

Case No. A09-969

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State of Minnesota  
**In Supreme Court**

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

*Respondents,*

v.

**Rochester International Airport Joint Zoning Board,**

*Appellant.*

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**REPLY BRIEF OF APPELLANT ROCHESTER  
INTERNATIONAL AIRPORT JOINT ZONING BOARD**

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**MALKERSON GUNN MARTIN LLP**

Bradley J. Gunn, Reg. No. 132238  
Howard A. Roston, Reg. No. 260460  
220 South Sixth Street, Suite 1900  
Minneapolis, MN 55402  
(512) 344-1111

*Attorneys for Respondents Leon S. DeCook  
and Judith M. DeCook*

**GREENE ESPEL P.L.L.P.**

Clifford M. Greene, Reg. No. 37436  
John M. Baker, Reg. No. 174403  
Monte A. Mills, Reg. No. 030458X  
200 South Sixth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 373-0830

*Attorneys for Appellant Rochester  
International Airport Joint Zoning Board*

*[continued on next page]*

**FAEGRE & BENSON LLP**

Aaron D. Van Oort, Reg. No. 315539  
Melina K. Williams, Reg. No. 387635  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis MN 55402-3901  
(612) 766-7000

*Attorneys for Amicus Curiae  
Metropolitan Airports Commission*

**SIEGEL, BRILL, GREUPNER, DUFFY  
& FOSTER, P.A.**

Wm. Christopher Penwell, Reg. No. 164847  
Anthony J. Gleckel, Reg. No. 185395  
Mark Thieroff, Reg. No. 322404  
100 Washington Avenue South, Suite 1300  
Minneapolis, MN 55401  
(612) 337-6100

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

**HESSIAN & MCKASY, P.A.**

Lee A. Henderson, Reg. No. 126305  
4000 Campbell Mithun Tower  
222 South Ninth Street  
Minneapolis, MN 55402  
(612) 746-5750

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

**LEAGUE OF MINNESOTA CITIES**

Susan L. Naughton, Reg. No. 259743  
145 University Avenue West  
St. Paul, MN 55103  
(651) 281-1232

*Attorney for Amicus Curiae  
League of Minnesota Cities*

**MINNESOTA ATTORNEY  
GENERAL**

Erik M. Johnson, Reg. No. 0247522  
Assistant Attorney General  
445 Minnesota Street, Suite 1800  
St. Paul, MN 55101-2134  
(651) 757-1476

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

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## LEGAL ARGUMENT

### I. DECOOKS HAVE FAILED TO DEMONSTRATE THAT THE ECONOMIC IMPACT OF THE ORDINANCE CONSTITUTES A TAKING.

DeCooks offer no explanation for how a six-percent decrease in the value of a multi-million-dollar property could constitute a serious economic impact that amounts to a regulatory taking. DeCooks fail to cite a single case in which a court concluded that a six-percent decrease in the value of a property constitutes a regulatory taking. DeCooks further fail to address any of the multiple cases—which the Board cited in its principal brief—holding that a serious financial loss is necessary to establish a regulatory taking. (App. Br. 17–20.) The purpose of the regulatory-takings analysis is to determine whether the regulation of property goes “too far.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007). The analysis seeks to identify regulations that are “functionally equivalent to the classic taking” in which government directly appropriates private property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The focus of the analysis is “the severity of the burden that government imposes upon private property rights.” *Wensmann*, 734 N.W.2d at 633 (quoting *Lingle*, 544 U.S. at 539). The \$170,000 decrease in the value of DeCooks’ \$2,770,000 property does not constitute a serious economic impact that amounts to a regulatory taking. A regulation does not go “too far” when it causes a six-percent decrease in the value of a property. The court of appeals’ decision should be reversed and the district court’s judgment that no taking occurred should be reinstated.

## II. DECOOKS HAVE WAIVED MANY ISSUES BY FAILING TO ADDRESS THEM.

DeCooks did not address or challenge a number of issues. “It is well-established that failure to address an issue in [a] brief constitutes waiver of that issue.” *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006). DeCooks therefore have waived all unaddressed issues. *See State v. Hurd*, 763 N.W.2d 17, 32 (Minn. 2009) (“issues not raised in the parties’ briefs are waived”); *State v. Hartmann*, 700 N.W.2d 449, 457 (Minn. 2005) (“failure to argue an issue in a party’s brief constitutes waiver of that issue”); *In re Olson*, 648 N.W.2d 226, 228 (Minn. 2002) (“It is axiomatic that issues not ‘argued’ in the briefs are deemed waived on appeal.”); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (“This issue was not argued in the briefs and accordingly must be deemed waived.”); *Pautz v. American Insurance Co.*, 128 N.W.2d 731, 738 (Minn. 1964) (“these were not argued in the brief and accordingly must be deemed waived”).

DeCooks have waived any objection to the following points: (1) the district court’s findings of fact; (2) Appellant’s statement of facts; (3) that the regulatory-takings analysis must consider DeCooks’ whole 240-acre Property; (4) that the “denominator” value of the Property in the regulatory-takings analysis is at least \$2,770,000; (5) that the Property had—at most—a six-percent decrease in value as a result of the 2002 Ordinance; (6) that DeCooks will be able to recoup their investment in the Property, and much more, even after the 2002 Ordinance; (7) that the 2002 Ordinance did not interfere with any existing use of the Property; (8) that the 2002 Ordinance did not interfere with any distinct and reasonable investment-backed expectations that DeCooks had for the Property; (9) that

the burden of Safety Zone A is allocated among several properties in the neighborhood of the Airport; (10) that other properties have been developed near the Airport by configuring the development so that the parking lot is in Safety Zone A and the building is outside of Safety Zone A; (11) that the Airport is an advantage to the Property; (12) that Airport zoning ordinances benefit property owners near the Airport by helping to preserve the Airport as a community amenity, and thereby protect those properties' advantageous location near the Airport; (13) that reciprocal benefits of regulations that protect public safety related to the Airport reduce any net negative effect on a particular owner; and (14) that the Ordinance is designed to protect public safety and prevent harm to users of the Airport and the surrounding properties.

In light of these waivers, DeCooks have conceded that they cannot prevail on a regulatory-taking claim against the Rochester International Airport Joint Zoning Board ("Board") under *Penn Central*.<sup>1</sup>

### **III. DECOOKS' PROPOSED BRIGHT-LINE TEST IS INAPPROPRIATE.**

To reach the conclusion they want, DeCooks seek to avoid any discussion of the "flexible," three-factor balancing test of *Penn Central*. *Wensmann*, 734 N.W.2d at 633 (describing the *Penn Central* approach as "flexible, with the factors often being balanced"). The three *Penn Central* factors govern the analysis of regulatory-taking

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<sup>1</sup> DeCooks inaccurately call Appellant in this case "the Airport." (R. Br. 6.) Appellant is the Rochester International Airport Joint Zoning Board. The Olmsted and Fillmore County Boards of Commissioners and the Common Council of the City of Rochester created the joint airport zoning board under Minnesota Statutes § 360.063. (App. 8.) The Rochester International Airport did not adopt the 2002 Ordinance. The Board did. The Airport and the Board are distinct legal entities.

claims under Minnesota law, *id.*, but DeCooks fail to establish a taking under *Penn Central*. DeCooks also disregard any recognized legal test for analyzing the economic impact of the 2002 Ordinance. DeCooks never address or explain how they could prevail under any standard that examines the percentage of decrease in value. Instead, DeCooks simply repeat the \$170,000 amount by itself—without any context—and ask rhetorical questions about that isolated number. DeCooks’ approach is not an appropriate legal test.

DeCooks essentially argue in favor of a bright-line test, citing *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), contending that any decrease in value is “substantial” and amounts to a regulatory taking. DeCooks incorrectly insist that “a loss of \$25,000 or \$10,000 or even \$5,000 would have to be regarded as substantial.” (R. Br. 16.) That is not the law.

To support their extraordinary position, DeCooks offer a definition of “substantial” from the sixth edition of Black’s Law Dictionary. (R. Br. 15.) But that dictionary passage does not properly frame the legal inquiry concerning “the severity of the burden that government imposes upon private property rights,” *Wensmann*, 734 N.W.2d at 633 (quoting *Lingle*, 544 U.S. at 539), or “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” *Lingle*, 544 U.S. at 540. Further, more recent versions of Black’s Law Dictionary do not define the term “substantial” by itself; rather, the newer dictionaries provide definitions that include the term “substantial” in the context of defining some legal test or concept. *See, e.g.*, BLACK’S LAW DICTIONARY 1442–43 (7th ed. 1999); BLACK’S LAW

DICTIONARY 1469–70 (8th ed. 2004); BLACK’S LAW DICTIONARY 1565–66 (9th ed. 2009). Likewise, one number should not be considered all by itself in the regulatory-takings analysis. The appropriate inquiry recognizes that a fact must be considered in the broader context: “the determination of whether a taking has occurred is highly fact-specific, depending on the particular circumstances underlying each case.” *Wensmann*, 734 N.W.2d at 632; *see also Penn Central*, 438 U.S. at 124 (describing takings analyses as “ad hoc, factual inquiries”).

Contrary to DeCooks’ position, the regulatory-takings analysis does not look at a single number in the abstract. The number reflecting the decrease in value caused by the regulation must be considered in relation to the property’s overall initial value. *Wensmann*, 734 N.W.2d at 634 n.7; *see also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property”). Otherwise, courts have no principled method for weighing the legal consequence of the number. Narrowly focusing only on one number also ignores other significant factors. *See Wensmann*, 734 N.W.2d at 632 (stating that *Penn Central* identified “several factors that have particular significance” in the analysis of regulatory-takings claims). DeCooks’ proposed bright-line standard—which would find that “a loss of \$25,000 or \$10,000 or even \$5,000” (R. Br. 16) amounts to a taking—is not an appropriate legal test for regulatory takings.

#### IV. DECOOKS DO NOT HAVE A TAKING CLAIM UNDER MCSHANE.

In *Wensmann*, this Court rejected the notion that *McShane* is “different from or inconsistent with” *Penn Central*, and directed that all three *Penn Central* factors must be balanced in the regulatory-takings analysis. *Wensmann*, 734 N.W.2d at 641 n.14. This Court observed that “commentators have viewed the *McShane* analysis as a distinct Minnesota approach to taking claims,” *id.*, but rejected that view. DeCooks advocate the same view as those commentators had. DeCooks argue that this case “falls within a special category of cases that was first recognized by” *McShane* and is “governed by a unique legal standard.” (R. Br. 7.) DeCooks suggest that *McShane* is different from *Penn Central* because *McShane* is an “easier” standard to meet. (R. Br. 8.) This is the same commentators’ argument that *Wensmann* already rejected. *Wensmann* clarified that *McShane* is not a distinct legal test from *Penn Central* and that the three-factor test of *Penn Central* controls the question of whether a regulatory taking exists. 734 N.W.2d at 641 n.14. DeCooks’ strained interpretation of *Wensmann* is wrong.

Furthermore, the facts of *McShane* are distinct from DeCooks’ circumstances because the plaintiffs in *McShane* showed an approximate 69% decrease in their property’s value. 292 N.W.2d at 256.<sup>2</sup> DeCooks argue that the distinction between their Property’s six-percent decrease in value and the facts of *McShane* concerning the magnitude of the decrease in value “confuses the facts of the case with its holding.”

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<sup>2</sup> *McShane* observed that the plaintiffs’ experts had testified that the land was worth \$522,000 when put to its highest and best use, and that the airport zoning ordinance had caused a \$360,000 decrease in value. 292 N.W.2d at 256. Dividing \$360,000 by \$522,000 equals 0.6896, which is a 69% decrease. Without explaining the calculation, *McShane* stated that the decrease in value was “67 percent.” *Id.*

(R. Br. 18.) But the facts are critical to a case's holding. "[T]he rules arise from a process which, while comparing fact situations, creates the rules and then applies them." EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3–4 (1948). The factual context is necessary for understanding the meaning of a case. See *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 301 (Minn. 2006) ("our holdings here must be viewed through the lens of the facts presented to us"); *Call v. Gomez*, 535 N.W.2d 312, 318 (Minn. 1995) ("Our holding was based on the facts of that case . . ."); *State v. Dahlin*, 695 N.W.2d 588, 594 (Minn. 2005) ("The holding in *Leinweber* is better understood in the context of the case's key facts."); *In re Welfare of K.A.A.*, 410 N.W.2d 836, 841 (Minn. 1987) ("the context within which the relied upon quotation lies contains critical facts not present in the instant case"); *Olson v. Hertz Corp.*, 270 Minn. 223, 228 (Minn. 1965) ("The conclusion we reached in the *Woodrich* case . . . was based on facts that are just the opposite of the facts here."); *Austin v. Wright*, 262 Minn. 301, 309 (Minn. 1962) ("We are unable to apply the holding in that case to the instant case since the facts are entirely different."); *In re Estate of Olson*, 244 Minn. 449, 454 (Minn. 1955) ("If the fact situation here were the same as in the *Firle* case, we would have no difficulty following the holding in that case. However, we have a different situation here."); *State ex rel. American Federation of State C. & M. Employees v. Hanson*, 229 Minn. 341, 352 (Minn. 1949) (Peterson, J., concurring) ("the dissenting opinion takes excerpts from prior cases with parts deleted and with utter disregard of what the cases decided, the fact situations which they involved, and the aids which such factors furnish in determining what the excerpts mean, and it exhibits those excerpts as holding precisely the opposite of what the

cases from which they were taken decided.”); *see also* KARL N. LLEWELLYN, THE BRAMBLE BUSH 12 (1951) (“the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all.”).

*McShane* specifically warned that it did “not hold that every landowner who is in some way limited or inconvenienced by [airport zoning] regulation is entitled to compensation.” 292 N.W.2d at 259.<sup>3</sup> Indeed, this Court often explains that a holding is limited to the facts of the case. *See, e.g., In re Collier*, 726 N.W.2d 799, 809 (Minn. 2007) (“we limit our holding to the facts of this case”); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 536 (Minn. 1986) (“our holding is limited to the facts of this case”); *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 353 (Minn. 1981) (“we limit this holding to the facts peculiar to this case”); *G.G.C. Co. v. First Nat'l Bank*, 287 N.W.2d 378, 382 (Minn. 1979) (“Our holding was compelled by the facts of that case”); *Phalen Park State Bank v. Reeves*, 312 Minn. 194, 205 (Minn. 1977) (“our holding has resulted from and is limited to the unique facts and circumstances presented in this case”); *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 200 (Minn. 1975) (“We limit our application of the holding in this case to its facts”); *Kisch v. Skow*, 305 Minn. 328, 333 (Minn. 1975) (“We expressly limit our holding to cases arising on facts similar to those

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<sup>3</sup> *McShane* did not create a new *per se* takings claim, like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where certain categories of regulation are “deemed *per se* takings.” *Lingle*, 544 U.S. at 538. Although *McShane* attempted to interpret *Penn Central* and determine the appropriate test for regulatory-takings claims, more recent decisions by this Court and the United States Supreme Court have explained what the *Penn Central* test is for regulatory takings.

we consider here”). Thus, the factual dissimilarities are significant—*McShane* involved a 69% decrease in value while DeCooks have merely a six-percent decrease.

Another key distinction from the case at hand and *McShane* is that the parties in *McShane* conceded that the decrease in the value of the property was “substantial.” 292 N.W.2d at 256 (“All parties concede the diminution in value was substantial.”). So, when DeCooks argue that *McShane* did not “adopt a numeric or percentage standard of any kind,” (R. Br. 18), they ignore the fact that the Court in *McShane* did not even need to reach the issue of what percentage decrease would be “substantial” because the parties had conceded the issue. In contrast, no such concession exists here. Six percent is far from substantial.

DeCooks overlook another significant aspect of *McShane* when asserting that, under *McShane*, “property owners are entitled to compensation if their property suffers a ‘substantial and measurable decline’ in market value as a result of the ordinance.” (R. Br. 7.) Even if a regulatory taking exists, under *McShane* DeCooks would not be entitled to compensation. *McShane* held that “an injunction against enforcement of the ordinance” was the appropriate remedy. 292 N.W.2d at 259. If DeCooks want to rely exclusively on *McShane* and disregard all subsequent case law, they may not pick and choose which parts of *McShane* they want applied. DeCooks’ statements that they would be entitled to compensation under *McShane* are incorrect. “[A]n injunction against enforcement of the ordinance” would be the available remedy under *McShane*. 292 N.W.2d at 259.

**V. THE MINNESOTA CONSTITUTION DOES NOT REFLECT A RELAXED STANDARD FOR REGULATORY TAKINGS.**

This Court has “relied on cases interpreting the U.S. Constitution’s Takings Clause” when interpreting the “language of the Takings Clause in the Minnesota Constitution” because it is “similar to the Takings Clause in the U.S. Constitution.” *Wensmann*, 734 N.W.2d at 631–32. In particular, this Court has followed the United States Supreme Court’s jurisprudence related to regulatory takings. *Wensmann*, 734 N.W.2d at 632–33 (citing *Lingle*, *Penn Central*, and other federal cases); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998) (citing *Penn Central* and other federal cases); *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996) (citing *Penn Central* and other federal cases); *State by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979) (citing *Penn Central*); *Krahl v. Nine Mile Creek Watershed Dist.*, 283 N.W.2d 538, 543 (Minn. 1979) (citing *Penn Central*). It would be an extraordinary step away from established regulatory-takings jurisprudence, *see Lingle*, 544 U.S. at 536–40, to hold that a regulation resulting in a six-percent decrease in the value of a property constitutes a regulatory taking. Such a departure from settled regulatory-takings law is unwarranted.

DeCooks rely on the “destroyed or damaged” phrase in the Minnesota Constitution, Art. I, § 13, to argue that a regulatory taking should be “easier” to prove in Minnesota. But DeCooks’ reliance on the Minnesota Constitution’s reference to “damaged” property is misplaced. The “damaged” language, which was added in 1896, did not open the floodgates in the manner suggested by DeCooks. The amendment did

not allow property owners who are unable to satisfy the established standards for a regulatory taking to nevertheless prove a constitutional violation simply by showing that the regulation reduced their property's value. DeCooks' suggestion is not the law.

This Court has previously explained the meaning of the 1896 addition of the "destroyed or damaged" phrase. And it had nothing to do with regulatory takings. Before the 1896 amendment, "[u]nder the former provision it was held that the right to damage given by the Constitution was confined to the particular tract of land the whole or part of which was taken." *Stuhl v. Great N. R. Co.*, 161 N.W. 501, 502 (Minn. 1917). To show a constitutional violation under the amended provision, "a *physical disturbance* of a valuable right in the property" is sufficient. *Id.* (emphasis added). A trespass of the public construction on the owner's property is not necessary, "and though the damage is consequential the owner may recover." *Id.* The purpose of the amendment was "not to change the substantive law of damages or to enlarge the definition of that term." *Id.* Rather, the purpose was "to make the law of damages uniform, so that a property owner may recover against persons or corporations having power of eminent domain, under the same circumstances that would have authorized recovery against one not armed with that power." *Id.*

This Court further explained that "[b]y the constitutional amendment covering damage without taking, no new cause of action unknown to the common law was created." *McCarthy v. City of Minneapolis*, 281 N.W. 759, 760 (Minn. 1938). The amendment simply removed a common-law bar to recovery, and its "*only purpose* is to allow recovery in the same circumstances and manner against corporations having power

of eminent domain as against those not enjoying that power.” *Id.* (emphasis added). “Not every diminution in the value of property caused by public improvement entitles the owner to recover.” *Id.* at 761. “The damage must be to the property itself.” *Id.* Public action that renders the property “less desirable, and even less salable” does not thereby “damage” the property itself for purposes of the Minnesota Constitution. *Id.*

Describing the 1896 amendment, this Court stated that, when the government actually takes adjoining property, “abutting property owners, whose property is damaged but not taken, are now entitled to compensation” as a result of the amendment “to require compensation for damage or destruction as well as taking.” *Burger v. St. Paul*, 64 N.W.2d 73, 77–78 (Minn. 1954). “Prior to the 1896 amendment damages caused to abutting property owners by an establishment or a change of the grade of a street were not compensable as a constitutional right on the theory that persons owning such abutting property were deemed to have acquired it subject to the reserved right of the authorities to make such improvements in the streets,” but after the amendment, consequential “damages resulting from the establishment or the change of street grade have been held compensable.” *Electric Short Line Terminal Co. v. Minneapolis*, 64 N.W.2d 149, 151–52 (Minn. 1954); *see also In re Town Ditch of Pleasant Mound Tp.*, 295 N.W. 47, 49 (Minn. 1940) (stating that “abutting owners, whose property is damaged, as by change of grade, but not taken, are now entitled to compensation” as a result of the constitutional amendment “to require compensation for damage as well as taking”); *Austin v. Village of Tonka Bay*, 153 N.W. 738, 739 (Minn. 1915) (“Prior to the amendment of 1896 by which the italicised [sic] words, ‘destroyed or damaged,’ were added to the constitutional

provision, the property owner had no remedy for the injury to his property caused by the change in grade of a highway; but since that amendment he is entitled to compensation for such injury . . . . The compensation to which plaintiffs are entitled is for the consequential damage to their property caused by the embankment, not for taking the corpus thereof.”); *Sallden v. Little Falls*, 113 N.W. 884 (Minn. 1907) (explaining that amendment of 1896 adding “destroyed or damaged” to takings clause abrogated the common-law rule that municipality was “not liable to property owners for consequential damages necessarily resulting from” actions establishing or improving street grades).

This Court’s interpretations of the 1896 amendment adding the “destroyed or damaged” phrase to Article I, Section 13, show that it related to physical takings. In short, the amendment allows a property owner to recover consequential damages by demonstrating “a *physical disturbance* of a valuable right in the property.” *Stuhl*, 161 N.W. at 502 (emphasis added). But DeCooks have not claimed—and they certainly have not proven—any *physical disturbance* of their Property.

The 1896 amendment had nothing to do with regulatory takings. The concept of a regulatory taking did not exist until the 1922 “watershed decision” in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Lingle*, 544 U.S. at 537. Beginning with *Mahon*, the United States Supreme Court recognized that “regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster,” thus creating the concept of a regulatory taking. *Id.* Before then, “constitutional theorists did not believe the Takings Clause embraced regulations of property at all.” *Id.*

(citation omitted). Because the amendment adding the “destroyed or damaged” phrase did not at all relate to regulatory takings, that phrase cannot support DeCooks’ position.

This Court has relied on the “damaged” language in Article I, Section 13, when allowing innocent property owners to be compensated for physical damage in a case arising from a physical invasion of their property. *See Wegner v. Milwaukee Mutual Insurance Co.*, 479 N.W.2d 38, 41–42 (Minn. 1991) (allowing compensation where flash-bang grenades severely damaged house into which suspected felon had fled). But the Court has not extended that concept to alleged *regulatory* takings in the 114 years since the phrase “destroyed or damaged” was added to Article I, Section 13. That is because a mere regulation of property use does not “damage” the property itself, as the standard requires.

Unlike circumstances where a physical appropriation of property has occurred, regulation adjusts rights and “curtails some potential for the use or economic exploitation of private property.” *Wensmann*, 734 N.W.2d at 632 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)). In the context of regulation, “[a] taking does not result simply because the property owner has been deprived of the most profitable use of the property.” *Wensmann*, 734 N.W.2d at 635 (citing *Andrus*, 444 U.S. at 66). To require compensation for all circumstances in which regulation adjusts property rights for the public good would improperly “compel the government to regulate by *purchase*.” *Andrus*, 444 U.S. at 65 (emphasis in original).

DeCooks inaccurately portray the Board’s position when they say that *Penn Central* provides a “universal standard that governs all regulatory taking claims.”

(R. Br. 11.) The Board outlined the other types of claims, in addition to *Penn Central*, while discussing *Lingle*, 544 U.S. at 536–40. (App. Br. 12–13.) That discussion of *Lingle* included the “exactions” and “all economically beneficial use” claims (*id.*), just like DeCooks list them. (R. Br. 11.) The discussion of *Lingle* related to other types of regulatory-takings claims. (App. Br. 12–13.) It was not intended to address all variations of *physical* takings. DeCooks have not alleged a physical taking or presented any evidence to support a physical taking.<sup>4</sup> This case is about a regulation. Thus, DeCooks’ straw-man argument fails.

Although DeCooks cite *Johnson v. City of Plymouth*, 263 N.W.2d 603 (Minn. 1978), for the proposition that “regulations that deprive a property of ‘reasonable’ access will be regarded as a taking,” (R. Br. 11), it does not help their argument. *Johnson* involved an alleged physical taking of access resulting from “the construction by the city of the curb and gutter.” 263 N.W.2d at 605. *Johnson* rejected the alleged taking claim, concluding that “the curb cuts linking appellant’s property with Kilmer Lane did not so interfere with access to the property as to be deemed a ‘taking’ of private property.” *Id.* at 607. No regulation was alleged to cause a taking in *Johnson*. Moreover, DeCooks are

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<sup>4</sup> Although DeCooks cite *Alevizos v. Metropolitan Airports Commission*, 216 N.W.2d 651, 662 (Minn. 1974), they have neither alleged nor proven an *Alevizos*-type claim. *Alevizos* recognized that noise from aircraft overflights may give rise to a taking claim depending how the noise affects the use and enjoyment of an owner’s property. “*Alevizos I* presents a two-step test for a constitutional taking in these unique airport noise cases.” *Alevizos v. Metropolitan Airports Commission*, 317 N.W.2d 352, 360 (Minn. 1982). First, a plaintiff must show “a direct and substantial invasion of [their] property rights of such a magnitude [they are] deprived of the practical enjoyment of the property.” *Alevizos*, 216 N.W.2d at 662. Second, a plaintiff must show that “such invasion results in a definite and measurable diminution of the market value of the property.” *Id.* DeCooks have waived an airport-noise claim under *Alevizos*.

mistaken when they assert that federal standards would not recognize a loss of reasonable access as a taking. *See, e.g., United States v. Grizzard*, 219 U.S. 180, 182 (1911) (holding that taking damages properly included physical destruction of “easement of access” to property).

DeCooks incorrectly rely on *Alexander v. City of Minneapolis*, 125 N.W.2d 583 (Minn. 1963), to support their contention that Minnesota has departed from federal regulatory-takings standards. DeCooks’ argument unravels for two reasons. First, this Court decided *Alexander* in 1963, about 15 years before *Penn Central*, 42 years before *Lingle*, and 44 years before *Wensmann*. The standards for regulatory-takings law—and other, unrelated legal issues in *Alexander*—have evolved since then. Second, *Alexander* actually relied on the United States Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Alexander* quoted extensively from *Mahon*, including the statement that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Alexander*, 125 N.W.2d at 587 (quoting *Mahon*, 260 U.S. at 415).

Although the O’Neill amici cite *State by Humphrey v. Strom*, 493 N.W.2d 554 (Minn. 1992) (O’Neill Br. 9.), the case does not support the notion that the Minnesota Constitution provides a relaxed standard for *regulatory* takings. The issues in *Strom* related to a *physical* taking of property and whether evidence of “construction-related interferences” and “loss of visibility” should be considered when determining just compensation in the condemnation proceeding. 493 N.W.2d at 556. *Strom* did not involve an alleged regulatory taking.

Further, any reliance on *Johnson v. City of Minneapolis* for the proposition that the Minnesota Constitution provides broader protection for regulatory takings is inappropriate because the Court expressly stated that the “case presents a narrow and rare instance in which precondemnation activity constituted a taking under the Minnesota Constitution,” and that the “decision is limited to the particular facts presented.” 667 N.W.2d 109, 116 (Minn. 2003). The taking found in *Johnson* did not arise from a regulation of the property. Rather, it was based on the “narrow and rare instance” of precondemnation blight—the prospect that the property would be condemned at some future date. *Id.* *Johnson* found an abuse of condemnation authority based on the city’s actions in the context of a conditional agreement to acquire parcels by eminent domain. *Id.* *Johnson* is unique and has no application here.

Finally, *McShane* did not—as DeCooks suggest—establish “its own standard” under the Minnesota Constitution. (R. Br. 11.) The O’Neill amici also incorrectly suggest that “*McShane* was decided under unique state constitutional provisions.” (O’Neill Br. 10.) Actually, *McShane* expressly stated that the issue was whether there was a taking of property without just compensation under the U.S. Constitution *and* the Minnesota Constitution. 292 N.W.2d at 257 (citing both “U.S. Const. amend. V and Minn. Const. art. I, s 13.”). *McShane* did not say anything about the Minnesota Constitution separately from the U.S. Constitution. *McShane* did not even mention the “destroyed or damaged” phrase of Article I, Section 13 of the Minnesota Constitution. Thus, *McShane* did not specifically determine that the Minnesota Constitution has a broader meaning than the U.S. Constitution for purposes of a regulatory-taking claim.

**VI. THE LAW-OF-THE-CASE DOCTRINE DOES NOT LIMIT THIS COURT'S REVIEW OF THE LEGAL ISSUES.**

DeCooks admit that the law-of-the-case doctrine does not preclude this Court from reviewing an earlier decision by the court of appeals. (R. Br. 14.) But DeCooks miss the point that the doctrine applies only to subsequent proceedings in the same or lower courts. It has no application here. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004) (“Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in *that court* or *any lower court*. . . .”) (emphasis added). Thus, the law-of-the-case doctrine does not bar this Court from determining that the court of appeals erred by failing to analyze the regulatory-taking claim under *Penn Central*.

**CONCLUSION**

Appellant Rochester International Airport Joint Zoning Board requests that this Court reverse the court of appeals' decision and reinstate the district court's judgment that no regulatory taking occurred.

Respectfully submitted,

Dated: September 20, 2010

**GREENE ESPEL P.L.L.P.**



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Clifford M. Greene, Reg. No. 37436  
John M. Baker, Reg. No. 174403  
Monte A. Mills, Reg. No. 030458X  
200 S. Sixth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 373-0830

*Attorneys for Appellant Rochester  
International Airport Joint Zoning Board*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared Microsoft Word 2007 (using the Word 97–2003 file format), which reports that the brief contains 5,110 words.

  
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Monte A. Mills