Note

Compensable Property Rights and Visibility Damages in Public Transportation Infrastructure Projects: *Department of Transportation v. Marilyn Hickey Ministries*

Kurtis T. Morrison*

* J.D. Candidate, May 2013, University of Denver Sturm College of Law; M.A. George Washington University; B.A. Creighton University. The author is the House Committee on Transportation staff person and transportation public policy specialist for the Colorado General Assembly. The author would like to thank Rachel A. Reiter, M.B.A. for her assistance.

I. INTRODUCTION

Echoing the U.S. Constitution, the Colorado Constitution provides that no private property shall be taken or damaged for public use, unless just compensation has been provided to the property owner.[1] In Colorado, just compensation is determined by a panel of three or more persons in accordance with statutory requirements set by the General Assembly.[2] Compensation rendered must be equal to an owner's loss so as to place him or her in an identical pecuniary position had the taking never occurred—thereby making the owner whole.[3]

Often, condemnations involve only a taking of a fraction of an owner's property. In such cases, the remainder property may suffer value reductions due to the taking, thereby entitling the owner to compensation for damages to the residue property.[4]

The Colorado Supreme Court has held that compensation for remainder property damages is the market value reduction resultant of the taking, offset by any special benefits gained.[5] Various courts have delineated factors to determine a remainder's market value diminution: view of the premises, surrounding of the premises, physical characteristics of a property, price at the time of purchase, prices of neighboring land, expert assessments and opinions, potential property uses, improvements, net income generated from the property, and likelihood of condemnation.[6] Yet, in relation to remainder damages due to public transportation im-

1. COLO. CONST. art. II, § 15, cl. 1.

2. COLO. CONST. art. II, § 15, cl. 2; Poudre Valley Rural Elec. Ass'n v. City of Loveland, 807 P.2d 547, 554 (Colo. 1991) (stating that the General Assembly may delineate requirements and amounts pertaining to the amount of compensation a condemnee may receive).

3. Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 806 (Colo. 2001).

4. COLO. REV. STAT. § 38-1-114; Dep't of Transp. v. Marilyn Hickey Ministries, 159 P.3d 111, 113 (Colo. 2007); Jagow v. E-470 Pub. Highway Auth., 49 P.3d 1151, 1156 (Colo. 2002); La Plata Elec. Ass'n. v. Cummins, 728 P.2d 696, 700 (Colo. 1986).

5. *Jagow*, 49 P.3d at 1161 (Colo. 2002) (citing *La Plata*, 728 P.2d at 698) ("The proper measure of compensation for damages to the remainder property is 'the reduction in the market value of the remaining property that is *caused by the taking*,' offset by the amount of any special benefits accrued due to the condemnation project.") (emphasis original).

6. United States v. 25.02 Acres of Land, More or Less, 495 F.2d 1398, 1400 (10th Cir. 1974); City of Brighton v. Palizzi, 214 P.3d 470, 476 (Colo. App. 2008).

provements, one factor has received specific attention by the Colorado courts—visibility damages.

In Colorado, conflicts between property ownership and new and expanding transportation infrastructure have led to a number of court cases regarding compensation for line of sight impairments or losses, including takings that impact scenic vistas or views.[7] Colorado's transportation network has experienced significant growth over the past fifty years. Landmark infrastructure investments, such as the Interstate-70 ("I-70") viaduct, the Interstate 25 ("I-25") Transportation Expansion project ("T-REX"), and the FasTracks light-rail system have all required public takings.[8] Consequently, owners of condemned properties have sought compensation for adversely affected remainders.[9] Often, plaintiffs have pursued visibility damages to recoup for value losses incurred by property remainders.

This analysis reviews the 2007 Colorado Supreme Court decision that addressed the compensability of visibility damages, *Department of Transportation v. Marilyn Hickey Ministries*.[10] In *Hickey Ministries*, a fraction of an owner's property was condemned, upon which a concrete overpass was constructed. The structure blocked a line of sight between the plaintiff landowner's remainder property and I-25. The plaintiff pursued compensation for value reductions due to the visibility loss of the remainder.[11]

II. Facts and Procedural History

In 2001, work began on the I-25 T-REX project.[12] A $1.67 billion investment in the I-25 central and southeast corridors of Denver, T-REX expanded highway lane capacity to improve traffic flow, upgraded interchanges to decrease congestion, and constructed new light-rail lines to provide public transit options.[13]

7. *See Hickey Ministries*, 159 P.3d at 112; *La Plata*, 728 P.2d at 696-97; City of Boulder v. Kahn's, Inc., 543 P.2d 711, 714 (Colo. 1975); Troiano v. Colo. Dept. of Highways, 463 P.2d 448, 449 (Colo. 1969).

8. *See, e.g.*, Board of County Comm'rs. v. Vail Assocs, Limited, 468 P.2d 842 (Colo. 1970) (public taking related to I-70 construction); *Hickey Ministries*, 159 P.3d at 112 (public taking related to T-REX project); Jeffrey Leib, *RTD Alerts 164 More of Land Seizure: the Agency's Letters to Owners Along the West Rail Line Offer Few Details Other than Square Footage*, Denver Post, Nov. 2, 2008, at B-01 (public takings related to FasTracks).

9. *See Hickey Ministries*, 159 P.3d at 112; *La Plata*, 728 P.2d at 696; *Kahn's*, 543 P.2d at 714; *Troiano*, 463 P.2d at 449.

10. *Hickey Ministries*, 159 P.3d at 112.

11. *Id.*

12. Jeffrey Leib, *At Launch, Pledges of T-REX Solvency*, Denver Post, Sep. 25, 2001, at B-1.

13. *Hickey Ministries*, 159 P.3d at 112.

To accommodate a new mass transit light-rail track line along the I-25 western curbside, the Regional Transportation District ("RTD") and the Colorado Department of Transportation ("CDOT") exercised eminent domain authority to condemn a narrow, 650-foot stretch of land.[14] The condemned property, located at the northwestern corner of the I-25 and Orchard Road interchange, was part of a religious campus owned by Marilyn Hickey Ministries ("Hickey Ministries").[15] The condemned property, approximately 10,000 square feet, two percent of the total campus area, was valued at $259,000 in compensable damages.[16]

The I-25 and Orchard Road interchange is heavily traveled by motorists commuting to and from various commercial centers and residential zones, including downtown Denver, the Denver Tech Center, and suburban and exurban developments. At the time of the condemnation, the Hickey Ministries property was visible from the I-25 southbound lanes, permitting thousands of commuters to view the campus daily. Once the 650-foot property was acquired, CDOT constructed a concrete wall, upon which the light-rail tracks descended an overpass clearing Orchard Road.[17] The size and location of the new wall blocked I-25 southbound motorists' line of sight of the religious campus.[18]

Hickey Ministries filed a claim for $1.9 million in pecuniary damages, mostly due to visibility losses to the remaining property of the religious campus—an amount over six times the value of the property actually condemned.[19] In adjudicating the claim, the question before the Colorado Supreme Court in *Hickey Ministries* was whether a landowner can be compensated for loss of visibility of one's property due to transportation infrastructure construction.[20]

In its claim, Hickey Ministries contended that "the retaining wall obscures passing motorists' views of its . . . property, which includes a substantial church complex."[21] CDOT and RTD counterargued that visibility of property is not a compensable attribute used in establishing property valuations for compensation.[22] Neither party disputed the bedrock facts that the overpass wall obstructed passing motorsts' visibility of the religious campus, and that there was no barrier to access.[23]

In the trial court, CDOT and RTD filed a motion in limine to ex-

14. *Id.*
15. *Id.*
16. *Id.* at 112-113.
17. *Id.* at 112.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Answer Brief at 2, *Hickey Ministries*, 159 P.3d 111 (No. 05SC816).
23. *Hickey Ministries*, 159 P.3d at 112.

clude evidence demonstrating the campus' market value loss due to the barrier's obstruction of I-25 drivers' line of sight towards the property.[24] The court agreed. The court found that a "view" is not compensable in determining the reduction of the *remainder property's* value; although views originating from the location of the *taken property* could be a valuation factor.[25] Thus, in regards to the light-rail wall, Hickey Ministries' damages would not account for lost visibility since the line of sight was of a property remainder.

On appeal, the decision was reversed.[26] Relying on a 1986 Colorado Supreme Court decision, the appellate court held that a remainder's reduction in value requires compensation for "all damages that are the natural, necessary, and reasonable result of the taking."[27] Whether or not such damages to the remainder are "aesthetic" was deemed irrelevant.[28] Accordingly, the appellate court remanded the case for reevaluation of the condemned property's compensable value, specifically accounting for the loss of passing motorists' visibility.

The Colorado Supreme Court granted certiorari to determine "whether the court of appeals erred in ruling that the landowner, part of whose property is being taken by eminent domain for a state transportation project, may recover damages for the impairment of passing motorists' view of the remainder of the landowner's property."[29]

III. Legal Background and Precedent

Eminent domain law provides just compensation, generally, for three sets of property damages: property damages due to a condemnation; property remainder damages residual to a condemnation; and special damages.[30] *Department of Transportation v. Marilyn Hickey Ministries* was a question of compensation for a remainder.

The Colorado Supreme Court has held that "not every depreciation in the value of [a landowner's remainder property] can be made the basis of an award of damages."[31] The construction and enhancement of public structures often results in obstructed or altered sight lines; consequently, property values may suffer. In response, landowners often pursue damages for either loss of sight directed towards their property or views out-

24. *Id.*
25. *Id.*
26. Dep't of Transp. v. Marilyn Hickey Ministries, 129 P.3d 1068, 1070 (Colo. App. 2005).
27. *Id.* (citing *La Plata*, 728 P.2d at 700).
28. *Id.* (citing Herring v. Platte River Power Auth., 728 P.2d 709, 712 (Colo. 1986)).
29. *Hickey Ministries*, 159 P.3d at 112.
30. *See La Plata*, 728 P.2d at 698-700.
31. Gayton v. Dep't of Highways, 367 P.2d 899, 900-01 (Colo. 1962) (citing People ex rel. Dep't of Pub. Works v. Symons, 357 P.2d 451, 453 (Colo. 1960)).

ward from their property. Compensation for visibility damages, from both public transportation authorities and other entities, varies by jurisdiction.[32] In Colorado, the modern rule was established in the 1969 decision: *Troiano v. Colorado Department of Highways*.[33]

A. Establishment and Reaffirmation of the Troiano Rule on Visibility Damages

In 1969, the court established the still-standing rule regarding visibility damages, due to transportation public improvements, both towards and from a property.[34] In *Troiano v. Colorado Department of Highways*, a motel owner brought an inverse condemnation proceeding against the Colorado Department of Highways (the predecessor state agency to the Colorado Department of Transportation) and the Colorado State Highway Commission.[35]

During the 1960s, construction of the Eisenhower Interstate Highway System was underway. In Colorado, a key highway system segment was the construction of an elevated I-70 viaduct through the north Denver area. One property owner objected to its construction, claiming an adverse effect upon her business constituting an inverse condemnation.

Troiano, a north Denver motel owner, sought $110,000 in damages due to diminution in her property's value stemming from the viaduct's construction.[36] Among her arguments, Troiano claimed the viaduct reduced motorists' views of her property; thereby reducing the motel's property value. Arguing that visibility is of utmost importance in generating customers for her business, Troiano contended that the Department of Highways caused diminished value to her property, requiring compensation.[37]

Pointing to non-Colorado authorities,[38] the Colorado Supreme Court drafted an opinion that serves as the modern day rule regarding visibility rights related to public improvements. The court held that a property

32. *See* 8,960 Square Feet, More or Less v. State Dept. of Transp. & Pub. Facilities, 806 P.2d 843 (Alaska 1991); Oliver v. AT&T Wireless Servs., 90 Cal. Rptr. 2d 491 (Cal. Ct. App. 1999); Dept. of Transp. v. Suit City of Aventura, 774 So. 2d 9 (Fla. Dist. Ct. App. 2000); Shriver v. City of Okoboji, 567 N.W.2d 397 (Iowa 1997); Stagni v. State ex rel. Dept. of Transp. & Dev., 812 So. 2d 867 (La. Ct. App. 5th 2002).

33. *Troiano*, 463 P.2d at 455-56.

34. *Id.*

35. *Id.* at 449.

36. *Id.*

37. *Id.* at 488.

38. *See* Earl v. Ark. State Highway Comm'n, 405 S.W.2d 931 (Ark. 1966); Probasco v. City of Reno, 459 P.2d 772 (Nev. 1969); Blair v. State, 244 N.Y.S.2d 274 (N.Y. App. Div. 1963); State ex rel. Schiederer v. Preston, 166 N.E.2d 748 (Ohio 1960); *see also* Campbell v. Ark. State Highway Comm'n, 38 S.W.2d 753 (Ark. 1931); Baldwin-Hall Co., Inc. v. State, 253 N.Y.S.2d 651 (N.Y. App. Div. 1964).

owner has no right to have travelers pass by his or her property; consequently, there is no right to have one's property remain visible to passing motorists.[39] Thus, there is no right to visibility *emanating from* the property.[40]

Following the *Troiano* ruling, the court again affirmed that line of sight is not a compensable right. In the 1975 decision *City of Boulder v. Kahn's, Inc.*, a Boulder establishment, protesting closure of a street to traffic, argued for visibility damages due to loss of its patrons' views.[41] The plaintiffs crafted a number of arguments against the City of Boulder's closure of Pearl Street (to develop what is now the Pearl Street Mall of downtown Boulder). In one supporting argument, the property owner asserted a right to have patrons drive by and view the establishment's location.[42]

Relying on the *Troijano* rule, the court dispensed with this claim.[43] Although the cases had distinguishing facts—*Troiano's* visibility claim dealt with reduced motorist visibility, *Kahn's* represented a complete removal of motorist traffic—the court soundly rejected the claim, utilizing the *Troiano* rule preventing visibility damages.[44]

B. *La Plata Electric Association, Inc. v. Cummins* – Establishment of the "Natural, Necessary, and Reasonable Result" Rule

In 1981, six years following *Kahn's*, the court ruled on *La Plata Electric Association, Inc. v. Cummins*.[45] In *La Plata*, the court evaluated visibility damages specifically related to loss of a property remainder's aesthetic appeal and scenic views.[46] The court held that a plaintiff could receive compensation for "all damage" including aesthetic damage.[47] Yet, this was not a departure from the *Troiano* rule.

In *La Plata*, an electric cooperative association planned to condemn an easement to install a power line along a stretch of land near Durango, Colorado.[48] The site crossed through a property with an impressive view of the city and mountains.[49] At the valuation hearing, damages to the

39. *Troiano*, 463 P.2d at 455-56.
40. *Id.* ("Loss of affinity or eye appeal . . . is non-compensable.").
41. *Kahn's*, 543 P.2d at 714.
42. *Id.*
43. *Id.* ("Respondents contend that persons have the right to drive by their establishments on Pearl Street and view them while driving by. That argument was negated in [*Troiano*].").
44. *Id.*
45. *La Plata*, 728 P.2d at 703.
46. *Id.*
47. *Id.*
48. *Id.* at 697.
49. *Id.*

remainder property were set at $5,000.[50] The landowners disagreed. A valuation of $5,000 was, in their estimation, too low, and ought to account for aesthetic damage to the property due to the power line's planned construction. The court granted certiorari to determine whether visible aesthetic damage was legally cognizable, and, thus, whether it should be accounted for in the remainder's valuation.[51]

The landowners' appraisers testified that the remainder's value was reduced due to two impacts: unattractiveness of the utility's power line, and obstruction of the property's views due the line's location.[52] As such, the remainder's damages were $5,000. The utility objected, unsuccessfully, to admission of the appraiser's testimony.[53]

The La Plata Electrical Association relied on *Troiano*, arguing for the court to rule the dispute as a simple visibility damages case.[54] The court conceded that aesthetic damages caused by the construction of public structures, as in *Troiano*, are noncompensable.[55] However, it distinguished *La Plata* from *Troiano*, in that the *Troiano* case was regarding an inverse condemnation action, whereas the case at hand was a taking in the form of an easement across the owner's property.[56] Thus, the court chose not to follow the *Troiano* rule in deciding the outcome of *La Plata.*

In place of the *Troiano* rule, the appellate court drafted an alternative rule allowing compensation for aethsetic damages "specifically relating to power lines."[57] The Colorado Supreme Court accepted the result, but rejected the rule used to reach the conclusion. In crafting its own rule, the court declared that when a value reduction occurs to a property remainder following a taking, the landowner should be compensated for all damages that are "the natural, necessary, and reasonable result of the taking."[58] Two justifications were provided.

The first of the court's reasons was that numerous other jurisdictions have adopted similar rules. The court stated:

> Some of these authorities [from non-Colorado jurisdictions] explicitly recognize a distinction between the assessment of compensation in the case of a partial taking—in which all damages that flow from that taking are compen-

50. *Id.*
51. *Id.* at 698.
52. *Id.* at 697.
53. *Id.*
54. *Id.* at 699.
55. *Id.* at 698-99 (citing *Troiano*, 463 P.2d at 456).
56. *Id.* (" . . . . prior cases, including *Troiano,* have involved inverse condemnation actions by landowners in which these owners claimed that damage to their property resulted from the use of adjoining or nearby land by a public entity; no physical taking of the plaintiff landowners' property occurred.").
57. *Id.* at 699.
58. *Id.* at 700.

> sable—and the assessment of compensation in the case of alleged damages when no land has been taken—in which only damages unique or special to the property are compensable. Others approve compensation, without sophisticated explanation, when the evidence establishes a reduction in the value of a remainder because of *general aesthetic damage flowing from the construction of a public improvement on the portion taken.*[59]

Secondly, the court reasoned that the above-stated approach is better reasoned . . . in terms of fairness and economic reality.[60]

Providing hypothetical scenarios, the court defended this position as a matter of equity—landowners that sell a fraction of their property would adjust their sales price to account for an adverse impact to their remaining property following the sale. As such, the court concluded that landowners should also receive damages that account for value reductions to their property when a portion of their land is taken by a public authority.[61]

The new rule, providing recovery for *all* remainder property damages brought about as the "natural, necessary, and reasonable result" of the original taking,[62] was also coupled with a correlative. Not only is full recovery provided, but a property owner may present "any relevant evidence concerning diminution of market value caused by the taking."[63] This provision would be at the core of the Hickey Ministries contention twenty years later in the CDOT case.

The *La Plata* rule was immediately used in another Colorado Supreme Court decision. In *Herring v. Platte River Power Authority*, the court disposed of a claim in which a landowner sought compensation for remainder damages after a portion of his property was condemned for a municipal electrical facility.[64] Testifying on behalf of the property owner, an appraiser stated that construction of the electrical facility on the condemned property reduced the value of the remainder property, in that the "nonharmonious" appearance of the facility detracted from the landowner's remainder.[65] As in *La Plata*, the court permitted recovery for "*all* damages to the remainder" captured within the scope of "natural, necessary, and reasonable" results of the taking.[66]

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59. *Id.* (emphasis added).
60. *Id.* at 701.
61. *Id.*
62. *Id.* at 700.
63. *Id.* at 703.
64. Herring v. Platte River Power Auth., 728 P.2d 709, 710 (Colo. 1986).
65. *Id.* at 711-12.
66. *Id.* (citing *La Plata*, 728 P.2d at 700).

IV. The Court's Decision

In the *Hickey Ministries* case, *Troiano* and *La Plata*, would serve as the parties' chief support for their arguments. CDOT and RTD contended that visibility, either inward or outward, is never a factor for compensation, as stated in the visibility damages rule established in *Troiano*.[67] Hickey Ministries countered that, under *La Plata*, it can recover for "*all* damages" to the remainder property that are the result of the taking of the 650-foot strip of land.[68]

Writing for the majority, Colorado Supreme Court Chief Justice Mary Mullarkey found for CDOT and RTD, thereby reversing and remanding to reinstate the trial court's decision.[69] Although the court found that compensation may be received for damages to a property remainder,[70] "[motorists'] visibility of a property . . . is not a compensable property right under the Colorado Constitution and our case law."[71] The Court reached its conclusion, following a sharp criticism of the lower court's reliance on *La Plata*, reasoning that Hickey Ministries, like the motel owner in *Troiano*, had neither a right to continued passing traffic nor a right to motorists' continued visibility of the religious campus.[72]

A. Inapplicability of *La Plata Electric Association v. Cummins*

In the *Hickey Ministries* opinion, the court also refuted the appellate court's reliance on *La Plata* in ruling against CDOT and RTD.[73] The criticism was based on two distinguishing points.

First, the court stated that the appellate court incorrectly relied upon the *La Plata* decision as its authority for holding in favor of Hickey Ministries. Specifically, the appellate court founded its reasoning on the *La Plata* rule that "a property owner should be compensated for all damages that are the natural, necessary and reasonable result of the taking."[74] The Colorado Supreme Court found this language too broad to cover visibility of one's property, thus limiting its elasticity.[75] As argued by CDOT, although *La Plata* assures compensation for "all damages," this

67. Opening Brief at 10, *Hickey Ministries*, 159 P.3d 111 (No. 05SC816).

68. Answer Brief, *supra* note 23, at 1 (emphasis added).

69. *Hickey Ministries*, 159 P.3d at 116.

70. *Id.* at 113 (citing Jagow v. E-470 Pub. Highway Auth., 49 P.3d 1151, 1156 (Colo. 2002)).

71. *Id.* at 116.

72. *Id.* at 113, 115.

73. *Id.* at 113 ("We find the court of appeals' reliance on *La Plata* to be misplaced; the controlling precedent is *Troiano*. We hold that because a landowner has no continued right to traffic passing its property, the landowner likewise has no right in the continued motorist visibility of its property from a transit corridor.").

74. *Id.* (quoting *La Plata*, 728 P.2d at 700).

75. *See id.*

rule is limited to only "*legally cognizable* damages."[76] The Colorado Supreme Court agreed.

The court also acknowledged that *La Plata* contained significant factual differences from *Hickey Ministries* and the controlling precedent, *Troiano*.[77] In *La Plata*, a public utility condemned a vacant parcel to construct an electric transmission line across the property.[78] The claim arose for damages to visibility *emanating from* the claimant's property. However, in both *Hickey Ministries* and *Troiano*, the claim arose out of the loss of visibility *towards* the claimant's property.[79] The court found the facts significantly distinguished, so as to dismiss *La Plata's* relevance to the case at hand. The Court stated:

> Rather, the sole basis of [Hickey Ministries'] claim is that motorists passing along a narrow 650 foot strip of land have a diminished view of the remainder property. *La Plata* did not recognize a right to visibility looking in toward one's property. As we stated above, *La Plata* only involved the loss of aesthetic value when taking an easement for an electric transmission line and all of the resulting damages following from such a taking.[80]

Even if Hickey Ministries attempted to employ the same strategy used by the *La Plata* landowner—arguing for damages due to loss of aesthetic appeal—the argument would fail as the blocked views are entirely dissimilar. In *La Plata*, a scenic vista was obstructed by a power line; in *Hickey Ministries*, an interstate highway was obstructed by a concrete barrier. To the court, this argument would not pass muster. There is no comparison between an obstruction of a scenic valley and mountain view, versus the blocking of unpleasant sights of passing traffic and resultant noise.[81] If anything, Hickey Ministries *benefitted by the obstruction.* As such, the plaintiff chose not to pursue an aesthetic value claim, which the court certainly would have ruled against.

Therefore, the court dismissed *La Plata's* relevance to the case at hand, opting instead to rely on *Troiano* as the correct controlling author-

76. Opening Brief, *supra* note 62, at 11 ("While *La Plata Electric* states that landowners are entitled to 'all damages' that are the natural, necessary and reasonable result of the taking, the 'all damages' language has been in Colorado law for many decades. Yet, Colorado cases have limited recovery to all *legally cognizable* damages.").

77. *Hickey Ministries*, 159 P.3d at 115.

78. *La Plata*, 728 P.2d at 697.

79. *Hickey Ministries*, 159 P.3d at 115 ("*La Plata* only recognized as compensable the value of a remainder property's aesthetic view, not the visibility of a property from a public transit corridor or the lack of a right to continued traffic flow past a property.").

80. *Id.*

81. *Id.* ("In the present case, [Hickey Ministries] does not claim a diminution in aesthetic value because the retaining wall obstructs its view from the remaining property out toward I-25. Nor could it reasonably claim that a view of a busy interstate freeway had any inherent aesthetic value.").

ity through which to adjudicate the case.[82]

B. No Right to Continued Passing Traffic or Continued Visibility Based on *Troiano v. Department of Highways*

In finding for the petitioner, the Court relied upon *Troiano* as its controlling authority.[83] In *Troiano*, the court examined a claim of compensation for lost visibility due to the nearby construction of an elevated interstate highway.[84] The *Troiano* plaintiff motel owner sought damages for diminished property value stemming from the loss of visibility of her business due to the construction of the I-70 viaduct.[85] Ultimately, the plaintiff failed to convince the court that the motel's loss of motorist visibility was compensable.[86] In deciding *Hickey Ministries*, the Supreme Court relied on two chief provisions from *Troiano*. First, the court concluded that Hickey Ministries had no right to continued passing motorists adjacent to its property.[87] Citing *Troiano*, the court repeated that "a property owner has no right to have the traveling public pass his property . . . ."[88] In applying the *Troiano* rule, the court reasoned that, similarly, Hickey Ministries lacked any legal right to a stream of passing automobiles along an adjacent public thoroughfare.[89]

Second, the court declared that the lack of a right to continued traffic would be inconsistent with a right to continued traffic *visibility*.[90] Again, the court's holding was founded on *Troiano*—coupled with similar, albeit nonbinding, authorities from Utah and Missouri state courts—holding that there is simply "no inherent property right to continued traffic or visibility along the I-25 transit corridor."[91]

The court further reasoned that Hickey Ministries religious campus never even possessed a right to the benefit it claimed to have lost.[92] I-25 was funded by taxpayers. Despite the fact that Hickey Ministries enjoyed the benefit of being seen by I-25 motorists, this was a benefit it never

82. *Id.* at 113.
83. *Id.*
84. *Troiano*, 463 P.2d at 449, 455.
85. *Id.*
86. *Id.* at 456.
87. *Hickey Ministries*, 159 P.3d at 116.
88. *Id.* at 114.
89. *Id.* at 114-15.
90. *Id.* at 114.
91. *Id.* at 114-15 (citing State ex rel. Mo. Highway Transp. Comm'n v. Dooley, 738 S.W.2d 457, 468 (Mo. Ct. App. 1987) (citing Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470, 474 (Mo. 1965) (holding that visibility loss due to the erection of an elevated viaduct is not an element of damages in condemnation proceedings)); Ivers v. Dep't of Transp. of State, 154 P.3d 802, 807 (Utah 2007) (holding that property owners have no protected interests in their property's visibility from an adjacent road, despite a taking)).
92. *Hickey Ministries*, 159 P.3d at 116.

possessed. Rather, the court cast the benefit as an "artificially created condition" which "does not inhere in the compensable value of the . . . property."[93] As support, the court repeated Justice Oliver Wendell Holmes, Jr.'s statement that "when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away."[94]

In short, a property owner has no right to the benefits of a public structure. Hence, Hickey Ministries held no right for I-25 to remain in its present form, despite any benefits that it enjoyed from its current positioning and location. As such, Hickey Ministries could not be compensated for changes to I-25, just as a local business establishment has no right to compensation for a municipality's relocation of a neighboring police station, firehouse, or other civic institution bestowing value on the property.

Based on this line of reasoning, grounded in the *Troiano* rule, the Supreme Court held that Hickey Ministries was unable to recover losses due to lost motorist visibility of the religious campus—a right that it never possessed in the first place.[95]

V. IMPLICATIONS

The *Hickey Ministries* decision, and the *Troiano* rule, hold significant implications for property owners and public transportation entities in Colorado. The resultant case law removes visibility damages, due to transportation projects, as a compensable right, for remainder properties. As a result, property owners, already having suffered property losses due to eminent domain, are prevented from receiving damages to their remaining land due to the construction of transportation infrastructure preventing passersbys from viewing their land or improvements.

This holding is particularly meaningful for parties located adjacent to transportation corridors—such as developers acquiring parcels to construct new transit-oriented development projects near light-rail stations. Such parties are acutely aware of the value of high visibility and high traffic locations in promoting their business interests. As a common business model, many private sector developers strategically locate projects adjacent to transportation infrastructure, specifically to take advantage of heightened visibility, passing motorists, and other transportation-related benefits. Under *Hickey Ministries*, such property owners would have no redress should a local government, metropolitan planning organization, public highway authority, transit agency, or CDOT choose to remove,

93. *Id.*
94. *Id.* (quoting Stanwood v. Malden, 31 N.E. 702, 703 (Mass. 1892)).
95. *Id.*

relocate, or reconstruct a transportation structure in such a way that minimizes or eliminates the visibility and traffic that the property owner once enjoyed and benefited from.

For example, the owner of a business establishment along a state highway may lose a number of patrons should CDOT determine that rerouting an adjacent highway is necessary. Under *Hickey Ministries* (and *Troiano*), should a restaurant owner bring a lawsuit to recover damages for the loss of visibility of her restaurant, she would most likely fail to recoup the value losses. Similarly, an urban residential property developer that invests significant capital to construct a housing development alongside a planned mass transit light-rail station could not recover damages in court, should RTD belatedly decide not to erect a station at that location, or to even construct the light-rail line altogther.

In contrast to these challenges for property ownership, *Hickey Ministries* and the *Troiano* rule provide flexibility for Colorado governmental entities exercising their police power and management of transportation networks. By removing visibility damages, a strong disincentive against rerouting or improving highways and other structures that impact sights and views is removed. In *Hickey Ministries*, CDOT and RTD relied on this argument. CDOT contended that a ruling in favor of Hickey Ministries would release a heavy fiscal burden on the state, by establishing a new rule affirming a right to be seen by adjoining highways—a complete deviation from the established and reaffirmed *Troiano* rule against visibility damages. Such a rule would unleash a "great financial burden on [s]tate transportation authorities" in the form of litigation costs and "inward" visibility damages.[96] This point is underscored by the expert valuation of the religious campus: damages for the land condemned was set at $259,000; damages for the remainder property's loss of motorists' views, $1.9 million.[97]

Had the court adopted this departure from the *Troiano* rule, potentially staggering costs due to similar property visibility losses could have adversely affected or altered future transportation planning, encouraging transportation officials to defensively plan transportation networks and improvements so as to avoid costly conflicts with property owners. Such a rule could be triggered at all levels—either the rerouting of a highway, or the growth of a thick tree on a public roadside right of way. Any visual blockage could potentially result in visibility damages requiring compensation.

96. Opening Brief, *supra* note 62, at 10-11.
97. *Id.* at 4-5, 8.

A. Exercising the State's Police Power for Transportation System Modifications

In its opinion, the court also engaged in the topic of transportation system modifications being within the state's police power.[98] Construction of a light-rail line, and an adjoining concrete overpass, was, in the court's estimation, appropriately within the police power and did not impair access to the plaintiff's property.[99] The court held that:

> Underlying *Troiano* . . . is the recognition that a public transit corridor like I-25 is an always evolving multi-modal point of access to a city's transportation infrastructure. The state's police power enables continued modifications to its public transportation systems and the '[r]ight of access is subject to reasonable control and limitation . . . it would be inconsistent' to recognize a right to visibility but no right to have the traveling public pass one's property. Under *Troiano,* there is simply no inherent property right to continued traffic or visibility along the I-25 transit corridor.[100]

The court concluded that CDOT and RTD "*reasonably* constructed the T-REX freeway and light rail portions . . . and accomplished this *without impairing access* to the Orchard Road entrance point to the Happy Church."[101] Although this statement is likely mere dicta, the court identifies two key factors for an appropriate exercise of police power related to transportation infrastructure: reasonableness and access. Although the court opted not to provide further elaboration, the implication is that the state, although bound to basic property ownership rights and law, still retains authority to modify its transportation infrastructure network. However, the state is bound to act reasonably in its execution such that access may not be unduly impaired by adjacent property owners.[102]

VI. Conclusion

At its foundations, *Department of Transportation v. Marily Hickey Ministries* makes clear the difference in seeing from and being seen, along with the corresponding interaction of compensable property rights. In matters of public transit corridors, the court rejects the latter.[103]

The *Hickey Ministries* decision has implications for both governments and private property owners. Governmental transportation entities are

98. *Hickey Ministries*, 159 P.3d at 114.

99. *Id.* at 115.

100. *Id.* at 114-15 (citing *Troiano*, 463 P.2d at 456).

101. *Id.* at 115 (emphasis added).

102. *See generally Troiano*, 463 P.2d at 456 (affirming that transportations planning is a necessary and appropriate police power).

103. *Hickey Ministries*, 159 P.3d at 116 ("The visibility of a property as seen from a public transit corridor is not a compensable property right under the Colorado Constitution and our case law.").

shielded from liability for visibility damages in such cases, thereby preventing potential litigation due to newly constructed, sight-blocking infrastructure. However, *Hickey Ministries* may also spur reticence by private actors seeking to locate business interests alongside transportation corridors. Fearful that such locational advantages may be lost or altered in the future, such property owners may reconsider the benefits of locating alongside transportation corridors.