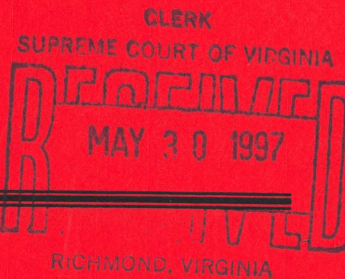


255VA69



IN THE

Supreme Court of Virginia

RECORD NO. 970016

EDWARD H. EVANS
and
ELIZABETH B. EVANS,

Appellants,

v.

SMYTH-WYTHE AIRPORT COMMISSION,

Appellee.

JOINT APPENDIX

Stephen M. Hodges
Mark E. Frye
PENN, STUART & ESKRIDGE
Post Office Box 2288
Abingdon, Virginia 24210
(540) 628-5151

Counsel for Appellants

John S. Bundy
Pamela Meade Sargent
WHITE, BUNDY, McELROY
HODGES & SARGENT
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(540) 628-9515

Counsel for Appellee

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CIRCUIT COURT OF SMYTH COUNTY, VIRGINIA

SMYTH-WYTHE AIRPORT COMMISSION)

Plaintiff)

Law Action No. _____

v.)

EDWARD H. EVANS and)

ELIZABETH B. EVANS)

Route 1)

Rural Retreat, Virginia)

Defendants)

MOTION FOR DECLARATORY JUDGMENT

1. The Plaintiff, the Smyth-Wythe Airport Commission (the Commission), is a public body created by the County of Smyth, the County of Wythe, the Town of Marion, the Town of Wytheville, and the Town of Rural Retreat, pursuant to Section 5.1-35 of the 1950 Code of Virginia, as amended.

2. Pursuant to Sections 5.1-33 and 5.1-34 of the 1950 Code of Virginia, as amended, the Commission has been vested with the power of eminent domain for the purposes of acquiring lands, easements and privileges for the operation of the Mountain Empire Airport (the Airport), which is located in Smyth County and is operated by the Commission.

3. Public convenience and necessity and the general interest and welfare of the communities served by the Commission require the extension and improvement of the Airport in order to more effectively serve the needs of the surrounding communities and to comply with the regulations of the Federal Aviation Authority. Due to the nature of aviation at the present time and the emergence of the corporate jet as a means of business travel, it is necessary to provide facilities for landing of corporate jets at the Airport by lengthening the threshold of the Airport runway to permit this use and service. In order to provide proper glide paths and slope easements, both horizontal and vertical, for the approach for landing and takeoff of aircraft, it is necessary to acquire certain property adjacent to the Airport, which is owned by the Defendants.

4. The Commission proposes to extend the threshold of the Airport in an eastwardly direction and as a part of the eastward extension of the threshold of the Airport Runway, requires the acquisition of the property hereinafter described, owned by the Defendants, in order to demolish the buildings thereon and provide a clear zone and flight path for sole use by aircraft in landing on the Airport runway. A plat or map showing the area to be acquired from the Defendants (the Property) is attached as Exhibit A.

5. On February 15, 1996, the Commission, by counsel, pursuant to Section 25-46.5 of the 1950 Code of Virginia, as amended, made a written offer to the Defendants to purchase the Property. This offer was rejected, and the Commission instituted condemnation proceedings in this Court on March 15, 1996, by filing a Petition for Condemnation against the Defendants (the Condemnation Case). (See Law No. 173CL96005081-00.)

6. By their Answer and Grounds of Defense filed in the Condemnation Case, the Defendants assert that any condemnation proceedings by the Commission with regard to the Property is barred by the provisions of a certain agreed order entered by this Court on July 5, 1984, which is recorded in Common Law Order Book No. 33, Page 627, (the Order). A copy of the Order is attached as Exhibit B.

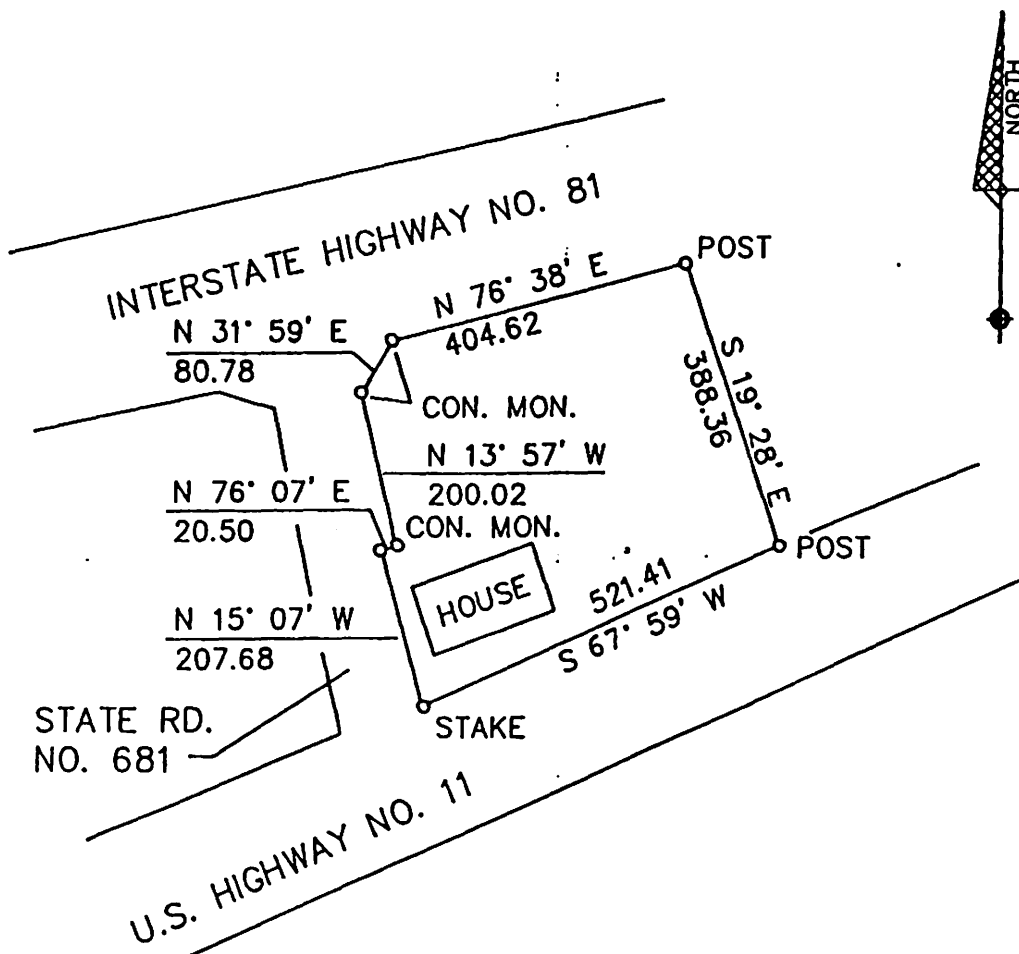
7. Accordingly, the Commission moves this Court, pursuant to Section 8.01-184 of the 1950 Code of Virginia, as amended, for a judgment declaring that any portion of this Order which purports to limit the Commission's future right to initiate condemnation proceedings against the Property is null and void *ab initio* because the Commission had no authority to voluntarily surrender or relinquish the power of eminent domain granted to it by the General Assembly.

SMYTH-WYTHE AIRPORT COMMISSION

By

Counsel

John S. Bundy
WHITE BUNDY MCELROY
HODGES & SARGENT
P. O. Box 429
Abingdon, VA 24212
Tel: 540/628-9515



PLAT

MADE
FOR :

SMYTH WYTHE AIRPORT COMM.

SHOWING SURVEY PROPERTY OF

EDWARD E. EVANS ET. UX.

BEING

THE SAME PROPERTY AS RECORDED IN D.B. 172 P. 206

NOT IN FLOOD ZONE

SMYTH COUNTY

By: Joe T. Gollehon

CERTIFIED LAND SURVEYOR

DATE: 6-12-75

REV. 3-15-96

SCALE: 200' = 1"

JOE T. GOLLEHON C.L.S.
P.O. BOX 734
CHILHOWIE, VA 24319



REVISED: 3-14-96

VIRGINIA

6-12-75

I HEREBY CERTIFY THAT THIS PLAT
OF SURVEY IS CORRECT TO THE BEST
OF MY KNOWLEDGE.

Joe T. Gollehon
LAND SURVEYOR

EXHIBIT A

PRESENT: THE HONORABLE J. AUSTIN MATTHEWS, JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF SMYTH COUNTY

SMYTH WYTHE JOINT AIRPORT COMMISSION

Plaintiff

vs

EDWARD H. EVANS, AND
ELIZABETH B. EVANS

Defendants

AND
EDWARD H. EVANS, AND
ELIZABETH B. EVANS

)

ORDER

Plaintiffs

vs.

SMYTH WYTHE JOINT AIRPORT COMMISSION

Defendant

This matter came again on this day to be heard upon the actions previously filed by the said Edward H. Evans and Elizabeth B. Evans against the Smyth Wythe Joint Airport Commission and upon the condemnation proceeding previously filed by the Smyth Wythe Joint Airport Commission against the defendants, Edward H. Evans and Elizabeth B. Evans; upon the previous consolidation of the these actions by the Court for trial herein; upon the representations of Counsel for the parties that a compromise settlement and agreement had been reached between the parties hereto with the concurrence of the Federal Aviation Authority, the Smyth Wythe Joint Airport Commission and the said Edward H. Evans and Elizabeth B. Evans.

On consideration of all of which, the Court doth find that the parties have agreed to the following terms and conditions of settlement of the actions herein by the Smyth Wythe Joint Airport Commission and by the said Edward H. and Elizabeth B. Evans.

VYN. TATE & TATE
ATTORNEYS AT LAW
MARION, VIRGINIA

1. The Smythe Wythe Joint Airport Commission has agreed, with the concurrence of the Federal Aviation Authority, to displace the threshold of the runway at the Mt. Empire Airport to such an extent that no clear zone easement will be required over the property of Edward H. Evans and Elizabeth B. Evans, so long as it is owned by them, which said displacement is shown on a drawing or sketch attached hereto and marked as Exhibit A. Said threshold as so displaced will not be moved to the east and the same will be clearly marked and lighted on the ground to indicate to pilots approaching said runway for landing the proper location of said threshold, which markings and lights will be maintained by the said Commission. In this regard the eastern end of said runway will not be moved or extended in an easterly direction from its present eastern terminus so long as the Evanses or their children own the property described in Paragraph 8, hereafter.

2. The Smyth Wythe Joint Airport Commission has agreed that it is not its intention to acquire any interest, either clear zone easement or otherwise, over or on the property of the defendants, Edward H. Evans and Elizabeth B. Evans.

3. Any construction and/or use of any property adjacent to the Evans' property shall terminate at the eastern edge of the right of way of State Route 681, being the public road immediately to the west of the Evans' property.

4. The said Edward H. Evans and Elizabeth B. Evans have agreed to dismiss, with prejudice, any claims, demands, or causes of action against the Smyth Wythe Joint Airport Commission existing as of this date as described in said suit.

5. The Smythe Wythe Joint Airport Commission has agreed to pay unto the said Edward H. Evans, Elizabeth B. Evans and W. H. Jolly, their

attorney, the sum of Eight Hundred Seventy Dollars (\$870.00), which said funds have heretofore been tendered, by check, and received and accepted by the said Edward H. Evans, Elizabeth B. Evans and W. H. Jolly.

6. Except for the payment outlined above, each party shall bear his own costs and expenses herein.

7. That both parties shall jointly move the Court to dismiss the pending actions herein, including the action of Edward H. Evans and Elizabeth B. Evans, his wife, against the Smyth Wythe Joint Airport Commission and the action of the Smyth Wythe Joint Airport Commission against Edward H. Evans and Elizabeth B. Evans, his wife, with prejudice to all claims and rights that they may have as outlined therein.

8. That the entry of this Order shall be res judicata, as provided by law, as to any further right of the Smyth Wythe Joint Airport Commission to condemn any portion of the Edward H. or Elizabeth B. Evans property located to the east of State Route 681, and to the south of Interstate Highway 81, so long as the same is owned by the Evanses or their children.

On consideration of which, the Court hath maturely considered the terms of the compromise settlement herein by both parties, each against the other, and doth find that said compromise is a reasonable and just compromise of the controversies existing herein and doth, therefore, ratify and approve the same.

On consideration of all of which, the Court doth ADJUDGE and ORDER that the terms set forth heretofore shall be observed by the parties herein; that the claim of the plaintiffs, Edward H. Evans and Elizabeth B. Evans, his wife, against the Smyth Wythe Joint Airport Commission be and it is hereby dismissed with prejudice; that the condemnation proceedings heretofore filed by the Smyth Wythe Joint Airport Commission against the defendants, Edward

H. Evans and Elizabeth B. Evans, his wife, be and it is hereby dismissed with prejudice; that the said Smyth Wythe Joint Airport Commission shall pay unto the defendants, Edward H. Evans, Elizabeth B. Evans and to their attorney. W. H. Jolly, the sum of Eight Hundred Seventy Dollars (\$870.00), and that by the execution of this order, the receipt of said funds are acknowledged; that nothing further remaining to be done in either of these proceedings herein, the same are herewith dismissed from the docket of this Court with prejudice.

The Clerk of this Court shall certify copies hereof to Counsel of Record.

WE ASK FOR THIS ORDER:

JOLLY, PLACE, FRALIN & PRILLAMAN, P. C.
Attorneys at Law
Galax, Virginia 24333
Counsel for Edward H. Evans and
Elizabeth B. Evans

BY W. H. Jolly
W. H. Jolly

GWYN, TATE & TATE
Marion, Virginia 24354
Counsel for Smyth Wythe
Joint Airport Commission

BY John H. Tate, Jr.
John H. Tate, Jr.

ENTER THIS _____ DAY OF _____, 1984.

JUDGE

GWYN, TATE & TATE
ATTORNEYS AT LAW
MARION, VIRGINIA

A COPY, TESTE:
JIMMY L. WARREN, CLERK OF THE
CIRCUIT COURT OF SMYTH COUNTY

BY: Osborne

DEPUTY CLERK

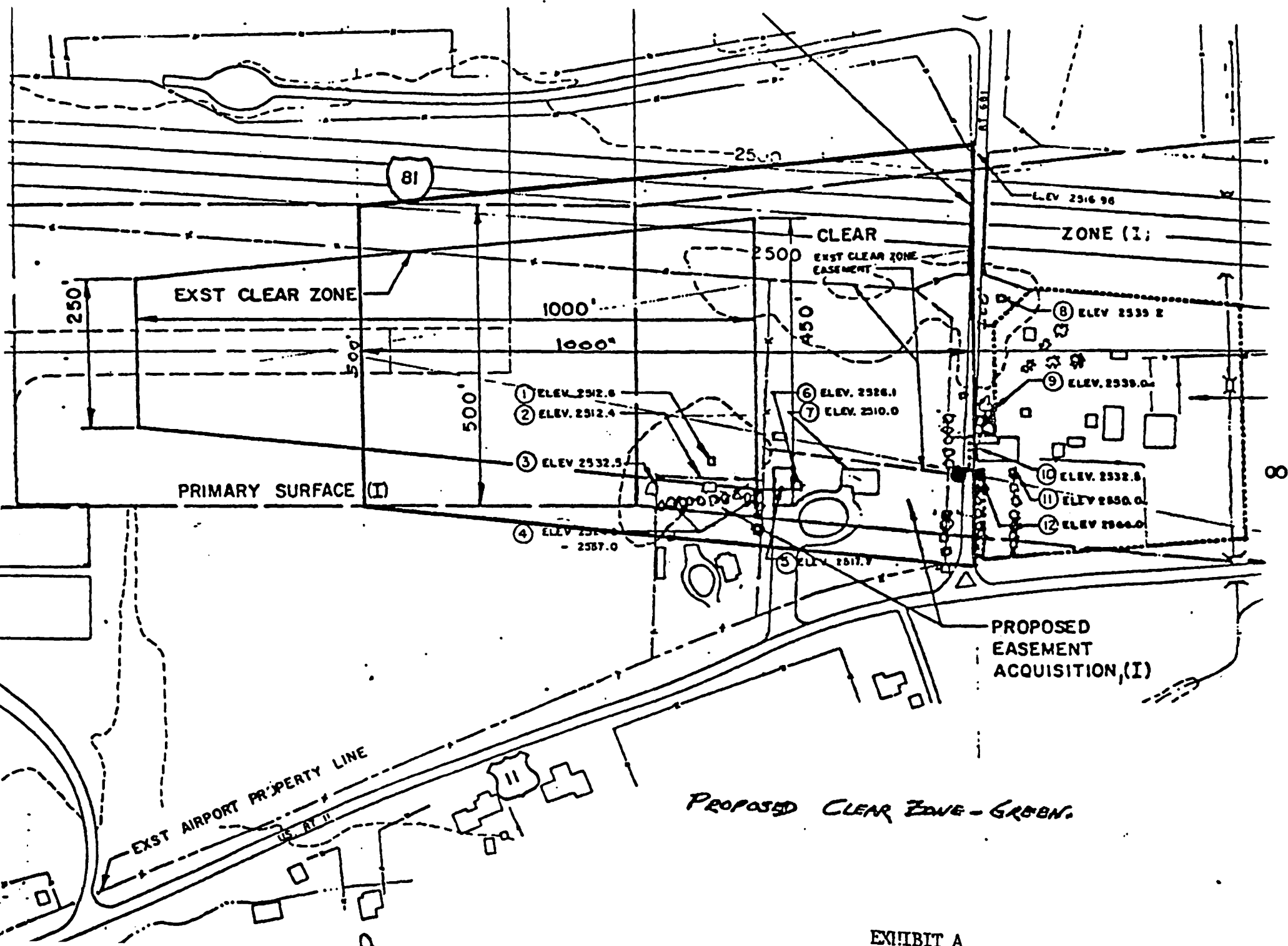


EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT OF SMYTH COUNTY

SMYTH-WYTHE AIRPORT COMMISSION,)

Plaintiff,)

v.)

LAW ACTION NO. 96-5164

EDWARD H. EVANS and
ELIZABETH B. EVANS,)

Defendants.)

MEMORANDUM IN OPPOSITION TO MOTION FOR
DECLARATORY JUDGMENT

This memorandum is filed on behalf of defendants Edward H. Evans and Elizabeth B. Evans (the "Evans") in opposition to the plaintiff's motion for declaratory judgment.

Statement of the Case and Facts

The Smyth-Wythe Airport Commission (the "Commission") is a public body created pursuant to Va. Code § 5.1-35. It operates the Mountain Empire Airport (the "Airport"), which is located in Smyth County. The Evans maintain their residence and conduct farming operations on property adjacent to the Airport.

In 1975, the Commission initiated condemnation proceedings in this Court against certain real property owned by the Evans. The Commission abandoned the proceeding after the condemnation commissioners returned an award the Commission deemed to be too high.

In 1977, the Evans brought a suit against the Commission seeking an injunction against aircraft flying below 300 feet over the Evans' property and for money damages for trespass and nuisance.

In 1981, the Commission commenced a second condemnation proceeding against real property owned by the Evans. The Evans contended that the proceeding was barred under the doctrine of res judicata. Both the condemnation proceeding and the Evans' action against the Commission were disposed of by an agreed order entered on July 5, 1984 (the "Order").¹ The Order sets out the terms of agreement, dismisses the Evans' claim against the Commission, and expressly states that it is res judicata as to any further right of the Commission to condemn the Evans' property so long as it is owned by the Evans or their children.

On March 15, 1996, the Commission instituted a third condemnation proceeding in this Court (Law No. 173CL96005081-00) against real property owned by the Evans (the "Property"). The Evans' answer and grounds of defense in the case asserts that the proceeding is barred by the Order.

The Commission filed the present action, pursuant to Va. Code § 8.01-184, seeking a declaration that the Order is void ab initio because the Commission allegedly had no authority to relinquish the power of eminent domain. The Commission has filed

¹The Order is recorded in Common Law Order book No. 33, page 627. A copy of the Order is attached to the Motion for Declaratory Judgment initiating this case.

a memorandum in support of its motion for declaratory judgment. The Evans submit the following argument in response.

Argument

THE ORDER BARS THE COMMISSION FROM CONDEMNING THE PROPERTY SO LONG AS IT IS OWNED BY THE EVANS OR THEIR CHILDREN.

Having fully obtained the benefits of the settlement agreement, the Commission now wishes to renege on its obligations thereunder, and to this end contends that the Order is void. Contrary to the Commission's assertion, the Order constitutes a valid and final judgment and is conclusive of the rights of the parties.

The Order expressly provides that it "shall be res judicata, as provided by law, as to any further right of the Smyth Wythe Joint Airport Commission to condemn [the Property] so long as the same is owned by the Evanses or their children." (The Order, § 8). In an attempt to avoid the bar of res judicata, the Commission makes a two-part argument: First, it asserts that the settlement agreement is void because the Commission was powerless to relinquish the right to condemn the Property even for the limited period of time the Property is owned by the Evans or their children. Second, the Commission contends that the Order is void because it incorporates the settlement agreement.

The Commission does not cite any Virginia case or statute in support of either of these propositions. Instead, the Commission relies upon an April 5, 1995, opinion of the Attorney General

of Virginia which states that a public body may not surrender the power of eminent domain. Such opinion is purely advisory to the party seeking it and has no precedential value to this court. See Va. Code § 2.1-118 (Attorney General may issue "advisory opinions"). It is for this Court and not the Attorney General to decide this issue. Indeed, under the Virginia Constitution and the separation of powers doctrine, the executive branch, including the Attorney General, is expressly forbidden from taking on the powers of the judiciary. Va. Const. art. I, § 5, art. III, § 1; Taylor v. Worrell Enters., Inc., 242 Va. 219, 221 (1991). The opinion should be considered a nullity as far as this Court's consideration of the current issue is concerned.

Further, the Commission incorrectly characterizes the settlement agreement as involving a "surrender" of the right of eminent domain. (Motion for Declaratory Judgment, § 7). In fact, the Commission merely agreed to delay condemnation of the Property for the limited period of time it is owned by the Evans or their children.

Even if the Commission lacked the authority to make the settlement agreement, it does not follow that the Order is void.²

²The Attorney General opinion upon which the Commission relies does not question the validity of the Order:

[T]he propriety of a circuit court's action on the same question posed in an official opinion request . . . is not subject to the review of the Office of the Attorney General "and must be treated as the binding determination with regard to the case before the court." . . . The conclusions set out, herein, therefore, address only my
(continued...)

A judgment is void only if it has been procured by extrinsic or collateral fraud, or is entered by a court which did not have jurisdiction over the subject matter or the parties. Parrish v. Jessee, 250 Va. 514, 521 (1995). The Commission requested entry of the Order. It does not assert that it was entered by fraud. Further, this Court clearly had jurisdiction of the subject matter and the parties. The Commission does not argue otherwise.

The Virginia Supreme Court's opinions in Parrish, and Rook v. Rook, 233 Va. 92, 95 (1987), confirm that the Order is not void. In Parrish, Parrish was incompetent as a result of a motor vehicle accident. His guardian brought an action in the Circuit Court of the City of Richmond against the owner of the other vehicle. The parties reached a settlement agreement, which was approved by the Richmond Court. A new guardian was appointed for Parrish by the Circuit Court of Goochland County. Thereafter, the new guardian moved the Goochland Court to vacate as void certain provisions of the Richmond Court's order which allegedly violated Va. Code § 8.01-124 by designating persons other than Parrish's guardian as payees of settlement funds. The Goochland Court ruled in favor of the new guardian and set aside the challenged provisions of the Richmond Court order. 250 Va. at 516-20.

²(...continued)
opinion concerning whether a public body voluntarily may
surrender or relinquish the right of eminent domain and
are not intended to call into question the validity of
[the Order]

(Letter Opinion of Attorney General, dated April 5, 1995 at 2 n.4).

The Virginia Supreme Court reversed. The court held that any error with respect to Va. Code § 8.01-422 rendered the Richmond Court order merely voidable and not void ab initio. Accordingly, because more than 21 days had passed since the entry of the Richmond Court order, the Goochland Court had no authority to modify the order, and the order of the Goochland Court was null and void. 250 Va. at 521-22.

In Rook, a married couple executed a property settlement agreement in contemplation of their future separation and divorce. Thereafter, the trial court dissolved the Rook marriage and incorporated the settlement agreement in its decree. In a subsequent contempt proceeding for failure to comply with the terms of the agreement, the husband contended that the agreement was void ab initio and unenforceable because it facilitated the parties' separation and divorce.³ The trial court ruled in favor of the husband, holding that the agreement was "invalid and unenforceable as void against public policy." 233 Va. at 93.

In reversing the trial court, the Supreme Court observed that the husband had, in effect, attacked the divorce decree and not merely the property settlement. The Supreme Court found that the decree was not void because it was not procured by fraud and the trial court had jurisdiction of the subject matter and the parties. Accordingly, 21 days after the entry of the divorce

³Any agreement between a husband and a wife which is intended to facilitate their divorce is contrary to public policy and void. Chattin v. Chattin, 245 Va. 302, 310 (1993).

decree, the trial court lost jurisdiction of the case, and had no authority to modify the decree by declaring the incorporated settlement agreement to be invalid. 233 Va. 94-96.

As stated by Rook, 21 days after the entry of a judgment which is not void, the court rendering the judgment loses jurisdiction of the case and, absent a perfected appeal, the judgment is final. 233 Va. at 95. This rule applies even to erroneous judgments, which are merely voidable. Parrish, 250 Va. at 521. In the present case, more than 12 years have passed since the entry of the Order. Accordingly, the Order is now final and, by its express terms, bars the Commission from condemning the Property so long as it is owned by the Evans or their children.

Conclusion

For the foregoing reasons, the defendants respectfully request that the plaintiff's motion for declaratory judgment be denied.

EDWARD H. EVANS and
ELIZABETH B. EVANS

By Counsel

Stephen M. Hodges
VSB No. 1220
PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, Virginia 24210
540/628-5151

By Stephen M. Hodges
Stephen M. Hodges

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 3rd day of October, 1996, to John S. Bundy, Esq., White, Bundy, McElroy, Hodges & Sargent, P.O. Box 429, Abingdon, Virginia 24212.



Stephen M. Hodges

VIRGINIA:

IN THE CIRCUIT COURT OF SMYTH COUNTY

SMYTH-WYTHE AIRPORT COMMISSION,)	
)	
Petitioner,)	
)	
v.)	<u>AT LAW</u>
)	
)	No. 96-5164
EDWARD H. EVANS, et al,)	
)	
Defendants.)	

AMENDED FINAL ORDER

The court entered its final order on November 20, 1996. It has now been brought to the court's attention that there is a counterclaim pending which has not been adjudicated or otherwise disposed of. The defendants have moved the court to non-suit the counterclaim. Wherefore, it is ADJUDGED and ORDERED that the final order entered November 20, 1996 is vacated and withdrawn and this amended final order is entered in its place.

This matter came on for hearing upon the Smyth-Wythe Airport Commission's Motion for Declaratory Judgment filed on or about June 10, 1996 (the Motion for Judgment). The Motion for Judgment seeks a ruling declaring that a certain agreed order entered by this Court on July 5, 1984, which is recorded in Common Law Order Book No. 33, page 627 (the Order), and which purports to limit the Commission's future right to initiate condemnation proceedings against property owned by the Defendants, is null and void *ab initio* because the Commission had no authority to voluntarily surrender or relinquish, and the Court had no authority

to terminate the power of eminent domain granted to the Commission by the General Assembly.

Upon consideration of oral arguments presented by counsel at the October 24, 1996, hearing of this matter and the written memoranda submitted by the parties, and for good cause shown, the Court announced on October 24, 1996 that the plaintiff's motion for a declaratory judgment would be granted. Before the entry of an order, the defendants filed a motion to reconsider on grounds that certain language in Virginia Code § 25-46.34 supports their contention that the July 5, 1985 order is valid. The Court has considered the defendants' additional argument set out in the motion to reconsider and has determined that the previously announced ruling will not be changed.

Wherefore, it is ADJUDGED and ORDERED that this Court's order of July 5, 1984 is null and void *ab initio* to the extent it purports to limit the plaintiff's right to initiate condemnation proceedings or exercise the power of eminent domain over property owned by the defendants.

The defendants objected to the Court voiding the July 5, 1984 order. Alternatively, the defendants objected to the Court avoiding the July 5, 1984 order only in part instead of *in toto*.

The defendants have moved for a non-suit of the counterclaim. Wherefore it is ADJUDGED and ORDERED that the counterclaim be and is hereby dismissed without prejudice.

Nothing further remaining to be done, this action is removed from the docket. The Clerk shall send attested copies of this Order to all counsel of record.

ENTER this 11th day of December, 1996.

Charles H. Smith Jr.
Circuit Judge

Requested: *Objected to as to the*
objections stated in the attached sheet
Renata Heale Sargent
Counsel for the Plaintiff Petitioner

entitled
"Petitioner's
Objections."

Requested as to the Non-Suit of the
Counterclaim. Otherwise Objected to:

Stephen M. Hodge
Counsel for the Defendants

PETITIONER'S OBJECTIONS

The Petitioner objects to the following:

1. As to the portion of the above Amended Final Order which vacates the Court's November 20, 1996 Final Order and substitutes this Amended Final Order on the grounds that the Circuit Court no longer retains jurisdiction to vacate its November 20, 1996 Final Order;

2. As to the portion of the above Amended Final Order which states that the Court's November 20, 1996 Final Order did not adjudicate or dispose of the Defendants' Counterclaim; and

3. As to the portion of the above Amended Final Order granting the Defendants a voluntary nonsuit of their Counterclaim without prejudice on the grounds that the Defendants' Motion for Nonsuit was not timely raised under Va. Code 8.01-380.

*Pamela Meade Sargent
Counsel for Petitioner*

VIRGINIA:

IN THE CIRCUIT COURT OF SMYTH COUNTY

SMYTH-WYTHE AIRPORT COMMISSION,)	
)	
Plaintiff,)	
)	<u>AT LAW</u>
v.)	
)	No. 96-5164
EDWARD H. EVANS and)	
ELIZABETH B. EVANS,)	
)	
Defendants.)	

NOTICE OF APPEAL

Defendants Edward H. Evans and Elizabeth B. Evans hereby give notice of appeal to the Virginia Supreme Court from the amended final order of this Court entered on the 11th day of December, 1996. No transcript, statement of facts, testimony, or other incident of trial will be filed.

EDWARD H. EVANS and
ELIZABETH B. EVANS

By Mark E. Frye
Of Counsel

Counsel:

Stephen M. Hodges
Mark E. Frye
PENN, STUART & ESKRIDGE
P. O. Box 2288
Abingdon, VA 24210
540/628-5151

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed this 12th day of December, 1996, to John S. Bundy, Esq., White, Bundy, McElroy, Hodges & Sargent, P. O. Box 429, Abingdon, VA 24212, counsel for Smyth-Wythe Airport Commission.

Mark E. Frye
Mark E. Frye

ASSIGNMENT OF ERROR

The trial court erred by declaring that the 1984 Order was null and void ab initio.