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Case No. A09-969

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State of Minnesota  
**In Supreme Court**

Leon S. DeCook and Judith M. DeCook,

*Respondents,*

v.

**Rochester International Airport Joint Zoning Board,**

*Appellant.*

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**BRIEF AND APPENDIX OF APPELLANT ROCHESTER  
INTERNATIONAL AIRPORT JOINT ZONING BOARD**

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**MALKERSON GUNN MARTIN LLP**

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

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

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

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

*Attorneys for Appellant Rochester  
International Airport Joint Zoning Board*

*[continued on next page]*

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**FAEGRE & BENSON LLP**

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

*Attorneys for Amicus Curiae  
Metropolitan Airports Commission*

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

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

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

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

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

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

**LEAGUE OF MINNESOTA CITIES**

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

*Attorney for Amicus Curiae  
League of Minnesota Cities*

**MINNESOTA ATTORNEY  
GENERAL**

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

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

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## STATEMENT OF THE ISSUES

### Appellant's Petition for Review

1. When an appellate court recognizes that “*Penn Central* governs regulatory-taking analysis,” should the court proceed to declare that an ordinance amounted to a regulatory taking without applying the three *Penn Central* factors to the facts of the case?

Answer: No.

After trial, the district court concluded that the evidence did not support a regulatory taking under *Penn Central*. (Add. 6–12.) The court of appeals reversed. (Add. 20–22.) This Court granted review.

#### Apposite Legal Authorities:

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

*Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998)

*Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996)

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

2. In light of this Court's instruction that the “primary focus of the inquiry” for a regulatory-taking claim is on “the severity of the burden that government imposes on private property rights,”<sup>1</sup> may an appellate court declare that an ordinance resulted in a regulatory taking without applying any recognized legal test for the severity of the economic burden?

Answer: No.

After trial, the district court concluded that the economic impact of the ordinance on the property does not support the regulatory-taking claim. (Add. 8.) The district court found that “the ordinance does not significantly impact the market value of the DeCooks' property as a whole,” and that a six-percent decrease in the market value of the DeCooks' property is “a minimal diminution in value.” (Add. 8.) The court of appeals reversed and directed that DeCooks should prevail, declaring that the “unequal burden” of the ordinance “resulted in a diminution of \$170,000 in the fair market value of [DeCooks'] property with no commensurate benefit,” and that

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<sup>1</sup> *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 (Minn. 2007) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)).

“it is manifestly unfair to require [DeCooks] to sustain the diminution in market value without just compensation.” (Add. 22.) This Court granted review.

Apposite Legal Authorities:

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

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

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

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

3. Where a jury’s verdict and undisputed facts found by the district court established that the ordinance caused a six-percent decrease in value of the property, should an appellate court conclude—under any recognized legal theory—that the ordinance constituted a regulatory taking?

Answer: No.

After trial, the district court concluded that the 2002 Airport Zoning Ordinance did not effect a regulatory taking of DeCooks’ Property. (Add. 7–12.) The district court found that a six-percent decrease in the market value of the DeCooks’ property is “a minimal diminution in value.” (Add. 8.) The court of appeals reversed. (Add. 22.) This Court granted review.

Apposite Legal Authorities:

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

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

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

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

**Respondents’ Request for Cross-Review**

1. Whether *Penn Central* or *McShane* governs the analysis of the regulatory-taking claim, both generally and under the law-of-the-case doctrine.

Answer: The current meaning of *Penn Central* governs the analysis of regulatory-takings claims.

The district court concluded that the evidence did not support a regulatory taking under *Penn Central*. (Add. 12.) Reversing, the court of appeals recognized that

“*Penn Central* governs regulatory-taking analysis” (Add. 20), but failed to apply the three *Penn Central* factors. Instead, the court of appeals stated that the law-of-the-case doctrine established that the ordinance “is designed to benefit a specific government enterprise within the meaning of *McShane*.” (Add. 21.) This Court granted review.

Apposite Legal Authorities:

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

*Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998)

*McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980)

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

**STATEMENT OF THE CASE**

On September 7, 2005, Leon S. DeCook and Judith M. DeCook (“DeCooks”) brought an inverse condemnation claim against the Rochester International Airport Joint Zoning Board, alleging that its airport zoning ordinance amounted to a regulatory taking of their property. On September 18, 2006, the Honorable Debra A. Jacobson, Judge of Olmsted County District Court, Third Judicial District of Minnesota, issued an order granting the Board’s motion for summary judgment and dismissing DeCooks’ complaint. DeCooks appealed. On July 31, 2007, the Minnesota Court of Appeals reversed the order granting summary judgment and remanded for further proceedings. On October 24, 2007, this Court denied the Board’s petition for review.

The district court held a jury trial on November 3 through 6, 2008. At the conclusion of the trial, the Jury found that the 2002 Airport Zoning Ordinance caused a decrease in the fair market value of the DeCooks’ Property in the amount of \$170,000. On February 27, 2009, the district court issued its Findings of Fact, Conclusions of Law,

and Order, concluding that the 2002 Ordinance did not effect a regulatory taking of DeCooks' Property. On March 30, 2009, the district court entered judgment in favor of the Board. DeCooks initiated an appeal on May 28, 2009. On May 11, 2010, the Minnesota Court of Appeals reversed and remanded for entry of judgment in favor of DeCooks. On June 29, 2010, this Court granted the petition for review.

### STATEMENT OF FACTS

DeCooks own 240 acres of land north of the Rochester International Airport. DeCooks purchased the 240 acres of land ("Property") in 1989. (Add. 3, ¶ 3; Tr. 59–60, 84–85.) DeCooks' total purchase price for the 240-acre Property was \$159,000. (Add. 3, ¶ 3; Tr. 85–86.) DeCooks operate Oak Summit Golf Course on the Property. (Tr. 55–57, 61, 87.) DeCooks were aware that the Rochester International Airport ("Airport") was next to the Property and that the approach path for one runway was over a portion of the Property when they purchased it in 1989. (Tr. 86–87.)

The Property is subject to zoning regulations by Olmsted County, the City of Rochester, and the Rochester International Airport Joint Zoning Board (the "Board"). When DeCooks purchased the Property in 1989, approximately 19 acres of it were subject to Safety Zone A of the Board's Airport Zoning Ordinance #3, which had been enacted in 1982 ("1982 Ordinance"). (Add. 3, ¶ 4; Tr. 69, 79, 87, 249–50.) The Board has authority to enact such an ordinance under Minn. Stat. § 360.063. (Add. 2, ¶ 1.) The 1982 Ordinance established safety zones in relation to the Airport. The safety zones have decreasing levels of land use restrictions, ranging from Safety Zone A, which is most restrictive, to Safety Zone C, which is less restrictive. (Minn. Rules 8800.2400,

Subp. 5–6.) Safety Zone A extends from the end of the runway in the shape of an isosceles trapezoid. (App. 1; Tr. 272.)

On September 18, 2002, the Board enacted Airport Zoning Ordinance #4 (“2002 Ordinance”). (Add. 3, ¶ 6; App. 4–30.) The 2002 Ordinance widened the preexisting isosceles trapezoid of Safety Zone A. (Tr. 272; App. 1.) The expansion of Safety Zone A will allow the corresponding runway, Runway 02/20, to be used as a precision instrument runway. (Tr. 219–20, 242–43.) A precision instrument approach zone must be wider than a non-instrument approach zone. *See* Minn. Rules 8800.2400, Subp. 3(D)–(E); Minn. Rules 8800.1200, Subp. 5(D)–(E). A precision instrument runway approach is designed to make it safer for airplanes to land in adverse weather conditions, where less visibility exists. (Tr. 219–20.) By enacting the 2002 Ordinance, the Board brought the zoning relative to Runway 02/20 in accord with the precision instrument runway shown in the Master Plan for the Airport. (Tr. 219.)

The 2002 Ordinance designates about 47 acres of the Property subject to Safety Zone A. (Add. 3, ¶ 7.1.) DeCooks’ other 193 acres of land are not subject to the Safety Zone A restrictions. The 2002 Ordinance added approximately 28 acres of the Property to Safety Zone A, in addition to the 19 acres that already were subject to Safety Zone A under the 1982 Ordinance. (Add. 3, ¶ 7; App. 1; Tr. at 249–50, 350, 378.) Those 28 acres contain dense trees, moderate to steep slopes, and a drainage way. (Add. 3, ¶ 7; App. 3; Tr. 104, 176, 350–51.) The ravine in Safety Zone A is visible in aerial photographs of the Property. (App. 1–2.)

Land within Safety Zone A of the 2002 Ordinance may “contain no buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards, and shall be restricted to those uses which will not create, attract, or bring together an assembly of persons thereon.” (App. 16, ¶ B.2.) Permitted land uses within Safety Zone A include “agriculture (seasonal crops), horticulture, animal husbandry, raising of livestock, wildlife habitat, lighted outdoor recreation (non-spectator), cemeteries, and automobile parking.” *Id.* Residential dwellings are prohibited with Safety Zone A. *Id.* The 2002 Ordinance does not prohibit the construction of roadways or automobile parking facilities on land subject to Safety Zone A. (Tr. 89, 194, 246, 376.)

During trial, the only expert opinion concerning the value of the whole 240-acre Property before the 2002 Ordinance was \$2,770,000. (Tr. 376–77; Add. 7, ¶¶ 21–22.) Mr. DeCook, who is not qualified as an expert real estate appraiser, testified that he thought that the value of his 240 acres before the 2002 Ordinance was about \$4,800,000. (Tr. 80–81; Add. 7, ¶ 23.) At the conclusion of the trial, the Jury found that the 2002 Ordinance caused a decrease in the fair market value of the Property in the amount of \$170,000. (Add. 4, ¶ 10.) The district court concluded that the 2002 Ordinance did not effect a regulatory taking of DeCooks’ Property. (Add. 7–12.) The district court analyzed the overall initial value of the property and the value taken from the property by the ordinance, concluding that “the ordinance does not significantly impact the market value of the DeCooks’ property as a whole.” (Add. 8.) The district court found that a “6.14% or 3.5% decrease in the market value of the DeCooks’ property is a minimal diminution in

value.” (Add. 8.) The district court also determined that the 2002 Ordinance did not interfere with any distinct investment-backed expectations that DeCooks had for the Property (Add. 9), and that the character of the governmental action did not support a regulatory taking (Add. 11). The district court entered judgment in favor of the Board.

The court of appeals reversed the district court’s judgment. The court of appeals stated that “*Penn Central* governs regulatory-taking analysis” (Add. 20), but did not apply the three-part *Penn Central* analysis. The court of appeals declared that the “unequal burden” of the ordinance “resulted in a diminution of \$170,000 in the fair market value of [DeCooks’] property with no commensurate benefit.” (Add. 22.) The court of appeals stated that “it is manifestly unfair to require [DeCooks] to sustain the diminution in market value without just compensation.” (Add. 22.)

This Court granted review. (Add. 26.)

### **SUMMARY OF LEGAL ARGUMENT**

This Court should reverse the court of appeals’ decision and reinstate the district court’s judgment that the 2002 Ordinance did not effect a regulatory taking of DeCooks’ Property. To determine whether a regulation goes “too far” and amounts to a taking, the proper legal analysis must involve the flexible, three-factor balancing test of *Penn Central*. The appropriate focus is on the severity of the burden that a regulation imposes upon private property rights. First, the 2002 Ordinance did not result in the serious economic impact on the Property necessary to constitute a regulatory taking. Evaluating the economic impact here—in light of the \$170,000 decrease in market value that the 2002 Ordinance caused, and viewing \$2,770,000 as the Property’s overall initial value—

the Property had a 6.14% decrease in value. A decrease in the market value of the Property from \$2,770,000 to \$2,600,000 as a result of the 2002 Ordinance does not amount to a serious economic impact. With only a 6.14% decrease in market value, DeCooks have not suffered a serious economic impact to the value of their Property as a result of the 2002 Ordinance. DeCooks paid \$159,000 to acquire the Property, and it is now a multi-million-dollar property, even after the 2002 Ordinance. Second, the 2002 Ordinance did not interfere with any distinct, investment-backed expectations that DeCooks had for the Property. DeCooks may continue to use the Property for their golf course. Third, the character of the government action is inconsistent with finding a regulatory taking. The Ordinance is designed to protect public safety. Although properties near the Airport may be burdened by the Ordinance's restrictions, the properties all benefit from the restrictions so that the Airport may operate safely in the neighborhood. Regulations that protect public safety related to the Airport have reciprocal benefits to properties in the vicinity, which have an advantageous location near the Airport.

The court of appeals failed to consider and balance the three *Penn Central* factors. The bright-line "enterprise" test that the court of appeals applied conflicts with more recent decisions interpreting *Penn Central* and is inappropriate for the analysis of regulatory-takings claims. The court of appeals' decision should be reversed and the district court's judgment should be reinstated.

## STANDARD OF REVIEW

Whether a taking has occurred is a question of law, which this Court reviews de novo. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 642 (Minn. 2007); *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 551 (Minn. 1996). “On appeal, a trial court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). If reasonable evidence exists to support the district court’s findings of fact, an appellate court will not disturb them. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

## LEGAL ARGUMENT

### **I. THE *PENN CENTRAL* FACTORS PROVIDE THE FRAMEWORK FOR ANALYZING A REGULATORY-TAKING CLAIM.**

#### **A. DeCooks’ regulatory-taking claim must turn on the three factors of *Penn Central*.**

This case presents a question about the “limited circumstances” in which “government regulation of property may result in a taking.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007). Regulation necessarily entails “the adjustment of rights for the public good,” and “[o]ften this adjustment curtails some potential for the use or economic exploitation of private property.” *Wensmann*, 734 N.W.2d at 632 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)). A taking may result when the government “goes ‘too far’ in its regulation, so as to unfairly diminish the value of the individual’s property, thus causing the individual to bear the burden rightly borne by the public.” *Wensmann*, 734 N.W.2d at 632 (quoting *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998)). The inquiry in regulatory-takings cases often is

“how to discern how far is ‘too far.’” *Wensmann*, 734 N.W.2d at 632 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)). The simple answer here is that a regulation does not go “too far” when it causes a six-percent decrease in the value of a property. This Court should reverse the court of appeals’ decision.

The doctrine of regulatory takings “aims to identify regulatory actions that are functionally equivalent to the classic taking” in which government directly appropriates private property or ousts the owners from their domain. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, --- U.S. ---, 130 S. Ct. 2592, 2601 (2010) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). Not all government regulations that limit property rights constitute regulatory takings. “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). Government 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*, 444 U.S. at 65 (emphasis in original).

This case does not present a claim for a “classic taking” in which government directly appropriates private property for public use; DeCooks have not alleged a physical taking or presented any evidence to support a physical taking. Instead, this case presents a regulatory-taking claim where the alleged interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the

common good.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also *Wensmann*, 734 N.W.2d at 632 (“government regulation—by definition— involves the adjustment of rights for the public good”) (quoting *Andrus*, 444 U.S. at 65). Again, the analysis of a regulatory taking-claim seeks to identify regulations that are “functionally equivalent to the classic taking” in which government directly appropriates private property. *Lingle*, 544 U.S. at 539. In *Penn Central*, the Court identified “several factors that have particular significance” in the analysis of regulatory-takings claims. *Wensmann*, 734 N.W.2d at 632. 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. 734 N.W.2d at 632–33. Whether the *Penn Central* test is satisfied and a taking exists is a question of law. *Id.* at 642. The three *Penn Central* factors afford the “best analytic framework” for determining whether a regulation goes “too far” and amounts to a taking. *Id.* at 633.

*Wensmann* observed that this Court has “used the *Penn Central* framework in other cases to analyze takings claims arising under the U.S. and Minnesota Constitutions.” 734 N.W.2d at 632. This Court has described the *Penn Central* approach as “flexible, with the factors often being balanced.” *Wensmann*, 734 N.W.2d at 633. In *Westling v. County of Mille Lacs*, this Court explained 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). Similarly, in *Zeman v. City of Minneapolis*, this 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).

**B. The United States Supreme Court’s 2005 clarification of takings law demonstrates that this case must be governed by *Penn Central*.**

Because the “language of the Takings Clause in the Minnesota Constitution is similar to the Takings Clause in the U.S. Constitution,” this Court has “relied on cases interpreting the U.S. Constitution’s Takings Clause in interpreting this clause in the Minnesota Constitution.” *Wensmann*, 734 N.W.2d at 631–32. In *Lingle*, a unanimous United States Supreme Court provided a comprehensive and coherent restatement of the purpose and effect of the takings clause. 544 U.S. at 536–40. The Court identified four discrete types of takings claims. The first two involve “categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.” *Id.* at 538. First, “where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). “A second categorical rule applies to regulations that completely deprive an owner of “*all* economically beneficial us[e]” of her property.” *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). *Lingle* then explained that “[o]utside these two relatively narrow categories (and the special context of land-use exactions discussed below, *see infra*, at 546–548) regulatory takings are governed by the standards set forth in *Penn Central*....” 544 U.S. at 538. Fourth, the “special context of land-use exactions,” includes only “challenges to adjudicative land-use exactions—specifically, government demands that a

landowner dedicate an easement allowing public access to her property as a condition to obtaining a development permit.” *Id.* at 546 (citing *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

Here, by process of elimination, *Lingle* dictates that DeCooks’ takings claim must be “governed by the standards set forth in” *Penn Central*. 544 U.S. at 538. DeCooks never alleged a physical taking of their Property, so any such claim has been waived. Nor have DeCooks attempted to prove a *Lucas* claim by demonstrating that the Ordinance deprived them of “all economically beneficial use” of their Property. *Lucas*, 505 U.S. at 1019. And this case it is not within “the special context of land-use exactions” as defined in *Lingle*. 544 U.S. at 538, 546. *Penn Central* governs DeCooks’ claim. The United States Supreme Court’s current takings jurisprudence simply does not recognize any additional type of regulatory-takings claim. *See Lingle*, 544 U.S. at 548 (“we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a ‘physical’ taking, a *Lucas*-type ‘total regulatory taking,’ a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.”).

**C. The court of appeals erred by failing to balance the *Penn Central* factors.**

This Court should reverse the court of appeals’ decision because it failed to balance the *Penn Central* factors. The court of appeals recognized that “*Penn Central* governs regulatory-taking analysis.” (Add. 20.) But the court of appeals did not apply the three-part *Penn Central* analysis before declaring that the ordinance resulted in a

regulatory taking of the Property. (Add. 22.) Instead, the court of appeals' decision reflects a rule—which the United States Supreme Court has rejected—that “there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the [regulation].” *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 320 (2002) (rejecting petitioners' proposed rule). The court of appeals' failure to analyze the regulatory-taking claim under *Penn Central* constituted reversible error. The “polestar” for regulatory-takings claims “remains the principles set forth in *Penn Central*.” *Tahoe-Sierra*, 535 U.S. at 327 n.23 (citation omitted).

The court of appeals neglected to apply the “flexible,” three-factor balancing test of *Penn Central*. *Wensmann*, 734 N.W.2d at 633. Instead, the court of appeals relied on the law-of-the-case doctrine to find a regulatory taking here by applying a bright-line test, citing *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). The court of appeals interpreted its prior decision, *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, No. A06-2170, 2007 WL 2178046 (Minn. Ct. App. July 31, 2007) (“*DeCook I*”), to require compensation to the landowner where the regulation “is designed to benefit a specific government enterprise within the meaning of *McShane*.” (Add. 21.) The bright-line test is irreconcilable with *Penn Central*, and the court of appeals erred by applying it. *See infra*, section III.

The court of appeals' application of the bright-line test found that a regulation causing a six-percent decrease in the value of a property is a taking. If such a bright-line

test were actually the law in Minnesota, it would disrupt land-use planning for airports and any other regulation that conceivably could be characterized as relating to a governmental enterprise. For instance, in *Wensmann* the property owner unsuccessfully contended that the city's effort to preserve parks and open space was a governmental enterprise. 734 N.W.2d at 641 n.14. *See also Wensmann Realty, Inc. v. City of Eagan*, No. A05-1074, 2006 WL 1390278, at \*3 n.3 (Minn. Ct. App. May 23, 2006) ("The denial of the application here was not solely to benefit a 'government enterprise.'"). Using the court of appeals' bright-line test "would transform government regulation into a luxury few governments could afford." *Tahoe-Sierra*, 535 U.S. at 324.

**D. This Court is not bound to perpetuate the court of appeals' earlier error in failing to apply *Penn Central*.**

The law-of-the-case doctrine does not preclude this Court from recognizing that the court of appeals erred by failing to analyze the regulatory-taking claim under *Penn Central*. This Court has held that "even though the court of appeals adhered to the law of the case based on its earlier holding, the law of the case doctrine does not preclude *our* review of issues decided by the court of appeals in" an earlier appeal. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 66 (Minn. 2004) (emphasis added).<sup>2</sup> The Board has met the requirement that a petitioner have sought review in the first appeal of any issue that it seeks to raise in a later appeal. *See Peterson*, 675 N.W.2d at 66–68. Following *DeCook I*,

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<sup>2</sup> With respect to a preemption issue under the Federal Insecticide, Fungicide, and Rodenticide Act, in *BASF Corp. v. Peterson*, 544 U.S. 1012 (2005), the United States Supreme Court granted the writ of certiorari, vacated the judgment, and remanded for reconsideration. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 473 (Minn. 2006). It did not affect this Court's discussion of the law-of-the-case doctrine in *Peterson*, 675 N.W.2d at 66.

the Board's 2007 petition for review directly raised the issue concerning *McShane*. (App. 34–38.) The law-of-the-case doctrine does not limit this Court's review of the legal issues.

Moreover, since *DeCook I* cited *Wensmann*, the law of the case includes *Wensmann*. As a procedural matter, *DeCook I* simply reversed the district court's decision to grant summary judgment to the Board because "the district court should have determined whether there was a genuine issue of material fact" concerning the diminution in the market value of DeCooks' Property. *DeCook I*, 2007 WL 2178046, at \*4. Because the court of appeals found a fact issue and remanded for trial, *DeCook I* did not have occasion to address all three *Penn Central* factors as *Wensmann* required. *DeCook I* acknowledged *Wensmann* and noted that *McShane*'s concern with an "unfairly unequal distribution of the regulatory burden" may be considered under the third character factor of *Penn Central* "and then balanced along with the other relevant factors." *DeCook I*, 2007 WL 2178046, at \*3 n.2 (quoting *Wensmann*). Thus, *DeCook I* is not necessarily inconsistent with *Wensmann*'s directive to apply the three *Penn Central* factors to regulatory-takings claims. In *DeCook II*, the court of appeals failed to interpret *DeCook I* in light of *Wensmann*. The court of appeals' decision should be reversed and the district court's judgment should be reinstated.

## II. THE ORDINANCE DID NOT RESULT IN A REGULATORY TAKING OF DECOOKS' PROPERTY.

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

The \$170,000 decrease in the value of DeCooks' \$2,770,000 property—which is a six-percent decrease in value—does not constitute a serious economic impact that amounts to a regulatory taking. Under *Penn Central*, the focus of the taking inquiry is “the severity of the burden that government imposes upon private property rights.” *Wensmann*, 734 N.W.2d at 633 (quoting *Lingle*, 544 U.S. at 539). 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*, 444 U.S. at 66). Rather, the “economic impact” criterion of *Penn Central* requires that DeCooks “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)). This Court in *Zeman* stated that the property owner must demonstrate that “the regulation has resulted in a severe economic loss” to establish a taking. *Zeman*, 552 N.W.2d at 553 (citation omitted). *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (“governmental land-use regulation may under extreme circumstances amount to a ‘taking’ of the affected property”). “[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).

To analyze the magnitude of a regulation’s economic impact, the Court considers the “value taken from the property by regulatory action against the overall initial value.” *Wensmann*, 734 N.W.2d at 634 n.7 (quotation omitted). Put differently, the Court should “compare the value that has been taken from the property with the value that remains in the property.” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987). *See also Brace v. United States*, 72 Fed. Cl. 337, 349–50 (Fed. Cl. 2006) (explaining that economic analysis of a taking claim is viewed “in the form of a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered.”); *Maritrans Inc. v. United States*, 51 Fed. Cl. 277, 282 (Fed. Cl. 2001) (stating that economic impact is “determined by a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered”). The analysis must focus on DeCooks’ whole 240-acre property. *See Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003) (stating that for the analysis of regulatory takings, courts must focus on “the nature and extent of the interference with rights in the parcel as a whole”) (citing *Penn Central*); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998) (stating that when deciding whether a regulatory taking exists, courts look at the “nature and extent of the interference with rights in the parcel as a whole”) (citing *Penn Central*). *See also Tahoe-*

*Sierra*, 535 U.S. at 331 (“in regulatory takings cases we must focus on “the parcel as a whole”) (citing *Penn Central*).

The Jury found that the 2002 Ordinance caused a decrease in the fair market value of DeCooks’ Property in the amount of \$170,000. The only expert opinion offered regarding the value of the 240-acre property before the 2002 Ordinance was \$2,770,000. Thus, the Property had a 6.14% decrease in value, given the Jury’s verdict of \$170,000 as the decrease in value, and viewing \$2,770,000 as the overall initial value. Put another way, the Property retained 93.86% of its value after the 2002 Ordinance.

With only a six-percent decrease in market value, DeCooks have not suffered a severe economic impact to the value of their property as a result of the 2002 Ordinance.<sup>3</sup> A decrease in value of the Property from \$2,770,000 to \$2,600,000 does not amount to a serious economic impact. The Supreme Court has declined to find a regulatory taking where the diminution of value was 46%. *See Concrete Pipe*, 508 U.S. at 645 (holding that 46% diminution in value resulting from pension plan regulation did not support a compensable taking). Courts generally require “diminutions well in excess of 85 percent before finding a regulatory taking.” *Walcek v. United States*, 49 Fed. Cl. 248, 271 (Fed. Cl. 2001). For instance, in *Maritrans Inc. v. United States*, the Federal Circuit found that a 13.1% reduction in economic value was not enough of a diminution to

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<sup>3</sup> The economic-impact factor weighs even less in favor of a taking when considering Mr. DeCook’s lay opinion that the value of the Property before the 2002 Ordinance was \$4,800,000. (Tr. 80–81.) Viewing \$4,800,000 as the overall initial value, in light of the \$170,000 decrease in value, the percent decrease would be 3.5%. The district court correctly concluded that DeCooks’ taking claim fails under the economic-impact factor because a 3.5% or 6.14% decrease in market value is a minimal decrease. (Add. 8, ¶ 25.)

indicate that the plaintiff was carrying an undue portion of the burden created when the double hull requirement of the Oil Pollution Act of 1990 rendered the plaintiff unable to use its single hull tank barges. 342 F.3d 1344, 1358 (Fed. Cir. 2003). Other cases reject takings claims where the economic impact is a five- or ten-percent decrease in value. *See, e.g., Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1275 (Fed. Cir. 2009) (rejecting taking claim and stating that there is “no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking”), *cert. denied*, 130 S.Ct. 1501 (2010); *Bass Enterprises Production Co. v. United States*, 54 Fed. Cl. 400, 404 (Fed. Cl. 2002) (rejecting taking claim where “plaintiffs’ economic impact is five percent of the value of their property”), *aff’d*, 381 F.3d 1360 (Fed. Cir. 2004). Here, a six-percent decrease in value is not a sufficiently severe or serious loss to equal a regulatory taking. Because the record does not show a serious economic impact, DeCooks have not established a regulatory taking.

The court of appeals failed to use any recognized method for analyzing the economic impact of the 2002 Ordinance. The court of appeals simply declared that the “unequal burden” of the ordinance “resulted in a diminution of \$170,000 in the fair market value of [DeCooks’] property with no commensurate benefit,” and that “it is manifestly unfair to require [DeCooks] to sustain the diminution in market value without just compensation.” (Add. 22.) Rather than comparing the decrease in value to the overall initial value of the Property as directed by *Wensmann*, 734 N.W.2d at 634 n.7, the court of appeals viewed the \$170,000 number in isolation, without reference to any baseline. As the dissent correctly observed, “[t]here is no precedent for the method of measuring

economic impact that is used in the opinion of the court, which merely looks at the number of dollars of diminished value.” (Add. 24.) The regulatory-takings analysis does not look at a number in the abstract. The number reflecting the decrease in value caused by the regulation must be considered in relation to the property’s overall initial value. *Wensmann*, 734 N.W.2d at 634 n.7. Otherwise, courts have no principled method for weighing the legal consequence of the number. The court of appeals failed to apply any proper method for analyzing the economic impact of the regulation.

The court of appeals also neglected to identify any serious economic impact to the market value of the Property. The district court appropriately concluded that “the ordinance does not significantly impact the market value of the DeCooks’ property as a whole,” and that a “6.14% or 3.5% decrease in the market value of the DeCooks’ property is a minimal diminution in value.” (Add. 8, ¶ 25.) The court of appeals provided no principled legal basis for reversing the district court’s sound conclusion. Instead, the court of appeals declared that because of an “unequal burden, it is manifestly unfair to require [DeCooks] to sustain the diminution in market value without just compensation.” (Add. 22.) The dissent accurately observed that “there is no precedent for the principle that a diminution in value of only six percent is enough to allow the conclusion that a compensable regulatory taking has occurred.” (Add. 25.) This Court has indicated that the “primary focus of the inquiry” for a regulatory-taking claim is on “the severity of the burden that government imposes on private property rights.” *Wensmann*, 734 N.W.2d at 633 (quoting *Lingle*, 544 U.S. at 539). The court of appeals lost this “primary focus” and failed to explain why the Ordinance imposes any severe burden on the Property here.

“[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” *Lingle*, 544 U.S. at 540. A six-percent decrease in the value of the Property caused by the Ordinance does not constitute the type of serious economic impact that amounts to a regulatory taking.

Furthermore, it is less likely that a regulatory taking has occurred here because DeCooks will be able to recoup their investment in the Property even after the 2002 Ordinance. This Court has recognized that another method for measuring the economic impact of a regulation is to consider “the claimant’s ability to recoup its capital.” *Wensmann*, 734 N.W.2d at 634 n.7 (quotation omitted). 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)). See also *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.”). *Wensmann* cited *Florida Rock* with approval. 734 N.W.2d at 635–37. This Court also favorably cited *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999), for the proposition that the “property owner’s takings claim was undermined by the fact that the property’s value had almost tripled since the purchase, despite the challenged regulatory restraint.” 734 N.W.2d at

636. In *Forest Properties*, the court found that despite the challenged regulatory restraint, the value of the subject property increased more than three-fold in 11 years “itself undermines Forest’s contention that its property was taken.” 177 F.3d at 1367. Thus, a property owner’s return on investment is relevant to the takings analysis.

The record shows that DeCooks will be able to recoup their capital investment in the Property, and much more, even after the Board enacted the 2002 Ordinance. DeCooks’ total purchase price for the 240-acre Property was \$159,600. (Add. 3, ¶ 3.) DeCooks acquired the 240-acre Property in two purchases: (1) 217 acres from Joseph More and Shirley More on July 11, 1989, for \$120,000; and (2) 23 acres from the Sportsmen’s Recreation Club on December 22, 1989, for \$39,600. (Add. 3, ¶ 3; Tr. 85–86.) Even after the 2002 Ordinance, DeCooks likely will be able to recoup far more than their \$159,600 investment in the property. *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”). DeCooks’ potential return on investment further undermines their regulatory-taking claim.

**B. Since the Ordinance does not interfere with distinct investment-backed expectations, it 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*). 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)).

DeCooks failed to prove that the 2002 Ordinance interfered with any distinct and reasonable investment-backed expectations in a manner that requires compensation. At trial, as the district court accurately observed, "DeCooks did not demonstrate any specific investment in the property in support of their expectations." (Add. 9, ¶ 27.) DeCooks did not establish that they "made any specific investment in the property with the expectation" that they could develop the Property in a way that the 2002 Ordinance now

prohibits. *Wensmann*, 734 N.W.2d at 639. DeCooks could not have had reasonable investment-backed expectations for comprehensive development on the part of the Property that is subject to Safety Zone A. When DeCooks purchased the Property, it already was subject to Safety Zone A of the 1982 Ordinance. (Tr. 59–60, 84–85, 87.) DeCooks lacked distinct investment-backed expectations that a portion of the Property would be unencumbered by Zone A restrictions. The 28 acres that the 2002 Ordinance added to Safety Zone A contain steep slopes and a drainage way. (Add. 3, ¶ 7; Tr. 104, 176, 350–51.) DeCooks failed to demonstrate any reasonable expectation for developing that area of the Property. Indeed, DeCooks have not submitted any application for a development on the Property other than their golf course. (Tr. 301.) Moreover, the 2002 Ordinance did not frustrate any investment-backed expectations because DeCooks may continue to use the Property for their golf course. *See, e.g., Penn Central*, 438 U.S. at 136 (finding that regulation did not interfere with appellants’ expectations for using 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 containing office space and concessions”); *Keystone*, 480 U.S. at 485 (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”). Because DeCooks did not establish any distinct and reasonable investment-backed expectations, the second *Penn Central* factor indicates that no taking exists.

**C. The character of the governmental 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). “[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).

Here, the actual burden imposed is Safety Zone A on approximately 47 acres of the 240-acre property. Under the 1982 Ordinance, approximately 19 acres were subject to Safety Zone A. (Add. 3, ¶ 7.1; Tr. 249–50.) The 2002 Ordinance added to Safety Zone A approximately 28 acres containing “dense trees, moderate to steep slopes, and a drainage way.” (Add. 3, ¶ 7; Tr. 104, 176, 350–51.) Land within Safety Zone A may “contain no buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards, and shall be restricted to those uses which will not create, attract, or bring together an assembly of persons thereon.” (App. 16, ¶ B.2.) Safety Zone A allows land uses such as “agriculture (seasonal crops), horticulture, animal husbandry, raising of livestock, wildlife habitat, lighted outdoor recreation (non-spectator), cemeteries, and automobile parking.” (*Id.*) DeCooks’ other 193 acres of land are not subject to the restrictions of Safety Zone A.

The burden of Safety Zone A is allocated among several properties in the neighborhood of the Airport. Safety Zone A exists off the end of all runways at the Airport. (App. 31–32.) The record shows that at least two properties off the same end of Runway 02/20 have been developed near the Airport by configuring the development so that the parking lot is in Safety Zone A and the building is outside of Safety Zone A. (Tr. 198–99, 227–28, 247–48.) Those developments arose even though portions of the properties were subject to Safety Zone A. The burden of the Ordinance is not unfairly allocated just on DeCooks’ Property. *See Wensmann*, 734 N.W.2d at 639.

Airport zoning ordinances benefit property owners near the Airport by helping to preserve the Airport as a community amenity, and thereby protect those properties’ advantageous location near the Airport. The Airport is a catalyst for development nearby. (Tr. 210, 226–27.) DeCooks acknowledge that the Airport is an advantage to their Property. (Add. 11, ¶ 31.) Since 1997, the Airport has been expanding and some of the growth has included non-aviation development, such as a hotel, restaurant, and office buildings. (Tr. 209–10.) Mr. DeCook testified about the advantages of owning property near the Airport and how he marketed the Property for sale as being close to the Airport. (Add. 11, ¶ 31; Tr. 99–101.) The “significant growth” of the Airport neighborhood “has been very beneficial” to the community. (Tr. 210.) While properties near the Airport may be burdened by the Ordinance’s restrictions, the properties all benefit from the restrictions that are placed on others so that the Airport may operate safely in the neighborhood. *See Keystone*, 480 U.S. at 491 (“While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on

others.”); *Zeman*, 552 N.W.2d at 554–55 (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.<sup>4</sup> See also *Penn Central*, 438 U.S. at 133 (“that the Landmarks Law has a more severe impact on some landowners than on others . . . in itself does not mean that the law effects a ‘taking’”). The character of the governmental action does not weigh in favor of finding a taking.

The court of appeals incorrectly based its conclusion on a presumed absence of the Airport’s benefits to the value of the Property. The court of appeals stated that DeCooks experienced a \$170,000 decrease in the market value of their Property “with no commensurate benefit.” (Add. 22.) In fact, the Board attempted to offer evidence of a benefit to the Property resulting from the Airport, but because of actions taken by DeCooks at trial, the jury’s verdict does not reflect that benefit. At trial, DeCooks successfully objected to the Board’s attempt to elicit from its expert appraiser his opinion about the benefits of the Airport to the market value of the Property. (Tr. 335–36, 382–85, 389.) As a result, the jury’s verdict reflects a \$170,000 decrease in value, unaffected by consideration of any benefits.

Furthermore, the character of the governmental action involved here does not indicate a taking because the Ordinance is a harm-prevention regulation. *Zeman* held that “[i]f the regulation is drawn to prevent harm to the public, broadly defined, and seems

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<sup>4</sup> *Wensmann* favorably cited *Keystone*. 734 N.W.2d at 634.

able to achieve this goal, then a taking has not occurred.” 552 N.W.2d at 554 (citing *Keystone*, 480 U.S. at 488–93). In *Zeman*, Minneapolis enacted an ordinance “designed to serve a legitimate public interest, deterring criminal activity in residential neighborhoods, by enlisting the aid of landlords.” 552 N.W.2d at 554. *Zeman* found no taking because the ordinance served a harm-prevention purpose. *Id.* at 555. The government may protect public safety by restricting certain uses on property:

Long ago it was recognized that “all property this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,” [citations omitted] and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

*Keystone*, 480 U.S. at 492–93. In *Keystone*, Pennsylvania “acted to arrest what it perceives to be a significant threat to the common welfare” to prohibit mining that causes damage to certain surface structures. 480 U.S. at 485. *Keystone* found no taking.

Here, the Ordinance is designed to protect public safety and prevent harm to users of the Airport and the surrounding properties. The expansion of Safety Zone A will allow Runway 02/20 to be used as a precision instrument runway, making it safer for airplanes to land in adverse weather conditions. (Tr. 219–20, 242–43.) The Ordinance recognizes that “[a]n airport hazard endangers the lives and property of users of the Rochester International Airport, and property or occupants of land in its vicinity.” (App. 8.) The Ordinance provides that an airport hazard is a “public nuisance,” (App. 8), which the police power may regulate. *Keystone*, 480 U.S. at 492 (“the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not

required compensation”). Like the situation in *Zeman* and *Keystone*, the character of the governmental action here weighs against finding a regulatory taking.

### III. DECOOKS DO NOT HAVE A TAKING CLAIM UNDER *MCSHANE*.

#### A. *McShane* is not a distinct Minnesota approach to takings claims.

DeCooks argued—and the court of appeals erroneously concluded—that the 2002 Ordinance effected a taking under *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). This Court has dispelled the notion that *McShane* provides a separate and independent legal test for regulatory takings. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641 n.14 (Minn. 2007). For many years, questions persisted about whether the *McShane* theory represented an independent basis for a regulatory-taking claim under Minnesota law. *Wensmann* rejected the view that *McShane* is a distinct Minnesota approach to regulatory-taking claims:

Some commentators have viewed the *McShane* analysis as a distinct Minnesota approach to takings claims. *See, e.g.*, 25 James R. Dorsey, Bradley J. Gunn & Marc D. Simpson, *Minnesota Practice-Real Estate Law* § 10.37 (Eileen M. Roberts ed., 2007) [additional citations omitted] . . . In this case, the district court concluded that the city’s denial of the comprehensive plan amendment, “in addition to being a taking under the *Penn Central* test, is also a taking under *McShane*.” We do not view the *McShane* analysis as different from or inconsistent with the flexible approach to takings adopted by the Supreme Court in *Penn Central*. Any unfairly unequal distribution of the regulatory burden may be considered in appropriate cases under the character factor of the *Penn Central* approach and then balanced along with the other relevant factors.

*Wensmann*, 734 N.W.2d at 641 n.14. In *Wensmann*, the district court had ruled on two legal claims, a *Penn Central* claim and a *McShane* claim. *See Wensmann Realty, Inc. v. City of Eagan*, No. 19-C4-04-010035, slip op. at 18 (Dakota County Dist. Ct. April 28,

2005). But this Court rejected the distinction between a *Penn Central* claim and a *McShane* claim, and directed that all three *Penn Central* factors must be balanced. *Wensmann*, 734 N.W.2d at 641 n.14. This Court also pointed out that “commentators have viewed the *McShane* analysis as a distinct Minnesota approach to taking claims.” *Id.* And this Court expressly rejected the notion that *McShane* is “different from or inconsistent with” *Penn Central*. *Id.* In short, *Wensmann* essentially folded *McShane* into *Penn Central*.

*Wensmann* confirmed that the three *Penn Central* factors govern the analysis of regulatory-taking claims under Minnesota law. All three factors of *Penn Central* must be considered in the question of whether a regulatory taking exists. If *McShane* remains useful at all, its concern about an unfair distribution of the regulatory burden may be considered under the character factor of *Penn Central*. *Wensmann*, 734 N.W.2d at 641 n.14. Then the character factor must be “balanced along with” the other two *Penn Central* factors. *Id.* “But the primary focus of the inquiry is on ‘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).

**B. The “enterprise” theory of *McShane* should be rejected because it provides no insight on whether the actual burden of a regulation goes “too far” and amounts to a taking.**

The “enterprise” theory of *McShane* should be rejected. While attempting to interpret *Penn Central*, *McShane* endorsed a “governmental enterprise” vs. “arbitration” distinction as a regulatory-takings theory, relying on an article that Professor Joseph Sax wrote in 1964. 292 N.W.2d at 258. *McShane* stated that “where a specific governmental

enterprise is involved, the burden of its activities falls on just a few individuals while the public as a whole receives the advantage of property rights for which it did not pay.” *Id.* In his article—written over forty-five years ago—Professor Sax had proposed that takings law distinguish between, on the one hand, instances in which the government acts in its enterprise capacity by acquiring resources for its own use, and, on the other, instances in which the government serves in an arbitral capacity by mediating disputes among property owners as to their consumption of resources. Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62–63 (1964). But, in a 1971 article, Professor Sax later repudiated the idea that the government always creates a taking when it acts in an enterprise capacity. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 150–51 (1971). When abandoning his “enterprise” theory, Professor Sax observed that takings questions are “considerably more complex.” 81 Yale L.J. at 150 n.5. Professor Sax explained that such regulations often are “better seen as an exercise of the police power in vindication of what shall be called ‘public rights.’” 81 Yale L.J. at 151. Contemporary legal scholars do not regard the “enterprise vs. arbitration” distinction as relevant to the regulatory-takings analysis in any respect. *See, e.g.*, John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Policy 171, 171–78 (2005). Scholars agree that *Penn Central* provides the best test for regulatory takings. *Zeman*, 552 N.W.2d at 552 n.3.

*McShane* did not purport to depart from *Penn Central*, but was simply trying to distill a legal test from *Penn Central* less than two years after that decision. Subsequently, however, the United States Supreme Court has interpreted *Penn Central* to stand for a

different, three-factor test for regulatory takings. Every more recent decision by this Court and the United States Supreme Court that articulates and applies the three-factor *Penn Central* test has implicitly cast a shadow over the continued vitality of *McShane*'s different "enterprise" theory for regulatory takings.

Just a year after *McShane*, this Court recognized that "the line between 'enterprise' and 'arbitration' is not always easy to discern." *Pratt v. State*, 309 N.W.2d 767, 773 (1981). *Pratt* wrestled with the question of whether a ban on mechanical wild rice harvesters served an arbitration or enterprise function. *Id.* The takings claim in *Pratt* was based on the State's reclassification of three lakes on the claimant's private property as public waters, which effectively banned the use of machines to harvest wild rice there. *Id.* *Pratt* concluded that the regulations served *both* the arbitration and enterprise function. *Pratt* saw arbitration because the regulations served "a conservation function by arbitrating among the competing wild rice harvesters" and "protecting a natural resource, wild rice, for the benefit of the public generally." *Id.* at 773–74. Yet *Pratt* also perceived an enterprise function. *Id.* at 773. *Pratt* explained that the principles for determining whether or not a regulation amounts a taking "must be applied with some flexibility," and that the inquiry requires an "examination of many significant factors." 309 N.W.2d at 774 (citing *Penn Central*).

The "enterprise" theory of *McShane* provides no principled legal basis to help courts determine whether the actual burden that a regulation imposes upon private

property rights “goes too far” and amounts to a taking.<sup>5</sup> The “enterprise” theory says nothing about “the severity of the burden that government imposes upon private property rights.” *Wensmann*, 734 N.W.2d at 633 (quoting *Lingle*, 544 U.S. at 539). The proper focus of the *Penn Central* inquiry is “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” *Lingle*, 544 U.S. at 540. The “enterprise” question provides no assistance for that inquiry.

The United States Supreme Court has confirmed that the “polestar” for analyzing a regulatory-taking claim “remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.” *Tahoe-Sierra*, 535 U.S. at 327 n.23 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-36 (2001) (O’Conner, J., concurring)). In the years following *Penn Central*, the Court continued to use the factors that *Penn Central* had identified. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (explaining that “ad hoc, factual” inquiry considered factors including “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”) (citations omitted). In the 1986 decision

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<sup>5</sup> When faced with a suggestion to apply the “enterprise” theory, the Maryland Supreme Court rejected the “enterprise” theory that Professor Sax had abandoned:

It is to be noted that the rule espoused by Professor Sax in his article at 74 Yale L.J. 36 (Sax I) treats any economic loss, unqualified as to degree, as a taking, if the loss results from an enterprise activity. . . . We give no weight to the [enterprise] theory . . . that any and all loss caused by the enterprise function of government is compensable as a taking. Professor Sax has disavowed that aspect of the theory he advanced in Sax I. *See Sax, Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971) (Sax II).

*Maryland Port Admin. v. QC Corp.*, 529 A.2d 829, 833 (Md. 1987).

*Connolly v. Pension Benefit Guaranty Corp.*, the Court enumerated for the first time the three factors that have “particular significance” in the regulatory-takings analysis: “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) ‘the character of the governmental action.’” 475 U.S. 211, 225 (1986) (quoting *Penn Central*). More recently, the Court explained that the analysis of regulatory takings “aims to identify regulatory actions that are functionally equivalent to the classic taking” in which government directly appropriates private property. *Lingle*, 544 U.S. at 539. The Court has not used the “enterprise” theory for such inquiries.

**C. Comparing the facts of *McShane* to the facts here, no taking exists.**

Setting aside the “enterprise” theory, *McShane* does not necessarily mean that all airport zoning ordinances automatically constitute a taking of property if a measurable decrease in value exists. Yet that is the essence of the court of appeals’ reasoning below. *McShane* specifically stated that it did “not hold that every landowner who is in some way limited or inconvenienced by [airport zoning] regulation is entitled to compensation.” 292 N.W.2d at 259. The facts of *McShane* are distinct from the facts here. The plaintiffs in *McShane* showed an approximate 69% decrease in their property’s value. 292 N.W.2d at 256. *McShane* explained that the plaintiffs’ experts had testified that the land was worth \$522,000 when put to its highest and best use, and that the airport zoning ordinance had caused a \$360,000 diminution in value. *Id.* Considering an initial value of \$522,000, and a diminution in value of \$360,000, the regulations reduced the

value of the land at issue in *McShane* by approximately 69%.<sup>6</sup> DeCooks' circumstances are not even close to those in *McShane*. DeCooks' Property had a six-percent decrease in value. (Add. 8.) The Ordinance did not impact DeCooks' Property "so substantially that it is manifestly unfair." *McShane*, 292 N.W.2d at 259. No taking exists here.

### CONCLUSION

Appellant Rochester International Airport Joint Zoning Board requests that this Court reverse the court of appeals' decision and reinstate the judgment ordered by the district court.

Respectfully submitted,

Dated: July 29, 2010

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



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

***Attorneys for Appellant Rochester  
International Airport Joint Zoning Board***

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<sup>6</sup> Dividing \$360,000 by \$522,000 equals 0.6896, which is approximately 69%. *McShane* stated that the decrease in value was "67 percent." 292 N.W.2d at 256. Either 67% or 69% is far, far greater than six percent.

## 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 10,179 words.



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Monte A. Mills