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The Price of Protection: Compensation for Partial Takings along the Coast

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THE PRICE OF PROTECTION: COMPENSATION FOR PARTIAL TAKINGS ALONG THE COAST

*Matthew Hromadka**

I. INTRODUCTION

On October 29, 2012, Hurricane Sandy made landfall in Atlantic City, New Jersey with winds exceeding 80 miles per hour.¹ Enhanced by a cold front sitting off the Northeast Coast of the United States, the storm took a violent turn directly into the heart of the tri-state area.² As the storm approached, it spanned 485 miles in width, ultimately causing serious damage in over ten states.³ The impact was most severe along the coastlines of New York and New Jersey.⁴ With record storm surges and driving wind and rain, the storm crippled the coastline, sending those in its path into a state of emergency.⁵ The hurricane was the most powerful of its kind, reminiscent of the disastrous Great New England Hurricane of 1938, which made landfall in New York.⁶

Immediately following the storm, 8.5 million people were

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¹ Fed. Emergency Mgmt. Agency, *Hurricane Sandy: One Year Later*, FEMA (Oct. 18, 2013), <http://www.fema.gov/hurricane-sandy>.

² Matt Daniel, *This Date in Science: Hurricane Sandy Hits U.S. Northeast*, EARTHSKY (Oct. 29, 2013), <http://earthsky.org/earth/this-date-in-science-hurricane-sandy-hits-u-s-northeast>.

³ *Id.*

⁴ See *Hurricane Sandy: One Year Later*, *supra* note 1 (discussing the number of residents affected by Hurricane Sandy and the cost of the damage).

⁵ *Id.*

⁶ Daniel, *supra* note 2 (discussing how the 1938 hurricane made landfall on Long Island, N.Y. and southern New England with sustained winds at about 100-120 miles per hour, and was responsible for approximately 700 deaths).

without power, and over 23,000 people sought refuge in temporary shelters.⁷ The Federal Emergency Management Agency (“FEMA”) deployed 1,690 officers over the course of a year and provided more than \$1.4 billion in federal aid to survivors of the storm.⁸ The storm killed 110 people in the United States, as well as 72 residents in the Caribbean Islands.⁹

Hurricane Sandy permanently damaged coastal residences, businesses, and the shoreline itself.¹⁰ For instance, on Fire Island, New York, the dunes were diminished by 54.5% from their pre-storm volume and restored to less than 20% of their original size.¹¹ These dunes have been either entirely destroyed or reduced by as much as 15 feet in height.¹² In addition, the important foliage that serves as the core structure of the dunes was obliterated in many places, weakening the ability of the dunes to withstand future storms.¹³ The coast-line shifted roughly 200 feet, pushing back dunes by as much as 70 feet.¹⁴ The beach destruction caused by Sandy was the equivalent of thirty years of erosion occurring in one single night.¹⁵

Coastal communities affected by Hurricane Sandy depend on dunes to withstand future storms and ongoing erosion.¹⁶ Dunes play an important role in protecting otherwise exposed coastlines from natural erosion, storm surges, wind, and waves produced by severe weather systems.¹⁷ Although dunes naturally erode over time, storms such as Sandy increase the rate at which this erosion occurs and hin-

⁷ *Hurricane Sandy: One Year Later*, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ Wayne Parry, *New Jersey Ends Beach Disputes with 1-2 Punch*, THE HUFFINGTON POST (Sept. 25, 2013, 1:19PM), http://www.huffingtonpost.com/2013/09/25/new-jersey-beach-dunes_n_3990107.html (discussing Hurricane Sandy’s effects on businesses and coastal residences); Daniel, *supra* note 2 (discussing the erosion and beach destruction resulting from Hurricane Sandy).

¹¹ U.S. Dep’t of the Interior, *Hurricane Sandy Eroded Over Half of Fire Island’s Dunes: New Report Quantifies Coastal Change*, U.S. GEOLOGICAL SURVEY (Aug. 28, 11:33:53 AM), <http://www.usgs.gov/newsroom/article.asp?ID=3674&from=rss>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. Dep’t of the Interior, *Photos Reveal Severity of Hurricane Sandy’s Impact*, U.S. GEOLOGICAL SURVEY (Nov. 9, 2012, 3:20 PM), <http://www.usgs.gov/newsroom/article.asp?ID=3452#Ux08K2eYaM8> (explaining that coastal erosion resulting from the storm was equivalent to the projected models for a thirty year period).

¹⁶ *Id.*

¹⁷ *Hurricane Sandy Eroded Over Half of Fire Island’s Dunes*, *supra* note 11.

der the natural replenishment.¹⁸

This Comment discusses the various jurisdictional approaches used when portions of private property are taken in order to conduct government funded beach re-nourishment programs aimed at combating erosion and restoring lost beach. Section II of this Comment explains the effects of coastal erosion in the area affected by Hurricane Sandy. Section III examines recovery efforts by federal, state and local governments in response to coastal erosion and Hurricane Sandy. Section IV assesses the scope of government actions that constitute a taking along the coast. Section V presents the historical origins of the fair market value approach for partial takings, which allows certain benefits to mitigate compensation for condemned property. Section VI discusses the case of *Borough of Harvey Cedars v. Karan*,¹⁹ which adopted the fair market approach of just compensation for condemned property occurring as a result of a coastal replenishment program. Section VII examines jurisdictions that use the fair market value analysis and its variations. Section VIII discusses jurisdictions that use neither the fair market value approach for partial takings cases nor offset just compensation by benefits realized by public projects. Section IX explores the problems with approaches that exclude benefits from reducing compensation for property taken by the government in order to protect threatened coastlines.

The United States Constitution, as well as state constitutions, permit government takings of private property but require just compensation to be paid in return.²⁰ In circumstances along the shore where property has been taken to protect coastal communities, just compensation must accurately reflect the cost of the loss. To achieve such a result, a fair market value approach that considers both the benefits and detriments to the property owner occurring from the taking yields the most equitable outcome.

II. THE EFFECTS ON LOCAL COASTAL COMMUNITIES

Hurricane Sandy, the second costliest storm in United States

¹⁸ *Id.*

¹⁹ 70 A.3d 524 (N.J. 2013).

²⁰ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); *see, e.g.*, N.Y. CONST. art. I, § 7 (“Private property shall not be taken for public use without just compensation.”).

history,²¹ created overarching economic difficulties for the national government.²² The federal government has spent roughly \$60 billion on recovery efforts, and this number is certain to rise as a result of ongoing projects.²³ A year following the storm, an additional \$1.4 billion in assistance was allocated to roughly 182,000 survivors of the storm.²⁴ The United States Small Business Administration has provided \$2.4 billion in low interest disaster relief loans to revive coastal industries.²⁵ More than \$3.2 billion has been disbursed to state, local and tribal governments for recovery efforts, as well as \$74 million in Federal Hazard Mitigation Grants.²⁶

Coastal businesses and residents have also experienced overwhelming economic obstacles.²⁷ Businesses in New Jersey suffered a cumulative loss of \$8.3 billion, with over 19,000 businesses losing at least \$250,000 each.²⁸ In New York City, Hurricane Sandy impacted over 23,000 small businesses, which employed roughly 245,000 people.²⁹ The total cost of damages in New York City was \$19 billion.³⁰ In total, 650,000 homes located near the water were destroyed by the storm.³¹ The New York City Department of Environmental Protection received \$402 million from FEMA in order to rebuild damaged homes and repair the infrastructure of service facilities, such as waste and water treatment plants.³²

²¹ Hurricane Katrina was the costliest storm in United States history, causing an estimated \$108 billion in damage. David Porter, *Hurricane Sandy was Second-Costliest in US History, Report Shows*, ASSOCIATED PRESS (Dec. 2, 2013), http://www.huffingtonpost.com/2013/02/12/hurricane-sandy-second-costliest_n_2669686.html.

²² *Id.*

²³ Scott Gurian, *Tracking the Federal Sandy Aid Money One Year Later*, N.J. SPOTLIGHT (Oct. 19, 2013), <http://www.njspotlight.com/stories/13/10/28/tracking-the-federal-sandy-aid-money-one-year-later/?p=all>.

²⁴ *Hurricane Sandy: One Year Later*, *supra* note 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Phyllis Furman, *Hurricane Sandy, One Year Later: Businesses Struggle to Survive*, N.Y. DAILY NEWS (Oct. 26, 2013, 6:42 PM), <http://www.nydailynews.com/new-york/hurricane-sandy/hurricane-sandy-year-business-article-1.1493143> (discussing the effects of Sandy on business recovery and local economies).

²⁸ Erik Blake, *Tropical Cyclone Report Hurricane Sandy*, NAT'L HURRICANE CENTER (Feb. 12, 2013), http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf.

²⁹ Furman, *supra* note 27 (explaining that the majority of businesses were small, employing under 50 employees).

³⁰ Blake, *supra* note 28, at 18.

³¹ *Id.* at 14.

³² *A Year After Hurricane Sandy, More Than \$2.1 Billion In FEMA Public Assistance Grants In New York Helps Clear Debris, Reopen Public Facilities*, FEMA (Oct. 24, 2014),

Furthermore, the storm's geological effects exposed greater portions of the coastline to storm related damage.³³ Hurricane Sandy caused record storm surges in low-lying coastal areas, with the largest being 13.8 feet in Battery Park, New York.³⁴ The federal government needed to update regional flood maps for the first time since 1983 because of the storm's permanent alteration of the coastline, leaving more residents susceptible to damage from erosion.³⁵ According to these new flood maps, New York City's number of at-risk residents has doubled since the 1980s.³⁶ Moreover, 67,000 buildings in New York City are now considered flood prone because of this re-configuration.³⁷

Hurricane Sandy also impacted the insurance industry for both property owners and insurance providers.³⁸ Insurance companies providing standard homeowner or property insurance were required to make substantial payments to policy-holders within a very short window.³⁹ The influx of claims depleted insurer earnings and revenue.⁴⁰ Although this did not substantially affect homeowners' insurance pricing, flood insurance rates have increased significantly following the storm.⁴¹ The National Flood Insurance Program ("NFIP") is the primary provider of flood insurance for at-risk residents.⁴² Prior to the storm, NFIP was already facing financial diffi-

<http://www.fema.gov/news-release/2013/10/24/year-after-hurricane-sandy-more-21-billion-fema-public-assistance-grants-new>.

³³ Jill Colvin, *FEMA Redrawing City's Flood Zone After Superstorm Sandy*, DNAINFO NEW YORK (Dec. 6, 2012), <http://www.dnainfo.com/new-york/20121206/new-york-city/fema-redrawing-citys-flood-zone-after-superstorm-sandy>.

³⁴ *Hurricane Sandy Recovery*, NAT'L PARK SERVICES (Apr. 4, 2013), <http://www.nps.gov/stli/after-hurricane-sandy.htm>.

³⁵ Colvin, *supra* note 33.

³⁶ Bloomberg Administration, *Mayor Bloomberg Announces Results of Flood Insurance Study Demonstrating New Federal Flood Maps and Rules Will Significantly Increase Costs*, OFFICIAL WEBSITE OF NEW YORK CITY (Oct. 25, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/344-13/mayor-bloomberg-results-flood-insurance-study-demonstrating-new-federal-flood-maps-and/>.

³⁷ *Id.*

³⁸ Dennis Sebyan, *How has Hurricane Sandy Impacted Insurance Rates?*, SMARTASSET BLOG (May 14, 2013), <http://www.smartasset.com/blog/housing/how-has-hurricane-sandy-impacted-insurance-rates-2/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (stating that although some private lenders offer this coverage, the NFIP comprises the largest market).

culties due to \$18 billion of debt incurred from Hurricane Katrina.⁴³ Notwithstanding this debt, NFIP has made an additional \$7.9 billion in Hurricane Sandy payments, which has caused flood insurance rates to soar.⁴⁴

III. RECOVERY EFFORTS, BEACH REPLENISHMENT, AND DUNE RECONSTRUCTION

The federal government has focused on rebuilding residences and businesses along the shore, while also providing protection from loss as a result of natural erosion and future storms.⁴⁵ Unfortunately, this task has been costly and complicated. FEMA is responsible for providing aid to state and local authorities, and organizing responses in the event of a natural disaster.⁴⁶ In order to expand FEMA's ability to adequately respond to Hurricane Sandy, Congress enacted legislation which outlined the implementation and funding of reconstruction.

The Sandy Recovery Improvement Act of 2013 ("SRIA") was signed into law on January 29, 2013, coupled with the Disaster Relief Appropriations Act ("DRAA").⁴⁷ This legislation made major changes to the previous FEMA standards for allocating funds for disaster relief.⁴⁸ These Acts provide more lenient standards for administering assistance to areas affected by the storm.⁴⁹ Explicitly, the SRIA calls for the "[u]se of all or part of the excess grant funds for cost-effective activities that reduce the risk of future damage, hardship, or suffering from a major disaster and other activities to improve future Public Assistance operations or planning."⁵⁰ Among these activities discussed, dune reconstruction has been one of the many measures taken to prevent future loss.⁵¹

The SRIA and DRAA provide additional federal funding for

⁴³ Sebyan, *supra* note 38.

⁴⁴ *Id.*

⁴⁵ *Sandy Recovery and Improvement Act of 2013*, FEMA (Jan. 1, 2014), <http://www.fema.gov/about-agency/sandy-recovery-improvement-act-2013>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Sandy Recovery and Improvement Act*, *supra* note 45.

⁵¹ *Designing for Flood Levels above the BFE after Hurricane Sandy*, FEMA MEDIA LIBRARY (Apr. 2013), http://www.fema.gov/media-library-data/20130726-1537-20490-8057/fema499_1_6_rev.pdf.

reconstruction along the shore.⁵² Specifically, the SRIA states:

That \$2,902,000,000 of the funds provided . . . shall be used to reduce future flood risk in ways that will support the long-term sustainability of the coastal ecosystem and communities and reduce the economic costs and risks associated with large-scale flood and storm events in areas along the Atlantic Coast.⁵³

These federal funds are used to aid state and local agencies in the recovery process.⁵⁴ Because beach replenishment programs impose significant financial burdens on state and local agencies, federal funding is imperative.⁵⁵ Following the storm, coastal communities have greatly relied on the receipt of this aid.⁵⁶

Furthermore, the methods for implementing reconstruction have been identified in detail in both acts. The SRIA and DRAA designate the Army Corps of Engineers to assess the damage along the Northeast coast.⁵⁷ Based upon these assessments, the Army Corps of Engineers is responsible for designing, coordinating, and executing reconstruction.⁵⁸ The SRIA sets forth numerous procedures and standards that federal agencies must comply with, as well as provisions directed at state and local authorities receiving recovery aid.⁵⁹ The SRIA even acknowledges potential disputes arising from reconstruction by requiring FEMA to adopt a dispute resolution program.⁶⁰ Despite the detailed procedures included in both acts, FEMA retains ultimate discretion over design and implementation of beach replen-

⁵² *Sandy Recovery and Improvement Act*, *supra* note 45.

⁵³ *Sandy Recovery and Improvement Act of 2013*, Pub. L. No. 113-2, § 1101 127 Stat 4 (2012) (codified in scattered sections of 42 U.S.C.).

⁵⁴ 42 U.S.C. § 5121 (2014).

⁵⁵ *Christie Administration Disburses More Than \$22.5 Million in Essential Services Grants To Sandy-Impacted Municipalities*, STATE OF NEW JERSEY OFFICIAL WEBSITE (Oct. 11, 2013), <http://www.state.nj.us/governor/news/news/552013/approved/20131011b.html> (discussing the economic ramifications of Sandy recovery efforts on municipal government agencies).

⁵⁶ *Id.* (discussing the budget issues of local townships in New Jersey that faced hardships providing adequate waste management services, as well as difficulties with continuing employment of local police officers and other public officials because of the excessive cost of reconstruction following Hurricane Sandy).

⁵⁷ 42 U.S.C. § 5189(f) (2013).

⁵⁸ *Id.*

⁵⁹ *See generally* 42 U.S.C. § 5121.

⁶⁰ *Sandy Recovery and Improvement Act*, *supra* note 45.

ishment efforts.⁶¹

Additionally, pursuant to the SRIA and DRAA, FEMA has provided private contractors with guidelines and methods for rebuilding after the storm.⁶² The guidelines are designed to encourage private builders to reconstruct the shore in a way that reduces the risk of future loss from recurring erosion.⁶³ According to FEMA's report manual, *Designing for Flood Levels above the BFE after Hurricane Sandy*,⁶⁴ residents in areas with substantial risk for flooding from beach erosion must take steps to mitigate potential damage.⁶⁵ The report recommends several building methods that substantially reduce the risk of loss for coastal properties.⁶⁶ Among these methods, the report suggests raising residences significantly from their previous base level and building structures as far inland as possible within the property boundaries.⁶⁷ Furthermore, the report explains that property owners in affected coastal areas should anticipate zoning changes as a result of the permanent alteration of the shore, which may affect the ability to build on shorefront property.⁶⁸

IV. THE SCOPE OF TAKINGS ALONG THE COAST

When beach replenishment programs are put into effect, government agencies typically need to take part of coastal property owners' land to adequately rebuild the shoreline.⁶⁹ However, what actually qualifies as a "taking" in a coastal context has been a difficult question. Courts dealing with land disputes along the East Coast endorse the government's right to take physical portions of private land

⁶¹ *Id.*

⁶² *Designing for Flood Levels above the BFE after Hurricane Sandy*, *supra* note 51.

⁶³ *Id.*

⁶⁴ *See id.* (explaining that the BFE refers to the Base Flood Elevation, which is the area that has a one percent chance of being flooded in any given year).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Designing for Flood Levels above the BFE after Hurricane Sandy*, *supra* note 51.

⁶⁸ *Id.* (explaining that many areas considered low-risk prior to Hurricane Sandy may experience changes in zoning regulations).

⁶⁹ *See, e.g.,* Fisher v. Town of Nags Head, 725 S.E.2d 99, 101-02 (N.C. Ct. App. 2012) (reviewing a beach re-nourishment program that required public takings to implement the project); Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot., 560 U.S. 702, 711-12 (2010) (reviewing a similar project that required the condemnation of coastal property).

along the shore under the takings clause.⁷⁰

Although it is undisputed that condemnations of physical portions of coastal land are takings and require just compensation, shore-front homeowners have unique property interests that extend beyond the physical boundaries of their property.⁷¹ These special rights are often infringed by construction along the shore.⁷² Beach replenishment programs typically eliminate littoral rights to future deposits of sand and interfere with the right to use and enjoy the foreshore area.⁷³ The courts and state legislatures have interpreted whether these programs qualify as takings.⁷⁴

State legislatures and judicial proceedings have attempted to deal with issues regarding residents' rights to deposits of sand and their relation to government takings.⁷⁵ For instance, in *Walton County v. Stop the Beach Renourishment, Inc.*,⁷⁶ the Supreme Court of Florida was faced with a dispute involving a dune replenishment program along the Gulf Coast of Florida.⁷⁷ Walton County's beach replenishment program was carried out as part of a larger scheme endorsed by the Florida legislature.⁷⁸ The Beach and Shore Preservation Act enacted in 1961 provides that "beach erosion is a serious menace to the economy and general welfare of the people of [Florida] and has advanced to emergency proportions."⁷⁹ Moreover, the Act explains that "a necessary governmental responsibility [is] to properly manage and protect Florida beaches . . . from erosion" and fund replenishment programs along the coast.⁸⁰

Under Florida common law, coastal property owners are not entitled to sudden deposits of sand (known as avulsions), which typically occur as result of a storm or major event that alters the coast.⁸¹

⁷⁰ John R. Nolan, *Symposium, Regulatory Takings And Property Rights Confront Sea Level Rise: How Do They Roll?*, 21 WIDENER L.J. 735, 753 (2012).

⁷¹ *Id.* at 747 (discussing coastal property owners' right to sand deposited over time, otherwise known as an accretion).

⁷² *Id.*

⁷³ *Id.* at 753; see, e.g., *Stop the Beach*, 560 U.S. 702.

⁷⁴ See *infra* note 82 and accompanying text (reviewing whether a Florida legislative policy properly adjusted littoral rights).

⁷⁵ See, e.g., *id.*

⁷⁶ 998 So. 2d 1102 (Fla. 2008).

⁷⁷ *Id.* at 1105.

⁷⁸ *Id.* at 1106.

⁷⁹ FLA. STAT. § 161.088 (2000).

⁸⁰ *Id.*

⁸¹ *Walton Cnty.*, 998 So. 2d at 1114 ("[I]f an avulsion has occurred, the boundary line re-

Conversely, coastal property owners are entitled to long-term deposits of sand (known as accretions), which typically result from natural erosion.⁸² Aside from accretions, littoral property owners have the right to access, and reasonably use and enjoy an unobstructed view of the water.⁸³ The Act removed property owners' common law rights to future accretions because it allowed government agencies to rectify all accretion, avulsions and damage from erosion.⁸⁴

In *Walton County*, the Supreme Court of Florida resolved the constitutionality of the Beach and Shore Preservation Act by determining if the legislation deprived coastal land owners of their upland property rights and rights to future accretions.⁸⁵ Specifically, the Act called for surveyors to inspect the Mean High Water Mark ("MHW"), and after doing so, to fix an area along that line for dune construction, known as the Erosion Control Line ("ECL").⁸⁶ The government was permitted to deposit sand up to the ECL after it was designated.⁸⁷

The property owners claimed that the establishment of the ECL unconstitutionally deprived them of their littoral rights because the Act eliminated their interests to future accretions.⁸⁸ The owners argued that the denial of future accretions and the temporary denial of the rights to view, access and enjoy the water constituted a taking and required just compensation.⁸⁹ The legislation did not mandate compensation for the interference with these littoral rights.⁹⁰

The court held that the Act was not a taking and the project did not violate the property owners' constitutional rights.⁹¹ The court reasoned that "[l]ike the common law, the Act seeks a careful balance

mains the same regardless of the change in the . . . shoreline.") (quoting 73 Am. Jur. Proof of Facts 3d 167 § 3, at 182) (alteration in original).

⁸² *Id.* ("[T]he owner of the [upland] loses title to land that is lost by erosion and ordinarily becomes the owner of land that is added to his land by accretion . . .") (quoting 73 Am. Jur. Proof of Facts 3d § 3, at 182) (alteration in original).

⁸³ *Id.* at 1125.

⁸⁴ *Id.* at 1127.

⁸⁵ *Id.* at 1105.

⁸⁶ *Walton Cnty.*, 998 So. 2d at 1108 (explaining the government was permitted to construct only erosion prevention structures "seaward of the ECL"; however, the Act specifically reserved property owners' rights to ingress and egress, as well as enjoyment of and access to the foreshore area).

⁸⁷ *Id.* at 1107.

⁸⁸ *Id.* at 1105.

⁸⁹ *Id.* at 1107.

⁹⁰ *Id.*

⁹¹ *Walton Cnty.*, 998 So. 2d at 1120-21.

between the interests of the public and the interests of the private upland owners.”⁹² The Act was intended to provide benefits to the general public by preserving beaches while mitigating damages to properties, businesses, and individual homeowners.⁹³ The court upheld the Act’s provision that sand resulting from government funded renourishment programs is an avulsion and creates no rights in the upland owners.⁹⁴ Further, because the court found the right to future accretions was not guaranteed by the common law, this could not be ruled a taking.⁹⁵ Also, the property owners still had the rights to access, view, and continued enjoyment the water after the completion of the project meant their upland interests were not taken.⁹⁶ The court relied on Article X, § 11 of the Florida State Constitution, which serves “to protect Florida’s beaches, part of which it holds ‘in trust for all the people’”⁹⁷ to conclude that the Act reflected an appropriate constitutional balance between public and private rights and the government’s interest in protecting the state’s shore.⁹⁸

The United States Supreme Court affirmed the Supreme Court of Florida’s decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,⁹⁹ which directly aligned with the holding and reasoning in *Walton County*.¹⁰⁰ The Supreme Court recognized that private accretion rights were subordinate to the state’s right to avulsions under Florida common law.¹⁰¹ First, the Court found that there was no taking because the dunes were constructed along the property line between private and state interests,

⁹² *Id.* at 1115.

⁹³ *Id.* The court explained that restoring and preserving the beaches from erosion-based damage served important public “economic, ecological, recreational, and aesthetic interests” along the shoreline. *Id.* The Act allowed shore-front property owners to enjoy the benefit of protection, replenishment of lost beach, as well as protection of existing structures. FLA. STAT. § 161.088.

⁹⁴ *Walton Cnty.*, 998 So. 2d at 1117-18.

⁹⁵ *Id.* at 1120-21 (explaining that the right to accretions was not absolute and is the equivalent property interest to an easement, which may be suspended or terminated).

⁹⁶ *Id.* at 1120.

⁹⁷ *Id.* at 1110-11 (citing FLA. CONST. art. X, § 11) (referring to the Public Trust Doctrine, which is a state law doctrine that designates the state as the holder of the foreshore area in trust for the use and enjoyment of the public).

⁹⁸ *Id.* at 1115.

⁹⁹ 560 U.S. 702 (2010).

¹⁰⁰ *Id.* at 733.

¹⁰¹ *Id.* at 709 (describing the Florida common law that recognized dry land received by an accretion entitles the property owner to that new land but previously submerged land exposed by an avulsion does not entitle the owner to the newly exposed property).

not physically on the property of the homeowner.¹⁰² Further, the project was an avulsion under state common law; thus, the property owners were not constitutionally divested of their rights to accretions.¹⁰³ Because there was no exception to the doctrine of avulsion when the state caused the deposit of sand, there was no taking and no compensation was required.¹⁰⁴

The United States Supreme Court also concluded that the property owners had no right to direct contact with the water.¹⁰⁵ The owners argued that they possessed a right to have physical contact with the ocean and that the establishment of the ECL deprived them of this right.¹⁰⁶ The Court explained that because there was no additional littoral right to touch the water, there was no taking.¹⁰⁷ The denial of contact was not a substantial interference with the littoral right to access requiring compensation.¹⁰⁸ However, in its holding, the Court explained that if the ECL had been declared upland from the MHWL, there would be an actual taking of physical property and compensation would be required.¹⁰⁹

Not only have legislatures defined the alteration of littoral rights in response to replenishment projects, state courts have also determined whether the interference with littoral rights qualifies as a taking.¹¹⁰ Consistent with the holdings in *Walton County* and *Stop the Beach*, the Supreme Court of New Jersey recognized that land resulting from government-funded avulsion projects did not constitute takings.¹¹¹ In *City of Long Branch v. Jui Yung Liu*,¹¹² the court reviewed a government taking that involved land previously deposited from a beach replenishment project.¹¹³ As part of a redevelopment plan of commercial areas along the shore, the City of Long Branch

¹⁰² *Id.* at 707.

¹⁰³ *Id.* at 730 (explaining that there is no exception to the doctrine of avulsion when the state caused the deposit of sand).

¹⁰⁴ *Stop the Beach Renourishment*, 560 U.S. at 730-31.

¹⁰⁵ *Id.* at 729-30.

¹⁰⁶ *Id.* at 729.

¹⁰⁷ *Id.* at 729-30 (explaining that the owners were claiming a separate right from mere "access" to the water, the right to "touch" the water). The Act did nothing to substantially affect the right to "access" the water. *Id.* at 730.

¹⁰⁸ *Stop the Beach Renourishment*, 560 U.S. at 730.

¹⁰⁹ *Id.* at 739.

¹¹⁰ *See, e.g., City of Long Branch v. Jui Yung Liu*, 4 A.3d 542, 560 (N.J. 2010).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 545.

moved to take a portion of the Lius' beachfront property.¹¹⁴ The Lius owned a small bulkhead located on the shore with a number of businesses.¹¹⁵ The City offered the Lius \$900,000 dollars to purchase the property in order to carry out the project, but the Lius rejected the offer and the government proceeded with an eminent domain hearing.¹¹⁶

The primary issue regarding the eminent domain proceeding was whether the Lius were the rightful owners of a 225 foot strip of sand deposited on their land under a beach replenishment project originating in the 1990s.¹¹⁷ The original deed that the Lius possessed did not include the nearly two extra acres of beach that had accrued over the course of the program.¹¹⁸ The court held that this addition to the Lius' property was an avulsion, despite the fact that the deposit occurred over an extended period.¹¹⁹ Therefore, the property owners were not entitled to compensation.¹²⁰ The court explained that because the state holds the shoreline in trust for the public sand deposited from government projects is property of the state, not of the coastal property owners.¹²¹

The court reasoned that the Lius enjoyed a protective benefit from the extra sand because the portion of their property contained in the original deed was shielded from harmful erosion.¹²² The benefits were considered a large compensatory award and justified deeming such deposits as avulsions.¹²³ This protection allowed the Lius to en-

¹¹⁴ *Id.* (discussing the Lius' compensation for the loss of their ocean front property due to an increase of 225 feet of beach from the government funded beach restoration project).

¹¹⁵ *City of Long Branch*, 4 A.3d at 546.

¹¹⁶ *Id.* (explaining that at the time of the condemnation proceeding, the court found that the Lius' property had been increased over two acres from 1977 to 2010 from previous government funded beach replenishment programs).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 546-47 (referencing previous beach re-nourishment projects initiated by the state in the mid-1990s which were carried out by the Army Corps of Engineers).

¹¹⁹ *Id.* at 554 (discussing the presumption of an avulsion rather than an accretion).

¹²⁰ *City of Long Branch*, 4 A.3d at 555.

¹²¹ *Id.*

[U]nder the public trust doctrine, the people of New Jersey are the beneficiaries of the lengthening of the dry beach created by this government-funded program. Because the old mean high water mark remains the boundary line between private and public property, there was no true loss of land to the Lius or gain to the State.

Id.

¹²² *Id.* at 553.

¹²³ *Id.* at 560.

joy the use of their property in ways that may not have been possible without the beach restoration project initiated some years before—to declare this land to be owned by the Lius would be unjust.¹²⁴

Judicial and legislative responses to coastal erosion and disputes arising from beach replenishment programs reflect sound policies. Courts have permitted the states to limit the common law right to accretions in the foreshore area.¹²⁵ This sacrifice by coastal homeowners is imperative to properly execute protective projects. Legislation such as the Beach Shore Preservation Act, adopted by the Florida legislature, reflects the important state interest in sheltering the shoreline, and courts have properly supported this interest.¹²⁶ Moreover, both the courts and legislatures have balanced common law littoral rights with the preservation of the state's interests in replenishing the shore.

V. HISTORICAL DEFINITION OF JUST COMPENSATION FOR PARTIAL TAKINGS: *BAUMAN V. ROSS* AND THE FEDERAL PRECEDENT

The federal approach to partial takings was articulated in the famous Supreme Court case *Bauman v. Ross*.¹²⁷ The Court identified the fair market approach, which considers benefits as offsetting factors when computing the amount for just compensation.¹²⁸ In *Bauman*, the United States Supreme Court held that special benefits, meaning those which are reasonably calculable at the time of the taking, should be considered when determining just compensation.¹²⁹ The Court stated that the term “just compensation” does not mean the value of the property taken alone, but rather is an amount that is equitable and just in light of the circumstances of each case.¹³⁰ General benefits, described as those that are conjectural and uncertain to occur, should not be offset from the compensation for a partial taking.¹³¹

¹²⁴ *City of Long Branch*, 4 A.3d at 553.

¹²⁵ *See, e.g., Walton Cnty.*, 998 So. 2d at 1110-11; *City of Long Branch*, 4 A.3d at 545-46.

¹²⁶ FLA. STAT. § 161.088.

¹²⁷ 167 U.S. 548 (1897).

¹²⁸ *Id.* at 584.

¹²⁹ *Id.* at 587.

¹³⁰ *Id.* at 569-70.

¹³¹ *Id.* at 561-62, 583-84. The terms “general benefits” and “special benefits” have been defined differently across jurisdictions following the *Bauman* holding.

The federal circuit courts of appeal have applied this distinction since the *Bauman* decision.¹³² For instance, in *United States v. Fort Smith River Development Corp.*,¹³³ the Eighth Circuit was faced with a partial takings case that involved the River and Harbor Improvement Act.¹³⁴ The Act, which sought to improve navigation and riverbank stability along the Arkansas River,¹³⁵ was a response to recurring flooding and property destruction resulting from the “ravages of the river.”¹³⁶ The project required partial takings along the riverbank, which was, in large part, privately owned.¹³⁷

In *Fort Smith*, the government condemned ninety-seven of the one hundred and sixty acres that belonged to the property owner.¹³⁸ Originally, in the district court, the government presented evidence that prior to the taking, the property could only be used for agricultural purposes.¹³⁹ Following the taking, the property could be used for industrial activities, which enhanced the value of the remaining land.¹⁴⁰ The district court held that the increase in value was a general benefit and should not offset compensation because all riverbank properties enjoyed this advantage.¹⁴¹

The Eighth Circuit reversed the district court’s decision and held that the benefits of riverbank stabilization and the enhanced value of the remaining land should be considered when determining just compensation.¹⁴² Consistent with *Bauman*, the court held that general benefits are not considered merely because they are enjoyed by similar surrounding properties.¹⁴³ The court explained that the benefit of a sustainable riverbank enjoyed by the homeowners was special because it was, in fact, readily ascertainable at the time of the taking.¹⁴⁴ Because the riverbank could now sustain use by industrial ac-

¹³² See, e.g., *United States v. Fort Smith River Dev. Corp.*, 349 F.2d 522, 525 (8th Cir. 1965); see also *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644, 649 (5th Cir. 1979).

¹³³ 349 F.2d 522 (8th Cir. 1965).

¹³⁴ *Id.* at 523.

¹³⁵ *Id.*

¹³⁶ *Id.* at 524.

¹³⁷ *Id.*

¹³⁸ *Fort Smith River Dev. Corp.*, 349 F.2d at 523.

¹³⁹ *Id.* at 523-24.

¹⁴⁰ *Id.* at 524.

¹⁴¹ *Id.*

¹⁴² *Id.* at 527.

¹⁴³ *Fort Smith River Dev. Corp.*, 349 F.2d at 526-27.

¹⁴⁴ *Id.* at 526.

tivity, the project allowed the homeowners to rezone their property.¹⁴⁵ The economic enhancement resulting from the rezoning was obvious, and not speculative by any means.¹⁴⁶ The court articulated the concern that disregarding this valuable improvement could improperly reflect the loss the property owner experienced.¹⁴⁷

The federal distinction between general and special benefits provides the most effective fair market approach because it focuses on how the benefits will affect the individual homeowner. The federal approach accounts for benefits that the property enjoys, whether or not the surrounding community shares them.¹⁴⁸ The determination does not focus on whether the benefits are unique to the property owner.¹⁴⁹ It is fair that benefits, which enhance the value of the property, can be considered as long as they are reasonably certain to occur and calculable at the time of the taking. Conversely, the federal approach appropriately excludes speculative, conjectural, and indirect benefits from mitigating compensation, which safeguards a property owner's constitutional right to be paid for condemned property.¹⁵⁰ This approach accurately represents the actual fair market value of the taking without under-representing property owners' interests or expanding those interests in an inequitable manner.

VI. THE CURRENT DISPUTE OVER COASTAL PARTIAL TAKINGS: *BOROUGH OF HARVEY CEDARS V. KARAN*

The ongoing struggle over the government's right to reconstruct dunes and replenish erosion-ravaged beaches continues to spawn litigation.¹⁵¹ Prior to Hurricane Sandy, public works projects had recently replenished the dunes in response to active storm seasons and recurring erosion.¹⁵² Beach replenishment programs typi-

¹⁴⁵ *Id.* (explaining that the increase was easily computable by assessing the fair market value of the property based on the sustained use of the land before and after condemnation).

¹⁴⁶ *Id.* at 526.

¹⁴⁷ *Id.*

¹⁴⁸ *Fort Smith River Dev. Corp.*, 348 F.2d at 526-27 (quoting *United States v. Crance*, 341 F.2d 161, 167 (8th Cir. 1965)) ("It is settled that special benefits do not become general merely because other lands in the area [of the taking] are similarly benefited.").

¹⁴⁹ *Bauman*, 167 U.S. at 583-84.

¹⁵⁰ *Id.* at 569.

¹⁵¹ See, e.g., *Fisher*, 725 S.E.2d at 101 (reviewing a beach re-nourishment program that required public takings to implement the project); see also *Stop the Beach Renourishment*, 560 U.S. at 707.

¹⁵² See, e.g., *Borough of Harvey Cedars*, 70 A.3d at 526 (discussing an eminent domain

cally involve partial takings of coastal property, which require just compensation to be paid by the government agency to the property owner.¹⁵³ However, there is a great deal of uncertainty among jurisdictions as to what constitutes just compensation.¹⁵⁴

In *The Borough of Harvey Cedars v. Karan*, the New Jersey Supreme Court clarified the calculation of just compensation while resolving a dispute regarding a beach replenishment program administered in 2008.¹⁵⁵ The Borough of Harvey Cedars (“Borough”) was required to secure easements from coastal property owners for a federal and state funded dune construction plan.¹⁵⁶ The plan sought to replenish the beach and construct twenty-two foot high dunes along the coast.¹⁵⁷ The project was to be carried out over fifty years with replenishment occurring every five to seven years.¹⁵⁸ The Borough acquired a majority of the easements necessary; however, some residents refused to grant the government access.¹⁵⁹

The Karans¹⁶⁰ did not provide a voluntary easement to the Borough because they claimed that the project would eliminate their ocean view and result in loss in value and enjoyment of their property.¹⁶¹ Nevertheless, the Borough acquired the necessary easement from the Karans through a condemnation proceeding pursuant to its power of eminent domain.¹⁶² The government appraiser found the

dispute regarding a beach re-nourishment program implemented in 2008).

¹⁵³ See, e.g., *id.*

¹⁵⁴ Compare *In re City of New York*, 83 N.E. 299, 303 (N.Y. 1907) (explaining that benefits to the remaining property may not be offset against the compensation award absent statutory authorization), with *Fisher*, 725 S.E.2d at 196 (explaining that benefits may offset compensation for partial takings).

¹⁵⁵ *Borough of Harvey Cedars*, 70 A.3d at 526-27.

¹⁵⁶ *Id.* at 527-28. The Army Corps of Engineers designed and carried out the project in conjunction with the New Jersey Department of Environmental Protection. *Id.* at 528.

¹⁵⁷ *Id.* at 527 (explaining that the project was implemented by pumping “massive amounts of sand on the beach to extend the shoreline seaward 200 feet” and constructing a dune wall the entire length of Long Beach Island).

¹⁵⁸ *Id.* at 530.

¹⁵⁹ *Borough of Harvey Cedars*, 70 A.3d at 528.

¹⁶⁰ The Karans owned property along the shoreline in the affected area. *Id.* The Karans’ home was estimated at \$1.9 million, but, despite agreement on this fact, both the Borough’s and Karans’ experts disagreed over the value of the property after the condemnation. *Id.* at 530.

¹⁶¹ *Id.* at 530 (discussing the Karans’ theory, which was based on the notion that the elimination of the oceanfront view would greatly diminish the desirability of their home on the market and destroy the unique nature of their oceanfront property).

¹⁶² *Id.* at 526. In April 2009, the Superior Court, Law Division affirmed the eminent domain power of the Borough and appointed commissioners to inspect the property and assess

condemned property to be worth \$300 based on the loss of their ocean view.¹⁶³

The Karans disputed this amount as just compensation for the taking at the condemnation trial.¹⁶⁴ They argued that the loss of the ocean view was substantial and would decrease the fair market value of the home because the property would essentially become “a second-row home” instead of oceanfront property.¹⁶⁵ The Borough argued that the dune wall would actually benefit the Karans’ property and that any economic loss resulting from the taking would be supplemented by the protection the dune wall would provide.¹⁶⁶

The Karans countered this position by relying on New Jersey State common law which only allowed certain benefits to mitigate just compensation.¹⁶⁷ Similar to *Bauman*, the common law approach distinguished between general and special benefits, by stating that the latter may only be used to offset the compensation for a partial taking.¹⁶⁸ Furthermore, like the definition used by district court in *Bauman*, the term “general” referred to benefits that were shared by surrounding properties, as well as the individual whose property was partially taken.¹⁶⁹ However, this definition deviates from the *Bauman* explanation of general benefits given by the Supreme Court. The New Jersey common law offset “special” benefits, defined as being unique to the property owner, not shared by other adjacent property owners.¹⁷⁰ This definition also differed from the *Bauman* explanation of special benefits.

The lower court adopted the common law approach and held that the benefits the dune wall provided were general and should not be considered when calculating just compensation.¹⁷¹ The Borough presented testimony that the dune wall was a special benefit given by

the value to be paid for just compensation. *Borough of Harvey Cedars*, 70 A.3d at 530. Interestingly, these commissioners found \$300 was adequate compensation without visiting the property. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (discussing the Karans’ expert witness who valued the loss around \$500,000 based on a comparative sales analysis).

¹⁶⁶ *Borough of Harvey Cedars*, 70 A.3d at 531.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 536.

¹⁶⁹ *Id.* at 537 (explaining the complicated development of the “general” and “special” distinction over the course of New Jersey’s legal history).

¹⁷⁰ *Id.*

¹⁷¹ *Borough of Harvey Cedars*, 70 A.3d at 531.

an Army Corps of Engineers civil engineer who specialized in coastal management.¹⁷² The expert testified that the defendants' property had a 56% chance of total loss within a thirty-year period without the dune construction.¹⁷³ The expert explained that the project enhanced the residence's expected lifetime by 200 years.¹⁷⁴ Further, the Karans' property only had a 27% chance of surviving the next fifty years without sustaining any storm damage if the project was not implemented.¹⁷⁵ Despite these statistics, the lower court considered the dune wall a general benefit because inland properties, as well as the Karans' shorefront property, were protected.¹⁷⁶ The court neglected to consider the varying degrees of protection afforded to properties located at different distances from the ocean, and the jury returned a verdict in favor of the Karans for \$375,000.¹⁷⁷

On appeal, the Supreme Court of New Jersey overturned the lower court and held that the calculation of just compensation for a partial taking is determined by the fair market value of the property.¹⁷⁸ This rule was a departure from earlier cases and abandoned the equation used by the lower courts.¹⁷⁹ The court explained that the previous distinction between general and special benefits misinterpreted the *Bauman* distinction and that all benefits that were calculable at the time of the taking could be used to offset the damages.¹⁸⁰ The court articulated that special benefits are those that are calculable, non-conjectural and quantifiable at the time of the taking.¹⁸¹ General benefits, described as those that are "speculative to occur in the indefinite future," could not offset compensation.¹⁸²

The Supreme Court of New Jersey explained that the lower

¹⁷² The expert was assigned through his position at the Army Corps of Engineers to assess the storm protection benefits the replenishment project would create. *Id.* at 529.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 531 (relying on expert testimony, which explained that within a fifty year period, the Karans had a 73% chance of sustaining *significant* or *total* loss without the project).

¹⁷⁶ *Borough of Harvey Cedars*, 70 A.3d at 531.

¹⁷⁷ *Id.* (excluding from the jury's consideration not only benefits the project produced, but also the Borough's expert testimony that the loss of ocean view was not substantial because the expert himself had never experienced the vantage point from the Karans' deck).

¹⁷⁸ *Id.* at 544.

¹⁷⁹ *Id.* at 542-43.

¹⁸⁰ *Id.*

¹⁸¹ *Borough of Harvey Cedars*, 70 A.3d at 542-43.

¹⁸² *Id.*

court improperly defined special and general benefits.¹⁸³ The lower court deemed general benefits as those shared by other property owners, but this directly conflicts with the definitions provided in *Bauman*.¹⁸⁴ This misinterpretation led the lower court to improperly exclude the benefits derived from the Karans' dune wall.¹⁸⁵ The court examined the extensive history of the New Jersey common law application that was originally based on the *Bauman* decision.¹⁸⁶ It concluded that the development of the common law approach involved an incorrect understanding of general and special benefits as articulated by the Supreme Court.¹⁸⁷ The holding in *Borough of Harvey Cedars* corrected this misapplication and aligned the new partial takings approach to properly represent the *Bauman* distinction.

VII. THE FAIR MARKET APPROACH: CONSIDERATION OF BENEFITS

A. The South Carolina Approach

Consistent with the federal and New Jersey approaches, South Carolina has also endorsed a fair market value assessment that considers reasonably calculable benefits.¹⁸⁸ In *Wilson v. Greenville County*,¹⁸⁹ the Supreme Court of South Carolina abandoned the old standard for just compensation that did not consider benefits enjoyed by surrounding properties.¹⁹⁰ Like the original New Jersey common law used by the lower court in *Borough of Harvey Cedars*, the previous South Carolina calculation classified special benefits as those that are unique only to the property owner and not shared by the commu-

¹⁸³ *Id.* at 541.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 544.

¹⁸⁶ *Borough of Harvey Cedars*, 70 A.3d at 535-38 (explaining that the general versus special distinction originated in response to the railroad industry boom in the nineteenth century). Many rail companies escaped compensation because general assertions of benefits allowed any damages to be offset, permitting the rapid expansion of railways across the United States. *Id.* at 536.

¹⁸⁷ *Id.* at 544 (discussing "shorthand" definitions applied by courts to the terms general and special, which caused deviations in the words' meanings envisioned by *Bauman*).

¹⁸⁸ *Wilson v. Greenville Cnty.*, 96 S.E. 301 (S.C. 1918).

¹⁸⁹ 96 S.E. 301 (S.C. 1918).

¹⁹⁰ *Id.* at 304 (explaining that the term "compensation" incorporates a balancing of interests, mainly benefits and loss or damage).

nity as a whole.¹⁹¹

In *Wilson*, the court reviewed the partial condemnation of the homeowners' property in order to construct a public highway.¹⁹² The government argued that the taking enhanced the value of the property owners' land, which should be considered as an offsetting factor for compensation.¹⁹³ The property owners relied on the state common law and claimed that any benefit derived from the highway project was general because it was mutually shared by surrounding properties.¹⁹⁴ They argued that this general benefit should be excluded when computing the damages.¹⁹⁵

The Supreme Court of South Carolina stated that compensation could not be adequately determined without consideration of "the manner, purpose, and effect of the taking upon the remainder, in so far as these produce benefit[s] as well as loss[es] and damage[s], and if the former exceeds the latter, just compensation has been made."¹⁹⁶ The court deemed this method to be the most effective and relied heavily upon the federal precedent in *Bauman*.¹⁹⁷ The highway enhanced the individual property owners' land in a unique way that differed from the effect on surrounding property and should be considered for compensation.¹⁹⁸

Similar to the reasoning in *Borough of Harvey Cedars*, the court explained that the benefits of the project to the individual property owner could be both general and special based on the common law distinction.¹⁹⁹ However, this fact should not have excluded the benefits from consideration.²⁰⁰ The court explained that the degree of benefits varies based on the proximity to the highway.²⁰¹ The closer the property was to the highway, the greater the economic enhancement.²⁰² The court concluded that the benefits were not general be-

¹⁹¹ *Id.* at 303.

¹⁹² *Id.* at 302.

¹⁹³ *Id.*

¹⁹⁴ *Wilson*, 96 S.E. at 303.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 304.

¹⁹⁷ *Id.* (citing *Bauman*, 167 U.S. at 548) (referring in its holding to the "rule adopted by the Supreme Court of the United States and a majority of the states, and . . . the approval of most eminent text-writers.").

¹⁹⁸ *Id.*

¹⁹⁹ *Wilson*, 96 S.E. at 303.

²⁰⁰ *Id.* at 304.

²⁰¹ *Id.* at 303.

²⁰² *Id.* at 303.

cause all adjacent lands were similarly advantaged and that the enhanced value of the property was directly realized to the owner and reasonably calculable at the time of the taking.²⁰³

The fair market approach identified in *Wilson* was clarified by a later decision of the South Carolina Supreme Court, which also involved a partial taking for road construction.²⁰⁴ In *Smith v. City of Greenville*,²⁰⁵ the court explained that the applicable state constitutional provision allowed benefits to be considered for just compensation.²⁰⁶ The power of eminent domain provided by the South Carolina Constitution permitted the state to delegate the power to local authorities and municipalities.²⁰⁷ Inherent in this delegation power was the authority to proscribe the manner in which the condemning entity could calculate just compensation.²⁰⁸ State legislation, which outlines proceedings that allow benefits to be offset, properly permits the condemning authority to do so within state constitutional standards.²⁰⁹ This approach views the condemned land and remaining land “as a whole,” and all injuries and benefits must be incorporated into the calculation.²¹⁰

The South Carolina approach endorses the fair market value assessment identified in *Bauman*.²¹¹ The *Smith* decision solidified this approach through state constitutional support and expanded the application of the fair market doctrine.²¹² The reasoning behind this approach was best described by the court in *Smith* as, “award[ing]

²⁰³ *Id.*

²⁰⁴ *Smith v. City of Greenville*, 92 S.E.2d 639, 643 (S.C. 1956).

²⁰⁵ 92 S.E.2d 639 (S.C. 1956).

²⁰⁶ *Id.* at 643;

Moreover, the ‘just compensation’ to which the landowner is entitled under Article I, § 17, is compensation for the taking, and not for the land taken. In this view of the matter the land is considered as a whole, and the landowner’s damage the diminution of its value by reason of the public work.

‘The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.

Id. at 645.

²⁰⁷ *Id.* at 643.

²⁰⁸ *Id.*

²⁰⁹ *Smith*, 92 S.E.2d at 644.

²¹⁰ *Id.* at 645.

²¹¹ *Id.*

²¹² *Id.* at 643.

him less would be unjust to him; . . . award[ing] him more would be unjust to the public.”²¹³

B. The Florida Approach: A Limited Fair Market Approach

Like the federal approach and the New Jersey and South Carolina approaches, Florida has endorsed the fair market value analysis but has limited it when only an easement has been taken under certain circumstances.²¹⁴ For example, in *Cordones v. Brevard County*,²¹⁵ the court applied the fair market analysis when the County acquired an easement over privately owned coastal property.²¹⁶ The case involved a beach re-nourishment program that was funded by the state of Florida and locally sponsored by Brevard County.²¹⁷ The County secured shorefront easements that would be used once every six years to construct dunes and replenish lost beach.²¹⁸ An aggrieved property owner, who refused to grant an easement, challenged the resulting condemnation action.²¹⁹ Specifically, the homeowners challenged the valuation of the property before and after the easement was condemned because the county assessor used a fair market value approach.²²⁰

The court upheld the valuation of the easement as proper under Florida law for partial takings.²²¹ The appraiser examined the property taken for the easement and found it was not exclusively controlled or accessed by the owners and could not be developed due to existing state regulations.²²² Because of these two factors, the valua-

²¹³ *Id.* at 645.

²¹⁴ *Cordones v. Brevard Cnty.*, 781 So. 2d 519 (Fla. Dist. Ct. App. 2001).

²¹⁵ 781 So. 2d 519 (Fla. Dist. Ct. App. 2001).

²¹⁶ *Id.* at 523-34.

²¹⁷ *Id.* at 521.

²¹⁸ *Id.* (explaining that the exact nature and frequency of beach re-nourishment projects are dictated by necessity, and securing an easement that lasts over a long period of time is paramount to implementing the most effective erosion control measures).

²¹⁹ *Id.* There were three claims by the property owners: that “Brevard County failed to establish [the] necessity for the easement[],” that the court approved an easement of unlimited duration, and that the valuation of the partial taking was improper. *Cordones*, 781 So. 2d at 521.

²²⁰ *Id.* at 523.

²²¹ *Id.* (explaining that the case was remanded due to the court’s agreement with the property owner’s claim on appeal that the original easement needed to fall within a fifty year period).

²²² *Id.* (relying on the appraiser’s explanation at the condemnation proceeding that the

tion was based primarily on the “potential density of development for the upland property.”²²³ The court found this method appropriate, explaining that the value was “expressed as the difference between the market value of the land free of the easement and the market value of the land burdened with the easement.”²²⁴ Further, the county appraiser considered a sales comparison and “income approach” to all upland properties in the area and derived a fair market value from these methods.²²⁵ The court held that this adequately represented the loss to the property owners.²²⁶ Although it was never argued that benefits should not be offset, the court explained that the “value of an easement cannot be ascertained without reference to the dominant estate to which it is attached.”²²⁷ This implies that when assessing just compensation, the court must consider the effect the taking has on the remaining property.

However, the court in *Cordones* explained that the fair market value approach should not be used in all situation²²⁸ The court articulated that the fair market valuation should not be used when the property interest was not “unique, none of the improvements on the property had been displaced, and the taking involved only an easement.”²²⁹ These limitations exclude benefits when the condemning entity acquires an easement, the project does not affect the improvements by the homeowner, and other property owners share the benefits of the project.²³⁰ In essence, the fair market value approach is compromised in the area of coastal disputes because beach replenishment programs typically involve easements.²³¹ Thus, the Florida approach may reach a different outcome than the federal, New Jersey,

public regularly used the portion of sand taken to access the foreshore).

²²³ *Id.*

²²⁴ *Cordones*, 781 So. 2d at 523.

²²⁵ *Id.* at 524

²²⁶ *Id.*

²²⁷ *Id.* at 523-24.

²²⁸ *Id.*

²²⁹ *Cordones*, 781 So. 2d at 523-24 (relying on an Indiana state court decision that outlined this distinction but did not refer to any Florida precedent on this point).

²³⁰ *Id.* This distinction is problematic for coastal takings because many projects do not affect the improvements, involve easements and create benefits for the community as a whole. Due to this, benefits almost certainly will not offset damage awards in a coastal setting.

²³¹ See, e.g., *Borough of Harvey Cedars*, 70 A.3d at 541 (explaining the municipality needed to secure easements over private property); see also *Walton Cnty.*, 998 So. 2d at 1108 (discussing easements acquired by the municipality for beach re-nourishment).

and South Carolina fair market analyses would.

VIII. THE EXCLUSION OF BENEFITS FOR JUST COMPENSATION

A. The New York Approach: Distinguishing between Land Taken and Remaining

The New York partial takings approach does not allow benefits to be considered for the *remaining land*.²³² However, both general and special benefits can mitigate compensation for the *land taken*, which is consistent with the previously discussed fair market value approaches.²³³ Despite this similarity, the New York approach specifically rejects the *Bauman* precedent for reducing compensation for partial takings.²³⁴ This policy allows property owners to receive compensation for their *condemned land* without considering the enhanced value of the *remaining land* caused by the taking.²³⁵ Simply put, New York courts disregard the purpose of the taking and only look at the portion of land acquired by the government entity. Unlike the fair market value approach, New York distinguishes the land remaining from the land taken.²³⁶ This distinction undermines the *Bauman* precedent because the benefits property owners enjoy from a partial taking affect the *remaining land*, not the condemned property.

In *Chiesa v. State*,²³⁷ the New York Court of Appeals reiterated this policy and held that the benefits enjoyed by property owners whose land was taken could not offset the damages award for the entire taking.²³⁸ In *Chiesa*, the property owners owned a 193-acre plot of land of which twenty-two acres were taken to construct a new interchange for a thruway.²³⁹ The taking increased the property value to the remaining land.²⁴⁰ The court cited *Bauman* and discussed the

²³² *Chiesa v. State*, 324 N.E.2d 329, 331 (N.Y. 1974).

²³³ See, e.g., *In re City of New York*, 83 N.E. 299.

²³⁴ *Chiesa*, 324 N.E.2d. at 331-32. This approach requires two proceedings for a taking: one for the land taken, and one for the remaining land. *Id.* at 332. In operation, this “dual” proceeding requirement does not allow compensation for the remaining land to be offset by the benefits generated by the condemned property. *Id.*

²³⁵ *Id.* at 331-32.

²³⁶ *Id.* (discussing the *Bauman* decision and the precedent it has set regarding partial takings).

²³⁷ 324 N.E.2d 329 (N.Y. 1974).

²³⁸ *Id.* at 331.

²³⁹ *Id.* at 330.

²⁴⁰ *Id.* (explaining that the theory of enhancement in value was based on the fact that the

Supreme Court's reliance on early New York decisions to endorse this federal partial takings policy.²⁴¹ Although this may have been the case, the New York Court of Appeals distinguished the current case from the earlier decisions in New York that appeared to support consideration of benefits.²⁴²

The New York Court of Appeals explained that the early decisions statutorily permitted the exercise of eminent domain by the state and required dual proceedings to account for surrounding properties.²⁴³ In each of the earlier cases, statutory authority allowed special and general benefits to offset damages for the remaining land but not for the actual damage award of the condemned land.²⁴⁴ The court explained that benefits to the remaining property could never offset the compensation for the taking.²⁴⁵ In effect, this approach will not consider the protection the dunes provided for the remaining property. The Court of Appeals ultimately held "that in no case should an award be made for less than the value of the property actually taken by condemnation."²⁴⁶

The support for the New York approach relies upon the state's power to tax and the placement of the burden of payment on the state and the taxpayers, not the individual who lost property.²⁴⁷ In *Chiesa*, the court expressed serious concern about situations where the state would be able to generally assert benefits to the remaining land to offset the damages for the property taken and escape the constitutional requirement for just compensation.²⁴⁸ The court had similar worries that benefits that exist at the time of the taking may be discontinued, eliminating any benefit that was subtracted for the taking.²⁴⁹

closer proximity to the Thruway would cause an increase in the demand for the property).

²⁴¹ *Id.* at 331.

²⁴² *Chiesa*, 324 N.E.2d at 332.

²⁴³ *Id.*

²⁴⁴ *Id.*; see, e.g., *Livingston v. City of New York*, 8 Wend. 85 (N.Y. 1831) (explaining that this case involved "dual" proceedings, which permitted the state to assess benefits as an offsetting factor through statutory provisions).

²⁴⁵ *Chiesa*, 324 N.E.2d. at 333.

²⁴⁶ *Id.* at 332.

²⁴⁷ *Id.*

²⁴⁸ *Id.* (describing the situation where the state could offset both general and specific benefits against the remainder and how this would be an "arbitrary and discriminatory exercise of the State's power of taxation.").

²⁴⁹ *Id.*; see also *In re City of New York*, 83 N.E. at 299 (describing the dangers of offsetting benefits to the remainder when the benefit was not guaranteed to last in perpetuity, thus becoming a false gift).

Essentially, the court was apprehensive about the offsetting of benefits against the award, and the state's abandoning the use of the property, stripping the property owner of just compensation. Moreover, it appears that the court believed the state bore the burden of paying for public projects through its power to tax. The reasoning was that the property owner already paid for the project through his or her taxes and that reducing the compensation award would be additional payment for the project that other owners (who did not have property condemned by the government) were not required to make.²⁵⁰

B. The Minnesota Approach: Excluding Benefits Shared by Adjacent Property

The Minnesota partial takings law follows an approach similar to the recently overturned New Jersey common law that distinguishes between general and special benefits on the basis of uniqueness to the property owner. In *State by Lord v. Hayden Miller Co.*,²⁵¹ the Minnesota Supreme Court explained that:

When part of a tract is taken by eminent domain, the owner is entitled to the difference between the market value of the tract immediately before the taking and the market value of what is left after the taking, excluding from consideration general benefits and deducting from the difference special benefits.²⁵²

On its face, this test aligns with the *Bauman* and *Borough of Harvey Cedars* decisions; however, the classification of general and special benefits differs, resulting in significantly different outcomes. The dispute in this case involved a condemnation proceeding for part of the property owners' land that was taken for the reconstruction of a local service road of an interstate highway.²⁵³ At the center of the dispute was the lower court's instruction to the jury explaining general and special benefits.²⁵⁴ The actual meaning of these terms

²⁵⁰ *Chiesa*, 324 N.E.2d. at 332.

²⁵¹ 116 N.W.2d 535 (Minn. 1962).

²⁵² *Id.* at 537.

²⁵³ *Id.* at 536.

²⁵⁴ *Id.* (explaining that the main contention by the state in the case was that the frontal access to the road enhanced the property value, while the property owners contended this actually conferred a greater detriment and should increase the damages award for the partial taking).

caused confusion and the municipality disputed the award on the ground that the jury did not consider the adequate amount of special benefits.²⁵⁵ The court rejected this argument, stating that the jury was permitted to offset special damages, as it saw fit, not that it was *required* to make this determination.²⁵⁶ Like the lower court in *Borough of Harvey Cedars*, the Minnesota Supreme Court relied on the idea that general benefits are those that are shared by the surrounding community and are not idiosyncratic to the condemned property owner.²⁵⁷ If adjacent property owners shared any benefits realized from the new highway, benefits could not offset compensation.²⁵⁸

The Minnesota approach is identical to the lower court's analysis in *Borough of Harvey Cedars*. Both approaches limit the consideration of benefits unless the property owner is the sole beneficiary. Minnesota still adheres to the partial takings analysis that was criticized by the New Jersey State Supreme Court.

IX. THE SHORTCOMINGS OF EXCLUDING BENEFITS FOR COMPENSATION

A. The Windfall Threat

The New York approach, which excludes all benefits to the remaining land, fails to reflect the true loss for partial takings along the coast. This approach disregards the policy purposes behind beach replenishment programs. The importance of rebuilding the shore for coastal communities has been emphasized in the wake of Hurricane Sandy.²⁵⁹ These programs are not an inconvenience for coastal residents—they are a necessity. By excluding all benefits conferred upon the remaining land, there is great potential for windfall judgments for property owners.²⁶⁰ In many cases, if government agencies did not undertake dune replenishment, private homeowners would be left funding such efforts themselves. Aside from providing much needed protection, significant maintenance and sustainability costs for

²⁵⁵ *Id.* at 537-38 (describing trial court decision where the jury was told that if it believed the frontal access was in fact a special benefit it may be deducted, but it was up to the jury members to make that finding).

²⁵⁶ *State by Lord*, 116 N.W.2d at 538.

²⁵⁷ *State by Mattson v. Colon*, 194 N.W.2d 574, 578 (Minn. 1972).

²⁵⁸ *Id.* at 580.

²⁵⁹ *Sandy Recovery and Improvement Act of 2013*, *supra* note 45.

²⁶⁰ *Borough of Harvey Cedars*, 70 A.3d at 541.

coastal owners have been reduced as well.

In *Chiesa*, Judge Jasen dissented, explaining the threat of windfall judgments in favor of individual property owners if calculable benefits were not offset.²⁶¹ This windfall threat was also a driving factor in the *Borough of Harvey Cedars* decision.²⁶² Judge Jasen supported the *Bauman* approach because otherwise property owners receive two forms of compensation: the benefit of the project and a greater damage award because those benefits did not lower the payment for condemned land.²⁶³ This point cannot be more telling when beach replenishment disputes arise. There seems to be no sound reasoning in the New York approach to overlook the fair market value when it is ascertainable at the time of the taking.

Likewise, the Minnesota approach, similar to New York's, has the potential for windfall judgments for property owners. Because special benefits must be distinct to the property owner, it is extremely likely that benefits produced by beach replenishment programs would be considered general. Thus, like New York, the protection provided by replenished dunes would be entirely excluded from consideration. Once again, this result is inequitable and over-compensates property owners.

Jurisdictions that disregard the benefits of protective public work projects allow coastal residents to enjoy protection from near certain loss for free. Shoreline property owners would need to fund similar beach nourishment projects themselves, absent the impressive responses by federal, state and local governments. Instead, tax generated revenue, which comes directly out of the public's pocket, provides funding for the projects that directly benefit front row coastal owners.²⁶⁴ With long-term plans of government-funded replenishment, coastal owners' remaining property continues to receive these benefits free of charge into the indefinite future.

²⁶¹ *Chiesa*, 324 N.E.2d at 334 (Jasen, J., dissenting).

²⁶² *Borough of Harvey Cedars*, 70 A.3d at 541.

²⁶³ *Chiesa*, 324 N.E.2d at 333 (Jasen, J., dissenting).

²⁶⁴ See *About the Agency*, FEMA, <http://www.fema.gov/about-agency> (last visited May 2, 2014) (reviewing the history of FEMA dating back to 1979, when President Carter signed an executive order creating the agency, which then became a federal administrative body funded by tax revenue).

B. The Confusion of the General versus Specific Distinction

The distinction of benefits based upon uniqueness to the individual property owners is not useful in cases involving beach replenishment programs. In *Borough of Harvey Cedars*, the lower court struggled when applying the original state approach which was similar to the New York and Minnesota view.²⁶⁵ The case became focused solely on whether the dune wall was a benefit to the Karans' property in a unique manner or in a way that was mutually enjoyed by the entire community.²⁶⁶ In fact, the dune wall provided both a general and special benefit as defined by the New Jersey common law.²⁶⁷ Thus, the common law distinction was arbitrary in this circumstance.

This dispute is a clear indication of the inefficiencies of the New York and Minnesota approach. The very nature of the claim concerned an arbitrary distinction that resulted in significantly different outcomes.²⁶⁸ Coastal protection projects undertaken by government agencies serve a multitude of purposes.²⁶⁹ Distinguishing the difference between these purposes is not only difficult, but it is also irrelevant for determining the value of loss to the individual owner.²⁷⁰

Statistically, coastal properties have a much greater chance and degree of destruction or loss in the event of a natural disaster or periodic erosion.²⁷¹ Although these projects are designed with the intention of providing broad protections for entire coastal communities, ultimately beachfront properties are directly benefited because of the

²⁶⁵ *Borough of Harvey Cedars*, 70 A.3d at 526.

²⁶⁶ *Id.* at 526.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 533.

²⁶⁹ See *N.J. Beach Replenishment Programs Underway in Monmouth Towns*, ASSOCIATED PRESS (Jan. 3, 2014, 12:01 PM), http://www.nj.com/monmouth/index.ssf/2014/01/nj_beach_replenishment_work_to_start_in_monmouth_towns.html (discussing the benefits of beach replenishment providing protection against erosion, tidal surge, periodic flooding, and structural damage).

²⁷⁰ See *Borough of Harvey Cedars*, 70 A.3d at 539 (explaining that the distinction is “difficult even for trained legal minds.”).

²⁷¹ Jeff Waters, *RMS: Insight and Observations of a Superstorm*, PROPERTY CASUALTY 360 (Oct. 30, 2013), <http://m.propertycasualty360.com/2013/10/30/rms-insight-and-observations-of-a-superstorm> (explaining the repercussions of Hurricanes Katrina, Ike and Sandy on coastal insurance and property law and the heightened risks following these major natural disasters).

heightened risk of loss associated with living directly on the shore.²⁷² As the lower court decision in *Borough of Harvey Cedars* demonstrated, maintaining the common law distinction between general and special benefits seriously complicates the process of compensating property owners and leads to an undesirable legal conflict.²⁷³ Instead, calculable and ascertainable benefits should be accounted for because this is a logical approach that is quantifiable and easier to apply.

C. Justifications for Excluding Benefits Fail to Materialize Along the Coast

Although the ultimate justifications for prohibiting the consideration of benefits for the remaining land have merit, they are not applicable in a coastal context. The concerns raised in *Chiesa*, regarding the possible discontinuation of the benefits derived from government projects, are not relevant in the coastal situations discussed in this Comment. Each of the beach re-nourishment projects presented, ranging from Florida to New Jersey, stipulated for a prolonged management of the condemned property. The projects were implemented with a long-term plan for continued assessment and replenishment that would allow for a sustainable shoreline. Because these projects are constantly ongoing as the coastline changes, there is no need to be concerned with whether the project will continually provide the benefits being used to reduce compensation.

Moreover, the policy concerns behind approaches that exclude benefits shared by adjacent properties are not relevant in a coastal setting. The Supreme Court of Minnesota explained it is not fair that partially condemned property owners suffer a loss and a benefit from public projects, but adjacent properties enjoy the same benefit without losing a portion of their land.²⁷⁴ However, as explained by the Borough's expert in *Borough of Harvey Cedars*, the threat of loss is remarkably heightened for property located immediately on the shore compared to property located two and three rows inland.²⁷⁵ Despite the shared benefits of these projects, the tangible benefits for

²⁷² See, e.g., *Borough of Harvey Cedars*, 70 A.3d at 529 (citing the Borough's expert report showing that the coastal property owners only had "a 27% chance of" avoiding any loss over a fifty year period).

²⁷³ *Id.*

²⁷⁴ *State by Mattson*, 194 N.W.2d at 579.

²⁷⁵ *Borough of Harvey Cedars*, 70 A.3d at 529.

first row homeowners are significantly greater and directly enhance shoreline properties' sustainability.

X. CONCLUSION

The fair market value approach set forth in *Borough of Harvey Cedars* establishes the most effective method of valuing partially taken property along the coast.²⁷⁶ As the New Jersey Supreme Court held, "just compensation should be based on non-conjectural and quantifiable benefits, benefits that are capable of reasonable calculation at the time of the taking."²⁷⁷ Computing compensation without accounting for these benefits awards coastal property owners windfall judgments "at the public's expense" that are "above the fair market value."²⁷⁸

When the remaining property is safer and more secure, paying exorbitant amounts in return for inconvenient beach access or the loss of an ocean view does not reflect the value of the land before and after the taking. As the court in *Borough of Harvey Cedars* explained, potential buyers will certainly value the view of the ocean, however "a rational purchaser would place a value on a protective barrier that shielded his property from partial or total destruction."²⁷⁹ Simply put, compensation should be reflected as the "quantifiable decrease in the value of [the] property—loss of view— . . . set off by any quantifiable increase in its value—storm-protection benefits."²⁸⁰

The ultimate price of protection can only be represented by considering all effects of dune re-nourishment programs for coastal properties. Beach replenishment projects directly benefit shoreline property owners more extensively than adjacent inland property. This tangible property interest cannot be ignored when computing just compensation for partially taken shorefront land.

²⁷⁶ *Id.* at 543.

²⁷⁷ *Id.* at 540.

²⁷⁸ *Id.* at 542, 543.

²⁷⁹ *Id.* at 541.

²⁸⁰ *Borough of Harvey Cedars*, 70 A.3d at 544.