

No. A09-969

STATE OF MINNESOTA  
IN SUPREME COURT

Leon S. DeCook and Judith M. DeCook,

Appellants,

vs.

Rochester International Airport Joint Zoning Board,

Respondent.

**BRIEF OF AMICI CURIAE HAMPTON K. O'NEILL,  
KELLEY McC. O'NEILL AND JAMES W. O'NEILL**

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## Introduction<sup>1</sup>

The task before the Court is far simpler than the voluminous briefing in this case would suggest. The Rochester International Airport Joint Zoning Board (“the Airport”) calls upon the Court to use this case as a vehicle for making fundamental changes to Minnesota regulatory-takings law. That invitation can and should be declined, however, because the decision of the court of appeals is wrong on its own terms. The Court should therefore simply reverse that decision on grounds that a diminution in value of six percent does not give rise to a takings claim under any test—under the Minnesota or U.S. Constitution—and reinstate the district court’s judgment.

If the Court were inclined to revisit its regulatory-takings jurisprudence as applied to airport-zoning regulations, it should wait for a case that presents a factual record sufficient to evaluate the actual distribution of the benefits and burdens of modern airport-zoning regulations, as they are implemented today, 30 years after this Court decided *McShane*.

The Airport contends that the Court “folded” *McShane* into *Penn Central* in its decision in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 (Minn. 2007),<sup>2</sup> such that *McShane* no longer has any separate significance. There are many reasons to question that assertion, as well as the Airport’s broader position that a takings claim under the Minnesota Constitution is, in the wake of *Wensmann*, governed by *Penn Central*. If the Court were to re-examine *McShane* in light of *Wensmann*, it should adopt a modified *Penn*

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<sup>1</sup> Pursuant to Minn. R. Civ. App. 129.03, amici curiae Hampton K. O’Neill, Kelley McC. O’Neill, and James W. O’Neill certify that no counsel for a party to this matter authored this brief, in whole or in part, and no person other than the amici curiae made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Appellant’s Brief at 31.

*Central* analysis for takings claims under the Minnesota Constitution. Under that analysis, in cases involving a *McShane*-like regulation that unfairly burdens one landowner in order to provide benefits to the public at large, the character-of-the-governmental action factor would favor finding a taking. And in that case, the economic-impact factor would also favor the landowner if the regulation caused a substantial and measurable decline in the market value of the property. Such a modified *Penn Central* test would reconcile the supposed tension between *Wensmann* and *McShane*, would preserve the essence of *McShane*, and, most importantly, would properly reflect the more protective nature of Minnesota's Takings Clause.

#### **Identification of amici curiae**

Hampton K. O'Neill, Kelley McC. O'Neill, and James W. O'Neill are the owners of approximately 60 acres of land located in the City of Bloomington, near the Minneapolis-St. Paul (MSP) International Airport. Their land, which has been owned and farmed by members of their family since 1932, is the last, large undeveloped tract in the immediate vicinity of both the MSP Airport and the Mall of America. The O'Neills wish to sell their property, which since 1981 has been zoned for uses including high-density multi-family housing and office development.

In 2004, a zoning board convened by the Metropolitan Airports Commission (MAC) adopted an amended zoning ordinance that significantly limits the uses of the O'Neill property. The amended ordinance changed the designation of the O'Neill property from Safety Zone C to Safety Zone B. A property located in Safety Zone B may not be put to residential uses, or be used for hospitals, schools, theaters, stadiums, churches and other

places of “public or semipublic assembly.” The amended ordinance also imposes a density cap and maximum site population (15 persons per acre) that eliminates most office uses. The ordinance also lowered the maximum-height limit and has had the effect of reducing the practical height limitation on the O’Neill property by approximately 50 feet. The MAC has acquired all of the properties surrounding the O’Neill property.

The O’Neills have recently commenced an inverse-condemnation action against the MAC and the City of Bloomington, which is currently pending in Hennepin County District Court. Expert reports have not yet been completed but preliminary study suggests that the new airport zoning regulations have resulted in a substantial diminution in the value of the O’Neills’ property.

### Argument

#### I. The Court should decline the Airport’s invitation to overrule *McShane*.

Minnesota airport-zoning authorities have long had their sites on this Court’s ruling in *McShane*. For example, amicus curiae Minnesota Department of Transportation (MNDOT) has posted on its internet website a 2005 study<sup>3</sup> advocating the view that *McShane* was “wrong when it was decided in 1980” and that “the time is ripe to overturn *McShane*.”<sup>4</sup> That study also envisions “tak[ing] a test case to the Minnesota Supreme Court and argu[ing] that *McShane* should be overruled”(a step called “somewhat risky”).<sup>5</sup> It accordingly comes as no surprise that the MAC and counsel for the Airport—who are both

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<sup>3</sup> The study is entitled “Does Airport Zoning Under the Minnesota Model Ordinance Violate the U.S. Constitution’s Takings Clause?” and is available at <http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualappendices.pdf>

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.*

defending the O’Neills’ pending suit—would seek to use this case as a vehicle for overturning *McShane*. Both have expressly invited the Court to reject categorically the enterprise theory of *McShane*.

Those invitations should be declined, for two reasons. First, and most importantly, resolution of this case does not require the Court to revisit *McShane*, and long-standing principles of judicial restraint hold that issues not essential to the case at hand should not be decided. Second, this case does not present a well-developed record regarding the nature and impact of the type of airport-zoning regulations at issue in *McShane*. If *McShane* is to be reevaluated, that should occur in the context of a case that presents a detailed record regarding the specific burdens and benefits of the airport-zoning ordinance at issue.

***1. Revisiting McShane is unnecessary to decide this case.***

The sole issue in this case as framed and decided by the court of appeals is whether a regulation that led to a diminution in the value of the DeCooks’ property of \$170,000 constituted a taking. The court of appeals concluded that it did, on grounds that the property had experienced a “substantial and measurable decline” in value, and remanded the case for entry of judgment in the amount of \$170,000.<sup>6</sup>

This appeal can and should be decided solely on the basis of whether the court of appeals erred in its application of the *McShane* “substantial and measurable decline” test. If the Court were to determine that a decline in market value of \$170,000 is not “substantial”

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<sup>6</sup> *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, No. A09-969, 2010 WL 1850268 (Minn. App.) at \* 4-5 (stating that “this court must address whether that diminution constitutes a ‘substantial and measurable decline’” and concluding that “[u]nder the facts of this case, appellants are entitled to compensation”).

under *McShane* as a matter of law, it would be unnecessary to decide whether the Airport engaged in a *Penn Central* taking or to consider the significance of the *McShane* holding as such.

Because it is unnecessary to examine the continuing vitality of *McShane* to resolve this case, undertaking that exercise now, in this case, would be inconsistent with established principles of judicial restraint. This court has repeatedly declined to rule on matters beyond those necessary to decide a particular case. For example, the Court has explained that “judicial restraint bids us to refrain from deciding any issue not essential to the disposition of the particular controversy before us.” *Lipka v. Minn. School Employees Ass’n, Local 1980*, 550 N.W.2d 618, 622 (Minn. 1996); *Navarre v. S. Washington Co. Schools*, 652 N.W.2d 9, 32 (Minn. 2002). And this restraint reflects a particular concern regarding the issuance of advisory opinions. “To issue an opinion deciding issues unnecessary to the resolution of the controversy in question is to invite litigants to demand a ruling on their chosen legal theory—in short to give litigants the power to exact advisory opinions.” *Lipka*, 550 N.W.2d at 622. *See also State v. Arens*, 586 N.W.2d 131, 132 (Minn. 1998) (“We do not issue advisory opinions, nor decide cases merely to establish precedent.”) That is exactly what the Airport and the MAC seek here: a ruling on *McShane* that can be used in other unrelated cases.

The Court should simply reverse the court of appeals and reinstate the district court’s determination that the DeCooks “have not suffered a substantial decline”<sup>7</sup> due to the

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<sup>7</sup> Appellant’s Addendum at 11.

Airport's zoning ordinance. The 3.5 to 6 percent diminution at issue here<sup>8</sup> is between one-tenth and one-twentieth of the 67-percent loss caused by the regulations at issue in *McShane*, which, to date, is the only loss in value that this court has ever found to be "substantial" under *McShane*. See *McShane*, 292 N.W.2d at 256 (explaining that the landowner's experts had found a diminution of 67 percent); *Pratt v. State*, 309 N.W.2d 767, 773 (Minn. 1981) ("in *McShane* . . . we found these regulations . . . resulted in a substantial diminution of the value of the landowner's property").

The court of appeals suggests that *any* measurable loss gives rise to a taking under *McShane*, as long as the loss reflects an unequal burden placed on the plaintiff by the regulations in question. But the *McShane* test requires a loss to be both measurable *and* substantial, meaning that there is a floor under which the impact of a regulation is measurable yet too small to constitute a taking. And *McShane* also expressly stated that not "every landowner who is in some way limited or inconvenienced by . . . regulations is entitled to compensation." *McShane v. City of Faribault*, 292 N.W.2d 253, 259 (Minn. 1980).

The court of appeals and the DeCooks carefully avoid any acknowledgment that the \$170,000 loss in value found by the jury constitutes a mere 3.5 or 6.14 percent diminution (depending on the overall value of the property), and instead analyze the amount of the diminution in isolation. But comparing the loss in value of the property caused by the

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<sup>8</sup> The precise diminution in value depends on the value of the DeCook property as a whole, in the absence of the challenged regulation. The jury made no finding as to that value. It received an expert opinion that the value of the whole 240-acre property before the 2002 ordinance was \$2,770,000, as well as the opinion of Mr. DeCook, who testified that he thought the value of his property was about \$4,800,000.

regulation to the total value of the property before the regulation is the only way to determine whether a diminution in value is substantial, as required by *McShane*. Otherwise, a court would be required to treat a \$170,000 diminution in the value of the Mall of America just as it would a \$170,000 diminution in the value of a \$400,000 residential property. Such a diminution may very well be “substantial” in relation to the residential property, but in relation to the Mall of America it is negligible.

In any event, a loss in value of six percent is simply not “substantial,” in any sense, or under any legal standard. Indeed, property values regularly rise and fall by six percent or more on an annual basis through nothing more than market forces.

**2. *This case does not present a record sufficient for reassessing the McShane holding.***

The Court should decline the Airport’s invitation to reexamine *McShane* at this time also because this case provides an insufficient record for assessing whether airport zoning-ordinances, such as the one at issue here, should be viewed as disproportionately burdening landowners subject to those ordinances so as to justify a claim for compensation. The lack of an adequate record has been recognized as a proper basis for judicial restraint. As Justice Kelly observed,

A second reason for judicial restraint is that any other course may lead the court into matters uncharted by the experience of the parties before them. To judge statutes and proposals in terms of hypothetical applications is to risk decisions founded on conjecture and uninformed by a record, briefs, and argument which shed light upon the practical application of the proposal.

*Hous. & Redev. Auth. of Minneapolis v. City of Minneapolis*, 293 Minn. 227, 241-42, 198

N.W.2d 531, 540 (Minn. 1972) (Kelly, J., dissenting).

In the 30 years since *McShane* was decided, airports and air travel in general have grown substantially, while residential patterns have also shifted towards less density, with residential development in particular taking place farther and farther from urban centers and airports. As a result, those benefitted by airport expansions, and the zoning regulations that come with them, are less likely to share in the burden of that growth. Indeed, in the case of the Minneapolis-St. Paul International Airport, the “burden of its activities”, *McShane*, 292 N.W.2d at 258, falls on only a very small portion of its users, with the vast majority of its passengers coming from communities throughout the state and outside Minnesota’s borders.<sup>9</sup> These passengers enjoy the benefits of airport expansion, in the form of “property rights for which [they] did not pay.” *Id.* Indeed, given MSP Airport’s status as a hub for one of the world’s largest airlines, the benefits of constructing the third runway at the MSP airport extend to travelers throughout the U.S. and even abroad, who travel through the Twin Cities en route to other destinations.

If the Court were inclined to revisit *McShane*’s enterprise theory as applied to all airport-zoning regulations, as urged by the Airport, it should do so in the context of a case that presents a fully developed record on the benefits and burdens of those regulations as applied to a major metropolitan airport and the areas served by that airport.

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<sup>9</sup> According to Federal Aviation Administration statistics, MSP Airport handles the largest passenger volume of any airport in the five-state Upper Midwest region (including North and South Dakota, Wisconsin and Iowa). Passenger volumes at the next largest airport in the region—in Milwaukee—are less than one-fifth of the over 16,000,000 enplanements a year at MSP. *See* Addendum at 1-2.

**II. If the Court were to revisit *McShane* it should reaffirm its holding.**

**1. *McShane is a proper application of the broader protections available under the Minnesota constitution.***

The O’Neills largely agree with the DeCooks’ analysis of Minnesota takings law and the protections available under the Minnesota Constitution. A principle flaw in the Airport’s treatment of *McShane* is its false assumption that a claim for compensation under Article I, § 13 of the Minnesota Constitution is governed by the *Penn Central* analysis. The Airport cites *Wensmann* for the proposition that state-law takings claims are considered under *Penn Central*, not *McShane*, but ignores the fact that *Wensmann* expressly applied *Penn Central* only “[b]ecause the property owner is not asking us to interpret the Takings Clause in the Minnesota Constitution more broadly than the Takings Clause in the U.S. Constitution has been interpreted.” *Wensmann*, 734 N.W.2d at 633. This is significant because, as *Wensmann* goes on to observe, “the language of the Takings Clause of the Minnesota Constitution can be construed to provide broader protections than the Takings Clause of the U.S. Constitution.” *Id.* at 632, n.5, citing *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992). *See also Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003) (“Even if appellants’ takings claim under the United States Constitution fails under *Penn Central*, appellants are entitled to compensation under the Minnesota Constitution.”) Unlike the Fifth Amendment as construed by the U.S. Supreme Court, the intent of the Minnesota Takings Clause is “to *fully compensate* . . . citizens for losses related to property rights incurred because of state actions.” *Id.* (emphasis added).

The broader protections available under the Minnesota Constitution flow from textual differences in the Takings Clauses of the two charters. Whereas the U.S. Constitution

prohibits only the “taking” of private property for public use without just compensation, U.S. Const. amend. V, the Minnesota Constitution provides that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation.” Minn. Const. art. I, § 13. Thus, on its face, the Minnesota Constitution extends the category of governmental action requiring compensation to regulations that merely “damage” private property, as opposed to “taking” it outright.

*McShane*’s recognition of a taking claim on the basis of an airport-zoning ordinance that caused a “substantial and measurable” decline in the value of the regulated property is a proper application of the state constitution’s protection against “damaging” private property for public use. While the *McShane* court noted that the arbitration-versus-enterprise distinction was present in the U.S. Supreme Court’s *Penn Central* analysis as well, *McShane*, 292 N.W.2d at 258, it in no way relies upon or applies the *Penn Central* factors to a claim under the Minnesota Constitution. And since *McShane* was decided under unique state constitutional provisions, the manner in which federal and other state courts have applied *Penn Central* over the ensuing 30 years is entirely irrelevant to the continuing vitality of that decision.

Because the *Penn Central* analysis is designed, as the Airport asserts, to “identify regulations that are functionally equivalent to the classic taking in which the government directly appropriates private property,”<sup>10</sup> *Penn Central* cannot provide the test for a claim under the Minnesota Constitution, which requires compensation for interferences of less

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<sup>10</sup> Appellant’s Brief at 10.

magnitude than an actual taking. *McShane* accurately applies the unique protections of the Minnesota Constitution and remains good law.

**2. *McShane was an appropriate response to the unique burdens of certain airport zoning.***

Amici League of Minnesota Cities and the MAC cast *McShane* as a threat to land-use regulation writ large. The League writes of “a chilling effect on municipal planning,”<sup>11</sup> while the MAC raises the specter of “a profound shift in the zoning process in Minnesota.”<sup>12</sup> Yet, the Court in *McShane* made clear that “[w]e believe . . . that not all zoning regulations are comparable.” *Id.* at 257. What the *McShane* court was concerned about was regulations that require one property owner to sustain a loss in market value while the property-owning public in general does not suffer. *See id.* at 259. That does not include zoning ordinances in general, which involve “a reciprocal benefit from the planned and orderly development of land use.” *Id.* at 257. With respect to those ordinances, compensation is unavailable, even when the loss in value is significant. *See id.*

With respect to certain airport-zoning regulations, the benefits and burdens are not equally shared, however. The Airport offers several arguments suggesting that there is such a sharing, but none of them is availing. First, it contends that airport zoning is designed to protect public safety, which is said to benefit properties near an airport. This argument fails because there would be no threat to public safety in the first place but for the establishment of the airport. This is not a situation involving an external threat to safety, such as in *Zeman v. Minneapolis*, 552 N.W.2d 548 (Minn. 1996), where the regulation at issue required the

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<sup>11</sup> Brief of Amicus Curiae League of Minnesota Cities at 6.

<sup>12</sup> Brief of Amicus Curiae Metropolitan Airports Commission at 9.

revocation of a rental license if the landlord failed to prevent disorderly conduct by tenants. Here, the government enterprise itself is the source of the threat to safety, and the Airport's public-safety argument is little more than "a ruse for a state purpose other than protecting the public." *Id.* at 554.

The Airport next argues that the burdens of airport zoning are balanced for nearby landowners by "an advantageous location near the Airport."<sup>13</sup> But the advantage of a particular location is not a simple function of proximity to the airport. An office building located three stops on the light rail from the MSP Airport—and beyond the boundaries of airport zoning—is located every bit as advantageously (if not more so) as the parcel at the end of a runway that is physically closer to the airport but subject to restrictive airport-zoning regulations. For that matter, there is very little difference between living ten minutes from the airport and living a half an hour or more from the airport. Whatever advantage may be gained from being located near the airport is certainly not worth the tens of millions of dollars in lost property value caused by airport zoning.

The Airport further argues that "[a]irport zoning ordinances benefit property owners near the Airport by helping to preserve the Airport as a community amenity."<sup>14</sup> Even if that were true, the neighboring landowner is still bearing most or all of the burden, while the general land-owning public bears no burden at all.

With respect to certain airport-zoning ordinances, *McShane* correctly recognized that by imposing burdens on a few individuals that benefited the public as a whole, "[i]n

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<sup>13</sup> Appellant's Brief at 8.

<sup>14</sup> *Id.* at 27.

essence, the public [had] appropriated an easement,” as “a shortcut to avoid compensation.”

*McShane*, 292 N.W.2d at 258. In those circumstances “the public should pay for the

diminution in value just as any private landowner must purchase an easement.” *Id.*

*McShane* was correctly decided and remains good law.

**3. At a minimum, the “character of the governmental action” factor under Penn Central should be found to favor the landowner in cases involving McShane-type public-enterprise regulations and warrant a lesser showing of economic impact.**

Despite the significant textual differences in the federal and state Takings Clauses, and despite the fact that *Wensmann* was not an airport-zoning or public-enterprise case, and despite *Wensmann*’s express statement that it was applying *Penn Central* because the landowner had not argued for greater protection under the Minnesota Constitution, the Airport insists that the DeCooks’ state-law takings claim is governed by *Penn Central* and *Wensmann*. And it argues that the Court “folded”<sup>15</sup> *McShane* into *Penn Central* with the following statement that appeared in a footnote in *Wensmann*:

Some commentators have viewed the *McShane* analysis as a distinct Minnesota approach to takings claims. In this case, the district court concluded that the city’s denial of the comprehensive plan amendment, ‘in addition to being a taking under the *Penn Central* test, is also a taking under *McShane*.’ We do not view the *McShane* analysis as different from or inconsistent with the flexible approach to takings adopted by the Supreme Court in *Penn Central*. Any unfairly unequal distribution of the regulatory burden may be considered in appropriate cases under the character factor of the *Penn Central* approach and then balanced along with the other relevant factors.

*Wensmann*, 734 N.w.2d at 641, n.14 (citations omitted).

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<sup>15</sup> Appellant’s Brief at 31.

The intent and meaning of the *Wensmann* footnote, as well as its application to a state-law takings claim, are not entirely clear, particularly since the *Wensmann* plaintiffs had not argued for a broader interpretation of the Minnesota Takings Clause. But assuming for the sake of argument that the footnote did “fold” *McShane* into *Penn Central*, and in particular its character factor, the Court should hold that a zoning ordinance similar to that in *McShane* absolutely establishes the “character of the governmental action” factor in favor of the property owner, which should, in turn, lower the threshold for proving the severity of the economic impact.

Support for this approach can be found in *Penn Central* itself:

A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

*Penn Central Transp. Co. v. New York City*, 438 U.S. at 124. This language is mirrored by *McShane*’s distinction between “arbitration” and “enterprise” regulations.

The character of the government action factor in *Penn Central* “requires a court to place the challenged regulatory action along a spectrum ranging from an actual physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an ‘average reciprocity of advantage’ on the other.” *K & K Const. v. Deq*, 705 N.W.2d 365, 383 (Mich. App. 2005). Where a particular governmental regulation falls along the spectrum is “a question of degree and therefore cannot be disposed of by general propositions.” *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922). At one end of the spectrum is a governmental regulation that “singles plaintiffs out to bear the burden for the public good”. *K & K Const.*, 705 N.W.2d at 384. *See also Armstrong v.*

*United States*, 364 U.S. 40, 49 (1960) (“The [Takings Clause] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”) At the other end of the spectrum is a governmental regulation that “is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.” *K & K Const.*, 705 N.W.2d at 384.

In the case of a major metropolitan airport, clearly a few property owners are singled out to bear the burden of a use that benefits the public in an enormous geographic area around the airport. Since airport zoning regulations fall so close to end of the spectrum, the threshold for proving the severity of the economic impact should be lowered. Support for this position is found in *Cienega Gardens v. U.S.*, 331 F.3d 1319 (Fed. Cir. 2003), in which the court found regulations preventing owners of low-income housing from prepaying certain subsidized loans and retaking possession of the housing to be “akin to [a] type of physical invasion.” *Id.* at 1338. The court continued: “The character of the government’s action is that of a taking of a property interest, albeit temporarily, and not an example of governmental regulation under common law nuisance or other similar doctrines, which we would treat differently.” *Id.* In analyzing the economic impact of the regulation, the court observed that there is not “an automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value.” *Id.* at 1340 citing *Yancey v. United States*, 915 F.2d 1534, 1539, 1541 (Fed. Cir. 1990) (affirming the conclusion that there had been a compensable taking despite arguments that the diminution in value of 77% was too small).

Contrast this with a wetland regulation, which requires a property owner to make a much greater showing of economic impact because of the particular importance of the public interest at stake:

As we will discuss in greater detail below, while no one of the three factors is dispositive in and of itself, a key factor in terms of wetland regulations is the third, the character of the government action. Where, as here, the regulation serves an important public interest and is widespread and ubiquitous, we conclude that, to sustain a regulatory taking claim, a plaintiff must prove that the economic impact and the extent to which the regulation has interfered with distinct investment backed expectations are the functional equivalent of the physical invasion by the government of the property in question.

*K & K Construction*, 705 N.W.2d at 365. See also *Apollo Fuels, Inc. v. U.S.*, 381 F.3d 1338 (Fed. Cir., 2004) in which a regulation that prohibited surface mining on the basis that runoff would impair water quality was deemed “the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations.” *Id.* at 1351.

These cases are consistent with the notion that the economic impact necessary to establish a taking properly fluctuates, depending on the nature of the governmental action. In airport-zoning cases, this Court should hold that under the Minnesota Constitution’s Takings Clause, the economic impact necessary to establish a taking is lower than the impact that has been required in recent federal takings jurisprudence involving exercises of police power to protect the health, safety and welfare of the public.<sup>16</sup> The most appropriate means to this end—as expressed in *McShane*—would be to deem the economic-impact

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<sup>16</sup> Again, the Airport attempts to make airport-zoning regulations an exercise of police power to protect the safety of the public but the regulations only protect against a threat to safety created by the airport itself.

factor as favoring the landowner if the regulation caused a substantial and measurable decline in the market value of the property. (This folding of *McShane* into *Penn Central* would not require an adjustment to the investment-backed expectations prong of *Penn Central*.)

Such a hybrid *Penn Central/McShane* analysis would reconcile the supposed tension between *Wensmann* and *McShane*, would preserve the essence of *McShane*, and, most importantly, would properly reflect the more protective nature of Minnesota's Takings Clause. The *Penn Central* analysis—and its limitation of takings to regulations “so onerous that [their] effect is tantamount to a direct appropriation or ouster,” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005)—simply cannot be reconciled with the fact that the Minnesota Constitution protects landowners not only against governmental action that “takes” private property, but also regulations that “damage” property. The economic-impact prong of *Penn Central*, as currently applied, simply does not account for that difference.

### **Conclusion**

This case should properly be decided on the basis of whether a diminution in value of six percent can give rise to a successful takings claim. Since a loss in value of that size does not require compensation under any legal theory, the Court should simply reverse the decision of the court of appeals and decline further consideration of *McShane* at this time.

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Respectfully submitted by



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