

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

YOLANDA CICCONE  
ASSIGNMENT JUDGE



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



**Fax**

**To:** James P. Rhatican, Esq. and Joseph M. Murphy, Esq. **From:** Hon. Yolanda Ciccone, A.J.S.C.

**Fax:** (973) 535-9217 **Pages:** 12 (including cover sheet)

**Phone:** 908-231-7069 (Debbie) **Date:** 11/14/06

**Re:** Township of Readington v. Solberg **CC:**  
Aviation

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Attached please find the Letter Opinion and corresponding orders.

**SUPERIOR COURT OF NEW JERSEY**  
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November 14, 2006

RE: Township of Readington v. Solberg Aviation Co., et als.  
Docket No. 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. On October 20, 2006, Third Party Kevin Devine and Tax Payers Alliance of Readington filed a motion to intervene as a defendant in this matter joining in Defendant Solberg's application to vacate the Order to Show Cause. On November 3, 2006, all of these applications were argued before me. Below are my findings.

The first issue to be decided is one of threshold. More specifically, whether or not the Defendants have set forth, through their submissions and oral argument, a prima facie case establishing that the reasons for the condemnation offered by the Township are either pretextual, or will result in an inverse condemnation rendering Solberg Airport at a greatly depreciated value if the taking is permitted to proceed. If this threshold is met, additional discovery will be permitted to explore the legality of this action.

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). Further, "[I]t 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.'"

Id. at 571. 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 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 is an effort to preserve open space as well as other natural resources laid out in Plaintiff’s brief. As such, this, if taken at face value, would certainly entitle Readington to proceed with this taking without further analysis. However, in this case, there are other pressing considerations that need to be explored.

Most pressing is whether Readington’s true motivation is the preservation of open space, or if there is an ulterior motive for the proposed taking. “Courts will generally not inquire into a

public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use. However, the decision to condemn shall not be enforced where there has been a showing of 'improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain.'" Essex Fells, 289 N.J. Super. at 337 (quoting Tennessee Gas Transmission Co. v. Hirschfeld, 39 N.J. Super. 286, 288 (App. Div. 1956). In Essex Fells, The Kessler Institute was attempting to construct a Skilled Nursing and Transitional Living Facility in the Borough of Essex Fells. Id. at 331. The Borough attempted to condemn this land under the guise of open space after an openly hostile sentiment was expressed by various community organizations with regard to Kessler's attempted construction. Id. at 335. The Court in Essex Fells concluded that the reasons set forth by the Borough; i.e. the preservation of open space, was purely pretextual, and as a result, the condemnation action commenced by the Borough was dismissed. Id. at 342-343. In doing so The Court held: "I am clearly convinced from the extensive record here that the Borough proceeded to condemn this property not to establish a park, or to protect a critical environmental area, but to block Kessler's development of a rehabilitation facility in the borough. The complaint in condemnation was presented in bad faith and is therefore dismissed." 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 Defendant has offered evidence to this end including admissions made by township officials as well as the auspice under which the \$22 million bond was secured, both of

which state that the reason for this action was to prevent expansion of the airport, and not the preservation of open space. See Defendant's Answer, Exhibit E. "[P]ublic bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Id. at 338. This evidence is 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.

As a result, it is my finding that additional discovery is 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 is hereby stayed pending resolution of the challenge. The attached order appoints Richard Norris, Esq. and Hon. William Drier, J.A.D., Ret. Discovery Masters. Discovery is hereby extended until March 2, 2007. The Declaration of Taking is stayed; however the deposited monies may remain in court.

The next issue to be decided is Third Party Kevin Devine and Taxpayers Alliance of Readington's (hereafter collectively known as "TAR") motion to intervene as a defendant in this matter. TAR asserts that they are entitled to intervene both as of right under R. 4:33-1, and permissively under R. 4:33-2.

R. 4:33-1 reads:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In order for a party to intervene as of right, the following criteria must be met: (1) an interest relating to the property or transaction which is the subject of the action; (2) the disposition of the action may as a practical matter impair or impede his ability to protect that

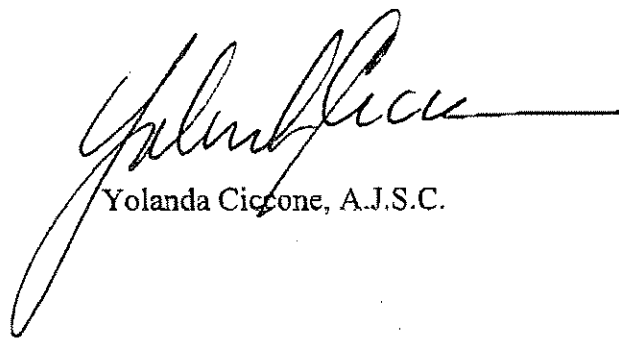
interest; (3) the intervenor's interest is not adequately protected by the existing parties; and (4) the application to intervene is timely filed. Chesterbrook Ltd. v. Planning Board of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989).

This Court will only address the issue of the timeliness of this action. It is obvious from TAR's papers that their true concern is the bond ordinance passed by the Plaintiff, and their concern that this condemnation will exceed the \$22 million amount set forth in that ordinance. It is important to note that TAR has already instituted a separate action challenging the bond ordinance in the form of an Action in Lieu of Prerogative Writ. See Rhatican Cert., Exhibit A. This prior action is the appropriate method for this challenge to the bond ordinance. Further, pursuant to R. 4:69-6(b)(11) no action in lieu of prerogative writs shall be commenced "to review any resolution or ordinance authorizing the issuance of notes or bonds of any municipality or other political subdivision, after 20 days from the date of first publication thereof following final passage." In this case, the bond ordinance was passed on February 21, 2006 and the date of first publication was February 25, 2006. Further, the referendum on the bond ordinance took place on May 16, 2006 with the date of first publication being June 8, 2006. Taking either of these dates, it is clear that the application to This Court is time barred. Further, This Court finds that the issues raised by TAR will be adequately addressed through the prerogative writ action already filed. Since R. 4:33-2 also requires a timely application, an analysis of permissive intervention is not required. As such, TAR's motion to intervene is DENIED.

Finally, although plaintiff, in his brief, calls for the severing of defendant's counter claim and third party complaint, This Court is not prepared at this time to take that action. However,

discovery will be stayed on counter claim and third party complaint until the issues outlined in this opinion are resolved.

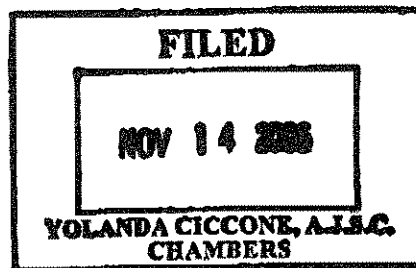
Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Yolanda Ciccone', with a long horizontal line extending to the right.

Yolanda Ciccone, A.J.S.C.



ORDER OF HON. YOLANDA CICCONE, A.J.S.C.  
SUPERIOR COURT OF NEW JERSEY  
SOMERSET COUNTY  
20 NORTH BRIDGE STREET  
P.O. BOX 3000  
SOMERVILLE, NEW JERSEY 08876  
(908) 231-7069



SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUNTERDON COUNTY  
DOCKET NO.: HNT-L-468-06

Plaintiff(s),  
**TOWNSHIP OF READINGTON**, a municipal  
Corporation of the State of New Jersey

vs.

CIVIL ACTION

Defendant(s),  
**SOLBERG AVIATION CO.**, a New Jersey partnership;  
**JOHN HROMHO, 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**

ORDER

**SOLBERG AVIATION COMPANY,**  
Defendant-Counterclaimant and  
Third-Party Plaintiff

and

**THOR SOLBERG, JR., SUZANNE SOLBERG**  
**NAGLE and LORRAINE SOLBERG**  
Third-Party Plaintiffs

vs.

**TOWNSHIP OF READINGTON,**  
Counterclaim Defendant

and

**GERALD SHAMEY, THOMAS AURIEMMA,**  
**JULIA C. ALLEN, FRED C. GATTI, and**  
**BEATRICE MUIR**  
Third-Party Defendants

IT IS on this 14<sup>th</sup> day of November, 2006,

ORDERED that Plaintiff, Township of Readington's Condemnation Complaint is hereby stayed pending the outcome of further discovery regarding the legality of the proposed taking;

ORDERED that discovery is extended until March 2, 2007. Extensions may be granted by the Court only by application of the appointed Discovery Master;

ORDERED that Plaintiff, Township of Readington's Declaration of Taking is stayed;

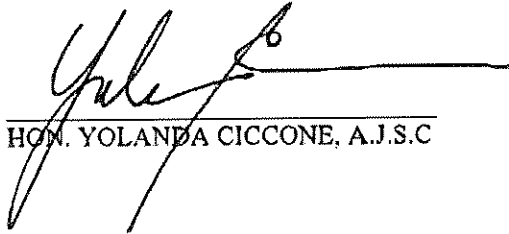
ORDERED that Plaintiff, Township of Readington may leave the monies deposited into court;

ORDERED that Plaintiff, Township of Readington is to immediately vacate the land owned by the Plaintiffs pending the outcome of this inquiry;

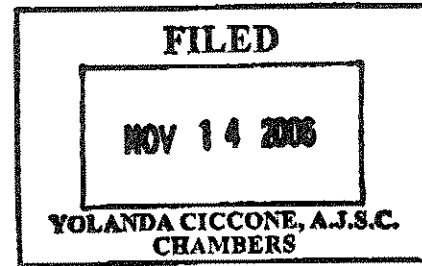
ORDERED that Defendant, while retaining sole possession of the property in question, is not permitted to make any improvements, or convey any portion of the land pending the outcome of this inquiry;

ORDERED that Kevin Devine and Tax Payer's Alliance of Readington's motion to intervene is DENIED.

IT IS FURTHER ORDERED that a true and correct copy of this Order be served upon all counsel within seven (7) days of the date hereof.

  
\_\_\_\_\_  
HON. YOLANDA CICCONE, A.J.S.C

ORDER OF HON. YOLANDA CICCONE, A.J.S.C.  
SUPERIOR COURT OF NEW JERSEY  
SOMERSET COUNTY  
20 NORTH BRIDGE STREET  
P.O. BOX 3000  
SOMERVILLE, NEW JERSEY 08876  
(908) 231-7069



Plaintiff(s),  
TOWNSHIP OF READINGTON, a municipal  
Corporation of the State of New Jersey

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUNTERDON COUNTY  
DOCKET NO.: HNT-L-468-06

vs.

CIVIL ACTION

Defendant(s),  
SOLBERG AVIATION CO., a New Jersey partnership;  
JOHN HROMHO, 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

ORDER FOR APPOINTMENT OF A  
SPECIAL DISCOVERY MASTER

SOLBERG AVIATION COMPANY,  
Defendant-Counterclaimant and  
Third-Party Plaintiff

and

THOR SOLBERG, JR., SUZANNE SOLBERG  
NAGLE and LORRAINE SOLBERG  
Third-Party Plaintiffs

vs.

TOWNSHIP OF READINGTON,  
Counterclaim Defendant

and

GERALD SHAMEY, THOMAS AURIEMMA,  
JULIA C. ALLEN, FRED C. GATTI, and  
BEATRICE MUIR  
Third-Party Defendants

THIS MATTER having been opened on the court's own motion pursuant to R.4:41-1 and it appearing that this is a complex matter with many issues justifying the need for extraordinary measures to expedite this matter;

IT IS ON THIS 14th DAY OF November, 2006

**ORDERED** that:

Richard Norris, Esq. and Hon. William Drier, J.A.D., Ret. be appointed to serve as Special Discovery Masters for the pendency of the pretrial proceedings in this case. His services will be compensated by all parties equally.

The Special Discovery Master shall have authority to conduct case management conferences, status conferences, settlement discussions and to resolve discovery disputes and other non-dispositive matters as directed by the court.

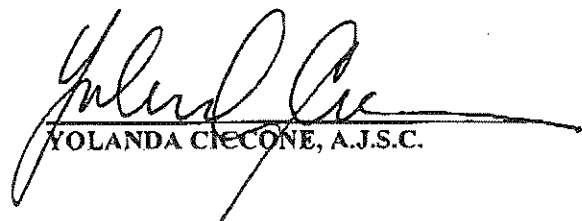
**Discovery Motions**

1. The parties shall make a good faith effort to resolve all discovery disputes through either a meeting or telephone conference. To the extent that the parties cannot reach agreement, the discovery dispute shall be submitted to the special master.
2. All motions related to discovery matters are to be heard by the special master.
3. The master may, in her discretion, schedule a telephone conference call on the return date of the motion in order to hear from all sides prior to determining such motions.
4. The special master will issue a recommendation containing her ruling on each motion and a Statement of Reasons in appropriate circumstances. Any extension of discovery or adjournment of the trial date is subject to approval of the court.

**Appeal from Recommendations**

1. **Time Requirements:** The parties have ten (10) business days to appeal to the court from a recommendation of the special master. Such an appeal shall be taken by filing a motion with the court within the ten day time period. The same filing fees, service requirements and standards for legal motions apply to the appellate motions.
2. **Affect of Appeal status on Recommendation:** Absent a timely appeal from the special master's recommendation, the recommendation shall have the same force and effect as a court order. If there is an appeal, the recommendation shall be stayed pending the final determination of such appeal.
3. **Standard of Review:** Where the issue involves discretionary decisions by the special master as to the discovery timetable, location of depositions, adjournments and the like, the court will not interfere unless enforcement of the special master's decision will result in manifest unfairness. As to all other recommendations, the conclusion or findings of the special master will not be disturbed unless they are inconsistent with or unsupported by the factual or legal theories proffered.

**BY THE COURT:**

  
YOLANDA CICCONE, A.J.S.C.