

NO. A10-481

6

State of Minnesota
In Court of Appeals

INTERSTATE COMPANIES, INC.,
GORDON D. GALARNEAU, JR. AND
PENNY SUE GALARNEAU,

Petitioners,

vs.

CITY OF BLOOMINGTON AND
METROPOLITAN AIRPORTS COMMISSION,

Respondents.

PETITIONERS' BRIEF AND ADDENDUM

Lee A. Henderson (#126305)
HESSIAN & MCKASY, P.A.
4000 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
(612) 746-5750

Attorneys for Petitioners

John M. Baker (#174403)
GREENE ESPEL, P.L.L.P.
200 South Sixth Street
Suite 1200
Minneapolis, MN 55402
(612) 373-0830

*Attorneys for Respondents City of Bloomington
and Metropolitan Airports Commission*

Thaddeus R. Lightfoot (#24594X)
THE ENVIRONMENTAL
LAW GROUP, LTD.
133 First Avenue North
Minneapolis, MN 55401
(612) 623-2363

*Attorneys for Respondent
Metropolitan Airports Commission*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

APPENDIX AND ITS INDEX.....	iii
TABLE OF AUTHORITIES	v
LEGAL ISSUES	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
A. Property History of 2501 and 2601 American Boulevard Prior To Expansion of Airport.....	3
B. The 2004 Zoning Changes Created Significant Impacts On The Property.	4
C. The 2004 Zoning Changes Caused Significant Harm To The 2501 Property and 2601 Property.	6
1. The Zoning Changes Have Had A Significant Impact On The Galarneau’s Ability To Develop The Property.....	6
2. The Zoning Changes Have Caused A Marked Increase In Noise And Related Airplane Impacts Described By the City As Severe..	7
ARGUMENT.....	9
A. Introduction.....	9
B. The Standard Of Review Requires A Reversal Of The District Court Decision.	11
C. The Enactment of the Airport Zoning Overlay District in 2004 Constituted A Taking of The Property For Which Appellants Are Entitled To Compensation And The District Court Order To the Contrary Must Be Reversed.....	11
D. The Use of Appellants’ Property For Airport Operations Constituted A Taking Of The Property By The MAC For Which Appellants Are Entitled To Compensation And The District Court Order To The Contrary Must Be Reversed.....	21
CONCLUSION.....	27

ADDENDUM

Map of Property.....ADD000001
Trial Court Order.....ADD000002
DeCook II.....ADD0000027
DeCok I.....ADD0000034

APPENDIX AND ITS INDEX

Order dated January 12, 2010	1
<i>DeCook v. Rochester International Airport Joint Zoning Board</i> , 2007 WL 2178046, (Minn. Ct. App. A06-2170) (July 31, 2007), <i>review denied</i> (Minn. Oct. 24, 2007).....	26
<i>DeCook v. Rochester International Airport Joint Zoning Board</i> , (Minn. Ct. App. A09-969) (May 11, 2010)	34
<i>Bailey v. Minnesota Pollution Control Agency</i> , (Minn. Ct. App. A07-2255) (November 4, 2008)).....	47
<i>Minnesota Commercial Railway Company v. Rice Creed Watershed District</i> , (Minn. Ct. App. A08-0096) (March 24, 2009)	56
Complaint dated February 20, 2008.....	63
Answer of Defendant City of Bloomington dated March 26, 2008.....	78
Answer of Defendant Metropolitan Airports Commission dated March 26, 2008.....	95
Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment and Statement of Documents which Comprise the Record in Support of Motion for Partial Summary Judgment dated May 28, 2008.....	112
Affidavit of Gordon D. Galarneau, Jr. dated May 28, 2008	120
Affidavit of Lee A. Henderson dated May 28, 2008	130
Supplemental Affidavit of Lee A. Henderson dated June 16, 2008	220
Order Nunc Pro Tunc dated September 24, 2008	241
Notice of Motion and Motion for Summary Judgment dated October 15, 2009.....	262
Memorandum of Law in Support of Motion for Partial Summary Judgment	264
Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment and Statement of Documents which Comprise the Record dated October 15, 2009	282
Affidavit of Lee A. Henderson in Support of Motion for Summary Judgment dated October 15, 2009	287

Notice of Motion and Motion for Summary Judgment dated October 15, 2009	458
Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment dated October 15, 2009	460
Memorandum of Law in Opposition to Defendants’ Motion for Partial Summary Judgment dated November 3, 2009	488
Affidavit of Gordon D. Galarneau, Jr. dated November 3, 2009.....	507
Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Partial Summary Judgment dated November 3, 2009.....	514
Reply Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment dated November 9, 2009	529
Defendants’ Reply Memorandum of Law in support of Their Motion for Summary Judgment dated November 9, 2009	545
June 14, 2010 article from <i>The New York Times</i>	562
June 15, 2010 article from the <i>Wall Street Journal</i>	564
June 6, 2010 article from <i>The Washington Post</i>	566

TABLE OF AUTHORITIES

Cases

<i>Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul</i> , 216 N.W.1d 651 (Minn. 1974).....	passim
<i>Alevizos v. Metropolitan Airports Commission</i> , 317 N.W.2d 352 (Minn. 1982)	2, 21
<i>Bailey v. Minnesota Pollution Control Agency</i> , No. A07-2255 (Minn. App. Nov. 4, 2008)	16
<i>Dale Properties, LLC v. State</i> , 638 N.W.2d 763 (Minn. 2002).....	12
<i>DeCook v. Rochester International Airport Joint Zoning Board</i> , (Minn. Ct. App. A09-969) (May 11, 2010)	passim
<i>DeCook v. Rochester International Airport Joint Zoning Board</i> , 2007 WL 2178046, (Minn. Ct. App. A06-2170) (July 31, 2007), <i>review denied</i> (Minn. Oct. 24, 2007)	passim
<i>Goldblatt v. Hempstead</i> , 369 U.S. 590 (1962).....	13
<i>Griggs v. Allegheny County</i> , 369 U.S. 84 (1962)	13
<i>Haeussler v. Braun</i> , 314 N.W.2d 4 (Minn., 1981)	2, 25
<i>Johnson v. City of Plymouth</i> , 263 N.W.2d 603 (Minn. 1978)	12
<i>McShane v. City of Faribault</i> , 292 N.W.2d 253 (Minn. 1980).....	passim
<i>Minnesota Commercial Railway Company v. Rice Creek Watershed District</i> , No. A08-0096 (Minn. App. 3/24/2009).....	17
<i>Penn Central Trans. Co. v. New York City</i> , 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed. 631 (1978).....	passim
<i>Portsmouth Co. v. United States</i> , 260 U.S. 327 (1922)	13
<i>Realty, Inc. v. City of Eagan</i> , 734 N.W.2d 623, 630 (Minn. 2007)	1, 11
<i>State, by Powderly, v. Erickson</i> , 285 N.W.2d 84 (Minn.1979)	14
<i>United States v. Caltex, Inc.</i> , 344 U.S. 149 (1952).....	13
<i>United States v. Causby</i> , 328 U.S. 256 (1946).....	13
<i>United States v. Central Eureka Mining Co.</i> , 357 U.S. 155 (1958).....	13
<i>Wensmann Realty, Inc. v. City of Eagan</i> , 734 N.W.2d 623 (Minn. 2007).....	passim
<i>Westling v. County of Mille Lacs</i> , 581 N.W.2d 815 (Minn. 1998).....	12

Statutes

Minn. Stat. 117.025, subd. 2 (2000)	12
Minn. Stat. 480A.08(c)	9

Constitutional Provisions

Minnesota Constitution, Article I, Section 13	12, 18
Minnesota Constitution, Article I, Section XIII.....	1, 2

LEGAL ISSUES

A. Whether the trial court erred in granting summary judgment to the City of Bloomington (“City”) and denying Appellants Gordon D. Galarneau and Penny Sue Galarneau’s (“the Galarneaus” or “Appellants”) motion for summary judgment on their state constitutional claims alleging that its property interests had been destroyed or damaged for public use without just compensation therefor, first paid or secured.

- (1) The issue was raised in a motion for summary judgment in the trial court. [App. 000262]
- (2) The Trial Court found that no taking had occurred and entered summary judgment for Respondents.
- (3) The issue was preserved for appeal by the filing of this appeal on March 12, 2010.
- (4) Most apposite authority:

DeCook v. Rochester International Airport Joint Zoning Board, 2007 WL 2178046, (Minn. Ct. App. A06-2170) (July 31, 2007), review denied (Minn. Oct. 24, 2007) [App. 000026]¹

DeCook v. Rochester International Airport Joint Zoning Board, (Minn. Ct. App. A09-969) (May 11, 2010) [App. 000034]²

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007)

McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980)

Minnesota Constitution, Article I, Section XIII

B. Whether the trial court erred in granting summary judgment to the Metropolitan Airports Commission (“MAC”)³ and denying Appellants’ motion for summary judgment on its state constitutional claims alleging that their property interests

¹ A copy of the Decision is also included in the attached Addendum at ADD 000034.

² A copy of the Decision is also included in the attached Addendum at ADD 000027.

³ The City and MAC may be referred to herein collectively as “Respondents.”

had been destroyed or damaged for public use without just compensation therefor, first paid or secured.

- (1) The issue was raised in a motion for summary judgment in the trial court. [APP 000262]
- (2) The Trial Court found that no taking had occurred and entered summary judgment for Respondents.
- (3) The issue was preserved for appeal by the filing of this appeal on March 12, 2010.
- (4) Most apposite authority:

Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul, 216 N.W.1d 651 (Minn. 1974)

Haessler v. Braun, 314 N.W.2d 4 (Minn., 1981)

Alevizos v. Metropolitan Airports Commission, 317 N.W.2d 352, 355 (Minn. 1982)

Minnesota Constitution, Article I, Section XIII

STATEMENT OF THE CASE

This is a civil action involving inverse condemnation claims arising out of actions taken by the Respondents to take some or all of Appellants property interests in property at the end of a new runway built at the Minneapolis-St. Paul International Airport (“Airport”) and which opened in 2004. This case involves claims of a taking under the Minnesota Constitution,⁴ Article I, Section XIII which states:

PRIVATE PROPERTY FOR PUBLIC USE. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

⁴ There are no federal constitutional takings claims at issue in this appeal as the trial court dismissed those claims without prejudice as premature in its Order dated September 24, 2008. [App. 000241]

Appellants appeal from an Order dated January, 12, 2010 and resulting judgment entered on January 21, 2010 issued by the Honorable Denise D. Reilly.

The Complaint was served on or about February 28, 2008. Following Answers by the Respondents, the parties brought early motions for summary judgment as to some of the causes of action in the Complaint. Several statutory claims were dismissed with prejudice in an Order dated September 24, 2008.⁵ Discovery was done on the state constitutional claims against the Respondents and cross motions for summary judgment were filed on October 15, 2009. The Trial Court denied Appellants' motion for summary judgment and granted Respondents' motion for summary judgment in an Order dated January 12, 2010 with the resulting judgment entered on January 21, 2010. This appeal followed.

STATEMENT OF FACTS

A. Property History of 2501 and 2601 American Boulevard Prior To Expansion of Airport.

The properties at issue in this case include property at 2501 American Boulevard East, Bloomington, MN ("2501 Property") owned by Appellant Gordon D. Galarneau, Jr. and property at 2601 American Boulevard East, Bloomington, MN ("2601 Property") owned by Appellant Penny Sue Galarneau (The two properties are hereafter referred to collectively as the "Property.")

In January of 1984 the Wold-Chamberlain Field Joint Airport Zoning Board adopted the Minneapolis-St. Paul International Airport (Wold - Chamberlain Field) Zoning Ordinance ("1984 Ordinance"). This ordinance established zoning restrictions including height restrictions on the runways and surrounding areas close to the

⁵ This Court dismissed an appeal of the September 24, 2008 Order. See APP. 000241.

Minneapolis-St. Paul International Airport ("Airport"). *A copy of excerpts from the 1984 Ordinance is attached to the Affidavit of Lee A. Henderson dated May 28, 2008 ("Henderson Aff'd. ") at Exhibit 1.* [APP 00132] Under the 1984 Ordinance the 2501 Property was in Safety Zone C and had a height limitation of 991 feet above mean sea level. *Affidavit of Gordon D. Galarneau, Jr. dated May 28, 2008 ("Galarneau Aff'd. ") at ¶6 [APP 000121].* The 2501 Property is approximately 808 to 814 feet above mean sea level. See, *Admissions of the Defendants attached to the Henderson Aff'd. at Exhibit 2 (Request Nos. 7 and 10).* [APP 000154-000155; APP 000165-000166] Thus, the maximum available height for development of the 2501 Property under the 1984 Ordinance was between 183 and 177 feet above the surface.

Under the 1984 Ordinance the 2601 Property was in Safety Zone C and had a height limitation of 991 feet above mean sea level. *Galarneau Aff'd. at ¶6 [APP 000121].* The 2601 Property is approximately 807 to 810 feet above mean sea level. See, *Admissions of the Defendants attached to the Henderson Aff'd. at Exhibit 2.* [APP 00150] The available height for development of the 2601 Property under the 1984 Ordinance was between 184 and 181 feet above the surface.

B. The 2004 Zoning Changes Created Significant Impacts On The Property.

On April 29, 2004, the Wold-Chamberlain Field Joint Airport Zoning Board adopted a new ordinance amending and essentially replacing the 1984 Ordinance ("2004 Ordinance"). The 2004 Ordinance incorporated zoning and height restrictions for Runway 17-35, which was under construction at the time. *A copy of Excerpts from the 1984 Ordinance is attached to the Henderson Aff'd. at Exhibit 3.* [APP 000173] The 2004 Ordinance established Safety Zone A and Safety Zone B to the south of Runway

17-35. Safety Zone A was reduced from 4,666 feet in the 1984 Ordinance to 2,500 feet in the 2004 Ordinance. *Henderson Aff'd. at Exhibits 1 and 3.* [APP 000132; APP 000173]

The 2501 Property and 2601 Property sit on the border of Safety Zone A and Safety Zone B, approximately 2500 feet from the runway, along the extended runway centerline and were put in Safety Zone B by the 2004 Ordinance.⁶ *Galarneau Aff'd. at ¶9.* [APP 000121-122] The 2501 Property and 2601 Property, because they are located on the extended runway centerline, became as a result of the 2004 Ordinance, subject to a Precision Instrument Approach Surface, which reflects the glide scope of landing airplanes. The slope inclines upwards at a rate of 50 to 1. No structures can impede the minimum glide scope for landing airplanes. The glide slope requirements demonstrate that landing airplanes are at a height of approximately 875 feet when they cross the 2501 Property and 2601 Property. *Henderson Aff'd. at Exhibit 4* [APP 000196] or approximately 65 feet above the ground.

The height limitations for the 2501 Property was reduced from 991 feet under the 1984 Ordinance to approximately 875 feet, or approximately 61 feet above the highest point on the 2501 Property. *Id.* [APP 000196] The height limitations for the 2601 Property was reduced from 991 feet under the 1984 Ordinance to approximately 875 feet, or approximately 65 feet above the highest point on the 2501 Property. Notwithstanding the "maximum" height limitations, given the thousands of airplanes that land directly over this area, no one would actually build a building to the maximum of the permitted

⁶ But for the efforts of the MAC to reduce the size of the applicable safety zone, the Property would have been in Safety Zone A and under those restrictions would have been required to have been taken by eminent domain. The MAC purchased all of the property located in Safety Zone A.

height as that leaves no margin of error for an airplane even slightly off course. *Id.* [APP 000196]

On April 8, 2004 Bloomington city staff recommended adoption of a proposed ordinance to mirror the 2004 Ordinance. The staff report identified that the purpose of the ordinances was "to mirror the 2004 MSP Zoning Ordinance regulations. At that time the JAZB ordinance had not received its final approval. *Henderson Aff'd. at Exhibit 5.* [APP 000199] On May 3, 2004, five days following the final approval of the JAZB ordinance, the Bloomington City Council adopted an "Ordinance Establishing Airport Runway Overlay Districts" and an "Ordinance Amending the Zoning Map for Districts AR-17 and AR-22." ("Bloomington Ordinance") The City undertook no independent studies and accepted no written or oral testimony to support the adoption of the ordinance. Bloomington adopted the JAZB ordinance with no changes. *Henderson Aff'd. at Exhibit 5.* [APP 000199] The Bloomington Ordinance is permanent and has no expiration date. *Henderson Aff'd. at Exhibit 6.* [APP 000206]

Runway 17-35 opened for operations in October of 2005. *Galarneau Aff'd. at ¶4.* [APP 000121] The Bloomington Ordinance was adopted solely to benefit the Airport and the construction of the new runway at the Airport. *See Bloomington City Code 19.38.03 (a) attached to the Henderson Affidavit as Exhibit 6.* [APP 000206]

C. The 2004 Zoning Changes Caused Significant Harm To The 2501 Property and 2601 Property.

1. The Zoning Changes Have Had A Significant Impact On The Galarneau's Ability To Develop The Property.

On February 1, 2002 the Galarneaus submitted Redevelopment Plans to the City of Bloomington with respect to the Property. *Henderson Aff'd. II at Exhibit 10.* [APP

000332] The plans were modified to seek only a Conditional Use Permit for the Property for the purpose of building a hotel and the City Council denied that application on July 1, 2002 by adopting a moratorium on development that applied to the Property as set forth in Resolution No. 2002-80. *Henderson Aff'd. II at Exhibit 11.* [APP 000363] Following the adoption of the Airport Runway Overlay District, the City Council of Bloomington again denied the application in Resolution No. 2004-111 on the basis that the proposed height of the hotel exceeded the limits imposed by the Airport Runway Overlay District and the prohibition against stormwater retention ponds.⁷ (See Resolution at p. 5, ~1, 2, and 3. *Henderson Aff'd. II at Exhibit 12.* [APP 000367])

A hotel use for the property was an appropriate use at the time the conditional use permit was submitted in 2002. *Henderson II Aff'd. at Exhibit 13* (Hawkbaker Deposition excerpts). [APP 000375] Nothing can be built on the Property above 50 feet off the ground without FAA approval. *Henderson II Aff'd. at Exhibit 14* [APP 000378]

2. The Zoning Changes Have Caused A Marked Increase In Noise And Related Airplane Impacts Described By the City As Severe.

The Noise Contour for the Property is DNL 75 as set forth in Figure 5.4 of *Henderson Aff'd. II at Exhibit 1* [APP 000290], a category described by the City of Bloomington as "severe," and "sustained and can routinely interfere with speech and sleep." *Id.* [APP 000290] Sound levels double with every five or six decibel increase in the sound. If you use 60 decibels as the beginning point as set forth on Figure 5.4 on *Henderson Aff'd. II at Exhibit 1* [APP 000294], then 65 decibels is twice as loud as 60

⁷ The City of Bloomington as part of its Comprehensive Plan update in 2008 adopted an Airport South District Plan which includes the height limitations set forth in Exhibit 5.2 of the Airport Impact Document which is attached to the *Affidavit of Lee A. Henderson ("Henderson Aff'd II.") at Exhibit 1* [APP 000292]

decibels; 70 decibels is 4 times as loud; 75 decibels is 8 times as loud; and 100 decibels is 128 times louder than 60 decibels. *Henderson Aff'd. II at Exhibit 2* (Larry Lee Deposition excerpts) [APP 000297]. The actual noise experienced at the Property during the takeoff of a DC-9 airplane is at least 100 decibels, if not 105 decibels. *Henderson Aff'd. II at Exhibit 3 (DC-9 takeoff Sound Contour)* [APP 000301] and *Exhibit 2 (Larry Lee Deposition excerpts)*. [APP 000297]

Employees of Interstate who work at the Property have described the noise levels as: "Business-halting," *Henderson Aff'd. II at Exhibit 4 (Caswell Deposition Excerpts)* [APP 000304]; "very disruptive," *Henderson Aff'd. II at Exhibit 5 (Penrod Deposition excerpts)* [APP 000307]; "screaming over the building and [sounds like it is] coming right through the building," *Henderson Aff'd. II at Exhibit 6 (Schwartz Deposition excerpts)* [APP 000311]; "buzz the building" *Henderson Aff'd. II at Exhibit 7 (Sarkkinen Deposition excerpts)* [APP 000315]; "major distraction ...you cannot hold a conversation at times" *Henderson Aff'd. II at Exhibit 8 (Woodward Deposition excerpts)* [APP 000322] (*Woodward Deposition excerpts*); "nerve rackingly loud" *Henderson Aff'd. II at Exhibit 9 (Galarneau Deposition excerpts)* [APP 000327].

Interstate employees have also identified safety concerns because of the close proximity of the airplanes. *Henderson Aff'd. II at Exhibit 6, 7 and 9* [APP 000311; APP 000315 and APP 000327].

During 2007, 26% of all takeoffs at the Airport occurred off the sound end of the Runway over the Property. *Henderson Aff'd. II at Exhibit 1*. [APP 000290] During 2007, 15% of all landings at the Airport occurred on the south end of the Runway over the

Property. *Henderson Aff'd. II at Exhibit 1.* [APP 000290] The number of takeoffs and landings over the Property now exceeds 300,000 flights. [APP 000284]

As a result of the zoning changes and the presence of airplanes flying overhead on a regular basis, the market value of the Property has been significantly impacted. Appellants' expert did an appraisal comparing the before and after valuations related to the creation of the Runway (established as of October 2005) and determined that there is a diminution in value from \$10,810,000 to \$5,035,000, a loss of almost 50%. *Henderson Aff'd. II at Exhibit 15.* [APP 000384]

ARGUMENT

A. Introduction

This Court has on two separate occasions rejected the exact arguments propounded by Respondents in this case. Unfortunately the Trial Court also disregarded this Court's prior decisions finding the decisions "not precedential" and not "persuasive." *Trial Court Order at p. 18, n. 12.* [APP 000001] While unpublished decisions are non-precedential by statute, it is because they are generally applying established existing law. *See* Minn. Stat. 480A.08(c).

These arguments are part of a larger scheme of the MAC seeking to avoid responsibility for airport impacts beyond the borders of the Airport.⁸ It is undoubtedly no

⁸ The efforts of the MAC to reduce the safety zones around the airport is part of a plan by the MAC to minimize its costs now, and pay later if something catastrophic happens. See Indemnification Agreement attached to Henderson Affidavit dated June 16, 2008 [APP 000222]. This is not the first time our society has seen this rationale. We are being reminded of this rationale daily with the oil spill in the Gulf of Mexico. See the following public articles: NY Times Article June 15, 2010 <http://www.nytimes.com/2010/06/15/science/earth/15rig.html?hp> [APP 000562]) and WSJ Article June 15, 2010 <http://online.wsj.com/article/SB10001424052748704324304575306800201158346.html?mod=W> SJ hps MIDDLETopStories . [APP 000564] In addition, Judge William Posner of the United

coincidence that MAC's counsel in this case, was counsel for the Rochester International Joint Airport Zoning Board in *DeCook v. Rochester International Airport Joint Zoning Board*, 2007 WL 2178046, (Minn. Ct. App. A06-2170) (July 31, 2007), *review denied* (Minn. Oct. 24, 2007) (APP 000026) ("*DeCook I*") and *DeCook v. Rochester International Airport Joint Zoning Board*, (Minn. Ct. App. A09-969) (May 11, 2010) (APP 000034) ("*DeCook II*").⁹ These two cases represent the most recent interpretation of inverse condemnation as it applies to airport expansions. This Court in *DeCook I* stated the issue to be whether the ordinance in question, had caused "so great a reduction in the value of appellant's 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 I* at *4; *DeCook II* at *2.

The Respondents in this case would like the Court to treat Appellants' situation no different than if the City had changed a set-back requirement from 10 to 15 feet. As this Court has recognized, airport expansion is different because it imposes burdens on a small number of property owners that the general public does not incur. It is that unique positioning that requires compensation. This Court has properly recognized that obligation in the last few years and should do so as well in this case.

States Court of Appeals for the Seventh Circuit, recently wrote an editorial addressing this exact issue in the Washington Post (June 4, 2010) <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/04/AR2010060402023.html?sid=ST2010060404017>. [APP 000566]

⁹ The Rochester International Joint Airport Zoning Board has sought review in the Minnesota Supreme Court of *DeCook II* and MAC and the League of Cities (on behalf of the City and other cities) have sought to intervene as *amicus* in that case. See Court's Docket for A09-969 (Amicus Motions dated June 3, 2010 (League of Cities) and June 9, 2010 (MAC)). The attempt to intervene has no public purpose except a desire by the City and MAC to avoid financial responsibility for the damage done to property owners caused by airport expansion.

B. The Standard Of Review Requires A Reversal Of The District Court Decision.

This Court's standard of review was set forth clearly in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 630 (Minn. 2007):

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law... we must view the evidence in the light most favorable to the... party against whom summary judgment was granted.

With respect to inverse condemnation claims, there are additional standards of review:

Whether a governmental entity's action constitutes a taking is a question of law that we review de novo...

Id. at 631.

In this case, the Trial Court did not view the evidence in the light most favorable to the Appellants as was required. Instead, the Court adopted facts proffered by the Respondents and ignored many contrasting facts offered by Appellants. In addition, the Trial Court incorrectly applied the law, which is reviewed by this Court de novo.

C. The Enactment of the Airport Zoning Overlay District in 2004 Constituted A Taking of The Property For Which Appellants Are Entitled To Compensation And The District Court Order To the Contrary Must Be Reversed.

In *DeCook I* and *DeCook II* the airport operator made exactly the same arguments as the City made in this case to the Trial Court. Compare App. 000514 with the Brief of Respondent dated October 19, 2009 in *DeCook II*, Case No. A09-969. Those arguments focus on the attempt to establish a rigid three part test for regulatory takings based on *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed. 631 (1978) which looks at (a) the 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. The problem with this analysis is that it ignores the teaching of *Penn Central* and actual holdings of the appellate courts in Minnesota and instead seeks to focus on issues that make it almost impossible for any claimant to establish a taking. To understand the error in the Trial Court decision, one must look first at the general takings standards and the evolution of the law from *Penn Central* to *DeCook II*.

The Minnesota Constitution provides that

"private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid or secured."

Minnesota Constitution, Article I, Section 13.⁷

Minnesota Statutes defines a taking as follows:

"[taking] and all words and phrases of like import" [include] every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property."

Minn. Stat. 117.025, subd. 2 (2000)

A taking may occur both as a result of the physical appropriation of property or as a result of interference with the ownership, possession, enjoyment or value of property. *Johnson v. City of Plymouth*, 263 N.W.2d 603,605 (Minn. 1978); *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002). Property owners who believe that a municipality has taken their property in the constitutional sense may petition the Court for a writ of mandamus to compel the initiation of condemnation proceedings. *Id.* at 765.

The purpose of the takings clause has also been firmly established:

The purpose of the Takings Clause is to ensure that the government does not require some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Wensmann, supra, at 532; *Westling v. County of Mille Lacs*, 581 N.W.2d 815,823 (Minn. 1998).

It is in this context that the Court must examine the progression in the law from *Penn Central* to *DeCook II*. Respondents would like the Court to adopt a fixed three part test for every case, with standards that are inconsistent with the Minnesota Constitution and established Minnesota law.¹⁰ Even the *Penn Central* Court dismissed this type of rigid standard noting that:

this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. *See Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *see United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952).

Penn Central, supra, 438 U.S. at 123. The Court in *Penn Central* also noted:

government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby*, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.* at 262-263, n. 7. *See also Griggs v. Allegheny County*, 369 U.S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking)

Id., at 128.

¹⁰ For example Respondents argued to the District Court and the District Court adopted the analysis that if the property is worth more at the time of the taking than at the time the affected party purchased the property there has been no economic impact on Appellants and thus no taking. District Court Order at p. 14. Under this analysis the only people who would have a takings claim are people who bought the affected property right before the taking event and so could suffer a loss from their initial purchase price. This cannot be a legal standard to be applied to all takings cases.

It was with this background that the Minnesota Supreme Court decided *McShane*, *supra*. Although Respondents would like the Court to think that *McShane* was decided before *Penn Central* that is not the case. In *McShane*, the Minnesota Supreme Court quoted approvingly from a California case:

We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulation of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

Id., at 258. The Court then cites *Penn Central* in the context of its holding:

We hold 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.⁴

⁴. The line between "enterprise" and "arbitration," while clear in this case, is not always easily defined. The United States Supreme Court determined in *Penn Central* that regulations for the purpose of historic preservation do not fall on the side of "enterprise." Our decision in *State, by Powderly, v. Erickson*, 285 N.W.2d 84 (Minn. 1979), follows the *Penn Central* reasoning and accordingly is not inconsistent with our resolution of the issue presented in this case.

Id., at 258-259.

Thus, in *McShane*, the Minnesota Supreme Court acknowledged the holding in *Penn Central*, and indicated that the reasoning in *Penn Central* was not inconsistent with its holding. What *McShane* did was acknowledge that there was no "set formula" as discussed in *Penn Central* and looked at the specific circumstances of the impact of airport operations on adjacent property owners. The *McShane* Court found that the character of the governmental action engaged in operating an airport was much different than traditional zoning actions and thus the property owner was entitled to compensation

if the property suffered a substantial and measurable decline in market value as a result of the regulations. *McShane* has been the law for the last 30 years in Minnesota. The public policy in *McShane* is sound – property owners exposed to the flight paths of runways suffer differently than most because the zoning contemplates the actual use of the airspace zoned by aircraft. Such actions are radically different than changing the set-back requirements across the City.

Beginning with *Wensmann*, there has been a concerted effort to get the Courts to rule that the three factors identified in *Penn Central* are the only factors to consider in a regulatory taking case, even a case involving an airport expansion. Even though *Wensmann* did not involve an airport, there was an argument that *McShane* somehow applied to the Comprehensive Plan at issue in *Wensmann* and thus *McShane* should be overruled. The Minnesota Supreme Court declined to overrule *McShane* and reaffirmed that *McShane* was still good law and consistent with *Penn Central*:

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. See *Pratt*, 309 N.W.2d at 774 (stating that "the principles enunciated in *McShane* for determining whether a taking has occurred must be applied with some flexibility" and noting that in *Penn Central* the Supreme Court "characterize[d] the inquiry as an essentially ad hoc examination of many significant factors").

Wensmann at 641, fn. 14.

With this background, the Court of Appeals has now decided four cases since *Wensmann* that deal with *McShane* issues. It is clear that where a governmental entity affirmatively acts through a specific zoning regulation designed to accommodate a specific governmental related activity and impacts a limited number of people, the

flexibility noted in *Penn Central* focuses on the nature of the governmental action and the impact on those people compared to the population as a whole.

In *DeCook v. Rochester International Airport Joint Zoning Board*, No. A06-2170 (Mn. App. July 31,2007) (*review denied* October 24,2007) the Court of Appeals, while acknowledging *Penn Central* and *Wensmann*, held:

...enacting the ordinance permitted specific activity to occur at an airport, and although the ordinances addressed potential conflicting land uses, they did so by subordinating the use of non-airport property to activity at the airport...the Supreme Court did not overrule *McShane*. Consequently, we will not disregard *McShane*, and we conclude that as in *McShane*, the ordinance here was designed to benefit the Rochester International International Airport, and appellants must be compensated if their property has suffered a substantial and measurable decline in market value as a result of the ordinance.

Id. at p. 3. (*attached to the Henderson Aff'd. II at Exhibit 17*) [APP 000434]

In 2008, the Court of Appeals again addressed the viability of *McShane* and the importance of circumstances where specific governmental activity is the reason for the zoning restrictions. In *Bailey v. Minnesota Pollution Control Agency*, No. A07-2255 (Minn. App. Nov. 4,2008) the Court held:

Where physical government activity causes interference, a compensable taking occurs if the activity causes a definite and measurable decrease in the value of the property and interferes with the current practical enjoyment of the property...When on the other hand, interference is caused by government regulation of property use, a compensable taking does not result unless the regulation deprives the property of all reasonable use...Further distinction is drawn between property-use regulations that are imposed to affect a comprehensive plan regarding competing land uses that create a reciprocal benefit and burden to all landowners...and regulations that serve to benefit a specific governmental enterprise...Enterprise regulations are excepted from the "deprivation of all reasonable use" standard that otherwise applies to land-use regulation takings claims. When a land-use regulation is designed to benefit a specific public or government 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.

Id. at pp. 7-9.¹¹ APP 000047

In *Minnesota Commercial Railway Company v. Rice Creek Watershed District*, No. A08-0096 (Minn. App. 3/24/2009), the Minnesota Court of Appeals noted that takings claims under the Minnesota Constitution can come in two forms -both physical governmental activity or specific actions through zoning:

The test, then, that we prescribe will give relief to any property owner who can show a direct and substantial invasion of his property rights of such a magnitude he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property.

Alevizos, 298 Minn. at 485-87, 216 N.W.2d at 661-62; see also *McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn. 1980) (distinguishing between interference with use and enjoyment of property by physical governmental activity, as where land is affected by airport noise and pollution, and a regulation of property use, as through zoning).

Id. at 9.¹² [APP 000056]

Finally, in *DeCook II*, the Court of Appeals was confronted a second time with the same arguments that *McShane* no longer was the law after *Wensmann*. The Court noted:

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

¹¹ In *Bailey*, the regulation at issue was not designed to benefit a specific public or government enterprise, nor did it involve physical government activity. Thus the deprivation of all reasonable use standard governed. However, the Court’s delineation of the applicable law is both applicable and instructive.

¹² The issue in *Minnesota Commercial Railway Company* involved a claim of physical governmental activity, not a specific regulation through zoning to accommodate a governmental activity. Again, the issue differed but the viability of the *McShane* situation of specific zoning actions to accommodate airport activity was affirmed by the Court of Appeals.

merely be instructive in considering the character factor under *Penn Central*...

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*.

(emphasis added) *DeCook II* at *4.

Unfortunately, the trial court in this case did not follow this Court’s teaching following *Wensmann*, but rather adopted a rigid three part test that has never been adopted by this Court or the Minnesota Supreme Court in airport takings cases. In addition, the application of the three part test by the trial court violates the Minnesota constitution.

The trial court ruled that in analyzing the economic impact of the regulation, the landowner loses unless he has been deprived of all reasonable uses of his land. *Trial Court Order at pp. 12-13*. This holding violates the Minnesota Constitution and state statutes which specifically contemplates recovery for a partial taking of property:

"private property shall not be taken, destroyed **or damaged** for public use without just compensation therefore, first paid or secured."

(emphasis added) *Minnesota Constitution, Article I, Section 13*. See also, *Minnesota 117.025, subd. 2 (2000)* (“[taking] and all words and phrases of like import” [include] every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property.”).

Therefore, the trial court found that since the Appellants continued to receive market rents for the property there was an economically viable use and therefore the economic impact factor favored the City. This analysis ignores the Minnesota

Constitution and statutes which contemplate recovery for partial takings (the federal constitution has no similar language for damage to property). In addition, the trial court ignored the fact that the zoning restrictions on the Appellants' Property do not apply to all property in Bloomington, but rather only to a very limited number of property owners in the flight path of the runway. Thus, almost all other property owners in Bloomington have the ability to redevelop their property to height limits much greater than what is now imposed on Appellants. That is a burden on Appellants that others in Bloomington and elsewhere in the Twin Cities do not have to bear.

In addition, the Court notes that since the Appellants have owned the Property for a long time, its value is higher today than when it was purchased and thus there has been no economic impact on Appellants. *Trial Court Order at 14*. This argument was specifically rejected by this Court in *DeCook I*:

But it appears that the district court determined this rate of return based on the change in property value during the entire period that appellants owned the property. Considering the entire ownership period fails to address whether Ordinance No. 4 caused a reduction in property value because the ordinance could only have caused a reduction in value during the period that it existed. Therefore, the district court should only have considered changes in value that occurred after the ordinance was adopted.

DeCook I at *4.

This entire analysis also ignores the fact that the increased risks created by operating aircraft over the Property, a risk that did not exist prior to the zoning changes, could catastrophically impact the Property at any time. We are watching daily the impact on property owners and businesses in the Gulf of Mexico that were severely impacted by a governmental decision to allow drilling and short cuts taken by the operator of an oil rig. Here, the MAC deliberately set out to reduce the safety zones around the new

runway and Appellants sit in an area of much higher risk because of those decisions. In the absence of a perpetual statute of limitations, this Court must factor that risk into the economic impact argument, since the risk did not exist prior to the adoption of the zoning ordinance.

The trial court's analysis of the investment backed expectations is similarly flawed. The Court compares the investment expectations at the time of the original purchase of the property, citing *Wensmann*. This analysis would be more accurate if the regulations at issue affected all of Bloomington. However, they apply only to a very narrow band of property. If Appellants' Property were one mile to the east or west, they would not be restricted in their redevelopment of the Property. It is only because of their proximity to the flight path of the new runway that they have had the zoning requirements changed as to their property. In addition, the same rationale in *DeCook I* cited above, applies to this factor. It is patently unfair to apply a zoning restriction to a handful of properties to accommodate an expansion of airport operations and then argue that since you did not contemplate redevelopment of the property at the time you purchased it, you fail the takings test. If the zoning change applied to all of Bloomington, then this analysis might carry some weight. However, when applied to a specific property owner impacted by airport operations, the factor is not helpful in determining a taking. Thus, the language in *Penn Central* that there is no

"set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons

Id. at 123.

Finally, the Court totally misconstrues the analysis of the character of the governmental action factor. The trial court imposes a “bad faith” test. *Trial Court Order at p. 18*. That is not the teaching of *Penn Central* or *McShane*. The Court also compares Appellants with other property owners in Safety Zone B to say that there is no burden imposed. That is also not the test. The test is whether Appellants bear a burden that the public as a whole does not have to bear. *See, Penn Central at 123, Wensmann at 632, DeCook I at *1, and DeCook II at *5*.

Therefore, the trial court’s analysis of takings issue as to the City is incorrect as a matter of law. This Court should reverse the trial court and order summary judgment entered for Appellants as to the issue of a taking, sending the case back for a determination of damages. *DeCook I, supra*.

D. The Use of Appellants’ Property For Airport Operations Constitutes A Taking Of The Property By The MAC For Which Appellants Are Entitled To Compensation And The District Court Order To The Contrary Must Be Reversed.

The Trial Court also misapplied the legal standards and assumed facts favorable to the MAC in ruling on the question of the MAC’s culpability for the airport operations now that occur over Appellants’ Property. The MAC is a public corporation that owns the airport but does not actually implement the restrictive zoning requirements. It does however bear responsibility for the overflights of aircraft over Appellants’ Property. *Alevizos v. Metropolitan Airports Commission*, 298 Minn. 471, 216 N.W.2d 651 (1974) (*Alevizos I*).

The Trial Court assumed facts favorable to the MAC in deciding in MAC’s favor on the pending summary judgment motion. By way of example, in *Alevizos I* the homeowners who were found to have had a substantial invasion of property rights were

8,000 feet from the runway and off the centerline. *Alevizos v. Metropolitan Airports Commission*, 317 N.W.2d 352, 355 (Minn. 1982) (“*Alevizos II*”). By contrast, the Appellants Property is located 2,500 feet from the runway and directly on the centerline. [APP 000121-122] It is difficult to fathom how the Court could determine as a matter of law that the first part of the overflight condemnation test was met in *Alevizos* and yet the trial court in this case found that there was no substantial invasion of property rights.

Airplanes landing over the Property can be as low as 60 – 75 feet off the ground as they are almost to the runway when they cross the Property. [APP 000196] That there has been an invasion of property rights is readily apparent to anyone standing on the property while airplanes are landing.

In addition, the property sits in the 75 DNL level, a level 8 times louder than the 60 DNL level. [APP 000283; 000293] Given that all property north of American Boulevard under the flight path has been purchased by the MAC, the Property is almost unique as the only private property in the 75 DNL noise contour. Even if the MAC argues that there is one or more other properties in the 75 DNL noise contour, there clearly are at best only a handful of privately owned properties that exist in the 75 DNL noise contour compared to all of the property owners in Bloomington.

The City of Bloomington, which has done a significant amount of noise analysis regarding the impact of airport noise on Bloomington, describes the impact of the 75 DNL noise contour on affected property:

Noise impacts at DNL 75 and above are considered severe. Residential, most public and quasi-public, and hotel uses are incompatible with these noise levels ... Noise impacts at DNL 70-75 are sustained and can routinely interfere with speech and sleep.

See Bloomington Comprehensive Plan 2008, Airport Impact (Henderson Aff'd. II at Exhibit 1) [APP 000293]

Larry Lee, the community Development Director in Bloomington agreed that the 75 DNL level is a very intrusive level of noise. [APP 000298-300] This description is also consistent with the testimony of Interstate employees who work at the Property. [APP 000283; 000305-331] (*and associated citations*). Based on its location in the 75 DNL noise contour there can be no dispute regarding the direct and substantial invasion of the Property.

However, the Property's position in the 75 DNL noise contour is actually only a secondary invasion of the Galarneau property rights. Unlike the residents of South Minneapolis in *Alevizos I*, the Appellants have actually had property rights taken away from them for the purpose of creating an airspace path for airplanes using the Runway. Prior to the building of the Runway, the height limits on Interstate's property was to an elevation of 991 feet above the sea level. The effective impact of this height limit was that the Appellants could have built a 15 story building on their property (similar to the Registry Hotel which existed across the street). They in fact filed an application with the City of Bloomington to establish that right.

After the building of the Runway, the height limit was reduced by 100 feet to 890 on the Property. Thus, the Appellants have had a complete taking of 100 feet of airspace above their property, which has been made available to airplanes when using the Runway for takes off or landings. Thus there clearly has been a direct invasion of their property rights as the airspace was physically taken away from the property owners. No one can argue that it was anything other than substantial because it is a complete and permanent taking of 100 feet of airspace for the use of airplane travel.

Although the trial court in *Alevizos* found property much farther away had met the legal standard for a taking, at a minimum the trial court in this case misapplied the summary judgment standard with respect to whether there were genuine issues of material fact regarding the location of the Property at the edge of Safety Zone A, 2,500 feet from the end of the runway, directly in the flight path, having landing airplanes less than 75 feet off the ground and experiencing decibel levels that the City of Bloomington acknowledges are “severe.” Appellants believe that summary judgment should be entered in their favor on this aspect of the *Alevizos* test, but at a minimum there are genuine issues of material fact that need to be resolved by a jury.

There have been over 300,000 airplanes take off or land over the Property since the runway opened. [APP 000284] The Court’s adopted standard of whether that constitutes a substantial invasion of their property rights is whether every aircraft going over the Property stops every telephone conversation. *Trial Court Order at pp. 22-23.* As the Court noted in *Alevizos I*:

The right to use one’s property in relative freedom from irritating noise and interference can hardly be disputed in view of present-day living conditions where a great deal of governmental and private effort is spent on planning and zoning our cities in an effort to improve the quality of life. These societal efforts to protect certain land uses from irritating interferences, then, indicate that the use and enjoyment of one’s property without unduly irritating noise, vibrations, and gaseous fumes have arisen to the status of a property right for which a property owner may demand compensation when it is denied to him by governmental activity.

This does not mean that every noise or interference with a property owner’s use and enjoyment thereof constitutes a taking. 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. But when those interferences reach the point where they cause a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the

air flights, a property right has been, if not 'taken or destroyed,' at the very least 'damaged,' for which our constitution requires that compensation be paid. This will not give relief to the unusually sensitive person because the measure of recovery is decrease in market value of the property due to its decreased desirability in the general market place rather than the amount of discomfort to the individual.

Id. at 661-662. There is no question that the Property is in a unique location and suffers from aircraft overflights unlike any other property in the Twin Cities. In addition to watching airplanes land at heights frightening to lay people, the Property certainly suffers from noise issues that do not affect the average member of a vibrant and progressive society. Therefore, the Trial Court erred in awarding summary judgment to MAC on the basis that there was no substantial invasion of the property rights of Appellants.

The trial court also disregarded the opinion of Appellants' expert that the impact of the airplane overflights caused a significant diminution in the value of the property. In *Haessler v. Braun*, 314 N.W.2d 4, 10 (Minn., 1981), the Supreme Court noted that to meet this part of the *Alevizos* test,

it is not necessary to prove the actual amount of damage caused to the property as a result of the alleged taking. Neither is it necessary to place a fixed percentage of diminution on the property's market value. That determination is for the court appointed commission, which has the responsibility of deciding what compensation would be just. To satisfy the *Alevizos* test, all the petitioner need show is that his property has suffered diminution in property value as a result of the invasion of a property right and that that diminution is definite and measurable.

Galarneaus have met this test without equivocation. There has been a complete taking of 100 feet of airspace above the property for use by airplanes. Plaintiff's expert has valued that loss. It is definite and measurable and is \$5 million or 50% of the value of the property prior to the Runway. *Henderson Aff d. II at Exhibit 15*. Therefore, Appellants

have met the requirement of demonstrating that there has been a measurable and definite diminution in value of the Property.

In addition, Appellants' expert report does an extensive evaluation of the value of the Property before the runway was built and the impact of the new runway and overflights on the value following the opening of the runway. [APP 000385-431] Comparisons were made of sales of property before the runway opened and after, and as impacted by the new runway. The conclusion of the expert was that there was a \$5 million decrease in value caused by the opening of the runway and the commencement of airplane overflights which did not exist prior to the runway. This conclusion was based on market studies of sales before and after the runway opening. The appraisal contains many pages of data regarding the Property, comparable sales, and the impact of the runway. [APP 000385-431] The trial court conclusion that the appraisal is not substantiated by market studies or other documentation is simply incorrect.

The issue for the Court to decide is whether there has been some diminution in value, not what the exact amount of that diminution might be, or whether the MAC and the City have to share – by having the loss allocated between the parties based on the zoning ordinances and the overflights. All of these questions are typically the responsibility of a jury.¹³ Likewise, the Court's statement that there was no causal connection between the aircraft overflights and the diminution of the market value of the

¹³ Similarly, the holdings of the Trial Court that the appraisal adjustments for comparable sales were "neither explained nor supported by the record as a whole" is incorrect. Trial Court Order at pp. 24-25. The business of appraising property is to take all the factors that affect a property and make adjustments to value accordingly. This was done. APP 000427 (p. 126). There is no magic formula for this task but requires an analysis of the comparable sales and the experience of the appraiser. These are the general subjects for cross examination of experts as to whether the adjustments made were appropriate, too high or too low. That is not the determination for this Court to make at this stage of the proceeding.

Property (Trial Court Order at p. 25) is also incorrect. The entire purpose of the expert report was to compare the value of the Property without the runway and the value of the Property after the runway opened and overflights commenced. Over 100 pages of the expert report are focused on that comparison, which clearly goes to the causation issue. The Trial Court erred in finding no diminution in value of the Property. The grant of summary judgment should be reversed and the matter remanded to the District Court with direction to enter an order compelling MAC to begin eminent domain proceedings related to the Property.

CONCLUSION

For the reasons set forth herein, this Court should reverse the decision of the Trial Court. Appellants believe that summary judgment should be granted in favor of Appellants as to the City and the MAC, leaving only a determination of the damages incurred. In the event the Court does not feel that summary judgment is appropriate for Appellants, then there exist genuine issues of material fact, which require a jury trial and the case must be remanded for that purpose.

Dated: June 16, 2010

HESSIAN & MCKASY, P.A.

By: 

Lee A. Henderson (Att. No. 126305)
4000 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
Telephone: (612) 746-5750

ATTORNEY FOR PETITIONERS