

NO. A10-481

State of Minnesota
In Court of Appeals

INTERSTATE COMPANIES, INC.,
GORDON D. GALARNEAU, JR. AND
PENNY SUE GALARNEAU,

Appellants,

vs.

CITY OF BLOOMINGTON AND
METROPOLITAN AIRPORTS COMMISSION,

Appellees.

APPELLANTS' REPLY BRIEF

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

Attorneys for Appellants

John M. Baker (#174403)
GREENE ESPEL, P.L.L.P.
200 South Sixth Street
Suite 1200
Minneapolis, MN 55402
(612) 373-0830

*Attorneys for Appellees City of Bloomington and
Metropolitan Airports Commission*

Thaddeus R. Lightfoot (#24594X)
THE ENVIRONMENTAL
LAW GROUP, LTD.
133 First Avenue North
Minneapolis, MN 55401
(612) 623-2363

*Attorneys for Appellee
Metropolitan Airports Commission*

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INTRODUCTION

The main issue in this case is the proper application of regulatory takings jurisprudence in the context of airport zoning, which is a very unique type of zoning. That is particularly true here where the airport operator, the Respondent Metropolitan Airports Commission (“MAC”) “purchased” its desired zoning¹ from Respondent City of Bloomington (“City”) (collectively “Respondents”) and the other members of the Joint Airport Zoning Board (“JAZB”) charged with establishing zoning standards around the Minneapolis-St. Paul International Airport (“Airport”). Thus the operator (MAC) of a commercial establishment (Airport) is establishing the rules that govern the its own impact on adjacent property owners. This situation is unique to airports and even within Minnesota unique to MAC as MAC is the only airport operator in Minnesota whose zoning requirements are less than the state standards.²

Under these circumstances, Respondents ask this Court to apply the three factor test identified in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed. 631 (1978) to airport zoning in a fashion no different than a change in set-back requirements imposed throughout a city. Neither this Court, nor the Minnesota Supreme Court has applied the generic *Penn Central* balancing test in that manner in the context of airport zoning. Rather both this Court and the Minnesota Supreme Court have found that the character of the governmental action – i.e. the operation of a commercial airport – in the context of airport zoning which affects a limited number of property owners, dominates the analysis under *Penn Central* in ways that do not exist for generalized municipal zoning. Since the trial court did not conduct its analysis

¹ See App. 000223-000236 for the Indemnification Agreement whereby MAC agreed to indemnify the City for any adverse consequences of airport zoning is the JAZB adopted zoning “in a form acceptable to MAC.” *Id.* at 000224.

² See *Minnesota Department of Transportation Airport Land Use Compatibility Manual, Chapter 2* <http://www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch2.pdf> (pp. 24-25).

consistent with this Court's and the Minnesota Supreme Court's holdings, its Order must be reversed and the summary judgment entered in favor of Appellants on liability.

The trial court also resolved factual disputes related to the noise claims in favor of MAC and granted MAC summary judgment on its claims. This was also error that requires reversal of the trial court order.

ARGUMENT

I. APPELLANTS SHOULD BE GRANTED SUMMARY JUDGMENT ON THEIR TAKINGS CLAIMS UNDER THE MINNESOTA CONSTITUTION.

A. *Wensmann Did Not Overrule McShane And McShane Is Appropriately Part Of A Penn Central Analysis Related To Airport Zoning.*

Respondents argue that *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007) effectively overruled *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). That is clearly not the case. See *Wensmann, supra*, at 641, fn. 14. In fact, *McShane* is an application of the *Penn Central* test in the context of airport runway zoning, exactly the situation in this case.

Respondents argue that the trial court's dismissal of Count II of Appellants' Complaint (APP 000068 – 000069) which asserted a specific cause of action under *McShane* separate from Count IV which asserted a claim under *Penn Central* (APP 000074 – 000075) precludes any consideration of *McShane* in the *Penn Central* analysis. However, the Trial Court's dismissal was actually consistent with this Court's ruling in *DeCook v. Rochester International Airport Joint Zoning Board*, (Minn. Ct. App. A09-969) (May 11, 2010) (APP 000034) ("*DeCook II*") which held that *McShane* did not create an independent cause of action, but rather was part of the

Penn Central analysis, particularly in consideration of airport zoning issues. *Id. at p. 8 (APP 000041)*.³

The Court of Appeals was particularly pointed in disagreeing with Respondent's argument in *DeCook II* that *McShane* is irrelevant which is also made in this case:

But we disagree with respondent's cavalier and dismissive assertion that, in light of *Wensmann*, 'if *McShane* remains useful at all, it may merely be instructive in considering the character factor under *Penn Central*.'

Id. at p. 8 (App. 000041)

The Minnesota Supreme Court has now granted review of *DeCook II*. (Case No. 09-969, Order dated June 29, 2010). MAC and the League of Minnesota Cities (on behalf of the City in this case) sought permission to file amicus briefs arguing essentially that *McShane* should be overruled. See *Request for Leave to File Amicus Curiae Brief on behalf of Metropolitan Airports Commission* (File No. A09-969) (Jun 9, 2010) and *Rule 129.01 Request for Leave To File A Brief As Amicus Curiae [League of Minnesota Cities]* (File A09-969) (June 3, 2010). Since Respondents in this case sought to influence the outcome of *DeCook II* for the specific benefit of its impact on this case (*See MAC Request at p. 3*)⁴ Appellants Gordon D. Galarneau, Jr. and Penny Sue Galarneau sought and were granted similar amicus status.⁵

Interestingly the Minnesota Department of Transportation (MnDOT) has also sought to file an Amicus Brief in *DeCook II*. *Rule 129.01 Request From The Minnesota Commissioner Of*

³ See also *DeCook v Rochester International Airport Joint Zoning Board*, 2007 WL 2178046, (Minn. Ct. App. A06-2170) (July 31, 2007), review denied (Minn. Oct. 24, 2007) (APP 000026) ("*DeCook I*") utilizing *McShane* in the airport zoning context following *Wensmann*.

⁴ Although MAC argued in *DeCook* that its resolution was critical to the outcome of this case, it barely mentioned *DeCook II* in its Brief and does not address this Court's analysis of the import of *McShane* and *Wensmann*.

⁵ Amicus status was also sought by Hampton O'Neill and his family members who are also engaged in similar litigation against the City and MAC, a case currently at the trial court level. See *Amicus Petition filed June 14, 2010 (Case No. A09-969)*. This amicus petition has also been granted.

Transportation For Leave To File A Brief As Amicus Curiae. (Case No. A09-969) (July 12, 2010). As the request notes, “The Commissioner has a public interest in this dispute as the officer given authority by the legislature over minimum requirements for land zoning in the vicinity of airports statewide.” *Id at p. 1*. However, the Commissioner does not advocate a reversal of *McShane* or argue that the holding in *McShane* with respect to airport zoning is inconsistent with *Penn Central* or *Wensmann*. Instead, the Commissioner argues that the amount of the diminution of value in *DeCook II* was not “so substantial that it is manifestly unfair.” *Id. at p. 3*. This is the standard adopted in *McShane* which addresses the economic impact of the regulation, one of the *Penn Central* factors.

A Minnesota Supreme Court decision in *DeCook II* will probably not occur until 2011. Based on the Minnesota Supreme Court’s specific holding in *Wensmann* that *McShane* was consistent with a *Penn Central* analysis, it seems very unlikely that the Court will overrule *McShane*.⁶ Thus *McShane* remains important in assessing the *Penn Central* factors (even though there is no independent cause of action under *McShane*).

B. Respondents Misstate Appellants’ Analysis Of The *Penn Central* Factors.

Respondents argue that Appellants “criticize the district court for applying *Penn Central*” (*Respondents Brief at p. 13*), that Appellants claim *Penn Central* is a “rigid test.” *Id.*, and that application of *Penn Central* violates the Minnesota Constitution. *Id.* All of these arguments misstate Appellants position.

⁶ It is also not yet clear whether the Minnesota Supreme Court’s decision will address the broad issue of the relationship between *McShane* and *Wensmann*. There are narrower grounds on which the Court could make its decision, leaving unresolved Respondents’ assertion that *McShane* is irrelevant to a *Penn Central* analysis.

Appellants have never criticized the district court for applying *Penn Central*. Appellants believe however that the District Court Order errs as a matter of law in the manner in which it analyzed the *Penn Central* factors in the context of airport zoning.

Likewise, Appellants do not claim *Penn Central* is a rigid test. In fact, the reference in Appellants brief is to the Respondents, not the Court, taking the position that the *Penn Central* factors must be analyzed in a rigid manner that deprives the Court of the very flexibility discussed in *Penn Central* and *McShane*. See Appellants Brief at pp. 11-13.

Perhaps the most troubling misstatement by Respondents is the assertion that Appellants believe that the *Penn Central* factors violate the Minnesota Constitution. Appellants have never made this claim. What Appellants have argued however, is that because the Minnesota Constitution is different from the federal constitution in a key way, application of the *Penn Central* factors must be done in a manner that applies them to the Minnesota Constitutional claims, not federal claims. That key difference is that the Minnesota Constitution specifically provides for compensation where private property has been “taken, destroyed **or damaged.**” (emphasis added) *Minnesota Constitution, Article I, Section 13*. The federal constitution has no corresponding provision. See *United States Constitution, Amendment No. 5* (“no private property shall be taken for public use”). Respondents do not address the differences between the Minnesota Constitution and the United States Constitution in their brief; in fact they do not even cite the Minnesota Constitution anywhere in their brief as the applicable standard for a taking in this case. The wisdom from *Wensmann* is that the *Penn Central* factors are useful in analyzing constitutional takings cases. The *Penn Central* factors do not supplant the Minnesota constitutional standard. Instead, they are tools to be used to determine whether a taking has in fact taken place under the Minnesota Constitution. It is the analysis and application of the three

Penn Central factors – economic impact, investment backed expectations, and character of the governmental action - that are at issue in this case.

1. The Economic Impact Factor Needs To Look At The Impact On The Value Of The Property Before And After The Runway Was Built.

In *Wensmann*, there was a dispute about how the economic impact factor should be analyzed. *Id. at 634-635*. The Court in *Wensmann* noted that courts have employed different methods of measuring economic impact, depending on the circumstances. *Id. at 634*. The Court after reviewing the methods proposed by the parties concluded:

We conclude that the most appropriate method **in cases like this, where the government chooses to maintain an existing comprehensive plan designation**, is to determine whether the city's decision leaves any reasonable, economically viable use of the property.

(emphasis added) *Id. at 635*.

Unlike *Wensmann*, this case does not involve a government maintaining an existing comprehensive plan designation. Instead, this case involves affirmative action taken by an airport operator to change the zoning requirements adjacent to the airport to permit airplanes to land and take off. Appellants' property sits on the centerline of a new runway, right on the border of a federal runway protection zone that permits no buildings or even trees to exist. The question then is whether the "any reasonable, economically viable use of the property" test is appropriate for airport zoning. Both the Minnesota Supreme Court and this Court have ruled on that issue and used a different test for determining the economic impact of the zoning. In *McShane* the Supreme Court specifically rejected this argument:

Defendants argue, therefore, that the effects of the airport zoning ordinance involved in the instant case should be evaluated in the same way as the ordinances in the cases just cited and that unless plaintiff's property has been rendered practically useless by the height and use restrictions, no compensable taking has occurred and the ordinance must be upheld. **We believe, however, that not all zoning regulations are comparable.**

The cases discussed so far have involved ordinances designed to effect a comprehensive plan. There is a reciprocal benefit and burden accruing to all landowners from the planned and orderly development of land use...In this case, however, the ordinance was not an arbitration of competing land uses but a regulation for the sole benefit of a governmental enterprise – the Fairbault Municipal Airport...In essence the public has appropriated an easement...We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulation of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

(emphasis added) *Id.* at 257.

Thus, the Minnesota Supreme Court has rejected the use of “any reasonable economically viable use of the property” as the benchmark for the economic impact argument under *Penn Central* in the application of *Penn Central* to airport zoning situations. Instead the Court determined that the economic impact factor has been satisfied if the landowner suffers “a substantial and measurable decline in market value as a result of the regulations.” In this case, Appellants’ expert has provided an opinion that the impact of the airport zoning regulations on the market value of the property was \$5 million or 50% of the value of the property prior to the regulation being enacted. That is a substantial sum by any measure. Thus the economic impact factor favors the Appellants.⁷

⁷ Respondents’ argument that the property owners have continued to collect rent since the opening of the runway, that Interstate the tenant has continued to make money, and that the amount of rent has not decreased since the opening of the runway all show that there has been no adverse economic impact on the property. As noted in *McShane*, the issue here is not a general regulation applicable to all landowners in a city (i.e. the comprehensive plan example at issue in *Wensmann* and noted in *McShane*) but rather the impact on property values by the specific airport activities. That 300,000 airplanes taking off and landing right over the property has an impact on its value is self evident. Given a near identical sized parcel one mile down the street, who would pay the same price for the parcel inundated by airplanes when you could get a similar parcel free of those issues?

2. The Investment Backed Expectations Factor In Airport Zoning Must Look To The Impact On The Property Owner As Compared To The Other Property Owning Public.

The second *Penn Central* factor looks at the investment backed expectations of the property owner. Respondents argue that as long as the property is worth more today than it was when it was purchased, the intervening acts of government to take some portion of the property would never constitute a taking. There is a fundamental difference between the circumstances in *Wensmann* and the circumstances in this case. The issue in *Wensmann* was whether the City's refusal to change its comprehensive plan – which was in effect at the time the property owner purchased the property – constituted a taking. The Court noted:

Rahn had no expectation of using the property at the time of purchase for anything other than a golf course, and the purchase price reflected the significant restrictions imposed on the use of the property. Furthermore, any losses that Rahn incurred subsequent to the purchase were not the result of the city's actions, but the result of general market conditions.

Wensmann, supra, at 638.

The circumstances in airport zoning cases are significantly different. They generally arise because the airport operator enacts new regulations that impact a property owner's use of his property in ways that were never contemplated prior to the airport zoning. Here, the City's ordinance was passed in 2004, well after the Galarneaus had purchased their property. Thus the rules of the game changed for the Galarneaus as a result of the airport's expansion. This is significantly different than in *Wensmann*, where the Comprehensive Plan had not changed. Thus, it is not a question of whether the property is worth more today than it was when purchased.

Nor is it the case that the Galarneaus intended to always rent this property to Interstate Companies. Prior to the zoning ordinance being adopted, the Galarneaus had filed redevelopment plans with the City to build a hotel on the property similar in size to one that was just across the street. (*APP 000284*) However, the City froze that application with a moratorium and then denied it based on the new airport zoning restrictions. (*APP 000288 at §§ 11 and 12 and referenced exhibits*) Thus, the Galarneaus had made clear their investment backed expectations and had spent money in connection with those intentions including the work of an architect and attorney to file the appropriate applications.

Unlike *Wensmann*, where the property owner bought his property aware of the comprehensive plan limitations, the Galarneaus had no such limitations on their redevelopment options when their property was purchased. Thus the concept that “when an owner buys property with knowledge of restrictions upon the development of the property, he assumes the risk of any economic loss,” *Wensmann, at 638*, does not apply in this case. The Airport zoning regulations were enacted long after Appellants had purchased their property. The Airport zoning regulations are significantly different than what existed at the time of Appellants’ initial purchase. Therefore, as *McShane* notes, the issue is whether the property owner is being asked to bear burdens “which the property-owning public in general does not suffer.” *McShane at 259*. It is that unfair burden that affects the investment backed expectations arising from an overt action like airport zoning restrictions and the overflight of hundreds of thousands of airplanes. The trial court’s analysis of the investment backed expectation is thus incorrect and summary judgment should be granted in favor of Appellants on the liability issue.

3. The Character of The Governmental Action Should Focus On The Fact That The Government Is Actively Engaged In A Commercial Activity As Opposed To Routine General Zoning Activities Like Set-Back Requirements.

The character of the governmental action was the primary issue the Minnesota Supreme Court focused on in *McShane*. There were two facts that separated airport zoning from general comprehensive plan zoning in the *McShane* analysis: (a) airport zoning contemplated actual use of the airspace of the affected property; and (b) the government was engaged in a commercial enterprise running an airport. *Id. at 258*. Both of those factors are present in the case before this Court, and neither were present in *Wensmann*.

The trial court held and Respondents argue that since the airport zoning regulations apply to other property owners in the safety zones, there is no unfair burden imposed on Appellants.

That is simply the wrong analysis. *Wensmann* stated the correct comparison:

Although the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners.

Id. at 640.

Thus in *Wensmann*, the court found the zoning of the property owner's property as park or green space for the benefit of the entire city a burden to the property owner that other property owners in the community did not share. Likewise in this case, the zoning restrictions adopted to facilitate the operation of a new runway at the Airport, resulting in hundreds of thousands of flights directly over Appellants' property, applies to a very small number of property owners, for the benefit of the entire Twin Cities metropolitan area. That is exactly the kind of governmental action which *Wensmann* recognized imposed an "unfair burden that in all fairness should be borne by the entire community." *Id. at p. 642*.

McShane contains almost identical language: “[the Airport] affect[s] 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.” *Id at p.259*.

Therefore, both *Wensmann* and *McShane* require that the government character factor look at whether the affected property owner is being asked to bear a burden that the general public is not. That cannot be disputed in this case. Sitting on the runway centerline at the border of the federal runway protection zone, Appellants’ property experiences airplane overflights unlike any other property around the Airport.⁸ Hundreds of thousands of airplanes have used Appellants’ airspace to take off or land at the Airport. That is a burden that is not experienced by the general public. In fact, it is a burden not experienced by property owners even a half a mile away.

Respondents also raise issues about the benefit of the airport to the community and cite *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987) for the proposition that while each of us is burdened somewhat by governmental restrictions, we in turn benefit from the restrictions placed on others. There are two problems with this argument. First, *Keystone* involved a state statute that applied across the entire state of Pennsylvania. It did not apply only to a discreet area like the end of a runway. More importantly, however, the argument that the airport creates a societal benefit for which all property owners should be thankful was rejected 36 years ago in *Alevizos I*:

⁸ Respondents argue that the testimony of Appellants witnesses who work at the property and have experienced the airplane overflights on a daily basis are inadmissible for purposes of determining the height at which airplanes actually pass over the property. To support this Respondents cite information that suggests that FAA radar information has determined that the **average** height of a landing airplane is 200 feet above the ground over the Appellants property. An average of course, requires data both above and below the average which means even under the Respondents’ analysis, there are airplanes flying very close to the ground over Appellants’ property. See analysis in Section II below.

...balancing of the individual's right to recover against that of MAC's utility to society is irrelevant.

Id. at p. 666.

Thus the character of the governmental action favors Appellants and the trial court order should be reversed and judgment entered in favor of Appellants on the liability issues.

C. Appellants' Taking Claim Is Based On The Impact Of The Zoning On The Parcel As Whole.

Respondents argues that discussion of the invasion of the airspace above Appellants' property is inappropriate because of federal case law discussing "bundles of property rights" and "strands" of such property rights. *Respondents Brief at pp. 25-26.* Respondents ignore the clear direction of the Minnesota Supreme Court approving and quoting language from *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318, 320 (1963):

We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulation of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

Likewise, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) relied upon by Respondents, the Court differentiated between proactive activities of government and general regulations, finding that:

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes even though that use is temporary. *United States v. General Motors Corp.*, 323 U.S. 373 (1945), *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); or **when its planes use private airspace to approach a government airport**, *United States v. Causby*, 328 U.S. 256 (1946), **it is required to pay for that share no matter how small.**

(emphasis added) *Id. at 322.*

Here, where the purpose of the airport zoning regulations was to create a flight path for landing airplanes, there is no question that the government is taking possession of an interest in property for a public purpose – the operation of an airport - and thus there has been a taking “no matter how small.” This is in contrast to the general regulations cited in *Tahoe-Sierra*, including the general regulation related to airspace in *Penn Central*. *Tahoe-Sierra*, at 322-323.

While the airspace is the portion of the property most directly affected by the airport zoning ordinances, it is the overall impact on the property as a whole that causes its diminution in value.⁹ That has been determined to be \$5 million or 50% of the Appellants’ property’s value prior to the opening of the runway.¹⁰ As Justice Oliver Wendell Holmes eloquently noted:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co v. Mahon, 260 U.S. 393, 415-416, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

The argument of Respondents that the Airport zoning designed to create a landing path for airplanes involves only a “strand” of a property right and therefore does not constitute a taking is a specious argument.

⁹ Respondents’ arguments about treating the property as a whole are in marked contrast to their criticism of Appellants’ expert report for not separating the diminution in value into subsets of the overall impact on the value.

¹⁰ A reduction of 50% of the property value was found sufficient in *Sneed, supra*, and noted with approval in *McShane, supra*, at 258.

II. THERE ARE GENUINE ISSUES OF MATERIAL FACT RELATED TO THE QUESTION OF WHETHER AN ALEVIZOS CLAIM EXISTS AGAINST MAC.

Under the standard adopted by the trial court and urged by Respondents in this appeal, it would be virtually impossible for any property owner to establish liability under *Alevizos v. Metropolitan Airports Commission*, 216 N.W.2d 651 (Minn. 1974) (“Alevizos I”) In *Alevizos I* liability was established in favor of homeowners who lived 8,000 feet from the runway and off the centerline. In the pending case, the property is 2,500 from the runway and directly on the centerline.

MAC makes much of the claim that the people who work at Appellants’ property are unqualified to express opinions as to how close the airplanes are to the ground when they land overhead. The lay witnesses estimated 80-100 feet above the ground. MAC claims the FAA Radar average is 200 feet. By virtue of the established glide slope, airplanes are authorized to fly as low as 890 feet above sea level, or about 77 feet above Appellants’ property. It is a simple matter of mathematics, that for the average airplane height to be 200 feet, there have to be airplanes that fly both above and below that average number. Thus, Appellants lay witnesses are not off when they testify that the planes are 80-100 feet off the ground.

Regardless of whether the number is 100 feet or 200 feet, the airplanes are very close to the ground. Even at 200 feet, the airplane is close enough to the ground that a good quarterback could hit the plane with a football, a baseball player could hit the plane with a baseball, and the distance is not much farther than the length of a 737-200, the most common airplane in Delta’s fleet. Respondents do not dispute that over 300,000 airplanes have traveled over the Appellants property. It is undisputed that there has been a substantial invasion, since no airplanes flew over Appellants’ property prior to the runway opening.

The trial court erred in its determination of whether this invasion was sufficient to deprive the property owner of the practical enjoyment of the property. The Court in *Alevizos I* helps define the practical enjoyment issue:

To justify an award of damages it must be proved that these invasions of property rights are not of an occasional nature, but are repeated and aggravated, and that there is a reasonable probability that they will be continued in the future.

Id. at 662.

Rather than focus on these factors, the trial court focused solely on individual people's reaction to the overflights.¹¹ See trial court Order at APP. 000022-000023. Thus the trial court used a subjective test framed around the human ability to get used to airplane flights screaming overhead to find that there had been no loss of "practical enjoyment" of the property.¹² That is not the correct analysis for determining whether the invasion deprives the property owner of the practical enjoyment of the property:

This will not give relief to the unusually sensitive person because the measure of recovery is decrease in market value of the property due to its decreased desirability in the general market place rather than the amount of discomfort to the individual.

Alevizos I at 662. It is not the subjective reactions of people on the property that determines the practical enjoyment issue.

Instead, the Court should have focused on whether the invasions of property rights were not of an occasional nature, repeated and aggravated and reasonably likely to continue in the

¹¹ The Court also adopted the facts propounded by MAC regarding those witnesses reaction to the airplane noise. Appellants provided the Court will additional facts from which the Court could have drawn different conclusions. APP. 000282 – 000285. In considering a summary judgment motion, the Court was obligated to accept the facts most favorable to Appellants.

¹² The trial court also ignored the objective information from the City regarding noise levels around the airport and their impact. MAC also argues that Appellants noise level arguments were based on a 2000 study and now the noise levels are different. Yet the Bloomington study APP000294 is published in 2008 using 2005 noise exposure levels. These types of disputes are not appropriate for resolution by summary judgment.

future. Those objective tests determine whether the practical enjoyment of the property has been lost. Appellants met all of those tests and MAC did not dispute any of those conclusions at the trial court level. The sheer number of flights (over 300,000 and counting) and the permanency of the runway lead to the inescapable conclusion that Appellants have met the first standard under *Alevizos I*. As the *Alevizos I* Court noted:

Every landowner must continue to endure that level of inconvenience, discomfort, and loss of peace and quiet which can be reasonably anticipated by any average member of a vibrant and progressive society. But when those interferences reach the point where they cause a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the air flights, a property right has been, if not 'taken or destroyed,' at the very least 'damaged,' for which our constitution requires that compensation be paid.

Id. at 662.

The second half of the *Alevizos I* test requires that the invasion lead to a measurable diminution in value of the property. MAC argued and the trial court agreed that Appellants' expert report establishing the diminution in value caused by the opening of the runway did not establish causation for the loss because it was not based on "market studies." There are two problems with this argument: (a) causation is almost always a question for the jury; and (b) the appraisal included an extensive market study of property values in the area before and after the opening of the runway.

Causation is almost always an issue for the jury:

...causation can be found as a matter of law only where the facts are undisputed and are reasonably susceptible of only one inference, or where reasonable people can come to no other conclusion. *Id.* Where reasonable minds can differ on the issue of causation, the jury should resolve the issue, and it would be error to grant summary judgment. See *id.*; see also *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn.2000) ("Causation is generally a question of fact left to the finder of fact that only becomes a question of law where different minds can reasonably arrive at only one result."); *Abo El Ela v. State*, 468 N.W.2d 580, 582-83 (Minn.App.1991) (because negligence involves standards of reasonableness and causation uniquely suited for jury consideration, questions of

negligence are usually inappropriate for summary judgment); *Van Gordon v. Herzog*, 410 N.W.2d 405, 406 (Minn.App.1987) ("From the outset, we emphasize that our task in reviewing a grant of summary judgment is to determine whether triable issues of material fact exist and whether the law was misapplied, not whether a jury would find the theory advanced under these facts to be credible in light of other evidence.").

Ingram v. Syverson, 674 N.W.2d 233, 237 (Minn. App., 2004)

In this case, Appellants' expert provided an extensive appraisal report which included a market study of property sales before and after the runway opened. The expert concluded that the opening of the runway and the concomitant flying of airplanes over the Appellants' property has caused a \$5 million reduction in the value of the Appellants' property. The trial court simply misread the expert report. *Compare APP 000418 – 000424 and APP 000425 – 000431*. Respondents do not agree with the report and have provided other expert opinion that claims there has been no diminution of value of the property since the opening of the airport. These types of disputes are for a jury to resolve.

Alevizos I also identifies factors which should be considered in determining whether property has suffered a diminution in value. They include the following:

A majority of the court is of the opinion that in appropriate cases the trial court may consider among other factors, the following:

- (1) The highest and best use to which the land may be put, as well as its present use, recognizing differences in the impact of sound and air pollution on areas suitable or zoned for residential, commercial, industrial, or recreational purposes.
- (2) The topography of the land, including natural or artificial sound barriers.
- (3) The proximity to runways.
- (4) The lateral and vertical distances from regular flight paths.
- (5) The frequency of takeoffs and landings.
- (6) The types of airplanes using the facilities.
- (7) The flight patterns, holding patterns, and glide angles regularly followed.
- (8) The location of the land relative to prevailing winds.
- (9) Whether the duration of the easement contemplated is temporary or permanent.

Id. at 662, fn 5.

It is clear that Appellants' expert considered these factors in her report. *See generally* APP. 00385 – 000431. There is substantial discussion in the report regarding the highest and best use for the land. APP 000410 – 000417. The topography is discussed. APP 000391. The proximity to the runway is undisputed as is its location under the extended runway centerline. ADD 000001. The frequency of takeoffs and landings has been established. APP 000433. The types of aircraft used at the Airport is mostly commercial and not in dispute. The glide angle is well established. APP 000197. The prevailing winds determine the frequency of use and whether airplanes are taking off or landing, none of which is in dispute. Finally there is no doubt the runway is permanent. Thus, Appellants have identified and focused on the factors that result in a diminution in value to the property. The disagreement as to damages is for a jury to decide, not the Court in a summary judgment motion.

Finally the Respondents criticize the Appellants' expert report claiming that it should have separated and specifically delineated damages caused by the restrictions on height limits and the resulting airplane noise. Given the Respondents' arguments that the property needs to be taken as a whole, this argument makes no practical sense. It is virtually impossible for anyone to separate the diminution in value between a lower height limit and the noise that results. They are intertwined in ways that no person could be expected to divide the damages accordingly. The different causes of action yield the same damages.

For these reasons the trial court order granting summary judgment to MAC was erroneous, and should be reversed and the case returned to the district court for trial as to the MAC claims.

III. APPELLANTS ARE NOT RE-LITIGATING ISSUES IN THIS APPEAL.

Respondents argue that Appellants, in this appeal, attempt to re-litigate three issues decided in the trial court's order dated August 27, 2008: (a) the finding that there was no constitutional *per se* taking related to the airspace above Appellants' property; (b) the finding that there was no independent cause of action under *McShane*; and (c) the finding that the Respondents had no legal duty to acquire an airport hazard. The dismissal of those legal causes of action does not render facts in this case irrelevant and thus the argument that Appellants are attempting to re-litigate issues in this appeal is erroneous.

The only issue decided with respect to the airspace above Appellants' property in the trial court's August 27, 2008 order was that there was no *per se* constitutional taking cause of action. The court made no findings of fact regarding the airspace or its impact on a *Penn Central* takings analysis. The *Penn Central* takings analysis was not part of that initial summary judgment motion by either side. Therefore, the argument that airspace is not a proper subject for consideration in terms of the impact to the property under *Penn Central* is erroneous.

The initial complaint also included a specific count alleging a direct cause of action under *McShane*. The trial court, citing *Wensmann* held that there was no independent cause of action under *McShane*, but that *McShane* was part of the *Penn Central* analysis. That finding did not preclude the use of *McShane's* holding and analysis in the *Penn Central* analysis. In fact the Supreme Court in *Wensmann*, specifically found that *McShane* was consistent with *Penn Central* based on the facts in that case. Since the facts in the pending case are very similar to *McShane*, it is a relevant part of the *Penn Central* analysis. Any argument to the contrary is erroneous.¹³

¹³ It is interesting that Respondents make the argument that the law of the case doctrine precludes any consideration of these issues in this appeal. At the same time, they make exactly the opposite argument in their petition for amicus status in *DeCook II* (See p. 3-6 of MAC's Request For Leave To File Amicus Curiae Brief)(A09-969)

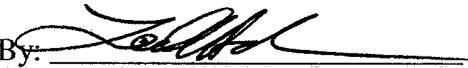
Finally, Respondents seek to marginalize the safety concerns raised by the Appellants as part of the economic impact analysis. Again, the context of this issue is misrepresented. Appellants do not seek to re-litigate Count IV of the Complaint. Instead, the safety concerns relate to the arguments that there has been no economic impact on the property because of the airport zoning regulations. Once the MAC granted indemnification to the City, it sought to substantially reduce the safety zoning around the Airport. The Safety Zone A restrictions which prohibit people and buildings was reduced from 4,666 feet to 2,500 from the end of the runway. Appellants' property sits right at the 2500 foot line from the runway and thus would have been in Safety Zone A (and been a required property purchase) except for the reductions procured by the MAC through its indemnification agreements. Thus, while Respondents argue that there has been no economic impact on the Property because it continues to operate in the same fashion as prior to the zoning, the undisputed fact is that the risk factors affecting the property have changed substantially. Prior to the runway opening, the property was no different than most other properties in the Twin Cities in terms of the risk that an airplane would crash onto the property. Now, however, the property sits right on the extended centerline of the runway and hundreds of thousands of airplanes pass over the property at very low altitudes. One tragic event caused by a mechanical malfunction, human error or the weather and resulting in an airplane crash on the Appellants' property would destroy the economic vitality of the property and its tenant, probably forever, not to mention the loss of human life. That risk did not exist prior to the runway opening. That economic risk now impacts the property every day. While it may not be an independent cause of action, it is a relevant fact in the *Penn Central* analysis.

CONCLUSION

For all of the reasons set forth herein and in the initial Brief of Appellants, this Court should reverse the trial court in this matter, and find as a matter of law that there has been an inverse condemnation with respect to Appellants' property, returning the case to the trial court for a determination of damages. Likewise, there are genuine issues of material fact related to the *Alevizos* claim against MAC and the matter should be returned to the trial court for a trial on the merits.

Dated: July 25, 2010

HESSIAN & MCKASY, P.A.

By: 

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

ATTORNEY FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. 132.01, subd. 3(a).
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Lee A. Henderson (Att. No. 126305)