STATE OF MINNESOTA

IN SUPREME COURT

A18-1280

Court of Appeals — Chutich, J.

State of Minnesota,
by its Commissioner of Transportation,

Respondent,

vs.

Filed: April 22, 2020
Office of Appellate Courts

Rosemary R. Elbert, et al.,

Appellants.

Keith Ellison, Attorney General, Matthew Ferche, Assistant Attorney General, Saint Paul, Minnesota, for respondent.

Harold A. Frederick, Eric S. Johnson, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for appellants.

Jon W. Morphew, Morphew Law Office, PLLC, Minneapolis, Minnesota; Leland J. Frankman, Frankman Law Offices, Minneapolis, Minnesota; James A. Yarosh, Siegel Brill, P.A., Minneapolis, Minnesota; and Stuart T. Alger, Malkerson Gunn Martin, LLP, Minneapolis, Minnesota, for amicus curiae Minnesota Eminent Domain Institute.

S Y L L A B U S

1. Appellants are not entitled to damages for loss of access under a theory that assumes that the taking of a temporary easement for a highway improvement includes the taking of the right of access to abutting property.

2. Appellants are not entitled to damages based on construction-related interferences solely based on an assumed loss of access resulting from the construction project as a whole.

Affirmed.

O P I N I O N

CHUTICH, Justice.

Appellants Rosemary Elbert and family (the Landowners) own valuable property along Highway 61 between Silver Bay and Little Marais on the north shore of Lake Superior. The State, acting through the Minnesota Department of Transportation (the Department), condemned a small portion of the Landowners' property for a construction project intended to improve the safety and quality of Highway 61. After a hearing, court-appointed commissioners awarded the Landowners $390,904.29 in damages, $305,000 of which were severance damages attributable to the presumed loss of access to the property from the abutting highway during construction. The Landowners never lost access during the project. The parties stipulated to damages for the remaining claims, but each appealed the damages awarded by the Commissioners to the district court.

The district court rejected the Landowners' theory of damages supporting their claim for severance damages, and the court of appeals affirmed. Because we do not assume

that the taking of a temporary easement includes the taking of access and decline to adopt a new rule of law that so holds, and because the damages based on construction-related interferences the Landowners seek are not compensable as a matter of law, we affirm.

FACTS

The Landowners own about 115 acres of property on the north shore of Lake Superior. Divided by Highway 61, one part of the Landowners' property is above the highway, and the other borders Lake Superior. In February 2013, the Department successfully petitioned the district court through eminent domain for temporary and permanent easements to reconstruct and widen a 5.3-mile segment of Highway 61. The 1½ year project included plans to resurface the pavement, regrade the slopes of the ditches, and adjust culverts.

Relevant here, the Department sought and acquired by court order land designated as Parcel 41. Parcel 41 contained 0.71 acres of permanent easements, varying in "depth from 20 to 90 feet," and providing "permanent workspace around drainage culverts." The areas encumbered by the permanent easements were "existing drainage areas consisting of gullies, watercourses, or other lower areas not generally usable for building zones." The permanent easement included the following rights: "to acquire all trees, shrubs, grass and herbage within the right of way therein to be taken, and to keep and have the exclusive control of the same."

The Department sought and the district court granted 3.29 acres of temporary easements within Parcel 41, including a "20- to 30-foot deep, temporary construction easement across the length of frontage on the upper side of the roadway," and a "20-foot,

temporary workspace . . . encumber[ing] most of the frontage of the lower side." The temporary easements also included a "50-foot deep workspace . . . at the [Landowners'] driveway for reconstruction of the apron."

In its May 2013 order concluding that the taking was necessary, the district court appointed three commissioners to determine the amount of damages sustained by the Landowners because of the taking. A hearing was held on December 6 and 7, 2016.

John Hinzmann, an engineer who oversaw the highway project for the Department, testified that the petition for temporary easements did not seek to acquire the right of access to the Landowners' property. Had it wanted to acquire that right, the Department would have had to "buy that access" and "delineate it" on its condemnation maps as "access control." He also testified that the construction contract specified that the contractors must maintain reasonable access to the Landowners' remaining property to the maximum extent possible; if they failed to do so, the contract provided for a $500 fine "for each incident at each location for each day or portion thereof."

Sanford Hoff, the Landowners' real estate appraiser, opined that the Landowners incurred severance damages of $305,000 for an assumed loss of access to the unencumbered property. He testified that the highest and best use for the Landowners' property was development of residential property and resort-style operations. According to Hoff, because the temporary easement extended most of the length of the property, potential developers would just "assume that during the construction period, they weren't going to have access" to the property. He maintained that a difference existed between losing *legal* access and losing *practical* access to the property and that losing access in a

practical sense would make it hard for potential buyers to do advance planning for development, thereby affecting the value of the property.

Hoff further testified that losing access to the unencumbered property was a "construction interference." He admitted that his estimation of damages based on construction-related interferences came from the Department's construction project itself and was based solely on the assumed lack of access, and not any other construction activities or alleged damages. Hoff was unaware that the contractor was required to maintain reasonable and adequate access throughout the project.

James Zapolski, an inspector for the Department in charge of overseeing the project, testified that he was never notified of "any interruption in rights to access the property at any time during the project or during the pendency of the temporary easement." He was not aware of any closures of the Landowners' single gravel driveway, and stated that, whatever construction work was done on the driveway was done one side at a time to preserve access. He also noted that the temporary easements for construction workspace along the highway were largely unused and that construction occurred on only one side of the highway at a time.

The commissioners determined that damages amounted to $390,904.29. Notably, they attributed $305,000 worth of the total damages to the temporary loss of access to the property.

Each party appealed the award to the district court, filing cross motions for partial summary judgment. The district court granted the Department's motion, finding that the Department did not acquire the right to access by its condemnation petition. The court

specifically found that "[a]t all times, the [Landowners] retained their property right to reasonably convenient and suitable access to Highway 61 throughout the project and the term of the temporary easements." The court also noted that, if the Landowners believed that a taking of the right of access had occurred, "the takings claim must either be determined in a separate mandamus action or by a motion to the district court to have that question of law determined and, if necessary, added to the case prior to presentation of the case to the court-appointed Commissioners."

The district court was also unpersuaded by the Landowners' arguments concerning their claim for takings damages based on construction-related interferences. Quoting *County of Anoka v. Blaine Building Corp.*, 566 N.W.2d 331, 334 (Minn. 1997), the court found that an expert opinion on market valuation could not claim "severance damages from 'the impact of the construction project as a whole.' " The court found that a valuation opinion could not be based on a hypothetical developer not wanting to compete with a highway right-of-way project; rather, the district court found that expert opinions must include certain assumptions about buyers and sellers. Specifically, the court concluded that buyers and sellers would "perform enough due diligence to understand the property rights acquired (the easement) and to understand what was not acquired (the right of access), and would . . . understand the obligations of the project contractor to not interfere with the owners' right of reasonably convenient and suitable access."

The parties stipulated that $80,904.29 in damages—attributable to the permanent and temporary easements and loss of trees and the vegetative buffer in these areas—was

unaffected by the district court order, and preserved the right to appeal "all damages and claims excluded by" the district court order.

The court of appeals affirmed. *State v. Elbert*, No. A18-1280, 2019 WL 1757934, at *2 (Minn. App. Apr. 22, 2019). The court rejected the Landowners' argument that easement damages are "based on the government's fullest possible use of the easement" as "inconsistent with Minnesota law." *Id.* at *2–3. The court of appeals also concluded that the Landowners did not allege damages based on construction-related interferences because they did not "identify any alleged *damages* actually suffered" on their property. *Id.* at *3.

The Landowners sought review, which we granted.

ANALYSIS

On appeal from summary judgment, we inquire whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom summary judgment was granted." *Id.* (quoting *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996)). When the relevant material facts are not in dispute, we review the district court's interpretation of the law de novo. *Id.*

"A state's ability to use eminent domain to take an individual's property is an awesome power." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010). Eminent domain is the power of the sovereign to take a person's land without consent, *id.*, and "[p]rivate property shall not be taken, destroyed or damaged for public

use without just compensation therefor first paid or secured." Minn. Const. art. I, § 13. The constitutional provision for just compensation is liberally construed. *Anda*, 789 N.W.2d at 876. In addition, " '[t]aking' and all words and phrases of like import include every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property." Minn. Stat. § 117.025, subd. 2 (2018).

At issue here is the amount of just compensation owed to the Landowners. To determine just compensation for a taking, court-appointed commissioners ascertain and report the amount of damages sustained by the property owner resulting from the taking. *Anda*, 789 N.W.2d at 876. In partial taking cases, including those involving temporary easements, damages are calculated using the "before and after" rule. *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992). That is, the damages are measured by "the difference between the market value of the entire tract immediately before the taking and the market value of what is left after the taking." *State by Lord v. Pahl*, 95 N.W.2d 85, 90 (Minn. 1959).

When determining value, the commissioners consider suitable uses, including the " 'highest and most profitable use for which property is adaptable and needed[.]' " *Anda*, 789 N.W.2d at 876 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). " 'Whatever the circumstances . . . the dominant consideration always remains the same: What compensation is "just" both to an owner whose property is taken and to the public that must pay the bill?' " *Id.* at 880 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

The Landowners base their claim for damages on two grounds.[1] First, they argue that our precedent, specifically *State by Lord v. Casey*, 115 N.W.2d 749 (Minn. 1962), sets out a rule equivalent to the "most-injurious-use" and "fullest-extent" theory of damages that assumes a taking of access based on the Department's fullest possible use of the easements. Alternatively, if we conclude that Minnesota precedent does not now encompass this approach, the Landowners urge us to adopt this theory of damages. Second, the Landowners maintain that they are entitled to severance damages based on construction-related interferences because work activity along the highway effectively prevented access to the unencumbered property, therefore causing market uncertainty and a reduction in value. We address each argument in turn.

I.

We first consider whether we must presume that access is destroyed when the Department is granted a temporary easement either under our precedent or, as the Landowners urge, under the "most-injurious-use" rule or "fullest extent" rule. For the reasons set forth below, we conclude that our precedent does not support the approach urged upon us by the Landowners, and we discern no good reason to depart from our well-established precedent concerning access to an abutting highway.

The Landowners argue that our decision in *Casey* assumes that the Department will use the temporary easement granted to the fullest extent possible and further assumes that

[1] At oral argument, the Landowners contended that the issue of the amount of damages should be resolved by a jury. But the Landowners appear to have waived a jury trial in their notice of appeal to the district court. And questions of law about the applicable legal standard are determined by the court. *See Blaine Bldg. Corp.*, 566 N.W.2d at 334.

the most injurious method of construction will be used, thereby effectively destroying access to the Landowners' property and entitling them to damages.

The Landowners alternatively urge us to adopt the most-injurious-use and fullest-extent rules and make the same assumptions, citing to treatises and foreign cases in support of this assertion.[2] In particular, the Landowners rely on *Kentucky Fried Chicken of Warren, Inc. v. Flanders*, a Rhode Island case in which the court held that, under state law, in the absence of a "written assurance" from the state that the property owner would maintain its right of access, the state presumably denied access for the entire two-year temporary easement. 461 A.2d 927, 928–29 (R.I. 1983).

The Landowners also point to *Hudson v. City of Shawnee*, which relied on *Kentucky Fried Chicken* for the same proposition. 777 P.2d 800, 805–06 (Kan. 1989). Under Kansas law, the court held that the condemnor must draft the petition in a way that makes clear that property owners retain access. *Id.* at 805. There, because the city took land for "all other purposes incidental to the construction of a street or sidewalk," the court concluded that this taking included the taking of the right of access. *Id.* at 806.

The Department, by contrast, asserts that Minnesota recognizes the right of access as a distinct property right that "necessarily remains with the abutting owner until and unless it has been explicitly acquired." The Department also maintains that the rights

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[2] In addition to the cases discussed, the Landowners cite to several other cases. *See, e.g., Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60, 67 (Idaho 1911); *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Hadley*, 101 N.E. 473, 476 (Ind. 1913); *Little v. Loup River Pub. Power Dist.*, 36 N.W.2d 261, 264–65 (Neb. 1949); *Coos Bay Logging Co. v. Barclay*, 79 P.2d 672, 677 (Or. 1938). Of course, these cases from foreign jurisdictions are not binding on the courts of our state.

acquired are those described in the condemnation petition and authorized by order, and here, the Department did not acquire the right of access. According to the Department, other procedures exist if a landowner believes rights other than those in the order have been taken, namely, moving the district court to expand the order *before* the commissioners' hearing or asserting a "mandamus action to compel condemnation of the allegedly taken property rights." We agree with the Department.

In Minnesota, an "easement" is an "interest in land owned by another person, consisting in the right to use or control the land for a specific limited purpose." *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010) (quoting *Easement*, *Black's Law Dictionary* (9th ed. 2009)). "The written instrument creating the easement . . . defines the scope and extent of the interest in land." *Id.* at 704.

Relevant to the parties' dispute about the scope of the Department's temporary construction easements is the right of access property owners have to abutting highways. Minnesota law treats the right of access—ingress and egress—as a distinct property right. *See Johnson v. City of Plymouth*, 263 N.W.2d 603, 605–06 (Minn. 1978); *Underwood v. Town Bd. of Empire*, 14 N.W.2d 459, 461 (Minn. 1944). Specifically, property owners have a right of "reasonably convenient and suitable access" to a highway that abuts their property. *Johnson*, 263 N.W.2d at 605. What is reasonable access is typically a fact question.[3] *Hendrickson v. State*, 127 N.W.2d 165, 172 (Minn. 1964).

[3] Here, the relevant material facts about access are not in dispute; the uncontroverted facts show that no actual loss of access occurred.

The Landowners rely on *State by Lord v. Casey* to argue that we should presume that the Department took the right of access when it took a temporary easement along the length of most of the Landowners' property. 115 N.W.2d 749 (Minn. 1962). *Casey* involved a property owner's subsurface rights. In *Casey*, the state's taking of land for highway purposes impeded the use of a gravel company's tunnel conveyor system. *Id.* at 751. In discussing the rights of the property owners—there, the gravel company—we stated that "when the state purchases or acquires an easement for highway purposes, the owner of the fee 'retains a right to use the land for any lawful purpose compatible with the full enjoyment of the public easement.' " *Casey*, 115 N.W.2d at 753 (quoting *Town of Glencoe v. Reed*, 101 N.W.2d 956, 957 (Minn. 1904)). In other words, even after the state took an easement to build a highway, the gravel company could continue to use its tunnel under the road, as long as it did not impede travel on the highway. *Id.* at 753−54. We ultimately held, however, that because use of the tunnel became practically impossible, the landowner was entitled to just compensation. *Id.* at 754.

The single statement in *Casey* on which the Landowners base their argument—"any lawful purpose compatible with the full enjoyment of the public easement"—actually discusses the protection of rights that property owners have; it does not support construing the scope of the Department's easement in the most injurious manner. The Landowners' right to access their property—which they retained and continued to enjoy during this construction project—was a "lawful purpose" that was "compatible with the full enjoyment" of the Department's easement. *Id.* at 753. *Casey* is therefore consistent with

our understanding of the rights acquired by the Department and the rights retained by the Landowners. The Landowners offer no persuasive reasons to depart from this precedent.[4]

Moreover, the Landowners have failed to assert any compelling reason why we should adopt the most-injurious-use or fullest-extent rules used in a small number of other states. Nothing in Minnesota law suggests that we presume that, simply because the Department took a temporary easement across the Landowners' property, the Department also took the right of access. *Cf. Blaine Bldg. Corp.*, 566 N.W.2d at 334 (noting that "a property owner suffers compensable damage" for loss of access only when the property "owner is denied reasonably and suitable access to the main thoroughfare in at least one direction"); *Johnson*, 263 N.W.2d at 607 (considering whether, but not presuming that, reasonable access was taken as a result of a public improvement project).

In fact, Minnesota law requires reasonable access when a highway is being reconstructed. When a new highway is constructed or an old one improved, property owners maintain their right to access the highway unless an "easement of access has been acquired." Minn. Stat. § 160.18, subd. 2 (2018) ("Except when the easement of access has been acquired," the government in constructing, reconstructing, or relocating a highway "shall construct suitable approaches thereto within the limits of the right-of-way where the approaches are reasonably necessary and practicable, so as to provide abutting owners a reasonable means of access to such highway.").

[4] In fact, we have never cited the portion of *Casey* on which the Landowners rely in any of our eminent domain case law.

We also have never required that the Department expressly preserve an owner's right of access in its condemnation petition.[5] And we do not require it here. Our approach is unlike Rhode Island, Kansas, and the other states that require otherwise.

Finally, as the Department points out, if we agreed with the Landowners that the Department takes access along with a temporary easement, the burden would shift to the Department to show that a taking had not occurred. This burden shifting runs contrary to Minnesota law, which places the burden "on the person challenging the government's action to establish that there is an unconstitutional taking." *State by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979) (internal citations omitted). For these reasons, we do not accept the Landowners' invitation to adopt a new rule of law in Minnesota.

In sum, the Department did not take a right of access in its petition and the Landowners retained "reasonably convenient and suitable access" to their property at all times during construction. *See Johnson*, 263 N.W.2d at 605. We therefore conclude that the Landowners are not entitled to $305,000 in damages for loss of access to their property.

Our decision does not leave property owners without a remedy when government action affects access. First, a party can object to the property rights taken when the state petitions for condemnation. *State by Mondale v. McAndrews*, 175 N.W.2d 492, 493 (Minn. 1970). If a property owner believes the right of access is impeded, the owner must object

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[5] Further evidence of this fact is found in the testimony of Hinzmann, the Department's engineer, who testified that the Department has separate procedures that it must follow if it wishes to acquire access, including actually purchasing access and delineating it on its condemnation maps. Here, by contrast, the Department required the contractor to maintain reasonable access to the Landowners' property.

to the petition before the trial court "submit[s] the damage question to the commissioners." *City of Mankato v. Hilgers*, 313 N.W.2d 610, 612–13 (Minn. 1981). But once parties appeal a commissioners' award of damages to the district court, the court's jurisdiction is limited to determining just compensation damages. *Id.* at 612. Second, property owners who believe that a right of access was taken without a formal exercise of eminent domain can assert an inverse-condemnation claim in a mandamus action. *See Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651, 657 (Minn. 1974).

II.

We next must determine whether the Landowners are entitled to severance damages based on construction-related interferences as an alternative means of compensation. The Landowners urge us to look to the highest and best use of their property—development—and the construction interferences—the temporary and permanent easements along the entire length of the property—to conclude that a diminution in market value has occurred for which they should be compensated. They assert that the Department's construction interferences stemming from the loss of access must have affected the market value for development at the time of the taking.

The Department agrees that development is the highest and best use for the property, but asserts that the supposed loss of access is the entire basis for the construction-related interferences that the Landowners claim. And because no loss of access occurred here, the Department maintains that the record lacks sufficient evidence to create a genuine dispute of material fact regarding any damages stemming from the construction interferences. The

Department argues that the Landowners' allegations are merely hypothetical and that the Landowners' evidence does not go beyond "speculative general assertions."

In a partial taking, just compensation includes (1) damages for the value of land actually taken, and (2) the severance damages to the remaining property resulting from the land actually taken. *Blaine Bldg. Corp.*, 566 N.W.2d at 334; *Strom*, 493 N.W.2d at 558 n.3. Severance damages measure the diminution in market value to the remaining property. *Blaine Bldg. Corp.*, 566 N.W.2d at 334. Considered in determining these severance damages are so-called construction-related interferences. *Strom*, 493 N.W.2d at 560–61.

Construction-related interferences sometimes arise because of inconveniences affecting the use and enjoyment of the remainder property during construction. *Id.* at 560. They are "temporary and any impairment to value is also temporary." *Id.* The property owner seeking damages for a partial taking "is not required to show that the injury is peculiar to [the owner's] remaining property," but the law limits recovery to only "the damage caused by the taker's use of the land acquired from the owner of the remainder area." *City of Crookston v. Erickson*, 69 N.W.2d 909, 912–13 (Minn. 1955).

Although we use a broad standard of relevancy in determining what evidence is admissible to prove construction-related interferences, evidence of " 'diminution in value of only *the real estate* is relevant.' " *Strom*, 493 N.W.2d at 559 (quoting *Hendrickson*, 127 N.W.2d at 173). Evidence "concerning any factor which would affect the price a purchaser willing but not required to buy the property would pay an owner willing but not required to sell it" is admissible. *Id.* But evidence must be "competent, relevant[,] and

material." *Id.* (quoting *City of St. Paul v. Rein Recreation, Inc.*, 298 N.W.2d 46, 50 (Minn. 1980)).

In *Strom*, a construction-related interference case, we noted the details of the construction project. There, a state highway was converted into Interstate Highway 394; construction lasted 3¼ years; access to the office tower at issue "changed many times" and "[t]he route was often circuitous and inconvenient although it was never completely eliminated." *Id.* at 557–58. In fact, the parties stipulated that "as a result of the changes in access during construction and other factors attributable to construction, such as vibration, noise, and dust, the owner of the property suffered damages during the construction period in the nature of a temporary reduction of rental income which reduction was attributable to construction activities." *Id.* at 559–60.

Given the burden of the large project and the parties' stipulations, we concluded that evidence of construction-related interferences was admissible, but only as "a factor to be considered by the finder of fact in determining the diminution in market value of the remaining property," and, notably, *not* as a separate item of damages. *Id.* at 560–61. In addition, construction-related interferences are compensable only to the extent that they result from "changes in the land actually taken, and *not merely from the impact of the construction project as a whole.*" *Blaine Bldg. Corp.*, 566 N.W.2d at 334 (emphasis added) (citing *Strom*, 493 N.W.2d at 560; *City of Crookston*, 69 N.W.2d at 912–13).

With this precedent in mind, we turn to the merits of the parties' arguments.

The parties agree that development is the highest and best use for this land. The Landowners assert that the temporary easements would cause hypothetical developers of

their property—those seeking to use the property for its highest and best use—to assume access to the property was unavailable, therefore affecting the price a developer would pay and reducing the land's market value. The Landowners' argument for damages based on construction-related interferences is without merit.

Careful review of Hoff's appraisal, which forms the sole basis for the Landowners' alleged severance damages based on construction-related interferences,[6] reveals that the damages here are not compensable. The focus of the appraisal pertaining to severance damages was entirely based on the *assumed* restriction or loss of access to the Landowners' property. Hoff specifically agreed that the "project itself" caused the market uncertainty that led to his damages calculations regarding construction interferences. The appraisal report contained no alleged construction-related interferences other than those based on an assumed loss of access.

These damages assertions are at odds with our precedent. As we explained above, we do not assume that the Department takes access to abutting property when it takes a temporary easement for road improvement. The parties dispute whether damage determinations may only be based on evidence available at the time of the taking or whether evidence of what actually occurred beyond the date of the taking can be used. We need not decide that issue because the Landowners are not entitled to compensation either way. At the time of the taking, the Department did not take access to the Landowners' property,

[6] At oral argument, the Landowners pointed out that they may present a different expert should the case go to a jury. But the summary-judgment record contains only Hoff's appraisal as support for the Landowners' damages assertions. Whatever other evidence the Landowners may have is therefore not part of the record on appeal.

and we cannot presume that it did so, under any theory. After the taking, uncontroverted evidence in the record shows that the Landowners never lost access to their property. As the Department correctly states, "no changes in access occurred or are alleged from the before condition to the after—access, both legally and practically, was the same before the taking, during the Project, and after the taking."

Moreover, in *Strom*, the parties stipulated to damages that not only included severe changes in access, but also "vibration, noise, and dust" that led to a measurable "temporary reduction of rental income." 493 N.W.2d at 559–60. But here, the parties have stipulated to certain damages and not for the loss of access or any other construction-related interferences.

And in *Blaine Building*, we made clear that damages must not arise from the construction project as a whole. 566 N.W.2d at 334. Again, the Landowners' expert testified that his calculations for construction-related interferences came from the project as a whole based on the presumed loss of access stemming from general construction on the highway.

As the district court pointed out, an expert's foundation must rely on certain assumptions about buyers and sellers, including that they would "perform enough due diligence to understand the property rights acquired . . . and not acquired." Here, a temporary easement was acquired by the Department, but the right of access was not. To the extent the Landowners' expert report was based on speculative predictions about what hypothetical buyers and sellers would incorrectly assume about rights that were not actually acquired, the report lacked foundation.

Accordingly, because the entirety of Hoff's severance damages analysis is based on a perceived loss of access from the construction project as a whole, *Blaine Bldg. Corp.*, 566 N.W.2d at 334, and because this report is the only evidence that the Landowners submit in support of their claim, they failed to establish a genuine issue of material fact for a jury on compensable damages. On the record before us, we therefore conclude that, as a matter of law, the Landowners are entitled to no damages based on construction-related interferences.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.