

NO. A09-969

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State of Minnesota  
**In Supreme Court**

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Leon S. DeCook and Judith M. DeCook,  
*Respondents,*

v.

Rochester International Airport Joint Zoning Board,  
*Petitioner.*

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**BRIEF AND APPENDIX OF *AMICUS CURIAE***  
**GORDON D. GALARNEAU AND PENNY S. GALARNEAU**

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## INTRODUCTION

Airport Safety Zoning is a unique event in Minnesota and generally affects a limited number of property owners. In this case, the *amici* Metropolitan Airports Commission (“MAC”) and League of Cities (“League”) advocate for a position that denies property owners their constitutional rights to compensation for property taken or damaged by airport activities. That is not the law as a matter of constitutional principles, nor is it consistent with this Court’s earlier rulings in *McShane v. Faribault*, 292 N.W.2d 253 (Minn. 1980) and *Wensmann v. City of Eagan*, 734 N.W.2d 623.

## IDENTIFICATION OF AMICUS INTEREST

Gordon D. Galarneau and Penny S. Galarneau are property owners just south of the Minneapolis-St. Paul International Airport (“MSP”) and have been affected by airport zoning enacted by MAC and the cities surrounding the airport. They have claims pending in *Interstate Companies, Inc. et al v. City of Bloomington, et al*, File No. A10-481. Oral argument in the Court of Appeals case has been scheduled for October 14, 2010. Pursuant to Minn. R. Civ. App. P. 129.03, *amicus* certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and no other person made a monetary contribution to its preparation or submission.

## BACKGROUND INFORMATION

### 1. Airport Zoning Is A Unique And Rare Event.

Although *amici* MAC) and the League assert that a ruling in favor of the property owner would have wide and far ranging consequences on the airports in Minnesota, a look at the facts suggests that is not the case. Airport zoning occurs very infrequently. At MSP, the state’s

largest airport, it has occurred only twice in the last 50 years – first in 1984 and again in 2004. That is hardly a recurring event likely to cause havoc to the state airport system.

Equally telling, is that the pending case is the first airport zoning case to reach this Court since *McShane* was decided thirty years ago. That also suggests that airport zoning and the standards in *McShane* have not caused a wave of litigation harmful to city or MAC interests.

A review of cases following *McShane* confirms that *McShane* has not caused a wave of reported appellate litigation related to airport zoning. *Keenan v. International Falls-Koochiching County Airport Zoning Bd.*, 357 N.W.2d 397 (Minn. App., 1984) is the only other reported court of appeals case related to airport zoning (other than the pending case). In that case the trial court found no loss in value to the affected property and the decision was upheld on appeal.

Thus, contrary to the arguments of the MAC and League, airport zoning issues arise infrequently and affect a limited number of people. Most of the litigation since *McShane* that cites *McShane*, has been an attempt to expand the principles of *McShane* to other types of zoning activities. That is a situation that can be easily remedied by this Court finding that the principles in *McShane* apply only to airport zoning.<sup>1</sup>

**2. The Metropolitan Airports Commission Is The Only Airport Operator In The State Of Minnesota That Does Not Have Zoning Standards Consistent With Or In Excess Of State Standards.**

Another telling example of why airport zoning does not create endless litigation is the fact that of the approximately 100 airports in Minnesota, the only airport operator who has not already zoned its airport consistent with or in excess of the safety standards required by state

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<sup>1</sup> This appears to be one of the major concerns of the League. See *Amicus* Brief at pp. 4-5. Although Court's generally are not in the business of anticipating future controversies that may or may not occur, the concerns raised by the League are easily addressed by a holding that discusses the unique nature of airport zoning and limits the *McShane* principles to airport zoning.

statutes is MAC. See *Airport Land Use Compatibility Manual, Chapter 2*

<http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch2.pdf> (pp. 24-25). Although the MAC owns seven airports in the Minneapolis-St. Paul Metropolitan Area, the only one that has any airport zoning in effect is MSP. *MAC Amicus Brief* at p. 3. The MAC has for years failed to comply with the state statutes requiring such zoning. *App. 000001-000003*. To the extent that MAC or the League, on behalf of the affected cities near MAC airports, argues that *McShane* would have an adverse economic impact on zoning at MAC airports, that is a self induced problem.<sup>2</sup>

**3. Local Airport Land Use Zoning Is An Integral Part Of The Public Safety Planning For Airports And Not Dictated By The Federal Aviation Administration.**

One of the most misunderstood concepts in airport zoning is the responsibility of the Federal Aviation Administration (“FAA”). The natural response given the FAA role in aviation generally, is to assume that the FAA dictates policies with respect to local land use and zoning. That is not the case. State and local governments actually are responsible for local land use zoning. See generally <http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch2.pdf>

A commonly heard argument by airport operators is that since the FAA does not require particular land use zoning beyond its control of certain airspace close to runways, nothing further is necessary to protect public safety. That is not correct. Minnesota has had in place for many years a specific system for local zoning to protect the safety of people in the air and on the ground when an aircraft is confronted with emergency conditions. *MnDOT Amicus Brief* at p. 5.

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<sup>2</sup> It is highly unlikely that there will be significant new airport construction in Minnesota or even expansion at existing locations in the foreseeable future. MAC is landlocked at MSP and there is no available space to increase runway length or the number of runways. Similarly, given the state of the aviation industry, it seems unlikely that there will be major expansion of outstate airports in the near future. Notwithstanding these facts, as DeCook points out in his brief, constitutional rights do not rise or fall based on their economic cost. *DeCook Brief* at p. 13, fn.2.

*See Minn. Rules 8800.2400.* The protection of public safety for people on the ground and in the air is the primary purpose of airport zoning, and as such it has a different purpose than most other governmental zoning activities.

**4. Airport Zoning Is Very Different From Other Regulatory Zoning Activities.**

MAC and the League argue that airports provide an “essential public service” and forcing airport operators to pay for property they utilize directly or indirectly in their operations would “negatively affect the ability of airport authorities to provide this essential public service.” *MAC Amicus Br. at p. 4; League Br. at pp. 5-6.* In making this argument, both *amici* seriously misstate the issue when considering constitutional questions. The issue is not whether the government has the right to take land for public purposes. The issue is whether they have the obligation to pay the property owners for the taking of their property. To some in government perhaps having to pay for property it is using may “negatively affect” the ability to use the property. For the property owner, however, requiring government to pay for the use of private property is a fundamental right in the Minnesota Constitution:

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

*Minnesota Constitution, Article I, Section 13.*

Minnesota Statutes defines a taking as follows:

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

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

Airport zoning is thus different from almost any other kind of zoning because the government itself is engaged in both the establishment of the land use controls and the activity of running the airport. While turning a profit in the business sense is not the ultimate objective,

there is no question airports operate like businesses:

The Metropolitan Airports Commission is a public corporation of the state. Unlike typical state agencies, the MAC does not receive an appropriation from the state operating budget. Instead, the MAC operates like a business, paying its expenses from revenues it generates.

In 2009, the MAC had operating revenues of \$241.5 million against operating expenses of \$126.7 million, excluding depreciation.

<http://www.metroairports.org/mac/organization/budget.aspx> (App. 000023)

Thus, in airport zoning, the players making the zoning decisions have a vested interest in the outcome as it directly affects the costs they incur in operating the airport. That is virtually unique among local zoning activities.

In addition, airport operations have an impact on surrounding property owners unlike any other zoning decisions made by local governments. This is particularly true for property owners whose property ends up in state Safety Zones A and B which is the flight path under which airplanes take off and land at airports. These areas include the area of highest risk of crashing airplanes, and the highest noise levels around an airport. Generally airports resolve the issues related to safety zone property by the airport itself owning the property. The issues in *DeCook* arose because the airport sought to avoid purchasing property it zoned into Safety Zone A, the area of highest restrictions and highest safety risks.<sup>3</sup>

Airports have generally resolved these conflicts by owning a substantial amount of property around the airport. By way of example, other major airports in similar climates to Minnesota, are substantially larger:

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<sup>3</sup> The same circumstances exist for both *amici* Galarneau and the O'Neills.

Denver:	34,000 Acres
Chicago O'Hare	7,000+ Acres
Detroit	6,700 Acres
MSP	3,400 Acres

*App. 000004 = 00007.*

In Minnesota, the political decision was made many years ago to keep MSP in its current location. Similarly, in Rochester the decision was made to implement an instrument landing system that required a larger safety zone. Those were appropriate political decisions. The decisions however come with consequences for dealing with private property around the Airport. Airport safety zoning is the method to both control the land use and compensate the affected property owners. In both *DeCook* and the cases of the *amici*, the airport operators are attempting to implement only half of the process – to use the property without paying for it.

**5. The Balancing Of Competing Interests Argued By The MAC Has Been Lost By Virtue Of MAC'S Purchase Of Zoning Power From Affected Municipalities.**

The MAC's concerns in this case and its efforts to reverse *McShane* are driven simply by a financial desire not to compensate property owners for property affected by its airport operations. Its argument that the airport zoning process is a balancing act that weights varying considerations rings hollow in light of its use of indemnification to essentially purchase zoning of its choosing. *See Indemnification Agreement at App. 000008 – 000021.* The MAC's requested zoning was approved by a political appointee at MnDOT, over the strenuous objection of the professional aviation staff. *App. 000022.* MAC is reportedly engaging in the same tactic in its pending zoning at the St. Paul Airport. Thus, the judicial system is the place where

property owners must look for protection of their constitutional rights. There is no current balancing of interests at the safety zoning level.

**6. Airport Zoning Is Not Funded By General Funds Taxpayer Dollars But Rather By The Users Of The Airport.**

Implicit, if not explicit, in the arguments of the MAC and the League are that this Court must reverse *McShane* because it costs money to purchase property around airports and of course governments today are having trouble balancing their budgets. Ignored in this argument is who in fact pays for airport operations. Improvements to airports, including the purchase of land around airports, are paid for through three primary sources of funding: passenger facility fees paid by travelers utilizing the aviation system, bonds paid for by airport revenues and federal grants. None of these sources requires general revenue funds from either the state or municipalities. The same is true for MAC. *App. 000023*. Thus, the airport system is generally a system paid for by its users and not a drag on taxpayer dollars.

**LEGAL ARGUMENTS**

**1. The Only Truly Neutral Party In This Case, The Minnesota Department Of Transportation, Does Not Advocate For A Reversal Of *McShane*.**

It is interesting and telling, that MnDOT, the only truly neutral party in this case, and the administrative body responsible for state wide aviation issues, does not advocate a reversal of *McShane*. If *McShane* was counter to long standing aviation principles, MnDOT would have advocated the reversal of the decision. Rather, MnDOT argues that the amount of the diminution in value found in *DeCook* was not “substantial” enough that it was “manifestly unfair” to constitute a taking under *McShane*. In so doing, MnDOT actually misreads this Court’s holding in *McShane* which upheld a taking in an airport zoning case when the following two factors existed:

- (a) there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations; and
- (b) those [zoning] effects adversely affect their property so directly and so substantially that it is manifestly unfair to require them to sustain a measurable loss in market value which the property-owning public in general does not suffer.

*McShane, supra, at 258-259.*

Property owners in the state Safety zones A and B are directly under the flight path of airplanes taking off and landing at the airport. They experience on a regular basis effects to their property that the property owning public in general does not suffer (e.g. height restrictions and increased noise levels). In fact, only a handful of property owners at any airport suffer the intrusions from airplanes based on the strict requirements for the flight paths used by airplanes taking off and landing. In terms of height limitations and noise, these property owners in the flight paths experience harm that very few other property owners in Minnesota experience.

The error in MnDOT's analysis is the combining of a "substantial and measurable loss" with the requirement that the economic loss be "manifestly unfair." This turns the analysis to a subjective assessment of substantial in the context of unfair, rather than the two part test established by this Court. The loss must be substantial and must be measurable. Those terms are subject to common interpretations. The use of formulas or analyses of the original purchase price is not helpful. The proper analysis as the Court has indicated (and as the Court of Appeals did in *DeCook v. Rochester International Airport Zoning Board, A06-2170 (2007)*) is measuring the difference in market value of the property before the zoning ordinance was passed and after. That clearly indicates whether the loss is measurable and by how much.<sup>4</sup> Then the property

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<sup>4</sup> Of course, contrary to the arguments of all the *amici*, the Minnesota Constitution does not require a complete taking for there to be a compensable loss. See *Article I, Section 13 cited above*. Any "destroyed or damaged" property is covered by the Minnesota Constitution, which is different from the language of the United States Constitution.

owner's loss must be caused by being in a location near the airport where it experiences the airport in ways that the property owning public in general does not. That analysis would generally limit zoning claims to property owners in state Safety Zones A and B since the restrictions in Zone C are generally minor and similar to the types of general restrictions found elsewhere in municipalities.<sup>5</sup>

**2. *Wensmann Did Not Overrule McShane.***

*Amici* MAC and the League advocate a reversal of *McShane* on the grounds that it is inconsistent with this Court's decision in *Wensmann*. Any fair reading of *Wensmann* belies this interpretation. *Wensmann* was not an airport zoning case. It was an example of property owners attempting to expand the reach of *McShane* beyond the airport zoning context. This Court dealt with *McShane* in an appropriate context, by indicating in footnote 13, that *McShane* was not inconsistent with *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 98, St. Ct. 2646, 57 L.Ed. 631 (1978) or the Court's decision in *Wensmann*. In addition, the Court noted that the nature of airport operations clearly went to the governmental character element of *Penn Central* and should be taken into consideration in the balancing of the various factors. The Court thus affirmed the consistency of *Penn Central*, *Wensmann* and *McShane* but left the issue of how the balancing of factors should occur in an airport zoning case for future consideration in a case involving airport zoning.<sup>6</sup>

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<sup>5</sup> As noted earlier, in most cases airport planners have eliminated this issue by seeking to control or own all the land in Safety Zone A and often in Safety Zone B. By so doing, they eliminate the constitutional issues and better protect people on the ground and in the air.

<sup>6</sup> *Wensmann* was a total takings case as the issue in that case was whether the appropriation of the space as "green space" for the City precluded any other use for the property. The partial takings circumstances of *DeCook* are substantially different and governed by a different standard.

**3. Under *Wensmann* and *McShane* The Character Of The Governmental Action In Running An Airport Is Unique In The Regulatory Takings Analysis And Dominates The Balancing Analysis.**

The initial determination for this Court is whether to decide *DeCook* on the substantial diminution issue or to address the complete analysis of *McShane* and *Wensmann*. If the Court decides the case on the substantial diminution question alone, it could defer the ultimate resolution of *McShane* and *Wensmann* for another day (and as noted by *Amici* Galarneaus and O'Neill's there are two other cases in the pipeline).

If the Court decides to address *McShane* and *Wensmann* directly, the analysis can be done quite simply. While the court starts with the three factors identified in *Penn Central* and *Wensmann*, when dealing with airport zoning and the partial takings resulting from airport activities on adjacent property owners in state Safety Zones A and B, the analysis of the three factors changes and the character of the governmental action is the dominant factor. The test is not a "bright line" test as advocated by *amici* MAC and the League. Rather, the test remains one that requires analysis of the *Penn Central* factors, but in a different context than the traditional federal zoning cases.

The first *Penn Central* factor focuses on the economic impact on the property. While the Rochester Airport, and *amici* MAC and the League all cite to federal authority governing general regulatory takings under federal law, none of those cases deal with the circumstances of a partial taking contemplated under the Minnesota Constitution, nor with airport zoning. A partial taking by its very definition assumes some continued economic use of the property. Otherwise it would be a total taking. Thus the focus of *amici* on the general federal analysis for the first element of the *Penn Central* analysis in a partial taking caused by airport zoning is misplaced. Instead the

economic impact analysis in an airport zoning case under the Minnesota Constitution must focus on whether there is a substantial diminution in market value of the property by comparing its value just before and just after the enactment of the airport zoning ordinance. It is the difference in value before and after the partial taking that is the economic impact at stake. Thus, whether there are other economic uses for the property is irrelevant to the partial taking analysis.

The second factor based on the property owner's investment backed expectations is also different in a partial taking situation. Rather than a comparison of the property owner's original purpose for the property vs. its current use, the Court should look at the circumstances affecting the property caused by the airport. For example, what was known to the property owner at the time he/she purchased the property? In other words, did the property owner purchase the property knowing that there was an airport runway Safety Zone already in place affecting the property? Obviously, buying property with knowledge of an existing safety zone on the property is different than having a new runway built years later and bringing safety zones into play where they had not been before. Thus the focus of the second factor is not whether the property owner will realize a gain or loss on their overall investment (as propounded by the Rochester Airport and supporting *amici*) but rather on the circumstances known to the property owner at the time of the purchase.

As noted in *Wensmann*, the character of the governmental action, the third factor in *Penn Central* will likely dominate in an airport zoning context. Given the use of the affected property by airport operations, the private funding for airports, the unique nature of the zoning, and the protection of the public safety, the character of the governmental action is unique in airport zoning cases, particularly in partial takings cases. This Court in *McShane*, established a specific test to meet the character of the governmental action element under *Penn Central*: is the

property owner impacted by the airport operations in ways that the general property owning public is not? If a property owner can satisfy this element, then the character of the governmental action factor dominates the analysis because of the unique impact on the property owner when compared to other property owners not in the same proximity to the airport. The question is thus not whether all the property owners in Safety Zone A or B are treated the same, but how those property owners are impacted in comparison to property owners in general. Under that analysis, no one can argue that property owners in Safety Zones A and B are not impacted in significant ways different from the general public. They suffer from height restrictions unique to their location in the flight path and experience noise levels more extensive than others outside the safety zones.

Thus, the issue is not whether *Penn Central* applies. The issue is what analysis is required. Analyzing the *Penn Central* factors in the context of what is actually happening in airport zoning provides much more appropriate context to the analysis than the vanilla analysis offered by the Rochester Airport and supporting *amici*. This is totally consistent with *Penn Central* and *Wensmann* which noted the need for flexibility in this analysis:

Consequently, "the determination of whether a taking has occurred is highly fact-specific, depending on the particular circumstances underlying each case." Westling, 581 N.W.2d at 823; see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (describing takings analyses as "ad hoc, factual inquiries").

*Wensmann, supra, at 632*. Thus, contrary to the arguments of the Rochester Airport and supporting *amici*, the Court of Appeals did not adopt a "bright line" test, but rather appropriately used an "ad hoc factual inquiry" as contemplated by both *Penn Central* and *Wensmann*.

**4. This Court Has Already Rejected Arguments About The Public Purpose Of Airports As A Justification For Non-Payment To Property Owners.**

*Amici* MAC and the League make arguments about the public purpose of airports and the corresponding right of government to impose restrictions on land use without payment of compensation to the affected landowners. These arguments have long been rejected by this Court and others. In *Alevizos v. Metropolitan Airports Commission*, 298 Minn. 471, 216 N.W.2d 651 (Minn., 1974):

MAC was created for the express purpose of promoting and developing airports around the metropolitan area. Having accomplished this task, it would be incongruous for this court to hold that MAC cannot be held responsible for the adverse effects of its activities.

216 N.W.2d at 663. This Court further held:

MAC finally asserts that an equitable balancing of the individual property owners' rights to compensation against the financial impact such payment would have on future aeronautical development is required as part of the mandamus action. Such a balancing, however, would be totally improper in an action which is basically one of eminent domain. The reason such a balancing is improper is that no individual seeks recovery in this action for personal injury, suffering, or inconvenience. Rather, petitioners seek compensation for a reduction in market value which amounts to a taking of property. This standard involves an inherent balancing, as was pointed out earlier in this opinion, in that the measure of recovery is based on decrease in value in the general marketplace rather than decrease in value to the individual property owner, thereby excluding recovery for the discomfort sustained by an unusually sensitive individual. This type of balancing exists when the state initiates the condemnation proceedings as well as when the injured property owner does so. But in either situation, a balancing of the individual's right to recover against that of MAC's utility to society is irrelevant.

216 N.W.2d at 666.

Thus, the arguments that the public utility of airports should be an excuse for not having to make payment to property owners whose rights have been impacted by the airport's operations has been long rejected in Minnesota. It was also long ago rejected by the United States Supreme Court:

We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense...We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built...A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant "taking" was "for public use" is not debatable. For respondent agreed with the C. A. A. that it would operate the airport "for the use and benefit of the public.."

The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam... Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. **Our conclusion is that by constitutional standards it did not acquire enough.**

(emphasis added) *Griggs v. Allegheny County*, 82 S. Ct. 531, 7 L.Ed. 2d 585, 369 U.S. 84, 89-90 (1962).

The same principles apply as this Court considers *Wensmann* and *McShane*. Airports by virtue of their public purpose are not immune from constitutional eminent domain responsibility.

## CONCLUSION

Airport safety zoning cases are unique in nature and limited in their numbers. This Court's holding in *McShane* recognizes the unique nature of this type of zoning and crafts a well reasoned analysis that protects both property owners impacted by the safety zoning ordinance from airport operators who seek to shirk their responsibility to purchase or obtain easements on affected property and airport operators from property owners looking for a generous payout, by limiting recovery to those who experience a substantial diminution in the market value of the property and are impacted in ways not experienced by the general public. This balancing test is consistent with *Penn Central* and *Wensmann* and should continue to be the law in Minnesota.

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