

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

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
HUNTERDON COUNTY

DOCKET NO. HNT-L-468-06

Civil Action

SOLBERG AVIATION COMPANY,

Defendant-Counterclaimant  
and Third-Party Plaintiff,

and

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

Third-Party Plaintiffs,

v.

TOWNSHIP OF READINGTON,

Counterclaim Defendant,

and

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

Third-Party Defendants.

**BRIEF ON BEHALF OF DEFENDANTS SOLBERG AVIATION  
AND THOR SOLBERG, JR. IN OPPOSITION TO PLAINTIFF  
TOWNSHIP OF READINGTON'S ORDER TO SHOW CAUSE**

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**BRIEF ON BEHALF OF DEFENDANTS SOLBERG AVIATION  
COMPANY AND THOR SOLBERG, JR. IN OPPOSITION TO  
PLAINTIFF TOWNSHIP OF READINGTON'S ORDER TO SHOW CAUSE**

(Emphasis Ours Unless Otherwise Noted)

**PRELIMINARY STATEMENT**

In this eminent domain proceeding, instituted by plaintiff Township of Readington on or about September 15, 2006, the defendant-condemnee, Solberg Aviation Company, re-affirms its objection to the plaintiff's authority and details at least some of the bases for that initial contest, in order that the Court may properly set the matter down for pre-trial and trial consideration in accordance with N.J.S.A. 20:3-11, mandating that all proceedings to determine value be stayed pending final disposition of the condemnor's authority.

As the facts presented in the Verified Answer and the accompanying Certifications demonstrate, there is substantial likelihood in this case that the plaintiff's effort to appropriate the airport property of Solberg Aviation, allegedly for the purpose of preserving open space, is in fact pretextual; rather, the true intent, supported by voluminous data, is to so restrict the use of the airport property as to ultimately destroy it as an operating facility -- a decidedly anti-public purpose.

Indeed, the instant action is but the culmination of a protracted campaign by the plaintiff and its public officials to ignore and disregard the Federal and State pre-emptive regulation of airport locations and operations -- including a direct defiance of New Jersey regulations adopted pursuant to statute -- and to endeavor, in the guise of

preserving “open space” in a municipality saturated with open space, to contravene the broad public welfare in promoting and preserving effective regional aviation facilities.

### **STATEMENT OF FACTS**

The facts pertinent to the instant aspect of this matter are set forth in the Complaint, the Verified Answer, and Counterclaim and Third-Party Complaint and the Certifications of Thor Solberg, Jr., Arlene Feldman, and George Ritter. They will be referred to more specifically in the course of the Argument section of this brief.

### **PROCEDURAL HISTORY**

This action was commenced on September 15, 2006, with the filing by plaintiff of its condemnation complaint.

On September 22, 2006, the Court issued an Order to Show Cause, now returnable on November 3, 2006.

At that time, the Court also entered an Order for Deposit of Monies and Declaration of Taking, and the Township proceeded to deposit the monies and file the Declaration of Taking.

On October 18, 2006, Solberg Aviation filed a motion, also returnable November 3, seeking, *inter alia*, to have the Court vacate the Declaration of Taking Order and direct the plaintiff to rescind the Declaration, or for other alternative relief, in view of the clearly stated contest of plaintiff’s authority to condemn and the provisions of N.J.S.A. 20:3-11, providing in pertinent part that “(w)hen the authority to condemn is denied, all further steps in the action should be stayed until that issue has been finally

determined,” as well as the provision of N.J.S.A. 20:3-19, that any effort to take possession should be stayed upon application and good cause shown.

The instant filing by Solberg Aviation, in the form of a formal pleading, which also includes germane Counterclaim and Third-Party Complaint assertions against plaintiff and its responsible officials, is in response to the Order to Show Cause and in further support of the automatic stay.

## ARGUMENT

### POINT I

**THE TOWNSHIP DOES NOT SEEK TO CONDEMN THE PROPERTY FOR A LEGITIMATE PUBLIC PURPOSE, BUT RATHER, SEEKS TO DO SO TO CONTROL, LIMIT THE ACTIVITIES OF, AND ULTIMATELY, DESTROY SOLBERG AIRPORT.**

#### **A. The Township Has No Authority To Regulate The Airport.**

The authority to regulate the Airport resides virtually exclusively in the State and Federal Authorities. By way of brief overview, the Federal government has authority over aviation that is generally confined to use of airspace, and related issues such as noise. See Gustafsen v. City of Lake Angelus, 76 F.3d 778 (6th Cir.), cert. den. 519 U.S. 823 (1996). Although notice must be provided to the Administrator of the Federal Aviation Administration when an airport plans to undertake an alteration, 14 C.F.R. 157.3, the ensuing determination with regard to the “safety of persons and property on the ground” is ordinarily “only advisory”, 14 C.F.R. 157.7.

The vast bulk of authority to regulate airports resides with the State. Specifically, the Commissioner of Transportation is delegated broad authority to regulate aeronautics, and has the power to issue “rules, regulations and orders” relating to airports,

N.J.S.A. 6:1-29. Relevant to the Township's actual concern here, N.J.A.C. 16:54-2.1 provides that the State has authority with respect to the issuance of licenses approving an "alteration to" an "existing aeronautical facility". In that license application process, the applicant must "show conformance with existing zoning and land use ordinances" or a denial of the application by the local planning authority. The application is to be processed under the standards set forth in N.J.A.C. 16:54-2.5. Under that regulation, the Division of Aeronautics is required to determine whether "issuance of such license would be consistent is to public health, safety and welfare, and the development of aeronautics in the State." The Division is to consider, among other things, "aviation development, surrounding land uses, local land use ordinances . . . and any other factors deemed relevant by the Department."

The local authorities have no direct final authority whatsoever. The agency's determination is reviewable only for an abuse of discretion, and to meet that standard, it need only give **some** consideration to local interests. Tanis v. Twp. of Hampton, 306 N.J. Super. 588, 600 (App. Div. 1997).

Dissatisfied with the allocation of authority between the State and local municipalities, the Township's current mayor, Gerald J. Shamey, has described aspects of the approval process for airport modification as a "cruel joke". [Ex. M to the Answer].<sup>1</sup>

Moreover, a municipality is restrained from using its zoning authority to control an airport within its borders. As described in detail in the Counterclaim and Third

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<sup>1</sup> Unless otherwise noted, all factual assertions herein are supported by reference to the Verified Answer on Behalf of Solberg Aviation Company and Thor Solberg, Jr., Counterclaim on Behalf of Solberg Aviation Company and Third-Party Complaint (the "Answer"), and the documents attached thereto.



Party Complaint, a municipality in which an airport is located is required by regulation to pass an ordinance and amend its master plan (as the case may require) to provide that airport operation is a permissible use of the land upon which the airport is located. N.J.A.C. 16:62-2.1(e) (“[t]hose municipalities which may currently classify an airport as non-conforming land use within the context of their ordinances or master plans of development, shall amend those ordinances or plans to eliminate that non-conforming status.”). State regulations also require that a host municipality pass an ordinance and amend its master plan to incorporate certain specified standards with respect to property adjacent to an airport. See N.J.A.C. 16:62-5.1 (“each municipality shall implement . . . ordinances which implement the [] standards for land use around airports” described in that provision).

In a defiant attempt to try to maintain control over Solberg Airport, Readington officials have expressly refused to enact this mandatory legislation.

**B. The Township Seeks To Circumvent Its Lack Of Authority Via This Condemnation Action.**

The Township’s and its officials’ efforts to circumvent the lack of authority over the Airport does not end with their blatant refusals to comply with New Jersey law. This condemnation action is another aspect of their ongoing campaign to control the Airport, with the apparent goal of constraining it to a point where its operation is unprofitable. The Township cannot misuse eminent domain to usurp the powers that reside in the State and Federal authorities under numerous statutes and regulations.

The authority of a government entity to condemn property is limited by the Fifth Amendment of the United States Constitution, which provides in relevant part that “nor shall private property be taken for public use, without just compensation.” That provision limits government entities’ authority to condemn to those instances where the condemnation serves a “public purpose”. Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005) (equating “public use” with “public purpose”).

Therefore, the New Jersey Eminent Domain Act extends the authority to condemn only to those instances where the condemnor seeks to condemn property for a **legitimate** “public purpose”. N.J.S.A. 20:3-1. A condemnor has no authority to condemn property where the asserted “public purpose” is a pretext and where the true purpose of the condemnation is illegitimate and beyond the condemnation authority granted under the Act. Overwhelming authority both in New Jersey and nationwide provides that “where the real purpose of the condemnation is other than the stated public purpose, the condemnation may be set aside.” Casino Reinvestment Dev. Auth. v. Banin, 320 N.J.Super. 342, 346 (Law Div. 1998); see Twp. of W. Orange v. 769 Assocs., 172 N.J. 564, 577 (2002) (“trial court must examine the ‘underlying purpose’ of the condemning authority” to ascertain whether taking is for a legitimate public purpose) (quoting Wilmington Parking Authority v. Land with Improv., 521 A.2d 227, 231 (Del. 1986)); City of Atl. City v. Cynwyd Invs., 148 N.J. 55, 73 (1997); Casino Redevelopment Auth. v. Banin, 320 N.J.Super. 342, 346 (Law Div. 1998) (requiring that the asserted public purpose be the “primary” purpose, and finding lack of authority where purpose of condemnation was primarily private); Earth Management, Inc. v. Heard County, 248 Ga.

442, 448 (Ga. 1981) (“the inescapable conclusion is that although a public park is a legitimate public use . . . we can only conclude that Heard County instituted the condemnation proceeding for the obvious purpose of preventing the land from being used as a hazardous waste facility.”); Pheasant Ridge Associates Ltd. Partnership v. Burlington, 399 Mass. 771, 779 (Mass. 1987) (“The public purposes for which the site purportedly was to be taken [for, among other things, recreation] were not purposes for which the town intended in good faith to take and use the property”, but rather, purpose was to avoid low income housing project); Redevelopment Authority of Erie v. Owners or Parties in Interest, 1 Pa. Commw. 378, 394 (Pa. Commw. Ct. 1971) (finding that “Authority’s real reason for condemning the property was to provide a new home for [private entity] and not to remove a substandard building” and that “[s]uch action is constitutionally impermissible.”); Miami v. Wolfe, 150 So. 2d 489, 490 (Fla.App.Ct. 1963) (condemnation attempt rejected where true purpose was not road extension, but rather, was to obtain profitable property interest).

Those authorities demonstrate that the concept of a “public purpose” is far from limitless. Consistent with those limitations of authority, the Eminent Domain Act at N.J.S.A. 20:3-11 expressly authorizes a condemnee to challenge a condemnor’s authority to condemn, and “all further steps in the action” are “stayed until that issue has been finally determined”. N.J.S.A. 20:3-11. The opinion in Borough of Essex Fells v. The Kessler Institute, 289 N.J.Super. 329 (Law Div. 1995), is factually and legally on point as to all relevant aspects of the case at bar, and is instructive in demonstrating those limits.

Like here, in Essex Fells the evidence showed that the condemnor was opposed to the use of the property proposed by the condemnee, Kessler. Local opposition mounted against Kessler and its proposal to operate a rehabilitation facility on the property. Several rallies were held by a private citizen's group to express opposition to that proposed use. Id. at 333-334.

Following that swell of opposition, Essex Fells explored measures to prevent Kessler from opening the facility and ultimately attempted to misuse its condemnation authority for that purpose. The borough officials justified the condemnation by asserting that the property was needed for the "public purpose" of "open space or park area." Id. At 340. In support of that justification, the condemnor made reference to its borough master plan, which reflected an interest in acquiring vacant land. Id. The borough also apparently asserted an argument relating to the environmental benefits of open space, because the property to be condemned included a "critical environmental area". Id.

The Essex Fells court, examining the record before it, determined that the "open space" justification was a pretext and that the condemnor's true purpose was to prevent Kessler from opening its facility. The court found that Essex Fells officials had expressed their concern regarding the use which might be made of the property in various public meetings. Id. at 339-40. In certain instances, the officials stated directly that they did not want Kessler to open a facility on the property. Id.

Turning to the public purpose of "open space" asserted by the borough, the court examined the borough's need for open space. The court observed that the National

Recreation and Park Association suggests that a municipality maintain 6.25 to 10.5 acres of park land per 1,000 persons. Id. at 341. The condemnor already had approximately 64 acres of park land per 1,000 residents. Id. Under those facts, the court found that the borough had “failed to present any credible ascertainable public need” for additional park land. Id.

Because the “power of eminent domain cannot be justified when used in response to public opinion against a proposed land use”, the court held that Essex Fells brought the action in bad faith and exceeded its authority by its attempt to condemn the property. Id. at 342.

The same approach was utilized by the court in Allamuchy v. Progressive Properties, Inc., A-987-02T3 (App.Div. July 16, 2004); cert. den. 182 N.J. 149 (2004).<sup>2</sup> In that case, the condemnee proposed to build multi-family housing on certain property located in Allamuchy Township. Id. at 7-9. The condemnor township opposed that use of the property, and sought to condemn the property as part of its pre-existing “aggressive campaign to acquire open space” in order to “create a greenbelt or greenway which would offer a more scenic view of the municipality from Interstate 80.” Id. at 9. The trial court rejected that justification as pretense, the Appellate Division affirmed, and our Supreme Court subsequently denied certification.

“[T]he Township’s claim of a public need for more park space in a large, sparsely populated community that was eighty percent undeveloped was pretextual”. Id. at 13. The condemnation action was brought, “in actuality, [in] an effort to stop

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<sup>2</sup> A copy of the opinion in Allamuchy v. Progressive Properties, Inc. is attached hereto as Exhibit A.

unwanted multi-family housing development in response to the opposition from residents” of the township. Id. That conclusion was supported by the evidence, which showed popular opposition to the proposed multi-family housing use, along with the fact that the township clearly already had “sufficient open space.” Id. at 13-15.

The evidence already in the possession of Solberg Aviation, obtained without yet having had the opportunity to conduct discovery, shows that the Township here seeks to condemn the property because of an irrational fear that Solberg Airport will become a “jetport”. Township officials have made numerous admissions to that effect, many of which are set forth in defendant’s Answer, and have engaged in a scare campaign to drive up anti-airport sentiment and to lay a basis for this condemnation action including but not limited to the following:

(a) A campaign mailing relating to the political campaign of current Readington Township Committeewoman Julia Allen in which she touts how she purportedly “fought to stop the Airport’s planned expansion” and how she is allegedly “negotiating to keep corporate jet traffic out of Readington by keeping the airport as is.” [See Exhibit A to the Answer].

(b) Another campaign mailing relating to the political campaign of Township Committeewoman Julia Allen urging the recipient to “STOP AIRPORT EXPANSION” and proclaiming “NO JETS”. That document further states that “Airport expansion [is] sure to destroy Readington’s environment and quality of life”. The second page of the document contains an illustration of an ominous jet airplane silhouette over a

map of Readington Township and warns that “Solberg Airport’s expansion will bring CORPORATE JET TRAFFIC to our skies”. [See Exhibit B to the Answer.]

(c) A campaign mailing promoting the political campaigns of current Readington Township Committeepersons Tom Auriemma and Beatrice Muir warning that “The Fight to Stop Solberg Airport Expansion is Far from Over!”, and that “Solberg supporters” will disseminate “misleading information” and make “erroneous claims” in order to get their “supporters elected to Township Committee so they can expand their airport”. Auriemma and Muir are proclaimed to be the “Right Vote for Readington” because they will “[s]top airport expansion” and “[k]eep jets out of Readington”. [See Exhibit C to the Answer.]

(d) In another mailing promoting the political campaigns of Auriemma and Muir, they state that their position on Solberg Airport is “no expansion of Solberg Airport”. [See Exhibit D to the Answer.]

(e) An “editorial” written by Auriemma in support of the bond ordinance authorizing Readington Township to undertake \$22 million in debt to purchase the Solberg Aviation property, which was published in the March 31, 2006 Courier News, stating that “[v]oting to oppose the \$22 million bond ordinance is a vote for a jetport in Readington”. [See Exhibit E to the Answer.]

(f) An “editorial” written by Readington Township Mayor Gerard J. Shamey, which appeared in the February 19, 2006 Courier News, stating that “an expanded Solberg Airport will unacceptably and irrevocably impair the quality of life of our residents.” [See Exhibit F to the Answer.]

(g) An “editorial” dated January 25, 2006 from the Hunterdon Review written by Committeewoman Julia Allen, stating that “full development of the airport to its maximum potential” would result in a “jetport similar in size to Morristown”. [See Exhibit G to the Answer.]

(h) A letter from Mayor Shamey to Readington residents dated January 27, 2006, emphasizing the importance of limiting the runway length at Solberg Airport to its current length in order to restrict the types of aircraft that use the airport and the frequency with which the airport is used. Shamey warns that “[o]nce airport improvements are in place to handle larger aircraft, increased utilization is no longer under control of the Township.” [See Exhibit H to the Answer.]

The pretext is also exposed by the undisputed fact that the Township of Readington, its mayor and committeepersons, have repeatedly violated state law by deliberately failing and refusing to enact an ordinance pursuant to Title 16 of the New Jersey regulations, N.J.A.C. 16:62-1, et seq. As described above, those regulations dictate that where an airport within a host municipality is currently located on land for which airport operation is a non-conforming use, the municipality must amend its ordinances and master plan to make airport operation a conforming use. Those regulations also require certain zoning and master plan requirements for land and properties surrounding an airport property. Not only has the Township refused to abide by that New Jersey state law, its officials have made statements acknowledging their defiance of those mandatory requirements. [See, e.g., Ex. L to the Answer.]



The evidence shows that, from the Township's perspective, the vote on the bond ordinance to fund and authorize the condemnation purchase was not a vote regarding whether or not the residents desired to obtain more open space. Rather, it was a vote on whether or not the residents desired a "jetport". [See, e.g. Exhibit E to the Answer ("[v]oting to oppose the \$22 million bond ordinance is a vote for a jetport in Readington"); see also Answer p. 13 ¶1 (the issue addressed at public meeting on the bond ordinance, according to Readington official, was "the right-sized airport for our Township.")]. This condemnation action is thus the culmination of the Township officials' efforts to fulfill their campaign promises to fight airport expansion, to assure that the airport is never permitted to accommodate modern aircraft, and ultimately to eliminate Solberg Airport as a viable operation in the municipality, state, and region.

Moreover, the evidence shows that the Township's combined open space and preserved farmland equals approximately 23.6% of the entire acreage of the Township, or approximately 3,931 acres. [See Certification of George Ritter, filed herewith, ¶¶5-6]. That sum far exceeds the recommendations of the New Jersey Green Acres Program Guidelines, which suggest that open developed and developable land held by a municipality equal 3% of a municipalities' total acreage. Moreover, even if the Township's preserved farmland is disregarded, the Township already has 3,320 acres of protected open space. [Id. at ¶¶7-8]. The Township clearly has an overabundance of open space, and cannot justify this condemnation action by asserting that its residents require additional open space.

The evidence already in defendant's possession exposes the Township's true purpose, and discovery in this matter is certain to yield additional evidence of the Township's bad faith and improper motivation in bringing this condemnation action.

**C. The Current Use Of The Property As An Airport Provides Benefits To The State And The Nation, And Therefore, Current Use Of The Property Already Serves A Public Purpose.**

New Jersey courts also consider the current use of the property in ascertaining whether the condemnor properly seeks to condemn the property for a public purpose. Where the current use of the property by the condemnor already provides a public benefit, the courts are more likely to find that the condemnor's public purpose is pretext and hold that the condemnation is not authorized.

The Essex Fells court noted that "Kessler is a not for profit, rehabilitation facility which provides treatment and services to persons with physical disabilities." Essex Fells, 289 N.J.Super. at 332. In addition, the "New Jersey Department of Health had issued a Certificate of Need to Kessler for its" proposed facility, thereby recognizing the public need for the facility. Id. at 333. Those interests served by the condemnee's proposed use of the property were a factor in the court's holding that the borough could not condemn the property because, given the public interests served by that proposed use, condemnation was not necessary to benefit the public. The Appellate Division in Mount Laurel Township v. Mipro Homes, LLC, 379 N.J.Super. 358, 377 (App.Div. 2005); cert. granted, 186 N.J. 241 (2006), acknowledged and adopted that reasoning and distinguished the facts before it on that basis. In Mount Laurel, the Court found that the condemnation sought by the Township was within its authority. In reaching that

conclusion, the court cited Essex Fells and observed that if the township had tried to condemn the property under circumstances where the owner planned an assisted living facility, a different result “might have been warranted”. “[S]ingle family homes that will be affordable only to upper-income families would not serve a comparable public interest.” Id. See Earth Management, 248 Ga. at 447 (with respect to property which was condemned to prevent use as a waste facility, finding that “[t]here is no law, statutory, constitutional or otherwise, which clothes a governing authority with the right to utilize the power of eminent domain in order to restrict a legitimate activity in which the state has an interest.”).

The evidence shows that Solberg Airport serves important economic and non-economic interests, and therefore, the public interest is already advanced by the current use of the property. The accompanying Certification of Arlene Feldman, a former FAA Regional Administrator, summarizes those benefits, including the business productivity and efficiency brought by the use of private aircraft. [Certification of Arlene Feldman ¶¶’s 2-7]. Ms. Feldman also describes the non-economic benefits conferred upon the public by facilities such as Solberg Airport. Solberg Airport and similar facilities not only reduce congestion at other overused airports such as Newark International, but also enable efficient rescue and emergency response services. [Id. at ¶10]. Those facilities, however, are increasingly threatened by local opposition such as that which motivates the Township to bring this condemnation action. [Id. at ¶8].

A report by the New Jersey General Aviation Study Commission (the “Aviation Study Report”) published in October 1998 addresses those subjects in far

greater detail. [Certification of Thor Solberg, Ex. A]. That Commission was appointed in 1993 by the New Jersey Legislature pursuant to P.L. 1993, c.336, to identify and address issues concerning the role of general aviation in New Jersey's transportation system. [Id. at 1.]. The appointment expressly provides that:

It shall be the duty of the commission to study the role of general aviation in the State's transportation system. Of particular importance in this study shall be the role of general aviation airports as reliever airports in the State's airport system, the closure of general aviation airports and ways to reverse that trend . . . and the relation between municipalities in this State and the general aviation airports located in or adjacent to those municipalities.

[Id. at the second, unnumbered page of the Report (designated at the top as p. "1825")].

The conclusions contained in the Aviation Study Report were the result of the review and evaluation of over 10,000 pages of documentary evidence, seven surveys and 100 meetings. [Id. at 8.]

The Aviation Study Report outlines how New Jersey has lost "half of its aviation infrastructure" since World War II, and concludes that its remaining "48 general aviation airports are in peril". [Id.] It notes that there are currently only "six airports in New Jersey that reasonably can be expected to support modern business aircraft" and "[e]ach airport closing has significant economic, tourism, and open-space preservation implications for the State". [Id.]

Beyond its detailed discussion of the economic benefits brought by general aviation airports, which are discussed in detail below, the Aviation Study Report expressly recognizes that **the presence of an airport actually ensures the continued**

**existence of open space:** “Many of New Jersey’s general aviation airports help preserve and protect the open space, woodlands and wetlands they encompass”. [Id.] This further supports the inescapable conclusion that Readington officials are using “open space” as a pretext in their efforts to control and ultimately decimate the airport. That purported public purpose is already being served by use of the property as an airport, and nowhere does the Aviation Study Report even suggest that modernization degrades the open space utility of an airport.

The Aviation Study Report further indicates that the continued existence of New Jersey’s general aviation airports are threatened. Many of New Jersey’s remaining general aviation airports are “outdated” and are “deteriorating after decades of State neglect.” [Id.]. The threat to New Jersey’s remaining general aviation airports stems, in part, from the fact that the host community is usually “unaware of its airport’s economic contribution”. [Id. at 2.] That, in turn, forces the owners of those airports to operate in a “hostile municipal regulatory environment”, which makes it “increasingly difficult to assure safe operation”. That hostile local climate is often accompanied by “unreasonable fears” of airport improvements and “intentional dissemination of misinformation” in opposition thereof. [Id. at 4.] Indeed the Aviation Study Report makes express reference to host communities’ frequent “refusal” to “allow these businesses to evolve” as a primary factor in the loss of New Jersey’s general aviation airports. [Id. at 9.] That refusal often destroys the economic viability of the airport. In fact, the Aviation Study Report concludes that the “quality of th[e] relationship” between an airport and its host

community is one of the most “important factors in determining the longevity of privately owned airports”. [Id. at 10.]

The Aviation Study Report opines that, as of the time of its creation, general aviation airports bring a total economic benefit to the state in the amount of \$1.7 billion. [Id. at 2.]. Because of the substantial benefits brought by New Jersey’s general aviation airports, the Aviation Study Report concludes that New Jersey should strive to update its general aviation airports to “accommodate every aircraft in the business fleet in all weather conditions”, which ordinarily includes a lengthening of an airport’s runways to accommodate modern aircraft. [Id. at 6.]

The Aviation Study Report outlines in detail how business aviation, the use of private aircraft by businesses, has developed into a norm and that therefore corporate location decisions are increasingly driven by the availability of adequate local aircraft facilities. [Id. at 14-18.] That increased use of business aviation results, in part, from the fact that New Jersey suffers from “a lot of highway congestion”. [Id. at 22.]. Therefore, the threat to New Jersey’s general aviation airports is a threat to the economy itself. “[A] declining aviation support system could lead to businesses deciding to relocate to states that provide a more stable aviation system and infrastructure”. [Id. at 19.] The Commission observed that New Jersey’s sister states are aware of this fact and “are vigorously developing their airport systems to attract major companies from New Jersey to relocate within their own borders.” [Id. at 19.]

As referenced by Ms. Feldman, the benefits of general aviation airports go far beyond tangible economic benefits, and the Aviation Study Report concludes that “a

community that has a general aviation airport benefits far more from it than does the actual airport owner”. [Id. at 23.] Although most citizens are unaware of those benefits, “the public would certainly notice their absence”. [Id. at 24.]. The Report proceeds to describe how general aviation airports help to preserve open space, increase tourism, foster aviation education, enable more efficient law enforcement, emergency, rescue services, and medical transport, and allow for recreational aviation. [Id. at 24-27.]

Turning to the threats facing those airports, the Aviation Study Report draws a contrast between those benefits and the poor return on investment received by airport owners, and notes that most remaining private owners remain in business because of their affinity for aviation. Factors resulting in insufficient income to airport owners include high property taxes, significant costs of regulatory compliance, and, relevant here, the “inordinate expense and resistance of municipalities when attempting to expand or improve an airport”. Those obstacles explain why, as of 1998, “not a single new airport has been established in New Jersey in the last 20 years” and instead “many airports have closed”. [Id. at 30.]

The Aviation Study Report outlines how those obstacles encountered by airport owners threaten any reasonable profitability, and thereby threaten the continued existence of New Jersey’s privately owned airports. As an initial matter, it “is a simple fact of aerodynamics that the modern aircraft needs a longer runway to become airborne safely”. [Id. at 34.] In the “1940’s an airport owner could operate a reasonable business catering to the needs of small aircraft, the business aircraft of the day”, and could do so with a 2,000 to 3,000 foot runway. [Id.] Today, modern business aircraft are larger and a

“viable private airport business today must be able to attract and accommodate the needs of that larger aircraft, for which 2,000 to 3,000 foot runways are wholly inadequate”. Other facilities at the airport must also be sufficient to “cater to the needs of modern business travelers”. [Id.]

Against that background, setting forth an airport’s needs in order to achieve reasonable economic viability, “many host municipalities will not allow the private airport owners to change their business” and, as here, local political “[c]ampaigns are run, and elections are won, based on a policy of ‘no growth’ for the airport.” Those local political campaigns are designed to “inspire irrational fears” among local residents that “a runway extension, designed to invite business aircraft, will suddenly transform their small country airport into a primary international airport.” Therefore, an airport owner seeking to make an airport economically viable through modernization is often forced into “wasteful and protracted litigation” which “makes the costs prohibitive to do business as a modern airport and to make safety improvements.” [Id. at 35.]

The Aviation Study Report includes a case study on Solberg Airport’s relationship with Readington Township to demonstrate the manner in which a local municipality often tries to inhibit the viability of a general aviation airport, and notes, as of 1998, that Readington Township continues to refuse to adopt the mandatory land use regulations under the Airport Safety Zoning Act [Id. at p. 38], a refusal that continues to this day. Excerpts of an interview with Readington Township’s then-Township Administrator are included as an example of an “adherence to disinformation fostered by the municipality” that is trying to prevent modernization. The Township Administrator’s



responses to the Commission's questions demonstrate to the Commission that Readington Township officials have endeavored to foster anti-airport sentiment by placing Readington Township residents in fear of a jetport. [Id. at 66-73.] At the conclusion of those interview excerpts, Commissioner McNamara chastised the Township Administrator: "I personally feel that you are not communicating with me, that you are trying to give a politically correct answer. By politically correct, I mean politically correct within the context of the government of Readington Township. That kind of discourse will lead to nothing." [Id. at 73.]

Thereafter, the Commission interviewed Readington Township's then-current Mayor. The Mayor bragged that she fought against improvement of Solberg Airport "30 years ago". "I was one of the leaders in founding the Jetport Association which eventually beat that back". [Id. at 75.] The then-Mayor discussed how Readington Township residents are "just getting more and more angry, and they're frantic thinking that there could be 5,670 foot runway -- absolutely frantic." [Id. at 77.]

The Aviation Study Report concludes that the statements of Readington officials provided in the interviews demonstrate how popular opposition to airport improvements results from a lack of understanding, and that "**general aviation airports do not have the potential of becoming major transport airports simply because they upgrade to accommodate business jets.**" [Id. at 79.]. The Aviation Study Report also concludes that the "very thing [that] gives airplanes and airports value . . . that they are part of a national transportation network", requires "uniform treatment", free from local control and local misinformation. [Id. at p. 86.] Moreover, "[b]egrudging airports the

proper length for their runways compromises aeronautical and public safety . . . and the airport's economic viability." [Id. at 112.]

For all of those reasons, the Aviation Study Report concludes that "New Jersey cannot afford to lose any of its existing general aviation airports", and where possible, each should be modernized to include at least one "runway of 4,700 feet in length" [Id. at 115]. It further concludes that the elimination of municipal interference, and improvements to general aviation airport facilities will "serve the needs of [the airports'] communities and the economy of the state" [Id. at 130], and that it will also eliminate the further loss of New Jersey's general aviation airports by "establish[ing] the economic viability" of those airports.

New Jersey's need for modernized general aviation facilities has obviously only increased since the time that that Report was published.

An earlier report, issued in May 1996 by the New Jersey Division of Aeronautics, discusses the primary and secondary beneficial impacts of New Jersey's general aviation airports. [Certification of Thor Solberg, Ex. B]. In that report it is estimated that as of 1994, Solberg Airport had a positive impact on New Jersey's economy in the sum of approximately \$10 million. [Id. at 136-38.]

Solberg Airport, and the ability of Solberg Airport to modernize to maintain economic viability, is also important to the nation's air transport system. The National Air Transport Association ("NATA") has determined that Solberg Airport is "vital to the future growth of aviation in our nation". [Certification of Thor Solberg, Ex. C]. In the report attached to that letter NATA describes how the nation's general aviation airports

are increasingly threatened by local opposition. The report also describes the importance of the nation's general aviation airports in view of the ever-increasing congestion at ordinary air carrier airports, such as Newark International. Another report issued by NATA examines the beneficial effects of general aviation airports on the economics of the United States and the local communities that are served by those airports. The report concludes that "[w]ith businesses accounting for most general aviation aircraft traffic . . . it is clear that providing adequate facilities for them is key to the nation's economy." [Certification of Thor Solberg Ex. D p. 5].

The Federal Aviation Administration (FAA), in a letter dated August 17, 2000, has also recognized Solberg Airport's importance as a "reliever airport" to Newark International. In that role, Solberg Airport accommodates "small general aviation aircraft which would otherwise be crowding, and further delaying commercial operations at Newark Airport." [Certification of Thor Solberg Ex. E].

The public interests furthered by Solberg Airport and its continued operation stand in sharp contrast to the pretextual, purported public purpose of "open space" asserted by Readington Township. Those interests currently being served underscore the impropriety of the Township's attempt to constrain the Airport out of existence.

## POINT II

### **ALL FURTHER PROCEEDINGS IN THIS MATTER SHOULD BE STAYED AND THE COURT SHOULD ENTER AN ORDER SETTING A SCHEDULE FOR DISCOVERY ON THE ISSUE OF PLAINTIFF'S AUTHORITY.**

Pursuant to N.J.S.A. 20:3-11, all further proceedings in this matter must be stayed. Moreover, it is appropriate for the Court to enter an Order setting a schedule for discovery as a result of the challenge to the condemnor's authority.

R. 4:73-1 governs the commencement of a condemnation action and provides that a condemnation action shall be commenced in a summary manner pursuant to R. 4:67-1. Where, as here, one or more issues of material fact are left unresolved by the parties' submissions, the matter proceeds thereafter as a plenary action. R. 4:67-5. That procedure contemplates that a litigant has a right to utilize the same substantive methods for building his or her case as those that are available in an ordinary lawsuit. See, e.g., County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380 (1963) (the rights of a litigant are "not diminished in the least by the 'summary' nature of the proceeding", but rather, "expedition is achieved by short-cutting procedural steps to the end that the merits will be tried at the earliest time consistent with fairness.").

Therefore, courts routinely order that discovery be allowed where a condemnor's authority is challenged. See Township of West Orange v. 769 Assocs. LLC, 172 N.J. 564, 570 (2002) (referring to a prior "complicated and protracted discovery dispute"); Township of West Orange v. 769 Assocs. LLC, 341 N.J. Super. 580, 587-588 (App. Div. 2001) (stating that condemnee "was granted leave to conduct discovery

regarding the purported public purpose of the proposed taking.”); Borough of Essex Fells v. Kessler Inst. for Rehab., 289 N.J. Super. 329, 341 (Law Div. 1995) (referring to the “deposition testimony” of the “borough planner”).

Accordingly, the Court should set a discovery schedule and order that all methods of discovery available under our Rules of Court may be utilized by the parties to obtain discovery on the issue of the Township’s authority to condemn.

**CONCLUSION**

For the foregoing reasons, to be further elucidated at oral argument, defendants Solberg Aviation Company and Thor Solberg, Jr. respectfully request that further proceedings on the condemnation Complaint in this matter be stayed pursuant to N.J.S.A. 20:3-11 and that the Court enter a discovery schedule and related orders so that the substantial issue of plaintiff’s authority may be tested and the true anti-public purpose of this action may be fully revealed.

Dated: October 20, 2006

Respectfully submitted,

Of Counsel:

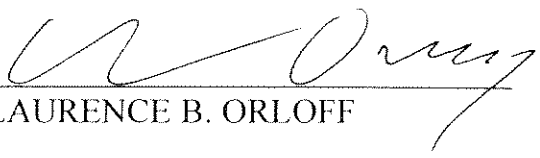
Laurence B. Orloff

ORLOFF, LOWENBACH, STIFELMAN  
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Suzanne Solberg Nagle and Lorraine Solberg

On the Brief:

Laurence B. Orloff  
Philip E. Mazur

By:   
LAURENCE B. ORLOFF

44-2-7402

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-987-02T3

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

Plaintiff-Appellant,

v.

PROGRESSIVE PROPERTIES, INC.,

Defendant-Respondent,

and

SOLITUDE FINANCIAL CORPORATION,  
INC., GPU ENERGY, as successor-in-interest  
to NEW JERSEY POWER & LIGHT COMPANY;  
GPU ENERGY, as successor-in-interest  
to JERSEY CENTRAL POWER & LIGHT CO.;  
NEW JERSEY BELL TELEPHONE COMPANY;  
UNITED TELEPHONE COMPANY OF NEW JERSEY;  
WARREN COUNTY SOIL CONSERVATION  
DISTRICT; PANTHER VALLEY SERVICE,  
INC.; PEQUEST SEWER COMPANY; MPW  
COMMUNITIES OF NEW JERSEY, INC.,  
TOWNSHIP OF ALLAMUCHY; STATE OF NEW  
JERSEY; PANTHER VALLEY PROPERTY OWNERS  
ASSOCIATION and ZOUBEK ASSOCIATES, INC.,

Defendants.

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

Plaintiff-Appellant,

v.

BAKER RESIDENTIAL LIMITED PARTNERSHIP,

Defendant-Respondent,

and

CONSOLIDATED RAIL CORPORATION;  
MPW COMMUNITIES OF NEW JERSEY, INC.;  
PANTHER VALLEY SERVICE, INC.; JEAN  
HARDER SHIELDS (formerly known as  
Jean Harder Ryan); WILLIAM SHIELDS, JR.;  
WINTHROP RUTHERFURD; ALICE POLK  
RUTHERFURD; GUY G. RUTHERFURD;  
GEORGETTE WHELAN RUTHERFURD; PANTHER  
VALLEY, LTD.; PEQUEST WATER COMPANY;  
PEQUEST SEWER COMPANY; WILLIS REED;  
PANTHER VALLEY, INC.; PANTHER VALLEY  
PROPERTY OWNERS ASSOCIATION, INC.;  
GPU ENERGY, formerly known as NEW  
JERSEY POWER & LIGHT COMPANY, the  
TOWNSHIP OF ALLAMUCHY, a municipal  
corporation of the State of New Jersey;  
and the STATE OF NEW JERSEY,

Defendants.

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

Plaintiff,

v.

BAKER RESIDENTIAL LIMITED PARTNERSHIP,

Defendant-Respondent,

and

PANTHER VALLEY COUNTRY CLUB, INC.;  
PANTHER VALLEY SERVICE, INC.; JEAN  
HARDER SHIELDS (formally Jean Harder  
Ryan); WILLIAM SHIELDS, JR.; FRED  
HEIDENSON; MINA K. HEIDENSON; GUY G.  
RUTHERFURD; GEORGETTE W. RUTHERFURD;

WINTHROP RUTHERFURD; ALICE POLK  
RUTHERFURD; JOHN PHILIP RUTHERFURD;  
JACQUELINE O. RUTHERFURD; PANTHER  
VALLEY LTD.; PEQUEST WATER COMPANY;  
PEQUEST SEWER COMPANY; PANTHER VALLEY  
PROPERTY OWNERS ASSOCIATION, INC.;  
PANTHER VALLEY, INC.; GPU ENERGY,  
formerly known as NEW JERSEY POWER &  
LIGHT COMPANY; MPW COMMUNITIES OF  
NEW JERSEY, INC.; the TOWNSHIP OF  
ALLAMUCHY, a municipal corporation of  
the State of New Jersey; and the STATE  
OF NEW JERSEY,

Defendants.

Argued: June 3, 2004 - Decided:

JUL 16 2004

Before Judges Kestin, Axelrad and Lario.

On appeal from the Superior Court of New  
Jersey, Law Division, Hunterdon County, L-  
516-01, L-517-01 and L-518-01.

Edward D. McKirdy argued the cause for  
appellant Township of Allamuchy (McKirdy and  
Riskin, attorneys; Mr. McKirdy of counsel;  
Mr. McKirdy, Anthony F. Della Pelle and L.  
Jeffrey Lewis, on the brief).

Meryl A.G. Gonchar argued the cause for  
respondent Baker Residential Limited  
Partnership (Greenbaum, Rowe, Smith, Rabin,  
Davis & Himmel, attorneys; Ms. Gonchar, of  
counsel; Ms. Gonchar, Peter A. Buchsbaum,  
Steven Firkser and Maya Obradovic, on the  
brief).

No other party participated in this appeal.

PER CURIAM

Plaintiff, Township of Allamuchy, appeals from a judgment  
dismissing its complaint seeking to condemn for open space



purposes three tracts of land that had been approved for multi-family development on the grounds they were instituted in bad faith and not for public purposes.<sup>1</sup> The Township also challenges the court's award of counsel fees and costs to defendant. We affirm.

The Township consists of twenty square miles (13,000 acres) in the northeastern corner of Warren County. The Township grew from a population of approximately 973 in 1960 to about 3500 people in 1990 and about 3700 people in 2000. The Township is bordered to the southeast by Mount Olive Township and Rackettstown, to the southwest by Independence Township, to the northwest by Frelinghuysen Township, and to the northeast by Byram and Green Townships. Interstate 80 bisects the Township from east to west, dividing the northern portion from the southern portion of the municipality.

The valley north of Interstate 80 is mostly vacant and agricultural land with large tracts of active farms. The southern half of the Township is more mountainous. More than

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<sup>1</sup>The judgment had also dismissed plaintiff's condemnation complaint against a forty-five acre parcel known as The Knoll, owned by Progressive Properties, that had received planning board approval on December 15, 1999, for the construction of four apartment buildings consisting of 100 units, three of which would be affordable. During the appeal, the Township settled with Progressive and the appeal was dismissed with respect to that tract.

ninety percent of the Township consists of vacant or agricultural land, wooded areas, or state parks. An additional 1.41 percent is open space, 3.41 percent is developed as single-family homes, and another .44 percent is developed as townhouses or multi-family uses. Commercial, industrial, and office uses make up a small fraction of the Township.

Most of the Township is included in an area known as the New York-New Jersey Highlands Region. According to the "New York-New Jersey Highlands Regional Study" prepared by the United States Department of Agriculture, the Highlands Region, which extends from northwestern Connecticut through eastern Pennsylvania, contains extensive forests which protect groundwater runoff, and as a result, the area is considered an important source for clean drinking water. The State Development and Redevelopment Plan has designated the Highlands Region as a "special resource area" with unique characteristics or resources of statewide importance, which are essential to the sustained well-being and functioning of the region and other regions. The New Jersey State Development and Redevelopment Plan (State Plan) at 139 (2001). The Highlands Region is characterized by rugged topography, distinguishing geology, and abundant precipitation, and is largely designated as environmentally sensitive. Id. at 140.

The properties under appeal are part of the Panther Valley planned unit development (PUD), which is a gated community with access exclusively from County Route 17. Panther Valley, consisting of about 1500 acres, was designed and approved in 1969 to accommodate over 2500 homes. Panther Valley comprises about 1500 homes and accounts for approximately eighty percent of the Township's population and dwelling units. There are a number of recreational facilities within Panther Valley, including tennis courts, swimming pools, tot lots, and a private golf course. The Panther Valley Property Owners Association (Association) owns substantial tracts of open space.

Defendant, Baker Residential Limited Partnership, owns the two parcels under appeal. They are a 20.93-acre parcel, designated as Block 602, Lots 26.07 and 27, also known as Village IX, and a 283-acre parcel, designated as Block 701, Lots 1001 and 1004, also known as Village VI.

Village IX is located in a single-family zone along the west side of Alphano Road. While located outside of the gates of Panther Valley, it is part of the Panther Valley community and subject to the regulations of the Association. The property has few environmental constraints; there are minimal steep slopes and an area of freshwater wetlands concentrated in the rear, around which there is a conservation easement. The prior

owner had received preliminary major site plan approval in 1990, which was extended. Baker filed for final approval in December 1998, and on October 27, 1999, the planning board granted final approval for the construction of 168 condominium flats, 96 one-bedroom units, and 72 two-bedroom units. Village IX would not contain any Mount Laurel<sup>2</sup> affordable housing units. It would, however, provide less expensive condominium flats, which would sell for less than the larger townhouse units and would generally be more affordable than single-family homes in Panther Valley and elsewhere in the Township. Moreover, Village IX is a component of the approved storm water management plan for the inclusionary site, Village VI.

Village VI is located along the east side of Alfano Road and is within the gates of the Panther Valley PUD. The property is zoned SFR (single-family residential), which permits large lot single-family homes and a townhouse cluster option. The subject tract consists of approximately 283 acres which is part of a larger 368-acre tract, the balance of which had previously been dedicated to the Association. The property has few

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<sup>2</sup>S. Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975) (Mount Laurel I); S. Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II).

environmental constraints; it has some steep slopes but no freshwater wetlands, flood plains, or limestone.

The Village VI site was included in the Township's 1993 Housing Plan Element and Housing Compliance Program, which noted that the townhouse option allowed protection and preservation of environmentally sensitive areas and also allowed for open space adjacent to the Panther Valley Golf Club to be dedicated. The Council on Affordable Housing (COAH) approved the inclusion of ten affordable units in the development towards the satisfaction of the Township's "second round" affordable housing obligation, and granted substantive certification on September 4, 1996. Baker sought preliminary major site plan and subdivision approval for Village VI on February 25, 1999. Originally, Baker had sought to develop sixty single-family homes and 322 townhouse units. During the site plan and subdivision review process, however, Baker agreed to reduce the development to forty-seven single-family homes and increase the number of townhouses from 322 to 324, ten of which would be Mount Laurel units. The planning board approved the application on October 25, 2000. Under the approved development plan, more than seventy percent of the site would remain undisturbed, the majority of which would remain as open space encumbered by

conservation easements. Baker filed for final approval for Village VI in January 2001.

In July 2000, the Township petitioned COAH for approval of a modified fair share housing plan with an additional site. Upon Baker's objection, the Township withdrew its petition. In October 2000, the Township sought to amend its fair share plan, which proposed a thirteen-unit regional contribution agreement (RCA) in lieu of constructing any new affordable units in the municipality. On December 12, 2001, COAH placed the Township's petition on inactive status pending the outcome of the present litigation.

In 1999 the Township sought to acquire these properties as part of an aggressive campaign to acquire open space, one purpose of which was to create a greenbelt or greenway which would offer a more scenic view of the municipality from Interstate 80. Following unsuccessful negotiations for the acquisition of these properties, in November and December 2000, the Township governing body adopted ordinances authorizing the acquisition of these parcels by eminent domain. Between March and May 2001, the Township filed declarations of taking, orders to show cause, and verified complaints for condemnation of these parcels. The Township deposited into court its appraiser's determined fair market value of Village IX of \$1,680,000 and

Village VI of \$2,826,000. Defendant's answer denied the Township's authority to condemn, alleging that acquisition of the parcels was not necessary for a public use or public purpose and that the Township had acted in bad faith. Defendant also alleged the taking would violate the Mount Laurel doctrine, the State Development and Redevelopment Plan and the Township's Master Plan.

With regard to the Village VI parcel, Baker also filed a separate lawsuit alleging exclusionary zoning and seeking a builder's remedy. The condemnation and Mount Laurel actions were consolidated. Following oral argument on Baker's summary judgment motion, Judge Mahon found the condemnation actions were instituted in bad faith and not for a public purpose and dismissed the Township's complaints. He also awarded counsel fees to Baker. Final judgment was entered on September 9, 2002, and amended on September 27, 2002, dismissing the condemnation complaints with prejudice, revesting title to the properties in the respective defendants, discharging all liens, and directing the Township to pay Baker \$172,853.69 in costs and counsel fees. The court severed the exclusionary zoning case and retained jurisdiction over it. By consent, the judgment stayed any action before COAH and development of the properties pending appeal.

The Township asserts the following arguments on appeal:

POINT I

THE COURT BELOW MISAPPLIED THE APPLICABLE CASE LAW.

A. The Motion Judge Ignored Controlling Authority.

B. The Motion Judge Failed to Apply the Proper Standard of Judicial Review.

C. The Motion Judge Misread and Relied Upon Inapposite Case Law.

POINT II

THE MOTION JUDGE FOUND NO NEED TO PRESERVE OPEN SPACE EVEN IN THE STATE'S ENVIRONMENTALLY SENSITIVE NORTHWEST HIGHLANDS AND IMPROPERLY CONCLUDED THAT ALLAMUCHY'S MOTIVES MUST, THEREFORE, BE "PRETEXTUAL."

POINT III

THE WITHIN ACQUISITION WAS NOT TO PREVENT MT. LAUREL HOUSING, AN OBJECTIVE THAT WAS CONSISTENT WITH THE PRESERVATION OF THE SITES FOR OPEN SPACE.

POINT IV

THE MOTION JUDGE FAILED TO APPLY THE APPROPRIATE STANDARD ON A MOTION FOR SUMMARY JUDGMENT AND COULD NOT PROPERLY DISMISS THE TOWNSHIP'S CONDEMNATION WITHOUT A PLENARY HEARING.

A. Summary Judgment Is Not Appropriate Where a Party's Intent Is the Issue.

B. The Motion Judge Failed to Consider All of the Competent Evidence in the Record.



POINT V  
THE LOWER COURT ERRED IN AWARDING ATTORNEYS  
FEES TO DEFENDANTS AND ERRED IN DETERMINING  
THE QUANTUM OF FEES.

A. Defendants Are Not Entitled to  
Any Award of Costs or Fees.

B. The Costs and Fees Requested by  
Defendants Are Improper as to  
Their Scope and Unreasonable in  
Amount.

We are not persuaded by the Township's arguments and affirm substantially for the reasons articulated by Judge Mahon in his oral opinions of April 24, 2002 and August 15, 2002. The motion judge analyzed the appropriate facts, which were presented in a voluminous record, in accordance with applicable law. We discern no reason for him to have conducted a plenary hearing where all material facts are undisputed and the only issues revolved around their implications. County of Ocean v. Stockhold, 129 N.J. Super. 286, 290 (App. Div. 1974).

Judge Mahon articulated his reasons in a comprehensive, well thought out, and persuasively articulated oral opinion. There is ample basis in the record for his finding that the property owner had shouldered its enhanced burden and had demonstrated, clearly and convincingly, that the Township's motives were improper and lacking in good faith. City of Newark v. New Jersey Tpk. Auth., 7 N.J. 377, 381-82 (1951); Essex Cty.

Improvement Auth. v. R.A.R. Dev. Assocs., 323 N.J. Super. 505, 516 (Law Div. 1999); Borough of Essex Fells v. Kessler Inst., 289 N.J. Super. 329, 342 (Law Div. 1995). Judge Mahon found, as well, that the selection of the particular properties at issue was arbitrary and capricious. The Township had not sought to condemn other properties, as suitable for open space preservation, that had not been slated for multi-family or affordable housing development.

There is also substantial evidence in the record to support the motion judge's finding that the Township's claim of a public need for more park or open space in a large, sparsely populated community that was eighty percent undeveloped was pretextual and was, in actuality, an effort to stop unwanted multi-family housing development in response to the opposition from residents of Panther Valley. It was significant to Judge Mahon that the Township had changed its position rather recently on issues of development generally and with regard to these tracts in particular. Neither parcel had been identified as an "important site" to be preserved in the Township's 1998 Conservation Plan Element nor proposed for open space or parkland designation in the Township's 1999 Master Plan re-examination report. Moreover, the sites were granted development approvals,

including variances, in the fall of 2000. As the motion judge noted,

[s]ometime in 1999, the township appears to have decided to eliminate further multi-family and affordable development in Panther Valley. The genesis of this decision is unclear. There is no adequate documentation to justify the sudden determination that Village IX [and] Village VI . . . had to be preserved as open space. The township determined that development, in accordance with the current zoning, would be costly, in part due to the assertion that a new school would be needed.

. . . .

On or about November 20, 2000, more than a year after it granted final approval to Village IX and mere months after the board concluded that there was more than ample open space to accommodate all the existing and likely future residents of the community, the township adopted Ordinance Number 13-00 which provided that: []

"The township has determined that there is a need to acquire the property for open space preservation, parkland and/or other public purposes and that such acquisition is in the best interest of the township." []

Judge Mahon appropriately concluded:

Consistent with the[] cases and based on the undisputed record, Allamuchy's position claiming a public need for additional park space or open space is pretextual based on opposition to the construction of inclusionary and multi-family housing consistent with the municipality's constitutional obligation as well as its own master plan and zoning.

There has been no demonstrated need for any additional open space according to any of the township generated documents, including, significantly, the township's own Open Space and Recreation Plan Element of its own master plan adopted in 2000. It specifically found that there was more than adequate recreation available for all existing and future residents of the community.

Given the amount of land in Allamuchy already devoted to open space and the predicted population trends within the municipality, there is sufficient open space. Thus, the uncontested facts demonstrate that the motive for the taking of defendants' property is not based upon need but, rather, improperly to thwart the development of multi-family and affordable housing in Panther Valley and the municipality.

. . . .

The recent about-face to Allamuchy's approach to these properties has not been satisfactorily explained or justified. While a municipality has broad powers of eminent domain, those powers are not without limits. Where they are used for a[n] improper purpose, the condemnation cannot be permitted to proceed.

Judge Mahon's well-reasoned decision of April 24, 2002 is not weakened by his reference to our opinion in Township of W. Orange v. 769 Assocs., L.L.C., 341 N.J. Super. 580 (App. Div. 2001), which was subsequently reversed by the Supreme Court. 172 N.J. 564 (2002). The Township mistakenly asserts that the motion judge relied upon our decision in 769 Associates to

establish a new standard of review of a public body's motives concerning the taking of property for public use. On the contrary, the judge mentioned 769 Associates solely as a recent Appellate Division case citing Kessler, supra, 289 N.J. Super. 329, "in support of the proposition that a condemnation may be set aside when a condemnation is commenced for an apparent valid public purpose but the real purpose is otherwise." The Court's reversal of our decision did not criticize the reliance on Kessler nor its holding. Moreover, in 769 Associates, the Court expressly found no evidence in the record of improper motives or bad faith in the township's condemnation of the property for use as a public road. The record here is otherwise.

Nor does our recent decision in Deland v. Township of Berkeley Heights, 361 N.J. Super. 1, 4 (App. Div.), certif. denied, 178 N.J. 32 and 179 N.J. 185 (2003), that the mere designation for Mount Laurel housing does not insulate the property from the exercise of the power of eminent domain, undercut Judge Mahon's decision. The inclusion of affordable housing in Village IX was one of many components considered by the motion judge in dismissing the Township's condemnation of Baker's properties. Even without that component, his findings on the issues challenged are amply supported by the record.

Nor do we discern any abuse of discretion in the court's award of counsel fees and costs against the public entity and the quantum of the award. Counsel fees may be awarded in all cases where permitted by statute. R. 4:42-9(a)(8). Under the Eminent Domain Act,

[i]f the court renders final judgment that the condemnor cannot acquire the real property by condemnation or, if the condemnation action is abandoned by the condemnor, then the court shall award the owner of any right, or title to, or interest in such real property, such sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees.

[N.J.S.A. 20:3-26b.]

In addition, if, after filing a declaration of taking, a judgment is entered dismissing the action, the condemnor shall "pay any damages sustained by the condemnee as a result of the action of the condemnor, and the expenses of the condemnee."  
N.J.S.A. 20:3-24.

Judge Mahon reduced Baker's request by directing it to revise its submission to delete extensive costs and fees incurred in COAH proceedings. He awarded Baker \$121,099 for legal services; \$36,146 for a planner, construction estimator, and appraisal costs; and \$15,607 for reimbursement of real estate taxes. These are compensable fees under the Act. We are

satisfied the motion judge gave the fees and costs requests detailed review, made value judgments that were well within his discretion, and provided sufficient explanations for his reasons for awarding the amounts challenged on appeal. Thus, we find no basis to disturb these determinations. DePalma v. Building Inspection Underwriters, 350 N.J. Super. 195, 218 (App. Div. 2002).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on file  
in my office.

*John F. Flynn*  
CLERK OF THE APPELLATE DIVISION