

Severance Damages in Partial Takings Cases: Lessons Learned and Future Considerations



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MUCH LIKE Superstorm Sandy stripped away portions of the coastline in New Jersey and New York, the New Jersey Supreme Court stripped away protections for property owners faced with a partial taking of their property. In *Borough of Harvey Cedars v. Karan*, 425 N.J. Super. 214 N.J. 384, 70 A.3d 524 (2013), the Court abandoned the long-standing “special benefits” doctrine which had controlled the valuation of properties in partial takings cases in New Jersey for decades in favor of a new formula that allows consideration of any benefit to the remaining property as an offset to the damages caused by the partial taking:

“[W]hen 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”.

In *Karan*, the municipality argued that as a result of the dune construction project that required the taking of an easement over the property, the owner realized “storm-protection benefits . . . that increased the value of their home” after the taking. The Borough argued that this benefit outweighed any damage caused to the remaining property’s value, so that only a *de minimus* award of damages was warranted. The Karans argued that because the project was intended to protect all residents of the Borough these “general benefits”

were not admissible as an offset against the loss in value caused by the partial taking. The New Jersey Supreme Court agreed with the Borough, which could have a dramatic impact on the measure of just compensation in partial takings cases.

Where only a portion of a property is condemned, the measure of damages includes both the value of the portion of land actually taken and the value by which the remaining land has been diminished as a consequence of the partial taking. The diminished value of the remaining property constitutes the severance damages visited upon that property as a result of the taking.

This article will focus on the impact of the *Karan* decision on the measure “severance damages,” also referred to as “damages to the remainder” and how it modified the “special benefits doctrine” as well as the implications for the application of the “project influence rule” in partial takings cases going forward.

SEVERANCE DAMAGES • In a partial taking, the property owner is not only entitled to compensation for the value of the property or rights taken, but also the diminution in value caused by the taking to the property that remains.

In New Jersey, the right to severance damages has been crafted by the courts. *State, by Comm’r of Transp. v. Silver*, 92 N.J. 507, 457 A.2d 463 (1983); *Village of South Orange v. Alden Corp.*, 71 N.J. 363, 365 A.2d 469 (1976). Other states, such as North Carolina, also recognize the right to compensation for any damage to the remainder caused by a partial taking. *Kirkman v. State Highway Commission*, 257 N.C. 428, 126 S.E.2d 107 (1962); *State Highway Commission v. Gasperson*, 268 N.C. 307, 317 S.E.2d (1984). The right to damages for any diminution in value to the remaining property has also been extended by the courts in South Carolina. *South Carolina State Highway Department v. Touchberry*, 248 S.C.1, 148 S.E.2d 747 (1966); *Moss v. South Carolina Highway Department*, 223 S.C. 282, 75 S.E.2d 462 (1953); *South Carolina*

Power Company v. Baker, 212 S.C. 358, 46 S.E.2d 278 (1948).

In other jurisdictions, such as Arizona and California, the right to severance damages has been codified by statute. *See* Arizona Revised Statutes (“A.R.S.”) § 12-112(A)(2) and California Code of Civil Procedure (“C.C.P.”) §1263.320(a).

Project Influence Rule

To understand the special benefits doctrine and the impact of *Karan*, there must first be an understanding of the “enhancement doctrine” now more commonly referred to as the “project influence rule.” Enhancement is a change in value attributable to the very project for which the subject property is being acquired. The just compensation calculus generally requires that enhanced value be excluded. This rule is a subsidiary to the constitutional rule that an owner shall receive just compensation, no more and no less; the special value of the land to the taker, or value created solely by the condemnor’s demand for the property is not compensable. *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 1392 (1949); *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

Project influence describes the full breadth of the doctrine which provides that increases or decreases in value attributable to the very project for which property is sought to be acquired may not be considered in calculating just compensation. Stated another way, in determining just compensation there can be no consideration given to the impact on value that may result from the planned project, whether positive or negative. In New Jersey, this rule has been stated as “[t]he proper basis of compensation is the value of the property . . . disregarding either the depreciating threat of or the inflationary reaction to the proposed public project.” *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374, 277 A.2d 873 (1971). This doctrine has been adopted by courts in other states such as Arizona, *State v. Hollis*, 93 Ariz. 200, 379 P.2d 750 (1963); *Robles v. City*

of *Tuscon*, 16 Ariz. App. 100, 491 P.2d 489 (1972); Ohio, *Nichols v. City of Cleveland*, (1922) 104 Ohio St. 19, 135 N.E. 291; and Missouri, *Quality Heights Redevelopment Corp. v. Urban Pioneers*, 799 S.W.2d 867 (M. Ct. App. 1990).

In California, the project influence rule has been adopted by statute, C.C.P. §1263.330. The Model Eminent Domain Code, Sec. 1005, also provides that fair market value of property taken does not include any increase or decrease in value before the date of valuation that is caused by the proposed improvement or project for which the property is taken. 13 Uniform Laws Annotated 91 (1986). South Carolina has adopted the enhancement doctrine by statute which provides that an award of just compensation “may not be increased by reason of any increases in the value of the property resulting from the placement of a public works project on it.” South Carolina Code Annotated §28-2-350. While the statute is silent with respect to any depreciating effects the project may have on the value of the remainder, an appellate court there held that the value “cannot be decreased by anything attributable to the project.” *City of North Charleston v. Claxton*, 315 S.C. 56; 431 S.E.2d 610 (Ct. App. 1993).

Even jurisdictions that have adopted the enhancement rule do not automatically prohibit consideration of the positive value impacts that a proposed project may have. Where the increase in value arises from a specific project, enhancement may be taken into consideration under certain circumstances. For example, in Florida a property owner “is entitled to any rise in the value of his property which may be occasioned by knowledge of a general nature that a project is likely to be located in his neighborhood sometime in the future.” *Nalven v. Div. of Admin.*, 409 So. 2d 166 (Fla. Dist. Ct. App. 2d Dist. 1982) (citing 4 P. Nichols, *supra*, § 12.3151(2)). In California, where the scope of a project changes to include the need to acquire additional properties or interests therein, the property owner is entitled to any enhanced value as a result

of the project up until the point in time that property was identified as being needed for the project. *Merced Irrigation Dist. V. Woolstenhulme*, 4 Cal. 3d 478 (1971). In Texas, which has also adopted the project influence rule, the acquisition of a property not originally identified as being needed for the project, may take into account any increase in value due to the project up until the time the property was identified as being needed for the project. *City of Dallas v. Shackelford*, 199 S.W.2d 503 (Tex. 1947).

THE SPECIAL BENEFITS DOCTRINE •

There is an exception to the project influence rule known as the special benefits doctrine. A special benefit is a benefit particular to the property that is the subject of the condemnation and not a general benefit which is the benefit to be produced by the public project for which the property or property interest was taken.

The special benefits doctrine originated in takings cases related to road and rail expansion projects during the 19th century. *See generally* John F. Stover, *American Railroads* 2-8 (2d ed. 1997); William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 78 (1995). It was not uncommon for a railroad to argue that the benefits from increased population and commerce that resulted from expanded rail service increased the value of the remainder of the property. Railroad companies frequently took an aggressive posture with landowners, offering little or no compensation, arguing that as a result of the project the value of the remainder exceeded the fair value of the part taken. *See* Fischel, *supra*, at 81 (quoting Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts, Perspectives in American History* 5: 329-402 (1971)).

The special benefits doctrine was first recognized in New Jersey in the late 19th century when a New Jersey appellate court held that only “special” benefits, not general benefits, could be deducted from the landowner’s damages. *Sullivan v. North*

Hudson County Railroad Co., 51 N.J.L. 518, 18 A. 689 (E. & A. 1889). *Sullivan* described “special benefits” as “those which directly increase the value of the particular tract crossed.” Later decisions noted specifically the inherent unfairness of allowing an offset for the benefit of the project which would result in the person who lost a portion of his property to the project to contribute more for that project than his neighbor, who did not lose any land, but who benefitted equally from the improvement. *Village of Ridgewood v. Sreel Investment Corp.*, 28 N.J. 121, 145 A.2d 306 (1958). (citing *State v. Miller*, 23 N.J.L. 383 (Sup. Ct. 1852)); see also *State v. Interpace Corp.*, 130 N.J. Super. 322; 327 A.2d 225 (App. Div. 1974)).

Pennsylvania also recognizes the distinction between special and general benefits. Legislation there provides that consideration shall be given “to the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken.” 26 Pa.C.S. § 706(a). While special benefits may be considered the expressly prohibits consideration of general benefit as an offset. 26 Pa.C.S. § 706(b)-(c).

In Arizona, the fact finder in a partial takings case must ascertain and assess how much the remainder “will be benefitted separately, if at all, by construction of the improvement proposed by [the condemner].” *A.R.S. § 12-1122*, Subsection A.3. However, “only special benefits may be deducted from severance damages. *Taylor v. State*, 12 *Ariz. App.* 27; 467 P.2d 251 (1970) (citing *Phoenix Title and Trust Co. v. State ex rel. Herman*, 5 *Ariz.App.* 246, 425 P.2d 434 (1967)).

Ohio has a statute that expressly excludes consideration of general benefits. Ohio Revised Code Ann. 163.14. However, case law in Ohio permits consideration of special benefits that result from the project as an offset. *Bd. of County Comm’rs v. Seminole Ave. Realty*, 179 Ohio App. 3d 37, 42 (Ohio Ct. App., Clark County 2008) (citing *City of Hilliard v. First Indus., L.P.*, 158 Ohio App. 3d 792, 822 N.E.2d 441 (Ohio Ct. App., Franklin County 2004)). While

neither the Ohio statute nor that state’s case law requires the fact-finder to include the accrual of special benefits when assessing the damage to the residue; the fact-finder may consider special benefits when making its determination. *City of Hilliard v. First Indus., L.P.*, 165 Ohio App. 3d 335, 344 (Ohio Ct. App., Franklin County 2005)

Florida also holds that general benefits resulting to the owner in common with the public cannot be set off, but that there may be consideration of a set off for special benefits. *Daniels v. State Road Dep’t.* 170 So. 2d 846 (F.a. 1964).

The decision in *Karan* ended the 124-year recognition of the special benefits doctrine in New Jersey. New Jersey joins other states in this regard.

Under a California statute, an offset against severance damages for any benefit accruing to the property owner is permitted. C.C.P. §1263.410(b). In fact, California’s “fair-market rule” “permit[s an] offset of all reasonably certain, immediate and non-speculative benefits,” which includes general benefits. *Los Angeles County Metro. Transp. Auth. v. Cont’l Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809 (Cal. 1997). Likewise, in Illinois a special benefit that enhances the market value of the remainder provided it is not conjectural or speculative must be offset against damages to land not taken. *Department of Public Works & Buildings v. Barton*, 371 Ill. 11; 19 N.E.2d 935 (Ill. 1939). This is similar to the rule in Rhode Island which also allows an offset in damages to the remainder provided by any special benefit. *Capital Properties, Inc. v. State of Rhode Island*, 636 A.2d 319 (1994). However, in none of these jurisdictions may the special benefit be used as an offset to value of the land actually taken. But that is not the case in all jurisdictions.

In Alabama the just compensation in partial taking case may be reduced by the benefits to the remaining parcel from the project if the project is a right-of-way, sewer line or water line or if the condemnation is commenced by a water conservancy or water management district. Code of Alabama,

§ 18-1A-171. The offset may be for both general and special benefits and the offset may not only be on the amount awarded for the damages to the remainder, but also to reduce compensation for the part taken. *See McRea v. Marion County*, 222 Ala. 511 (Ala. 1931) (“When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.” *quoting Bauman v. Ross*, 167 U.S. 548, 17 S. Ct. 966, 42 L.Ed. 220 (U.S. 1897).

Likewise in South Carolina, the Supreme Court has held that in an eminent domain case, it was proper to charge the jury that the benefits to the remainder of a landowner’s property from construction of public highway could be applied against the value of the land actually taken. *Smith v. Greenville*, 229 S.C. 252, 266 (S.C. 1956)

How Might *Karan* Affect Future Partial Takings or the Project Influence Doctrine?

The *Karan* decision altered the legal landscape in New Jersey partial takings cases by giving the government the right to present evidence – provided it is not speculative and is “reasonably calculable” – that the project provides a benefit to the property which can be used to offset the damages caused to the property by the taking. In other words, until there is reliable, credible evidence that the project in question provides a benefit which can be proven by market data, *not conjecture* – condemning agencies may find themselves in exactly the same position they were in before, suggesting that the owners are entitled to nothing. Along the New Jersey shore, the issue should be whether the sand dunes provide a quantifiable benefit to the properties in question. To date, what *can* be proven about this project in New Jersey is that the private real estate market places a premium on not only ocean views, but also upon direct access to and from the beach, as well as the exclusivity that private beaches afford to those fortunate enough to own them. To the extent

that these real and tangible benefits are impaired or destroyed by a taking such as one for dune construction, the cost of acquisition will undoubtedly continue to be significant. And until the condemning authorities recognize that beachfront property owners are entitled to the constitutional guarantee of just compensation, just like everybody else in this country, they may continue to be disappointed and even unsuccessful in their efforts.

What the *Karan* decision may portend for other types of future partial takings cases is unknown and potentially problematic. On the one hand, it virtually assures that the litigation of partial takings matters in the trial court will be more difficult and burdensome to manage, as condemning authorities are likely to now take the position that the project for which a portion of a property is taken will provide some benefit to that property which can be used to offset the damages that the taking creates. However, regardless of the purpose of these future partial takings, unless and until the benefit of a project 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.

Additional concerns exist about the impact of the holding in *Karan* in the many regards, including the following:

- What aspect(s) of the project influence doctrine remain? Strict adherence to the holding in *Karan* would require that certain provable benefits of the project be considered to offset damages, while the project influence doctrine clearly provides that increases or decreases in value attributable to the project for which the property is taken are *not* admissible.
- Can provable benefits of the project be used to offset the compensation that would be owed for the value of the part taken, or is the offset limited to the severance damages caused to the remainder by the taking?

- Can the *Karan* holding be used as a sword against condemning authorities in situations involving the diminution of access, where certain case law and/or legislation had previously held that certain diminutions were “non-compensable”, but where damage to a property’s value can be proven by a reasonably calculable sum due to those changes in access. For instance, a retail property which enjoyed direct highway access in front of its property, but now only has access at the rear, would suffer a valuation loss but, before *Karan*, those damages were non-compensable so long as the new access was determined to be “reasonable”. Now, *Karan* appears to put those damages into play. These are likely only some of the loose ends that *Karan* has left untied, and promises to lead to further dispute going forward. Superstorm Sandy certainly affected people outside of New Jersey, but whether the impact of *Karan* will extend beyond New Jersey will also remain to be seen.

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