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The Confusing Death of the Special Benefits Doctrine in Louisiana Expropriation Law

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THE CONFUSING DEATH OF THE SPECIAL BENEFITS DOCTRINE IN LOUISIANA EXPROPRIATION LAW

The exercise by the state of Louisiana of its inherent power of expropriation is restricted only by the federal and state constitutions.[1] The Louisiana constitution of 1921, which imposes a greater duty of just compensation than the federal constitution, provides that a landowner shall be compensated for the land actually taken *and* the damages sustained by the remainder as a result of the taking (*i.e.*, severance damages).[2] In determining the total compensation for the expropriated land, Louisiana has statutorily denied the consideration of any *benefit* which the remaining land may have experienced from the project.[3] However, Louisiana courts have recognized the rule

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1. The United States Constitution's requirement in the fifth and fourteenth amendments that private property not be taken unless just compensation is paid has been interpreted in *Bauman v. Ross*, 167 U.S. 548, 574 (1897): "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."

2. LA. CONST. art. I, § 2. "No person shall be deprived of life, liberty, or property except by due process of law. Except as otherwise provided in this constitution, private property shall not be taken *or damaged* except for public purposes and after just and adequate compensation is paid." (Emphasis added.) For a detailed discussion of this requirement see Comment, 26 LA. L. REV. 91 (1965); Comment, 19 LA. L. REV. 491 (1959).

Article I, Section 4 of the newly adopted Louisiana constitution (effective January 1, 1975) provides: "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

"Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

"This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes."

3. LA. R.S. 19:9 (1950): "In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

See also LA. CIV. CODE art. 2633 (which states the identical formula).

adopted by other states that certain benefits which accrue to the remaining land should be considered in determining the net amount of compensation due for severance damages.[4] Louisiana courts have also adopted the distinction that the expropriating authority is entitled to an offset for "special" benefits but not for "general" benefits in the computation of severance damages.[5] The application of this distinction has been recognized as one of the most complex and difficult problems of expropriation law.[6]

The "Special Benefits" Doctrine

The "special benefits" doctrine in Louisiana was definitively stated in 1941 by the Louisiana supreme court in *Louisiana Highway Commission v. Grey*:[7]

> The benefits or advantages, if any, which may result from the construction of the work are either general or special. General benefits are those which are shared alike by all property owners in the neighborhood or community. Such damage as a property owner may sustain as a result of the construction and use of a public work cannot be offset by these general benefits. . . .
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> The rule is different as to peculiar or special benefits or those affecting a particular estate by reason of its direct relationship to the improvement. If, as a result of constructing a new work, the remaining land or part of it is left fronting on a road or street and the land fronting the road or street is more desirable and more valuable because of the frontage, the advantage thus gained is a special or peculiar benefit, and damages to the remaining property may be offset by such benefits.[8]

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4. *See* Louisiana Hwy. Comm'n v. Hoell, 174 La. 302, 140 So. 485 (1932) (and cases cited therein). For a complete annotation of the various nuances of the doctrine of offset, see Annot., 13 A.L.R.3d 1149 (1967) (which supersedes Annot., 145 A.L.R. 7 (1943) for highway condemnation cases). *See also Recognition of Benefits to Remainder Property in Highway Valuation Cases*, Report No. 88, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM (1970).

5. See, e.g., *Louisiana Hwy. Comm'n v. Hoell*, 174 La. 302, 306, 140 So. 485, 486 (1932), which specifically held that general benefits could not be offset against severance damages. Its definition of "general" as the "benefit or advantage that might result generally to all of the owners of lands adjacent to or in the vicinity of the highway" was replaced by a more specific one in *Louisiana Hwy. Comm'n v. Grey*, 197 La. 942, 2 So. 2d 654 (1941).

6. DAKIN AND KLEIN, EMINENT DOMAIN IN LOUISIANA 86-87 (1970); 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.62 (1965); Gleaves, *Special Benefits in Eminent Domain: Phantom of the Opera*, 40 CALIF. ST. B.J. 245 (1965); Haar and Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963).

7. 197 La. 942, 2 So. 2d 654 (1941).

8. *Id.* at 961-62, 2 So. 2d at 660-61.

In *Grey* the remaining rural farm tract was found to have suffered severance damages by the partial taking for the construction of a new highway. However, these damages were found to be offset by the enhanced value of the remaining property now available as building lots fronting the new highway; the court found that this increased value was a special benefit not shared by the community generally.[9]

In defining the term "special," the Louisiana supreme court relied on *United States v. River Rouge Improvement Co.*,[10] in which the United States Supreme Court applied a federal statute[11] specifically requiring an offset of special benefits against severance damages and compensation for land actually taken. In *River Rouge* the Supreme Court found that all the riparian owners along the river subject to the project experienced special benefits which entitled the Government to an offset.[12] The existence of special benefits was not affected by the fact that all property in the area served by the river benefited generally from the increased river activity,[13] nor by the fact that more than one piece of property experienced a special benefit.[14] Therefore, the

9. *Id.* at 960, 2 So. 2d at 660. The supreme court confronted the same factual situation as in *Grey* and again found special benefits in *State, Dept. of Hwys. v. Cooper*, 213 La. 1016, 36 So. 2d 22 (1948).

10. 269 U.S. 411 (1926).

11. 33 U.S.C. § 595 (1970) (originally enacted as Act of July 18, 1918, c. 155, § 6, 40 Stat. 911). For a discussion of the statute and its recent application see Kaskell, *The Problems of the Owner in Federal Condemnation*, 27 LA. L. REV. 43 (1966).

12. The case involved the claims of fifteen riparian landowners whose land had been partially taken for the straightening and deepening of the River Rouge.

13. In *United States v. River Rouge Imp. Co.*, 269 U.S. 411, 415-16 (1926), the United States Supreme Court applied the following reasoning which was quoted and adopted by *Grey*: "We are of the opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute, as distinguished from a benefit common to all lands in the vicinity, although the remaining portions of other riparian parcels would be similarly benefited. This is in accordance with the rule recognized by this court and established by the weight of authority in the state courts in reference to special benefits to lands abutting upon a new or widened street." (Citations omitted.)

14. The Louisiana supreme court declared that the fact that other property enjoyed the same benefit would not destroy the benefit's special nature. The court quoted the Massachusetts supreme judicial court in *Allen v. Charlestown*, 109 Mass. 243, 246 (1872), which was also quoted by the United States Supreme Court in *River Rouge*, 269 U.S. at 416.

"The benefit is not the less direct and special to the land of the petitioner, because other estates upon the same street are benefited in a similar manner. The kind of benefit, which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and conveniences of increased public facilities, and the general advance in value of real estate in the vicinity by

court in *Grey* specifically rejected defendant's contention that the enjoyment of the same benefit by other frontage owners transformed a special benefit into a general benefit.[15]

In *Grey* the term "special" was given an expansive meaning which included all increases in property value except those shared by the *entire* community or vicinity.[16] General and special benefits were not considered to be mutually exclusive. The problem was to categorize the myriad of benefits caused by a single public improvement and then to place a proper valuation on those determined to be special. Those additional benefits (increases in value), not shared by the community at large, would then be set off against severance damages in determining the amount of compensation, if any, due the landowner.

Recent Jurisprudence

Characterization of the Benefits

Subsequent to *Grey,* and until recently, it could "be fairly stated that there is a presumption of special benefits in any taking for a road or highway project."[17] However, an analysis of recent cases which

reason thereof. . . . The advantages of more convenient access to the particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefited. Louisiana Hwy. Comm'n. v. Grey, 197 La. 942, 963, 2 So. 2d 654, 661 (1941).

15. The court stated the defendant's argument to be "that, because other lands which front on the highway will be benefited, the benefits to the defendant's land are not special, but general." Judge Odom replied, "[Defendant's] counsel are mistaken." Louisiana Hwy. Comm'n v. Grey, 197 La. 942, 963, 2 So. 2d 654, 661 (1941).

16. *Id.* at 964, 2 So. 2d at 661. citing with approval, *Wilson v. Greenville County,* 110 S.C. 321, 325-26, 96 S.E. 301, 303 (1918), where the South Carolina supreme court stated the rule to be as follows: "The benefits derived from such improvements are classed as general and special. The general are such as are enjoyed by all people in the community. The special are such as are peculiar to one or more persons by reason of the more favorable location of their lands with reference to the highway. Those who own land immediately on a highway derive advantages which are not shared by others in the same community. These special benefits usually find concrete expression in a comparatively greater increase in the value of such lands, though they may not be, and often are not, the only special benefit which they enjoy. But certainly, to the extent that the benefits accruing to those who own lands on the highway exceed those of their neighbors whose lands are off the highway, they are special. A benefit that is limited in enjoyment to one or more persons is special to him or them. Therefore the fact that all persons who own land adjacent to the road enjoy special benefits does not make such benefits general."

17. DAKIN AND KLEIN, EMINENT DOMAIN IN LOUISIANA 86-87 (1970). The authors

involve the claim of special benefits to remaining land located on an interstate highway interchange evidences a departure from this presumption and seriously questions the entire doctrine of special benefits.[18] For example, in *State, Department of Highways v. Martin,*[19] the Third Circuit stated:

> The courts, in this state and elsewhere, are virtually unanimous in holding that where the improvement benefits the community as a whole it is general; and where it benefits an individual it is special. The courts are divided when the problem falls into the area of benefit to the neighborhood which is what we have here.[20]

This is an unfortunate over-simplification of the Louisiana rule.[21] All public improvements are intended in varying degrees to benefit the community, neighborhood and contiguous property. The court's analysis incorrectly implies that a general benefit excludes the existence of a special benefit. The issue is not the nature and extent of the total improvement caused by the project, but rather the extent to which the remainder property's benefits exceed those of the com-

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suggest the following distinction: "Perhaps the most satisfactory distinction between general and special benefits describes general benefits as those which arise from the fulfillment of the public object which justified the taking and special benefits as those which arise from the peculiar relationship of the land in question to the public improvement.

"This does not mean, however, that a benefit is disqualified as special merely because a like benefit is enjoyed by many other tracts contiguous to the same improvement. A defendant landowner cannot successfully argue that since other lands fronting on a highway will be benefited, the benefits to his land are general. The advantages may be the same in greater or less degree for every tract of ground, but such advantages to each are direct and special."

18. All the cases discussed were initiated by the State Highway Department under the Quick Taking Statutes. LA. R.S. 48:451-60 (1950).

19. 219 So. 2d 548 (La. App. 3d Cir. 1969). The subject property was located on the northeast quadrant of the interchange of Interstate 10 and Louisiana Route 725 about one and one-half miles north of Lafayette.

20. *Id.* at 550.

21. According to 3 NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6202 (1965), there are three natural classes of benefits arising from a public improvement. However in section 8.6203 Nichols states: "In cases arising out of the exercise of the power of eminent domain the natural classification set out in the proceeding section [§8.6202] is not adopted and benefits are arbitrarily divided into two classes, general and special, the special benefits including the peculiar benefits and to some extent the local ones."

Additionally, the court in *Martin* states that "Like most general rules, which sound both wise and simple when bandied about in purely philosophical or academic circles, the rub comes when the principle is dropped into the crucible of specifics, to-wit: Who gets, or keeps, the money?" 219 So. 2d at 550. While the rule of setoff is concededly vague, there is no need to compound the confusion by introducing a balancing test of interests.

munity at large. The project (*i.e.*, the improvement) does not have one "benefit" which can be characterized as either general or special; therefore, the court must look at the property and determine the relationship of its benefits to those of the community or general area.[22] The fact that the general area experienced a rise in value does not determine the nature of all the benefits to the subject land; in most instances the project will enhance the value of all the land in the area and produce general benefits.[23] The court's task is then to determine how the specific piece of property has benefited in excess of other property in the economic region.

In contrast to *Martin* the Third Circuit in *State, Department of Highways v. William T. Burton Industries, Inc.*[24] recognized that all property within a reasonable distance of the interchange and highway would appreciate in value, but that this fact alone would not affect the determination of special benefits. In *Burton* the state attempted to prove through the use of comparable sales at other interchanges, that the remainder property would increase in value to a greater extent than neighboring land and thus receive a special benefit from the project. In rejecting the state's claim of special benefits, the court seemed to aggregate certain factors[25] which would indicate special benefits and other factors which would be useful in the proper application of the comparable sale technique to show increased value in relation to neighboring land, which is a special benefit in itself. It is

22. It can be seen, that in weighing the evidence in *Martin*, the court indulged in a *non sequitur* when it said: "The evidence shows that all of the land in the area of the new interchange gained in value as a result of its projected location. However, this gain in value was general as to all land in the area, whether or not part of the tract was taken for the new improvement. The preponderance of the evidence supports the trial court's determination that the increase in value of the subject tract was a general benefit, and thus not available as an offset against severance damages." Louisiana Dept. of Hwys. v. Martin, 219 So. 2d 548, 550 (La. App. 3d Cir. 1969).

23. *See, e.g.*, United States v. River Rouge Imp. Co., 269 U.S. 411 (1926) (improvement of a river); McCoy v. Union Elev. R.R., 247 U.S. 354 (1918) (effect of construction of intra-city railroad. Merchant's premises were found to have been specially benefited by the construction of the Chicago Loop).

24. 219 So. 2d 837 (La. App. 3d Cir. 1969). This Interstate 10 interchange was located four miles from Lake Charles at Chloe.

25. *Id.* at 843. In its evaluation of the state's claim of special benefits, the court listed six factors to be considered in determining the relationship of the property to the project: (1) the volume of traffic, both from the Interstate and the cross highway; (2) the position of the remainder with regard to being the most available for motorists leaving the expressway; (3) the visibility of the property to expressway motorists before they reach the exit ramp; (4) readiness of access to and from the expressway and the entrance ramp; (5) the location of the interchange with regard to population centers; and (6) competing sites at the same or nearby interchange.

not clear[26] however whether the court rejected the state's comparable sales or found no increase in value. It is preferable to read the court's opinion as rejecting, as not comparable, those sales offered by the state in order to avoid the conclusion that each interchange property is to be compared to property at other interchanges and not with the neighboring land. Such a reading would allow *Burton* to be consistent with *Grey* which clearly held that special benefits were to be determined by the subject land's benefits *vis-a-vis* land within the neighboring vicinity.

Increase of Remainder's Value as a Benefit

The use of increases in fair market value as a reflection of special benefits was at issue before the First Circuit in *State, Department of Highways v. Mayer*[27] where the effect of a possible zoning change was considered in relation to the value of the remaining land. Following the precedent of *City of Monroe v. Natasi,*[28] the court held that the

26. For example, the court after listing these factors said, "In most of these aspects, the subject property was deficient, as compared with the properties relied upon by the Department as comparable," but concluded, "the evidence indicates that commercial development will more likely take place at interchanges with more favorable attributes, and that the present quadrant-remainder has received no appreciation in value because of its location near the present interchange." *Id.* at 843-44.

27. 257 So. 2d 723 (La. App. 1st Cir. 1971), *cert. denied* 261 La. 460, 259 So. 2d 913 (1972). This land occupied three quadrants of the interchange of Interstate 10 and the Acadian Thruway, a major four lane north-south artery in Baton Rouge.

28. 175 So. 2d 681 (La. App. 2d Cir. 1965). *See also* City of Monroe v. Carso, 179 So. 2d 696 (La. App. 2d Cir. 1965) (which also followed the rationale enunciated by United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958).

The use of zoning changes to determine highest and best use is consistent with recent California jurisprudence. *See* People v. Donovan, 57 Cal. 2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962): "Where there is a reasonable probability that zoning restrictions will be altered in the near future, the jury should consider not only those uses currently permitted, but also other uses to which the property could be devoted in the event of such a change. [Citations omitted.] The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were he contemplating a purchase of the property [Citations omitted.] and it is manifest that plausible and probable changes in the character of the neighborhood and in zoning restrictions in an area constitute such factors." *Id.* at 352, 19 Cal. Rptr. at 476, 369 P.2d at 4. A lower California appellate court applied the above rule to partial takings when it reasoned: "Since a reasonable probability of rezoning may be taken into consideration in fixing present market value of property taken [Citation omitted.], it would seem that such probability of rezoning might also be taken into consideration in determining the matter of special benefits." People v. Hurd, 205 Cal. App. 2d 16, 22, 23 Cal. Rptr. 67, 70 (1962). The court found no error in permitting plaintiff's expert testimony of the probability of a zoning change as a result of the construction. For a discussion of these cases see Gleves, *Special Benefits in Eminent Domain: Phantom of the Opera,* 40 CAL. ST. B.J. 245, 253 (1965).

reasonable possibility of a zoning change for purpose of determining the "highest and best use" must be shown to have existed *at the time of taking and that the zoning change had to be the result of the project.* In so holding, the court failed to differentiate between *Natasi* which involved valuation of the expropriated land which is determined at time of taking,[29] and severance damages which must be determined at the time of trial.[30] Similarly, special benefits should be computed at the time of trial after consideration of the reasonable possibility of a zoning change *at the time of trial* which would more clearly reflect the effect of the improvement on the remainder. This must be the method to avoid the unacceptable result of having severance damages computed on a different basis than correlative special benefits; otherwise, it would be permissible for the defendant to claim severance damages based upon the reasonable possibility of commercial use while calculating special benefits according to residential use.[31]

The requirement by *Mayer* that for a reasonable possibility of a

29. LA. R.S. 48:453 (Supp. 1954): "The market value is determined as in general expropriation suits but as of the time the estimated compensation was deposited in the registry of the court.

"Damage to the remainder of the property is determined as of the date of the trial.

"In either case the defendant has the burden of proving his claim."

30. The court's position is found in the following passages: "The Department's request for a remand to show a rezoning of the subject property to Commercial classification following the time of trial must be denied. We believe the legislature has wisely and properly restricted proof of damages in these cases to such reasonable possibilities as exist at the time of taking, as reflected by the circumstances existing at the time of trial. We find the evidence preponderates in favor of the conclusion that the zoning change to A-4 which occurred following the taking in this instance cannot be attributed to the construction of the expressway and interchange, but rather that such change resulted from circumstances independently of the taking and construction involved herein." Louisiana, Dept. of Hwys. v. Mayer, 257 So. 2d 723, 740 (La. App. 1st Cir. 1971). Later the court stated: "[T]he Department did not establish that a zoning change for other purposes was reasonably possible at the time of taking."*Id.*

31. The need for a mutual time frame was recognized by the court in *Burton Industries* when it said: "In our view, however, the provision that severance damages be valued as of the date of the trial was statutorily intended to specify that the damages the remainder suffers should be reduced by special benefits which result to it from the completion of the highway construction . . . ." 219 So. 2d 837, 842 (La. App. 3d Cir. 1969). Additionally, the supreme court has recognized the need to use the same time when it said in dicta: "[I]t is the special benefit which exists at the time of trial which is pertinent. La. R.S. 48:453. That is to say, speculative benefits can no more be considered than can speculative damages. 3 NICHOLS, THE LAW OF EMINENT DOMAIN, § 8.6203 (1965)." State, Department of Hwys. v. McPherson, 261 La. 116, 138, 259 So. 2d 33, 41 (1972). *See also* State, Dept. of Hwys. v. Reymond, 255 La. 425, 231 So. 2d 375, 383-84 (1970); Tate, *Legal Criteria of Damages and Benefits: The Measurement of Taking-Caused Damages to Untaken Property*, 31 LA. L. REV. 431, 440-42 (1971).

zoning change to be considered it must be caused by the project is not logically necessary in all cases. In determining the "highest and best use" for purposes of appraisal, changes caused by the project are excluded in determining the value of land taken.[32] However, for severance damages and their offset, which are computed at time of trial, the project's damage and benefit should be considered with regard to the land's "highest and best use" at that time regardless of the factors influencing the determination of the best use. Thus, the possible or actual zoning change may be a special benefit if caused by the project, but regardless of causation it should be considered in computing the highest and best use of the property which will then be the basis for determining whether the subject property has increased in value disproportionately to the general area.

Tacit Rejection of the Doctrine

The issue of special benefits has been the subject of two recent supreme court decisions. In *State, Department of Highways v. McPherson,*[33] the state claimed special benefits because (1) the project permitted the defendant to sell dirt from the remainder property to the contractor building the highway and (2) the remainder of the property increased in value because of its location. The court rejected both contentions and awarded severance damages.[34] The claim of

32. *See* LA. R.S. 19:9 (1950) at note 3 *supra*.

33. 261 La. 116, 259 So. 2d 33 (1972). This land was located at the intersection of Interstate 20 and Louisiana Route 577 near Waverly.

For other recent decisions in this area which are not discussed see State, Dept. of Hwys. v. Crow, 286 So. 2d 353 (La. 1973) (no affirmative showing of special benefits by state); State, Dept. of Hwys. v. Hoyt, 284 So. 2d 763 (La. 1973) (severance damages found as a result of more inconvenient access to service station); State, Dept. of Hwys. v. Neyrey, 260 So. 2d 739 (La. App. 4th Cir. 1972) (special benefits found because of location on service roads); State, Dept. of Hwys. v. Brandt, 247 So. 2d 876 (La. App. 2d Cir. 1971) (special benefits found accruing to land located at Interstate 20 interchange in Shreveport—use of comparable sales demonstrated rise in value per square foot); State, Dept. of Hwys. v. Thurman, 231 So. 2d 692 (La. App. 1st Cir. 1970) (special benefit was found to offset any severance damage—benefit was due to land's proximity to city of Bogalusa and its enhanced residential value).

34. Two other issues besides the claim of special benefits as reflected by increases in value confronted the court. The first involved the state's claim of special benefits from the sale of dirt to the contractor building the highway at a price twice the value per acre of the land actually taken. In rejecting this claim the court stated: "Thus, in the case before us where dirt is sold to the contractor from the remainder of McPherson's land and the same contractor and others acquired dirt from other landowners in at least six other locations, in the area of the highway right of way, the benefit is not special to McPherson. It is instead general to those located near the right of way who have the type soil desired and who are willing to sell.

"The lands of six other landowners who sold to the contractors were not affected

increased value was rejected as being too speculative in nature,[35] as benefits were not shown to be a reality at the time of trial. If the court meant that there had not been any increase in the fair market value of the land at the time of trial as a result of its location, then its conclusion is not questionable. To read the decision as requiring that the benefit be in actual existence at time of trial would produce a decision in contradiction to prior jurisprudence. It is rare that the benefit will immediately occur; the potential need only be sufficiently definite to permit valuation. By looking to what a willing buyer would pay a willing seller, the courts have permitted increases in market value to be used as one method to indicate that special benefits will

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by expropriation and were not damaged by the highway construction. Therefore no deduction can be made from the price they received for the dirt sales. Under these circumstances justice does not require that McPherson put back a substantial part of the amount realized from his dirt sale to offset severance damages to his property. To permit such an offset would be to compel McPherson to bear a greater proportion of the cost of the public improvement than others." 261 La. at 136, 259 So. 2d at 40.

This reasoning seems to ignore two factors in favor of the state. First, the causal relationship is more than that of project and demand for dirt. The defendant was able to receive an artificially high price because his dirt was adjacent to the project which eliminated any transportation expense to the contractor. This benefit allowed the defendant to collect for the dirt a price twice what he was paid per acre for land actually expropriated. Secondly, any existing equity in favor of the defendant was rebutted by the fact that the severance damages being claimed by the defendant were in fact caused by the excavation for the dirt as pointed out by the dissent: "But conceding that we are faced with contradictions in regard to severance damage to the north, we have the answer by the landowner himself through the clear, unequivocal testimony of his expert Williams. Williams negates absolutely, positively, and categorically the testimony of the landowner's other appraiser, Sevier, and the engineer. According to Williams, the only damage to the north remainder is that caused by the landowner when he allowed 12 acres of the north remainder to be excavated to fulfill his contract for the sale of dirt. Williams' expert conclusion is that the partial taking in no manner adversely affected the north remainder, and that the north remainder suffered no severance damage. *Id.* at 147-48, 259 So. 2d at 44.

The second issue involved the cost of constructing a bridge under the "cost-to-cure" approach of severance damage computation. Here the majority used both the cost-to-cure approach and the before-and-after market value test without regard to the fact that the after value by definition includes the effect of the splitting of the land into two tracts without a bridge permitting transit between the two. Therefore, the landowner's after valuation of the remaining land was reduced as a result of this defect (thus increasing the difference between the before and after which is the severance damage) while compensation was being paid to correct this defect; in effect, a double recovery. *See* State, Dept. of Hwys. v. Mason, 254 La. 1035, 229 So. 2d 89 (1969) (which states that the "cost-to-cure" approach in determining damages should be used only in most unique situations).

35. The court stated: "Thus, no enhancement in value to the land surrounding the interchange having been shown as of the date of the trial, the speculation that an increase in value is forthcoming cannot be considered in mitigation of damages to the remainder. Nichols, § 8.6201." *Id.* at 138-39, 259 So. 2d at 41.

be actually experienced.[36] Fluctuations in the market value will compensate for the "[m]any circumstances [that] could occur before the highway is completed which would prevent the predicted enhancement of value."[37] To require an actual realization of a benefit would permit an owner to have his property double in value because of the location of an exit ramp and avoid special benefits by saying that he has neither sold the property nor has the ramp been constructed.

Finally, the court makes the following statement which casts doubt on the entire doctrine of special benefits:

> Aside from the speculative character of the values at the interchange, another factor enters into the resolution of this issue. The record does not adequately establish that the benefit to accrue to McPherson's property in the event of an increase in the value of lands at the interchange will be a special benefit. As the testimony of the Department's own witnesses disclose [*sic*], the enhancement in value will not be peculiar to McPherson's property *alone*. To a diminishing extent, the property from the immediate vicinity of the interchange and for a distance therefrom along Highway 577 will also benefit when the interchange is completed should a benefit in fact result.
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> Except for the McPherson property and one other tract, the other property to be benefited by completion of the interchange is unaffected by expropriation and it will be damaged by the construction of the highway. In other words, in this neighborhood, all property will be enhanced but only McPherson must pay now by offset for a future speculative benefit. We think not.[38]

The court in the first paragraph seems to have come full circle from *Grey* which recognized that although there may be varying degrees of increased value in the vicinity of the project, certain tracts of land would still benefit specially as a result of their location. The implication in *McPherson* is that the court now considers there to be only one type of benefit caused by a project: either general or special. Furthermore, the state must prove that the enhancement in value is peculiar to the defendant *alone* which in effect destroys the distinction between general and special except in the rarest circumstances. The effect of such a result is to discard the entire prior jurisprudence constructed upon *Grey* and its progeny.

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36. *See, e.g.*, State, Dept. of Hwys. v. Brandt, 246 So. 2d 876 (La. App. 2d Cir. 1971); State, Dept. of Hwys. v. Mouledous, 200 So. 2d 384 (La. App. 3d Cir. 1967).

37. State, Dept. of Hwys. v. McPherson, 261 La. 116, 139, 259 So. 2d 33, 41 (1972).

38. *Id.* at 139-40, 259 So. 2d at 41. (Emphasis added.)

Furthermore, *McPherson* seriously erodes the entire special benefits doctrine by questioning the equity basis upon which *Grey* is founded. *Grey* and decisions of other states considered it inequitable and illogical for a landowner to claim that his remaining property was damaged by the taking when in fact the property had increased in value as a result of the project precipitating the severance. The courts following the rationale of *Grey* refused to countenance such a windfall at the expense of the public.

Subsequent to *McPherson* the supreme court confronted the issue in *State, Department of Highways v. Trippeer Realty Corporation*[39] and in terms not wholly consistent with *McPherson* further narrowed the application of special benefits. In reversing the First Circuit's finding of special benefits based upon comparable sales, the court made the following statement:

> While the Highway Department's experts, for differing reasons, testified to particular enhancement in value of the defendant's property because of its proximity to the interchange, defendant's experts on the contrary testified that defendant's property enjoyed no greater benefit than other properties in the vicinity of the interchange (perhaps even less because of the disadvantages of a portion of the property being placed off the Airline Highway and on a frontage road); and that *all such enhancement* along the Airline Highway near the interchange was not identifiably the consequence of proximity to the interchange so much as general appreciation as a consequence of the coming of the highway.[40]

The requirement that all enhancement to the frontage owners be shown to be special clearly contradicts *McPherson* which would require that the benefit to the affected property be shown peculiar to it alone and not shared by any other tract of land. Additionally, *Trippeer* ignores the original jurisprudence which clearly concedes that part of any enhancement will be general but that the existence of general benefits does not exclude special benefits to the property. In the future, the expropriating authority must either show that the benefit inures exclusively to one piece of property alone in order to claim an offset under *McPherson,* or that all the project benefits experienced by the frontage owners were not shared by the community in order to be entitled to an offset under *Trippeer.*

The movement by the Louisiana courts has been to discard the principles of *Grey* by narrowing extremely its application or rejecting

39. 276 So. 2d 315 (La. 1973).
40. *Id.* at 321-22.

it *sub silentio*. Additionally, Justice Summers in *McPherson*[41] questions the equity basis of *Grey* by arguing that it is inequitable through the offset of special benefits to make the landowner whose property is taken from him bear a greater burden than that borne by his neighbors who have not suffered any loss and have benefited from the project. This position is contrary to the opinion of commentators[42] and courts [43] which have reconsidered the doctrine. The more logical rule is to offset *all* benefits. This would permit the use of the before-and-after test of valuation to determine the compensation due for damages to the remainder. Such a test is easier to apply than the Louisiana two-step procedure of characterization and valuation; it merely calls for a valuation of the remainder before the project and after the project.[44] In determining the fair market value of the prop-

41. *See also* Tate, *Legal Criteria of Damages and Benefits—The Measurement of Taking-Caused Damages to Untaken Property*, 31 LA. L. REV. 431 (1971).

42. *See, e.g.*, Bishop & Phelps, *Enhancement in Condemnation Cases*, VALUATION FOR EMINENT DOMAIN 104 (E. Rams ed. 1973); Peacock, *The Offset of Benefits Against Losses in Eminent Domain Cases in Texas: A Critical Appraisal*, 44 TEXAS L. REV. 1564 (1966). It was suggested that "Texas courts give careful consideration to adopting the Louisiana rule that a superhighway presumptively confers a special benefit where the market value abutting land is increased." *Id.* at 1582; Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963); Bishop & Phelps, *Enhancement in Condemnation Cases*, 13 ALA. L. REV. 123 (1960).

43. Bishop and Phelps report that: "An analysis of decisions throughout the country indicates a tendency by courts to expand the definition and application of special benefits to include virtually all benefits accruing to the remaining property—a tendency to look to the actual market value of the property as affected by the improvement." Bishop & Phelps, *Enhancement in Condemnation Cases*, in VALUATION FOR EMINENT DOMAIN 104, 112 (E. Rams ed. 1973). For an extensive discussion of the jurisprudence see *State v. Bailey*, 212 Ore. 261, 319 P.2d 906 (1957). In *Bailey*, the Oregon supreme court yielded to the weight of authority and followed the rule adopted by *Grey* permitting the offset of special damages only. However, the Oregon court adopted the doctrine of special benefits reluctantly, as it stated that the more preferable and logical rule was to offset all benefits. Additionally, the court gave an expansive meaning to the term "special benefits."

Additionally, the New Mexico supreme court in *Board of Comm'rs. of Dona Ana County v. Gardner*, 57 N.M. 478, 483-84, 260 P.2d 682, 685 (1953) stated: "The trend throughout the nation is toward considering *all* benefits in the determination of damages in condemnation cases. This trend is nurtured by the policy of the state in trying to bring down excessive costs of rights-of-way so as to make the money appropriated and available for roads and other public improvements go as far as possible. It is possibly due also to some extent to a gradually changing concept of the sacred character of real property ownership which thus gradually is altering the basic theory of 'just compensation' in condemnation cases."

44. The greater ease in application is now even more important in light of the new constitution which guarantees a trial by jury in expropriation cases. Such a test would require the jury to make only two valuations of the remainder land based upon two distinct periods; that is, at the time of trial without considering the project and with

erty strictly on the basis of before and after the project, all the various factors of damage, benefit, speculativeness and possibilities of changes in use, are placed into the crucible of the "fair market value." The result would be eminently fair because a person cannot claim that his property has been damaged when in reality the market price has not been decreased.[45]

There would not seem to be any constitutional impediment to the adoption of such a rule. In fact, in attempting to evaluate severance damages only, the courts have followed this procedure.[46] The difference in fair market values is made complete by including in the computation of the "after" market value, the effects of the project on the value; that is, actual fair market value. If the court insisted that general benefits not be included as an offset, the deduction could be by a percentage. It would not be difficult to ascertain with some specificity the average percent increase in value accruing to all the property of the community as a result of the project.[47] This percent of increase attributable to general benefits would then be deducted from the "after" market value for comparison with the "before" value to determine the amount of damage. The definition of "general" as postulated in *Grey* would provide an adequate base to compute a sufficiently representative factor and would follow *Grey's* prescription that all benefits except general benefits (*i.e.*, everything in excess) should be offset.

The recently enacted state constitution provides that a landowner be compensated for "the full extent of his loss" as a result of expropriation.[48] This would seem to provide impetus to discarding the general-special distinction which has heretofore troubled the courts. If the landowner is to be made whole for his entire loss, equity would require that all accruing benefits of the project be offset in determin-

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the entire effect of the project considered. The loss for which compensation would then be due would be the difference in value, if any.

45. *See* Haar and Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833, 868-81 (1963).

46. "It is well settled in our jurisprudence that the damages allowable under Section 2 of Article I of the Constitution of 1921, resulting from expropriation of property rights, is the difference between the market value of the property for sale or rental purposes immediately before and immediately after expropriation. State, Dept. of Hyws. v. Central Realty Invest. Co., 238 La. 965, 978, 117 So. 2d 261, 265 (1960).

47. *See, e.g.*, Michigan Wisconsin Pipeline Co. v. Sugarland Devel. Corp., 221 So. 2d 593 (La. App. 3d Cir. 1969). The court found that high pressure gas pipeline depreciated the value of nearby land by 30 percent. In *State, Dept. of Hwys. v. Trippeer Realty Corp.*, 256 So. 2d 683 (La. App. 1st Cir. 1971) (The court found 35 percent of the increase in value attributable to special benefits. The finding of *any* special benefits was later reversed.

48. *See* note 2 *supra*.

ing his actual loss. In so doing, the affected landowner is not treated any differently from his neighbor who must bear both loss and damages for which he does not receive any compensation. The inconvenience and benefit accruing to the nonexpropriated landowner must be borne by all members of the community for the benefit of the common good. If the landowner is to be reimbursed for his entire loss, then surely one must offset all the advantages which the affected landowner will experience as a result of the project. Secondly, it must be remembered that the greater the individual landowner is permitted to profit above his actual loss at the expense of the public, the more costly and less frequent public improvements become. Recurring inequities resulting from offsetting all benefits could be remedied by legislation.[49] In any event, the public taxpayer who is not so fortunate to own land near the improvement must be protected in the determination of what is "just" compensation.

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49. For example, this was done in the area of relocation assistance. *See* LA. CONST. art. IV, section 6 (1972) and LA. R.S. 38:3101-09 (Supp. 1971), which were enacted pursuant to the mandate of 42 U.S.C. §§ 4601-4655 (1970).