



CHAPTER 5: APPLICABLE LAWS/ STATUTES AND LEGAL ISSUES



*Introduction*³⁹

This chapter compiles and summarizes federal and Minnesota legislation related to the regulation of land uses in the vicinity of public airports. Many federal and state entities are involved in the regulation of airports and, in particular, with implementing programs related to land use compatibility around airports, including but not limited to the Federal Aviation Administration (FAA), the Minnesota Department of Transportation (Mn/DOT), and a myriad of local governments. The statutes, rules, orders, and circulars described in this chapter are narrowed only to those that address airport and land use planning related regulations. Taken as a whole, this package of legislation is intended to accomplish the following goals:

- To protect the substantial public investment in, and the numerous public benefits derived from the nation's air transportation facilities.
- To protect property owners from the adverse impacts associated with activity at public airports, including protection from noise and the risk of harm from air traffic accidents.

CHAPTER 5 OVERVIEW

- Introduction
- Summary of Key Federal Legislation
- Summary of Key Minnesota Legislation
- Airport Zoning and the "Taking" Issue

Summary of Key Federal Legislation

There are a multitude of federal laws granting authority to the FAA, other federal entities, and recipients of federal funding to protect public airport operations. The following compilation is intended to provide only a "big picture" view of the applicable law. In sum, the federal body of law related to airport land use compatibility is comprised primarily of statutes and rules that:

1. Make the use of federal airport funding contingent on local assurances regarding the vigilant and wise management of land use

³⁹ If this chapter is read in full, we recognize its contents may overlap with other discussions presented in other chapters. We believe most users will read specific chapters of this manual as needed and, therefore, we feel it is better to include some discussions that may be repetitive. Where possible, however, we have eliminated duplicate text and included cross references.



- in the vicinity of the airport, including the prevention of encroaching, incompatible land use activities and structures.
2. Protect the public interest in the nation's navigable airspace by establishing standards and procedures to identify, prevent, and control obstructions that may affect air traffic (e.g., buildings, towers, etc.). Provide a model zoning ordinance for local governments to limits the height of objects around airports.
 3. Establish general rules for the operation and flight of specific types of aircraft, which in turn suggest specific spatial requirements for safety areas around airports that must be accounted for in master planning.
 4. Protect the public investment in airports, by specifying minimum land use compatibility standards and a comprehensive planning process to ensure that incompatible land uses that could pose a risk to the airport's operation are either not developed or mitigated.
 5. Specify guidelines for an effective airport master planning process that balances airport growth needs and compatible community development.
 6. Ensure public access to specific airport-related project information and the airport master planning and implementation process, including full disclosure of possible adverse impacts on the surrounding community.
 7. Provide guidance and minimum criteria to avoid the creation or intensification of land uses considered to be wildlife attractants when sited close to an airport (e.g., wastewater treatment facilities, waste landfills, wetlands).

FEDERAL AIRPORT PLANNING STATUTES AND REGULATIONS

Federal statutes and regulations relating to land use compatibility and airport planning, are summarized below. This is not an exhaustive summary, but it provides the primary legislation related to land use issues.

Airport and Airway Improvement Act of 1982

TITLE 49, UNITED STATES CODE (USC), CHAPTER 471 (GRANT ASSURANCES)

This Act identifies the safe operation of the airport and airway system in the United States as “the highest aviation priority.” § 47101(a)(1). It authorizes the Secretary of Transportation to make project grants for airport development and prescribes procedures for grant applications and awards. Among other things, it obligates airport owners, upon acceptance of federal funds, to make specific assurances, including mitigating and preventing airport hazards and maintaining compatible land uses around airports by the adoption of zoning laws. § 47107(a)(9), (10).



Safety Regulation (Aviation Programs—Air Commerce and Safety)

TITLE 49, UNITED STATES CODE (USC), CHAPTER 447

This Chapter authorizes the administrator of the Federal Aviation Administration (FAA) to take measures to “promote safe flight of civil aircraft.” § 44701(a). Although most of this chapter pertains to aircraft, it does extend this authority prescribing minimum safety standards for operating airports that serve aircraft designed for at least 31 passenger seats. § 44701(b)(2). The FAA Administrator is authorized to issue airport operating certificates, which must include terms to insure safety. § 44706(b). Airports cannot operate without an operating certificate. § 44711(a)(8). Chapter 447 also authorizes the Secretary of Transportation to regulate structures that might interfere with navigable airspace. § 44718.

Federal Aid to Airports

TITLE 14, CODE OF FEDERAL REGULATIONS (CFR), PART 151

This regulation prescribes policies and procedures for application for and administration of federal funds to airports. In particular, § 151.26 requires an applicant for federal aid to describe in its application action it has taken to restrict the use of land adjacent to and in the vicinity of an airport to uses compatible with airport activities.

Notice of Construction, Alteration, Activation, and Deactivation of Airports

TITLE 14, CODE OF FEDERAL REGULATIONS (CFR), PART 157

This regulation requires any person who intends to construct, alter, activate, or deactivate an airport in any way to notify the FAA. The FAA must issue a written determination that considers, among other things, the effect of the proposed change on “the safety of persons and property on the ground.” § 157.7.

Objects Affecting Navigable Airspace

TITLE 14, CODE OF FEDERAL REGULATIONS (CFR), PART 77

This regulation establishes standards for determining obstructions in navigable airspace. It sets forth requirements for construction and alteration of structures (e.g., buildings, towers, etc.). It also provides for studies of obstructions to determine their effect on the safe and efficient use of airspace, as well as providing for public hearings regarding these obstructions. It includes provisions for the creation of antenna farms. It also establishes methods of identifying surfaces that must be free from penetration by obstructions, including buildings, cranes, and cell towers, in the vicinity of an airport. This regulation is predominately concerned with airspace related issues. Implementation and enforcement of the elements contained in this regulation is a cooperative effort between the FAA and the individual state aviation agencies, in this instance, Mn/DOT. A more in-depth review of the



specific regulations found in FAR Part 77 is outlined in Chapter 2 of this manual.

Proposed Construction or Alteration of Objects That May Affect the Navigable Airspace

FAA ADVISORY CIRCULAR (AC) 70/7460-2K (2000) (FORM 7460-1)

This document works within the requirements of FAR Part 77 and provides information about obtaining approval for the construction or alteration of objects that may affect navigable airspace. Form 7460-1 is required at all federally obligated airports to assess each proposed or temporary construction in the vicinity of the airport. The FAA conducts an aeronautical study and issues a determination to the airport operator. The determination identifies whether or not the proposed development is a hazard to airspace. It is imperative that local planners be aware of the various critical safety considerations when siting developments around airports.

A sample FAA 7460-1 form is included in the Appendix 11 of this manual.

U.S. Standards for Terminal Instrument Procedures (TERPs)

FAA ORDER 18 (NOVEMBER 1999) AND FAA ORDER 8260.3 B, CHANGE 14 (JULY 7, 1976 WITH CHANGES 1-19 THROUGH MAY 2002)

This document contains standards for establishing and designing Terminal Instrument Flight Procedures (TERPS). The criteria are applicable at any location over which the United States has jurisdiction. TERPS are similar to FAR Part 77 in that there are constraints placed on the airspace in the vicinity of the airport that may have an impact on the land uses allowable beneath those surfaces.

Criteria for Municipal Solid Waste Landfills

TITLE 40, CODE OF FEDERAL REGULATIONS (CFR), PART 258, SUBPART B—LOCATION RESTRICTIONS

The subpart establishes criteria for the expansion and/or development of new Municipal Solid Waste Landfills (MSWLF). In particular, §258.10 (Airport Safety) requires a demonstration that new and certain existing MSWLFs do not pose a bird hazard to aircraft. In part, it states that:

- (a) Owners or operators of new MSWLF units, and lateral expansions that are located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft must demonstrate that the units are designed and operated so that the MSWLF unit does not pose a bird hazard to aircraft.



(b) Owners or operators proposing to site new MSWLF units and lateral expansions within a five-mile radius of any airport runway end used by turbojet or piston-type aircraft must notify the affected airport and the FAA.

General Operating and Flight Rules

TITLE 14, CODE OF FEDERAL REGULATIONS (CFR), PART 91

This regulation establishes general rules for the operation of aircraft with regards to various airports, various types of flight, i.e., Instrument Flight Rules (IFR) or Visual Flight Rules (VFR) conditions, as well as maintenance, special flight operations, foreign aircraft operations and operating noise limits. These requirements are considered planning regulations, because the recommendations for flight operations translate into specific spatial requirements for safety areas that must be considered during the master planning process.

Airport Land Use Compatibility Planning

FAA ADVISORY CIRCULAR (AC) 150/5060-6 (1977)

This document guides the development of a compatibility plan to ensure that areas surrounding an airport are not developed in a manner that could pose a risk to the airport's operations. This document specifically looks at land use and noise issues.

Airport Master Plans

FAA ADVISORY CIRCULAR (AC) 150/5070-6B (2005)

This document provides guidance for the preparation of master plans for airports that range in size and function from small general aviation to large commercial service facilities. This advisory circular replaces the 1985 version (AC No: 150/5070-6A) and incorporates newer methods and techniques associated with airport master plan studies, including current industry methods and procedures commonly employed in the preparation and documentation of master plan studies. The scope of each Master Plan must be tailored to the individual airport under evaluation, and this advisory circular fosters a flexible approach to master planning that directs attention and resources to the most critical issues.

Model Zoning Ordinance to Limit Height of Objects Around Airports

FAA ADVISORY CIRCULAR (AC) 150/5190-4A (1987)

This advisory circular concerns developing zoning ordinances to control the height of objects. It is based upon the surfaces described in Subpart C of 14 CFR Part 77, Objects Affecting Navigable Airspace. This document provides sample language and model ordinances for use by local airports.



Obstruction Marking and Lighting

FAA ADVISORY CIRCULAR (AC) 70/7460-1K, CHANGE 1 (2000)

This document contains FAA standards for marking and lighting obstructions to promote aviation safety.

Airport Design

FAA ADVISORY CIRCULARS (AC) 150/5300-13 CONSOLIDATED REPRINT (1998), AND CHANGES 6 (2000) AND 7 (2002)

These documents provide the basic standards and recommendations for airport design. The Consolidated Reprint includes five previous documents pertaining to airport design. The most recent update provides expanded information for new approach procedures for Runway Protection Zones, threshold-siting criteria and new instrument approach categories.

Planning the Metropolitan Airport

FAA ADVISORY CIRCULAR 150/5070-5 (1970)

This document provides guidance in airport planning for large metropolitan areas.

Hazardous Wildlife Attractants On or Near Airports

FAA ADVISORY CIRCULAR (AC) 150/5200-33A (2004)

This document (which replaces AC 150/5200-33 (1997)) provides guidance regarding the types of land uses that are considered to be incompatible near airports because they attract wildlife. These uses include but are not limited to the following: wastewater treatment facilities, wetlands, dredge spoil containment areas, solid waste landfills, certain agricultural activities, and golf courses. Typically, these uses should be located at least 5,000 feet away from an airport runway end if the airport serves piston-type aircraft, and at least 10,000 feet away from an airport runway end if the airport serves turbojet aircraft.

Construction or Establishment of Landfills Near Public Airports

FAA ADVISORY CIRCULAR (AC) 150/5200-34 (2000)

This document provides guidance regarding the requirements for complying with federal statutory requirements concerning the construction or establishment of municipal solid waste landfills (MSWLF) near public airports. These new limitations apply to only those airports that are recipients of Federal grants and to those that primarily serve general aviation aircraft and scheduled air carrier operations using aircraft with less than 60 passenger seats. These new restrictions require a minimum separation distance of six (6) statute miles between a new MSWLF and a public airport.



Summary of Key Minnesota Legislation

Minnesota law related to airport land use compatibility is more comprehensive compared to other states in the country. Minnesota has granted its executive departments (Mn/DOT) and local governments the authority and powers to protect public airport operations within the state, and to plan for and manage land uses around the airports. In sum, the Minnesota body of laws and regulations related to airport land use compatibility is comprised primarily of statutes and rules that:

1. Grant state and municipal officials broad powers, including the power of eminent domain, to acquire property rights and interests for the construction or expansion of airport facilities and when necessary to assure safe approaches to and operation of airport landing areas.
2. Specify minimum land use controls and specific procedures for adopting and administering safety- and noise-related zoning of land in the vicinity of the state's airports. This includes regulation of structure heights. Prohibits the state from funding airports unless a local government has established an airport zoning authority and an airport zoning ordinance.
3. Grant authority to joint airport zoning boards to apply and enforce airport zoning to lands under the jurisdiction of any local government that fails to cooperate with the board or otherwise does not act on its own to adopt and apply airport zoning to airport safety areas.
4. Require reasonableness in the adoption and administration of airport zoning controls. The laws require the Commissioner of Transportation and local officials to consider local conditions, as well as possible net social or economic costs, in determining what airport zoning regulations to adopt.
5. Give local governments "breathing room" to study, plan, and adopt local controls by authorizing interim ordinances, including moratoriums on building activity within potentially affected areas adjacent to planned airport facilities.
6. Proclaim a policy and require specific actions to protect existing residential neighborhoods near airports from the effects of airport zoning. Specifically, local governments must avoid the elimination of existing residential uses if it can be done without severely compromising safety.
7. Enable municipalities in the metropolitan area to regulate building construction and methods to attenuate aircraft noise in buildings and around airport noise zones.
8. Prohibit the use of amortization to eliminate a land use that was lawful at the time of its inception, unless the land use constitutes a public nuisance.



9. Ensure a process that informs state and local decision-makers about the impacts of airport-related projects on the human environment, and requires the decision-makers to account for and mitigate any disclosed, adverse impacts.
10. Require the replacement of drained or filled wetlands with wetlands of equal public value, when the loss of the wetlands is unavoidable in the course of development activity.

MINNESOTA AIRPORT ZONING STATUTES

Minnesota Statutes 2004, Chapter 360—Airports and Aeronautics

The declared purpose of Chapter 360 is “to further the public interest and aeronautical progress by providing [among other things] for the protection and promotion of safety in aeronautics” §360.011. To this end, Chapter 360 includes two sections that directly regulate airport zoning to ensure safety and land use compatibility.

This part highlights only the provisions of Chapter 360 that directly or indirectly affect airport development and describes in greater detail the two sections regulating airport zoning (§§ 360.061--360.074) and structure height (§§360.81--360.91).

ADMINISTRATION (§§ 360.011—360.024)

Several sections are pertinent to airport zoning for safety and land use compatibility, including Section 360.013, which defines key terms related to land use compatibility, such as “airport,” “airport hazard,” “structure,” and “tree.”

§§ 360.016, 360.0161—Federal Aid

Section 360.016 authorizes the Transportation Commissioner to cooperate with the federal government in the planning, acquisition, construction, improvement, maintenance, and operation of airports in Minnesota. It further authorizes the Commissioner to receive federal funds for these activities and authorizes the Commissioner to act as an agent for any municipality to receive and disburse federal funds. It gives the Commissioner authority to enter into any contracts necessary to engage in the powers authorized by this section.

Section 360.0161 requires municipalities to receive the Commissioner’s approval before submitting any project applications to the federal government. It also requires municipalities to designate the Commissioner as their agent to receive and disburse any federal funds they may receive for projects.

§ 360.017—State Airports Fund

This section authorizes creation of a fund for the acquisition, construction, improvement, maintenance, and operation of



airports in Minnesota. Money in this fund can be used to assist municipalities in these activities.

§ 360.018—Regulating Airports

This section specifically authorizes the Transportation Commissioner to approve and license airport and restricted landing area sites. Subdivision 6 requires licensing of airports and restricted landing areas before they can be used. It further requires any person or municipality to obtain from the Commissioner a certificate of site approval before acquiring property for an airport or restricted landing area. This pre-acquisition approval insures “that the property and its use shall conform to minimum standards of safety” Subdivision 8 directs the Commissioner to consider, in determining whether to issue a certificate of site approval or an operating license:

- the proposed location, size, and layout of the airport
- the relationship of the proposed airport to “a comprehensive plan for statewide or nationwide development” (no definition of this phrase is offered in Chapter 360);
- the availability of safe areas for expansion purposes;
- the presence (or absence) of obstructions in adjoining areas;
- the nature of the terrain; and
- the nature of the uses to which the proposed airport will be put.
- Other subdivisions of this section provide for hearings on certificates or licenses and revocation procedures.

ESTABLISHING AIRPORTS (§§ 360.031—360.045)

Several sections are pertinent to the review of airport zoning for safety and land use compatibility.

§ 360.031—Definition

For purposes of these sections, “municipality” means any county, city or town in the state.

§ 360.032—Municipality May Acquire Airport

This section authorizes municipalities to acquire property for establishing, constructing, enlarging, and moving airports and airport facilities. Municipalities may purchase or lease such property, acquire it by gift or devise, and, if no other means is available, by condemnation.

Subdivision 3 authorizes municipalities to acquire easements and invoke other airport protection privileges that may be necessary to insure unobstructed airspace for landing and taking off and to acquire easements to facilitate placing and maintaining marks and lighting of airport hazards. This authority is not to be “so construed as to limit any right, power, or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of [Minnesota].”



Subdivision 4 makes it unlawful for anyone to build any object or plant any tree or other vegetation that would encroach upon any airport protection privileges that municipalities may acquire under this section for airport or airport operations. It declares such encroachments to be public nuisances and authorizes municipalities to use legal procedures to abate them or to enter others' property to remove encroachments.

§ 360.038—Specific Powers of Municipality

This section grants to municipalities a number of powers necessary to establish, operate and maintain airports, including the power to adopt regulations and ordinances for the management and use of any property under their control. Such municipal enactments must be consistent with state and federal laws and with the regulations of the Transportation Commissioner.

§ 360.042—Joint Operation; Joint Powers Board

This section authorizes joint agreements by two or more municipalities or by the state and one or more municipalities to acquire, construct, operate, maintain, and regulate airports and to acquire airport protection privileges. It requires municipalities acting jointly to create a board to act on their behalf.

AIRPORT ZONING (§§ 360.061—360.074)

These sections of Chapter 360 are directly applicable to safety and land use compatibility.

§ 360.061—Definitions

This section contains several definitions applicable only to the airport zoning statutes. “Airport” includes restricted landing areas. This makes the term broader for the purpose of these sections than the general definition in § 360.013, which defines “restricted landing area” separately from “airport.” “Municipality,” for purposes of these zoning statutes, does not include a county, unless the county “owns or controls an airport.” “Municipality” specifically includes a town, the Metropolitan Airports Commission, and the State of Minnesota.

§ 360.062—Airport Hazard Prevention

After finding (1) that airport hazards endanger the lives and property of airport users and occupants of land in the vicinity of airports, and (2) that the “social and financial costs” of disrupting existing land uses around airports may outweigh the benefits of reducing airport hazards in these areas, this section makes the following declarations:

- The creation of an airport hazard is a public nuisance and “an injury to the community served by the airport”;
- The public health, safety, and welfare require the prevention of airport hazards by exercise of the police power without compensation, to the extent legally possible;



- The elimination of existing land uses or their designation as nonconforming uses is not in the public interest and should be avoided whenever possible “consistent with reasonable standards of safety”; and
- The prevention of new airport hazards and the elimination, mitigation, or marking of existing airport hazards are public purposes, entitling political subdivisions to raise and spend public money and to acquire land or property interests.

§ 360.063—Airport Zoning; Authority, Procedure

Subdivision 1(a) (Enforcement under police power) authorizes municipalities, in the absence of a joint zoning board, to adopt and enforce zoning regulations to prevent the creation of airport hazards. It also authorizes municipalities to divide airport hazard areas located within the municipality’s territorial limits into zones and to regulate the height of structures and trees in these areas.

Subdivision 1(b) authorizes municipalities to regulate the location, size, and use of buildings and population density for no more than two miles from the airport boundary in portions of airport hazard areas under approach zones. In other portions of airport hazard areas, municipalities may regulate these uses by land use zoning for up to one mile from the airport boundary and by height-restriction zoning for up to one and one-half miles from the airport boundary.

Subdivisions 1(c) and 1(d) give these zoning powers to metropolitan airport commissions in contiguous first class cities and to state airport zoning boards for airports owned or operated by the state.

Subdivision 3(a) (Joint airport zoning board) governs situations in which an airport is owned or controlled by one municipality and an airport hazard area is appurtenant to the airport but is located in a different municipality. In such cases, the municipality owning or operating the airport may ask the adjacent municipality (or county) either to adopt and enforce zoning regulations for the airport hazard area that are consistent with standards set by the state commissioner of transportation; or to join in creating an airport zoning board. The municipality that owns or controls the airport determines which action it will take, and it must make a request by certified mail to the governing body of each county or municipality affected. However, if the other municipality fails to respond, the municipality owning or controlling the airport may act unilaterally to apply airport zoning under Subdivision 3(c) below.

Subdivision 3(b) describes the procedure for creating an joint airport zoning board. Each county or municipality involved must approve the board by resolution or ordinance. Once approved, a joint zoning board has all the zoning powers granted municipalities in Subdivision 1. The members of the board

Minnesota Statutes, Section 473.608, Subdivision 21, directs the Metropolitan Airports Commission (Minneapolis-St. Paul metropolitan area) to create a joint zoning board for each airport it operates.



consist of two appointed by the municipality or county that owns the airport and two appointed by each municipality or county in which the airport hazard is located. From these members, the board elects a chair. If the municipality that owns the airport is a city of the first class, however, then it appoints four members to the board.

Subdivision 3(c) provides that if a municipality or county in which an airport hazard is located fails to respond within 60 days to the request of a municipality owning or controlling an airport for either local regulation or the creation of a joint zoning board, then the owning or controlling municipality or a joint board created without the non-responsive municipality may adopt and enforce zoning regulations for the airport hazard area within the non-responsive municipality.

Subdivision 3(d) includes in the definition of “owning or controlling municipality” joint airport operating boards created under § 360.042 and the metropolitan airports commission established under Chapter 473 of the Minnesota Statutes.

Subdivision 4 (Airport approach) authorizes the Transportation Commissioner to recommend an airport approach plan for each publicly owned airport and each privately owned airport of the publicly owned class in the state. The plan must indicate the circumstances in which trees or structures would be airport hazards and describe the airport hazard area, as well as measures to eliminate airport hazards in the area. The commissioner must also designate airport approach and turning standards, and any locally adopted airport zoning regulations must conform to these standards.

Subdivision 6 (Procedure when zoning board fails to act) authorizes the Transportation Commissioner to adopt and enforce zoning regulations if a municipality, county, or joint zoning board fails to do so within a reasonable time. If one of these entities adopts regulations that are inconsistent with state standards, then the Commissioner may amend, supplement, or repeal the local zoning regulations so that they conform. The commissioner’s actions under this subsection are subject to judicial review.

Subdivision 6a (Review of variance) authorizes the Transportation Commissioner to review any airport zoning variance that is granted because of a board of adjustment’s failure to act on the variance application. (See § 360.067 below.) The Commissioner may amend or rescind a variance if necessary to protect the public safety. The Commissioner has 60 days after the initial grant of the variance to take action and notify the applicant. The Commissioner’s actions under this subsection are subject to judicial review.

Subdivision 7 (Airport zoning board, each airport) requires the creation of state airport zoning board when an airport is owned



or operated by the state and airport hazard areas are located in adjacent counties or municipalities. A state board has the same authority to adopt and enforce airport zoning regulations that Subdivision 1 grants to municipalities and counties. The members of a state airport zoning board consist of the Transportation Commissioner, who is the chair, one member appointed by the county board for each county in which the airport hazard is located, and one member appointed by the governing body of each municipality located in the area to be zoned. If no municipalities are located in the area to be zoned, then the board must select another county representative. Members have a three-year term. Zoning rules adopted by the board must be published once in a legal newspaper for the county in which the airport is located and must also be filed with the Transportation Commissioner and the county recorder in each county affected by the zoning.

Subdivision 8 (Airport zoning board authority after failure to appoint member) authorizes the remaining members of a state airport zoning board or the Transportation Commissioner, if no board is created (presumably because the county or counties involved did not appoint members), to adopt and enforce airport zoning regulations when a county or municipality that should be part of the state zoning board fails to appoint a member to the board within 30 days after the Transportation Commissioner requests it to do so.

§ 360.064—Airport Zoning; Comprehensive Ordinance, Conflict

Subdivision 1 (Comprehensive regulations) authorizes municipalities to incorporate airport zoning regulations into any “comprehensive zoning ordinance” it may adopt or have already adopted and to administer and enforce the airport zoning regulations as part of the larger ordinance.

Special Note: The term “comprehensive zoning ordinance” is not defined in Chapter 360 and is not a term used in either the county or municipal planning and zoning enabling acts (Chapters 394 and 462, respectively). The latter chapters use the defined term “official controls” to refer to the local government’s compiled set of land use and zoning regulations.

Subdivision 2 (Effect when regulations conflict) provides that the more stringent limitation shall prevail in the event of a conflict between airport zoning regulations adopted pursuant to Chapter 360 and other zoning regulations applicable to the same area.

§ 360.065—Airport Zoning; Adoption, Approval

Subdivision 1 (Notice, hearing) requires public hearings to be held on proposed airport zoning regulations before they are submitted to the Transportation Commissioner for approval and after that approval but before final adoption by the local zoning



authority. It also establishes the publication requirements for notice of these public hearings.

Subdivision 2 (Regulations submitted to Commissioner) requires municipalities, counties, or joint airport zoning boards to submit proposed regulations for airport hazard areas to the Transportation Commissioner. The Commissioner must immediately review the proposed regulations for their conformity with state standards. If the regulations do not conform to state standards, then the municipality, county, or joint airport zoning board must amend the regulations “unless it demonstrates that the social and economic costs of restricting land uses in accordance with the standards outweighs the benefits of a strict application of the standards.” The Commissioner may approve local zoning regulations that are more stringent than the state standards.

§ 360.066—Airport Zoning; Minimum Standards, Land Uses

Subdivision 1 (Reasonableness) mandates that state standards for airport hazard areas and airport zoning regulations be reasonable. In determining what airport zoning regulations to adopt, the Commissioner and local zoning authorities must consider, among other factors, the following:

- The character of the flying operations conducted at the airport;
- The location of the airport;
- The nature of the terrain in the airport hazard area;
- The existing land uses and character of the neighborhood around the airport;
- The uses to which the property to be zoned may be put; and
- The “social and economic costs of restricting land uses versus the benefits derived from a strict application of the [state] standards”

Subdivision 1a(a) (Protection of existing neighborhood) requires the state standards and local airport zoning regulations to distinguish “between the creation or establishment of a use and the elimination of an existing use” and to avoid eliminating or reclassifying existing uses if this can be done without compromising safety. The state standards must include criteria for determining when an existing use constitutes an airport hazard “so severe that considerations of public safety outweigh the public interest in preventing disruption to that land use.”

Subdivision 1a(b) prohibits the state and local zoning authorities from adopting standards or regulations that classify any “low-density residential structure” or any “isolated low-density residential building lots existing on January 1, 1978 in an established residential neighborhood” as a nonconforming use.



Subdivision 1a(c) authorizes local airport zoning authorities to classify a land use described in subsection (b) as an airport hazard if considerations of public safety justify this classification and it is consistent with state airport zoning standards. Any land use described in subsection (b) that is classified as an airport hazard must be acquired, altered, or removed at public expense.

Subdivision 1b requires the Transportation Commissioner to amend the airport hazard standards to conform to legislation adopted in 1978.

Subdivision 2 prohibits airport zoning regulations from requiring the removal or alteration of any nonconforming structure or tree or any other nonconforming use already in existence when the regulations are adopted or amended, except as provided in § 360.067.

§ 360.067—Airport Zoning Permit, Variance; Administrative Agent

Subdivision 1(a) (Permits) authorizes airport zoning regulations to require a permit to construct or establish a new use or structure or to substantially change, alter, or repair an existing use or structure. All regulations must require a permit before any nonconforming structure or tree may be “replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted . . .” No permit can be issued that would allow the creation of an airport hazard or a nonconforming use or that would allow an existing nonconforming use to become a greater hazard to air navigation that it was when the regulation was adopted or the permit application made.

Subdivision 1(b) provides that no permit can be granted that would allow a nonconforming use, structure, or tree, which has been abandoned or is more than 80 percent torn down, decayed, or destroyed, to exceed applicable height limitations or “otherwise deviate from the zoning regulations.” It also authorizes the local governing body to compel the owner of the nonconforming structure or tree to “lower, remove, reconstruct, or equip the object” to make it conform to the zoning regulations. This must be done at the owner’s expense. If the owner refuses, the local authority can proceed and assess the owner for the cost.

Subdivision 1(c) provides that all permits shall be granted, except as provided in the preceding subdivisions.

Subdivision 2 (Variance) provides that anyone who wants to build or increase the height of any structure, allow the growth of a tree, or otherwise use property in violation of applicable airport zoning regulations, may apply to the board of adjustment for a variance. If a variance is not granted by the board within four months⁴⁰ after the last board member receives the application by

⁴⁰ Note: Minnesota Statutes, Section 360.067, Subd. 2, allows the Board of Adjustment to



certified mail, the variance is deemed granted. The person obtaining a variance in this manner must notify the board of adjustment and the Transportation Commissioner by certified mail and include the variance application with the notification to the Commissioner. The variance is effective 60 days after the Commissioner receives the notice, subject to any action the Commissioner might take pursuant to § 360.063, subd. 6.

The subdivision further provides that variances “shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the [variance] would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations” The board of adjustment may impose reasonable conditions on a variance.

Subdivision 3 (Hazard marking and lighting) authorizes a board of adjustment or local zoning authority to impose conditions on a permit or variance that require the applicant to allow a municipality to install, operate, and maintain, at public expense, any markers and lights that may be necessary to indicate an airport hazard.

Subdivision 4 (Administrative agent, appointment) requires a state airport zoning board to appoint a local official in the governmental unit of the area where the airport hazard area is located to act as the administrative agent. This official is authorized to exercise the powers and duties granted in this section and in § 360.069 to local governing bodies.

§ 360.068—Appeal of Airport Zoning Decision

Subdivision 1 (When granted) authorizes any “person aggrieved, or taxpayer affected” by any decision of a local zoning agency, a county or municipality governing body, or a joint airport zoning board, to appeal to the board of adjustment.

Subdivision 2 (Reasonable time) requires appeals to be made within a reasonable time (as defined by rules of the board of adjustment) by filing a notice of appeal.

Subdivision 3 (Stay) directs that all proceedings relating to the action appealed from are stayed unless a stay would cause “imminent peril to life or property.”

take up to four (4) months to make a final decision on a variance application. However, since Section 360.067, Subd. 2, was drafted, a new state law became effective. Known as the “Sixty-Day Rule,” Minnesota requires all state and local decision-making agencies to take action on a “zoning application” within 60 days of receipt of a complete application. Minnesota Statutes Sec. 15.99. If the agency fails to comply with the 60-day rule, the zoning application is deemed approved. It is unclear whether Section 15.99 applies to airport zoning permit or variance applications, and the question has not yet been adjudicated. Accordingly, Mn/DOT believes the airport zoning procedures under Chapter 360 are distinct from and different than the types of zoning applications that trigger the Sixty-Day Rule in Section 15.99. Municipalities are urged to check with their own legal counsel prior to adopting the model ordinance language.



Subdivision 4 (Hearing; notice) requires the board of adjustment to set a hearing and notify the public and interested parties of the date. Any party may appear at the hearing in person or by an agent or attorney.

Subdivision 5 (Decision and order) authorizes the board of adjustment to affirm, reverse, or modify the decision appealed from, to make any additional orders, and to exercise the powers of the agency from which the appeal is taken.

§ 360.069—Airport Zoning Administration

This section requires all airport zoning regulations to provide for administration and enforcement of the regulations by an “appropriate permit-issuing agency.” The regulations may create an agency or may designate an existing agency, board, or official (other than the board of adjustment) to perform these functions. The agency’s duties must include hearing and deciding all permit applications but cannot include any powers delegated to boards of adjustment.

§ 360.071—Board of Adjustment

Subdivision 1 (Powers) grants boards of adjustment the following powers:

- To hear and decide appeals from orders made by the administrative agency charged with enforcing airport zoning regulations;
- To hear and decide special exceptions to the airport zoning regulations; and
- To hear and decide variance applications.

Subdivision 2 (Membership) provides that an existing zoning board of appeals or adjustment may be appointed as the board of adjustment required under this section. Otherwise, a board of adjustment must have five members appointed for three-year terms by the authority adopting the airport zoning regulations. A metropolitan airports commission must appoint five members from the area for which the commission was created. For an airport owned or operated by the state, the board of commissioners of the county or counties in which the airport hazard is located comprise the airport board of adjustment.

Subdivision 3 (Majority control) makes a vote of the majority of the members of the board of adjustment sufficient to reverse any orders of a zoning agency, or to decide in favor of a permit or variance applicant.

Subdivision 4 (Rules and procedure) authorizes boards of adjustment to adopt procedural rules, directs that all meetings be public, and requires boards to keep minutes of proceedings that record members’ votes. It also makes these minutes public records.



§ 360.072—Judicial Review

Subdivision 1 (Appeal) gives any “person aggrieved, or taxpayer affected” by any decision or action of boards of adjustment, the Transportation Commissioner, or local government agencies the right to judicial review.

Subdivision 6 (Allowance of costs) prohibits the assessment of litigation costs against a board of adjustment or the Transportation Commissioner in the absence of gross negligence, bad faith, or malice.

Subdivision 7 (Unconstitutional taking) provides that if a court finds “generally reasonable” airport zoning regulations to be so onerous in their application to a particular structure or parcel of land as to constitute a taking, that holding does not affect the application of the regulations to other structures or parcels of land.

§ 360.073—Violations, Penalties, and Remedies

This section makes any person who does not obtain a permit or variance when required to do so under § 360.067, or who does not conform to the requirements of the permit or variance issued under that section, or who violates any other airport zoning regulations guilty of a misdemeanor and creates a separate offense for each day a violation continues to occur. This section also gives local governments or the Transportation Commissioner the authority to seek injunctive relief or institute abatement proceedings in any court of competent jurisdiction.

§ 360.074—Acquisition of Air Rights

If a nonconforming structure or use must be removed, lowered, or otherwise terminated, or approach protection cannot be provided by airport zoning regulations because of constitutional limitations, or approach protection would be better provided by acquiring property rights than by zoning regulations, the municipality in which the property or nonconforming use is located, or the municipality that owns or is served by the airport, may acquire easements or other airport protection privileges in accordance with § 360.032.

RECIPROCITY (§§ 360.201 TO 360.203)

If an adjoining state grants such rights and privileges to local governments in Minnesota, these sections authorize local governments in an adjoining state to construct, operate, and maintain airports or restricted landing areas in the state of Minnesota, subject to Minnesota’s laws and regulations. They give the local governments of an adjoining state the rights and duties granted to local governments in Minnesota, including the right to exercise the power of eminent domain.

**EXPENDITURES FOR AIRPORTS – ZONING REQUIRED
(§ 360.305)**

This section governs airport financing. Subdivision 6 prohibits the Transportation Commissioner from spending money to acquire land



for or to construct, improve, or maintain airports unless a local government has established or is establishing an airport zoning authority and an airport zoning ordinance. It also directs the Commissioner to make “maximum use” of zoning and easements to eliminate potential airport hazards instead of acquiring land or interests in land for this purpose.

REGULATION OF STRUCTURE HEIGHTS (§§ 360.81 TO 360.91)

§ 360.81—Purpose; Safe Flight

After finding that safety requires the maintenance of unobstructed airspace and approaches to airports, this section declares that the location, height and identification of structures and the land related to them can be regulated.

§ 360.82—Definitions

This section contains definitions of “airport reference point” (point selected and marked at the geometric center of the airport landing area), “permit” (refers to permits issued under the height regulation statutes), and “public airport” (area of land licensed as a public use airport).

§360.83—Permit, Necessity

Subdivision 1 (Building height) prohibits any structure at any place in the state from extending more than 500 feet above the highest point of land within a one mile radius of the structure, until a permit has been issued or unless zoning regulations otherwise allow.

Subdivision 2 (Permit required in unzoned areas) requires issuance of a permit by the Transportation Commissioner to erect or add to the height of a structure that will obstruct air navigation in unzoned areas surrounding public airports. Height standards set by the Transportation Commissioner must conform to federal laws.

Subdivision 3 (Zoning regulations controlling) provides that no permit from the Transportation Commissioner is required in territory for which airport zoning regulations have been adopted. Height regulations and restrictions in airport zoning regulations control the construction or addition to the height of any structure in such territory.

Subdivision 4 (Exception for unnecessary hardship) authorizes the Transportation Commissioner to issue a permit for a structure “which will be located with respect to natural formations or other objects of a permanent character so that no material increase in the aeronautical hazard results therefrom.” This section also directs the Commissioner to issue permits “where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest”



Subdivision 5 (Exception for structure already in place or federally authorized) creates an exception from the permit requirement for structures existing or authorized by the federal government prior to the 1959 effective date of the structure height statutes. It further provides that neither a change in the Commissioner's rules nor the relocation or alteration of an airport imposes any new restriction on a structure existing or authorized by the federal government.

§ 360.84—Height Limitations; Exceptions

This section prohibits the issuance of a permit to erect or add to the height of a structure that will extend more than 1000 feet above the highest point of land within a one mile radius of the structure. It does authorize the Transportation Commissioner to issue a permit that exceeds this restriction if the proposed structure will not be higher than “50 feet above the height of the highest structure in existence” on the 1959 effective date of this section. This section also prohibits anyone from building or adding to the height of a structure for which a permit is required that exceeds the height allowed in the permit. These requirements are not applicable to a structure for which a permit is required from the federal government.

§ 360.85—Interest of Applicant for Permit

An applicant for a permit required by these sections need not have an ownership or possessory right to the site for which the permit is requested before the permit application is filed.

§ 360.86—Visual or Aural Identification

This section requires every permit granted to specify any markers, lighting, or other visual or aural identification that must be installed on or in the vicinity of the structure. Identification must, at a minimum, conform to federal standards, but a higher standard may be required.

§ 360.87—Investigation, Determination, Notice, and Hearing

This section authorizes the Transportation Commissioner to perform any investigation necessary to process an application submitted for a height permit. If the Commissioner determines a permit should not be issued, the permit applicant must be notified of that decision in writing and given an opportunity for a public hearing before the Commissioner.

§ 360.88—Failure to File for Permit; Commissioner's Action

This section authorizes the Commissioner to order any person who is constructing or adding to the height of a structure that is governed by the height restrictions to appear and show cause why a permit need not be obtained.

§ 360.89—Enforcement

This section authorizes the Commissioner to commence court action to prevent, restrain, correct, or abate violations of the



height restrictions and authorizes a court to grant injunctions and other appropriate relief.

§ 360.90—Structure Height Rules; Forms

This section authorizes the Commissioner to adopt regulations and forms necessary to administer the height restrictions.

§ 360.91—Misdemeanor

This section makes violations of the structure height provisions a misdemeanor and further provides that each day a violation continues constitutes a separate offense.

MINNESOTA AIRPORT NOISE STATUTES

Minnesota's airport noise statutes apply to the Minneapolis-St. Paul metropolitan area, which includes seven counties.

Minnesota Statutes 2004, § 473.192—Aircraft Noise Attenuation

This is the “Metropolitan Area Aircraft Noise Attenuation Act.” It authorizes municipalities in the metropolitan area to adopt and enforce ordinances and controls that regulate building construction and methods to attenuate aircraft noise in buildings in and around airport noise zones. Such ordinances must conform with the metropolitan area council's guidelines for land use compatibility with aircraft noise.

Minnesota Statutes 2004, § 473.661—Budget

Subdivision 4 provides for the allocation of metropolitan area funds to implement the federal noise compatibility program established by the Federal Aviation Administration and to install soundproofing in buildings affected by aircraft noise in the metropolitan area. Subdivision 4(d) requires an analysis of probable noise levels before new runways are constructed at the Minneapolis-St. Paul International Airport and development of an accompanying noise mitigation program with a reservation of funds for its implementation.

MINNESOTA AIRPORT ZONING RULES

Minnesota Rules, Chapter 8800—Aeronautics

This chapter contains regulations governing aircraft, airports, and aviation in Minnesota. Several regulations are pertinent to airport zoning and land use. Because they contain great detail, this document merely highlights and summarizes key concepts in the regulations. The text of the regulations themselves should be consulted for specific information.

§ 8800.0100—DEFINITIONS

This section contains definitions of terms used in the regulation, including “airport,” “height,” “structure,” and “tree.”



§ 8800.1100—REGULATION OF STRUCTURE HEIGHTS

This section authorizes the Transportation Commissioner to make any investigation necessary to assist in determining whether to grant a permit, required by Minnesota Statutes §§ 360.81 to 360.91. It authorizes interested persons to intervene in any permit determination by written notification to the Commissioner. It further authorizes the Commissioner to request an informal appearance by the permit applicant or any intervener.

§ 8800.1200—DETERMINING AIR NAVIGATION OBSTRUCTIONS

This section contains the height and surface measurements for determining whether any existing or future object would be an obstruction to air navigation, public airports, or public heliports.

§ 8800.2400—AIRPORT ZONING STANDARDS

This section contains minimum standards for airport zoning airspace, land use safety, and noise sensitivity. Any governmental body that has been granted airport zoning powers under Minnesota Statutes, Sections 360.061 to 360.074, may adopt more restrictive standards. Subpart 3 establishes six airspace zones (the primary, horizontal, conical, approach, precision instrument approach, and transitional airspace zones) and Subpart 4 imposes height restrictions consistent with these zones. Subpart 5 establishes three land use safety zones for an airport and each runway associated with it.

Subpart 6 details the use restrictions applicable to each land use safety zone. A separate section (6E) of this subpart specifies use restrictions for “established residential neighborhoods in built up areas.” It includes a list describing hazards so severe that local airport zoning ordinances must prohibit them, but it authorizes local ordinances to prohibit other uses deemed to be equally hazardous. Examples of such extreme hazards include existing residences either located entirely within Safety Zone A and within 1,000 feet of the end of a runway’s primary zone, or entirely within either Zones A or B and which penetrate an approach airspace zone.

Subpart 7 authorizes the creation of noise sensitivity zones.

SELECTED MINNESOTA ZONING AND PLANNING LAWS—MUNICIPALITIES

Enabling Legislation for Municipality Land Use Planning and Control

MINNESOTA STATUTES 2004, CHAPTER 462—HOUSING, REDEVELOPMENT, PLANNING, ZONING

§ 462.351—Municipal Planning and Development

This section contains findings concerning municipalities’ problems in guiding the development of land within their jurisdiction and the value of comprehensive planning.



“Municipalities” is defined in § 462.352 as “any city, including a city operating under a home rule charter, and any town.”

§462.353—Authority to Plan

This section grants general authority to municipalities to conduct comprehensive municipal planning activities.

§462.355—Interim Ordinance

Subdivision 4 (Interim Ordinance), as amended in 2004, specifically authorizes municipalities to adopt interim ordinances, including moratoriums on new development, if the municipality is conducting planning studies or is in the process of adopting or amending its comprehensive plan. An interim ordinance may “regulate, restrict or prohibit any use, development, or subdivision” within the jurisdiction for up to a one-year period. In the case where Mn/DOT has requested a city to update its airport master plan prior to August 1, 2004, the municipality may extend the period of an interim ordinance applicable to an area affected by an airport master plan for “such additional periods as the municipality may deem appropriate,” but no more than 18 months. (*Note:* Prior to this deadline, Mn/DOT Office of Aeronautics in fact mailed notice letters to all of the state’s public airports requiring them to update their airport master plans.)

The wording of this provision is convoluted in parts, but with the 2004 amendments, it appears that an interim ordinance necessitated by a city adopting or amending its airport master plan is the only type of interim ordinance that may halt development in a subdivision previously granted preliminary approval or that may delay the municipality’s action on a development application submitted prior to the effective date of the interim ordinance.

§ 462.357—Procedure to Effect Plan: Zoning

Subdivision 1 (Authority for zoning) specifically authorizes municipalities to regulate by ordinance the use of all surface, airspace, and subsurface areas. It authorizes the purchase and transfer of development rights and the creation of districts or zones within each municipality. It further directs that regulations be uniform for each class or kind of building, structure, or land and for each class or kind of use within a zoning district. Finally, this section gives municipalities extra-territorial zoning jurisdiction over lands within two miles of its corporate boundaries, but only within unincorporated counties or towns that have not adopted zoning regulations.



What is Amortization?

Amortization is a zoning tool used to control the longevity of nonconforming uses. Because an owner's right to continue a nonconforming uses is not necessarily indefinite, amortization provides for the phased, mandatory, and uncompensated termination of a nonconforming use following a time-specific period. The time-specific period must be reasonable and long enough, given the nature and scale of the use, for the owner to reasonably recoup the remaining investment value and turn the property over to a conforming use. While the courts have enunciated a number of tests for determining "reasonableness," clearly it depends on the totality of circumstances in each case. Many states outside of Minnesota allow the judicious use of amortization to eliminate nonconforming hazards, including airport land use hazards.

Given the state legislature's declaration that airport hazards are "public nuisances," local governments have many options under Minnesota law to abate or eliminate them, including—perhaps—amortization under the exception granted public nuisances in Sec. 462.357 (for municipalities) or Sec. 394.21 (for counties). However, until more clarifying legislation is adopted, MnDOT interprets the general amortization ban in Sections 462.357 (for municipalities) and 394.421 (for counties) as **NOT** allowing the use of amortization to eliminate nonconforming airport land use hazards without compensation.

Amortization—Municipalities

MINNESOTA STATUTES 2004, § 462.357, SUBDIVISION 1C (AMORTIZATION PROHIBITED) (ENACTED 1999) AND SUBDIVISION 1D (NUISANCE)

Subdivision 1c prohibits municipalities from enacting or enforcing an ordinance eliminating or terminating by amortization a use that was lawful at the time of its inception. The statute's prohibition expressly does not apply to adults-only businesses.

Subdivision 1d clarifies, however, that Subdivision 1c does not prevent enforcement of an ordinance providing for the prevention or abatement of "nuisances" or the elimination of "public nuisances."

For purposes of this section, the term "nuisance" is as defined in Minnesota Statutes §561.01 as "anything injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property" that interferes with the "comfortable enjoyment of life or property."

For purposes of this section, the term "public nuisance" is as defined in Minnesota Statutes §617.81 to include maintaining a public nuisance in violation of §609.74, clause (1) or (3). Sections 609.74(1) and (3) declare an actionable public nuisance to include where a person "maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public," or whenever a person is "guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided." This latter clause may arguably encompass the Minnesota airport safety statutes, and specifically Section 360.062(b)(1), which declare "the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question."

Special Note: Technically – although it is unclear – the elimination of land uses that constitute "airport hazards" may fall **outside** the general municipal prohibition of amortization in this Section 462.357(1)(c). However, Section 360.062(b)(1) states clearly that the establishment or creation of airport hazards should be accomplished "to the extent legally possible" by a municipality's police powers (e.g., its zoning powers) and not by eminent domain (e.g., condemnation) and that municipalities should avoid designating existing land uses as nonconforming uses "whenever possible consistent with reasonable standards of safety." Thus, while Section 462.357(1)(c) may arguably leave room for municipalities to amortize nonconforming land uses in airport safety zones to legitimately eliminate a declared public nuisance, the Minnesota legislature has also made clear in Chapter 360 that such tool should be avoided to the maximum extent possible to avoid substantial hardship to property owners. Therefore, until more clarifying legislation is adopted, Mn/DOT interprets the general amortization ban in Sections 462.357 (for municipalities) and 394.421 (for counties) as **NOT** allowing the use of amortization to eliminate nonconforming airport land use hazards without



compensation. This is one area where the state might consider clarifying the intent of the amortization ban as it applies to airport hazards.

Nonconforming Uses—Municipalities

MINNESOTA STATUTES 2004, § 462.357, SUBDIVISION 1E (ENACTED 2001, AMENDED 2004)

This section authorizes the continuation of any lawful nonconforming use existing at the time of the adoption of a zoning ordinance or regulation. “Continued” is further defined to include “repair, replacement, restoration, maintenance, or improvement, but not including expansion.” However, there are two circumstances where a municipality may require the nonconforming use to be discontinued: (1) if the nonconforming use is discontinued for more than one year; or (2) if the nonconforming use is destroyed “to the extent of greater than 50 percent of its market value” and no building permit has been applied for within 180 days from the date of damage. In those two instances, any subsequent use or occupancy must be conforming. This section also authorizes municipalities to impose reasonable regulations upon nonconforming uses to prevent and abate nuisances and to protect the public health, welfare, and safety.

The Minnesota airport zoning enabling statutes (Chapter 360) establish a less strict threshold of 80% destruction to determine the point after which a nonconforming use must comply with applicable municipal or county airport zoning regulations. Thus, if a municipality adopts the 50% destruction threshold in its general zoning regulations, and does not specifically except nonconforming uses under an applicable airport zoning ordinance, the more strict 50% threshold would arguably apply in lieu of the less strict 80% threshold according to the rule stated in Minn. Stat. §360.064.2 (Effect When Regulations Conflict).

SELECTED MINNESOTA ZONING AND PLANNING LAWS—COUNTIES

Enabling Legislation for County Land Use Planning and Control

MINNESOTA STATUTES 2004, CHAPTER 394—PLANNING, DEVELOPMENT, ZONING

§ 394.21—Authority to Carry On County Planning and Zoning Activities

This section authorizes any county with a population of less than 300,000 in the 1950 U.S. Census to conduct county planning and zoning activities.

§394.23—Comprehensive Plan

This section authorizes counties to prepare and adopt by ordinance a comprehensive plan, which becomes the basis for any “official controls” the counties adopt.

§ 394.24—Official Controls

This section directs that any official controls that further the purpose and objectives of the comprehensive plan must be adopted by ordinance.

§ 394.25—Forms of Control

This section directs that official controls be adopted by ordinance and lists some features that may be included, such as zoning districts, zoning maps, conditional uses for manufactured home



parks, feedlot zoning ordinances, special conservation areas, and subdivision rules.

§ 394.34—Interim Zoning

This section authorizes counties to adopt, as an emergency measure, temporary or interim zoning maps or ordinances regulating the use or occupancy of land when a county is in good faith conducting studies or has held a hearing to adopt or amend a comprehensive plan or official control. The term of such interim zoning is limited to one year, and extensions of up to one year are allowed.

Amortization—Counties

MINNESOTA STATUTES 2004, § 394.21, SUBDIVISION 1A (AMORTIZATION PROHIBITED) (ENACTED 1999) AND SUBDIVISION 3 (NUISANCE)

Subdivision 1a contains the same exact language as the municipal provisions in §462.357.1e, and prohibits counties from enacting or enforcing an ordinance eliminating or terminating by amortization a use that was lawful at the time of its inception. This prohibition expressly does not apply to adults-only businesses. **Subdivision 3** further clarifies that the prohibition on amortization does not prohibit the prevention, abatement, or elimination of “nuisances,” as defined in Minnesota statutes §561.01, or the elimination of “public nuisances” as defined in Minnesota Statutes §617.81. Until more clarifying legislation is adopted, Mn/DOT interprets the general amortization ban in §394.421 as **NOT** allowing the use of amortization to eliminate nonconforming airport land use hazards without compensation.

See the explanation and discussion of the meaning of the terms “nuisance” and “public nuisance” in the discussion of the similar municipal statute found at Section 462.357, Subdivisions 1c and 1d (above).

Nonconforming Uses—Counties

MINNESOTA STATUTES 2004, § 394.36 (ENACTED 1959)

Subdivision 1 authorizes the continuation of any lawful nonconforming use existing at the time of the adoption of a zoning ordinance or regulation. If the nonconforming use is discontinued for more than one year or is destroyed “to the extent of greater than 50 percent of its market value,” any subsequent use must be a conforming use.

Subdivision 2 authorizes counties to adopt regulations they deem desirable or necessary to control, regulate, reduce the number of, or provide for the gradual elimination of nonconforming uses. They may require nonconforming uses to conform to official controls within a reasonable time or be terminated. They may also impose additional regulations on nonconforming uses.

Special Note: Section 394.21(1)(a) of the Minnesota Statutes (described above), which was enacted in 1999, generally prohibits the use of amortization in eliminating nonconforming uses that are not considered public nuisances. This later general prohibition would appear to trump the earlier-adopted general allowance stated in this Subdivision 2.



Subdivision 3 authorizes counties to acquire nonconformities that they find to be detrimental to achieving the goals of a comprehensive plan.

SELECTED MINNESOTA ENVIRONMENTAL LAWS

The following summary highlights the primary Minnesota state environmental laws and regulations that typically are implicated in airport development. Development at public airports almost always involves the use of state funds, which triggers environmental review under state statutes. This review is intended to analyze and disclose the impacts of state actions – including funding Minnesota’s public airports – on the surrounding human environment. Any identified adverse impacts must be substantially mitigated. One of the criteria for determining the potential for adverse impact is whether existing and planned land uses in the vicinity of an airport are compatible with the proposed airport development. The more compatible surrounding airport land uses are, the easier it is to make a finding of “no significant impact,” and the smoother the path toward future airport growth.

Environmental Policy—Minnesota Statutes 2004, Chapter 116D

This chapter is Minnesota’s NEPA-like statute which, paralleling the federal National Environmental Policy Act (“NEPA”), declares a statewide policy to “encourage productive and enjoyable harmony between human beings and their environment.” The Minnesota act is similar to NEPA, and parallels the federal provisions in virtually all its elements. The Act requires state agencies to implement a process to identify, acknowledge, and mitigate the effects of its actions on the human environment prior to making a final decision. The primary vehicle for doing this is preparation of environmental assessments (EAs) and environmental impact statements when there is potential for significant environmental effects resulting from any major governmental action. One significant difference between the Minnesota Act and NEPA is that the state’s requirements for scoping the contents of an EIS, including the range of reasonable alternatives to the proposed action, is more extensive than the federal requirements.

Wetlands Conservation Act—Minnesota Statutes 2004, Chapter 103G

Wetlands near airports can be a significant attraction of migratory birds. The potential for “bird strikes,” however constitutes a substantial aviation hazard. Federal and Minnesota rules and regulations advise significant separation between airports and airport operations from bird attractants, such as wetlands. Consequently, and solely in terms of airport planning, wetlands located under or close to an airport’s approach zones arguably constitute an incompatible land use. Thus, the ability or inability to fill or remove wetlands as part of private development activity in the vicinity of an airport can be important in airport planning.



The Minnesota Wetlands Conservation Act (Minn. Statutes §§ 130G.001 through 130G.251) requires a public waters work permit and a wetlands replacement plan for any proposals to drain, fill, alter, or remove “public water wetlands” within the state. “Public water wetlands” include types 3, 4, and 5 wetlands as defined in the U.S. Fish and Wildlife Services Circular No. 39 (1971), and which are larger than 10 acres in unincorporated areas or 2.5 acres in incorporated areas. All other wetlands cannot be drained or filled, wholly or in part, unless replaced by restoring or creating wetland areas of at least equal public value according to an approved replacement plan. While the Act does expressly exempt certain public transportation road projects from the requirement for a wetlands replacement plan, the Act does not similarly exempt wetland drain/fill related to public airport construction projects from the Act’s requirements.

Local governments issue permits required under the Act, and approve wetland replacement plans consistent with a locally adopted wetland protection and management plan. When a proposed activity triggers the jurisdiction of the federal government under Section 401 or Section 404 of the Clean Water Act, applicants may submit a joint application to the appropriate local government, the state Department of Natural Resources, and to the U.S. Army Corps of Engineers; grant of a permit pursuant to the joint application satisfies the local, state, and federal wetlands requirements.

Replacement wetlands must be of equal public value to the wetland that is drained or filled. The Act specifies the amount of replacement wetlands that must be provided for every one acre of removed wetland, depending generally on whether the removed/altered wetland is on agricultural or nonagricultural land. Replacement wetlands may be sited on-site, preferably, or off-site under circumstances specified by the Act.

Minnesota Environmental Coordination Procedures Act, Minnesota Statutes 2004, Chapter 116C

This Act provides the guidelines and minimum requirements for an optional procedure to assist persons undertaking development or construction projects with potential environmental impacts, and who must obtain more than one state permit, by establishing a mechanism to coordinate the administrative decision-making process. The Act is also intended to make it easier for the general public to present their comments on such projects seeking state approval. Essentially, the option allows a project proponent to submit a “master application” to the designated coordination unit (the Minnesota Bureau of Business Licenses) requesting the issuance of all state permits necessary for the project. Such master application will only be processed if the applicant certifies that, among other things, an EIS is completed (or not required) and that the project complies with local zoning, subdivision, environmental, and planning requirements. When required or desired, a single public hearing may be conducted on the master application, and within 60 days of the close of the administrative hearing, each involved state agency must make its final decision on the permit application.



Airport Zoning and the “Takings” Issue

As discussed in Chapter 4, one of the most effective tools to protect airports from incompatible development is local zoning and land use controls. The State of Minnesota has granted its local governments broad authority to impose land use controls for a variety of purposes ranging from protection of natural resources to specifying allowed uses in appropriate locations. As such, there is little question that Minnesota communities have the power to adopt protective regulations to prevent incompatible development around airports.

However, that is not the last word on the subject. The United States Constitution and the Minnesota courts impose some limitations on the extent that regulations can be used to control the use of land through zoning—the so-called “taking” issue. These limitations and the threat of having to pay damages to landowners subjected to strong development controls through zoning have made some jurisdictions in Minnesota wary of utilizing their land use control authority to protect airports from incompatible development. Until these issues are resolved, airport zoning may not be as an effective tool as it has proven to be in other states. This section discusses the taking issue in greater detail from a national and state perspective.

AN OVERVIEW OF TAKINGS LAW

**“... nor shall private property be taken
for public use, without just compensation.”**

With these few words, the framers of the United States Constitution enshrined in the Fifth Amendment one of the most fundamental of individual rights—to own property free of the threat of seizure by government, unless the government pays for it. This basic property right was derived from 17th- and 18th-century English legal tradition that prohibited the king from taking a subject's property except by a duly enacted law of the land and with full indemnification.

Historical records show that what the drafters of the Bill of Rights had in mind when they adopted the “just compensation” or “takings” clause was to permit the government to take private property for public use—for example, land needed for a public highway—but only upon payment of compensation. Today, we call this government action exercising the right of eminent domain or condemnation. Thus, once again, the framers demonstrated their genius in balancing the rights of the individual with the clear need of the people—government—to undertake public projects for everyone's benefit. It is hard to imagine how the nation could have grown or society would have functioned without the ability to judiciously exercise the power of eminent domain to build roads, dams, parks, and other projects. Indeed, hardly any reasonable person would quarrel with that notion.



How then has the just compensation clause of the Fifth Amendment become the center of a controversy involving zoning that lawyers like to call the “takings” issue—which has little to do with the actual seizure of property or exercise of the power of eminent domain as our forefathers understood it?

Interestingly, early experience from England and Colonial America does not suggest that by simply regulating, the government could “take” someone's property. Indeed, there are many examples of strict government regulation of land during this period where there is no hint that anyone expected compensation to be paid. These cases reflect the American tradition of landowner responsibility to use property prudently. For example, after the great fire in Boston in the late 17th century, a series of laws was enacted directing the use of brick or stone in buildings. No dwelling house could be constructed otherwise upon threat of serious fine. A later act declared that any building that did not meet these standards was a nuisance subject to demolition.

Where landowners sought compensation, courts typically were unsympathetic. For example, in *Hadacheck v. Sebastian*, 230 U.S.394 (1915), the City of Los Angeles banned brick making—an industrial operation that spewed “fumes, gases, smoke, soot, steam and dust” into the air—from certain areas of the city to protect surrounding residential neighborhoods, even though the plaintiff's brickyard was built before people moved into the area. The factory owner sued, arguing a taking had resulted because the value of his property was reduced from \$800,000 to \$60,000. The U.S. Supreme Court rejected this argument, balancing the needs of the public against the harmful or inappropriate use of land. The city was promoting a legitimate public need, and the property owner could still use the parcel, even if for a different purpose.

The general rule was that “acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.” 230 U.S. 394, citing *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 638 (1878).

The clear line between actual physical takings and regulatory takings began to blur in the 1920s. In a case called *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), the U.S. Supreme Court accepted the notion that regulations can cause a taking even if there is no actual physical invasion of the property in question. The State of Pennsylvania had passed a law forbidding coal mining that would cause buildings or streets on the surface to subside, or sink, into the mine shafts—even though the coal mining companies retained that right when they sold the surface rights to individual landowners.

While the Supreme Court found that the law served a valid public purpose, the only constitutionally acceptable method to accomplish that goal was for the government to buy the property interest held by the coal company. Since the state law did not authorize compensation, only regulatory control,



the Court struck down the legislation, and Justice Oliver Wendall Holmes said:

“The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U.S. 393, 415.

Just how far was too far? In literally thousands of cases over the ensuing decades, state and federal courts were called upon to determine whether a particular environmental or zoning regulation was overly burdensome and violated the takings clause. Judges considering these cases had considerable difficulty in establishing hard and fast rules—largely because each situation involving the use of land is unique, both as to the economic impact of regulation and the impact of unregulated use on neighboring property owners and the public generally. Nevertheless, rarely did state or federal courts strike down local land use regulations as a taking.

Almost 50 years after the *Pennsylvania Coal* decision, the Supreme Court finally agreed to consider another major land-use takings case and to try to provide more guidance on the taking issue. In 1978, in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, the Supreme Court reaffirmed the accepted takings analysis that an owner must be denied all reasonable use of a property for a taking to occur. The Court also set forth basic principles to guide communities, property owners, and reviewing courts in evaluating the constitutionality of regulatory acts in specific situations. What are these principles? Briefly, that:

- Communities clearly have the authority to adopt laws and regulations that are designed to protect and enhance the quality of life of their citizens.
- The regulation of private property will not constitute a taking, as long as: (1) the regulation advances a legitimate governmental interest; and (2) the property owner retains some viable use of the property (particularly as measured by the owner’s reasonable investment-backed expectations).
- Property owners may not establish a taking “simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.” 438 U.S. 104, 130.
- In deciding whether a particular governmental action has caused a taking, a reviewing court must examine the effect of the regulation on the entire property, and not focus on any one specific segment or interest.

Although *Penn Central* involved a challenge to a landmark preservation ordinance, these principles have been applied to a variety of public interest laws, including zoning and land-use regulations. In subsequent decisions, the Supreme Court did hold that if a zoning regulation went too far and deprived a landowner of all reasonable use, the local government would be liable for damages for the period in which the offending regulation was in



place. The Supreme Court in *Lingle v. Chevron*, 125 S.Ct. 2074 (2005), recently confirmed the taking rules as set forth in the *Penn Central* decision.

The practical upshot of the *Penn Central* decision has been that rarely will courts find that a zoning regulation will amount to an unconstitutional taking unless an owner is not left with any reasonable use of the property. For example, if a zoning regulation required an owner to maintain his land as open space and the only use he was allowed was to camp on it, a taking would likely occur. Similarly, if a large city zoned land off the end of its airport's runway in Safety Zones A and B as agriculture, even though the airport was located in a densely developed urban area, the takings line might be crossed because agriculture might not be an economically viable use. On the other hand, in a more rural or small city setting, there are a number of cases holding restricting land to agricultural use does not amount to a taking. In such instances the locality might be able to zone land in Safety Zones A, B, and C as agriculture without much risk. Again, the exact facts of the case will be determinative. Thus, notwithstanding the specter of damages, which are remote, numerous local governments around the United States have enacted very strong zoning and land use controls to preserve community character and protect airports from incompatible development.

The Minnesota Courts' Interpretation of the Takings Issue⁴¹

Nationally, the state of takings law is very positive for local governments wanting to address land use compatibility regulations near airports. Both at the U.S. Supreme Court level and in the majority of other states, takings law has noticeably shifted more strongly in favor of local zoning regulations against takings claims.

Twenty-five years ago, however, the Minnesota Supreme Court adopted a unique interpretation of takings law and applied it to airport zoning regulations. In 1980, the Minnesota Supreme Court, in *McShane v. Faribault*, 292 N.W.2d 253 (Minn. 1980), held that all zoning restrictions are not the same. The court distinguished between regulations that "arbitrate" between competing land uses and regulations that serve a "governmental enterprise." The consequence of this unique classification, called the "enterprise/arbitration test," is significant. Regulations that arbitrate are an appropriate exercise of the police power if any reasonable use of the property remains. Regulations that serve a governmental enterprise, however, constitute a taking of property if there is a substantial diminution in the property's value. Thus, when a court finds that a zoning regulation serves an enterprise rather than an arbitrating function, the defending municipality's zoning actions are measured against a much less deferential standard of review. The *McShane* Court found the airport zoning in that case served a "governmental enterprise" – i.e., the operation of an airport, and because the zoning caused a substantial reduction in the property's value, there was a *per se* taking of property. As a result of this one case, airport zoning in Minnesota (and really all local zoning efforts) operates

⁴¹ For a more thorough discussion of Minnesota takings law, see Appendix 8.



under a legal cloud and an assumption of risk. *McShane*'s legacy is the real threat of litigation if a local government adopts the Minnesota Model Ordinance or some variant of airport zoning.

After *McShane*, a local government in Minnesota faces a tough choice: (1) It can choose to pay or compensate a landowner whose property will be substantially devalued by the airport zoning ordinance, (2) it can refuse to compensate and possibly face a takings claim based on the *McShane* holding, or (3) it can simply give up on airport zoning all together and allow incompatible development to proceed. None of these choices are appealing.

However, for several reasons, the foundation supporting the *McShane* case appears to be weakening. First, the *McShane* case relies on the “government enterprise versus government arbitration” test to determine government takings liability. No other state in the country now uses this test. Even the test’s originator, a noted law professor and scholar, has repudiated it as unworkable and incorrect.⁴² Subsequent appellate Minnesota airport zoning cases also confirm the test may be flawed. Since *McShane*, no other reported appellate case in Minnesota has found that airport zoning laws have worked an uncompensated taking (although state trial courts, in unreported opinions, have relied on *McShane* to overturn airport zoning as applied to specific properties). These subsequent appellate cases either found that *McShane* was “inapplicable”; or that the facts presented did not support finding a taking. These recent cases suggest that *McShane*'s underlying theory—the government enterprise test—may no longer be viable. For example, see *Olsen v. City of Ironton*, 2001 WL 379010 (Minn. App., unpublished opinion) (“We question whether a land-use regulation adopted . . . contemporaneous with the preparation of a . . . comprehensive plan could be considered a land-use regulation adopted to benefit a specific governmental enterprise.”).

It is important to realize that the state courts have never found that Minnesota’s model ordinance, and more specifically local zoning ordinances based on that model, are unconstitutional on their face. There is only one reported appellate case—*McShane*—where the local government was found liable for just compensation, and that was where the government conceded their airport zoning laws, as applied to Mr. McShane’s property, resulted in a “substantial and measurable” decline in the property’s market value. Since *McShane*, landowners typically have not been able to meet their burden beyond the trial courts to show this same loss of market value. Indeed, Minnesota appellate courts have announced this is a “difficult” burden to meet. This fact, coupled with the fact that state trial courts continue to rely on the *McShane* test to strike down airport zoning, underscore how *McShane* has had influenced assumptions about local government takings liability for the past 25 years in Minnesota.

Second, outside Minnesota, takings law has taken a different direction. Virtually every modern court case dealing with takings liability for airport zoning laws has concluded that laws very similar to the Minnesota model

⁴² Joseph Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971)



ordinance are proper exercises of the police power and NOT unconstitutional uncompensated takings of property. These cases are cited and discussed at length in the legal memorandum found in Appendix 8 to this manual.

The judicial authority from other states is that airport zoning laws, like the Minnesota model ordinance, are not unconstitutional uncompensated takings when applied. Instead, courts generally uphold them as valid and necessary exercises of the police power. They are tested as more generic land use laws are normally tested, by simply asking: What was the underlying reason for the law? Does it benefit the public interest in safety and orderly land use planning? If the answers to these questions are "yes," then the courts almost always find the laws constitutional, unless their application to a specific piece of property virtually wipes out all of the land value (a total taking).

McShane also appears inconsistent with the direction found in the United States Supreme Court's recent takings cases. These cases reveal that courts will test land use laws like the Minnesota model airport zoning ordinance against a takings challenge by whether: (1) the law produces a public benefit and (2) whether the law take away essentially ALL of an affected property's remaining value. Minnesota local governments that adopt the model ordinance, or a variant, would almost certainly meet the U.S. Supreme Court's takings test if challenged. Airport zoning laws are adopted for important public benefits, and rarely will remove all the value of affected land.