STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1114

Hampton K. O'Neill, et al.,
as successors in interest to Cynthia Kelley O'Neill
and the Cynthia Kelley O'Neill Trust No. 1,
Appellants,
James W. O'Neill,
Plaintiff,

vs.

City of Bloomington, et al.,
Respondents.

Filed March 3, 2014
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV108294

William Christopher Penwell, Mark Thieroff, Siegel Brill, P.A., Minneapolis, Minnesota (for appellants Hampton and Kelley O'Neill)

Perry Wilson III, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota (for appellant James O'Neill)

John M. Baker, Monte A. Mills, Greene Espel, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant/cross-respondent landowners appeal (1) the district court's grant of summary judgment dismissing their regulatory-taking claim against defendant joint-airport-zoning board and (2) the determination by the district court that they failed to meet their burden of proof in a regulatory-taking claim against respondent city. Respondent/cross-appellant airport commission challenges the district court's ruling that it took an avigational easement on landowners' property without just compensation, arguing that the evidence does not support the decision. We affirm.

FACTS

Appellants/cross-respondents Hampton O'Neill, Kelley O'Neill, and James O'Neill own interests in approximately 60 acres of land in Bloomington, located at 2701 and 2901 East Old Shakopee Road and 3011 and 3013 Long Meadow Circle (the property). The property is about a mile south of the Minneapolis-St. Paul Airport, which is owned and operated by respondent/cross-appellant Metropolitan Airports Commission (MAC). The O'Neills do not live on the property, which has been owned by the family for three generations and is currently being used as a sheep farm. In 2001, the O'Neills submitted a development plan to the city to establish their rights to develop the property to the full extent of its zoning classification, which at that time was RO-50 (permitting multi-family dwellings, public uses, transit stations and accessory uses incidental to permitted uses). Due to the unique location of the property on the bluffs of the

Minnesota River, the O'Neills envisioned that the best use of the property would be primarily residential.

Prior to approval of the O'Neills's development plan, and as a direct result of 1996 legislation directing MAC to implement "the 2010" plan, which included building a new north-south runway at the airport, the city imposed a moratorium on development that encompassed the property.

Respondent Wold-Chamberlain Field Joint Airport Zoning Board (JAZB), consisting of representatives from MAC, Hennepin County, and several cities, including Bloomington, proposed an amended MSP airport zoning ordinance to account for the new runway and other airport changes. The amended ordinance was approved and went into effect in May 2004 (the JAZB ordinance). Under the JAZB ordinance, most of the property is located in a protection zone designated as safety zone B. Certain land uses are prohibited in safety zone B, including all residential uses, theaters, churches, gas stations, and schools.

In response to the JAZB ordinance, the city adopted the airport runway overlay district, which references the JAZB ordinance and incorporates the same terms and changes the primary zoning of the property to CS-1, subject to the airport overlay district (the city ordinance). The zoning change means that the property is no longer zoned for residential use, but more office use and hotel use is permitted, as well as the non-residential uses permitted under RO-50 zoning. This change increases the principal uses from four uses to five. Under CS-1 zoning, expanded provisional and conditional uses are permitted on the property, including free-standing restaurants and restaurants in

excess of ten percent of the area within a building, financial institutions, and automotive service facilities. The zoning change also doubles the available density of commercial uses on the property and makes it possible to increase the structure lot coverage and reduce the amount of required parking on the property.

In October 2005, the new north-south runway opened. Flights using this runway, which is just over three-quarters of one mile north of the border of the property, begin between 5:30 and 6:00 a.m. and the intervals between flights can be 60 seconds at peak times. Flights using this runway fly directly over the property, with take-offs passing over at a higher elevation than landings. In preparation for the opening of the new runway, the city condemned residential developments surrounding the property but did not condemn the property.

In April 2010, the O'Neills brought an inverse-condemnation suit against the city, MAC, and JAZB. In relevant part, the O'Neills alleged a regulatory taking of the property without just compensation by the city and the JAZB and a taking of an uncompensated avigational easement on the property by MAC due to aircraft noise. The district court granted summary judgment to the JAZB on the regulatory-taking claim, concluding that the city was the only regulator of the property.

During the bench trial on the O'Neills's claims, the district court heard testimony from the O'Neills, the experts of both parties concerning the impact of the zoning changes and aircraft noise on the value and utility of the property, and MAC witnesses concerning actual airport operations. The district court also visited the site for more than an hour.

The O'Neills's expert appraiser, Jeffrey Johnson, who has acted as a condemnation commissioner many times, including for nearby properties, used a sales-comparison approach to determine the market value of the property before and after the May 3, 2004 zoning change. Johnson concluded that the highest and best use of the property prior to May 3, 2004, was a mixed-use development, made up primarily of multi-family housing with some office and supportive retail. He opined that the pre-zoning-change value of the property was $29,490,000 on the date of the zoning change. Johnson opined that the highest and best use of the property after rezoning was an office development, rejecting hotel development based on the location of the property. Johnson appraised the value of the property after the zoning change at $11,700,000. Based on these appraisals, Johnson opined that the rezoning resulted in a $17,790,000 diminution in value of the property.

To address the regulatory-taking claim, the city did not contest Johnson's evidence of the pre-zoning-change value of the property, but presented expert testimony on the post-zoning-change value of the property from land-use planner Robert Koegler and appraiser Robert Strachota. Koegler presented a post-rezoning conceptual development plan for the property (the concept plan), which was informed by Strachota's appraisal and the expert opinion of a builder who testified about construction costs. The concept plan represented what Koegler and Strachota concluded is the highest and best use of the property following rezoning, consisting of a mix of office buildings, hotels with room for retail or restaurants, and structured parking to serve these facilities. Koegler explained that the concept plan did not reflect the maximum amount of development legally

permissible and that the plan was in line with the city's ordinance requirements and comprehensive plan, and plausible from the perspective of traffic impacts and water management. Koegler opined that the concept plan was consistent with input from the market, financially feasible, and maximally productive. Based on the concept plan, Strachota opined that post-rezoning value of the property was $30,150,000.

With regard to the claim of an avigational easement, Johnson, the O'Neills's expert appraiser, testified about the impact of the noise from overhead flights on the property's value, using an October 15, 2005 valuation date, reflecting approximately when the runway opened, and assuming that the property was subject to airport zoning regulations before and after the noise began.[1] In assessing the noise-based claim, Johnson consulted information from the city and the Met Council to determine what was known about the noise level around the time the runway was set to open and how land uses would change because of the noise in order to evaluate the market value of the property at the time the runway opened.

In 2005, the available noise-forecast information was in the city's 2001 comprehensive plan, which shows the property at a 75 day-night level[2] (DNL), with 37% of all take-offs and 17% of all landings using the new north-south runway, of the projected 575,000 total flights at the airport. The Met Council's 2030 transportation policy plan, issued in 2004, discouraged new office, commercial, or retail development in areas of 70-74 DNL and 65-69 DNL, categorizing such land use as provisional and

[1] The runway did not open until October 27, 2005.
[2] DNL is the annualized average reading of decibels from aircraft noise during the night and day.

specifying that the office structures would need to meet certain acoustical construction standards to achieve lower interior sound levels. The property fell into this provisional category and there was no information available in 2005 to suggest that noise levels would improve over time. Johnson opined that a potential buyer would assume that the noise level would remain the same.

Based on interviews with developers in the area around the property and realtors, Johnson determined that buildings constructed on the property would have to be built to a greater structural standard in order to withstand the noise level, increasing the cost of the building and putting the landowner at a competitive disadvantage. Johnson's analysis showed the noise levels would impact future development, the value of the property, and land uses. Factoring in the information he gathered during his interviews, the impact of noise on prospective office-building tenants, and the additional building and marketing costs, Johnson determined the diminution of value of the property resulting from the aircraft noise amounts to $630,000.

MAC presented no expert testimony on the impact of the noise on the value of the property, but presented fact witnesses to address actual airport operations. Roy Fuhrmann, director of environment for MAC, stated that the forecast for operations in 2005 was higher than actual operations and that operations have not reached the forecasted level. Fuhrmann testified that, due in part to changes in plane regulation and manufacturing, the DNL never reached the forecasted level. He explained that the new north-south runway was used conservatively until sometime in 2007, with use increasing over time. Using data collected by MAC and air-traffic controllers, Fuhrmann explained

that in 2006, the DNL at the property was mostly within the 60-65 range and that 12.2% of arrivals and 15.5% of departures used this runway. In 2007, the DNL at the property was 70, and in 2010, it was in the 65-69 range. Fuhrmann stated that the DNL was projected to be in the same range in 2020 and 2025.

The district court issued findings of fact, conclusions of law, and order for judgment, finding that the O'Neills failed to meet their burden of proof to establish a regulatory taking,[3] but MAC had taken an avigational easement without just compensation. The district court ordered MAC to begin eminent-domain proceedings to determine compensation owed to the O'Neills for the avigational easement.

The O'Neills and MAC moved for amended findings and conclusions of law. The motions were heard by a judge other than the trial judge, who had retired, and the district court denied both motions. These related appeals followed.

D E C I S I O N

I. Regulatory taking

On appeal, the O'Neills argue that the district court erred by (1) applying the wrong legal standard to the regulatory-taking claim by using a "manifestly unfair" standard when assessing diminution in the value of the property; (2) failing to make

[3] The district court found the experts on both sides to be credible and determined that the O'Neills had not met their burden of proving that the city's ordinance had decreased the value of the property so substantially as to be manifestly unfair. The court compared the effect of the ordinance on the property with the limitations imposed by the ordinances addressed in *DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011), and determined that the O'Neills had not suffered a substantial diminution in the overall market value of the property because several uses are permitted, even though residential use is not.

required findings of fact about whether there was a diminution in value of the property and if so, in what amount; and (3) granting summary judgment to the JAZB on the O'Neills's regulatory-taking claim.

Whether the district court applied the proper legal standard and whether it made required findings are questions of law, reviewed de novo. *Am. Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781, 785 (Minn. App. 2011).

The Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation." Minn. Const. art. I, § 13. In limited circumstances, government regulation of private property may result in a taking even though the government has not directly appropriated or physically invaded the property. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007) (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414–15, 43 S. Ct. 158, 160 (1922)). Whether a governmental entity's action constitutes a regulatory taking is a question of law that we review de novo. *Wensmann*, 734 N.W.2d at 631; *Alevizos v. Metro. Airports Comm'n* (*Alevizos I*), 298 Minn. 471, 484, 216 N.W.2d 651, 660–61 (1974). In considering whether a regulatory taking has occurred, this court "relies heavily on reasoning by analogy to previous takings cases." *Decook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011) (quotation omitted).

A. Standard for assessing whether there has been a regulatory taking

In *McShane v. City of Faribault*, the supreme court held:

> [W]here land use regulations . . . 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.
>
> We do not hold that every landowner who is in some way limited or inconvenienced by such regulation is entitled to compensation . . . "Property owners cannot * * * have the advantages created by conveniences and yet be paid for the undesirable effects created by the same conveniences unless those effects adversely affect their property so directly and so substantially that it is manifestly unfair to require them to sustain a measurable loss in market value which the property-owing public in general does not suffer."

292 N.W.2d 253, 258-59 (Minn. 1980) (quoting *Alevizos I*, 298 Minn. at 486-86, 216 N.W.2d at 662). Recently, in *DeCook v. Rochester Intern. Airport Joint Zoning Bd*., the supreme court held that "*McShane* provides the appropriate analysis to determine whether the enactment of an airport ordinance restricting land use within runway safety zones amounts to a regulatory taking under the Minnesota Constitution." 796 N.W.2d at 307. The supreme court noted that under *McShane*, "not every landowner who is in some way limited or inconvenienced by [airport zoning] regulation is entitled to compensation," but concluded that as a matter of law the $170,000 diminution in value established by the jury in DeCook's case "is substantial" such that a regulatory taking occurred under the Minnesota Constitution. *Id.* at 308-09 (alteration in original).

The O'Neills argue that because the *DeCook* opinion does not repeat the term "manifestly unfair" as used in *McShane*, the district court in this case applied the wrong standard by considering whether any diminution in their property value due to the zoning change was "so substantial that it is manifestly unfair" to require them to sustain a measurable loss in market value. We disagree with the O'Neills's premise that *DeCook*

has eliminated consideration of whether it is "manifestly unfair" to require a landowner to sustain a measurable loss in market value which the property-owning public in general does not suffer. *DeCook* specifically states that in evaluating "whether a government regulation of private property is a taking, our task is to determine whether justice and fairness require that the economic injuries caused by public action be compensated by the government." *DeCook*, 796 N.W.2d at 305 (quotation omitted). *DeCook* also cautions that the inquiry is "highly fact-specific, depending on the particular circumstances underlying each case." *Id.* (quotation omitted).

In both *McShane* and *DeCook*, the diminution in property value caused by airport zoning regulations was found to be not merely measurable, but substantial; here the issue was whether the regulations caused any diminution in value. The district court found equally credible the testimony of the O'Neills's expert on post-rezoning value (showing a diminution in value) and the city's experts on post-rezoning value (showing an increase in value). Because the O'Neills did not meet their burden of proving a diminution in value by a preponderance of the evidence, the argument that the district court erred by considering whether they proved a manifestly unfair diminution in value is somewhat academic. But we hold that the district court did not apply the wrong standard by phrasing its holding in terms of whether the O'Neills failed to "meet their burden of proving that the City's ordinance caused a decrease in the market value of their Property that was so substantial that it is 'manifestly unfair.'"

B. Adequacy of district court's findings

The O'Neills allege that this court cannot adequately review their regulatory-taking claim because the district court failed to make two findings of fact required by *DeCook* for a determination of whether they proved a substantial diminution in value caused by rezoning. The supreme court stated in *DeCook* that "[w]hether a diminution in value has occurred, and the extent of diminution, are questions of fact . . . [and] [w]hether the diminution is substantial is a question of law." 796 N.W.2d at 307. The O'Neills argue for a remand to the district court with instructions to make specific findings on whether there was a diminution in value and, if so, the amount. They assert that meaningful appellate review is impossible absent these findings.

But this argument ignores the district court's specific finding that the testimony of all of the experts was equally credible. Appellate courts defer to district court credibility determinations, including those determinations about the credibility of expert witnesses. *E.g. St. Louis County v. S.D.S.*, 610 N.W.2d 644, 650 (Minn. App. 2000). Because the district court found credible the city's evidence that the post-rezoning value of the property exceeds the O'Neills's unchallenged evidence of the pre-rezoning value of the property, the district court concluded that the O'Neills failed to meet their burden of proof on the issue of regulatory taking. The O'Neills argue that the wording of the district court's conclusions of law imply that the district court *might* have thought that they had proved *some* diminution in value. We disagree. Finding the experts' valuation testimony equally credible is an implicit finding that the O'Neills failed to prove a post-rezoning diminution in value. *See City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4

(Minn. 2004) ("If evidence of a fact or issue is equally balanced, then that fact or issue has not been established by a preponderance of the evidence."). Under the specific facts of this case the district court was not able to make a finding that there was a diminution of value or a finding on the amount of any diminution because the evidence does not support such findings. There is no merit in the O'Neills's assertion that the case must be remanded for additional findings.

The O'Neills also argue that the district court erred by denying their post-trial motion for amended findings including whether a diminution in value occurred and, if so, the amount of the diminution in value. The district court held that their request for additional findings is beyond the scope of a motion for amended findings under Minn. R. Civ. P. 52.02. As stated above, the district court could not have made additional findings that would not have changed the conclusions of law, therefore we will not address this argument. *See Kehrer v. Seeman*, 182 Minn. 596, 602, 235 N.W. 386, 389 (1931) ("Where the findings made are sustained by the evidence and sustain the conclusion of law, the refusal to make additional findings calling for different conclusions of law will not be reversed unless the evidence is conclusive in favor of the proposed findings, or so strong that findings to the contrary could not stand.").

C. Summary judgment granted to the JAZB

Because we are affirming the district court's determination that the O'Neills failed to meet their burden to establish a regulatory taking, we decline to address their challenge to the district court's grant of summary judgment to the JAZB on the regulatory-taking claim. *See Barnes v. Macken*, 252 Minn. 412, 416, 90 N.W.2d 222, 226 (1958) ("When

the affirmance or reversal of an order made in the course of the proceeding would make no difference in respect of the controversy on the merits, the appellate court will not determine whether it was decided erroneously or not.").

II. Avigational Easement

In its related appeal, MAC asserts that the district court erred by finding that MAC took an uncompensated avigational easement on the property, arguing that the district court misapplied the established test by relying on forecasted rather than actual noise levels on the property.

To establish a taking of an avigational easement as a result of aircraft noise, a property owner must show "a direct and substantial invasion of his property rights of such a magnitude he is 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." *Alevizos I*, 298 Minn. at 487, 216 N.W.2d at 662. "To justify an award of damages it must be proved that these invasions of property rights are not of an occasional nature, but are repeated and aggravated, and that there is a reasonable probability that they will be continued in the future." *Id*. at 488, 210 N.W.2d at 662. "Diminution in one's enjoyment and use of property is not the same as a diminution in market value . . . . 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." *Alevizos v. Metro. Airports Comm'n* (*Alevizos II*), 317 N.W.2d 352, 359 (Minn. 1982).

MAC argues that this case law precludes the finding of an avigational easement in this case because the noise-level forecast, relied on by Johnson to opine that there is a

diminution in market value of the property, does not establish "direct and substantial invasion" of the O'Neills's property rights. In support of this contention, MAC quotes language from *Alevizos I*, stating that such an easement arises from "the operation of aircraft" and "irritating noise and interference," to argue that actual runway operations must serve as the basis for finding an avigational easement and that planning activities are not sufficient to effect a taking.[4]

"[A] landowner has no action against a government body for mere plotting or planning, without more, in anticipation of taking land." *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 820 (Minn. 1984). And "[n]ot every diminution in the value of property caused by public improvement entitles the owner to recover. The damage must be to the property itself. That sum of rights which is the property must be damaged in substance, or rendered intrinsically, rather than esthetically, less valuable." *McCarthy v. City of Minneapolis*, 203 Minn. 427, 431, 281 N.W. 759, 761 (1938). But "[p]roperty is more than the physical thing—it involves the group of rights inhering in a citizen's relation to the physical thing. Traditionally, that group of rights has included the rights to possess, use, and dispose of property." *Alevizos I*, 298 Minn. at 485, 216 N.W.2d at 661. The taking of an avigational easement is not based on noise levels on a particular date, but is based on establishment of an invasion that is "repeated and aggravated" and that has reasonable probability of continuing. *Id.* at 487-88, 216 N.W.2d at 662.

[4] MAC also implies that the O'Neills's claim has no merit because they do not live on the property and are not directly impacted by the actual operation of aircraft, but this is contrary to the *Alevizos II* directive to consider the impact of noise objectively. 317 N.W.2d at 359.

In this case, the district court determined that aircraft noise directly invades the O'Neills's right to dispose of the property by evaluating the taking claim as a potential buyer would have, considering the value of the property on the day the new runway opened, based on the information available at the time. Though Johnson relied on noise forecasts contained in planning documents to determine the impact of noise on the market value of the property, the runway was operational, not in the planning stages at the time of his valuation. While MAC may be correct that *Alevizos I* contemplates consideration of the actual impact of the noise caused by aircraft flying over a subject property, nothing in the test prescribed forecloses the district court from considering the impact of forecasted operations, which subsequently substantially materialized, on the right to dispose of property.

It is not necessary that a landowner establish the actual amount of damage caused to property as the result of an alleged avigational taking. *See Haeussler v. Braun*, 314 N.W.2d 4, 10 (Minn. 1981) (stating that the actual amount of damage caused by an alleged taking is a determination for court-appointed commissioners). The O'Neills only had to show that their property suffered a diminution in value that is definite and measurable. *Id.*

In this case, actual aircraft operations, though somewhat lower than projected, have resulted in DNLs at the property in the 60 to 70 range, and DNLs are projected to be

in the same range ten years from now.[5] The record reflects that even though actual DNL levels are lower than the levels relied on in Johnson's appraisal, structures built on the property will require modification that adds to construction costs to achieve acceptable interior sound levels. The district court did not err in concluding that the increased cost of construction required for noise mitigation will result in a definite and measurable diminution in market value of the property.

Affirmed.

[5] MAC argued that when a portion of the property is in a certain DNL range, this DNL range cannot be used to find an avigational easement over the entire parcel, but MAC's director of environment stated that if any portion of a parcel is touched by a DNL contour, the entire parcel is considered to be within that contour.