LOST VISIBILITY AND THE RIGHT TO EXCLUDE: HOW MERRILL'S *SINE QUA NON* OF PROPERTY COMPELS JUST COMPENSATION IN TAKINGS CASES

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I. THE RIGHT TO EXCLUDE AND LOSS OF VISIBILITY DUE TO GOVERNMENT TAKINGS

In 1998, Thomas W. Merrill, one of the great modern property law scholars, published an article in the Nebraska Law Review that has since framed much of the scholarly discussion on the nature of property rights.[1] Now, fifteen years after it was published, Merrill's essay, *Property and the Right to Exclude*, still compels those looking to understand the fundamental nature of property to address his famous assertion: "[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."[2]

In this Article, we propose to connect Merrill's observation about the supremacy of the right to exclude among the "bundle of sticks" that is commonly thought of as property to a specific aspect of property law: the question of what should constitute a taking of property

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1. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

2. Merrill, *supra* note 1, at 730. A recent search using Westlaw reveals more than 175 law review and journal articles which cite to Merrill's essay. Citing References for 77 NEB. L. REV. 730 (1998), WESTLAW, http://www.westlaw.com (search "77 Neb. L. Rev. 730"; then follow "Citing References" hyperlink). While much of the scholarly debate has centered on whether the right to exclude reigns supreme over all the other rights which collectively comprise property, it is important to note that Merrill was not advancing the argument that the right to exclude is the *only* relevant attribute of property. Rather, his contention is that without the right to exclude, there cannot be property. Taken on its face, this claim should be non-controversial: the Supreme Court has called the right to exclude "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (same); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044 (1992) (same); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (same).

for purposes of compensation in eminent domain cases. In particular, the right to exclude has significant implications for courts seeking to determine whether a change in visibility as the result of a taking of property for public use should be a compensable element of just compensation. As we argue here, a property owner's right to exclude others necessarily means that when a government actor wielding the power of eminent domain uses that power to intrude upon this fundamental owner's right, a taking has occurred. Specifically, when eminent domain is used to overcome an owner's right to exclude in such a way that the owner's control over the visibility of his property is lost, compensation is required equivalent to the value of that which has been lost. As straightforward as this proposition seems, it has been disregarded by numerous courts that have lost sight of this foundational right to exclude. Professor Merrill, both in his 1998 article and in his more recent remarks at William & Mary Law School, reminds us that if we misunderstand the place of the right to exclude, we misunderstand property.

In Part II of this Article, we will trace and consider the history of the law regarding takings of visibility in the context of eminent domain, pointing out three approaches that have been used by the courts which have considered the issue. In Part III, we will offer an argument regarding the analytical approach found in the better reasoned of these cases—that an owner's right to exclude others requires that a condemning authority must compensate the owner for lost visibility as a result of the project when the authority uses its extraordinary power to overcome an owner's fundamental right.

II. THE EVOLVING CASE LAW INVOLVING THE COMPENSABILITY OF LOST VISIBILITY IN EMINENT DOMAIN CASES

Until as recently as the 1940s, there existed very little appellate law regarding takings of visibility within the law of eminent domain.[3]

3. LEXIS Advance database, search for "Eminent Domain and Visibility" showing 0 cases between 1900 and 1910; 2 cases between 1910 and 1920; 0 cases between 1920 and 1930; 5 cases between 1930 and 1940; 5 cases between 1940 and 1950; 16 cases between 1950 and 1960; 39 cases between 1960 and 1970. Using the same search and database, eminent domain cases between 2000 and 2010 constituted about 1% of all civil actions; between 1900 and 1910 eminent domain cases were about 3% of all civil actions. Ben Tozer at Fredrikson & Byron constructed the searches that provided this data and that found in note 6, *infra*.

The reason for this absence likely reflects changes in American life and commerce that are now so pervasive that we have lost sight of them. When shopping was done principally in downtown and neighborhood shopping districts, "visibility" meant shoppers looking in store windows from adjoining streets and sidewalks. In such instances, visibility might be obstructed on occasion, but such obstructions were typically temporary and infrequent.[4] But with the advent of the modern freeway,[5] and particularly with the development of grade separated interchanges that simultaneously change traffic flow and obstruct visibility, the law regarding visibility became—and continues to be—an important and developing issue within the law of eminent domain.[6]

Until the spring of 2012, however, when the Utah Supreme Court published its decision in *Admiral Beverage*,[7] changing the law of eminent domain in Utah to allow compensation for the taking of visibility, no state supreme court had ever made a decision regarding the

4. *See, e.g.*, Sinsheimer v. Underpinning & Found. Co., 165 N.Y.S. 645 (N.Y. App. Div. 1917) (complaint by store owner about shop windows obscured by construction for NYC subway).

5. The commercial importance of visibility in modern highway-oriented real estate is well-established and frequently discussed in real estate publications. *See, e.g.*, Robert Bainbridge, *Site Essentials of Convenience Stores and Retail Fuel Properties*, APPRAISAL J., June 7, 2012; Robert Simons, *Site Attributes in Retail Leasing: An Analysis of a Fast-Food Restaurant Market*, APPRAISAL J., Oct. 1992.

6. Claims for loss of visibility appear to be occurring with significantly increased frequency since the late 1980s. While the absolute number of claims remains relatively low compared, for example, to claims for lost or impaired access, the correlation between visibility issues and eminent domain cases involving freeways shows a fourfold increase between the 1950s and the 2000s. The table shown below, based on case information in all U.S. jurisdictions obtained through LEXIS Advance, indicates that visibility now appears as an issue in more than three-quarters of cases involving freeway takings. This suggests that an increased number of jurisdictions will be faced with considering or reconsidering visibility issues.

Decade	Freeway Cases and Eminent Domain	Visibility Cases and Eminent Domain	Visibility Cases / Freeway Cases
50s	80	16	20%
60s	234	39	16.7%
70s	198	37	18.7%
80s	89	26	29.2%
90s	114	80	70.2%
00s	132	102	77.3%

7. Utah Dep't of Transp. v. Admiral Beverage Corp., 275 P.3d 208 (Utah 2012). The Utah court released its decision in the fall of 2011, but the decision was not published until the following year.

compensability of visibility and then revisited and re-examined that decision in light of the actual consequences of its prior decision. The Utah court's decision in *Admiral Beverage* to review *sua sponte* its holding of fewer than five years prior in *Ivers*[8] may signal a change in the way in which appellate courts will consider the issue of what constitutes a property right for which compensation must be paid in a takings case. More significantly for property owners, the Utah Supreme Court's decision to expressly overrule the holding of *Ivers* as it relates to visibility and to hold that "when a landowner suffers the physical taking of a portion of his land, he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking"[9] represents a noteworthy development in that court's approach to takings of visibility. It may also suggest how other courts will begin to approach this issue. It is a decision that, even if not followed, cannot be ignored. A key premise underlying the *Admiral Beverage* court's analysis is that an owner has a fundamental right to exclude from his own land that which interferes with visibility, and while the owner may be forced to surrender that right in face of eminent domain, the right to be fully compensated for that taking is retained. This premise suggests how deeply Merrill's thinking has pervaded modern property theory. Though Merrill's name is never invoked, his analysis is echoed.

While there are cases in numerous jurisdictions regarding the compensability of loss of visibility,[10] fundamentally there are three approaches to the taking of visibility that have been used by the courts: (1) an often amorphous "easement" analysis based on borrowings from the older law of implied easements of light, air and view;[11] (2) a state

8. Ivers v. Utah Dep't of Transp., 154 P.3d 802 (Utah 2007).

9. *Admiral Beverage*, 275 P.3d at 214.

10. *See* Tracy A. Bateman, Annotation, *Eminent Domain: Compensability of Loss of Visibility of Owners Property*, 7 A.L.R. 5th 113 (collecting and summarizing cases); James L. Thompson & Joseph P. Suntum, *Compensation for Loss of Visibility to and View from the Owner's Property*, A.L.I.–A.B.A. COURSE OF STUDY ON EMINENT DOMAIN & LAND VALUATION LITIG. (2006) (discussing legal principles and cases and law on loss of view); 4 NICHOLS ON EMINENT DOMAIN §§ 13.21, G9A.04[4][c][iii] (3d ed. 2000). In more than half of the states there appears to be no dispositive law on the compensability of visibility in eminent domain. Approximately a dozen states now allow claims for loss of visibility; approximately nine do not.

11. For a discussion of background principles, see generally J.A. Robinson, *Implied Easements of Light and Air*, 4 YALE L.J. 190 (1895). A grantor of land who subdivided land and sold a portion of that land to another was deemed to have created by implication reciprocal easements such that neither buyer or seller could unreasonably interfere with light or air serving

constitutional analysis based on loss of market value before and after the taking, particularly in jurisdictions where owners are protected by state constitutional language against "damaging" of their property; and (3) an analysis based on the landowner's lack of any property interest in the traffic flow passing the land taken. Cases finding visibility to be compensable will typically look to the first and second approaches; cases denying compensability will typically employ the first and third approaches. This Article argues that a fourth approach based on an owner's right to exclude provides a superior means of analyzing such cases.

A. Visibility Takings: Recurring Fact Patterns

Talking about takings of visibility in the abstract tends to be confusing, uninteresting, and insufficiently detailed to either follow or test the legal analysis of most court decisions. When the properties described in the cases can be examined,[12] however, the decisions can be more readily analyzed and three common fact patterns emerge:

> **Pattern I:** There is **no taking by eminent domain**, either permanent or temporary, but the property that was visible before

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either property without specific agreement. On a similar theory when land was dedicated by an adjoining owner for street use, the owner was deemed to retain an implied easement for access, light, air, and view (particulars varying with jurisdictions) subject, however, to the dominant "proper street use." There are exhaustive and inconclusive discussions of these rights in the late 19th and early 20th century cases involving street railways; see, e.g., *Adams v. Chicago, B. & N. R. Co.*, 39 N.W. 629 (1888), for a particularly full discussion of the issues involved and the uncertainty of application of these principles. An especially interesting case, but again one which is ultimately inconclusive in defining how such implied easements are to be viewed for purposes of eminent domain is "The Forty-Second Street Elevated Spur Case," *In re City of New York*, 192 N.E. 188 (1934), *aff'd sub nom.*, *Roberts v. City of New York*, 295 U.S. 264 (1935), in which a railway company which was required to acquire such implied easements later had the easements condemned by the City of New York.

There is underlying the implied easement analysis a powerful reliance argument that, if developed, weighs in favor of the abutting property owner. This argument is implicit in several of the cases holding that loss of visibility is compensable and is typically dismissed or disregarded when compensation is denied. When courts are discussing these implied easements, they are often talking about "equitable rights" clothed for purposes of discussion as "property rights." Even if mislabeled as a matter of property law, the rights remain substantial.

12. The widespread availability of satellite and aerial photos through technology services such as Google Earth has made it possible in many instances (and especially in more recent matters) to obtain a photographic record of the properties at issue. Use of such services will often clarify the circumstances of the cited cases.

the project has now lost visibility. Since, in most of these cases, there is no direct use of eminent domain, they must necessarily proceed as tort or inverse condemnation matters. The law is generally unfriendly to property owners making such claims. *See, e.g.*, *Randall v. City of Milwaukee*, 249 N.W. 73 (Wis. 1933) (finding no taking where shelter at entrance to subway obstructed visibility of store owner's property because implied easement of light and air overcome by doctrine of proper street use). *But see Sinsheimer v. Underpinning & Foundation Co.*, 165 N.Y.S. 645 (N.Y. App. Div. 1917) (holding obstruction by builder of Lexington Avenue subway for impairment of abutter's rights when cribbing used for construction temporarily blocked storefront windows and obstructed light and visibility to constitute a taking of easement rights without just compensation).

Pattern II: There is a **taking by eminent domain** and that which impairs visibility is **built in part within the parcel subject to the taking**. *See State v. Strom*, 493 N.W.2d 554 (Minn. 1992); *see Colorado Department of Transportation v. Marilyn Hickey Ministries*, 159 P.3d 111 (Colo. 2007). In both of these cases, the condemning authority did not dispute that visibility from the adjoining roadway was impaired. Compensation was awarded in the Minnesota matter; compensation was allowed by the Colorado Appellate Court but denied by the Colorado Supreme Court in *Hickey Ministries*.

Pattern III: There is a **taking by eminent domain** and that which causes the actual loss of visibility is **not actually built within the parcel taken**, but the property taken was either (1) **essential to the completion** of the project; or (2) **integral and inseparable** from the project. *See Ivers v. Utah Department of Transportation*, 154 P.3d 802 (Utah 2007) (finding that taking for U.S. 89 overpass was essential to completion to project but denying compensation for loss of visibility). *But see Admiral Beverage*, 275 P.3d 208 (Utah 2011) (finding that taking for I-15 project was essential to completion of project and, overruling *Ivers*, allowing compensation for loss of visibility).

B. The Ancestral Split in the Analysis of Visibility: People v. Ricciardi

The most important early case concerning the compensability of visibility comes in 1943, predictably enough from California. In *People*

v. Ricciardi,[13] the California Supreme Court held by a 4–3 majority (with Justice Shenk authoring the opinion) that both loss of direct access and loss of visibility were compensable;[14] three justices including Justice Traynor joined in a furious dissent.[15] Rehearing was sought by the State a year later and denied on the same split.

The case is an early and landmark freeway case involving what is now known as the I-10, the San Bernardino Freeway. The fact pattern, even though 70 years past, is precisely that which gives rise to most modern cases: the creation of a limited access interchange based on a separation of grade—in this case Rosemead Boulevard, the north-south cross street, was lowered by about 17 feet so as to pass under the new Ramona Boulevard freeway.[16] The Rosemead underpass obstructed visibility to the Ricciardi property (a retail meat market and "modern slaughterhouse") located at the northeast corner of Ramona and Rosemead.[17]

At its essence, the dissent's position was (1) that the majority was adopting a before and after rule not previously accepted in California; (2) that the new overpass was a "proper street use" and thus, if there was an easement for view and if that easement was obstructed, then it was not compensable; and (3) most importantly, that the property owner was being compensated for loss of traffic flow to which he had no legal right and that, as a matter of public policy, recognizing the loss of visibility would have a "prohibitive effect . . . upon the construction of increasingly necessary arterial freeways, without grade crossings,"[18] identifying in particular the then contemplated Bayshore Freeway in San Francisco and San Fernando Freeway in Los Angeles.[19] In retrospect, the dissent's prediction about the importance of freeways appears prescient, but its concern about stunting California freeway growth is, at best, wishful thinking. Nonetheless, the fundamental argument that would be repeated by condemning authorities in every jurisdiction thereafter where this issue was litigated had been set: abutting owners have no property rights in traffic flow and allowing compensation for takings of visibility takes

13. 144 P.2d 799 (Cal. 1943).
14. *Id.* at 806.
15. *Id.* at 807–18.
16. *Id.* at 801.
17. *Id.*
18. *Id.* at 816.
19. *Id.*

money away from transportation departments and constrains highway growth.[20]

The *Ricciardi* majority's analysis concluded from the older street easement cases that "an abutting owner . . . on a public highway has an easement of reasonable view of his property from the highway,"[21] and then relied on a different public policy interest than the cost of highway construction to support its conclusion: "The courts have the burden and responsibility . . . of safeguarding the constitutional rights of private parties on the one hand and on the other hand of seeing to it that the cost of public improvements . . . not be unduly enhanced."[22]

The majority could not avoid the fact that the underpass constructed *using Ricciardi's land*[23] left the Ricciardi property with little or no visibility from Rosemead, which would cause a loss in the post-taking market value that had to be regarded as "damage" under the California Constitution. These antipodal public positions, protection of the government's interest in controlling the cost of property acquisition for an expanding roadway system on the one hand, and protecting the individual's right to compensation from disproportionately burdensome market value losses on the other, underlie the split that is at the core of most visibility cases and that is ultimately seen in *Admiral Beverage*'s overruling of *Ivers*. The *Ricciardi* decision does not explicitly address the right to exclude in the context of visibility, instead relying largely on the property owner's "easement of reasonable view of his property from the highway."[24] Nonetheless, analysis of the majority's opinion shows that the critical aspect of *Ricciardi* was that the improvement which obstructed visibility was itself constructed on the property taken. Seen in that light, Ricciardi's right to exclude the State of California from his property absent the state's use of its power of eminent domain is a dispositive fact. A prudent Ricciardi would only willingly convey the land needed for the new interchange if he were compensated for the loss of a right that he controlled. The state could choose to locate its interchange elsewhere, but if it chose to locate the new structure on land over which

20. *See, e.g.*, Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470, 474 (Mo. 1965).

21. *Ricciardi*, 144 P.2d at 806.

22. *Id.* at 802.

23. *Ricciardi* thus falls squarely into Pattern II of the familiar fact patterns that arise in visibility cases, as the improvement which eliminated the visibility of the Ricciardi property from the roadway was built, at least in part, on land actually taken from Ricciardi.

24. *Id.* at 806.

Ricciardi held a right to exclude, it must purchase the land from him. Or, it could use its power of eminent domain to force an exchange, and, in doing so must compensate the owner for the value of overcoming the right to exclude.

C. The Alaska Court Thinks About Visibility: The Dimond D *Case, "*8,960 Square Feet*"*

In the *Dimond D* case,[25] the Alaska Supreme Court considered two different fact patterns of visibility loss within the same condemnation and found one compensable and one not. In reaching these conclusions, the Alaska court provides one of the few post-*Ricciardi* decisions which actually analyzes the issues involved rather than simply coming down on one side or the other of the *Ricciardi* split. Recognizing that the compensability of visibility was for it an issue of first impression, the Alaska court reviewed cases from numerous jurisdictions (including *Ricciardi*) in reaching its conclusion, looking with some care at the rationales provided in the cases it reviewed. The project at issue involved widening Dimond Boulevard from two lanes to six lanes and providing an overpass across Dimond Boulevard for the Alaska Railroad. As a part of the widening of Dimond Boulevard, and in conjunction with the railway overpass, Dimond Boulevard was lowered between five-and-a-half and seven feet as it passed by the adjoining Dimond D property. In addition, earthen berms were constructed within the Alaska Railroad right-of-way in order to further elevate the tracks as they crossed over Dimond Boulevard.[26] The court ultimately concluded that loss of visibility was compensable where the loss results from changes made on the parcel taken for the road widening but found that the loss of visibility caused by the construction of the railway trestle within existing and legally separate Alaska Railroad right of way was not compensable.[27]

While the case's holding is clear, its consequence is difficult to comprehend without understanding the physical layout involved. Prior to the project, the Dimond D parcel had clear visibility from a large shopping center property to the east. This borrowed visibility was lost when the railroad overpass was constructed. The Alaska court reasoned that because the Alaska Railway had the right to change the

25. 8,960 Square Feet v. State (Dimond D), 806 P.2d 843 (Alaska 1991).
26. *Id.* at 845.
27. *Id.* at 846.

elevation of its tracks at any time that there could be no reasonable expectation by Dimond D, and certainly no legal right, to control what would occur on that parcel. In other words, key to the Alaska court's decision was that Dimond D had no right to exclude with regard to the railroad property. Accordingly, with regard to that particular claim for damages—the loss of visibility caused by the Alaska Railroad trestle—compensation was denied. The logic of the Court's argument, however, requires the conclusion that compensation for loss of visibility would have been due if a new elevated structure had been built by the condemnor on land owned by Dimond D.

With regard to the loss of visibility caused by the change in grade directly in front of the Dimond D parcel caused by the taking from Dimond D's property, the court found it to be compensable. In reaching this conclusion to allow claims for impaired visibility resulting from work done on property taken from the landowner for the project, the Alaska Supreme Court considered and rejected the dissent's argument in *Ricciardi* and its progeny in Missouri and elsewhere that "since landowners have no right to traffic flow, they cannot have a right to be seen by traffic."[28] The defect in the traffic flow argument identified by the *Dimond D* court is that "as long as there *is* a road adjacent to the taken property," the owner of that property possesses a valuable right "to control the visibility of land further away from the road."[29] "The state must compensate the owner for the loss of the right to control the visibility of the remaining parcel."[30]

In analyzing the problem in this way, the Alaska court avoided the morass of much of the implied easement analysis: an owner has the right to control any use of its own property against a detrimental use. A rational owner would not convey part of its property to another for a use that would diminish the value of the owner's remainder without exacting a cost sufficient to compensate for any such diminution. Such must also be the case when a conveyance is compelled through eminent domain.[31]

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28. *Id.* at 847.

29. *Id.* at 847, 848.

30. *Id.* at 846.

31. *Id.* In footnote 6 of *Dimond D*, the court considers the problem where the condemnor takes a parcel yet does not immediately cause a loss of visibility. This is the "later project" problem where the subsequent project does not occur until after the current eminent domain proceedings are over. "To protect the owner of the remaining parcel from such an occurrence, we believe that . . . an easement of visibility across the taken parcel is reserved to the owner of the remaining parcel. If and when the state causes a loss of visibility to the remaining

As a coda to the *Dimond D* decision, the Minnesota Supreme Court in considering the compensability of loss of visibility a year later—again as an issue of first impression—observed that "the reasoning we find most persuasive is that of the Alaska Supreme Court."[32] The court then followed the holding of the Alaska court that loss of visibility was compensable where the obstruction resulted from the condemnor's use of property within the parcel taken for the project.[33]

D. Regression to the Mean—Two 2007 Cases Return to the Lost Traffic Analysis: Ivers *and* Hickey

In the first six months of 2007 two cases were decided in two neighboring Western states regarding the compensability of visibility: *Ivers v. Utah Department of Transportation*,[34] filed February 6, 2007, and *Colorado Department of Transportation v. Marilyn Hickey Ministries*,[35] filed May 29, 2007.[36] Both cases adopted what each characterized as a property rights analysis and concluded that because there was "no right to passing traffic, an impairment of the visibility from the traffic is not compensable."[37] Both cases rest principally on the lost traffic

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parcel through a change on the taken parcel, then this constitutes a separate taking." *Id.* at 846 n.6. The court's proposed solution reflects its knowledge of eminent domain and transportation projects. Terming the preserved right an "easement," however, suggests the imprecision with which courts sometimes use this term, and further muddies the waters with regard to the "implied easement of visibility" noted in *Ricciardi* and other cases.

32. State v. Strom, 493 N.W.2d 554 (Minn. 1992). *Strom* is another freeway case arising from the conversion of U.S. 12 (a major at grade intersection highway connecting Minneapolis and its western suburbs) to Interstate 394, a grade-separated freeway. There is a *Ricciardi*-style dissent by Justice Tomljanovich.

33. *Id.* at 561. Minnesota follows the inseparability doctrine set forth in *City of Crookston v. Erickson*, which provides that "where the use of the land taken constitutes an integral and inseparable part of a single use . . . the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land." City of Crookston v. Erickson, 69 N.W.2d 909, 914 (1955). Under this analysis, it should make no difference whether the taking is permanent or temporary so long as the land taken is essential to the project and, but for the taking, under the control of the owner. The issue of project inseparability (or the parallel doctrine of "essential to completion") with regard to the relationship between the railway overpass and the street project was apparently not raised in the *Dimond D* case, but it lies at the crux of the Utah Supreme Court's subsequent holding in *Admiral Beverage*.

34. 154 P.3d 802 (Utah 2007).

35. 159 P.3d 111 (Colo. 2007).

36. *See also* Kurtis T. Morrison, Note, *Compensable Property Rights and Visibility Damages in Public Transportation Infrastructure Projects:* Department of Transportation v. Marilyn Hickey Ministries, 38 TRANSP. L.J. 145 (2011).

37. *Hickey*, 159 P.3d at 114 (describing the holding of *Ivers*).

flow theory that had been considered and rejected by the Alaska and Minnesota courts; *Hickey* notes *Dimond D* only in passing[38] and the Utah court notes that the Alaska court found loss of visibility compensable where the obstruction was constructed on land taken from the claimant and then found that such was not the case in *Ivers*.[39] The *Ivers* decision includes no discussion of the significant difference between the Alaska Railroad configuration and the *Ivers* configuration or of the controlling principle for the decision in *Dimond D*.[40]

The fact patterns for the two cases are similar, but not identical. In *Hickey* the Department of Transportation condemned a lengthy (650') but narrow strip from the easterly edge of the Hickey property (a former shopping center, now used as a religious school, house of worship, and ministry center) to construct a new light rail line. Construction occurred on land taken from Hickey and completely cut off visibility of the church property from I-25, the adjacent roadway. Prior to the taking, the church owned the property at issue and had the absolute right to control what structures could be built upon it. It is safe to assume that the church would not have conveyed this strip to any acquiring entity without either protection of its visibility or compensation for the loss of such visibility. Though the owner's right to control use of its own land is a key point made by the Alaska court in analyzing the relevant rights where a taking from the owner's property results in the obstruction of visibility,[41] this issue is not addressed by the Colorado court.

In his discussion of the *Hickey* case in the *Transportation Law Journal*, Kurtis T. Morrison notes that the Colorado Department of Transportation ("CDOT") argued that a ruling allowing compensation for visibility "would unleash 'a great financial burden' on state transportation authorities."[42] CDOT's argument, of course, repeats

38. *Id.* at 114 n.4.

39. In fact, the *Ivers* decision refers obliquely to the *Dimond D* decision as reflecting the decisions of "some states [which] recognize an easement of visibility where an obstruction is built on the condemned land." *Ivers*, 154 P.3d at 805 & n.3. This is a mischaracterization of the holding of *Dimond D*, which relied not on the implied easement of visibility found in *Ricciardi*, but rather on a landowner's right to limit obstructions from being placed on his or her land. *See Dimond D*, 806 P.2d at 846. This mischaracterization, however, allowed the *Ivers* court to frame its decision in terms of a landowner's right (or lack thereof) to traffic flow past his or her property as opposed to confronting the issue of the landowner's right to exclude.

40. *Ivers*, 154 P.3d at 805.

41. *See Dimond D*, 806 P.2d at 846.

42. Morrison, *supra* note 36, at 158 (quoting CDOT's Opening Brief).

the damper on new freeways argument employed by the dissent in *Ricciardi*.[43] Recognizing a taking that causes a loss in visibility as compensable, argued CDOT, could have "potentially staggering costs and adversely affected or altered future transportation planning."[44] While Morrison notes that a different policy consequence of the Court's decision "may be to spur reticence by private actors seeking to locate business interests along transportation corridors,"[45] the Colorado court's opinion reflects no public policy analysis other than increased cost as stopping transportation growth.

Ultimately, the *Hickey* court held that "there is simply no inherent property right to continued traffic or visibility along the I-25 transit corridor" and characterized the church's claim of lost visibility as "nothing more than an access claim."[46] Given that starting point, it was easy for the Colorado Supreme Court to conclude that the church had not suffered a substantial (and therefore compensable) limitation or loss of access. By focusing on the claim as one for lost access, the *Hickey* court circumvented the need to address the right which formed the basis for the holding in *Dimond D*: the right of the landowner to exclude a private entity from constructing an elevated highway on its property unless the owner is appropriately compensated.

In *Ivers*, the Utah court faced a slightly different fact pattern. U.S. 89 in Farmington, Utah was being converted to a limited access highway and what had previously been an at-grade intersection was being converted to an elevated interchange, which would reduce visibility of an Arby's restaurant on the *Ivers* property. Property was taken by eminent domain from Ivers for part of a new service road to be constructed as part of U.S. 89 project. Unlike *Hickey*, where the LRT viaduct was constructed on land taken from the church, in *Ivers* the actual elevated highway was constructed on land adjacent to Ivers's, but not on property taken from Ivers.[47]

Ivers made claims for both loss of view and loss of visibility. The court held that loss of view (not visibility) was a "property right,"

43. 144 P.2d 799, 816 (Cal. 1943).

44. Morrison, *supra* note 36, at 158.

45. *Id.*

46. *Hickey*, 159 P.2d at 114–15.

47. Thus *Ivers* falls into Pattern III of the typical fact patterns found in loss of visibility cases, as set forth in Part II.A, *supra*, in that the improvement which actually obstructed visibility to the property was not constructed on the property taken from Ivers, but the taking of Ivers's property was essential to the completion of the project which, as a whole, resulted in the loss of visibility.

citing an earlier decision that found that an "easement of view" was a protectable property interest.[48] To address the objection of the Department of Transportation that the improvement which obstructed the view was not built on the *Ivers* property, the Utah court then further held that land taken in *Ivers* was "essential to the completion of the project":

> When land is condemned as part of a single project—even if the view impairing structure itself is built on property other than that which was condemned—if the use of the condemned property is essential to the completion of the project as a whole, the property owner is entitled to severance damages.[49]

When it came to claims for loss of visibility, however, the Utah court simply followed the "no right to traffic flow" position and thus, for the claim of lost visibility, it was irrelevant that the Ivers land was essential to the project. Its simplistic position on this point, as well as its choice to avoid the contrary position taken in the Alaska and Minnesota cases, may explain the attractiveness of *Ivers* to the Colorado court in *Hickey*. It may also explain the dissatisfaction that caused the Utah court to revisit this identical issue in *Admiral Beverage* only four years later.

E. Admiral Beverage*: The Utah Court Changes Direction*

Although the Utah Supreme Court issued its opinion in *Admiral Beverage*[50] in October 2011, the decision was not actually released for publication until May 9, 2012.[51] There has been some speculation that the seven-month delay in publication reflected uncertainty in the

48. Ivers v. Utah Dep't of Transp., 154 P.3d 802, 806 (Utah 2007).

49. *Id.* at 807. The court considered and did not adopt the "inseparability" analysis employed by the Minnesota Court in *Crookston*, 69 N.W.2d 909, 914 (1955), suggesting that it considered the "essential to completion of the project standard" narrower than the "inseparability" standard. Implicit in the "essential to the project" standard is that the condemnor has made a considered and intentional decision to take the owner's property and, with it, responsibility for any severance damages.

50. *See generally* Richard E. Danley, Jr., *Severance Damages Take a Sea-Change with Admirable Beverage*, 25 UTAH BAR J., May/June 2012, at 42. Danley's title suggests the significance of the change in the Utah court's position. This change in position is especially striking because the composition of the court was largely unchanged; four of the five justices who participated in *Ivers* also participated in *Admiral Beverage*. The new justice on the court, Justice Thomas Lee, took the seat left by Justice Wilkens, the author of *Ivers*. *Admiral Beverage* is authored by Justice Parrish.

51. *See* Utah Dep't of Transp. v. Admiral Beverage Corp., 275 P.3d 208 (Utah 2012).

Utah Supreme Court about a decision that reversed the analytical direction of eminent domain law in Utah. Any such speculation must now be dismissed in light of the Utah court's even more recent decision in *Utah Department of Transportation v. FPA West Point, LLC*,[52] in which it expressly relied on the compensation principles established by *Admiral Beverage* in rejecting the so-called "unit-rule" and instead adopting a position intended to indemnify all holders of an interest in property taken against actual market-value loss.[53]

The fact pattern in *Admiral Beverage* is, as the court itself notes, "strangely similar" to that in *Ivers*.[54] In connection with the massive reconstruction of I-15 through Salt Lake City, land was taken by eminent domain for expansion of a frontage road necessary to accommodate one of the I-15 ramps; the actual new elevated I-15 roadway, ramp and flyover which obstructed visibility was not constructed on the land taken from *Admiral Beverage* but on land which abutted the new frontage road for which property was taken from *Admiral Beverage*.[55] Both the Department of Transportation and the owner agreed that the property taken from Admiral was "essential to completion of the project."

The most salient part of the *Admiral Beverage* decision is the court's choice to reject the mechanistic notion of "recognized property rights" theory it held to in *Ivers* by allowing compensation for lost view, but not for lost visibility (a distinction the Court could not justify). Rather, the court premised its approach on indemnification of actual market value lost, which the court found comported with both its obligations under the Utah Constitution[56] and common sense.[57] As a practical matter, what the Court did was recognize that an owner would not surrender a valuable right—what Merrill identifies as the right to exclude—without market-based compensation.

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52. 304 P.3d 810 (2012).

53. *FPA West Point* is itself an important decision in the law of eminent domain, rejecting the so-called "unit rule" and holding instead that the value of each interest condemned must be valued under an "aggregate-of-interests" approach.

54. Counsel for Ivers, Donald J. Winder and John W. Holt, participated as amicus in the briefing of *Admiral Beverage*.

55. In this regard, *Admiral Beverage* is, like *Ivers*, a Pattern III case. *See supra* Part II.A.

56. The Utah Constitution, like a majority of state constitutions, provides for compensation when property is taken "or damaged." Utah Const. art. I, § 22. *Admiral Beverage* contains a careful exposition of the importance of this language to its analysis. *Admiral Beverage*, 275 P.3d at 215–16. *See also People v. Ricciardi*, 144 P.2d 799, 804 (Cal. 1943) (discussing "damage" under the California Constitution).

57. *Admiral Beverage*, 275 P.3d at 211.

Procedurally, the case is remarkable because while the court initially granted review only on the issue of severance damages for loss of view, after hearing oral argument the court *sua sponte* issued an order for supplemental briefing and re-hearing on the issue of whether *Ivers* should be overruled with regard to damages for loss of visibility.[58]

The Utah court recognized that overruling its recent decision in *Ivers* with regard to the compensability of lost visibility was not something to be undertaken lightly,[59] but concluded both that its earlier rule was "originally erroneous" and failed to "comport with a constitutional right."[60] The court specifically noted that its holding in *Ivers* that a person whose property was taken by the Utah Department of Transportation could only recover for damages to "recognized property rights" was at odds with the constitutional obligation that severance damages are to be measured by the diminution in market value of the remainder property.[61] In assessing fair market value, the court explained "we have *always* allowed evidence of all factors that affect market value."[62] Although such statements of broad admissibility are not uncommon within the law of eminent domain, the willingness of the Utah court to tie this evidentiary standard to a meaningful constitutional requirement for compensation is unusual.[63]

Admiral Beverage holds that when "a landowner suffers the physical taking of a portion of his land, he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking."[64]

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58. *Id.* at 212.

59. *Id.* at 214–15.

60. *Id.* at 215.

61. *Id.*

62. *Id.* at 214 (emphasis in original).

63. Indeed, instead of focusing on the public policy arguments raised by the dissent in *Ricciardi* and by condemnor in the *Hickey* matter, the Utah Supreme Court focused instead on the fundamental constitutional right of a property owner to be made whole by a just compensation award. In light of the overarching policy in favor of allowing evidence "of all factors that affect market value," the Utah court had no trouble finding that a rule excluding from compensation damages attributable to loss of visibility would be nearly impossible to implement and would deprive property owners of the protections guaranteed them under the Utah Constitution.

64. *Id.* at 214. The line drawn by the Utah court requires that there must be an actual taking from the property in question, though it is not necessary that the obstruction to visibility be constructed on the land taken, so long as the land taken is essential to the project. This is the threshold that must be crossed. Once crossed, however, the measure is loss in market value. Allegations of damages not connected to a physical taking will only be sustained if there is damage to "protectable property rights." A landowner under the Utah analysis does not have a protectable property interest in a particular flow of traffic past his property—a change in the

If *Ivers*'s constitutional infirmity provided the initial reason for its rejection by *Admiral Beverage*, it is clear from the supplemental briefing and the court's opinion that when the court found itself immersed in the practical issues of valuation, it found the sorting of severance damages into compensable and non-compensable elements to be unworkable as a practical matter. In particular, the court found it would be "rank speculation" for an appraiser to attempt to exclude from a property's post-taking value the amount attributable to loss of visibility.[65] The court's pragmatic conclusion was that: "Not only is there no factual basis for such speculation, but requiring it would result in an increase in unnecessarily complex drawn out litigation involving valuation of partially condemned property. In contrast, using market value as the measure of severance damage is relatively simple and fact-based."[66]

The *Admiral Beverage* court's analysis ends with a common sense notion that is familiar to all whose work engages owners whose property is taken by eminent domain:

> The average landowner assumes that the value of his land is equal to the amount that a willing buyer would pay for it. And the average landowner ought to be able to expect that he will be compensated for any reduction in that amount that results if the state takes part of his property.[67]

III. THE RIGHT TO EXCLUDE REQUIRES THAT PROPERTY OWNERS BE FULLY COMPENSATED FOR THE MARKET VALUE OF THEIR PROPERTY TAKEN AND THE MARKET VALUE OF SEVERANCE DAMAGES CAUSED BY THE TAKING

None of the state supreme courts to have addressed the issue of the compensability of loss of visibility in the context of an eminent

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traffic flow under Utah law does not create a taking—but once there is an undisputed physical taking the owner is then entitled as a constitutional matter to be put in the same place he would have been economically but for the taking. *Id.* at 216. What would constitute a "protectable property right" remains generally undefined.

65. *Id.* at 220.

66. *Id.* The briefing in *Ivers* and particularly an amicus brief submitted by Ivers's counsel appears to have sharpened the court's focus on these pragmatic appraisal issues. In particular, the court recognized problems in jury instructions relating to market value as the measure of just compensation if visibility, a key component of market value, could not be considered by the jury.

67. *Id.*

domain case have explicitly referred to Merrill's *Property and the Right to Exclude* to support their holdings.[68] Nonetheless, at the core of the approach adopted by the Utah Supreme Court in *Admiral Beverage*, the Alaska court in *Dimond D*, and the Minnesota court in *Strom*, is the concept that a property owner possesses the right to exclude a third party from his or her property. Therefore, if even a tiny taking or a temporary taking of a landowner's property is deemed necessary for the completion of a public project, and such taking both overcomes the owner's fundamental right to exclude and results in the remainder of the landowner's property having reduced visibility which affects the market value of the remainder, the landowner logically must be compensated for that diminution in market value caused by the reduction in visibility.

Merrill directly touches on this in his seminal essay in defending the "logical primacy of the right to exclude."[69] Constructing a hypothetical in which A is the owner of the proverbial Blackacre, Merrill pointed out that "A has the power to act as the gatekeeper of Blackacre. A can forbid other persons from entering onto Blackacre *or from causing structures or objects to encroach on Blackacre*; alternatively, A can consent to other persons entering onto or encroaching on Blackacre. As Blackacre's gatekeeper, A has the power to determine who has access to Blackacre and on what terms."[70]

Using the right to exclude as his touchstone, Merrill then proceeds to set out how the rest of A's rights in Blackacre flow from his right to serve as its gatekeeper. For example, Merrill notes that "no one other than A or those given permission by A may enter onto Blackacre or encroach on Blackacre."[71] If B owns Greenacre, adjacent to Blackacre, A can prevent B from building a billboard (or any other improvement) that encroaches on Blackacre and hinders its visibility from the adjoining public street because A has the right to dictate whether B can enter upon Blackacre and under what terms. Similarly, A may sell to B the right to construct a billboard that encroached on Blackacre, but will demand that price which fully compensates A for the expected loss in the value of Blackacre, including that loss attributable to Blackacre's loss of visibility from the public street.

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68. This should not be surprising, as many of the decisions, including, significantly, *Dimond D* and *Strom*, predate the publication of *Property and the Right to Exclude*.

69. Merrill, *supra* note 1, at 740.

70. *Id.* (emphasis added).

71. *Id.* at 741.

Now, consider a slight change to the scenario, in which Greenacre is not owned by B, but rather by the local municipal government, G. Instead of proposing a billboard which will be partially built on Blackacre, G plans to construct a highway overpass with sound walls and needs a small portion of Blackacre in order to build the project. If G did not possess the power of eminent domain, a prudent and reasonable A would prevent G from acquiring a portion of Blackacre, unless G were willing to pay A an amount equal to and commensurate with the harm caused by the taking, including specifically the diminution in value to the rest of Blackacre from the loss in visibility due to the highway overpass. If, on the other hand, G does possess the power of eminent domain, A cannot prevent G from taking a portion of Blackacre, but compensation for this substitute forced exchange should be no different than it would be in an unforced market transaction with a reasonable and prudent seller.

It is the landowner's right to exclude which forms the basis for the landowner's right to be justly compensated for the conveyance of that right. In the first hypothetical, A may exercise A's right to exclude in order to prevent B from constructing the billboard that encroaches on Blackacre, or A may allow B to construct the billboard on the condition of appropriate compensation. In the second hypothetical, A's right to exclude is subservient to G's power to take property for public use, and therefore the taking of A's right to exclude must be matched with the payment of just compensation, the "full and perfect equivalent" in money.[72]

To the extent that the billboard proposed by B is to be built entirely or mostly on Blackacre, such that the portion of the billboard which blocks visibility is itself located on Blackacre, then the hypothetical falls squarely within Pattern II of the recurrent fact patterns seen in those cases considered by the courts as noted in Part II of this Article. But if the only part of B's proposed billboard that encroaches on Blackacre is a small piece of a footing that is located entirely below ground level, then the hypothetical falls into Pattern III, in which the part of the improvement that causes the loss of visibility is not

72. *See, e.g.*, United States v. Miller, 317 U.S. 369, 374 (1943) ("The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.").

actually constructed on the property in question, but is nonetheless integral to the operation of the billboard itself. The analysis does not change if the taking is temporally limited, rather than limited in area.

Turning to the scenario in which G is constructing a highway overpass with sound walls, if the only portion of G's public road improvement that is actually built on what was formerly part of Blackacre are some underground storm drainage pipes, is A entitled to receive compensation for the loss of visibility to rest of Blackacre caused by the overpass and sound walls themselves? Or to put it another way, even though those parts of the project which actually block the visibility of Blackacre from the public street are not built property taken from A, should A receive compensation for the loss of visibility as part of the just compensation award?

Analyzing this scenario through the lens of A's "easement of visibility," as set forth in *Ricciardi*, it is not immediately clear that G has taken or impinged upon A's easement rights by constructing visibility-blocking improvements offsite. Indeed, this is the crux of the now rejected *Ivers* holding—even though the Utah Supreme Court found that the use of the condemned property was essential to the completion of the project, it nonetheless held that the landowner was not entitled to compensation for lost visibility because he had no property right in the flow of traffic.[73]

Yet considering the scenario through the rubric of A's right to exclude (as opposed to A's "easement of visibility"), the compensability of G's taking, which causes a loss of visibility to the remainder of Blackacre, is readily apparent. Just as A has an absolute right to prevent B from encroaching upon Blackacre for even the slightest portion of an underground footing for a billboard, A also has the right to permit B to build the billboard footing on Blackacre, and will demand in exchange for that right the appropriate amount of compensation for the loss of visibility caused not merely by the footing itself, but by the entire billboard, for which the footing is an integral part. And a prudent A's right to extract from B the appropriate amount of compensation for all of the negative aspects of B's billboard is entirely analogous with a prudent A's right to extract from G the full measure of just compensation for all of the negative aspects of G's overpass and sound wall, including the loss of visibility, so long as the

73. Ivers v. Utah Dep't of Transp., 154 P.3d 802 (Utah 2007).

underground stormwater drainage pipes are essential to the completion of G's road project.

Although not termed as such, it is clear that the Alaska Supreme Court in *Dimond D* relied upon the landowner's right to exclude others from its property in holding that a public improvement that obstructs visibility and is built, at least in part, on property taken from the landowner by eminent domain, is compensable:

> Ownership of land gives the owner the right and ability to limit any obstructions from being placed on that land. In particular, ownership of land abutting on a road gives the owner the right to control the visibility of all adjoining land further off the road. This obviously can be an important commercial asset. Thus when the state takes a parcel which abuts the road, it also takes the potentially valuable right to control the visibility of the remaining parcel. For this reason, we believe that the best rule in light of reason and policy is that loss of visibility to a remaining parcel is compensable where that loss is due to changes made *on the parcel taken by the state*.[74]

Indeed, a landowner's "right and ability to limit any obstructions from being placed on that land" flows directly from the landowner's right to exclude others from encroaching on his or her property. It follows, then, that the taking of the "potentially valuable right to control the visibility of the remaining parcel" must be compensable. Thus, the *Dimond D* court's recognition of this right in the context of the loss of visibility in an eminent domain context serves as an example of the proper application of Merrill's thesis on the right to exclude to a real-world scenario involving the constitutional right to just compensation.

In reversing the holding of *Ivers*, the Utah Supreme Court in *Admiral Beverage* took the *Dimond D* court's analysis to the next logical level.[75] Under its holding, lost visibility is compensable not only in Pattern II cases (like *Dimond D*), but also in Pattern III cases, in which the improvement obstructing visibility was not itself built on property taken from the owner claiming loss of visibility, but the property taken was essential to the completion of the improvement

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74. *8,960 Square Feet v. State (Dimond D)*, 806 P.2d 843, 846 (Alaska 1991) (emphasis in original). *But see* Colo. Dep't of Transp. v. Marilyn Hickey Ministries, 159 P.3d 111, 114–15 (Colo. 2007).

75. *See* Utah Dep't of Transp. v. Admiral Beverage Corp., 275 P.3d 208 (Utah 2012).

project. Given the primacy of the right to exclude among all the rights in the "bundle of sticks," and especially in light of Merrill's pronouncement that the right to exclude is the *sine qua non* of property,[76] this is the necessary result for both Pattern II and Pattern III cases. Of course, analyzing a Pattern I case under the right to exclude framework will generally result in a finding of no compensability, unless the landowner has some specially defined right to visibility, such as an easement of visibility,[77] over adjoining property.[78]

Indeed, although the application of the landowner's right to exclude as a basis for analyzing loss of visibility in condemnation cases often focuses on those takings in which the remainder of the landowner's property is negatively impacted ("damaged") as a result of the lost visibility, the principle has equal application to those cases in which visibility is not a valuable attribute of the property before the taking. Consider the scenario of a single family residence located on property that backs up to a busy highway. Should the local government acquire a small strip of land along the rear of the property for expansion of the highway and construction of a sound wall, the landowner would likely look favorably on the opportunity to have his or her backyard shielded from the view of every passing motorist.

The landowner's right to exclude the local government from constructing such a sound wall without being appropriately compensated still remains. However, the amount of appropriate compensation for a public improvement which enhances the owner's privacy while diminishing the property's visibility could be zero.[79] The landowner's right to exclude still exists, but its value under that particular circumstance may be minimal or zero. In the end, however, employing the landowner's right to exclude as an analytical tool permits the

76. *See* Merrill, *supra* note 1, at 730.

77. This is the holding of the Alaska Supreme Court in *Dimond D* with regard to the loss of visibility resulting from berms built within the Alaska Railway right-of-way. 806 P.2d 843, 845–46 (1991).

78. There is some argument to be made that Pattern I cases, in which there is no taking of property, either permanent or temporary, but an improvement is constructed which results in a loss of visibility, should still result in compensation for loss of visibility, especially in jurisdictions in which just compensation must be paid for the taking "*and damaging*" of private property for public use. However, that argument is beyond the scope of this Article.

79. Or it could be negative, as the landowner's remaining property may be enhanced in value by the addition of the sound wall. Whether this enhancement is compensable will often depend on whether the jurisdiction in which the condemnation matter is proceeding follows the "state rule" or "federal rule" on calculation of just compensation.

full consideration of all the impacts of the condemnation while preventing a landowner from reaping a windfall award for lost visibility if visibility was not a valuable attribute of the property before the condemnation.

CONCLUSION

Sometimes the most important legal principles are the most difficult to identify because they are so fundamental that we lose sight of their foundational position. Such is the case with the right to exclude. While the case law often struggles to understand exactly what rights are at issue when property is taken, Professor Merrill's statement that the right to exclude is the *sine qua non* of property provides a clear and practical tool for establishing when compensation must be paid. This is especially so when visibility, often a key attribute of value in real property, is lost as a result of a condemnor using its power of condemnation to overcome an owner's fundamental right to exclude. Merrill's principle used as an analytical tool allows us to logically resolve when compensation should be paid for lost visibility.