

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,  
*Appellant.*

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**BRIEF AND APPENDIX OF RESPONDENTS  
LEON S. DECOOK AND JUDITH M. DECOOK**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE LEGAL ISSUES

A. Is a state court regulatory taking claim arising out of a municipal airport zoning ordinance properly decided under *McShane* or under *Penn Central*?

(1) *Description of how the issue was raised in the trial court, including citations to the record.*

This issue was raised in the parties' pre-trial and post-trial memoranda.

(2) *Concise statement of the trial court's ruling.*

The trial court held that *Penn Central* was controlling. The Court of Appeals agreed in general, but it held that under the law of the case doctrine *McShane* was controlling in this proceeding.

(3) *Description of how the issue was subsequently preserved for appeal, including citations to the record.*

The issue was raised in DeCook's Statement of the Case, in the Airport's Petition for Review, and in DeCook's Response to Petition for Review.

(4) *List of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.*

*McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *DeCook v. Rochester International Airport Joint Zoning Board*, 2007 WL 2178046 (Minn. App.) (unpublished decision, see R. App. at 1); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007).

B. Does *McShane* govern this action under the doctrine of the law of the case?

(1) *Description of how the issue was raised in the trial court, including citations to the record.*

DeCook argued in its pre-trial and post-trial memoranda that *DeCook I*, along with *McShane*, set forth the legal principles that govern this action.

(2) *Concise statement of the trial court's ruling.*

The trial court held that *Penn Central* was controlling. On appeal, the Court of Appeals agreed generally but held that *McShane* was controlling under the law of the case doctrine.

- (3) *Description of how the issue was subsequently preserved for appeal, including citations to the record.*

The issue was raised, pursuant to Minn.R.Civ.App.Pro. 117, Subd. 4, in DeCook's Response to Petition for Review.

- (4) *List of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.*

*Brezinka v. Bystrom Bros.*, 403 N.W.2d 841, 843 (Minn. 1987); *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987); *Peterson v. BASF Corp.*, 675 N.W.2d 57, 66 (Minn. 2004).

- C. Does an airport zoning ordinance that causes a loss of \$170,000 in the market value of an affected property constitute a compensable taking or damaging of private property?

- (1) *Description of how the issue was raised in the trial court, including citations to the record.*

The jury determined that the airport zoning ordinance caused a \$170,000 diminution in the market value of DeCook's property. The issue was then briefed in the parties' post-trial memoranda.

- (2) *Concise statement of the trial court's ruling.*

The trial court concluded that, under *Penn Central*, the diminution in market value did not constitute a taking or damaging. On appeal, the Court of Appeals reversed and found that the \$170,000 loss in value did constitute a taking under *McShane*.

- (3) *Description of how the issue was subsequently preserved for appeal, including citations to the record.*

The issue was raised in DeCook's Statement of the Case, in the Airport's Petition for Review, and in DeCook's Response to Petition for Review.

- (4) *List of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.*

*McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *DeCook v. Rochester International Airport Joint Zoning Board*, 2007 WL 2178046 (Minn. App.) (unpublished decision, see R. App. at 1); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007).

## STATEMENT OF THE CASE

In April 2006, Leon and Judith DeCook (“DeCook”) commenced an inverse condemnation action against the Rochester International Airport Joint Zoning Board (the “Airport”) alleging that Airport Zoning Ordinance No. 4 had caused a taking or damaging of their property rights. On September 18, 2006, the district court granted the Airport’s motion for summary judgment and dismissed the DeCook’s Complaint. DeCook appealed to the Minnesota Court of Appeals, which on July 31, 2007 reversed and remanded for further proceedings. The Minnesota Supreme Court denied the Airport’s petition for review on October 24, 2007.

The action came on for a jury trial on November 3 to 6, 2008 before the Honorable Debra A. Jacobson. The jury returned a special verdict finding that Airport Zoning Ordinance No. 4 had decreased the fair market value of DeCook’s property by \$170,000. On February 27, 2009 the district court filed its Findings of Fact, Conclusions of Law, Order and Order for Judgment in favor of the Airport, concluding that Airport Zoning Ordinance No. 4 does not effectuate a regulatory taking of DeCook’s property as a matter of law. Judgment was entered on March 30, 2009, and DeCook appealed to the Minnesota Court of Appeals on May 28, 2009. On May 11, 2010, the Court of Appeals reversed and remanded for entry of judgment in favor of DeCook. This Court granted review on June 29, 2010.

## STANDARD OF REVIEW

The issue in this case, and on this appeal, is whether Airport Zoning Ordinance No. 4 caused a taking or damaging of DeCook's property and property rights. Generally speaking, in all inverse condemnation cases it is the role of the jury to determine any disputed issues of fact, and then the court "rules whether the facts as found by the jury legally constitute a taking." *Alevizos v. Metropolitan Airports Comm'n*, 317 N.W.2d 352, 360 (Minn. 1982). Similarly, in remanding this case for trial, the Minnesota Court of Appeals explained that "[w]hether a diminution in value has occurred and the extent of the diminution are questions of fact, but whether the diminution is substantial is a legal question." *DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 2007 WL 2178046, at \*7 (Minn. Ct. App. July 31, 2007) (*DeCook I*).<sup>1</sup> Since the question of whether a taking has occurred is a legal question, review on appeal is *de novo*. *Id.*

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<sup>1</sup> Unpublished decision; copy attached at R. App. 1 pursuant to Minn. Stat. § 480A.08, subd. 3.

## ARGUMENT

The DeCooks are the owners of approximately 240 acres of land located on the north side of the Rochester International Airport. In September 2002, the Airport adopted its Airport Zoning Ordinance No. 4, which expanded Safety Zone A to accommodate a runway expansion. Under the terms of the new zoning ordinance, approximately 28 additional acres of DeCook's property was subjected to the zoning restrictions in Safety Zone A. These zoning restrictions effectively rendered the 28 acres, which are located within the Rochester city limits and zoned for commercial/industrial development, unbuildable.

Unlike many of the cases decided by this Court, the facts and the issues on this appeal are relatively straightforward. It is undisputed that the Airport adopted Airport Zoning Ordinance No. 4, and that the Ordinance decreased the market value of DeCook's property by \$170,000. This matter comes before the Court for a determination as to whether that diminution in value constitutes a compensable taking or damaging of DeCook's property or property rights.

### **I. THIS APPEAL INVOLVES A MUNICIPAL AIRPORT ZONING ORDINANCE AND *McSHANE* -- AND NOT *PENN CENTRAL* -- IS THEREFORE CONTROLLING.**

The Minnesota Constitution provides that if private property is "taken, destroyed or damaged" for a public use, the property owner is entitled to just compensation. Minn. Const. Art. I, Sec. 13. There are several different kinds of inverse condemnation cases (*e.g.*, physical takings, exactions, regulatory takings, etc.), and the legal principles that apply in a particular case will vary depending on what category of inverse condemnation

case it is. The present case is a state court action that involves zoning regulations adopted for the benefit of a municipal airport, and it thus falls within a special category of cases that was first recognized by the Minnesota Supreme Court in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). Unlike other kinds of government zoning regulations, airport zoning regulations are adopted for the benefit of a specific public “enterprise,” namely an airport, and as such they are governed by a unique legal standard.

Specifically, the Court in *McShane*, as well as the Minnesota Court of Appeals in the previous appeal of this matter, *DeCook I*, held that in airport zoning cases such as this, property owners are entitled to compensation if their property suffers a “substantial and measurable decline” in market value as a result of the ordinance. *See e.g. McShane*, 292 N.W.2d at 258-59; *DeCook I*, 2007 WL 2178046, at \*6 (DeCook “must be compensated if their property has suffered a substantial and measurable decline in market value as a result of the ordinance.”). Thus, under *McShane*, if the diminution of \$170,000 in this case is “substantial and measurable,” then it constitutes a taking or damaging of DeCook’s property and property rights for which they must be compensated.

The Airport argues that *McShane* was effectively overruled by the Minnesota Supreme Court’s decision in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007), which relied on the three-prong analysis set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). (App. Br. at 30) The district court appeared to agree, stating that “[t]he standards set forth in *Penn Central* provide the appropriate analytic framework to determine whether the Airport Joint Zoning Board’s actions

resulted in a regulatory taking in this case.” (App. Add. at 6) We respectfully disagree, for the reasons set forth below.

What is the difference between the legal standards set forth in *McShane* and *Penn Central*? Under *McShane*, a property owner whose lands are devalued by an airport zoning ordinance may recover if his or her property suffers a “substantial and measurable” decline in market value because of the ordinance. 292 N.W.2d at 258-59. In contrast, *Penn Central* establishes a generic three-prong standard for a variety of regulatory takings which considers: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with the owner’s distinct investment-backed expectations, and (3) the character of the governmental action. 438 U.S. at 124. Simply put, the *McShane* standard is easier for property owners to meet than is the *Penn Central* standard. The Minnesota Supreme Court established the *McShane* standard because it concluded that it was uniquely appropriate in municipal airport zoning cases since, in those cases, the zoning regulations are intended to benefit a particular governmental “enterprise” (*i.e.*, the airport), unlike traditional zoning regulations in which the government is acting in an “arbitration” capacity. 292 N.W.2d at 258.

There are six reasons why the specific standard set forth in *McShane*, and not the more generic standard adopted in *Penn Central*, is controlling in this case:

1. *McShane* was decided in 1980 – two years *after* the decision in *Penn Central*. The *McShane* decision also discussed the *Penn Central* case. It cannot be disputed that *McShane* established a specific standard for affected property owners to meet in cases such as this that involve municipal airport zoning regulations. That

standard was created two years after the decision in *Penn Central* and it remains controlling today.

2. Second, contrary to the Airport's suggestion, *Wensmann* did not overrule *McShane*. In fact, *Wensmann* was not even an airport zoning case, and it did not even purport to overrule *McShane*. On the contrary, the Court in *Wensmann* stated "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." 734 N.W.2d at 641 n. 14 (emphasis added). What this means is that, even under *Penn Central*, one of the three factors to be considered is the "character of the government action." The Court in *Wensmann* merely acknowledged that the standard adopted in *McShane* was not inconsistent with the *Penn Central* approach because it was limited to a specific *character* of government action, namely "enterprise" functions in which the municipality that adopts the zoning is also understood to benefit from such zoning, unlike typical "arbitration" kinds of zoning regulations. In short, the Court in *Wensmann* specifically addressed the *McShane* decision and it did so in an approving manner. It did not, under any fair reading of the decision, even remotely overrule or limit *McShane* in any way. In short, the Court in *Wensmann* certainly could have reversed *McShane* if it had wished to do so, but it did not.

3. Third, the Minnesota Constitution is broader than its federal counterpart. The United States Constitution provides that "nor shall private property be *taken* for a

public use without just compensation.” U.S. Const., Fifth Amend. (emphasis added). In Minnesota, however, the Constitution also provides that private property shall not be “damaged” without just compensation. Minn. Const. Art. I, Sec. 13 (“private property shall not be taken, destroyed or *damaged* for a public use without just compensation therefore first paid or secured”) (emphasis added). Thus, it is important to understand that to prevail in this case the DeCooks do not need to prove that their property has been “taken” under the federal *Penn Central* standard, but rather only that it has been “damaged” within the meaning of the Minnesota Constitution by reason of Airport Zoning Ordinance No. 4.

The Airport relies primarily on federal decisions to support its position, thus avoiding the fact that *McShane* was intended to create a specific standard, under *Minnesota* law, that is applicable to state court inverse condemnation cases arising out of municipal airport zoning regulations. Indeed, it is noteworthy that in one of this Court’s leading inverse condemnation cases, which also involved airport-related interferences, the Court acknowledged that many state court decisions had departed from the federal standard in such cases, in part because of the differences between the federal constitution and many state constitutions:

The state court decisions have largely deviated from the Federal court pattern by allowing recovery both to those property owners directly beneath the flight path and to those near the flight path. However, this difference in result may not be inconsistent with the Federal court decisions because the Fifth Amendment to the United States Constitution refers only to a *taking* of property, whereas many state constitutions similar to Minnesota’s require compensation where private property is “taken, destroyed or damaged.”

*Alevizos v. Metropolitan Airports Comm'n*, 216 N.W.2d 651, 659 (Minn. 1974) (emphasis in original). The point is simply that the federal taking standard is not binding under Minnesota law. The Court in *McShane* was fully aware of the *Penn Central* decision, and it even discussed it, but in the end it chose not to follow *Penn Central* and to establish its own standard in airport zoning cases such as this.

4. Contrary to the Airport's argument, *Penn Central* does not create a universal standard that governs all regulatory taking claims. On the contrary, there are a number of kinds of regulatory taking cases that are governed by other and different standards, including: (a) in so-called "exaction" cases, in which cities attempt to force developers to dedicate land to the city in exchange for plat approval, such dedication requirements will constitute a taking unless they are "reasonable," *Middlemist v. City of Plymouth*, 387 N.W.2d 190, 193 (Minn. Ct. App. 1986), (b) in cases where a government regulation deprives a property of all economically beneficial or productive use it will be found to constitute a so-called "categorical," or automatic, taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), (c) government regulations that deprive a property of "reasonable" access will be regarded as a taking, *Johnson v. City of Plymouth*, 263 N.W.2d 603 (Minn. 1978), and (d) in so-called "spot zoning" cases, this Court has held that a "substantial diminution of value of property affected thereby" constitutes a taking. *Alexander v. City of Minneapolis*, 267 Minn. 155, 125 N.W.2d 583, 586 (1963). While the Airport acknowledges one or two of these "other" standards for federal regulatory taking claims (App. Br. at 12-13), it misses the broader point that

Minnesota law recognizes certain regulatory taking standards that simply do not exist under federal law. Including the *McShane* standard in airport zoning cases such as this.

5. Interestingly, while the Airport relies principally on *Wensmann* to support its argument that *Penn Central* is controlling, the decision in *Wensmann* actually suggests the opposite. Specifically, while the Court in *Wensmann* acknowledges that it has used *Penn Central* to analyze taking claims under Minnesota law, it states that “even if appellants’ taking claim under the United States Constitution fails under *Penn Central*, appellants are entitled to compensation under the Minnesota Constitution.” 734 N.W.2d at 633 (citing *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003)). Similarly, in the present case even if DeCook were not able to prove their taking claim under *Penn Central*, they are entitled to compensation under the Minnesota Constitution.

Moreover, the Court in *Wensmann* also explains that it was applying the *Penn Central* standard because, unlike the present case, the property owner in *Wensmann* did not ask the Court to interpret the Takings Clause in the Minnesota Constitution more broadly than its federal counterpart. 734 N.W.2d at 633. In contrast, DeCook is clearly raising precisely that argument.

6. Finally, in *DeCook I* the Court of Appeals specifically acknowledged the *Wensmann* case and stated that “we are not persuaded that the supreme court would reach a different decision in this case” in light of *Wensmann*. 2007 WL 2178046, at \*5-6. On the contrary, the Court of Appeals concluded that *McShane* remains controlling in cases of this nature, and in this specific case itself, even after the decision in *Wensmann*. Of course, in the more recent decision below a different panel of the Court of Appeals

concluded that *McShane* did not establish a separate legal standard, but its reasoning in this regard was not entirely clear.

In summary, this appeal involves a state court action arising out of a municipal airport zoning ordinance. *McShane* remains controlling with respect to such cases. (Indeed, if this were a federal case involving an architectural preservation ordinance it would be absurd to argue that *McShane* was more controlling than *Penn Central*, yet to a large degree that is precisely the position advanced by the Airport in this case, except in reverse.) Under *McShane*, a property owner may recover if a municipality, for its own economic benefit, adopts zoning regulations that cause a “substantial and measurable decline” in the market value of the owner’s property. In this case, the jury found that the Airport’s zoning regulations diminished the value of DeCook’s property by \$170,000. We respectfully submit that the district court erred in relying on *Penn Central* and concluding that a \$170,000 loss is not substantial.<sup>2</sup>

**II. EVEN IF THIS COURT WERE TO DETERMINE THAT *PENN CENTRAL* WOULD NORMALLY APPLY TO AIRPORT ZONING CASES SUCH AS THIS, *McSHANE* WOULD STILL BE CONTROLLING UNDER THE DOCTRINE OF THE LAW OF THE CASE.**

The law of the case doctrine is a discretionary doctrine that is used to effectuate the finality of appellate decisions. *Loo v. Loo*, 520 N.W.2d 740, 744 n. 1 (Minn. 1994).

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<sup>2</sup> The Airport and the *Amici* predictably assert the standard “parade of horrors” that will allegedly result if the government is required to pay for the damages it causes. These claims are irrelevant to the legal issues in this case, however, because the meaning of the Constitution does not change based on the alleged cost of enforcing it. Moreover, the Airport and the *Amici* ignore the very real impacts of a decision allowing governmental entities to impose onerous new zoning restrictions on property owners with little or no responsibility for the consequences of their actions.

It is “a rule of practice, not of substantive law.” *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n. 1 (Minn. 1992). Issues decided in a first appeal “will not be relitigated in the trial court nor re-examined in a second appeal.” *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987). *See also Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989) (an issue decided on appeal becomes the “‘law of the case’ and may not be relitigated in the trial court or reexamined in a second appeal”) and *Brezinka v. Bystrom Bros.*, 403 N.W.2d 841, 843 (Minn. 1987) (“[l]aw of the case applies most commonly to situations where an appellate court has passed on a legal question and remanded to the court below for further proceedings. The legal question thus determined by the appellate court will not be re-examined on a second appeal of the same case.”) The law of the case doctrine applies whether the previous decision was right or wrong. *Bjorgo v. First Nat’l Bank*, 156 N.W. 277, 277 (1916).

In the present case, the Court in *DeCook I* held that *McShane* was controlling and it reversed and remanded “for further proceedings consistent with this opinion.”

2007 WL 2178046 at \*5. This Court denied review on October 24, 2007. Accordingly, in its subsequent decision in 2010 the Court of Appeals concluded that *McShane* remained controlling under the law of the case doctrine. 2010 WL 1850268 at \*4.

The Airport correctly points out that the law of the case doctrine does not necessarily preclude this Court from reviewing an earlier decision of the Court of Appeals, citing *Peterson v. BASF Corp.*, 675 N.W.2d 57, 66 (Minn. 2004). (App. Br. at 15) Indeed, the Court acknowledges that the doctrine is not a limitation on the power of a court to reexamine an issue, but rather “a rule of practice, not of substantive law...,”

citing *Braunwarth, supra*. Nevertheless, the Court notes that “other interests such as finality and ‘encourag[ing] compliance with fair and efficient procedure’” may weigh into the Court’s decision to exercise such review.

In the present case, there has been no change in the applicable law by a judicial ruling since *DeCook I*, nor has there been a change in the evidence upon which the decision on this issue was made in *DeCook I*. Therefore, while this Court is not required to apply the law of the case doctrine, in this case or in any other, there do not appear to be any compelling reasons for departing from the traditional practice, and we respectfully request the Court to apply the law of the case doctrine.

### **III. THE LOSS OF \$170,000 IN THE MARKET VALUE OF DECOOK’S PROPERTY CONSTITUTES A TAKING.**

Under *McShane*, a property owner whose land is subjected to a restrictive municipal airport zoning ordinance may recover if the ordinance causes a substantial and measurable decline in the market value of the property. DeCook’s position with respect to this issue is relatively simple. Both sides’ appraisers found that the loss in value of DeCook’s property was “measurable,” and that it was in excess of \$100,000. The jury found the actual loss in value to be \$170,000. Under any reasonable interpretation of the term, a loss of \$170,000 simply must be regarded as “substantial.”

*Black’s Law Dictionary* defines the term “substantial” as “of real worth and importance, of considerable value and valuable.” *Black’s Law Dictionary* (Sixth Edition), “Substantial,” p. 1428. Under this definition, or any common sense definition

of the term, a loss of \$25,000 or \$10,000 or even \$5000 would have to be regarded as substantial. In this case, DeCook's loss was much, much greater.

How can a loss of \$170,000, as the jury found, not be regarded as "substantial?" How do you explain to your clients that the jury agreed that you clearly lost \$170,000, but the judge ruled that you cannot recover because your loss wasn't big enough?

The district court analyzed the \$170,000 loss in market value under the three *Penn Central* factors ("economic impact," "investment backed expectations," and "character of the government action," App. Add. at 6-11) and it concluded that "[t]he evidence does not support a regulatory taking pursuant to the *Penn Central* factors." (App. Add. at 12) DeCook believes that *even under* the *Penn Central* standard, their loss in this case was sufficient for them to recover, in light of the "government enterprise" character of the airport zoning ordinance and the statement in *Wensmann* that 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. 734 N.W.2d at 641 n. 14. More importantly, however, the district court simply applied the wrong legal standard. Under *McShane*, DeCook needs to prove only that they suffered a substantial and measurable loss, and at the end of the trial they succeeded in proving a loss of \$170,000. By any measure of fairness and common sense they are entitled to recover for this loss.

The Airport argues that "the 'enterprise' theory of *McShane* should be rejected" because in 1971 Professor Sax "repudiated the idea that the government always creates a

taking when it acts in an enterprise capacity.” (App. Br. at 31-32) This argument is without merit for four reasons:

- First, Professor Sax’s so-called “repudiation” occurred in 1971, which was nine years before *McShane* was decided. Thus, the Court in *McShane* was presumably aware of Professor Sax’s position.
- Second, what Professor Sax “repudiated” in 1971 was “the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid.” Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 150 n. 5. This Court, however, never adopted that standard in *McShane* in the first place. On the contrary, *McShane* held that a property owner whose land is affected by an airport zoning ordinance may recover only upon proof of a “substantial and measurable” reduction in value.
- Third, Professor Sax explained in 1971 that “[m]uch of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of what shall be called ‘public rights.’” 81 Yale L.J. at 151. Under Minnesota law, however, it is settled that lawful exercises of the police power may also give rise to compensable takings. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 606 (Minn. 1978).
- Fourth, while the Court in *McShane* did specifically mention Professor Sax, it noted that he was only one of a number of authors who had argued in favor of the government enterprise approach, and that a number of

courts in other states had also adopted the approach. 292 N.W.2d at 258.

Thus, Professor Sax's comments, even if they had post-dated *McShane*, would hardly be dispositive.

Finally, the Airport argues that, even under *McShane*, there is no taking in this case because the percentage of the diminution in value was much greater in *McShane* than in this case. (App. Br. at 35-36) This argument, however, confuses the facts of the case with its holding. The Court in *McShane* explained that “[w]e hold that where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or government enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.” 292 N.W.2d at 258-59. The case was reversed and remanded with instructions. *Id.* at 260. Nowhere in the decision did the Court adopt a numeric or percentage standard of any kind, other than the requirement that the loss be “substantial and measurable.” It is undisputed that the loss was measurable, and, for the reasons set forth above, we respectfully submit that the loss of \$170,000 was clearly substantial.

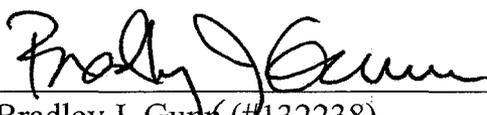
## CONCLUSION

This Court in *McShane* established a legal standard that was specifically intended to apply to state court regulatory taking claims involving municipal airport zoning ordinances. The district court erroneously ignored that standard and instead applied the more restrictive generic regulatory taking standard set forth in *Penn Central*. The Court of Appeals, in its May 2010 decision, agreed that *Penn Central* was generally controlling in regulatory taking cases, but it applied *McShane* under the law of the case doctrine. The DeCooks therefore respectfully request this Court: (1) to reverse the decision below in part, (2) to hold that *McShane* is controlling both as a matter of substantive law and under the law of the case doctrine, and (3) to conclude that the DeCooks' loss of \$170,000 was substantial and that Airport Zoning Ordinance No. 4 therefore caused a taking or damaging of the DeCooks' property rights, for which they are entitled to just compensation.

Respectfully submitted,

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,104 words. This brief was prepared using Microsoft® Word 2000.

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