

NEW JERSEY MODERNIZES PARTIAL TAKINGS COMPENSATION

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The New Jersey Supreme Court's decision in *Harvey Cedars v. Karan*, has brought the evidence that may be presented to a jury in line with what the law required that jury to consider. Before *Karan*, a jury in New Jersey was instructed by the judge to weigh *all* the relevant factors that a willing buyer and willing seller would consider regarding the property in issue on a particular date. Despite this instruction, under the previous "special benefits" standard, the jury was not permitted to hear all those factors. Rather, the jury was limited to considering only the negative impact a buyer would point out to reduce a purchase price - in the *Karan* case, the alleged loss of view. The jury was not permitted to hear the positive impacts of a project that a seller would likely emphasize to increase a purchase price, such as the protective benefit of the dune and added beach area.

Post *Karan*, a jury will now hear and consider evidence of both the negative impact of a project on the remaining property and the positive impact of a project on that same remaining property. Moreover, the *Karan* decision will apply to cases beyond the oceanfront. For example, in a road widening context, the condemning authority will now be able to introduce evidence of the benefit received by a property impacted by such widening, to the extent reliable, credible, evidence of value regarding that property can be produced.

Going forward, determinations of just compensation in New Jersey partial takings cases will more accurately reflect the realities of the real estate market. In practice, this shift in the

law will allow for fairer determinations in terms of awards to be paid for property taken by eminent domain, for both property owners and condemning authorities.

The decision in *Karan* will have a lasting impact in terms of the amount of just compensation property owners can expect to be awarded for the use of their property for beach replenishment projects. It will also reverberate in all partial takings cases. Importantly, the decision will provide municipalities and other condemning authorities with a means to lessen the tremendous financial burden they face in partial takings cases.

The Harvey Cedars v. Karan Case

On July 8, 2013, the New Jersey Supreme Court issued its opinion in *Harvey Cedars v. Karan*, ruling that in partial taking eminent domain cases, the jury's calculation of just compensation to be paid for any impact that taking-related project has on the remaining property must take into consideration the benefits to property owners resulting from the project. While the specific beach replenishment and protection project underlying the *Karan* case began in 2005, the larger issue of beach replenishment has come to the forefront in the wake of Hurricane Sandy.

History of Beach Replenishment Project on Long Beach Island and in Harvey Cedars

In 1999 the U.S. Army Corps of Engineers ("Army Corps"), together with the New Jersey Department of Environmental Protection began a comprehensive, multi-million dollar storm damage reduction and beach replenishment project on the eighteen-mile-long barrier island of Long Beach Island ("LBI"), located in southern Ocean County, New Jersey. Designed to combat shoreline erosion problems and protect against storm damage, the project essentially consists of three phases: Expansion of the eroding shoreline by pumping approximately eleven million cubic yards of sand into the project area; a periodic nourishment cycle that will

contribute an additional two million cubic yards of sand every seven years for the next fifty years; and construction of a dune with a top elevation of twenty two feet above sea level, with a thirty- to forty-foot-wide berm (depending on the specific location), at an elevation of eight feet above sea level.

The total estimated cost of the project is valued at \$273 million, with costs being borne proportionately by the federal, state, county, and local governments. In the Borough of Harvey Cedars, the estimated cost for the initial phase of the project is approximately \$22 million, of which the borough is responsible for over one million dollars, including the cost to acquire the necessary easements from private property owners. In other words, the local municipality has to pay for the easements with its own funds.

In Harvey Cedars, a total of eighty-two easements were required. The borough was able to acquire the majority of the easements for little or no compensation without resorting to eminent domain. However, despite its best efforts, the borough was unable to privately acquire sixteen easements from individual property owners, including Harvey and Phyllis Karan. Notably, the easements were all to be acquired over multi-million dollar, beachfront properties, most owned by seasonal residents.

A. Initial Attempts to Obtain Easement over Karans' Property

The Karans own an 11,868-square-foot beachfront lot in the borough with a three-story, single-family house built in 1973 and anchored on pilings. The two upper floors open onto exterior decks, which, prior to the project, had provided panoramic views of the beach and ocean. After the project, the view from the second floor (first full floor of living area) was altered, meaning that the view of the beach east of the dune and wave break were obstructed by

the dune. However, a full panoramic view of the ocean remained, and the view from the third floor was not impacted.

Unable to obtain the easement voluntarily, in November 2008 the borough exercised its power to acquire the easement over the Karan's property by eminent domain. The easement consists of a perpetual easement over a 3,381-square-foot strip of the Karan's property, nearest to the ocean. The borough valued the easement at \$300 and found that there was no diminution in value of the remaining property. The Karans asserted that the easement and its impact on their remaining property, specifically, the view from their summer house, devalued their \$1.9 million property by \$500,000.

On April 28, 2010, court-appointed commissioners issued a report with their opinion of value, setting it at \$700. The Karans appealed the commissioners' decision, and a trial was held in April of 2011.

At the time of trial, "special benefits" was the standard in New Jersey law for what evidence a condemning authority like the borough could present to a jury regarding the positive impact of a project on property remaining after condemnation. The test for special benefits required a condemnor to demonstrate that the property condemned received a special benefit from the project giving rise to the condemnation, i.e. that the benefit to the property owner is different and distinct from general benefits to other properties in the project vicinity. The expert reports presented by the borough established that, absent the project, the Karans' property was at a significantly greater risk of being damaged or destroyed by a large single storm, as well as by the cumulative effect of multiple smaller storms over the years. In particular, based on historical and scientific data, the expert reports demonstrated that over a thirty-year period, the risk of damage to the Karans' property without the project was 56 percent, whereas the risk of damage

to non-beachfront properties located to the immediate west of the Karans' property was only 37 percent or less. With the project, the risk of damage to the Karans' property would be reduced to less than one percent. Thus, the borough argued that the Karans' beachfront property, which is at a significantly greater risk of being damaged or destroyed by a storm such as Sandy as well as by the cumulative impact of recurring, non-major storm events, would receive a significantly greater, special benefit from the project than other non-beachfront properties. Despite this evidence, at the conclusion of the hearing, the trial court held that as a matter of law, the borough's evidence did not relate to special benefits and was therefore inadmissible. The trial court based its reasoning on the fact that the benefits of the project were shared – although in varying degrees – by the larger community of Harvey Cedars.

Based on that decision, the jury was not permitted to hear or consider the borough's evidence of the protective and positive benefits received by the Karans from the project. In other words, the jury only heard about the negative impact of the twenty-two-foot dune on the Karans' remaining property, which the Karans claimed was an obstruction and alteration of their ocean view. The jury was *not* permitted to hear evidence about the positive effects of the project on the Karans' property, like storm protection. After a four day trial, the jury determined that the fair and just compensation to which the Karans were entitled was \$375,000. The borough appealed and, after an Appellate Division decision affirming the trial court holding, on June 8, 2012, the New Jersey Supreme Court granted certification for review.

B. The New Jersey Supreme Court Decision

The New Jersey Supreme Court reversed the lower courts' holdings, vacated the \$375,000 award, and remanded the matter back to the trial court for a new trial. The court

emphasized that the issue was how to calculate the just compensation to which the Karans are entitled, “when the taking of a portion of the property for a public project may lessen in part and enhance in part the value of the remaining property.”¹ The court ruled that property owners such as the Karans should not be entitled to a “windfall” or “pay out that disregards the home’s enhanced value resulting from a public project.”² Rather, in determining the proper award of just compensation, there must be “a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.”³ In other words, the court did away with the old special benefit standard and, in a major shift of New Jersey law, ruled that *any* credible, reliable evidence of impact on value of the property at issue is to be considered by a jury.

The court noted that in the state’s early history, there was no provision for considering benefits conferred on the remainder of a property in a partial takings case.⁴ With the expansion of roads and railroads came the distinction between general and special benefits.⁵ Presenting an overview of several early court cases, the *Karan* court demonstrated that, “what exactly constitutes a general benefit is an issue that has bedeviled our jurisprudence[,]” and emphasized that “the task of distinguishing between special and general benefits . . . is difficult ‘even for trained legal minds.’”⁶ Rejecting the historic difficulty surrounding this distinction, the court established a more simple and holistic approach. The court noted that the fair-market considerations employed in total-takings cases should also be employed in partial-takings cases and held that the determination of just compensation should consider “what a willing buyer and a

¹ Borough of Harvey Cedars v. Karan, No. A-4555-10T3, 2013 WL 3368225, at *1 (N.J. July 8, 2013).

² Id.

³ Id.

⁴ Id. at *10.

⁵ Id. at *11.

⁶ Id. at *11, *14 (citation omitted).

willing seller would weigh in coming to an agreement on the property's value at the time of the taking and after the taking.”⁷ Specifically, the court directed:

[J]ust compensation should be based on non-conjectural and quantifiable benefits, benefits that are capable of reasonable calculation at the time of the taking. Speculative benefits projected into the indefinite future should not be considered. Benefits that both a willing buyer and a willing seller would agree enhance the value of the property should be considered in determining just compensation, whether those benefits are categorized as special or general.⁸

The New Jersey Supreme Court noted that the Karans uniquely benefitted from the project's implementation in Harvey Cedars. While recognizing that the benefits of the project extend not just to the Karans but to many residents, the court emphasized that “clearly the properties most vulnerable to dramatic ocean surges and larger storms are the frontline properties, such as the Karans’.”⁹ Accordingly, “the Karans benefitted to a greater degree than their westward neighbors.”¹⁰

In doing away with the distinction between special and general benefits in favor of the fair-market approach, the court recognized that “[t]he historical reasons that gave rise to the development of the doctrine of general and special benefits no longer have resonance today.”¹¹ The court held that “reasonably calculable benefits—regardless of whether those benefits are enjoyed to some lesser or greater degree by others in the community—that increase the value of property at the time of the taking should be discounted from the condemnation award.”¹²

In remanding the matter back to the trial court for a determination of just compensation, considering “non-speculative, reasonably calculable benefit that inured to the advantage of the Karans’ property at the time of the taking[,]” the court conceded that it “cannot devise a perfect

⁷ Id. at *15.

⁸ Id. at *15 (internal citations omitted).

⁹ Id. at *16.

¹⁰ Id.

¹¹ Id. at *18.

¹² Id.

means for compensating a property owner whose land is partially taken as part of a public project.”¹³ However, the court emphasized that “[u]sing fair market value as the benchmark is the best method” to ensure that such property owners receive just compensation.¹⁴

Future Impact

The impact of the New Jersey Supreme Court’s decision in the *Karan* case is not yet known. At the time of writing, the parties are in negotiations to attempt to settle the matter. Notably, any payment to the Karans will *not* be for just compensation but solely for reimbursement of expenses they incurred in the years of legal struggle that resulted in a major change to New Jersey law.

Aside from the impact in the case itself, the court’s decision in *Karan* will be rippling through New Jersey’s courts for years to come. For the beach towns, this means that the cost of acquiring property through eminent domain will be meaningfully reduced, as determinations of just compensation will permit negative aspects of the taking to be offset by market evidence of the benefits of such projects. For other municipalities it means that such fair market considerations may be considered in any and all partial takings cases.

How the newly enunciated law, which has brought fairness to the playing field in partial takings cases, will be implemented remains to be seen. There will still be a need for expert input as to the impact, both positive and negative, of the partial taking on any remaining property. However, the sufficiency of that evidence, what comprises such evidence, and the quantification of that evidence will be the subject of legal proceedings in condemnation cases for years to come. In the meantime, the efforts of federal, New Jersey, and local governments to protect and preserve the coastline of New Jersey will benefit from this ruling, allowing for the full

¹³ *Id.* at *19, *18.

¹⁴ *Id.* at *18.

construction and implementation of the project. Ironically, the project's dunes' ability to withstand the ravages of Hurricane Sandy (which demonstrates the efficacy of the project) preserved the very home from which the Karans claimed to have lost their ocean view –clear, non-speculative evidence of the positive, protective benefit of the project which a future jury will be able to consider.