SECTION 2

IMPAIRMENT OF ACCESS AND JUST COMPENSATION

To be compensated for impairment of access, a landowner must prove he suffered a substantial and material impairment of access to his land…. To show material and substantial impairment, the property owner must establish 1) a total temporary restriction of access, 2) a partial permanent restriction of access, or 3) a partial temporary restriction of access due to illegal or negligent activity. The "material and substantial test" acknowledges situations in which the access for which the property was specifically intended is rendered unreasonably deficient even though normal access remains reasonably available.

It is a question of law whether there is a "material and substantial impairment" to the remainder as a direct result of a taking…. Before trial, the court must determine whether access rights have been materially and substantially impaired and control the admission of trial evidence accordingly.

A landowner is entitled to compensation when a public improvement destroys *all reasonable access*, thereby damaging the property.[1]

[1] Magnolia Assocs., Ltd. v. Texas, 2001 Tex. App. LEXIS 392 (Unpub.) (Tex. App. 5th Dist. 2001) (citations omitted) (emphasis supplied).

A. HISTORICAL ORIGINS OF ACCESS AS A PROPERTY RIGHT

A.1. Development of the Law during the 19th Century

As abutting landowners began to experience hardship caused by highway construction, the courts were asked to award compensation for loss of access to the adjacent street. In 1821, the U.S. Supreme Court denied compensation to an abutting landowner for damage caused by street grading.[2] In 1833, the Massachusetts Supreme Court likewise denied compensation where a landowner had to construct new access to the street after a grade alteration.[3]

As densely developed urban areas appeared in the United States and the value of land depended greatly on its accessibility, the legal concepts began to change. A Kentucky court in 1839 recognized that streets were designed to serve both the public and the persons who owned property to adjacent streets: "The title to such lots carries with it, as essential incidents, certain servitudes and easements, not only valuable and almost indispensable, but as inviolable as property in the lots themselves."[4]

"Between 1850 and 1880 the concept that property was 'taken' in the constitutional sense only if it was physically appropriated or destroyed was extended to include instances of interference with the landowner's use of his land."[5] Thus, in an 1857 Ohio case, *Crawford v. Village of Delaware*,[6] the court held that injury to an abutting landowner's access could constitute a taking within the meaning of the state constitution. In that case the landowner had lost all access to the street because of a 6-ft change in grade. The court held that access to and from the abutting street was a distinct property right just as was ownership of the lot itself.

A.2. Evolution of the Rights of Abutting Landowners

The earliest American cases involving *damnum absque injuria* or damage without legal injury[7] arose as these improvements were superimposed on existing patterns of land use. Change of street grade and impairment of lateral support provided situations that tested the extent to which abutting owners could claim compensation for consequential damages caused by public improvements. In 1821, in *Goszler v. The Corporation of Georgetown,*[8] the U.S. Supreme Court affirmed the dismissal of a landowner's action to enjoin the defendant municipal corporation from altering the grade and level of the street near the owner's house. Although "the power of graduating and leveling the streets ought not to be capriciously exercised,"[9] the work on the street did not amount to a condemnation of private property for public use.[10] Two years later, the Massachusetts Supreme Court in *Callendar v. Marsh* denied the claim of a landowner who had been put to the expense of building retaining walls and a new point of access to the public street following a change of the grade of the street.[11]

For the next 50 years the *Callendar v. Marsh* precedent remained the authoritative definition of the rights of landowners suffering consequential damages.[12] Some scholars argued that there was no reason the public should not pay for injury to property in any degree the same as in the case of a physical taking of property for public use.[13] Gradually, Lord Kenyon's statement in the *British Cast Plate Manufacturers Case*—that compensation of roadside landowners for consequential damages would expose every bridge and turnpike project to "an infinity of claims"—began to lose support as the law gradually evolved.[14]

In the 1880s, the *New York Elevated Railroad cases*[15] expanded the basis for compensation by approving the proposition that the use to which one put his land was itself a form of property entitled to protection under the law and by recognizing that a functional relationship exists between roads and adjacent land. In *Story v. New York Elevated R.R. Co.,*[16] a landowner whose property abutted a street that was restricted to use as a public street brought an action to restrain a railroad company from constructing an aboveground structure that the

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[2] Goszler v. Georgetown, 19 U.S. 593, 5 L. Ed. 339, 1821 U.S. LEXIS 381 (1821).

[3] Callendar v. Marsh, 18 Mass. (1 Pick.) 417 (1823).

[4] Lexington & Ohio R.R. Co. v. Applegate, 9 Dana (Ky.) 289, 294 (1839).

[5] R. Netherton, *A Summary and Reappraisal of Access Control*, in LIMITED ACCESS CONTROLS AND THEIR ADMINISTRATION, at 5 Highway Research Board Bulletin No. 345 (1962).

[6] 7 Ohio St. 459 (1857).

[7] *See, e.g.,* Sienkiewicz v. Commonwealth, Dep't of Transp., 584 Pa. 270, 280, 883 A.2d 494, 501 (2005) (describing *damnum absque injuria* as "damage without legal injury"), (*citing* Mo. *ex rel*. State Highway Comm'n v. Meier, Mo., 388 S.W.2d 855, 857 (Mo. 1965)).

[8] 19 U.S. 593, 5 L. Ed. 339, 1821 U.S. LEXIS 381 (1821).

[9] 1821 U.S. LEXIS 381, at *4.

[10] 1821 U.S. LEXIS 381, at *5.

[11] Callender v. Marsh, 18 Mass (1 Pick.) 418 (1823).

[12] In the change of grade cases, Kentucky and Ohio were the first states to show signs of recognizing a rule that would compensate consequential damages. *See* City of Louisville v. Louisville Rolling Mill Co., 3 Bush (66 Ky.) 416, 96 Am. Dec. 243 (1867); Lexington & Ohio R.R. Co. v. Applegate, 8 Dana (38 Ky.) 289, 33 Am. Dec. 496 (1839); and Crawford v. Village of Delaware, 7 Ohio St. 460 (1857).

[13] THEODORE SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 524 (1857).

[14] 4 Term Rep. 794 (1772).

[15] Kane v. Metro. Elevated R.R. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Abendroth v. N.Y. Elevated R.R. Co., 122 N.Y. 1, 25 N.E. 496 (1890); Lohr v. Metro. R.R. Co., 104 N.H. 268, 10 N.E. 528 (1887); Story v. N.Y. Elevated R.R. Co., 90 N.Y. 122, 43 Am. Rep. 146 (1882).

[16] 90 N.Y. 122, 171, 43 Am. Rep. 146 (1882).

landowner argued impaired the owner's right to air, light, and access provided by the street. The New York Court of Appeals, *inter alia*, held that the landowner had an easement that entitled him to keep the street open as a public street and that the structure would amount to a taking of the landowner's property.

> The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.[17]

In the New York Elevated Railway cases, the U.S. Supreme Court gave further impetus to the view that an abutting landowner's access was a property right. The Court held that the abutting property owner could recover for interference with light, air, and existing access when elevated railroads were constructed on public streets. The right of access in relation to the abutting physical property was "an incorporeal hereditament," was "appurtenant" to the lot, and constituted a "perpetual encumbrance."[18] The *Story v. New York Elevated R.R. Co.* case and others that followed held that the right of abutters arose by virtue of the proximity of their land to the street and the necessity for access to the street. No longer could it be argued that a right of the abutting owner was not taken simply because his land was not physically disturbed.[19]

A.3. Modern View on Impairment of Access and Compensation

The modern view of an abutter's rights of access is stated in *Canon v. City of Chicopee,*[20] in which the Supreme Judicial Court of Massachusetts noted that the limiting of an adjacent owner's access without an actual physical taking may be compensable.

> It is well settled that a taking of private property for which compensation must be paid is not necessarily restricted to an actual physical taking of the property. See Nichols, Eminent Domain (Rev. 3d ed.) § 6.1. This rule has long been recognized in this Commonwealth. In *Old Colony & Fall River R.R.* v. *County of Plymouth*, 14 Gray, 155, 161, we stated that private property can be "appropriated" to public use "by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it." Likewise, the Supreme Court of the United States has stated that "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking…." In line with the above rule, we have stated that the taking of an interest in adjacent property thereby limiting access to the owner's property constitutes a compensable taking, …and that the setting of a building line constitutes an encumbrance on the land in the nature of an equitable easement for the benefit of the public and that, as such, it is a taking of private property for public use.[21]

In sum, there may be a compensable taking of access, a property right, without a taking of the land itself. The issue of course is whether there is an impairment of access requiring the payment of compensation.

A.4. Access as a Compensable Property Right

It is clear that the term property now includes an abutter's right of access to the street or highway;[22] "an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access."[23] Thus, "[w]hen property is contiguous to a public road, the right of access or easement of access to such public road is a property right arising from the ownership of such land."[24] As stated in *Nichols on Eminent Domain*, "[i]n the severance damage context, it is occasionally noted that any diminution in value to the remainder parcel is compensable if it is directly attributable to the taking, regardless of the existence or nonexistence of similar damage to neighboring properties."[25] In addition to judicial evolution of the right of access, the right of access may be created by legislative grant or by express agreement; thus, a breach of an agreement by the highway authority may give rise to a claim for damages.[26]

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[17] Story v. N.Y. Elevated R.R. Co*,* 90 N.Y. at 171.

[18] *Id.,* 90 N.Y. at 145–6.

[19] *Id.*

[20] 360 Mass. 606, 277 N.E.2d 116 (1971).

[21] *Id.,* 609, 277 N.E.2d at 118 (citations omitted); *see also* Skrocki v. City of Pittsburgh, Mass., 1980 U.S. Dist. LEXIS 11194, at *6-7 (D. Mass. 1980) (*quoting Canon*); Paul's Lobster v. Commw., 53 Mass. App. Ct. 227, 758 N.E.2d 145, 149 (2001) (*quoting Canon* but holding that the redesign of roads affecting the landowner's access to its loading dock was not a constructive taking).

[22] WILLIAM B. STOEBUCK, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 734 (1969).

[23] Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 207, 762 A.2d 1219, 1225 (2000).

[24] Dep't of Transp. v. Taylor, 264 Ga. 18, 19, 21, 440 S.E.2d 652, 654, 655 (1994) (holding that evidence was excluded properly by the trial court because the evidence related not to inconvenience or difficulty of access caused by any physical alteration or obstruction of the owner's former access but to inconvenience caused by traffic flow and traffic volume); *see also* Dep't of Transp. v. Durpo, 220 Ga. App. 458, 460, 469 S.E.2d 404, 406 (Ga. App. 1996) (*citing Taylor* and reversing the trial court's decision that the erection of a barricade and the resultant interference with access to the shopping center constituted a compensable taking.)

[25] 2A NICHOLS, EMINENT DOMAIN (3d ed.), § 6.02[4][a], at 6-111.

[26] People *ex rel*. Dep't of Pub. Works v. Di Tomaso*,* 248 Cal. App. 2d 741, 755, 57 Cal. Rptr. 293, 302–3 (Cal. App. 1st Dist. 1967) (holding that the state had agreed to construct a "road approach" and that the agreement could not be abrogated because of new traffic demands without the payment of compensation. 248 Cal. App. 2d at 758–60, 57 Cal. Rptr. at 303–04.). *See also* Kenco Petroleum Marketers, Inc. v. State Highway Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967) (holding that

If the public authority is unable to acquire property by purchase, then it must acquire the property by condemnation. If the government condemns the right of access of an abutting landowner, then the government must pay just compensation.[27] The reason is that "[I]f the Commission acquires the rights of access of an abutting property owner on an existing highway, the Commission has absolute control and may prohibit, at will, any further entrances to the portion of the land along which access rights have been acquired."[28]

Even if a road has not been built, damages must be awarded for the taking of access. A county board of commissioners' decision to vacate two of four platted and dedicated but not maintained county roads abutting a ranch was held to impair the landowners' right of access even if another means of access existed.[29] Condemning a right-of-way without a road still entitles the abutting owner to compensation.[30] However, "notations on a plat incorporated into a deed cannot vary or expand the right of access given in a deed."[31]

The landowner must show a substantial or unreasonable interference with a property right, either an actual physical taking of property or an impairment of an intangible interest.[32] For instance, it has been held that if the government denies vehicular access to property, leaving it landlocked with the only access being by boat, then the government must pay compensation.[33] It does not matter that the property that is being denied access is not "developed property."[34] "Whether a property has access to another road is a principal consideration for the state when it considers whether a property has reasonable access." However, the fact that a property owner has a "license" that is revocable or terminable at will for access through another owner's adjacent property does not obviate the requirement of reasonable access to the public street.[35]

prohibiting construction of a driveway at a point designated in a right-of-way agreement entitled the owner to compensation).

[27] Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959) (*cited in Okemo Mountain, Inc.*, 171 Vt. 201, 762 A.2d 1219 (2000)).

[28] *Id.* at 459, 346 P.2d at 271.

[29] Davenport Pasture, LP v. Morris County Bd. of County Comm'rs, 31 Kan. App. 2d 217, 62 P.3d 699 (Kan. App. 2003).

[30] 31 Kan. App. 2d at 224–25, 62 P.3d at 705.

[31] Dep't of Transp. v. Meadow Trace, Inc., 280 Ga. 720, 722, 631 S.E.2d 359, 362 (Ga. 2006) (*citing* Johnson v. Willingham, 212 Ga. 310, 311, 92 S.E.2d 1 (1956) and Wooten v. Solomon, 139 Ga. 433, 435, 77 S.E. 375 (1913)).

[32] State *ex rel*. Hilltop Basic Res., Inc. v. City of Cincinnati, 167 Ohio App. 3d 798, 804, 2006 Ohio 3348, at *P24, 857 N.E.2d 612, 617 (Ohio App. 1st Dist. 2006), *aff'd*, 2008 Ohio 1966, 2008 Ohio LEXIS 1167 (Ohio, Apr. 30, 2008).

[33] 167 Ohio App. 3d at 809, 2006 Ohio 3348, at *P44, 857 N.E.2d at 620.

[34] 167 Ohio App. 3d at 805, 2006 Ohio 3348, at *P29, 857 N.E.2d at 618.

[35] 167 Ohio App. 3d at 807–08, 2006 Ohio 3348, at *P38, 40857 N.E.2d at 619.

A.5. Regulating Access as an Alternative to a Taking of Access

Although the outright acquisition of access rights is one method to inhibit functional obsolescence of highways, it is undoubtedly an expensive one. In a condemnation proceeding for the taking of physical property, it is important not to condemn access rights unless that is the intent. Moreover, it should be borne in mind that the same result—control of access—may be accomplished by a reasonable restriction of existing access without the necessity of purchase or condemnation. It is possible for the highway authority to condemn a parcel of land for highway improvements and simultaneously impair access without paying compensation for the latter.[36]

For example, in *Department of Transportation v. Taylor*,[37] involving a partial taking of the owner's land, the court agreed with the trial court that Taylor had not been denied convenient access. It was error for the court of appeals to hold that for purposes of compensating the property owner evidence could be introduced relating to "any change in traffic flow or pattern, the location of the exit ramp and the replacement of a stop sign with a yield sign, the configuration of the lanes [on the avenue being widened], and the expected traffic activity resulting from the use of the strip or property taken."[38]

Various kinds of access control are discussed in succeeding subsections herein whereby the highway authority has been able to restrict an owner's access in a reasonable manner without having to pay compensation.

A.6. Denial of Access as Court or Jury Question

There appears to be a split of authority on whether impairment of access is a question of law for the court to decide or a question of fact for a jury's determination. It may be argued that the decision in some instances appears to be an arbitrary one; that is, the courts simply announce that the question is one of law[39] or one of

[36] Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 37–40, 220 A.2d 868, 870, 873 (1966). In *Wolf*, the state had condemned a portion of the property and constructed curbs that permitted access at two points and erected median dividers on the highway. The trial court had allowed the jury to consider the impact of the construction of the barriers and curbs in arriving at the after-value of the property; however, the Pennsylvania Supreme Court reversed, holding that the partial taking of the physical property bore no relation to the construction and that Wolf retained reasonable although circuitous access. *See* Commw., Dep't of Transp. v. Kastner, 13 Pa. Commw. 525, 532, 320 A.2d 146, 149 (1974) (noting that the *Wolf* court rejected the argument that there is a distinction between business properties and residences such that business establishments should have a compensable interest in the traffic pattern existing before a street has been vacated).

[37] 264 Ga. 18, 440 S.E.2d 652 (1994).

[38] *Id.* at 19, 440 S.E.2d at 653.

[39] Ada County Highway Dist. v. Sharp, 135 Idaho 888, 891, 892, 26 P.3d 1225, 1228, 1229 (2002); Schwartz v. State *ex rel*.

fact[40] without any discussion of the reasons that support or compel a court's conclusion. However, in *Palm Beach County v. Tessler,*[41] the Supreme Court of Florida stated the rule as follows:

> [I]n an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.[42]

B. ABUTTING AND NONABUTTING LANDOWNER'S RIGHT OF ACCESS

B.1. Abutting Owner's Entitlement to Reasonable Access

As seen, property that abuts a highway has been held to have certain incorporeal or intangible rights or easements appurtenant to the property. Furthermore, as discussed in section 3, *infra*, the abutting landowner has easements of access, as well as of light, air, and view that constitute property, the taking or damaging of which may give rise to a requirement of compensation.[43] It should be noted that a state's constitution requiring the payment of just compensation for a damaging of property "provides a remedy additional to that provided by the federal constitution."[44]

One court recently explained the rules applicable to an abutting owner's right of access in this manner:

> "An owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor…." *A property owner's easement of access to the abutting highway is located at any or all points located within his frontage on the highway until such easement is extinguished by proper legal process*….
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> However, the state may, in the lawful exercise of police power, regulate a property owner's easement of access without compensation so long as there is no denial of ingress and egress…. The critical issue in cases involving the easement right of access is whether the action taken by the state amounts to a mere regulation to promote the public safety, comfort, health, and welfare or whether such action amounts to a substantial material, or unreasonable interference with the physical access to or from the property.[45]

The issue is whether "'the right of access is destroyed or materially impaired'," in which case "the damages are compensable if the injury sustained is peculiar to the owners' land and not of a kind suffered by the public generally.'"[46] In *Hall*, *supra*, the case was remanded because the trial court had not considered whether there was a loss of reasonable and convenient access nor had considered the state's purpose, both issues being relevant to whether "the State's exercise of police power was unreasonable and arbitrary."[47]

B.2. No Entitlement to "Direct Access" to Property

The majority and long-standing rule appears to be that an abutting owner is not entitled to direct access to

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DOT, 111 Nev. 998, 1001, 900 P.2d 939, 941 (1995) ("The determination of whether such substantial impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact."); *see also* Rueth v. State, 100 Idaho 203, 596 P.2d 75, 92, 93 (1979); State *ex rel*. Dep't of Highways v. Linnecke, 468 P.2d 8 (Nev. 1970); Ray v. State Highway Comm'n, 196 Kan. 13, 410 P.2d 278 (1966); Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963); People v. Ricciardi, 23 Cal. 2d 390, 405, 144 P.2d 799, 807 (1943) ("[T]he question whether there has been a substantial impairment of her property right is a question of law, or of fact, or a mixed question of law and fact, for the trial court to determine. In no case is it a 'question of fact for the jury' to determine.").

[40] Maloley v. Lexington, 3 Neb. Ct. App. 976, 983, 536 N.W.2d 916, 921–22 (Neb. Ct. App. 1995) (*citing* Balog v. State Dep't of Roads, 177 Neb. 826, 131 N.W.2d 402 (1964)). *See also* Hendrickson v. State, 267 Minn. 436, 445–46, 127 N.W.2d 165, 172–73 (1964) ("What is reasonable ingress and egress is a fact question. If the jury decides that the location of the proposed interchange substantially impairs plaintiffs' right to reasonably convenient and suitable access to the main thoroughfare, plaintiffs are entitled to damages." *Hendrickson,* 267 Minn. 436, 445–46, 127 N.W.2d at 172–73.); State *ex rel*. Herman v. Schaffer, 105 Ariz. 478, 467 P.2d 66 (1970).

[41] 538 So. 2d 846 (Fla. 1989).

[42] *Id*. at 850 (*followed by* USA Independence Mobile Home Sales, Inc. v. City of Lake City, 908 So. 2d 1151 (Fla. App. 1st Dist. 2005)).

[43] 2 NICHOLS ON EMINENT DOMAIN § 5.07[2][c], at 5-359.

[44] Hall v. State, 2006 S.D. 24, at *P13, 712 N.W.2d 22, 27 (2006).

[45] Ohio *ex rel*. Habash vs. City of Middleton, Ohio, 2005 Ohio 6688, at *P14-15, 2005 Ohio App. LEXIS 6018, at **5-7 (2005) (emphasis supplied), (*quoting* State *ex rel*. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955)). *See also* Hillerege v. City of Scottsbluff, 164 N.D. 560, 573, 83 N.W.2d 76, 84 (1947)

> (The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of abutting property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.).

[46] Hall v. State, 2006 SD 24, at *P17, 712 N.W.2d at 29, (*quoting* Hurley v. State, 82 S.D. 156, 143 N.W.2d 722, 726 (1966) (compensable taking where the State erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access)).

[47] 2006 SD 24 at *P21, 712 N.W.2d at 30.

the road or highway.[48] As one state's supreme court has stated,

> "'[i]n cases of…destruction of a fundamental attribute of ownership like the right of access, the landowner need not establish the deprivation of *all* economically viable uses of the land….'" Instead, the landowner must demonstrate "a substantial or unreasonable interference with a property right…."
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> Consistent with these holdings, "[a] property owner's right of access to his property from a street or highway upon which it abuts cannot be lawfully destroyed or unreasonably affected…."[49]

The court in the foregoing case rejected the argument that "a substantial or unreasonable interference with access to abutting roads necessarily occurs when that access no longer is direct from the frontage of the parcel itself."[50]

In an earlier case in which a condemnee claimed severance damages for impairment of access to a shopping center, the appellate court held that the trial judge improperly instructed the jury when he charged that the condemnee was entitled to damages for loss of direct access:

> [T]he right to such compensation doesn't depend upon whether the right of access taken was a *direct* route of access; rather, it appears the question is whether, where as here some right of access is still available, there has been a *substantial diminution in access* as a result of the taking. It is rudimentary, of course, that it is for the jury to determine whether such diminution in access is nominal or substantial.[51]

Hence, the rule appears to be well settled that an abutting landowner is not entitled to direct access to his or her property.

B.3. No Entitlement to Access along the Entire Frontage of the Property

Although one case has stated that "[i]t is fundamental that the owner of land possesses an easement of access to the abutting highway at any or all points included within his frontage on such highway until such easement is extinguished by proper legal process,"[52] the majority view appears to be that the landowner is not entitled to access all along the frontage of his or her property.

> It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint….[53]

Most authorities, moreover, seem to be in agreement that an abutter's right is subordinate to the public's right of passage and may be limited reasonably without the payment of compensation. "[A] landowner is not entitled to unlimited access to abutting property at all points along a highway, nor does a taking occur where ingress and egress is made more circuitous and difficult."[54] The reason is that the public has a valid interest in the safety and convenience of travel, both of which may be impaired where unrestricted access exists along arterials.[55] Finally, a landowner may have frontage

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[48] State v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); State Dep't of Transp. v. ABS Inc., 336 So. 2d 1278 (Fla. App. 1976). *Compare Ricciardi*, 23 Cal. 2d at 399, 144 P.2d at 803–04 (the court stating "that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway").

[49] State *ex rel*. Preschool Dev. Ltd. v. City of Springboro, 99 Ohio St. 3d 347, 349, 2003 Ohio 3999, at **P13-14, 792 N.E.2d 721, 724 (2003) (citations omitted). *See also* State *ex rel*. OTR v. Columbus, 76 Ohio St. 3d 203, 667 N.E.2d 8 (1996); State *ex rel.* McKay v. Kauer, 156 Ohio St. 347, 102 N.E.2d 703 (1951).

[50] *Id.* at 350, 2003 Ohio 3999, at *P17, 792 N.E.2d at 725.

[51] Fla. Dep't of Transp. v. ABS, Inc., 336 So. 2d 1278, 1280 (Fla. App. 2d Dist. 1976) (emphasis in original).

[52] *In re Appropriation of Easement for Highway Purposes*, 93 Ohio App. 179, 187, 112 N.E.2d 411, 415 (Ohio. App. 6th Dist. 1952) (reversing and remanding for new trial, *inter alia*, with respect to whether the appropriation affected the ease and facility of access to the residue of the property, as the jury's finding that the residue of the property on the west side of the highway was not damaged was contrary to the evidence).

[53] Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 875, 82 N.W.2d 755, 759 (1957) (citations omitted).

[54] Town Council of New Harmony, Indiana v. Parker, 726 N.E.2d 1217, 1222 (Ind. 2000) (placing of a chain across the street held not to constitute a taking of property in that the action did not deprive plaintiff of access to her property or inconvenience her more greatly than the general public); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 875, 82 N.W.2d 755, 759 (1957) (*citing* State *ex rel*. Gebelin v. Dep't of Highways, 200 La. 409, 8 So. 2d 71 (1942); Sweet v. Irrigation Canal Co., 198 Or. 166, 254 P.2d 700, 717 (1953); Genazzi v. Marin County, 88 Cal. App. 545, 263 P. 825, 826 (1928); State Highway Bd. v. Baxter, 167 Ga. 124, 144 S.E. 796 (1928); and Wegner v. Kelley, 182 Iowa 259, 265, 165 N.W. 449 (1917)).

[55] Dale Props., LLC v. State, 638 N.W.2d 763, 766 (Minn. 2002); State v. Ensley, 240 Ind. 472, 490, 164 N.E.2d 342, 350–51 (1960)

> (This court takes judicial notice of the ever-increasing problems of traffic control with which a thriving metropolitan area is confronted. The creation of such facilities as limited access highways, one-way streets, express thoroughfares and other methods of construction such as that involved in the present case, is to be encouraged in the interest of traffic control and regulation to the end that the general welfare and safety of the public may best be served.);

Mueller v. N.J. Highway Auth., 59 N.J. Super. 583, 158 A.2d 343, 349 (1960); Johnson v. Burke County, 101 Ga. App. 747, 115 S.E.2d 484 (1960); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 876, 82 N.W.2d 755, 759 (1957) (The state

> has the undoubted right, in the interest of public safety, to regulate the means of access to abutting property provided its regulations are reasonable and strike a balance between the public and private interest. And an abutting owner may make

along a new, limited-access highway where no road previously existed. In such instance there is no compensable damage due to lack of access because the landowner had no prior rights of access.[56]

B.4. Owner's Entitlement to Reasonable Access

The abutter of course may not be deprived of all access to an existing street or highway.[57] Indeed, the owner is entitled to reasonable access, a concept that depends on whether he or she has suitable access under the circumstances to the adjacent street and from there to the general system of highways. As discussed below, a finding of whether access is suitable may depend, for example, on the difficulties in gaining access to the premises or on whether the remaining access continues to satisfy the property's needs in regard to the highest and best use of the property. It should be noted that "the imposition of even substantial inconvenience has not been considered tantamount to a denial of the right of reasonable access."[58]

As one court has explained, when "direct access to a highway has been eliminated or substantially interfered with, causing diminution in value of an abutting property, the landowner is entitled to damages…."[59] "[W]hen all direct access has been eliminated, there has been *pro tanto* a taking; the availability and reasonableness of any other access goes to the question of damages and not to the question of liability for the denial of access."[60] There may be a compensable taking of direct access if no frontage or service road has been provided that is directly visible and accessible from the highway.[61] Compensation may be required if access is "only available through a series of *local roads* which are part of the city street system, not '*local traffic lanes*' which are part of the new highway."[62]

only such use of his right of access as reasonable regulations permit.)

(citations omitted).

[56] Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 82, 83, 99 N.W.2d 404, 406, 407 (1959).

[57] Annotation, *Power to Directly Regulate or Prohibit Abutter's Access to Street or Highway*, 73 A.L.R. 2D 652, 659 (1960). *See also* Annotation, *Power to Restrict or Interfere with Access of Abutter by Traffic Regulations*, 73 A.L.R. 2D 689 (1960).

[58] Johnson v. City of Plymouth, 263 N.W.2d 603, 607 (Minn. 1978), (*citing* Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills, 1 Cal. App. 3d 781, 82 Cal. Rptr. 318 (1969); Or. Inv. Co. v. Schrunk, 242 Or. 63, 408 P.2d 89 (1965); City of San Antonio v. Pigeonhole Parking of Texas, 158 Tex. 318, 311 S.W.2d 218 (1958); and Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927)).

[59] Dep't of Transp. v. Harkey, 308 N.C. 148, 154, 301 S.E.2d 64, 68 (1983) (compensation required for the elimination of direct access to the highway with access to a new highway via various streets in a residential neighborhood) (citation omitted).

[60] *Id.* at 155, 301 S.E.2d at 69.

[61] *Id.* at 158, 301 S.E.2d at 70. *See also* Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989).

[62] 308 N.C. at 158, 301 S.E.2d at 70 (emphasis in original).

B.5. Reasonable Restrictions on Access

Pursuant to its police power the highway authority may regulate highway traffic reasonably in a manner that has a significant impact on an abutter's access.[63] Thus, it may not be necessary for the public authority to condemn a right of access when taking a part of the abutting property. Although these forms of regulation may affect the abutter's ease or convenience of access, absent some unusual circumstances, they come within the category of noncompensable restrictions on access pursuant to the public authority's police power and constitute *damnum absque injuria*. The abutting property owner has no absolute right, as against the public, to insist that the adjacent highway always remain available for his or her use in the same manner and to the same extent as when the highway was constructed.[64] Because the property owner has no property right in the flow of traffic,[65] the law of access "does not include any right to develop property with reference to the type of access granted or to have access at any particular point on the boundary line of the property."[66]

The abutter's access is subject to reasonable control and regulation of the public authority without a requirement of compensation for changes made by the highway department. One who acquires property abutting a public road acquires it subject and subordinate to the right to have the road improved to meet the public need.[67] For example, the highway authority may establish one-way streets and traffic lanes, regulate speed, parking, and U-turns and prohibit left turns;[68] create

[63] State Highway Comm'n v. Hazapis, 3 Or. App. 282, 287, 472 P.2d 831, 833 (1970) (ordering new trial as it was improper for the trial court to rule as a matter of law that the property owners were entitled to compensation for "unreasonable access" and to submit question of damages to the jury because the property was placed on a cul-de-sac) (*citing* By and Through State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783 (1954)).

[64] By and Through State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783 (1954).

[65] Voss v. Middleton, 162 Wis. 2d 737, 767, 470 N.W.2d 625, 637 (1991); Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989); Narciso v. State, 114 R.I. 53, 62, 328 A.2d 107, 112 (1974) (court remanding the case for determination whether the installation of curbing amounted to a substantial denial of access) (*citing* State Highway Comm'r v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973); Surety Savings & Loan Ass'n v. State, 54 Wis. 2d 438, 195 N.W.2d 464 (1972); Acme Theatres, Inc. v. State, 26 N.Y.2d 385, 258 N.E.2d 912, 310 N.Y.S.2d 496 (1970); Commw. v. Hession, 430 Pa. 273, 242 A.2d 432 (1968); and STOEBUCK, *supra* note 22, at 764)).

[66] Surety Savings and Loan Ass'n v. State Dep't of Transp., 54 Wis. 2d 438, 444, 195 N.W.2d 464, 467 (1972).

[67] Palm Beach County v. Tessler, 538 So. 2d 846, 847 (Fla. 1989); Weir v. Palm Beach County, 85 So. 2d 865, 868 (1956).

[68] Jones Beach Blvd. Estate, Inc. v. Moses, 268 N.Y. 362, 367, 197 N.E. 313, 315 (1935) (*cited in* Cities Serv. Oil Co. v. New York, 5 N.Y.2d 110, 115, 154 N.E.2d 814, 816 (1958) (holding that maintenance of bus stops does not constitute an unreasonable interference with plaintiffs' right of ingress and egress and did not result in a taking).

one-way streets;[69] regulate vehicle weights;[70] grant permits for driveway openings;[71] and reduce the number of parking spaces on an abutting street[72] or restrict parking or the making of deliveries.[73] Other forms of regulation are not compensable such as the installation of "no parking" signs, curbs, stop lights, or yellow lines that separate the direction of traffic.[74] Neither is causing an increase or decrease in the flow of traffic past the property compensable,[75] nor is causing the landowner to have to back out into the street from the property necessarily compensable.[76]

There is recent authority confirming that a city's designation of a street as a one-way street is not a compensable taking of an owner's right to access to his or her property.[77] Similarly, another court recently explained that "[p]roperty owners do not have a right to be free from one-way streets, restricted 'U' and left turns, or other suitable traffic control devices deemed necessary."[78] As the North Carolina Court of Appeals wrote in a 2005 opinion,

> [t]he scope of the police power generally includes the protection of the public health, safety, morals and general welfare. The means used to accomplish a goal within the scope of the police power are unreasonable when they deprive an owner of all practical use of the property or they cause the property to lose all reasonable value….
>
> Our Supreme Court specifically has stated, "[a] median strip, completely separating traffic moving in opposite directions on [the roadway], and preventing left turns except at intersections, is an obvious safety device clearly calculated to reduce traffic hazards."[79]

In sum, the rule everywhere uniformly seems to be that reasonable exercises of the police power to regulate access do not require the payment of compensation for an impairment of access.

B.6. Nonabutting Property and Compensation for Special Injury

A landowner near a street whose access has been impaired may not obtain a recovery without demonstrating that the owner "'has suffered special damages which are not common to the general public.'"[80] Even if an owner's property does not abut a highway but the owner's access is impaired, the owner may be entitled to compensation if he or she is able to show a special injury, that is, an injury that is different in kind from the injury suffered by the general public.[81] As another court has reiterated, a "taking [is not] limited to physical confiscation—it can also be by impairing the property's value by, as here, cutting off access."[82] As the Supreme Court of Minnesota held in an earlier case, "[t]o be constitutionally compensable, the taking or damage need not occur in a strictly physical sense and can arise out of any interference by the state with the ownership, possession, enjoyment, or value of private property."[83] In a 2006 case in which the owners' property did not abut a road closed by the city, the court held that the owners had to prove special damages; however, the owners still had adequate access via a new access road.[84]

In *Hardin v. South Carolina Department of Transportation,*[85] the Supreme Court of South Carolina reversed the South Carolina Court of Appeals in two separate but consolidated cases that involved claims for compensation based on a diminution in access and loss of property value in which the appellate court had ruled that the property owners were entitled to compensation.[86] In the *Hardin* case, the property owners had

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[69] Brumer v. L.A. County Metro. Transp. Auth., 36 Cal. App. 4th 1738, 1748, 43 Cal. Rptr. 2d 314, 320 (Cal. App. 2d Dist. 1955); Chissel v. City of Baltimore, 193 Md. 535, 69 A.2d 53 (1949); Commw. v. Nolan, 189 Ky. 34, 224 S.W. 506 (1920).

[70] Wilbur v. City of Newton, 310 Mass. 97, 16 N.E.2d 86 (1938); Ferguson Coal Co. v. Thompson, 343 Ill. 20, 174 N.E. 896 (1931).

[71] Pure Oil Co. v. City of Northlake, 10 Ill. 2d 241, 140 N.E.2d 289 (1956); Bfeinig v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938); Lydy, Inc. v. City of Chicago, 356 Ill. 230, 190 N.E. 273 (1934).

[72] *Brumer*, 36 Cal. App. 4th at 1749, 43 Cal. Rptr. 2d at 320.

[73] Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N.W. 755 (1930).

[74] City of Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967).

[75] *Id.* at 508, 428 P.2d at 453.

[76] *Id.* at 509, 428 P.2d at 454.

[77] Hanson v. City of Roswell, 262 Ga. App. 671, 672, 586 S.E.2d 341, 342 (2003).

[78] Bauder v. State of Wash. Dep't of Transp., 2006 Wash. App. LEXIS 541, at *4-5 (Wash. App. 3d Div. 2006).

[79] City of Concord v. Stafford, 173 N.C. App. 201, 205–06, 618 S.E.2d 276, 279 (2005), *review denied*, 360 N.C. 174, 625 S.E.2d 784 (N.C. 2005) (*quoting* Gene's, Inc. v. Charlotte, 259 N.C. 118, 121, 129 S.E.2d 889, 892 (1963)).

[80] Palm Beach County v. Tessler, 538 So. 2d at 849 (*quoting* Pinellas County v. Austin, 323 So. 2d 6, 8–9 (Fla. App. 2d Dist. 1975)).

[81] Bowden v. Louisiana, 556 So. 2d 1343 (La. App. 3d Cir. 1990), *cert. denied*, 563 So. 2d 879 (La. 1990) (holding that special damages were shown where plaintiffs' access to a public road was completely obstructed by I-49); *but see* Hibert v. Louisiana, 238 So. 2d 372 (La. App. 3d Cir. 1970), *cert. denied,* 240 So. 2d 373 (La. 1970) (holding that special damage was not shown, resulting in reversal and entry of judgment for the state).

[82] State *ex rel* Hilltop Basic Res., Inc. v. City of Cincinnati, 167 Ohio App. 3d at 799, 2006 Ohio 3348, at *P1, 857 N.E.2d at 613.

[83] Johnson v. Plymouth, 263 N.W.2d 603, at 605 (Minn. 1978).

[84] Mill Creek Props., Inc. v. City of Columbia, 944 So. 2d 67, 69 (Miss. Ct. App. 2006).

[85] 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007).

[86] Hardin v. S.C. Dep't of Transp., 359 S.C. 244, 597 S.E.2d 814, 816 (S.C. Ct. App. 2004) and Tallent v. S.C. Dep't of Transp., 363 S.C. 160, 609 S.E.2d 544 (S.C. Ct. App. 2005), both *reversed* in Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007). Even prior to the reversal of the *Tallent* and *Hardin* cases the North Carolina Court of Appeals

property on Dave Lyle Boulevard situated on either side of the highway's intersection with Garrison Road near Interstate Highway 77.[87] The intersection had an opening that "allowed vehicles at the intersection to access both Garrison Road and the highway in either direction."[88] The construction of a new intersection required the closure of the Garrison/Dave Lyle intersection that "prevented vehicle traffic from making any left turns at the Garrison/Dave Lyle intersection."[89] The plaintiffs' inverse condemnation action alleged that the closure "depriv[ed] the traffic leaving their properties the ability to cross Dave Lyle Boulevard…."[90]

In the *Tallent* case, the transportation department in constructing a controlled-access diamond interchange, altered the character of Old Eastley Bridge Road, which had provided access to Highway 123 from the owner's property.[91] The "changes altered the character of Old Eastley Road from a through-connecting surface street to a road ending in a cul-de-sac."[92]

In reversing the two cases, the South Carolina Supreme Court sought to clarify takings law in the context of change in a property owner's access without a physical taking of property or a regulation that "denies all economically beneficial or productive use of land."[93]

First, "as long as a property owner has access to the public road system, his easement is intact. For this reason, any road re-configuration that does not cut off an owner's access to the public road system effects no taking upon him."[94]

Second,

> When only a portion of a public road abutting a landowner's property is closed, leaving the property in a cul-de-sac, no taking has occurred. As long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Further, as long as a landowner still has access to the public road system, this easement is unaffected. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction.[95]

The court stated that to the extent its prior decisions implied that a property owner possesses "a property interest in the existence of a particular road," its prior decisions were not correct.[96] The court interpreted the owner's right of access to more one of an easement and stated that the owner does not possess more than an easement:

> [T]he focus of our inquiry must be on a landowner's actual property interests; that is, his easements. We therefore overrule the "special injury" analysis contained in our jurisprudence in this area and specify that our focus in these cases is on how any road re-configuration affects a property owner's easements. An easement is either taken or it is not. That is the "injury different in kind and not merely in degree" with which we are concerned.[97]

All that is required is that after a road's realignment or closure is that the property owner "still has access to the public road system…."[98] The court held that in neither the *Hardin* case nor the *Tallent* case had there been a taking.[99]

Although the court in *Hardin* "overrule[d] the 'special injury' analysis…in this area and specif[ied] that [the] focus in these cases is on how any road reconfiguration affects a property owner's easements,"[100] the majority rule appears to be that where an affected owner's property does not abut the highway but the owner alleges an impairment of access in the constitutional sense, the owner must prove that he or she has suffered special damage, damage that is different in kind from that suffered by other property owners whose access has been affected.

C. DETERMINING WHAT CONSTITUTES A COMPENSABLE IMPAIRMENT OF ACCESS

C.1. Difficulty of Access to Affected Property as the Critical Factor

For there to be a taking or damaging in the constitutional sense, it is not necessary that access rights be acquired directly. The public authority's action in making highway improvements or alterations or in implementing traffic regulations may hamper, restrict, impede, or limit an abutting landowner's present access. With respect to an impairment of access, although there

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in City of Concord v. Stafford, 173 N.C. App. 201, 618 S.E.2d 276, 278 (2005), *review denied*, 625 S.E.2d 785 (N.C. 2005), declined to allow for the "recovery of diminution of value resulting from the construction of medians included in larger road projects" as held in *Hardin, supra.*

[87] 371 S.C. at 602, 641 S.E.2d at 440.

[88] *Id.*

[89] *Id.* at 603, 641 S.E.2d at 440.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Hardin v. S.C. DOT, 371 S.C. at 605, 641 S.E.2d at 441 (*citing* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

[94] *Id*. The court did state that

> [i]n South Carolina…a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. South Carolina State Hwy. Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). Thus, for example, in South Carolina, *an owner of a corner lot has an easement for access to and from both roads that abut his property*. Of course, an owner in South Carolina also has an easement for access to and from the public road system. This principle provides that an owner whose property does not abut any public road will not be denied access to the public road system.

Id. (emphasis supplied).

[95] *Id.* at 607, 641 S.E.2d at 442 (footnote omitted) (citation omitted).

[96] *Id.* at 609, 641 S.E.2d at 443.

[97] *Id.* (emphasis supplied).

[98] *Id.* at 607, 641 S.E.2d at 442.

[99] *Id.* at 610, 641 S.E.2d at 441.

[100] *Id.* at 609, 641 S.E.2d at 443.

is no distinction between condemnation and inverse condemnation in this instance,[101] every action of the government that impairs access does not require the payment of compensation.

Only if the government unreasonably impairs or substantially impairs existing access will the government be held liable; loss of access is not compensable when the property owner retains a reasonable means of ingress and egress to the highway. "It follows that the owner must be entitled to show what he will have left in the way of access before it can be determined whether it is reasonable."[102] Moreover, "whether or not a material impairment of access exists must be determined in each case upon the basis of the factual situation present, and each case must be considered on its own right. Material impairment of access cannot be fixed by abstract definition."[103]

There is considerable difficulty in articulating a standard by which to determine whether an impairment of access is a compensable one. The extent of impairment that is compensable has been addressed in a number of ways by the courts and commentators. As the Minnesota Supreme Court has observed, the dilemma is that

> [c]ourts have long struggled with the notion of reasonable access and the compensable "taking" thereof.... The result has been the creation of an unfortunate rhetorical device: Reasonable assertions of the police power are not compensable but the "taking" of a reasonable right of access is compensable. There is an obvious difficulty, however, with any attempted application of this statement as a rule of law. The statement itself provides no principled means for distinguishing a due process "taking" from a noncompensable exercise of police powers.[104]

The difficulty in gaining access to property is clearly a factor in determining whether remaining access is unreasonable.[105] However, merely because access is rendered more difficult, or even nearly impossible, by a highway improvement does not mean that the courts will find a compensable loss of access. It must be shown that the governmental action has interfered with the method of ingress and egress to an unreasonable extent. The abutter may find it difficult to make a sufficient showing of loss of access if, for example, his access has been unsuitable all along. As discussed below, if the abutter has been injured by a diversion of traffic, rather than an unreasonable impairment of access, then compensation may not be required.

C.2. Diversion of Traffic as Noncompensable

The abutting owner has the right to enter and leave the street from the abutting property in a reasonable manner and to have access to the general system of public roads. The abutter's right of access includes having his property reasonably accessible to others.[106] Although a claimant may contend that many items should be included as elements of damage, the element the property owner frequently attempts to include is for diversion of traffic that may result or has resulted in a loss of business. Ordinarily, the abutting property owner may not recover damages for any loss of business or diminution in value of the property due to the impairment of his or her access.[107] In *Department of Transportation v. Taylor,*[108] the owner's access was the same, and the landowner's evidence did "not relate to inconvenience or difficulty of access caused by any physical alteration or obstruction to Taylor's former (pre-take) access; rather [the evidence] relates to inconvenience caused by traffic flow and traffic volume, an inconvenience shared by the public in general."[109]

Thus, the abutter is not entitled to insist that the current volume of traffic that passes by his or her business establishment be maintained, nor is the abutting property owner entitled to have his or her economic status quo maintained as an element of the owner's

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[101] State v. Schmidt, 867 S.W.2d 769, 775, 777 (Tex. 1993) (stating that "we have refused to allow recovery for loss of value due to diversion of traffic and circuity of travel in both condemnation cases and inverse condemnation cases").

[102] G. Roettger & Dickson, *Access Control: Improper Hybridization of Police Power*, 6 URBAN LAWYER 603, 615 (1974).

[103] *Id.* at 616.

[104] Johnson v. Plymouth, 263 N.W.2d at 603, 606 (citation omitted).

[105] State v. Dunard, 485 S.W.2d 657, 658 (Mo. 1972). In *Dunard* it appeared that the access to the remaining property following the condemnation of a portion of farmland would be impaired to the extent that it would be difficult or impossible to move agricultural equipment unless a bridge was built over creeks and low-lying areas. At trial, the state sought to amend its petition to show the proposed construction of new access, evidence to which the landowners objected on the basis that the same might not be constructed. Although the court allowed the amendment, the court indicated that absent the additional access the owners should be compensated for their loss of access. *See also* State *ex rel*. Mo. Highway & Transp. Comm'n v. Cowger*,* 838 S.W.2d 144, 147 (Mo. App. W. Dist. 1992) (holding that "a condemnor has the right to offer evidence as to its plans for the condemned land, even where the petition does not set out the manner of its use") (*citing* St. Louis K. & N.W. Ry. Co. v. Clark*,* 25 S.W. 906, 907 (Mo. 1894)).

[106] *See* Palm Beach County v. Tessler, 538 So. 2d 846, 850 (Fla. 1989) (*citing Tessler*, 518 So. 2d 970, 972 (Fla. App. 4th Dist. 1988)).

[107] Mont. Dep't of Transp. v. Simonson*,* 320 Mont. 249, 256, 87 P.3d 416, 421 (2004) (*quoting* State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958); and *see also* Miczek v. Commw., 32 Mass. App. Ct. 105, 586 N.E.2d 1004, 1006 (1992); Malone v. Commw., 378 Mass. 74, 389 N.E.2d 975 (1979); Commw., Dep't of Highways v. Wooton, 507 S.W.2d 451 (Ky. 1974); Narcisco v. State, 114 R.I. 53, 328 A.2d 107 (R.I. 1974)).

[108] 264 Ga. 18, 440 S.E.2d 652 (1994).

[109] 264 Ga. 21, 440 S.E.2d at 655 (*cited in* Dep't of Transp. v. Bridges, 268 Ga. 258, 259, 486 S.E.2d 593, 594 (1997) (reversing an appeals court decision that held that the landowner had suffered a violation of a special right entitling him to compensation because the transportation department's road closure had an impact on the commercial nature of the property).

property right.[110] As the Supreme Court of Pennsylvania has stated,

> "all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury."[111]

Many if not all methods of controlling access to existing, uncontrolled-access highways cause the abutter or his or her patrons to travel some additional distance before being able to enter or leave the premises. However, as the Supreme Court of Texas stated in *State v. Schmidt,*[112] the "decisions have uniformly refused to allow severance damages based upon diversion of traffic and circuity of travel."[113] A landowner "cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property in the same manner as that to which he has become accustomed."[114]

According to the court in *Narcisco v. State*,[115] the majority of courts have refused to grant compensation for diversion of traffic.[116] However, the *Narcisco* court did refer to some cases "in which loss of access due to rerouting of traffic has been held to be a relevant factor in determining the loss in fair market value suffered by the property."[117]

In *Tessler*, *supra*, the Supreme Court of Florida held that there had been a compensable taking of access. The property owners' business had frontage and access to a road, both of which the county planned to block with a wall. The remaining access to the property was "an indirect winding route of some 600 yards through a primarily residential neighborhood."[118] The court rejected the county's argument that "unless the property owner has been deprived of all access, the law of eminent domain does not recognize that a taking has occurred."[119] The court held that although "the rights of abutting landowners [are] subordinate to the needs of government to improve the roads,"[120] more recent cases had held that "'an unreasonable interference [with access] may constitute a taking or damaging within constitution provisions requiring compensation….'"[121] The *Tessler* court agreed with the lower court that in this case there was a "substantial loss of access," quoting the appellate court's conclusion that "'the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property'" and would "'block visibility of the commercial storefront from Palmetto Park Road.'"[122] Nevertheless, the *Tessler* court also recognized that there could be no compensable taking of property merely because of a reduction in the flow of traffic in front of the property.[123]

Consequently, the courts usually are of the opinion that whatever the police power may provide an abutting

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[110] Palm Beach County v. Tessler, 538 So. 2d at 849 (*citing* Div. of Admin. v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981); Jahoda v. State Road Dep't, 106 So. 2d 870 (Fla. App. 2d Dist. 1958)).

[111] Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 47, 220 A.2d 868, 875 (1966) (*quoting* Missouri v. Meier, 388 S.W.2d 855, 857 (1965)). The *Wolf* decision is cited in Sienkiewicz v. Commw., Dep't of Transp., 584 Pa. 270, 276, 883 A.2d 494, 498 (2005). *See also* Tubular Serv. Corp. v. Comm'r State Highway Dep't, 77 N.J. Super. 556, 187 A.2d 201 (1963).

[112] 37 Tex. Sup. Ct. J. 47, 867 S.W.2d 769 (Tex. 1993).

[113] *Id.* at 777 (suggesting that the same rule applied even to claims based on "visibility of property or disruption of use due to construction activities….") (*Id*.). *See also* County of Bexar v. Santikos, 144 S.W.3d 455, 463 (Tex. 2004).

[114] Bumer v. L.A. County Metro. Transp. Auth., 36 Cal. App. 4th 1738, 1747, 43 Cal. Rptr. 2d 314, 319 (Cal. App. 2d Dist. 1995).

[115] 114 R.I. 53, 328 A.2d 107 (1974).

[116] *Narcisco*, 328 A.2d at 111 (*citing* State Comm'n of Transp. v. Monmouth Hills, Inc., 110 N.J. Super. 449, 266 A.2d 133 (1970); Jacobson v. State Highway Comm'n, 244 A.2d 419 (Me. 1968); Painter v. State Dep't of Roads, 177 Neb. 905, 131 N.W.2d 587 (1964); People *ex rel*. v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958)). With respect to the majority rule, *see also* Bruzzese v. Wood, 674 A.2d 390, 394 (R.I. 1996) and St. Sahag & Mesrob Armenian Church v. Dir. of Pub. Works, 116 R.I. 735, 360 A.2d 534 (1976) (both *citing Narcisco*). *See also* Wolf v. Commw., Dep't of Highways, 422 Pa. 34, 38, 220 A.2d 868, 870 (Pa. 1966) (Where after a partial taking it was necessary to proceed 1,500 to 1,700 ft east of the property and then make turns to reach the premises, the court held that the diversion of traffic, even though it resulted in a diminution of the value of the property, was not an element properly to be considered in determining the after-value of the property.).

[117] *Id.* (*citing* State Dep't of Highways v. Bagwell, 255 So. 2d 852 (La. App. 1971); S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970); State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931)).

[118] Palm Beach County v. Tessler, 538 So. 2d at 847.

[119] *Id.*

[120] *Id.* (*citing* Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891)).

[121] *Id.* at 848 (*quoting* Benerofe v. State Road Dep't, 217 So. 2d 838, 839 (Fla. 1969)).

[122] *Id.* at 850 (*quoting Tessler*, 518 So. 2d 970, 972 (Fla. App. 4th Dist. 1988)). S*ee also* USA Independence Mobile Home Sales, Inc. v. City of Lake City, 908 So. 2d 1151, 1156–57 (Fla. App. 1st Dist. 2005) (*quoting Tessler*) (affirming that part of a trial court's decision that held that no taking had occurred on the basis of a loss of access).

[123] *Id.* at 849 (*citing* Div. of Admin. v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981); Jahoda v. State Rd. Dep't, 106 So. 2d 870 (Fla. App. 2d Dist. 1958)).

landowner, it may take away.[124] The state has no duty to maintain the traffic on a certain highway for the business establishments that may abut the highway.[125] As seen in *La Briola v. State,*[126] one must be careful to distinguish loss of access that may be compensable from diversion of traffic caused by a relocation of traffic that is not compensable. Each case depends on its particular circumstances, a point illustrated aptly in the Supreme Court of Vermont's decision in *Ehrhart v. Agency of Transportation.*[127]

In *Ehrhart* the property owners conceded that they "base[d] their business losses on the change in the flow of traffic from the construction of the median strip" in front of their businesses.[128] In Vermont a recovery may be had for business losses but the claim must be "directly and proximately caused by the physical loss of the property."[129] That is, compensation is not recoverable "when traffic is only routed away from a business…."[130] In the *Ehrhart* case the emphasis appears to have been more on the loss of business from reduced flow rather than on the difficulty of access to the owners' properties, although the court did discuss how the median restricted access to the businesses to certain openings. In ruling that the claims were not compensable, the court did observe that there were "several out-of-state cases" that permitted compensation for all incidental effects of a highway project on the value of the remaining land.[131]

The *Ehrhart* court stated, however, that the rule in Vermont and most jurisdictions was that "when the loss of a piece of property results directly in further losses to a business, the owner is entitled to compensation, but when the business loss arises from the rerouting of traffic, and not from the loss of the land itself, no compensation is due."[132] The court rejected the landowners' argument that

> the losses resulting from the median strip fit within the 'direct and proximate decrease' language of [Vermont Stat. Ann. tit. 19] § 501(2) because the State could not have built the median strip without widening the road and taking landowners' property. According to this logic, the physical taking of their land caused the placement of the median strip and the resulting business losses.[133]

However, the court held that

> [a]ttaching legal significance to the incidental link between the physical takings and the losses from the median strip would also introduce an arbitrary distinction between those adjacent landowners whose property is taken and those whose property is left intact. If the State were to take all the land it needed to widen a road from the landowners on one side of the road, and none from the other, it would be required to compensate half of the landowners affected by the concurrent placement of a median strip, while the other half, who would presumably be affected in equal measure by the median strip, would receive no compensation. Instead of reducing the burden of the highway project on those who may be harmed by it, this approach would place a larger burden than the current system on a smaller group of property owners, while disproportionately benefiting a similarly situated group.[134]

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[124] Wolf v. Commonwealth, 422 Pa. 34 at 47, 220 A.2d 868, at 875.

[125] *Id*.

[126] 36 N.Y.2d 328, 328 N.E.2d 781 (1975).

[127] 180 Vt. 125, 904 A.2d 1200 (2006).

[128] *Id.* at 129, 904 A.2d at 1204.

[129] *Id.* at 128, 904 A.2d at 1203. *See also* LA. CODE 48:217.

[130] *Id*.

[131] *Id.* at 129, 904 A.2d at 1204 (*citing* S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 367–68, 175 S.E.2d 391, 396 (S.C. 1970) (holding that a landowner could recover for placement of a median strip that could not have occurred but for the taking of the landowner's property because "the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use") (internal quotation marks omitted)). *See also* State *ex rel.* Mo. Highway and Transp. Comm'n v. Jim Lynch Toyota, Inc., 830 S.W.2d 481, 485 (Mo. App. E. Dist. 1992) (holding that the "loss of access resulting from a median strip constructed as part of a highway widening project was a proper consideration because '[a]ny factor that has a present, quantifiable effect on the market value of the property is proper as an element of damages.'") (citation omitted).

[132] *Id.* at 129, 904 A.2d at 1203 (*citing* Div. of Admin., State Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981) (holding that a landowner who lost a strip of property to a highway widening project could not recover losses caused by concurrent placement of a median strip because "[w]hen less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking" and that "[c]onstruction of the median, not the taking, caused the alleged damage");
Jacobson v. State *ex rel*. State Highway Comm'n, 244 A.2d 419, 421-22 (Me. 1968); Painter v. Dep't of Roads, 177 Neb. 905, 909-10, 131 N.W.2d 587, 590-91 (Neb. 1964) (holding that a landowner whose property was taken in a highway widening project could recover only for the lost land and not for losses caused by traffic islands constructed as part of the same project); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342, 349 (Ind. 1960)).

[133] *Id.* at 131, 904 A.2d at 1205. The court observed that the "[l]andowners' approach would result in compensation not only for lost traffic flow, but also for the even more remote effects of the highway project, such as heavier competition from nearby businesses that might be more accessible after the completion of the project." *Id.*

[134] *Id.* at 131–32, 904 A.2d at 1205 (Emphasis added) For decisions that have been read to permit or that have held that a diversion of traffic may be compensable, *see* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (distinguished in People *ex rel*. Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960) (affirming trial court's decision in a condemnation action that compensation was not due for an alleged impairment to the lessees' right of access to an abutting street)); State *ex rel*. Herman v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 163 (1968) (permitting testimony concerning diversion of traffic and loss of business in determining the after-value of the property); and State *ex rel*. Herman v. Jacobs, 7 Ariz. App. 396, 440 P.2d 32 (1968).

In *Brumer v. Los Angeles County Metropolitan Transportation Authority,*[135] although the court held that there had been no substantial impairment of access caused by the construction of a transit project, the court stated that

> [t]he compensable right of an abutting property owner is to direct access to the adjacent street *and to the through traffic which passes along that street* (*People v. Riccardi, supra*.) If this basic right is not adversely affected, a public agency may enact and enforce reasonable and proper traffic regulations without the payment of compensation although such regulations may impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuitry of travel to reach a given destination….[136]

C.3. Circuity or Increased Distance of Travel

Although the courts hold that there is no compensable damage for mere circuity of travel, this phrase appears to be another way of saying that distance in and of itself does not make the remaining or existing access unreasonable.[137] If access is changed and entails a more circuitous route, the abutter shares the same inconvenience as the general public, although perhaps to a greater extent. The question as always is whether the abutting property owner "has suffered special damages which are not common to the general public."[138]

Although the abutter may have a greater distance to travel following highway improvements or alterations, his or her right of access is one of being able to enter and leave the highway with a reasonable connection to the system of public roads. According to an Indiana court the general rule is that

> [o]ne whose property abuts upon a roadway, a part of which is closed or vacated has no special damage if his lands do not abut upon the closed or vacated portion so that his right of ingress and egress is not affected. If he has the same access to the general highway system as before, his injury is the same in kind as that suffered by the general public and is not compensable. It is damnum absque injuria.[139]

Increased distance is probably insufficient in most cases to establish a compensable loss of access. If the owner still has a reasonable means of access to the highway, there is not a compensable taking of access.[140] However, as each case depends on its particular facts, a precise rule simply may not be stated. Nevertheless, the cases illustrate that some additional distance or circuity of travel is insufficient to constitute a compensable impairment of access, such as increased distance of 400 ft,[141] or to one-third of a mi beyond the property to reach and return via a frontage road,[142] to 1,400 or 1,500 ft beyond the property,[143] to 1,500 ft in one direction and 200 ft in the other direction,[144] to 1.2 and 1.3 mi in either direction,[145] or to as much as 2[146] or even 3[147] mi from the property as held in more recent cases. However, an additional distance of 7.45 mi from the property was held in one case to be unreasonable.[148] Also, it has been held that loss of frontage and access to one street with remaining access being a winding, circuitous route of 600 yds through a residential section was a compensable impairment of access.[149]

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[135] 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314 (1995).

[136] *Id.* at 1748, 843 Cal. Rptr. 2d at 320 (internal quotation marks omitted) (emphasis supplied). The property had a one-story commercial building consisting of eight stores. Before the construction of a transit line,vehicular traffic on the property owners' abutting street was two-way; after the construction, traffic was one-way. The court held that "designating an entire street as one way is a non-compensable police regulation." *Id.*

[137] 4A NICHOLS ON EMINENT DOMAIN § 14.A.01[6][a], [b].

[138] Palm Beach County v. Tessler, 538 So. 2d at 849. *See* State v. City of Terre Haute, 250 Ind. 613, 618, 238 N.E.2d 459, 462 (1968), in which the court stated that

> "either some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate [must be] taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public."

(citation omitted). *See also* State v. Hastings, 246 Ind. 475, 481–83, 206 N.E.2d 874, 877 (1965) (jury instruction permitting the consideration of loss of profits held to be error).

[139] Old Romney Dev. Co. v. Tippecanoe County, Ind., 817 N.E.2d 1282, 1287 (Ind. App. 4th Dist. 2004).

[140] *Id.* at 1288.

[141] New v. State Highway Comm'n, 297 So. 2d 821, 823 (Miss. 1974).

[142] State *ex rel*. State Highway Comm'n v. Mauney, 76 N.M. 36, 43, 411 P.2d 1009, 1013 (1966).

[143] *See* State *ex rel*. Morrison v. Thelberg, 86 Ariz. 263, 265, 344 P.2d 1015, 1016, 1017 (1959), but the opinion was replaced by State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 324, 350 P.2d 988, 991 in which the court

> overruled the principle laid down in In re Forsstrom, [44 Ariz. 472, 38 P.2d 878] and Grande v. Casson, [50 Ariz. 397, 72 P.2d 676], …which declared the non-compensability of an abutting property owner for the destruction or substantial impairment of his right of access to such highway. We also reject the reasoning upon which the rule rests i.e., that there is a presumption of payment. The rule to the contrary, supported by the weight of authority, is based upon the fact that an abutting property owner to a highway has an easement of ingress and egress to and from his property which constitutes a property right.

[144] State, Comm'r of Transp. v. Charles Investment Corp., 143 N.J. Super. 541, 543, 546, 363 A.2d 944, 945, 946 (1976).

[145] In Re: De Facto Condemnation by the Commw. of Pa., 164 Pa. Commw. 81, 82, 88, 644 A.2d 1274, 1274, 1277 (1994).

[146] Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185, 1188, 135 P.3d 1221, 1225 (2006).

[147] City of Wichita v. McDonald's Corp., 266 Kan. 708, 711, 971 P.2d 1189, 1193 (1999).

[148] Dep't of Transp. v. Guyette, 103 Pa. Commw. Ct. 402, 404, 520 A.2d 548, 549 (1987), *appeal denied*, 516 Pa. 644, 533 A.2d 714 (1987).

[149] Palm Beach County v. Tessler, 538 So. 2d at 847.

D. COMPENSATION FOR REDUCTION IN HIGHEST AND BEST USE OF PROPERTY

An important factor to be considered in determining whether the remaining access is unreasonable is any reduction in the highest and best use of the property attributable to the impairment of access.[150] "What constitutes reasonable access must…depend to some extent on the nature of the property under consideration."[151] If the highway project or "government's use…constitute[s] a fundamental change in the character of use from its original use, the government's conduct amounts to a taking requiring compensation."[152]

Chemung Canal Trust Co. v. State of New York[153] involved the state's appropriation of part of a street bordering the bank's land, resulting in a loss of access. The court held that the "fact that the taking and closing of State Street did not involve any direct taking of plaintiff's land does not preclude recovery in damages, if through that taking, claimant's property was in fact deprived of suitable access."[154] "Unsuitability of access is not to be determined in the abstract, but in relation to the need for access inherent in the highest and best use of the property…. What constitutes the highest, best use and access suitable for such use is generally a question of fact…."[155]

In *Priestly v. State,*[156] the court held that the evidence established that the highest and best use of the property had been reduced from commercial to residential and that the sole remaining access to the property was quite circuitous. More recently, in *Split Rock Partnership v. State*,[157] an appellate court stated that *Priestly* had been interpreted

> to include cases in which the remaining access would not support the degree of development potential that existed before the taking. Thus, consequential damages have been properly awarded when the highest and best use of the property was the same both before and after the taking, but the remaining access reduced the potential development of the property….[158]

Nevertheless, the court in *Split Rock Partnership* determined that there was no evidence "that the size of the office building would have to be reduced because of the lack of access thereto or that a new access road would not support the same amount of traffic as the old one…. Under these circumstances, the award of consequential damages was improper."[159]

In 2005, in *Lake George Associates v. New York*,[160] a case involving a partial taking and a change in access to the property, an appellate court agreed with the court of claims that the property owner was not entitled to consequential damages based upon "allegations that suitable access to and from the property was diminished, its traffic flow was adversely implicated, the property lost its corner identity, and the property ended up with reduced parking benefits."[161] Although citing *Priestly*, the court stated that

> consequential damages will not be recovered when the appropriation results in making travel to and from the parcel more inconvenient or circuitous…. Instead, it must be demonstrated that access "is not only circuitous or inconvenient but *unsuitable*, i.e., 'inadequate to access needs inherent in the highest and best use of the property involved….'" Here, claimant was given substitute access by means of an easement over a driveway south of its parcel on Route 9 and by means of an easement over a driveway east of its parcel on Route 149. This type of access is considered sufficient….[162]
>
> Claimant also failed to establish that ingress or egress to and from Routes 9 and 149 through the newly established curb cuts restricted or impeded access.[163]

The foregoing cases illustrate that a reduction in the highest and best use of the remaining property is a factor to consider but that it must be shown that it is the loss of access that has caused the change in the use of

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[150] See, e.g., State *ex rel*. Dep't of Highways v. Beatty, 288 So. 2d 900, 909 (La. App. 1st Cir. 1973), *cert. denied*, 293 So. 2d 169 (La. 1974) (holding that "the inconvenience and diversion of traffic which will result from this expropriation diminished the value of defendant's remaining property by changing its highest and best use from highway commercial to residential" and that "[t]he inconvenience and diversion of traffic [were] proper elements of severance damages"); Priestly v. State*,* 23 N.Y.2d 152, 157, 242 N.E.2d 827, 830 (1968) (holding that the evidence established that the highest and best use of the property was reduced from commercial to residential and that the sole remaining access to the property was quite circuitous); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505, 515, 519 (1942) (holding that because traffic lanes were not capable of supplying the necessary ingress and egress for the industrially zoned property, the property could not be put to the same uses after the construction as it had been prior to the construction). *See, however,* La Briola v. State*,* 36 N.Y.2d 328, 334, 328 N.E.2d 781, 785 (1975) (holding that there had not been a reduction in highest and best use because of loss of access or mere diversion of traffic).

[151] *Johnson*, 263 N.W.2d at 607 (holding "that the reduction in highest use of claimant's property was caused not by loss of suitable access but by the loss of abutment on a highway and its profitable traffic").

[152] Killinger v. Twin Falls Highway Dist., 135 Idaho 322, 327, 17 P.3d 266, 271 (2000) (holding in a case involving a highway widening project that altered the property's use by making access more difficult for semi and tow trucks, that, inter alia, "the creation of the buffer zone constitutes a change in character of the type of use and, thus, a taking").

[153] 90 A.D. 2d 889, 456 N.Y.S.2d 518 (App. Div. 3d Dep't 1982).

[154] *Id.* at 890, 456 N.Y.S.2d at 519.

[155] *Id.* (citation omitted).

[156] 23 N.Y.2d 152, 155–56, 242 N.E.2d 827, 829–30 (1968).

[157] 275 A.D. 2d 450, 713 N.Y.S.2d 64 (App. Div. 1st Dep't 2000).

[158] *Id.* at 451, 713 N.Y.S.2d at 65 (citation omitted).

[159] *Id.*

[160] 23 A.D. 3d 737, 803 N.Y.S.2d 724 (App. Div. 3d Dep't 2005).

[161] *Id.* at 738, 803 N.Y.S.2d at 725.

[162] *Id.*

[163] *Id.* at 739, 803 N.Y.S.2d at 726.

property. The cases demonstrate the difficulty the courts encounter in determining whether a substantial or unreasonable impairment of access exists; the question is largely one of fact.[164]

E. DENIAL OR LOSS OF DIRECT ACCESS

E.1. Denial of Access to a New Highway

Although not discussed in detail here, the highway authority may construct a new highway pursuant to a statute that authorizes such highways but that denies access to newly created abutting landowners.[165] An abutter to a new highway is not entitled to compensation for something that he or she never had in the first place, and, therefore, could not lose: "There is no inherent right of access to a newly relocated highway…. The condemnee never having had access to the new highway there is no easement of access taken in this proceeding."[166]

E.2. Substitute Access via a Service or Frontage Road

In situations where access must be partially or fully controlled, the highway department may find it necessary to convert an uncontrolled-access highway into a limited-access highway and limit ingress and egress to the main road at specified interchanges via service roads. Thus, the highway authority may eliminate direct access and provide the abutter with substitute access by a service or frontage road. The abutting landowner who by virtue of the conversion is relegated to access via a service road to a main highway may find that his other access is more circuitous. Customers may have to travel to a point beyond the property, exit at an interchange, and travel in the opposite direction to reach the premises. Moreover, a significant amount of traffic (i.e., business) may be diverted entirely because of the circuitous access.

One approach is for a highway authority to locate and build a new highway near an existing road that is converted into a service road for a new highway. Another approach is to construct a limited-access road over an old road with a new service road to provide ingress and egress. The issue is whether the abutting landowner may recover compensation for a loss of direct access and for the substitute access with which he or she has been provided. One court has held that compensation is required when a service road is converted into a limited-access facility "'regardless of the specific requirements of a statute.'"[167]

The majority view appears to be that it is immaterial whether the service road was constructed from the old highway or is entirely new[168] and that the substitution of an alternative means of access is noncompensable if the substitute access is reasonable to meet the needs of the affected property.[169]

E.3. Service or Frontage Road—Not Merely a Substitute for Direct Access

It is not enough merely for the public authority to substitute a frontage road for what had been direct access;[170] a destruction or substantial impairment of ac-

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[164] La Briola v. State, 36 N.Y.2d at 337, 328 N.E.2d at 787.

[165] *See* Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 81–83, 99 N.W.2d 404, 406 (1959).

[166] State *ex rel*. Rich v. Fonburg, 80 Idaho 269, 277, 328 P.2d 60, 64 (Idaho 1958), (*quoted in* James v. State, 88 Idaho 172, 178, 397 P.2d 766, 770 (1964)). *See also* South Meadow Realty Corp. v. State, 144 Conn. 289, 130 A.2d 290 (1957); State v. Clevenger, 365 Mo. 970, 291 S.W.2d 57 (1956); State v. Burk, 200 Or. 211, 265 P.2d 783 (1954); Smick v. Commonwealth, 268 S.W.2d 424 (Ky. 1954); City of L.A. v. Geiger, 94 Cal. App. 2d 180, 210 P.2d 717 (Cal. App. 2d Dist. 1949).

[167] Palm Beach County v. Tessler, 538 So. 2d at 848 (*quoting* Anhoco Corp. v. Dade County, 144 So. 2d 793, 797 (Fla. 1962)).

[168] State v. Mauney, 76 N.M. 36, 42, 411 P.2d 1009, 1012–13 (1966). The court stated that it could not "understand why a person's rights as to compensation should differ if the state should decide to use the old road for a frontage road or use it for the through lanes of a limited-access highway…. [S]uch a difference should make no change in the right to compensation for deprivation of access." *Id*. *See, however*, State *ex rel*. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), in which the court suggests that if the highway authority converts the paved surface of the existing conventional road into a frontage road for the use of the abutting property owner, then under these circumstances the abutting owner has not suffered an impairment of access because he or she has the same access as existed before the conversion.

> It seems to be the law…that where land is condemned or purchased for the construction of a controlled-access highway…that an abutting owner of land on the old highway, which is retained as a service road, cannot recover damages for destruction or impairment or loss of access for the reason that his access to the old highway has not been disturbed in the slightest degree.

87 Ariz. at 324–25, 350 P.2d at 992.

[169] *See, e.g.,* Triangle, Inc. v. State, 632 P.2d 965, 968 (Alaska 1981) (*quoting* State Highway Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), *cert. denied,* 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964)). *See also* State by State Highway Comm'n v. Cent. Paving Co., 240 Or. 71, 74, 399 P.2d 1019, 1021–22 (1965) (adopting the rule denying recovery to a landowner caused by "circuity of route resulting from the construction of a limited access highway" and holding that the "[d]efendants are not entitled to recover compensation for a loss unless they can show that the type of loss is peculiar to those owning land as distinct from the loss suffered by the general public") (*citing* Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963); Selig v. New York, 10 N.Y.2d 34, 217 N.Y.S.2d 33, 176 N.E.2d 59 (1961); Ark. State Highway Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960)).

[170] In Dep't of Pub. Works & Bldgs. v. Wilson and Co., Inc., 62 Ill. 2d 131, 340 N.E.2d 12 (1975), the court affirmed a trial court's judgment awarding damages to the property owner based on damages to the land taken and to the remainder based on loss of highway access. The court stated that

> [w]e do not agree with the Department's suggestion that the frontage road in this case was a traffic control device of the same character [as the median divider cases]. Here, the effect of the partial taking was not merely a limitation of the existing direct access to Roosevelt Road nor simply a change in the flow of

cess may be compensable when a service road is provided in lieu of direct access.[171]

> The measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the difference between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof. *The damages awarded the abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in the value of the remaining property before and after the access thereto has been destroyed or impaired.* This in turn is based upon the highest and best use to which the land involved is best suited before and after the right of access is molested.[172]

In *State ex rel. Herman v. Wilson*,[173] involving condemnation of land and conversion of a state route into an interstate highway, the court noted that a number of states had

> adopted the principle that the right of direct access to a public highway may be limited to frontage roads and possibly to other circumstances in which access is not unreasonably circuitous.
>
> ....
>
> But we do not have such a situation here for there is no frontage road and the substitute access road is, in our opinion, unreasonably circuitous. Accordingly we hold, consistent with our former decisions, that the complete destruction of direct access to a public highway constitutes a damaging of property within the meaning of the Constitution of Arizona.[174]

Extended to its logical conclusion, the idea that a service or frontage road may be substituted without regard to the suitability of the access would seem to deny recovery even if no connection were ever made to the new highway. Such a wholly untenable possibility was recognized in *Teachers Insurance and Annuity Association of America v. City of Wichita*.[175] Prior to the proposed conversion of Kellogg Street to a fully-controlled-access highway, the owners' parcels had direct access to Kellogg Street. No part of the owners' properties was taken for the project. Although the city argued that the owners had the same street access as before the project, the court held that no physical taking of property was required for compensation.[176] The court further held that the street (Kellogg Drive), which would front the plaintiffs' properties for a distance of five blocks after the completion of the highway project, was not a frontage road.[177] Because the new "Kellogg Drive will not furnish any access whatever to the newly improved Kellogg Street and highways,"[178] the property owners were entitled to compensation for impairment of their preconstruction access.[179]

> Here long distances must be traveled on roads, other than Kellogg Drive, which are no part of a frontage road, in order to gain access to the controlled highway at interchanges on the highway. The circuity of travel in the instant case is such that reasonable men could not differ in finding it unreasonable.
>
> While Kellogg Drive in the instant case is adjacent to the plaintiffs' properties and parallel to the new limited access highway, at no point does it permit entry onto the express lanes of the highway. Kellogg Drive which extends for a distance of five blocks parallel to the new highway terminates at its extremities without permitting any access to the new controlled highway facility.[180]

In 2006, in *Department of Transportation v. Lowderman, LLC,*[181] an interesting question was posed by the property owner that was rejected by the appellate court regarding whether the landowner was entitled to compensation for damages to the remainder for impairment of access when an Illinois statute guaranteed access to state highways. The state condemned a portion of Lowderman's property located adjacent to a state highway.[182] The complaint stated that it was necessary for the Illinois Department of Transportation to acquire all access rights to the highway of the remaining property, but that access to the remainder would be provided by a frontage road.[183]

Lowderman's argument was that access via a frontage road was a mere license revocable at will by the state, that the state had "extinguished all of the Lowderman remainder's access rights to U.S. Route 136, including those by way of the frontage road."[184] Consequently, Lowderman wanted the jury to be allowed to

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> traffic on the street, but rather a complete elimination of all direct access with the substitution of a frontage road....

62 Ill. 2d at 144, 340 N.E.2d at 18.

[171] State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960) (affirming the trial court's judgment awarding severance damages to the landowners where part of land was taken to convert a conventional highway into a controlled-access highway, so that access to and from remaining property was controlled by a frontage road.)

[172] *Id.*, 87 Ariz. at 325, 350 P.2d 992 (citations omitted) (emphasis supplied).

[173] 103 Ariz. 194, 438 P.2d 760 (1968) (affirming the trial court's decision for the condemnees and reasoning that access was a substantial right that allowed the condemnees' family, friends, and guests to pass to and from the property).

[174] *Id.,* 103. Ariz. at 197, 438 P.2d at 763 (citations omitted).

[175] 221 Kan. 325, 559 P.2d 347 (1977).

[176] *Id.,* 221 Kan. at 330, 559 P.2d at 353 (stating that "[o]ur cases…clearly indicate there is no requirement that the land of an abutting property owner be taken by eminent domain or otherwise as a condition precedent to the maintenance of an action for damages to compensate for the loss of access taken from the abutting property owner" and that "[o]ur controlled access statute, K. S. A. 1975 Supp. 68-1901, et seq., expressly contemplates compensation for the taking of an abutting landowner's right of access").

[177] *Id.,* 221 Kan. at 334, 559 P.2d at 355, 356.

[178] *Id.*

[179] *Id.* at 333–34, 559 P.2d at 355, 356.

[180] *Id.* at 334, 559 P.2d at 356.

[181] 367 Ill. App. 3d 502 (Ill. App. 3d Dist. 2006).

[182] *Id.* at 503.

[183] *Id.*

[184] *Id.* at 506.

determine damages based on the extinguishment of such rights.[185] Lowderman argued that it "only had one opportunity to obtain compensation for the loss of access rights…and that the jury [should have been] allowed to determine damages resulting from the extinguishment of such rights."[186]

The statute on which Lowderman relied provided:

> Except where the right of access has been limited by or pursuant to law every owner or occupant of property abutting upon any State highway shall have reasonable means of ingress from and egress to the State highway consistent with the use being made of such property and not inconsistent with public safety or with the proper construction and maintenance of the State highway for purposes of travel, drainage and other appropriate public use.[187]

The appellate court held that it would be improper, under 605 Illinois Compiled Statutes 5/8-102,[188] " to read into section 4-210 a prohibition on a governmental entity's power to landlock property abutting a freeway.[189] Thus, the appeals court held that section 4-210 could not restrict Lowderman's property from being landlocked as a matter of law."[190] Although a dissenting opinion argued that "the usage of the frontage road [was] merely a license and not a right,"[191] the majority held "that Lowderman still retains a reasonable right of indirect access to U.S. Route 136" and that there was a "right of access that is protected under section 4-210 until it is further limited pursuant to some law such as section 8-102."[192] The court held that the claim that the owner was entitled to more compensation "because its remainder has effectively become landlocked is premature and thus not before this court."[193]

Relying on *Department of Public Works and Buildings v. Wilson and Co., Inc.,*[194] the *Lowderman* court agreed that "the 'frontage road bears not on the question of compensability but is relevant in mitigation of damages resulting from the elimination of the existing *direct* access.'"[195]

> Here, the trial court followed the procedure announced by the court in Wilson. The court correctly determined that Lowderman's access rights were materially impaired as a result of the State's taking of his direct access to the highway. The court then found that the jury can determine just compensation based on the value of the land itself and any reduction in value of the remainder resulting from the taking of direct access and the substitution of the frontage road. Because Lowderman retains an indirect right of access through the use of the frontage road, the trial court also ruled correctly in denying Lowderman's claim that the jury can determine damages resulting from IDOT's extinguishment of all access rights of the Lowderman remainder to U.S. Route 136.[196]

E.4. Whether Substitute Access Is Compensable

As discussed below, the courts generally have applied one of several rules concerning the substitution of the service or frontage road on the question of compensation:

- Any loss of access that results from being placed on a service road should not be compensated if the substitute access is suitable, or
- Any loss of access should be compensated and the existence of the frontage road should be considered in mitigation of the loss, or
- Any loss should be compensated only when accompanied by a taking of a parcel of the land by eminent domain.

E.4.a. No Compensation If Access Is Suitable

As seen, if all direct access to the adjacent road is eliminated on the conversion of a road into a limited-access facility, the owner must be provided with substitute access that provides reasonable ingress to and egress from his or her property. Numerous cases hold that if the highway authority provides "reasonable access to a service road when it terminated direct access to the highway…[,] the [property owners] are not entitled to compensation for the termination of their direct access."[197] In following a reasonableness test, a New Jersey court stated that

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[185] *Id.* at 505.

[186] *Id.* at 507.

[187] 605 ILL. COMP. STAT. 5/4-210 (West 2004).

[188] 605 ILL. COMP. STAT. 5/8-102 (West 2004) provides:

> The Department, the county board, or the corporate authorities of any municipality, as the case may be, shall also have authority to extinguish by purchase or condemnation any existing rights or easements of access, crossing, light, air or view to, from or over the freeway vested in abutting land, in the same manner as the Department, county board, or corporate authorities of any municipality now is or hereafter may be authorized by law to acquire private property and property rights in connection with highways under their respective jurisdiction and control.

[189] DOT v. Lowderman*,* LLC*,* 367 Ill. App. 3d at 503.

[190] *Id.* at 505.

[191] *Id.* at 508.

[192] *Id.* at 507.

[193] *Id.*

[194] 62 Ill. 2d 131, 340 N.E.2d 12 (1975).

[195] 367 Ill. App. 3d at 508 (emphasis in original).

[196] *Id.* at 509.

[197] 26 AM. JUR. 2D, *Eminent Domain* § 195, at 592 (2004 ed.) ("[T]he impairment or loss of access resulting from the conversion of a conventional road into a limited-access or controlled-access highway is noncompensable if after the conversion the owner of abutting land retains a reasonable means of ingress and egress to and from his or her property."). *See State*, Comm'r of Transp. v. Charles Investment Corp., 143 N.J. Super. 541, 546, 363 A.2d 944, 946 (1976) (adopting a reasonableness of access test and holding that because reasonable access existed there could be no recovery of damages for loss of direct access in a case in which because of highway reconstruction the closest access points to a service road were 1500 ft in one direction and approximately 200 ft in the other direction); Surety Savings and Loan Ass'n v. State Dep't of Transp.*,* 54 Wis. 2d 438, 443, 195 N.W.2d 464, 467 (1972) (holding that "there is no compensable taking when direct access to a controlled access highway is de-

> fairness dictates noncompensability. Fairness with respect to this particular case because the owner is not charged for the benefits, if any, resulting from the fact the abutting road is now a feeder from the New Jersey Turnpike any more than the State is charged for the detriment, if any, which may result from the fact the abutting road is now a service road.[198]

In *South Carolina State Highway Department v. Allison*,[199] the court observed that "[a] number of jurisdictions have held that the state…may deprive an abutting landowner of access to an existing highway, in the course of the construction of a controlled-access facility, without compensation, where the landowner is provided with a frontage road along the abutting property;" however, the court stated that "the decisions are…far from unanimous on the point."[200]

In *Utah Department of Transportation v. Ivers,*[201] the department took private property to construct a frontage road. Although access to the highway from one road to another road known as Shepard Lane was modified, the affected place of business (an Arby's restaurant) still had access to Shepard Lane, as well as via a frontage road that connected to the highway one-half mi in either direction from the business. The court agreed with the trial court that "Arby's had failed to establish the essential link between the damages it claims for loss of access, and 'the taking itself and…the condemnor's use of the land taken.'"[202]

> Thus, while Arby's "taking may be somewhat related" to the construction project, the taking did not "cause the damages [Arby's] claims as a result" of the project….[203]

> "The right does not extend so far as to guarantee a property owner that his property will be accessed through specific intersections or that the roads accessing his property will be easily accessed from other thoroughfares…." In other words, the right of access is the right of reasonable access. In the present case, the frontage roads provide access, via Shepard Lane, to and from Arby's property to Highway 89, albeit circuitously, both one-half mile to the north and one-half mile to the south of Arby's property. Additionally, Arby's Shepard Lane access remains unchanged. This is reasonable access.[204]

National Auto Truckstops, Inc. v. State of Wisconsin[205] involved a partial taking for a reconstruction project of a highway abutting the truckstop's property. "The project involved widening a highway and building a frontage road on the condemned property."[206] After the project, vehicles could enter the property only via a frontage road north of the property. The improved highway was not declared to be a controlled-access highway. The court held that the change in access via the frontage road was not a change in access based on an exercise of the state's police power.[207] The court noted that Wisconsin law requires that compensation be paid for a "partial taking of premises, such as access rights under the power of eminent domain."[208] The court, stating that the court of appeals had erred in assuming that "[a] frontage road [always] provides reasonable access to and from a landowner's property,"[209] held that "[t]he essential inquiry is whether a change in access is 'reasonable,'"[210] thus remanding the case for a determination on that issue.

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nied…where other access is given or otherwise exists" in a case in which the department condemned a strip of land across the owner's land that caused a severance of the northeast and southwest portions of the land, resulting in loss of access to the owner's other parcels except by a frontage road). *See also* Bock v. United States*,* 375 F.2d 479 (9th Cir. 1967); Houghs v. Mackie*,* I Mich. App. 554, 137 N.W.2d 289 (1965); State Highway Comm'n v. Cent. Paving Co., 240 Or. 71, 399 P.2d 1019 (1965); Ark. State Highway Comm'n v. Bingham, 237 Ark. 934, 333 S.W.2d 728 (1960); Gagne v. Morton, 102 N.H. 114, 151 A.2d 588 (1959); State *ex rel.* State Highway Comm'n v. Brockfeld*,* 388 S.W.2d 862 (Mo. 1965).

[198] State by Comm'r of Transp. v. Charles Inv. Corp., 143 N.J. Super. 541 at 546–47, 363 A.2d at 947 (footnote omitted). *See also* Brock v. State Highway Comm'n, 195 Kan. 361, 370, 404 P.2d 934, 943 (1965) (holding that there was not a denial of access when abutting owners were placed on a frontage road after the road adjacent their property was changed into a limited-access highway and that the owners "have access to the frontage road at all points at which it abuts their property"). *See* Eberth v. Carlson, 266 Kan. 726, 734, 971 P.2d 1182, 1188 (1999) (*citing Brock*). *But see* State *ex rel*. Herman v. Wilson, 103 Ariz. 194, 197, 438 P.2d 760, 763 (1968) (reaching a different result and holding the state liable for compensation for impairment of access because the substitute access after the conversion of an abutting conventional road into a limited-access highway caused unreasonable circuity of travel).

[199] 246 S.C. 389, 143 S.E.2d 800 (1965).

[200] *Id.* at 395, 143 S.E.2d at 803.

[201] 2005 UT App. 519, 128 P.3d 74 (Utah Ct. App. 2005), *aff'd in part, rev'd in part, remanded*, 2007 UT 19, 154 P.3d 802 (2007) (affirming the appellate court, which held that Arby's was precluded from presenting evidence of severance damages for loss of visibility of the property ("essentially a claim for lost business profits"), (2007 UT 19, at *P14, 154 P.3d at 806), but remanding for a determination of whether Arby's was entitled severance damages for loss of view from the property: "If the use of Arby's condemned land was not 'essential' to the project, they are not entitled to severance damages for loss of view from the property under article I, section 22 of the Utah Constitution or Utah Code section 78-34-10. If it was, appropriate damages may be awarded." 2007 UT 19, at *P24, 154 P.3d at 807.

[202] 2005 UT App. 519, at *P16, 128 P.3d at 78 (citation omitted) (internal quotation marks omitted).

[203] 2005 UT App. 519, at *P17, 128 P.3d at 78 (citation omitted).

[204] 2005 UT App. 128, at *P18, 128 P.3d at 79 (citation omitted).

[205] 263 Wis. 2d 649, 665 N.W.2d 198 (2003).

[206] *Id.* at 654, 665 N.W.2d at 201.

[207] *Id.* at 655–56, 661, 665 N.W.2d at 202–03, 204.

[208] *Id.* at 660, 665 N.W.2d at 203 (citations omitted).

[209] *Id.*

[210] *Id.* at 665, 665 N.W.2d at 206.

E.4.b. Substitute Access as Mitigation of Compensation

If the highway authority eliminates direct access and provides other access by a service road, it is not relieved of its obligation to compensate the abutting landowner for the impairment of direct access; however, the new method of access may mitigate the damages that otherwise may be required.[211] For example, in *South Carolina State Highway Department v. Allison,*[212] a right-of-way was acquired for a controlled-access facility, one lane of which was to be constructed on top of the existing highway leaving the abutter with identical access after the taking via the frontage road being constructed. The court held that the loss of access was compensable to the extent that the loss adversely affected the fair market value of the remainder of the property; however, the frontage road is a benefit that may mitigate damages or may be offset against compensation.[213]

In *Muse v. Mississippi State Highway Comm'n*,[214] involving a partial taking and access to a frontage road, the court held that the introduction of evidence of the existence of the frontage road was proper and that the exclusion of such evidence would require the jury "to award damages based upon a false assumption that the taking of the strip of land sought to be condemned would leave the appellant without any right of access to the highway."[215]

Other cases have held that "[t]he fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery."[216] As one court earlier had stated,

> [w]here a part of the owner's contiguous land is taken in a condemnation proceeding, all inconveniences resulting to the owner's remaining land, including an easement or access to a road or right of way formerly enjoyed, which decrease the value of the land retained by the owner, are elements of severance damage for which compensation should be paid. [217]

The difference in approach by the courts is important. Under the first approach, if the court rules as a matter of law that the substitute access is reasonable the jury would be precluded from considering loss of access as an element of damage. However, in jurisdictions following the second approach, the jury would be entitled to consider loss of access as an element of damage, although it would be further advised to consider the effect of the service road in mitigation of damages.

E.4.c. Compensation Only When There Is a Partial Taking

There is apparently some support for a third approach in the situation of substitute access, *i.e.*, that there should be compensation for a loss of access only if the loss is accompanied by a partial taking of the property in eminent domain. In *Nick v. State Highway Commission,*[218] the court stated that

> [a]n impairment of the use of property by the exercise of police power, where the property itself is not taken by the state, does not entitle the owner of such property to a right to compensation.…
>
> In *Carazalla v. State*, 1955, 269 Wis. 593, 608b, 70 N.W.2d 208, 71 N.W.2d 276,—a controlled-access highway case,—we approved the conclusion of textwriters that if no land is taken for the converted highway but the abutting landowner's access to the highway is merely made more circuitous, no compensation should be paid, and our decision embodied that principle.[219]

The opinion seems to be based on the belief that a recovery for impairment of access may be had only as part of severance damages and that if there is not a partial taking of land (and hence no severance damage), a recovery for impairment of access cannot be allowed. Such reasoning, the subject of strong criticism, has been either ignored by a majority of the courts or repudiated.[220]

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[211] DOT v. Lowderman, LLC, 367 Ill. App. 3d at 508 (holding that the frontage road bears not on the question of compensability but is relevant in mitigation of damages resulting from the elimination of the existing *direct* access) (*citing* Dep't of Pub. Works and Bldgs. v. Wilson and Co., Inc., 62 Ill. 2d 131, 340 N.E.2d 12 (1975)).

[212] 246 S.C. 389, 143 S.E.2d 800 (1965).

[213] *Id.* at 393–94, 143 S.E.2d at 802 *See also* Haymore v. N.C. State Highway Comm'n, 14 N.C. App. 691, 189 S.E.2d 611 (N.C. Ct. App. 1972); State v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966); Ray v. State Highway Comm'n, 196 Kan. 13, 410 P.2d 278 (1966).

[214] 233 Miss. 694, 103 So. 2d 839 (Miss. 1958).

[215] *Id.* at 716, 103 So. 2d at 848–49.

[216] S.C. State Highway Dep't v. Allison, 246 S.C. 393, 143 S.E.2d at 802 (citations omitted).

[217] State *ex rel.* Rich v. Fonburg, 80 Idaho 269, at 278, 328 P.2d 60, at 64 (holding that it was error for the trial court not to instruct the jury "that the easement and right of access, ingress and egress to highway No. 95 as formerly enjoyed, and curtailed in this proceeding, was an element of damage to be considered by the jury") (*Id.,* 80 Idaho at 279, 328 P.2d at 65). *See also* State *ex rel*. Rich v. Dunclick, Inc., 77 Idaho 45, 286 P.2d 1112 (1955); State v. Styner, 58 Idaho 233, 72 P.2d 699 (1937).

[218] 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

[219] *Id.* at 514, 109 N.W.2d at 72 (citation omitted).

[220] State Dep't of Highways v. Davis, 626 P.2d 661 (Colo. 1981). One commentator observes that

> [s]ome courts…profess to award compensation for loss of access only when part of the…land is physically taken. This betrays a fundamental lack of knowledge of the nature of access rights. We allow compensation for loss of access at all only because the right of access is a species of property within the panoply of a constitutional eminent domain clause. Why then should we refuse to compensate for its loss unless other forms of property no doubt compensable separately in their own right, are taken along with it? To refuse compensation is to deny legitimacy in the long historical process by which various forms of intangible rights in land, including access rights, were recognized as "property." It is an anachronism and a source of confusion.

Stoebuck, *supra* note 22, at 753.

It appears that the weight of authority is that there need not be a partial taking of an abutting owner's property to allow the owner to recover compensation for damages where substitute access is provided by the highway agency that is not suitable for the affected property.

F. SPECIFIC ACCESS CONTROL MEASURES

F.1. Change of Grade

F.1.a. Evolution of Abutting Owners' Rights

The public authority may undertake road and street improvements that result in a change or alteration of the grade of an abutting property owner. Such construction may have a substantial effect on an abutter's means of access to the highway. There are disparate views among the courts on the question of compensability for a change of grade of the abutting street or highway.

When discussing change-of-grade cases, one may begin with the 1823 decision of the Massachusetts court in *Callendar v. Marsh*.[221] It may be recalled that the court in that case ruled that the abutting property owner could not recover compensation for loss of access to the public street resulting from a change of grade. Although the modern law of abutters' rights of access differs sharply from the rule of noncompensability announced in *Callendar v. Marsh*, it appears that there are still some jurisdictions in which the decision has viability when compensation is sought for a change of grade. Some courts hold that unless compensation is required or authorized by statute, the state may change the grade of the highway without having to pay the owner for impairment of access. As noted, some state constitutions provide that just compensation must be paid by the state for a taking of private property for public use, while others provide that payment must be made for a taking or damaging of private property. Some authorities, particularly *Nichols on Eminent Domain*, attribute the variance among the states on the issue of compensation for change of grade to differences in constitutional language.[222]

F.1.b. Whether a Taking is the Sine Qua Non *for Compensation for a Change of Grade*

The following rules relating to compensation for change of grade are set forth first for states with a taking provision and then for those states with a taking or damaging provision in the state's constitution.

First, in those states with a taking provision, some courts have held that the owner of abutting land has no constitutional right to compensation for injury to his premises because of the public agency's raising or lowering of the grade of the road if no part of the land is taken.[223] As stated in *Dumala v. State*,[224] New York having a taking provision,[225] the anomaly is that the common law rule was and still is that "the State is not liable for change of grade damages not part of a direct taking…."[226] In denying compensation for a change in grade in an inverse condemnation case, an Oregon appeals court held in *Deupree v. State*, Oregon also having a taking provision,[227] that "[w]here access to private property is retained through another public road, even though that access may be less satisfactory, the loss of direct highway access is not compensable."[228]

The second view is that in a state with a taking provision, there is a taking of property within the meaning of the constitution if a change of grade unreasonably or substantially impairs access even though no part of the real estate itself is taken.[229] In *Thom v. State,*[230] Michigan having a taking provision,[231] the court found that the courts in several instances had held that a change of the grade of a highway may result in a taking of the abutter's property.[232] Moreover, the court found that in those cases in which compensation for impairment of access because of a change of grade had been denied, suitable access to the abutting property still remained.[233] The court, expressly overruling *City of Pontiac v. Carter,*[234] held that a substantial impairment of access caused by a change of grade may constitute a taking.

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[221] Callender v. Marsh*,* 18 Mass. (1 Pick.) 418 (1823).

[222] 5 NICHOLS ON EMINENT DOMAIN (3d ed.) §§ 16.05[1], [2].

[223] 5 NICHOLS ON EMINENT DOMAIN (3d ed.) § 16.05[1].

[224] 72 Misc. 2d 687, 340 N.Y.S.2d 515 (Ct. Cl. 1973).

[225] N.Y. CONST. art. I, § 7.

[226] Dumala v. State, 72 Misc. 2d at 693, 340 N.Y.S.2d at 523 (citation omitted). *See also* Deupree v. State*,* 173 Or. App. 623, 22 P.3d 773 (Or. Ct. App. 2001), *review denied*, 334 Or. 397, 52 P.3d 435 (2002) (holding in an inverse condemnation case that there was no compensation for a change in grade); Look v. State, 267 A.2d 907 (Me. 1970); Smith v. State Highway Comm'n, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962)

> (holding that there had not been a taking of access and stating that [w]hen a public highway is established, whether by dedication, by prescription, or by the exercise of eminent domain, the public easement thus acquired by a governmental agency includes the right to establish a grade in the first place, and to alter it at any future time, as the public necessity and convenience may require) .

[227] OR. CONST. art I, § 18.

[228] Deupree v. State*,* 173 Or. App. at 629, 22 P.3d at 777 (citation omitted).

[229] *See* Thom v. State, 376 Mich. 608, 627, 138 N.W.2d 322, 330 (1965) (holding in a case involving a change of grade causing the claimant great difficulty in moving his farm machinery to and from his property, that the state had taken the plaintiff's property when it caused the access to the land to become very difficult, resulting in a "substantial diminution" in the value of the property).

[230] 376 Mich. 608, 138 N.W.2d 322 (1965).

[231] MICH. CONST. art. 10, § 2.

[232] *Id.* at 616–17, 138 N.W.2d at 325.

[233] *Id.* at 623–24, 138 N.W.2d at 329.

[234] 32 Mich. 164 (1875).

> We conclude then, that when a governmental unit changes the grade of a highway in such a way as either to destroy or to interfere seriously with an abutting owner's right of access to that highway, and such interference results in a significant diminution in value of the property, then there has been a taking of the property to that extent….[235]

Similarly, in an Indiana case,[236] also a state with a taking provision,[237] it was contended that a change of grade constituted a taking. The court referred to its duty to determine whether there was a taking of a "substantial" right in the property. The court appears to treat the phrases "substantial right,"[238] "special and peculiar" injury,[239] and "materially and substantially impaired"[240] as synonymous. The decision, noting that there was available access to the property at intersecting streets, appears to hold that there has not been a taking unless access is substantially impaired, which is not the case if the owner has suitable, remaining access. According to the court, "unless the lowering of the grade of the highway cuts off access to the abutting property, there can be no compensable damages to the property owner."[241]

In *State ex rel. Schiederer v. Preston,*[242] a case from Ohio that has a taking provision,[243] the court stated that if

> an owner of land abutting on a highway has made improvements thereon with reference to an established grade for that highway, a substantial interference with his right of access to those improvements from that highway by a subsequent change of grade of the highway is a taking of property for which compensation must be provided.[244]

A more recent Ohio case held that in a condemnation action, damages were recoverable only when there was an unreasonable change of grade.[245]

A third and apparently uniform view among the courts is that in a taking state, compensation must be paid for an impairment of access if a change of grade accompanies a partial taking of abutting land.[246] In a partial-taking case from the State of Tennessee, whose constitutional provision refers to property "taken[] or applied,"[247] an appellate court held that it was proper for the trial court to admit testimony relating to impairment of access caused by the construction of an embankment that raised the grade level of the highway.[248]

A fourth rule applies in those states that have a constitutional provision against a "taking or damaging" of private property for public use without payment of just compensation; compensation is required for an unreasonable impairment of access caused by a change of grade regardless of whether there is a partial taking of property.[249] However, a slight lowering of grade that does not impair the abutter's access directly, substantially, or peculiarly as compared to the injury suffered by the public does not entitle the owner to compensation in a taking or damaging state.[250] In *Thomsen v. State*, a case from Minnesota having a provision requiring compensation for property "taken, destroyed, or damaged,"[251] the highest court held that although

> it is clear that deprivation of lateral support can amount to damage in the constitutional sense,…there is no evidence, beyond plaintiff's mere contention, that the slight lowering of the grade of the highway below the level of his property deprived his house of lateral support. Not every change in the grade of a highway entitles abutting property owners to compensation. In order to be compensable, the change, unlike the one involved in this case, must be material and must give rise to direct and substantial consequential damages…. It is clear…that not every conceivable kind of injury to the value of adjoining property resulting from highway construction is "damage" in the constitutional sense….[252]

Similarly, in *Cheek v. Floyd County, Georgia*,[253] Georgia's constitutional provision referring to property

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[235] 376 Mich. at 628, 138 N.W.2d at 331. *See* Barker v. City of Flint, 2001 Mich. App. LEXIS 1952, at *10 (Mich. Ct. App. 2001) (denying compensation "because plaintiff offer[ed] no evidence in this case that defendant changed the grade of the street 'in such a way as either to destroy or to interfere seriously with [plaintiff's] right of access to that highway'") (*quoting* Thom, 376 Mich. at 628, 138 N.W.2d at 331.)

[236] Young v. State, 252 Ind. 131, 246 N.E.2d 377 (1969).

[237] IND. CONST. art 1, § 21.

[238] 252 Ind. at 134, 246 N.E.2d at 378, 379.

[239] *Id.* (citation omitted).

[240] *Id* .at 135, 246 N.E.2d at 380.

[241] *Id.* at 136, 246 N.E.2d at 380 (citations omitted).

[242] 170 Ohio St. 542, 166 N.E.2d 748 (1960).

[243] OHIO CONST. art. 1, § 19.

[244] 170 Ohio St. at 545, 166 N.E.2d at 751 (citations omitted).

[245] Smith v. Sembach, 1988 Ohio App. LEXIS 1641, at *5 (Ohio App. 11th Dist. 1988) (citations omitted).

[246] Commw., Dep't of Highways v. Roberts, 496 S.W.2d 343 (Ky. 1973). Kentucky's constitutional provision refers to property "taken or applied." KY. CONST., part 1, § 13.

[247] TENN. CONST. art. I, § 21.

[248] Pack v. Boyer, 59 Tenn. App. 141, 145, 438 S.W.2d 754, 756 (1969) (affirming the trial court's decision allowing landowners to introduce evidence of incidental damages from a high fill or embankment that was constructed to raise the grade level of a state highway, which landowners argued was unsightly and obstructed the view of the landscape and the house, thereby materially decreasing the market value of their remaining land).

[249] *See* 5 NICHOLS ON EMINENT DOMAIN (3d ed.) § 16.05[2].

[250] Thomsen v. State, 170 N.W.2d 575 (Minn. 1969); Trolano v. Colo. Dep't of Highways, 463 P.2d 448 (Colo. 1969) (Colorado having a provision regarding property "taken or damaged," COLO. CONST. art. II, § 15).

[251] MINN. CONST. art I, § 13.

[252] Thomsen v. State, 170 N.W.2d at 579 (citations omitted).

[253] 308 F. Supp. 777 (N.D. Ga. 1970). *See also* Dep't of Transp. v. Kendricks, 150 Ga. App. 9, 256 S.E.2d 610, 612 (1979) (holding that in condemnation action "testimony relating to interference with access from the lowering of the grade was properly admitted"), *rev'd on other grounds*, 244 Ga. 613, 261 S.E.2d 391 (1979).

"taken or damaged,"[254] a federal district court held that a change in grade will give rise to a claim for damages for deprivation of access if there is a "substantial change" in access.[255]

In *County of Bexar v. Santikos,*[256] the Texas Constitution having a "taken, damaged, or destroyed" provision,[257] a jury awarded severance damages in a condemnation action because the project had raised the roadway above the natural grade. The Supreme Court of Texas reversed and remanded, holding that it was "hard to find any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind" and holding that "[e]asy access to the frontage road remains along 90 percent of the [owner's] tract."[258] However, in *Cozby v. City of Waco,*[259] the court held that factual issues precluded summary judgment for the city. The property owners alleged that a 9 in. rise in the elevation of an alley caused by paving prevented the owners from using their rear garage or from parking on their property adjacent the alley, allegations that if proved could establish an unreasonable interference with access.[260]

F.1.c. Compensation for a Change of Grade Pursuant to a State Statute

Some states have adopted legislation requiring or authorizing compensation if the grade of a highway is changed or altered by highway improvements. Moreover, it has been held that such legislation authorizes the payment of damages even if suitable access remains after the reconstruction or grading.[261] Claimants, however, may be barred from seeking compensation under such statutes if they do not adhere to required procedural steps such as filing a claim within the prescribed period.[262]

States have addressed the issue of the right to compensation for a change of grade of the highway, one such state being Pennsylvania in Section 612 of the Pennsylvania Eminent Domain Code, providing that "[a]ll condemnors, including the Commonwealth, shall be liable for damages to a property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken."[263]

In *Daw v. Commonwealth of Pennsylvania, Department of Transportation,*[264] the owner of property along a two-lane state route alleged that PennDOT's resurfacing of the street and addition of 1 in. in height to its surface changed the grade, creating drainage problems and causing damage to her property.[265] The appellate court noted that "no Pennsylvania cases have squarely addressed the issue of what constitutes a change in grade to allow an action for a *de facto* taking."[266] The court, however, disagreed with the trial court and found that the resurfacing was maintenance only and that such "repair does not constitute a change of grade under Section 612 of the Code."[267] Relying on a New York case,[268] the court agreed that "the 'mere removal of irregularities or improvement of the street is not to be regarded as a change of grade for which compensation may be had.'"[269] (The court, however, was also of the opinion that the evidence failed to show that the resurfacing caused any damage to the property.)[270]

Access was not an issue in the *Daw* case, *supra*; however, in another Pennsylvania case, as well as an Ohio case, *infra*, access was one of the issues with respect to a claim for compensation concerning a change of grade. In the Pennsylvania case, *Harrington v. Commonwealth of Pennsylvania, Department of Transportation*,[271] resurfacing raised the height of a road by 2.5 in. The court affirmed the trial court's judgment in favor of the property owner. In addition to damage caused by rain and water runoff, the court agreed with the owner that

> the totality of DOT's actions, including the paving of the berm whereby traffic was brought within five feet of Harrington's front door, has resulted in permanent interference with her access to the property. *Consequently, a change of grade and a permanent interference with access to her property have caused Harrington to experience a deprivation in the use and enjoyment of her property*.[272]

In an Oregon case, property owners sought damages resulting from a change in access to the road but failed to show that a change of grade caused "legal damage" to the property.[273] Although including a claim also in inverse condemnation, the plaintiffs brought a statutory claim for a change of the grade of the highway under

[254] GA. CONST. art I, § III.

[255] Cheek v. Floyd County, 308 F. Supp. at 781.

[256] 144 S.W.3d 455 (Tex. 2004).

[257] TEX. CONST. art 1, § 17.

[258] 144 S.W.3d at 460.

[259] 110 S.W.3d 32 (Tex. App. 10th Dist. 2002).

[260] *Id.* at 39.

[261] *See* 240 Scott, Inc. v. State, 18 N.Y.2d 299, 304–05, 274 N.Y.S.2d 673, 676–77 (1966).

[262] Jantz v. State Dep't of Transp., 63 Wis. 2d 404, 217 N.W.2d 266 (1974); Look v. State, 267 A.2d 907 (Me. 1970). *See* Annotation, 156 A.L.R. 416 for further discussion of statutes authorizing compensation for change of grade.

[263] PA. STAT. ANN. tit. 26, § 1-612.

[264] 768 A.2d 1207 (Pa. Commw. Ct. 2001).

[265] *Id.* at 1208.

[266] *Id.* at 1211.

[267] *Id.*

[268] Williams v. New York, 34 A.D. 2d 101, 309 N.Y.S.2d 795 (N.Y. App. 3d Dep't 1970).

[269] Daw v. Commonwealth, 768 A.2d at 1211 (citation omitted).

[270] *Id.*

[271] 792 A.2d 669 (Pa. Commw. Ct. 2002).

[272] *Id.* at 675–76 (emphasis supplied).

[273] Deupree v. State, 173 Or. App. 623, 626–27, 22 P.3d 773, 776 (Or. Ct. App. 2001) (*quoting* OR. REV. STAT. 105.755).

Oregon Revised Statues 105.755.[274] The statute provides:

> (2) Whenever the Department of Transportation changes the grade of any public road from a previously established or maintained grade, the state shall be liable for and shall pay just and reasonable compensation for any legal damage or injury to real property abutting upon the public road affected by the grade change; except that the state shall not be liable for any damage or injury for any such change whenever the county has requested the Department of Transportation to make such change.[275]

The court noted that the plaintiffs' argument was a straightforward one: "ODOT changed the highway grade, resulting in a loss of direct access to plantiff's property at four locations."[276] The court saw the matter differently, separating, as did the trial court, the issues of a change of grade and of impairment of access. The court held that the plaintiffs had to show that "the change of grade has caused legal damage or injury to their property."[277] According to the court, such legal damage would include a claim for faulty drainage or the loss of lateral support, not, however, for interference with access *as long as* the abutting owner had access to the property.[278]

> ORS_105.755 refers only to the effects of a change of grade; it does not refer expressly to damage or injury resulting from loss of highway access. Assuming, nevertheless, that such damage or injury falls within the ambit of the statute, nothing in its language suggests that the legislature intended to create a remedy for a harm for which a person is not entitled to just compensation under Article I, section 18. Because the statute is framed in terms familiar to the law of eminent domain, it suggests precisely the opposite inference. We therefore conclude that, because plaintiffs have not suffered a loss of all highway access to their property, they have not suffered legal damage or injury giving rise to a right under ORS 105.755.[279]

The plaintiffs had not shown "that the change of grade deprived them of all highway access to their property."[280]

In *County of Bexar v. Santikos,*[281] *supra,* property was taken in a condemnation proceeding for an embankment to support the elevation of a frontage road. The question was whether there was a claim for compensation for damages to the remainder because the grade of the property was below the frontage road. The court held that because the property was undeveloped it was difficult to find "any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind…. [T]he only claim is that someday a developer may want to build a driveway at the single most difficult and expensive location on the entire property."[282] It was important in the *Santikos* case that the owner had in the court's view "[e]asy access to the frontage road...along 90% of the property."[283]

Although the lack of any development of access affected the court's ruling in the *Santikos* case, in *State ex rel. OTR v. City of Columbus,*[284] the court did not allow the lack of present development of access to the property to preclude the award of compensation for impairment of future access to the properties in question. The court held that the owners of two parcels were entitled to compensation where the properties were developed after the establishment of the grade of the abutting boulevard.[285] However, an appellate court in reversing the trial court had noted that the owners had not established any driveways along the properties' frontage on the boulevard. The Supreme Court of Ohio disagreed with the appellate court's belief, which was that for there to be a taking, the overpass structure (causing a change of grade) "would have had to interfere with an existing driveway or a 'developed' access route."[286] The Supreme Court of Ohio, ruling that the overpass construction denied forever the owners' access along the properties' frontage, quoted prior authorities to the effect that

> "[t]he owner of a lot abutting on a street has an easement in the street appendant to his lots whereby he is entitled to an unobstructed access to and from the street, and this appendant easement is as much property as the lot itself. This right of property vested in the owner of abutting land is subject, however, to the right of the public to grade and improve the street. But grades once established are presumptively permanent and cannot, it is obvious, be changed without causing injury and confusion…." Public authorities of cities and towns have control over the use, grade and regrade of streets. "But if, after establishing the grade, they block up or cut down the street before one man's house for the benefit of others, doing a substantial injury, the rights of property have been invaded, and plainest principles of justice require compensation."[287]

In brief, in cases involving a change of grade, a state statute may authorize compensation for a change of grade. The statute may refer to compensation, as well for impairment of access caused by a change of grade. Compensation for a change of grade may be recoverable in an inverse condemnation action; the majority rule appears to be, except in those states in which a taking of property must accompany a change of grade for there to be compensation, that an abutting owner has no claim for impairment of a right of access because of a change of grade—unless it is shown that access to the

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[274] *Id.*

[275] OR. REV. STAT 105.755.

[276] Deupree v. State, 173 Or. App. at 627, 22 P.3d at 776.

[277] *Id.* at 628, 22 P.3d at 776.

[278] *Id.* at 629, 22 P.3d at 777 (citation omitted).

[279] *Id.* at 629–30, 22 P.3d at 777–78.

[280] *Id.* at 630, 22 P.3d at 778.

[281] 144 S.W.3d 455 (Tex. 2004).

[282] *Id.* at 460.

[283] *Id.* at 461.

[284] 76 Ohio St. 3d 203, 667 N.E.2d 8 (Ohio 1996).

[285] *Id.* at 208, 667 N.E.2d at 13.

[286] *Id.* at 209, 667 N.E.2d at 13.

[287] *Id.* at 211, 667 N.E.2d at 15 (citations omitted).

property actually has been impaired substantially and that the impairment was caused by the change of grade.

F.2. Closing of an Intersection, Street, or Interchange

The majority view appears to be that the highway authority may close an intersection as long as a property owner has reasonable, although more circuitous, access.[288] As the court stated in a Kansas case, "[r]ight of access is traditionally defined as an abutting landowner's common-law right of access from the landowner's property to abutting public roads. Such a right is the right to reasonable, but not unlimited, access to existing and adjacent public roads…."

On the other hand, "[w]hen the government actually blocks or takes away existing access to and from property, the landowner is generally entitled to compensation."[289]

In *Kau Kau Take Home No. 1 v. City of Wichita,*[290] an inverse-condemnation case, a road project involved the closing of an intersection. The property was located near but did not abut the roads that formed the intersection. Although the project "significantly altered the route for patrons" of the restaurant on the property, the project did not change the property owners' two points of access to their property.[291] The court observed that "[t]he additional 2 miles of travel to access [the owners'] property is less than the additional 3 miles of travel that the *McDonald's* court found to be reasonable."[292] As discussed previously, "[a]n abutting property owner has no right to the continuation of a flow of traffic from nearby highways to the owner's property."[293]

On the other hand, another case concerned the construction of an extension of a public transit system that interfered with access to the owners' driveway to their business and resulted in the closing of the street on which the business was located. The court held that the "level of deprivation of use" compromising the ability of the business to operate "constitute[d] more than a 'temporary inconvenience'…."[294]

In *Hall v. State of South Dakota*,[295] the court addressed the issue of whether the state had to pay just compensation "for depriving Owners of their right of access to a public highway by closing the highway interchange abutting their property…."[296] The issue was whether "'the right of access is destroyed or materially impaired,'" in which case "the damages are compensable if the injury sustained is peculiar to the owners' land and not of a kind suffered by the public generally.'"[297] In *Hall,* the case was remanded because the trial court had not considered whether there was a loss of reasonable and convenient access or considered the state's purpose which was relevant to whether "the State's exercise of police power was unreasonable and arbitrary."[298]

F.3. Curbs, Curb Openings, and Driveways

Public control over curbs, curb openings, and driveways is another method to control highway access. The majority view appears to be that a physical taking is not required and that a highway agency's substantial limitation of the access to property may be compensable.[299]

With respect to curb openings and driveways, the abutting landowner either may attempt to secure additional openings or simply retain the ones that he or she already has. If the owner is denied additional access or is deprived of existing openings, the owner may seek damages for a denial or loss of access. However, it must be the property owner's access that is restricted or taken. In one case, in which a property owner had a point of access via the driveway of a bus depot, such access was not a vested right, because the driveway was not on the claimants' land and the claimants did not abut the highway in question.[300] The claimants were "not by law entitled to ingress and egress by that particular roadway, [because they had] full access by way of the highway frontage road."[301] In another case, the court held that the city had not completely eliminated the property owner's access to the highway "as the new curb and small aprons still allow ingress and egress[] and are merely designed to regulate the flow of traffic…."[302]

In *State by Commissioner of Transportation v. Van Nortwick,*[303] an appellate court reversed a trial court for

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[288] *See, e.g.,* Thomas A. McElwee & Son, Inc. v. Se. Pa. Transp. Auth., 896 A.2d 13 (Pa. Commw. Ct. 2006), *appeal granted*, 2006 Pa. LEXIS 2466 (Pa., Dec. 20, 2006).

[289] Kau Kau Take Home No. 1 v. City of Wichita*,* 281 Kan. at 1191, 135 P.3d at 1227 (citation omitted).

[290] 281 Kan. 1185, 135 P.3d 1221 (2006).

[291] *Id.* at 1188, 135 P.3d at 1225.

[292] *Id.* at 1194, 135 P.3d at 1228.

[293] *Id.* at 1192, 135 P.3d at 1227 (*citing* City of Wichita v. McDonald's Corp., 266 Kan. 708, 714, 971 P.2d 1189 (1999)).

[294] *Thomas A. McElwee & Son, Inc.,* 896 A.2d at 21.

[295] 2006 S.D. 24, 712 N.W.2d 22 (2005).

[296] 2006 S.D. 24, at *P7, 712 N.W.2d at 25 (question of whether the owners had no right of access to the Interstate and the intersection closed by the state because I-90 was a controlled-access highway was not raised below, and thus was not before the court).

[297] 2006 S.D. 24, at *P17, 712 N.W.2d at 29 (*quoting* Hurley v. State, 82 S.D. 156, 163, 143 N.W.2d 722, 726 (1966) (compensable taking where the state erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access)).

[298] 2006 S.D. 24, at *P21, 712 N.W.2d at 30.

[299] *Hilltop Basic Res., Inc.*, 167 Ohio App. 3d at 805, 2006 Ohio 3348, at *P26, 857 N.E.2d at 617 (city's denial of a request for a curb side permit, such that the only access to river front property along River Road in Cincinnati was by boat).

[300] Carson v. Texas*,* 117 S.W.3d 63, 65, 66, 67 (Tex. App. 3d Dist. 2003).

[301] *Id.* at 69.

[302] Ohio *ex rel*. Habash v. City of Middleton, Ohio, 2005 Ohio 6688, at *P18 (12th Dist. 2005).

[303] 260 N.J. Super. 555, 617 A.2d 284 (N.J. App. 1992).

having allowed evidence relating to diminution in value to the remainder where the owner continued to have reasonable access to the highway.[304] However, the Supreme Court of Rhode Island, in *Bruzzese v. Wood*,[305] affirmed a trial court's judgment that a property owner was entitled to compensation for elimination of several railroad crossings that precluded some vehicular traffic.[306]

In a more recent case, an appellate court affirmed the trial court's judgment that the city's denial of an application for a curbcut to an abutting street did not constitute a taking because the owner had alternate access via a back alley.[307] The court held that "'taking' jurisprudence does not divide a single parcel into discrete segments…. The focus is upon both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[308] Moreover, "the fact that property is rendered less desirable as a result of the governmental activity does not in and of itself constitute a taking so as to entitle the owner thereof to compensation."[309] Moreover, reasonable access need not be directly from the property to the street if the owner has access to and from one lot through another lot. It is proper for the city to consider the fact that an unsafe traffic situation already exists without another driveway.[310]

Furthermore, it has been held that it is a reasonable exercise of governmental discretion to order the closure of certain curb cuts if it has been some years since they were used.[311] In *Orchard Grove of Dutchess, Inc. v. New York,*[312] the court held that an earlier taking of the subject property did not leave any residual rights of access to the future owner's property bisected by the appropriation. "Acquiescence by the State to the use of the driveway by claimant's predecessors-in-interest afforded permissive and practical access but not a permanent legal right of access."[313]

As for driveways, "[t]he absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained."[314] There is no compensable claim for loss of driveway access unless the owner is able to demonstrate that the remaining access is no longer suited to the highest and best use of the property.[315] On the other hand, it has been held that a city may not deny a service station access to one street without first paying compensation even though there was a driveway to the

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[304] *See also* Johnson v. City of Plymouth, 263 N.W.2d 603, 607 (Minn. 1978) (affirming a trial court's ruling that curb-cuts that had been constructed by the city were generous and were plainly designed with the commercial use of the appellants' property in mind and holding that therefore there had been no taking for which the owner could claim compensation from the city). *See also* State by State Highway Comm'r v. Kendall*,* 107 N.J. Super. 248, 251–52, 258 A.2d 33, 35 (1969) (holding that where the state erected curbing and a guardrail along the entire frontage yet granted five curb opening permits leaving approximately 242 ft of the frontage of the property without access, the abutting property owner was not denied reasonable access); W.E.W. Truck Lines, Inc. v. State Dep't of Roads, 178 Neb. 218, 222, 132 N.W.2d 782, 786 (1965) (holding that the trial court properly excluded a condemnee's evidence with respect to any loss of access from his premises to the highway); Painter v. State, Dep't of Roads, 177 Neb. 905, 909, 131 N.W.2d 587, 590 (1964) (holding that three 30-ft curb cuts constituted reasonable access to the premises); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Wilson v. Iowa State Highway Comm'n*,* 249 Iowa 994, 1003, 90 N.W.2d 161, 167 (Iowa 1958) (holding that three curb openings, each 34 ft wide, afforded reasonable access from the highway to a restaurant and service station serving cross-country trucks and that the plaintiffs were not entitled to damages because traffic islands prevented left turns into the property); Elder v. Mayor of New Port, 73 R.I. 482, 484–85, 57 A.2d 653, 655 (1948) (holding that a curb opening or driveway need only be reasonably suited for the permitted use of the land).

[305] 674 A.2d 390, 394 (R.I. 1996).

[306] *See also* Narciso v. State*,* 328 A.2d 107, 112 (R.I. 1974) (remanding on the issue of whether installation of the curbing amounted to a substantial denial of access).

[307] State *ex rel.* Morris v. City of Chillicothe, 1991 Ohio App. LEXIS 4807 (Ohio App. 4th Dist. 1991).

[308] 1991 Ohio App. LEXIS 4807 at *16 (*citing* Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104, 123, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

[309] 1991 Ohio App. LEXIS 4807, at *10. The court pointed out that

> [i]n determining whether there has been a substantial interference with the abutting property owner's easement right of access to a public street, Ohio courts have considered the issue not in the abstract nor in relation to what might be developed in the future on the land, but in relation to the improvements currently existing on the property.

Id. at *12–13 (citation omitted).

[310] Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills, I Cal. App. 3d 781, 82 Cal. Rptr. 318 (Cal. App. 2d Dist. 1970).

[311] Johnston v. Boise City, 87 Idaho 44, 50-52, 390 P.2d 291, 294–95 (1964).

[312] 1 Misc. 3d 810, 772 N.Y.S.2d 201 (N.Y. Ct. Cl. 2003).

[313] *Id.* at 816, 772 N.Y.S.2d at 206.

[314] Breinig v. County of Allegheny, 332 Pa. 474, 482, 2 A.2d at 847–48. *See* Brownlow v. O'Donoghue Bros., Inc., 276 F. 636, 637 (D.C. Cir. 1921) ("No doubt the Commissioners have the right to make reasonable regulations for the use of driveways across sidewalks…and…their decision in that regard will not be disturbed if it has any reasonable basis in the facts relating to the matter…. But regulation is one thing, and prohibition is another.") (citations omitted)).

[315] *See, e.g.,* Raj v. State of New York, 124 A.D. 2d 426, 427–28, 507 N.Y.S.2d 770, 771, 772 (N.Y. App. 3d Dep't 1986) (holding that the reconstruction of a highway causing the elimination of the property owner's status as an abutting landowner and necessitating extension of her driveway to meet the relocated highway was not compensable);
Penningroth v. State, 35 A.D. 2d 1024, 316 N.Y.S.2d 123, 124 (N.Y. App. 3d Dep't 1970) (holding that the fact that claimant's trucks must do substantial maneuvering after the impairment of access in order to use a semicircular driveway on the property may be inconvenient but not necessarily unsuitable access).

property from another street.[316] One court has held that if a planned curb cut is not installed there is no basis for a *de facto* condemnation action for loss of direct access.[317]

The cases illustrate the majority rule that if the right of access to land abutting a highway is impaired or diminished, unless the impairment is so substantial that the property is left without reasonable, suitable access, there is not a taking or damaging requiring compensation. Thus, public authorities may deny applications for driveway permits and curb openings or close existing ones in some instances without the payment of compensation if reasonable access exists. One authority, however, has observed that the courts tend to review more strictly the cutting off of existing access than the refusal to permit new access.[318]

F.4. Fences, Barricades, and Medians

The public authority may erect fences along the boundary of the right-of-way to control access without paying compensation as long as the abutting landowner retains reasonable access.[319] In *Aposporos v. Urban Redevelopment Comm'n of the City of Stamford,*[320] the Urban Redevelopment Commission first condemned a portion of the plaintiff partners' property on which they operated Curly's Diner and then erected a chain-link fence along the sides of the diner, one foot from the building, and constructed a fence along the rear of the building, restricting access only to the sidewalk in front of the building.[321] Nevertheless, the court dismissed the action, in part, because access still existed to the diner.[322]

In regard to barricades, in a case in which the city erected a barricade along the entire frontage of an abutting apartment house and convenience store preventing through traffic, leaving the apartment house on two cul-de-sacs and the convenience store on one cul-de-sac, the court held that the respective owners' "easement rights were materially and substantially impaired as a matter of law."[323] Moreover, the court held that the owners' "easement rights are being subjected to a 'perpetual servitude' for the benefit of the residents in the neighborhood."[324]

As for medians, there exist numerous cases involving alleged deprivation or unreasonable impairment of access caused by the installation of medians in the street or highway. The objections to control of access are readily apparent. Businesses, formerly having direct access to traffic in both directions, may be accessible from one direction only. Motorists may have to travel beyond the premises to the next median opening to turn or may be forced to make several turns before reaching the premises. Commercial establishments may believe that the results of such access control are a loss of business and a lower value of the abutting property.

The courts, however, have held that the abutting property owner is not entitled to damages for loss of business or for consequential damages for the diminution in value of the adjacent land where abutters and patrons are relegated to more circuitous access.[325] In *In Re: De Facto Condemnation by the Dept. of Transp.,*[326] the court held that the transportation department's use of a medial barrier that eliminated left turns and resulted in additional travel of 1.2 and 1.3 mi was not a compensable taking. The court relied on a number of authorities in reaching its conclusion that there was not an unreasonable interference with access.[327] However,

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[316] State *ex rel.* Moore v. Bastian, 97 Idaho 444, 449, 546 P.2d 399, 404 (1976).

[317] Sienkiewicz v. Commw. of Pa., Dep't of Transp., 584 Pa. 270, 282, 883 A.2d 494, 502 (2005).

[318] Annotation, 73 A.L.R. 2d at 674.

[319] Lodestro Co. v. City of Shreveport, 768 So. 2d 724, 728 (La. App., 2d Cir. 2002) (holding that no compensation was allowable in an inverse condemnation case for construction activities that included barricades and a ditch that eliminated direct access to a store because parking for patrons was still available two blocks from the store); Town Council of New Harmony, Ind. v. Parker, 726 N.E.2d 1217, 1222 (Ind. 2000) (placing of a chain across the street held not to constitute a taking of property in that the action did not deprive plaintiff of access to her property or inconvenience her more greatly than the general public); Tucci v. State, 28 A.D. 2d 774, 280 N.Y.S.2d 789, 791 (N.Y. App. 3d Dep't 1967); Houghs v. Mackie, 1 Mich. App. 554, 137 N.W.2d 289 (Mich. Ct. App. 1965). *See, however,* Ark. State Highway Comm'n v. Kesner, 239 Ark. 270, 275, 388 S.W.2d 905, 909–10 (Ark. 1965) (abutting owners suffered special damages because of the erection of barricades on one abutting street that rendered the owners' ingress and egress much more difficult and unsafe).

[320] 2005 Conn. Super. LEXIS 3468 (Stamford Dist. 2005).

[321] *Id.* at *5.

[322] *Id.* at *10–11.

[323] Lethu Inc. v. City of Houston, 23 S.W.3d 482 (Tex. App. 1st Dist. 2000), *petition for review denied* (Apr. 5, 2001).

[324] *Id.* at 488.

[325] New v. State Highway Comm'n, 297 So. 2d 821 (Miss. 1974) (holding that additional travel of 400 ft to reach a crossover after a median strip was built in the highway was not compensable); Langley Shopping Center v. State Roads Comm'n, 213 Md. 230, 131 A.2d 690 (1957) (holding that although left turns could no longer be made directly into the property after highway construction, reasonable access to the highway still existed).

[326] 164 Pa. Commw. 81, 644 A.2d 1274 (1994).

[327] Cases holding that there was not a compensable taking notwithstanding the use of barriers or other controls include: Commerce Land Corp. v. Dep't of Transp., 34 Pa. Commw. Ct. 356, 358, 383 A.2d 1289, 1290 (1978) (medial strip requiring circuitous travel of 2.35 mi and 2.8 mi, respectively); Brill v. Dep't of Transp., 22 Pa. Commw. Ct. 202, 205, 348 A.2d 451, 452 (1975) (change of grade requiring additional travel of about 1.5 mi); Dep't of Transp. v. Nod's Inc., 14 Pa. Commw. Ct. 192, 193, 321 A.2d 373, 374 (1974) (medial barrier restricting access, for example, such that northbound traffic was required to travel an additional 2 mi to an opening in the barrier and then 2 mi back to get to the property); Dep't of Transp. v. Kastner, 13 Pa. Commw. 525, 527, 320 A.2d 146 (1974), *cert. denied*, 419 U.S. 1109, 95 S. Ct. 783, 42 L. Ed. 2d 806 (1975) (bypass and road relocation caused distance to the property to increase

the court observed that in one case the erection of a medial barrier forcing a detour of 7.45 mi for 18-wheel trucks was "so circuitous as to constitute an unreasonable interference with access."[328]

In *Kick's Liquor Store, Inc. v. City of Minneapolis,*[329] the liquor store had access to its property from McNair Avenue, which the city closed with a barrier, turning the street into a cul-de-sac and eliminating direct access to the store's parking lot for patrons traveling on the street from the south. Although there was still access to McNair at Broadway and Penn Avenues, the city erected a pylon that among other things confused drivers who entered the parking lot by mistake, thus forcing them to have to turn around in the parking lot. The court noted that the state's highest court had held, in *Dale Props., LLC v. State,*[330] "that, as a matter of law, the installation or closure of a median does not constitute a compensable taking when the property owner maintains direct access in one direction."[331] There was a compensable taking of access in this case, however, because the city "erected a barrier across McNair that completely closed access in one direction. And, it also erected a concrete pylon in the middle of McNair that modified access in the remaining direction."[332]

Construction of medians may accompany a taking of a parcel of the adjoining property. Again the rule is the same: the abutting landowner is entitled to damages for impairment of access as an element of severance damage only where he shows that there has been an unreasonable impairment of his access to his remaining property.[333] Nevertheless, in *State ex rel. Missouri Highway and Transportation Commission v. Jim Lynch Toyota, Inc.,*[334] the court held that the loss of access resulting from a median strip constructed as part of a highway-widening project was a proper consideration because "[a]ny factor that has a present, quantifiable effect on the market value of the property is proper as an element of damages."[335]

F.5. Restriction of Access to Pedestrian Traffic

Access is usually thought of in terms of vehicular access, but the question has arisen in some instances whether the public authority may regulate streets by denying access to all vehicular traffic, thereby permitting access only by pedestrians. The general rule is that a street may be closed to vehicular traffic if other reasonable means of access are available;[336] if such alternate access is not available, then the abutting landowner may be entitled to compensation.[337] Thus, it has been held that the public authority may close a street to vehicular traffic if there is a serious traffic hazard presented without paying compensation when the abutting property owner has other, suitable access.[338]

An illustration of a situation in which compensation was required for a denial of vehicular access is *Metropolitan Atlanta Rapid Transit Authority v. Datrey*.[339] In the *Datrey* case, the abutting property owners challenged the Metropolitan Atlanta Rapid Transit Authority (MARTA) when it closed the 100 block of Sycamore Street to vehicular traffic and constructed a transit station at that location. The court held that the agency could not properly exclude all vehicular traffic in the 100 block of Sycamore Street unless the owners were paid just compensation.

The court stated that

> the question is limited to plaintiffs' right to vehicular access to their property. The prohibition of vehicular traffic

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slightly but a possible decrease in the travel time to the property).

[328] *In Re: De Facto Condemnation by the Dep't of Transp.,* 644 A.2d at 1277 (*citing* Dep't of Transp. v. Guyette, 103 Pa. Commw. 402, 404–05, 520 A.2d 548, 549 (1987), *appeal denied*, 516 Pa. 644, 533 A.2d 714 (1987) (involving the use of a medial barrier)).

[329] 2002 Minn. App. LEXIS 754 (2002), *review denied*, 2002 Minn. LEXIS 722 (2002).

[330] 638 N.W.2d 763 (Minn. 2002) (holding that the closure of a median crossover opposite the point of access to the owner's property was not compensable even though the owner alleged a reduction in the highest and best use of the property).

[331] 2002 Minn. App. LEXIS 754, at *10.

[332] *Id.* at *10–11. The court held also that there was an independent basis to find that a taking had occurred that was unrelated to the Dale Props' principles inasmuch as the trial court had found that the city failed "to provide an adequate turn around at the cul-de-sac, forcing drivers to use respondent's parking lot…." *Id.* at *11–12. *See also* Hall v. State, 2006 S.D. 24, at *P16, 712 N.W.2d at 28 (compensable taking where the State erected a steel barrier along the entire eastern edge and for a short distance on the southern edge of the property, substantially impairing the landowner's right of access).

[333] Div. of Admin., State Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981) (holding that a landowner who lost a strip of property to a highway widening project could not recover losses caused by concurrent placement of a median strip because "[w]hen less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking," and that "[c]onstruction of the median, not the taking, caused the alleged damage"). *See also* State *ex rel*. Moore v. Bastin, 97 Idaho 444, 546 P.2d 399 (1976) (State's requested instruction that the jury be advised not to award damages for any injury that they might find to have been caused by the medians should have been granted); Richley v. Jones, 38 Ohio St. 2d 64, 310 N.E.2d 236 (1974) (holding that the fact that a median strip was constructed on land taken from the abutting owner did not alter the result); Jacobson v. State *ex rel*. State Highway Comm'n, 244 A.2d 419, 421–22 (Me. 1968); Painter v. Dep't of Roads, 177 Neb. 905, 131 N.W.2d 587, 590–91 (Neb. 1964) (holding that a landowner whose property was taken in a highway widening project could recover only for the lost land, and not for losses caused by traffic islands constructed as part of the same project); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960).

[334] 830 S.W.2d 481 (Mo. App. E. Dist. 1992).

[335] *Id.* at 485 (citation omitted).

[336] *See* Annotation, 73 A.L.R. 2d at 660.

[337] Breinig v. Allegheny County, 332 Pa. 474, 482–84, 2 A.2d at 847–49 (1938).

[338] Segal v. Village of Scarsdale, 17 Misc. 2d 27, 184 N.Y.S.2d 547 (N.Y. Sup. Ct. Westchester Co. 1958).

[339] 235 Ga. 568, 220 S.E.2d 905 (1975).

> in the 100 block of Sycamore Street will clearly deprive plaintiffs of the possibility of vehicular access to their property from Sycamore Street.
>
> "Interfering with access to premises by impeding or rendering difficult ingress or egress is such [a] taking and damaging as entitles the party injured to compensation under a provision for compensation where property is damaged."[340]

More recent cases have allowed restrictions on pedestrian access. In *Banning v. King County,*[341] the property owners had built steps, ladders, and platforms on the county's right-of-way for access to adjacent tidelands. The court held that the county's reconstruction of the road and seawall eliminating the property owners' structures was not a taking. In *Jordan v. Landry's Seafood Restaurant, Inc.,*[342] the city's restriction of traffic on a street abutting a restaurant to pedestrian traffic and emergency vehicles was held not to constitute a taking. The court observed that "[a] decrease in market value alone will not support the conclusion that a taking has occurred" and that "[a] property owner must demonstrate that the interference with the property's use and enjoyment is substantial."[343]

[340] *Id.* at 577, 220 S.E.2d at 911 (citation omitted).

[341] 2000 Wash. App. LEXIS 216 (Wash. App. 1st Div. 2000), 30 ELR 20363.

[342] 89 S.W.3d 737 (Tex. App. 1st Dist. 2002).

[343] *Id.* at 743 (citations omitted).