STATE OF MINNESOTA

IN SUPREME COURT

A09-969

Court of Appeals

Anderson, G. Barry, J.
Took no part, Stras, J.

Leon S. DeCook, et al.,

Respondents,

vs.

Filed: March 30, 2011
Office of Appellate Courts

Rochester International Airport Joint
Zoning Board,

Appellant.

Bradley J. Gunn, Howard A. Roston, Malkerson Gunn Martin, L.L.P., Minneapolis, Minnesota, for respondents.

Clifford M. Greene, John M. Baker, Monte A. Mills, Greene Espel P.L.L.P, Minneapolis, Minnesota, for appellant.

Susan L. Naughton, St. Paul, Minnesota, for amicus curiae League of Minnesota Cities.

Aaron D. Van Oort, Melina K. Williams, Faegre & Benson L.L.P., Minneapolis, Minnesota, for amicus curiae Metropolitan Airports Commission.

Lori Swanson, Attorney General, Erik M. Johnson, Assistant Attorney General, for amicus curiae State of Minnesota Commissioner of Transportation.

Lee A. Henderson, Hessian & McKasy, P.A., Minneapolis, Minnesota, for amici curiae Gordon D. Galarneau and Penny S. Galarneau.

Wm. Christopher Penwell, Anthony J. Gleekel, Mark Thieroff, Siegel, Brill, Greupner, Duffy & Foster, P.A., Minneapolis, Minnesota, for amici curiae Hampton K. O'Neill, Kelley McC. O'Neill, and James W. O'Neill.

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S Y L L A B U S

1. *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), governs whether an airport zoning board's decision to enact an ordinance creating runway safety zones that restrict land use is a regulatory taking under the Minnesota Constitution.

2. The Minnesota Constitution, Article I, Section 13, which states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor," provides greater protection for property owners than the Takings Clause of the U.S. Constitution, Amendment V.

3. Under *McShane* and the facts of and circumstances underlying this case, a $170,000 decrease in market value caused by an airport zoning ordinance establishing a runway Safety Zone A is a substantial and measurable diminution and must be compensated.

Affirmed and remanded.

O P I N I O N

ANDERSON, G. Barry, Justice.

This case arises from an airport zoning ordinance enacted in 2002 by appellant Rochester International Airport Joint Zoning Board. The ordinance increased the size of a runway safety zone that extended over property owned by respondents Leon S. and Judith M. DeCook. The ordinance also changed the restrictions within the safety zone to allow fewer land uses on the DeCooks' property and other land within the zone. The DeCooks alleged in an inverse-condemnation action that the Board's decision constituted a taking or damaging of private property for public use for which the DeCooks must be

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compensated. After trial, a jury found that the 2002 ordinance diminished the value of the DeCooks' land by $170,000. The district court concluded that the diminution of value determined by the jury did not constitute a taking as a matter of law and entered judgment in favor of the Board. The DeCooks appealed, and the court of appeals reversed. The Board appealed. We affirm the court of appeals and remand to the district court to enter judgment in favor of the DeCooks.

The DeCooks purchased 240 acres of land north of the Rochester International Airport for $159,600 in 1989. Approximately 19 acres of the land purchased by the DeCooks was subject to land-use regulations defined by Safety Zone A, the most restrictive safety zone established by ordinance in 1982 by the Board.[1] Soon after buying

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[1] In 1945, the Legislature granted to local governments and joint airport zoning boards the authority to adopt and enforce zoning regulations near airports and established a process for the State to review and approve local airport regulations. Act of Apr. 16, 1945, ch. 303, §§ 26–27, 1945 Minn. Laws 534, 567–69 (codified as amended at Minn. Stat. ch. 360 (2010)). Before a local body may adopt zoning regulations, it must submit its proposed ordinance to the Minnesota Commissioner of Transportation, who reviews the proposal to ensure that the local safety regulations satisfy minimum standards set by the Commissioner. *See* Minn. Stat. § 360.065, subd. 2. The local body may not enact its proposed ordinance without the approval of the Commissioner. *Id.*

The State standards include three land use safety zones for the area surrounding an airport. *See* Minn. R. 8800.2400 (2009). Safety Zone A is the most restrictive zone and is currently defined to apply to a fan-shaped area extending from the end of a runway for a distance equal to two-thirds of the length of the runway. *Id.*, subps. 5, 6(B). In Zone A, the State standards prohibit buildings and allow only uses such as agriculture, certain outdoor recreation, and automobile parking. *Id.*, subp. 6(B). Safety Zone B, the next most restrictive zone, extends from the end of Safety Zone A for a distance equal to one-third of the length of the runway. *Id.*, subps. 5, 6(C). Buildings are allowed in Safety Zone B, subject to restrictions on density, plot size, and height. *Id.* subp. 6(C). Safety Zone C, the least restrictive zone in the current standards, surrounds an airport and includes general restrictions on uses that may interfere with communications and other flight operations. *Id.*, subps. 5, 6(A), (D).

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the land, the DeCooks developed Oak Summit Golf Course. The DeCooks operated the golf course throughout the period at issue here, but the course is not subject to Safety Zone A. The 1982 ordinance, identified as Ordinance No. 3, applied Safety Zone A to the approach areas that radiated from the end of the airport's runways. At the time the DeCooks purchased their 240 acres, Ordinance No. 3 allowed land within Safety Zone A to be used for agriculture and for commercial or industrial sites, so long as those commercial or industrial sites were at least 20 acres in size. Ordinance No. 3 prohibited dwellings within Safety Zone A, and also prohibited a range of specific uses such as churches, trailer courts, campgrounds, and any use that brought more than 10 people to any one acre or more than 50 people to a commercial or industrial site.

On September 18, 2002, the Board enacted Ordinance No. 4, the ordinance at issue in this case. Ordinance No. 4 changed the land-use regulations within Safety Zone A so that fewer uses were allowed than previously permitted under Ordinance No. 3. For example, although Ordinance No. 4 continued to prohibit dwellings within Safety Zone A, it also prohibited all "buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards." Permissible land uses within Safety Zone A under Ordinance No. 4 included "agriculture (seasonal crops)[,] horticulture, animal husbandry, raising of livestock, wildlife habitat, lighted outdoor recreation (non-spectator), cemeteries, and automobile parking," and those uses that "will not create, attract, or bring together an assembly of persons thereon." The Board also increased the size of Safety Zone A. For the DeCook property, that meant a total of 47

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acres was within Safety Zone A as defined by Ordinance No. 4—the 19 acres previously located within Safety Zone A as defined by Ordinance No. 3 and an additional 28 acres.

Most of the DeCook property is outside Safety Zone A. The western 160 acres of the DeCooks' 240-acre parcel is zoned by Olmsted County as "RC," in which recreational and commercial uses are allowed. The eastern 80 acres of the DeCook parcel is zoned by the City of Rochester as "M1," in which commercial and light industrial development is allowed. The M1 zoning underlies all of the property subject to Safety Zone A under Ordinance No. 4. Oak Summit Golf Course stretches across the RC land and part of the M1 land.

The DeCooks commenced this action in 2005. The DeCook complaint alleged that Ordinance No. 4 was "designed to specifically benefit a public or governmental enterprise," caused "a substantial and measurable decline" in the market value of the DeCooks' property, and constituted "a constitutional compensable taking under the principles of *McShane v. City of Faribault*," 292 N.W.2d 253, 258–59 (Minn. 1980). In *McShane*, we resolved a regulatory takings claim brought by the owner of land subject to runway safety-zone regulations near the Faribault Municipal Airport. We held that "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations." 292 N.W.2d at 258–59.

The district court granted the Board's motion for summary judgment, and the DeCooks appealed. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.* (*DeCook I*), No.

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