Case No. A10-481

State of Minnesota

In Court of Appeals

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

Petitioners,

v.

CITY OF BLOOMINGTON AND
METROPOLITAN AIRPORTS COMMISSION,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES

1. Does Appellants' regulatory-taking claim against the City of Bloomington based on the airport zoning ordinance fail as a matter of law under the three factors of *Penn Central*?

   Respondents moved for summary judgment on the regulatory-taking claim under *Penn Central* against the City. (ADD007.) The district court granted summary judgment in favor of the City on the regulatory-taking claim under *Penn Central*. (ADD019.) Appellant filed this appeal.

   Apposite Legal Authorities:

   Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007)

   Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)

   Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005)

   Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987)

2. Does Appellants' inverse-condemnation claim against the Metropolitan Airports Commission ("MAC") based on noise generated by aircraft operations fail as a matter of law under *Alevizos*?

   Respondents moved for summary judgment on the inverse-condemnation claim based on noise generated by aircraft operations under *Alevizos* against the MAC. (ADD007.) The district court granted summary judgment in favor of the MAC on the *Alevizos* claim. (ADD026.) Appellant filed this appeal.

   Apposite Legal Authorities:

   Alevizos v. Metropolitan Airports Commission, 216 N.W.2d 651 (Minn. 1974) ("*Alevizos I*")

   Alevizos v. Metropolitan Airports Commission, 317 N.W.2d 352 (Minn. 1982) ("*Alevizos II*")

   United States v. Causby, 328 U.S. 256 (1946)

   Griggs v. Allegheny County, 369 U.S. 84 (1962)

STATEMENT OF THE CASE

Interstate Companies, Inc., Gordon D. Galarneau Jr., and Penny Sue Galarneau ("Appellants") initiated this action by filing a complaint on February 25, 2008. (ADD007.) Appellants' complaint alleged multiple claims: Constitutional Per Se Taking of Air Space Above the Property (Count I), Taking Under *McShane* (Count II), Airport Hazard Taking (Count III), As Applied Constitutional Taking (Count IV), and Taking Under *Alevizos* (Count V). (*Id.*) On May 30, 2008, Appellants moved for summary judgment and Respondents City of Bloomington and Metropolitan Airports Commission ("MAC") moved for partial judgment on the pleadings.

Appellants incorrectly describe the district court's 2008 order regarding the motion for judgment on the pleadings by stating that "Several statutory claims were dismissed with prejudice. . . ." (App. Br. 3.) The difference between Appellants' characterization of the 2008 order and the actual order is significant here because Appellants are attempting in the current appeal to revive dismissed (non-statutory) claims that were subject to a final, partial judgment in 2008. On August 27, 2008, the Honorable Denise D. Reilly, Judge of Hennepin County District Court, Fourth Judicial District of Minnesota, issued an order denying Appellants' motion for summary judgment, granting the City's motion for judgment on the pleadings with respect to Counts I, II, III, and V of the complaint, and granting the MAC's motion for judgment on the pleadings with respect to Counts I, II, III, and IV of the complaint. (ADD007; RA0001–21.) Following the district court's order dated August 27, 2008, the only two claims remaining were

Count IV, the regulatory-taking claim under *Penn Central* against the City, and Count V, the *Alevizos* claim against the MAC. (ADD007.)

The district court certified its order of August 27, 2008, and entered final, partial judgment under Rule 54.02 of the Minnesota Rules of Civil Procedure on September 9, 2008. (RA0023.) Appellants filed an appeal of that judgment on November 21, 2008. (RA0022.) The Minnesota Court of Appeals issued an order on December 23, 2008, dismissing the appeal because the time to appeal the September 9 judgment had expired on November 10. (RA0024.) On March 17, 2009, the Minnesota Supreme Court denied Appellants' petition for review of the order dismissing the appeal. (RA0026.)

Regarding Appellants' remaining two claims, on January 12, 2010, the Honorable Denise D. Reilly, Judge of Hennepin County District Court, Fourth Judicial District of Minnesota, issued an order granting Respondents' motion for summary judgment. (ADD002.) The district court entered judgment on January 21, 2010, and Appellants initiated this appeal of that judgment on March 12, 2010.

STATEMENT OF FACTS

A. Interstate distributes and services diesel engines and related parts on the Property at 2501 and 2601 American Boulevard in Bloomington, Minnesota.

Interstate operates its business on property owned by Gordon D. Galarneau Jr. and Penny Sue Galarneau at 2501 and 2601 American Boulevard in Bloomington, Minnesota ("Property"). (ADD004.) The Property consists of the real estate at 2501 American Boulevard ("2501 Building") and the real estate at 2601 American Boulevard ("2601 Building"). Gordon Galarneau owns the 2501 Building. Penny Galarneau owns the 2601

Building. Interstate leases the 2501 Building from Gordon Galarneau and the 2601 Building from Penny Galarneau. (ADD005.)

In the 2501 Building, Interstate operates a business that has parts distribution, service repair, and sales activities related to diesel engines. (APP 0462.) The northern quarter of the 2501 Building contains office space and the remainder is the parts department and service shop. (*Id.*) Gordon Galarneau paid $900,000 to acquire the 2501 Building in 1977. (ADD005.)

In the 2601 Building, Interstate has an engine service shop in the rear of the building and a warehouse in the center portion of the building. (APP 0463.) The front third of the 2601 Building contains Interstate's corporate headquarters and two conference rooms. (*Id.*) Penny Galarneau paid approximately $1,320,000 to acquire the 2601 Building in October 1994. (APP 0462.) Interstate initially purchased the 2601 Building on a contract for deed. (*Id.*) Then Interstate remodeled the 2601 Building and sold it to Penny Galarneau, who is Gordon Galarneau's ex-wife. (*Id.*)

B. The City adopted the Airport Zoning Ordinance in May 2004.

On May 3, 2004, the City adopted the Airport Zoning Ordinance, Bloomington City Code § 19.38.03, regulating land use near the new north-south Runway 17-35 at the Minneapolis-St. Paul International Airport. The City based its Ordinance on the Minneapolis-St. Paul Airport (Wold-Chamberlain Field) Zoning Ordinance (amended April 29, 2004), which the Minnesota Department of Transportation ("MnDOT") previously approved. Under Minn. Stat. § 360.061 *et seq.*, representatives of the MAC, Hennepin County, and the Cities of Eagan, Mendota, Mendota Heights, Richfield,

Bloomington, Minneapolis, and St. Paul served as the Wold-Chamberlain Field Joint Airport Zoning Board ("JAZB"). The JAZB prepared and proposed the Airport Zoning Ordinance for approval by MnDOT and for ultimate adoption by local governments. (RA0037.) The Commissioner of MnDOT approved the proposed ordinance on April 26, 2004. (RA0027–32.) The JAZB adopted the ordinance on April 29, 2004. (RA0058.)

Interstate's current use of the Property is a permitted use under the Airport Zoning Ordinance. (RA0068–69.) The Property is located on the extended centerline of Runway 17-35. Under the City's Airport Zoning Ordinance, the Property falls within "Safety Zone B," which prohibits certain new land uses but allows many other uses, including Interstate's use of the Property. *See* Bloomington City Code § 19.38.03(c). Interstate's business on the Property, both *before* and *after* the Airport Zoning Ordinance, continues to be permissible under the City's regulations.

C. The new Runway 17-35 opened in October 2005.

The MAC owns and operates the Airport. The new Runway 17-35, which was part of an expansion at the Airport, became operational on October 27, 2005. (APP 0464.) The opening of Runway 17-35 was the culmination of a nearly 17-year process during which the State considered whether to expand the Airport or build a new airport. In 1989, the Minnesota Legislature enacted the Metropolitan Airport Planning Act, which directed the MAC and the Metropolitan Council to perform various studies and analyses in order to determine whether expanding the Airport or building a new airport elsewhere in the metropolitan area would best meet the Twin Cities' aviation needs through the year 2020. *See* 1989 Minn. Laws, ch. 279. The analysis, which became known as the "Dual Track

Airport Planning Process," involved preparation of a series of environmental review documents that evaluated alternative concepts for building a new airport and for expanding the Airport by adding a new runway.[1]

One of the Dual Track Airport Planning Process environmental review documents was the First Phase Scoping Report. Published in April 1992, the document included a diagram depicting the recommended location for a new 8,000-foot north-south runway at the Airport, as well as new airport development concepts.[2] The First Phase Scoping Report was followed by further environmental and planning studies, and ultimate recommendations by the MAC and the Metropolitan Council. In April 1996, the Minnesota Legislature enacted legislation directing the MAC to implement the "2010 Plan," which included building a new 8,000-foot north-south runway (Runway 17-35) at the Airport and eliminating the new airport alternative.[3] The MAC and the Federal Aviation Administration ("FAA") completed environmental review for the Airport expansion in 1998, and the MAC built Runway 17-35 in the location originally depicted in the First Phase Scoping Report.[4]

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[1] *See* Lightfoot Aff. at ¶ 5 and Ex. D at 6–11 (FAA Record of Decision, Dual Track Airport Planning Process).

[2] *See* Lightfoot Aff. at ¶ 2 and Ex. A at 3–4.

[3] *See* Minn. Laws 1996, ch. 469, art. 3; Minn. Stat. § 473.608. *See also* Lightfoot Aff. at ¶ 4 and Ex. C at I-9 to I-11, III-9, III-12 to III-13. (Dual Track Airport Planning Process Final Environmental Impact Statement) *and* Lightfoot Aff. at ¶ 4 and Ex. D at 10–11, 30–31 (FAA Record of Decision, Dual Track Airport Planning Process).

[4] *Compare* Lightfoot Aff. at ¶ 2 and Ex. A at 4 (First Phase Scoping Report) *with* Lightfoot Aff. at ¶ 4 and Ex. C at Figure 8 (Dual Track Airport Planning Process Final Environmental Impact Statement) *and* Lightfoot Aff. at ¶ 5 and Ex. D at Figure 1 (FAA Record of Decision, Dual Track Airport Planning Process).

Aircraft fly over the Property when departing from or arriving on Runway 17-35, but Appellants exaggerate the height at which such aircraft travel. FAA radar data conclusively establishes that aircraft departing on Runway 17 are at an average altitude of approximately 729 feet and aircraft arriving on Runway 35 are at an average altitude of approximately 200 feet as they pass over the Interstate Property.[5] Although Appellants repeatedly state that aircraft are about 60 to 75 feet above the ground when they fly over the Property (App. Br. 5, 22, 24), they have no admissible evidence to support those assertions. Rule 56.05 required that Appellants "set forth such facts as would be admissible in evidence." Minn. R. Civ. P. 56.05. *See also Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001) (holding that testimony that was "speculative and lacked foundation" may not preclude summary judgment). Gordon Galarneau lacks foundation under Rule 602 to testify about the altitude of aircraft passing over the Property. Although Mr. Galarneau signed an affidavit stating that aircraft passing over the Property are at an altitude of approximately 80 feet, Mr. Galarneau testified in his deposition that he lacks the personal knowledge necessary to accurately determine the altitude of aircraft passing over the Property. (APP 0517.) Such testimony lacking in foundation is inadmissible and must be disregarded under Rule 602 and Rule 56.05. Furthermore, objective FAA radar data is more probative of aircraft altitude than Mr. Galarneau's guess. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (1997) (stating that nonmoving party cannot establish a genuine issue of material fact based upon evidence that "merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with

[5] *See* Leqve Aff. ¶ 3 & Ex. A.

respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.").

Also, Appellants misinterpret a draft glide-slope document from May 2002 when they state that aircraft are 65 feet above the ground when they fly over the Property. (App. Br. 5; APP 0197.) The *minimum* glide slope does not constitute evidence regarding whether or the extent to which aircraft fly at that height. The MSP Airport Zoning Ordinance defines slopes for airspace surfaces. For example, the precision instrument approach surface is an "imaginary surface longitudinally centered on the extended centerline" of Runway 17-35 that inclines upward and outward at a slope of 50:1 for 10,000 feet, then continues upward and outward at a slope of 40:1 for an additional 40,000 feet. (RA0044, at § IV(A)(7).) No structures are allowed to project above the imaginary airspace surfaces defined in the MSP Airport Zoning Ordinance. (RA0045, at § IV(B); Bloomington Code § 19.38.03(d)(1).) The definition of the imaginary airspace surfaces in the ordinance does not necessarily mean that aircraft fly exclusively along the surface of the slope. The 2002 draft slope document—upon which Appellants rely—lacks foundation to demonstrate the height of aircraft using a runway that opened in 2005. The FAA radar data shows the altitude of aircraft actually using Runway 17-35.

D. Interstate's business has been profitable since 2004.

Interstate's business has been profitable since 2004. (APP0466–467.) Gordon Galarneau, Interstate's owner, testified that the operations at Interstate's facilities in the 2501 and 2601 Buildings have not changed between 2000 and 2009. Interstate's CEO characterized the profitability of Interstate's Bloomington facility since 2004 as

"good." (RA0099 at 89.) Interstate's CFO reiterated that Interstate's Bloomington facility has been profitable and has continued to grow since 2004. (RA0113 at 75.) The President of Interstate Power Systems testified that Interstate has "had some of the most profitable months in the history of our company" since January 2005. (RA0111 at 56.) Indeed, Interstate's most profitable year ever was 2008. (RA0112 at 58.) Mr. Galarneau admitted that 2007 and 2008 were a "couple of the best years we ever had." (RA0110 at 158.) The district court accurately observed that, between 2006 and 2007, Interstate's profits rose from $6.2 million to over $7.5 million. (ADD015.)

E. The rental prices for the 2501 Building and the 2601 Building have not decreased since 2004.

Gordon Galarneau signs the lease for the 2501 Building both as landlord and as the tenant. (RA0105 at 82.) In 2006, an amendment to the lease increased rent for the 2501 Building from $57,500 to $62,500 per month. (RA0080-81.) Mr. Galarneau testified that the rent for the 2501 Building increased in 2006 because of "market value" as determined by his accountants. (RA0106 at 86.) When asked why the rent for the 2601 Building has not increased since 1994, when Penny Galarneau acquired the property, Mr. Galarneau responded, "maybe she didn't ask." (RA0107 at 103–104.)

F. In 2008, Interstate acquired a parcel next door at 2701 American Boulevard.

In July 2008, Interstate purchased the building at 2701 American Boulevard from Qwest Corporation. (RA0100 at 131, RA0102 at 140.) Appellant's complaint included no allegations or claims regarding 2701 American Boulevard. The 2701 building is right next door to the 2601 Building.

Interstate paid $2,200,000 to acquire the 2701 building. (RA0100 at 132; RA0108 at 105.) Interstate's CEO considered the 2701 building to be "a fairly good buy" at $2.2 million. (RA0101 at 136.) When Interstate acquired the 2701 building, Interstate was already leasing parking space and some warehouse space there. (RA0100 at 129.) Interstate still uses the 2701 building for warehousing and parking. (RA0102 at 140.) But Interstate does not use the office portion of the 2701 building because "there isn't a need." (RA0103 at 141.) Interstate has assigned the 2701 building to Gordon Galarneau and his current wife. (RA0108 at 107–108.) Interstate leases the 2701 building from Gordon Galarneau and his wife. (RA0087–98.) Gordon Galarneau testified that he did not investigate any development potential for the 2701 Building before purchasing it. (RA0109 at 115.)

SUMMARY OF LEGAL ARGUMENT

Appellants improperly attempt to revive dismissed claims that were subject to a final, partial judgment in 2008. For example, Appellants argue that they have had "a complete taking of 100 feet of airspace above their property," (App. Br. 23) and that they have established a taking under *McShane* (App. Br. 14–15). But the district court dismissed Appellants' claims for Taking of Air Space Above the Property (Count I), Taking Under *McShane* (Count II), and Airport Hazard Taking (Count III). (ADD007; RA0001–21.) The district court entered final, partial judgment under Rule 54.02 of the Minnesota Rules of Civil Procedure in 2008. Appellants filed an appeal and this Court dismissed the appeal because the time to appeal the judgment had expired. (RA0024.) Following the final, partial judgment in 2008, the only two claims remaining in this case

were Count IV, the regulatory-taking claim under *Penn Central* against the City, and Count V, the *Alevizos* claim against the MAC. (ADD007.) This Court should reject Appellants' attempt to revive the claims that were dismissed and subject to a final, partial judgment in 2008. *See infra*, section III.

In January 2010, the district court appropriately determined that as a matter of law Appellants cannot prevail on their two remaining claims: (1) the regulatory-taking claim under *Penn Central* against the City, and (2) the inverse-condemnation claim based on noise generated by aircraft operations under *Alevizos* against the MAC. Regarding the regulatory-taking claim, the City's regulation did not result in the serious economic impact on Appellants' property necessary to constitute a taking, the regulation did not interfere with any distinct investment-backed expectations for the property, and the character of the regulation does not indicate a taking. Appellants' reliance on *DeCook II* in support of their arguments against *Penn Central* is inappropriate because *DeCook II* recognized that "*Penn Central* governs regulatory-taking analysis." (APP 0041.) Also, the Minnesota Supreme Court granted review of *DeCook II*. (Order of June 29, 2010, Case No. A09-969.) Regarding the noise claim under *Alevizos*, Appellants lack sufficient evidence to establish that aircraft noise directly and substantially invades their property rights to such a magnitude that they are deprived of the practical enjoyment of the property, and that such invasion results in a definite and measurable diminution of the market value of the property. The district court correctly concluded that Respondents were entitled to summary judgment.

STANDARD OF REVIEW

On an appeal from summary judgment, the appellate court reviews de novo whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *STAR Centers Inc. v. Faegre & Benson LLP*, 644 N.W.2d 72, 76 (Minn. 2002); *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

LEGAL ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANTS' REGULATORY-TAKING CLAIM FAILS.

The district court properly analyzed the regulatory-taking claim against the City by using the three factors of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In *Wensmann Realty, Inc. v. City of Eagan*, the Minnesota Supreme Court stated that "[w]e have used the *Penn Central* framework in other cases to analyze takings claims arising under the U.S. and Minnesota Constitutions." 734 N.W.2d 623, 632 (Minn. 2007). The standards set forth in *Penn Central* provide the "best analytic framework" to determine whether the government's actions resulted in a regulatory taking. *Id.* at 633. The *Penn Central* factors include: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct, reasonable, investment-backed expectations; and (3) the character of the governmental action. *Id.* 632–33. Whether the *Penn Central* test is satisfied and a taking exists is a question of law. *Id.* 642. The district court appropriately determined that Appellants cannot establish a regulatory-taking claim under the *Penn Central* factors.

Although Appellants criticize the district court for applying *Penn Central*, their criticism is flawed. Appellants mischaracterize *Penn Central* as a "rigid" legal test. (App. Br. 11.) But the Minnesota Supreme Court has described the *Penn Central* approach as "flexible, with the factors often being balanced." *Wensmann*, 734 N.W.2d at 633 (citing *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 114 (Minn. 2003)). Appellants also wrongly criticize the application of *Penn Central* as a violation of the Minnesota constitution. (App. Br. 18.) The Minnesota Supreme Court in *Wensmann* endorsed the *Penn Central* framework for analyzing regulatory-takings claims "arising under the U.S. and Minnesota Constitutions." 734 N.W.2d at 632. *Wensmann* itself involved "solely claims of violations of state law." *Id.* at 629.[6] Also, in *Zeman v. City of Minneapolis*, the Court stated that the *Penn Central* factors "provide the best analytic framework" for considering a regulatory-taking claim. 552 N.W.2d 548, 552 (Minn. 1996). Similarly, in *Westling v. County of Mille Lacs*, the Court observed that the *Penn Central* factors "are particularly significant to making the factual inquiry into whether a particular government act is a regulatory taking." 581 N.W.2d 815, 823 (Minn. 1998). Contrary to Appellants' assertion, applying the *Penn Central* factors to a regulatory-taking claim does not violate the Minnesota constitution. The district court properly applied *Penn Central*.

The three *Penn Central* factors provide the framework for determining whether a regulation goes "too far" and amounts to a taking. *See Wensmann*, 734 N.W.2d at 632. Not all government regulations that limit property rights constitute regulatory takings.

[6] In *Wensmann*, "the federal court dismissed the federal claims without prejudice and remanded the remaining state claims to the Dakota County District Court." 734 N.W.2d at 629.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Governments may regulate property use without triggering a compensable taking. To require compensation for all circumstances in which government regulation adjusts property rights for the public good would improperly "compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis in original).

A. The economic impact of the regulation does not indicate a taking.

Under the economic-impact factor of *Penn Central*, the focus of the taking inquiry is "the severity of the burden that government imposes upon private property rights." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 (Minn. 2007) (quoting *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005)). Regulatory takings are limited to claims against a governmental entity that enforces a regulation "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537. "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 v. Allard*, 444 U.S. 51, 66 (1979)). Rather, the "economic impact" criterion of *Penn Central* requires that the property owner "show 'serious financial loss' from the regulatory imposition in order to merit compensation." *Wensmann*, 734 N.W.2d at 636 (citing *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003)). *See also Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553 (Minn. 1996) (stating that no taking exists "unless the property owner demonstrates that the regulation has resulted in a severe economic loss to the

property owner"). "[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1992).

1. Because Appellants may continue their reasonable, economically-viable use of the Property, the economic impact of the regulation is not "so onerous" to constitute a taking.

The district court appropriately recognized—quoting *Wensmann*—that courts employ "different methods of measuring economic impact, depending on the circumstances." (ADD014.) In *Wensmann*, the Minnesota Supreme Court stated that, to evaluate the economic impact of government regulation under *Penn Central*, courts may consider whether the regulation "leaves any reasonable, economically viable use of the property." 734 N.W.2d at 635. The United States Supreme Court in *Penn Central* concluded that the regulation did not interfere with appellant's expectations concerning the use of the property because it "may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal," and that the regulation permits "Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." 438 U.S. at 136. *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987) (concluding that no taking occurred because "there is no record in this case to support a finding" that the regulation "makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations").

Interstate's use of the Property is a "reasonable, economically viable use." (ADD014–15.) After the Airport Zoning Ordinance was enacted, Interstate had its most

profitable years in its history. (*Id.*) The operating profits from Interstate's facilities on the Property since 2004 often account for over half of the company's total profits. (APP0466–467.) The Ordinance does not interfere with Interstate's economically successful use of the Property.

2. Because Appellants can recoup their investment in the Property, the economic impact of the regulation is not "so onerous" to constitute a taking.

The record shows that Gordon Galarneau and Penny Galarneau will be able to recoup their entire investment in the Property, and much more, even after the City enacted the Airport Zoning Ordinance. (ADD015.) In *Wensmann*, the Minnesota Supreme Court recognized that courts have considered "the claimant's ability to recoup its capital" as a method of analyzing the economic impact of a regulation. 734 N.W.2d at 634. *See Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003) (stating that purchase price is relevant because "if a party were able to recoup its investment after the government action, it is less likely that a taking has occurred."). In *Florida Rock*, the Court of Appeals for the Federal Circuit stated that "[i]n determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (quoting *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053 (1987)). The Minnesota Supreme Court has cited *Florida Rock* with approval. *Wensmann*, 734 N.W.2d at 635–37. The district court accurately observed that Appellants are capable of recouping their investment in the Property despite the Airport Zoning Ordinance.

Furthermore, Gordon Galarneau and Penny Galarneau are receiving a substantial return on their investment in the Property by collecting rental income every month. (ADD016.) In weighing the economic impact of a regulation, courts may properly consider the property owners' potential for a substantial return on their investment. *See, e.g., Walcek v. United States*, 303 F.3d 1349, 1357 (Fed. Cir. 2002) (finding no taking as a result of the government's 1996 permit because "the 1996 permit allows the Walceks to recover their initial expenditure and realize a return of $305,000 on their investment"); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1363 (Fed. Cir. 2001) ("the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored"); *Walcek v. United States*, 49 Fed. Cl. 248, 266 (Fed. Cl. 2001) (rejecting takings claim, and stating that "profit or return of investment is a factor to be considered in assessing economic impact"). Interstate pays $62,500 in monthly rent to Gordon Galarneau for the 2501 Building and $34,000 in monthly rent to Penny Galarneau for the 2601 Building. (ADD016.) Even after the Airport Zoning Ordinance, their internal rate of return on their investment in the Property exceeds 25% per year. The economic impact of the Airport Zoning Ordinance does not support a regulatory-taking claim.

3. Because Appellants can redevelop the Property to alternative uses that are reasonable and economically viable, the economic impact of the regulation is not "so onerous" to constitute a taking.

The Airport Zoning Ordinance does not constitute a regulatory taking of the Property because alternative potential uses exist for the Property within the parameters of the City's current Zoning and Comprehensive Plan designation. "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). The current zoning of the Property, Industrial Park I-1, reflects its current industrial use. (RA0068–69.) The current Bloomington Comprehensive Plan designation for the Property is Office. (*Id.*) The I-1 zoning district is consistent with the Comprehensive Plan's Office designation. (*Id.*) The Industrial Park district allows a wide variety of uses, including permitted uses such as Manufacturing Uses, Offices and office buildings, Research laboratories, and Wholesale businesses. (*Id.*) The Industrial Park district allows Conditional Uses such as Hotels and Motels, Restaurants when included in a hotel or motel, Service Stations, Nonprofit Clubs and Lodges, Vehicle and Equipment Repair, and Vocational Schools. Interstate's existing use on the Property is considered a conforming industrial use in the I-1 zoning district, and alternative potential lawful uses exist. If the Property were redeveloped, although the height of new structures is limited in Safety Zone B (Bloomington City Code § 19.38.03(d)), a building approximately seven stories high could be built within the height limit of Safety Zone B.[7] The alternative potential

[7] Based on the height limitations in Safety Zone B, the Ordinance allows for construction of a building up to 890 feet above mean sea level for about two-thirds of the Property and up to 900 feet above mean sea level for the other third. (RA0060; RA0068–69.) Because elevations on the Property range from approximately 803 to 813 feet above mean sea level, Appellants could construct a building approximately 77 feet tall on the Property and still satisfy the Ordinance's height limitations. (RA0069.) Section VIII of the MSP Airport Zoning Ordinance governs "Airport Zoning Permits." (For purposes of Section VIII(C) of the Ordinance, the City is the "Zoning Administrator" for permit applications, as designated by Section XI of the Ordinance.) A permit "shall" be granted under Section VIII(D), unless granting the permit would allow a violation of the ordinance or would permit a nonconforming structure, tree, or use to become a greater violation. Thus, if a request for an Airport Zoning Permit were submitted for a structure

lawful uses of the Property are relevant to the inquiry regarding "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). In light of the alternative uses available, the economic impact of the Airport Zoning Ordinance is not "so onerous" that it amounts to a taking. *Lingle*, 544 U.S. at 537.

4. Appellants' only expert report is deficient as a matter of law to prove that a regulatory taking exists.

The district court correctly concluded that Appellant's only expert report was deficient in two significant respects that preclude its use as support for a regulatory taking. (ADD016.) First, Appellants' expert incorrectly presumed that the Property would have been zoned High Intensity Mixed-Use with Residential (HX-R) in absence of the Airport Zoning Ordinance. (*Id.*) But the Minnesota Supreme Court has held that a property owner may not presuppose a right that "the property never enjoyed under the city's regulatory scheme." *Wensmann*, 734 N.W.2d at 635. As a matter of law, Appellants may not rely on the fiction of a HX-R zoning district on the Property to create an economic impact. "The takings clause was never intended to compensate property owners for property rights they never had." *Wensmann*, 734 N.W.2d at 635 (citing *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 831 N.E.2d 865, 874 (2005)). Second, Appellants' expert failed to demonstrate a causal link between the Airport Zoning Ordinance and any diminution in value of the Property. *See Davis v. City of Princeton*, 401 N.W.2d 391, 396 (Minn. Ct. App. 1987) (holding that plaintiff must show actual link

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that would be 50 to 75 feet high on the Property, the terms of the Ordinance would require the City to issue that permit.

between the airport zoning ordinance and the diminution in value, and stating that if the rule were otherwise, "every airport ordinance that imposes more restrictive rules than the underlying zoning would be held to be a constitutional taking"). Appellants' expert conflated the regulatory and other impacts on the Property, opining on an alleged diminution in market value based on an indiscriminate mix of "height and land use restrictions, jet noise and pollution, and safety risks." (ADD016.) Appellants' expert report offered no independent basis for a causal link between the Airport Zoning Ordinance and any diminution in value of the Property. As a result, the expert report was deficient as a matter of law.

B. The extent to which the regulation interferes with distinct investment-backed expectations does not indicate a taking.

The second *Penn Central* factor evaluates the extent to which a regulation interferes with an owner's investment-backed expectations for property. This factor is objective. The "inquiry focuses on *distinct* investment-backed expectations." *Wensmann*, 734 N.W.2d at 639 (citing *Penn Central*) (emphasis in original). An abstract need or unilateral expectation is insufficient. "Merely having expectations . . . without taking investment action on such expectations is not relevant to the *Penn Central* analysis, even if the expectations are reasonable." *Wensmann*, 734 N.W.2d at 639. "[T]he existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Wensmann*, 734 N.W.2d at 637 (citing *Penn Central*). When analyzing this factor, courts "may distinguish between 'legitimate' as opposed to 'speculative' development expectations." *Wensmann*,

734 N.W.2d at 637–38 (citation omitted). To support a claim for a regulatory taking, "an investment-backed expectation must be 'reasonable.'" *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984)).

The district court correctly found that when Appellants acquired the Property they had no distinct investment-backed expectations of a use that the City's regulation no longer allows. (ADD017.) Appellants did not have any distinct ideas about redeveloping the Property before they acquired it that the Airport Zoning Ordinance now prohibits. (*Id.*) Gordon Galarneau may continue to use the Property for the Interstate business just as he has used it since purchasing the 2501 Building in 1977. Penny Galarneau may continue using the Property just as she has used it since she acquired the 2601 Building in 1994. The district court properly concluded that the Airport Zoning Ordinance did not frustrate any distinct investment-backed expectations. *See, e.g.*, *Penn Central*, 438 U.S. at 136 (finding that regulation did not interfere with appellants' expectations concerning the use of the property because appellants "may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal").

Although Appellants complain that the Airport Zoning Ordinance spoiled their 2002 plan to put a hotel on the Property (App. Br. 7), their plan for a 15-story hotel was not a legally permissible use of the Property even before the 2004 Airport Zoning Ordinance. (APP 0552–554.) In asserting a regulatory-taking claim, a property owner may not presuppose a right that "the property never enjoyed under the city's regulatory scheme." *Wensmann*, 734 N.W.2d at 635. Appellants never had the legal right to build

their hypothetical 15-story hotel on the Property for reasons independent of the 2004 Airport Zoning Ordinance. First, the Comprehensive Plan prior to 2004 did not permit a 15-story hotel on the Property. (APP 0552.) Second, Appellants had not completed the necessary Environmental Assessment Worksheet (EAW) for the 15-story hotel and absent a determination that an EAW was adequate, state law (Minn. Stat. § 116D.04, subd. 2b) prohibited the City from approving the application for the 15-story hotel. (APP 0553.) Finally, the underlying general zoning regulations—the Commercial Office District (CO-1) and Commercial Service District (CS-1) zoning districts—restricted the height of any new development on the Property to approximately four stories. (APP 0553–554.) Those general zoning regulations applied to the Property regardless of the height limitation later imposed by the Airport Zoning Ordinance in 2004.

Appellants wrongly argue that the absence of any interference with any investment-backed expectations should not be considered here because the regulation at issue does not affect "all of Bloomington," and applies "to a specific property owner impacted by airport operations." (App. Br. 20.) Appellants improperly attempt to read the second factor out of *Penn Central*. Further, Appellants' argument is contrary to *Penn Central*, which stated that while it was "true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'" 438 U.S. at 133. The Court observed that regulation "designed to promote the general welfare commonly burdens some more than others." *Id.* Appellants may not ignore the fact that the Airport Zoning Ordinance does not interfere with any distinct investment-backed expectations that they had for the Property. (ADD017–18.)

C. The character of the government action does not indicate a taking.

The third *Penn Central* factor considers the "character" of the governmental action in determining whether a regulatory taking exists. The "focus of the character inquiry should be on 'the *nature* rather than the merit of the governmental action.'" *Wensmann*, 734 N.W.2d at 639 (citation omitted) (emphasis in original). "[A]n 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.* Courts "should take into account the actual burden imposed on property rights and 'how that burden is allocated.'" *Id.* (quoting *Lingle*, 544 U.S. at 543). Contrary to Appellants' argument, the district court did not improperly impose a "bad faith" test. Rather, the district court followed the instructions of *Wensmann* and considered the actual burden imposed on property rights and how the burden is allocated. The district court found that "there is no indication that the burden was unfairly allocated to Plaintiffs' Property." (ADD019.)

The Property is subject to "Safety Zone B" of the City's Airport Runway Overlay District. Bloomington City Code § 19.38.03(c). The restrictions of Safety Zone B do not prohibit Interstate's use of the Property. The use restrictions of Safety Zone B would affect none of the alternative uses allowed in the underlying zoning district, I-1 Industrial Park (the current zoning of the Property), other than a vocational school. The height of structures is limited in Safety Zone B. Bloomington City Code § 19.38.03(d). The existing 2501 and the 2601 Buildings are well under the height limit. If the Property were

redeveloped, a building approximately seven stories high could be built within the height limit of Safety Zone B. (RA0069.) The actual burden of the regulation is not heavy.

Safety Zone B exists off the end of all runways at the Airport. (ADD019; RA0059.) Thus, Safety Zone B is allocated among several properties in the neighborhood of the Airport. The City has Airport Runway Overlay Districts for both Runway 17-35 and Runway 4-22. Bloomington City Code § 19.38.03(b). This is a situation where numerous property owners near the Airport are subject to the same type of land-use restrictions. The burden was not unfairly allocated. *See Wensmann*, 734 N.W.2d at 639. The restrictions of Safety Zone B do not affect the Property "so substantially that it is manifestly unfair." *McShane v. City of Faribault*, 292 N.W.2d 253, 259 (Minn. 1980). The district court appropriately concluded that the character of the government action does not weigh in favor of a taking.

The Airport Zoning Ordinance benefits property owners near the Airport by helping to preserve the Airport as a community amenity, and thereby protects those properties' advantageous location near the Airport. The JAZB, in preparing the Airport Zoning Ordinance for approval by MnDOT, considered "among other things, location of the airport, existing land uses and character of the neighborhood, uses planned and adaptable, and public safety references in Minn. Stat. § 360.066." (RA0028 at ¶ 11.) The JAZB demonstrated that the social and economic costs of strict compliance with MnDOT's standards outweighed the benefits of strict application of the standards, as authorized by Minn. Stat. § 360.065, subd. 2. (RA0031–32, ¶¶ 4–12.) While properties near the Airport may be burdened by the zoning restrictions, the properties all benefit

from the restrictions that are placed on others so that the Airport may operate safely in the neighborhood. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554–55 (Minn. 1996) (same). The reciprocal benefits of regulations that protect public safety related to the Airport reduce any net negative effect on a particular owner. "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." *Keystone*, 480 U.S. at 492 n.21.[8] The character of the government action here does not indicate that a regulatory taking occurred.

D. The whole parcel must be considered in the regulatory-taking analysis.

Appellants may not carve out a discrete portion of the Property—the airspace above it—to support their regulatory-takings claim. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327–30 (2002). Appellants argue that the "zoning contemplates the actual use of the airspace zoned by aircraft." (App. Br. 15.) But under established law, Appellants may not divide a parcel into discrete segments and then attempt to determine whether rights in a particular segment have been entirely denied. *Tahoe-Sierra*, 535 U.S. at 328. Appellants' attempt to base their regulatory-taking claim on the airspace above the Property is improper because "defining the property interest taken in terms of the very regulation being challenged is circular." *Id.* at 331.

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[8] The Minnesota Supreme Court has favorably cited *Keystone*. *See Wensmann*, 734 N.W.2d at 634.

The United States Supreme Court has expressly rejected the notion that a landowner may establish a taking claim simply by showing that a regulation deprived the owner of the use of airspace irrespective of the remainder of the property's value. *Penn Central*, 438 U.S. at 130. The Court stated that the analysis of the taking question must focus on the whole parcel:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130–31. Where an "owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979). *See also Keystone*, 480 U.S. at 498 (explaining that owner may not divide property and define "a separate segment of property for takings law purposes"). *Penn Central* and subsequent cases make "it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases [courts] must focus on 'the parcel as a whole.'" *Tahoe-Sierra*, 535 U.S. at 327.

A regulatory-taking claim may not narrowly focus on the airspace above the Property. Rather, under the whole-parcel rule, the taking analysis must consider Appellants' entire Property. *See Tahoe-Sierra*, 535 U.S. at 331 ("in regulatory takings cases [courts] must focus on 'the parcel as a whole'"); *Armour & Co. v. Inver Grove Heights*, 2 F.3d 276, 278 (8th Cir. 1993) (stating that court must focus on "nature and extent of the interference with rights in the parcel as a whole"). The Minnesota Supreme

Court has approved the whole-parcel rule, requiring courts to consider the "nature and extent of the interference with rights in the parcel as a whole." *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998). Considering the Property as a whole, Appellants are unable to establish a regulatory-taking claim under the *Penn Central* factors.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANTS' *ALEVIZOS* CLAIM FAILS.

The district court properly analyzed Appellants' claim under *Alevizos v. Metropolitan Airports Commission*, 216 N.W.2d 651, 662 (Minn. 1974) ("*Alevizos I*"), which 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) ("*Alevizos II*"). First, Appellants 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 I*, 216 N.W.2d at 662. Second, Appellants must show that "such invasion results in a definite and measurable diminution of the market value of the property." *Id.* Appellants must prove both elements to establish a claim. *Id.* Because Appellants were unable as a matter of law to establish these essential elements, the district court appropriately rejected the *Alevizos* claim.

A. Appellants failed to establish "a direct and substantial invasion of their property rights of such a magnitude they are deprived of the practical enjoyment of the property.

Appellants failed to establish the first element of a claim under *Alevizos*: a direct and substantial invasion of property rights that deprives an owner of the practical enjoyment of the property. "[N]ot every inconvenience, annoyance, or loss of peace and quiet caused by air flights will give rise to a cause of action in inverse condemnation against an airport operator." *Alevizos I*, 216 N.W.2d at 662. Appellants lacked evidence to demonstrate a "direct and substantial invasion" of their property rights so that they were "deprived of the practical enjoyment of the property." *Id.* The *Alevizos* claim fails because Appellants cannot prove this essential element as a matter of law.

The aircraft operations on Runway 17-35 do not deprive Interstate of the practical use and enjoyment of the Property. Interstate's CFO testified that the aircraft noise does not prevent Interstate employees from getting their work done. (ADD024.) Aircraft noise does not affect the methodology of how Interstate works and how employees go about their day. (APP 0482.) A few times per week, however, a loud airplane will fly over Interstate and interrupt conversations. (*Id.*) But not every aircraft causes conversations to stop. (ADD023.) Interstate's CEO estimated that conversations stop as a result of aircraft noise about "two to three times a day." (APP 0482.) Those conversations may stop for "10 to 15 seconds." (*Id.*) Gordon Galarneau testified that aircraft noise sometimes interrupts his telephone conversations when he is in his office in the northeast corner of the 2601 Building, although aircraft noise is less noticeable in other areas of the building. (ADD023.) Gordon Galarneau can hear aircraft noise when calling in to the office, but

could only recall hearing aircraft noise when talking to the receptionist up front. (ADD023.) Gordon Galarneau was not aware of any other impact of aircraft on Interstate's operations, other than the aircraft noise. (ADD023.)

Aircraft noise does not prevent Interstate from holding open-house events at the Property. Interstate hosts open-house events at its Bloomington facility for up to 200 people and typically holds them outdoors. (RA0104 at 197–198.) Interstate sometimes erects tents on the Property for the open-house events. (RA0104 at 198.) On August 24, 2006, Interstate held an open house outdoors at the Property for at least a hundred customers. (RA0114 at 60; RA0115 at 61.) Interstate placed a tent in the parking lot between the 2501 and 2601 Buildings. (RA0082–86.) Interstate's Vice President of Operations considered the 2006 open house to be "a very good event." (RA0116 at 65.)

Appellants' selective quotation regarding the 75 DNL contour from Bloomington's Comprehensive Plan (App. Br. 22) does not prove that aircraft noise directly and substantially invades their property rights to such a magnitude that they are deprived of the practical use and enjoyment of the Property. Using an ellipsis, Appellants omit the following critical sentence: "Other non-industrial land uses are appropriate only when adequately insulated." (APP 0294.) Appellants' block quotation also omits the sentence stating that "Other uses may require insulation depending on the nature of the use." (*Id.*) Viewed as a whole, the sentences that Appellants have selectively quoted do not describe the effect of airport noise on industrial property. Bloomington's Comprehensive Plan recognizes that industrial land uses, such as the Interstate business, are compatible with the level of aircraft noise at the Property. The sentences omitted from

Appellants' block quotation are revealing. Because the current use of the Property is industrial, Appellants' quotation of Bloomington's Comprehensive Plan does not support their *Alevizos* claim.

Furthermore, in asserting that the Property is within the 75 DNL contour, Appellants rely on a map the MAC prepared in 2000 projecting expected aircraft noise exposure from Runway 17-35 in 2005. In reality, based upon actual aircraft operations in 2008, the Property is within the 70 DNL contour. (RA0076.) Moreover, the DNL contours reflect exterior noise levels, not the noise levels experienced inside a building. Appellants offer no information regarding the actual noise levels inside their buildings. The only evidence in the record regarding *interior* noise levels is the report by Respondents' expert, who concluded that the design and construction of the office buildings at the Property reduce the exterior noise level by at least 30 decibels. (RA0076–79.) As a result, the noise level inside the offices at the 2501 and 2601 Buildings is not greater than 44 decibels. (*Id.*) Inside the Interstate offices, for 98.5% of the day telephone communication capabilities are good with normal voices intelligible at up to six meters. (*Id.*) And for the remaining 1.5% of the day, telephone communication is satisfactory to slightly difficult with raised voice levels at distances up to two meters. (*Id.*) Aircraft noise will continue to decline, reducing aircraft noise levels in the vicinity of the Property, as a result of the phase-out of DC9 operations and the increased use of newer and quieter manufactured Stage 3 aircraft at the Airport. (*Id.*)

Finally, aircraft noise does not negatively impact Interstate's profitable use of the Property. Since Runway 17-35 opened in October 2005, Interstate has achieved its most

profitable years in company history. (APP 0484.) Interstate's use and enjoyment of the Property has suffered no cognizable harm from aircraft noise. Also, the Galarneaus receive nearly $100,000 per month in rental income from Interstate for its use of the Property. (ADD04.) Appellants have not been deprived of the practical use and enjoyment of the Property. The district court correctly concluded that the *Alevizos* claim fails as a matter of law.

Proof of the *Alevizos* test's first step is a prerequisite to reaching the second question concerning diminution in market value. *Alevizos I*, 216 N.W.2d at 662. Since the record shows that noise from aircraft overflights does not constitute a direct and substantial invasion that deprives Appellants of the use and enjoyment of the Property, this Court need not reach the question of whether the noise causes a definite and measurable diminution in market value. *Alevizos I*, 216 N.W.2d at 662.

B. Appellants failed to show that any "such invasion results in a definite and measurable diminution of the market value of the property."

The second element of a claim under *Alevizos* requires proof that aircraft noise resulted in a definite and measurable diminution in the market value of the Property. *Alevizos I*, 216 N.W.2d at 662. "Diminution in one's enjoyment and use of property is not the same as a diminution in market value." *Alevizos II*, 317 N.W.2d at 359. Courts will not afford relief to "the unusually sensitive person" because the focus is "the general market place rather than the amount of discomfort to the individual." *Alevizos I*, 216 N.W.2d at 662. Thus, "the subjective discomfort or inconvenience of the landowner does not, by itself, prove any loss in market value of the land." *Alevizos II*, 317 N.W.2d at 359.

"An affront to one's sensibilities becomes legally cognizable here only when it becomes a servitude on the property itself, depressing its value on the market." *Id.*

Appellants have no evidence to demonstrate a connection between the noise generated by aircraft operations at Runway 17-35 and any decrease in the Property's market value. *Alevizos II* requires that an opinion on the diminution in value of the Property "should ordinarily be substantiated by some kind of market studies or other documentation." 317 N.W.2d at 359. Appellants admitted that they "have not done any studies regarding noise and loss of market value." (APP 0485.) Instead, Appellants relied on a single expert appraisal report that bases its conclusions on a combination of "height and land use restrictions, jet noise and pollution, and safety risks." (ADD025; APP0430.) The expert report does not provide any study directly connecting aircraft noise to a loss of market value. (ADD026.) The expert provides no explanation or justification for the downward adjustments in the appraisal. The expert simply asserts that the downward adjustments are due to an amalgam of "the site's height restrictions, avigation easements, jet noise and pollution, and safety risks." (APP 0428.) Appellants' expert report contains no market studies concerning the effect of aircraft noise on the Property's value. Although Appellants argue that their expert report is "[o]ver 100 pages" long (App. Br. 27), they cannot identify any analysis in it connecting aircraft noise with any decrease in market value. "Mere assertions are not enough" to prove that aircraft noise results in a diminution in the market value of the Property. *Alevizos II*, 317 N.W.2d at 359. Because no independent basis exists in Appellants' expert report for a causal link between the

noise generated by aircraft operations at Runway 17-35 and any diminution the Property's value, the report is inadequate as a matter of law.

Alevizos II recognizes that in establishing an inverse-condemnation claim for aircraft noise, "a property owner has a difficult burden of proof." 317 N.W.2d at 360. Appellants lack any "market studies or other documentation" showing that noise from aircraft flying over the Property has caused a loss in the market value of the Property. The district court appropriately determined that Appellants failed to sustain their burden under *Alevizos* and that their claim fails as a matter of law.

III. APPELLANTS MAY NOT PURSUE CLAIMS THAT WERE DISMISSED UNDER THE FINAL, PARTIAL JUDGMENT IN 2008.

A. Because Appellants' claim under *McShane v. City of Faribault* was previously dismissed and their previous appeal failed, they are precluded from litigating the claim for a second time.

Appellants improperly attempt to resuscitate a previously dismissed claim that was subject to a final, partial judgment in 2008. Appellants argue that under *McShane* they are "entitled to compensation if the property suffered a substantial and measurable decline in market value as a result of the regulations." (App. Br. 14–15.) Count Two of the complaint had alleged that "the Property has suffered a substantial and measurable decline in market value as a result of the 2004 ordinance, constituting a regulatory taking of their property pursuant to *McShane v. City of Faribault*, 292 N.W. 2d 253 (Minn. 1980)." (Compl. ¶ 27.) The district court dismissed Count Two because *McShane* is not an independent basis for a regulatory-taking claim under Minnesota law:

> *McShane* does not create an independent test for regulatory takings cases. Any notion to the contrary was clearly disabused in *Wensmann*, where the Minnesota Supreme Court considered the impact of *McShane* and whether it constituted a distinctly Minnesota approach to regulatory takings claims. The Minnesota Supreme Court firmly rejected this idea, and reiterated that regulatory takings claims are governed by the three-factor *Penn Central* test.

(RA0020.) After the district court certified its order and entered a final, partial judgment under Rule 54.02, Appellants filed an appeal. Appellants' statement of the case raised the following issues:

> Whether the trial Court should grant summary judgment as to Count Two of the Complaint, finding that there has been a taking under *McShane* . . . ?
>
> Whether the trial Court erred in dismissing Count Two of the Complaint finding that *McShane v. City of Fairbault* does not create an independent test for regulatory takings cases related to airports?[9]

This Court dismissed the appeal because Appellants filed it too late. (RA0022–25.) The Minnesota Supreme Court denied review. (RA0026.) Despite the prior judgment on the claim, Appellants continue to contend that they have demonstrated a taking under *McShane*. (App. Br. 14–15.) But Appellants are precluded from pursuing a *McShane* claim for a second time.

The doctrines of res judicata and law of the case are based on the policy that litigation should be brought to a "definite conclusion with reasonable dispatch." *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987). The Minnesota Supreme Court has explained that "when judgment was entered and the time for appeal from that judgment expired, the judgment became a final judgment on the merits." *State*

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[9] Statement of the Case of Appellants, at 5–6, *Interstate Companies, Inc. v. City of Bloomington, et al.*, Appellate Court File No. A08-2030 (Nov. 21, 2008).

v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001). *See also Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, P.L.L.P., 732 N.W.2d 209, 221 (Minn. 2007) ("for res judicata purposes, a judgment becomes final when it is entered in the district court and it remains final, despite a pending appeal, until it is reversed, vacated or otherwise modified"); *Deli v. Hasselmo*, 542 NW 2d 649, 657-58 (Minn. Ct. App. 1996) (holding that res judicata barred claim on which had previously been rejected on motion for summary judgment in a prior action). The res judicata effect of the 2008 judgment and expiration of the appeal deadline precludes Appellants from relitigating the dismissed claims, including the "Taking under *McShane*" claim. *Myers v. Bull*, 599 F.2d 863, 865 (8th Cir. 1979) (holding that plaintiff's "attempt to resurrect the two claims previously raised" in complaint was barred by res judicata effect of district court's previous decision dismissing those claims). Similar to res judicata, the law-of-the-case doctrine bars Appellants from continuing to pursue a dismissed claim. The Minnesota Supreme Court has stated that "issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or readjudicated on a second appeal of the same case." *Lange v. Nelson-Ryan Flight Service, Inc.*, 116 N.W.2d 266, 269 (Minn. 1962). *See also Loo v. Loo*, 520 N.W.2d 743–44 (Minn. 1994) ("Although none of the principles or doctrines requiring that judicial decisions have preclusive effect apply to this case in a technical sense, the underlying principle that an adjudication on the merits of an issue is conclusive, and should not be relitigated, clearly applies.").

Appellants may not rely on unpublished decisions of this Court to reverse the district court's judgment. Unpublished decisions are not precedential. Minn. Stat.

§ 480A.08, subd. 3; *see Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("unpublished opinions of the court of appeals are not precedential"); *Roer v. Dunham*, 682 N.W.2d 179, 181 n.1 (Minn. Ct. App. 2004) ("Unpublished opinions are not of value in deciding an appeal."); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800–01 (Minn. Ct. App. 1993) (stating dangers of miscitation and unfairness associated with use of unpublished opinions and that while persuasive, the "legislature has unequivocally provided that unpublished opinions are not precedential"). Moreover, *DeCook II* recognized that "*McShane* does not provide a 'separate and independent legal test for regulatory takings,' and that *Penn Central* governs regulatory-takings analysis." (APP 0041.) Appellants even acknowledge that *DeCook II* stated that *Penn Central* governs. (App. Br. 17.) Although the court in *DeCook II* recognized that "*Penn Central* governs regulatory-taking analysis," the court did not apply the three-part *Penn Central* analysis before declaring that the ordinance resulted in a regulatory taking of the property. (APP 0041–43.) The Minnesota Supreme Court granted review of *DeCook II*. (Order of June 29, 2010, Case No. A09-969.)

B. Because Appellants' claim for "Taking of Air Space" was previously dismissed and their previous appeal failed, they are precluded from litigating the claim for a second time.

Appellants improperly attempt to resuscitate another previously dismissed claim that was subject to the final, partial judgment in 2008. Appellants argue that they "have had a complete taking of 100 feet of airspace above their property, which has been made available to airplanes when using the Runway for takes off [sic] or landings." (App. Br. 23.) Count One of the complaint had alleged "a per se taking of their property to the

extent of the airspace between 60 feet and 175 feet above the ground under both the Minnesota and United States constitutions." (Compl. ¶ 19.)[10] In August 2008, the district court dismissed Count One because the claim for a taking of airspace above the Property was contrary to established Minnesota law:

> Plaintiffs' *per se* takings claim fails to comport with the holdings of *Causby* and *Alevizos*, which expressly disclaim a *per se* takings rule in instances involving airplane overflights. . . . Further, the Court is not persuaded by the Nevada court's finding in *Sisolak*, which is contrary to established Minnesota law.

(RA0019). The district court expressly rejected the "anomalous Nevada law" set forth in *McCarren Int'l Airport v. Sisolak*, 137 P.3d 1110, 1124 (Nev. 2006). (RA0013.) The district court certified its order and entered final, partial judgment under Rule 54.02.

Then Appellants attempted to appeal the district court's 2008 order and judgment. In their 2008 statement of the case, Appellants framed one of their appellate issues as: "Whether the trial court should grant partial summary judgment as to Count One of the Complaint finding that there has been a per se taking of airspace above the Property, leaving only the issue of damages for trial?"[11] This Court dismissed the appeal because Appellants filed it too late. (RA0022–25.) The Minnesota Supreme Court denied review. (RA0026.) Nevertheless, Appellants continue to insist that there has been a complete taking of airspace above the Property. (App. Br. 23.) But Appellants may not revive their "Taking of Air Space" claim through a distorted discussion of *Alevizos*. The doctrines of

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[10] Plaintiffs' complaint captioned Count One as "Constitutional Per Se Taking of Air Space Above The Property." (Compl. at 4.)

[11] Statement of the Case of Appellants, at 5, *Interstate Companies, Inc. v. City of Bloomington, et al.*, Appellate Court File No. A08-2030 (Nov. 21, 2008).

res judicata and law of the case preclude Appellants from litigating a "Taking of Air Space" claim again.

As a further indication that Appellants are continuing to pursue a dismissed claim, Appellants describe how their expert report conflates the previously rejected "Taking of Air Space" claim, the impact of aircraft noise, and regulatory restrictions on the Property:

> There has been a complete taking of 100 feet of airspace above the property for use by airplanes. [Appellants'] expert has valued that loss. It is definite and measurable and is $5 million or 50% of the value of the property prior to the Runway.

(App. Br. 25.) Appellants do not have a "Taking of Air Space" claim. Because Appellants concede that their expert report answered the wrong question, the report is inadequate as a matter of law to support either their *Penn Central* claim or their *Alevizos* claim.

Anyway, Appellants do not have a claim for a physical taking of the Property under Minnesota law. Yet Appellants allude to a physical taking of the Property, stating that "there clearly has been a direct invasion of their property rights as the airspace was physically taken away from the property owners." (App. Br. 23.) Appellants argue that they experienced "a complete and permanent taking of 100 feet of airspace for the use of airplane travel." (App. Br. 23.) But the use of airspace for overflights does not constitute a *per se* physical taking. The Minnesota Supreme Court has indicated that it views *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), as the principal persuasive—if not controlling—authorities regarding takings claims arising from aircraft overflights. In *Alevizos I*, the Minnesota Supreme Court reasoned that "[a]ny discussion of whether inverse condemnation should be anchored to a

nuisance theory, a trespass theory, a trespass theory with a new look, or on some combination of these theories should be preceded by a summary of" *Causby* and *Griggs*. 216 N.W.2d at 658. Thus, in *Alevizos I*, the Minnesota Supreme Court articulated the proper legal test for takings claims arising from aircraft overflights based on the Court's interpretation of *Causby* and *Griggs*.

In *Causby*, the United States Supreme Court explained that airspace is a "public highway" and that the "ancient doctrine" that "ownership of the land extended to the periphery of the universe . . . has no place in the modern world." 328 U.S. at 260–61. *Causby* held that "flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. When Justice Douglas, the author of *Causby*, later described the case in *Griggs*, he explained that the *Causby* decision "held that the United States by low flights of its military planes over a chicken farm *made the property unusable for that purpose* and that therefore there had been a 'taking', in the constitutional sense, of an air easement for which compensation must be made." 369 U.S. at 88 (emphasis added). Similarly, when describing *Causby* in *Penn Central*, the Supreme Court stated that it had held "that direct overflights above the claimant's land, *that destroyed the present use of the land as a chicken farm*, constituted a 'taking.'" 438 U.S. at 128 (emphasis added).

Causby and *Alevizos I* demonstrate that the mere existence of aircraft overflights does not constitute a *per se* physical-invasion taking of property under the U.S. or Minnesota constitutions. Appellants must meet the legal tests set forth in *Causby* or *Alevizos I* to establish a taking. But they have failed to meet either of those standards.

C. Because Appellants' claim for "Airport Hazard Taking" was previously dismissed and their previous appeal failed, they are precluded from litigating the claim for a second time.

Count Three of the complaint alleged an "Airport Hazard Taking." (Compl. ¶¶ 29–38.) The complaint alleged that "[t]he use of the property by Interstate . . . constitutes an airport hazard that is not consistent with reasonable standards of safety." (Compl. ¶ 33.) The district court dismissed the "airport hazard" claim because it is untenable under Minnesota law. (RA0020–21.) The district court certified its order and entered final, partial judgment under Rule 54.02. This Court dismissed the appeal because Appellants filed it too late. (RA0022–25.) Yet Appellants continue to argue that a taking occurred due to "the increased risks created by operating aircraft over the Property, a risk that did not exist prior to the zoning changes, could catastrophically impact the Property at any time." (App. Br. 19.) Appellants may not litigate this claim for a second time. The claim lacks a basis in law, notwithstanding the inapt hyperbole of Appellants' references to the leak from the Deepwater Horizon oil well in the Gulf of Mexico. (App. Br. 9, 19.)

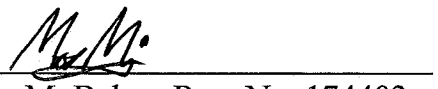
CONCLUSION

Respondents request that this Court affirm the district court's decision that Appellant's two remaining claims—(1) the regulatory-taking claim under *Penn Central* against the City of Bloomington, and (2) the inverse-condemnation claim based on noise generated by aircraft operations under *Alevizos* against the MAC—fail as a matter of law.

Respectfully submitted,

Dated: July 16, 2010

GREENE ESPEL P.L.L.P.



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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 11,328 words.

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