

SUPERIOR COURT OF NEW JERSEY
SOMERSET, HUNTERDON AND WARREN COUNTIES
VICINAGE 13

YOLANDA CICCONE
ASSIGNMENT JUDGE



SOMERSET COUNTY COURT HOUSE
P.O. BOX 3000
SOMERVILLE, NEW JERSEY 08876
(908) 231-7069

January 16, 2008

TO:

Mr. James P. Rhatican, Esq.
Connell Foley LLP
85 Livingston Avenue
Roseland, New Jersey 07068
Attorney for Plaintiff Township of Readington

Mr. Laurence B. Orloff, Esq.
Orloff, Lowenbach, Stifelman & Siegel, P.C.
101 Eisenhower Parkway
Roseland, New Jersey 07068-1012
Attorney for Defendants Solberg Aviation and Thor Solberg, Jr.

RE: Township of Readington v. Solberg Aviation Co., et als.
Docket #: HNT-L-468-06

Dear Counsel:

This letter opinion is in regard to Township of Readington v. Solberg Aviation Co., et als., docket number HNT-L-468-06.

This eminent domain action was commenced by the Township of Readington with the filing of a Condemnation Complaint on September 15, 2006. On September 22, 2006, This Court issued an Order to Show Cause initially returnable October 20, 2006,

then adjourned until November 3, 2006. Along with the Order to Show Cause, This Court also entered an Order for the Deposit of Monies into court in the amount of \$21,738,000, as well as a Declaration of Taking all filed by the Plaintiff. On October 18, 2006, Defendant Solberg Aviation Company filed a motion also returnable on November 3, 2006 asking This Court to vacate the Declaration of Taking and compelling Plaintiff to withdraw the monies deposited into court pending full discovery as well as other relief. Readington asserts that its purpose for this taking is an effort to preserve open space as well as other natural resources. Defendants contend that the attempted taking here, is purely pretextual and in bad faith. Defendants allege that while Readington is masking this taking as an attempt to preserve open space as well as other environmental considerations, that is not its true purpose. Rather Defendants allege that this land is being condemned so as to prevent Solberg Aviation from expanding or modernizing its airport to allow for larger aircraft to utilize the facility. The evidence supporting these allegations was sufficient to create a prima facie showing that the purpose of this condemnation action was pretextual and/or will result in an inverse condemnation greatly reducing the value of defendant's airport. The Court found on November 3, 2007 that additional discovery is needed to allow the court to make an accurate determination regarding the legality of the proposed taking. Readington's Complaint was stayed pending resolution of the challenge. Discovery has ended and the competing motions for summary judgment came before the Court on December 14, 2007.

Having considered all of the facts, papers and the oral argument, I hereby **GRANT** the Township of Readington's motion for summary judgment and **DENY** Solberg's Cross Motion for Summary Judgment. An order is attached to this opinion. In

deciding a motion for summary judgment, the determination of whether there exists a genuine issue with respect to a material fact requires the court to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). The Reasons for my decision are stated below.

A. Solberg Aviation Company's Motion for Summary Judgment:

Ordinarily where the power to condemn exists the quantity of land to be taken as well as the location is a matter within the discretion of the condemnor. The exercise of that discretion will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action." Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966). Thus although the public purpose for taking land may be valid, if the true reason is beyond the power conferred by law, the condemnation may be set aside." Borough of Essex Fells v. Kessler Inst. for Rehabilitation, Inc., 289 N.J. Super. 329, 338 (Law Div. 1995). Public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Id.

In the instant case, Defendants contend that the attempted taking here, as in Essex Fells, is purely pretextual and in bad faith. Defendants allege that while Readington is masking this taking as an attempt to preserve open space as well as other environmental considerations that is not its true purpose. Rather Defendants allege that this land is being condemned so as to prevent Solberg Aviation from expanding or modernizing its

airport to allow for larger aircraft to utilize the facility. The evidence that was presented during the November 3, 2006 hearing was sufficient to create a prima facie showing that the purpose of this condemnation action was pretextual and/or will result in an inverse condemnation greatly reducing the value of defendant's airport.

As a result, it was my finding that additional discovery was needed to allow the court to make an accurate determination regarding the legality of the proposed taking. Pursuant to N.J.S.A. 20:3-11, Readington's Complaint was stayed pending resolution of the challenge. Discovery was extended until March 2, 2007. Discovery has now ended in this matter and it is the opinion of this Court that Solberg Aviation Company has not met its high burden. Solberg bears a heavy burden to demonstrate that the Township's motives rise to the level of fraud or bad faith. Courts are reluctant to find bad faith in determining public purpose and thus overturning a decision to condemn. The evidence presented should be strong and convincing. Borough of Essex Fells, 289 N.J. Super. at 342. Solberg Aviation Company has presented little to nothing new since the November 3, 2006 hearing. And, although the evidence presented at the 2006 hearing was sufficient to create a prima facie case it cannot meet the strong and convincing burden needed to prove pretextual taking. Accordingly, Solberg Aviation Company's Motion for Summary Judgment shall be **DENIED**.

B. Township of Readington's Motion for Summary Judgment:

The New Jersey Constitution provides that private property may be taken by eminent domain for "public use." N.J. Const., Art. I, 20. The power of government to exercise eminent domain over private property, when necessary for public use, is an

essential and long-recognized function of the government. Township of West Orange v. 769 Associates, LLC, 172 N.J. 564, 571 (2002). New Jersey Courts have traditionally granted wide latitude to condemning authorities in determining what property may be condemned for "public use". Township of West Orange v. 769 Associates, LLC, 172 N.J. 564, 571 (2002). In West Orange, the New Jersey Supreme Court defined the phrase "public use" as anything that "tends to enlarge resources, increase the industrial energies, and ... manifestly contributes to the general welfare and the prosperity of the whole community." Id. at 573. Further, it is without question that typically a court should defer to the legislature who is far better suited to make the determination of whether or not a particular use is for a public purpose and thus an appropriate taking. Essex Fells v. Kessler Institute for Rehabilitation, Inc., 289 N.J. Super. 329 337 (Law Div. 1995); see Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240-244 (1984).

It is well established that a reviewing court will not upset a municipality's decision to use its eminent domain power in the absence of an affirmative showing of fraud, bad faith or manifest abuse." Township of West Orange v. 769 Associates, LLC, 172 N.J. 564, 572 (2002). This pronouncement rests upon the holding of the United States Supreme Court that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use is palpably without reasonable foundation. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241. Such judicial deference is required because local legislative bodies "are better able to assess what public purposes should be advanced by an exercise of the taking power. Id. at 243-44. Thus, the courts are required to defer to local legislative bodies as to issues involving the power of eminent domain. 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.


It is well established both through valid case law as well as legislation that the preservation of open space may constitute a valid public use in condemnation actions. In Mount Laurel Township v. Mipro Homes, L.L.C., the Appellate Division held that "a municipality has statutory authority to condemn property for open space." 379 N.J. Super. 358, 368 (App. Div. 2005). The Court in Mount Laurel went on to hold that "the conservation of land for open space is a public use, even though the government agency acquiring the land has no plans to put the property to active use." Id. at 373.

In the instant case, Readington asserts that its purpose for this taking the property is an effort to preserve open space, preserve wetlands and other natural resources, water quality protection, preserve critical wildlife habitat, historic preservation, airport preservation, and preservation of community character. Each of these purposes is important based on the law of this state. The principle is well accepted that the power of eminent domain may be exercised for the purpose of preserving open space. Again, citing Mount Laurel Tp. v. Mipro Homes, the Appellate division gave a comprehensive explanation of the legislative initiatives of this State with the goal of preserving open space. There are multiple statutory enactments that confer authority upon municipalities to acquire land by eminent domain for preservation of open space and land conservation. In light of the Township's established and recognized land use authority over the airport, it is the opinion of this Court that the Township of Readington is entitled as a matter of law to condemn the Subject Property, Solberg Airport and the surrounding property, as it

proposes. Accordingly, the Township of Readington's Motion for Summary Judgment shall be **GRANTED**.

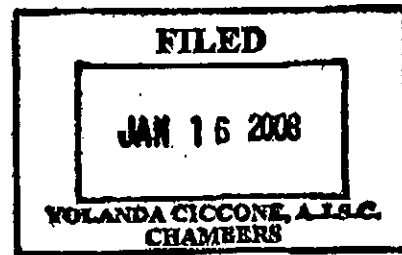
In conclusion, Solberg Aviations Motion for Summary Judgment is hereby **DENIED** and the Township of Readington's Motion for Summary Judgment is hereby **GRANTED**. Furthermore, the stay of the Township's Declaration of Taking is lifted, and condemnation commissioners will be appointed to determine the value of Solberg Airport and the surrounding property. The order is attached to this opinion.

Very Truly;



HONORABLE YOLANDA CICCONE A.J.S.C.

Connell Foley LLP
85 Livingston Avenue
Roseland, New Jersey 07068
(973) 535-0500
Attorneys for Plaintiff
Township of Readington



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. 1 THROUGH 20, JOHN DOE CORPORATION NOS. 1 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

ORDER FOR FINAL JUDGMENT
AND APPOINTMENT OF
COMMISSIONERS

GRANTED

THIS MATTER having been opened to the Court on behalf of the Township of Readington (the "Township") by way of motion for summary judgment seeking entry of final judgment and a finding that the Township is legally authorized to condemn certain properties identified in the Township's Verified Complaint; and the Court having read all papers submitted in support of said motion for summary judgment and having heard and considered oral argument; and for good cause shown;

IT IS ON this 16 day of ^{January 2008} ~~December~~, 2007, ORDERED as follows:

1. It is hereby adjudged that the Township is authorized to exercise and has duly exercised its power of Eminent Domain to acquire the interests in the property described in the Verified Complaint filed in this action.

2. The Declaration of Taking previously filed by the Township is hereby given full force and effect, and the Court's prior stay of the Township's right of possession to the subject property is hereby vacated. The Township is hereby vested with the right to the immediate exclusive possession of and title to the interests in the property described in the Declaration of Taking.

3. The following three disinterested residents of the County of Hunterdon are hereby appointed commissioners to examine and appraise the land and premises described in the Verified Complaint to be taken by Readington for public use as set forth therein, and to fix the compensation to be paid as of the date of the commencement of this action and to do whatever else the said Commissioners are by law authorized or required to do:

<u>Name</u>	<u>Address</u>
<u>Anthony Mergatroyd Esq</u>	<u>179 Route 31</u> <u>Flemington NJ 08822</u> <u>TEL 908-788-1011</u>

<u>Walter Wilson Esq</u>	<u>148 Main</u> <u>Lebanon, NJ 08822</u> <u>TEL 908-236-6221</u>
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<u>Tracee Schaefer</u>	<u>1311 Pine Rodgers Ave</u> <u>Bradgewater, NJ 08807</u> <u>TEL 908-685-0700</u>
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4. The above-named Commissioners shall cause notice of the time and place of the hearing of this matter to be given to the parties no later than ten (10) days prior to that hearing by mailing a

copy of said notice to Connell Foley LLP, 85 Livingston Avenue, Roseland, New Jersey, attorneys for the Township, and to all other defendants whose addresses are known, or to their attorneys if they are so represented, by certified mail, return receipt requested, and to all defendants whose addresses are unknown by publishing said notice once in a newspaper published in Hunterdon County.

5. Said notice shall state that, should any interested party fail to appear at the condemnation commissioners hearing, either personally or through counsel, said party will not be permitted to appeal from the commissioners' report, which will become final.

6. The above-appointed Commissioners shall file their report with the Superior Court on or before the 19TH day of May, 2008.

7. All counterclaims and third-party claims against the municipal third-party defendants are hereby severed from the within condemnation action


Yolanda Ciccone, A.J.S.C.

ORLOFF, LOWENBACH, STIFELMAN & SIEGEL, P.A.
A Professional Corporation
101 Eisenhower Parkway
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(973) 622-6200

Attorneys for Defendant/Counterclaimant/Third-Party Plaintiff
Solberg Aviation Company, Defendant/Third-Party Plaintiff
Thor Solberg, Jr., and Third-Party Plaintiffs Suzanne Solberg
Nagle and Lorraine Solberg

TOWNSHIP OF READINGTON, a
municipal 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.

FILED

JAN 16 2008

YOLANDA CICCONE, A.J.C.
CHAMBERS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUNTERDON COUNTY

DOCKET NO. HNT-L-468-06

Civil Action

**ORDER FOR
SUMMARY JUDGMENT**

DENIED

This matter having been opened to the Court on December 14, 2007, the
return date of the motion for summary judgment on behalf of defendant Solberg

Aviation Company, in the presence of, Connell Foley, LLP (James P. Rhatican appearing), attorneys for plaintiff, and Orloff, Lowenbach, Stifelman & Siegel, P.A. (Laurence B. Orloff appearing), attorneys for defendant Solberg Aviation Company, and the Court having read and considered the moving, answering and reply papers and briefs, and all materials presented in connection therewith, and having heard the arguments of aforesaid counsel, and good cause appearing,

IT IS on this 16TH day of ^{January 2008} ~~December~~, 2007,

ORDERED as follows:

1. The motion of defendant Solberg Aviation Company for summary judgment is hereby granted.

2. It is hereby adjudged and determined that plaintiff Township of Readington is without authority to condemn the property in Readington Township, Hunterdon County, New Jersey, which is the subject matter of the within Complaint.

3. The Declaration of Taking and all prior Orders entered in connection therewith are hereby vacated and set aside and are null and void and of no further force and effect.

4. That defendant Solberg Aviation Company shall file and serve its application for counsel fees and costs pursuant to N.J.S.A. 20:3-26(b) in connection with this matter within _____ days from the date hereof. Answering papers on the subject of counsel fees shall be filed and served within _____ days thereafter, and reply papers may be filed and served within _____ days after the answering papers are

received. The Court will then determine whether or not any further hearing is required
with respect to the subject of counsel fees and costs.

DELETED



YOLANDA CICCONE, A.J.S.C.