

Inverse condemnation claim to go to a jury

by Mark Cohen

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An inverse condemnation claim brought by an engine sales and service company against the city of Bloomington and the Metropolitan Airports Commission is headed to a jury.

The company, which is located near the airport, sued the city and MAC after a new zoning ordinance was adopted because of a proposed new runway. The changes in the ordinance meant that the company could not build a planned hotel, and because of the company's proximity to the new runway, noise can be a problem.



Interstate Companies' buildings in Bloomington

The Minnesota Court of Appeals determined that a Hennepin County District Court judge erred in dismissing the company's claims of a regulatory taking and inverse condemnation because the judge failed to consider the language of the Minnesota Constitution, which provides more protection for property owners than the less restrictive language of the federal constitution.

"Courts must consider whether a property owner has suffered a substantial and measurable decline in property value because of a governmental regulation, and a private property owner may not be forced to bear a burden for the benefit of the general public," wrote Judge Roger Klaphake. "Where the evidence is in controversy, the issue of whether a property owner has demonstrated a substantial diminution in value is a fact question for determination by the factfinder."

Eminent domain practitioners say the decision reinforces the broad protection afforded landowners in Minnesota.

"The court has not focused on that before," said Minneapolis attorney Virginia Bell, who represents landowners. "This decision squarely, and I think properly, focuses on ... how the Minnesota Constitution does in fact give property owners more protection than the federal constitution does."

Chanhassen attorney Patrick Neaton said that judges sometimes "gloss over" his contention that the Minnesota Constitution offers landowners broader protections. He said arming himself with a recent, published Court of Appeals decision will go a long way in making the point in future cases.

"Article 1, section 13 is still alive and well," said Neaton. "That's important."

Minneapolis attorney Daniel Rosen said he hopes the effect of *Interstate* will be that the government will more broadly recognize that it cannot cause specific property owners to bear the burden of government operations without paying for that burden.

"The decision ... clarifies rights that have existed, but have not been widely recognized by government entities," he said. "The rationale for inverse condemnation law has always been that the burden of government operations must be borne by the public at large and not placed on the shoulders of only certain property owners."

The decision is *Interstate Companies, Inc., et al. v. City of Bloomington, et al.*

Newly zoned

Interstate Companies, Inc., which distributes truck parts and sells and services diesel engines, is located at 2501 and 2601 American Boulevard East in Bloomington. MAC owns and operates the Minneapolis-St. Paul International Airport in Bloomington.

In 2004, the Joint Airport Zoning Board, which consists of representatives from MAC and the city, adopted a new zoning ordinance because of a proposed new airport runway. The ordinance establishes various safety zones.

Interstate's buildings are located in Safety Zone B, which prohibits certain uses of the property and buildings higher than seven stories. Before the new ordinance, its buildings were in the less restrictive Safety Zone C.

In 2005, Interstate's plan to build a hotel was rejected because it violated the height restrictions of the new zoning ordinance. Moreover, because the Interstate buildings are only 2,500 feet from the end of the runway, noise in the buildings is disruptive.

In subsequent litigation, Interstate's expert opined that there was a diminution in value of the combined properties before and after installation of the new runway, from \$10.8 million to \$5.035 million.

On Jan. 12, 2010, the District Court judge granted the defendants summary judgment, finding that the zoning amendment was not a regulatory taking by the city and that MAC's use of Interstate's property was not a taking through deprivation of practical enjoyment of their property (inverse condemnation).

Takings and condemnation

The Court of Appeals explained that a regulatory taking occurs when the government does not directly appropriate or physically invade private property but imposes a regulation that curtails some potential for the use or economic exploitation of the property.

In the 1980 decision, *McShane v. City of Faribault*, the Minnesota Supreme Court specifically ruled that when a zoning ordinance benefits a specific public or governmental enterprise, a property owner who suffers a substantial and measurable decline in market value as a result of the regulations must be compensated.

The *McShane* decision, the Court of Appeals determined, informs and broadens the standard set out by the U.S. Supreme Court in 1978 in *Penn Central Transp. Co. v. New York City*, to analyze a regulatory taking. *McShane*, Klaphake wrote, provides the framework for analyzing the difference between the federal constitution's prohibition against the taking of private property for public use without just compensation and the Minnesota constitution, which protects private property from being "taken, destroyed or *damaged* for public use without just compensation." (Emphasis by the court.)

In analyzing the *Penn* factors, the Court of Appeals found that the District Court judge improperly weighed evidence, including the expert's market study.

"[The claimants] raised fact issues about their reasonable investment expectations prior to enactment of the zoning ordinance and the development of the area around the airport," Klaphake wrote, adding that the market value study raises a fact question of whether the claimants suffered a "substantial and measurable decline in market value" as a result of the regulation.

Turning to the inverse condemnation claim, the Court of Appeals again found that the District Court judge improperly weighed evidence and resolved factual disputes.

"[T]he district court dismissed accounts of noise, disrupted telephone calls and conversations, and employee fears of low-flying airplanes, concluding that these allegations did not interfere with the use and enjoyment of the property," Klaphake wrote. "But this conclusion rests on a resolution of factual issues, inappropriate to summary judgment."

Viable report

Minneapolis attorney John (Mac) Lefevre, who often represents municipalities in eminent domain proceedings, said he's concerned the decision may expand what constitutes a taking under Minnesota law without good authority to back it up.

"Unfortunately it comes down to appraisal opinions, which are subject to extreme variations and are sometimes quite subjective, especially in a case where the property owner didn't lose any of the current use of the property and didn't lose a reasonable use of the property," he said.

But Neaton, who typically represents landowners, called the decision a great reminder to trial judges that the sufficiency of an expert's report is a factual determination.

"As a practical matter the Court of Appeals is saying that if a landowner comes in with a viable

appraisal report by an expert, then it should go to a jury," he said.

Minneapolis attorney Lee A. Henderson, who represents Interstate, pointed out that airport zoning affects a fairly limited number of property owners.

"What [these decisions] do is establish, for today and going forward, the concept that airport zoning is a somewhat unique animal and impacts some property owners in ways the rest of the community isn't," he said. "Those people deserve compensation. They are bearing the brunt of something that nobody else in the community has to bear."

Minneapolis lawyer John Baker, who represents the city and MAC, could not be reached for comment.

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