EMINENT DOMAIN—JUST COMPENSATION—SPECIAL BENEFITS

It is well established that just compensation must be made for all private property taken for public use.[1] But just compensation need not always be made in terms of money. When only part of a parcel of land is taken for a public project, the value of the land remaining—the remainder—is influenced by the nature of the project. When the value of the remainder is increased, a benefit is said to have accrued. Most states will permit this benefit to some degree to be treated as part of the owner's just compensation.[2] This is done by permitting benefits to be set off against the award to which the property owner otherwise would be entitled. The various states do not agree, however, as to the extent of the setoff. Some permit setoff of benefits only against damages caused to the remainder.[3] Others, like Wisconsin, permit setoff of benefits against the compensation owed for that part of the parcel which was taken, as well as against the compensation owed for damages to the remaining parcel.[4]

Most states also distinguish between "special" and "general" benefits and permit only the former to be set off. This distinction between general and special benefits poses one of the most vexing problems in this area of the law. For a period of time, Wisconsin law permitted the setoff of all benefits, whether general or special, in street and highway cases.[5] Since 1955, however, statutory law has permitted only special benefits to be set off, regardless of the purpose of the condemnation.[6] The legislature has never attempted to define a special benefit. Until recently, the two principal judicial decisions bearing on the definition of special benefits in Wisconsin were *Milwaukee & Miss. R.R. v. Eble*,[7] decided in 1851, and *Washburn v. Milwaukee & L.W.R.R.*,[8] decided in 1884.

In *Eble*, the Wisconsin Supreme Court approved an instruction that "common advantages to the neighborhood were not chargeable as benefits . . . but only such as were peculiar to . . . [the particular parcel]."[9] The trial judge had suggested that such things

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1 U.S. CONST. amend. V; Chicago, B. & O.R.R. v. Chicago, 166 U.S. 226, 241 (1897), applying the fourteenth amendment to state just compensation; WIS. CONST. art. I, § 13.

2 See 3 NICHOLS, EMINENT DOMAIN § 8.6211 (rev. 3d ed. 1965) for a compilation indicating how benefits are treated in the various jurisdictions.

3 See, *e.g.*, IND. ANN. STAT. § 3-1706(5) (Supp. 1963), State v. Smith, 237 Ind. 72, 143 N.E.2d 666 (1957); TENN. CODE ANN. § 23-1414 (Supp. 1965), Newberry v. Hamblen County, 157 Tenn. 491, 9 S.W.2d 700 (1928).

4 WIS. STAT. § 32.09 (1965).

5 Wis. Laws 1919, ch. 571.

6 WIS. STAT. § 32.18 (1965).

7 3 Pin. 334 (Wis. 1851).

8 59 Wis. 364, 18 N.W. 328 (1884).

9 Milwaukee & Miss. R.R. v. Eble, 3 Pin. 334, 358 (Wis. 1851).

as making the particular parcel more salable, draining or fertilizing the particular parcel, or opening an avenue to the parcel not shared with others would be special benefits.[10] In *Washburn*, the court said that the proximity of a depot to the remainder was not a special benefit. The court indicated that a special benefit was "one which enhances the value of the land affected by it, by improving its physical condition *and* adaptability for use . . . ."[11] The court speculated that such things as reclaiming waste land, draining marsh land, aiding in developing water power, dispensing with the need for fences, and opening a mine or quarry might be special benefits.[12] Thus, it can be seen that the emphasis in these cases was upon physical changes in the land which would increase its utility.

In *Petkus v. State Highway Comm'n*,[13] decided in 1964, the court removed the requirement of physical change as a necessary element of a special benefit.[14] It thus broadened the definition of special benefit in an important respect, but, at the same time left its meaning more uncertain than ever. It is the purpose of this note to suggest a construction of the *Petkus* case which will render the concept of a special benefit more certain and which at the same time can be supported on policy grounds.

The *Petkus*[15] case involved the taking of eleven and one-half acres of the plaintiff's forty-eight acre parcel for highway relocation and widening incident to the construction of an interchange. The trial court defined a special benefit as:

> a benefit which enhances the market value of the property remaining after the taking through improvement of the physical condition of such land *or* its adaptability for profitable use and which special benefit arises from the peculiar relation of the land in question to the public highway improvement for which the property was acquired.[16]

The jury found the before-taking value of the remaining parcel to be 36,500 dollars and the after-taking value of the remainder to be 47,100 dollars.[17]

Plaintiffs contended on appeal that the court erred in its instruction on special benefits. The state, on the other hand, argued that

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[10] *Id.* at 338.

[11] Washburn v. Milwaukee & L.W.R.R., 59 Wis. 364, 377, 18 N.W. 328, 334 (1884). (Emphasis added.)

[12] *Ibid.*

[13] 24 Wis. 2d 643, 130 N.W.2d 253 (1964).

[14] *Id.* at 648, 130 N.W.2d at 255.

[15] 24 Wis. 2d 643, 130 N.W.2d 253 (1964).

[16] Brief for Appellant, p. 120, Petkus v. State Highway Comm'n, 24 Wis. 2d 643, 130 N.W.2d 253 (1964). (Emphasis added.)

[17] 24 Wis. 2d at 646, 130 N.W.2d at 254. The jury does not find the value of the special benefits specially, but merely considers them in arriving at an after-taking value.

the rule of *Washburn* was too restrictive, and urged the court to take the position that: "any benefits that are peculiar to the position the property enjoys in relationship to a public improvement which changes its adaptability for profitable use and enhances the market value of the property remaining, are special benefits."[18] The court characterized this as a definition "based on value accruing to the land because of its proximity to the public improvement."[19] Although the court accepted the "proximity" test in theory, it rejected it as a working rule because it included enhancement in value due to increased business activity in the community as a whole—a general rather than a special benefit.[20] The court stated that "special benefits are distinguished from general benefits in that they differ in kind rather than in degree from those which accrue to the public generally."[21] The court then stated:

> [T]he definition of special benefits should be extended to include enhanced value because of more advantageous adaptability for use. Land which by reason of its proximity to a no-access highway interchange is enhanced in value because its highest and best use, assuming the completion of the public improvement, is immediately favorably changed or its potential for favorable change in use appears by reasonable probability to be imminent, is specially benefited.[22]

Since the *Petkus* decision the previously clear distinction between general and special benefits based on the presence or absence of physical improvement to the remainder is no longer clear. The new definition of special benefits requires the court to compare the relationship of the remainder parcel to the improvement, with the relationship of other parcels in the community to the improvement. When the Wisconsin Supreme Court said that "special benefits are distinguished from general benefits in that they differ in kind rather than in degree from those which accrue to the public generally," it recognized this comparison of relationships. This statement assumes that there is one group of parcels—all the public in general—which receives benefit from the improvement. The benefit received by the remainder must differ in kind rather than in degree from the benefit received by this group of parcels. The relationship between the remainder and the improvement is relatively constant because the improvement will abut on the remainder. The variable is the relationship between the other parcels which are benefited and the improvement. This latter relationship may be such that the benefit to the remainder may remain special

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18 Brief for Respondent, p. 12, Petkus v. State Highway Comm'n, 24 Wis. 2d 643, 130 N.W.2d 253 (1964).

19 24 Wis. 2d at 648, 130 N.W.2d at 255.

20 *Ibid.*

21 *Ibid.*

22 *Id.* at 648-49, 130 N.W.2d at 255-56.

even though shared with other parcels. When does the benefit cease to be special? When the benefit is unique to the remainder, there being no other group of parcels so benefiting, it is well-settled that the remainder is specially benefited. When the benefit is similarly shared by the whole community it is equally well-settled that a general benefit exists. The difficulties in determination arise where more than the remainder parcel but less than all of the community share the benefit equally.

There are suggested solutions to this problem. Nichols proposes the following classification of benefits:

> (1) Benefits peculiar to a particular estate by reason of its direct relation to the improvement;
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> (2) Local or neighborhood benefits, or those accruing to a well-defined and limited part of a city or town by reason of its proximity to the improvement;
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> (3) General benefits, or those which affect the community as a whole and perhaps raise the value of land in an entire city or town.[23]

Nichols states that with some qualifications, the generally accepted doctrine is that special benefits include the peculiar and local benefits under his classification.[24] The offset of all local benefits would be too comprehensive. In highway cases, courts have usually distinguished between special and general benefits on the basis of whether the benefit accrues only to lands abutting on the highway or to non-abutting lands as well.[25] Probably few matters in eminent domain have such a dominant majority view.[26]

Donald G. Hagman has proposed a classification of benefits which recognizes this majority view:

> 1. Unique: a benefit not shared by any other parcel;
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> 2. Special: a benefit shared with other parcels along the road [or improvement] similarly situated;
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> . . . . .
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> 3. Local or neighborhood: a benefit shared with other parcels not abutting the road [or improvement] but in the near vicinity;
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> 4. General or community: a benefit shared with other parcels in the community . . . .[27]

Benefits numbered 1 and 2 would be set off, and benefits numbered 3 and 4 would not.[28]

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23 3 NICHOLS, *op. cit. supra* note 2, § 8.6202 at 65.

24 *Id.* § 8.6203 at 66.

25 Goldstein, *Economic Evidence in Right-of-Way Litigation*, 50 GEO. L.J. 205, 209 (1961).

26 Hagman, *Special Benefits in Road Cases: Myths and Realities*, 6 INSTITUTE ON EMINENT DOMAIN 135, 155 (1964).

27 *Id.* at 138.

28 *Ibid.* Hagman includes as a fifth category, which would not be set

Under the rationale suggested by Hagman, the crucial factor becomes the relationship of the particular benefited parcel to other benefited parcels, rather than the type of benefit involved. Thus, a public improvement which, as in *Petkus*, changes the highest and best use of the remainder from agricultural to commercial gives rise to a special benefit to that land if it is shared only by other lands abutting on the improvement. Similarly, improved drainage as a result of a public improvement is a special benefit if it is shared only by other lands abutting the improvement; it is a general benefit if it is shared by non-abutting lands.

This suggested definition of special benefit has the merit of adding certainty to the law. Moreover, it is an important goal of the law to treat the person owning condemned property equitably in relation to his landowning neighbors. In the *Eble* case[29] the court stated the policy on which the distinction between general and special benefits was created:

> If general benefits accruing to landholders from the construction of this extensive improvement were to be regarded, then those who are subjected to a forced sale of their property to furnish the track, must suffer greater losses and inconvenience than the rest of the community . . . . It is due to the legislative wisdom of the state, to impute to it a design in accordance with general principles of justice and equity; and such a design is consistent only with the limiting of the benefits, to set off against damages, to such special advantages as each proprietor shall be found to have derived from the making of the road across his land.[30]

This the suggested definition accomplishes.

It is submitted that the suggested definition is consistent with the *Petkus* decision and may even be exactly what the court intended. It is suggested that when the Wisconsin Supreme Court in *Petkus* used the word "proximity" in defining special benefits, it used the word in its superlative sense. That is, the court meant nearest to, or contiguous with, rather than merely near, or in the vicinity. There is support for this conclusion. The instruction on special benefits given by the trial judge was based on benefits arising from the peculiar relationship between the remainder and the improvement.[31] This instruction was affirmed by the supreme

off, benefits which are speculative in nature. *But see* 3 NICHOLS, *op. cit. supra* note 2, § 8.6203 at 71, to the effect that it is not the benefit which is speculative but the evidence which is introduced to prove its existence and value.

29 Milwaukee & Miss. R.R. v. Eble, 3 Pin. 334 (Wis. 1851).

30 *Id.* at 360.

31 Brief for Appellant, p. 120, Petkus v. State Highway Comm'n, 24 Wis. 2d 643, 130 N.W.2d 253 (1964). In a memorandum decision the trial judge indicates that this instruction on the definition of special benefits was arrived at by the Civil Jury Instructions Committee of the Circuit Judges.

court. Further, the position of the state was based on a theory of peculiar relationship which the court characterized as "proximity."[32] If the court meant "proximity" in its broadest sense there would not necessarily be a peculiar relationship between the parcel in question and the improvement. The benefit from the improvement might be shared to some degree with many other parcels. It might be the same kind of benefit as that shared with the general public. It might not, therefore, qualify as a special benefit.

Because of the confusion which exists in this area, it has been suggested that it would be realistic to abolish the distinction between general and special benefits.[33] Both would be set off against the compensation payable to the person involuntarily selling condemned property. The saving to condemnors which would result from such a rule might be substantial and thus would serve the goal of building public projects as economically as possible. Those who support this position point out that the party losing property through condemnation is in as good a financial position after the taking as he was before the taking. Therefore, he should not be able to complain that some of his neighbors fared even better.[34] Another reason which has been suggested for the abolition of the distinction between general and special benefits is the practical evidentiary problems involved in proving the existence and value of special benefits.[35]

Ibid. The instruction given by the trial judge in Hietpas v. State, 24 Wis. 2d 650, 130 N.W.2d 248 (1964), was almost identical to the instruction in *Petkus*. Brief for Appellant, p. 29, Hietpas v. State, *supra*.

32 Brief for Respondent, p. 12, Petkus v. State Highway Comm'n, *supra* note 31.

33 See Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833, 873 (1963).

34 *Id.* at 871.

35 The basic methods to prove special benefits are: opinions of expert and non-expert witnesses, Milwaukee & Miss. R.R. v. Eble, 3 Pin. 334 (Wis. 1851); evidence of recent sales of the subject parcel, Watson v. Milwaukee & M. Ry., 57 Wis. 332, 352, 15 N.W. 468, 477 (1883); and evidence of comparable parcels in the area, Bear v. Kenosha County, 22 Wis. 2d 92, 100, 125 N.W.2d 375, 380 (1963). The Wisconsin Supreme Court, in Hurkman v. State, 24 Wis. 2d 634, 130 N.W.2d 244 (1964), took judicial notice that the disparity in the opinions of expert witnesses is often so great as to be of little aid to the jury in determining value. This was restated in Weeden v. City of Beloit, 29 Wis. 2d 662, 139 N.W.2d 616 (1966).

The difficulty in using either sales of the parcel itself or sales of comparable parcels is isolating the value of the special benefit from the general benefit. The sale price of a parcel after the condemnation will include both of these elements of benefit.

In Hietpas v. State, 24 Wis. 2d 650, 130 N.W.2d 248 (1964), the court indicated that statistical evidence might be introduced to show the change in land-use patterns surrounding improvements and the increase in market value of the land. This assumes that the study would meet certain standards set out by the court. It would seem that a valid land-use study could be made, based on the records of local planning agencies. To the extent that a study on land values is based on the opinions of experts not avail-

In any major recasting of the rules relating to setoff of benefits, these factors must be weighed against the countervailing principle of providing substantially equal treatment for neighboring landowners. It is no doubt within the province of the state legislature to determine what the rule relative to setoff of benefits should be.[36] As long as the *Petkus* decision is law, however, it is submitted that a rule which limits setoff to those benefits which are shared only by other parcels abutting the public improvement rests on a sound base.

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able for cross examination, there may be difficulty with the rule against hearsay evidence.

[36] McCoy v. Union Elevated R.R., 247 U.S. 354, 365-66 (1918).