1999

Property—Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case

Alison J. Midden

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Midden, Alison J. (1999) "Property—Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case," William Mitchell Law Review: Vol. 25: Iss. 1, Article 10. Available at: http://open.mitchellhamline.edu/wmlr/vol25/iss1/10
PROPERTY—TAKING OF ACCESS: MINNESOTA SUPREME COURT DECLINES TO ALLOW ADMISSION OF EVIDENCE OF DIMINISHED ACCESS DUE TO INSTALLATION OF A MEDIAN IN A TAKINGS CASE

County of Anoka v. Blaine Building Corporation, 566 N.W.2d 331 (Minn. 1997)

I. INTRODUCTION ...................................................................... 329
II. BACKGROUND ......................................................................... 332
   A. The U.S. Constitution’s Takings Clause ................................................ 332
   B. Physical Takings Cases ......................................................................... 334
   C. Loss of Access Cases ........................................................................... 336
   D. Minnesota Partial Takings Cases ............................................................. 336
   E. Minnesota Inverse Compensation Takings Cases ...................................... 340
III. THE BLAINE BUILDING CORP. CASE .......................................... 343
   A. The Facts .......................................................................................... 343
   B. The Majority’s Analysis ........................................................................ 344
   C. The Dissent’s Analysis ......................................................................... 346
IV. ANALYSIS OF THE BLAINE BUILDING CORP. DECISION .......... 346
   A. The Court Ignored the Strom Decision .................................................... 347
   B. The Court Failed to Extend the Crookston “Exception” .............................. 348
   C. The Court Relied on Inverse Condemnation Cases .................................... 349
V. CONCLUSION .......................................................................... 350

I. INTRODUCTION

Takings law is often characterized by commentators as nonsensical at best and utterly chaotic at worst. Recently, the Minnesota Supreme Court

---

helped further the uncertainty of physical takings law in this state by refusing to allow evidence of loss of highway access in the determination of damages allowed a property owner whose land was taken by eminent domain.

This note addresses the loss of the property right of “access,” which is defined as “the capability to enter and leave one’s land.” In County of Anoka v. Blaine Building Corp., the Minnesota Supreme Court held that evidence of diminished access to a highway due to the construction of a median is not admissible in determining the before and after fair market value of a landowner’s property taken in an eminent domain proceeding. In Blaine Building Corp., commercial landowners who had previously enjoyed direct access to and from a roadway lost that access due to a government highway improvement project. Before the construction project, customers of the commercial businesses could access the businesses from either side of the roadway. After the reconstruction and the addition of a median to the highway, customers could only conveniently access the businesses from one side of the highway. Although the landowners were compensated for land actually taken from them in the reconstruction project, the landowners were not compensated for damage to the value of the remainder land due to the loss of access. In fact, the court refused to allow evidence of diminished access to be considered as evidence of reduced market value. In Blaine Building Corp., the court disregarded Minnesota precedent and instead came to an erroneous conclusion that

Takings Clause as “engulfed in confusion” and takings law as “out of joint;” stating that “[t]hroughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle-prize” and defining “eminent domain” as referring “to the state’s prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good”); William Michael Treanor, The Armstrong Principle, the Narratives of Takings, and Compensation Statutes, 38 WM. & MARY L. REV. 1151, 1151 (1997) (noting that the “Takings Clause” is “famous for inspiring disagreement” and that the Supreme Court “has been unable to offer a coherent vision of when compensation is required”).

3. 566 N.W.2d 331 (Minn. 1997).
4. See id. at 333. For an interesting comment on the law of eminent domain, see Winger v. Aires, 89 A.2d 521, 522 (Pa. 1952) (stating “[t]he power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land”).
5. See Blaine Bldg. Corp., 566 N.W.2d at 333.
6. See id.
7. See id.
8. See id. at 334, 336.
9. See id. at 333.
10. Specifically, the court disregarded two cases. See id. at 337 (Anderson, J. dissenting). The court ignored State v. Strom, 493 N.W.2d 554, 561 (Minn. 1992),
adversely impacts the value of commercial property abutting highways.\textsuperscript{11}

This case note will first examine the background of the United States Constitution's Takings Clause and then explore the national background of physical takings law.\textsuperscript{12} The note will go on to explain Minnesota physical takings law by first examining partial takings cases\textsuperscript{13} and then examining cases in an inverse condemnation\textsuperscript{14} context.\textsuperscript{15} Part III examines the facts and the majority's analysis in the \textit{Blaine Building Corp.} decision, followed by an explanation of the dissent's analysis.\textsuperscript{16} Part IV discusses the court's analysis and implications of that decision. Finally, this note will conclude that the Minnesota Supreme Court has deprived landowners of just compensation by denying them an opportunity to present evidence of loss of access.\textsuperscript{17}

which held that in a partial taking condemnation action, evidence of construction-related interferences and loss of visibility to the public traveling on a redesigned highway is admissible, not as a separate item of damages, but as a factor to be considered in determining the diminution in market value of remaining property. See \textsuperscript{id}. The court also disregarded \textit{City of Crookston v. Erickson}, 244 Minn. 321, 327-28, 69 N.W.2d 909, 914 (1955), which held that the depreciating effects of an entire sewage disposal and treatment facility should be considered in determining damages to the remaining land if the use of the land constituted an integral and inseparable part of a single use to which all the condemned land was subject. See \textsuperscript{id}.

11. Strangely, the court came to a conclusion at odds with property rights at a time when there is an apparent property rights movement underway. See Dennis J. Coyle, \textit{Takings Jurisprudence and the Political Cultures of American Politics}, 42 CATH. U. L. REV. 817 (1993) (describing the rediscovery of property rights); see also Treanor, \textit{supra} note 1, at 1152 (stating that the property rights movement demands that both state and national legislatures provide compensation for takings that diminish property values); Recent Legislation, \textit{Land-Use Regulation: Compensation Statutes—Florida Creates Cause Of Action For Compensation Of Property Owners When Regulation Imposes "Inordinate Burden,"} 109 HARV. L. REV. 542, 543 (1995) (describing emerging state legislation designed to remedy perceived property rights attacks).

12. See \textit{infra} Part II.A–C.

13. A "partial taking" occurs where the government takes only a portion of land of a larger parcel belonging to the landowner. See Cynthia M. Filipovich, Note, \textit{Inadmissibility of Governmental Highest Possible Use Evidence in A Partial Takings Case: A Departure from Constitutional Just Compensation}, 70 U. DET. MERCY L. REV. 873, 874 (1993). Partial takings cases often involve arguments as to what compensation, if any, is due the landowner for any damages to the remaining land not taken. See \textsuperscript{id}.

14. See Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974) (describing "inverse condemnation" as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency").

15. See \textit{infra} Part II.D–E.

16. See \textit{infra} Part III.A–C.

17. See \textit{infra} Part V. For an account of cases where access, not loss of access, to a highway actually causes a diminution in market value due to increase in noise pollution, dust, vibrations, and other reasons, see Richard Kahn, Comment, \textit{Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners}, 22 B.C.
II. BACKGROUND

A. The U.S. Constitution's Takings Clause

The United States Constitution limits the government's power of eminent domain through the Fifth Amendment, requiring just compensation for land taken for public use. There are two broad categories of takings claims. The first type of taking, a "physical taking," occurs when the government has physically appropriated land for public purposes through the exercise of eminent domain. The second type, the so-called "regulatory taking" occurs where a landowner claims that a government regulation constructively appropriates the landowner's private property for public purposes, without the government initiating eminent domain proceedings.

The Fifth Amendment, or the "Takings Clause," originally and ex-

18. See U.S. CONST. amend. V. The Fifth Amendment to the U.S. Constitution reads, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Chicago, Burlington and Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 240 (1897) (deciding that states must adhere to the requirements of due process under the Fourteenth Amendment in eminent domain cases). For a history of the origins of the Fifth Amendment and its placement in the Constitution, see BERNARD H. SIEGAN, PROPERTY AND FREEDOM 13-46 (1997).

19. See Wendie L. Kellington, Nuts and Bolts of Takings Claims, INST. ON PLAN. ZONING & EMINENT DOMAIN § 3.02 (1997) (providing a general description of takings law).

20. See id. For example, when the government forces the purchase of property from a landowner in order a build a highway.


22. The Fifth Amendment is also referred to as the "Eminent Domain Clause" and the "Just Compensation Clause," as well as the "Takings Clause." See WILLIAM A. FISCHEL, REGULATORY TAKINGS 1 (1995) (providing commentary on the Fifth Amendment).
clusively protected property from outright government seizure. Only in the late 1800s would the concept of "regulatory takings" emerge where regulations were deemed to usurp property rights to the point that the regulations constituted Fifth Amendment takings. Blaine Building Corp. concerns the first type of taking described: a government appropriation of property through eminent domain proceedings.

23. See Fred P. Bosselman et al., The Taking Issue 82-104 (1973) (discussing the history of colonial and pre-colonial takings issues). The authors state "[t]here is no evidence that the founding fathers ever conceived that the Taking Clause could establish any sort of restrictions on the power to regulate the use of land." Id. at 104. See also William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995) (providing a comprehensive history of takings law before the Fifth Amendment). Treanor makes clear that the Fifth Amendment originally only applied when "the federal government physically took private property, but not when government regulations limited the ways in which property could be used." Id. at 782.

24. See Lindfors, supra note 21, at 261. See, e.g., Mugler v. Kansas, 123 U.S. 623, 670 (1887) (holding that a state statute prohibiting the sale or manufacture of alcohol was not a taking of a brewery owner's property as the manufacture and sale of alcohol was a public nuisance). Regulatory takings cases have constituted a major expansion of Supreme Court takings jurisprudence. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), Justice Holmes writing for the majority, stated that a regulation of private property is a taking if it "goes too far." This case is regarded as the "original and most-cited Supreme Court decision on regulatory takings." Fischel, supra note 22, at 13. After Pennsylvania Coal, the Supreme Court decided other landmark regulatory takings cases. In Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1977), the Court decided that a taking had not occurred when a New York City historical preservation ordinance restricting development did not allow the owners of Grand Central Station Terminal to construct a high-rise office building above the terminal. See id. at 138. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court found a taking where a New York state statute compelled property owners to allow cable installation on property, stating "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Id. at 426. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Court decided that a county ordinance forbidding a church to rebuild structures destroyed by flooding was a "temporary" taking requiring compensation. See id. at 321. In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the Supreme Court found a taking where a grant of a building permit was conditioned on the homeowners granting a public easement to the state. See id. at 838-39. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Court held that a taking had occurred when a regulation effectively barred Lucas from building structures on beachfront property. See id. at 1030-32. Finally, in Dolan v. City of Tigard, 512 U.S. 374 (1994), the Court found a regulatory taking where a city conditioned approval of a building permit on the landowner's agreement to establish a pedestrian and bike path on her property. See id. at 995-96.

B. Physical Takings Cases

Where there is an actual physical occupation of land by the government, the Supreme Court is more than willing to find a compensable taking.26 A brief review of Supreme Court physical takings cases illustrates the Court’s willingness to allow compensation in cases where there is a physical invasion of property.

In an early case, Pumpelly v. Green Bay Co.,27 water overflowed 640 acres of Pumpelly’s land due to the erection of a dam across Wisconsin’s Fox River.28 The building of the dam was part of a plan to use the river water for hydraulic purposes.29 The defendant claimed that a state may erect works such as dams for the good of the public, “without rendering itself liable to individuals owning land bordering on [the] river.”30 Further, the defendant went on to argue that the plaintiff’s lands “had not been taken or appropriated” despite the permanent flooding and that “[w]hatever may be the extent of this injury, it is remote and consequential and without remedy.”31 The Supreme Court disagreed, stating “[i]t would be a very curious and unsatisfactory result, if... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely... without making any compensation....”32

In the following 100 years, flooding of land continued to be a common application of physical takings law. Other physical takings cases after Pumpelly involved whether there was a compensable taking where airplanes flew over farm land;33 where the United States condemned a

27. 80 U.S. (13 Wall.) 166 (1871).
28. See id. at 167. Although the case arose under the Wisconsin Constitution, which provides that “[t]he property of no person shall be taken for public use without just compensation therefor,” Wis. Const. art. 1, § 13, the Court decided that since the Wisconsin Constitution and the Federal Constitution had almost identical language, it was proper to examine the question of whether the injury to Pumpelly was within the Federal Constitution. See Pumpelly, 80 U.S. at 176-77.
29. See id. at 167.
30. Id. at 174.
31. Id.
32. Id. at 177-78.
33. See, e.g., Sanguinetti v. United States, 264 U.S. 146 (1924) (holding that there was no taking where a canal constructed by the United States intermittently flooded plaintiff’s land); United States v. Cress, 243 U.S. 316 (1917) (finding a partial taking where flooding of landowner’s property occurred upon damming rivers in Kentucky); Bedford v. United States, 192 U.S. 217 (1904) (finding that flood damage to land as a result of improvements made upon the Mississippi River did not constitute a taking as the flood damage was “consequential”).
34. See United States v. Causby, 328 U.S. 256, 260-61, 266 (1946) (holding that the common law doctrine that ownership of land extends to the "periphery of
laundry facility during World War II;\textsuperscript{35} where a coal mine was seized and operated by the federal government in order to avert a nationwide miners strike;\textsuperscript{36} and where the federal government acquired title to uncompleted ships making it impossible for shipbuilders to collect on construction liens attached to the ships.\textsuperscript{37}

Years later, in 1982, the Supreme Court decided \textit{Loretto v. Teleprompter Manhattan CATV Corp.,} \textsuperscript{38} taking a step forward in physical takings law. In \textit{Loretto}, a property owner bought a five-story apartment building and discovered that cable television companies had installed cables on the building, both “crossovers” to serve other buildings and a cable to serve the landlord’s tenants.\textsuperscript{39} The television cable company had also installed two “large silver boxes” on the roof of the building.\textsuperscript{40}

New York law provided that a landlord could not interfere with the installation of the cable lines nor demand payment from any cable company where the payment was in excess of what the state commission deemed reasonable.\textsuperscript{41} The state commission had determined a one time $1 fee was a reasonable amount of payment from a cable company to a landlord for placement of television cables on buildings.\textsuperscript{42} \textit{Loretto} brought a class action lawsuit on behalf of all owners of real property in the state on which the cable company had placed cable components, arguing that the cable installations were trespass.\textsuperscript{43}

The Court concluded that the physical intrusion was a taking, affirming the “traditional rule that a permanent physical occupation of property is a taking.”\textsuperscript{44} The Court rejected the practical argument that the cable lines were a small inconvenience, stating that “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”\textsuperscript{45}

\begin{thebibliography}
\bibitem{Kimball} See Kimball Laundry Co. v. United States, 338 U.S. 1, 4 (1949) (determining proper compensation for a temporary taking of a laundry facility during wartime).
\bibitem{Pewee} See United States v. Pewee Coal Co., 341 U.S. 114, 116-17 (1951) (holding that there was a taking of mining company's property, entitling respondent to compensation under the Fifth Amendment).
\bibitem{Armstrong} See Armstrong v. United States, 364 U.S. 40, 48-49 (1960) (holding that there was a compensable taking of liens held by shipbuilders and material providers).
\bibitem{Loretto} 458 U.S. 419 (1982).
\bibitem{id} See \textit{id.}
\bibitem{id2} See \textit{id.} at 422.
\bibitem{id3} See \textit{id.} at 423.
\bibitem{id4} See \textit{id.} at 423-24.
\bibitem{id5} See \textit{id.} at 424.
\bibitem{id6} \textit{Id.} at 441.
\bibitem{id7} \textit{Id.} at 436-37.
\end{thebibliography}
In summary, the Supreme Court's physical takings decisions set forth the general rule that no matter what the intrusion, when government occupies a piece of private property or a property right, the result is a taking that requires compensation.

C. Loss of Access Cases

By comparison, the Supreme Court has yet to decide a case where loss of access is deemed a compensable taking. Prior to 1900, the Supreme Court had decided three physical takings cases regarding loss of access, but was unwilling to find a Fifth Amendment taking.\(^46\) In *Smith v. Corporation of Washington*,\(^47\) the Court held that the Fifth Amendment did not require compensation where the Washington, D.C. government lowered the grade of a public street, blocking access to a landowner's home.\(^48\) In *Transportation Co. v. Chicago*,\(^49\) the City of Chicago built a tunnel and made improvements to a street, blocking access to the landowner's property.\(^50\) Once more, the Court found no compensable taking since there was no actual physical taking of land, only the blocking of access.\(^51\) Later, in *Gibson v. United States*,\(^52\) the federal government built a dike on the Ohio River in Pennsylvania, blocking access to the property owner's dock.\(^53\) The Court did not find a compensable taking; yet again there was no physical invasion of the property owner's land.\(^54\) These cases did not allow compensation for loss of access, and the Court consistently refused to entertain Fifth Amendment arguments concerning lowered property values.

D. Minnesota Partial Takings Cases

The Minnesota Constitution, like the United States Constitution, limits the state's power of eminent domain and requires just compensation when land is taken for public use.\(^55\) The Minnesota Constitution confers a

---

47. 61 U.S. (20 How.) 135 (1857).
48. *See* id. at 146.
49. 99 U.S. 635 (1878).
50. *See* id. at 636.
51. *See* id. at 642.
52. 166 U.S. 269 (1897).
53. *See* id. at 269.
54. *See* id. at 275.
55. *See* Treanor, *supra* note 23, at 796.
56. *See* MINN. CONST. art. 1, § 13. *See also* State v. Strom, 493 N.W.2d 554, 558 (Minn. 1992) (noting that the Minnesota Constitution is considered more broad than the United States Constitution due to the added lan-
right to compensation for damaging as well as for taking private property. To gain the protection of the Minnesota Constitution and receive

guage of “destroyed or damaged”). But see Edward D. McKirdy, Compensation for Impairment of Rights of Access, 1988 INST. ON PLAN. ZONING & EMINENT DOMAIN § 13.02[2] (stating that the results in access cases do not depend on whether a particular state has a “taking” or “taking and damaged” constitution).

57. Minnesota law defines a “taking” to include “every interference, under the right of eminent domain, with the possession, enjoyment or value of private property.” MINN. STAT. § 117.025, subd. 2 (1996); see NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS, UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 23 (1997) (defining a taking as referring to “any acts that diminish, deprive or disturb any of the legally protected rights to use, possess, or dispose of one’s acquisitions or property”).

58. See Hendrickson v. State, 267 Minn. 436, 439, 127 N.W.2d 165, 169 (1964). Twenty-four other state constitutions also provide for compensation when property is “taken or damaged” as opposed to only “taken.” See ALASKA CONST. art. 1, § 18 (“Private property shall not be taken or damaged for public use without just compensation.”); ARIZ. CONST. art. 2, § 17 (“No private property shall be taken or damaged for public or private use without just compensation having first been made . . . .”); ARK. CONST. art. 2, § 22 (“[P]rivate property shall not be taken, appropriated or damaged for public use, without just compensation therefor.”); CAL. CONST. art. 1, § 19 (“Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.”); COLO. CONST. art. 2, § 15 (“Private property shall not be taken or damaged for public or private use, without just compensation.”); GA. CONST. art. I, § III, ¶ 1(a) (“[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”); HAW. CONST. art. I, § 20 (“Private property shall not be taken or damaged for public use without just compensation.”); ILL. CONST. art. I, § 15 (“Private property shall not be taken or damaged for public use without just compensation . . . .”); KAN. STAT. ANN. § 26-513 (1996) (“Private property shall not be taken or damaged for public use without just compensation.”); LA. CONST. art. I, § 4 (“Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner . . . .”); MISS. CONST. art. III, § 17 (“Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof.”); MO. CONST. art. 1, § 26 (“[P]rivate property shall not be taken or damaged for public use without just compensation.”); MONT. CONST. art 2, § 29 (“Private property shall not be taken or damaged for public use without just compensation . . . .”); NEB. CONST. art. I, § 21 (“The property of no person shall be taken or damaged for public use without just compensation therefor.”); N.M. CONST. art. II, § 20 (“Private property shall not be taken or damaged for public use without just compensation.”); N.D. CONST. art. I, § 16 (“Private property shall not be taken or damaged for public use without just compensation having first been made . . . .”); OKLA. CONST. art. II, § 23 (“No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except . . . in such manner as may be prescribed by law.”); S.D. CONST. art. VI, § 13 (“Private property shall not be taken for public use, or damaged, without just compensation . . . .”); TEX. CONST. art. I, § 17 (“No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .”); UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation.”); VA. CONST. art. I, § 11 (“[T]he General Assembly shall not pass any law . . . whereby private prop-
compensation when losing a property interest, a landowner first must have a property interest. In Minnesota, landowners have a property right to reasonably convenient access to a public street or highway abutting landowner property. 59

An early Minnesota partial takings case was City of Crookston v. Erickson. 60 In Crookston, private land was acquired by the city to be used as the site for a sewage treatment center and disposal plant. 61 Although the landowners were compensated for the taking of their land for the sewage plant, they were not compensated for any reduction in market value of their remaining land and the land adjoining the taken land. 62 The trial court held that the reduction in market value of the noncondemned portions of land caused by the proximity of the sewage treatment and disposal plant was not a factor for the jury's consideration in deciding the damages. 63

The Minnesota Supreme Court disagreed, holding that the “depreci-
ating effect of the entire disposal plant should have been considered in
determining damages to the remaining land if the use of the land taken
constituted an integral and inseparable part of a single use to which all
the condemned land was subjected." 64 The court reasoned that where a
landowner did not actually suffer a taking but the landowner's property
was damaged because of the nature of the taking of the adjoining land,
compensation was proper because the injury of an adjoining sewage dis-
posal facility was incurred by only that landowner and not the public as a
whole. 65 Finally, the court concluded that "where the use of the land
taken constitutes an integral and inseparable part of a single use to which
the land taken and other adjoining land is put, the effect of the whole
improvement is properly to be considered in estimating the depreciation in
value of the remaining land." 66

Several years later, the Minnesota Supreme Court decided another
partial takings case, State v. Strom. 67 In Strom, the plaintiffs owned an office
building fronting Highway 12. 68 After Highway 12 was rebuilt and redes-
ignated as Interstate 394, the lower grading of the new roadway impaired
the visibility of the office building to passing motorists, and the occupancy
rate of the building dropped dramatically. 69 The court decided to admit
evidence of construction-related interferences and evidence of loss of visi-
bility to the public traveling on a redesigned roadway, not as a separate
item of damages, but as a factor to be considered in determining the
diminution in market value of the remainder property. 70 The supreme
court stated that "[t]o determine the fair market value of property in a
condemnation proceeding, 'any competent evidence may be considered if
it legitimately bears upon the market value.'" 71 The court further stated

64. *Id.* at 321-22, 69 N.W.2d at 913-14.
65. *See id.* at 325, 69 N.W.2d at 912.
66. *Id.* at 327, 69 N.W.2d at 914 (quoting Andrews v. Cox, 29 A.2d 587, 590
(Conn. 1942)).
67. 493 N.W.2d 554 (Minn. 1992). For additional discussion of this case, see
possible ramifications to takings law due to the holding in *Strom*).
68. *See Strom*, 493 N.W.2d at 557.
69. *See id.* at 558.
70. *See id.* at 561-62.
71. *Id.* at 559 (quoting Ramsey County v. Miller, 316 N.W.2d 917, 919 (Minn.
1982)) (emphasis added). *See MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY
INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 589 (Mi-
chael K. Steenson, rep.) in 4 MINN. PRACTICE 1, at 448 (3d ed. 1986)](hereinafter
JURY INSTRUCTION GUIDES). Instruction 589 states:

[j]ust compensation to an owner when only part of a tract or property is
taken is the difference between the fair market value of the entire tract
immediately before such taking and the fair market value of what is left
after such taking. The result of this subtraction is the just compensation
to which the owner is entitled for the part taken as well as for the sever-
that evidence of any matter that would influence a buyer or seller in setting a price for the property may be considered, "subject to the caveat that such proof must be competent, relevant, and material."\(^72\)

These cases suggest that where a partial taking has occurred, the primary issue for the court is how to calculate damages. In these types of cases, the Minnesota Supreme Court has shown a willingness to permit evidence regarding loss of access in a damages determination.

### E. Minnesota Inverse Compensation Takings Cases

The crucial difference between a "partial takings" case and an "inverse condemnation" case is that in a partial takings case, the court has already admitted that there has been a taking and that compensation is required.\(^73\) In an inverse condemnation case brought by the landowner, the landowner must prove that the government is liable for a taking.\(^74\) This distinction is important because evidence is more likely to be admitted where the issue is merely measuring the amount of damages, rather than determining whether or not there is a taking.\(^75\)

---

ance damages to the part not taken. [Give JIG 585 if not previously given.]

\textit{Id. (alterations in original).} \textit{Jury Instruction Guides} 585 states:

[i]n determining the fair market value of the property at the time of the taking, you will consider all facts and circumstances which a buyer and seller in the open market would reasonably consider and which would bear upon the question of the value of the property. Fair market value is the price which the evidence discloses would be paid for the entire property by a buyer who is willing, but is not required to buy, to an owner who is willing, but is not required to sell. An owner is entitled to the value of the property for which it may be most advantageously used.

[The fact that the owner may not have contemplated an immediate use of the property which is its highest use is not to be considered in itself as diminishing fair market value.] . . .

[Neither the value of the property to the [condemnor] or his need for the particular property is a measure of, or a guide to, the fair market value.]

[Fair market value is not necessarily the equivalent of the owner’s investment. The owner may have acquired the property for less than it was worth or more than it was worth, or the property may have changed in value while it was held by the owner.]

\textit{Id. (alterations in original).}

\(^72\). \textit{Strom}, 493 N.W.2d at 559 (citing City of St. Paul v. Rein Recreation, Inc., 298 N.W.2d 46, 50 (Minn. 1980)).

\(^73\). \textit{See} Filipovich, \textit{supra} note 13, at 879 (discussing distinction between inverse condemnation cases and partial takings cases).

\(^74\). \textit{See id.}

\(^75\). \textit{See id.}
An early Minnesota case to consider the loss of access in a taking context was *Hendrickson v. State*. 76 In that inverse condemnation case, the plaintiffs owned a hotel that abutted U.S. Highway 63, a conventional two-lane roadway approximately two miles south of the City of Rochester. 77 After a highway reconstruction project, the highway was changed into two one-way surfaces, separated by a median. 78 The plaintiffs no longer had direct access to the highway, but instead had access via a circuitous route over a service road. 79 The Minnesota Supreme Court held that a landowner may suffer compensable damage if the highway to which the landowner previously had access is rebuilt to deny or limit the landowner's reasonably convenient and suitable access to the highway in at least one direction. 80 However, the court also ruled that a landowner has no interest in the continued flow of traffic past the landowner's property and that the state may divert traffic without being liable for economic loss that the landowners may sustain. 81 The court remanded the case to the trial court, stating that "what is reasonable ingress and egress is a fact question." 82

After *Hendrickson* was decided, the Minnesota Supreme Court heard another inverse condemnation case, *State v. Gannons*. 83 In *Gannons*, the plaintiff owned a restaurant in the City of St. Paul. 84 As a result of highway reconstruction, the lanes of the road adjacent to the landowner's property were divided by a median to provide for one-way traffic running in northerly and southerly directions, and Gannon's immediate access to the main road was made circuitous via a frontage road. 85 The court ruled that the

---

76. 267 Minn. 436, 127 N.W.2d 165 (1964). Prior to *Hendrickson*, Minnesota decisions held that a property owner was not entitled to compensation when access to property was made more circuitous by road construction, traffic regulations or land developments, or because the flow of traffic was diverted from the highway that the landowner's land abutted. See Note, *Abutting Property Owners Entitled to Compensation for Deprivation of Reasonably Convenient Access to Main Thoroughfare*, 49 MINN. L. REV. 198, 199 (1964).

77. See *Hendrickson*, 267 Minn. at 437, 127 N.W.2d at 167.

78. See id.

79. See id. at 437, 127 N.W.2d at 167-68.

80. See id. at 444-45, 127 N.W.2d at 172. But see *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605-07 (Minn. 1978) (holding that an impairment of access rights due to the construction of a curb and gutter on plaintiff's property was not a compensable taking except where it is shown that such construction deprives the owner of reasonably convenient and suitable access); *State v. Gannons*, 275 Minn. 14, 23-24, 145 N.W.2d 321, 329 (1966) (holding that loss of access to main thoroughfare was not a compensable taking if reasonable access was available in at least one direction).

81. See *Hendrickson*, 267 Minn. 436 at 442, 127 N.W.2d at 170-71.

82. Id. at 445, 127 N.W.2d at 172.

83. 275 Minn. 14, 145 N.W.2d 321 (1966).

84. See id. at 16, 145 N.W.2d at 324.

85. See id. at 16-17, 145 N.W.2d at 324-25.
dividing of a roadway by median strips cannot compel compensation. The court then reversed and ordered a new trial, holding that the jury may have become confused by the jury instructions that compensable damages occurred when reconstruction denied the owner reasonable, convenient, and suitable access to the road in at least one direction.

By comparison, although relying on the court's statements in Hendrickson, the Minnesota Supreme Court found a taking in Johnson Brothers Grocery, Inc. v. State. In Johnson Brothers, the plaintiff operated a retail liquor store on Hudson Road, parallel to and with access to Highway 12. In 1973, access to Highway 12 was lost as that highway was reconstructed into Interstate 94. Thus, the property owners lost direct and unlimited access to an abutting highway due to the rebuilding of that highway into a divided, four-lane "limited access" highway. Accordingly, the court found that the particular actions of the state compelled compensation in this case.

Another important physical takings case in Minnesota also allowed a landowner to be compensated. In Spaeth v. City of Plymouth, an inverse condemnation case and an echo of Pumpelly, a large portion of a property owner's land was flooded as a consequence of a city's development plan. The City of Plymouth argued it was not liable for the flooding of Spaeth's land, as it could not be held liable for mere "planning." The court disagreed, upholding the trial court's ruling that the city's actions constituted a taking.

Other inverse condemnation cases in Minnesota include Caponi v. Carlson, where the Minnesota Court of Appeals, relying on Spaeth and

86. See id. at 23, 145 N.W.2d at 329.
87. See id. at 24-25, 145 N.W.2d at 329.
88. 304 Minn. 75, 229 N.W.2d 504 (1975).
89. See id. at 76, 229 N.W.2d at 504.
90. See id. at 77, 229 N.W.2d at 505.
91. See id. A "limited access" or "controlled-access" highway is a "highway especially designed to expedite and control through traffic, primarily by means of median dividers or strips, elimination of grade level intersections, and limitation of access to specific interchanges or access ramps at designated intervals." See Roland F. Chase, Annotation, Abutting Owner's Right to Damages for Limitation of Access Caused by Conversion of Conventional Road into Limited-Access Highway, 42 A.L.R.3d 13, 19 (1972).
92. Johnson Bros., 304 Minn. at 77, 229 N.W.2d at 505.
93. 344 N.W.2d 815 (Minn. 1984).
94. 80 U.S. (13 Wall.) 166 (1871). See supra notes 27-32 and accompanying text.
95. See Spaeth, 344 N.W.2d at 822.
96. See id. at 820.
97. See id. at 822. But see Love v. Burlington Northern, Inc., 407 N.W.2d 452 (Minn. Ct. App. 1987) (holding that there was no compensable taking where flooding on property owner's land was found to be intermittent).
98. 392 N.W.2d 591 (Minn. Ct. App. 1986).
Loretto, found a taking when the City of Eagan designated part of Caponi’s land as a storm water holding pond,\textsuperscript{99} and Wegner v. Milwaukee Mutual Insurance Co.,\textsuperscript{100} where the Minnesota Supreme Court found a taking when an innocent third party’s home was damaged by police spreading tear gas in the course of apprehending a suspect.

In conclusion, the Minnesota Supreme Court is willing to grant compensation for a taking in inverse compensation cases where a government entity floods land or gases a home.\textsuperscript{102} However, the court is less willing to grant compensation for loss of access in inverse condemnation cases, where the primary issue is whether a taking has even occurred, as compared to partial takings cases which acknowledge the taking and the issue is the determination of appropriate damages.

III. THE **BLAINE BUILDING CORP.** CASE

A. **The Facts**

As part of a project to reconstruct County State-Aid Highway Number 51, also known as University Avenue Northwest, Anoka County decided to widen the road and install a median strip.\textsuperscript{104} The new median strip was not constructed on land previously owned by the landowners, but instead on the pre-existing right-of-way.\textsuperscript{105} Even so, to accomplish the widening and median placement, the county brought eminent domain proceedings\textsuperscript{106} to acquire land from four parcels of commercial property abutting University Avenue.\textsuperscript{107} Blaine State Bank and a gas station/convenience store, Finaserve, were located on the parcels of land.\textsuperscript{108}

Of particular concern to the property owners, the median con-

\textsuperscript{99} See id. at 595.

\textsuperscript{100} 479 N.W.2d 38 (Minn. 1991).

\textsuperscript{101} See id. at 41-42.

\textsuperscript{102} See, e.g., Wegner, 479 N.W.2d at 41-42; Caponi, 392 N.W.2d at 595; Spaeth, 344 N.W.2d at 822.


\textsuperscript{104} See County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331, 333 (Minn. 1997).

\textsuperscript{105} See id.

\textsuperscript{106} See id. The eminent domain proceedings were properly brought pursuant to Chapter 117 of Minnesota Statutes. See id. See also MINN. STAT. ch. 117 (1996).

\textsuperscript{107} See id. Parcels 18, 19, 20 and 21 were affected. See id. The county acquired a 27-foot strip of land from parcels 18, 19, and 20 and an 18.7-foot strip of land from parcel 21. See id.

\textsuperscript{108} See id. Finaserve, Inc. was the fee record owner of parcels 20 and 21. See Appellants' Brief at 2, Blaine Bldg. Corp. (Nos. C5-95-1584, C7-95-1585). The Blaine Building Company was the fee record owner of parcel 18, with Blaine State Bank as a lessee. See id. The Bacon, Harstad & Savelkoul Company (a partnership) was the fee record owner of parcel 19 with Blaine State Bank as a lessee. See id.
constructed as part of the project prevented left turns into and out of the subject properties along University Avenue. Before the construction began, vehicles could turn into the owners' properties while traveling in either the northbound or southbound direction. The new median made it impossible for potential customers to access the businesses from the southbound lanes other than by an inconvenient route; however, access from the northbound lanes remained unchanged.

The commissioners' appointed by the county to determine damages due each property owner for the partial taking, recommended compensation for loss of traffic access to and from the southbound lanes of University Avenue.

Subsequently, the county sought and received partial summary judgment overturning the commissioners' award, arguing that the property owners were not entitled to introduce evidence of the partial loss of traffic access as part of the damages estimate. The landowners appealed the trial court's decision, and the court of appeals affirmed the grant of summary judgment.

B. The Majority's Analysis

The Minnesota Supreme Court affirmed the decisions of the trial court and the court of appeals, holding that "the loss of traffic access may not be the basis of severance damages where a property owner is subject to a partial taking and coincidentally loses access due to the construction..." 109

109. See Blaine Bldg. Corp., 566 N.W.2d at 333.
110. See id.
111. See id. The commissioners were appointed pursuant to section 117.075 of the Minnesota Statutes. See id. The court-appointed commissioners included real estate appraisal and management specialists, and one commissioner possessed knowledge of the convenience retail industry. See Appellants' Brief at 3, Blaine Bldg. Corp. (Nos. C5-95-1584, C7-95-1585).
112. See Blaine Bldg. Corp., 566 N.W.2d at 333.
113. See Blaine Bldg. Corp., 566 N.W.2d at 333.
114. The landowners initially brought two separate actions, one concerning parcels 18 and 19 and one concerning parcels 20 and 21. See County of Anoka v. Maego, Inc., 541 N.W.2d 375 (Minn. Ct. App. 1996), aff'd sub nom. County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331 (Minn. 1996). The two cases were consolidated on appeal. See Blaine Bldg. Corp., 551 N.W.2d at 333. Interestingly, in County of Anoka v. Esmailzadeh, 498 N.W.2d 58 (Minn. Ct. App. 1993), a case with almost identical facts as Maego, and an opinion written by the same judge, the court held that loss of access was a compensable taking. See id. at 59.
115. See Maego, 541 N.W.2d at 379.
116. Justice Anderson, dissenting, disagreed with the majority's characterization of the loss of access as "coincidentally" occurring with the partial taking as the installation of the median and the partial taking to widen the street were one integrated project. See Blaine Bldg. Corp., 566 N.W.2d at 340 (Anderson, J., dissenting).
of a median barrier."\textsuperscript{117}  

Justice Gardebring, writing for the majority,\textsuperscript{118} explained that the court was concerned that allowing evidence of market value diminution would overcome the longstanding rule that loss of access from the construction of a median is not a compensable taking in Minnesota.\textsuperscript{119} The court further stated that allowing the landowners to introduce evidence of loss of access for purposes of the determination of damages would allow the landowners to "do indirectly what they cannot do directly: be compensated for the loss of traffic access from one side of the roadway when they retain access to the other side."\textsuperscript{120}

The court also noted that the appellants could not recover damages for loss of access since the median was not constructed on land actually taken from the landowners, but on land that was already part of the right-of-way.\textsuperscript{121} This fact barred introduction of loss of access evidence in the determination of damages.\textsuperscript{122} According to the court, an owner is not entitled to damages caused to the landowner's remainder land by the use of additional land acquired from other parties notwithstanding the fact that all of the land is used in the same project.\textsuperscript{123}

The court then declined to apply an exception to the general rule which, on occasion, may provide compensation for damage to remainder land where the taken land and adjoining remainder land form one project.\textsuperscript{124} The exception is found in \textit{Crookston}, where the court allowed a landowner to obtain severance damages for the construction of a sewage treatment plant even though the facility was built on land that simply adjoined the taken land.\textsuperscript{125} The \textit{Crookston} court enunciated the "exception" by stating "[w]here the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoin-

\textsuperscript{117} \textit{Id.} at 336.  
\textsuperscript{118} Justice Anderson dissented in this case, joined by Chief Justice Keith. \textit{See id.} at 337-41. Justice Blatz took no part in the consideration or decision. \textit{See id.} at 337.  
\textsuperscript{119} \textit{See id.} at 335; \textit{see also} \textit{State v. Gannons}, 275 Minn. 14, 23, 145 N.W.2d 321, 329 (Minn. 1966) (stating that "the dividing of a roadway by median strips or dividers cannot be made the subject of compensation in condemnation"); Sackman, \textit{supra} note 59, at § 14A.03[6][a] (stating that installing a median strip is generally considered by courts to be a valid exercise of the state's police power and is not compensable).  
\textsuperscript{120} \textit{Blaine Bldg. Corp.}, 566 N.W.2d at 335.  
\textsuperscript{121} \textit{See id.} at 335.  
\textsuperscript{122} \textit{See id.}  
\textsuperscript{123} \textit{See id.}  
\textsuperscript{124} \textit{See id.}  
\textsuperscript{125} \textit{See City of Crookston v. Erickson}, 244 Minn. 321, 327-28, 69 N.W.2d 909, 914 (Minn. 1955) (finding it impossible to apportion the damages between the part of the sewage treatment facility project using the landowner's land and the other land used in the project).
ing land is put, the effect of the whole improvement is properly to be con-
sidered in estimating the depreciation in value of the remaining land.” 126

Finally, the majority explained that holding loss of access evidence admissible in this case would “yield future inequitable results.” 127 The reasoning was that if landowner A lost access to a road but had no land actually taken and landowner B lost access to the same road and suffered a taking of land, only landowner B would be compensated since there cannot be compensation for loss of access without a physical taking occurring simultaneously. 128

C. The Dissent’s Analysis

Justice Anderson’s dissent attacked the majority’s opinion as incor-
correct for three reasons. 129 First, Justice Anderson considered the majority’s reading of Strom as “unduly narrow.” 130 Next, the dissent pointed out that the case law relied upon by the majority in its opinion involved inverse condemnation actions and that such cases do not dictate the same result as partial takings cases. 131 Finally, the dissent found that the court’s decision in Crookston supported admission of the loss of traffic access to de-
termine whether the partial taking of the landowner’s property consti-
tuted an “integral and inseparable” part of the roadway reconstruction project. 132

IV. ANALYSIS OF THE BLAINE BUILDING CORP. DECISION

Blaine Building Corp. presents the same “very curious and unsatisfac-
tory result” that the United States Supreme Court warned of more than a century ago in Pumpelly. 133 In Blaine Building Corp., the court not only refused to allow compensation for the loss of the property right of access due to installation of a median, but did not even allow evidence of the installation of a median to be considered by the jury in determining diminu-
tion of market value of the remainder property. 134 In doing so, the court

126. Id. at 327, 69 N.W.2d at 914 (citing Andrews v. Cox, 29 A.2d 587, 590 (Conn. 1942)). See supra notes 60-66 and accompanying text.
128. See id.
129. See id. at 337 (Anderson, J., dissenting).
130. See id. (Anderson, J., dissenting). The majority asserted that Strom was distin-
guishable from Blaine Bldg. Corp. because Strom dealt with loss of visibility rather than just loss of access. See id. at 335 n.1.
131. See id. at 339 (Anderson, J., dissenting).
132. See id. at 340 (Anderson, J., dissenting).
133. See Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871); su-
pra notes 27-32 and accompanying text.
134. See Blaine Bldg. Corp., 566 N.W.2d at 333. It is interesting to note that
Minnesota courts have allowed other types of evidence in eminent domain pro-
has created a situation that further erodes property rights in the ever expanding metropolitan area of the Twin Cities. The decision breaks with the precedent found in Strom and Crookston and quashes any hope for a remedy for businesses likely to be similarly impacted with highway construction.

A. The Court Ignored the Strom Decision

Unfortunately, in deciding Blaine Bldg. Corp., the majority sidestepped the logic found in Strom. In Strom, evidence of construction-related interferences and loss of visibility of the landowner's property to the public was deemed to be admissible as evidence in calculating the diminution in market value of the remainder property. Both loss of visibility and loss of access play a major role in reversing favorable market value of a business.

A better approach for the majority would have been to consider loss of access at least as important, if not more so, than loss of visibility. As the Strom court recognized, the fact that drivers can no longer view a business from the roadway is an obvious detriment to the property value. The proceedings. See, e.g., State v. Harbor Oil Co., 486 N.W.2d 455, 457 (Minn. Ct. App. 1992) (holding the "trial court did not abuse its discretion in allowing jury to hear and consider expert testimony that nonconforming use status increased property's market value" and in admitting "testimony of avoided costs as substitute for market data"); see also County of Ramsey v. Miller, 316 N.W.2d 917, 922 (Minn. 1982) (holding that "specific numerical, analytical and illustrative evidence" which supports an appraisal, "specific prices of comparable sales" in the area, "assessed valuation of the property as shown in the county auditor's records," and the "owner's acquisition costs and money expended for improvements" are all admissible in an eminent domain proceeding).

135. See William B. Stoebuck, The Property Right of Access Versus the Power of Eminent Domain, 47 TEX. L. REV. 733 (1969) (explaining that the urbanization of American society has greatly increased the power of eminent domain nationwide); see also James E. Brookshire, The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use, 38 WM. & MARY L. REV. 1047 (1997) (describing difficulties in land-use planning, including highway reconstruction projects, due to population increases in Washington, D.C. area).

136. As possible evidence of the effect of loss of access on the businesses involved in this case, the gas station and convenience store that had operated on parcel 21 at the time of the condemnation proceeding is now a vacant commercial building. See County of Anoka v. Maego, Inc., 541 N.W.2d 375, 376-77 (Minn. Ct. App. 1996), aff'd sub nom. County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331 (Minn. 1997).

137. See State v. Strom, 493 N.W.2d 554, 560-61 (Minn. 1992); supra notes 69-74 and accompanying text.

138. See Garber, supra note 59, at 271 (describing the difficulties faced by businesses due to highway reconstruction).

139. See Strom, 493 N.W.2d at 561. The court states "[i]tems such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he
loss in value is particularly burdensome when the business is one that relies on "drop-in" customer business, such as a fast food or 24-hour restaurant, or a gas station and convenience store. The court has been willing to recognize that evidence of the loss of the property right of visibility from the roadway should be admitted as a factor to be considered by the finder of fact in determining the diminution in market value of the remainder property.140

However, the "access" property right, although equally as valuable as the "visibility" property right to drop-in type businesses is not considered compensable by the court, nor is evidence of the loss of access even admissible.141 Yet for these types of businesses, catering to the rushed consumer, mere "visibility" with no readily apparent method of access is pointless. A consumer looking for a quick drive through meal or a customer needing gasoline will not necessarily be willing to take the time to determine which exit or frontage road leads back to the fast food restaurant or gas station he or she just passed on the busy highway. More likely, that consumer will continue on to the next convenient establishment.

B. The Court Failed to Extend the Crookston "Exception"

Moreover, the court defied precedent and logic when it failed to apply the Crookston analysis to this case. In Crookston, the court allowed evidence of diminished value of remainder property where a sewage facility was built upon land adjoining the taken land.142 In contrast, the Blaine Building Corp. court refused to allow evidence of diminished value of remainder property where a median blocking access was built upon land adjoining the taken land.143 Those two fact situations are not fundamentally different,144 but the majority came to a different conclusion in Blaine Building Corp. A more consistent approach for the court to take would have been to follow the precedent found in Crookston.

The obvious underlying reason for the majority's failure to extend Crookston to median cases is the potential financial burden placed on state and local governments; they would have to pay property owners who lose access due to the installation of a median.145 Median development is

would pay for any given piece of real property." Id. (quoting People v. Volunteers of Am., 98 Cal. Rptr. 423, 431 (1971)).

140. See Strom, 493 N.W.2d at 561.
141. See Blaine Bldg. Corp., 566 N.W.2d 331, 334-35.
142. See City of Crookston v. Erickson, 244 Minn. 321, 327-28, 69 N.W.2d 909, 914 (1955).
143. See Blaine Bldg. Corp., 566 N.W.2d at 335.
144. For instance, the court in Strom discussed the property owner's loss of access during construction as one of the property owner's problems. See Strom, 493 N.W.2d at 557-58.
145. See Strom, 493 N.W.2d at 560. In that case, the court discussed the state's argument, that on a policy level, allowing admission of evidence on construction-
widespread due to increased traffic pressure in the Twin Cities. Requiring municipalities to compensate for the taking of the access property right would be costly. Perhaps the history of this “well settled” question may be based on a fiscal concern, rather than on Minnesota’s Constitution.

C. The Court Relied on Inverse Condemnation Cases

Finally, and most importantly, the majority erroneously relied on inverse condemnation cases in its decision.\(^{146}\) Inverse condemnation cases are not dispositive in a partial takings case.\(^{147}\) As the dissent stated, it is unfortunate that the majority relied on inverse condemnation cases because “inverse condemnation precedent confuses the threshold issue of whether a property owner is entitled to compensation with the true issue in this case: whether evidence of diminished access is admissible to establish the proper measure of damages when there has been a partial taking.”\(^{148}\) Thus, in \textit{Blaine Building Corp.}, the majority spends much of the opinion arguing the reasons for denying compensation, when the issue of whether or not compensation will be awarded is not in dispute, instead of discussing any reasons as to why the evidence of diminished access is not admissible.

A better and more coherent approach for the majority would have been to exclusively rely on partial takings cases in making its decision. Inverse condemnation cases are instituted by a landowner to try to prove that property has been taken.\(^{149}\) In \textit{Blaine Building Corp.}, property had related interferences would render highway projects “prohibitively expensive.” See \textit{id.} However, the court rejected that argument as “not a reason to undercompensate abutting landowners.” \textit{id.}

\(^{146}\) \textit{See Blaine Bldg. Corp.}, 566 N.W.2d at 339 (Anderson, J., dissenting). For example, the majority relied on \textit{State v. Gannons, Inc.}, 275 Minn. 14, 145 N.W.2d 321 (1966) (holding that loss of access in one direction is not compensable) and \textit{Hendrickson v. State}, 267 Minn. 436, 127 N.W.2d 165 (1964) (stating that property owners have no vested rights in the continued flow of traffic past their property). \textit{See Blaine Bldg. Corp.}, 566 N.W.2d at 339.

\(^{147}\) \textit{See id.} (Anderson, J., dissenting).

\(^{148}\) \textit{Id.} (Anderson, J., dissenting). To support his point, Justice Anderson cites a Texas case, \textit{State v. Schmidt}, 805 S.W.2d 25 (Tex. Ct. App. 1991), \textit{rev’d on other grounds, State v. Schmidt}, 867 S.W.2d 769 (Tex. 1993). In that case, the Texas Court of Appeals observed that the argument of the State:

mixes indiscriminately the rules which govern two distinctly different elements of a condemnation action: (1) the substantive rules applicable to a determination of whether the owner has a legal right to compensation; and (2) the substantive and evidentiary rules applicable to a calculation of the owner’s compensation once [the owner] has established a legal right to it.

\textit{Id.} at 29.

\(^{149}\) \textit{See Alevizos v. Metropolitan Airports Comm’n}, 298 Minn. 471, 477, 216
been taken and there was no dispute as to the fact that compensation was required, as is the case in other partial takings cases.\textsuperscript{150} Thus, the line of cases presented by the majority are, as the dissent pointed out, "not helpful in that they address only the issue of whether a compensable taking has occurred and shed little light on the proper measure of damages when, as here, the right to compensation is indisputable."\textsuperscript{151}

Although Minnesota's Constitution intends to justly compensate those whose land is taken by the state, here, the Minnesota Supreme Court is not allowing full compensation in refusing to admit evidence of loss of access to determine diminution in market value of the properties. The constitutional clause that requires compensation "was designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."\textsuperscript{152} Unfortunately, the landowners in this case are bearing a public burden literally without the public, or at least with diminished access to the public.

\textbf{V. CONCLUSION}

As more limited access highways are built and medians installed, more commercial and residential landowners will experience loss of access. Obviously, if a business loses access, it also loses customers, and the market value of the property correspondingly decreases as the site becomes less desirable for potential buyers. The holding in \textit{Blaine Building Corp.} furthers the uncertainty for business owners by barring compensation for loss of access due to highway work done ostensibly for the public good. Ultimately, the court's holding causes concern for those business owners whose land abuts a highway that is about to undergo construction.

\begin{flushright}
\textit{Alison J. Midden}
\end{flushright}

\begin{footnotesize}
\textsuperscript{150} See \textit{Blaine Bldg. Corp.}, 566 N.W.2d at 334.
\textsuperscript{151} Id. at 339 (Anderson, J., dissenting).
\textsuperscript{152} Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40 (Minn. 1991) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
\end{footnotesize}