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“Economic Impact” in Regulatory Takings Law

Steven J. Eagle*

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I. Introduction

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The *economic impact of the regulation on the claimant* and, particularly, the extent to which the regulation has inter-

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ferred with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.¹

This Article discusses and evaluates the role of the *Penn Central* “economic impact of the regulation on the claimant” test in takings law, and how that impact should be measured. Part I begins with a conceptual discussion of the relationship between property and its owner for purposes of takings claims. Part II then considers how “economic impact” should be defined and measured, with emphasis on recent cases.

It is not clear why the “economic impact” of a government action affecting property should be relevant to whether there has been a taking. After all, an insurance company, for instance, must pay indemnification regardless of the impact of a casualty loss on the insured’s wealth. The short answer is that the Supreme Court generally ascertains whether there has been a “taking” in the first instance by using the ad-hoc, multifactor test that had its genesis in *Penn Central*, and that “[t]he economic impact of the regulation on the claimant” is one of three factors that *Penn Central* identified as having “particular significance.”²

Summing up its regulatory takings jurisprudence, the Court stated, in *Lingle v. Chevron U.S.A. Inc.*,³ that “the *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”⁴ The “legitimate interest” clause of that quotation should be related to another statement in *Penn Central*: “Primary among those [three enumerated] factors are [t]he economic impact of the regulation on the claimant and, *particularly*, the extent to which the regulation has interfered with distinct investment-backed expectations.”⁵ Some lower courts have inferred from this “particular” emphasis that “investment-backed expectations” is “the primary” *Penn*

1. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal citations omitted) (emphasis added).

2. *Id.*

3. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

4. *Id.* at 540.

5. *Id.* at 538-39 (emphasis added).

Central factor.⁶ From that perspective, it seems the Court has relegated the “economic impact” factor to a secondary role, and consequently failed to delineate the factor’s contours with respect to “investment-backed expectations” or to provide more guidance as to how “impact” should be calculated.

“[E]conomic impact . . . on the claimant” must take into account not only “distinct investment backed expectations,” but also the “character” of the governmental action, and possibly other factors as well. We also must consider that “impact,” as the U.S. Supreme Court sketches it, has a dimension of “what” is affected as well as “who” is affected. These two dimensions emerge from *Penn Central*’s reference to the unit of property affected as the “parcel as a whole.”⁷

Because of *Penn Central*’s “chronic vagueness,” Professor John Echeverria noted, the Supreme Court “appeared poised to jettison” the case’s analysis completely.⁸ However, perhaps for want of a better alternative, the Court subsequently confirmed *Penn Central* as the “polestar” of its regulatory takings jurisprudence.⁹ With tepid praise, Professor Echeverria looked back at *Penn Central* as “the only plausible path to reform of regulatory takings doctrine,” and added that “the challenge ahead is figuring out how to convert *Penn Central* into the foundation for a manageable legal doctrine.”¹⁰ Our work is cut out for us.

Although the Supreme Court in *Penn Central* described the three factors it mentioned only as possessing “particular significance,” it has become conventional for courts to treat their enumeration as a comprehensive checklist. Thus, the U.S. Court of Appeals for the Federal Circuit recently noted: “*Penn Central* considered and balanced three factors: (1) economic impact, (2) reasonable investment backed expectations, and (3) the character of the government action.”¹¹ In various cases, including one examined later

6. See *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (asserting “That ‘primary factor,’ ‘the extent to which the regulation has interfered with distinct investment-backed expectations,’ is fatal to the Guggenheims’ claim.”).

7. *Penn Central*, 438 U.S. at 130-31.

8. John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10471, 10471 (2009).

9. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 336 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)).

10. Echeverria, *supra* note 8, at 10472. This seems reminiscent of then-Secretary of Defense Donald Rumsfeld’s observation that “you go to war with the army you have, not the army you might want or wish to have at a later time.” Eric Schmitt, *Troops’ Queries Leave Rumsfeld on the Defensive*, N.Y. TIMES, Dec. 9, 2004, at A1.

11. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1332 (Fed. Cir. 2012) (quoting *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359,

in this Article, *CCA Associates v. United States*,¹² the Court has declined to examine the extent to which other tests should be included in the balance,¹³ how the three enumerated tests might be weighted, or how many tests the claimant has to satisfy, and by what standard.¹⁴

As Professor John Fee observed, “[t]he factors that *Penn Central* says to balance . . . cannot be reconciled with a classical conception of property rights.”¹⁵ In the present author’s view, evaluating “the claimant” and “economic impact” under *Penn Central* and its progeny is an exercise in building upon what Professor Carol Rose memorably termed “crystals and mud.”¹⁶ As it has metastasized, *Penn Central* has become an amalgam of hard-edged tests, prongs, and demands for calculations reeking of precision, all resting upon a foundation that is imprecise, subjective, and self-referential in nature.

II. Evaluating “the Claimant” and “Economic Impact”

A. The Constitution, the Takings Clause and Property

Normally, property rights with respect to things are a function of the general law and any preexisting relationship among the parties that might give rise to privity of contract. Thus, grocers are not obligated to sell food to needy persons at a discounted price in the absence of an agreement to do so.¹⁷ On the other hand, the State, serving as a mediating institution, might distribute food stamps and impose the cost on taxpayers. Providing for the

1362 (Fed. Cir. 2009)). Interestingly, *Hearts Bluff* did not quote the following sentence in the earlier case: “*Penn Central* provides an ad hoc analysis allowing holistic consideration of the relevant factors.” *Schooner Harbor*, 569 F.3d at 1362.

12. *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), *cert. denied*, 129 S.Ct. 1313 (Feb. 23, 2012). See *infra* Part C. for discussion.

13. Compare *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997) (enumerating ten regulatory takings factors in addition to the three posited in *Penn Central*, and adding that “instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering.”).

14. See, e.g., *CCA Assocs.*, 667 F.3d 1239 (raising issues stated in text).

15. John E. Fee, *The Takings Clause As A Comparative Right*, 76 S. CAL. L. REV. 1003, 1033 (2003).

16. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

17. See *Pennell v. City of San Jose*, 485 U.S. 1, 21 (1988) (Scalia, J., concurring in part and dissenting in part).

basic needs of the indigent is a public function, and the generality exempts such levies from the purview of the Takings Clause.¹⁸

Penn Central observed that, in *Armstrong v. United States*,¹⁹ the court “recognized that the ‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”²⁰ The Court subsequently enshrined this philosophy as the “*Armstrong* principle.”²¹

Were the Constitution’s concern limited to “fairness and justice,” substantive due process might be the only protection that individuals require. Both the Contracts Clause²² and the Takings Clause²³ might be rendered superfluous, and we all could dwell happily in a restored *Lochnerian* world.²⁴ The suggestion in *Penn Central* that our concern is with “economic injuries”²⁵ belies the dignitary interests and political implications that underlie protection of contract²⁶ and property.²⁷ Furthermore, economic “injury” may be rectified through tort law, although waiver of the United States’ sovereign im-

18. See generally, Eric Kades, *Drawing the Line Between Taxes and Takings: the Continuous Burden Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002).

19. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

20. *Penn Central*, 438 U.S. at 123 (quoting *Armstrong*, 364 U.S. at 49).

21. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002).

22. U.S. CONST. art. I, § 10 (“No State shall pass any . . . Law impairing the Obligation of Contracts . . .”)

23. U.S. CONST. amend V. (“[N]or shall private property be taken for public use, without just compensation”).

24. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating labor regulation under economic substantive due process). For a general critique of *Penn Central* as a substantive due process test, see Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV. 988.

25. *Penn Central*, 438 U.S. at 124 (“this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that *economic injuries* caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” (emphasis added)).

26. See SIR HENRY MAINE, *ANCIENT LAW* 100 (J. M. Dent & Sons 1972) (1861) (noting that the “movement of the progressive societies has hitherto been a movement from Status to Contract.”). In feudal times, persons were not regarded as having equal innate dignity, and their respective rights were a function of their feudal status rather than their consensual bargain.

27. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (explaining that individuals express and develop their sense of self through their interactions with their property).

munity from tort liability is a matter of grace.²⁸ It is an important distinction that the United States possesses no such immunity from the obligation to pay just compensation for a taking.²⁹ This issue was a subtext of the Supreme Court's recent decision in *Arkansas Game and Fish Commission v. United States*,³⁰ where the Court held that damage resulting from recurrent, but not inevitable, federal flooding of Commission lands could constitute a taking, as opposed to a tort.

Respect for private property was an integral part of the English and colonial notion of liberty that was the backdrop of the United States Constitution.³¹ Private property insulates owners from dependence on State largess. The possibility that a sovereign could deprive citizens of property without compensation would lead to their demoralization and lack of independence. Those considerations underlay President John Adams's proclamation: "Property must be secured, or liberty cannot exist."³²

The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."³³ The Amendment refers to "property" and not to "owners." Nor does the text mention unfairness in connection with the burdens that owners might incur. This distinction is important in understanding the function of the "economic impact" test.

28. See, e.g. *United States v. Orleans*, 425 U.S. 807, 814 (1976) (holding action against United States impossible without express government waiver of immunity).

29. See *United States v. Clarke*, 445 U.S. 253, 257 (1980) (holding that a landowner is entitled to bring an action for inverse condemnation "as a result of 'the self-executing character of the constitutional provision with respect to compensation . . .'" (quoting 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972))).

30. *Arkansas Game & Fish Comm'n v. United States*, 133 S.Ct. 511 (2012).

31. See generally, Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77 (2002). See also PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, 87 (1st ed. 1997) (noting the prevalence of "'Lockean' ideals").

32. 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1850), quoted in JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1st ed. 1996). See generally, Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77 (2002).

33. U.S. CONST. amend. V.

B. Impact “on the Claimant”

Why does the first *Penn Central* factor refer to impact of the regulation “on the claimant”?³⁴ Taken literally, it might refer to the effect of the action on all of the claimant’s property. Instead, the Court always has referred to the impact on claimant’s relevant property, which *Penn Central* described as “the nature and extent of the interference with rights in the parcel as a whole.”³⁵ This exercise, of course, requires a determination of what the “parcel as a whole” actually is. The answer to this ostensibly simple question is not apparent, despite the growth of a cottage industry of judicial and academic scholarship devoted to it.³⁶

Thus, *Penn Central* considers “impact” not upon a right that the law would regard as “property,” nor upon “the claimant,” but rather on some hybrid that might be called “the claimant’s ownership.”³⁷ The overall effect, drawing from Professor Fee, is that *Penn Central*’s impact-per-acre is a function of the number-of-ownerships-per-acre. The smaller each holding, the more likely it is that a regulation significantly affecting a given area of land would be considered a taking.³⁸ Fee concludes that “[t]his is fundamentally inconsistent with the classical idea of property as a fungible entitlement.”³⁹

34. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (referring to “[t]he economic impact of the regulation on the claimant”).

35. *Penn Central*, 438 U.S. at 130-31.

36. See, e.g., *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 427-30 (2011) (noting, *inter alia*, that factors to be taken into account include the extent to which an owner’s separately deeded parcels are contiguous, the dates on which such parcels were acquired, whether the owner employs them as a single economic unit, and whether sales of parts of an original parcel were precedent and unrelated to particular government restrictions at issue in the case); Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003) (illustrating and explaining common “parcel as a whole” complications); Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 597-600 (2012) (asserting that contiguous parcels with no overlap of legal ownership cannot be aggregated under “parcel of a whole” simply because neighborly cooperation provides mutual enhancement of value).

37. See *infra* Part C. (discussing *Penn Central*’s conflation of owner and ownership and its reflection in confusion in applying the economic impact test).

38. Fee, *supra* note 15, at 1033 (“[W]hen a single estate is partitioned and subdivided among numerous owners, the sum of private usage rights increases as the government’s power of regulation decreases; or, when an owner purchases and unites multiple estates into a single estate, the sum of private usage rights decreases as the government’s police power increases.”).

39. *Id.* at 1033-34.

Professor Echeverria did not disagree, although he added that, “on balance, the parcel rule helps produce fairer outcomes in takings cases. The subjective losses experienced by property owners will vary depending upon the size of the owners’ holdings.”⁴⁰ Thus, *Armstrong’s* call for “fairness and justice” might be deemed a right of landowners only in the aggregate.⁴¹ This is quite a distance from then-Justice Rehnquist’s observation in *Penn Central* that “[t]he Fifth Amendment does not allow simply an approximate compensation but requires ‘a full and perfect equivalent for the property taken.’”⁴²

Somewhat incongruously, although the “parcel as a whole” produces more relative impact as parcels grow smaller, it is defended precisely because it might preclude that result. Professor Margaret Radin’s term “conceptual severance” often is invoked in this regard.⁴³ While it is true an owner might claim a complete deprivation by cherry-picking a miniscule property right that is completely vitiated by the government’s action, the government also can play the game. While “a taking can appear to emerge if the property is viewed too narrowly,” it is just as true that “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined.”⁴⁴

It would be much more straightforward if a taking simply could be related to “property;” but that would require an objective definition of the term. Professor Fee has suggested that we consider whether a horizontal relevant parcel proposed by the claimant has “independent economic viability.”⁴⁵ I have suggested a “commercial unit” test, borrowing from Uniform Commercial Code § 2-608(1), under which the claimant could choose any unit of property as the relevant parcel but would have to establish that the selection is a unit used generally in real estate transactions in the area.⁴⁶ Neither approach has gained traction.⁴⁷

40. Echeverria, *supra* note 8, at 10475 n.37.

41. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

42. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893)).

43. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667 (1988).

44. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991).

45. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1557-62 (1994).

46. STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-7(e)(5) (5th ed. 2012).

47. See Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 613-15 (2012) (criticizing approaches).

C. “Impact” and “Expectations” as Separate *Penn Central* Factors

It now is conventional to think of the paragraph in *Penn Central* embodying the enumerated factors⁴⁸ as the *Penn Central* “test.” However, “the opinion did not give any indication that it viewed the paragraph . . . as a test, much less an outcome-determinative test, for assessing regulatory takings.”⁴⁹

More pointedly, to the extent that the Court in *Penn Central* identified discrete factors for consideration, it identified two, rather than three, such factors: (1) the impact of the challenged regulation on the claimant, viewed in light of the claimant’s investment-backed expectations and (2) the character of the governmental action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings than are garden-variety land use regulations. Someone who knew nothing of modern takings law would be, to say the least, hard pressed to distill a discrete three-factor analysis from the opinion in *Penn Central*.⁵⁰

The ubiquitous structured discussion in takings cases, following the familiar three-factor track, is not a creature of *Penn Central*, but rather first appeared the following year, in *Kaiser Aetna v. United States*.⁵¹ Thus, it was *Kaiser Aetna* that first split economic impact from investment-backed expectations.

There are substantial reasons for combining the “economic impact” and “distinct investment-backed expectations” factors.⁵² The Supreme Court should revisit the conceptual foundations of *Penn Central* in a comprehensive way. More narrowly, the U.S. Court of Appeals for the Federal Circuit should

48. See *supra*, note 1 and accompanying text (reproducing referenced paragraph).

49. Gary Lawson, Katharine Ferguson, and Guillermo A. Montero, “Oh Lord, Please Don’t Let Me Be Misunderstood: Rediscovering the *Matthews v. Eldridge* and *Penn Central* Frameworks,” 81 NOTRE DAME L. REV. 1, 31-32 (2005).

50. *Id.* at 32.

51. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

52. See *infra* Part 4. for discussion.

reconsider en banc whether “impact” is to be measured primarily by value or by return on equity.⁵³

III. Measuring Economic Impact on the Claimant

Having previously focused on “the claimant,” this Article now turns to those practical factors that can be used to measure the “impact” of a regulation.

It is useful at the outset to stress that many things that have economic value are not “property.” A motel along an old U.S. highway might lose most value when a parallel interstate highway is built nearby, but the motel owner never possessed a legal right to have tired long-distance travelers pass his door. For the same reason, a taking cannot be supported by loss of value alone.⁵⁴ As the Federal Circuit has applied it, the determination of whether there is a regulatory taking is a two-step process. “First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.”⁵⁵ “Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest.”⁵⁶

The Supreme Court’s opinion in *Penn Central* contained statements suggesting the need to establish a quantum of economic impact that would augur in favor of a taking.

We now must consider whether the interference with appellants’ property is of such a magnitude that “there must be an exercise of eminent domain and compensation to sustain [it].” That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.⁵⁷

53. See *supra* Part B. for discussion. The Federal Circuit applies the rule that earlier decisions prevail unless overruled en banc. *USPPS, Ltd. v. Avery Dennison Corp.*, 676 F.3d 1341, 1346-47 (Fed. Cir. 2012).

54. See *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (“[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”).

55. *Air Pegasus of D.C., Inc. v. U.S.*, 424 F.3d 1206, 1212 (Fed. Cir. 2005) (quoting *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed.Cir.2004), cert. denied, 545 U.S. 1139 (2005)).

56. *Id.* at 1213 (quoting *Am Pelagic*, 379 F.3d at 1372).

57. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

However, as then-Justice Rehnquist pointed out in a footnote, the majority's economic terminology was problematic.

Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. . . . The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have "an unduly harsh impact upon the owner's use of the property," *ante*, at [127]; at another point, the question is phrased as whether Penn Central can obtain "a 'reasonable return' on its investment," *ante*, at [136]; and, at yet another point, the question becomes whether the landmark is "economically viable," *ante*, at [138] n. 36.⁵⁸

As land economist William Wade observed, "[t]he footnote appears to point out politely that the majority was not schooled in the meanings of the economic terms used in their language."⁵⁹ Importantly, Wade concludes that *Penn Central* conflated factors concerning diminution of the value of the parcel resulting from regulation and factors relating to whether the cash flow generated by the parcel after regulation were so diminished as to make the use of the parcel not a viable investment.⁶⁰

A. General Methodology

1. Methods for Valuing Takings Losses

Where a taking is permanent and complete, all connection between the former owner and the condemned interest in land is terminated. If the interest taken were a fee simple, the basic measure of damages would be the fair market value of the fee at the effective date of the taking. If the interest taken were less than a fee simple, the measure of damages would be the fair market value of that interest. Given the thin or nonexistent market for such interests, however, the "with and without" method is generally employed. The fair market value of the owner's interest, subject to the government's

58. *Penn Central*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting).

59. William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to Penn Central*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10936, 10937 n. 11 (2011).

60. *Id.*

rights, is subtracted from the fair market value of the owner's interest prior to the taking. Where there are no suitable comparable parcels, appraisers use capitalized income to value commercial parcels, and replacement costs to value unique noncommercial structures, such as some houses of worship.

2. Treatment of Severance Damages and Government Benefits

In addition to just compensation for that part of a parcel that is taken, owners are entitled to damages for harm done to their remaining property.⁶¹ Especially where they own adjoining parcels with complementary uses, owners may receive "severance damages" for injury to their remaining land. "General benefits" from a project involving condemnation are conferred on the general public in the vicinity. On the other hand, "special benefits" are conferred on the condemnee. For example, if a transit station is built on condemned land next to the condemnee's office building, the condemnee likely would have received a special benefit. Members of the public walking to the station from some blocks away would receive only a general benefit.

Where severance damages are not claimed by the owner, evidence of benefits to the remainder is not admissible. Since benefits are raised as a defense to severance damages, it logically follows that damages must first be claimed before evidence of benefits can be offered. The condemning authority has the burden of proving that its project resulted in a measurable benefit to the owner's remaining land. To meet this burden, the government must offer proof that the increase in value of condemnee's remainder resulted directly and peculiarly from the public improvement, over and above that appreciation in value enjoyed by neighboring property.⁶²

The U.S. Supreme Court has held that offsetting benefits against severance damages is constitutional, but that the offset is limited to special benefits.⁶³ According to the leading eminent domain treatise:

Arguably, the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since the

61. See generally, NICHOLS ON EMINENT DOMAIN, § 8A.02.

62. NICHOLS ON EMINENT DOMAIN, § 8A.02 [5] (citations omitted).

63. *Bauman v. Ross*, 167 U.S. 548, 574 (1897) ("When, on the other hand, the part which he retains is *speciallly and directlly* increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened") (emphasis added).

condemnee is singled out and deprived of a share in the increased prosperity of his or her fellow citizens merely because the public happens to want a portion of the condemnee's land. The condemnee pays in taxation for his or her share of general benefits, just as other members of the public, and therefore, is entitled to receive his/her fair portion of the general advantages brought about by a public improvement. Nevertheless, a minority of states permit both special and general benefits to offset severance damages.⁶⁴

The principles of eminent domain also bear upon the nature of, and burden to establish, offsetting benefits that might ameliorate the impact of regulations in regulatory takings cases.⁶⁵ They explain why offsets from economic impacts resulting from regulations are limited to provisions establishing benefits in the regulations themselves, and not benefits contained in the general law.⁶⁶

Where a taking is temporary, the matter is more complex. Unfortunately, "commentators and courts alike have been unable to agree on a consistent measure of compensation for temporary regulatory takings and have instead adopted a wide range of formulations."⁶⁷ As Daniel Siegel and Robert Meltz have explained, whether there is a taking often depends on "(a) whether the Court deems the imposition physical, as opposed to a use restriction; (b) if physical, whether the Court considers the imposition to be temporary or permanent; and (c) if physical and temporary, whether the imposition is seen as partial or total."⁶⁸

This Article deals with these issues in the context of calculating the impact of temporary regulations recently litigated in the Federal Circuit's *Cienega Gardens*⁶⁹ and *CCA Associates*⁷⁰ lines of cases.⁷¹

64. NICHOLS ON EMINENT DOMAIN, § 8A.02 [6] (citing *Brand v. Union Elevated R. Co.*, 238 U.S. 586 (1915). "[A]lthough the majority of the Court failed to reach the constitutional question, four of the justices supported the opinion that setting off general benefits denied the owner just compensation and was a violation of due process.") *Id.*

65. See *infra* Part C. for discussion.

66. See *infra* Part C. (discussing offsetting benefits in economic impact cases).

67. Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 512, 496-499 (2010) (citing cases employing term).

68. *Id.* at 481.

69. See *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*Cienega X*).

3. “With and Without” Approach

It is difficult to measure the value of government restrictions directly, since there is no market for them. The usual approach to determine the impact of the regulation subtracts the value of a parcel with the regulation in place from the value of the parcel without the regulation.

Professor Echeverria cited, as a defect of the “with and without” approach, that its “one-sided arithmetic grants a claimant credit for the negative effects of regulatory restrictions while giving the public no credit for the positive effects of regulation on the claimant’s property due to the restrictions on neighboring properties.”⁷² However, this analysis gives insufficient credit to the concept of “reciprocity of advantage.” Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*,⁷³ most famously used the term. The dissent of then-Justice Rehnquist in *Penn Central* was based, in part, on the lack of reciprocity between the few parcels that were burdened and the multitude that were not.⁷⁴ Using reciprocity of advantage, even a stringent burden placed on one property owner might be offset by the advantages of like burdens being imposed on neighbors. Even if there is a taking in theory, the implicit answer is that there is compensation in kind. The Supreme Court’s upholding of a strict regulation affecting the French Quarter of New Orleans was based on just such reciprocity among Quarter merchants and the City’s tourist industry, generally.⁷⁵ Reciprocity of advantage has been a recurrent theme in Professor Richard Epstein’s work.⁷⁶

In addition, the opportunistic owner posited by Professor Echeverria is unlikely to launch a facial challenge to the offending regulation, since a successful challenge means relieving neighbors of the burden, leaving the plaintiff bereft of special advantage. In any event, litigating would be an “uphill battle.”⁷⁷ An “as applied” facial challenge is almost certain to falter

70. See *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), *cert. denied*, 129 S.Ct. 1313 (Feb. 23, 2012).

71. See *infra* Part B. for discussion.

72. Echeverria, *supra* note 8, at 10475.

73. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

74. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 139-140 (1978) (Rehnquist, J., dissenting).

75. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

76. See, e.g., Richard A. Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3, 11 (1986) (“Some takings can be justified by the police power; and for others implicit in-kind compensation (e.g., the benefit of regulation or taxes) may be provided to the persons whose property is taken, whether in whole or in part, so that the constitutional standard of just compensation is in fact met”).

77. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

where the neighbors are similarly regulated. Also, if one owner wins such a challenge, others will as well, with the probable outcome that the neighborhood is rezoned.

4. Regulated Value Minus Investment

Another method for determining the impact of a regulation is the relationship between a claimant's investment (for tax purposes, referred to as "cost basis") in the property, and the value of the property as restricted. The Court of Federal Claims used this method in *Walcek v. United States*,⁷⁸ where it said that "[t]he comparative value of the Property before and after the regulatory imposition is not the sole indicia of the economic impact of the regulation."⁷⁹ The Court there cited a Federal Circuit opinion, *Florida Rock Industries*,⁸⁰ for the proposition that, in assessing the severity of the economic impact of the regulations, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored."⁸¹

It is possible that the *Florida Rock* quotation overstated the Federal Circuit's mandate. *Florida Rock* found that the trial court had erred in some of its factual and legal determinations, and, at the end of the "conclusions" section of its opinion, provided the trial judge with some general instructions.

On remand, the court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking. In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.⁸²

Professor Echeverria stated: "When a property owner can at least recover his cost basis in the property, a takings claim should arguably be rejected regardless of what the with-and-without approach might show."⁸³ This statement seems problematic. The problem involves more than untangling the complexities of inflation and the general effects of government regulation on land prices in the area, which Echeverria noted.⁸⁴ More perva-

78. *Walcek v. United States*, 49 Fed. Cl. 248 (Fed. Cl. 2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

79. *Id.* at 266.

80. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed.Cir.1986), *cert. denied*, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987).

81. *Walcek*, 49 Fed. Cl. at 266 (quoting *Florida Rock Indus.*, 791 F.2d at 905).

82. *Florida Rock*, 791 F.2d at 905.

83. Echeverria, *supra* note 8, at 10475.

84. *Id.*

sively, the owner's very hard or astute work would not be captured in cost basis. Neither would a dramatic increase in land values in the area occasioned by factors such as its becoming a trendy tourist destination, the center of a dynamic new industry, or the scene of newly discovered mineral wealth. In any such situation, the owner might be able to produce compelling evidence that regulation had diminished the value of the specific parcel, although it was still comfortably above cost basis.

Finally, just as the denominator of "parcel as a whole" gives undue leverage to the effects of regulation on impact as parcels grow smaller,⁸⁵ the presence or absence of factors affecting cost basis, such as accelerated tax depreciation, similarly leverage impact under a regulated-value-minus-investment approach. Thus, were the recoupment of cost basis the determinant of impact, a regulation might not have severe impact if the claimant used specialized facilities, but might if it utilized raw land. While recoupment of the owner's investment is a useful concept, it should not be outcome determinative.

5. Loss of Profitability

Another measure of the impact of a regulation is the loss of business profits that results from it. This was a factor analyzed by the Federal Circuit in *Rose Acre Farms, Inc. v. United States*,⁸⁶ where the claim was based on strict government restrictions on egg sales, imposed after the farms tested positive for the presence of salmonella bacteria. The plaintiffs asserted that the restrictions substantially lowered earnings and thus constituted a taking. The court "reject[ed] the government's contention that a returns-based analysis is per se less suitable than one based on diminution in value in the present case."⁸⁷ The Court of Federal Claims' decision in *Walcek v. United States* also makes clear that profit is an impact factor.⁸⁸

On this point, it is instructive that *Penn Central* itself described the petitioner's loss in terms of income and profitability. The Court stated that "the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself . . . even if the Terminal proper could never operate at a reasonable profit"⁸⁹

85. See *supra* notes 38-39 and associated text for discussion.

86. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177 (Fed. Cir. 2004).

87. *Id.* at 1188.

88. *Walcek*, 49 Fed. Cl. at 266-67.

89. *Penn Central*, 438 U.S. at 121.

B. Federal Circuit Adopts, Then Abandons, “Return on Equity” Impact Analysis

In *First English*,⁹⁰ the Supreme Court ruled that states had to provide a compensation remedy for temporary takings, and that mere invalidation of the offending regulation was insufficient. Subsequently, in *Tahoe-Sierra*,⁹¹ the Court ruled that the claimants’ losses could not be measured with respect to the period that the prohibition on use was in effect, but rather had to be measured with respect to their fee simple interests, and not with respect to the term of years carved out by the government.⁹² Justice Stevens explained this rejection of temporal segmentation as an application of the “parcel as a whole” rule the Court enunciated in *Penn Central*.⁹³ In two recent lines of cases culminating in *Cienega Gardens v. United States (Cienega X)*,⁹⁴ and *CCA Associates v. United States*,⁹⁵ the U.S. Court of Appeals for the Federal Circuit interpreted *Tahoe-Sierra* to preclude the use of “return on equity” analysis to determine the impact of a regulation on takings claimants. Instead, the Federal Circuit will consider the effects of temporary regulatory takings only as they affect the value of the claimants’ fee interests.

1. Background of Housing Preservation Acts

The background of the housing preservation acts that gave rise to the *Cienega* and *CCA Associates* cases is summarized in *Cienega X*.⁹⁶ In 1934, Congress enacted the National Housing Act⁹⁷ to enhance the Nation’s stock of affordable housing. During the 1960s, it augmented its subsidies for local public housing authorities by providing incentives for investors to provide additional low-income housing.⁹⁸ The government “provided below-market-rate mortgages.”⁹⁹ “The mortgage contracts were for forty-year mortgages and included an option to prepay the mortgage without HUD approval after

90. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

91. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

92. *Id.* at 331-32.

93. *Id.* at 332.

94. *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*Cienega X*).

95. *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), *cert. denied*, 129 S.Ct. 1313 (Feb. 23, 2012).

96. *Cienega X*, 503 F.3d at 1270-73.

97. Pub.L. No. 73-479, § 1, 48 Stat. 1246 (1934).

98. *Cienega X*, 503 F.3d at 1270.

99. *Id.*

twenty years. The regulations under the statute were consistent with these contracts, including providing for prepayment without HUD approval after twenty years.”¹⁰⁰ Congress further authorized FHA insurance to protect lenders against default, provided for a HUD contribution towards the owner’s down payment, and provided tax benefits for investors.¹⁰¹

In return, HUD would oversee and restrict operation of the housing units, including important management decisions and increases in rent.¹⁰² The owners’ annual return on their equity investments would be limited to six percent of their initial equity investment.¹⁰³ “The restrictions of the regulatory agreements were effective for as long as HUD insured the mortgage on the property, *i.e.*, until the mortgage was paid off. The exercise of the prepayment right under the mortgage agreement with the mortgage lender would thus have the effect of terminating the regulatory agreement.”¹⁰⁴ Thus, “[p]repayment removed regulatory restrictions and allowed participation in the conventional housing market.”¹⁰⁵ However:

In the 1980s, Congress became concerned that as prepayment dates arrived the limited partnerships would prepay the mortgages; that the restrictions imposed during the mortgage period would expire; and that the housing stock represented by these projects would be withdrawn from the low-income market and converted to traditional apartment units, rented at market rates.¹⁰⁶

As a result, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) in 1988¹⁰⁷ (a temporary measure), and the Low-Income Housing Preservation and Resident Homeownership Act of 1990¹⁰⁸ (LIHPRHA) in 1990 (initially planned as permanent). Both of these measures were designed, as a Congressional report put it, “to ‘balance the public policy need to preserve housing for low income families with the perceived contractual rights of the owners.’”¹⁰⁹ Under LIHPRHA, most pertinent to the cases discussed,

100. *Id.*

101. *Id.* at 1271.

102. *Id.*

103. *Id.*

104. *Id.*

105. *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 585 (2010).

106. *Cienega X*, 503 F.3d at 1272.

107. Pub.L. No. 100–242, § 202, 101 Stat. 1877 (1988).

108. Pub.L. No. 101-625, 104 Stat. 4249 (1990).

109. *Cienega X*, 503 F.3d at 1272 (quoting H.R. Rep. No. 101-559, at 75 (1990)).

Congress restricted the rights of owners by requiring them as a condition of exiting the program to offer their property for sale to owners that would preserve the rent restrictions and barring the owners from exiting the programs (by effectively barring prepayment of the mortgages) while the properties were offered for sale.¹¹⁰

However, Congress subsequently restored prepayment rights, effective April 29, 1996.¹¹¹ This did not affect takings cases that previously had been filed. Additionally, the Federal Circuit had ruled earlier that HUD was not in breach of a duty to accept prepayment because, technically, HUD and the borrowers were not in privity of contract.¹¹²

Both the *Cienega* and *CCA Associates* cases were filed by claimants who asserted that the five-year suspension of their rights to prepay their mortgages, and thus escape the onerous requirements of low-income housing obligations, constituted temporary regulatory takings.

2. Temporary Takings in Light of “Parcel as a Whole”

The decisions in *Cienega X*¹¹³ and *CCA Associates*¹¹⁴ raise fundamental questions about the meaning, or even existence, of the “temporary taking.” At the outset, it is not clear whether even a physical invasion and ouster that subsequently is terminated by the government entity can constitute a temporary taking.¹¹⁵ In *Seiber v. United States*,¹¹⁶ the owner contended that a two-year prohibition on economically viable use constituted a taking under the *per se* rule of *Lucas*.¹¹⁷ The government argued that this result was precluded by *Tahoe-Sierra*, since “there is no such legal category as a temporary categor-

110. *Id.*

111. *Id.* at 1274 (citing the Housing Opportunity Program Extension Act of 1996, Pub.L. No. 104-120, 110 Stat. 834 (1996) (“HOPE”).

112. *Id.* (citing *Cienega Gardens v. United States*, 194 F.3d 1231, 1234, 1246 (Fed. Cir. 1998) (*Cienega IV*). While bound by this precedent, the Court of Federal Claims spoke disparagingly of it, noting “there is no doubt that the government, by providing the forms for the documents that were executed in this case, intended to provide the basis for a single, integrated transaction.” *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 592 (2010).

113. *Cienega X*, 503 F.3d 1266.

114. *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), *cert. denied*, 129 S. Ct. 1313 (Feb. 23, 2012).

115. See generally, Siegel & Meltz, *supra* note 67, at 496-99.

116. *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004).

117. *Id.*

ical taking because by its very nature a temporary taking allows a property owner to recoup some measure of its property's value."¹¹⁸ The Federal Circuit did not address the issue, but observed that one of its earlier cases had "explained that the Supreme Court may have only 'rejected [the] application of the per se rule articulated in *Lucas* to temporary development moratoria,' and not to temporary takings that result from the rescission of a permit requirement or denial."¹¹⁹

In its initial decision in *CCA Associates* in 2007,¹²⁰ the Court of Federal Claims restated the three different methods that courts had used to measure the economic impact of a regulation on the claimant. The first involved the change in fair market value due to the regulation.¹²¹ The second measure looked to the "claimant's ability to recoup its capital."¹²² The final method the court utilized "examines a claimant's return on equity under a given regulatory regime in comparison to the return on equity that would be received but for the alleged taking."¹²³

The 2007 Claims Court opinion noted that the Federal Circuit, when faced with temporary takings claims "similar in all respects to that at issue here," took the same return-on-equity approach.¹²⁴

In *Cienega VIII*, the Court of Appeals compared the annual rate of return on the owners' real equity in their properties to the 8.5 percent return on "low-risk Fannie Mae bonds." This approach "best measures the impact of ELIHPA and LIHPRHA on" the owners of Section 221(d)(3) properties because the alleged taking involves lost streams of income at an operating property, not the physical transfer of a piece of undeveloped property to the government and the subsequent return of that property to the owner. As the Federal Circuit explained:

The Owners' theory of recovery is *not* that their fee simple estates were taken or their land rendered "valueless." The Owners' entitlement to compensation is based on the taking of the real prop-

118. *Id.*

119. *Id.* (quoting *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350-52 (Fed. Cir. 2002)).

120. *CCA Assocs. v. United States*, 75 Fed. Cl. 170 (2007).

121. *Id.* at 195 (citing, e.g., *Maritrans v. United States*, 342 F.3d 1344 at 1358 (Fed. Cir. 2003)).

122. *Id.* (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1363 (Fed. Cir. 2001)).

123. *Id.* (citing *Penn Central*, 438 U.S. at 129 ("capable of earning a reasonable return")).

124. *Id.*

erty interests reflected in the mortgage loan notes and the Regulatory Agreements. The difference is that the Owners' loss of the contractual prepayment rights was both total and immediate. They were barred from the unregulated rental market and other more lucrative property uses.¹²⁵

However, *Cienega X* subsequently rejected the return-on-equity approach, declaring that the Supreme Court "has made clear that in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation."¹²⁶ The court noted that the Supreme Court had stated that separate consideration of the airspace subject to restrictions in *Penn Central* was "quite simply untenable," and that "[t]aking jurisprudence does not divide a single parcel into discrete segments . . ."¹²⁷ Turning to the temporal application of the *Penn Central* "parcel as a whole" rule, *Cienega X* stated that "[i]n *Tahoe-Sierra*, the necessity of considering of the overall value [sic] of the property was explicitly confirmed in the temporary regulatory takings context."¹²⁸

Furthermore, *Cienega X* added, the return-on-equity approach in temporary regulatory takings cases could not be justified by such temporary physical appropriation cases as *Kimble Laundry Co. v. United States*, where the Court held that just compensation was "the rental that probably could have been obtained."¹²⁹ The Federal Circuit noted that *Kimble Laundry* used return-on-equity to measure just compensation, not to find a taking, and that *Tahoe-Sierra* deemed it "inappropriate" to treat physical takings cases as "controlling precedents" for regulatory takings claims.¹³⁰ The justification for the *Tahoe-Sierra* "inappropriate" language is that

Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare,

125. *Id.* at 195-96 (quoting *Cienega VIII*, 331 F.3d at 1344).

126. *Cienega Gardens v. United States*, 503 F.3d 1266, 1280 (*Cienega X*) (citing, e.g. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002)).

127. *Id.* (quoting *Penn Central*, *Tahoe-Sierra*).

128. *Id.* at 1281 (citing *Tahoe-Sierra*, 535 U.S. at 331).

129. *Id.* at 1281 (quoting *Kimble Laundry*, 338 U.S. 1, 7 (1949)).

130. *Id.* at 1281-82 (quoting *Tahoe-Sierra*, 535 U.S. at 323).

easily identified, and usually represent a greater affront to individual property rights.¹³¹

These distinctions might augur for a presumption of “inappropriateness” in many cases, perhaps most. However, they hardly seem to justify an absolute rule precluding return-on-equity as the proper measure of the “impact” factor in takings determinations.

The Federal Circuit vacated the Court of Federal Claims’ 2007 decision in *CCA Associates* and remanded in light of the fact that the decision was premised on *Cienega VIII*’s approval of return-on-equity analysis of temporary regulatory takings cases, subsequently repudiated in *Cienega X*.¹³² In its subsequent 2010 opinion in *CCA Associates*,¹³³ the Claims Court undertook to determine the economic impact of the regulation with respect to *CCA Associates*’ entire ownership. *Cienega X* “proposed two possible ways ‘to compare the value of the restriction to the value of the property as a whole.’”¹³⁴

First, a comparison could be made between the market value of the property with and without the restrictions on the date that the restriction began (the change in value approach). The other approach is to compare the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value).¹³⁵

Evidence was not presented on the discounted lost income approach, so the court employed the change in value approach. It determined, pursuant to a joint stipulation by the parties, that, using the methodology of *Cienega X*, there was an economic impact of 18 percent as a result of the Preservation Statutes, not considering statutory benefits conferred by the statutes.¹³⁶ The Claims Court’s 2007 opinion, premised on the *Cienega VIII* standard, found a corresponding economic impact of 81.25 percent during the five-year period when the prepayment prohibition was in effect.¹³⁷ On appeal, the Federal Circuit stated:

131. *Tahoe-Sierra*, 535 U.S. at 324.

132. *CCA Assocs. v. United States*, 284 Fed. Appx. 810, 811 (Fed. Cir. 2008).

133. *CCA Assocs. v. United States*, 91 Fed. Cl. 580 (2010).

134. *Id.* at 612 (quoting *Cienega X*, 503 F.3d at 1282).

135. *Id.* (quoting *Cienega X*, 503 F.3d at 1282).

136. *Id.* at 612-13.

137. *CCA Assocs. v. United States*, 667 F.3d 1239, 1245-46 (Fed. Cir. 2011).

In light of the facts of this case, we cannot conclude that an 18% economic impact qualifies as sufficiently substantial to favor a taking. Because we are bound by the economic impact methodology of *Cienega X*, we must conclude that the Court of Federal Claims erred when it held that this factor supported a taking.¹³⁸

The court pointedly noted that, while it was “bound by the law” of *Cienega X*,¹³⁹ “*Cienega X* makes it virtually impossible for any ELIHPA or LIHPRHA plaintiff to establish the severe economic impact necessary for a takings.”¹⁴⁰

3. *Cienega X* Could Hasten the Demise of Temporary Takings

The Supreme Court’s *Tahoe-Sierra* decision treated extended development moratoria as an opportunity to impose the “parcel as a whole” framework on “the temporal aspect of the owner’s interest.”¹⁴¹

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because *the property will recover value as soon as the prohibition is lifted*.¹⁴²

This statement is both doctrinally anomalous and economically uninformed. It contradicts the gravamen of the Supreme Court’s *First English* holding, which, although providing for a remedy only, necessarily is predicated on the existence of compensable temporary takings.¹⁴³ It also suggests

138. *Id.* at 1246.

139. *Id.* at 1244 (quoting *Hometown Financial, Inc. v. United States*, 409 F.3d 1360, 1365 (Fed. Cir. 2005) (“[W]e are bound to follow our own precedent as set forth by prior panels.”)).

140. *Id.* at 1246.

141. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 331-32 (2002).

142. *Tahoe-Sierra*, 535 U.S. at 331-32 (emphasis added) (internal citations omitted).

143. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

that lost economic value could be restored through the miracle of compound interest.

In *First English*, the Court held that the Just Compensation Clause of the Fifth Amendment requires that a landowner be allowed to recover damages during the time that a taking is in effect.¹⁴⁴ The type of taking under consideration in *First English*, sometimes called a “retrospectively temporary taking,”¹⁴⁵ refers to a regulation intended to be permanent, but which retrospectively is truncated after a court finds a taking or the regulator is faced with a lawsuit that might plausibly be successful or some other undesirable outcome. It is difficult to understand why, having consummated an inverse condemnation of an interest in land, the condemnor should be free to unwind its actions. The inverse condemnee seeking damages presumably has relied, albeit unhappily, on the government’s action subsequently determined to constitute a taking being final.

According to *First English*, “[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”¹⁴⁶ But there is nothing “invalid” about the regulation from a takings perspective,¹⁴⁷ although it might be arbitrary or otherwise violative of due process.¹⁴⁸ Nor is it clear why government “retains” the right to a “do over,” to replace a choice that validly constrains the actions or possessions of citizens, though under the rubric of a taking for the public good rather than a police power device to prevent harm. When the former owners have rearranged their lives and finances in light of the condemnation of their property, it surely might be said that they have formed new “investment-backed expectations.” I have suggested elsewhere that it would be better to view the municipality’s retrospective choice not as an es-

144. *Id.* at 319 (“Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.”).

145. See Siegel & Meltz, *supra* note 67, at 496-97.

146. *First English*, 482 U.S. at 321.

147. See *Id.* 315 (noting the Fifth Amendment “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking”).

148. See *Lingle v. Chevron U.S.A.*, 544 U.S. at 531-32 (2005) (holding “substantially advance legitimate state interests” language of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) not a valid takings test, but rather a due process test. 544 U.S. at 540.

cape hatch from a taking, but rather as a taking coupled with a “put option” to retransfer the interest to the inverse condemnee.¹⁴⁹

The anomaly driving the Federal Circuit’s decision in *Cienega X*¹⁵⁰ is that it takes *Penn Central*’s “parcel as a whole” doctrine,¹⁵¹ adds to it the *Tahoe-Sierra* inclusion in that doctrine of “temporal segmentation,” and applies them in such a way as to vitiate the *First English* holding that temporary takings do exist, and under the Constitution require just compensation.

Cienega X accomplishes this by holding that the economic impact of a temporary taking should be calculated by its effect on the claimant’s “parcel as a whole,” which is to say, all of the claimant’s ownership. By judging the economic impact of temporary regulations and permanent regulations on a unitary scale, *Cienega X* means that, in order to prevail on the “economic impact” test of *Penn Central* for a temporary regulation, the claimant would also have to prevail if the regulation were permanent.

There is no need for the Federal Circuit to take such a dogmatic position. While “parcel as a whole” seems clear at first blush, it requires, and has received, much interpretation.¹⁵² For instance, in *Lost Tree Village Corp. v. United States*,¹⁵³ the government objected to parts of the claimant’s original parcel that were being sold excluded from the “parcel as a whole.” The court responded:

[F]acts regarding the progression and status of development plus sale of potentially-related properties are aspects of property ownership that reflect manifestations of a property owner’s use and projected use of property. If the particular circumstances and realities of usage indicate that temporal considerations are salient, then temporality has to be taken into account in determining the “parcel as a whole.”¹⁵⁴

The Claims Court added: “Quite simply, there are very few *per se* rules in regulatory takings cases.”¹⁵⁵

149. See Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIR. B.J. 485-511 (2001).

150. *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*Cienega X*).

151. *Penn Central*, 438 U.S. at 131.

152. See *supra* note 36 and accompanying text.

153. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412 (2011). It should be noted that the author, Judge Charles F. Lettow, also wrote the Claims Court’s opinions in the *CCA Associates* cases.

154. *Id.* at 430.

155. *Id.* at 430 n.28 (citing *Tahoe-Sierra*, 535 U.S. at 322).

Under the same reasoning, if it is persuasive that the shorter time horizon and cash-flow imperatives of housing investors make the terminations of their investments prior to the expiration of the natural life of the apartment buildings imperative, there is no absolute barrier in “parcel as a whole” that should preclude that outcome.

Also, what could Justice Stevens have meant when he wrote in *Tahoe-Sierra* that “a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted”?¹⁵⁶ A landowner is no more made whole by such “lifting” than is a person suffering from a debilitating disease made whole by a cure many decades later. A landlord who is compelled to receive below-market rents today will not, for that reason, receive above-market rents in the future. A person who was deprived of most of her capital today and prudently invests the remainder might have a sum “lifted” to the original capital many years later, but that does not equate to the individual’s wealth if the entire sum was originally available for investment.

The foregoing are illustrations of what, in finance, is known as the “time value of money.” Sums of money can only meaningfully be compared across time if they are discounted by an interest factor to the same date. The better way of explaining Justice Stevens’ comment is that it is true that a dollar at some point in the distant future is not “worthless” today; it merely has a miniscule value. The value would be small enough either to pass muster under *Lucas*, or to be a “severe” diminution under the *Penn Central* impact test.

The inconsistency between *First English* and *Tahoe-Sierra* is both sufficiently fundamental and apparent as to lend strength to Judge Alex Kozinski’s suggestion that the latter decision was intended to undermine the former. In his dissent from the Ninth Circuit’s denial of the petition for rehearing of *Tahoe-Sierra* en banc,¹⁵⁷ Kozinski noted

Justice Stevens dissented from *First English* because he disagreed with the Court’s “conclu[sion] that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time.” Justice Stevens would have held that a temporary regulation cannot be a taking, even though it deprives the owner of all present uses, because the property retains value based upon its future uses. That reasoning, embraced by no other member of the Supreme Court, is adopted by the panel in this

156. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l. Planning Agency*, 535 U.S. 302, 332 (2002).

157. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 228 F.3d 998 (9th Cir. 2000).

case. While the opinion nowhere cites Justice Stevens' *First English* dissent, the reasoning-and even the wording-bear an uncanny resemblance.¹⁵⁸

When *Tahoe-Sierra* reached the Supreme Court, Justice Stevens lavishly quoted Judge Reinhardt's Ninth Circuit panel opinion, and left unacknowledged that Reinhardt had closely paraphrased his own *First English* dissent.

4. Combining "Impact" and "Expectations"

As noted earlier,¹⁵⁹ the three-factor regulatory takings test did not arise full-blown in *Penn Central*, but rather emerged from subsequent Supreme Court efforts to build a logical structure from *Penn Central's* nebulous foundation.¹⁶⁰ Those approaching *Penn Central* for the first time almost invariably believe that the "distinct investment-backed expectations" test is but a subset of the "economic impact on the claimant" test.¹⁶¹ A combined test, along the lines of "impact of the challenged regulation on the claimant, viewed in light of the claimant's own investment-backed expectations"¹⁶² would help in clarifying takings jurisprudence.

As land economist William Wade notes, the *Penn Central* text (as opposed to tests) does include language that "reveals financial and economic meaning" both for impact and expectations.¹⁶³ As Wade suggests, then-Justice Rehnquist's apparently idiosyncratic shift in terminology from "distinct" investment-backed expectations to "reasonable" investment-backed expectations in *Kaiser Aetna v. United States* had the effect of converting landowners' informed judgments about future possibilities into a reasonable notice of rules inquiry.¹⁶⁴ Professor Frank Michelman, from whom Justice Brennan borrowed the concept, saw expectations in terms of settled expectations that should be protected as a matter of fairness. Justice Brennan's practical use of "expectations" suggests, and Wade's recent exposition makes clear, that the term has more to do with whether unanticipated changes in regula-

158. *Id.* at 1000 (Kozinski, J., dissenting from denial of reh. en banc) (quoting *First English*, 482 U.S. at 322 (Stevens, J., dissenting)).

159. See *supra* Part C. for discussion.

160. See *supra* note 1 and accompanying text (setting forth key paragraph from *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

161. See Lawson, et al., *supra* note 49 at 33.

162. *Id.* at 32.

163. Wade, *supra* note 59, at 10937.

164. *Id.* at 10938 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

tions would “erode economic viability of the investment in the whole property after imposition of the unanticipated change in the regulations.”¹⁶⁵

It is axiomatic in property law that “value” is not property. This is reflected in the condemnation law percept that a regulation that merely lowers value is not a taking.¹⁶⁶ While “value” does measure the apparent pecuniary wealth embodied in an asset, ownership of wealth is not the reason individuals acquire property. Residential buyers value the subjective enjoyment of ownership, and, more germane to this Article, commercial buyers relish the opportunity to acquire favorable investments. Potential investments are valued by comparing the periodic stream of income that they generate, such as rental fees, together with ultimate net sales proceeds, against the periodic costs that they generate, such as taxes and maintenance, together with the initial purchase price. All must be adjusted to some common temporal reference point, which is expressed as all cash flows being discounted to present value.

What determines whether an investment is a favorable investment is not its net present value, but whether the return on the investment exceeds that on other deals of comparable risk. The result is that an investor employs as a benchmark the going rate of return on equity in the marketplace for comparable investments and determines if the proposed deal is favorable or unfavorable in that light. The focus of *Tahoe-Sierra* was the value of the lots upon which middle-income individuals wanted to build their own retirement homes. They were not seeking to generate income from their parcels, and so the Supreme Court’s simplistic views of present and future value harmed prospective retirement homeowners less than it harmed the conceptual rigor of temporary takings. On the other hand, the *Cienega Gardens* and CCA investors were interested in juggling debt servicing, taxes, repairs, and in whether authorized rentals would be enough to pay expenses and generate an adequate yearly return on investment.

This is at the heart of the debate between the return-on-equity approach of *Cienega VIII*¹⁶⁷ and the Court of Federal Claims original opinion in *CCA Associates*¹⁶⁸ on one hand, and the regulation’s effect on the value of the parcel as a whole in *Cienega X*¹⁶⁹ and the Claims Court’s second opinion in *CCA Associates* on the other.¹⁷⁰

165. *Id.* at 10938.

166. *See, e.g.,* *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (“[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”).

167. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (*Cienega VIII*).

168. *CCA Assocs. v. United States*, 75 Fed. Cl. 170 (2007).

169. *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*Cienega X*).

170. *CCA Assocs. v. United States*, 91 Fed. Cl. 580 (2010).

The *Cienega X* concept of “economic impact” on value of the “parcel as a whole” makes little sense for investors expected to act on “investment-backed expectations.” The fact that CCA investors were deemed to have gone from a *Cienega VIII*-based 81.25 percent diminution of return on equity over the five-year taking period based on lost rental income,¹⁷¹ to a *Cienega X*-based 18 percent economic loss, inevitably will encourage future regulators to impose large (and uncompensated) losses now, with the rationalization that the spirits and fisc of claimants will be “lifted” at some unspecified time.¹⁷²

The *Cienega X* quest for a rule based on economic impact on value in a business setting marked by short- and medium-term investments dependent on cash flow also is reminiscent of California judicial attempts to reconcile rent controlled landlords’ constitutional right to a “just and reasonable return on their property,”—enunciated by the state supreme court in *Birkenfeld v. City of Berkeley*,¹⁷³—with the fact that landlords purchased their buildings at different times, with different debt service costs, and different levels of expenses. The lower courts, for a time, tried to square the circle of “just and reasonable” returns with the policy of rent control to keep rents low without considering the circumstances of individual landlords. Finally, in *Fisher v. City of Berkeley*, the California Supreme Court warned lower courts not to assume that its *Birkenfeld* “just and reasonable return” requirement set any “specific constitutional standard.”¹⁷⁴

C. The Role of Offsetting Benefits

1. Burden of Proof

The U.S. Supreme Court established long ago that eminent domain just compensation awards should be offset by benefits provided to the condemnee in connection with the taking that are special and direct.¹⁷⁵

In *Cienega X*,¹⁷⁶ the Federal Circuit discussed “benefits that the statutory scheme afforded which were specifically designed to ameliorate the impact

171. CCA Assocs. v. United States, 75 Fed. Cl. 170, 199 (2007).

172. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency, 535 U.S. 302, 332 (2002).

173. Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1027 (Cal. 1976).

174. Fisher v. City of Berkeley, 693 P.2d 261, 291 n. 35 (Cal. 1984), *aff’d*, 475 U.S. 260 (1986).

175. Bauman v. Ross, 167 U.S. 548, 574 (1897). See *supra* notes 63-64 and accompanying text for discussion.

176. Cienega Gardens v. United States, 503 F.3d 1266, 1283 (Fed. Cir. 2007) (*Cienega X*).

of the prepayment restrictions.¹⁷⁷ It rejected the characterization below by the Court of Federal Claims that such benefits were inadequate compensation for takings.¹⁷⁸ Instead, quoting *Penn Central*, it stated “these benefits ‘undoubtedly mitigate whatever financial burdens the law has imposed on the appellants and, for that reason, are to be taken into account in considering the impact of the regulation.’”¹⁷⁹

In *CCA Associates*,¹⁸⁰ the Federal Circuit held that the Court of Federal Claims “correctly explained that its offsetting benefits analysis ‘must consider facts as they existed in New Orleans at the time, not merely what the regulations indicate was possible.’”¹⁸¹ The Claims Court then “analyzed different benefits” under LIHPRHA, “concluding, *inter alia*, that a ‘fair-market sale . . . is too speculative to offset the economic loss imposed on CCA by the prepayment restrictions.’”¹⁸² “As part of this analysis, the court concluded that ‘the burden is on the government to show that other statutory benefits should offset’ the economic impact.”¹⁸³

We see no error in this analysis and apportionment of the respective burdens. Although the plaintiff has the burden to prove a taking occurred, this ultimate burden does not require the plaintiff to identify and come forward with evidence rebutting economic harm. The plaintiff must establish economic impact, but it need not establish the absence of any mitigating factors. Offsetting benefits, if there are any, must be established by the government to rebut the plaintiff’s economic impact case. . . . Once CCA came forward with evidence of an economic impact, the government then had the burden to establish any offsetting benefits which would mitigate or reduce the impact. Contrary to the government’s argument, and the dissent’s claims, nothing in *Cienega X* requires the plaintiff to bear the burden of establishing the value of offsetting benefits. What *Cienega X* held is that, in assessing whether a takings has occurred, “available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs.” This is precisely what was done here.¹⁸⁴

177. *Id.* at 1283.

178. *Id.*

179. *Id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978)).

180. *CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011).

181. *Id.* (quoting 91 Fed. Cl. at 612).

182. *Id.* (quoting 91 Fed. Cl. at 612).

183. *Id.* (quoting 91 Fed. Cl. at 613-14).

184. *Id.* at 1245 (quoting *Cienega X*, 503 F.3d at 1287).

Judge Dyk, dissenting on this issue, described LIHPRHA as a government program that imposed “a form of rent control on the developers of low-income housing that received federal assistance,” but which permitted them to “escape the rent-control regulation” by exercising a statutory right of sale or prepayment that *Cienega X* characterized as “offsetting benefits.”¹⁸⁵ He asserted that the Claims Court’s “refus[al] to consider offsetting benefits . . . finding those benefits to be speculative,” was “in direct contradiction” of *Cienega X*, and that the CCA *Associates* panel majority approved this “without justification.”¹⁸⁶

Judge Dyk noted that the Supreme Court places the burden on takings claimants.¹⁸⁷ He added: “As we said in *Cienega X*, for each of the *Penn Central* factors, ‘the burden is on the owners.’”¹⁸⁸ Also, he added, the plaintiffs had better access to the necessary information regarding betterment offsets, since they were “well aware of the scope of the regulatory scheme.”¹⁸⁹ Judge Dyk drew an analogy to contract cases, where “a non-breaching plaintiff bears the burden of persuasion to establish both the costs that it incurred and the costs that it avoided as a result of a breach of contract.”¹⁹⁰ It might be that, “[i]n such contexts, ‘the breaching party may be responsible for affirmatively pointing out costs that were avoided,’ but ultimately ‘the plaintiff must incorporate them into a plausible model of [] damages.’”¹⁹¹

The issue of burden of proof respecting special benefits is not neatly drawn. The Claims Court agreed “CCA undoubtedly has the burden of proof on each of the *Penn Central* factors, including that of economic impact.”¹⁹² It added, though, that “[o]nce CCA has established the economic impact of the restriction in question, the burden is on the government to show that *other statutory benefits* should offset that impact.”¹⁹³

The Claims Court cited for that proposition *Rose Acre Farms*, where the Federal Circuit refused to consider offsetting economic benefits “because

185. *Id.* at 1251 (Dyk, J., concurring in the judgments and dissenting in part).

186. *Id.* (Dyk, J., concurring in the judgments and dissenting in part).

187. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Eastern Enters.*, 524 U.S. 498, 523 (1998) (“a party challenging governmental action as an unconstitutional taking bears a substantial burden”).

188. *Id.* at 1252 (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Cienega X*, 503 F.3d at 1288).

189. *Id.* at 1253 (Dyk, J., concurring in the judgments and dissenting in part).

190. *Id.* at 1254 (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Boston Edison Co. v. United States*, 658 F.3d 1361, 1369 (Fed. Cir. 2011)).

191. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Boston Edison*, 658 F.3d at 1369).

192. *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 613 (2010).

193. *Id.* at 613-14 (emphasis added).

‘the government points to no economic data in the record to support its assertion of benefits.’¹⁹⁴ It also cited *Whitney Benefits*, which “reject[ed] the government’s argument that a coal exchange should be considered in assessing economic impact.”¹⁹⁵ “To hold otherwise,” the Claims Court concluded, “would require CCA to prove a negative—to prove that nothing else in the statute could provide any offsetting economic benefit.”¹⁹⁶ Some notions of government benefit that would vitiate takings claims do appear extravagant. The New York Court of Appeals’ opinion in *Penn Central*, averring that the State commandeered “the accumulated indirect social and direct governmental investment” that provided most of its value to physical property,¹⁹⁷ seems an example of such imaginary extravaganza. This points out to the need of limiting “special benefits” to those explicitly categorized as such in the statute imposing burdens.

Judge Dyk’s dissent also cited to *Rose Acre Farms*, stating that the “snippet of language” about the government not pointing to economic data referred to “indirect benefits flowing from” efforts to solve a regulatory problem, rather than from provisions in the regulation itself.¹⁹⁸

Thus, there is agreement that a regulatory takings plaintiff has the burden of proof on each of the *Penn Central* factors, including economic impact, and that the government has the burden with respect to benefits not intrinsic to the statutory scheme. Within the scheme itself, however, the *CCA Associates* majority recognized that *Cienega X* required that “available offsetting benefits must be taken into account *generally*, along with the *particular benefits* that actually were offered to the plaintiffs.”¹⁹⁹ Judge Dyk stated that the claimant must take all such information, including any supplied by the government, and “must incorporate them into a plausible model of [] damages.”²⁰⁰

The question might come down to a semantic dispute about how exactly all of the information must be incorporated by the claimant into a

194. *Id.* at 614 (quoting *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1275 (Fed. Cir. 2009)).

195. *Id.* (citing *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1175 (Fed. Cir. 1991)).

196. *Id.*

197. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1273-74 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978).

198. *CCA Assocs. v. United States*, 667 F.3d 1239, 1254 (Dyk, J., concurring in the judgments and dissenting in part).

199. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Cienega X*, 503 F.3d at 1287) (emphasis added).

200. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (quoting *Boston Edison*, 658 F.3d at 1369).

“plausible” model, and how detained, and plausible, that model must be. So long as the trial court refrains from totally disregarding germane and credible evidence in the record, it is likely to prevail under the Federal Circuit’s “clear error” standard of review.²⁰¹

2. “Speculation” in Establishing Offsetting Benefits

A related issue is whether the Court of Federal Claims could disregard evidence of statutory special benefit as being speculative, and, if so, to what extent. In his dissent in *CCA Associates*, Judge Dyk disagreed with the majority’s approval of the Court of Federal Claims’ characterization of the offsetting benefits as “speculative.”²⁰² While agreeing with the majority’s determination that an 18 percent economic impact was insufficient to establish a taking, he asserted that the analysis “entirely ignores offsetting benefits.”²⁰³

Judge Dyk noted the government’s expert report indicating that the potential to sell the property, exit the program, or raise rents required an adjustment that would lower the reduction in value from 18 percent to 5 percent.²⁰⁴ “However,” he added, “the Claims Court held that offsetting benefits could only be taken into account if there was ‘reasonable certainty’ that a sale would have occurred, and that such a reasonable certainty did not exist.”²⁰⁵ Thus, “[t]he possibility that CCA could exit the program was [i]speculative.”²⁰⁶

Judge Dyk also maintained that the Claims Court mistakenly thought that the value of the statutory options could not be ascertained because they had not been availed of, whereas the “proper analysis is whether a prospective purchaser . . . would have attributed value” to them.²⁰⁷

The majority approved the Claims Court’s conclusion that “a fair-market sale . . . is too speculative to offset the economic loss imposed on CCA by the prepayment restrictions.”²⁰⁸ Might the lack of “reasonable cer-

201. See *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004) (stating the Federal Circuit reviews legal determinations of the Court of Federal Claims without deference and its findings of fact for clear error).

202. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (citing *CCA Assocs.*, 91 Fed. Cl. at 618).

203. *Id.* (Dyk, J., concurring in the judgments and dissenting in part).

204. *Id.* at 125 (Dyk, J., concurring in the judgments and dissenting in part).

205. *Id.* (Dyk, J., concurring in the judgments and dissenting in part) (quoting *CCA Assocs.*, 91 Fed. Cl. at 618).

206. *Id.* at 1255 (Dyk, J., concurring in the judgments and dissenting in part) (quoting *CCA Assocs.*, 91 Fed. Cl. at 618).

207. *Id.* at 1255 (Dyk, J., concurring in the judgments and dissenting in part).

208. *Id.* at 1245 (internal quotations omitted).

tainty that a buyer would be available” be a consideration leading to the conclusion that the possibility of a sale would be “too speculative”?

The probability of zoning changes, variances, or other actions that might affect market value properly is included in real property appraisals.²⁰⁹ Clearly, speculation affects market value. Furthermore, in *Florida Rock Industries*, the Federal Circuit declared that “a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market.”²¹⁰

However, the leading treatise on condemnation warns that, “[a] benefit, to be considered at all, must not be so remote or speculative as to be incapable of a reasonably accurate monetary measurement.”²¹¹ In *United States v. 930.65 Acres of Land*,²¹² the U.S. district court admonished:

[T]he courts are agreed on the proposition that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical, or hypothetical benefits cannot, under any circumstances, be taken into consideration. The reason for this is that otherwise the property owner might be compelled to pay for something which would never be in existence. It has been said that if speculative or chimerical benefits could be considered, the constitutional safeguards for protecting the citizen in the enjoyment of his property would be rendered of no avail.²¹³

An analogous interest often deemed speculative is the possibility of reverter, which rarely is eligible to receive a just compensation when the property it relates to is taken by the United States. “Generally, no compensation is due to a holder of a possibility of reverter unless the reversion is reasonably probable within a short period of time of condemnation.”²¹⁴ The

209. See, e.g. *City of Las Vegas v. Bustos*, 75 P.3d 351, 352-353 (Nev. 2003) (zoning changes or variances that are reasonably probable may be considered when determining the highest and best use of the property); Eric Thomas Carver, *A Valuation Primer: Trends and Techniques for Estate Planners*, 77 MICH. B.J. 1304, 1309 (1998) (citing Michael F. Beausang, 830 TM, *Valuation: General and Real Estate* (noting the importance of documentation the present status of the property, the area in which it is located, the present zoning conditions, and the possibility of zoning changes)).

210. *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

211. NICHOLS ON EMINENT DOMAIN, § 8A.02 [3] (citing, e.g., *Bauman v. Ross*, 167 U.S. 548 (1897); *6,816.5 Acres of Land v. United States*, 411 F.2d 834 (10th Cir. 1969)).

212. *United States v. 930.65 Acres of Land*, 299 F. Supp. 673, 676-677 (D. Kan. 1968).

213. *Id.* at 676-77.

214. *U.S. v. 32.42 Acres of Land, More or Less Located in San Diego County State of California*, 2009 WL 2424303 (S.D. Cal. 2009) (not reported in F.Supp.2d).

U.S. Court of Appeals for the Tenth Circuit held in *Mount Olivet Cemetery Association v. Salt Lake City*,²¹⁵ that a possibility of reverter owned by the United States was “minimal and speculative” and insufficient to constitute property owned by the United States for purposes of preempting state authority.

As is the case with the burden of proof for special benefits, the answer in a given case might come down to whether the court interprets *Cienega X* to demand that the claimant generally take into account possibly probable events, or that the claimant construct rigorous models incorporating them. A court that balances these concerns with prudence is unlikely to commit clear error.²¹⁶

IV. Conclusion

Many received truths of property and takings law are proclaimed regularly and for extended periods, until they are tested by reality. Thus, under the *ad coleum* doctrine, airspace had been viewed as an extension of the land below, something changed by the advent of flight.²¹⁷ In the field of takings, a quarter-century of usage by the Supreme Court of the *Agins v. City of Tiburon* “substantially advance legitimate state interests” formula²¹⁸ was held not to be a takings test at all, but rather mere “imprecise” language in *Lingle v. Chevron U.S.A.*, a case in which the language was crucial.²¹⁹

It may be that the Supreme Court will revisit the *Penn Central* formulation, which started with a concept of explaining the regulatory taking that was explicitly ad hoc, and has, over time, become a fossilized branching of tests and subtests. The “economic impact of the regulation on the claimant” test explored here is a prime example of the need for a fresh examination of *Penn Central* and the need for a vibrant and coherent law of takings.

215. *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 485 (10th Cir. 1998).

216. See *supra* notes 199-201 and accompanying text for discussion.

217. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (photo. reprint 1979) (1766); JESSE DUKEMINIER, ET AL., PROPERTY 120 n.10 (7th ed. 2010) (“to whomsoever the soil belongs, he owns also to the sky and to the depths”).

218. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

219. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531-32 (2005).

* * *