NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

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.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUNTERDON COUNTY Docket No. HNT-L-468-06 OPINION

Decided: May 4, 2015

James P. Rhatican, Daniel Barnes, Brian P. O'Neill, for Plaintiff Township of Readington (Wolff & Samson P.C.)

Laurence B. Orloff, Matthew T. Aslanian for Defendant Solberg Aviation Company (Orloff, Lowenbach, Stifelman & Siegel, P.A.)

ARMSTRONG, J.S.C.

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This condemnation action is before the Court on remand from the Superior Court of New Jersey, Appellate Division. Township of Readington v. Solberg Aviation Co., 409 N.J. Super. 282 (App. Div. 2009). The Appellate Division instructed the Court to determine whether the taking of the Solberg Hunterdon Airport's land by the Township of Readington was proper under New Jersey's Eminent Domain Act, N.J.S.A. 20:3-35. The Superior Court, Law Division, Hunterdon County, applied the principles elucidated in Mt. Laurel Tp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358 (App. Div. 2005), aff'd, 188 N.J. 531 (2006), cert. denied, 552 U.S. 940, 128 S.Ct. 46, 169 L. Ed.2d 242 (2007), and Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., 289 N.J. Super. 329 (Law Div.1995), and concluded that the condemnation plan implemented by the Township of Readington was orchestrated to prevent airport expansion under the pretexutal banner of open space policy amounting to a manifest abuse of the power of eminent domain. Moreover, the resulting lack of transparency in the Township's action subverted the political process and weakened private property rights protection. The verified complaint was therefore brought in bad faith and is accordingly dismissed.

I. *Background*

This action commenced on September 15, 2006, when Plaintiff, the Township of Readington ("Readington", "Township"), enacted ordinance Number 25-2006, authorizing the taking of approximately 726 acres of real estate belonging to Defendant Solberg Aviation Company ("Solberg"). On October 4, 2006, Readington filed a declaration of taking and paid into the Court's trust fund unit the amount of the higher of two appraisals of the value of the land and rights being taken.

On October 20, 2006, Kevin J. Devine and the Taxpayers Alliance of Readington filed a notice of motion to intervene in order to request that the Court's September 22, 2006 order for payment into Court be vacated. The motion judge ordered additional discovery, stayed the condemnation complaint and the declaration of taking, allowed the monies deposited by the Township to remain with the Court, ordered the Township to immediately vacate the property, ordered Defendant not to make any improvements or convey the property, denied Devine's motion to intervene, and appointed two special discovery masters to oversee pretrial proceedings.

Defendant filed a motion for summary judgment, seeking an order declaring that the Township was without authority to condemn the airport property. The Township also filed a motion for summary judgment, seeking an order entering final judgment on its claims and appointing commissioners for the determination of just compensation. During the course of the litigation, the parties produced voluminous reports and certifications from experts in the fields of aviation, valuation, planning and the environment.

The motion judge granted the Township's motion for summary judgment, finding that the Defendant had not met their high burden of demonstrating that the Township's motives rose to the level of bad faith, and concluded: "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 Hunterdon Airport and the surrounding property as it proposes."

The Superior Court of New Jersey, Appellate Division, heard arguments on April 27, 2009. On August 19, 2009, the Appellate Division[1] reversed the former improvident ruling, vacated the summary judgment in favor of Readington, and remanded to the trial Court with definitive guidance, directions, legal analysis and commentary. Specifically, the Appellate Court

[1] Township of Readington v. Solberg Aviation Co., 409 N.J. Super. 282 (App. Div. 2009).

asked this Court to analyze "which, if any, of the seven parcels named in the Township's condemnation action fell outside of the airport facilities area and safety zone." The Appellate Court concluded that the "issue of parcel identification together with the necessity of a plenary examination of the various written submissions proffered to the Court preclude the entry of judgment to either party."

After the appeal and subsequent remand, Readington adopted a new ordinance, Ordinance 22-2011, in which Readington proposed a revised taking that it asserted was consistent with the Appellate Division's decision. On March 28, 2012, Readington filed a motion for leave to amend its complaint to conform the complaint to Ordinance 22-2011. Solberg opposed. After hearing oral arguments, the motion judge issued an opinion dated May 31, 2012, granting Readington's motion for leave to amend, conditioned on the Township's payment of attorney's fees per N.J.S.A. 20:3-26(b).

Through its amended verified complaint, the municipal ordinance that preceded it, and the amended declaration of taking, Readington sought to acquire certain property interests held by Solberg, which included (1) development rights to certain parcels within the so-called "Airport Safety Zone" (but excluding the "Airport Facilities Area"), and (2) fee title to additional property surrounding the Airport Safety Zone.

Solberg moved to dismiss the amended verified complaint arguing that Readington cannot abandon part of its taking without Solberg's consent according to the Eminent Domain Act. See N.J.S.A. 20:3-35. The motion judge granted that motion finding that Readington's amended verified complaint significantly changed (and decreased) the original property to be taken and that this reduced taking would constitute "abandonment" under the statute.

In October of 2013, Readington again sought leave to file a second amended verified complaint seeking to take a fee interest in all of the land related to the Airport and to add N.J.S.A. 40:8-1 as support for their acquisition. That section permits the "governing body of any county and the governing body of any municipality, or either of them, may acquire by . . . condemnation . . . real estate or any right or interest therein for airport purposes." Solberg opposed arguing that Readington had not satisfied the statutory prerequisites imposed by N.J.S.A. 20:3-6 and N.J.S.A. 40A:12-5(a).

Readington was denied leave to amend. The motion Court found that while Readington underwent the process required by N.J.S.A. 20:3-6 in connection with their initial attempt to acquire Solberg's land the second effort to amend the complaint was no different from Readington's previously dismissed amended complaint altering the terms of their intended condemnation. Simultaneous with that motion, the Court granted Solberg's cross-motion lifting the December 13, 2006 stay on their counterclaim and third-party complaint and directing Readington to deposit withdrawn funds back into the Court.

In January of 2014, Readington moved to dismiss Solberg's counterclaim and third-party complaint. The counterclaim and third-party complaint were predicated upon the alleged failure of the Township of Readington Committee to adopt an ordinance allegedly required by the New Jersey Air Safety and Zoning Act, N.J.S.A. 6:1-80, (Counts 1, 2, and 4) and contained a cause of action alleging a violation of their civil rights under 42 U.S.C. §1983 (Count 3).

Readington moved to dismiss asserting that the claims were mooted by the enactment of Ordinance 18-2007 by the Township Committee pursuant to the Air Safety and Zoning Act. They argued that the proper venue to challenge the ordinance was in a parallel prerogative writ action and that Solberg had not sufficiently alleged a §1983 cause of action. Readington's

motion was granted with respect to Count 1, 2 and 4 finding that these causes of action are subsumed within the prerogative writ action as the relief requested in the motion was specifically the relief requested and available there. The motion was denied with respect to Count 3 finding that the Section § 1983 cause of action was properly alleged.

Trial in this matter was scheduled for March 17, 2014, but had been postponed pending resolution of Plaintiff's *in limine* motion to bar certain Defendant's experts.[2] Readington alleged that Solberg Aviation had furnished expert reports from several individuals which contained net opinions that lacked a factual basis. They further alleged that the expert's conclusions bore no logical relationship to the factual basis proffered in the report or during deposition testimony.

Solberg argued that Readington's motion was both procedurally premature and without substantive merit. They asserted that their experts came from a diverse cross-section of the aviation industry, from the private sector, from those intimately familiar with the New Jersey state system, and from those intimately familiar with the Federal aviation system. Solberg argued that Readington's motion with respect to each expert depended on several unsustainable critiques or semantic issues.

After hearing oral argument on the motion *in limine* conducted on April 16, 2014, the trial judge held that because this matter will be tried via bench trial the usual considerations regarding the helpfulness of the proposed testimony to the trier of fact or the potential for confusion were not present. The Court, therefore, denied Plaintiff's motion finding that trial courts are quite capable of hearing the testimony proposed by Defendant's experts and giving them whatever probative weight is appropriate.

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[2] The motion judge, qua assignment judge, recused herself from hearing the matter over a conflict concerning her supervisory responsibilities over a Readington Township committeeman who resigned his position in order to become the Township's municipal judge. She subsequently assigned outstanding motions and the bench trial to the current trial judge.

Prior to trial, the Court and its two law clerks, accompanied by Plaintiff's and Defendant's counsel as well a representative of Solberg Airport, conducted a non-evidentiary site visit of Solberg Airport in order to familiarize itself with the surrounding area and general lay of the land in order to better understand the eventual evidentiary submissions.

During the pendency of the trial, the Hon. Edward M. Coleman, P.J.Ch., issued an interim order from the bench in the matter of Suzanne Solberg-Nagel v. Thor Solberg, Jr., et al., C-14022-11 (Ch. Div. 2014). This action concerned a dispute between the partnership members of Solberg Aviation Co., the entity that owns and operates Solberg Aviation Co. Inc., concerning the operation of the airport business. Mrs. Solberg-Nagle asserted that she was excluded from conducting the business of the partnership by Thor Solberg, Jr. and Lorraine Solberg. The chancery judge ultimately issued an interim order and appointed the Hon. John J. Coyle, Jr., J.S.C. (ret) as special fiscal agent.

Readington, at the insistence of then Mayor Julia Allen, sought to admit, as evidence, the verified complaint and interim order from the ongoing Chancery action. Readington argued that the Court's gatekeeper function is considerably diminished because this matter was being tried via bench trial and not by a jury, that the verified complaint and Chancery Court's interim order were probative on issues identified by the Appellate Division, and that the verified complaint and Court's decision would serve as likely indicators of the testimony of Suzanne Solberg-Nagel, Thor Solberg, Jr., and Lorraine Solberg.

In opposing the admission of the verified complaint and the Chancery Court's interim order, Solberg argued that neither the verified complaint nor the Chancery Court's decision were relevant to the remand issues in this matter. Solberg argued that the Chancery action was irrelevant to the issue of bad faith because Readington could not have known about it when they

voted to condemn the airport in 2006 as it was not filed until 2011, that the ongoing litigation is irrelevant to the issue of the arbitrariness of Readington's proposed taking, and that admission of the verified complaint and the Chancery Court's interim order would be unduly prejudicial and would result in undue delay, waste of time, or needless presentation of cumulative evidence.

The Court directed the parties to submit briefs on the relevancy of the verified complaint and the Chancery Court's interim order in this matter. After a review of those submissions and of the chancery order, the Court concluded that it and the verified complaint were not relevant and should not be admitted. The Court held that Readington had only demonstrated that the current discord among the partnership members could be viewed as having impacted the operation of the business and its ability to meet its public purpose but did not show how the factual assertions and findings contained in the verified complaint and current 2014 order could have been known to Readington at the time of their decision to condemn in 2006.

Additionally, the Court held that while the verified complaint and the Chancery Court's interim order might be read to call into question the airports ability to meet its public purpose, the inquiry ordered by the Appellate Division does not necessitate the submission of these documents in order to assess the airport's public purpose.

On May 8, 2014, the Court heard the opening statement of Plaintiff, the Township of Readington. On May 8 and 17, 2014, the Court heard the opening from the Defendant, Solberg Aviation Company. The Court presided over the forty-eight day trial, on a weekly basis until it ended on January 22, 2015.[3] The Court heard and reviewed testimony from eleven fact witnesses; Mary Mastro, Michael Andy Kovunuk, Pamela Matthews, Suzy Nagle, Julia Allen, Thomas Auriemma, Gerard Shamey, Frank Gatti, Thomas Thatcher, Beatrice Muir, Rick

[3] The Trial Court's Drug Court responsibilities necessitated that the Solberg trial be conducted on two days per week throughout 2014 and 2015.

Gimello and four expert witnesses; Stephen Souza, Mark Conway, Michael Sullivan and Richard Golaszewski, for Readington. The Court heard and reviewed testimony from fact witnesses; Thor Solberg Jr., Vita Mekovetz, Anthony Cicatiello, Ronald Monaco and seven expert witnesses; George Ritter, Arlene Feldman, Amy Greene, Alan A'Hara, Dennis Yap, Laurence Kiernan and Winthrup D.Perkins for Solberg. By way of rebuttal, Readington briefly examined Monaco, recalled Souza, and produced on the last day of trial Victoria Jenkins, a DEP employee.

The Court also received and reviewed approximately 115 items of evidence submitted by the Plaintiff and approximately 733 items of evidence submitted by Defendant. The Court received and reviewed the entire transcript, approximately 5,600 pages of Court proceedings. The Court received and reviewed briefs from the Plaintiff, Readington and Defendant, Solberg, filed on February 23, 2015. The Court received and reviewed reply briefs, from counsel submitted on March 9, 2015.

II. *Facts*

A.

The airport that bears the name Solberg Hunterdon Airport ("SHA") is an important part of New Jersey and America's aviation history. SHA's founder, Thor Solberg Sr., was a world renowned aviator, knighted by the King of Norway in 1935 for his historic flights and contributions to pre and post war aeronautical achievements. Moreover, President Franklin D. Roosevelt bestowed upon him the designation of "Great American" for his achievements and contributions to the security of the United States in the years leading up to and during World War II.

It was this visionary who settled in Hunterdon County and in 1939 acquired sufficient real estate to establish his dream of an inter-modal transportation facility for the significant purpose of meeting the region's general aviation needs. Thor Solberg Sr., fulfilled his dream and became the owner in fee simple of approximately 726 acres, comprised of four contiguous tracts separated by public roads, a historic airport, farmland, open fields, wetlands, and stream corridors in the Township of Readington, Hunterdon County. His early successes were indeed recognized by the Readington Township Committee, which on February 3, 1941 passed a resolution granting permission for a commercial airport to be operated on the Solberg property. (This, through the lens of history, appears to be the initial stimulus of tension between the airport facility and a vocal group of local residents.)

Thor Solberg Sr., died in 1966 leaving the Airport and the responsibility for its regional role in the aviation system to his son and two daughters, who have for the past quarter century endeavored to maintain, modernize and expand the facility to meet contemporary needs.

SHA is located on lands owned by Solberg Aviation Company (Solberg Aviation) which is a partnership formed under the laws of New Jersey. The partnership owns land in Readington Township, Hunterdon County, New Jersey, consisting, among other blocks and lots of 726 acres known as: Block 48, Lot 23, Block 55, Lot 33, Block 56, Lots 1, 3, 6 and 8, and Block 67, Lot 2. Solberg Aviation is a company, also formed under the laws of New Jersey, for the exclusive purpose of the fixed base operator of the SHA facilities.

SHA is a well-established general aviation facility devoted to the needs of recreational and business aircraft. Of a historical piece, Governor Richard J. Hughes, patently impressed with SHA's progress, promise, and purpose, proposed recommendations in 1967 that the facility

become the site of a fourth metropolitan jetport. Again, local and vocal opposition led to the withdrawal of the plans to expand the airport to accommodate jets.

A VORTAC navigational aid is located upon Block 56, Lot 3, of the compound. It is significant to note that both the Federal Aviation Administration ("FAA") and the New Jersey Department of Transportation Division of Aeronautics ("NJDOT") designated SHA, in 1990, as a "reliever airport," as a result of its important potential to reduce rising congestion at Newark Liberty International Airport. Moreover, the National Air Transportation Association, in 2000, designated SHA as one of "America's 100 Most Needed Airports."

SHA's current physical layout includes: a single 3,735 foot runway, of which 3,000 feet are paved. In addition, there are several unpaved taxiways and runways. The airport houses a two story terminal, two hangers, underground fuel tanks, numerous airplane tie down spaces, a paved automobile parking lot and the aforementioned VORTAC navigational aid. Typical aircraft that utilize the facility include single and light twin engine piston, turbo prop and jet aircraft, gliders, helicopters and blimps. SHA provides space for model airplane enthusiasts and clubs. Of international, national, statewide and regional importance is SHA's hosting of the Annual New Jersey Hot Air Balloon Festival, the largest of its kind in North America.

Today, this property is held in fee simple by Solberg and consists of approximately 726 acres of land located in the Township of Readington, Hunterdon County, New Jersey. It is comprised of four contiguous tracts divided by public roads, and in addition to the historic airport, contains: farmland, open fields, woodlands, wetlands and stream corridors superbly maintained by Solberg.

B.

In accordance with the directives of the Appellate Division, this Court finds that the testimony and evidence clearly and convincingly supports the following factual predicate to the Township of Readington's Ordinance 25-2006 authorizing the acquisition of the Solberg property through condemnation.

In 1983, the New Jersey Legislature enacted the Airport Safety Zone Act ("ASZA"), which authorized the Commissioner of Transportation to adopt rules and regulations to specify permitted and prohibited land uses within airport safety zones. N.J.S.A. 6:1-85 required each municipality that contained any part of an airport safety zone to enact an ordinance incorporating standards promulgated by the Commissioner. Shortly after the passage of the ASZA, the Solbergs applied for and received grant funding from the NJDOT to pave the entire licensed length of the runway, 3,735 feet. After approval for construction, the Township unilaterally issued a stop work order, stating it would not permit paving the main runway beyond 3,000 feet.

The Township strongly opposed the statute, petitioning the NJDOT to exempt the Township because they believed the ASZA removed decisions left for local officials regarding airport expansion ("Homerule"). The Township, despite its legal obligation, failed to pass an ordinance that complied with N.J.S.A. 6:1-85, but rather lobbied and petitioned to have the ASZA declared unconstitutional.

In the late 1980s, it appeared that the Linden Airport might close. A feasibility study prepared by representatives of the FAA, NJDOT and local officials determined that SHA was qualified as a potential replacement site. The township vehemently opposed the position taken by the FAA. Despite the opposition, the Solbergs wrote to the Mayor of Linden on May 30, 1990, confirming their willingness to accept the transfer of aircraft from Linden Airport. The

plan eventually fell through, and ongoing tensions between the Solbergs and detractors increased.

In August 1990, the first threat of condemnation occurred during a Township meeting involving Township officials Ron Monaco and Steve Mirota, Township attorney William Savo, and Thor Solberg Jr.. During a heated exchange between officials and Thor Solberg Jr., the Township made it clear that the Township could condemn the airport and threatened the Solberg's livelihood by putting them out of business, if they so desired. During the August 1990 meeting, the following recorded exchange took place:

> [Solberg]: [Y]ou're taking away my livelihood
> [Monaco]: No, we're not
> [Mirota]: Not necessarily.
> [Solberg]: You know that's what–you want to take the land.
> [Monaco]: We haven't done that yet.
> [Solberg]: It's our land.
> [Savo]: Let me tell you what our options are. We could go down ther[e] tomorrow, right? And [take] just enough to put the airport out of business. I wouldn't say anything.[4]
> [D-600].

In September 1990, the Solbergs requested, and were approved, funding from the FAA to expand the main airport runaway from 1,800 feet to 3,000 feet. In 1995, and against sharp criticism from the NJDOT, the Township's Board of Education decided to site an elementary school directly adjacent to the airport. Subsequently, the Township committee encouraged petitioning in opposition of runway length expansion and adopted several resolutions opposing any increase in SHA's runway length over the next several years.

In 1997, SHA released a Final Draft Master Plan and an Airport Layout Plan that provided detailed recommendations for airport development, estimated construction costs, and set forth a schedule of improvements over a twenty-year planning period. SHA recommended a

[4] Compact Disc recording made by Lorraine Solberg, middle of Summer, 1990 – January 15, 2015 Trial transcript, pages 32,33 and 35.

new 4,890 foot long replacement runway, a full parallel taxiway, paving and extension of a crosswind runway, parking facility improvement, additional hangars, an automated weather observation station, a precision instrument approach and an approach lighting system. The Township immediately challenged SHA and filed lengthy letters with the FAA, NJDOT as well as numerous government officials. The Township passed Resolution R-97-18, challenging the SHA master plan, arguing that the current state of the airport provided adequate safety for existing aircraft and expansion would be highly inappropriate to create a commercial airport in a rural residential zone.

The Hunterdon County Chamber of Commerce (1997) Aviation Task Force recommended support for "the need for an expanded general aviation airport in Hunterdon County ... as an important business issue..." The Hunterdon County Agricultural Development Board joined the opposition to the condemnation of SHA concluding: (a) where land is privately owned the landowner has a greater commitment to manage the land properly than someone managing publicly owned land; and (b) the condemnation of SHA would not be beneficial to the local agricultural community, or to the surrounding agricultural lands. Moreover, the Board communicated to the Township and residents "that condemnation overall would have a negative impact on this property and the Township's farmland preservation program." [D-247 at p.5].

Of coequal importance, the Hunterdon County Board of Chosen Freeholders passed a resolution opposing the condemnation of the SHA property. The Freeholders underscored "the Hunterdon County Planning Board approved report entitled 'General Aviation Needs in Hunterdon County' and found a continued necessity for a private general aviation airport at SHA as a component of the county's regional transportation infrastructure." The Freeholders, in one voice, "respectfully urged Readington Township not to consider condemnation of the airport and

that the Township take no action that would diminish SHA as a county and regional transportation resource." [D-236].

In March 1999, the FAA and NJDOT gave conditional approval to the Airport Layout Plan, pending the successful completion of the environmental assessment. Shortly thereafter, the Mayor of Readington wrote to the NJDOT to protest this decision and stated that the township would "do everything in its power to maintain the status quo of the airport." In the following years, the Township commissioned voluminous environmental reports provided by experts and township committees. The Township amended its 1990 Master Plan, recommending that the most effective way to preserve the environmentally valuable land of SHA would be through acquisition by the Township. These amendments were the first time that the Township labeled the land that SHA occupied as a "critical environmental impact area." The property was also listed in Readington Township Open Space Inventory and Recommendations for Preservation, in its Greenways properties, and was identified as being environmentally vulnerable. SHA was never recommended for acquisition prior to these amendments.

On April 11, 2002, the Solbergs entered into an agreement with the NJDOT for the sale of SHA. The agreement set a base price of $22,000,000 subject to negotiation, and contingent upon obtaining a financing commitment from the FAA. The Township vehemently opposed any airport expansion, wrote to the Governor's office, and continuously corresponded with the NJDOT regarding their future plans after the purchase of SHA. The agreement with the NJDOT eventually fell through, and the Township continued to strategize as to how acquire SHA.

On July 14, 2005, the Township received an appraisal report that estimated the value of the Solberg property at $15,219,700. On August 5, 2005, Mayor Shamey sent a letter of general circulation to the Township residents informing them that the Township would be taking steps to

acquire SHA. The Mayor stated that the Township had come to an impasse because the Solbergs remained committed to expanding the airport. He provided that it was necessary to acquire the airport in order to maintain decision making power over development in Readington Township.

At a public hearing on February 21, 2006, the Committee voted unanimously to approve a 22 million dollar bond ordinance. A referendum on the bond ordinance was the subject of a special municipal election on May 16, 2006. The Township stated that their reason and goal for acquisition was to maintain the airport as a small recreational airport and to protect 625 acres around the airport as open space. The Township explained that they would not manage the airport but would own the rights to determine future development rights on the airport lands. The referendum passed with a narrow affirmative vote of 55.6%.

Following the passing of the referendum, the Township Committee adopted Ordinance 25-2006, authorizing acquisition of the Solberg's property. The ordinance provided that:

> The Township has determined that the public interest will be served by acquisition of the entirety of the Property for public use and purposes, including, without limitation, open space and farmland preservation; land for recreational uses, conservation of natural resources, wetlands protection, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation and preservation of community character.....

III. *Discussion*

A.

Eminent domain is the power of the State to take private property for public use. It is the right founded on the law of necessity which is inherent in sovereignty to the existence of

government. Twp. Of West Orange v. 769 Assocs., L.L.C., 172 N.J. 564, 571 (2002). Generally, a government entity may take, or condemn private property where it is essential for public use, and where just compensation has been made to the owner. Essex Fells, supra, 289 N.J. Super. at 336; U.S. Const., Am. XIV; N.J. Const., art I. ¶ 20 ("Private property shall not be taken for public use without just compensation."). The New Jersey Legislature has delegated broad authority to municipalities to acquire private property by eminent domain for public uses including recreation and open space. Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 19 (App. Div.), certif. denied., 178 N.J. 32 (2003). For that reason, "New Jersey courts traditionally have granted wide latitude to condemning authorities in determining what property may be condemned for 'public use'". Twp. of West Orange, supra, 172 N.J. at 572.

The exercise of the State's power of eminent domain is the exclusive province of the legislative branch of the government. Essex Fells, supra, 289 N.J. Super. at 336. Since the Legislature cannot in all instances directly supervise the taking of property through condemnation, it has delegated the exercise of that right to numerous State agencies and political subdivisions. Ibid. 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. Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 264 (1976). 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. Riggs v. Long Beach Tp., 109 N.J. 601, 613 (1988). 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, supra, 289 N.J. Super. at 337.

B.

Within the United States, air commerce and safety are governed by the Federal Aviation Authorization Act of 1994 ("FAA"), 49 U.S.C.A. §§ 40101 to 40129. Solberg supra, 409 N.J. Super. at 304. Under the Act, the FAA has exclusive sovereignty over the use of the nation's navigable airspace. 49 U.S.C.A. § 40103 (b)(1). The FAA also has exclusive control of flight routes and schedules while other decisions concerning the location and operation of the airports have generally been left to the discretion of local governments. Hoagland v. Town of Clear Lake, 415 F.3d 693, 698 (7th Cir. 2005), cert. denied, 547 U.S. 1004, 126 S. Ct. 1476, 164 L. Ed.2d 249 (2006). In New Jersey, courts have held that federal regulations do not preempt state and local jurisdictions with regard to the placement of private aeronautical facilities. Garden State Farms, Inc. v. Bay, 77 N.J. 439, 449 (1978).

In Garden State Farms, the court addressed the complicated question of state preemption:

> A legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature. Id. at 450.

The court recognized that the Aviation Act of 1938, N.J.S.A. 6:1-20 to -44, is comprehensive and preemptive but nevertheless held that "certain responsibilities over the area of land use, development and location of aeronautical facilities are left to the municipalities. Id. at 451-52. In Tanis v. Township v. Hampton, 306 N.J. Super. 588, 592 (App. Div. 1997)., the court held that the municipal land use control is not totally preempted in light of the Act's requirement that the Commissioner give due deference to local zoning ordinances. Id. at 598-600.

The Appellate Court in Solberg adopted a balanced approach pertaining to the conflicting authorities regulating preemptions. Solberg, supra, 409 N.J. Super. at 282. The Court held that "although the ASZA expresses a clear intent that State policies concerning airport operations and

development should prevail over local concerns, the regulations require the Commissioner to consider local zoning ordinances when acting on applications to alter an airport facility." Id. at 307-08. The Court further stated that preemption is not complete but only occurs when "the local regulation conflicts with the state statutes or stands as an obstacle to a state policy." Ibid. The Court found that the legislative design is to allow municipal land use considerations to co-exist with Federal and State regulations to the extent that they are compatible. Ibid. Where, however, local interests collide with expressed policy goals of State and Federal legislation, local zoning interests must yield. Ibid.

The Court found that a municipality's ability to regulate land use within an airport safety zone is not entirely preempted by ASZA. Ibid. It is, however, narrowly circumscribed because it must conform to the requirements imposed by the regulations. Ibid. Moreover, the Commissioner has the ultimate authority to override any local zoning decisions if it is contrary to the purposes of the ASZA or the Aviation Act. Ibid. Therefore, the Appellate Division held that the Township's authority to exercise zoning control over the Defendant's property is constrained by State law. Ibid.

Further, in emphasizing its concurrence with this conclusion, this Court finds that historically New Jersey's Legislature delegated regulatory authority over airports to the NJDOT long before the passage of ASZA in 1983, or its implementing regulations in 1985. New Jersey's statutory provisions governing aviation extend back to at least 1931, and have been amended from time to time throughout history. N.J.S.A. 6:1-9. Furthermore, the New Jersey Legislature empowers the Commissioner of the NJDOT to regulate airports, specifically authorizing him to "encourage and effect, in so far as is practicable, uniform field rules for airports." N.J.S.A. 6:1-9. The NJDOT promulgated regulations pursuant to the authority vested

in it by the State of New Jersey, which specifically recognizes that the "ultimate authority over the regulating and licensing of aeronautical activities and facilities in New Jersey resides with the Commissioner," and makes those chapters applicable not only to fixed wing aeronautical facilities, but also to airport facilities dealing with helistops, balloon spots, airship bases, etc. N.J.A.C. 16:54-1.1, 1.2.

The regulations define "airport" as any designated area of land or water licenses for the landing and takeoff of airplanes as well as other aircraft, including, airships, blimps, dirigibles, gyroplanes, gliders, helicopters, hot air or gas balloons, etc. N.J.A.C. 16:54-1.3. Thus, the Court finds that the Commissioner of the NJDOT has regulatory authority over land used for takeoff and landing of non-fixed wing aircraft as well, such as those balloons and blimps that use land at SHA outside the delineated safety zones. Moreover, nowhere in the statutes or regulations does there appear to be any limitation of that regulatory authority that would preclude the exercise of the Commissioners authority on land falling outside the Air Safety Zone delineations. See generally, N.J.S.A. 6:1-1 et seq.; N.J.A.C. 16:54-1, et seq.

C.

The condemnation process involves the exercise of one of the most awesome powers of government. City of Atlantic City v. Cynwd Invs., 148 N.J. 55, 73 (1997). The New Jersey Legislature has delegated broad authority to municipalities to acquire private property by eminent domain for public uses including recreation and open space. Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 19 (App. Div.), certif. denied, 178 N.J. 32 (2003).

Since the initial enactments, the New Jersey Legislature has routinely recognized the public interest in acquisition of land for open space. Mipro, supra, 379 N.J. Super. at 371-72.

The statutes created by the Legislature declare that it is in the public interest for the State and local governments to acquire additional land for public recreation and the conservation of natural resources [N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36] and authorize the State to make loans or grants to municipalities to acquire property for these purposes [N.J.S.A. 13:8A-4; N.J.S.A. 13:8A-22; N.J.S.A. 13:8A-38]. Mipro, supra, 379 N.J. Super. at 371-73. These statutes also provide that the power of eminent domain may be used to acquire land for recreation and conservation purposes. Ibid; N.J.S.A. 13:8A-6; N.J.S.A. 13:8A-8; N.J.S.A. 13:8A-24; N.J.S.A. 13:8A-26; N.J.S.A. 13:8A-40; N.J.S.A. 13:8A-42.

In recent years, the Legislature has reaffirmed a municipality's statutory authority to utilize the power of eminent domain to acquire land for open space and established new methods to generate the financial resources required for such acquisitions. Mipro, supra, 379 N.J. Super. at 371-73. In 1997 the Legislature enacted the Municipal Trust Fund Act, N.J.S.A. 40:12-15.1 to -15.9, which confers authority upon a municipality to submit a public referendum to the voters for approval of a tax levy for recreation and conservation purposes, including open space. Ibid.; N.J.S.A. 40:12-15.7 (a)(1)(a).

Moreover, in 1998, voters approved N.J. Const. art. VIII, § 2 ¶ 7, which dedicates funds from the State sales and use tax for acquisition and development of land for recreation and conservation purposes as well as farmland and historic preservation. Mipro, supra, 379 N.J. Super. at 371-73. The Legislature then enacted the Garden State Preservation Trust Act, N.J.S.A. 13:8C-1 to -42, which contains legislative declarations that "there is growing public recognition that the quality of life, economic prosperity, and environmental quality in New Jersey are served by protection and timely preservation of open space. Ibid.

Municipalities may exercise their authority under the presumption of land conservation for open space even though the government agency acquiring the land has no plans to put the property to any active use. Ibid. The Green Acres statutes, Municipal Trust Fund and the Garden State Preservation Act, all declare that it is in the public interest to preserve as much open space as possible. Ibid.; N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36; N.J.S.A. 40:12-15.2; N.J.S.A. 40:12-15.1; N.J.S.A. 13:8C-2; N.J.S.A. 13:8C-3. None of these statutory enactments include an explicit or implicit requirement that a municipality have a plan for active use of land acquired thereunder or be able to demonstrate a "need" for the acquisition. Mipro, supra, 379 N.J. Super. at 374. To the contrary, the manifest legislative intent in authorizing acquisition of land for "conservation" and "open space" is to authorize acquisition for use as passive open space. Ibid. Thus, these statutory enactments recognize that open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development. Ibid.

Yet, where a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside. Casino Reinv. Dev. Auth. v. Banin, 320 N.J. Super. 342 (Law Div. 1998); Essex Fells, supra, 289 N.J. Super. at 337; Wilmington Parking Auth. v. Land With Improvements, 521 A.2d 227 (De. 1986); see also, Earth Management, Inc. v. Heard County, 248 Ga. 442, 283 S.E.2d 455 (1981) (condemnation of land for a public park was a subterfuge to veil the real purpose of preventing construction of a hazardous waste disposal site); Carroll County v. City of Bremen, 256 Ga. 281, 347 S.E.2d 598 (1986) (condemnation for police and fire training facility voided when real purpose was to prevent the construction of a sewage treatment plant); Pheasant Ridge Assoc. v. Burlington Town, 399 Mass. 771, 1506 N.E.2d 1152 (1987) (land taken for park, recreation and moderate

income housing seen as pretext to exclude low or moderate income housing). In 1997, the Supreme Court of New Jersey quoted from Wilmington Parking Auth., supra, 521 A.2d at 231: "In determining whether projects with substantial benefit to private parties are for a public purpose, this Court has held that the trial court must examine the 'underlying purpose' of the condemning authority in proposing a project as well as the purpose of the project itself." City of Atlantic City, supra, 148 N.J. at 73.

In such determinations, 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, supra, 289 N.J. Super. at 337, citing Tennessee Gas Transmission Co. v. Hirshfield, 39 N.J. Super. 26, 288 (App. Div. 1956); In re. East Windsor Mun. Util. Auth v. Shapiro, 57 N.J. 168, 169 (1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971); Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347 (1970); City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954); N.J. Highway Authority v. Currie, 35 N.J. Super. 525, 532 (App. Div. 1955); State, by State H. Com. v. Totowa Lum. & Sup. Co., 96 N.J. Super. 115, 124 (App. Div. 1967); Barnegat Light v. Ocean County Freeholders Board, 44 N.J. Super. 332, 352 (Law Div. 1957). Absent a showing of "improper motives, bad faith or some other consideration amounting to a manifest abuse of the power of eminent domain," the courts will not interfere with the public body's decision to condemn private property. Essex County Imp. Authority v. RAR Development Associates, 323 N.J. Super. 505, 515 (Law Div. 1999); Essex Fells, supra, 289 N.J. Super. at 337. There will be no judicial scrutiny of the government's decision to use its eminent domain power unless there is evidence demonstrating that the decision to condemn was made in bad faith or through fraud. In re East Windsor Mun. Util. Auth. supra, 57 N.J. at 168.

As the court in Essex Fells provided, "'bad faith" generally implies the doing of an act for a dishonest purpose." Essex Fells, supra, 289 N.J. Super. at 338. The term "bad faith" contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. Ibid. citing Lustrelon Inc. v. Prutscher, 178 N.J. Super. 128, 144 (App. Div. 1981). Thus, "although the public purpose for taking land may be valid, if the true reason is beyond the power conferred by law, the condemnation must be set aside." Ibid. "In other words, public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Ibid.

The party claiming that a municipality acted in bad faith has the burden of proof. Essex County Imp. Authority, supra, 323 N.J. Super. at 515, see, Texas East. Trans. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 (1966); Essex County v. Hindenlang, 35 N.J. Super. 479 (App. Div. 1955); State v. Totowa Lum. & Sup. Co., 96 N.J. Super. 115 (App. Div. 1967). The evidence showing that the government acted in bad faith in the condemnation must be clear and convincing. Solberg, supra, 409 N.J. Super. at 310; Essex Fells, supra, 289 N.J. Super. at 338; Essex County Imp. Authority, supra, 323 N.J. Super. at 516; Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 42, 47 (1957). New Jersey Courts have also held that the "evidence should be strong and convincing." Essex Fells, supra, 409 N.J. Super. at 342; see Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 42, 47 (1957); see also, Uniform Eminent Domain Code § 507.

The question of "bad faith" in the context of eminent domain has generally been determined by distinguishing the "motives of the individuals who adopted the legislation and the purposes of the condemnation itself." Solberg, supra, 409 N.J. Super. at 311, quoting, Lynda J. Oswald, Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law, 35 B.C. Envtl. Aff. L. Rev. 45, 57-58 (2008). The Appellate Division

noted that, "unfortunately the distinction between motive and purpose often blurs because of the difficulty of categorizing legislative actions." Ibid.

The Appellate Division adopted the test set forth by the Supreme Court in Riggs v. Township of Long Beach, which considered whether a municipality had enacted a challenged zoning ordinance for a valid purpose. Riggs v. Township of Long Beach, 109 N.J. 601, 603 (1988). The Court in Riggs acknowledged that the "distinction between motive and purpose can be fuzzy," but explained that "motive" ordinarily concerns the mental processes and subjective considerations that induce a legislator's action, while "purpose" speaks to the goals to be achieved. Solberg, supra, 409 N.J. Super. at 41-42, quoting Riggs, supra, 109 N.J. at 613. The Court held that the "determination of 'purpose' depends on objective factors, such as the terms of an ordinance and its operation and effect, as well as the context in which the ordinance was adopted." Ibid. The Court further held that "when a party asserts that an ordinance was adopted for an improper purpose, the inquiry should be limited to an evaluation of the objective facts surrounding the adoption of the ordinance." Id. at 614.

Thus, with these legal principles in mind, the question presented by Solberg's challenge to the taking is whether the Township acted in bad faith when it condemned the airport property. This Court incorporates the elaborate legal arguments outlined in Solberg, supra, 409 N.J. Super. 282, and emphasizes the dispositive nature of the bad faith issue. The precedent outlined herein compels us to invalidate the entirety of a taking in circumstances where improper motive and bad faith clearly influenced the condemnation. Regardless of whether certain parcels are preempted by state law and others are open to condemnation under open space designation, it is clear to this Court that the objective evidence depicts nothing less than deliberate subterfuge on the part of Readington Township in its efforts to obfuscate the desire to preclude airport expansion under

the auspices of environmental policy. This is indeed sufficient bad faith which gives rise to manifest abuse of the power of eminent domain.

To substantiate their burden of proof, the Defendant established an extensive record both before the Appellate Division and before the trial court documenting Readington Township's opposition to the expansion of the airport. The timeline spanned several decades, starting in the 1960s and ending with the condemnation ordinance of 2006. This Court evaluated hundreds of exhibits and heard hours of testimony on this issue in addition to that which was presented on appeal in 2009. At that time, the Appellate Division's opinion suggested that a "review of this record may reasonably lead to the conclusion that the condemnation of Defendant's property was motivated, or at least substantially motivated, by the desire of the Township officials to limit airport expansion and to prevent SHA from becoming a jetport." Solberg supra, 409 N.J. Super. at 309-310. This Court finds that this was emphatically the case.

D.

In order to determine if an ordinance was adopted for an improper purpose, Riggs, supra, 109 N.J. at 618, directs that the court's "inquiry should be limited to an evaluation of the objective facts surrounding the adoption of the ordinance." Ibid. Critical to this inquiry and the Trial Court's ultimate finding is, as in all trials, the credibility of the witnesses' testimony.

Ordinance 25-2006 provides that its purpose in acquiring the entirety of the property is as "open space and farmland preservation, land for recreational uses, conservation of natural resources, wetlands protection, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation, and preservation of community character." Solberg, supra, 409 N.J. Super. at 290. This Court finds that there is no support for the premise behind

the ordinance. Indeed, the evidence clearly and convincingly shows that these reasons were a pretext for Readington Township's true purpose, which was to limit the airport's capacity to remain economically competitive and to limit its expansion.

The evidence presented demonstrates that the public purpose stated by the Township for the taking of the airport property was not based on any public need but solely in response to community fears regarding the proposed use of the airport. This conclusion derives its veracity most conclusively from the chain of events that occurred after Solberg released a Final Draft Master Plan and an Airport Layout Plan in 1997 that provided the detailed recommendations for airport development. This plan included a new 4,890 foot runway, a parallel taxiway, and other improvements, which were subsequently conditionally approved and elaborated by NJDOT and the FAA. See, Solberg, supra, 409 N.J. Super. at 292. In reaction to the scope of that plan, the Township elected to "draw a line in the sand" and "do whatever it takes right now legally to make sure that [SHA] never becomes a jetport." Ibid.

In December of 2005, Readington engaged an experienced public relations consultant, Anthony Cicatiello and his firm CN Communication. His trial testimony tellingly revealed that his firm would now be responsible for the origination and or review of all communications presented to the public by the Township committee. In January of 2006 CN submitted a Public Relations Strategy Memo to the Township as well as to "public officials," which noted "the expansion of the Solberg Airport runway has been a controversial issue since the late 1990s" and highlighted the importance of media coverage in shaping the public's opinion.

The first bullet point in that strategy memo is entitled "problem with runway expansion" and notes that "the original matter that drew the most public scrutiny was that of runway expansion." This was and still should be "a major not in my backyard issue." The first and

primary paragraph, addressing airport expansion, concludes with the line "this is the main issue." (12T 84:1-86:13).

The overwhelming evidence reveals that, prior to February 6, 2006, Readington officials, in 2006 faithfully followed this public relations strategy by emphasizing that municipal control vis-à-vis the FAA and the NJDOT in public meetings, press releases and letters to the editor; e.g. runway length, hanger size, jet aircraft noise and purported impact of jet aircraft on property values were paramount – not concerns with acquisition of additional open space.

On June 28, 2006, Readington introduced an ordinance authorizing the acquisition of the SHA property by condemnation or otherwise. The ordinance was passed on July 11, 2006. [P-126]. On July 11, 2006, Readington issued a press release which deceptively emphasized that the purpose of the ordinance was the voluntary negotiation and acquisition of the airport, when in fact it was plainly the prelude to the first eminent domain proceeding. [D-356; P-126]. On September 15, 2006, Readington filed the verified complaint and on October 4, 2006, the Township of Readington executed and filed a formal declaration of taking. [P-1].

At this point CN, sensing public disquiet with the Township's first time use of eminent domain, devised a different strategy to provide to press and public. Now the emphasis would be a detailed history of the Township's efforts to preserve open space and farmland dating back to 1978, explaining that the Township had been interested in acquiring the Solberg property for preservation purposes since at least 1999. Officials were now schooled to avoid the contentious eminent domain process and to retreat to a rich history of extraordinary open space preservation. The base tactical dichotomy of this ploy does not escape the serious attention of this Court.

During trial, Township officials provided key testimony regarding their desire to limit airport expansion under the guise of open space acquisition. The Court received the sworn

testimony of Readington officials Ms. Allen, Mr. Shamey, Mr. Gatti, Mr. Auriemma and Ms. Muir. Ms. Allen and Mr. Shamey were subjected to rigorous and extensive cross-examination – the others were cross-questioned to an extent commensurate with the scope of their direct examination. The testimony reflected that each, after their own fashion, were faithful pupils of the shifting strategies of their public relations firm, CN. This, in and of itself, leads the Court to harbor deep concerns about their individual and collective credibility with regard to pretext and improper purpose.[5]

Readington called, as its witnesses, each of the Township Committee persons who voted in favor of the challenged condemnation ordinance. Ms. Julia Allen, in large measure, manned the laboring oar on behalf of Readington Township's elected officials. Ms. Allen has long been involved, in Readington's extra-ordinary open space and farmland preservation efforts. Her direct testimony may be fairly characterized as an oral history of the Township's efforts of acquisition in keeping with accepted funding principles of "willing seller, willing buyer and agreed upon price." On direct, her testimony was responsive, forthright, and lucid with regard to the claimed purpose of acquiring the Solberg property solely for preservation purposes. However, she labored mightily to avoid acknowledging concerns over airport expansion or the ability of the "host" community to control the use of the airport property, including purported industrial or commercial development, as concomitant rationales for the Township's novel use of eminent domain for acquisition of Defendant's property. A proposition which this Court finds clearly and convincingly to be untenable.

Moreover, the crucible of cross-examination exposed a faltering memory and an evasive and argumentative testimony – often incapable of recalling the very things she testified so ably to

[5] It further demonstrates a shared cynical attitude toward the electorate and an imprudent lack of public candor concerning the overall costs of the first time use of eminent domain, which offends the conscience of the Court.

at depositions and during direct examination. Her wavering efforts to apply the laudable goals of open space and farmland preservation to the heavy handed use of eminent domain to the involuntary acquisition of SHA fails to withstand judicial scrutiny. In fine, the Court finds the totality of her testimony to be un-forthright, evasive, and nonresponsive to both counsel and Court and thus dispositively lacking in credibility.

Mr. Gerard Shamey, an attorney, a member of Readington Township's Committee since the 1990s, was mayor of Readington in 2006 (he no longer resides in Readington Township and currently serves as the Township's Municipal Judge). In 2006, in keeping with CN's overall public and fourth estate strategy, then Mayor Shamey became the principal spokesman for the Township's public meetings addressing the Solberg acquisition. His testimony centered on his public statements linking the purpose of the taking to wresting control of the airport's future from the state and federal regulators and, in contradicting Ms. Allen, acknowledged that the taking was all about the airport and in reality, nothing else.

He candidly advised that he was unaware of any applications to develop the Solberg lands for residential purposes and that the Township clearly understood that NJDOT was opposed to any funding for the purchase by eminent domain or condemnation as opposed to "a willing seller, willing buyer and agreed upon price basis." Lastly, at a public hearing on February 21, 2006, then Mayor Shamey clearly and effectively informed the public that Readington's decision to take the Solberg airport property by eminent domain was triggered by the SHA Master Plan Process, and the contents of that particular Master Plan. [12T 70:19-73:25].

The Court finds these particular portions of Mr. Shamey's testimony to be credible and instrumental in shaping its ultimate decision and remedies.

The Court also received the testimony of Mr. Frank Gatti, a Township Committeeman since the 1990's and its Mayor in 2005 when a bond ordinance was initially introduced and subsequently withdrawn. The sum and substance of his testimony was a candid acknowledgement that Mr. Gatti clearly understood that the role of SHA in the state and region, importantly its role as a reliever airport, would necessarily lead to an expansion of the airport, subject to the state and federal regulations, and that Readington Township was fastly opposed to this. [19T 43: 4-47:8].

While he endeavored to iterate his newly minted preservation - purported housing development and community character concerns - under cross examination he agreed that the 40-plus years of the airport's existence was "consistent with and in furtherance of Readington's open space objectives." [19T 86.5:9]

His final testimonial insight was that, to the best of his knowledge, Readington Township made no effort whatsoever between February 2006 and the time eminent domain was enacted to negotiate with the Solberg family. [21T 42:1-8].

The Court subsequently heard the testimony of Readington Township Committee members Ms. Beatrice Muir, Mr. Thomas Auriemma and Mr. Ronald Monaco. While Ms. Muir struggled to articulate a principled basis for voting for the eminent domain ordinance, the Court came to a vague understanding that her primary impetus was "rampant residential development" in Readington. When pressed by counsel and the Court, Ms. Muir was unable to articulate any specific threat of development in 2006 when she cast her vote for the condemnation ordinance.

So too with Committeeman Thomas Auriemma – his primary concern in connection with the condemnation of the SHA property was his fear of the possibility of "a runaway housing development" and uniquely advised that he voted for condemnation because he felt "zoning

could always be changed in the future." He joined the condemnation effort knowing of no such plans for housing development on the Solberg property and finally admitted that his deepest concern was that he did not want to see the runway at SHA expanded. [9T 64:10-20].

Mr. Ronald Monaco, another long standing member of the Township Committee in the years preceding 2006, gave short but revealing testimony. His understanding of Readington's preparation for a possible condemnation of SHA, as early as 1996, was that the Township was trying to be careful to "do things by the book so that Solberg Aviation could not challenge the taking and win." [42T 9:15–12:7].

In fine, an objective scrutiny of the collective testimony of the elected officials involved in the architecture and implementation of the eminent domain ordinance concerning the SHA property reveals a studied attempt to obscure the true purpose of the condemnors in the instant taking. The Court finds this testimony, as a whole, to be un-forthright, evasive, untrustworthy, argumentative, lacking credibility and therefore unworthy of belief. Moreover, the resultant lack of transparency in governmental actions of Readington Township has subverted an open political process thus weakening the protection of all its citizens' private property rights including the Solberg family. That is to say the condemnation was singularly initiated to secure Township control over airport operations. This objective evidence conclusively establishes that the taking was in direct response to Solberg's airport development proposal and only ostensibly part of some environmental protection plan dependent upon the condemnation of the subject property. Such behavior undermines the integrity of the municipal government's stated public purpose behind Ordinance 25-2006 and demonstrates bad faith. Accordingly, the taking is invalid in its entirety.

Initially, elected officials of Readington Township attempted to justify their defiance of the NJDOT, the FAA, the Hunterdon County Board of Freeholders, and the Hunterdon County Agricultural Board under the guise of the principle of "Home Rule." All the while surreptitiously implementing a process which would ultimately, and for the first time, exercise its limited use of the sovereign power of eminent domain against SHA.

Concomitantly, CN Communications and township officials engaged in a sophisticated public relations process, at public meetings and in the press, which demonized the SHA by disseminating a catalogue of fears and appeals to mistrust which mischaracterized SHA's plans for expansion: " .... to include operations and the types of airplanes that might use SHA if it had a 5,600 ft. runway much like those that are used by Continental Airlines out of Newark Airport ..... " [D-385 at 65:3-66:3].

The Mayor and Committee members took great care by carefully avoiding the controversial issue of a first time condemnation of private property in Readington through eminent domain. The Court is clearly convinced by the testimony and evidence that this course of action by Readington Township was triggered by the 1999 conditional approvals of the Master Plan and the Airport Layout plan of Solberg Aviation by the FAA and NJDOT.

Moreover, understanding that the long history of open space and farmland preservation had never used eminent domain to achieve this goal, CN Communications now devised a strategy to emphasize, for the first time, the underlying purpose of employing this process to acquire SHA was now open space, farmland, historic and airport preservation as well as a claimed, but unsubstantiated concern for potential residential housing development. The Court finds these shifting rationales to deviate from "willing seller, willing buyer and agreed upon price" to be without credibility and a mere pretext and subversion of the real objective improper

purpose to gain control of the airport and the prevention of its expansion in keeping with the FAA and NJDOT regulations.

IV. *Legal Analysis*

The Appellate Division remanded this case for a determination on the Defendant's defense of arbitrariness. In its analysis it looked to the principle case on this issue, Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261 (1996). There, the Supreme Court of New Jersey explained that a defendant may raise the defense of arbitrariness of the taking in challenging a condemnation. Id. at 273. It held that when raising a claim of arbitrariness, the quantum of proof required of a defendant whose land is devoted to a public use "should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses." Ibid; Solberg, supra, 409 N.J. Super. at 322. The Supreme Court remanded the case with instructions as to how to balance the parties' competing interests, explaining that if a [defendant] presented a prima facie case of arbitrariness, the [plaintiff] would be required to prove that the condemnation was a reasonable and not capricious choice, reasonably calculated to serve the public necessity. Texas Eastern Transmission, supra, 48 N.J. at 275-76; Solberg, supra, 409 N.J. Super. at 322.

In Solberg, the Court found that such an approach was consistent with the Court's analysis in Essex Fells, supra, 289 N.J. Super at 331. It also held that this public interest balancing test was consistent with the Court in MiPro, supra, 379 N.J. Super. at 376-377. In so doing, the Appellate Division remanded Solberg back to the trial court for an analysis pursuant to these guidelines. Solberg, supra, 409 N.J. Super. at 323. Specifically, the Court instructed the trial court if it:

> determines that the defendants have made a prima facie showing of arbitrariness, then the Township should be required to prove that the condemnation is reasonable and necessary. In analyzing the reasonableness of the condemnation, the court should consider the public purpose served by the airport as compared to the public purpose to be achieved through the condemnation. With regard to necessity, the court should consider the amount of open space already available to the Township, how defendants' property fits into the Township's existing plans for continuous greenways, and whether the Township's goals could be achieved with a lesser taking. Ibid

A.

This Court first considered the Township's assertions of public purpose in condemnation. The purpose of the Township's condemnation is:

> to preserve the substantial open space and farmland within the Subject Property, to preserve significant natural resources including critical water and habitat resources within and around the Subject Property, to preserve the rural and agrarian character and heritage of Readington, and to preserve the Airport itself. Among the open space and environmental functions to be served by the condemnation is the Property's function as greenway connecting other ecologically important areas of Readington, namely, stream corridors of Holland Brook and Chambers Brook, both of which eventually feed into the Raritan River. No other property within Readington enjoys a unique location between these important stream corridors. [P-126]

The Township further provides that Solberg Airport is exceptional land because it contains a "unique collage of ecological traits" and paints a "mosaic of ecological functions." Thus, it argues that preservation is in keeping with the Township's stated greenway and greenbelt goals, and "no other property in Readington can accomplish preservation of the greenway between these two critical stream corridors." Such land compels preservation as "there is no property in Readington like the Subject Property." Given the risk of development in the region, the Township looked to open space policy to further this public interest.

In addition to the preservation of open space, this condemnation is intended to preserve the wetlands and other natural resources found on the property. The condemnation would

purportedly serve historic preservation, preservation of threatened and endangered species habitats, preservation of natural heritage, and water quality protection. Numerous legislative findings substantiate this purpose. See, e.g., N.J.S.A. 13:1B-15.146; N.J.S.A. 13:1B-15.147; N.J.S.A. 23:2A-2; N.J.S.A. 58:10A-2; N.J.S.A. 58:11A-2.

In furtherance of these public interests, the Township explains that open space may be preserved through the power of eminent domain. Looking to MiPro, the argument outlines the legislative initiatives of this State with the goal of preserving open space. Both the Appellate Division and the Supreme Court of New Jersey noted New Jersey's policy and practice of preserving open space and that "municipalities may utilize the eminent domain power to acquire property for this purpose." MiPro, supra, 379 N.J. Super. at 371-73.

The Court finds that the Township's asserted public interests appear to be facially valid. New Jersey law allows for open space preservation through the power of eminent domain and in certain circumstances such purposes would properly support a similar taking. Ibid. This Court will not hold that open space is an invalid public purpose; it only finds that here it was a pretext for an unconstitutional taking that was designed to control the extent of the airport operations and to preclude and prevent the expansion of the airport. Indeed, the Township of Readington has a commendable history of successful open space acquisition, all of which was acquired without the use of eminent domain. According to the evidence on the record, such preserved land comprises approximately 40% of the entire township.

B.

However, the Township's public purpose does not outweigh that of Solberg Airport. The Appellate Division instructed this Court to balance any public purpose served by the airport against the public purpose to be served by the Township's condemnation. The court provided:

> Defendants here submitted substantial evidence to support their claim that the airport provides a public benefit and that the benefit will be impaired or lost if the condemnation proceeds. Solberg, supra, 409 N.J. Super. at 322
>
> The Township is incorrect, however, when it claims that defendants failed to prove that SHA provides a public benefit. The expert report and certification of Arlene Feldman strongly supports defendants' contention that the airport serves an important public purpose. Further, courts have long held that the taking of property for the creation of an airport serves a public purpose. 2A Nichols on Eminent Domain, 97.06[13][a] (3rd ed. 2008). Moreover, the Township itself recognized the airport's public benefits when it listed 'airport preservation' as one of the purpose of condemnation. Ibid.

This Court adopts the Appellate Division's interpretation of its record and finds that the trial evidence greatly supports the finding that general aviation airports, including Solberg Airport, serve a valuable public purpose.

Solberg-Hunterdon is a general aviation airport. The FAA defines general aviation (GA) as operations of aircraft not covered by rules that govern air carriers or charter aircraft. See, 49 U.S.C. 40101 *et. seq.* Our national system of airports, heliports, and seaplane bases was developed to provide communities with access to a safe and adequate public system of general aviation airports. General Aviation Airports: A National Asset, U.S. Dept. of Transportation Federal Aviation Administration, May 2012 at 4. The nation's general aviation airports focus mainly on more specialized services that airlines cannot provide. In 2009, nonairline operators at these general aviation airports spent over $12 billion, flying an estimated 27 million flights for emergency medical services, aerial firefighting, law enforcement, and border control, agricultural

functions, flight training, time-sensitive air cargo services, business travel, and scheduled services. Id. at 5.

Federal, state, and local governments have invested in a system of general aviation airports since the beginning of the 20th century. Ibid. This airport system is interconnected and interdependent and was included in the National Plan of Integrated Airport Systems because these locations were deemed important to the federal system and are open to the public. Ibid. Having such a well-developed system of general aviation airports throughout the country supports commerce while also providing a safety net of airports to support emergency aircraft diversions when necessary due to mechanical issues, medical emergencies, deteriorating weather conditions or other unforeseen circumstances. Ibid. Solberg-Hunterdon airport is one such example, and serves as one of only eleven reliever airports in the state.

Not only is general aviation important to the national infrastructure, but it serves a critical role as the cradle of aviation. The security and economic vitality of the United States depends on this laboratory of flight where future civilian and military pilots are born. Airports such as Solberg blossomed in an era when local young men turned their dreams of barnstorming into air dominance in World War II and led this country into its golden age. These dreams still live in our youth, and general aviation endures as the proving ground for future pilots from all walks of life.

Finally, there is a certain freedom that defines general aviation. Men and women throughout history gazed longingly at the soaring effortless freedom of birds, pondering release from the symbolic bondage of gravity. Only here can a man or woman walk onto some old farmer's field and turn dreams into reality. As Charles Lindbergh once said: "What freedom lies

in flying, what Godlike power it gives to men . . . I lose all consciousness in this strong unmortal space crowded with beauty, pierced with danger."

Thus, general aviation airports serve a myriad of public purposes. The record substantiates the importance of general aviation and Solberg Airport's role in particular. The Defendant offered documentary and testimonial evidence, which this Court found persuasive in its determination of public purpose. The objective evidence demonstrated that general aviation generates over a billion dollars in revenue and creates thousands of jobs across the state. It has a substantial economic impact on communities and contributes directly to local business transportation capability. The evidence also demonstrated that New Jersey's general aviation infrastructure provides many health, welfare, and social benefits: emergency medical services, schools, fire and emergency services, law enforcement, tour operators, and traffic surveillance directly benefit from general aviation airports.

By way of example, the Defendant offered the testimony of Ms. Arlene Feldman, a consultant to the New Jersey Aviation Association, former Director of Aeronautics for the State of New Jersey, former Deputy Director of the Federal Aviation Administration's Technical Center in Atlantic City, and former FAA Regional Administrator of the Eastern Region of the United States. She answered questions regarding the importance of general aviation nationally, regionally, and specifically with regard to Solberg Airport. Her direct testimony provided that:

> A. Solberg, it's a very important airport because of its location. It is accessible to so many of the major highways in New Jersey that that creates a real positive for Solberg Airport. In fact, many, many years ago the Federal Aviation Administration considered that location, of Solberg Airport, to become a major facility. That did not happen. But it serves the same purposes.
>
> Solberg provides to the community all kinds of things. They conduct a Balloon Festival that brings in hundreds and hundreds of people and lots of money to the community. They have a lot of activities for young people. This is all in addition to the fact that they have corporate aircraft, helicopters that land there.

> And in the GAO report, somewhere along the way, the ideal situation for aviation in this country is to have, is to be within ten miles, each community should be within ten miles of an airport. (37T 32: 1-25).

Ms. Feldman also addressed the importance of general aviation in New Jersey and Solberg's particular role:

> A. Well, I go back to the 2007 report. In that report it would indicate that approximately 18,000 jobs are generated because of general aviation. Solberg is a major part of that because they do have the facility to have visitors to come into that airport as well as the major corporations that have their aircraft there. (37T 33: 8-13)
>
> A. One of the advantages to Solberg Airport is because they do have as much acreage as they have, and have the ability to increase the facility and its value to the State. . . (37T 33: 17-20)
>
> Q. Ms. Feldman, are you generally familiar with the effect of the condemnation in this case upon the size of the remaining airport facility? (37T 36:13-17)
>
> A. I'm getting, I'm getting emotional, to say the least, about the taking of the condemnation of the Solberg Airport because to take away 80 percent of their acreage would reduce the availability to really advance the airport, to develop the airport to accommodate the general aviation community, and it would make that airport useless. (37T 36: 18-24)
>
> Q. Do you have an opinion as to whether the loss of any additional acreage or runway length, if this condemnation were to be upheld, and whether the limitation of Solberg Airport to its current runway length would have a negative effect upon the general aviation industry and the welfare of the State and region in terms of aviation needs? (37T 37: 16-22)
>
> A. The ability of Solberg to operate as an airport would also be taken away. All of the ability to have medical facilities or medical evacuations, all of the things that Solberg now conducts in the way of their operation would be taken away from them. They would not – they would only have a runway and very little after that. (37T 38: 1-16)
>
> Q. And are you aware of any other airports in the region of Solberg Airport that would have the ability to modernize and expand their size and runway length such as Solberg? (37T 39: 4-7)

> A. No. Most of the airports do not have that ability, they, they just don't have the acreage to accommodate any future growth that Solberg would be able to accommodate. (37T 39: 8-11).

In her testimony, Ms. Feldman referred to the "Report of the New Jersey General Aviation Study Commission," which was a 1993 commission created by the New Jersey Legislature, and which was charged with studying issues concerning the role of aviation and general aviation in New Jersey's transportation system. [D-392]. She referred to this report as "the bible" of general aviation in her testimony. The extensive report provided an analysis of the role of general aviation in New Jersey and identified challenges and recommendations to the legislature.

This Court holds the legislative findings of the "Report of the New Jersey General Aviation Study Commission" (Public Law 93 ch. 336) to be especially persuasive. The report concluded that a community with a general aviation airport benefits far more from it than does the actual airport owner. P.L. 93 §336 at 23. "New Jersey's airports provide benefits to communities without providing any economic reward to airport owners." Ibid. "In the study of economics, these benefits are recognized as 'public benefits' or 'public good' for which a charge or fee is nearly impossible to collect." Ibid. A general aviation airport contributes to the "quality of life and it improves the local economy for both its host and its neighboring communities." The Commission report provided extensive testimony and analysis, which demonstrated that general aviation airports facilitate community services, including educational opportunities, preservation of open space, woodlands, wetlands, and help facilitate medical and fire emergency services. Id. at 24. The Court incorporates those findings here.

In particular, the report found that New Jersey has the highest number of people per airport in the nation as well as the second-largest percentage of privately owned public use airports in the United States. Id. at 1. The State's airports "are of outdated design and are

deteriorating after decades of State neglect." Ibid. Moreover, "private owners of public use airports – many of whom are second generation – are fighting a losing battle, dealing with often-conflicting regulatory oversight of State agencies and hostile municipalities." Id. at 2.

The report then highlighted several municipalities within the State with particular airport conflicts. Under a subsection entitled "Bad Relations: Two Case Studies," it addressed Readington Township and Solberg Airport, which was "perhaps the worst relationship this Commission found." Id. at 66. The Commission heard the testimony of the Readington Township Mayor and of the Readington Township Administrator and Chief Financial Officer, each of whom "appeared separately demonstrated an adherence to disinformation fostered by the municipality." Ibid. The Commission found the testimony in both instances to be "uniquely stunning."

The Court also finds that Solberg Airport serves an important government interest. The New Jersey State Airport System Plan (NJSASP) was the subject of extensive testimony. [D-601]. The first plan was issued in 1992 and discussed the economic benefits of general aviation and aviation system planning, the development of a "core system" of airports and the "need to have sufficient land available when airport expansion or new facilities are required." Id. at I-1-8.

The most recent plan was released by the New Jersey Department of Transportation in 2008 and recommended that Solberg Airport be "considered" for an upgrade to an "advanced service airport" facility from a "general service" facility. [D-631 at 7-27]. The report further recommended that Solberg be immediately classified as a "priority service airport," which would open it up for development. Id. at 7-41. In the corresponding press release, the Transportation Commissioner stated that the report's "key strategy is the preservation of the existing system of public use airports in New Jersey." These public use airports bring "extensive benefits to the

State economy," including more than 18,000 aviation-related and aviation-dependent jobs with an estimated payroll of at least $624.7 million. Ibid. This plan was consistent with the findings in New Jersey's Long-Range Transportation Plan and the Federal Aviation Administration's National Plan.

C.

As a preliminary matter, the Court notes that the Township argues that "the airport does not serve a cognizable public purpose." This is a staggering generality and one that is contradicted by voluminous objective evidence on the record. The Township's primary contention is that there is nothing to substantiate that Solberg itself serves some immediate tangible economic purpose. To focus narrowly only upon economic value is deliberately myopic and directly contradicts the Township's purportedly valid reasons for condemnation: ". . . to preserve the Airport itself."

The concept of public purpose is a broad one. The Supreme Court of New Jersey provides that "generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Roe v. Kervick, 42 N.J. 191, 199 (1964); Davidson Bros. v. D. Katz & Sons, Inc., 121 N.J. 196, 202 (1990); Hoglund v. City of Summit, 28 N.J. 540, 549 (1959). Moreover, "to be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society." Ibid. Thus, it is "incapable of exact or perduring definition." Ibid. The Court therefore finds that for the reasons enumerated herein, Solberg Airport provides a legitimate public purpose under the Roe v. Kervick two-prong test.

The Court further notes that the Township seems to confuse "public purpose" with immediate economic benefit to the Township of Readington. Despite well documented assertions of the alleged power of "Home Rule," Readington Township is a municipality of the State of New Jersey and of the United States of America. For the Township to argue that there is "no cognizable public purpose" is to assume that they ignore the stated public purposes of the FAA and NJDOT, as well as the findings of the state legislature and Congress, and focus entirely on local control. The Township asserts that "Solberg Aviation has offered literally no proof of any economic benefit (whether to the Solberg family or to the region at large) resulting from the operation of the Airport"; and that it cannot sustain "its burden to show any cognizable and quantifiable public purpose in the Airport."

Here, the Appellate Division did not define the burden in such terms. Indeed, this Court struggles to locate evidence in the record illustrating how the condemnation of the property for open space would meet a "cognizable and quantifiable public purpose." However, this is not the general standard. See, Roe v. Kervick, supra, 42 N.J. 191; Berman v. Parker, 348 U.S. 26, 31, 75 S. Ct. 98, 99 L. Ed. 27 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 104 S. Ct. 2321, 81 L. Ed.2d 186 (1984); Kelo v. City of New London, 545 U.S. 469, 479-83, 125 S. Ct. 2655, 162 L. Ed.2d 439 (2005); Essex Fells, supra, 289 N.J. Super. 329.

The Supreme Court held that when raising a claim of arbitrariness, the quantum of proof required of a defendant whose land is devoted to a public use "should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses." Texas Eastern Transmission, supra, 48 N.J. at 273. Pursuant to this standard, and the abundant trial evidence, the Court finds that Solberg Airport serves an important public and government interest and that the Defendant's claim of arbitrariness is therefore sufficient and compelling.

D.

Subsequent to a finding of arbitrariness, the burden shifted to the Plaintiff to demonstrate that the condemnation was "reasonable and necessary." Solberg, supra, 409 N.J. Super. at 323. Regarding the reasonableness question, the Appellate Division directed this Court to compare the public purpose served by the airport to the public purpose achieved through the condemnation. Ibid. The Appellate Court stated that this Court "should consider the public purpose served by SHA as compared to the public purpose to be achieved through the condemnation." Ibid. Moreover, the Court stated that with regard to necessity, this Court should "consider the amount of open space already available to the Township, how the Defendant's property fits into the Township's existing plans for continuous greenways, and whether the Township's goals could be achieved with a lesser taking." Ibid. This Court hereby incorporates its previous findings regarding the important government and public purpose served by Solberg Airport and finds that the taking is unreasonable as to the lands within the air safety zone. Following a review of all the evidence presented, this Court concurs with the Appellate Court's decision "even when this evidence is viewed in the light most favorable to the Township, there is no support for finding that the condemnation of development rights will achieve airport preservation and preservation of community character", therefore making the condemnation unreasonable. Id. at 313.

The condemnation of development rights will not further the Township's goals of "preservation of open space." The airport facilities are not open space; rather SHA consists of runways, taxiways, parking lots, airplane hangars, fuel tanks, operation buildings and a small restaurant. Moreover, the portions of the airport that are unoccupied are under the control of the FAA pursuant to governmental safety requirements. As the Appellate Court held, "the fact that the condemnation of development rights to the airport will not achieve its stated purpose

indicates that the true purpose of the condemnation was to secure a greater measure of land authority over the airport than the Township enjoys." Ibid. This Court believes that the taking initiated by the Township sought to expressly take control of the airport and thus directly subvert the Commissioner's ultimate authority over aeronautical facilities.

In addition, the condemnation would limit Solberg's ability to improve facilities. As the Appellate Court stated, "limiting the airport's capacity to remain economically competitive is thus at cross purposes to the goal of airport preservation." Id. at 314. It is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the lands within the airport safety zone would be "contrary to express State purposes" and therefore be in conflict with higher authority. Id. at 320.

The Court also recalls its tour of the airport, which when considered in the context of the testimony offered by both parties, reveals that the airport is in need of physical improvements and has limited prospects for future success. Therefore, this Court believes that the Township's condemnation will not achieve its stated purposes because the "condemnation itself would not change the outlook for the airport unless it led to upgrading of facilities." Id. at 312.

The Appellate Division found that the analysis was different for "parcels and portions that fall outside of the airport facilities area and the airport safety zone." Id. at 316. It provided that the Township's "taking a fee simple interest in land unaffected by airport operations is not improper because the Township retains full zoning authority over these parcels." Ibid.

The Court instructed this trial court to assess each parcel consistent with its opinion and the Court in MiPro, supra, 379 N.J. Super. at 320. ("if any parcels fall outside of the facilities

area and safety zone, the condemnation of those parcels must be revisited consistent with MiPro").

A brief analysis of the court's decision in MiPro is necessary here to understand this Court's holding that the additional parcels were improperly condemned. In affirming the Superior Court, Appellate Division, in MiPro, the Supreme Court of New Jersey firmly established that a municipality has a statutory power to condemn property for open space, even if there is no specific plan for those condemned parcels. Ibid. There, the municipality sought to limit development with the purpose of limiting the overcrowded schools, traffic congestion and pollution. The Appellate Division found that the town's motive could not be considered inconsistent with the motive driving the public interest in open space generally. Ibid.

The Court in MiPro also found that even if the primary goal in condemnation was to stymie further residential development, this did not rise to the level of fraud, bad faith, or manifest abuse. Id. at 376. The Appellate Division provided that Mount Laurel had a reasonable basis for their concerns over residential development, stating that "such concerns are reflected in the State's public policy to halt suburban sprawl." Ibid. Thus, the parcels condemned in MiPro served the public purpose of open space, according to the court. Ibid.

The Appellate Division then distinguished the facts of MiPro from those in Essex Fells, supra, 289 N.J. Super. 329, where the court dismissed the condemnation action by the municipality which sought to preclude the construction of a medical facility. MiPro, supra, 379 N.J. Super. at 376. In cases such as Essex Fells, the condemnee's proposed uses "implicated significant public interests, and the courts found abuses of the eminent domain power in the municipality's attempts to prevent those uses." Id. at 377. The MiPro court found the

condemnation orchestrated to prevent the development of upper income single family homes would not serve a comparable public interest to that in Essex Fells. Ibid.

Here, this distinction is essential because the taking of the additional parcels outside of the immediate airport zone may impact the important public interest served by the property. The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport's zone of operations. Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government's interest in keeping the airport viable. This is especially true when one notes that certain parcels outside of the current Air Safety Zone are used for the takeoff and landing of non-fixed wing aircraft, such as balloons and blimps.

The Court in MiPro also noted that there was no indication that the municipality treated the condemned property differently than other large tracts of vacant land in similar circumstances. Id. at 377. This is a second important distinction between the cases. The evidence demonstrates that the Township of Readington acquired its open space without the use of eminent domain. Indeed, the 1995 Greenways Report does not identify the use of eminent domain as a method for preserving land within the Township. Rather, it specifically uses language addressing "voluntary participation of a landowner in the county or municipal farmland preservation program. . . when land is for sale at a reasonable price, fee simple acquisition could be considered." The report concludes by recommending that "all purchases be the result of open, free-market negotiations with willing landowners, and only after the landowner has shown an

interest in participating." The Township followed these guidelines in its expansive open space acquisition proceedings everywhere else in its jurisdiction.

The sole exception is here. It was only after the Township received notice of the 1999 conditional approval by NJDOT of the airport expansion plan that it pursued eminent domain as an option. The Court's evaluation of the municipal planning documents subsequent to this event leads it to one conclusion: that the Township would use the irregular tool of eminent domain to control the airport's development. It is therefore clear for purposes of a MiPro analysis that the Township treated the acquisition of all of the Solberg parcels differently than other open space lands. Finally, the Court in MiPro noted 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." Ibid. It then again distinguished the taking from that in Essex Fells, and found that there was no evidence of bad faith in the design. Ibid.

This Court finds that the circumstances surrounding the taking in Essex Fells are on point. There is clear and convincing evidence that even though the Township intends to preserve other parcels for open space purposes, the real reason for the taking is to preclude the application of a public use in which the state has an interest. See, Solberg, supra, 409 N.J. Super. at 318; See also, Earth Management, Inc. v. Heard County, 248 Ga. 442, 282 S.E.2d 455, 456 (1981). For the reasons previously stated in this opinion, Solberg is distinguished from MiPro in that it is apparent from the evidence that the Township intended to take the parcels outside of the airport safety zone to preclude it from the expansion outlined in the Airport Master Plan and the NJDOT's conditional approval thereof. The open space argument was therefore brought as a pretext for this ulterior motive. Not only does the evidence demonstrate that the taking for open

space facially precludes an important government purpose, but it also shows a well-designed strategy for controlling the airport's future in its entirety.

E.

Readington Township has not demonstrated that the taking of the Solberg property is necessary for its contiguous greenways plan. The Appellate Division further instructed:

> With regard to necessity, the Court should consider the amount of open space already available to the Township, how Defendant's property fits into the Township's already existing plans for continuous greenways, and whether the Township's goals could be achieved with a lesser taking. Ibid.

Readington argued that the property contained a certain ecological "mosaic" that warranted preservation. It further argued that such preservation was necessary to "stabilize" areas such as the Holland Brook watershed. While such stabilization might be desirable, the Township fails to demonstrate how the current operation of the airport or any proposed runway extension plan would impact this goal. Given the persuasive expert testimony establishing that the Solberg family maintained exemplary stewardship over the property for decades, there is nothing tangible in the record suggesting that the taking is necessary to preclude them from continuing such behavior. Moreover, Solberg airport is not so unique that the general public purpose of open space and contiguous greenways would be challenged without condemnation. The Township may meet these objectives in a variety of other capacities, and indeed has.

There is abundant open space in Readington Township. As of 2014, a total of approximately 9,500 acres of preserved lands, according to its own expert, Mr. Sullivan. This figure does not include an additional 3,177 acres of cluster zoning, which combined would total

approximately 12,600 acres of preserved property entirely separate and distinct from the Solberg property. If the Court permitted this taking, but still allowed for airport expansion, the total would rise above approximately 13,000 acres, in excess of approximately 40% of the land in the Township. While the Court will not determine an arbitrary threshold of open space, it will find that the Township's history of successful open space preservation dilutes any necessity it claims for this specific property. In sum, the Court finds that the Solbergs continue to take considerable care of the wetlands and grasslands on their property. Absent tangible evidence to the contrary and fanciful speculation notwithstanding, there is nothing in the record that depicts anything other than a deliberate stewardship in complete accordance with the contiguous greenway goals of the municipality.[6]

Yet, Readington Township argues that nothing less than the 2006 Ordinance is necessary to achieve its open space policies. It justifies this position by asserting that the Solberg Master Plan would cause unspecified "disturbances" of the environment and that any lesser taking would not meet their contiguous greenway plans. Such an uncompromising position makes the analysis simpler: the proposed contiguous greenway plan for this property cannot be reconciled with the authority of the state to maintain airport viability and relevance in the region. The condemnation of the property is therefore unnecessary to achieve the generalized greenways objective of the Township. The evidence presented does not meet the burden outlined by the Appellate Division in this matter.

[6] Here the Court wishes to recognize the especial significance of the testimony of every environmental expert called by the parties – each, without reservation, praised the Solberg family's exemplary environmental stewardship of the lands, flora and fauna involved. The airport distinctly enhances the greenacre and preservation value of the property.

V. *Conclusion*

New Jersey courts insist that governmental officials act solely in the public interest. In dealing with the public, government must turn "square corners." Gruber v. May and Tp. Com. of Raritan Tp., 73 N.J. Super. 120 (App. Div.), aff'd, 39 N.J. 1 (1962). Generally, courts presume "a public entity of this State will act diligently, responsibly, and honorably." City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11 (App. Div. 2006). As such, "there is a prima facie presumption that the power and discretion of governmental action has been properly exercised. This presumption is the effective check against judicial interference with executive and legislative actions." Miller v. Passaic Valley Water Comm'n, 259 N.J. Super. 1, 14 (App. Div. 1992).

The Supreme Court recognized that "in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners." Auth. of the City of New Brunswick v. Suydam Investors, 177 N.J. 2, 15 (2003), quoting, F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985). Moreover, "in exercising their powers of eminent domain, government entities must strictly comply with the rules and statutes governing condemnation." City of Passaic v. Shennett, 390 N.J. Super. 475, 486 (App. Div. 2007).

The Fifth Amendment authorizes the taking of private property for public use. This does not mean that a government may always do what it deems in the best interest of its constituents. The trappings of power are significant, and because our system is predicated upon the inherent rights of the individual, we must take care of its express limitations. This means that the relationship between the judiciary and the political process must be open and transparent to avoid such scrutiny as we have here. The official decisions illuminated in this opinion demonstrate

evasive and subversive behavior designed to thwart the democratic process and which exceeded the perimeters of proper procedure in eminent domain.

The Court is mindful that the issue before the Court is not whether municipalities have the right to engage in condemnation for non-use purposes. Rather, the issue is whether they engage in concerted subterfuge to reach their objective. See Oswald, 35 B.C. Envtl. Aff. L. Rev. at 49. Thus, the Court emphasizes that there was a proper way to engage in the condemnation of the airport property. Readington Township should have adopted a forthright approach to the process and addressed its concerns about airport expansion directly. Instead it engaged in an elaborate public agitation effort to incite voter opposition, which it then channeled into an opaque condemnation action under the guise of the necessity of the contiguous greenway. Such subversion challenges the protections that sharply limit the eminent domain power.

Municipal behavior in condemnation actions shall oblige certain governing principles. As in all government operations, there is an affirmative duty to act within statutory and constitutional boundaries. This includes Fifth and Fourteenth Amendment jurisprudence, as well as the uniform procedures established in the Eminent Domain Act, N.J.S.A. 20:3-1 to -50 (2008), and its interpretive progeny. There is also an affirmative duty of candor before the public and the political process. Condemning authorities must provide fair public hearings, investigate and address material issues relating to disputes within the community and fairly and openly report the facts and findings of an investigation. The municipality shall refrain from and rebut any misinformation promulgated on the issue before it, especially where such misinformation may unduly influence the voting public. This direct approach to condemnation will prevent officials from engaging in the subversive behavior so apparent in this case.

In the case of Solberg Hunterdon Airport this Court finds that the stated purpose of the condemnation was a subterfuge. Its sole purpose was to prevent the expansion of the airport under the pretextual banner of open space policy. Thus, given the strong inferences presented in an extensive record, the Court concludes that the Township of Readington has no reasonable public need for the Solberg property. The Court further holds that the Township's primary purpose was never environmental protection, but rather limiting airport expansion. The Complaint was therefore presented in bad faith and is hereby dismissed pursuant to the law of eminent domain in New Jersey.

The foregoing analyses, findings and opinion of the Court informs and authenticates the invalidation of the condemnation in its entirety[7] as a manifest abuse of the power of eminent domain, and impels the entry of an order in the following substantive manner:

A. That, except as hereinafter set forth, judgment is entered in favor of Defendant Solberg Aviation Company, with respect to the Complaint, invalidating the taking on the basis set forth in the Court's opinion.

B. That, with respect to each of Block 55, Lot 23; Block 56, Lots 1, 3, and 6; Block 48, Lot 23; Block 56, Lot 8, and Block 67, Lot 2, as described in Exhibit A to the declaration of taking dated 4 October 06, fee simple title and all other rights and accoutrements of fee simple ownership are hereby re-vested in Solberg Aviation Company.

C. Solberg Aviation Company, in connection and in conjunction with its fee ownership, shall have the right, as more particularly set forth below, to develop or otherwise utilize the aforesaid property for any use involved with or incidental to the ownership and operation of an airport in accordance with the laws and regulations of the State of New Jersey and the United States, including but not limited to all such uses in effect currently and immediately prior to the condemnation, and specifically include the following:

    1. Any and all rights to operate an airport aviation enterprise, including uses ancillary to a principal airport use (and including specifically the annual balloon festival and other

[7] While SHA invites the Court to allow the taken Developmental Rights to remain with Readington Township and to appoint Commissioners pursuant to N.J.S.A. 20:3-12 to determine their value, the Court declines to do so. The necessity for a final resolution of this arduous and protracted matter cries out for closure. The citizens of Readington Township and the Solberg family deserve no less from its state's judiciary. However, nothing in this court's decision would preclude the parties from reaching a just accord concerning the Developmental Rights by employing the time honored process of "willing seller, willing buyer and agreed upon price."

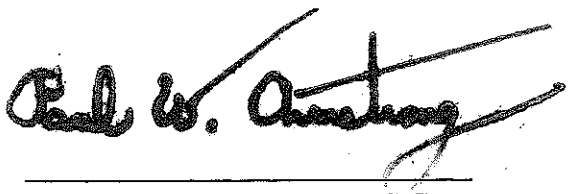
similar public events), subject to regulation by the Division of Aeronautics of the New Jersey Department of Transportation and such other or successor governmental entity of the State of New Jersey exercising regulatory control over airports;

2. Any and all rights to improve, modernize, and expand the property for airport and aviation enterprise purposes, including but not limited to, construction or improvement of airport facilities and infrastructure including runways, taxiways, hangars, administration buildings, lighting, navigational aids, weather reporting equipment, and other facilities ancillary to airport use (e.g., restaurants with adequate seating, lounges, museums, gift shops, meeting or conference rooms, etc.); and

3. The right to agricultural use, conservation use, recreational use, and such other non-residential uses as may be permitted by law.

D. That, in accordance with N.J.S.A. 20:3-26(b), counsel fees and expenses, including expert fees, in connection with the within action, as well as counsel fees and expenses, including counsel fees and expert fees incurred in connection with defending prior efforts in 2001 by the Township of Readington to condemn the subject property, are hereby awarded to Solberg Aviation Company, to be paid within 120 days. Counsel for Solberg Aviation Company shall submit appropriate Certification of Services within 30 days of the date hereof. Readington Township may respond to said application within 30 days after receipt thereof.

Judgment should be submitted accordingly.



Hon. Paul W. Armstrong, J.S.C.