

A09-969

State of Minnesota  
In Supreme Court

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Leon S. DeCook and Judith M. DeCook,

Respondents,

vs.

Rochester International Airport Joint Zoning Board,

Appellant.

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ON APPEAL FROM THE COURT OF APPEALS

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BRIEF OF *AMICUS CURIAE*  
METROPOLITAN AIRPORTS COMMISSION

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## INTRODUCTION<sup>1</sup>

In the decision below, the court of appeals disregarded this Court's direction to apply a flexible balancing test to assess regulatory takings claims. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641 n.14 (Minn. 2007). Instead, over a dissent by Judge Johnson, the court applied a bright-line rule that is so absolute in its requirement of compensation for any diminution in property value caused by airport zoning that it will "effectively compel [airports] to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis in original).

The Metropolitan Airports Commission ("MAC") urges the Court to reject the court of appeals' approach and instead hold that airport zoning is subject to the same, multi-factor test that governs regulatory takings claims as a whole.

To aid the Court's consideration of the issues presented on appeal, this brief does two things. First, it provides an overview of the airport zoning that exists in Minnesota; addresses the safety, efficiency, and preexisting-land-use concerns that guide airport zoning; and explains the regulatory process through which zoning ordinances are adopted. The court of appeals' approach would have a severe and negative effect on the ability of airport zoning authorities to protect safety and efficiency concerns in Minnesota. Second,

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<sup>1</sup> As required by Minn. R. App. P. 129.03, the MAC certifies that no counsel for a party authored this brief in whole or in part and no person or entity other than the MAC made a monetary contribution to the preparation or submission of this brief.

this brief demonstrates how the distinction between enterprise and arbitration functions that this Court introduced in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), and that the court of appeals believed compelled its erroneous holding, has been undermined by this Court's own subsequent authority and has been distinguished and limited by the lower courts. The Court should explicitly overrule the enterprise/arbitration distinction in this case.

### **IDENTIFICATION OF AMICUS**

Created by an act of the Minnesota Legislature in 1943, *see* Minn. Laws 1943, chapter 500, the MAC holds the mandate of developing the metropolitan airports system for the good of the State and its citizens. *See* Minn. Stat. § 473.601 *et seq.* Its “purposes” are “public and governmental,” and the Minnesota legislature has declared that its work on the “development, extension, maintenance, and operation of the [airports] system . . . benefits the people of the state as a whole, renders a general public service, . . . and is of great public economic benefit.” Minn. Stat. § 473.655.

The MAC owns and operates seven airports in the Minneapolis-St. Paul Metropolitan Area, including Minneapolis-St. Paul International Airport (“MSP”) and six reliever airports, including St. Paul Downtown Airport, Flying Cloud Airport, Crystal Airport, Anoka County/Blaine Airport, Lake Elmo Airport, and Airlake Airport.<sup>2</sup> These airports generate substantial benefits for the local, regional, and state economies. *See* John

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<sup>2</sup> *See generally* <http://www.metroairports.org>.

C. Martin Associates, LLC, *The Local and Regional Economic Impacts of the Minneapolis/St. Paul International Airport* (March 7, 2005).<sup>3</sup> In 2004, activity at MSP alone generated \$7.0 billion in business revenue, of which about \$1.1 billion was used for local purchases. *Id.* at 28. MSP directly generated 28,545 jobs, leading to \$1.5 billion in direct wages, and it supported a total of 231,141 jobs, including jobs in the related visitor and air freight industries. *Id.* at 19, 28.

Operating under the statutes and regulations described below, the MAC and communities adjacent to Minneapolis-St. Paul International Airport have created a joint airport zoning board and adopted an off-airport zoning ordinance for MSP. *See* Wold-Chamberlain Field Joint Airport Zoning Board, Zoning Ordinance (adopted Jan. 1984, amended April 29, 2004).<sup>4</sup> The MAC has also formed Joint Airport Zoning Boards at two of its reliever airports (Flying Cloud and St. Paul), and it expects to convene joint airport zoning boards at its remaining airports.

### ARGUMENT

#### **I. The Court Of Appeals' Bright-line Test Would Severely And Negatively Affect Zoning Near Airports Across The State.**

“The operation and maintenance of airports is an essential public service.” Minn.

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<sup>3</sup> Available at [http://metroairports.org/mac/appdocs/meetings/Mo/Agenda/MO\\_A\\_622.pdf](http://metroairports.org/mac/appdocs/meetings/Mo/Agenda/MO_A_622.pdf) (at numbered pages 33-73 of the pdf). All references herein are to the page numbers of the report.

<sup>4</sup> Available at [http://www.metroairports.org/mac/appdocs/ordinances/JAZB\\_Ordinance\\_2004.pdf](http://www.metroairports.org/mac/appdocs/ordinances/JAZB_Ordinance_2004.pdf).

Stat. § 360.013, subd. 39, and the State has created a fair and balanced process for reconciling the competing safety and economic interests implicated by airport zoning. The court of appeals' bright-line approach to applying regulatory takings law to airport zoning would severely and negatively affect the ability of airport authorities to provide this "essential public service" by disrupting the balance between competing interests that the legislature set.

**A. Airport zoning is pervasive, and it implicates the core police powers of the State to protect the safety and welfare of its citizens.**

As of the time of this filing, 142 public airports operate in Minnesota.<sup>5</sup> Maps showing the area of influence of each public airport on land planning are available on MnDOT's website.<sup>6</sup> Many of the airports are supported by zoning regulations adopted by joint airport zoning boards that balance the sometimes conflicting interests of airport users and surrounding landowners. In other communities, the airport itself or the communities adjacent to the airport have adopted zoning regulations.

Airport zoning regulations are a core exercise of a state's police power to arbitrate between potentially competing uses of property and to protect the public safety and welfare. In Minnesota, airport zoning regulations are partly a matter of statute, *see* Minn. Stat. §§ 360.061 – 360.074, partly a matter of administrative rules adopted by MnDOT, *see*

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<sup>5</sup> For a list, see <http://www.dot.state.mn.us/aero/avoffice/ops/airdir/airports.html>. For a map, see <http://www.dot.state.mn.us/aero/avoffice/pdf/PublicAccessAirports.pdf>.

<sup>6</sup> *See* <http://www.dot.state.mn.us/aero/avoffice/airportinfluencemaps.html>.

Minn. Rule 8800.2400, and partly a matter of ordinances enacted by the counties and municipalities whose territory the airports affect. The field of aeronautics is regulated generally by Chapter 360 of the Minnesota Statutes and Chapter 8800 of the Minnesota Administrative Rules. As the legislature declared, “the purpose of [these] sections is to further the public interest and aeronautical progress by providing for the protection and promotion of safety in aeronautics . . . . in order that those engaged in aeronautics of every character may so engage with the least possible restrictions, consistent with the safety and rights of others . . . .” Minn. Stat. § 360.011.

Airport zoning implicates a complex balance of competing interests, including the interests of safety, efficiency, and preservation of land uses. The legislature has instructed that each of these interests should be addressed in the zoning process:

- **Safety** – zoning should protect “the lives and property of users of the airport and of occupants of land in its vicinity,” Minn. Stat. § 360.062(a);
- **Public and private efficiency** – zoning should maximize “the utility of the airport and the public investment therein,” *id.*; and
- **Preservation of existing land uses** – zoning should preserve “existing land uses, particularly established residential neighborhoods in built-up urban areas, . . . whenever possible consistent with reasonable standards of safety,” *id.* at (b).

To characterize these interests as either purely public or purely private is too simplistic. They are both. Safety, for example, involves the safety of travelers, the safety of land owners, and the State’s general interest in the safety of its citizens. Efficiency benefits not just the operator of an airport, but the businesses and

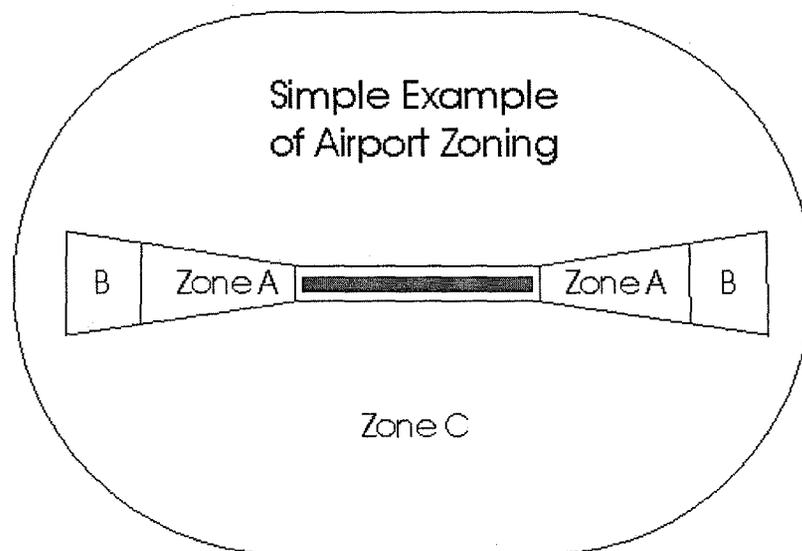
individual travelers who use it, as well as everyone who buys goods transported by air or services affected by air travel.

**B. Minnesota law establishes a fair and thorough process for balancing the competing interests implicated by airport zoning.**

To give fair consideration to all of the interests that airport zoning implicates, local government authorities engage in zoning within parameters set by the legislature, according to rules promulgated by MnDOT, in a process that invites participation by all interested parties through public hearings.

The general parameters for balancing the sometimes complementary and sometimes competing interests implicated by airport zoning are established by the legislature. Placing safety first, the legislature has found that “the creation of establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question,” Minn. Stat. § 360.062(b), and concluded that it is “necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented . . . .” *Id.* In abating hazards, however, the legislature has also instructed authorities to “distinguish between the *creation* or establishment of a use and the *elimination* of an *existing* use.” Minn. Stat. § 360.066, Subd. 1a (emphasis added). Finally, the legislature has directed authorities to accomplish the purposes of airport zoning, “to the extent legally possible, by exercise of the police power” and “without compensation.” Minn. Stat. § 360.062(b).

Implementing the legislative goals, the Commissioner of Transportation has promulgated regulations establishing minimum zoning standards for three safety zones around airports—Zone A, Zone B, and Zone C, organized from most to least restrictive. Minn. Rule 8800.2400, subp. 5. Here is a simple example provided by MnDOT showing the orientation of the three safety zones to a runway:



Land contained within each safety zone is subject to restrictions on the height of structures, *id.* at subp. 4, and the types of use permitted on the land, *id.* at subp. 6. The restrictions expressly distinguish between future and existing uses, allowing some existing uses to be grandfathered to protect settled expectations. Minn. Rule 8800.2400, subp. 6(E).

Acting within the guidelines established by statute and MnDOT’s regulations, airport operators and the municipalities and county authorities whose territories are affected work cooperatively with MnDOT to enact airport zoning ordinances. When the affected territory falls entirely within a single municipality, the municipality may act on its own to “adopt,

amend from time to time, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations . . . .” Minn. Stat. § 360.063, subd. 1(a). But in the more common situation where the zoning will affect multiple authorities, the airport owner requests a joint airport zoning board (“JAZB”) comprised of representatives from the various authorities. Minn. Stat. § 360.063, subd. 3(a)(2), (b), (e); *see generally* Minn. Stat. § 360.042 (describing formation, structure, and powers of a JAZB). After a JAZB is formed, it prepares an initial draft zoning ordinance and map, then presents it at a public hearing. Minn. Stat. § 360.065, subd. 1. After any changes caused by the hearing are made, the draft is submitted to the MnDOT Commissioner for review and approval. Minn. Stat. § 360.065, subd. 2. If the Commissioner determines that the proposed ordinance does not meet MnDOT’s standards, the JAZB must amend the ordinance unless the JAZB demonstrates and the Commissioner agrees that the social and economic costs of strict compliance with MnDOT’s standards outweigh the associated benefits. *Id.* After the ordinance is finalized and approved by the Commissioner, a second public hearing is then held and, if it does not result in any further changes, the participating authorities adopt the ordinance. If a municipality adopts the JAZB proposed ordinance, it becomes the enforcing authority for the ordinance within its boundaries. Minn. Stat. § 360.063, subd. 3(c). But should the municipality fail to adopt the proposed JAZB regulation, the JAZB “may itself adopt, administer, and enforce airport zoning regulations for the airport hazard area in question.” *Id.*

The promulgation of airport zoning regulations creates an overlapping system of zoning where both the airport zoning and the pre-existing municipal zoning regulations apply. In the event of conflict between the two, “the more stringent limitation or requirement shall govern and prevail.” Minn. Stat. § 360.064, subd. 2.

**C. The court of appeals’ approach would skew the balancing process established by the legislature, to the detriment of both safety and efficiency.**

By threatening to make local government authorities pay for all measurable declines in the economic value of land caused by airport zoning, the court of appeals’ approach would elevate one competing interest above all others and sharply skew the balance set by the legislature. The court of appeals’ approach would not end airport zoning, but it would constantly push zoning authorities to discount safety and efficiency in favor of unrestricted use by landowners by making their interests the one thing that cannot be balanced, only bought. *Cf.* Christopher Serkin, *Big Differences for Small Governments: Local Governments And The Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1666, 1680 (2006) (explaining that “risk aversion will cause a local government to discount benefits at a greater rate than would a risk-neutral government, as well as place too high a premium on the costs of takings liability.”). This would be a profound shift in the zoning process in Minnesota, and one that would not benefit the public as a whole.

**II. The Same Principles Of Regulatory Takings Law That Govern Other Land Use Regulations Should Also Govern Airport Zoning.**

The court of appeals felt compelled by this Court's decision in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), to single out airport zoning for application of a bright-line test that does not apply to any other type of land use regulation. This was error. Under settled law, a regulation does not take property, requiring payment of compensation, unless its burden is so severe that it is equivalent to a physical taking. There is no persuasive reason for subjecting airport zoning to a different test that would require compensation for any measurable decline in property value. As demonstrated above, airport zoning falls within the state's core police powers of protecting the safety and welfare of its citizens. *See also State ex rel. Berndt v. Iten*, 106 N.W.2d 366, 368 (Minn. 1960) ("The justification for a zoning ordinance lies in the police power exerted in the public interest."). In addition, airport zoning, no less than other types of zoning, reconciles potentially conflicting uses of property for the good of the community as a whole. To the extent *McShane* would require a different result, this Court should overrule it. It has been thoroughly undermined by subsequent authority. The Court should reject it entirely. At a minimum, the Court should reject its application to airport zoning.

**A. Under settled law, there can be no regulatory taking absent a diminution in value so severe it amounts to a physical appropriation of the property, and there is no reason to treat airport zoning differently.**

In an area of law where reliable rules are hard to come by, one principle is clear: the government does not have to pay to regulate a property's use unless the regulation is

“so onerous that its effect is tantamount to a direct appropriation or ouster.” *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005); *see Wensmann*, 734 N.W.2d at 633. Being subject to some regulations is the price every landowner pays for receiving the benefits of regulations placed on other landowners. Not every landowner is subject to every regulation. Not every regulation benefits every landowner. Nor does the Constitution require otherwise. The test of the takings clause is not a test of mathematical equivalence; a landowner need not receive benefits from each regulation commensurate to the regulation’s burden. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326-327 (2002) (rejecting idea of “mathematically precise” formula” in takings analysis). Instead, regulatory takings doctrine presumes that a landowner benefits sufficiently from the *general* reciprocity of regulation to avoid the need for compensation—unless the economic impact of a regulation is so severe that it is practically equivalent to a physical taking. *See, e.g., Wensmann*, 734 N.W.2d at 633 (citing “the severity of the burden that government imposes on private property rights” as the key determinant of a regulatory taking (quotation omitted)). Historically, courts have required a property’s value to be reduced by 85% or more before they even consider the character of the regulation and its interference with distinct, investment-backed expectations to determine whether a taking has occurred. *See, e.g., Walcek v. United States*, 49 Fed. Cl. 248, 271 (Fed. Cl. 2001) (stating that courts have required “diminutions well in excess of 85 percent before finding a regulatory taking”).

There is no persuasive reason to single out airport zoning for a different test and

require the state to pay for any measurable diminution in property value that the zoning causes. The basis for the government's regulation is no less compelling for airport zoning than for other regulations. To the contrary, because one key function of airport zoning is to protect safety—both of travelers and of people using the neighboring land—the state should arguably be able to impose *greater* restrictions without being required to pay compensation. “[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 492-93 (1987) (citations omitted). Hence, when a “regulation is drawn to prevent harm to the public, broadly defined, and seems able to achieve this goal ... a taking has not occurred.” *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn. 1996). Here in Minnesota, the legislature expressly invoked its power to prevent public harm by making a legislative finding that “the creation of establishment of an airport hazard is a public nuisance and an injury to the community,” Minn. Stat. § 360.062(b), and concluded that it is “necessary in the interest of . . . public safety” to prevent the creation of such hazards “by exercise of the police power” and “without compensation.” Minn. Stat. § 360.062(a). The Court should defer to this legislative judgment.

In addition to safety, the government has an interest in reconciling the competing economic and property-use interests of the community at large and landowners near the airport. *See Connor v. Township of Chanhassen*, 81 N.W.2d 789, 796 (Minn.1957) (zoning power includes the power to encourage appropriate uses). Airports are “an

essential public service” that benefit the community as a whole. Minn. Stat. § 360.013, subd. 39. Balanced against the interests of all citizens in having an efficient airport are the interests of landowners near the airports in using their property as they please. Reconciling competing interests such as these is the classic justification for zoning laws—and the justification is no less persuasive for airport zoning than otherwise. *See Kiges v. City of St. Paul*, 62 N.W.2d 363, 372 (Minn. 1953) (zoning decisions should be made with eye to encouraging most appropriate use of land).

Finally, there is no reason to think that owners of land near airports uniquely fail to enjoy the general reciprocity of benefits that arises from the government’s ability to regulate for the common good. If anything, one would suspect that they benefit more than most property owners from being near such a large draw of people and such a large economic generator. The record in this case certainly shows that the DeCooks benefitted from being near the Rochester airport, realizing more than a 1,000 percent increase in their property value from 1989, when they bought the property for \$159,600, to 2002, when it was worth at least \$2.6 million—even accounting for the effect of the zoning regulations. Rochester Addendum 3, 7; Rochester Br. 19.

**B. This Court should overrule *McShane*’s enterprise/arbitration distinction and hold that airport zoning is subject to the standard, multi-factor balancing test for regulatory takings.**

The court of appeals ruled as it did because it considered itself bound by this Court’s decision in *McShane*. The Court should take the opportunity to expressly overrule *McShane*’s unfounded distinction between “enterprise” and “arbitration” zoning

regulations.

This Court applies the doctrine of *stare decisis*, but not as an “inflexible rule of law.” *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (citation omitted). Instead, the Court applies it as a guiding policy subject to the Court’s discretion, *Naftalin v. King*, 102 N.W.2d 301, 302 (Minn. 1960). The doctrine “does not bind the court to unsound principles.” *Cargill, Inc. v. Ace American Ins. Co.*, \_\_\_ N.W.2d \_\_\_, 2010 WL 2606020, \*9 (Minn. June 30, 2010) (citation and quotation omitted). When a decision has proved unworkable in practice, and when it has been undermined by later decisions, this Court retains the authority to overrule it. *See Payne v. Tennessee*, 501 U.S. 808, 827-828 (1991).

That is precisely what the Court should do to the enterprise/arbitration distinction in *McShane*. In *McShane*, the Court created a new distinction between zoning regulations “designed to effect a comprehensive plan,” which the Court said involve an “‘arbitration’ of competing land uses,” and zoning regulations enacted “for the sole benefit of a governmental enterprise.” 292 N.W.2d at 257-58. In the arbitration setting, the Court acknowledged that a regulation does “not constitute a compensable taking unless it deprives the property of all reasonable use.” *Id.* at 257. But in the enterprise setting, the Court wrote, “the public should pay for the diminution in value just as any private landowner must purchase an easement.” *Id.* at 258. Analogizing airport zoning to a direct physical taking, *id.* at 257, the Court ruled 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.” *Id.* at 258-59.

*McShane*’s enterprise/arbitration distinction has been thoroughly discredited over time and should be abandoned. As Rochester notes in its brief, the same professor who espoused the distinction later recanted its use for determining whether a regulation effects a compensable taking. Rochester Br. at 32. Moreover, this Court’s own decisions have thoroughly undermined *McShane*.

**1. This Court’s subsequent decisions have undermined *McShane*.**

Almost as soon as *McShane* was issued, this Court began rejecting any use of its enterprise/arbitration distinction to alter the ordinary multi-factor test for regulatory takings and create a bright-line test awarding compensation for minimal reductions in property value.

Just one year after *McShane*, the Court noted that “the line between ‘enterprise’ and ‘arbitration’ is not always easy to discern,” as indeed the Court had acknowledged in *McShane* itself. *Pratt v. State of Minnesota*, 309 N.W.2d 767, 773 (Minn. 1981) (Simonett, J.). In *Pratt*, the Court considered a regulation that reclassified the lakes in which plaintiff grew wild rice and banned the use of mechanical wild rice harvesters. *Id.* at 770. Straining to apply *McShane*, the *Pratt* Court concluded that “it would read too much into the legislative intent to characterize the regulations as either predominantly enterprise or predominantly arbitration.” *Id.* at 774. The regulations’ goal of preserving traditional wild rice harvest for Native Americans in lieu of subsidies “seems to us an enterprise function.” *Id.* at 773. But the state’s purpose of conserving and protecting the

natural resource of wild rice for the benefit of the general public “seems ... more like an arbitration function.” *Id.* at 774. Faced with this dual reality, the Court expressly rejected an application of *McShane* that would alter the flexible regulatory takings test:

The presence of multiple purposes for a regulation, as in the instant case, is, we believe, more the rule than the exception, and *to be at all useful, the principles enunciated in McShane for determining whether a taking has occurred must be applied with some flexibility.*

*Id.* (emphasis supplied). Having criticized *McShane*, the Court reasserted its endorsement of United States Supreme Court precedent as creating “an essentially ad hoc examination of many significant factors.” *Id.*

One year after *Pratt*, this Court further isolated *McShane* when it considered whether a city’s denial of a special-use permit to construct a satellite station constituted a taking. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 766 (Minn. 1982).

Addressing *McShane*, the Court quoted it for the proposition that “[r]egulation through zoning ordinances ‘does not constitute a compensable taking unless it deprives the property of all reasonable use.’” *Id.* (quoting *McShane*, 292 N.W.2d at 257). With no mention of the enterprise/arbitration distinction, the Court held that no taking had occurred because the permit denial did not remove all reasonable use of the property. *Id.*

Most recently, in *Wensmann* this Court expressly rejected the notion that *McShane* stands as a “distinct Minnesota approach to takings claims.” 734 N.W.2d at 641 n.14. *Wensmann* held instead that the *McShane* analysis is not “different from or inconsistent with the flexible approach to takings adopted by the Supreme Court in *Penn Central*,” and

that its concerns fell within the character factor of the *Penn Central* approach. *Id.* In addition, rather than placing any weight on the distinction between “arbitration” and “enterprise” functions, the Court instructed that the proper concern is whether there has been “[a]ny unfairly unequal distribution of the regulatory burden.” *Id.*

Little, if anything, remains of *McShane*’s enterprise/arbitration rule after this Court’s limitations, distinctions, and rejections of the decision.

**2. *McShane*’s “enterprise” analysis has been distinguished and limited by the lower courts.**

If anything does still remain of *McShane*’s enterprise/arbitration distinction, it is not worth keeping because it has been repeatedly distinguished and limited by the lower courts.

Some decisions have limited *McShane*’s potentially debilitating effect on government regulation by concluding that its “enterprise” test applies only when a regulation “takes an effective easement on the property, causing a substantial diminution in market value.” *Concept Prop., LLP v. City of Minnetrista*, 694 N.W.2d 804, 823 (Minn. App. 2005) (citing *Thompson v. City of Red Wing*, 455 N.W.2d 512, 517 (Minn. App. 1990)). *Accord Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. App. 1996). Without explaining what an effective easement is, these decisions have all concluded that the plaintiffs did not show one, effectively eliminating the “enterprise” category.

Other decisions have simply declared that the zoning regulations before them were “clearly” arbitration regulations, avoiding the enterprise category that way. *Shenkman v.*

*City of Duluth*, No. C8-88-1320, 1989 WL 17594, \*3 (Minn. App. March 7, 1989) (holding that the city acted in its arbitration function when enacting the zoning ordinance to implement a comprehensive plan); *Parranto Bros., Inc. v. City of New Brighton*, 425 N.W.2d 585, 592 (Minn. App. 1988) (holding that the city's rezoning of property was taken in its arbitration capacity).

In cases involving airport zoning regulations, where the enterprise category is unavoidable because of *McShane*, courts have tightened the requirements of causation and diminution of value, limiting *McShane* that way. In *Keenan v. International Falls-Koochiching County Airport Zoning Board*, 357 N.W.2d 397, 400 (Minn. App. 1984), the court of appeals held that “the landowner has the burden of proving measurable diminution of market value, that such burden is difficult, and that mere assertions are not enough.” Applying this strict test, the court affirmed the trial court’s decision rejecting the landowner’s takings claim. In *Davis v. City of Princeton*, 401 N.W.2d 391, 396-97 (Minn. App. 1987), the court of appeals held that a plaintiff must prove a measurable diminution of market value caused by the challenged zoning ordinance, not just that the ordinance limits the property’s use. Were the rule otherwise, the court wrote, “every airport ordinance that imposes more restrictive rules than the underlying zoning would be held to be an unconstitutional taking.” *Id.* at 396. The court reversed the decision below that had found a taking. *Id.* at 397-98.<sup>7</sup>

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<sup>7</sup> One decision involving non-airport zoning assumed that *McShane*'s enterprise test applied

(Footnote continued)

**3. The Court should overrule *McShane*, or at least hold that its enterprise rule does not apply to airport zoning.**

Thirty years of experience has proven that *McShane*'s enterprise/arbitration distinction should be rejected. It is difficult—if not impossible—to apply because most regulations have multiple purposes, some of which can be labeled “enterprise” purposes and some of which can be labeled “arbitration.” It does not contribute to the ultimate takings analysis because classifying a regulation as enterprise or arbitration does not usefully capture the character of the regulation or indicate how important the government's purpose is. And its attempt to relax the most important criteria of regulatory takings law—the severity of the regulation's impact on the property—has provoked persistent limitations by lower courts that unnecessarily complicate an already complex body of law. The Court should end all this unnecessary work and expressly reject *McShane*'s notion that the enterprise/arbitration distinction has any relevance to determining a regulatory taking.

At a minimum, the Court should hold that airport zoning should be assessed under the classic regulatory takings test—which *McShane* applied to so-called arbitration regulations—rather than the altered test that *McShane* announced for enterprise regulations. This case proves the truth of *Pratt*'s observation that the presence of multiple

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(Footnote continued from previous page)

but nonetheless rejected plaintiff's claim because he had not proved a sufficient diminution in value of his property. *Olsen v. City of Ironton*, No. Cx-00-1371, 2001 WL 379010, at \*4, \*3 (Minn. App. April 17, 2001).

purposes is more the rule than the exception, even for airport zoning. *McShane* characterized airport zoning as involving purely the enterprise function. But as demonstrated above, airport zoning instead quite obviously involves the arbitration function as well by balancing competing economic and safety interests held by travelers, landowners, and businesses and citizens that benefit from an efficient airport. Through airport zoning ordinances, the state gives preference to land uses that can safely exist in close proximity to the airport over those that cannot. Neighboring landowners quite clearly receive reciprocal benefits from being near an airport that can operate safely and efficiently by virtue of the zoning. Even in the context in which it was decided, *McShane*'s distinction does not hold up to scrutiny, and this Court should reject it.

### **CONCLUSION**

For the reasons set forth above, the MAC respectfully requests that the Court reverse the decision of the court of appeals and reinstate the judgment of the lower court holding that no compensable taking occurred.

Dated: August 5, 2010

Respectfully submitted,

FAEGRE & BENSON LLP

A handwritten signature in black ink, appearing to read "A. Van Oort", is written over a horizontal line.

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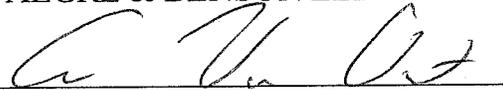
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## CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). The brief was prepared using Microsoft Word 2007, complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 1, and contains 4,971 words.

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I hereby certify that on August 5, 2010, I caused the attached BRIEF OF *AMICUS CURIAE* METROPOLITAN AIRPORTS COMMISSION to be served on all counsel of record by placing two copies thereof in envelopes and arranging for the deposit of same, postage prepaid, in the United States Mails at Minneapolis, Minnesota, directed to counsel as follows:

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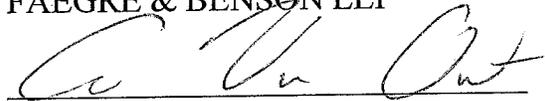
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