

## Real Estate Title Insurance & Construction Law

### Thanks to Dunes Case, Compensation for Partial Takings Will Likely Go Down

No more “special vs. general” benefits distinction

By Christopher John Stracco and  
Brian Disler

In a recent decision, *Borough of Harvey Cedars v. Karan*, 214 N.J. 384 (2013), the New Jersey Supreme Court overturned the “special vs. general benefits” distinction that had previously been used in calculating compensation to property owners in partial-takings cases. This ruling will have a substantial impact on the calculation of compensation in forthcoming partial-takings by the state. The court’s decision specifically will impact the compensation received by owners of property taken in connection with the government’s plan to reinforce beachfront property in the wake of Superstorm Sandy.

In *Harvey Cedars*, the borough of Harvey Cedars condemned a portion of

the oceanfront property of the Karans, in order to permit dune construction. The dune construction project was part of a larger shore-protection project. The new dune line was designed to benefit all of the residents of the borough by providing greater protection against flooding and rising tides during storms. The dune-construction project required the securing of easements on properties bordering the ocean. The responsibility and cost of acquiring those easements fell to the municipalities on Long Beach Island — including the borough of Harvey Cedars.

The borough’s obligation was to secure 82 perpetual easements over the portions of private beachfront properties closest to the ocean on which the dunes would be built. The borough acquired 66 easements by voluntary consent of the property owners. The owners of 16 beachfront properties, including the Karans, did not consent. As a result, the borough adopted an ordinance authorizing it to acquire easements over those 16 properties through its statutory powers of emi-

nent domain. The borough and the Karans could not agree on a figure representing just compensation for a perpetual dune easement over the seaside portion of the Karans’ property. The Karans alleged that the dune construction would result in the loss of the view of the beach and ocean from their property. The borough disputed that claim. As such, the borough instituted an action in the Superior Court, Law Division, to acquire the Karans’ property by eminent domain.

In calculating just compensation, the borough attempted to submit evidence that the dune would likely spare the Karans’ home from damage during storms and thus add value to the property. The trial court, however, did not permit the submission of this evidence. In making this ruling, the trial court relied on the previously established “special vs. general benefits” test, which stated that only special benefits, not general benefits flowing from a public project, can be considered in calculating the value to the remaining property in a partial-takings case. In the trial court’s view, the storm protection afforded by the project was a general

*Stracco is a partner with Day Pitney LLP in Parsippany, practicing in the areas of real estate, property and commercial litigation. Disler is an associate in the firm’s commercial litigation department.*

benefit because the new dunes protected all property in the borough to some extent and, presumably, therefore added value to all property in the borough.

In support of its ruling, the trial court relied upon *Sullivan v. North Hudson County Railroad Co.*, 51 N.J.L. 518, 18 A. 689 (E. & A. 1889), a case involving an eminent-domain action in which a railroad acquired an easement over a landowner's property. The trial court deduced from the holding in *Sullivan* that benefits enjoyed by the Karans from the dune construction that were likewise enjoyed "in greater or less degree" by their neighbors, were general benefits not to be weighed by the jury. Based on its reading of *Sullivan*, the trial court deemed special benefits to be those that "directly increase the value of particular tracts" as opposed to general benefits which advantage "the whole community or neighborhood."

At trial, both sides presented expert testimony from real estate appraisers to give their opinions as to the value of the property after the partial taking. The experts came to markedly different opinions as to this value. In accordance with the court's evidentiary ruling, the borough's appraiser did not present evidence of any special financial benefits accruing to the Karans' property from the construction. After the close of trial, the jury returned an award of \$375,000 as compensation for the easement and for any damages to the remainder of the Karans' property.

The borough appealed the trial court's ruling, alleging that the court acted improperly when it ruled that the borough was barred from presenting evidence that the construction of the dune would add value to the Karans' property. On appeal, the Appellate Division further examined the "special vs. general benefits" test. The court explained that, "[g]eneral benefits are those produced by the improvement which a property owner may enjoy in the future in common with all other property owners in the area," whereas special benefits are those

"that differ in kind, rather than in degree, from the benefits which are shared by the public at large." Applying this distinction, the Appellate Division reasoned that the benefit to the Karans' property from the construction of the dune was a general benefit, as the benefit bestowed upon the Karans' property was not different in kind from the benefit conferred on the island as a whole. The Appellate Division therefore upheld the trial court's ruling.

The borough sought certification, which was granted by the New Jersey Supreme Court. The Supreme Court found that the "special vs. general benefits" test was no longer viable. The court analyzed the litany of cases applying this rule over the last century and concluded that: "[T]he terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases. The problem with the term 'general benefits' is that it may mean different things to different courts." Additionally, the court found that, "[t]he task of distinguishing between special and general benefits — as defined by case law in New Jersey and other jurisdictions — is difficult even for trained legal minds."

As such, the court set aside the "special vs. general benefits" test and established a new test based upon the principle that a property's fair market value should be used as the benchmark in computing "just compensation" in a partial-takings case. The court found that nonspeculative, reasonably calculable benefits that increased the property's value at the time of the taking should be considered in determining just compensation, regardless of whether those benefits were enjoyed to a lesser or greater degree by others in the community. The court stated, "In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project." The court continued, "a

formula ... that does not permit consideration of the quantifiable benefits of a public project that increase the value of the remaining property in a partial-takings case will lead to a compensation award that does not reflect the owner's true loss."

The court therefore concluded that the trial court's decision to prohibit evidence that the construction of the dune would increase the value to the Karans' property, "distorted the fair-market valuation of the property by artificially withholding a key component of the analysis." Because the borough was prohibited from presenting evidence of such benefits, the Supreme Court ordered that a new trial take place. However, subsequent to the Supreme Court's ruling, on or about Sept. 25, the state and the Karans settled the matter with the state paying the Karans \$1 as compensation for the partial taking, resolving the matter before the need for a new trial.

The New Jersey Supreme Court's ruling will permit the state to present evidence of benefits to property owners stemming from public works projects in partial takings cases, even where said benefits are also conferred upon the community as a whole. This ruling is particularly impactful in takings cases involving owners of beachfront property affected by the state's initiative to protect the shoreline from future storms like Sandy. Prior to the court's ruling in *Harvey Cedars*, any benefit the shoreline project would have conferred upon a property owner in the form of improved safety and prevention of property damage would have been inadmissible. Under *Harvey Cedars* this evidence is now admissible. Considering the public's heightened awareness, in the wake of Superstorm Sandy, of the potential damage that can be caused to beachfront property, it is possible, if not likely, that juries will find the benefit of these shoreline projects to property owners to be substantial. As such, the New Jersey Supreme Court's ruling in *Harvey Cedars* will likely result in reduced awards to property owners in these cases. ■