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Sand Politics: Coastal Dunes against Property Rights in Post-Superstorm

*Sandy New Jersey*¹

I. INTRODUCTION

On April 11, 2011, a jury awarded a New Jersey couple a judgment in a condemnation case; the borough government where the couple's vacation home was located determined it needed to take by way of easement some of the Karan's land in order to construct a coastal dune to prevent catastrophic storm damage from potential hurricanes and nor'easters.² The dune constructed on the Karan's land partially blocked the couple's view of the ocean when it was constructed and also prevented the couple from enjoying the once private strip of beach between their home and the ocean. During the trial, jurors went to the home and saw exactly how the dune, constructed by the Army Corps of Engineers in 2010 at a cost of \$25 million, blocks the "formerly spectacular" ocean view from the beach house.

In late October 2012, the coast of the state of New Jersey was devastated by a massive storm which came to be known as Superstorm Sandy.³ Hurricane Sandy was a classic late-season hurricane in the southwestern Caribbean Sea, according to the National Hurricane Center (NHC), a division of the National Weather Service (NWS).⁴

¹ The title comes from an internet article titled: Kirk Moore, *The Politics of Sand: How greed and politics nearly destroyed the coast* (Jan. 4, 2013), <http://www.app.com/article/99999999/SPECIAL/121213015&template=periodic2&theme=SANDPOLITICS>.

² Borough of Harvey Cedars v. Karan, 40 A.3d 75 (N.J. Super. App. Div. 2012).

³ David Shukman, *Superstorm Sandy triggers climate blame game* (Nov. 2, 2012), <http://www.bbc.co.uk/news/science-environment-20181266>.

⁴ Eric S. Blake et al., *Tropical Cyclone Report Hurricane Sandy (AL182012) 22 – 29 October 2012* (Feb. 12, 2013) http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf.

According to the NHS, Sandy underwent a complex evolution and grew considerably in size while over the Bahamas, and re-strengthened into a hurricane while it moved northeastward, parallel to the coast of the southeastern United States.⁵ When Sandy turned northwestward toward the Mid-Atlantic States, the hurricane reached a secondary peak intensity.⁶ Sandy weakened somewhat and then made landfall as a post-tropical cyclone near Brigantine, New Jersey with 70-knot maximum sustained winds.⁷ Because of its tremendous size, Sandy drove a catastrophic storm surge into the New Jersey coastline communities, destroying homes, bringing sand on shore and flooding in its wake.⁸ Seaside, the town made famous at a national level by the popular MTV show *Jersey Shore*, is just now rebuilding its iconic boardwalk after it was swept away by Sandy.⁹

Other places around the country have experienced more frequent, violent storms than has the Northeast region. Hurricane comparisons show that Katrina, which hit New Orleans, was a much stronger Category 5 hurricane on the Saffir–Simpson scale, which is used to measure hurricane strength. But Sandy, a Category 3 storm, was the second costliest storm in the history of the Atlantic hurricanes in the United States because of the area it hit: the center of one of the most populated areas in the United States with a large coastal beach population which crowd the coast’s barrier islands.¹⁰

⁵ Village of Ridgewood v. Steel Inv. Corp., 28 N.J. 121 (1958).

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.*

⁹ "Jersey Shore's" Seaside Heights hit hard by Superstorm, CBSNEWS (Oct. 31, 2012, 3:50 PM), http://www.cbsnews.com/8301-207_162-57543014/jersey-shores-seaside-heights-hit-hard-by-superstorm-sandy/.

¹⁰ David Porter, *Sandy officially U.S.'s second-costliest hurricane*, (Feb. 12, 2013), <http://www.nbcnews.com/business/economywatch/sandy-officially-u-s-s-second-costliest-hurricane-1C8346787>.

The federal government has taken storm preparation seriously and created projects such as the National Hurricane Program (NHP), under the Federal Emergency Management Agency or FEMA, which helps protect communities and residents from hurricane hazards through various projects and activities.¹¹ One of the activities described in this program and its publications are dunes, which can provide protection from flooding and wave action to coastal development.¹² Of course, no protection project is perfect. Dunes also have negative externalities; the large sand barriers can provide a physical barrier to the beach and an visual barrier, obstructing citizens' view of the beach and ocean.

The lawsuit took place before the devastation of Hurricane Sandy. However, when Sandy hit the Jersey Shore and LBI, the storm surge and potential damage which could have destroyed many of the homes on the thin strip of Harvey Cedars, it did not. Ironically, the same dunes which Karans won a judgment for were a substantial reason why their home was protected from the storm surge and wind and still stands to this day.¹³

Regrettably, the property law which the court applied does not account for even the home-saving benefits that the government provided the Karans.¹⁴ New Jersey courts in the oft mentioned *Harvey Cedars* case determined that the benefit which the Karan's

¹¹ FEMA: National Hurricane Program, available at <http://www.fema.gov/region-iii-mitigation-division/national-hurricane-program>.

¹² J. Richard Weggell & David C. Weggel, *Development of a Coastal Sand Dune Management Program*, Proceedings of the 7th Int'l Conference on HydroScience and Engineering (2006).

¹³ *NJ Residents file suit over dune that saved homes* (Nov. 25, 2012), <http://www.thedailyjournal.com/article/20121126/NEWS01/311260019/NJ-residents-file-suit-over-dune-saved-homes>.

¹⁴ Josh Galperin, *How To Survive Climate Change and Get Rich While Doing It...* (Dec. 04, 2012), <http://environment.yale.edu/envirocenter/post/how-to-survive-climate-change-and-get-rich-while-doing-it/>

received from the dune was not a special benefit but a general benefit.¹⁵ As a general rule, compensation for a partial taking will be reduced by the value of any special benefits to be conferred on the remaining land, but not by the value of any general benefits.¹⁶ Therefore, the city would have to compensate the Karan's for any loss in value of their home, which was determined, pre-Sandy, to be \$375,000.¹⁷

After Hurricane Sandy and the Karan's home was spared, the Karans continued their struggle in court, where they have had success.¹⁸ In March 2012, also before Hurricane Sandy, a three-judge state appellate court upheld the judgment against the borough and the case is now to be heard by the New Jersey Supreme Court this year.

After this devastating storm, with the potential for future storms, something about a single family obtaining such a sum for a lost view seems unjust, especially considering the vital role that the dunes played during the storm. To the lay person, an award of this magnitude seemed unthinkable for a blocked view and loss of land which was used to save the Karan's home and the rest of the borough. Beach replenishment projects and the construction of property-protecting dunes ensure the barrier islands are not completely washed away during a storm such as Sandy. The attorney representing the Karans claims that the case will not be affected by Hurricane Sandy and maintains that the couple should be compensated.¹⁹

If the Karan's home was to be sold today, one of the most important questions a potential homebuyer should be asking about is how the property during the hurricane. When the answer is that there was minimal damage because of the rather unsightly, but

¹⁵ *Borough of Harvey Cedars*, 40 A.2d.

¹⁶ 26 AM. JUR. 2d EMINENT DOMAIN § 387 (2004).

¹⁷ *Id.*

¹⁸ *NJ Residents file suit over dune that saved homes*, *supra* note 13.

¹⁹ *Id.*

highly effective dune, buyers are more likely to buy that property over another that does not have the dune protection. The home is still very close to the water, and has fabulous access to the beach and to the local businesses, many of which remain, unlike some other areas, because of the dune which blocks the home's view.

The categorization of dunes in the way the court in *Harvey Cedars* did is not the best or only way to address the dispute. Because of the special circumstances, namely the dunes as a life saving device to prevent catastrophic damage, the court should have chosen a different framework within which to analyze the controversy. Additionally, the ownership of the view from the home should be questioned and if the homeowners should be compensated for their loss of land, the value of the view should not be part of that compensation because American jurisprudence does not compensate for a the loss of a view.

II. BOROUGH OF HARVEY CEDARS V. HARVEY KARAN: THE CASE

In the *Harvey Cedars* case, a condemnation case at the trial court level, the three-judge panel denied Harvey Cedars' motion for a new trial and declined to set the verdict aside when the jury had determined the amount of the value lost at issue, \$375,000.²⁰ Writing for the three-judge panel, Judge Reisner of the Superior Court of New Jersey, Appellate Division, wrote that the jury had visited the property, where the borough's witness had not, and it was within the jury's province to reject the borough's expert, who had valued the loss at an amount significantly lower.²¹ The borough's expert had valued

²⁰ *Borough of Harvey Cedars*, 40 A.2d.

²¹ *Id.*

the Karan's loss at a mere \$300, even though the dune constructed partially blocked the waterfront view the property had once enjoyed unobstructed.²² This waterfront view added value to the home, according to the trial court, and due to the loss of this view, the beach house lost value.²³ In this assessment, it appears that the court has given the Karans a property right to the view from their home.

In the case, the court cites and relies on a case which has been cited by multiple other courts for the standard of general and special benefits: *Sullivan v. North Hudson Railroad Company*. In this 1889 condemnation case, the defendant railroad wished to take the right to build a double track elevated railroad, at least thirteen feet high supported by pillars, to be set on each side of Oakland Avenue, in Jersey City, New Jersey.²⁴ A jury awarded the plaintiff \$80²⁵ in this case, which in today's dollar, accounting for inflation, would be around \$2013.²⁶ The court described the benefits a landowner could accrue by reason of the construction and operation of a railroad across his land in two different categories: general benefits and special benefits.

III. HOW DUNES CAN PROTECT COASTAL POPULATIONS AND STRUCTURES

Dunes are not a new way of dealing with hurricanes or other powerful storms such as nor'easters.²⁷ Naturally, the coastal regions often are littered with barrier islands and natural dune protection. These barriers are eroded by storms, and, as some of the

²² *Id.*

²³ *Id.*

²⁴ *Sullivan v. N.H.C.R. Co.*, 51 N.J.L. 518 (1889).

²⁵ *Id.*

²⁶ Inflation calculator, http://www.bls.gov/data/inflation_calculator.htm.

²⁷ Shivangi Prasad, *An Assessment of Human Vulnerability to Hazards in the US Coastal Northeast and mid-Atlantic*, 52(3) SOUTHEASTERN GEOGRAPHER 282–98 (2012).

Southern states have realized, need to be replenished.²⁸ After hurricane Katrina, whole towns were destroyed including Holly Beach, Louisiana, Gulfport and Waveland, Mississippi, and other locations on the Gulf of Mexico.²⁹ Comparisons of towns and cities which had dunes from those that didn't show a stark difference in the amount of damage done to infrastructure and property.³⁰ For example, on the coast of the Gulf of Mexico, Port Aransas and Mustang Island, Texas, are fortunate to be protected by dunes which protected these two cities from Hurricane Katrina in 2005.³¹

In the Northeast, there are also numerous examples after Hurricane Sandy of towns which fared better with the protection of dunes, and many of those who opposed dunes in various locations in the Northeast have come to regret their opposition after Hurricane Sandy hit. Six years ago, after the Army Corps of Engineers proposed to erect dunes and elevate beaches along more than six miles of coast to protect a barrier island off the coast of Long Island, New York.³² The Long Beach City Council voted 5 to 0 against paying its \$7 million initial share and taking part in dune construction.³³ Property owners did not like dune construction for purely aesthetical reasons; who would not want to look at the ocean rather than a tall pile of sand, with a bit of vegetation?³⁴ Who would come to Long Beach's iconic boardwalk if the dunes were obscuring the view; the dunes would hurt local businesses reliant on beach tourism.³⁵ However, today, the businesses

²⁸ Richard L. Watson, *Protect the Natural Dune Seawall and Prevent Hurricane Destruction at Port Aransas, Texas* (2005), <http://TexasCoastGeology.com/beach.pdf>.

²⁹ *Id.*

³⁰ Mireya Navarro & Rachel Nuwer, *Resisted for Blocking the View, Dunes Prove They Blunt Storms* (Dec. 3, 2012), http://www.nytimes.com/2012/12/04/science/earth/after-hurricane-sandy-dunes-prove-they-blunt-storms.html?_r=2&.

³¹ Watson, *supra* note 28.

³² *Id.*

³³ Nuwer, *supra* note 30.

³⁴ *Id.*

³⁵ *Id.*

realize their mistake, for their boardwalk was completely destroyed by Hurricane Sandy's 15-foot storm surge.³⁶ Sandy had been a wakeup call for Long Beach, New York and the boardwalk will be rebuilt, but likely with the addition of sea barriers.³⁷

Comparisons of the recent disaster with Sandy and the Great Atlantic Storm of 1962, also known as the Ash Wednesday Storm, no homes were lost, even though the 1962 storm destroyed half of the municipality.³⁸ In New Jersey, an excellent case study for Hurricane Sandy are the boroughs of Seaside Park and Seaside Heights, neighbors on the Barnegat Peninsula.³⁹ Seaside Park, protected by dunes, was not nearly as affected as Seaside Heights with its boardwalk, and lack of dunes. Seaside Heights opted for seawalls which are well-known to be less effective than dunes, but had numerous areas which were on boardwalks out into the Atlantic Ocean, all of which was destroyed by storm surge.⁴⁰

The Mayor of the borough of Harvey Cedars claimed that without the beach project, the community, just three blocks thick in some parts, would not be as fortunate as it was after the storm.⁴¹ Not only do beach communities have to worry about property and infrastructure damage, but also completely losing the ground under their feet. Barrier islands in the United States have been described as "restless ribbons of sand," and inlets, the area between barrier islands, are particularly subject to rapid change.⁴² In New

³⁶ *Id.*

³⁷ Vivian Yee, *A City Reminisces While Saying Goodbye, for Now, to Its Boardwalk* (2013), <http://www.nytimes.com/2013/01/07/nyregion/long-beach-new-york-says-goodbye-to-its-boardwalk.html>.

³⁸ Lisa Rose, *50 years later, N.J. remembers the storm that swallowed the Jersey Shore* (2012), http://www.nj.com/news/index.ssf/2012/03/50_years_later_nj_remembers_wh.html.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ NJ residents file suit over dune that saved homes, *supra* note 13.

⁴² ORRIN H. PILKEY, *THE NORTH CAROLINA SHORE AND ITS BARRIER ISLANDS: RESTLESS RIBBONS OF SAND* (1998).

Jersey, these islands are highly populated and the residents do not look like they want to move anytime in the near future.

IV. SPECIAL AND GENERAL BENEFITS, THE DIFFERENCE

A Missouri Court of Appeals judge described the challenge of distinguishing between a general and special benefit well: “in practical application, the distinction between special benefits and general benefits is shadowy at best,” and even seasoned practitioners sometimes struggle with the nuanced differences.⁴³ The decision in which the *Harvey Cedars* court cites adds some helpful explication. General benefits are the ones which benefit the whole neighborhood or community by, for example, increasing the facility of transportation, attracting population, and the like.⁴⁴ General Benefits are those produced by some improvement which a property owner may enjoy the future in common with all other property owners nearby.⁴⁵ Special benefits are those which directly increase the value of the tract crossed, as if a cut required by a railroad should drain a swamp, or if a bridge, which the railroad company had to build should afford a better way between portions of the tract of land.⁴⁶ Additionally, a key difference between general benefits and special benefits is that special must be of a different kind, not a variance of degree in the benefit given to the landowner. With respect to special benefits, the question is whether the advantage is likely to accrue to the property owner

⁴³ State v. Koziatek, 639 S.W.2d 86 (Mo. Ct. App. 1982).

⁴⁴ *Borough of Harvey Cedars*, 40 A.2d.

⁴⁵ *Id.*

⁴⁶ *Id.*

over and above the advantages to other property in that vicinity. Special benefits are described by the court in *Harvey Cedars* as existing only in very limited circumstances.⁴⁷

For matters of transportation, it's fairly clear that adding a road or railroad on someone's property would be the type of general benefit the court in *Sullivan* had in mind. Adding a rail line does not benefit that owner in any special way, nor does it add to the value of the home. In fact, the noise from a train is a negative externality and nuisance to a property owner. Another example of a general benefit such as the one in *Sullivan* can be found in *New Jersey Turnpike Authority v. Herrontown Woods, Inc.*, where the land in question was used to create an interstate highway's exit ramp across part of the defendant's land.⁴⁸ The defendant company would have better access to travel and possibly for trucking and so on, but only a general benefit to them. Because of the creation of the highway, which allowed for ingress and egress of the land, did not confer any special benefit to the landowner than any of the rest of community, this is considered a general benefit.

The couple did benefit from the dune project, which protected their home from Sandy's damage.⁴⁹ But protecting beachfront property from storm damage was exactly the benefit that the government intended to protect the property and population of that section of LBI.⁵⁰ When Sandy ravaged New Jersey, the Karans received an immense benefit: their home is still standing and largely undamaged, but that is an advantage that

⁴⁷ *Id.*

⁴⁸ N.J. Tpk. Auth. v. Herrontown Woods, Inc., 384 A.2d 823 (1978).

⁴⁹ Galperin, *supra* note 14.

⁵⁰ *Id.*

the courts could not consider in this case and as such, the Karans benefit twice and get a windfall.⁵¹

But the dunes are a significantly different type of benefit than the convenience of an off ramp near a place of business or a train that will bring shoppers close to a business for a day of shopping: this is a way, an effective way, to protect homes from storm surge and the many other effects of a powerful storm, which we saw firsthand when hurricane Sandy thrashed the coast of New Jersey. A major and key reason why the Karans gained no special benefit, according to the court, from the construction of the dune was because a special benefit need not be peculiar to the land in question but must differ in kind, rather than in degree, from the benefits which are shared by the public at large.⁵² It could be easily argued, which the plaintiff borough did attempt to argue in *Harvey Cedars* without success, that the dune does in fact offer a special benefit, which is different than those around them. The protection offered to those against the dune is not theoretical protection greater to those closer to the dunes; they are closer to the dunes, but they are also closer to the water. It seemed like in some places from satellite images posted around the media, on the Jersey shore that the homes on the water incredibly stopped some of the storm surge from their neighbors, because the homes closer to the shore acted as artificial barriers for the water and sand. The homes which were closer to the water saved those behind them, the same way a dune would block the brunt of the storm surge—a sad truth.⁵³

⁵¹ *Id.*

⁵² *Borough of Harvey Cedars*, 40 A.2d.

⁵³ Jim Jubak, *Rebuilding after Sandy? Maybe not* (Nov.1, 2012, 7:30 PM), <http://money.msn.com/investing/rebuilding-after-sandy-maybe-not>.

The difference between this case and other typical cases concerning general and special benefits is significant when looked at who the parties are in the other cases and this particular case. It's perplexing as to why the courts, or maybe the legislature, haven't found a balance between catastrophic property damage and the examples from other cases such as roads and railroads. The kind of benefit that the Karan's received is not similar to most of the other cases or even the case cited by the court in *Harvey Cedars*.⁵⁴ *Board of Levee Inspections v. Crittenden* is a 19th century case in the Eighth Circuit case which took place in Arkansas that is more similar to the *Harvey Cedars* case, but it too is different in many respects. In the areas surrounding the banks of the Mississippi such as in the states of Arkansas and areas north and south, the river is controlled by a system of levees, forcefully rerouting the river's water into a predetermined course, affecting the mouth of river all the way south in Louisiana.⁵⁵ The court recognizes that there were numerous shortfalls when it came to notification to the defendants, the landowners, and with the actions taken by the Board of Levee Inspectors.⁵⁶ The case describes over \$85,600 in 2012 dollars of damage done to the property including damage to cultivated lands for excavations, damage to timber land and the destruction of a house on the land.⁵⁷ This damage was damage not in the theoretical type of value of the land, but the property owners actually lost assets and saw their land in distress. The landowners were offered only \$1, about \$27 in 2012 dollars, but the dollar could have represented a nominal amount.⁵⁸

⁵⁴ *Borough of Harvey Cedars*, 40 A.2d.

⁵⁵ *Bd. of Levee Inspectors v. Crittenden*, 94 F. 613 (8th Cir. 1899).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

One way to look at the situation was that the dune in front of the Karans home was part of a network of dunes which protected the city. However, the other dunes also existed so the Karans dune would function properly. Without the network, the dune in front of their property would still allow the storm surge to pass and flood their home and possibly knock it off its foundation, as other homes did on LBI.⁵⁹ There isn't really a way for opt out of the dune project; if one individual wants, and fights for, a large amount of compensation, then the project will simply be cancelled and the entire city could be at great risk. We speak not of convenience, not of "it would be nice to have that train so we can go to the city," we're discussing massive, catastrophic loss of property and if It's still a general benefit, in the sense that a road or railroad is a general benefit, and cannot be offset, then the courts or the legislature should carve out an exception.

V. THE OWNERSHIP OF A VIEW

The major complaint of the defendants, the Karans, in the Harvey Cedars case was that the dune constructed on the what was formally their land not only conferred no special benefit to them, but also blocked a formally-spectacular view of the ocean.⁶⁰ They also mentioned the private beach which the dune now occupies which could no longer be used for recreation.⁶¹

⁶⁰ Nuwer, *supra* note 30.

⁶¹ *Borough of Harvey Cedars*, 40 A.2d.

In United States and in other common-law countries such as England^{62,63} or South Africa,⁶⁴ views are not recognized as an inherent right; citizens do not have the right to the unobstructed view from a property: “property views are not generally considered a right incident to land in the United States, and unless acquired pursuant to an express grant or covenant, they generally are not protected in a court of law.”⁶⁵ The right of a landowner to air, light or an unobstructed view may be created by: a) private parties through the granting of an easement; b) through the adoption of conditions, covenants and restrictions; c) by a state legislature, as by creating the right to sunlight for a solar collector; or d) by local governments in adopting height limits to protect views and provide for light and air.⁶⁶ Some places, such as California, have established what one writer calls Draconian ordinances pertaining to unreasonable obstruction of views and sets out what views are to be protected such as the Golden Gate Bridge and the Bay Bridge.⁶⁷ Governments are allowed to prevent citizens from obstructing views by implementing restrictions to height.⁶⁸ City planners in Boston denied a citizen the right to build his building higher than about 125 feet, in order to, the plaintiff claimed, maintain the view of the city.⁶⁹ The reason for the refusal to grant the building permit was because

⁶² *Protecting a Right to a View*, (June 21st, 2011), <http://www.hip-consultant.co.uk/blog/protecting-a-right-to-a-view-123/>.

⁶³ SIR EDWARD COKE, *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*, VOL. 1. (Steve Sheppard, et al., eds., Indianapolis: Liberty Fund, 2003). Chapter: William Aldred’s Case: “[W]hich is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect.... But the law does not give an action for such things of delight.”

⁶⁴ Carolina A. Koch. *The Right to a View: Common Law, Legislation and the Constitution* (Dec. 2012) available online at: Stellenbosch University <http://scholar.sun.ac.za>.

⁶⁵ Paul J. Weinberg, *Trees and Neighbors – When is a view so valuable that it should be litigated?* ZONING AND PLANNING L. REPORT, Dec 2011.

⁶⁶ *Pacifica Homeowners' Ass'n v. Wesley Palms Ret. Cmty.*, 178 Cal. App. 3d 1147 (1986).

⁶⁷ Weinberg, *supra* note 5.

⁶⁸ John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y at 1, 18 (1996).

⁶⁹ *Welch v. Swasey*, 214 U.S. 91 (1909).

the building site for the proposed building was situated in one of the districts created under the provisions of the acts mentioned, in which districts the height of the buildings is limited to eighty, or, in some cases, to one hundred feet. In a neighboring district, the height of buildings was limited to one hundred and twenty-five feet. The Court did not see this as an unreasonable use of the police power.⁷⁰ It is certainly possible that this height restriction was a safety consideration, and the taking of the additional floors ensured that firefighters would be able to fight a blaze, if one was to break out in the upper floors. Other countries such as France have also restricted building heights to maintain a certain historical look, for exclusively aesthetical reasons.⁷¹ Of course, these agreements are required to be in place before anyone can claim injury or the town can enforce a restriction.

Most of the literature on the obstruction of view is described in relation to nuisance law, but no loss of view in itself has ever been recognized as compensable. The way a blocked view has been mentioned in nuisance has been in relation to light and air, but the only exception to the general rule of no compensation is the example of a spite fence where a structure is erected for the *sole purpose* of maliciously harming the neighbor by interfering with that neighbor's access to sunlight or view. A description of a spite fence is discussed in *Krauth v. Geller*: "Occasionally they [nuisances] proceed from a malicious desire to do harm for its own sake [e.g., the spite fence cases]; but more often they are intentional merely in the sense that the defendant has created or continued the

⁷⁰ *Id.*

⁷¹ Henry Samuel, *590ft controversial 'Triangle' tower to be built in Paris* (Mar. 31, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/france/8419159/590ft-controversial-Triangle-tower-to-be-built-in-Paris.html>.

condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.”⁷²

Safety, although, seems like the purpose of the police power. But the main question is, why do the Karans have a right to the view of the ocean? The view must be about value, whether its value to you, or to those who would buy your home. The court in the *Harvey Cedars* case includes dramatic language such as, “formerly spectacular view” and “magnificent panoramic view.” However, it’s unclear that the Karans had the right to this view, and the lengths the court goes to describe it may have been ineffectual and distracting. Because the court appears to have given the Karans the value of the view, the court has also given them a right to the view and requires the others, at least the government, to not interfere with the view. A right as defined by the Restatement of the Law of Property is “a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act.”⁷³ Of course, if the borough of Harvey Cedars is put in a federal flood advisory area which requires homes to be elevated, the insurance premiums may force those with blocked views to raise their homes above the dunes.⁷⁴ Indeed, the new standards are scheduled to be finalized in 2014, though few know what to expect from the rules.⁷⁵

⁷² *Krauth v. Geller*, 149 A.2d 271 (App. Div. 1959).

⁷³ RESTATEMENT OF PROP.: INTRODUCTION & FREEHOLD ESTATES § 1 (1936).

⁷⁴ Wallace McKelvey, *The work of elevating houses along the Jersey Shore may take years*, http://m.pressofatlanticcity.com/news/top_three/the-work-of-elevating-houses-along-the-jersey-shore-may/article_b4528a0c-6d89-11e2-8bd6-0019bb2963f4.html.

⁷⁵ *Id.*

VI. JUST COMPENSATION FOR LAND IN EMINENT DOMAIN IN NEW JERSEY

The origin of government takings is the Takings Clause of the Fifth Amendment which provides that private property may not "be taken for public use, without just compensation." The use of eminent domain became a controversial national issue after the 2005 Supreme Court decision in *Kelo v. City of New London*, and other cases have caused uproar among the public. The case stirred up a scare in the public who saw the decision as the erosion of their private property rights, making their rights unfairly vulnerable to government takings through eminent domain.

New Jersey law is significantly different from Connecticut law as it was applied in *Kelo*. Under a liberally construed Connecticut law, the government may use eminent domain to take private property for an entirely private project that promotes economic development. So, the law which came from *Kelo* was much narrower than the public would believe. Justice Stevens, the architect of the majority's ruling in *Kelo*, later viewed the public outcry that resulted from the Court's ruling in a favorable light. During a speech to a county bar association, Justice Stevens noted that the backlash alone is some evidence that the political process is up to the task of addressing eminent domain reform.⁷⁶

In the state of New Jersey, courts determine how much money a property owner should get when the government takes land by exercising its power to take private property under the Eminent Domain Act, by determining the fair market value of the

⁷⁶ Justice John Paul Stevens, Fall 2011 Albritton Lecture: *Kelo*, Popularity, and Substantive Due Process (Nov. 16, 2011), available online at: <http://www.supremecourt.gov/publicinfo/speeches/1.pdf>.

property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act. This language does not account for a loss to the other parts of the property which are not tangible: the statute accounts for the actual property taken, not the lowered value to other parts of the property which should be distinguished from the land which was taken. Then taking should account only for property taken, not the value to the property not taken because the law does not compensate for the loss of a view.

VIII. OTHER OPTIONS FOR THE COURT TO CONSIDER

The court chose to follow the general-special benefit framework when analyzing the issue in *Harvey Cedars*. This is not the only framework the court could have chosen to analyze the controversy.

The case commonly cited which the takings rule is derived is a case dealing with the sale of property to African Americans in the early 20th century. In this case, a white property owner attempted to sell his home to an African American. One of the reasons why this case is well-known is for its deeming a statute which allowed for racial segregation unconstitutional. The Court also weighed in on statutes which take private property not for a public use, but for the benefit of other private persons:

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property.⁷⁷

There is, as the Court has said in later cases, no room for the view that one individual's property may be taken or destroyed, either directly through eminent domain or indirectly, under the guise of police power, in order to enhance the property values or financial prosperity of another individual.⁷⁸

However, the Court has held valid statutes which have allowed the destruction of one type of property for the preservation of another in narrow circumstances. Because of the necessity, the need to protect, and the requirement for the public to be safe, legally, there exists a preferment of not private individuals, but the public interest at large.⁷⁹ Therefore there exists the possibility that a state government can deem one type of property more important than another, even to the point of requiring the property to be destroyed, to protect the greater good.

In *Miller v. Schoene*, a 1928 Supreme Court case dealing with the review of a decision by the Supreme Court of Virginia, the Court examined the constitutionality of a statute which called for the destruction of the plaintiff's ornamental cedar trees under the due process clause of the Fourteenth Amendment.⁸⁰ In Virginia, there exists a type of unsightly fungus which has a lifecycle on two plants, back and forth from one of the

⁷⁷ *Buchanan v. Warley*, 245 U.S. 60, 75 (1917).

⁷⁸ *Miller v. Schoene*, 276 U.S. 272 (1928).

⁷⁹ *Id.*

⁸⁰ *Id.*

cypress family, such as a cedar, and then secondly on a member of rose family such as an apple tree.⁸¹ Interestingly, the fungus does not injure the cedar trees other than in a visual way, but on apple trees, fruit can become infected, and leaf drop can occur where the tree's leaves prematurely fall off, affecting crops.⁸² The two trees can only give the disease to each other, but the cedars and apple trees cannot give the disease to members of their own species; to keep one species safe, one species must be exterminated. During the time the case took place, Virginia in the early 20th century was a major producer of apples, and even today Virginia is the sixth largest producer of apples in the United States.⁸³ The court notes that the cedar, native to Virginia, aside from its ornamental use, has occasional use and value as lumber, but is not cultivated for this purpose nor is it dealt with on a commercial scale, as is the apple tree.⁸⁴ The commercial value of the cedar is shown throughout the state to be small compared to the apple orchards.⁸⁵

The Supreme Court agreed with the Virginia courts and legislature in this case, saying that the social policies were not unreasonable, that sacrificing one form of property for another, without compensation, was not unreasonable.⁸⁶ Controversy

Another case which a similar situation occurred was in Boston in the late 19th century and was memorialized in the case *Bowditch v. Boston*.⁸⁷ Under the statutes of Massachusetts and ordinances of the city of Boston, a building could be blown up to prevent the spread of fire, in cases of actual necessity.⁸⁸ At common law, as the court

⁸¹ Chris Wallis & Dennis J. Lewandowski, *Cedar Rust Diseases of Ornamental Plants*, available online at: <http://ohioline.osu.edu/hyg-fact/3000/pdf/3055.pdf>.

⁸² *Miller*, 276 U.S. 272

⁸³ *Agriculture and Industry*, <http://www.nps.gov/nr/travel/vamainstreet/agriculture.HTM>.

⁸⁴ *Miller*, 276 U.S. 272.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Bowditch v. Boston*, 101 U.S. 16 (1880).

⁸⁸ *Id.*

states, everyone has the right to destroy the real and personal property in cases of actual necessity to prevent the spreading of fire, which is often called creating a “fire-break.”⁸⁹ Another facet of this common law rule is that the destroyer is not required to compensate the owner; there is no remedy for the owner.⁹⁰ This practice still occurs today as it did in 1666, in the Great Fire of London, where the King of England, Charles II, ordered the Mayor, Sir Thomas Bloodworth, to destroy as many houses as necessary to contain the fire.⁹¹ The Supreme Court stated that the burning of homes was within the state’s police power and that the legislature had the authority to determine necessity, which the statute had procedures laid out for such as approval by government officials.⁹² Joint authority was given to three designated officers, acting together, which none could separately approve.⁹³ All three officials are required to approve so the decision cannot be made lightly.⁹⁴

A final case is the 1962 Supreme Court case, *Goldblatt v. Hempstead*.⁹⁵ The Appellant Goldblatt owned a 38-acre tract within the Town of Hempstead where he mined sand and gravel, which he had been continuously since 1927.⁹⁶ The excavation reached the water table leaving a water-filled crater which has been widened and deepened to the point that it was a 20-acre lake with an average depth of 25 feet.⁹⁷ The town of Hempstead had also grown to where within a radius of 3,500 feet there were

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Bruce Robinson, *London's Burning: The Great Fire* (Mar. 29, 2011), http://www.bbc.co.uk/history/british/civil_war_revolution/great_fire_01.shtml.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

⁹⁶ *Id.*

⁹⁷ *Id.*

more than 2,200 homes and four public schools with a combined enrollment of 4,500 pupils.⁹⁸

The town of Hempstead's government took a series of steps to regulate the mine including, in 1958, the town amended Ordinance No. 16 to prohibit any excavating below the water table and imposed an affirmative duty to refill any excavation presently below that level.⁹⁹ The amendment also made previous requirements more stringent.¹⁰⁰ The regulations culminated in the town enjoining the appellant, preventing mining, because the appellant had not complied with the new provisions of Ordinance No. 16.¹⁰¹

As the Court noted, the ordinance completely prohibited a beneficial use to which the property has previously been devoted for a long time.¹⁰² However the Court remarked that a valid exercise of the town's police powers which deprives the property of its most beneficial use does automatically not render the ordinance unconstitutional.¹⁰³ Simply because the ordinance takes the use which the citizen would prefer to use or for, or renders the land unusable for the purpose which it was once used, does not mean that automatically the citizens should get compensation. The Court then quoted another case, *Mugler v. Kansas*:

⁹⁸ *Id.*

⁹⁹ *Id.* Specifically the ordinance provides that "[n]o excavation shall be made below two feet above the maximum ground water level at the site."

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

"[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

There are many similarities between this excerpt and the controversy in *Harvey Cedar*; the courts are allowing the Karans to use their property to the detriment of the rest of their community.

Storm surge and its destructive results can be seen as a type of disease or fire which requires attention, not hasty action, but well-thought out regulations written by state governments which they are able to do under the state governments' police powers. The problems presented by these individual homeowners should be remedied by a state regulation to take one type of property to prevent larger destruction of the larger population. The state government in New Jersey has been considering options for the holdout homeowners and those who are winning large judgments against cash-strapped borough governments.¹⁰⁴ The judgment by the court in *Harvey Cedars* tipped the scales toward property rights, away from the public good.¹⁰⁵

¹⁰⁴ Paul Mulshine, *Crackpot libertarianism at the beach* (Jan. 27, 2013, 9:18 AM), http://blog.nj.com/njv_paul_mulshine/2013/01/crackpot_libertarianism_at_the.html.

¹⁰⁵ *Court ruling on Harvey Cedars beach replenishment is short-sighted*, (Apr. 02, 2012, 6:01 AM), http://blog.nj.com/njv_editorial_page/2012/04/court_ruling_on_harvey_cedars.html.

Additionally, the failure of the citizens such as the Karan's to ensure the safety of other citizens by allowing the dunes to be constructed on their property could be seen as a noxious use. The failure to have dunes built on the Karan's land could be seen prejudicial to the health, the morals, or the safety of the public. Certainly, the safety of the public, and their real and personal property, could be threatened if the government is unable to build dunes as required by a planned system.

IX. A HOPE FOR A COMMUNITY TO PRESERVE ITSELF

No one owes a duty to anyone else unless that duty is created. We value self-interest as a society, but we also value compassion, and the gap between our moral institutions and our economic and political practices is particularly wide now.¹⁰⁶ Liberty to us, seems to mean freedom from obligation and the promotion of liberty is an invitation to act in a self-interested manner.¹⁰⁷ But self-interest also has a dark side and it promotes indifference to the effects of one's actions on others.¹⁰⁸ Corporate law is a great example of this problem. If we consider how the law is in relation to corporations, we see how self-interest and throwing your fellow man under the bus is required in some cases: companies are obligated to shareholders to maximize returns for shareholders and that is the only goal, legally, they can pursue.¹⁰⁹ There is no real way to have a sense of obligation to the greater good. Even when a corporation offers money to charity, It's always in the best interest of the shareholders whether for tax reasons or corporate image.

¹⁰⁶ JOSEPH SINGER, THE EDGES OF THE FIELD 11, 12 (2000).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Goldblatt*, 369 U.S. 590.

We value our liberty, but recognize that it undermines security.¹¹⁰ There is also something to be said for the community itself, and what type of community it's. The majority of people who have homes on the Jersey Shore are not permanent residents. When the fall rolls around, most spend Labor Day weekend closing up their homes, winterizing their boats. Businesses shut down because operating costs, without the tourists, would be too high to keep the doors open. The sort of protection a dune offers preserves not only these temporary residents, but protects those who live on the barrier islands year round even more; because once a primary residence is destroyed, it's a whole different ball game. But there is really no way for a homeowner to protect themselves; the government is in the best position to ensure the safety of the residents in this circumstance, there is little question of that.

X. CONCLUSION

The fight over rehabilitating the Jersey Shore's dune system—long ago compromised by development—has been in and out of courtrooms for years.¹¹¹ Many of those houses would still be standing if various citizens in both the public and private sector had not leveled the sand dunes that are a natural feature at the Shore.¹¹² On New Jersey's barrier islands, towns whose dunes had been worked on by the Army Corps—such as Ocean City and Avalon—sustained less Sandy damage.

¹¹⁰ *Id.* at 13.

¹¹¹ *New Jersey Shore Towns Near Showdown With Dune-Building Foes*, (Dec. 4, 2012)

<http://www.claimsjournal.com/news/east/2012/12/04/218444.htm>.

¹¹² Paul Mulshine, *supra* note 104.

It may well be that this storm pushes the courts to finally reassess the question of valuation or how courts will decide on which law to apply, because the environmental stakes must be taken into account.¹¹³ If the dunes are not built to adequately repel the next surge, the next storm will cause immense harm, economically and environmentally, for the homeowners and the greater populace.¹¹⁴

¹¹³ Paula Franzese, *Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law*, 38 FORDHAM URB. L.J. 1091 (2011).

¹¹⁴ James Osborne, *Shore towns near showdown with dune-building foes* (Dec. 03, 2012), http://articles.philly.com/2012-12-03/news/35550241_1_dune-sandy-damage-barrier-islands.