

No. A09-969

STATE OF MINNESOTA
IN SUPREME COURT

Leon S. DeCook and Judith M. DeCook;

Appellant,

vs.

Rochester International Airport Joint Zoning Board,

Respondent.

BRIEF OF AMICUS CURIAE
STATE OF MINNESOTA COMMISSIONER OF TRANSPORTATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
LEGAL ISSUES.....	1
STATEMENT OF AMICUS INTEREST.....	2
ARGUMENT	7
I. A REGULATION THAT CAUSES A MERE DIMINUTION IN VALUE TO AFFECTED PROPERTY DOES NOT, WITHOUT MORE, EFFECT A COMPENSABLE CONSTITUTIONAL TAKING.	7
II. THE POLICIES THAT SUPPORT GOVERNING MINNESOTA LAW CONTINUE TO SUPPORT THE POSITION THAT GOVERNMENT REGULATIONS THAT CAUSE MINIMAL DIMINUTIONS IN VALUE TO PRIVATE PROPERTY DO NOT RESULT IN COMPENSABLE CONSTITUTIONAL TAKINGS.	10
III. A CHANGE IN THE LAW THAT WOULD ALLOW COMPENSATION FOR EVERY DIMINUTION IN VALUE RESULTING FROM AIRPORT SAFETY REGULATION WOULD IMPACT AIRPORTS STATEWIDE.	12
CONCLUSION	16
APPENDIX	18

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 AUTHORITIES

	Page
FEDERAL CASES	
Andrus v. Allard 444 U.S. 51, 100 S.Ct. 318 (1979)	9
DeCook v. Rochester Int'l Airport Joint Zoning Bd. No. A09-969, 2010 WL 1850268, *1 (Minn. Ct. App. May 11, 2010).....	7
Lingle v. Chevron U.S.A., Inc. 544 U.S. 528, 25 S.Ct. 2074 (2005)	10, 11
Penn Central Transportation Company v. New York City 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)	7, 8, 11, 16
STATE CASES	
Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007).....	8, 9, 11
STATE STATUTES	
Minn. Stat. § 15.01	2
Minn. Stat. § 15.06	2
Minn. Stat. § 174.01	2
Minn. Stat. § 360.011	2
Minn. Stat. § 360.013	2
Minn. Stat. § 360.015	2, 3, 5
Minn. Stat. § 360.033	2
Minn. Stat. § 360.063	6
Minn. Stat. § 360.065	5, 6
Minn. Stat. § 360.0637	6
Minn. Stat. § 360.071	6

Minn. Stat. § 360.072 6

STATE REGULATIONS

Minn. R. 8800.2400 (2010) 1, 3, 4, 5

MINN. R. CIV. APP. P. 129.03 2

LEGAL ISSUES

Where a governmental entity enacts zoning of privately-owned property near an airport to satisfy safety concerns, and the property experiences some diminution in value as a consequence of the zoning change, while many allowable uses of the property exist that are compatible with proximity to an airport, does a mere diminution in any amount result in a compensable constitutional taking?

After trial, the district court concluded that the diminution in value was minimal with regard to the value of the property as a whole and so did not result in a compensable constitutional taking. The court of appeals reversed. This Court granted review.

Apposite Authorities:

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

Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318 (1979).

Minn. Const. art. 1, § 13.

Minn. Stat. § 360.011 (2010).

Minn. Stat. § 360.015, subd. 3(2010).

Minn. R. 8800.2400 (2010).

STATEMENT OF AMICUS INTEREST¹

The Department of Transportation (MnDOT) is a department of Minnesota's state government. Minn. Stat. § 15.01. MnDOT is charged with development, maintenance, and administration of state transportation policies, plans, and programs. Minn. Stat. § 174.01, subd. 1. The first enumerated goal of the state transportation system is providing safe transportation for users throughout the state of Minnesota. Minn. Stat. § 174.01, subd. 2 (1).

MnDOT is supervised and controlled by the Commissioner of Transportation. Minn. Stat. § 174.02, subd. 1, Minn. Stat. § 15.06, subd. 1. Among other specified transportation responsibilities, the Commissioner is charged with "general supervision over aeronautics within" Minnesota and to "encourage the establishment of airports." Minn. Stat. § 360.015, subd. 1. The legislature has determined that airports are a "public necessity." Minn. Stat. § 360.033, subd. 1. The legislature has stated that "[t]he operation and maintenance of airports is an essential public service." Minn. Stat. § 360.013, subd. 39. The legislature has declared that the purpose of statutes governing aeronautics is to "provid[e] for the protection and promotion of safety in aeronautics" and to "establish[] uniform rules . . . consistent with the safety and rights of others." Minn. Stat. § 360.011. The legislature has charged the Commissioner with making

¹ Pursuant to Minn. R. Civ. App. P. 129.03, *amicus* Commissioner hereby indicates that counsel for Commissioner authored this brief in whole; no person or entity, other than the *amicus curiae*, its members, and its counsel, authored any part of it or made a monetary contribution to the preparation or submission of the brief.

administrative rules with respect to aeronautics, “all commensurate with and for the purpose of protecting and insuring the general public safety [and] the safety of persons and property on land or water.” Minn. Stat. § 360.015, subd. 3.

The Commissioner has adopted rules governing zoning of land in the vicinity of airports. Minn. R. 8800.2400. Three zoning designations (A, B, and C) provide differing restrictions on use, allowed structures, and population density, with “A” being the most restrictive. Minn. R. 8800.2400, subpts. 5, 6.

In zone A, permitted uses include “uses which will not create, attract, or bring together an assembly of persons” such as “agriculture (seasonal crops), horticulture, raising of livestock, animal husbandry, wildlife habitat, light outdoor recreation (nonspectator), cemeteries, and auto parking.” Minn. R. 8800.2400, subpt. 6(B). Zone A does not allow “buildings, temporary structures, exposed transmission lines, or other similar land use structural hazards.” Minn. R. 8800.2400, subpt. 6(B).

In zone B, one or more structures may exist as long as they fit within a single building plot on a parcel of land containing at least 3 acres; the size of the building plot is limited by ratios applied to the size of the land parcel. Minn. R. 8800.2400, subpt. 6(C). The use of the land and any structures must be such that they would “not create, attract, or bring together a site population that would exceed 15 times that of the site acreage.” Minn. R. 8800.2400, subpt. 6(C). Uses that are not allowed in zone B include “churches, hospitals, schools, theaters, stadiums, hotels and motels, trailer courts, camp grounds, and other places of public or semipublic assembly.” Minn. R. 8800.2400, subpt. 6(C).

In zone C, uses are allowed other than a use that “creates or causes interference with the operation of radio or electronic facilities on the airport or with radio or electronic communications between the airport and aircraft, makes it difficult for pilots to distinguish between airport lights and other lights, results in glare in the eyes of pilots using the airport, impairs visibility in the vicinity of the airport, or otherwise endangers the landing, taking off, or maneuvering of aircraft.” Minn. R. 8800.2400, subpts. 6(A), (D). The limitations on uses in zone C also apply in zones A and B. Minn. R. 8800.2400, subpt. 6(A).

With regard to “established residential neighborhoods in built up urban areas” in zoning areas A and B, the general zoning prohibitions do not apply and instead the public interest in safety is balanced against the public interest in “maintaining existing land uses.” Minn. R. 8800.2400, subpt. 6(E)(1). In making that determination, uses are prohibited where they present “in the opinion of the commissioner, a material danger to the landing, taking off, or maneuvering of aircraft or to the safety of persons on the ground.” Minn. R. 8800.2400, subpt. 6(E)(5)(e). The Commissioner must consider factors such as the “possibility that the land use may contribute to or cause a collision of two or more aircraft or an aircraft and some other object,” the “possibility that the land use may, in case of an aircraft accident, cause an explosion, fire, or the release of harmful or noxious fumes, gases, or substances,” the “tendency of the land use to increase the number of persons that would be injured in case of an aircraft accident,” and the “effect of the land use on availability of clear areas for emergency landings.” Minn. R.

8800.2400, subpt. 6(E)(5)(e). Decisions about airport safety zones involve consideration of safety issues; they do not involve consideration of the impact that safety zoning may have on the profitability of an airport. Accordingly, any notion that an airport is a business enterprise, rather than a publicly-regulated transportation hub, should not apply.²

The purpose of these airport safety zones is to protect the safety and property of people on the ground when airplanes encounter an emergency situation³. Minn. R. 8800.2400, subpt. 6. The airport safety zones exist as a response place near the airport where an aircraft confronted with emergency conditions can dump fuel or make an emergency landing.

The Commissioner also plays a role in the process for the specific zoning areas for each airport in addition to adopting the airport safety zoning rules set forth in Minn. R. 8800.2400 pursuant to its statutory charge from Minn. Stat. § 360.015, subd. 3. Although local joint airport zoning boards (like the Rochester Board) create zoning areas for regional airports, they must submit their plans to the Commissioner, where they are reviewed by the Aeronautics Office of the Minnesota Department of Transportation (MnDOT). Minn. Stat. § 360.065, subd. 2. Local airport safety zoning may not be adopted or otherwise acted upon without the Commissioner's approval. Minn. Stat. § 360.065, subd. 2. If the plans conform to the governing minimum standards, the

² Airports facilitate a mode of transportation in our changing society. FAA enplanement data maintained by MnDOT shows, *e.g.*, that enplanements at commercial airports in Minnesota doubled from 9,190,277 in 1988 to 18,372,496 in 2005. App. 1.

³ See <http://www.dot.state.mn.us/aero/avoffice/planning/zoning.html>. App. 3.

Commissioner approves; if the Commissioner objects, the local board is allowed to make amendments to satisfy the objections. Minn. Stat. § 360.065, subd. 2.

Furthermore, the Commissioner may also be involved in decisions about variances from zoning regulations. Airport safety zoning regulations created by a joint zoning board must also provide for the creation of a board of adjustment that hears and decides applications for variances from zoning. Minn. Stat. § 360.071, subd. 1. A person seeking a variance submits an application to the board of adjustment. Minn. Stat. § 360.067, subd. 2. If the board does not explicitly grant or deny within four months, the application is deemed granted, subject to mandatory review by the Commissioner. Minn. Stat. § 360.063, subd. 6a. Upon review of those applications deemed granted by lack of board action, the Commissioner “may amend or rescind the variance on finding that this action is required to protect the public safety.” Minn. Stat. § 360.063, subd. 6a. The Commissioner does not have authority to overturn a variance explicitly granted by a board of adjustment. The repeated granting of variances compromises airport safety zoning at the subject airport. A person aggrieved by a decision of either the board of adjustment or the Commissioner may seek judicial review. Minn. Stat. § 360.072, subd. 1.

The Commissioner has an interest in this case as an *amicus curiae* as a result of the responsibility for a safe statewide multi-modal transportation system. The Commissioner has reviewed the Rochester International Airport Zoning Ordinance No. 4 and approved it because it conforms to applicable minimum standards.

ARGUMENT

I. A REGULATION THAT CAUSES A MERE DIMINUTION IN VALUE TO AFFECTED PROPERTY DOES NOT, WITHOUT MORE, EFFECT A COMPENSABLE CONSTITUTIONAL TAKING.

At the root of this case is a change in airport safety zoning to a portion of a 240-acre tract of land. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, No. A09-969, 2010 WL 1850268, *1 (Minn. Ct. App. May 11, 2010). When appellants Leon DeCook and Judith DeCook purchased the land at issue, the eastern portion was under the approach path for a runway. *Id.* As a result, 19 acres of the 240-acre tract had been in safety zone A at the time of purchase. *Id.* In 2002, the Rochester Board increased the width of safety zone A which brought an additional 28 acres of the 240-acre tract into zone A. *Id.* The owners alleged that the change in zoning effected a compensable constitutional taking; a jury concluded that, as a result of the change, the value of the entire 240-acre tract diminished by \$170,000. *Id.* at *2.

In *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the United States Supreme Court adopted a three-factor analysis that applied for determining whether a government regulation of private property amounted to a compensable taking pursuant to the United States Constitution. Those factors are, “[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations [, and] . . . the ‘character of the governmental action.’” *Id.* The Minnesota Supreme Court has applied the *Penn Central* framework for analysis of claims that regulations

effected a compensable taking, stating “we agree . . . that the standards set forth in *Penn Central* provide the best analytic framework to determine whether the city’s actions resulted in a regulatory taking under the Minnesota Constitution.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 (Minn. 2007).

To determine whether the airport safety zoning change at issue in this case effected a compensable taking, a majority of the court of appeals recognized that the legal approach discussed in “*Penn Central* governs regulatory-taking analysis.” *Id.* at *4. The majority recognized law that a regulation effects a taking when the regulation diminishes the property value “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 *5 (citing *McShane*). That analysis expressly requires conclusions on two prongs: (1) that the diminution in value is “so substantial[] that it is manifestly unfair;” and (2) that the diminution is one that “the property-owning public in general does not suffer.”

The court of appeals below purported to apply the *Penn Central* standard, but only reached a conclusion on the second prong, that the regulation forced the owners to bear a burden that their neighbors do not, and then proceeded to hold that “[b]ecause of appellants’ unequal burden, it is manifestly unfair to require them to sustain the diminution in market value without just compensation.” *Id.* at *5. The majority did not provide any express analysis on the first prong. The majority held that the diminution in

value amounted to a constitutional ‘taking’ of private property as would entitle the owners to ‘just compensation’ from the taker. *Id.* at *4.

The dissent below describes three methods recognized in law for analysis of the first prong, whether a diminution is so “substantial” as to be “manifestly unfair;” the dissent notes that two of those methods would not apply and that the method that could apply is the “most commonly-used method,” whereby the law “measures the value taken from the property by regulatory action against the overall initial value.” *Id.* at *5.

The decision of the court of appeals was incorrect because it effectively removed, or simply ignored, the pre-existing requirement in Minnesota law that a diminution in land value caused by a regulation be “substantial” before imposition of the regulation would be considered a ‘taking’ of private property. The majority holding is not consistent with governing law, but rather departs from the law to the extent that it stands for the proposition that any diminution in value results in a ‘taking.’

That result is inconsistent with the United States Supreme Court’s interpretation of the United States Constitution. *See Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327 (1979) (stating, “a reduction in the value of property is not necessarily equated with a taking.”). This Court has cited *Andrus* as support for the principle in Minnesota law that “[a] taking does not result simply because the property owner has been deprived of the most profitable use of the property.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007) (citing *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327 (1979)). Accordingly, the Minnesota Constitution, like its federal counterpart, does

not recognize a compensable constitutional taking in every regulation that effects some diminution in value to private property.

II. THE POLICIES THAT SUPPORT GOVERNING MINNESOTA LAW CONTINUE TO SUPPORT THE POSITION THAT GOVERNMENT REGULATIONS THAT CAUSE MINIMAL DIMINUTIONS IN VALUE TO PRIVATE PROPERTY DO NOT RESULT IN COMPENSABLE CONSTITUTIONAL TAKINGS.

One of the policy rationales expressed for the settled law that ‘a reduction in the value of property is not necessarily equated with a taking’ is the understanding that “government regulation — by definition — involves the adjustment of rights for the public good.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 2081 (2005). Implicit then is the notion that private property owners must accept some diminutions in value to their property without compensation as part of the cost of being part of American society.

Another policy rationale is the concern, that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Id.* That concern recognizes the reality that payment for any and all diminutions in value that result from regulation must be offset from expenditure elsewhere and the policy that those other expenditures for the public good should not be sacrificed.

Moreover, it must be emphasized that, unlike a traditional constitutional taking in which the public acquires private property in full, when an alleged taking arises from regulation, the private land owner still retains ownership of the same entire tract of land. Also, to the extent that the regulated property still retains significant value, it is further

distinct from a traditional taking⁴. Furthermore, where the diminution arises from a zoning change, there remains the potential that the zoning could change again, restoring the original use or development possibilities.

Particularly with regard to land adjacent to airports, the second *Penn Central* factor, that the regulation interferes with “distinct investment-backed expectations,”⁵ will often weigh against finding a taking. Courts have found that analysis of this factor involves consideration as to whether the private land owner’s investment expectations were reasonable. *See Wensmann*, 734 N.W.2d at 638 (stating, “[t]he fact that residential development of the property was prohibited when Rahn purchased the property is relevant to determining the reasonableness of Rahn’s expectations.”). When a property owner purchases land adjacent to an airport, it is often reasonably foreseeable that zoning in the vicinity of an airport could change for safety reasons, in a way that could render expectations for use or development unreasonable. Here, the owners could continue the existing uses of their property for a golf course and for agricultural crop production.

⁴ Regulatory takings jurisprudence “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 539, 125 S.Ct. 2074, 2082 (2005). “[P]hysical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.” *Id.* In the instant case, no physical property was taken and no current uses were prohibited or disturbed.

⁵ *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 637 (Minn. 2007).

Here, the potential for other uses continued both in the area subject to safety zone A and the area not subject to safety zoning. Indeed, many potential uses of their property would benefit from the proximity to the airport.

III. A CHANGE IN THE LAW THAT WOULD ALLOW COMPENSATION FOR EVERY DIMINUTION IN VALUE RESULTING FROM AIRPORT SAFETY REGULATION WOULD IMPACT AIRPORTS STATEWIDE.

Minnesota has 136 publicly-owned general aviation and commercial airports.⁶ These airports are the result of significant public investment in transportation infrastructure over time. MnDOT is involved in system planning and airport funding for all the state system airports in Minnesota. The executive summary of the 2006 Minnesota Aviation System Plan indicates that of the 127 non-metro airports, 24 are “key airports” having paved and lighted runways at least 5,000 feet long; 80 are “intermediate airports” having paved and lighted runways less than 5,000 feet long; and 23 are “landing strips” having turf runways. *Id.* The airport zoning rules apply to all three types of airports.

Eighty-six percent of Minnesota’s population is within 60 minutes of a commercial service airport. *Id.* Airports that provide commercial airline service include Bemidji, Brainerd Lakes, Chiselm-Hibbing, Duluth, International Falls, Thief River Falls, and Rochester.⁷ Some examples of ‘key’ airports include the Rochester airport at issue here as well as those at the cities of Warroad, International Falls, Ely, Hibbing, Bemidji,

⁶<http://www.dot.state.mn.us/aero/avoffice/pdf/MinnesotaAviationSystemPlan-2006ExecutiveSummary.pdf>, p. 4. App. 9.

⁷ <http://www.dot.state.mn.us/aero/avoffice/commaviation.html>. App. 30.

Willmar, Fergus Falls, Worthington, Marshall, Austin, Winona, St. Cloud, and Duluth.

Id. These airports provide Minnesota citizens with a wide range of business and personal service, such as economic development opportunity, package delivery, tourism access, emergency medical service, firefighting, search and rescue, agricultural services, and weather information.

If the decision of the court of appeals is allowed to stand, it will impact safety zoning at airports around the state. If regulatory actions amount to a “taking” of property when the regulation causes any diminution in value, enacting any such regulation will cause extra expenditure of public funds or render the previous public investment in the aviation system useless.

The Commissioner is concerned with airports statewide. Airports in smaller communities around the state do not have the financial resources as the metro airports. Although a decision by this Court in this case that changes the law in a way that increases costs for airport safety zoning will apply to and impact all airports in the state, the effect of the economic impact on airports that have less financial resources will likely be more pronounced.

One potential result is that airports might forego expanding infrastructure, even where analysis suggests that it is warranted, to avoid incurring the costs of proportionately expanding the airport safety zones.

Also, if airports around the state expand or change their safety zoning, communities may be more inclined to grant variances to the airport safety zoning to avoid

the costs of the 'taking' and the additional costs of the litigation. Local airports may be more inclined to opt against ruling on a variance application, allowing it to be deemed granted and then subject to review by the Commissioner. If variances are granted for economic reasons which otherwise would be denied for safety reasons, the purpose of the airport safety zoning will be effectively defeated. Businesses or residences would continue in areas that airport safety zoning indicates should be free of persons and property. At that point, persons in the residences or operating or working at businesses in the airport safety zones would be exposed to the risks that the airport safety zoning ordinance was enacted to prevent. Would employees of a business conducted in an airport safety zone need to be given notice that their employment placed them in an area designated a safety zone for airplane emergencies? If so, by whom?

Recently, the zoning authority for the Willmar airport allowed incompatible land uses in the airport zoning area causing the entire airport to be relocated.⁸ The public cost exceeded \$20 million.⁹

Higher costs to achieve airport safety zoning could impact other areas of aviation safety. If a higher portion of the airport budget must be devoted to payment to nearby

8

http://www.dot.state.mn.us/aero/avoffice/pdf/MN%20Compatibility%20Best%20Practices%20FINAL%20DRAFT%20_Clean_.pdf. App. 36.

⁹ <http://wcco.com/local/Willmar.Municipal.Airport.2.361479.html>. App. 75.
<http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch1.pdf>. App. 86.

affected landowners, there may be less in the budget to pay for other safety items, such as, *e.g.*, runway maintenance, obstruction removal, and technological navigation devices.

Minnesota's airport system provides a variety of services at wide-ranging locations within a wide range of financial constraints. Large airports have both large budgets and large expenses; small airports have smaller budgets and potentially lower costs. A consequence of a court decision that imposes a new cost would impact both large and small airports, but could be the difference in an outstate community not being able to operate its airport. If a smaller community concludes that this Court's change in the law rendered the cost to continue prohibitive, and it cannot afford the sort of relocation that was done at Willmar, the community may ultimately decide to close the airport. Minnesota businesses may depend on or make decisions about locations based on whether a community has an airport. Accordingly, the Court's decision could have impacts on business development and private prosperity in Minnesota, as well as government's ability to provide access and essential services like emergency relief.

This Court should consider these potential impacts in light of the alleged injustice to a property owner from a zoning change that diminishes the value of the property. But what is the extent of that injustice? Unlike the situation involved with a taking of fee, the owner of regulated property still owns the fee, which may continue to have significant value. Indeed, the sorts of properties at issue here are near airports, and studies have shown that such properties have increased appeal for some uses because of the proximity

to the airport.¹⁰ The various safety zoning areas continue to allow a number of productive, profitable uses. And in established residential neighborhoods, the Commissioner must consider maintaining existing uses. To the extent that some uses are prohibited for airport safety reasons, a private party owning land near an airport should be able to foresee that safety changes could impact the owner's use of the land. And because airport safety zoning changes protect the safety of persons and property on the ground, the diminution in value may arguably be offset by the benefit of protection provided to life and property in the airport safety zoning.

CONCLUSION

The holding of the court of appeals in this case is inconsistent with Minnesota law governing allegations that a government zoning regulation on private property effects a compensable constitutional "taking" of property. No decisional law supports a holding that a change in zoning that causes some measurable diminution in value, however minor, results in a constitutional "taking" of property.

Instead, Minnesota law has held that for a diminution to amount to a "taking," it must be "substantial." That requirement is consistent with the first *Penn Central* factor, involving consideration of the degree of economic impact of the regulation. Although "substantial" has not been (and perhaps cannot be) defined precisely, one benchmark stated in federal law is that regulations cause a taking when the result is "functionally-equivalent to a total taking." There has been no real suggestion that the impact of the

¹⁰ <http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch1.pdf>. App. 81.

airport safety zoning at issue in Rochester came anywhere near that standard. In fact, the opposite is more likely in light of the fact that existing uses in the safety zone were not prohibited or disturbed, areas of the tract unaffected by the safety zoning benefited from the proximity to the airport, and areas in the safety zone benefited by keeping people and property from areas exposed to the risks of severe consequences that follow airplane emergencies.

Changing the law to the standard that the court of appeals majority applied would have negative impacts on all airports in Minnesota. This Court should reverse the court of appeals and hold that airport safety zoning does not effect a compensable constitutional taking when it results in but a minor diminution in value to an affected tract of property, particularly where the property retains many allowable uses, some of which will be, no doubt, more valuable due to proximity to the airport.

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Respectfully submitted,

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