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THE COMPENSATION CONUNDRUM IN PARTIAL TAKINGS CASES AND THE CONSEQUENCES OF *BOROUGH OF HARVEY CEDARS*

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INTRODUCTION

Federal and state governments use the power of eminent domain to appropriate private property for public projects.[1] This type of acquisition—commonly referred to as a "taking" or "condemnation"—requires that the government use the taken property for a public purpose and pay the landowner just compensation for his loss.[2] The Constitution does not define just compensation, leaving the courts to develop and apply methods for determining what compensation is "just."[3]

A "partial taking" occurs when the public project does not require the condemnor to take the landowner's entire parcel.[4] Under these circumstances, the landowner-condemnee may receive just compensation that includes the value of the part taken, as well as any severance damages[5] to the remainder parcel that are caused by the taking. Courts primarily enlist one of two calculation methods to measure just compensation.[6] The "before and after" method awards the landowner the difference between the market value of the property before the taking and the market value of the remainder parcel after the taking.[7] Alternatively, compensation under the "value plus damages" approach awards the value of the part taken plus net damages to the

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1 U.S. CONST. amend. V. The Fourteenth Amendment confers the equivalent power to the states. U.S. CONST. amend. XIV; *see generally* 3-8 PHILIP NICHOLS, ET AL., NICHOLS ON EMINENT DOMAIN § 8.01 (Matthew Bender, 3d ed. 2013).

2 *See* U.S. v. Miller, 317 U.S. 369, 373 (1943).

3 *Id.* at 373–74; *see generally* Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 597 (1954); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 JOURNAL OF POLITICAL ECONOMY, No. 3, 473, 474 (1976).

4 *See* United States v. Banisadr Bldg. Joint Venture, 65 F.3d 374, 378 (4th Cir. 1995) (defining a partial taking); *see generally* 4A-14 NICHOLS, *supra* note 1, at § 14.01. In a partial taking, the remainder parcel constitutes the part of the parcel that the government does not take, which the landowner retains ownership.

5 *Miller*, 317 U.S. at 376. Severance damages compensate for the diminution in value of the remainder directly caused by the taking itself and by the use of the land taken. United States v. 38.60 Acres of Land, 625 F.2d 196, 198–99 (8th Cir. 1980); *see generally*, 4A NICHOLS, *supra* note 1, at § 14.02. Severance damages may include such factors as loss of access (*see* State, Dep't of Highway v. Anderson, 356 So. 2d 1086, 1087–88 (La. Ct. App. 1978)), change in highest and best use of remainder parcel (*see* State Through Dep't of Highways v. Hoyt, 284 So. 2d 763, 766 (La. 1973)), or impact of public project on zoning of the remainder parcel (*see* Duval Prods., Inc. v. City of Tampa, 307 So. 2d 493, 493–94 (Fla. Dist. Ct. App. 1975)).

6 *See generally* 4A-14 NICHOLS, *supra* note 1, at § 14.02.

7 *See* United States v. 8.41 Acres of Land, 680 F.2d 388, 392 (5th Cir. 1982) (citing United States v. Virginia Elec. Co., 365 U.S. 624, 630 (1961)).

remainder parcel.[8]

In most cases, the approaches reach an equivalent award; however, these valuation methods reach divergent results in certain cases in which the remainder parcel's increased value exceeds the value of the part taken and the landowner's net damages.[9] Some courts permit this increase in market value to offset the compensation award for the part taken.[10] In that event, the before and after rule would award zero dollars to the landowner because the value received from the taking exceeds the landowner's losses.[11] By contrast, the value plus damages rule would compensate the landowner for the part taken under the same facts, and simply award zero severance damages for the remainder parcel.[12]

Consider the following hypothetical: A partial taking occurs when the city condemns one acre, valued at $5,000, of a landowner's five acre parcel in order to construct a highway. The taking causes a drainage issue on the remainder parcel for which the landowner seeks severance damages of $1,000. However, the market value of the remainder parcel also increases as a result of the taking by $2,000 per acre, or $8,000 total. This increase in market value exceeds both the value of the parcel taken and the damages sought for the drainage issue. Consequently, the landowner has not lost any monetary value as a result of the taking, notwithstanding the loss of part of his parcel. Three different compensation awards are possible under these facts. In each instance, the landowner would retain the $8,000 increase in value to the remainder parcel.

Outcome 1: "No Credit for Increased Value": The court disregards any increased market value to the remainder parcel caused by the partial taking and awards the landowner the market value of the part taken, plus any damages suffered by the remainder. The landowner receives $6,000 in compensation.[13]

Outcome 2: Before and After: The court assesses the parcel as a

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8 *See* State ex rel. Missouri Highway & Transp. Comm'n v. McDonald's Corp., 872 S.W.2d 108, 111 (Mo. Ct. App. 1994) (discussing value plus damages rule as another method to reach compensation award) (citing State ex rel. State Highway Comm'n. v. Kendrick, 383 S.W.2d 740, 745 (Mo. 1964)).

9 "Net damages" refers to the value of any severance damages suffered by the remainder parcel less any offsettable benefits caused by the taking. *See* 26 Am. Jur. 2d Eminent Domain § 324 (2014) (citing cases that offset special benefits against damages to the remainder).

10 *See* Bauman v. Ross, 167 U.S. 548, 558 (1898) (federal eminent domain law permits offset of benefits against severance damages and compensation for part taken); *see generally* 8A NICHOLS, *supra* note 1, at § G16.02. The condemnor bears the burden of proving benefits or increase in market value to the remainder. *See* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18, 46–47 (Tex. App. 2002); *see generally* 3-8A NICHOLS, *supra* note 1, at § 8A.02.

11 *See* UNIF. EMINENT DOMAIN CODE Art. X § 1002 cmt. (1974).

12 *Id.*

13 The "No Credit for Increased Value" outcome awards the landowner compensation of $6,000, which includes the value of the part taken ($5,000) plus the damages for the drainage problem ($1,000). See *infra* Part III.A for a discussion of this approach.

whole and compares the value of the entire parcel before the taking with the value of the parcel after the taking. Thus, any increase in market value may offset the entire award, including compensation for the parcel taken. The landowner receives $0 in compensation.[14]

Outcome 3: Value Plus Damages: The court accounts for the increase in market value to the remainder but only as an offset against severance damages. This approach requires payment for the part taken in all cases. The landowner receives $5,000 in compensation for the parcel taken and $0 in severance damages.[15]

The New Jersey Supreme Court recently encountered this compensation issue in the 2013 case of *Borough of Harvey Cedars v. Karan*,[16] in which the court announced a "market value rule" for measuring compensation.[17] However, the application of this rule remains uncertain. In future cases, the market value rule can be applied under either the before and after method or the value plus damages method because *Harvey Cedars* permits future courts to determine which method is more practical for a particular case.[18]

This Note suggests that the goals the *Harvey Cedars* court sought to achieve—including reduced windfalls and greater certainty in the law[19]—would best be achieved by applying the market value rule as adopted in California, which follows a value plus damages approach and requires payment for the part taken.[20] Part I of this Note introduces the *Harvey Cedars* case. Part II provides a historical background to partial takings cases and a discussion of the special benefits doctrine, a

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[14] The "Full Credit for Increased Value" outcome considers the $8,000 increase in value to the remainder parcel to offset the total compensation of $6,000 (Value of the Part Taken ($5,000) plus Damages for the Drainage Problem ($1,000)). The landowner receives a net value increase of $2,000 as a result of the taking (Credit for Increased Value to Remainder Parcel ($8,000) minus Compensation ($6,000)). The landowner thus receives $0 as compensation for the taking. See *infra* Part III for a discussion of various methods that reach this outcome.

[15] The "Credit Only Against Severance Damages" outcome considers the increase in value to the remainder parcel, but rather than award $0 for the taking, this outcome guarantees compensation for the part taken. The landowner thus receives $5,000 for the taking. See *infra* Part III.D for a discussion of the New York and California methods, which require compensation for the part taken.

[16] 70 A.3d 524 (N.J. 2013).

[17] *Id.* at 543 (opining that all reasonably calculable benefits accruing to remainder as a result of the public project that increase market value of property should offset the condemnation award, regardless of whether the community shares in these benefits).

[18] *Id.* at 543 n.8 (endorsing the before and after approach for future cases unless value plus damages rule provides more practical approach). New Jersey courts have used both the before and after rule and the value plus damages rule in partial takings cases. *See* Village of South Orange v. Alden Corp., 365 A.2d 469, 472 (N.J. 1976) (discussing the use of both valuation approaches in partial takings by New Jersey courts).

[19] *See Harvey Cedars*, 70 A.3d at 544 (injured landowner should receive just compensation for his loss, but such compensation does not entitle him to a windfall at public expense); *id.* at 540 (discounting terms special and general benefits as obscuring rather than illuminating calculation of just compensation).

[20] L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 824 (Cal. 1997); see also *infra* Part III.D for a discussion of the California approach.

type of compensation method that emerged as a compromise position to compensation to better protect condemnees. Part III surveys the various compensation methods used by several state courts. Part IV discusses the advantages and disadvantages of these approaches and proposes that New Jersey courts apply the market value rule under the value plus damages calculation—even in cases where the remainder's value increases to a greater extent than net damages incurred—in order to avoid the negative consequences associated with zero compensation under the before and after rule.

I. THE NEW JERSEY SUPREME COURT DECIDES *BOROUGH OF HARVEY CEDARS V. KARAN*

The New Jersey case of *Borough of Harvey Cedars v. Karan* involved a landowner who sought compensation and damages for the partial taking of his beachfront property by the Borough of Harvey Cedars (the Borough).[21] The partial taking involved a perpetual easement[22] to construct a sand dune as part of a beach replenishment project in Long Beach Island, New Jersey. Pursuant to recommendations of a 1999 feasibility report, the Army Corps of Engineers embarked on the project, which involved the construction of coastal sand dunes, to protect the island from damage caused by coastal storms and hurricanes.[23] The Borough acquired easements to construct these dunes from sixty-six landowners voluntarily,[24] but the Borough was forced to enact an eminent domain ordinance[25] to condemn the

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21 *Harvey Cedars*, 70 A.3d at 526.

22 An easement grants an individual the right to use another's land (affirmative easement) or restricts a landowner from using his land in a certain way that may harm his neighbors (negative easement). *See* JESSE DUKEMINIER, ET AL., PROPERTY 767 (7th ed. 2010). In this case, the Borough acquired an affirmative easement through its exercise of the eminent domain power in order to construct the sand dune on the taken portion of the Karans' property. *Harvey Cedars*, 70 A.3d at 526.

23 Pursuant to recommendations of a 1999 feasibility report, the Army Corps of Engineers (the Corps) embarked on a beach replenishment project in Long Beach Island, New Jersey, involving the construction of twenty-two-feet-high sand dunes along the coastline to protect the island from the damage of coastal storms and hurricanes. *Long Beach Island Shore Protection Project*, STATE OF N.J. DEP'T OF ENVTL. PROT., ENG'G & CONSTR., http://www.nj.gov/dep/ec/lbi_project.htm (last visited Sept. 18, 2013). The Corps, in conjunction with the New Jersey Department of Environmental Protection, were to carry out the project with the municipalities of Long Beach Island, working to obtain easements on coastline properties in order to construct the dunes. *Harvey Cedars*, 70 A.3d at 527–28.

24 *Harvey Cedars*, 70 A.3d at 527–28.

25 The legislature maintains the discretion to determine procedures for exercising the eminent domain power, subject to the limitations of the Fifth Amendment. U.S. CONST. amend. V; *see also* 6-24 NICHOLS, *supra* note 1, at § 24.06. A state charter or statute conferring eminent domain power to a municipal body often requires that a condemnation proceeding be authorized by adoption of an ordinance, resolution, or formal order. *See id.* at § 24.12.

necessary property from sixteen holdouts[26] who were unwilling to voluntarily contribute their land to the project.

In November 2008, the Borough initiated a condemnation proceeding[27] against the Karans, one of the sixteen holdouts, after the parties failed to negotiate an amount of compensation for the easement.[28] At trial, the landowners argued that the twenty-two-feet-high sand dune obstructed the beachfront property's panoramic ocean view, diminishing the value of the property.[29] On the other hand, an expert for the Borough testified that the landowners obtained a monetary benefit from the added storm protection of the sand dune.[30]

The trial judge used the special benefits doctrine to consider the nature of the benefit of additional storm protection[31] and determined as a matter of law that the storm protection could not offset the landowners' award.[32] The Appellate Division affirmed.[33] The special benefits doctrine was developed to distinguish between the types of benefits caused by a taking:[34] if the court deemed a benefit to be "general," arising from the public project, then the value of the benefit could not be counted against the landowner; on the other hand, a benefit found to be "special" to the property would offset the compensation award.[35] In this case, the trial court determined that any benefit derived from the dunes constituted a general benefit to the entire community, rather than a special benefit to the landowner's property that could factor into the calculation of just compensation.[36]

On appeal, the Supreme Court of New Jersey reasoned that because the sand dune would likely prevent complete destruction of the property in the event of a major storm[37]—and thus tangibly increase the

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26 N.J. STAT. ANN. §§ 20:3-1–50 (West 2013); *Harvey Cedars*, 70 A.3d at 527–28.

27 When a public body—or a private corporation invested with the power of eminent domain—initiates a taking of private property, it institutes a court proceeding against the owners of the desired lands. 6-24 NICHOLS, *supra* note 1, at § 24.05. The court must determine the value of the parcel and authorize the condemnation of the parcel upon payment of just compensation. *Id.*

28 The government generally must attempt to negotiate with the landowner for a purchase price for the parcel taken, but if negotiations fail, the condemning body files a petition in court to acquire the property. *See* DUKEMINIER, *supra* note 22, at 1081. The condemning body has the burden of proving necessity of the taking, and a jury generally determines just compensation. *Id.*

29 *Harvey Cedars*, 70 A.3d at 530. At trial, the expert for the condemnor testified that the loss of the ocean view caused nominal damages of $300, while the landowners' expert asserted a $500,000 loss in value. *Id.*

30 Borough of Harvey Cedars v. Karan, 40 A.3d 75, 78–79 (N.J. Super. Ct. App. Div. 2012).

31 *Id.* at 82.

32 *Id.* at 79.

33 *Id.* at 84–85.

34 *See, e.g.*, Sullivan v. N. Hudson Cnty. R.R. Co., 18 A. 689, 690 (N.J. 1889).

35 *Harvey Cedars*, 40 A.3d at 82.

36 *Id.* at 79.

37 Borough of Harvey Cedars v. Karan, 70 A.3d 524, 542 (N.J. 2013). The New Jersey Supreme Court decided the *Harvey Cedars* case on July 8, 2013, less than one year following Superstorm Sandy. While the opinion does not mention the storm, one may question the effect

market value of the beachfront property—this benefit should offset the compensation award to avoid granting the landowner a windfall.[38] In order to account for such a benefit, the court announced the market value rule to measure compensation, which would require a jury to consider all factors affecting the value of the property.[39]

Although the Supreme Court of New Jersey announced the market value rule, the court did not decide whether the rule should be applied under a before and after approach or a value plus damages approach. Consequently, future courts maintain the discretion to decide which method to use in a particular case, meaning that an injured landowner in a New Jersey case would not necessarily receive compensation for the parcel taken where the remainder parcel's value exceeds net damages. One New Jersey court could decide to use the before and after method to award the landowner zero compensation in these types of cases.[40] On the other hand, another court in the state could apply the value plus damages method, which would require payment to the landowner for the part taken.[41]

II. BACKGROUND

A. *Railroad Appropriations*

Different compensation methods in partial takings cases emerged with the upsurge in takings by private corporations—particularly railroads[42]—during the nineteenth century.[43] Initially, railroad companies sought to minimize the costs of public projects by claiming that landowners who suffered a partial taking did not suffer any

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that the storm had on the court's analysis. The landowners' property was left largely untouched by Sandy, arguably because of the protection provided by the sand dune, and the landowners later settled the case for $1 rather than try their chances with a post-Sandy jury. *See* Nicholas Huba, *Supreme Court: Beachfront Owners Can't Cash In On Protective Dunes*, ASBURY PARK PRESS (Jul. 9, 2013), http://www.app.com/apps/pbcs.dll/article?AID=/201307080410/NJNEWS/307080002; Marc Poirier, *Partial Taking in the Dunes of New Jersey: The Harvey Cedars Case*, CONCURRING OPINIONS (Oct. 31, 2013), http://www.concurringopinions.com/archives/2013/10/partial-taking-in-the-dunes-of-new-jersey-the-harvey-cedars-case.html.

38 *Harvey Cedars*, 70 A.3d at 544.

39 *Id.* at 543–44.

40 *See supra* notes 11 and 14 and accompanying text.

41 *See supra* notes 12 and 15 and accompanying text.

42 Legislatures may confer the power of eminent domain on private corporations or persons in order to facilitate public projects. *See* E. Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 821 (4th Cir. 2004) (citing Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878)) (landowner possesses absolute right to compensation, applicable to any person or corporation to whom legislature confers eminent domain power).

43 *See Harvey Cedars*, 70 A.3d at 536 (noting railroad condemnation practices at turn of century as period in which general and special benefits doctrine emerged); *see generally* LEWIS ORGEL, 1 VALUATION UNDER THE LAW OF EMINENT DOMAIN, 41–45 (2d ed. 1953).

damages because the construction of the railroad increased the value of the remainder parcel.[44]

During this period, several state courts' decisions[45] awarded the landowner zero compensation for a partial taking by using the before and after rule to calculate compensation, allowing railroad companies to freely appropriate private property.[46] The nineteenth century cases of *Alton and Sangamon Railroad Company v. Carpenter*[47] and *San Francisco, Alameda and Stockton Railroad Company v. Caldwell*[48] are illustrative. The condemnor railroad in *Alton* asserted that an increase in value to the remainder parcel caused by the taking should offset the landowner's compensation award.[49] The Illinois Supreme Court agreed on appeal.[50] The opinion interpreted the state condemnation statute to allow the court to consider all benefits caused by the taking in measuring compensation.[51] Thus, the general rise in property values created by the taking in this case offset the landowner's award.[52] The condemnor railroad company in *Alameda* argued for the same outcome.[53] The California Supreme Court also found for the railroad company and held that the remainder parcel's increased value resulting

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44 *See, e.g.*, Short v. Rochester & P. R.R. Co., 8 A. 596 (Pa. 1887) (noting that if property would have brought a higher price after the railroad construction than before and this benefit equals or exceeds damages, then defendant can recover nothing); Bohlman v. Green Bay & M. Ry. Co., 40 Wis. 157, 160 (Wis. 1876) (noting that president of condemnor railroad testified that condemnee did not suffer damages as a result of taking because condemnee's land was worth more with railroad than without); Peoria, Pekin & Jacksonville R.R. Co. v. Laurie, 63 Ill. 264, 266–68 (Ill. 1872) (affirming judgment of no damages in condemnation proceeding in which condemnor railroad proffered evidence regarding benefit to remainder and showed landowner suffered no damages as a result of taking); S.F., Alameda & Stockton R.R. Co. v. Caldwell, 31 Cal. 368 (Cal. 1866) (holding in favor of condemnor that just compensation may be paid in benefits caused by taking and rejecting condemnee's argument that only special benefits may offset compensation); Alton and Sangamon R.R. Co. v. Carpenter, 14 Ill. 190 (Ill. 1852) (noting that condemnor railroad requested jury instructions to award no damages if benefits exceeded damages); Nicholson v. N.Y. & N.H.R. Co., 22 Conn. 74, 78–79 (Conn. 1852) (noting that railroad condemnor offered evidence to show that the property had increased in value to a greater extent than the landowner's expenses).

45 *See, e.g.*, *Alton*, 14 Ill. at 190; *Alameda*, 31 Cal. at 368; *see also* cases cited *infra* note 90 (awarding no damages under before and after rule).

46 *See supra* note 44; *see generally* Edward J. Connor, Jr., *Valuation of Partial Taking In Condemnation: A Need for Legislative Review*, 2 PAC L.J. 116, 124 (1971) (discussing California's departure from "no credit for increased value" outcome of just compensation as an initiative aimed primarily at numerous railroad acquisitions occurring during late nineteenth century); Charles M. Haar & Barbara Hering, *The Determination of Benefits in Land Acquisition*, 51 CAL. L. REV. 833, 866 (1963) (describing series of New York cases that distinguished general and special benefits to limit increase in value to remainder that offset compensation for railroads takings).

47 *Alton*, 14 Ill. 190.

48 *Alameda*, 31 Cal. 368.

49 *Alton and Sangamon R.R. Co.*, 14 Ill. at 191.

50 *Id.* at 192.

51 *Id.*

52 *Id.* at 191.

53 *Alameda*, 31 Cal. at 370.

from railroad construction constituted just compensation. This opinion reasoned that the Constitution does not mandate monetary payment for a taking.[54]

Over time, this practice generated disapproval and motivated a departure from the before and after rule in favor of compensation methods that would award the landowner at least some compensation for the parcel taken.[55] Courts[56] and legislatures[57] began to either limit or prohibit the offset of a remainder parcel's increased value against compensation. Specifically, those jurisdictions that permitted zero compensation in *Alton* and *Alameda* responded with steps to end free appropriations by railroad companies. The Illinois legislature enacted a statute that required monetary compensation for the part taken,[58] and the California Supreme Court adopted the special benefits doctrine to limit the types of benefits that could offset compensation.[59]

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54 *Id.* at 374.

55 *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 536 (N.J. 2013) (noting railroad condemnation practices at turn of century as period in which special benefits doctrine emerged); *see generally* ORGEL, *supra* note 43, at 44–45.

56 *See, e.g.*, Gallatin Valley Elec. Ry. v. Neible, 186 P. 689, 691–92 (Mont. 1919) (general appreciation in value of properties surrounding railroad construction was not special benefit and could not offset severance damages); Salt Lake & U. R.R. Co. v. Butterfield, 150 P. 931, 932 (Utah 1915) (Offset for general benefits denies equal protection because landowner must contribute all potential benefits from improvement, while similarly situated neighbors are not required to contribute to project.) (citing Beveridge v. Lewis, 67 P. 1040 (Cal. 1902)); City of Paragould v. Milner, 170 S.W. 78, 79 (Ark. 1914) (interpreting ARK. CONST. art. 2, § 22 and ARK. CONST. art. 12, § 9 as permitting the offset of "local, peculiar, and special" benefits); Lake Roland Elevated Ry. Co. v. Frick, 37 A. 650, 652 (Md. 1897) (disallowing offset of benefits when condemnation brought by private railroad and market value of land increased as a result of improved travel); Newman v. Metro. Elevated Ry. Co., 23 N.E. 901, 903 (N.Y. 1890) (Increase of value resulting from the growth of public improvements, the construction of railroads, and improved means of transit accrues to the public benefit generally, and the general appreciation of property values cannot offset compensation to the injured landowner.); Meacham v. Fitchburg R.R. Co., 58 Mass. 291, 297–98 (Mass. 1849) (allowing consideration of increase in market value to particular remainder parcel caused by location of railroad on property but prohibiting offset for general rise in property values surrounding railroad).

57 *See, e.g.*, IOWA CONST. art. I, § 18 (Jury shall not consider any advantage that may result to the landowner as a result of the partial taking in measuring just compensation.); OKLA. CONST. art. II, § 24 (offset for special and direct benefits against the remainder parcel only); 26 PA. CONS. STAT. ANN. § 706(b) (West 2014) (disallowing offset of future damages and general benefits which will affect entire community beyond properties directly abutting project in calculating after value of remainder); WIS. STAT. ANN. § 32.09(3), (6) (West 2013) (special benefits considered in just compensation calculation, but no allowance for offset of general benefits).

58 *See* Peoria, Pekin & Jacksonville R.R. Co. v. Laurie, 63 Ill. 264, 266–68 (Ill. 1872) (affirming judgment of no severance damages in condemnation proceeding in which condemnor railroad proffered evidence regarding benefit to remainder and showed landowner suffered no damages as a result of taking).

59 *See* Beveridge v. Lewis, 70 P. 1083, 1086 (Cal. 1902) (holding that general benefits may not offset compensation insofar as applicable to private railroad corporations and overruling prior California decision that permitted offset of general benefits against compensation) (overruled by L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 816 (Cal. 1997)); *see also L.A. Cnty. Metro. Transp. Auth.*, 941 P.2d at 816 (discussing addition to state constitutional provision in reaction to "speculative computation of benefits" by private railroad enterprises to preclude private railroad companies both from taking land without first compensating owner and

Only Iowa absolutely precludes the offset of benefits or increased value in calculating just compensation[60] and a small minority of state laws take the opposite approach, using the before and after rule and permitting zero compensation.[61] The majority of states utilize some form of the special benefits doctrine to limit the circumstances in which an advantage resulting from a partial taking may offset payment to the landowner.[62]

B. *Responding to Free Appropriations: The Special Benefits Doctrine*

The special benefits doctrine classifies benefits caused by a taking as either "general" or "special" to the particular remainder parcel.[63] The most basic distinction between the two types of benefits differentiates a general benefit shared by the community at large from a benefit that directly enhances the value of the parcel in particular.[64] Traditionally, general benefits include such communal advantages as increased facility of transportation, population growth,[65] or a general appreciation in property values around a municipal project; by contrast, special benefits confer a unique benefit to the remainder parcel distinct from neighboring parcels.[66] A general benefit cannot offset the amount of compensation or severance damages owed to the landowner, whereas a special benefit may be credited against all or part of the compensation award.[67]

By offsetting a landowner's compensation by just the special benefits that he received distinctly from his neighbors,[68] the special benefits doctrine was designed to accomplish two goals. First, the doctrine would prevent a landowner from subsidizing a municipal project with part of his property in exchange for general benefits that his

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from setting off damages by benefits to remainder); Weston L. Johnson, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764, 765–66 (1969) (describing early California rule as essentially eliminating monetary compensation for takings by railroads during 1870s).

60 *See infra* Part III.A.

61 *See infra* Part III.B.

62 *See infra* Part III.C.

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

64 *Id.*

65 Sullivan v. N. Hudson Cnty. R.R. Co., 18 A. 689, 690 (N.J. 1889).

66 *See* State v. Ahaus, 63 N.E.2d 199, 202 (Ind. 1945) (Special benefits render a landowner's remainder parcel more useful or convenient or otherwise confer a peculiar increase in value.); *see generally Bauman*, 167 U.S. at 581–82; 4A NICHOLS, *supra* note 1, at § 14.03.

67 *See Bauman*, 167 U.S. at 581–82.

68 *Id.* ("[I]f the [taking] inure[s] 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. Otherwise, he is favored above the rest, and, instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage.").

neighbors received for free.[69] Second, because general benefits did not offset compensation for the taking, the doctrine would reduce the frequency of zero compensation for injured landowners as compared to the before and after method.[70]

Louisiana Highway Commission v. Grey[71] illustrates the function of the special benefits doctrine. The Supreme Court of Louisiana held that the unique subdivision potential conferred to the landowner's remainder parcels by the partial taking constituted an offsettable special benefit, rather than a general benefit to the entire community.[72] The condemnor appropriated 21.11 acres of land from the landowner's 172-acre farm to facilitate a highway construction project, leaving the remaining property severed in two remainder plots.[73] The court found that the remainder parcels realized a unique benefit because the farmland could be utilized as subdivisible parcels.[74] The farmland was the only property that was undeveloped in an otherwise suburban area located near a growing city.[75] The court applied the special benefits doctrine to offset the value of the subdivision potential against the landowner's compensation because this landowner derived this exclusive benefit over and above the general benefits of the project that his neighbors received for free.

Nonetheless, the doctrine has developed some patent flaws since its inception. First, many courts have developed conflicting definitions of a special benefit, particularly when neighboring parcels share a similar benefit from the taking.[76] Second, jurisdictions offset special benefits in different ways,[77] which has created confusion in this area of the law. Third, the special benefits doctrine may actually overcompensate the condemnee at the expense of the taxpaying public.[78]

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69 *See* City of Maryland Heights v. Heitz, 358 S.W.3d 98, 106 (Mo. 2011) (allowing offset for general benefits would effectively require landowner whose land was taken to subsidize project that rest of community received at no cost) (citing 3 NICHOLS, *supra* note 1, at § 8A.02(1)); *see also* State v. Midkiff, 516 P.2d 1250, 1254–55 (Haw. 1973) (special benefits doctrine avoids unfairness of making one landowner pay in land for benefits that another receives free) (citing Territory v. Mendonca, 375 P.2d 6, 13 (Haw. 1962); United States. v. 930.65 Acres of Land, 299 F. Supp. 673, 677–78 (D. Kan. 1968) (justifying narrow application of special benefits doctrine with equitable principle that it is unfair to offset benefits to landowners when neighbors, whose lands are not taken, receive same benefits for free); Louisiana Highway Comm'n v. Hoell, 140 So. 485, 486 (La. 1932) (reasoning that landowner should not bear more of cost of public improvement and benefit than neighbor whose lands are not taken for public project).

70 *See supra* notes 46 and 59.

71 2 So. 2d 654 (La. 1941).

72 *Id.* at 660–61

73 *Id.* at 655.

74 *Id.*

75 *Id.* at 657.

76 *See infra* notes 101–103.

77 *See infra* Part III.C.

78 *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 544 (N.J. 2013) (abolishing the special benefits doctrine and reasoning that injured landowner should receive just

III. STATE SURVEY

A. *No Credit for Increased Value: Iowa*

The state of Iowa remains the only state to absolutely prohibit an offset against compensation for increased value accruing to the remainder parcel.[79] This approach awards the largest possible compensation because the landowner receives the full value of the part taken plus the value of all damages incurred, without any offset whatsoever.

In the seminal case of *Frederick v. Shane*,[80] the state constitution precluded the Supreme Court of Iowa from offsetting compensation or severance damages by any benefit to the remainder parcel.[81] At trial, the landowner claimed $500 for damages arising from road construction on a portion of his land, even though the State's witnesses testified—and the landowner conceded—that the road actually improved drainage on the land and increased its market value.[82] The lower court instructed the jury to consider this improvement as an offset against the compensation award, and the landowner appealed.[83]

The Supreme Court of Iowa reversed and cited to the "plain and unmistakable" language of the state constitution as an absolute bar to offsetting compensation.[84] Under the state's recently adopted constitution, the court was required to award damages to the landowner without reduction by the increased value to the remainder parcel.[85] Although the previous state constitution permitted benefits to offset compensation,[86] the negative sentiment surrounding the free appropriations by railroad companies during this period likely compelled this shift in Iowa state law.[87]

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compensation for his loss, but not a windfall at public expense).

79 *See* IOWA CONST. art. I, § 18; Johnson v. Des Moines Metro. Wastewater Reclamation Auth., 814 N.W.2d 240, 246–47 (Iowa 2012) ("Before-and-after" requires the jury to measure the difference in the fair market value of the parcel before and immediately after the taking, without concern for any benefit caused by the public condemnation project.) (citing Jones v. Iowa State Highway Comm'n, 185 N.W.2d 746, 750 (Iowa 1971)); *see also* Frederick v. Shane, 32 Iowa 254, 256 (Iowa 1871) (state constitution absolutely prohibits offset of benefits).

80 *Frederick*, 32 Iowa 254.

81 *Id.* at 255–56.

82 *Id.* at 254–55.

83 *Id.* at 255.

84 *Id.* at 255–56 ("Private property shall not be taken for public use without just compensation first being made or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken.") (citing IOWA CONST. art. I, § 18).

85 *Frederick*, 32 Iowa at 255–56. The condemnor cited to prior state cases that had permitted such an offset, but the court rejected these authorities as inapplicable because they were adjudicated under the old constitution. *Id.* at 256.

86 *Id.*

87 *See supra* notes 55–57 and accompanying text.

B. *The Before and After Method*

A small minority of jurisdictions utilize the opposite approach from Iowa, the before and after rule, which credits all benefits accruing to the remainder against the total compensation award.[88] In these states, any benefit accruing to the remainder may offset compensation, whether traditionally classified as general or special.[89] Consequently, a landowner does not receive any compensation if the partial taking causes the remainder's value to exceed net damages because the increased value offsets the landowner's severance damages as well as the payment for the parcel taken.[90]

The Supreme Court of North Carolina addressed the use of the before and after rule to offset benefits against total compensation in *Department of Transportation v. Rowe* and held that the approach was constitutional.[91] In *Rowe*, the condemnor appropriated a portion of the landowner's property pursuant to a state condemnation statute that codified the before and after rule in partial takings cases.[92] The trial judge entered a judgment on the jury verdict of zero compensation because the increase in value to the landowner's remainder parcel exceeded the total net damages.[93] The landowner appealed, and the Court of Appeals ordered a new trial, holding that the state condemnation statute constituted a violation of the North Carolina Constitution because the statute allowed the fact-finder to credit both

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88 This approach has been utilized in a small minority of states, including Alabama (*see* ALA. CODE § 18-1A-170 (1975); State v. Huggins, 196 So. 2d 387, 390–91 (Ala. 1967) (citing Pryor v. Limestone Cnty., 134 So. 17, 17–18 (Ala. 1931))); Arkansas (*see* Barnes v. Ark. State Highway Comm'n, 664 S.W.2d 884, 885–86 (Ark. Ct. App. 1984) (citing ARK. STAT. ANN. § 76–521 (Repl. 1981))); North Carolina (*see* Williams v. State Highway Comm'n of N.C., 114 S.E.2d 340, 344 (N. C. 1960)); and Kentucky (*see* Ky. Dep't of Highways v. Sherrod, 367 S.W.2d 844, 853, 857 (Ky. 1963) (offsetting benefits because condemnor should not be required to pay more for partial taking if remainder parcel's value increases, notwithstanding fact that neighbor may receive equivalent benefit for free)). Eminent domain scholars have also endorsed this approach as the more logical compensation method. *See Ky. Dep't of Highways*, 367 S.W. at 857 (citing ORGEL, *supra* note 43, and NICHOLS, *supra* note 1, as support for the court's use of the before and after rule to offset benefits against the value of the part taken).

89 *See supra* note 88.

90 *See, e.g.*, Dep't of Transp. v. Rowe, 549 S.E.2d 203, 206 (N.C. 2001) (affirming a verdict of zero compensation when special and general benefits accruing to the remainder exceeded damages.); S. Furniture Mfg. Co. v. Mobile Cnty., 161 So. 2d 805, 806, 811 (Ala. 1963) (holding that evidence sustained jury verdict of "No Dollars" damages in which benefits from two-year easement on property exceeded damages); Posey v. St. Clair Cnty., 116 So. 2d 743, 746 (Ala. 1959) (affirming jury award of zero damages when remainder parcel increased in value due to road construction).

91 549 S.E.2d 203.

92 *Id.* at 206 ("[J]ust compensation is '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.'") (citing N.C. GEN. STAT. § 136-112(1) (1959)).

93 *Id.*

special and general benefits against the landowner's compensation.[94]

The Supreme Court of North Carolina rejected this argument and reversed the Court of Appeals' decision.[95] According to the court, permitting the fact-finder to consider all types of benefits ensured that condemnees were put in the same financial position as they were prior to the taking[96] and avoided overcompensating the landowner for his loss.[97] If the court had not credited general benefits against the net compensation award in this case, the condemnee would have received a windfall consisting of full compensation for the part taken and any increase in value to the remainder parcel caused by the alleged "general benefits."[98]

C. *The Special Benefits Doctrine In Practice*

Those states that adopt the special benefits doctrine agree that any general benefit resulting from a partial taking cannot offset the landowner's losses from the taking. Two significant differences, however, divide the many states that embrace the doctrine. First, many scholars[99] and judges[100] have criticized the doctrine because courts define a special benefit differently, which has muddled the distinction between special and general benefits. For instance, a Vermont court defined a special benefit as peculiar to the remainder parcel, although

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94 Dep't of Transp. v. Rowe, 531 S.E.2d 836, 845 (N.C. Ct. App. 2000) (allowing general benefits to offset market value of remainder violates constitutional requirement of just compensation, which is unjust to condemnee and provides a windfall to the public).

95 *Rowe*, 549 S.E.2d at 207.

96 *Id.* at 210.

97 *Id.*

98 *Id.*

99 *See generally* Connor, Jr., *supra* note 46 at 119; Haar, *supra* note 46 at 869 ("A certain amount of diversity is doubtless inevitable, but even for us it is rare to have such a kaleidoscope of rules pertaining to so narrow a subject as the various rules pertaining to the deductibility of benefits from condemnation awards."); Johnson, *supra* note 59 (proposing the adoption of a straightforward before and after rule to measure just compensation in place of the special benefits doctrine); Philip K. Jones, Jr., Comment, *The Confusing Death of the Special Benefits Doctrine in Louisiana Expropriation Law,* 34 LA. L. REV. 820, 832 (1974) ("The more logical rule is to offset *all* benefits.").

100 *Cf.* Borough of Harvey Cedars v. Karan, 70 A.3d 524, 540 (N.J. 2013) (discounting terms special and general benefits as obscuring rather than illuminating the calculation of just compensation); L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 818–20 (Cal. 1997) (concluding that difficulties in applying special benefits doctrine and lack of justification for its continued use warrant rejection of the doctrine); State *ex rel.* State Highway Comm'n of Mo. v. Koziatek, 639 S.W.2d 86, 88 (Mo. Ct. App. 1982) (referring to the distinction between general and special benefits as "shadowy at best"); State By and Through State Highway Comm'n v. Bailey, 319 P.2d 906, 927–28 (Or. 1957) (emphasizing the apparent inconsistences in the special benefits doctrine in yielding to precedent and "reluctantly" applying the doctrine); Gallatin Valley Elec. Ry. v. Neible, 186 P. 689, 690 (discussing the inability to harmonize the definitions of the special benefits doctrine, although the court continued to apply the doctrine).

the benefit does not have to be unique;[101] a Washington court held that benefits may be special even though other owners receive similar benefits;[102] and a South Dakota court held that special benefits must be different in kind from any other landowner in proximity to the project.[103]

Second, when courts determine that the benefit is special, they disagree about how the special benefit offsets compensation. One method credits special benefits against total compensation,[104] which effectively operates as the before and after rule in cases where special benefits are found to exceed net damages.[105] These jurisdictions differ from those states that enlist the before and after rule[106] in one pivotal respect: these courts will not offset increased value resulting from general benefits against compensation. However, when special benefits increase the remainder parcel's value beyond the landowner's net damages, this approach reaches the same result as the before and after rule[107] and awards zero compensation. The second method offsets special benefits against only severance damages and requires compensation for the part taken.[108]

A Washington case illustrates the first approach. In *State v. Templeman*,[109] the Washington Supreme Court utilized the special benefits doctrine and awarded zero compensation by offsetting the increase in value to the remainder caused by the partial taking against

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101 Farrell v. State Highway Bd., 194 A.2d 410, 414 (Vt. 1963).

102 State v. Templeman, 693 P.2d 125, 127 (Wash. Ct. App. 1984).

103 State Highway Comm'n *ex rel.* State v. Emry, 244 N.W.2d 91, 96 (S.D. 1976).

104 *See, e.g.,* City of Branson v. Estate of LaFavre, 9 S.W.3d 755, 758 (Mo. Ct. App. 2000) (special benefits may offset compensation for part taken and damages to remainder) (citing State *ex rel.* State Highway Comm'n v. Tate, 592 S.W.2d 777, 778 (Mo. 1980) (en banc)); State v. Hawkins, No. 91C-10-183(WTQ), 1995 WL 717407, at *2–3 (Del. Super. Ct., New Castle Cnty. Nov. 22, 1995) (citing Acierno v. State, 643 A.2d 1328, 1332 (Del. 1994)) (same); E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1042 (Colo. 2004) (en banc) (special benefits are valid form of compensation under state constitution); Ky. Dep't of Highways v. Sherrod, 367 S.W.2d 844, 857 (Ky. Ct. App. 1963) (special benefits may offset payment for part taken); Rudder v. Limestone Cnty., 125 So. 670, 675 (Ala. 1929) (same).

105 *See infra* notes 109–117 and corresponding text.

106 *See supra* Part III.B.

107 *See, e.g.*, *Templeman*, 693 P.2d 126 (affirming compensation of $0 for partial taking when value of special benefits exceeded damages); Petkus v. State Highway Comm'n, 130 N.W.2d 253, 254 (Wis. 1964) (affirming jury award of no damages when evidence showed value of remainder was worth more after taking than net damages and increase in value to remainder constituted special benefit); State *ex rel.* State Highway Comm'n v. Mattox, 307 S.W.2d 382, 384 (Mo. 1957) (holding jury award of zero damages for parcel taken not a result of prejudice when condemnor provided substantial evidence that landowners would receive special benefits in excess of damages); Smith v. City of Greenville, 92 S.E.2d 639, 644 (S.C. 1956) (holding special benefits to remainder could offset payment for part taken); State *ex rel.* State Highway Comm'n v. Baumhoff, 93 S.W.2d 104, 106, 109 (Mo. Ct. App. 1936) (affirming jury award of no damages when special benefits exceeded net damages for partial taking); McKeen v. City of Minneapolis, 212 N.W. 202 (Minn. 1927).

108 *See infra* notes 121–134 and corresponding text.

109 693 P.2d 125.

compensation for the part taken.[110] The State condemned portions of two separate parcels totaling 66.73 acres as part of a highway project, for which the condemnee claimed compensation valued at $8,888 for the portion on one parcel and $402,000 for the portion on the other.[111] The State's expert testified that these remainder parcels would actually increase in value by $298,960 and $2,927,740, thus exceeding the value of the taken parcels and entitling the landowner to zero compensation for the partial taking.[112] The jury subsequently returned an award of zero dollars to the condemnees[113] because Washington law permits the offset of special benefits against the total compensation award.[114]

On appeal, the condemnees asserted that the increase in value to the remainder parcel did not constitute an offsettable special benefit because the landowner's remainder parcel was not the sole recipient of the benefit.[115] The Washington Supreme Court rejected this argument and construed the increase in market value to the remainder parcel as a special benefit, despite the fact that neighboring parcels shared the same increase in value.[116] The court affirmed the award of zero dollars and noted that the value of the remainder increased sevenfold due to the project.[117]

The second approach to the special benefits doctrine offsets special benefits against severance damages, but not against payment for the part taken.[118] This approach operates like the value plus damages compensation method, so an injured landowner would receive compensation for the part taken even if special benefits from the taking exceeded his net damages. Although this approach is common, courts utilize different definitions of a special benefit to reach the same result.[119] The following two cases are illustrative of decisions in which the court offset special benefits against only severance damages but did so by defining the benefit more broadly than a unique advantage on the

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110 *Id.*

111 *Id.* at 126.

112 *Id.*

113 *Id.*

114 *Id.* at 127 (benefits offset against any and all compensation and damages (citing WASH. REV. CODE ANN. § 8.04.080)(West 2014)).

115 *Templeman*, 693 P.2d. at 126–27.

116 *Id.* at 127 (increase in market value constitutes special benefit) (citing Spokane Traction Co. v. Granath, 85 P. 261 (Wash. 1906)).

117 *Id.* at 128 (noting annexation, rezone, and city plans to extend utilities to the property as benefits directly resulting from the highway project).

118 *See, e.g.*, State v. Lewis, 785 P.2d 24, 27 (Alaska 1990) (special benefits may offset damages) (citing ALASKA STAT. ANN. § 09.55.310(a)(3) (West 2013)); City of Orofino v. Swayne, 504 P.2d 398, 400–01 (Idaho 1972) (special benefits cannot offset compensation for the part taken); State Through Dep't of Highways v. Bitterwolf, 415 So. 2d 196, 200 (La. 1982) (statutory prohibition against offset of benefits applies only to part taken, and not to offsetting damages to remainder) (referencing LA. CIV. CODE ANN. art. 2633 (2012)).

119 *See supra* notes 101–103 and accompanying text (different definitions of special benefit).

particular remainder parcel.[120]

For example, Illinois courts broadly define a special benefit as any tangible increase in market value to the remainder parcel—whether or not the landowner shares the benefit with the community—and guarantee compensation for the part taken.[121] In *Illinois State Toll Highway Authority v. Heritage Standard Bank and Trust Company*,[122] the Appellate Court of Illinois affirmed an award for a partial taking for full compensation for the taken parcel and zero dollars in damages because the project caused the remainder to increase in value.[123] The condemnor appropriated 11.4 acres of land, leaving a remainder parcel of approximately 29 acres for which the landowners claimed damages.[124] Two experts for the condemnor testified that the remainder parcel incurred no damages from the taking because the project provided improved accessibility to the parcel.[125]

The landowners appealed the jury award of $805,000 for the part taken and zero damages to the remainder, alleging that the jury had credited nonoffsettable general benefits against the damages award.[126] The appellate court rejected their argument and stated that any enhancement in market value caused by the public project constituted a special benefit to the remainder.[127] Under this reasoning, sharing the benefit of increased market value with other parcels does not automatically qualify the benefit as general because *each parcel* whose value increases as a result of the project receives a special benefit, irrespective of the project's effect on surrounding properties.[128]

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120 *Compare* La. Highway Comm'n v. Grey, 2 So. 2d 654 (remainder parcel received special benefit as a result of unique subdivision potential as a result of the taking) *with* Farrell v. State Hwy Bd., 194 A.2d 410, 413–14 (Vt. 1963) (special benefits must be peculiar to land directly affected but do not have to be unique) *and Templeman*, 693 P.2d at 125 (special benefits may be special even though other landowners receive similar benefits as result of highway improvement).

121 Illinois case law requires compensation for the part taken. *See, e.g.*, Ill. State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chicago, 642 N.E.2d 1249, 1255 (Ill. 1994) (Long-standing measure of damages for *part not taken* is the difference between fair market value of property prior to improvement and fair market value of property as affected by improvement.) (citing Dep't of Pub. Works & Bldg. v. Divit 182 N.E.2d 749, 753 (Ill. 1962) (emphasis added)); *see also* Kane v. City of Chicago, 64 N.E.2d 506, 508 (Ill. 1945) (Parcel actually taken must be compensated in money, but damages to remainder may be offset by benefits occasioned by taking.). Georgia exhibits similar flexibility by considering a tangible increase in market value as an offsettable benefit against the remainder and likewise assures the "Credit Only Against Severance Damages" outcome by requiring compensation for the part taken. *See* Fulton Cnty v. Power, 137 S.E.2d 474, 477 (Ga. Ct. App. 1964) (benefits may not offset compensation for part taken) (citing GA. CODE ANN. § 36-504)).

122 552 N.E.2d 1151 (Ill. App. Ct. 1990).

123 *Id.* at 1155.

124 *Id.*

125 *Id.* at 1155–56.

126 *Id.* at 1157.

127 *Id.* at 1158.

128 *Id.* (citing Brand v. Union Elevated R.R. Co., 101 N.E. 247, 249 (Ill. 1913)); *see also* Sanitary Dist. of Chicago v. Boening, 107 N.E. 810 (Ill. 1915) (holding that special benefit results when increase in market value accrues to remainder as result of project, and finding reversible

The Tennessee Court of Appeals also required compensation for the part taken and offset special benefits only against severance damages in *Maryville Housing Authority v. Williams*.[129] There, the alleged benefits to the remainder parcel were also shared with surrounding properties.[130] These benefits could traditionally be defined as general benefits because the remainder parcel shared the benefit of the project—a municipal parking lot—with the public at large.[131] The trial judge adopted this view and held as a matter of law that the municipal lot did not specially benefit the remainder parcel.[132]

However, the Court of Appeals reversed the award for $10,000 in damages after the condemnor appealed, reasoning that the jury should have been permitted to evaluate any evidence of benefits to the remainder parcel.[133] The opinion stated that access to public parking could materially affect the market value of commercial properties, and, therefore, the fact-finder should consider whether this municipal lot conferred a special benefit on the remainder parcel.[134]

D. *The New York and California Approach*

Several courts award value plus damages compensation and offset severance damages by all benefits resulting from the taking, without distinguishing between those that are special and general. This type of compensation provides the best solution in cases in which increased value to the remainder parcel exceeds net damages for two primary reasons. First, this method avoids an award of zero dollars to the landowner, who has physically lost a piece of property, because compensation must be paid for the part taken in all cases. Second, it ensures that the condemnor does not pay the landowner for undeserved severance damages.

States such as New York[135] use the terms "general benefit" and

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error in jury instruction to exclude consideration of all benefits shared with other landowners).

129 478 S.W.2d 66 (Tenn. Ct. App. 1971).

130 *Id.* at 67.

131 *See, e.g.*, Hilliard v. First Indus., L.P., 846 N.E.2d 559, 565 (Ohio Ct. App. 2005) ("Special benefits are those that accrue directly and solely to the landowner's property.") (citing Little Miami R.R. Co v. Collett, 6 Ohio St. 182, 186 (Ohio 1856)); State Highway Comm'n *ex rel.* State v. Emry, 244 N.W.2d 91, 96 (S.D. 1976) (noting that "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement and that, though the benefits to various landowners affected may differ in degree, it is not the degree of benefit that controls").

132 *Maryville Hous. Auth.*, 478 S.W.2d at 67. The jury thus disregarded any value conferred by the municipal lot and awarded the landowners $16,350 for the part taken and $10,000 in damages for the remainder at trial. *Id.*

133 *Id.* at 69.

134 *Id.*

135 *See* Chiesa v. State, 324 N.E.2d 329, 333 (N.Y. 1974); *see also* Michigan (*see* Dep't of Transp. v. Sherburn, 492 N.W.2d 517, 520 (Mich. Ct. App. 1992) (Proper measure of damages in

"special benefit" to describe the types of advantages conferred on a parcel[136] but offset all benefits against severance damages. This approach differs from the before and after rule[137] because a landowner always receives compensation for the part taken, even when the value of the remainder exceeds net damages. It also differs from those jurisdictions that utilize the special benefits doctrine[138] because these jurisdictions offset all types of benefits against severance damages.

The New York Court of Appeals accounted for all benefits accruing to the landowner's remainder parcel in *Chiesa v. State*,[139] but it limited the offset of these benefits to severance damages and required compensation for the part taken.[140] The court mandated payment for the taken parcel even though experts for both parties agreed that the taking increased the value of the remainder more than the landowner's losses.[141]

Both the Appellate Division and the Court of Appeals rejected the condemnor's argument that the remainder's increased value should offset compensation for the part taken.[142] The Appellate Division affirmed the award for the part taken and reasoned that any "so-called windfall" to the landowner would not burden the taxpaying public because the windfall would only materialize upon the sale of the remainder parcel[143] and not as part of the compensation award paid by the condemnor. The Court of Appeals also affirmed.[144] The opinion regarded compensation for the part taken as the more equitable rule—even when the value of the remainder increases as a result of the taking—because the condemnor ought to bear the responsibility of paying for the taken parcel.[145]

California reaches the same result as New York in partial takings cases because the state does not differentiate between types of benefits

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partial takings case consists of fair market value of property taken plus any severance damages to remainder.)); New Mexico (*see* N.M. STAT. ANN. § 42A-1-26 (West 2014); Yates Petroleum Corp. v. Kennedy, 775 P.2d 1281, 1284–85 (N.M. 1989) (clarifying that any enhancement in value to remainder may offset severance damages but cannot offset compensation for part taken)); Virginia (*see* VA. CODE ANN. § 25.1-230(A)(1) (West 2014) (increase in value to remainder shall not offset value of property taken)); and West Virginia (*see* W. Va. Dep't of Highways v. Bartlett, 194 S.E.2d 383, 389 (W. Va. 1973) (citing W. VA. CODE ANN. § 54-2-9 (West 2013))).

136 The use of benefits language in the New York cases is likely a relic of early twentieth century decisions that first encountered the question of benefits. *See Chiesa*, 324 N.E.2d at 331 (citing *In re* City of New York (Cons. Gas Co.), 83 N.E. 299 (N.Y. 1907) (New York rule for calculating compensation in partial takings offsets special and general benefits.).

137 *See supra* Part III.B.

138 *See supra* Part III.C.

139 324 N.E.2d at 330.

140 *Id.*

141 *Id.*

142 *Id.*

143 Chiesa v. State, 43 A.D.2d 359, 361 (N.Y. App. Div. 1974).

144 *Chiesa*, 324 N.E.2d at 330.

145 *Id.* at 332–33.

and no increase in value to the remainder can offset compensation for the part taken.[146] The Supreme Court of California announced the market value rule after abolishing the special benefits doctrine in the 1997 case of *Los Angeles County, Metropolitan Transportation Authority v. Continental Development Corporation*.[147] California's market value rule offsets a remainder parcel's increased value against only severance damages and requires compensation for the part taken.[148]

The decision eliminated the special benefits doctrine in California because the historical reasons behind the doctrine, including uncompensated takings by railroads, were no longer prevalent.[149] Moreover, the confusion surrounding the doctrine outweighed its usefulness.[150] The court held that calculation for severance damages must include all relevant evidence concerning the remainder's market value,[151] which offered a simpler method of calculating compensation because the state courts would no longer struggle to distinguish between types of benefits.

The case involved the condemnation of three separate interests in a parcel that was located near a planned transit station.[152] Although the condemnee claimed severance damages to the remainder, the condemnor argued that the remainder's value would increase by $3,760,000, based on evidence of the rise in property values surrounding transit stations.[153] The trial court refused to admit this evidence, finding that the increase in value to the landowner's parcel was not a special benefit because all property values in the vicinity of the project would increase.[154] At the close of the trial, the jury awarded the condemnee compensation for the part taken and severance damages[155]—an enormous windfall—because the jury could not consider the alleged $3,760,000 increase in market value to offset severance damages.

The condemnor appealed and asserted that special benefits to the remainder should offset severance damages, or in the alternative, that the court should abolish the distinction between general and special

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146 CAL. CIV. PROC. CODE § 1263.410(b) (West 2014) (if benefits to remainder exceed damages to remainder, such excess shall not offset compensation for part taken).

147 L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp, 941 P.2d 809, 812, 823–24 (Cal. 1997).

148 *Id.* at 814 n.2 (noting that California's current eminent domain statute requires payment for the part taken).

149 *Id.* at 812.

150 *Id.* (concluding that courts' difficulty in consistently applying the doctrine warranted overruling prior California cases that distinguished between special and general benefits).

151 *Id.* at 824.

152 *Id.* at 811–12.

153 *Id.* at 813.

154 *Id.*

155 *Id.* at 812.

benefits.[156] The court accepted the latter argument and announced the market value rule to replace the special benefits doctrine.[157] The court reasoned that the special benefits doctrine actually permitted a landowner to pay *less* for a public project than his neighbors in some cases if a landowner received severance damages for the remainder unreduced by the increased value caused by any general benefits.[158] Moreover, because California law requires payment for the parcel taken in all partial takings cases, the concern regarding uncompensated takings during the nineteenth century was no longer relevant.[159]

IV. FUTURE APPLICATION OF THE *HARVEY CEDARS* MARKET VALUE RULE

A. *Issues Solved by the* Harvey Cedars *Decision*

New Jersey's adoption of the market value rule successfully alleviated several issues in partial takings cases. First, *Harvey Cedars* offered some clarity on calculating compensation for a partial taking by eliminating the special benefits doctrine.[160] Second, it decreased the likelihood of windfall severance damages by requiring that all factors affecting the market value of the remainder be accounted for in calculating damages for a partial taking.[161]

The special benefits doctrine had failed to solve many of the issues that it was designed to prevent. In many cases, the injured landowner must pay for the same advantage that his neighbors receive for free even if the court uses the special benefits doctrine. This outcome occurs when a court considers benefits shared with neighboring parcels along a project to be "special," notwithstanding the fact that the landowner does not receive the advantage distinctly from his uninjured neighbors.[162] Moreover, zero compensation persists under the special benefits doctrine in those states that offset special benefits against total compensation,[163] further undermining the doctrine's initial goal of

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156 *Id.*

157 *Id.* at 822–23

158 *Id.*

159 *Id.* at 819–20.

160 Borough of Harvey Cedars v. Karan, 70 A.3d 524, 540 (N.J. 2013). The court's new approach would consider all measurable and tangible market value factors affecting the remainder parcel (*Id.* at 543) based on what a willing seller and willing buyer would consider. *Id.* at 540.

161 *Id.*

162 *See, e.g.*, State v. Templeman, 693 P.2d 125, 127 (Wash. Ct. App. 1984) (Special benefits may be special even though other owners receive similar benefits.); Ill. State Toll Highway Auth. v. Heritage Standard Bank & Trust Co., 552 N.E.2d 1151, 1158 (Ill. App. Ct. 1990) (same); Maryville Hous. Auth. v. Williams, 478 S.W.2d 66, 68 (Tenn. Ct. App. 1971) (same).

163 *See supra* Part III.B.

preventing free appropriations.[164] By removing the distinction between special and general benefits, the *Harvey Cedars* approach provides greater certainty because a court assesses all increases in market value caused by the taking in the same manner.

New Jersey's market value rule also succeeds in reducing the windfall damages awards that may occur under the special benefits doctrine. For example, the Supreme Court of Vermont granted such a windfall under Vermont law in *Farrell v. State Highway Board*.[165] There, experts testified to the increase in market value of the properties surrounding the project and to the landowner's parcel in particular.[166] The jury found the value of the land taken to be $75,000 plus $45,000 in damages to the remainder, which the jury reduced by $35,000 in benefits.[167] The condemnees appealed, asserting that any benefits arising from the public project constituted non-offsettable general benefits because the project increased the value of all surrounding properties.[168] On appeal, the Supreme Court of Vermont found for the condemnees and remanded the case for a judgment based on damages of $120,000,[169] unreduced by any of the increased value caused by the taking.

Farrell illustrates the significant issue of overcompensation that the *Harvey Cedars* court addressed. While Vermont's codified special benefits law[170] required the court to award the landowner more than he lost from the taking, the market value rule would have reduced the condemnee's severance damages by the remainder's increased value,[171] reducing the landowner's windfall.

The *Harvey Cedars* market value rule also precludes Iowa's approach, which wholly disregards any increase in value caused by the partial taking.[172] Under Iowa's partial takings compensation method, condemnees may receive windfall damages that place them in a more

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164 *See supra* Part II.B.

165 194 A.2d 410, 411 (Vt. 1963) (partial taking for construction of a control access highway interchange).

166 *Id.* at 412. The landowner's parcel increased in value by $52,000, or fifty percent, following the taking. *Id.*

167 *Id.* at 410–11.

168 *Id.* at 412–13.

169 *Id.* at 415.

170 *Id.* at 413–14 (general public benefits shall not be considered in calculating damages (citing 19 V.S.A. § 221(2)).

171 Borough of Harvey Cedars v. Karan, 70 A.3d 524, 542 (N.J. 2013) ("The [condemnees] could not receive a financial windfall—an award above fair market value—if the entirety of their property were taken to build the dune, regardless of the positive benefits inuring to their neighbors. It therefore makes little sense that they should profit from a partial taking of their property."); *see also* L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 822 (Cal. 1997) ("There is no guarantee that [the condemnee] shall derive a positive pecuniary advantage from a public work whenever a neighbor does.") (citing McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918)).

172 *See supra* Part III.A (discussing the *Frederick* decision).

advantageous position as a result of the partial taking and consequently increase the costs of public projects.[173] New Jersey's market value rule ensures that a remainder parcel's enhanced value offsets any severance damages and precludes a condemnee from receiving undeserved damages at taxpayers' expense.[174]

B. *Issues in Applying the Market Value Rule Under the Before and After Approach*

Notwithstanding the clarity that the *Harvey Cedars* decision introduced to this area of the law, outcomes in these cases remain uncertain because the Supreme Court of New Jersey left an open question as to the application of the market value rule. The opinion permits the lower courts to decide whether the before and after rule or the value plus damages rule is the more "practical" approach in a particular case.[175] This open question permits two possible outcomes in future cases. If New Jersey courts use the market value rule under the before and after application, zero compensation will result in cases in which the increased value to the remainder exceeds net damages. By contrast, a value plus damages application of the market value rule would guarantee compensation for the part taken under the same facts.

This Note proposes that New Jersey Courts apply the market value rule in a manner consistent with New York and California.[176] To reach the same outcomes as New York and California, New Jersey courts would consider all relevant factors affecting market value and require payment for the part taken in all cases. This approach would succeed in reducing the windfall damages awards that *Harvey Cedars* sought to end,[177] while also preventing uncompensated takings that can occur under the before and after approach.[178]

Unlike the value plus damages approach, the before and after method permits unfair treatment to the condemnee by undercompensating him for his loss relative to his neighbors. The landowner's neighbors may experience the general rise in property values associated with the construction of a public project without

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173 *See generally* Haar, *supra* note 46 at 872 (arguing that higher compensation awards may reduce the amount of funding available for construction, with significant long-term consequences on job markets and commerce); Jones, Jr., *supra* note 99 at 834 (cautioning that permitting the landowner to profit above his actual loss at the expense of the public causes the costs of public projects to increase and thus disincentivizes these improvements).

174 *Harvey Cedars*, 70 A.3d at 544; *see supra* note 171.

175 *Harvey Cedars*, 70 A.3d at 543 n.8.

176 *See supra* Part III.D.

177 *See Harvey Cedars*, 70 A.3d at 544 (injured landowner should receive just compensation for loss but not a windfall at public expense).

178 *See supra* Part II.A (discussing uncompensated takings by railroads under the before and after rule).

relinquishing any of their own property to the project. However, the injured landowner would pay for these same benefits with a loss in property if the increased value from the project exceeds his losses because the before and after rule allows zero compensation under these circumstances.[179] Just as the before and after rule undercompensates the landowner, it simultaneously favors the condemnor by permitting an appropriation of private property for a public project without payment.[180]

Courts that utilize the before and after rule justify awards of zero compensation by reasoning that payment for the part taken would overcompensate the landowner when the remainder parcel's increased value exceeds his net damages.[181] However, the majority of jurisdictions have displayed a strong disinclination towards zero compensation—courts developed the special benefits doctrine as a response to uncompensated railroad appropriations during the nineteenth century,[182] and modern courts either continue to use the doctrine[183] or require payment to the landowner for the part taken in all cases.[184] Ultimately, it seems intrinsically unfair that a condemnor could physically appropriate land for a project without paying for its own gain and the landowner's corresponding loss.

The before and after rule could also motivate undesirable social incentives. This rule may prompt condemnees to subdivide their land before a taking because the compensation awards differ depending on whether a partial taking or a total taking occurs. In a before and after jurisdiction, the landowner receives full compensation for the fair market value of the parcel taken when a total taking occurs.[185] However, in the event that the condemnor takes a piece of land for a *partial* taking, the landowner does not receive any compensation for the taken parcel if the remainder's increased value exceeds net damages.[186]

Thus, under the before and after rule, whether the landowner

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179 *See supra* note 90 and corresponding text.

180 *See supra* Part II.A (discussing uncompensated takings by railroads under the before and after rule).

181 *See supra* notes 88 and 96–98.

182 *See supra* Part II.A.

183 *See supra* Part IV.A (discussing *Farrell*).

184 *Cf.* ALASKA STAT. ANN. § 09.55.310(A)(3) (West 2013); ARIZ. REV. STAT. ANN. § 12-1122(A)(3) (2002); CAL. CIV. PROC. CODE § 1263.410(b) (West 2013); IDAHO CODE ANN. § 7-711(3) (West 2013); ME. REV. STAT. ANN. tit. 23, § 154–F (2014); MD. CODE ANN. REAL PROP. § 12-104(b) (West 2014); NEV. REV. STAT. ANN § 37.120(3) (West 2013); N.M. STAT. ANN. § 42A-1-26 (West 2014); N.D. CENT. CODE ANN. § 32-15-22(4) (West 2013); OKLA. CONST. art. 2 § 24; UTAH CODE ANN. § 78B-6-511(4) (West 2013).

185 *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 535 (N.J. 2013) (valuation for total taking equals fair market value of the parcel as of date of taking); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973) (market value for monetary equivalent of parcel taken measured by price that willing buyer would pay in cash to willing seller) (citing United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961)).

186 *See supra* note 90 (partial takings cases awarding zero compensation for the part taken).

receives the value of his taken parcel depends on whether the taking is defined as total or partial. These divergent compensation awards incentivize subdividing to avoid the partial taking. For instance, a landowner could subdivide his parcel into two halves, granting one half to another owner. When the condemnor takes the first half, a total taking occurs. Consequently, the landowner receives compensation for the full market value of the part taken. The owner with the second half after the subdivision reaps the benefit of increased value without sacrificing property to the project.

The before and after method also increases the potential for favoritism by government officials in deciding where to locate public facilities. Officials may locate public projects to maximize benefits to their preferred constituents if immediate neighbors are inevitably going to receive disparate treatment under the before and after rule.

C. *A Proposal for Compensation in New Jersey Partial Takings Cases*

By contrast, applying the market value rule under the value plus damages format, as used in California, offers a more equitable compensation method because it ensures that the landowner receives compensation for the part taken. Even though this approach requires payment for the part taken in all cases,[187] it would still reduce the overcompensation that concerned the *Harvey Cedars* court by avoiding undeserved severance damages awards.[188] Because any increased market value to the remainder would offset severance damages, the landowner receives damages only if the remainder has actually lost net value.

Requiring compensation for the part taken also removes both the incentive to subdivide and favoritism by elected officials. The motivation to subdivide decreases because the landowner will always receive the value of the taken parcel, whether a total or partial taking occurs. This approach also reduces favoritism because when the condemnor is required to always pay for the appropriated parcel, the condemnor is motivated to appropriate the least expensive land.

Concededly, this method awards the landowner compensation for the part taken even when the increased value of the remainder exceeds net damages.[189] However, requiring compensation for the part taken

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[187] *Harvey Cedars*, 70 A.3d at 543 (acknowledging that the court cannot devise a perfect means to compensate an injured landowner, but emphasizing that market value rule offers the best solution).

[188] *Id.* at 544 (increase in value to landowners' property, resulting from the taking, should offset decline in value of property in order to avoid a windfall).

[189] *See, e.g.*, Chiesa v. State, 324 N.E.2d 329, 330 (N.Y. 1974) (landowner entitled to compensation for the part taken even when enhanced value to remainder exceeds damages); L.A.

presents only minor drawbacks when compared to zero compensation under the before and after approach. First, any windfall awarded under the value plus damages approach—in the form of compensation for the part taken—still decreases windfall awards by precluding unnecessary severance damages. Second, because the only windfall that a landowner may receive would materialize upon sale of the remainder[190]—not affecting the amount paid in compensation by the condemnor—the landowner does not receive a windfall at the taxpayers' expense.[191]

CONCLUSION

After the adoption of the market value rule in *Harvey Cedars*, New Jersey courts maintain the discretion to use the rule under a before and after method or a value plus damages method. The value plus damages application offers the most benefits for all parties. This application achieves a reduction in windfall damages awards and lowers the costs of public projects, while also ensuring an equitable outcome to an injured landowner by preventing condemnors from appropriating private lands without payment.

Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 815 n.2 (Cal. 1997) (noting that current eminent domain statute requires payment for the part taken).

190 *See supra* note 143 and accompanying text.

191 *Harvey Cedars*, 70 A.3d at 540 (injured landowner should receive just compensation for his loss, but such compensation does not entitle him to a windfall at public expense).