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Condemnation in California



Redefining Damages for Partial Takings

An Overview

An August 25, 1997 decision by the California Supreme Court has upset 95 years of eminent domain law for partial takings by eliminating the distinction between special benefits and general benefits. Now there is only a single category, benefits. As before, benefits may be used to set off only damages to the remainder, but not the value of the part taken. Now, a broad spectrum of factors must be systematically considered in order to evaluate what changes from a "before" to "after" condition may produce significant elements of damage or benefit.

This article presents a checklist that helps identify and organize the evaluation

of possible elements of damages or benefits to the remainder. Practical guidance for the evaluations is taken from the rules, policies and practices of the federal government as well as the other states that have eliminated special benefits, using all benefits to set off damages.

Historical Perspective

In California, the requirement for eminent domain damages to be offset by benefits first arose in the Railroad Act of 1861 (Stars. 1861, B 30, p. 621). The distinction between general and special benefits was first made by the state Supreme Court in the 1902 eminent domain case of

Beveridge v. Lewis (137 Cal. 619). At that time, the Court found that, "benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement..." and that, "general benefits are such as result from the mere construction of the improvement and are peculiar to the land in question." (Id. at p. 623.)

Nearly a century after *Beveridge*, in the 1997 case of *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation*, MTA argued that, "the very

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distinction between general and special benefits is unworkable, produces inconsistent results when applied in different cases and should be abolished." The Court concluded that, "The distinction between general and special benefits no longer finds support in the reasons articulated at its inception. We further conclude this lack of support and the difficulties inherent in courts' efforts consistently to apply the distinction warrant overruling this aspect of *Beveridge* and its progeny." There is no longer a distinction between general and special benefits.

As before, just compensation consists of the value

of the part taken, plus the amount of damages to the remainder set off by the amount of any benefits. Benefits may exceed damages, but do not reduce the value of the part taken. Now, however, all the potential sources of "general" benefits that used to be taken for granted must be systematically identified and evaluated in the search for significant damages or benefits. The following example illustrates the impact that *MTA v. Continental* can have on compensation.

The "Before" Condition

The subject neighborhood consists of high value homes that back up to a stream and marsh, with

unobstructed views of both. Similar homes in a nearby, similar neighborhood overlook a stream that has been channelized for flood control purposes. These sell for \$10 per square foot less than homes that view the stream and marsh. An updated study finds that the subject neighborhood is within the 100-year flood plain. Home values drop by 520 per square foot as the market reacts adversely to the perceived flood threat.

The Acquisition

The city determines that the subject neighborhood as well as the community at large is at risk of inundation, unless the stream

is channelized. The city intends to acquire and confine the stream, eliminating the threat of flooding in the after condition.

The "After" Condition

The property is free of the threat of flooding, but its view of a stream and marsh has been replaced by a view of a fenced storm drain with access roads on both sides. Prior to *MTA v. Continental*, compensation would have consisted of the value of the part taken plus \$10 per square foot damages for the loss of the view. Following *MTA v. Continental*, the \$20 per square foot benefit of flood control is set off against the \$10 per square foot dam-

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ages for the loss of the view, resulting in zero damages. Compensation consists only of the value of the part taken.

A Checklist

The effect of the *MTA v. Continental* decision is to add a broad spectrum of factors, formerly identified as general benefits, that must now be evaluated in the search for damages and/or benefits. Over the years, many elements of value that fell into the category of general benefits had been taken for granted. These must once again be investigated systematically in order to see whether a partial taking causes changes that significantly affect value, producing damages or benefits.

The accompanying checklist is intended to help organize the tasks of identifying elements of value and determine whether any is a possible source of significant damages or benefits. The list is helpful to anyone dealing with eminent domain, particularly partial takes in the wake of *MTA v. Continental*. It reads much like an outline of the factors that are considered in an appraisal. Changes in elements of value from before to

after condition are the potential sources of damages or benefits.

In the list, the elements of value are organized in rows by category (Site Utility, Legal Matters, etc.) and type (Site Access, Size, Shape, Topography, etc.). Along each row are check boxes to indicate a general

Many elements of value that fell into the category of general benefits had been taken for granted.

comparison of the before and after conditions (Same, Worse, Better). Checking the "Same" box indicates that the after condition is pretty much the same as the-before condition. This does not mean that there has been no change, only that the change doesn't significantly affect value. The "Same"

box is likely to be checked frequently, because before and after conditions are often the same or similar for many elements of value.

A mark in one of the other two boxes indicates that the change in that element from the before to the after condition may significantly affect value and ought to be investigated further. The "Worse" and "Better" columns have spaces for short notes about value elements that are significantly changed in the after condition. The note spaces contain brief hints or examples that are intended to prompt recognition of these significant changes.

The checklist is intended to be a practical aid to comparing before and after conditions. It lists most of the elements of value, but it is not meant to be an exhaustive list of all possible factors. That is why there is space for "Other" value elements at the bottom. The authors grant permission to copy and use the checklist, providing the copyright with the authors' names remains clearly readable. The authors also encourage others to offer suggestions for additional categories and items.

Federal & State Eminent Domain Setoff Rules & Policies

of Jurisdictions that Set Off Compensation with both
General and Special Benefits

Jurisdiction	Benefits Applied to Compensation	Benefits are Applied Against		Percent of Total Cases	Future Damages & Benefits		
		Damages to Remainder	Value of Part Taken		Future Years To Count	Discount Future Values	Typical Rates
Federal*	Special	Yes	No*	10% to 15%	3 - 5 Years	Yes	8% - 12%
Illinois	General & Special	Yes	No	1% ±	1 Year	No	-----
New Mexico**	General & Special	Yes	No	2% ±	1 Year	Yes**	-----
New York	General & Special	Yes	No	5% ±	3 - 5 Years	No	-----
West Virginia	General & Special	Yes	No	1% ±	2 - 7 Years	Yes	9% - 11%
California***	General & Special	Yes	No	1% to 2%***	3 - 5 Years	Yes	8% - 12%

* The Federal Government applied both general and special benefits to both damages and the value of the part taken as recently as 1992.

**New Mexico ordinarily only counts benefits realized within the first year. These needn't be discounted. In some cases, incremental income ascribable to benefits may be discounted for many years into the future.

*** An August 25, 1997 decision by the California Supreme Court, merged general and special benefits into "benefits." Historically, special benefits were in 1% to 2% of cases.

Elements of Possible Damage & Benefit to the Remainder

Client: _____ Phone: _____

Case Name: _____

Property Location: _____

Category	Item	Compare After Condition to Before Condition			
		Same	Worse (Damage)	Better (Benefit)	
Site Utility	Access		Gone or impaired	More convenient	
	Circulation		Impaired	Enhanced	
	Flood / Drainage		Flood more likely	Control adds to site productivity	
	Maintenance		More needed	Less Needed	
	Parking		Impaired	Enhanced	
	Site Visibility		Eliminated or impaired	Created or enhanced	
	Size & Shape		Less usable	More usable	
	Soils & Geology		Site becomes less usable	Site becomes more usable	
	Topography / Grade		Site becomes less usable	Site becomes more usable	
	Traffic Count		Change negatively affects use	Change positively affects use	
Site Amenity	View		Eliminated or degraded.	Created or enhanced	
	Privacy / Seclusion		Privacy is impaired	Privacy is enhanced	
	Water Frontage		Eliminated or degraded.	Created or enhanced	
	Nuisance		Created or enhanced	Eliminated or degraded.	
Improvements	Loading		Less access or capacity	Better access or capacity	
	Parking		Impaired	Enhanced	
	Off-Sites		Reduce utility or amenity of site	Add to utility or amenity of site	
Utilities & Services	Water		Eliminated or impaired	Added or enhanced	
	Electricity		Eliminated or impaired	Added or enhanced	
	Gas		Eliminated or impaired	Added or enhanced	
	Telephone		Eliminated or impaired	Added or enhanced	
	Security		Eliminated or impaired	Added or enhanced	
	Sewer		Eliminated or impaired	Added or enhanced	
	Storm Drain		Eliminated or impaired	Added or enhanced	
Transportation	Pedestrian		Eliminated or impaired	Added or enhanced	
	Surface Streets		Eliminated or impaired	Added or enhanced	
	Freeways		Eliminated or impaired	Added or enhanced	
	Rail		Eliminated or impaired	Added or enhanced	
	Water		Eliminated or impaired	Added or enhanced	
	Air		Eliminated or impaired	Added or enhanced	
Environmental Impact	Significant Change		Worse	Better	
	Air Pollution		Increases exposure	Decreases exposure	
	Hazardous Materials		Increased hazard or risk	Decreased hazard or risk	
	Noise		Increases exposure	Decreases exposure	
	Light		Increases exposure at night / Decreases exposure in day	Decreases exposure at night	
	Transmission Corridors		Increases exposure	Decreases exposure	
	Dust, dirt, grit, etc.		Increases exposure	Decreases exposure	
	Wildlife habitat		Degrades or destroys	Enhances or creates	
Socioeconomic Impact	Business Environment		Decreased business	Increased business	
	Revised Tax Structure		New assessments	Tax Relief Zones	
	Highest & Best Use		Impairs Highest & Best Use	Enhances Highest & Best Use	
Legal Matters	Zoning		Downzoned	Upzoned	
	Easements		Impairs Title or Use	Relieve former problem	
	Other Encumbrances		Impairs Highest & Best Use	Enhances Highest & Best Use	
Other					

Setoff Rules

The checklist helps identify and organize likely sources of damages and/or benefits. Each of these must still be evaluated to see whether it materially affects value. In order to learn what criteria may already exist for these evaluations, we conducted a survey to investigate the rules, policies and practices of the four states that currently allow the use of benefits to set off damages: Illinois, New Mexico, New York and West Virginia. Federal rules, policies and practices were also investigated. The Transportation, Highway and/or justice departments in each of these five jurisdictions were interviewed, as were private sector appraisers and attorneys.

Federal Regulations

The *Uniform Appraisal Standards For Federal Land Acquisitions* (often called, "The Yellow Book") (Rev. 3/92) is issued by the Interagency Land Acquisition Conference. This is a voluntary organization with representatives from numerous federal agencies involved with the acquisition of real estate for public purposes. Regarding offsetting of benefits, *Standards A-12*, page 35 says:

It is established federal law that, in the case of partial taking, the just compensation payable by the United States should be reduced by special benefits to the remainder which are capable of present estimate and reasonable computation. The law makes a distinction between "general" and "special" benefits and provides that only "special" benefits may be set off against compensation.

Prior to the revised 1992 edition, *Standards* urged the setting off of both general and special benefits against both damages to the remainder and the value of the part taken, even though no state jurisdiction followed this rule. The Appraisal Unit of the Department of justice indicated that, of all federal cases that have been filed (where negotiations have failed), approximately 10 to 15 percent include

benefits as an element of value.

Furthermore, interviewed sources noted that *Standards* "requires recognition of delay." In other words, discounting benefits to a present value for proposed public improvements is appropriate if these improvements will not occur until three to five years in the future. Benefits more than five years in the future typically are ignored. Discount rates characteristically range from eight to 12 percent.

California now joins four states with regards to setting off damages with both general and special benefits. None of these states applies benefits to the value of the part taken, only to damages to the remainder.

Illinois

Illinois considers both general and special benefits under the category of "benefits." Very few matters involve setting off general benefits against damages, typically less than one percent with most involving highway interchanges. The Department of Transportation will not purchase real estate where the proposed improvements will not be completed within four or five years. Most acquisitions are for short-term projects (12 months or less). These are not discounted.

New Mexico

New Mexico considers special and general benefits as a single entity that is used to set off damages to the remainder. Special benefits historically have been an element of value in about two percent of all cases. General benefits represent only a small fraction of that amount, because their existence is hard to prove. The state urges extreme caution and simplicity in valuation, because these benefits must be obvious, supportable and justifiable from the market.

No condemnation award involving the setting off of damages with general benefits has occurred within the past five years. Discounting, as a practical element of valuation, is not used, because of the typically short

period from the date of value to the completion of the improvement, usually about six to 12 months. However, if benefits increase the income stream to the subject property, then the increase may be discounted to a present value and counted as a measure of the benefits.

New York

The state of New York does not consider general and special benefits separately, but groups both under the category of "benefits." Approximately three to five percent of eminent domain cases involve offsetting benefits; however, very few court rulings favor setting off benefits against damages. As a matter of practice, discounting future benefits to a present value is not performed. Benefits are valued "as though construction is complete." The property owner is charged the undiscounted future value of the benefit, even though these benefits may not be actualized for three to five years.

West Virginia

West Virginia considers both general and special benefits under the category of "benefits." Only about one percent of their takings involves offsetting benefits and 95 percent of those cases are limited to freeway interchanges or intersections where the Highest and Best Use has very clearly changed. Discounting is appropriate for damages or benefits of the "public improvements as designed" within the "reasonable foreseeable future." West Virginia considers the "reasonable foreseeable future" to be two to seven years, typically five years. This longer-than-typical discounting term is due to the slow population growth of the state.

Typical discount rates are derived from ground leases and are generally within the nine to 11 percent range, with 10 percent as most typical. Appraisers are given an estimated date of completion for construction as a basis for the projection period; however, they are at liberty to establish their own projection period, similar to

setting marketing or absorption periods for a sale. The checklist on page 37 summarizes the rules, policies and practices these jurisdictions and compares them to California *after MTA v Continental*.

Summary

The *MTA v Continental* decision creates a need for a systematic evaluation of the elements of value in order to determine whether any change from before to after condition produces significant damages or benefits to the remainder. Many of these factors have not been considered since the 1902 decision that first spawned general benefits. A checklist is provided to help organize the assessment of these value elements as a new era in eminent domain begins in California. ■

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