

No. A09-969

STATE OF MINNESOTA
IN SUPREME COURT

Leon S. DeCook and
Judith M. DeCook,

Respondents,

vs.

Rochester International Airport Joint Zoning Board,

Appellant.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

Bradley J. Gunn (#132238)
MALKERSON GUNN MARTIN LLP
220 South Sixth Street, Suite 1900
Minneapolis, MN 55402
(612) 344-1111

Attorney for Respondents
Leon S. DeCook and Judith M. DeCook

Monte A. Mills (#030458X)
Clifford M. Greene (#37436)
John M. Baker (#174403)
GREENE ESPEL, PLLP
200 South Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830

Attorneys for Appellant
*Rochester International Airport Joint
Zoning Board*

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103
(651) 281-1232

Attorney for Amicus Curiae
League of Minnesota Cities

[Additional attorneys appear on the next page]

Aaron D. Van Oort (#315539)
Melina K. Willaims (#387635)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-700

*Attorneys for Amicus Curiae
Metropolitan Airports Commission*

Wm. Christopher Penwell (#164847)
Anthony J. Gleekel (#185395)
Mark Thieroff (#322404)
SIEGEL, BRILL, GREUPNER, DUFFY
& FOSTER, PA
100 Washington Ave S, Suite 1300
Minneapolis, MN 55401
(612) 337-6100

*Attorneys for Amici Curiae Hampton K.
O'Neill, Kelly McC. O'Neill, and
James W. O'Neill*

Lori Swanson
Attorney General
Erik M. Johnson (#0247522)
Assistant Attorney General
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
(651) 757-1476

*Attorneys for Amicus Curiae
Commissioner of Transportation
for the State of Minnesota*

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

*Attorney for Amici Curiae Gordon D.
Galarneau and Penny S. Galarneau*

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
LEGAL ISSUE.....	1
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	2
STATEMENT OF THE CASE AND FACTS.....	2
STANDARD OF REVIEW.....	2
INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
LEGAL ARGUMENT.....	4
I. This appeal’s resolution will have a significant, statewide impact.....	4
II. There would be substantial problems with applying the bright-line <i>McShane</i> enterprise test as an independent regulatory-taking test.....	7
CONCLUSION.....	13

TABLE OF AUTHORITIES

PAGE

MINNESOTA STATUTES

Minn. Stat. § 360.066.....12

MINNESOTA RULES

Minn. Rules 8800.2400.....4

MINNESOTA CASES

Arcadia Dev. Corp. v. Bloomington, 552 N.W.2d 281 (Minn. Ct. App. 1996).....6

Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003).....8

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

Oswalt v. Ramsey County, 371 N.W.2d 241 (Minn. 1981).....6-7

Pratt v. State, 309 N.W.2d 767 (Minn. 1981).....7

Thomson v. City of Red Wing, 455 N.W.2d 512 (Minn. Ct. App. 1990).....6

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007).....6, 9, 11

FEDERAL CASES

Armour & Co., Inc. v. Inver Grove Heights, 2 F.3d 276 (8th Cir. 1993).....6

Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005).....11

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).....11

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).....*passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).....5

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002).....5

OTHER AUTHORITY

John D. Echeverria, *Making Sense of Penn Central*,
23 UCLA J. Envtl. L. & Policy 171 (2005).....7

Joseph L. Sax, *Takings and the Police Power*,
74 Yale L.J. 36 (1964).....8

Joseph L. Sax, *Takings, Private Property and Public Rights*,
81 Yale L.J. 149 (1971).....8-9

Susan A. Macmanus, *The Impact of Litigation on Municipalities:
Total Cost, Driving Factors, and Cost Containment Mechanisms*,
44 Syracuse L. Rev. 833 (1993).....6

LEGAL ISSUE

Should the bright-line *McShane* enterprise test be applied independently of the flexible, three-factor *Penn Central* balancing test to analyze a regulatory-taking claim challenging an ordinance imposing building and use restrictions on property near an airport that were adopted to protect life and property?

The district court carefully analyzed *Penn Central's* three factors and concluded that the Airport Zoning Ordinance did not result in a regulatory taking. The court of appeals reversed the district court's decision and held that the Airport Zoning Ordinance was a regulatory taking "within the meaning" of *McShane*.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The League of Minnesota Cities (“League”) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Rochester.¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League’s mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities. The League has a public interest in this case as a representative of cities throughout the state with land-use authority and other police powers that will be impacted by this appeal’s resolution.

STATEMENT OF THE CASE AND FACTS

The League concurs with Appellant’s statement of the case and facts.

STANDARD OF REVIEW

The League concurs with Appellant’s statement of the standard of review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The DeCooks commenced an inverse-condemnation action against the Rochester International Airport Joint Zoning Board (“Board”). The DeCooks claim that the Board’s adoption of a 2002 Airport Zoning Ordinance (“2002 Ordinance”) that expanded Safety Zone A for one of its runways was a regulatory taking of their property. The 2002 Ordinance subjects property in Safety Zone A to building and use restrictions designed to

¹ The League certifies pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity made a monetary contribution to its preparation or submission.

protect life and property on aircrafts and on the land below aircraft-approach zones.

(Appellant's App. 8, App. 15.) When the DeCooks purchased 240 acres near the Airport in 1989, about 19 acres of their property were already in Safety Zone A. (Tr. 59-60, 84-85, 87.) About 28 additional acres of their property were included in Safety Zone A after the 2002 Ordinance was adopted. (Appellant's Add. 3, ¶ 7.)

The district court carefully applied the flexible, three-factor *Penn Central* balancing test and concluded that no taking had occurred noting that when the \$170,000 diminution in property value is compared to the property's estimated value as a whole, the maximum diminution is 6.14 percent. (Appellant's Add. 8.); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The court of appeals reversed the district court's decision and held that a regulatory taking had occurred "within the meaning" of *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). (Appellant's Add. 21.) The court of appeals did not analyze the three *Penn Central* factors, but instead, simply concluded that a regulatory taking had occurred because: "Appellants' unequal burden has resulted in a diminution of \$170,000 in the fair market value of their property with no commensurate benefit." (Appellant's Add. 22.)

The court of appeals disregarded state and federal precedent and applied an expansive regulatory-takings test that could be interpreted to require governmental entities across the state to pay damages for minimal reductions in property value resulting from the adoption of governmental regulations. It will be significantly easier for property owners to claim regulatory-taking damages under the court of appeals' test. As a result, if the court of appeals' decision is not reversed, it will likely give rise to numerous new

regulatory-taking claims that will force cities to spend tax dollars to fund litigation costs and that will entangle courts in second-guessing legislative decisions.

The court of appeals' decision should be reversed and the district court's decision should be reinstated. In addition, this Court should again confirm that *McShane* does not provide an independent test for analyzing regulatory-taking claims. The independent application of a bright-line *McShane* enterprise test would conflict with state and federal precedent, and it would create substantial problems from a practical and policy perspective.

I. This appeal's resolution will have a significant, statewide impact.

Appellant's brief demonstrates why the court of appeals' decision should be reversed. The League will not repeat Appellant's legal arguments here. Instead, this brief will focus on the statewide significance of this appeal and on the problems with applying the bright-line *McShane* enterprise test as an independent regulatory-taking test.

This appeal's resolution will have a significant, statewide impact on cities and on other governmental entities. The 2010 Airport Directory for the Minnesota Department of Transportation, for example, lists over 100 municipal and regional airports located throughout the state—airports that serve as community assets and that have a similar public interest in using safety zones to protect life and property.

<http://www.dot.state.mn.us/aero/avoffice/ops/airdir/pdf/airdirectoryinterior2010full.pdf>

(visited Aug. 3, 2010); Minn. Rules 8800.2400, Subp. 6. This appeal's resolution will also impact the hundreds of cities throughout the state with operations and programs that could arguably be characterized as governmental enterprises including cities with golf

courses, liquor stores, water and sewer utilities, and recycling and composting centers. In addition, it is especially troubling that Minnesota cities could now face regulatory-taking claims for adopting governmental regulations that cause only a minimal diminution of property value.

There are a wide variety of city regulations that could cause at least a six percent decrease in property value including regulations for conditional use permits, subdivisions, historic preservation, and licensing to name a few. Indeed, the United States Supreme Court has noted that: “Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002). Cities adopt land-use and other police-power regulations to protect the public, and they should not be deterred from continuing to do so because of fear of liability for regulatory-taking damages. It would be bad public policy—or in the words of Justice Holmes: “Government hardly could go on”—if tax dollars must be spent to pay damages for every decrease in property value resulting from the adoption of a new law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The DeCooks have been very clear about why they want *McShane* to apply as an independent regulatory-taking test: “Simply put, the *McShane* standard is easier for property owners to meet than is the *Penn Central* standard.” Appellants’ Brief at Court of Appeals at 8. If the court of appeals’ decision is not reversed, there will undoubtedly be additional lawsuits attempting to take advantage of this easier standard. And even if these claims were to fail, tax dollars will still need to be spent to defend against them. In

addition, the fear of litigation costs will have a chilling effect on municipal planning—especially in smaller cities—because even when local governments regulate appropriately, litigation costs can soar through the process of discovery, pretrial motions, trial, and appeal. See Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 *Syracuse L. Rev.* 833 (1993).

And in fact, the fear of litigation costs will not be unfounded. Past confusion about the status of *McShane* has given rise to a number of regulatory-taking claims including several published decisions in which property owners attempted to characterize a variety of operations and programs as governmental enterprises. See, e.g., *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641 n. 14 (Minn. 2007) (claiming that a city's comprehensive plan and zoning ordinance were adopted to benefit the governmental enterprise of maintaining parks and open space); *Arcadia Dev. Corp. v. Bloomington*, 552 N.W.2d 281, 288 (Minn. Ct. App. 1996) (claiming that a city ordinance that required a mobile-home park owner to pay relocation costs of park residents upon the park's closure was adopted to benefit a governmental enterprise); *Armour & Co., Inc. v. Inver Grove Heights*, 2 F.3d 276, 279 (8th Cir. 1993) (claiming that a development agreement entered into for the construction of a shopping mall by a private developer was adopted to benefit a governmental enterprise); *Thompson v. City of Red Wing*, 455 N.W.2d 512, 517 (Minn. Ct. App. 1990) (claiming that a state statute prohibiting the destruction, mutilation, injury, or removal of human burials was adopted for the benefit of a governmental enterprise); *Oswalt v. Ramsey County*, 371 N.W.2d 241,

246 n. 3 (Minn. Ct. App. 1985) (claiming that a flood-plain-management ordinance was adopted to benefit a governmental enterprise); *Pratt v. State*, 309 N.W.2d 767, 773 (Minn. 1981) (claiming that a state statute regulating the harvesting of wild rice was adopted to benefit a governmental enterprise).

In short, if the court of appeals' expansive bright-line application of the *McShane* enterprise test is not reversed, property owners across the state will likely seek to take advantage of this easier standard, and cities will be forced to spend public resources to fund litigation costs and courts will become entangled in second-guessing legislative decisions. Indeed, one regulatory-taking expert has noted that: "an expansive theory of regulatory takings would enmesh the courts in frequent review of executive and legislative policy making, pushing the courts beyond both their proper constitutional role and their institutional competence." John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Policy 171, 179 (2005).

II. There would be substantial problems with applying the bright-line *McShane* enterprise test as an independent regulatory-taking test.

This Court recently clarified Minnesota's regulatory-taking law when it rejected the argument that *McShane* established an independent test for regulatory-taking claims.

Some commentators have viewed the *McShane* analysis as a distinct Minnesota approach to taking claims... 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.

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 641 n. 14 (Minn. 2007). This Court's conclusion in *Wensmann* was consistent with its earlier precedent. See, e.g.,

Johnson v. City of Minneapolis, 667 N.W.2d 109, 114 (Minn. 2003) (noting that when analyzing a regulatory-taking claim, anything less than a complete taking of property requires the balancing test set forth in *Penn Central*); *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996) (noting that the three *Penn Central* factors provide the best framework for analyzing a regulatory-taking claim). The court of appeals destroyed this clarity by adopting a bright-line enterprise test that conflicts with *Penn Central* and establishes bad public policy for our state.

It is true that the court of appeals stated that: “*Penn Central* governs regulatory-taking analysis” and set out the three factors that must be considered under *Penn Central*. (Appellant’s Add. 20.) But the court of appeals failed to analyze the three *Penn Central* factors, and instead, relied on a bright-line application of the *McShane* enterprise test to conclude that the 2002 Ordinance was a regulatory taking “within the meaning” of *McShane*. (Appellant’s Add. 21-22.)

There are several good reasons not to apply *McShane* as an independent regulatory-taking test. First, a bright-line enterprise test is not equipped to address the complexity of governmental regulations. Indeed, Professor Joseph Sax, who is attributed with the enterprise distinction that was recognized in *McShane*, subsequently found the distinction problematic and rejected it. See Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964) (recognizing the enterprise test); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 150-151 (1971) (rejecting the enterprise test). Professor Sax rejected the enterprise test because he concluded that it failed to recognize the complexity of governmental regulations. *Id.* Professor Sax reasoned that

many “enterprise” regulations are better understood as exercises of the police power in vindication of public rights for which compensation should not be required. *Id.*

In this case, for example, the 2002 Ordinance was adopted to benefit the airport’s operations. But it is also readily apparent that the ordinance is an exercise of police power designed to prevent harm and to benefit public rights by protecting life and property and by allowing the airport to safely operate and serve as a community asset.

The flexible, three-factor *Penn Central* balancing test is well equipped to handle the complexity of governmental regulations. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002) (noting that the United States Supreme Court has generally eschewed any set formula for determining how far is too far in partial regulatory-taking claims choosing instead to engage in essentially *ad hoc*, factual inquiries under the *Penn Central* test) (citations omitted). Courts can consider and balance both public and private interests under *Penn Central*’s three-factors. Thus, appropriate consideration can be given to the important public rights served by governmental regulations—regardless of whether those regulations could arguably be characterized as benefitting a governmental enterprise. And as this Court has already noted: “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.” *Wensmann*, 734 N.W.2d at 641 n. 14.

In addition, this Court should reject the court of appeals’ bright-line application of the *McShane* enterprise test as an independent regulatory-taking test because the uniform application of *Penn Central* to partial regulatory-takings claims will provide consistency

for regulatory-taking law—an area of law that has been confusing in the past and that would greatly benefit from consistency. This Court should also confirm the uniform application of *Penn Central* because it will allow Minnesota courts to avoid making difficult determinations about what operations and programs should be considered governmental enterprises. The *McShane* Court acknowledged this problem when it noted that the line between enterprise and arbitration “is not always easily defined.” See *McShane*, 292 N.W.2d at 259 n. 4. One year later this Court again acknowledged that it was difficult to define the line between enterprise and arbitration because of the “presence of multiple purposes for a regulation.” *Pratt v. State Dep’t of Natural Res.*, 309 N.W.2d 767, 773-774 (Minn. 1981) (concluding that a state statute that regulated the harvesting of wild rice had both enterprise and arbitration functions).

Consider, for example, whether a city’s water and sewer utility should be considered a governmental enterprise. One could argue that a city utility is a governmental enterprise because a city charges for its utility services. But when a city provides water and sewer services it is meeting a basic public need, and it is performing what most would consider an essential governmental function. In fact, in most communities, cities are the only entities qualified and willing to provide these services.

Or consider, for example, whether a city’s affordable-housing program should be considered a governmental enterprise. Does a city promote a governmental enterprise when it adopts affordable-housing regulations that encourage development of particular types of housing and limit development of other types? Or do these regulations simply allow a city to fulfill a governmental function by ensuring that there is sufficient housing

for its citizens? And isn't it true that affordable housing provides additional public benefits beyond those enjoyed by the housing residents? Courts do not need to search to find definitive answers to problematic questions like these if *McShane* does not apply as an independent regulatory-taking test.

And finally, this Court should not apply the bright-line *McShane* enterprise test as an independent regulatory-taking test because such an application would be inconsistent with recent state and federal precedent. In 2005, the United States Supreme Court significantly narrowed regulatory-taking law by clarifying that a regulation can only result in a taking under *Penn Central* if it is “functionally equivalent” to a direct appropriation or an ouster of private property. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). Indeed, the *Lingle* court acknowledged that: “Early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.” *Lingle*, 544 U.S. at 537 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n. 15 (1992)). And in 2007, this Court quoted *Lingle* when it likewise confirmed that the focus of a regulatory-taking inquiry must be on “the severity of the burden the government imposes upon private property rights.” *Wensmann*, 734 N.W.2d at 633.

The court of appeals' bright-line application of the *McShane* enterprise test is inconsistent with this precedent because—as noted by Appellant—it provides no insight on the severity of the burden imposed by the regulation or on whether the regulation has resulted in the functional equivalence of a physical taking. Appellant's Br. at 31-35. Indeed, it cannot be emphasized enough that the court of appeals concluded that the 2002

Ordinance resulted in a regulatory taking based on a *mere six percent* diminution of property value. It is hard to imagine an interpretation of regulatory-taking law that is more expansive or more inconsistent with recent state and federal precedent.

In short, when all three *Penn Central* factors are analyzed with the proper focus, it is obvious that the 2002 Ordinance did not result in a regulatory taking. It is simply impossible to characterize any governmental regulation—that has only resulted in a six-percent decrease in property value, that authorizes a property owner to continue his historical use of the property², and that authorizes a variety of land uses for the small portion of the affected property—as a regulation that has imposed a burden on private property that is so severe that it is the functional equivalent of a physical taking.

² State law requires local airport ordinances to “avoid the elimination, removal, or reclassification of existing uses to the extent consistent with reasonable standards of safety.” Minn. Stat. § 360.066, Subd. 1a.

CONCLUSION

The court of appeals disregarded state and federal precedent and applied an expansive regulatory-taking test that could be interpreted to require governmental entities across the state to pay damages for minimal reductions in property value resulting from the adoption of governmental regulations. It will be significantly easier for property owners to claim regulatory-taking damages under the court of appeals' bright-line application of the *McShane* enterprise test. If the court of appeals' decision is not reversed, it will likely increase the number of lawsuits attempting to characterize a wide variety of operations and programs as governmental enterprises so that property owners can take advantage of an easier regulatory-taking test. As a result, cities throughout the state will be forced to spend public resources to fund litigation costs and courts will become entangled in second-guessing legislative decisions.

This Court has already concluded that *McShane* does not provide an independent regulatory-taking test. This conclusion was sound because there would be substantial problems with applying *McShane* as an independent test. The enterprise test is problematic because it fails to recognize the complexity of governmental regulations. In contrast, the flexible, three-factor *Penn Central* balancing test is well equipped to handle this complexity by allowing both public and private interests to be considered and balanced. The uniform application of *Penn Central* to partial regulatory-taking claims will provide consistency in regulatory-taking law. It will also allow courts to avoid searching for definitive answers to problematic questions about what operations and programs should qualify as governmental enterprises. Finally, the uniform application of

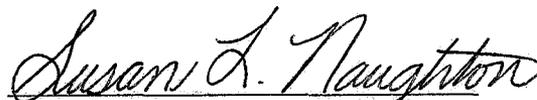
Penn Central to partial regulatory-taking claims is consistent with recent state and federal precedent.

For all of these reasons, the League respectfully requests that this Court reverse the court of appeal's decision and reinstate the district court's decision. This Court should again confirm that *McShane* did not establish an independent regulatory-taking test and that all three *Penn Central's* factors must be considered when analyzing partial regulatory-taking claims.

Dated: August 5, 2010

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES



Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044
Attorney for *Amicus Curiae*