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## Necessary Change: Re-Calculating Just Compensation for Environmental Benefits

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# NECESSARY CHANGE: RE-CALCULATING JUST COMPENSATION FOR ENVIRONMENTAL BENEFITS

Scott Salmon\*

## *Abstract*

This Note is about the recent New Jersey Supreme Court case, *Borough of Harvey Cedars v. Karan*, and how other courts should adopt its holding of allowing all reasonably certain and calculable benefits to be considered in determining partial takings just compensation. Furthermore, it addresses the impact that the decision will have on environmental takings and its importance to the future of both property and environmental law.

## *Table of Contents*

I. Introduction .....	553
II. History of Eminent Domain .....	555
III. Calculation of Just Compensation.....	560
A. Theoretical Conception of Just Compensation .....	560
B. Value Plus Damage Method.....	562
C. Before-and-After Method.....	564
D. Defining Special and General Benefits.....	566
IV. Impact on Environmental Takings .....	573
V. Borough of Harvey Cedars v. Karan .....	576
VI. Proposed Change and Its Effects .....	582
VII. Arguments and Alternatives .....	584
VIII. Conclusion .....	591

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### I. Introduction

*“In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall.”<sup>1</sup>*

*-Justice Barry T. Albin, Supreme Court of New Jersey*

Under the Fifth Amendment to the Constitution of the United States, colloquially known as the Takings Clause, the federal government may take private property for public use through the doctrine of eminent domain, provided that the owner is reimbursed with “just compensation.”<sup>2</sup> The calculation of this compensation is generally dictated by statute, which differs by jurisdiction and type of taking.<sup>3</sup>

Unfortunately, most methods of calculation currently in practice hinder government partial takings for environmental purposes, because the costs are unfairly weighted towards the landowner.<sup>4</sup> For example, if the government wishes to use its eminent domain authority to condemn a section of an individual’s property to replenish a beach, build a dam, or raise a windmill, the intangible benefits of the project to the public are generally not considered in calculating the compensation to the landowner.<sup>5</sup>

As a result of the inability to calculate such benefits, the proposed project may be prohibitively costly for the government with no financial offset for the benefits.<sup>6</sup> As the general goal of

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1. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 527 (N.J. 2013).

2. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

3. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 2.18, cmt. h (2000) (“Federal and state constitutions require that the servitude be acquired for some public purpose and that just compensation be paid.”); see also *infra* Part III for a more detailed discussion of calculation methods.

4. See *Harvey Cedars*, 70 A.3d at 527 (stating that in a formula used to determine damages of a partial taking, the court did not consider the benefits of that increased the value of the remaining property in a partial taking).

5. See *id.* at 535–36 (citing prior cases where any benefit to the landowner as a result of the taking is not considered in calculating the amount of compensation due to the landowner).

6. See *infra* note 218 and accompanying text. [Press release, Jerry Patterson]

eminent domain compensation serves to make the property owner whole,<sup>7</sup> these calculations are by definition focused on benefitting the private individual rather than the condemnor, the public acting through the government.<sup>8</sup>

The failure of most compensation models to account for general public benefits may make an environmental enterprise impossible for the government if the compensation costs are unreasonably high.<sup>9</sup> This Note argues for modifying partial takings jurisprudence in the mold of the recent New Jersey Supreme Court decision, *Borough of Harvey Cedars v. Karan*, such that just compensation to private owners would be calculated using the before-and-after method, offset by both reasonably calculable general and special benefits.<sup>10</sup>

First, this Note will set the stage for the current understanding of takings jurisprudence by discussing the history of eminent domain.<sup>11</sup> Then, this note will go deeper into a discussion of eminent domain and how just compensation is actually calculated in partial takings, by exploring the various methods and manners of calculation.<sup>12</sup> It will then look at how these calculations affect environmental takings<sup>13</sup> before looking at the specific case of *Borough of Harvey Cedars v. Karan*.<sup>14</sup> The decision forms the basis of the proposed modification to takings jurisprudence that this Note advocates.<sup>15</sup> Finally, this Note will

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7. See 26 AM. JUR. 2D *Eminent Domain* § 224 (2014) (“[C]ompensation should be designed to place the owner in a position as good as, but not better than, the position the owner is in before the taking occurs.”).

8. See *id.* (describing that compensation should reimburse a landowner to the full extent of their loss).

9. See *infra* note 218 and accompanying text. [Press release, Jerry Patterson].

10. See *Harvey Cedars*, 70 A.3d at 526–27 (“We now conclude that when a public project requires the partial taking of property, ‘just compensation’ to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.”).

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See *id.* at 384 (holding that the just compensation calculation must include benefits that homeowners obtained from storm protection that a constructed dune provided).

look at the proposed change and its effects, along with the opinions of both advocates and detractors.<sup>16</sup>

## *II. History of Eminent Domain*

In 1897, the Supreme Court incorporated the Takings Clause of the Fifth Amendment to the Due Process Clause of the Fourteenth Amendment,<sup>17</sup> which meant that the just compensation requirement of eminent domain applied to the states, in addition to the federal government.<sup>18</sup> The Court held in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* that:

[the] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution [sic] of the United States.<sup>19</sup>

*Chicago* involved the taking of land by private individuals, along with the Chicago, Burlington & Quincy Railroad Company for the purpose of widening a road.<sup>20</sup> In that instance, the Court awarded a nominal amount of \$1 to the condemnees, which they found constituted just compensation.<sup>21</sup> As a result of the Supreme Court's decision, when a state or a local jurisdiction decides to use their eminent domain authority, they must not only provide the

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16. See *infra* Parts VI and VII.

17. See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of . . . property, without due process of law.”).

18. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (affirming that the Due Process Clause of the Fourteenth Amendment extends just compensation obligations to the states).

19. *Id.*

20. See *id.* at 230 (explaining that the city of Chicago petitioned to the circuit court of Cook county for the condemnation of land for the improvement and sought just compensation for private property taken or damaged).

21. See *id.* (noting that the jury determined \$1 to be just compensation for the railroad company's portion of the right of way).

same procedural due process the Fourteenth Amendment requires, but must also provide just compensation, even if the appropriate amount is merely a nominal fee.<sup>22</sup>

Until 1922, courts interpreted the Takings Clause literally as it was written, so property had to be physically taken for public uses to qualify under the doctrine of eminent domain.<sup>23</sup> In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court expanded the definition of takings by holding that regulation of property beyond a certain point constitutes a regulatory taking and required just compensation.<sup>24</sup>

In that matter, the Kohler Act prohibited mining that would cause subsidence of homes and surfaces near residential properties.<sup>25</sup> The Pennsylvania Coal Company proceeded to mine underneath the homes based on the explicit terms of the deeds to the homes, which only granted the landowners the rights to the surface, and not the ground beneath their land.<sup>26</sup> The contractual agreement through the deeds conflicted with the Kohler Act, so the Court found that the statute's regulatory powers necessarily constituted a taking because they were so restricting upon the Pennsylvania Coal Company's rights as owner the land beneath the property.<sup>27</sup>

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22. See *id.* at 247 (stating that the state court has a duty to guard and protect the constitutional right of due process enjoined by the Fourteenth Amendment).

23. See JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 678 (2d ed. 2005) ("Before 1922, the takings clause was interpreted fairly literally. A taking would be found when a state or the federal government exercised its *eminent domain power* to take property for public uses.").

24. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

25. See *id.* at 416–17 ("The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent 'as to cause the . . . subsidence of . . . any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.'") (Brandeis, J., dissenting).

26. See *id.* at 412 ("The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal.").

27. See *id.* at 414 ("It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of

As the Court stated, “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>28</sup> Regulations that essentially deprive landowners of their property rights thus qualify as a regulatory taking.<sup>29</sup> After *Pennsylvania Coal Co.*, a taking could be either physical or regulatory, both of which would require just compensation.<sup>30</sup>

Eminent domain jurisprudence changed significantly again in 1978 with the Supreme Court’s decision in *Penn Central Transportation Co. v. New York City*, which called for an ad hoc determination of various factors in considering whether or not a regulatory taking has occurred.<sup>31</sup> In this case, the landowner owned Grand Central Terminal and wanted to build a multistory office building on top.<sup>32</sup> However, the terminal had been designated a landmark under New York’s Landmark Preservation Law.<sup>33</sup> The landmark status of the building prevented such construction, so the owner sued, alleging that the restrictive nature of the statute constituted a regulatory taking which demanded just compensation under the Takings Clause.<sup>34</sup>

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coal under streets or cities in places where the right to mine such coal has been reserved.”)

28. See *id.* at 415.

29. See SINGER, *supra* note 23, at 680 (“Justice Holmes reasoned [in *Pennsylvania Coal*] that regulations that deprive owners of the value of their property were as harmful to the legal rights and justified expectations of owners as outright seizure of their land.”).

30. See *Pennsylvania Coal*, 260 U.S. at 415 (stating that if a regulation goes too far then it is a taking and the constitutional way of paying for the change must be upheld).

31. See SINGER, *supra* note 23, at 687 (“Instead of a clear rule, the Court engages in ‘essentially ad hoc, factual inquiries’ into the ‘particular circumstances’ of the case . . . .”); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance.”).

32. See *Penn Central*, 438 U.S. at 104 (“[A]ppellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal.”).

33. See *id.* (“Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a “landmark” and the block it occupies a ‘landmark site.’”).

34. See *id.* (“[A]ppellants brought suit in state court claiming that the application of the Landmarks Law had “taken” their property without just compensation in violation of the Fifth and Fourteenth Amendments and

The Court ruled that the ad hoc factors to be considered included the “economic impact of the regulation on the claimant,” and the extent of the government’s regulatory interference, among others.<sup>35</sup> As a result, it took a holistic view in considering whether or not a regulatory taking had occurred, and looked at the substance rather than the form of the regulations.<sup>36</sup>

Although this Note does not focus on regulatory takings, there is currently an enormous amount of discussion about the subject in conjunction with environmental issues relating to land conservation, wetlands management, endangered species, mining, and industrial air pollution, making the subject relevant in a corollary manner.<sup>37</sup>

The most recent major development in complete takings law came in 2005 with the Supreme Court’s decision in *Kelo v. City of New London*, in which the Court held that the government may transfer private property to another private party, with proper compensation, and qualify as a legitimate public taking.<sup>38</sup> Furthermore, the defining characteristic seemingly emphasized by Justice Stevens was the “public purpose” of the taking: “Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments . . . .”<sup>39</sup> *Kelo* was concerned primarily with complete

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arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment.”).

35. See *id.* at 124 (describing the specific significant ad hoc factors of relevant consideration).

36. See *id.* (acknowledging that the Court has been “unable to develop any ‘set formula’”).

37. See Jennifer Koons, *Supreme Court’s Regulatory Takings Case Draws Widespread Interest*, N.Y. TIMES (Oct. 6, 2009), <http://www.nytimes.com/gwire/2009/10/06/06greenwire-supreme-courts-regulatory-takings-case-draws-w-78107.html> (noting the widespread interest from then-Solicitor General Elena Kagan, attorney generals from twenty-six states, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and others, in *Stop the Beach Renourishment v. Florida*, a regulatory takings case that involved a plan to create a state-owned public beach between private waterfront land and the Gulf of Mexico) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

38. See *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (holding that the city’s exercise of eminent domain power on ground takings met the constitutional “public use” requirement).

39. See *id.* at 480 (rejecting a narrow test for the universal test to determine public purpose).



takings, and the specific question has not come before the Supreme Court with regards to partial takings, so it is unclear if the Court would view the public purpose requirement as broadly and necessary as in partial takings.<sup>40</sup> However, the lack of a distinction made in *Kelo* between types of takings would indicate the requirement would apply similarly to partial takings.<sup>41</sup>

The only significant federal case addressing partial takings is *Bauman v. Ross*, which came before the Supreme Court soon after the *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* decision in 1897.<sup>42</sup> In that matter, the Court dealt with the expansion of Washington, D.C. and the necessity of partially taking property under eminent domain to build the streets of the city.<sup>43</sup> Justice Horace Gray wrote of the constitutionality of partial takings, and that in calculating compensation, for federal purposes, only special benefits may be set off from the compensation award, and not general benefits.<sup>44</sup> This distinction is discussed in more detail in Section III, but it fits within the majority view of the subject.<sup>45</sup>

From the time the Fifth Amendment was ratified in 1791 to the *Kelo* decision in 2005, courts have changed the accepted

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40. See *id.* at 479 (noting that the public use test was difficult to administer because the definition of public use was unclear on the issue of public purpose).

41. See *id.* at 480 (reaffirming the broad interpretation of public use as “public purpose”).

42. See *Bauman v. Ross*, 167 U.S. 548, 561 (1897) (“[A] jury of seven was summoned . . . and the introduction of evidence by the petitioners and by the respondents, rendered a verdict, in the form prescribed by the court, setting forth a description of each parcel of land affected, the number of square feet in the parcel, the number of square feet taken, the number of square feet not taken . . .”).

43. See *id.* at 550 (“Congress accordingly, by the act of August 27, 1888 (chapter 916), entitled ‘An act to regulate the subdivision of land within the District of Columbia,’ authorized the commissioners of the District of Columbia to make and publish general orders regulating the platting and subdividing of all lands and grounds in the District . . .”).

44. See *id.* at 581–82 (“We, of course, exclude the indirect and general benefits which result to the public as a whole . . . But, if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation.”).

45. See *infra* Part III.D (providing a more detailed discussion of special and general benefits).

interpretation of the Takings Clause in a staggered manner from a literal interpretation to a much more complex tool that can be used for public use and private individuals through varying methods.<sup>46</sup>

### III. Calculation of Just Compensation

#### A. Theoretical Conception of Just Compensation

When the government takes an entire property either physically or through regulation, the just compensation owed to the condemnee is calculated by a simple appraisal of the property to determine its fair market value, which is then paid to them by the government.<sup>47</sup> For a complete taking, the Takings Clause does not require compensation for anything other than the taken property, not even consequential or future damages.<sup>48</sup> As the Supreme Court said in *Boston Chamber of Commerce v. Boston*, the Fifth Amendment “merely requires that an owner of property taken should be paid for what is taken from him.”<sup>49</sup>

However, the simple compensation rule for complete takings does not extend to partial takings, where the government seeks only a section of the privately owned property.<sup>50</sup> A typical example would be if the government condemned a strip of land within a larger plot to build a highway.<sup>51</sup> This would constitute a

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46. See *Kelo*, 545 U.S. at 483 (noting that public use jurisprudence changed from rigid formulas to favoring an approach giving legislatures broad latitude).

47. See WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 539 (3d ed. 2000) (“In the usual kind of taking case [a complete taking] . . . the remedy is monetary damages . . . measured by the owner’s loss, the fair market value of the land . . .”).

48. See BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, *FUNDAMENTALS OF PROPERTY LAW* 747 (3d ed. 2010) (“For example, the Takings Clause does not require compensation for consequential damages, such as relocation costs.”).

49. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

50. See 1 LEWIS ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 47 (2d ed. 1953) (describing the various scenarios in which a partial taking may be confused with a complete taking).

51. See *State ex rel. State Highway Comm’n v. Nickerson*, 578 S.W.2d 916 (Mo. 1979) (illustrating an example of a partial taking).

partial conveyance, whereas the condemning the entire plot of land to construct a nature preserve would be a complete taking.<sup>52</sup>

Determining the value of a partially taken property brings difficult questions.<sup>53</sup> If the piece taken contains the majority of the value of the property, or if the remaining property is worthless without the section that was taken, valuation becomes a balancing test of different factors with no precise answer.<sup>54</sup> If a partial taking will increase the value of the remaining property instead of decreasing it, that presents problems because an individual should not be expected to pay the government for the privilege of having their property taken.<sup>55</sup> As a result, there are a number of issues facing any calculation that must be addressed in a proposed formula.

Although a variety of methods have been postulated,<sup>56</sup> as a matter of practice, there are two principal methods of calculating just compensation in partial takings.<sup>57</sup> The first method, known as “value plus damage” (“VPD”), calculates the value of the part taken, plus any damages to the remainder.<sup>58</sup> Currently, a majority of jurisdictions use VPD.<sup>59</sup> The second method, known as “before-and-after” (“BAA”), takes the difference between the fair market value of the entire property before and after the taking,

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52. See *Dep’t of Pub. Works & Bldgs. v. Keller*, 335 N.E.2d 443, 446 (Ill. 1975) (illustrating such an example as a complete taking).

53. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526–27 (N.J. 2013) (stating that the Court must consider all “relevant, reasonably calculable, and non-conjectural factors” to determine the value of the remaining property).

54. See *Dep’t of Transp. v. Gunnels*, 340 S.E.2d 12, 15 (Ga. 1986) (“A partial taking (hypothetically, of a narrow strip) might indeed render a remainder, still within the ownership of the condemnee, nearly worthless.”).

55. See *United States v. 101.88 Acres of Land*, 616 F.2d 762, 769 (5th Cir. 1980) (“If, instead, the taking increases the value of the remainder, the increment in value may be set off against the compensation awarded for the land condemned.”).

56. See ORGEL, *supra* note 50, § 48 (listing three possible formulae). *But see* AM. JUR. *supra* note 7, § 373 (listing four possible formulae).

57. See ORGEL, *supra* note 50, §§ 50–51 (describing the “value plus damage” method and the “before-and-after” method).

58. See *id.* § 52 (describing the application of the VPD formula in case law).

59. See *id.* § 50 (“This formula is perhaps more often used than any other.”); see also AM. JUR., *supra* note 7, § 324 (“In most states, the condemnee’s compensation for a partial taking is calculated under some variation of the ‘value plus damage’ rule . . .”).

minus any benefits to the property as a result.<sup>60</sup> Both methods are composed of two steps, which will be discussed in more detail below.

### *B. Value Plus Damage Method*

The finder of fact calculates VPD through two steps.<sup>61</sup> The first step requires the valuation of the piece of property taken.<sup>62</sup> This usually involves hearing testimony from appraisal experts and other forms of extrinsic evidence.<sup>63</sup> Following the initial valuation, the second step is to add the value of any damages to the remaining part of land, which may be offset by special benefits.<sup>64</sup>

The valued damages to the remainder of the property are known as “severance damages.”<sup>65</sup> Severance damages are broadly defined as “the depreciation in the ‘market value’ (or ‘fair market value’) of the remainder resulting from, or due to, the taking of that portion of the owner’s property that is expropriated.”<sup>66</sup> As one court stated, “[s]everance damage in an expropriation case may be defined as a diminution in the value of the landowner’s remaining, unexpropriated property.”<sup>67</sup> If the government were to condemn part of an individual’s property to take an easement for the construction of a natural gas pipeline and this were to increase the difficulty of developing or selling the remaining land,

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60. See ORGEL, *supra* note 50, § 51 (introducing the basic components of the BAA formula).

61. See AM. JUR., *supra* note 7, § 324 (“[T]he condemnee should receive compensation equal to the total of: (1) the value of the property actually taken, and (2) any net damages to the property remaining, after offsetting special benefits to the remaining property.”).

62. See *id.* (listing the first step of calculating under VPD).

63. See *id.* § 229 (explaining methods used to determine the valuation of the property).

64. See *id.* § 324 (listing the second step of calculating under VPD); see also *infra* Part III.D (providing a more detailed discussion of special benefits).

65. See SINGER, *supra* note 23, at 750 (“The reduction in the value of the remaining [property] is called severance damages.”).

66. ORGEL, *supra* note 50, § 53.

67. See State Dept. of Transp. and Dev. v. Regard, 567 So. 2d 1174, 1176 (La. Ct. App. 1990).

the value of these damages will increase the intrinsic value of the taken property as a measure of severance damages.<sup>68</sup>

Furthermore, “[w]hatever is reasonably certain to follow as an incident to such construction and operation, which in an appreciable degree depreciates the value of the remaining land, is a proper element of damages to be considered by the jury in arriving at its verdict.”<sup>69</sup> Courts have held that severance damages must “proximately arise” as a consequence of the taking.<sup>70</sup> There is wide acceptance of the importance that every type of damage may be considered.<sup>71</sup> Courts have held that there should be broad admissibility of evidence,<sup>72</sup> and that “[a] court may consider all factors indicative of the value of the property, and which would have been present in the minds of a willing buyer and a willing seller.”<sup>73</sup>

Courts have also been clear that the damages admitted must be real and may not be “too speculative or remote,” which would make them “not a necessary, natural, or proximate result of the taking.”<sup>74</sup> If the possibility of a specific damage may occur but is unlikely, the value of such damages may not be considered in the final valuation of just compensation.<sup>75</sup>

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68. See *Portland Natural Gas Transp. Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 284 (1st Cir. 2003) (“[T]he Requirements supports the court’s determination that [it] would decrease the price a reasonable buyer was willing to pay. . . . [T]he encumbered land may not be used for structure, storage, or trees. . . . [A] landowner must submit proposed plans to the Pipeline Companies for authorization before beginning any work on or near the easement.”).

69. *Idaho & W. Ry. Co. v. Coey*, 131 P. 810, 810 (Wash. 1913).

70. See *Cent. Ga. Power Co. v. May*, 72 S.E. 900, 901 (Ga. 1911) (“The measure of such consequential damages is the diminution in the market value of the remainder of the property proximately arising from the causes just mentioned.”).

71. See AM. JUR., *supra* note 7 § 224 (“[I]t is proper to consider all factors indicative of the value of the property and which would have been present in the minds of a willing buyer and a willing seller if the peroperty were offered in a free market exchange.”).

72. See *United States v. L.E. Cooke Co.*, 991 F.2d 336, 341 (6th Cir. 1993) (“[Federal] Rule [of Evidence] 702 should be broadly interpreted on the basis of whether the use of expert testimony will assist the trier of fact.”).

73. *Kurth v. Iowa Dept. of Trans.*, 628 N.W.2d 1, 6 (Iowa 2001)(citing 26 AM. JUR. 2D, *Eminent Domain* § 294 (1996)).

74. See *id.* (noting that a jury can consider things that may entice a buyer to purchase the property) (citing 26 AM. JUR. 2D, *Eminent Domain* § 294 (1996)).

75. See ORGEL, *supra* note 50, § 59 (describing how potential, speculative, and remote damages may not be considered); see also AM. JUR.

Finally, any benefits or increase in value to the remaining property may not be subtracted from the compensation for the taken property as part of the first step.<sup>76</sup> If a hypothetical new highway would increase the value of a farm due to easier export of crops, for example, that value may not be used to offset the valuation of the property taken.<sup>77</sup> At most, benefits to the remainder “may be deducted from the consequential or severance damages.”<sup>78</sup> If the benefits so completely overwhelm the damages, “the condemnor does not have to provide compensation for any severance damages.”<sup>79</sup> But even if the severance damages are completely negated by the listed benefits, the initial valuation of the property taken may not be touched; that amount is guaranteed to the condemnee.<sup>80</sup>

### C. Before-and-After Method

Although the majority of jurisdictions do not use BAA,<sup>81</sup> there are some specific advantages to the method over VPD,

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*supra* note 7, § 281 (“While severance damages may be awarded for real diminution of value sustained by a remainder, recovery may not be based on speculative, remote, imaginary, contingent, or merely possible events.”).

76. See AM. JUR., *supra* note 7, § 324 (“Under the value plus damage rule, a property owner must receive just compensation for the entire value of the part of the land that is taken, regardless of the fact that the remaining land is benefitted by the project.”); see also *Alabama Power Co. v. 1354.02 Acres, More or Less, of Land in Randolph County, Ala.*, 709 F.2d 666, 668 (11th Cir. 1983) (“[T]here is a distinction . . . between the land taken and the land remaining. The property owner must receive ‘just compensation’ for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land...may be offset by enhancement in the value of that land.”).

77. See *Ivy Inn, Inc., v. Metro. Atlanta Rapid Transit Auth.*, 340 S.E.2d 600, 601 (Ga. 1986) (elaborating about how the incremental benefit to the adjacent land because of the use of nearby land for a MARTA station “cannot be deducted from the value of the land actually taken.”).

78. See AM. JUR., *supra* note 7, § 324 (explaining that the special benefit “may not be deducted from value of the part taken”).

79. See *id.* (observing that courts base the “value plus damage” rule on constitutional or statutory requirement of just compensation).

80. See *Westgate Ltd., v. Texas*, 843 S.W.2d 448, 456 (Tex. 1992) (stating that “the landowner is in all cases entitled to at least the market value of the part taken”).

81. See Jerome P. Pesick, *Eminent Domain: Calculating Compensation in Partial Taking Condemnation Cases*, 82 MICH. BAR J. 12, 35

which will be outlined. Calculation of this method occurs through two steps, the first of which involves determining the difference between the fair market value of the property before and after the taking.<sup>82</sup> This can be done through appraisals and real estate experts as a question for a finder of fact.<sup>83</sup> Once the difference between the fair market value of the property before and after the taking is determined under the BAA model, the second step grants deductions for “benefits which may also accrue to the condemnee.”<sup>84</sup>

Although at least one theorist has stated that BAA may simply be another way of expressing the VPD method without any actual difference, he later noted that the application seems to take a more realistic value of the damages, rather than the artificial nature of the VPD.<sup>85</sup> With the VPD method, “an appraiser is prone to exaggerate both elements of compensation . . . [T]he formula encourages him to make allowance for damages though none in fact may have been sustained.”<sup>86</sup> Instead, the BAA method, by definition, efficiently incorporates any damages into the final valuation, leaving less room for human error.<sup>87</sup> As a result, BAA ensures more accurate and fair results.

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(2003) (“Generally, just compensation is measured by determining the market value of the property that is taken.”).

82. See AM. JUR., *supra* note 7, § 237 (“Under this so-called ‘before-and-after’ rule, the measure of damages or compensation in such a case is the difference between the value of the whole tract, lot, or parcel of land immediately before the taking, and the value of the remaining part immediately afterward.”); see also ORGEL, *supra* note 50, § 51 (stating that one possible formula includes the “[d]ifference between the [f]air [m]arket [v]alue of the [p]roperty before and after the [t]aking”).

83. See AM. JUR., *supra* note 7, § 237 (describing how the “before” and “after” valuations must also be calculated using the same method).

84. See *id.* § 335 (“[B]enefits accruing primarily to property not owned by the condemnee cannot be considered even though some incidental benefit may also accrue to the condemnee.”).

85. See ORGEL, *supra* note 50, § 51 (“Whether or not it is simply another mode of expressing “value of the land taken plus damages to the remainder” is a difficult question . . . it is at least more satisfactory than the more usual formula, for it recognizes the artificial nature of the dichotomy required by the latter.”).

86. *Id.* § 64.

87. See AM. JUR., *supra* note 7, § 283 (“In the case of a partial taking, if the before and after measure of compensation is properly submitted to the jury, there is no occasion for counsel or the trial court to talk about

### *D. Defining Special and General Benefits*

Broadly, benefits incorporated into a just compensation award may be either “special” or “general.”<sup>88</sup> Although the difference between the two has been characterized as “nebulous at best,”<sup>89</sup> special benefits tend to be specific to the remaining property, while general benefits are those “which affect the entire community or neighborhood.”<sup>90</sup> In fact, it has been stated that “[g]eneral benefits are those the adjoining landowner shares in common with the general public, and special benefits are those resulting from a public work that enhances the value of the lands not taken because of their advantageous relation to the improvement.”<sup>91</sup>

One theorist has highlighted the differences by stating that “benefits which the public enjoys as a result of the improvement are classified as general benefits; benefits which inure to an individual landowner as a private advantage by reason of the direct relation of his remaining property to the improvement are classified as special benefits.”<sup>92</sup> Finally, the United States Court of Appeals for the Federal Circuit has noted that distinguishing between the two is not always an easy task, stating that, “as a general matter, special benefits are those that inure specifically to the landowner who suffered the partial taking and are associated with the ownership of the remaining land. In contrast, benefits that inure to the community at large are considered general.”<sup>93</sup>

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“severance damage” as such, and indeed it may be confusing to do so. The matter is taken care of automatically in the ‘before and after’ submission.”).

88. See *id.* § 345 (defining special and general benefits).

89. *Id.* § 342.

90. *Sullivan v. N. Hudson Cnty. R.R. Co.*, 18 A. 689, 690 (N.J. 1889). *But see* AM. JUR., *supra* note 7, § 345 (stating that a condemnee may receive a special benefit even if the entire neighborhood benefits from the taking).

91. AM. JUR., *supra* note 7, § 338.

92. Comment, *Special Benefits and Just Compensation: Ensuring Fair Treatment of Landowners in Partial Taking Cases*, 27 ME. L. REV. 279, 281 n.9 (1975) (citing 3 NICHOLS, EMINENT DOMAIN § 8.6202 (3d ed. 1974)).

93. See *Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999) (citations omitted).



Although these concepts may seem distinct in theory, they can become clouded in practice.<sup>94</sup> If a partial taking for the creation of a railroad will help the community but helps the landowner the most, it would be considered a general benefit even though it also gives special benefits to the landowner.<sup>95</sup> Conversely, even if a general benefit helps the community equally, the benefits to the individual landowner are not lost, despite the general community advantage.<sup>96</sup>

Specifically, in forty-four states<sup>97</sup> and the federal government,<sup>98</sup> “compensation for a partial taking will be reduced

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94. See AM. JUR., *supra* note 7, § 343 (noting that because the distinction can be confusing, many courts have rejected it).

95. See AM. JUR., *supra* note 7, § 348 (observing that a rationale for this classification is that it “allow[s] setoff against the compensation for those whose land has been partially taken, but [does] not . . . require any payment from others in the neighborhood who benefit from the improvement but whose property has not been taken.”).

96. See *id.* (noting that these are not special benefits and cannot be deducted).

97. See generally *Marion McRea v. Marion Cnty.*, 133 So. 278 (Ala. 1931); *Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 612 (Alaska 1999); *Taylor v. Arizona*, 467 P.2d 251 (Ariz. 1970); *Arkansas State Highway Comm’n v. Phillips*, 398 S.W.2d 899 (Ark. 1966); *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18 (Colo. 2000); *Connecticut Ry. & Lighting Co. v. Waterbury*, 18 A.2d 700 (Conn. 1941); *Acierno v. Delaware*, 643 A.2d 1328 (Del. 1994); *Caspersen v. W. Coast Inland Nav. Dist.*, 198 So. 2d 65 (Fla. Dist. Ct. App. 1967); *Williams v. State Highway Dep’t* 85 S.E.2d 616 (Ga. 1971); *Hawaii v. Midkiff*, 516 P.2d 1250 (Haw. 1973); *State ex rel. Symms v. Collier*, 454 P.2d 56 (Idaho 1969); *Dep’t of Public Works & Bldgs. v. Barton*, 19 N.E.2d 395 (Ill. 1939); *Gradison v. Indiana*, 300 N.E.2d 67 (Ind. 1973); *Horak Prairie Farm, L.P. v. Cedar Rapids*, 748 N.W.2d 504 (Iowa 2008); *Davis v. Leawood*, 893 P.2d 233 (Kan. 1995); *Dep’t of Highways v. Sherrod*, 367 S.W.2d 844 (Ky. 1963); *Dep’t of Highways v. Trippeer Realty Corp.*, 276 So. 2d 315 (La. 1973); *J.A. Rapaport Family Ltd. P’ship v. Brewer*, 877 A.2d 1077 (Me. 2005); *Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty.*, 691 F.2d 702 (4th Cir. 1982); *Hilbourne v. Suffolk Cnty.*, 120 Mass. 393 (1876); *Michigan Dep’t of Transp. v. Tomkins*, 749 N.W.2d 716 (Mich. 2008); *Minnesota v. Strom*, 493 N.W.2d 554 (Minn. 1992); *Adcock v. Mississippi Transp. Comm’n*, 981 So. 2d 942 (Miss. 2008); *State Highway Comm’n v. Gatson*, 617 S.W.2d 80 (Mo. Ct. App. 1981); *Lewis & Clark Cnty. v. Nett*, 263 P. 418 (Mont. 1928); *Prudential Ins. Co. v. Cent. Nebraska Pub. Power & Irrigation Dist.*, 296 N.W. 752 (Neb. 1941); *Dep’t of Highways v. Haapanen*, 448 P.2d 703 (Nev. 1968); *Lebanon Hous. Auth. v. Nat’l Bank of Lebanon*, 301 A.2d 37 (N.H. 1973); *State Highway Dep’t v. Kistler-Collister Co.*, 529 P.2d 611 (N.M. 1975); *Lineburg v. Sandven*, 21 N.W.2d 808 (N.D. 1946); *Hurst v. Starr*, 607 N.E.2d 1155 (Ohio Ct. App. 1992); *Williams Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997); *State Highway Comm’n v. Hooper*, 488 P.2d 421 (Or. 1971); *Appeal of Philadelphia Elec. Co. (PECO)*,

by the value of any special benefits to be conferred on the remaining land, but not by the value of any general benefits,” presumably so the condemnee isn’t forced to solely bear the cost of the surrounding neighborhood’s gain.<sup>99</sup> Such consideration precludes the offset of general benefits against the compensation award.<sup>100</sup>

The Oregon Court of Appeals highlighted these special benefits in holding that “[a]ny devaluation of property retained by a condemnee can be offset by the value of any ‘special benefit’ that is conferred on the remaining property by the taking.”<sup>101</sup> Other courts have agreed, with one stating that “only ‘special’ benefits can be deducted from any compensation due; ‘general’ benefits cannot be deducted.”<sup>102</sup> The Missouri Court of Appeals for the Southern District has been even more specific, noting, “special benefits to a condemnee’s remaining real estate may be set off against an award of compensation for the real estate that is taken, but general benefits may not be set off.”<sup>103</sup>

In *Bauman v. Ross*, the Supreme Court held that for federal takings:

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580 A.2d 424 (Pa. 1990); *Capital Props, Inc. v. Rhode Island*, 636 A.2d 319 (1994); *Robinson v. Richland Cnty. Council*, 358 S.E.2d 392 (S.C. 1987); *State Highway Comm’n v. Emry*, 244 N.W.2d 91 (S.D. 1976); *Dep’t of Transp. v. Brevard*, 545 S.W.2d 431 (Tenn. Ct. App. 1976); *Texas v. McCarley*, 247 S.W.3d 323 (Tex. App. 2007); *Utah v. Harvey Real Estate*, 57 P.3d 1088 (Utah 2002); *Howe v. State Highway Bd.*, 187 A.2d 342 (Vt. 1963); *Washington v. Green*, 578 P.2d 855 (Wash. 1978); *Hietpas v. Wisconsin*, 130 N.W.2d 248 (Wis. 1964); *State Highway Comm’n v. Rollins*, 471 P.2d 324 (Wyo. 1970).

98. See *Bauman v. Ross*, 167 U.S. 548, 582 (1897) (noting that “the rule has been applied where the special benefits equaled or exceeded the damages, so that the owner of the land received nothing”).

99. See AM. JUR., *supra* note 7, § 338; *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1157 (Colo. 2002) (limiting the offset to special benefits, not general benefits); see also *Moyer v. Nebraska City Airport Auth.*, 655 N.W.2d 855, 863 (Neb. 2003) (limiting the offset to special benefits, not general benefits).

100. See AM. JUR., *supra* note 7, § 352 (describing that benefits that are common to the entire “community may not be deducted from a condemnation award.”).

101. *State of Oregon v. Fullerton*, 34 P.3d 1180, 1181 (Or. Ct. App. 2001).

102. *Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999).

103. See *Brandon v. Estate of LaFavre*, 9 S.W.3d 755, 758 (Mo. Ct. App. 2000).

[I]f the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation.<sup>104</sup>

In contrast, the Court would “exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits.”<sup>105</sup> This decision was based upon the majority of states’ own holdings.<sup>106</sup>

In contrast, six states—California,<sup>107</sup> New Jersey,<sup>108</sup> New York,<sup>109</sup> North Carolina,<sup>110</sup> Virginia<sup>111</sup> and West Virginia,<sup>112</sup>—

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104. *Bauman v. Ross*, 167 U.S. 548, 581–82 (1897).

105. *Id.* at 581.

106. *See id.* at 583 (“[I]n the greater number of the states, unless expressly forbidden by constitution or statute, special benefits are allowed to be set off, both against the value of the part taken, and against damages to the remainder . . .”).

107. *See Los Angeles Cnty. Metro. Transp. Auth. v. Cont’l Dev. Corp.*, 941 P.2d 809, 809 (Cal. 1997) (“A rule permitting offset of all reasonably certain, immediate and nonspeculative benefits has the virtue of treating benefits and severance damages evenhandedly.”).

108. *See Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526–27 (N.J. 2013) (“[W]hen a project calls for the construction of dunes along the entire public project requires the partial taking of property, ‘just compensation’ to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.”).

109. *See Chiesa v. New York*, 324 N.E.2d 329, 333 (N.Y. 1974) (“The New York rule . . . may be formulated as follows: Value of land taken consequential damages to remainder minus general and special benefits = just compensation.”).

110. *See Bd. of Transp. v. Jones*, 255 S.E.2d 185, 187 (N.C. 1979) (“Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.”) (quoting N.C. GEN. STAT. § 136-112 (1959)).

111. *See Long v. Shirley*, 14 S.E.2d 375, 377–78 (Va. 1941) (stating that the intent of the Virginia legislature was to disregard the differences between special and general benefits).

112. *See Guyandotte Valley Ry. v. Buskirk*, 50 S.E. 521, 522 (W.Va. 1905) (“Benefits, whether general and common to all property affected by the

reject the distinction between special and general benefits, and incorporate any reasonably calculable benefit that increases the fair market value of the remaining property, regardless of whether the benefit has a larger impact on the community as a whole.<sup>113</sup> Notably, all six jurisdictions employ the BAA method of just compensation calculation.<sup>114</sup>

The earliest of these cases, *Guyandotte Valley Railway Co. v. Buskirk*, was decided in 1905, however *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation* (California) and *Borough of Harvey Cedars v. Karan* (New Jersey) have both been decided in the past twenty years.<sup>115</sup> Furthermore, *Chiesa v. New York* (New York) and *Board of Transportation v. Jones* (North Carolina) were decided in the 1970s, making the disregard for the distinction between general and special benefits a seemingly relatively recent movement.<sup>116</sup>

Other than *Harvey Cedars*, which will be discussed in Part V, the primary case considering both special and general benefits is *Continental Development Corporation*.<sup>117</sup> In that case, the California Supreme Court overruled a century's worth of precedent in a matter over the construction of an elevated light rail.<sup>118</sup> The light rail reduced the landowner's view, but it also

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work of improvement, or peculiar to it, when material, can obviously be considered for but one purpose, namely, deduction from the damages to the property.”).

113. See AM. JUR., *supra* note 7, § 325, (stating that under a strict interpretation of the before-and-after rule, any benefit is taken into consideration if it affects the value of the taking); see also *id.* § 343 (some courts find the distinction so confusing they've abolished it, and that other jurisdictions have abolished the distinction by statute).

114. See *id.* § 325 (noting that both special and general benefits are included into consideration).

115. See generally *Guyandotte Valley Ry. v. Buskirk*, 50 S.E. 521 (W.Va. 1905); *Los Angeles Cnty. Metro. Trans. Auth. v. Cont'l Dev. Corp.*, 941 P.2d 809 (Cal. 2002); *Borough of Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013).

116. See generally *Chiesa v. New York*, 324 N.E.2d 329 (N.Y. 1974); *Bd. of Transp. v. Jones*, 255 S.E.2d 185 (N.C. 1979). *But see* *Long v. Shirley*, 14 S.E.2d 375 (Va. 1941).

117. 941 P.2d 809 (Cal. 2002).

118. See *Continental Dev. Corp.*, 941 P. 2d at 811–12 (“Here, the Los Angeles County Metropolitan Transportation Authority (the MTA) brought a condemnation action to acquire a narrow strip of land for an easement along one side of a parcel owned by Continental Development Corporation

provided the benefit of access to quicker and easier transportation.<sup>119</sup> As a result, the Court found that since the goal of the Takings Clause is to make condemnees whole, and nothing more, true and complete indemnity requires the offset of all benefits actually received . . . including general benefits.<sup>120</sup>

In addition, some states have rejected the distinction between special and general benefits only in certain circumstances and for specific types of takings.<sup>121</sup> In at least one jurisdiction, the special benefits alone may count as just compensation, without any financial remuneration necessary.<sup>122</sup> While VPD typically doesn't allow benefits to detract from the valuation of the taken property, merely the severance damages to the remainder, it's possible under the BAA context that effectively no compensation will be required if the benefits to the remaining property are large enough as to completely overwhelm the loss of the property.<sup>123</sup> For example, if the construction of a dune is the only thing that can prevent a beach house from

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(Continental) for the construction of a portion of an elevated light rail line known as the Green Line.”).

119. See *id.* at 812 (relaying that the trial court did not allow the evidence because the court reasoned “that proximity to the transit station was not a special benefit because it was shared by numerous properties in the vicinity”).

120. See *id.* at 824 (“A rule permitting offset of all reasonably certain, immediate and nonspeculative benefits has the virtue of treating benefits and severance damages evenhandedly.”).

121. See AM. JUR., *supra* note 7, § 343 (rejecting the distinction because of the confusion caused); see also *Crum v. Mt. Shasta Power Corp.*, 4 P.2d 564, 573 (Cal. 1931) (“In eminent domain cases, other than those which involve rights of way, both general and special benefits which accrue to either the portion taken or that which remains, may be considered and set off against the damages assessed.”).

122. See AM. JUR., *supra* note 7, § 338 (“Special benefits conferred on a property owner’s remaining property as a direct result of a taking may constitute just compensation”); see also *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 864 (Cal. 1997) (“More explicitly, the court has long held that the special benefits conferred on a property owner’s remaining property as a direct result of a taking may constitute just compensation.”).

123. See MaryAnn Spoto, *Harvey Cedars Couple Receives \$1 Settlement for Dune Blocking Ocean View*, THE STAR-LEDGER (Sep. 25, 2013, 1:21 PM),

[http://www.nj.com/ocean/index.ssf/2013/09/harvey\\_cedars\\_sand\\_dune\\_dispute\\_settled.html](http://www.nj.com/ocean/index.ssf/2013/09/harvey_cedars_sand_dune_dispute_settled.html) (stating that the initial settlement offer was for \$300, but the case eventually settled for \$1) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

guaranteed destruction, that special benefit, if calculable in financial terms, may completely offset the extent to which the government must provide just compensation.<sup>124</sup>

Others have looked to an “increase in the market value of the remaining property [as] the sole test by which a court ascertains the deductibility of a benefit,” where “the distinction between general and special benefits becomes meaningless, since a finding of market value necessarily includes value contributed by any kind of benefit, general as well as special.”<sup>125</sup> Therefore, general benefits are included because they recognize the gain realized by the landowner that he would undoubtedly receive, regardless of the gain others will also obtain.<sup>126</sup>

All jurisdictions agree that any benefit, either special or general, must be real and cannot be speculative, which is true of damages in both the VPD and BAA context.<sup>127</sup> Like damages, future benefits can only be used if they are certain, or reasonably certain to be realized.<sup>128</sup> These benefits must additionally be calculable and measurable in financial terms so they may be deducted from the compensation award.<sup>129</sup>

For example, if the benefit of a storm protective dune and extended beach would save the remaining property from almost certain destruction, the benefit can be reasonably calculated.<sup>130</sup> As a corollary, if a highway might help a farm but it is unclear

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124. See *id.* (detailing how dunes the dunes were created after Hurricane Sandy for protection by the Army Corp of Engineers).

125. AM. JUR., *supra* note 7, § 339; Illinois State Toll Highway Auth. v. American Nat. Bank & Trust Co. of Chicago, 624 N.E.2d 1249, 1255 (Ill. 1994) (stating that any benefits that are not speculative or conjectural may be considered).

126. See AM. JUR., *supra* note 7, § 353 (“[B]enefits resulting from an improvement generally are not deductible from the damage award where the condemnee’s remaining land has been or will be assessed for the cost of the improvements.”).

127. See *id.* § 281 (“[R]ecovery may not be based on speculative, remote, imaginary, or merely possible events.”).

128. See *id.* § 331 (noting that future benefits can only be used if a finder of fact is certain they will be realized).

129. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526–27 (N.J. 2013) (“We now conclude that when a public project requires the partial taking of property, ‘just compensation’ to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.”).

130. See *id.* at 529 (demonstrating how storm protection benefits may be calculable).

how much or the benefits cannot be quantified in economic terms, those benefits may not be included in the final compensation award. While VPD protects the condemnee by adding damages, BAA makes takings easier, or at least less costly, for the government, as there can be a greater deduction for benefits from the valuation.<sup>131</sup>

#### IV. Impact on Environmental Takings

Since 2005, Hurricane Katrina destroyed New Orleans,<sup>132</sup> *An Inconvenient Truth* exposed the practical impact of global warming,<sup>133</sup> the explosion at Deepwater Horizon released 4.9 million barrels of oil into the Gulf of Mexico,<sup>134</sup> and Hurricane Sandy caused severe damage to the northeastern coast of the United States.<sup>135</sup>

The legal ramifications of these crises are endless, involving questions of tort liability, criminal negligence, and property claims, among others.<sup>136</sup> Environmental and property law have become increasingly intertwined as a result of increasing land use and zoning regulations, which can dictate liability and responsibility for preventative and post-environmental crisis cleanup measures.<sup>137</sup> Property law may

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131. See ORGEL, *supra* note 50, §§ 50–51 (listing the requirements and benefits of each method).

132. See *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 443 (5th Cir. 2012) (noting the extent of damage caused by Hurricane Katrina).

133. AN INCONVENIENT TRUTH (Lawrence Bender Prods. 2006).

134. JANE LUBCHENCO ET AL., BP DEEPWATER HORIZON OIL BUDGET: WHAT HAPPENED TO THE OIL? 1 (U.S. Geological Survey 2010), available at <http://www.usgs.gov/foia/budget/08-03-2010...Oil%20Budget%20description%20FINAL.pdf> (stating that 4.9 million barrels of oil were released) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

135. *Superstorm Sandy Slams Northeast, Triggers Massive Blackouts and Flooding*, CBS NEWS & ASSOCIATED PRESS (Oct. 30, 2012, 2:00 AM) [www.cbsnews.com/news/superstorm-sandy-slams-northeast-triggers-massive-blackouts-and-flooding/](http://www.cbsnews.com/news/superstorm-sandy-slams-northeast-triggers-massive-blackouts-and-flooding/) (describing the extent of the damage in the northeast) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

136. See *In re Katrina Canal*, 696 F.3d at 443 (listing plaintiff's claims against the federal government for damages caused by Hurricane Katrina).

137. See John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES (Mar. 2, 2012),

dictate if beachfront property owners are responsible for building levees to prevent Hurricane Katrina destruction, or if such actions are within the purview of the government.<sup>138</sup> Likewise, property law has helped determine responsibility for the Deepwater Horizon oil spill cleanup.<sup>139</sup>

While environmental jurisprudence has developed significantly over the past forty years,<sup>140</sup> the law of takings has remained relatively unchanged, with the notable exception of *Kelo v. City of New London*.<sup>141</sup> Since the founding of the United States, there have been few notable changes in our understanding of eminent domain, just one of which was related to partial takings.<sup>142</sup> This has left the field underdeveloped in certain aspects.<sup>143</sup>

Eminent domain's staggered development is not necessarily flawed, but its slow evolution creates a problem when planning for the future.<sup>144</sup> The jurisprudence of eminent domain highlights how legal regimes that seek to remedy past wrongs in a static world are insufficient when faced with prospective issues that can have severe consequences in the future. If the government is expected to take action to prevent coastal

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[http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?\\_r=0](http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=0) (stating that British Petroleum would be responsible for paying for the cleanup in the wake of the Deepwater Horizon spill) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

138. See 50 AM. JUR. 2D. *Levees and Flood Control* § 3 (2014) (discussing federal powers and responsibilities in relation to flood prevention measures).

139. See Schwartz, *supra* note 137 (summarizing the settlement reached by British Petroleum, who owned the Deepwater Horizon well).

140. See *References/Links: Environmental Laws & Treatises*, NATIONAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/reference/laws.asp> (indicating that a majority of federal environmental statutes have been enacted since 1972) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

141. See SINGER, *supra* note 23, at 678–92 (providing a historical background of takings law indicating that takings jurisprudence has not changed much since *Penn Central*).

142. See *id.* (discussing how takings jurisprudence is historically static).

143. See *supra* Part II (summarizing the history of eminent domain).

144. See SINGER, *supra* note 23 (outlining three issues as a result of takings jurisprudence: (1) the Supreme Court has developed different tests over time; (2) precedent; and (3) issues of fairness and justice).



destruction caused by the projected increase in tropical storms,<sup>145</sup> it should not be forced to rely on property law developed decades before such a crisis could have been predicted. If even one property is left unprotected because of disagreements over just compensation, the entire area is at risk of destruction by a coastal storm.<sup>146</sup>

The current partial takings jurisprudence consequently gives to the individual undue priority over society, limiting the government's ability to respond to future environmental challenges. This misalignment of priorities has and will continue to give rise to scenarios in which the government cannot take necessary protective measures due to overwhelming costs.<sup>147</sup> As a result, it is necessary to ease the burden on the government in the case of partial takings for the good of society as a whole.

The current methods of calculating just compensation in partial takings cases are outdated in most jurisdictions and do not allow for the increased need for government to confront environmental issues head-on.<sup>148</sup> These issues are, in many cases, not predictable, and will strain the status quo to a breaking point.<sup>149</sup> The modification proposed will lessen the burden on jurisdictions trying to get a step ahead of the curve, whereas current statutory regimes such as VPD have the effect of protecting the individual when it is the general public that needs greater protection in the face of impending environmental

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145. See *Future Climate Change*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/climatechange/science/future.html> (last visited March 15, 2015) (stating that climate change will cause an increase in tropical storms) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

146. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526 (N.J. 2013) (explaining the importance of a dune in front of the Karan's beachfront property).

147. See Anthony F. DellaPelle & Richard P. DeAngelis, Jr., Commentary, *New Jersey's New View on Partial Takings Compensation*, 65 PLAN. & ENVTL. L. J. 4 (Nov. 2013) (raising the issue as to whom should pay for partial takings).

148. See *supra* Part II. B (defining the value plus damage method to calculate just compensation and its shortcomings).

149. See AM. JUR., *supra* note 7, § 324 (commenting that under VPD the landowner will get just compensation for the entire value of the property taken regardless of any benefit to the landowner as a result of the taking).

challenges.<sup>150</sup> As a result, a widespread adoption of the BAA method for calculating just compensation in partial takings cases is the best solution, provided the award can be offset for both reasonably calculable and definite special and general benefits.

### *V. Borough of Harvey Cedars v. Karan*

In 2013, the Supreme Court of New Jersey significantly altered its partial takings jurisprudence with its decision in *Borough of Harvey Cedars v. Karan*.<sup>151</sup> The environmental concerns it addressed highlight the challenges faced by courts attempting to balance the rights of property owners with the need for state action, notably in an environmental context.

In 2008, the U.S. Army Corps of Engineers began collaborating with the New Jersey Department of Environmental Protection and local municipalities on a beach-restoration and storm-protection project on Long Beach Island, New Jersey.<sup>152</sup> The plan consisted of extending the shoreline by 200 feet into the ocean to prevent beach erosion, maintaining the amount of sand every five to seven years, and building trapezoidal dunes twenty-two feet high and thirty feet wide at the top, to protect the island from future storms capable of destroying homes and businesses in the region.<sup>153</sup>

As part of the project, the Borough of Harvey Cedars sought to secure eighty-two perpetual easements along the shore, upon which the dunes would be built.<sup>154</sup> Sixty-six property owners granted their voluntary consent,<sup>155</sup> and when the remaining sixteen property owners balked, the Borough adopted an

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158. See *Superstorm Sandy Slams Northeast*, *supra* note 135 (explaining the last minute changes in forecasting for the scope of the storm).

151. See *New Jersey's New View*, *supra* note 147 (“This decision represented a departure by the court from a long-standing doctrine known as the ‘special benefits’ doctrine, which had controlled the valuation of properties in partial takings cases for decades.”).

152. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 527–28 (N.J. 2013) (providing background to the dune restoration project at issue).

153. See *id.* at 527 (describing the planned beach restoration and dune construction).

154. See *id.* (“The Borough’s obligation was to secure eighty-two perpetual easements over the portions of private beachfront properties closest to the ocean on which the dunes would be built.”).

155. See *id.* at 527–28 (“The Borough acquired sixty-six easements by voluntary consent of the property owners.”).

ordinance taking from each the sliver of property under its statutory eminent domain authority.<sup>156</sup> Harvey and Phyllis Karan were the owners of one of the holdout properties, and contested the nominal amount of \$300 offered by the government in recompense for the land taken and the devaluation of the remaining property.<sup>157</sup>

At the trial and appellate levels, the New Jersey courts found that “merely because ‘differing property owners enjoy the benefit to different degrees does not convert a general benefit into a special benefit,’”<sup>158</sup> and subsequently disregarded the general benefits provided to the Karans.<sup>159</sup> Furthermore, the trial court instructed the jury to only consider damages, which consisted mostly of a reportedly decreased view of the ocean, and special benefits, plus the value of the taken land in the award.<sup>160</sup> The jury was not allowed to consider general benefits, of which the storm protection was the key feature.<sup>161</sup>

Without the project, Randall A. Wise of the U.S. Army Corps of Engineers determined there was only a 27% chance of the Karan’s property surviving fifty years without storm damage.<sup>162</sup> Furthermore, over a thirty-year period, there was a 56% likelihood of a storm “totally” damaging their property without the creation of the dunes.<sup>163</sup> With the project completed, the Karan’s property would likely survive the next 200 years’ worth of storms.<sup>164</sup> Wise, a civil engineer specializing in coastal

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156. *See id.* at 528 (“However, the owners of sixteen beachfront properties, including the Karans, did not consent. As a result, in July 2008, the Borough adopted an ordinance authorizing it to acquire easements over those sixteen properties through its statutory powers of eminent domain.”).

157. *See id.* (“The Karans rejected the Borough’s offer of \$300 as compensation for both the land taken and any devaluation of the remaining property.”).

158. *Id.* at 529.

159. *See id.* at 529–30 (noting the trial and appellate courts disregard of the general benefits given to the Karans).

160. *See id.* at 531 (“However, the court advised the jury to disregard, in valuing the Karans’ remainder property, any general benefit flowing from the public project.”).

161. *See id.* (citing jury instructions state that the jury not consider general benefits).

162. *See id.* at 529 (presenting statistics related to the value added from the dune construction).

163. *See id.* (discussing the probability of future damage).

164. *See id.* (noting the benefits of the project).

engineering, calculated this information using statistical analysis that determined decreasing levels of risk for each “line” of homes stretching away from the ocean.<sup>165</sup>

Wise’s analysis became reality, much more quickly than he could have ever predicted. Hurricane Sandy devastated Long Beach Island in 2012, inflicting an estimated \$700,000,000 in damage.<sup>166</sup> Notably, the places where the Army Corps of Engineers’ dunes had been created were spared from the destruction.<sup>167</sup> “There are the places that had a protective dune system installed and, as a result, sustained minimal damage. Then there are the areas where there were no tall dunes, where Sandy made its destructive powers known.”<sup>168</sup> Hurricane Sandy, in effect, justified Wise’s proposal and solidified the preventative measures as a valuable public purpose.

The project budget was roughly \$25,000,000, with the Borough responsible for just \$1,000,000 of the total amount.<sup>169</sup> The jury calculated compensation using the previous New Jersey method of calculation, which was the BAA method but did not allow for consideration of general benefits.<sup>170</sup> Using this model,

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165. See *id.* (listing Randall A. Wise’s qualifications and role as an expert).

166. See Ryan Hutchins, *Long Beach Island Officials Shocked at Extent of Damage from Hurricane Sandy*, THE STAR-LEDGER (Oct. 31, 2012, 8:43 PM),

[http://www.nj.com/news/index.ssf/2012/10/lbi\\_hurricane\\_sandy\\_damage.html](http://www.nj.com/news/index.ssf/2012/10/lbi_hurricane_sandy_damage.html) (“It will take at least \$700 million to remake this 18-mile strip of land, an estimate that could certainly surpass \$1 billion as more is learned.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

167. See Ryan Hutchins & Seth Augenstein, *N.J. Sand Dunes Protected Shore Towns from Hurricane Sandy’s Wrath*, THE STAR-LEDGER (Nov. 6, 2012, 7:05 AM),

[http://www.nj.com/news/index.ssf/2012/11/nj\\_sand\\_dunes\\_protected\\_shore.html](http://www.nj.com/news/index.ssf/2012/11/nj_sand_dunes_protected_shore.html) (describing the difference in damage from Hurricane Sandy when comparing areas that had dune construction and those that had not) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

168. *Id.*

169. See *Harvey Cedars*, 70 A.3d at 530 (“The cost of the project was approximately twenty-five million dollars, with the Borough bearing approximately one million dollars of the cost, the State approximately seven-and-one-half million dollars, and the federal government the balance.”).

170. See *id.* at 531 (“The trial court charged the jury that the Karans were entitled to ‘just compensation’ for the easement acquired by the Borough ‘measured by the difference between the fair market value of the entire

and unable to consider the storm protection benefits the Karan's would receive because they were deemed general and would help the island as a whole, the jury level calculated the just compensation of the taken property, plus damages to the remainder, at \$375,000.<sup>171</sup> The damages mostly consisted of the loss of some view due to the large dunes.<sup>172</sup>

If the \$375,000 amount were to be prorated to the remaining fifteen properties, the Borough would have had to pay \$6,000,000, or six times its portion of the budget of the project, simply to acquire the easements.<sup>173</sup> This does not even take into consideration the other sixty-six property owners who would likely demand similar compensation and not acquiesce towards a much smaller figure, as they did.<sup>174</sup> Furthermore, that \$6,000,000 figure does not include the actual construction costs, which would drive the number significantly higher.<sup>175</sup> As such, full compensation would have made the costs of the project incredibly high, and if the lower court's decision had stood, likely impossible to carry out. Following the decisions in favor of the Karans by the trial and appellate levels, the Borough appealed to the New Jersey Supreme Court.<sup>176</sup>

The New Jersey Supreme Court held that just compensation in partial-takings "must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property."<sup>177</sup> As such, the Court removed the distinction between general and special benefits, finding them to be outdated, contradictory, and impossible to distinguish.<sup>178</sup>

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property . . . immediately before the taking and the fair market value . . . immediately after the taking").

171. *See id.* ("The jury returned an award of \$375,000 as compensation for the easement and for any damages to the remainder of the Karans' property.").

172. *See id.* at 528 (discussing the damages from the taking).

173. *See id.* (discussing the scope of the Borough's project).

174. *See id.* at 527–28 (noting that some of the other property owners gave the easements without "just compensation").

175. *See id.* at 528 (noting the initial compensation offered only considered compensation for the value of the land taken and any loss of value to the remaining property).

176. *See id.* at 532 (discussing the procedural history of the case).

177. *Id.* at 526–27.

178. *See id.* at 539–40 ("As to this distinction, it has been said that more rules, different from and inconsistent with each other, have been laid

Instead, the Court simply looked at the fair market value of the property before and after the taking by considering all non-speculative factors that any real buyer would consider,<sup>179</sup> with the end goal that compensation “in a partial-takings case must be ‘just’ to both the landowner and the public.”<sup>180</sup>

The Court held that a formula that “does not permit consideration of the quantifiable benefits of a public project that increase the value of the remaining property” due to general benefits that increase value to the neighborhood as a whole is not just and does not reflect the owner’s true loss.<sup>181</sup> The practical effect of this change allows the finder of fact to consider general benefits in the calculation process because they aided the public and not just the landowner.<sup>182</sup>

As its rationale, the New Jersey Supreme Court focused on the different degrees of benefit shared by the landowners that make the storm protection a special benefit, rather than a general benefit.<sup>183</sup> The Court also heavily focused on the difficulty courts have had in distinguishing between general and special benefits, with contradictory results that have led to confusion.<sup>184</sup> By erasing the distinction between the two, the Court chose to simplify the determination to any factor that would be considered in a typical arms-length negotiation.<sup>185</sup>

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down on this point than upon any other point in the law of eminent domain.”) (citing *Daniels v. State Rd. Dep’t*, 170 So.2d 846, 854 (Fla. 1964)).

179. *See id.* at 540 (“Benefits that both a willing buyer and willing seller would agree enhance the value of property should be considered in determining just compensation, whether those benefits are categorized as special or general.”).

180. *See id.* at 527 (discussing the intent behind compensation and the ultimate goal that the award be just).

181. *See id.* (explaining the shortcomings of the calculations used by the courts below).

182. *See id.* at 537 (noting the general definition of general benefits)

183. *See id.* at 541 (“Unquestionably, the benefits of the dune project extended not only to the Karans but also to their neighbors further from the shoreline. . . . Therefore, the Karans benefitted to a greater degree than their westward neighbors.”).

184. *See id.* at 539 (“The task of distinguishing between special and general benefits—as defined by case law in New Jersey and other jurisdictions—is difficult ‘even for trained legal minds.’”).

185. *See id.* at 543 (“The Borough should not have been barred from presenting all non-speculative, reasonably calculable benefits from the dune project—the kind that a willing purchaser and willing seller would consider in an arm’s length transaction.”).

To calculate the final valuation amount, finders of fact may hear testimony from real estate appraisal experts as to the value of these general benefits upon the specific property owner.<sup>186</sup> If the property is likely to be damaged or destroyed without the completed government project, the resulting compensation will be lowered accordingly to reflect the project's necessity.<sup>187</sup>

To that end, a court may choose to award nominal damages if the reasonably calculable benefits vastly outweigh the severance damages.<sup>188</sup> In fact, Harvey and Phyllis Karan eventually settled for \$1 in nominal damages following Hurricane Sandy and the destruction of much of Long Beach Island, despite the initial offer of \$300 by the Borough.<sup>189</sup>

The decision in *Harvey Cedars* presents a dramatic shift in eminent domain law by allowing use of eminent domain in natural disaster prevention projects that would otherwise be prohibitively expensive.<sup>190</sup> Without the decision, the Borough would likely have been unable to complete the project, at least within the apportioned budget, placing all of Long Beach Island at continued risk from severe storms.<sup>191</sup>

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186. See *id.* at 544 (“At that trial, the Borough will have the opportunity to present evidence of any non-speculative, reasonably calculable benefits that inured to the advantage of the Karans’ property at the time of the taking.”).

187. See *id.* (“In short, the quantifiable decrease in the value of their property—loss of view—should have been set off by any quantifiable increase in its value—storm-protection benefits.”).

188. See *id.* at 530 (“Dr. Molliver determined that the Borough’s taking of 3,381 square feet of the Karan’s property had a *de minimis* value of only \$300.”).

189. See *Harvey Cedars Couple Receives \$1*, *supra* note 123 (stating the initial and final settlement offers).

190. See Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 295–97 (2003) (describing the increase in government “givings” actions that increase the value of coastal private property).

191. See *Harvey Cedars*, 70 A.3d at 527 (noting that “[t]he dune-construction project required the securing of easements on properties bordering the ocean”).

### VI. Proposed Change and Its Effects

This Note proposes that other jurisdictions adopt the aforementioned holding in *Harvey Cedars* and should modify their just compensation calculation formulas to include both general and specific benefits as part of the BAA analysis.<sup>192</sup> As the *Harvey Cedars* Court noted, the two categories of benefits are often interpreted in a contradictory manner, and even the most trained of legal minds struggle to identify the difference in practice.<sup>193</sup>

In *Harvey Cedars*, the rest of the neighborhood shared, in varying degrees, the general benefit of protection against the destruction from a future storm.<sup>194</sup> Although the benefits received from this protection are practical, such as the continued security of a home, and not exclusively financial, such as an increase in business due to a new highway, the price and financial value of that home is still calculable.<sup>195</sup> As the storm protection was classified as a general benefit shared by the neighborhood, the benefits afforded by the dunes could not be calculated under the old formula of disallowing general benefits to be considered.<sup>196</sup> However, the old New Jersey formula ignores the fact that Karan received a disproportionate special benefit within the general benefit, and does not grant the government leeway if their project

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192. See AM. JUR., *supra* note 7, §§ 290, 343 (stating that some jurisdictions effectively disregard the distinction between general and special benefits in deducting from the total just compensation, either statutorily or effectively).

193. See *Harvey Cedars*, 70 A.3d at 539 (“The task of distinguishing between special and general benefits—as defined by case law in New Jersey and other jurisdictions—is difficult ‘even for trained legal minds.’”).

194. See *id.* at 529 (“[C]ertain storms would cause damage to frontline properties but not to properties further from the ocean. Risk of storm damage drops significantly the further a property is from the ocean . . .”).

195. See *id.* at 543–44 (“The jury in this case should have been charged that the determination of just compensation required calculating the fair market value of the Karans' property immediately before the taking and after the taking (and construction of the twenty-two-foot dune).”).

196. See *id.* at 544 (“The trial court’s charge required the jury to disregard even quantifiable storm-protection benefits resulting from the public project that increased the fair market value of the Karans’ property.”).



will save an entire neighborhood from certain environmental destruction.<sup>197</sup>

Instead, the new formulas include all benefits and damages that are reasonable calculable, and which may increase or decrease the value of the remaining property.<sup>198</sup> In so doing, courts will likely award compensation that closely resembles an arms-length exchange where the condemnee sells the taken piece of property at the true fair market price.<sup>199</sup> As a result, the compensation award will be significantly fairer to the government and will result in fewer windfalls for the condemnee.<sup>200</sup>

In *Harvey Cedars*, the Court discussed the historical development of general and special benefits, and noted that the distinction, at least in New Jersey, came from railroads in the 1800s that took property to build tracks and gave only nominal damages as compensation.<sup>201</sup> The railroads argued that increased population and commerce were enough to essentially eliminate any compensation.<sup>202</sup> The effect of this new formula, however, would preclude such an unfair result to the landowner, as the benefits considered must be reasonably calculable and cannot have the same indefinite timeline or assistance that the railroads

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197. *See id.* at 527 (“A formula . . . that does not permit consideration of the quantifiable benefits of a public project that increase the value of the remaining property in a partial-takings case will lead to a compensation award that does not reflect the owner’s true loss.”).

198. *See id.* at 526–27 (“We now conclude that when a public project requires the partial taking of property, ‘just compensation’ to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.”).

199. *See id.* at 543 (“The Borough should not have been barred from presenting all non-speculative, reasonably calculable benefits from the dune project—the kind that a willing purchaser and willing seller would consider in an arm’s length transaction.”).

200. *See id.* at 527 (“In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a payout that disregards the home’s enhanced value resulting from a public project.”).

201. *See id.* at 536–37 (noting that railroads justified low compensation amounts on the benefits transportation development conferred on communities).

202. *See id.* at 536 (“[R]ailroads argued that the benefits from increased population and commerce . . . made the remainder property more valuable.”).

preferred.<sup>203</sup> Simply put, “[t]he historical reasons that gave rise to the development of the doctrine of general and special benefits no longer have resonance today.”<sup>204</sup> With the allowance of any quantifiable yet definite benefit to be considered, the problem of unfair results to the landowner may be limited, if not eliminated.<sup>205</sup>

Certainly in cases like *Harvey Cedars*, when the property will almost undoubtedly be destroyed without action,<sup>206</sup> full consideration should be left to the finder of fact since the remainder may be worthless without the government’s taking, regardless of general or specific benefit determination.<sup>207</sup> Ideally, the proposed modification, through simple fairness, would encourage the government to partially take property for environmentally friendly purposes, such as beach replenishment, storm protection, alternative energy creation, among other goals, as there will be a financial incentive for projects due to a lower economic cost.<sup>208</sup>

### VII. Arguments and Alternatives

Like many other debates, the proposed change here has its advocates and detractors; the government on one side, and landowners on the other.<sup>209</sup> Despite concerns over individual

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203. See *id.* at 542 (explaining why the railroad formula is not workable today).

204. *Id.*

205. See *id.* at 544 (concluding that decreases in property values should be offset by value increases resulting from storm-protection benefits because those affected by government takings “are entitled to just compensation, a reasonable calculation of any decrease in the fair market value of their property after the taking”).

206. See *id.* at 529 (“Without the dune project, the Karans’ project had only a 27% chance of surviving fifty years without any storm damage.”).

207. See *id.* at 533 (“[T]he gate keeping function of the trial court is to determine if evidence is reliable and not speculative, and once determined to be reliable, it is for the jury to determine what, if any, impact the evidence presented has on just compensation.”) (citing *State v. Caoili*, 693 A.2d 275 (N.J. 1994)).

208. See Barnhizer, *supra* note 190, at 297 (stating that the “government must increase its emphasis on property acquisition as a response to repetitive flood losses and heightened flood risks on coastal floodplains”).

209. See *Harvey Cedars*, 70 A.3d at 526–27214 N.J. at 388–89 (describing the tension between a compensation method that incorporates

rights, landowners have been increasingly in favor of such a change following the destruction caused by Hurricane Sandy,<sup>210</sup> when the need for partial takings to build storm protection at cost-effective prices became more important than maximizing financial compensation for the landowner.<sup>211</sup> As a result, it is important that just compensation be fair to both the government and the landowner.<sup>212</sup>

Supporters of the *Harvey Cedars* decision might argue that the rule change acts as an incentive for the government to take property for the environmental benefit of the public.<sup>213</sup> When building storm protection, alternative forms of energy creation, or even a proliferation of oil pipelines to cheapen prices, among other possible scenarios, the landowners are the ultimate beneficiaries.<sup>214</sup> The inclusion of general benefits, as recognized

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speculative future benefits and one that is limited to immediately ascertainable benefits).

210. See Erin O'Neill, *Harvey Cedars Neighbors Say Dune Protection Outweighs Obstruction of Ocean Views*, THE STAR-LEDGER (July 9, 2013, 6:29 AM), [http://www.nj.com/news/index.ssf/2013/07/karan\\_harvey\\_cedars\\_dunes.html](http://www.nj.com/news/index.ssf/2013/07/karan_harvey_cedars_dunes.html) (“Lalevee—a 78-year-old Bergen County resident—said his views of the crashing waves along the shoreline were obstructed by the dune project, but ‘I rather have that than have a lot of other problems.’”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

211. See MaryAnn Spoto, *Toms River to Start Eminent Domain Proceedings Against 16 Oceanfront Property Owners*, THE STAR-LEDGER (OCT. 22, 2013, 8:31 PM), [http://www.nj.com/ocean/index.ssf/2013/10/toms\\_river\\_votes\\_to\\_start\\_eminant\\_domain\\_proceedings\\_against\\_16\\_oceanfront\\_property\\_owners.html](http://www.nj.com/ocean/index.ssf/2013/10/toms_river_votes_to_start_eminant_domain_proceedings_against_16_oceanfront_property_owners.html) (“‘If this dune system was in place during Hurricane Sandy, the devastation that impacted our community would not have occurred,’ Wittmann said. ‘It would not have occurred because the dune would have protected the township.’”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

212. See *Harvey Cedars*, 70 A.3d at 527 (“In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a payout that disregards the home’s enhanced value resulting from a public project.”).

213. See Barnhizer, *supra* note 190, at 295–99 (discussing government takings actions designed to protect coastal property and the incentives provided to landowners by “landowners who receive compensation for the value of past governmental givings in addition to whatever value the landowner may have created in the property through individual actions related to real market risks”).

214. See *id.* at 300 (“At the center of the controversy is the inevitable tension between the rights and duties . . . This tension has long been

by the *Harvey Cedars* decision, would therefore recognize their beneficiary status as an alternative means of compensation. Furthermore, without such environmentally or energy focused takings, society suffers as a result.<sup>215</sup> When the government cannot afford to build storm protection to shelter a number of houses along the coastline from being destroyed, it does not matter how much a landowner believes their view is worth.<sup>216</sup>

As federal, state, and local governments increasingly seek to perform takings for environmental or energy purposes, the idea of being unable to afford projects is a real possibility.<sup>217</sup> The inability to effectuate takings within reasonable financial limits has forced the State of Texas to cancel a \$40 million beach restoration project similar to the one in *Harvey Cedars* and necessary to prevent high erosion rates from destroying infrastructure,<sup>218</sup> in the wake of ongoing litigation in *Severance v. Patterson*.<sup>219</sup>

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recognized in Fifth Amendment takings jurisprudence as the extent to which private individuals should bear burdens intended to benefit the community at large.”).

215. See Barnhizer, *supra* note 190, at 310 (“[W]e may reach a point—if indeed we have not already passed it—where it will be too expensive to pull back, even if the cost of not doing so includes enormous economic and human losses and catastrophic environmental damage.”).

216. See *id.* at 313 (“Over time, beaches, dunes, and barrier islands alter their size, shape, location, and topography in reaction to erosive and accretive forces of wave action, storm surge, and rising sea levels. Each of these changes alters the ability of the coastal floodplain to protect inland areas from flooding.”).

217. See Heather Smith, *Crude Awakening: As Keystone Opens in Texas, Neighbors Fight to Protect their Water*, GRIST (Jan. 23, 2014), <http://grist.org/climate-energy/oil-and-water-as-texas-keystone-pipe-opens-neighbors-organize-to-protect-their-aquifer/> (stating that increased litigation delay and may end proposed eminent domain projects) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

218. See Press Release, Jerry Patterson, Land Comm’r, Texas Gen. Land Office, West Galveston Island Beach Project Is Cancelled: Timing and Legal Issues from Court Decision Spells End for Project (Nov. 15, 2010), available at [http://www.glo.texas.gov/glo\\_news/press\\_releases/2010/NOVEMBER/West-Galveston-Island.pdf](http://www.glo.texas.gov/glo_news/press_releases/2010/NOVEMBER/West-Galveston-Island.pdf) (“Patterson said a recent Texas Supreme Court opinion in a case brought forward by California-based Pacific Legal Foundation has muddied the legal waters enough to delay the beach project indefinitely.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

219. 370 S.W.3d 705 (Tex. 2012).

Furthermore, cases in California in recent years have indicated, “acquiring property through eminent domain is an increasingly costly prospect for the government.”<sup>220</sup> As another example, California is seeking to build a high-speed rail system, which could have “devastating, irreversible effects on the state’s environment,” and which will require at least separate partial takings, which could be prohibitively expensive.<sup>221</sup> The financial feasibility of these projects, especially in the environmental context, remains an important factor to consider.

There remains a logical fallacy to say that the individual bears the burden for society when their compensation is reduced due to general benefits.<sup>222</sup> If the dunes had not been built, Karan would have suffered to a greater degree than most, as evidenced by Hurricane Sandy.<sup>223</sup> In many cases, simply because a general benefit assists the public does not mean the value does not exist to the particular property owner, who may benefit disproportionately.<sup>224</sup> If the taking of property for a windmill will lower energy costs or a local park will benefit the neighborhood by raising property values, the degree to which the condemnee

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220. Paul Shigley, *Eminent Domain Acquisitions Grow More Expensive*, CALIFORNIA PLANNING & DEVELOPMENT REPORT (Jan. 30, 2008, 4:26 PM), <http://www.cp-dr.com/node/1915> (“Courts have issued four recent court decisions regarding eminent domain that suggest that acquiring property through eminent domain is an increasingly costly prospect for the government.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

221. Joe Guzzardi, *Judge Sends High-Speed Rail Plan Off the Tracks*, LODI-NEWS SENTINEL (Jan. 4, 2014, 12:00 AM), [http://www.lodinews.com/opinion/columnists/joe\\_guzzardi/article\\_b2365b98-2c0e-593b-8c93-7109fb544d94.html](http://www.lodinews.com/opinion/columnists/joe_guzzardi/article_b2365b98-2c0e-593b-8c93-7109fb544d94.html) (“[T]he rail would have devastating, irreversible effects on the state’s environment, encourage further unsustainable population growth and, despite its huge cost, have no guarantee of ridership.”) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

222. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526 (N.J. 2013) (explaining the requirement of providing “just compensation” to individuals whose property has been taken through eminent domain proceedings).

223. See *id.* at 527 (observing the protective nature of the dunes constructed to prevent property destruction).

224. See AM. JUR., *supra* note 7, § 324 (“A special benefit conferred on the remaining parcel may not be deducted from the value of the part taken, therefore, but it may be deducted from consequential or severance damages.”).

benefits may be equal or greater to that of the rest of the neighborhood.

In contrast, opponents of the proposed change advocate for an emphasis in the word “just” in just compensation.<sup>225</sup> The landowner must be fairly and justly compensated for their loss, and should not bear the cost of society’s gain.<sup>226</sup> In addition, opponents in *Beveridge v. Lewis* noted:

The chance that land will increase in value as population increases and new facilities for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. This chance for gain is the property of the land-owner. If a part of his property is taken for the construction of the railway, he stands in reference to the other property not taken like similar property-owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement of value in order to secure the increased facilities which the railroad will afford.<sup>227</sup>

In short, everyone in a neighborhood receives the benefit of the general benefits, but while neighbors’ property may appreciate in value, the same cannot be said of the landowner that lost their

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225. See DellaPelle, *supra* note 151 (noting the premium paid for beachfront properties in the *Harvey Cedars* case); see also SINGER, *supra* note 23, at 677 (highlighting issues of justice and fairness as factors that have been considered in prior takings cases).

226. See *Penn Cent. Transp. Co. v. New York*, 483 U.S. 104, 148 (1978) (“[T]he Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

227. *Beveridge v. Lewis*, 70 P. 1083, 1086 (Cal. 1902), overruled by *Los Angeles Cnty. Metro. Transp. Auth. v. Cont’l Dev. Corp.*, 941 P.2d 809, 825 (Cal. 1997) (“On balance, and acknowledging that Continental’s position is not without some force, we overrule *Beveridge*, *supra*, 137 Cal. 619, to the extent it holds that only “special” benefits may be offset against severance damages.”).

property to the partial taking.<sup>228</sup> As a result, the neighbors get the general benefit in addition to the increased value, while the condemnee gets merely the increased value.<sup>229</sup> However, as the California Supreme Court in *Continental Development* said, this argument fails because those neighbors do not also receive the severance damages that the condemnee receives, making the ultimate difference in benefits received insubstantial.<sup>230</sup>

Opponents against the proposed change have noted that it may be difficult to calculate with reasonable certainty the positive environmental general benefits.<sup>231</sup> If the general benefits cannot be calculated non-speculatively, they would not be admitted into court, which would lead to the same result as before.<sup>232</sup> Consequently, there would be no practical change from the adoption of the *Harvey Cedars* decision.<sup>233</sup>

One additional concern that the general benefits of a public project may be so great as to entirely offset any compensation owed to a condemnee, leaving a landowner with no financial recompense.<sup>234</sup> If so, the benefits would unfairly foreclose the just compensation award to which the landowner is

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228. See *Harvey Cedars*, 70 A.3d at 526–27 (observing the protective benefits of the dune creation project and the simultaneous disadvantage to those whose property was taken as a result of the project).

229. See *id.* (describing the calculation of benefits provided to homeowners affected by partial takings).

230. See *Continental*, 941 P.2d 809, 820 (Cal. 1992) (“Continental’s equal protection argument is flawed in that it fails to account for a significant difference, in terms of the availability of compensation for the detrimental effects of the Green Line . . . . Continental is entitled to severance damages, whereas its neighbors are not.”).

231. See *id.* at 826 (discussing condemnee’s objection to a somewhat vague standard of what is to be considered reasonable).

232. See DellaPelle, *supra* note 151 (“[U]nless and until the benefit can be proven, as a reasonably calculable sum by objective market data, the mandate of the *Karan* court will not necessarily lead to lower condemnation awards.”).

233. See *Harvey Cedars*, 70 A.3d at 544 (“[T]he quantifiable decrease in the value of their property—loss of view—should have been set off by any quantifiable increase in its value—storm-protection benefits. The Karans are entitled to just compensation, a reasonable calculation of any decrease in the fair market value of their property after the taking.”).

234. See Spoto, *supra* note 123 (noting the *Karan*’s eventually settled for \$1 of just compensation).

constitutionally entitled.<sup>235</sup> If the landowner has their land taken from them and receives nothing tangible in return, there is a certain unjust quality at play.<sup>236</sup> Although Susette Kelo did receive compensation in the *Kelo* case, she described a similar plight to the one just described by stating, “My name is Susette Kelo and the government stole my home.”<sup>237</sup> A landowner that loses part of their property without financial compensation in return might feel similarly.

Despite this possibly unjust nature, the *Harvey Cedars* case eventually settled for \$1, far less than the nominal \$300 offered to the Karans.<sup>238</sup> As a result, at least one court remains satisfied with nominal compensation, despite concerns stated above.<sup>239</sup> In addition, it should be noted that the Constitution does not require just compensation to be paid in monetary forms by its very terms; the notion of benefits in itself constitutes compensation outside of currency.<sup>240</sup> This is why conceptual, although certain, general benefits should be considered and as an offset to real damages to the remaining property, because even though they are a more ephemeral concept than visible damages, general benefits still have real consequences and are calculable.<sup>241</sup>

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235. See AM. JUR., *supra* note 7, § 338 (“Special benefits conferred on a property owner’s remaining property as a direct result of a taking may constitute just compensation”).

236. See U.S. CONST. amend. V (stating the constitutional prohibition against unjust takings compensation).

237. *Susette Kelo*, The Government Stole My Home, Policy Report, 31 CATO INSTITUTE (Mar./Apr. 2009), available at <http://object.cato.org/policy-report/marchapril-2009/government-stole-home> (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

238. See Spoto, *supra* note 123 (identifying the insignificant settlement amount of the Karan case).

239. See *supra* note 123 and accompanying text.

240. See AM. JUR., *supra* note 7, § 338 (“Special benefits conferred on a property owner’s remaining property as a direct result of a taking may constitute just compensation”). *But see* Paducah & Memphis R.R. Co. v. Stovall, 59 Tenn. 1, 5 (1873) (“In the case of *Woodfolk v. The Nashville & Chattanooga Railroad Co.*, 2 Swan, 422, it was settled that the ‘just compensation’ of the Constitution was the fair value of the land appropriated, which must be actually paid in money, and can not be discharged in benefits or ameliorations.”).

241. See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 544 (N.J. 2013) (explaining the necessity of using a compensation method that accurately identifies general benefits).



*VIII. Conclusion*

Every state and the federal court should adopt the New Jersey Supreme Court's holding in *Harvey Cedars*, which allows for just compensation in partial takings to be calculated according to the before-and-after method, mitigated by non-speculative and reasonably calculable general and special benefits.<sup>242</sup> The applied effect of the change would be to lower economic costs for states and municipalities in creating environmentally friendly projects that benefit the general populace, and to recognize the benefits realized in practice by landowners of such projects.<sup>243</sup>

In addition, development of partial takings jurisprudence would allow the government to be better suited to take unpredictable and unforeseeable environmental concerns that may pop up in the future, without being forced to rely on property law developed in the 1800s, as is the case with *Bauman*.<sup>244</sup> In the end, federal, state, and local jurisdictions will be in a better financial position to take partial tracts of land for the betterment of the public as a whole, in keeping with the fundamental public use doctrine that eminent domain demands.<sup>245</sup>

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242. See *id.* at 543 (“The Borough should not have been barred from presenting all non-speculative, reasonably calculable benefits from the dune project . . . . Those benefits are part of the fair-market equation, regardless of whether they are enjoyed by others in the community.”).

243. See Barnhizer, *supra* note 190, at 295–97 (discussing the need for environmentally motivated takings actions).

244. See *Bauman v. Ross*, 167 U.S. 548, 563 (1897) (applying underlying property law principles to the Fifth Amendment's Takings Clause).

245. See Barnhizer, *supra* note 190, at 297–99 (advocating for more aggressive takings actions based on the necessity of public planning and response to environmental concerns).