Resilience and Raisins: Partial Takings and Coastal Climate Change Adaptation

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Summary

The increased need for government-driven coastal resilience projects will lead to a growing number of claims for "partial takings" of coastal property. Much attention has been paid to what actions constitute a partial taking, but there is less clarity about how to calculate just compensation for such takings, and when compensation should be offset by the value of benefits conferred to the property owner. While the U.S. Supreme Court has an analytically consistent line of cases on compensation for partial takings, it has repeatedly failed (most recently in *Horne v. U.S. Department of Agriculture*) to articulate a clear rule. The authors argue the government should compensate property owners based on the free market value of their remaining property, the calculation of which should include all nonspeculative, calculable benefits of the taking.

Coastal climate change adaptation strategies are critical. The U.S. coasts, including the Gulf of Mexico and the Great Lakes, are home to over 164 million people, more than 50% of the U.S. population.[1] These areas support 66 million jobs and $3.4 trillion in wages.[2] In the aggregate, coastal communities "generate 58% of the national gross domestic product"[3] and contribute $6.7 trillion to the U.S. economy.[4] Although this concentration of people, jobs, wealth, and economic energy is threatened by climate change, there is a feeling among some coastal residents that it is not climate change but government-driven coastal resilience projects that truly threaten their property.

Constitutional protection of private property is not absolute. The government may take private property to serve the public good as long as the government also offers the property owner "just compensation." While the concept of public good is capacious, determining just compensation is often difficult and lacks the guidance of fully articulated judicial precedent. Courts will need to solve this problem as governments more frequently acquire private coastal property, often through eminent domain, to adapt to the threat of climate change.

This Article considers the issue of just compensation for partial acquisitions of private property, particularly for coastal resilience projects. What formula should be used in determining a property owner's compensation in a partial taking? What compensation is due the owner of the property if, at the time of the taking, the government's proposed use of it is reasonably expected to confer a monetary benefit on him or her? How should the expectation of a monetary benefit to the private owner impact the compensation calculation?

This Article argues that, while the U.S. Supreme Court has an analytically consistent line of cases on compensation for partial takings, it has failed to articulate a clear rule and that failure has resulted in significant confusion. The Court's recent decision in *Horne v. U.S. Department of Agriculture*[5] was a missed opportunity to lay out the simple rule proposed in this Article: The government should compensate property owners based on the fair market value of their remaining property, the calculation of which should

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1. Susanne C. Moser et al., *Ch. 25: Coastal Zone Development and Ecosystems*, *in* Climate Change Impacts in the United States: The Third National Climate Assessment 579, 581 (U.S. Global Change Research Program ed., May 2014), *available at* http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_Climate_Change_Impacts_in_the_United%20States_HighRes.pdf.
2. *Id.*
3. *Id.*
4. *Id.*
5. No. 14-275, 2015 WL 2473384, 45 ELR 20120 (U.S. June 22, 2015).

include all nonspeculative, calculable benefits of the taking to the remainder. This Article illustrates its proposed rule with a recent decision from New Jersey, and concludes that the Court should follow suit.

I. The Need for Adaptation and the Option of Eminent Domain

Climate change's effect on coastlines includes accelerated sea-level rise, increasingly frequent and increasingly severe coastal storms, erosion, and permanent flooding.[6] Sea-level rise threatens over 5,790 square miles and over $1 trillion of property and structures.[7] In the Mid-Atlantic, for example, estimates suggest that 450,000 to 2.3 million people are at risk from sea-level rise.[8] Sea-level rise threatens New Jersey's coastal properties, valued at over $106 billion, and its tourism revenue, valued in excess of $30 billion.[9]

The risk is particularly acute given historical development patterns. Shoreline developments have "frequently occurred without adequate regard for coastal hazards," as noted in at least one study.[10] Sea levels rose at an average of 1.7 millimeters per year through the 20th century, and this rate seems to be accelerating.[11] Other studies estimate "global sea levels rose approximate eight inches (203 millimeters), despite stable levels over the previous two millennia."[12] Some studies have estimated that global sea levels could rise by one meter or more over the next 100 years.[13] And because sea-level rise has significant inertia, it will likely continue for many centuries.[14]

The threat has not escaped public notice. Sea-level rise has resulted in a "national conversation about what coastal developments should be permitted and how they should be built."[15] There have been various attempts to chronicle local, regional, and national adaptation activities.[16] "Hard" protections, such as sea walls, can exacerbate erosion and coastal loss, resulting in "negative effects on coastal ecosystems, undermining the attractiveness of beach tourism."[17] In contrast, "soft" coastal adaptation strategies, such as dune renourishment, are inexpensive and effective, which may explain why they are the most common method of coastline protection in the United States.[18] "Soft" adaptation "is commonly employed along ocean shores—generally at public expense."[19] In some cases, dunes and other soft projects might not intrude on private property; in most cases, however, coastal adaptation projects will require government possession of strips of private property on the seaward edge of coastal lots, often achieved through eminent domain.[20]

Naturally, adaptation programs have spawned litigation, from Washington to Texas to Florida to New Jersey, regarding such issues as coastal sewage systems, integration of adaptation into utility development plans, nutrient concerns in changing water conditions, and insurance considerations, to name a few.[21] In Margate, New Jersey, litigation has already begun over the Absecon Island Shore Protection Project. The state government has not completed appraisal for all the beachfront property where it will construct sand dunes for the project, but because parties cannot agree on a price, "the state . . . will ask the court to take the easements by eminent domain," said the city administrator.[22] The New Jersey Department of Environmental Protection estimates needing 4,200 easements for public projects along the coast and, already, 239 owners have indicated unwillingness to sell their rights.[23]

Property acquisition is authorized by the Fifth Amendment to the U.S. Constitution, which allows governments to take private property using eminent domain as long as the taking meets two criteria.[24] First, the government can only take private property for "public use."[25] Generally speaking, any purpose that promotes the public health, safety, welfare, or morals is a valid public use.[26] Second, the

6. Lara D. Guercio, *Climate Change Adaptation and Coastal Property Rights: A Massachusetts Case Study*, 40 B.C. Envtl. Aff. L. Rev. 349, 354 (2013).
7. Moser et al., *supra* note 1, at 589.
8. Radley Horton et al., *Ch.16: Northeast*, *in* Climate Change Impacts in the United States: The Third National Climate Assessment 378 (U.S. Global Change Research Program ed., May 2014), *available at* http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_Climate_Change_Impacts_in_the_United%20States_HighRes.pdf.
9. Center for Integrative Environmental Research, Economic Impact of Climate Change on New Jersey 7 (July 2008), *available at* http://www.pinelandsalliance.org/downloads/pinelandsalliance_59.pdf.
10. Moser et al., *supra* note 1, at 589.
11. *Id.*
12. Guercio, *supra* note 6, at 355.
13. *Id.*
14. Intergovernmental Panel on Climate Change, Fourth Assessment Report: Climate Change 2007, Ch. 6, Coastal and Low-Lying Areas 317 (2007), https://www.ipcc.ch/publications_and_data /ar4/wg2/en/ch6.html.
15. Edna Sussman et al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. Envtl. L.J. 55, 70-71 (2010).
16. *See* Henry D. Jacoby et al., *Ch.27: Mitigation*, *in* Climate Change Impacts in the United States: The Third National Climate Assessment 678 (U.S. Global Change Research Program ed., May 2014), *available at* http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_Climate_Change_Impacts_in_the_United%20States_HighRes.pdf.
17. Moser et al., *supra* note 1, at 589.
18. Thomas J. Campbell & Lindino Benedet, *Beach Nourishment Magnitudes and Trends in the U.S.*, SI 39 J. Coastal Res. (Special Issue) 57, 58 (2006), *available at* http://www.cerf-jcr.org/images/stories/09_tom.pdf.
19. James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1308 (1998).
20. *See, e.g.*, *Property Owners Throw Cold Water on N.J. Shore Protective Dunes Plan*, W. Va. Pub. Broad. (May 26, 2015, 3:47 PM), http://wvpublic.org/post/property-owners-throw-cold-water-nj-shore-protective-dunes-plan.
21. Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?*, 99 Minn. L. Rev. 2177, 2193 (2015).
22. Nanette LoBiondo Galloway, *Margate Receives Appraisal for Dunes Easement; Deadline to Respond Is Oct. 8*, ShoreNewsToday (Oct. 2, 2015), *available at* http://www.shorenewstoday.com/downbeach/margate-receives-appraisal-for-dunes-easement-deadline-to-respond-is/article_27c7aca4-693d-11e5-9fb2-d358da06e050.html.
23. Kevin McArdle, *Want Dunes to Protect the Shore? New Jersey Facing Down 239 "Hardcore" Holdouts*, NewJersey1015 (Oct. 5, 2015), *available at* http://nj1015.com/want-dunes-to-protect-the-shore-nj-facing-down-240-hardcore-holdouts.
24. U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation.").
25. *Id. See also*, *e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994); 26 Am. Jur. 2d *Eminent Domain* §3 (2015).
26. Kelo v. City of New London, 545 U.S. 469, 481, 35 ELR 20134 (2005) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-bal-

government must give the property owner (or prior property owner, as the case may be) "just compensation."[27]

There are many arguments in favor of eminent domain in the context of adaptation. It benefits adjacent lands,[28] state procurement makes the public less likely to tolerate backsliding in mitigation efforts,[29] and federal action is the more rational course because the nation as a whole contributes to greenhouse warming and therefore the cost should similarly be borne nationwide.[30] Whatever justifications are offered, debates over compensation will flare and raise questions about the nuances of this constitutional requirement.

In broad terms, the constitutional mandate of just compensation ensures that the government will put the property owner "in the same position monetarily as he would have occupied if his property had not been taken."[31] "To determine such monetary equivalence, the Court early established the concept of 'market value'": The owner is entitled to the fair market value of his property at the time of the taking.[32]

The fair market value rule is easy in principle but more complicated in practice in the coastal resilience context. When the government takes a strip of land to build a new dune system, for example, it might cause a diminishment in value to the remaining piece of the land, perhaps by blocking ocean views from the lot. At the same time, however, the new dunes will protect the property from complete destruction by the next big storm. The questions arise: What factors should a court consider in calculating compensation? May the court take into account project-related benefits to the property or only the damages?

II. Judicial Convolution

Courts have long struggled with the "benefit-offset problem,"[33] the question of when a court should reduce compensation because of benefits that the taking confers on the property owner. At the center of the ongoing struggle is a futile attempt to draw a bright line between individual and societal benefits. Because the government can only take property for the purposes of public use, it is natural that taking will result in some public, and some private, benefit. It is from this inevitability that a distinction between "general benefits" and "special benefits" arose as a nominal tool for determining whether or not to offset benefits from a compensation award.[34] Ultimately, the distinction, although often referenced, remains nominal and is rarely applied as an analytical tool.

In short, we argue that courts should dispose of this muddied general benefit/special benefit dichotomy,[35] but it is nevertheless necessary to have a working explanation of terms. The "remainder" is the property that stays in private hands after a partial taking. "General benefits" are benefits to the remainder that are similar in kind to the benefits other properties in the area will receive from the government project.[36] For example, when the government builds a new road, all residents in the vicinity will have quicker access to neighboring towns and potential economic benefits stemming from that access.

A "special benefit," on the other hand, is a benefit unique to the remainder and does not apply to other properties. If the new road takes a small portion of a farmer's property, its very presence will provide the farmer a general benefit of quicker transportation on her remaining land. But the road builders might also drain a large marsh on the farmer's land in order to build the road. By draining this marsh, the government makes a new section of the farmer's land arable, thereby increasing the value of her remaining land. This benefit, which increases the value of the land, is a special benefit that is unique to the farmer alone.

Understanding the general/special distinction is important because many courts, at least nominally, will only offset special benefits when calculating just compensation and will not offset general benefits.[37] Unfortunately, courts have applied this distinction in ways that present at least two practical problems. First, the definitions of, and distinction between, general and special benefits are treated differently and frequently muddled to the point that "the difference between the two is difficult to ascertain even for trained legal minds" and "many jurisdictions disagree as to what constitutes a special benefit."[38] Second, the "shadowy"[39] definitions and subjectivity of the distinction create a great deal of flexibility that can undermine truly just compensation and public confidence in the fairness of eminent domain more broadly.

In the coastal context, the subjectivity of the special/general distinction is obvious. If a dune restoration project protects the coastline from future storm surges, should that protection be deemed general, because although it protects the first row of shoreline homes more than others, it also provides substantial protections to homes farther inland? Or should the coastline protection be deemed

anced as well as carefully patrolled.") (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

27. *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973); 3-8 Nichols on Eminent Domain §8.01 (3d ed. 2015).
28. Titus, *supra* note 19, at 1384.
29. *Id.* at 1385.
30. *Id.* at 1385-86.
31. *Almota Farmers*, 409 U.S. at 474 (citing United States v. Reynolds, 379 U.S. 14, 16 (1970)).
32. *Id.* (citing New York v. Sage, 239 U.S. 57, 61 (1915)).
33. The phrase "benefit-offset problem" is borrowed from William Fischel. *See* William Fischel, Regulatory Takings Law, Economics, Politics (1998).
34. *See, e.g.*, E.H. Schopflocher, Annotation, *Deduction of Benefits in Determining Compensation or Damages in Eminent Domain*, 145 A.L.R. 7 (1945); Bauman v. Ross, 167 U.S. 548, 562 (1897).
35. *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 536 (N.J. 2013).
36. 3-8A Nichols, *supra* note 27, §8A.02.
37. *See, e.g.*, Schopflocher, *supra* note 34.
38. 3-8A Nichols, *supra* note 27, §8A.02 (citing State v. Gatson, 617 S.W.2d 80 (Mo. Ct. App. 1981) (internal citations omitted); State Highway Comm'n v. Koziatek, 639 S.W.2d 86 (Mo. Ct. App. 1982).
39. *Koziatek*, 639 S.W.2d at 88 ("In practical application, the distinction between special and general benefits is shadowy at best.").

special, because the first row of homeowners is protected from complete destruction, while others are only protected from storm damage? If the dune system stretches past 75 houses, is the benefit general because 75 property owners are benefited, or special because only 75 of 75,000 residents are benefited?

But importantly, unlike the requirement of "just compensation," the special/general dichotomy is not a constitutional distinction[40] and, perhaps because of this, the Supreme Court has never really applied the distinction. Though the Court has written about the distinction and sometimes treated it as a controlling rule, the Court has only used it as a post hoc description of benefits after having determined, on "other grounds," whether those benefits should offset compensation. When the Court offsets benefits, it describes the benefits as special; when the Court refuses to offset, it describes the benefits as general. The "other grounds," the true analytical distinction on which the Court relies, is not breadth of benefits, but whether or not the benefits are certain and calculable.

A variety of cases have dealt with the benefit-offset problem in situations including the construction of canals,[41] roads,[42] schools,[43] parks,[44] reservoirs,[45] public transit,[46] and river tolls,[47] but two cases with opposing outcomes demonstrate the Supreme Court's underlying analytical consistency.

In *Olson v. United States*, the Court dealt with potential economic benefits to remainder property that were too speculative and incalculable to offset against compensation.[48] *Olson* involved condemnation of lands flooded for a reservoir.[49] The government argued that the change brought about by the new reservoir would allow the neighboring property owners, whose lands were subject to partial takings, to use their new frontage for power generation.[50] The remaining property was certainly "physically adaptable" for power generation, but making generation a reality was contingent on the landowners agreeing to work together.[51] The Court refused to offset compensation by the economic benefits of potential power generation, reasoning that the benefits were too speculative and too difficult to calculate, as they would not accrue until an indefinite and uncertain point in the future.[52]

The Court in *Bauman v. Ross,* relying on similar reasoning but with different facts, reached a different conclusion.[53] In *Bauman*, the U.S. Congress began a project to improve the street layout in the District of Columbia, partially condemning lots to lay road.[54] The authorizing act directed the jury, in setting compensation, to consider the benefit to the remainder of the property from the new street system.[55] The Court upheld this provision.[56] The Justices held that courts may reduce compensation based on a real, certain, and calculable benefit to a remainder, noting that the Constitution "contains no express prohibition against considering benefits in estimating the just compensation" nor against considering "special and direct benefits."[57] But the Court's use of the term "special,"[58] which it contrasted with "general," or those benefits "in common with all lands in the neighborhood"[59] or "benefits which result to the public as a whole," introduced the confusion that persists to this day.[60]

Bauman implied that courts could only consider narrowly accruing benefits and must ignore those that were broadly applicable, but this was not, in fact, the analysis that the Court used. Instead, *Bauman* reasoned that other courts had offset benefits that were "direct," "actual," "in fact," "proximate," "immediately accruing," "capable of present estimation," or "capable of "reasonable computation."[61] The Court rejected, and saw other courts reject, benefits that were in the "indefinite future," "contingent and speculative," or might only "arise in the future."[62] The certainty and calculability around the economic benefit of the new road system persuaded the Court to offset benefits against compensation.[63]

Later Supreme Court opinions continue to apply *Bauman*'s and *Olson*'s "certainty versus speculation" test, but often conflate that test with the special/general distinction. *McCoy v. Union Elevated R.R. Co.* is the prime example. The *McCoy* Court considered compensation due a hotel owner whose property was partially taken to construct an elevated railway. The Court held that a state may permit consideration of "actual benefits—enhancements in market value—flowing directly from a public work, although all in the neighborhood receive like advantages."[64] In other words, the benefits could be widespread and still offset compensation as long as they were actual enhancements to market value.

This confusion persists to this day.[65] Courts analyze whether a benefit to the remainder's market value is cer-

40. Bauman v. Ross, 167 U.S. 548, 584 (1897).
41. *See* Chesapeake & Ohio Canal Co. v. Key, 5 F. Cas. 563 (D.C. Cir. 1829).
42. *See Bauman*, 167 U.S. 548. *See also* Garrison v. City of New York, 88 U.S. 196, 198 (1874).
43. Searl v. School Dist. No. 2, 133 U.S. 553 (1890).
44. Shoemaker v. United States, 147 U.S. 282, 284 (1893).
45. Olson v. United States, 292 U.S. 246, 255 (1934).
46. McCoy v. Union Elevated R.R. Co., 247 U.S. 354 (1918).
47. Monangahela Navigation Co. v. United States, 148 U.S. 312 (1893).
48. 292 U.S. 246, 256 (1934).
49. *Id.* at 248.
50. *Id.*
51. *Id.* at 256-57.
52. *Id.*
53. 167 U.S. 548 (1897).
54. *Id.* at 550-51.
55. *Id.* at 557 (first alteration in original, second alteration not in original).
56. *Id.* at 584.
57. *Id.*
58. *Id.*
59. *Id.* at 577 (citing Mecham v. Fitchburg R.R. Co., 4 Cush. 291, 298, 299 (Mass. 1849)).
60. *Id.* at 581 (citing Commissioners v. O'Sullivan, 17 Kan. 58, 60 (Kan. 1876)).
61. *Id.* at 576-82.
62. *Id.* at 577, 584.
63. *Id.* at 581 (citing *O'Sullivan*, 17 Kan. at 60)).
64. 247 U.S. 354, 366 (1918).
65. *See* United States v. River Rouge Improvement Co., 269 U.S 411, 415-16 (1926) (holding that a court could consider "direct" and "immediate" benefits, but explaining that by virtue of being direct and immediate the ben-

tain and nonspeculative and ignore the breadth of the benefit, but insist on couching their analysis in special/general terminology.[66] The Supreme Court should follow the actual analysis in this line of cases, articulating their reasoning while explicitly rejecting the unhelpful special/general distinction. Unfortunately, when recently given the chance in *Horne*,[67] the Court did not embrace its opportunity.

III. The Supreme Court Fails to Clarify Its Jurisprudence

After the Great Depression, Congress enacted the Agricultural Marketing Agreement Act of 1937[68] to establish more orderly commodity markets for, among other things, raisins.[69] Under the Act and its regulations, raisin growers' harvests are split into two portions: The "free-tonnage" portion is sold,[70] while a "reserve" portion, per a federal "marketing order,"[71] is sent to a government Raisin Committee to control the supply and, therefore, the market price of raisins.[72] Marvin and Laura Horne, California raisin farmers, challenged this system and argued that the marketing order was an invalid government seizure of private property, specifically their raisins, without just compensation.[73]

That challenge rose to the Supreme Court, which delivered an opinion in *Horne* on June 22, 2015.[74] *Horne* raised a number of interesting questions, but one is particularly relevant to the matter of takings compensation for coastal climate change projects. The Court held, 8-1, that the government seizure of the Hornes' property was a physical taking that required just compensation.[75] However, it also is likely that the Hornes received a monetary benefit from the long-term operation of the supply management program[76] that created an "orderly raisin market."[77] Given this benefit, should the Court adjust compensation by offsetting the benefits from the compensation award? On this question, a five-Justice majority concluded that it should not offset.[78]

Three Justices in the minority argued that the case should be remanded for the lower courts to calculate compensation, adjusting for any benefit that the Hornes received from the increased market price flowing from the raisin supply management program.[79] The government argued, and Justice Stephen Breyer, on behalf of himself as well as Justices Ruth Bader Ginsburg and Elena Kagan, agreed, that the Takings Clause entitled a property owner "to be put in as good a position pecuniarily as if his property had not been taken, which is to say that he must be made whole but is not entitled to more."[80] Justice Breyer concluded that the lower court should adjust compensation by the benefit of the regulatory program.[81] If the benefit exceeds, or exactly matches, the value of the taken property, the government need not provide additional compensation.[82]

Chief Justice John Roberts' majority opinion dismissed Justice Breyer's reasoning as the "notion that general regulatory activity . . . can constitute just compensation for a specific physical taking."[83] Indeed, the *Horne* majority rejected consideration of what "the value of the reserve raisins would have been without the price support program" and consideration of other regulatory benefits,[84] calling this type of benefit hypothetical or speculative.[85] Rather, Chief Justice Roberts argued for the "clear and administrable rule" that "just compensation . . . be measured by the market value of property at the time of the taking."[86] His conclusion flows from the Court's precedent and presents a more appropriate, if not detailed and explicit, outline for addressing the benefit-offset problem.

Horne presented the opportunity to resolve the lingering issue of how to deal with the benefit-offset problem. However, the question was barely briefed[87] and not forcefully presented at oral argument,[88] and though Justice Breyer chose to make it the centerpiece of his three-Justice partial dissent, Chief Justice Roberts gave it only superficial

efits were "special" even though common to all others). *See also* Blanchette v. Connecticut General Ins. Corp., 419 U.S. 102, 151 (1974).

66. *See* Olson v. United States, 292 U.S. 246, 256 (1934) (finding that landowners whose lands were partially condemned to create a reservoir need not have compensation offset by new cooperative uses of power generation "within the realm of possibility" that were not "reasonably probable"). *See also* United States v. 50 Acres of Land, 469 U.S. 24, 35, 15 ELR 20117 (1984) (setting aside a measure of value based on speculation in favor of market value because a speculative "approach would add uncertainty and complexity to the valuation proceeding without any necessary improvement in the process").
67. Horne v. U.S. Dep't of Agric., No. 14-275, 2015 WL 2473384, 45 ELR 20120 (U.S. June 22, 2015).
68. 7 U.S.C. §602 (2012).
69. Raisins Produced From Grapes Grown in California, 7 C.F.R. §989 (2014).
70. *Horne*, 2015 WL 2473384, at *3.
71. Agricultural Marketing Agreement Act, 7 U.S.C. §§601-674 (2012).
72. *Horne*, 2015 WL 2473384, at *3. *See also* Raisins Produced From Grapes Grown in California, 7 C.F.R. §§989.1 et seq. (2014).
73. *Horne*, 2015 WL 2473384, at *4.
74. *Id.*
75. *Id.*
76. *See, e.g.*, Raisins Produced From Grapes Grown in California; Final Free and Reserve Percentages for 2002-03 Crop Natural (Sun-Dried) Seedless and Zante Currant Raisins, 68 Fed. Reg. 41686, 41686 (July 15, 2003) ("The volume regulation percentages are intended to help stabilize raisin supplies and prices, and strengthen market conditions.").
77. *Horne*, 2015 WL 2473384, at *4.
78. *Horne*, 2015 WL 2473384, at *12 ("In any event, this litigation presents no occasion to consider the broader issues [of calculating just compensation].").
79. *Id.* at *8. In fact, in this case, the Raisin Committee never took possession of the raisins at issue. *Id.* at *4. Rather, they fined the Hornes the value of the raisins and the Hornes refused to pay, claiming that the fine would amount to a taking. *Id.* Therefore, whatever the ultimate compensation, the government would only pay this amount if it chose to follow through and acquire the raisins at issue. Had the benefit-offset applied in this case and the courts determined that the benefit would entirely or very dramatically reduce the necessary compensation, then perhaps the ruling would have had no practical effect on the raisin marketing order.
80. *Id.* at *13 (Breyer, J. concurring in part and dissenting in part) (quoting Olson v. United States, 292 U.S. 246, 255 (1934) (alteration and quotation marks omitted).
81. *Id.* at *15.
82. *Id.*
83. *Id.* at *12.
84. *Id.* at *11.
85. *Id.* at *12 ("[T]he Government cites no support for its hypothetical-based approach.").
86. *Id.*
87. *Id.* at *13 (Breyer, J. concurring in part and dissenting in part).
88. *Id.* at *11.

treatment. The majority probably reached the correct conclusion, but failed to explain its reasoning or announce a usable rule.

Luckily, the New Jersey Supreme Court has offered a robust explanation of, and justification for, the same rule that the U.S. Supreme Court should adopt.

IV. The New Jersey Supreme Court Clarifies a Rule

The state of New Jersey, the borough of Harvey Cedars, and the U.S. Army Corps of Engineers (the Corps) were preparing for a Hurricane Sandy-type event long before the 2012 superstorm.[89] With 127 miles of coast, New Jersey was particularly at risk.[90] The state's vulnerability provoked climate change adaptation planning, beginning with a major dune restoration project in 2008 designed to protect the coast from massive storm surges that could destroy homes and businesses.[91] To carry out the effort, the local governments purchased—through voluntary sale or eminent domain condemnation[92]—easements from shorefront property owners, and then built dunes 20 feet high and 30 feet wide.[93] In Harvey Cedars, 66 properties willingly sold easements; 16 were taken through eminent domain.[94] One of these 16 belonged to Harvey and Phyllis Karan.[95]

The borough originally offered the Karans $300 for a strip of their land on which the borough would build and maintain the new dune.[96] The Karans refused, demanding compensation for the land taken and for damage to their remaining property's view.[97] Harvey Cedars began an eminent domain proceeding and acquired the property by condemnation.[98] Following the borough's acquisition, compensation for the Karans was set at $700.[99] The Karans rejected the valuation and demanded a jury trial.[100]

At trial, it was clear that the dune would protect the Karans' home from a major storm.[101] Evidence was presented that without the dune, the Corps estimated there was a 56% chance that within the next 30 years a storm would destroy the home.[102] With the dunes, their house would be safe for the next two centuries.[103] The judge ruled that the jury should not consider the storm protection benefits.[104] Without authority to offset, the jury returned a verdict requiring the government to compensate the Karans in the amount of $375,000.[105] The case of *Harvey Cedars v. Karan* reached the New Jersey Supreme Court, which, after considering New Jersey's occasional practice of ignoring general benefits, opted to change the law.[106]

The specific question that the New Jersey Supreme Court resolved was how to calculate just compensation, considering both the Karans' reduced ocean view and improved storm protection.[107] Interestingly, the parties argued this case on May 13, 2013,[108] five years after the Corps constructed the new dunes, but only six months after those same dunes had prevented Hurricane Sandy from even slightly damaging the Karans' house.[109]

The New Jersey court began its discussion by noting that partial takings analysis "has not necessarily reflected the straightforward fair market value approach that is evident in total-takings cases."[110] In its unanimous opinion, the *Karan* court declared that it "need not pay slavish homage to labels that have outlived their usefulness," and explained that "the terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases."[111] The court held that the fair market value, determined by "what a willing buyer and willing seller would weigh in coming to an agreement on the property's value at the time of the taking," should govern.[112] "[J]ust compensation should be based on *non-conjectural* and *quantifiable* benefits that are capable of reasonable calculation at the time of the taking."[113]

It was not a stretch, then, for the New Jersey court to reason that "[a] willing purchaser of beachfront property would obviously value the view and proximity to the ocean. But it is also likely that a rational purchaser would place a value on a protective barrier that shielded his property from partial or total destruction."[114] This is the crux of the fair market value approach that *Karan* adopted.

V. A Cohesive Rule

In light of *Karan*, its own precedent, and the unsteady jurisprudence it left after *Horne*, the Supreme Court should codify the reasoning in its line of cases and announce that the special benefit/general benefit distinction is not

89. *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 527 (N.J. 2013).
90. Norbert P. Psuty & Douglas D. Ofiara, Coastal Hazard Management: Lessons and Future Directions From New Jersey 9-10 (2002).
91. *See, e.g., Karan*, 70 A.3d at 528.
92. *Id.* at 527-28.
93. *Id.* at 527.
94. *Id.* at 527-28.
95. *Id.* at 528.
96. *Id.*
97. *Id.*
98. *Id.*
99. Petition for Certification and Appendix on Behalf of Plaintiff/Petitioner Borough of Harvey Cedars at 10, Borough of Harvey Cedars v. Karan, 70 A.3d 524 (N.J. 2013).
100. *Karan*, 70 A.3d at 528.
101. *Id.* at 529.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 531.
106. *See generally*, *id.* at 524.
107. *Id.* at 526.
108. *Id.* at 524.
109. Nicholas Huba & Kirk Moore, *Harvey Cedars Homeowners Demand Payment From Town for Spoiling Ocean View*, Asbury Park Press, Dec. 20, 2012, *available at* http://archive.app.com/article/20121125/NJNEWS2002/311250050 ("Thanks to a line of recently erected two-story high sand dunes, Harvey and Phyllis Karan's $1.7 million oceanfront house, and the town, stood fast when Sandy stormed ashore.").
110. *Karan*, 70 A.3d at 535.
111. *Id.* at 540.
112. *Id.*
113. *Id.* (emphasis added).
114. *Id.* at 541.

valid. It should declare that market value will constitute just compensation, and that market value will be assessed based on only nonspeculative factors calculable at the time of the taking.

The Supreme Court has applied consistent reasoning when dealing with the benefit-offset problem, but has not articulated a rule in a sufficiently clear and powerful way. Despite the fact that such a rule would not depart from its current jurisprudence, the Court failed to take this step in *Horne*. The Court's ongoing failure to clearly outline a fair-market-based benefit-offset rule may have led to the Chief Justice's correct conclusions, but insufficient analysis, in *Horne*. When properly articulated, however, the rule aligns with Chief Justice Roberts' conclusion and parallels the New Jersey court's reasoning in *Karan*, despite the fact that those cases reach opposite conclusions with respect to offsetting.

The *Karan* court provided good logic for disposing of the special/general distinction and relying instead on fair market value.[115] *Karan* reasoned: "the terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases."[116] The court concluded that "general benefit" is too amorphous a term.[117] In some courts, general benefits are "speculative or conjectural," which ought not to offset compensation[118]; in other courts, general benefits are broadly applicable or widespread benefits, which may offset compensation.[119] Rather than rely on the old distinction, the New Jersey court put forward a better rule:

> [J]ust compensation should be based on *non-conjectural* and *quantifiable* 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 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.[120]

It is helpful to define some of the terms that underlie the rule enunciated by the New Jersey court. Conjectural benefits are those that might arise "in the indefinite future,"[121] while unquantifiable benefits are those that are "so uncertain in character as to be incapable of present estimation."[122] In contrast, the court will look for benefits that are "capable of present estimation"[123] (i.e., reasonably certain) and "capable of . . . reasonable computation"[124] (i.e., calculable), and are an "actual benefit"[125] (i.e., nonspeculative) and an "enhancement in market value"[126] (i.e., real and measurable). The Supreme Court's decisions discussed above already represent a nearly identical framework while nonetheless claiming to rely on the special/general distinction, with resulting confusion that the New Jersey court's reasoning cuts through.

With regard to a regulatory program or public work that creates benefits, a court applying *Karan*'s compensation computation rule needs only to determine if the benefits are reasonably certain and capable of present calculation. If the benefits are reasonably certain and capable of present calculation and if they do not require speculation, qualitative judgments, or delay while waiting for a prospective benefit to actually manifest so that it can be calculated, then the court can determine how these benefits will impact the fair market value of the remaining property. If benefits raise the remainder's fair market value, the court may offset compensation by the marginal increase in that value.

In *Horne,* in effect though certainly not explicitly, Chief Justice Roberts declined to make any special adjustments or to speculate about what fair market value might be in the absence of the raisin-marketing program. Chief Justice Roberts followed the Court's precedent by recognizing that compensation should be set at the current market value of the Hornes' raisins, which included the benefits of the regulatory program, and which the government had already calculated as part of its enforcement effort. In extensive administrative hearings, a U.S. Department of Agriculture judicial officer calculated the market value of the Hornes' raisins that the Hornes failed to reserve.[127] Calculating this price simply involved multiplying the tonnage of raisins that the Hornes should have turned over to the Raisin Administrative Committee by the average price per ton of raisins in the relevant crop year.[128] This number was an established market value that did not rely on speculation, but on actual prices, and was readily calculable.

To offset the regulatory benefits would have required the Court to speculate about the impacts of the generations-old program, evaluate retrospectively how that program impacted prices over more than one-half century, and determine how that long-term impact influenced contemporary prices. This method would have resulted in lower compensation (or possibly no compensation), but it would have placed more burden on the Court and injected greater uncertainty and speculation into the process.

Courts should rely on fair market value, where ascertainable, and refrain from adjusting that value based on speculative or uncertain factors. Courts should discard the misleading dichotomy of special and general benefits, and instead consider whether benefits are reasonably certain and capable of present estimation. Courts should not endeavor

115. *Id.* at 538.
116. *Id.* at 540.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (emphasis added; internal citations omitted).
121. *Id.* at 537.
122. *Id.* (quoting Mangles v. Hudson Cnty. Bd. of Chosen Freeholders, 25 A. 322, 323 (N.J. 1892)).
123. *Id.* at 538 (quoting Bauman v. Ross, 167 U.S. 548, 585 (1897)).
124. *Id.* (quoting *Bauman,* 167 U.S. at 585).
125. *Id.* (citing McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918).
126. *Id.* (citing *McCoy*, 247 U.S. at 366).
127. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1135 n.6 (9th Cir. 2014).
128. Horne v. U.S. Dep't of Agric., No. 08-1549, 2009 WL 4895362, at *19 (E.D. Cal. Dec. 11, 2009).

to perform subjective and speculative adjustments to fair market value based on potential but uncertain benefits that are not presently calculable.

VI. Conclusion

Climate change makes coastal adaptation strategies a necessity in shoring up some of the nation's coastal vulnerabilities. However, as has been seen nationwide generally, and in New Jersey specifically, the lack of private cooperation can necessitate the use of eminent domain. Unfortunately, decisionmakers in coastal towns are still awaiting a clear message from the Supreme Court on eminent domain compensation for a partial taking.

With the increasing frequency and intensity of storms and the growing reliance on soft coastal adaptation measures, the Supreme Court will likely have the opportunity to clearly and directly resolve three issues. First, the Court must discharge the special/general distinction. That distinction has only added confusion over its lifespan and has not served as an administrable benchmark for deciding when to offset a benefit against compensation. Second, the Court should reiterate that fair market value is the basis for determining just compensation. Third, and finally, the Court should elaborate on its prior holdings that benefits resulting from a public project or regulation, whether widespread or narrow, may be considered as part of a fair market assessment only if they are certain, nonspeculative, and presently calculable. In other words, such benefits should be part of the government's valuation only if they are the sort of benefits that a willing buyer and willing seller would consider in reaching a price on the open market.