

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-969**

Leon S. DeCook, et al.,  
Appellants,

vs.

Rochester International Airport Joint Zoning Board,  
Respondent.

**Filed May 11, 2010  
Reversed and remanded  
Schellhas, Judge  
Dissenting, Johnson, Judge**

Olmsted County District Court  
File No. 55-CV-06-3803

Bradley J. Gunn, Malkerson Gunn Martin, Minneapolis, Minnesota (for appellants)

Clifford M. Greene, Monte A. Mills, Greene Espel, Minneapolis, Minnesota (for  
respondent)

Susan L. Naughton, League of Minnesota Cities, St. Paul, Minnesota (for Amicus Curiae)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and  
Johnson, Judge.

**UNPUBLISHED OPINION**

**SCHELLHAS**, Judge

After remand, appellants challenge the district court's determination that the 2002  
Rochester International Airport Zoning Ordinance No. 4 did not effectuate a regulatory

taking of their property as a matter of law. Because we conclude that the ordinance effectuated a regulatory taking of appellants' property, we reverse and remand.

## FACTS

In 1989, appellants Leon DeCook and Judith DeCook purchased 240 acres of land near the Rochester International Airport. The property was purchased in two blocks—217 acres in the summer of 1989, and an additional 23 acres in December 1989. At the time of their purchases, appellants were aware that the approach path for one of the airport's runways was over an eastern portion of the property. In fact, approximately 19 acres of the property were located in and subject to Safety Zone A under a 1982 ordinance established by respondent Rochester International Airport Joint Zoning Board. The property in Safety Zone A was subject to certain building-height and use restrictions. Rochester Municipal Airport Joint Zoning Bd. Ordinance No. 3, §§ 6, 7 (1982). The property could be used only for agricultural purposes, or for commercial or industrial uses provided that each site comprised at least 20 acres. *Id.*, § 7.B. Dwellings were prohibited, as well as uses that would “permit, require, cause, or attract” assemblies of more than 50 persons per commercial or industrial site, or more than 10 persons per acre, and “[c]hurches, hospitals, schools, theatres, stadia, and other places of public or semi-public assembly, and hotels, motels, trailer courts, campgrounds, and multi-unit dwellings.” *Id.*

Prior to their purchase in 1989, appellants rented the 217-acre portion and farmed the tillable land. After their purchase, appellants continued to farm the property until 1990, when they began developing a golf course on the property. Appellants opened the

golf course to the public in 1992, and since then Leon DeCook has operated the golf course and considers his occupation to be “golf course owner.” Appellants also rent out some of the property for farming.

On September 18, 2002, respondent enacted Zoning Ordinance No. 4, which modified the usage restrictions for Safety Zone A to provide that

areas designated as Zone A shall contain no buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards, and shall be restricted to those uses which will not create, attract, or bring together an assembly of persons thereon. Permitted uses may include, such uses as agriculture (seasonal crops) horticulture, animal husbandry, raising of livestock, wildlife habitat, lighted outdoor recreation (non-spectator), cemeteries, and automobile parking. However, in no case shall dwellings be permitted.

Rochester Int’l Airport Joint Zoning Bd., Rochester Int’l Airport Zoning Ordinance No. 4, § V.B.2 (2002). Ordinance No. 4 also increased the width of Safety Zone A, subjecting an additional 28 acres of appellants’ property to Safety Zone A, for a total of 47 acres.

On September 7, 2005, appellants commenced an inverse-condemnation action against respondent alleging that the imposition of Ordinance No. 4’s restrictive regulations on their property constituted a compensable regulatory taking under the United States and Minnesota Constitutions. On September 18, 2006, the district court granted summary judgment to respondent and dismissed appellants’ complaint. On appeal from the summary judgment, this court reversed and remanded, holding that the district court should have determined whether there were genuine issues of material fact

on the question of whether Ordinance No. 4 had caused “so great a reduction in the value of appellants’ property that it would be manifestly unfair to require appellants to sustain a loss in market value that the general property-owning public did not suffer.” *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, No. A06-2170, 2007 WL 2178046, at \*4 (Minn. App. July 31, 2007) (*DeCook I*), review denied (Minn. Oct. 24, 2007).

On remand, the inverse-condemnation case proceeded to trial by jury on November 3–6, 2008. The jury found that the 2002 ordinance caused a \$170,000 decrease in the fair market value of appellants’ property. Following the verdict, the district court concluded that the 2002 ordinance did not effectuate a regulatory taking as a matter of law and, accordingly, issued findings of fact, conclusions of law, and an order for judgment. This appeal follows.

## **D E C I S I O N**

Appellants argue that Ordinance No. 4 constituted a taking or damaging of their property rights, entitling them to just compensation under the United States and Minnesota Constitutions. The United States Constitution provides that “private property [shall not] be taken for public use without just compensation,” U.S. Const. amend. V, and the Minnesota Constitution provides that “private property shall not be taken, destroyed or damaged for public use without just compensation,” Minn. Const. art. I, § 13. A property owner has a cause of action for inverse condemnation when the government has taken private property without formally using its eminent-domain power. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 487 n.2 (Minn. 2004).

“Whether a governmental entity’s action constitutes a taking is a question of law that we review de novo.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007). We will uphold the district court’s findings of fact with regard to a takings claim unless clearly erroneous and unsupported by the record. *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585, 591 (Minn. App. 1988), *review denied* (Minn. July 28, 1988).

While appellants do not claim a physical invasion of their property by the government, it “is well established that the government need not directly appropriate or physically invade private property to effectuate a taking.” *Wensmann*, 734 N.W.2d at 632. “In limited circumstances, government regulation of property may result in a taking.” *Id.* “[A] taking may result when the government goes ‘too far’ in its regulation, so as to unfairly diminish the value of the individual’s property, thus causing the individual to bear the burden rightly borne by the public.” *Id.* (quotation omitted). “The rub, of course, has been—and remains—how to discern how far is ‘too far.’” *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 124 S. Ct. 2074, 2081 (2005)) (quotation marks omitted).

In *Penn Central Transp. Co. v. New York City*, the United States Supreme Court considered whether the owner of Grand Central Terminal in New York City had suffered a taking under a landmark-preservation ordinance that prevented it from constructing a high-rise office tower on top of the building. 438 U.S. 104, 98 S. Ct. 2646 (1978). The Court noted that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’” require compensation for a government regulation that

disproportionately burdens a few, but instead relies on “ad hoc, factual inquiries” that depend largely “upon the particular circumstances [of each] case.” *Id.* at 124, 98 S. Ct. at 2659. The Court noted that its decisions have identified “several factors that have particular significance” in determining whether a regulation effects a taking. *Id.* The factors include (1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.” *Id.*; *see also Johnson v. City of Minneapolis*, 667 N.W.2d 109, 114 (Minn. 2003) (describing analysis of these factors as a “balancing test”).

In *DeCook I*, this court relied on *McShane v. City of Faribault*, 292 N.W.2d 253, 258–59 (Minn. 1980), which also involved an airport zoning ordinance, noting that the facts of *DeCook I* and *McShane* are “strikingly similar” and that the ordinance in *McShane* “appears to be virtually identical with the ordinance adopted by the board in the present case.” 2007 WL 2178046, at \*2–4 & n.1. In *McShane*, the Minnesota Supreme Court held “that where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.” 292 N.W.2d at 258–59. Respondent argued in *DeCook I*, as it does now, that this case must be analyzed using the three-factor “balancing test” identified in *Penn Central*. But, in *DeCook I*, this court disagreed with the district court’s conclusion that Ordinance No. 4 “fulfills an arbitration function, and should be analyzed under the full *Penn Central* test, and [that] appellants

failed to show how the *McShane* test for analyzing enterprise regulations applies.” *Id.* at \*2. Based on the supreme court’s conclusion in *McShane* that the airport ordinance fulfilled an enterprise function and this court’s observation that the ordinances in the two cases were “virtually identical,” this court saw “no basis for distinguishing” Ordinance No. 4 from the *McShane* ordinance. *Id.* at \*3. This court concluded that the district court should have determined whether there was a genuine issue of material fact about whether Ordinance No. 4 “directly caused so great a reduction in the value of appellants’ property that it would be manifestly unfair to require appellants to sustain a loss in market value that the general property-owning public did not suffer.” *Id.* at \*4.

Nineteen days before this court filed its decision in *DeCook I*, the supreme court filed its decision in *Wensmann*, 734 N.W.2d 623. This court cited *Wensmann* in *DeCook I*. 2007 WL 2178046, at \*3 n.2. But, despite this court’s reference to *Wensmann* in *DeCook I*, respondent now argues that in a footnote in *Wensmann*,<sup>1</sup> the supreme court

---

<sup>1</sup> In the footnote addressing *McShane*, the *Wensmann* court said:

In [*McShane*], we observed that “not all zoning regulations are comparable.” 292 N.W.2d [at 257]. We distinguished between zoning regulations that arbitrate among competing land uses and zoning regulations that benefit a specific governmental enterprise. *Id.* at 257–59 (explaining that zoning regulations designed to effect a comprehensive plan generally involve “a reciprocal benefit and burden accruing to all landowners,” while zoning regulations “for the sole benefit of a governmental enterprise” generally result in the burden falling on just a few individuals). Some commentators have viewed the *McShane* analysis as a distinct Minnesota approach to takings claims. In this case, the district court concluded that the city’s denial of the comprehensive plan amendment, “in addition to being a

“dispelled the notion that *McShane* provides a separate and independent legal test for regulatory takings” and “confirmed” that *Penn Central* “govern[s] the analysis of regulatory-taking claims under Minnesota law.” Respondent further argues that “[i]f *McShane* remains useful at all, it may merely be instructive in considering the character factor under *Penn Central*.” We agree with respondent that *McShane* does not provide “a separate and independent legal test for regulatory takings,” and that *Penn Central* governs regulatory-taking analysis. See *Wensmann*, 734 N.W.2d at 641 n.14. But we disagree with respondent’s cavalier and dismissive assertion that, in light of *Wensmann*, “[i]f *McShane* remains useful at all, it may merely be instructive in considering the character factor under *Penn Central*.”

Under the law-of-the-case doctrine, this court will not reexamine whether *McShane* applies—it does. See *Brezinka v. Bystrom Bros.*, 403 N.W.2d 841, 843 (Minn. 1987) (“Law of the case applies most commonly to situations where an appellate court has passed on a legal question and remanded to the court below for further proceedings. The legal question thus determined by the appellate court will not be re-examined on a

---

taking under the *Penn Central* test, is also a taking under *McShane*.” We do not view the *McShane* analysis as different from or inconsistent with the flexible approach to takings adopted by the Supreme Court in *Penn Central*. Any unfairly unequal distribution of the regulatory burden may be considered in appropriate cases under the character factor of the *Penn Central* approach and then balanced along with the other relevant factors.

734 N.W.2d at 641 n.14 (other citations omitted) (emphasis added).

second appeal of the same case.”); *DeCook I*, 2007 WL 2178046, at \*2–4. In *DeCook I*, this court acknowledged *Wensmann*, noting that “[i]n *McShane*, the supreme court considered the application of *Penn Central* to facts strikingly similar to the present case, and we are not persuaded that the supreme court would certainly reach a different conclusion in this case,” and stated that this court “is not in a position to overturn established supreme court precedent” from *McShane*. *DeCook I*, 2007 WL 2178046, at \*3 & n.2 (quotation omitted).

In *DeCook I*, this court established that Ordinance No. 4 is designed to benefit a specific government enterprise within the meaning of *McShane*. See *DeCook I*, 2007 WL 2178046, at \*3 (stating that the court sees no basis for distinguishing the ordinance in this case from the ordinance in *McShane*). And a jury subsequently decided that the ordinance diminished the fair market value of appellants’ property by \$170,000. “Whether a diminution in value has occurred and the extent of the diminution are questions of fact, but whether the diminution is substantial is a legal question.” *DeCook I*, 2007 WL 2178046, at \*4 (citing *Keenan v. Int’l Falls–Koochiching County Airport Zoning Bd.*, 357 N.W.2d 397, 400 (Minn. App. 1984)); see also *Thomsen v. State by Head*, 284 Minn. 468, 474, 170 N.W.2d 575, 580 (1969) (stating that “whether plaintiff’s property has been so unfairly, directly, substantially, and peculiarly injured that it has been damaged in the constitutional sense so that the state should be compelled to condemn it” is a question of law). Therefore, this court must address whether that diminution constitutes a “substantial and measurable decline.” See *McShane*, 292 N.W.2d at 258–59. The *McShane* court explained:

Every landowner must continue to endure that level of inconvenience, discomfort, and loss of peace and quiet which can be reasonably anticipated by any average member of a vibrant and progressive society. . . . Property owners cannot . . . have the advantages created by conveniences and yet be paid for the undesirable effects created by the same conveniences unless those effects adversely affect their property so directly and so substantially that it is manifestly unfair to require them to sustain a measurable loss in market value which the property-owning public in general does not suffer.

*Id.* at 259 (quoting *Alevizos v. Metro. Airports Comm'n*, 298 Minn. 471, 486–87, 216 N.W.2d 651, 662 (1974)) (alterations in original).

Although appellants have acknowledged that they are benefitted as well as burdened by being close to the airport, no record evidence suggests that they are benefitted by their proximity to the airport more than their neighbors, whose properties do not abut the runway and are not subject to Safety Zone A. Although appellants and their neighbors must bear the “level of inconvenience, discomfort, and loss of peace and quiet” that comes from being close to an airport, we conclude that appellants unequally bear the additional burden of use restrictions because their property falls within Safety Zone A. Appellants’ unequal burden has resulted in a diminution of \$170,000 in the fair market value of their property with no commensurate benefit. Because of appellants’ unequal burden, it is manifestly unfair to require them to sustain the diminution in market value without just compensation.

Under the facts of this case, appellants are entitled to compensation. We therefore remand for entry of judgment in favor of appellants based on the jury’s verdict.

**Reversed and remanded.**

**JOHNSON**, Judge (dissenting)

I respectfully dissent from the opinion of the court. In our prior opinion in this case, we remanded for a determination whether the DeCooks’ “property has suffered a substantial and measurable decline in market value as a result of the ordinance.” *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, No. A06-2170, 2007 WL 2178046, at \*3 (Minn. App. July 31, 2007), *review denied* (Minn. Oct. 24, 2007). In my view, the district court properly concluded that the DeCooks did not suffer a substantial and measurable diminution in the market value of their property. In reversing the judgment of the district court, the opinion of this court errs in two respects.

First, the court’s opinion does not use a recognized method of measuring the economic impact of the alleged regulatory takings. The most commonly used method “measures the value taken from the property by regulatory action against the overall initial value.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 634 n.7 (Minn. 2007) (quotation omitted). In fact, the United States Supreme Court has stated that the *Penn Central* test “requires us to compare the value that has been taken from the property with the value that remains in the property.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248 (1987) (emphasis added). Accordingly, the Supreme Court typically analyzes a regulatory takings case by comparing the diminution in value to the original value of the property. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117 (1926) (comparing restricted value of land, \$2,500 per acre, to unrestricted value, \$10,000 per acre); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S. Ct. 143, 143 (1915) (comparing

restricted value of land, \$60,000, to unrestricted value, \$800,000); *see also Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 113 S. Ct. 2264, 2291 (1993) (citing *Euclid* and *Hadacheck* with approval).

Our supreme court has identified two other methods of measuring economic impact that may be appropriate in certain cases. *Wensmann Realty*, 734 N.W.2d at 634 n.7. But neither of those two methods applies to this case. The second method “looks to the claimant’s ability to recoup its capital.” *Id.* (quotation omitted). The DeCooks have not attempted to invoke this method, probably because they purchased the property in 1989 for only \$159,600 and believe that it now is worth \$4,800,000. “The third method examines a claimant’s return on equity under a given regulatory regime in comparison to the return on equity that would be received but for the alleged taking.” *Id.* (quotation omitted). The DeCooks have not attempted to invoke this method either, probably because the zoning ordinance does not restrict their ability to operate the golf course that they have been operating since the early 1990s. There is no precedent for the method of measuring economic impact that is used in the opinion of the court, which merely looks at the number of dollars of diminished value.

Second, a regulatory takings claim cannot be successful unless the extent of the diminution in value is considerably greater than the diminution in this case. The *Penn Central* test is a three-part balancing test, and there is no particular minimum impact on economic value that must be established at the first step of the test. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326-327, 122 S. Ct. 1465, 1481 (2002) (noting that “we still resist the temptation to adopt *per se* rules in our

cases involving partial regulatory takings, preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula”). Nonetheless, I am unable to find any regulatory takings cases in Minnesota caselaw or federal caselaw in which a property owner was successful with a diminution in value that is remotely close to the diminution in this case. In fact, in some cases, the United States Supreme Court has rejected regulatory takings claims even when properties have diminished in value by more than 50 percent. *See, e.g., Euclid*, 272 U.S. at 384, 47 S. Ct. at 117 (holding that compensable regulatory taking did not occur where diminution in value was 75%); *Hadacheck*, 239 U.S. at 405, 36 S. Ct. at 143 (holding that compensable regulatory taking did not occur where diminution in value was 92.5%).

In this case, the DeCooks suffered a diminution in market value of between 3.5% and 6.1%. The jury found that the market value of the property was diminished by \$170,000. Mr. DeCook testified that the property was worth \$4,800,000 at the time of trial, and the board’s valuation expert testified that the property was worth \$2,770,000 before the zoning ordinance went into effect. The district court determined that the diminution in value is “minimal” and “does not significantly interfere with the DeCooks’ legitimate property interests.” The district court is correct because there is no precedent for the principle that a diminution in value of only six percent is enough to allow the conclusion that a compensable regulatory taking has occurred.

For these reasons, I would affirm the judgment of the district court.