ct. 46 (Oct. 1, 2007) is consistent because the alleged purpose in that case, preventing residential development to preserve open space, was a lawful purpose well within the authority of the municipality.

Specifically, the residential development at issue in MiPro was inconsistent with open space, and residential development is within a township's authority to regulate. Therefore, the evidence in MiPro showed not only that open space was the actual purpose, but also that the township was only exercising authority that it actually lawfully

held. The fact that the township's purpose in MiPro, whether construed as "open space" or slowing residential development, was within the township's authority was crucial to the holding: the Appellate Division decision in MiPro (which was affirmed per curiam), specifically held that "even if the primary goal" of the condemnation "is to slow down residential development in the municipality", it is within the township's authority to do so. 379 N.J.Super. 358, 375-76.

In fact, the Appellate Division in MiPro expressly observed that "**this is not a case in which a condemnation action ostensibly brought for a legitimate public purpose, such as acquisition of additional open space, was actually brought for a discriminatory reason or other improper motive.**" Id. at 377.

By contrast, Readington Township's actual purpose here involves its unlawful usurpation of authority over the airport. Unlike the municipality's uncontested authority to regulate development of residences in MiPro, Readington clearly does not have the authority to regulate the Airport. Accordingly, Readington's substantial reliance on MiPro is misplaced. In addition, the MiPro Appellate Division opinion, which was summarily affirmed by the Supreme Court, was cited by Readington and relied upon by it in its Order to Show Cause papers from October 30, 2006, and therefore is not new law, as Readington implies. And the Appellate Division decision in MiPro was cited by this Court in its November 14, 2006 Letter Opinion. The Supreme Court, affirming substantially for the reasons set forth by the Appellate Division, adds little if anything new to the equation, other than the stamp of the State's highest court.

D. A Condemnation Cannot And Should Not Be Permitted To Proceed Where The Real Purpose Exceeds The Proposed Condemnor's Authority.

Although courts will not second-guess a stated purpose, they will -- when asked -- examine the record for pretext to determine whether the actual purpose is unlawful. This is because "if the true reason is **beyond the power conferred by law**, the condemnation may be set aside." Borough of Essex Fells v. The Kessler Institute, 289 N.J.Super. 329, 338 (Law Div. 1995); see MiPro, 379 N.J.Super. at 377 ("this case is governed by the general rule that 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 . . . [because there is no evidence that the condemnation] was actually brought for a discriminatory reason or other improper motive."). In Essex Fells, the evidence showed that the condemnor was opposed to the use of the property proposed by the condemnee, Kessler. To prevent Kessler from opening the facility, Essex Fells ultimately attempted to misuse its condemnation authority, asserting that the condemnation was for "open space". Id. at 340. The Essex Fells court did not second guess the wisdom or need for open space, but rather held that open space was not the purpose at all, and therefore, found that the proposed condemnor lacked authority.

The Appellate Division in Allamuchy v. Progressive Properties, Inc., A-987-02T3 (App.Div. July 16, 2004); cert. den. 182 N.J. 149 (2004), similarly found pretext, without substituting its own "open space" judgment for that of the local legislature, where there was "an effort to stop unwanted multi-family housing

development in response to the opposition from residents" of the township.[10] And in Township of Monroe v. Noonan, A-1443-99T1 (March 9, 2001), pretext was found where certain development applications set off a "political situation", and nearby residents "expressed [their] preference" for "a park rather than commercial development." Id. at 3 That determination did not require the court to substitute its judgment as to Monroe's open space needs with that of the township. Rather, the court's holding was reached by an analysis of the facts surrounding the condemnation, which showed that "open space" was not the real purpose at all. Also see Earth Management, Inc. v. Heard County, 248 Ga. 442, 447 (Ga. 1981) (Although "a public park for recreational purposes is a public purpose", and there was "no evidence that the land condemned will be used for any purpose other than for a public park", the fact remains that the "real reason for its being taken was to thwart the application of another use" that the county sought to avoid); Pheasant Ridge Associates Ltd. v. Burlington, 506 N.E.2d 1152, 1158 (Mass. 1987) (asserted purposes "were selected as a device in the erroneous belief that, as generally lawful public purposes, they would make the taking proper.").

Open space is not the "object" driving Readington's efforts to condemn the property, but rather, it is fear of a "jetport" in Readington, as demonstrated in Solberg's moving papers. Therefore, the abundance of general policies and goals for open space presented in Readington's papers are beside the point. In fact, those general policies and goals are no different from the evidence that Readington first presented to this Court over

[10] The courts in those cases looked at the amount of parkland and open space in the respective towns as evidence of pretext, not to override the local governments' determination' of "need", which were a sham to conceal the real purposes for the condemnation. A similar analysis in this case supports the conclusion of pretext.

a year ago on the return date of the Order to Show Cause. In its November 14, 2006 Opinion on that Order to Show Cause, the Court found that Solberg had made a "prima facie showing that the purpose of this condemnation action is pretextual", and Readington has presented nothing to cause this Court to deviate from that finding.

Readington's unlawful purpose or "object" is to avoid state law and take authority over the airport for itself. Therefore, Readington's motion for summary judgment should be denied.

E. This Court's Examination Should, At A Minimum, Extend To The History And Context In Which The Determination To Condemn Was Made, Which Demonstrates A Calculated and Persistent Campaign By The Township To Control The Airport.

Readington argues that this Court should stop its inquiry at the "facially valid ordinance" [Readington Brief p. 39] authorizing the condemnation and refuse to examine other evidence, including the lengthy anti-airport history, which demonstrates Readington's true purpose and cannot be papered over by Readington's recently created effort to wrap the subject property in "open space" dressing. Readington endeavors to support its position by asserting a confusing and inconsistent distinction between "motive" and "purpose". Readington already tried to argue that the Court should not look behind the ordinance authorizing the condemnation, which principle was implicitly rejected by the Court's Order and Opinion allowing discovery. That argument should be rejected again now.

"If a legislature should say that a certain taking was for a public use, that would not make it so; for such a rule would enable a legislature to conclude the

question of constitutionality by its own declaration," Rhode Island Economic Development Corp. v. The Parking Company, L.P., 892 A.2d 87, 101 (R.I. 2006). The case law clearly demonstrates that external evidence, including at a minimum the history and context surrounding the enactment and statements made by public officials in their capacities as public officials, should be reviewed in ascertaining the existence of pretext where prima facie evidence of pretext has been demonstrated. A review of that history clearly reveals that Readington's purpose here is to control the airport and its operations, in violation of state law, and to eventually constrain the airport out of existence.

1. The Court's Inquiry Should Not End At The Face Of The Ordinance.

As demonstrated above, the courts in Essex Fells, Allamuchy, Monroe, and other cases involving allegations of pretext do not end their inquiry at the face of the enactment, but rather, examine what actually motivated the condemnations at issue to assure that the purpose does not exceed the condemnor's authority. This is also precisely what Judge Skillman did in his "thoughtful and well-written" Appellate Division decision in MiPro (so characterized by the Supreme Court).

If a condemnation could not be challenged just because the legislation stated a valid public purpose on its face, then a successful challenge would be impossible and the cases discussed herein would have turned out differently. See Essex Fells, 289 N.J.Super. 329("open space" express purpose); Noonan, A-1443-99T1 (express purpose was "parkland"); Allamuchy, A-987-02T3 ("open space" express purpose); Earth Management, 248 Ga. at 447("a public park for recreational purposes" was stated

purpose); Pheasant Ridge, 506 N.E.2d at 1158 (stated purpose of park and recreational land, as well as moderate income housing).

In a recent decision involving an alleged pretextual condemnation, the D.C. Court of Appeals expressly rejected the notion that the inquiry must stop at the face of the ordinance. Franco v. National Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007). A "government would not be allowed to take property under the mere pretext of a public purpose", Id. at 169 (citing Kelo v. City of New London, 545 U.S. 469, 478 (2005)). Thus, "Kelo recognized that there may be situations where a court should not take at face value what the legislature has said" with respect to a public purpose. Id. That inquiry is necessary in the context of pretext because the "government will rarely acknowledge that it is acting for a forbidden reason". Id. Therefore, "a property owner must, in some circumstances be allowed to allege and demonstrate that the stated public purpose for the condemnation is pretextual." Id.

In The Parking Company, 892 A2d at 101, the Rhode Island Supreme Court found (albeit in the public versus private benefit context) that a "legislative declaration of public use is instructive, and entitled to deference, but not conclusive". In that case, a government entity that was in a contractual relationship with the lessor of a parking garage was in negotiations to amend the contract terms, but the negotiations broke down. Thereafter, the entity voted to condemn the leasehold, but sent a letter to the lessor stating that it was still willing to negotiate rather than condemning the leasehold. Id. at 93.

The court held that "what constitutes a public use is a judicial question", which "must be determined on a case by case basis". Id. at 103-04. Given the

relationship between the parties, the context of negotiations between them, and the contents of that letter, the court concluded that the purported public purpose of providing adequate parking was a pretext for the real purpose of "alter[ing] the balance of bargaining power in its favor" to obtain "what it could not achieve at the bargaining table". Id. at 106.

Similarly, in MHC Financing Ltd. v. City of San Rafael, 2006 U.S.Dist.LEXIS 89195 (N.D.Ca. 2006), the court held that the proposed condemnor's reliance on the statement in the legislation that a public purpose will be served was insufficient to support its motion for summary judgment, and that the complete lack of evidence presented by the condemnor supported a finding that the enactment at issue was not for a valid public purpose. In MHC Financing, the city passed a purported rent control ordinance which had the effect of a one-time transfer of wealth to current tenant/mobile home owners. On that basis, the property owner alleged that the ordinance was, in effect, a pretextual taking not for a public purpose. Id. at *28.

In support of its motion, the city argued that "rent control is pervasive" and therefore its "legislative determinations . . . cannot be second-guessed by the court." Id. at *28. That bald allegation was insufficient to support the summary judgment motion brought by the city. To the contrary, the city's refusal to present any evidence in support of a public purpose "invit[ed] the court's inference that the ordinance simply confers a private benefit" and therefore does not serve a public purpose. Id. at 42.

A Federal Court in New Jersey, in CBS Outdoor, Inc. v. New Jersey Transit Corp., 2007 U.S.Dist.LEXIS 64155 (D.N.J. 2007), recently observed that the United

States Supreme Court in Kelo mandates that plausible claims of pretextual condemnation be given substantial scrutiny. Analyzing a claim of pretext in the case before it, the court commented that "Justice Kennedy, in an influential fifth-vote concurrence in Kelo . . . observed that 'a court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit'". Id. at *43-44(quoting Kelo, 545 U.S. at 491.

Readington relies upon the zoning cases F.M. Kirby v. Township of Bedminster, 341 N.J.Super. 276 (App.Div. 2000), Riggs v. Township of Long Beach, 109 N.J. 601 (1988), and Gallo v. Lawrence Township, 328 N.J.Super. 117 (App.Div. 2000), in support of its "motive/purpose" argument, but those cases show the contrary, at least to the extent that pretext is alleged. Where pretext was involved in those cases, the courts reviewed and examined the circumstances and history behind the challenged action to ascertain whether there was an unlawful purpose.

In Kirby, the plaintiff challenged a rezoning of his land which required larger minimum lot sizes. 341 N.J.Super. 276 at 283. The analysis of the validity of that zoning ordinance did not involve a "public purpose" authority to take analysis like that implicated in a condemnation suit. Rather, the test applied to the validity of the ordinance was whether it furthered a goal contained in the land use law, whether it was substantially consistent with the town's master plan, whether it comported with constitutional limits on zoning power and whether it was adopted in a procedurally correct manner. Id. at 286. The court concluded that those factors were satisfied and upheld the ordinance.

Riggs, 109 N.J. 601, on the other hand, cited by Readington, confirms that a court will examine the history behind an enactment to ascertain whether it was passed for a permissible purpose. Plaintiff in that matter alleged that the township rezoned his property in order to reduce its market value in anticipation of a buy sell agreement between plaintiff and the township. The parties had previously engaged in negotiations to reach a willing sale agreement, but the mayor told plaintiff that the township could not afford to pay plaintiff the sum contained in plaintiff's appraisal. Id. at 605-606. Following a failure to agree on price, the township, in a separate earlier lawsuit, sought to compel the plaintiff to sell the property, arguing that the negotiations yielded an enforceable contract. Id. at 606. After that action was dismissed, the township rezoned the property on the purported grounds that the rezoning would protect open space and plaintiff brought suit challenging that rezoning. Id. The township thereafter brought another lawsuit condemning the property. Id. at 610.

The court examined whether the zoning was enacted for a permissible purpose under the land use law. In undertaking that analysis, the court recounted a historical background that resembles the history here:

> When the Township was unable to negotiate a contract to acquire the Riggs property, it instituted an unsuccessful specific performance action against them. Mayor Mancini's November 5, 1980, letter to Riggs iterated the Township's interest in purchasing the property, but claimed that the Township did not have funds to consummate the purchase.
>
> * * *
>
> The minutes of the December 23, 1980, Planning Board meeting confirm that the Township adopted the 1981

> ordinance with an eye toward condemning the Riggs property. In sum, objective facts establish that the sole purpose of the ordinance was to permit the Township to purchase the property more cheaply.

[Id. at 614]. The court continued "[h]ere, the objective facts, from the public referendum in 1976 to the condemnation proceedings initiated in 1987, constitute a continuous attempt by the Township to acquire the property at the lowest possible price." Therefore, the ordinance was held to be invalid because it was not enacted for a purpose authorized under the land use law. Id. at 615.

In Gallo, 328 N.J.Super. 117, also cited by Readington, a property owner brought suit challenging a zoning ordinance primarily on the basis that he was not given adequate personal notice of the enactment, and also on the grounds that the enactment constituted "spot zoning". Following its rejection of the notice related arguments, the court gave cursory treatment to the substantive challenge. Id. at 127-28. The rejection was based upon plaintiff's failure to provide "any evidence that the Township had some interest in awarding [a certain developer] a benefit to the detriment of all other land owners in and around this zone." Id. at 128. Accordingly, the summary judgment entered in favor of the township was affirmed, not because the court refused to consider plaintiff's evidence, but because the plaintiff presented no evidence to support his argument.

It has long been established that evidence beyond the face of the enactment should be considered when determining whether an ulterior purpose is behind an enactment. In Wital Corp. v. Township of Denville, 93 N.J.Super. 107 (App.Div. 1966),

plaintiff argued that an amendatory zoning ordinance requiring larger minimum building lots was passed by the township in order to reduce the price the township would pay for a parcel owned by plaintiff, which the township was planning to condemn. Rather than presenting any evidence beyond the face of the legislation, the township relied upon the expressed purpose stated therein to try to rebut plaintiff's evidence of pretext, which consisted of, among other things, a memorandum drafted by a township official. The trial court held that the evidence of pretext offered by plaintiff "fell far short" of establishing abuse of zoning power, even though the township failed to present any evidence in rebuttal. Id. at 109.

The Appellate Division reversed, holding that the evidence of improper purpose presented by plaintiff, including the memorandum, was sufficient to establish a prima facie showing of abuse. Id. at 110. The court stated that the township was required to rebut those proofs following plaintiff's prima facie showing and could not rely solely on the expressed purpose of the ordinance to do so. Id. The court remanded the matter to permit the township an opportunity to present its proofs. Id.

The history and context that this Court may and should consider include, at a minimum, statements made by Readington officials in public and in their official capacities (some of which are nearly identical to those in the case law). See Earth Management, Inc. (finding of bad faith condemnation based, in part, on public statements of county officials that they would "**do anything within their power to block the hazardous waste disposal facility**", public statements eerily similar to those in this case); Avalon Bay Communities, Inc. v. Town of Orange, 256 Conn. 557, 577 (Conn.

2001) (court "relied on the actions and statements of the board of selectmen and other town officials, as more indicative of the general attitude . . . [as to the] affordable housing application" including statements that "**described the town's eminent domain power . . . as a way to regain control of property that some statutes, such as the affordable housing statute, allegedly take away from municipalities**.").

Riggs and the other cases discussed above demonstrate that all of the relevant history and circumstances behind a legislative enactment should be examined to ascertain pretext where prima facie evidence of pretext has been presented. Citing Riggs, Readington reluctantly seems to agree that it is appropriate for the Court to examine a takings' "operation and effect, as well as the context in which it was adopted." [Readington Brief p. 40].[11]

F. The History And Context Here Reveals A Continuous Effort By The Township To Control The Airport In Violation Of State Law.

Although Readington cites to Riggs, in which purpose was revealed by a "continuous attempt by the Township" to obtain the property cheaply, it avoids a linear sequence of events here, and instead intermingles very general open space policies and goals (generally pre-1999) with more specific purported preservation related goals relating to **this** property (post -1999). A clear examination of the sequence of events, and

[11] Readington's "motive/purpose" argument is so riddled with contradictions that even Readington itself cannot maintain any consistency among the principles it asserts, and it is difficult to determine precisely what Readington contends should be considered by this Court. [Readington Brief p. 37-47]. For example, Readington argues that it is entitled to summary judgment because "the Ordinance and this condemnation action **will serve the very purposes enunciated therein** [in the Ordinance]." "Thus the Ordinance and this condemnation are facially valid, and the Court's inquiry should end there". [Readington Brief p. 42]. Yet only two pages prior, Readington advises the Court that "courts are **not** called upon to inquire whether a condemnation will **serve its purpose**". [Readington Brief p. 40 n. 3].

more specifically, an examination of when the Township became interested in this specific property for supposed "open space" demonstrates Readington's true purpose, just as the history in Riggs, Essex Fells, Allamuchy and Monroe exposed a pretextual purpose.

Without needless repetition of the long history leading up to this condemnation and the effects it would have on the airport if it were to succeed, which is laid out in minute detail in Solberg's papers in support of its motion, that context includes numerous actions and statements by Readington officials in their official capacities:

> ● A 40-year history of Readington trying to control the airport, including specifically the length of the runway and noise and the type of aircraft that use the facility. [Solberg Brief p. 6-44].
>
> ● Well over 20 years of refusal to comply with the Airport Safety Act which it believed would limit its ability to control the airport, its operations and modernization. [Solberg Brief p. 7-12].
>
> ● Numerous efforts to lobby against the Air Safety Act which eliminated Readington's perceived zoning control over the airport. [Id.].
>
> ● A deliberate failure by Readington to designate the Airport Property as to be acquired for open space until the ALP and Master Plan were given conditional approval in or around April 1999 and Readington became aware of that approval, which appeared to bring a longer runway closer to reality. [Mazur Opposition Cert. Ex. B p. 451:13-466:8].
>
> ● The 1990 Readington Master Plan, prior to Readington's concerted effort to create a justification for this condemnation, admitting "Readington Township's desire that the airport not grow beyond being a local recreational airport. Any expansion or significant improvements proposed to the

airport facilities (including runways) should be approved by the Planning Board". [Mazur Opposition Cert. Ex. D. p. 125].

- Overt threats to condemn the airport in order to control its operations, and assure that the runway is not lengthened. [Solberg Brief p. 14-17].

- Vows by Readington officials to prevent a "jetport" in Readington by any means necessary. [See, e.g., Solberg Brief p. 5, 21].

The operation and effect of the acquisition are as follows:

- Rendering the Airport unable to meet the transportation demands of the public and business, and precluding the airport from conferring substantial benefits on the state and national economies. [Solberg Brief p. 44-54].

- Preventing the Airport from generating any reasonable profit by preventing it from servicing the affluent surrounding population. [Solberg Brief p. 55-56].

- Constraining the Airport out of business. Although Readington argues that the small piece of the Airport Property that it proposes to allow to be used as an airport "allow[s] it to modernize" [Readington Brief p. 43], that assertion is without support. [Solberg Brief p. 55-56].

Far from showing that Readington seeks to condemn the property for a valid public purpose, the evidence demonstrates that Readington is seeking to condemn the property to try to retake the authority over the airport that was taken from it by statute, including the Air Safety Act, so that it can guarantee that there will never be a "jetport" in Readington, and to constrain the airport so that it eventually ceases operations. Much like the facts in The Parking Company, where the condemnor sought to condemn to obtain what it could not get in negotiations with the condemnee,

Readington seeks to usurp control over the airport and runway length, which years of lobbying, avoiding state law, and other ceaseless maneuvering has failed to provide to it.

Accordingly, Readington's request for summary judgment should be denied and, indeed, as urged in its separate motion, summary judgment should be entered in favor of Solberg.

CONCLUSION

For the foregoing reasons, to be further elucidated at oral argument, defendant Solberg Aviation Company respectfully requests that Readington Township's motion for summary judgment be denied.

Dated: November 21, 2007

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS
(Continued)

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(Continued)

PAGE

STATUTES