



COMMONWEALTH OF VIRGINIA

Office of the Attorney General

William C. Mims
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071

FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

December 11, 2009

Lucy E. Phillips, Esq.
Washington County Attorney
205 Academy Drive
Abingdon, Virginia 24210

Dear Ms. Phillips:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the Virginia Highlands Airport Authority is authorized to use its power of eminent domain pursuant to § 5.1-34 to condemn trees in a private cemetery for the purpose of providing unobstructed airspace for air safety.

Response

It is my opinion that the Virginia Highlands Airport Authority is authorized to exercise its power of eminent domain to condemn trees in a private cemetery to provide unobstructed airspace for purposes of air safety.

Background

You relate that the Virginia Highlands Airport Authority (the "Authority") operates the Virginia Highlands Airport in Washington County, Virginia. One of the two runways at the airport is classified as a non-precision instrument runway whereby a constant signal to incoming aircraft provides an approach path to the airport. However, you note that at a certain distance from the airport, the signal's limited precision will require a pilot to complete the landing by line-of-sight navigation.

The Federal Aviation Administration ("FAA") requires all airports to maintain a safety zone above the land surface and below the flight path into and out of the airport. Further, such safety zone may not contain vegetation or buildings.¹ You state that the safety zone is determined by a geometric plane in space and often referred to by the FAA as an imaginary line which angles upward from the end of the runway. You explain that this imaginary line is known as an "approach surface"; however, it is not the approach path by which the pilot lands. The approach surface merely is additional clear airspace under the flight path which might be analogized to paved shoulders along the pavement of highways. For

¹ 14 C.F.R. § 77.1 to § 77.75 (2009) (codified in scattered sections) (providing standards for determining obstructions in navigable airspace and governing objects affecting navigable airspace).

commercial airports with large passenger planes, the approach surface must be a ratio of 50:1, that is, for every 50 feet of distance in a straight line from a fixed point at the end of the runway, the surface rises 1 foot. For general aviation airports without any instrumentation, the safety zone is 20:1. For example, at 500 feet, the approach surface must rise to 25 feet. For a non-precision instrument runway, such as Virginia Highlands Airport, the approach surface rises at a rate of 34:1.

You relate that the federal safety regulations have been adopted as the law of the Commonwealth and set forth in § 15.2-2294. Every Virginia locality which has an airport or a flight path within its boundaries is required to adopt in its zoning ordinance an “Airport Safety Overlay Zone Ordinance.” Such an ordinance adopts the FAA standards by incorporation or reference. You advise that Washington County and the Town of Abingdon have adopted such ordinances.

You also relate that a private, commercial cemetery near the Virginia Highlands Airport has a few trees penetrating into the approach surface, which penetration predated adoption of the ordinances. Both the FAA and the Virginia Department of Aviation require that the Authority remove the obstructing trees. Your question is whether the Authority may exercise its statutory power of eminent domain to obtain an easement to remove the obstructing trees from the cemetery property.

You observe that a question arises regarding whether § 25.1-105 would prevent the Authority from condemning trees that intrude into the federally-mandated approach surface or “safety zone.” You conclude that § 25.1-105 does not apply to condemnations made by the Authority pursuant to § 5.1-34.²

Applicable Law and Discussion

Section 25.1-105, a portion of Virginia’s general laws concerning “Eminent Domain”³ (hereinafter the “Condemnation Act”), provides that:

Nothing in [Title 25.1] shall be construed to authorize the condemnation of property of any cemetery or burial ground, or any part thereof. The authority to condemn any cemetery or burial ground shall be specifically as provided by law.

The Supreme Court of Virginia has defined “eminent domain” as “the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law.”⁴ The Court also has stated that “[t]he only constitutional limitations imposed upon the power of eminent domain are contained in the just compensation clause.”⁵ “[T]here is no

²Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

³VA. CODE ANN. tit. 25.1, ch. 1, §§ 25.1-100 to 25.1-109 (2006 & Supp. 2009).

⁴Talbot v. Mass. Mut. Life Ins. Co., 177 Va. 443, 448-49, 14 S.E.2d 335, 336 (1941) (citation omitted).

⁵Hamer v. Sch. Bd., 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990) (citing VA. CONST. art. I, § 4).

constitutional right to a hearing on the issue of necessity [for such a taking].”⁶ When a public purpose is established, the necessity or expediency of a condemnor’s project is a legislative question and is not reviewable by the courts.⁷

The Supreme Court of Virginia has commented that “[a]s sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands ... within its territorial limits,” which right is sometimes termed *jus publicum*.⁸ “The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State.”⁹ The Virginia Constitution “impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the *jus publicum*.”¹⁰

The General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies.¹¹ However, the delegated right of eminent domain must be exercised on such terms, and in such manner, and for such public uses as the General Assembly may direct.¹²

Under §§ 5.1-31 and 5.1-34, the General Assembly has delegated to counties, cities, and towns the authority to condemn land reasonably necessary for the purpose of operating and maintaining an airport. Pursuant to § 5.1-32, the power of eminent domain is extended to the acquisition of easements and privileges outside the boundaries of an airport to ensure safe approaches to the airport or landing fields. Sections 5.1-35 and 5.1-36 provide that these powers may be exercised jointly by two or more political subdivisions in an airport authority.

In the situation you present, the Authority is the governmental entity that operates the Virginia Highlands Airport. As such, the General Assembly has granted the power of eminent domain to the Authority by virtue of Title 5.1. The need to acquire clear zone easements for the protection and safety of the public clearly is a public necessity as described in § 5.1-32. “Where [it is] necessary to provide unobstructed airspace for the landing and taking off of aircraft,” § 5.1-32 authorizes an authority to acquire, by condemnation, “easements through or other interests or privileges with respect to lands ... outside the boundaries of such airports or landing fields which are necessary to ensure safe approaches to such airports or landing fields and the safe and efficient operation thereof.”

⁶*Id.*; see also *Richmond Fairfield Ry. Co. v. Llewellyn*, 156 Va. 258, 278-79, 157 S.E. 809, 815-16, *amended on other grounds*, 156 Va. 258, 162 S.E. 601 (1931) (noting that hearing for necessity of condemnation is not required to protect due process; necessity of taking property for public use is political matter and not subject to judicial inquiry).

⁷*Hamer*, 240 Va. at 70, 393 S.E.2d at 625; *Stewart v. Fugate*, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972).

⁸*Commonwealth v. Newport News*, 158 Va. 521, 546, 164 S.E. 689, 696 (1932).

⁹*Id.* at 546, 164 S.E. at 696-97.

¹⁰*Id.* at 546, 164 S.E. at 697.

¹¹*The Alexandria & Fredericksburg Ry. Co. v. Alexandria & Wash. R.R. Co.*, 75 Va. 780, 784 (1881); see also *Light v. Danville*, 168 Va. 181, 196, 190 S.E. 276, 281 (1937) (noting that state may delegate power of eminent domain to subordinate agencies to be exercised in interest of public welfare).

¹²*Blondell v. Guntner*, 118 Va. 11, 12, 86 S.E. 897, 897 (1915).

An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the general.¹³ Also, when statutes provide different procedures on the same subject matter, “the general must give way to the specific.”¹⁴

Section 25.1-105 is part of the Condemnation Act.¹⁵ “Ordinary” condemnation proceedings are undertaken pursuant to the Condemnation Act, which is an act of general application. Section § 5.1-32 is a specific grant of the power of eminent domain which would prevail over the general statute, § 25.1-105.¹⁶ Further, § 5.1-32 extends the power of eminent domain to the acquisition of easements and privileges outside the boundaries of an airport, which would include condemnation of trees in a private cemetery for the purpose of providing unobstructed airspace for air safety. Since the Authority is the governmental entity that operates the Virginia Highlands Airport, it is statutorily authorized to exercise the power of eminent domain for the purpose of operating and maintaining the airport.

Conclusion

Accordingly, it is my opinion that the Virginia Highlands Airport Authority is authorized to exercise its power of eminent domain to condemn trees in a private cemetery to provide unobstructed airspace for purposes of air safety.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

1:213; 1:941/09-086

¹³See Va. Nat'l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979); Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935); Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Op. Va. Att'y Gen.: 2001 at 17, 19; 1990 at 227, 228; 1987-1988 at 276, 277.

¹⁴Davis v. Davis, 206 Va. 381, 386, 143 S.E.2d 835, 839 (1965); see also Op. Va. Att'y Gen.: 2001, *supra* note 13, at 19; 1976-1977 at 93, 94.

¹⁵See *supra* note 3.

¹⁶See *supra* notes 13 and 14 and accompanying text.