2010-5100, -5101

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CCA ASSOCIATES,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in case no. 97-CV-334, Judge Charles F. Lettow

BRIEF OF DEFENDANT-APPELLANT, THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel states that this action was previously appealed to this Court as case number 2007-5094. See CCA Assocs. v. United States, 284 Fed. Appx. 810 (Fed. Cir. 2008), cert. denied, 129 S. Ct. 1313 (2009).

Two cases pending in the Court of Federal Claims may be affected by the outcome of this appeal: Anaheim Gardens v. United States, No. 93-655C (Fed. Cl.); and Algonquin Heights v. United States, No. 97-582C (Fed. Cl.). There are approximately 100 takings claims pending in those two cases.

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JURISDICTIONAL STATEMENT

This Court possesses jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims erred in finding a temporary regulatory taking under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), where (1) the regulation's economic impact was no more than 18 percent, (2) the court failed to take into account benefits conferred by the challenged regulations, and (3) the court did not follow this Court's instruction to

use "contemporaneous documents" to assess reasonable investment-backed expectations.

2. Assuming that the challenged regulations effected a regulatory taking under Penn Central, whether the court erred when it failed to base compensation upon an *ex ante* valuation of the restricted property right.

STATEMENT OF THE CASE

I. Nature Of The Case

This case concerns the claim, founded upon the Fifth Amendment to the United States Constitution, that the Emergency Low-Income Housing Preservation Act ("ELIHPA"), and the Low-Income Housing Preservation and Resident Homeownership Act ("LIHPRHA") (collectively, the "Preservation Statutes") effected a temporary regulatory taking of plaintiff-cross appellant's right to prepay its federally-insured mortgage.

II. Course Of Proceedings And Disposition Below

CCA Associates ("CCA") – owner of the Chateau Cleary housing project – filed this action in May 1997. CCA's two-count complaint contained breach of contract and regulatory taking claims. See A53.[1]

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[1] The Addendum to this brief is cited as "A__." The Joint Appendix filed in conjunction with this appeal is cited as "JA__."

A. The 2006 Takings Trial

The Court of Federal Claims held an eight-day trial upon CCA's regulatory taking claim, during which CCA elected not to present a claim for breach of contract. JA1653-745.

Subsequently, the trial court issued an opinion concluding that the Preservation Statutes had effected a temporary taking of CCA's right to prepay its HUD-insured mortgage. CCA Associates v. United States, 75 Fed. Cl. 170 (2007) (Lettow, J.). The court applied the same approach used in Cienega Gardens v. United States, 67 Fed. Cl. 434 (2005) (Lettow, J.) ("Cienega IX") – an earlier action that also addressed whether the Preservation Statutes had effected a regulatory taking. As in Cienega IX, the trial court (1) used a return-on-equity approach to analyze economic impact, (2) declined to take into account objective evidence of investment-backed expectations, and (3) refused to consider the benefits conferred by the Preservation Statutes. CCA, 75 Fed. Cl. at 189-90, 199. The trial court awarded $841,839 as just compensation. Id. at 206. The United States appealed.

B. The 2007 Appeal

On appeal, soon after the United States filed its opening brief, a seven-judge panel of this Court vacated the trial court's Cienega IX decision. Cienega Gardens v. United States, 503 F.3d 1266 (Fed. Cir. 2007) ("Cienega X"). The Cienega X

court found four distinct errors in the approach developed in Cienega IX and subsequently applied in this action: (1) the return-on-equity approach to economic impact failed to assess the regulation's effect on the "parcel as a whole;" (2) the return-on-equity approach to economic impact failed to take into account the regulatory duration; (3) the trial court failed to consider "offsetting benefits that the statutory scheme afforded" to "ameliorate the impact" of the Preservation Statutes, and (4) the trial court failed to consider "the expectations of the industry as a whole" in assessing "whether the plaintiffs had a reasonable investment-backed expectation." Id. at 1280, 1282-83, 1287, 1290. Accordingly, soon after vacating Cienega IX, this Court also vacated the judgment in this action and remanded "for further consideration in accordance with Cienega X." JA1749 (CCA Assocs. v. United States, 284 Fed. Appx. 810, 811 (Fed. Cir. 2008)).

C. Proceedings On Remand

On remand, the trial court, on its own initiative, resurrected CCA's breach of contract claim. JA1039-45. We objected that this was contrary to the appellate mandate and that the breach of contract claim was waived when not presented at the 2006 trial. JA1045-46. The trial court overruled these objections. JA1046.

Subsequently, the trial court scheduled a three-day trial to allow the parties to supplement the record. Prior to trial, the parties stipulated that the economic effect

of the Preservation Statutes on CCA, without taking into account statutory benefits, was 18 percent. JA1147-48. At trial, CCA called a single witness – the project's current owner who described the alleged importance of prepayment to his father, Ernest B. Norman, Jr., and his uncle, Robert Norman (the "Norman brothers"), when they originally developed Chateau Cleary in 1970. See JA1060, 1069-70. CCA offered no evidence about the Preservation Statutes' sale and use agreement options. Likewise, CCA presented no evidence about the significance of prepayment to the industry as a whole.

By contrast, we called witnesses establishing that CCA could have sold Chateau Cleary under the Preservation Statutes and that the restrictions' economic impact on CCA was only five percent once the sale option was considered. JA1120-23. In addition, we introduced expert testimony, a learned treatise on low-income housing published in 1972, and six prospectuses that each placed a nominal value (typically $1) on the opportunity to prepay. JA1100-09, 1114, 1150-484, 1632-40. Collectively, this confirmed that the opportunity to prepay 20 years in the future was not a significant inducement for industry participants in the early 1970s. See JA67, 1100-09, 1114, 1150-55, 1170, 1186-91, 1207, 1210, 1223-29, 1244-45, 1260-67, 1291, 1296-97, 1309-19, 1375-76, 1389, 1632-40.

The trial court ruled that the Preservation Statutes effected a temporary regulatory taking of CCA's property under Penn Central. A49 (CCA Associates v. United States, 91 Fed. Cl. 580 (2010)). It awarded compensation in the amount of $714,430 using an ex post approach that valued CCA's prepayment right at the end of the temporary taking, plus compound interest and attorney fees. A51. This appeal followed.

STATEMENT OF FACTS

I. Statutory Background

A. The Section 221(d)(3) Program

Modern national housing policy began in the New Deal era with the passage of the National Housing Act of 1934. Initially, the Federal Government sought to provide low-income housing by subsidizing projects developed, owned, and managed by local public housing authorities. By the 1960s, however, the Federal Government shifted its focus to private development. In 1961, Congress amended the National Housing Act to establish the section 221(d)(3) program. 12 U.S.C. § 1715l(d)(3). This program authorized the Federal Housing Administration (and, subsequently, the Department of Housing and Urban Development ("HUD")) to provide mortgage insurance and fund below-market-interest-rate loans to encourage private developers to construct, own, and manage moderate- and low-income

housing. The Chateau Cleary project was developed through the section 221(d)(3) program. JA611.

In order to obtain Federal mortgage insurance, developers participating in the section 221(d)(3) program entered into a "regulatory agreement" with the Government in which the owner accepted specific restrictions on the mortgaged property, including restrictions on tenant income, allowable rental rates, and cash distributions that could be received from the project. See generally Cienega Gardens v. United States, 331 F.3d 1319, 1234-35 (Fed. Cir. 2003). The regulatory agreement remained in effect as long as the property was subject to the insured mortgage. JA502.

The regulatory agreement did not limit or address prepayment of the insured mortgage. See JA502-16. However, the mortgage note between the developer and a private lender typically prohibited prepayment without Government approval for the loan's first 20 years. See JA618. Although the Government could waive this restriction, it was only after 20 years that the owner had the option to prepay unilaterally, end the regulatory agreement, and exit the section 221(d)(3) program.

B. Benefits Of Participating In The Section 221(d)(3) Program

The section 221(d)(3) program, as established by Congress, provided lucrative benefits to entice developers and investors to participate. First, the program provided low-risk, highly-leveraged Government-insured financing. JA55. This permitted developers to build housing projects with a cash outlay as little as two to three percent of the project's total cost. JA55-57, 62-63, 1634-36. Moreover, the program allowed private developers to obtain significant tax savings to offset income earned from other sources. JA59, 63, 1632-33. In most cases, developers recovered their cash investments within three years of investing in the program. JA58-59, 1155, 1191, 1229, 1266, 1314, 1475, see also JA1633 ("tax savings in the very first year may be as large as the total cash investment") (emphasis in original). These were the principal reasons that developers chose to construct and operate projects pursuant to section 221(d)(3). JA54-55, 591-96.

C. The Preservation Statutes

In the late 1980s, as the 20-year anniversary approached for many section 221(d)(3) properties, Congress became concerned that many owners would prepay their mortgages, triggering a dramatic drop in the nation's supply of low-income housing. See, e.g., H.R. Conf. Rep. No. 100-426, at 192 (1987) (estimating almost 950,000 low-income housing units lost through mortgage prepayments).

Consequently, in 1988 and 1990, Congress enacted the Preservation Statutes to preserve low-income housing.

1. ELIHPA

In 1988, as a temporary measure, Congress enacted the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, 101 Stat. 1877-86 (1988). ELIHPA, which contained a two-year sunset provision, instituted a permitting process under which owners interested in prepaying their mortgage were required to apply to HUD for approval. ELIHPA §§ 221-23. This allowed HUD to assess whether it was worthwhile to preserve the project as low-income housing.

As an alternative to prepayment, Congress authorized numerous publicly-funded benefits "to provide a fair return [to] the owner." Id. §§ 224-25. ELIHPA provided owners with a Government-insured equity take out loan funded by increased rents, increased annual cash distributions, Section 8 housing assistance contracts, and financing for capital improvements. Id. §§ 224(b), 231. In exchange for these financial benefits, owners executed a use agreement that extended the existing use restrictions on the property. Id. § 225(b). Additionally, the legislation authorized HUD to facilitate the project's sale at a market rate. Id. § 224(b); see also 24 C.F.R. § 248.231(g) (1990); JA1082-83 (2009 Tr. 90-96).

ELIHPA permitted owners to seek benefits one year before their original prepayment date, which helped ensure that benefits were received on or near that date. ELIHPA §§ 222, 233(1)(b).

2. LIHPRHA

In 1990, Congress replaced ELIHPA with the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, 104 Stat. 4249 (1990) (codified at 12 U.S.C. § 4101 et seq.). Like its predecessor, LIHPRHA asserted HUD's regulatory jurisdiction over prepayment, required owners to seek approval to prepay their HUD-insured mortgage, and provided other opportunities to exit the program or seek monetary benefits. 12 U.S.C. §§ 4101(a), 4108-10, 4114.

As under ELIHPA, LIHPRHA allowed owners who wished to realize their equity in the project to sell at fair market value based upon the property's highest and best use, i.e., the project's market value without HUD restrictions. 12 U.S.C. §§ 4103(b)(2), 4110(b)(1); JA1082 (2009 Tr. 90-91). To facilitate these sales, which released the owners from the program entirely, HUD funded virtually all transaction costs, provided mortgage insurance, and paid consultants to assist the parties. 12 U.S.C. § 4110(d); JA1082, 1093-94. HUD also provided loans and grants that enabled non-profit organizations to acquire the project. Id.

In addition, LIHPRHA funded valuable financial incentives in exchange for extending the properties' use restrictions. 12 U.S.C. § 4109. HUD could provide owners rent increases, an increased rate of return based upon the property's market value as conventional rental housing, access to project equity through a Government-insured loan, and financing for capital improvements. Id.

Finally, LIHPRHA sought to ensure that owners were not disadvantaged by agency delay in processing applications or providing funds. The statute permitted owners to submit their first notice of intent two years before their original prepayment date to minimize any administrative delays after prepayment eligibility. 12 U.S.C. §§ 4102, 4119(1)(B). Additionally, the statute permitted the owner to unilaterally prepay in the event that benefits were not funded, or a was sale not consummated, within a set period. 12 U.S.C. § 4114.

D. The HOPE Act

The Preservation Statutes were regularly criticized for their generous provisions and excessive cost to the Government. In the mid-1990s, Congress commenced hearings to explore alternatives. See JA697. HUD's Inspector General recommended, among other measures, that Congress "[d]iscontinue paying owners windfall profits for projects that threaten to prepay their mortgages and remove the low income character of the units." Hearing before the Subcommittee on VA,

HUD, and Independent Agencies of the House Committee on Appropriations, 104th Cong., 1st Sess. (January 24, 1995) (statement of Susan Gaffney, HUD Inspector General). These concerns resulted in passage of the Housing Opportunity Program Extension Act of 1996 ("HOPE Act"), Pub. L. No. 104-120, 110 Stat. 834 (March 28, 1996). The HOPE Act "restored the prepayment rights to owners" of moderate- and low-income housing. E.g., Chancellor Manor v. United States, 331 F.3d 891, 896 (Fed. Cir. 2003). One month later, Congress enacted an appropriations statute for HUD, which included an express provision that allowed owners to prepay. Cienega X, 503 F.3d at 1274 (citing Pub.L. No. 104-134, 110 Stat. 1321-265 to 1321-293 (1996)).

II. CCA Associates

Plaintiff-Cross Appellant, CCA Associates, is a family-owned and operated partnership with its principal place of business in New Orleans, Louisiana. CCA owns Chateau Cleary Apartments, a moderate-income apartment complex developed under HUD's section 221(d)(3) program. JA1147; see also JA517-20.

A. The Initial Deal

The Chateau Cleary housing project was built and operated by the Norman brothers. JA8. In 1969, the brothers executed a regulatory agreement pursuant to section 221(d)(3) of the National Housing Act, which provided a firm commitment

to insure a 40-year loan for $1,601,100 at a below-market interest rate. JA8, 518, 618-24. The brothers also received various Government credits for the project. JA9, 57. As a result, the Norman brothers made an actual cash investment of only $31,877, or 1.8 percent of Chateau Cleary's estimated replacement cost. JA54.

The Norman brothers profited both from the construction and management of the project. They contracted with their own construction company – Stratford Construction Company – to build the Chateau Cleary Apartments for an estimated cost of $1,227,655. JA58, 531-37. To manage the property, the Norman brothers contracted with Apartment Management Corporation – another wholly-owned company that they had established. JA10, 58, 527-30.

The Norman brothers also obtained tax benefits associated with the section 221(d)(3) program. The tax shelter aspects of the CCA project were valuable to the Norman brothers because of their oil and gas investments. JA58, 64. Tax benefits during the project's first four years – from 1972 to 1975 – significantly exceeded the amount of the Normans' initial investment. JA65. Accordingly, the option to prepay after 20 years was a very minor component of anticipated returns on the investment. Id.

B. CCA's Inaction Under The Preservation Statutes

CCA was free to choose among the options available under the Preservation Statutes. Despite being advised that CCA was eligible for reduced regulation and significant incentives, and despite being aware that a non-profit organization was interested in purchasing Chateau Cleary in order to preserve it as affordable housing, CCA chose to do nothing. See JA21, 538-41.

C. CCA's Eventual Prepayment Of Its HUD-Insured Mortgage And Conversion To Market Rate Operation

In June 1995, nearly one year before Congress passed the HOPE Act, CCA's managing partner learned that Congress would likely reinstate the owners' ability to prepay without HUD approval. JA29, 697. He learned that HOPE had been enacted on the very day of its passage in March 1996. JA697. However, it was not until September 1998, more than two years after the passage of HOPE, that CCA prepaid its mortgage. See JA19.

SUMMARY OF ARGUMENT

This action is one in a series of cases asserting that the Preservation Statutes effected a regulatory taking of a moderate- or low-income housing project. In Cienega X, a seven-judge panel of this Court clarified the framework for analyzing such claims. The Cienega X Court directed that statutory benefits provided by the Preservation Statutes be taken into account under Penn Central and that

"contemporaneous documents" reflecting "the expectations of the industry as a whole" be used to assess reasonable investment-backed expectations. Cienega X, 503 F.3d at 1290-91. The Court remanded this case for the trial court to apply the Cienega X framework. JA1749 (CCA, 284 Fed. Appx. at 811).

On remand, the trial court offered a litany of reasons for not applying Cienega X: (1) statutory benefits were "too speculative" to take into account in evaluating economic impact; (2) statutory benefits need not be considered in assessing the character of the Government action; and (3) industry expectations set forth in contemporaneous treatises and private placement memoranda were inapposite because the Chateau Cleary project was unique. The trial court even created a "fourth" Penn Central factor, which it used to support the conclusion that an 18 percent economic impact constitutes serious financial loss. These errors led the court to wrongly conclude that the Preservation Statutes effected a regulatory taking.

If the trial court had properly applied Cienega X, the court would have found an economic impact on CCA of 5 percent, an industry that in the 1960s and 1970s placed little significance on the option to prepay 20 years in the future, and a statutory scheme that used generous, publicly-funded benefits to ameliorate the statutes' effect on property owners. Because none of the Penn Central factors

support CCA's claim, this Court should reverse the decision below and enter judgment in favor of the United States.

Although the issue should be moot and need not be reached, the trial court further erred in determining just compensation. It is well-established that just compensation is the value of the property taken on the date that the taking occurred. The court instead used an ex post methodology that valued the property on the date that the alleged temporary taking ended. This approach is contrary to the law, overstates compensation, and leads to bizarre outcomes.

ARGUMENT

I. Standard Of Review

The determination of whether a particular regulatory action constitutes a taking under the Fifth Amendment is a question of law based upon factual underpinnings. Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). This Court reviews without deference the Court of Federal Claim's determination as to whether a taking occurred. Id. Factual findings on which the legal determination is based are reviewed for clear error. Id.

II. The Court Erred In Applying The *Penn Central* Test

The Supreme Court established the framework for analyzing regulatory taking claims in its landmark Penn Central decision. Under Penn Central, the

claimant must present evidence regarding: (1) the regulations' economic impact upon the claimant; (2) the extent to which the regulation interfered with reasonable investment-backed expectations; and (3) the character of the Government action. 438 U.S. at 124; see also Forest Properties, Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (the claimant bears the burden of proof in regulatory taking cases). The court then balances these factors in an ad hoc analysis to determine whether the regulatory action is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005); see also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).

Significant errors are present in every part of the trial court's Penn Central analysis. The Court should, therefore, reverse the judgment below.

A. CCA Failed To Establish A "Serious Financial Loss" As The Basis For Its Regulatory Taking Claim

Regulatory takings are "in essence, a claim that 'a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation.'" Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1195 (Fed. Cir. 2004) (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002)). Penn Central "aims to identify regulatory actions that are functionally equivalent to the classic taking in

which government directly appropriates private property or ousts the owner from his domain." Lingle, 544 U.S. at 539. For this reason, courts commonly reject claims where the regulation's economic impact is less than 80 to 90 percent. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) ("in at least some cases the landowner with 95% loss will get nothing"). "What has evolved in the case law is a threshold requirement that plaintiffs show 'serious financial loss' . . . to merit compensation." Cienega X, 503 F.3d at 1282. The impact of the Preservation Statutes on CCA did not reach this threshold.

1. Eighteen Percent Economic Impact Does Not Support A Regulatory Taking

It is undisputed that, without taking into account statutory benefits, the economic effect of the Preservation Statutes on CCA was 18 percent. A42; JA1147-48. By disregarding statutory benefits, this figure substantially overstates the actual impact on CCA. See Cienega X, 503 F.3d at 1286 ("The sale and use agreement options . . . conferred considerable benefits on the owners"). However, even this overstated impact does not "approach the level of severe economic harm" needed to support a regulatory taking claim. See Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1275 (Fed. Cir. 2009).

We are aware of no case in which a court has found a taking where diminution in value was less than 50 percent.[2] Courts have, however, concluded that plaintiffs suffered no serious financial loss with significantly higher percentages of economic impact: Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993) (46 percent diminution); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (approximately 75 percent diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (92.5 percent diminution); Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (50 percent diminution); Walcek v. United States, 49 Fed. Cl. 248, 271-72 (2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002) (59.7 percent diminution); see also Lucas, 505 U.S. at 1019 n.8 ("in at least some cases the landowner with 95% loss will get nothing"). Here, the economic impact (18 percent) is neither severe, nor tantamount to a condemnation or appropriation.

The trial court notes that there is no "magic number" below which compensation must be denied. A40. This, however, does not mean that a court can dispense with the requirement of severe economic harm. See Rose Acre, 559 F.3d at 1275. Accepting the trial court's assertion that "an 18% economic loss

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[2] CCA has previously suggested that Hodel v. Irving, 481 U.S. 704 (1987), is such a case. Hodel, however, concerned the outright elimination of the right of inheritance, not a regulation that merely affected property rights, and in any event identified no figure for economic impact. See CCA, 91 Fed. Cl. at 600-01.

concentrated over approximately five years constitutes a 'serious financial loss,'" A49, would run counter to decades of regulatory takings jurisprudence and dramatically lower the bar for takings claimants. See Brace v. United States, 72 Fed. Cl. 337, 357 (2006) (surveying cases and finding that this Court has generally required diminutions in value to be "well in excess of 85 percent before finding a regulatory taking"), aff'd, 250 Fed. Appx. 359 (Fed. Cir. 2007), cert. denied, 552 U.S. 1258 (2008). Justice Holmes warned nearly 100 years ago that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The Court should take heed of this warning and reverse the decision below.

2. The Trial Court Failed To Comply With *Cienega X* By Disregarding Statutory Benefits Available Under The Preservation Statutes

Cienega X held that the Preservation Statutes conferred "considerable" benefits on owners through the sale and use agreement options and that these statutory benefits must be taken into account under Penn Central. 503 F.3d at 1282-86. Statutory benefits include the project owner's ability to sell the property at a market rate and the opportunity to receive increased revenue from the property. ELIHPA § 224(b); 12 U.S.C. §§ 4109-10.

This Court vacated the trial court's decision in this action, which had failed to consider such statutory benefits, "for further consideration in accordance with Cienega X." CCA, 284 Fed. Appx. at 811. However, despite Cienega X and the appellate mandate, the trial court disregarded statutory benefits on remand. It did so by (1) placing the burden of valuing benefits on the Government, and (2) rejecting the Government's evidence of value as too speculative. A43, 47. In both respects, the trial court erred.

a. The Court Improperly Shifted The Burden of Proof

It is well-established that the plaintiff in a regulatory taking case bears the burden of proof. Forest Properties, 177 F.3d at 1367. This burden applies equally to each of the Penn Central factors. See Cienega X, 503 F.3d at 1288.

The trial court nevertheless ruled that United States bore the burden of valuing statutory benefits that reduced economic impact. A43. To support this burden shifting, the trial court relied upon Whitney Benefits v. United States, 926 F.2d 1169, 1175 (Fed. Cir. 1991), and Rose Acre Farms v. United States, 559 F.3d 1260, 1275 (Fed. Cir. 2009). A43. Neither Whitney Benefits nor Rose Acre , however, discuss burden of proof, much less distinguish Forest Properties.

The Court in Whitney Benefits concluded that asserted benefits from a land exchange program need not be considered in assessing economic impact.[3] 926 F.2d at 1175. For this reason, the Court did not reach or decide issues relating to the burden of proof. See id.

The trial court's reliance on Rose Acre is equally inapt. Rose Acre addressed a claim that regulations intended to prevent the spread of salmonella effected a taking. The United States asserted on appeal that by reducing the incidence of disease, the regulatory scheme benefitted egg producers generally, and that this indirect, industry-wide benefit should have been taken into account in assessing the economic impact on Rose Acre's property. 559 F.3d at 1275. The Court rejected this argument because the record contained no economic data establishing the existence of such an indirect benefit. Id. The Court based its ruling upon a lack of evidence that the asserted benefit actually existed, not the United States' failure to quantify an extant benefit. By contrast, the Cienega X court held that the Preservation Statues' sale and use agreement options provided a direct economic

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[3] This Court reached a different conclusion regarding the benefits provided by the Preservation Statutes. Cienega X, 503 F.3d at 1282-83 (ruling that statutory benefits were to be considered under Penn Central); see also id. at 1283 (distinguishing Whitney Benefits on the ground that the Preservation Statutes do "not involve a transfer of new property to the owner as in Whitney Benefits, but rather an amelioration of the restrictions imposed on the existing property").

benefit to project owners. Cienega X, 503 F.3d at 1286. It was CCA's burden to quantify that benefit. See id. at 1288; Forest Properties, 177 F.3d at 1367.

The trial court suggests that placing the burden of proof on CCA "would require CCA to prove a negative – to prove that nothing else in the statute could provide any offsetting economic benefit." A43. This concern is unfounded. The sale and use agreement options were "specifically designed to ameliorate the impact of the prepayment restrictions." Cienega X, 503 F.3d at 1283. Indeed, Cienega X held that the statutory options conferred "considerable" benefits on project owners and that such benefits "must be taken into account." Id. at 1286. Having alleged that the Preservation Statutes effected a taking, CCA was obliged to account for both restrictions and benefits that the statutes conferred. See Penn Central, 438 U.S. at 137 (holding that the appellant's transferable development-rights "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation").

CCA proffered no evidence about the value of the sale or use agreement options. Consequently, CCA failed to establish the economic impact of the Preservation Statutes and its regulatory taking claim should fail for this reason.

b. The Court's Ruling That The Sale Option Was "Too Speculative" Is Contrary To *Cienega X*

The trial court erred when it rejected as speculative the Government's evidence about the sale option's value. At trial, the United States presented unrebutted expert testimony explaining that CCA could have pursued the Preservation Statutes' sale option and, if CCA had, that economic impact would have been five percent. JA1120-23. This conclusion was supported by (1) testimony from CCA's owner acknowledging that CCA could have sold under the Preservation Statutes, JA27; (2) testimony from HUD's national director of preservation processing that many owners elected to sell under the Preservation Statutes in the early 1990s, that HUD funding for such sales was available, that HUD would have provided funding to facilitate CCA's sale, and that he was aware of no instance where an owner who sought to sell was unable to find a willing purchaser, JA1082-83, 1094; (3) evidence that four projects in the New Orleans area sold to a non-profit purchaser in the mid-1990s, A45; JA938; and (4) evidence that CCA was actually approached by an interested non-profit purchaser in October 1990, A45; JA538-39.

The court, nevertheless, declined to attribute any value to the sale option. A48. The court relied principally upon the fact that no sales occurred under the Preservation Statutes in the New Orleans metropolitan area between 1990 and 1994.

A45. The court neglected to mention that no sale occurred because no local owner sought a preservation sale during this period. See JA936-38. When New Orleans owners opted to sell one year later, buyers appeared for each and every property put up for sale. See A45; JA938.

The record contains no evidence that any proposed preservation sale anywhere in the United States failed to receive a bona fide offer during the early 1990s. Kevin East, HUD's national director of preservation processing, testified that he was unaware of any attempted sale where a purchaser was not found. JA1083 (2009 Tr. 95-96). Likewise, in Cienega X, this Court cited "testimony by Richard Mandel, from the California Housing Partnership Corporation, that he was not 'aware of any [properties involved in the sale process] that did not receive a bona fide offer.'" 503 F.3d at 1286 (brackets in original). Given that (1) HUD would have provided funding to facilitate Chateau Cleary's sale, (2) CCA was approached by an interested buyer in 1990, (3) preservation sales were almost invariably successful, and (4) CCA's owner acknowledged that he could have sold the Chateau Cleary project, JA27, 538-39, 1082-83, 1094, the court erred in refusing to ascribe any value to the sale option on the ground that "there was no reasonable certainty that a buyer would be available." A48. Of course, if for some reason a preservation sale had not been consummated, CCA would have been

eligible to prepay. Cienega X, 503 F.3d at 1285 (citing 12 U.S.C. § 4114). The trial court likewise failed to ascribe any value to this contingency. A48.

The Court held that ELIHPA failed to put property owners on notice of a sale option. A46. This is incorrect. ELIHPA and its implementing regulations identify "actions to facilitate a transfer or sale of the housing" as one incentive available to project owners. ELIHPA § 224(b); 24 C.F.R. § 248.231(g) (1990); 53 Fed. Reg. 11,229 (Apr. 5, 1988); see also City Line Joint Ventures v. United States, 82 Fed. Cl. 312, 314 (2008) (noting that plaintiff – the owner of a section 221(d)(3) project – submitted a notice of intent to sell under ELIPHA in 1990); JA1082-83 (explaining that HUD funded numerous sales under ELIHPA during the early 1990s). This is precisely what the United States and courts have referred to as the "sale option." See, e.g., Cienega IX, 67 Fed. Cl. at 441, 442.

CCA was aware of the option to sell under ELIHPA. Indeed, CCA notified HUD in December 1990 that it intended either to seek incentives or to pursue ELIHPA's sale option. JA653-55. However, even if CCA had not possessed actual knowledge of the sale option, CCA would be charged with knowledge that one benefit provided by ELIPHA was Government assistance in facilitating sale at fair market value. See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large,

Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."); Hunt Constr. Group, Inc. v. United States, 281 F.3d 1369, 1373 (Fed. Cir. 2002) (same).

In sum, the "sale option was plainly an available alternative because many owners in fact elected to sell their property," the option provided "considerable" benefits to owners, and such "benefits must be considered as part of the takings analysis." Cienega X, 503 F.3d at 1283-84, 1286. The trial court's refusal to assign any value to the sale option constitutes reversible, legal error. Id.

B. The Court Incorrectly Invoked The "Duration Of The Restriction" As Support For Its Ruling

The trial court devotes a separate section of its opinion to the duration of the regulatory restriction. A30. Indeed, the court describes duration as a "fourth" Penn Central factor. A17. Although the regulation's duration is properly taken into account in evaluating an alleged temporary taking, the court erred in treating duration as an independent factor under Penn Central.

"[T]he duration of the restriction" is properly taken into account "under the economic impact prong." Cienega X, 503 F.3d at 1279. The parties, therefore,

properly accounted for the regulatory duration when they stipulated to an 18 percent economic impact based upon a five-year prepayment restriction.[4] See JA1147-48.

The trial court, however, also treated the regulatory restriction's duration as a separate, "fourth" Penn Central factor. See A17, 26, 49. Treating the restriction's duration as an independent factor, one that supports or detracts from the claim, double counts its significance where, as here, duration has already been used to derive economic impact. Furthermore, the court offers no justification – and none is apparent – for concluding that a taking should be more readily found for a modest restriction that lasts for five years (resulting in an 18 percent economic impact) than for a more stringent restriction that lasts for a shorter period (that likewise results in an 18 percent economic impact).

To support its modification of the Penn Central test, the trial court relied upon Tahoe Sierra. A17 (citing Tahoe-Sierra, 535 U.S. at 342). The Tahoe-Sierra decision addressed whether a development moratorium effected a per se taking. See 535 U.S. at 341-42. As a result, the Court had no occasion to apply Penn Central, much less to alter its three-part balancing test. Tahoe-Sierra, 535 U.S. at 341-42; see also Lingle, 544 U.S. at 538-39 (reaffirming Penn Central's three

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[4] If the regulatory restriction had lasted longer, the diminution in value measure of economic impact would have been greater. If the regulation had ended sooner, economic impact would have been lower.

factors post-Tahoe-Sierra). More recent Supreme Court and Federal Circuit jurisprudence confirms the continuing vitality of the three-part Penn Central analysis. See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, ___ U.S. ___, 2010 WL 2400086, at *9 n.6 (June 17, 2010) (plurality opinion); Lingle, 544 U.S. at 539; Rose Acre, 559 F.3d at 1267.

Nor does the temporary nature of the alleged taking in this action affect the requisite approach. "The Penn Central test is the same whether the regulation is permanent or temporary in nature, although in the latter situation, the court must carefully consider the duration of the restriction under the economic impact prong." Cienega X, 503 F.3d at 1279. Consequently, the trial court erred in treating regulatory duration as an independent factor under Penn Central.

C. The Trial Court Incorrectly Analyzed Reasonable Investment-Backed Expectations

The second recognized criterion in a regulatory takings case is whether the challenged regulation interfered with reasonable investment-backed expectations. Penn Central, 438 U.S. at 124. This analysis is multifaceted. The claimant must establish its "actual expectation" at the time of the investment. Cienega X, 503 F.3d at 1288 (citing Cienega Gardens v. United States, 331 F.3d 1319, 1346 (Fed. Cir. 2003)). The claimant, however, must also establish that the challenged regulation interfered with reasonable investment-backed expectations. Cienega X,

503 F.3d at 1289 (requiring an analysis of "the benefits that the owners reasonably could have expected at the time they entered into the investment"); see also Chancellor Manor, 331 F.3d 891, 904 (Fed. Cir. 2003) (the proper focus is upon a "reasonable owner" in the claimant's position). "In determining whether expectations of prepayment were reasonably investment backed, it is necessary to inquire as to the expectations of the industry as a whole." Cienega X, 503 F.3d at 1290.

The trial court erred in two ways in addressing reasonable investment-backed expectations: (1) by treating the temporary regulatory restriction on prepayment as permanent; and (2) by disregarding that the option to prepay after 20 years was of little importance to the low-income housing industry in the 1960s and 1970s.

1. The Trial Court Mistakenly Treated The Preservation Statutes As Establishing A Permanent Restriction On Prepayment

It is "particularly important" in assessing reasonable investment-backed expectations that the court "first determine the precise scope of the benefits denied." Cienega X, 503 F.3d at 1290. This is because "the claimant must establish that it made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the government action, rather than the remaining benefits." Id. at 1289.

Here, as in Cienega X, the owner was not "entirely denied the right to prepay; rather that right was denied for a short period." Id. The Preservation Statutes restricted prepayment by Chateau Cleary's owner for approximately five years.[5] Consequently, under Cienega X, the salient question was whether a reasonable owner would have declined to participate in the section 221(d)(3) program if the option to prepay first arose after 25 years – rather than after 20 years.

The trial court failed to address this question. Instead, the trial court treated prepayment as "permanently restricted." A32. The court's only justification for this approach was that, in 1990, "owners could not have anticipated that the permanent restrictions contained in LIHPRHA would be removed." Id. This fails to distinguish Cienega X – binding precedent that the trial court was directed to apply on remand. CCA, 284 Fed. Appx. at 811. Nor is an owner's understanding of LIHPRHA in 1990 relevant. Investment-backed expectations are adjudged as of the initial investment, not at the time the challenged regulatory regulation comes into existence. Cienega X, 503 F.3d at 1289; Rith Energy, Inc. v. United States, 247 F.3d 1355, 1364 (Fed. Cir. 2001).

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[5] If the right to prepay had been permanently abrogated, CCA would have been unable to exit the section 221(d)(3) program until 2011. See JA502. CCA prepaid its mortgage in 1998 – two years after the HOPE Act restored its right to prepay and thereby exit the section 221(d)(3) program. See JA19; Chancellor Manor, 331 F.3d at 896; Cienega X, 503 F.3d at 1287.

Thus, the trial court evaluated the Preservation Statutes as a permanent restriction on prepayment even though it is undisputed that the restrictions lasted only five years. This flawed starting point renders the court's analysis of investment-backed expectations invalid and unsound.

2. The Court Erred In Determining The Significance Of Prepayment To The Industry As A Whole

This Court held in Cienega X that "it is necessary to inquire as to the expectations of the industry as a whole" to determine the significance of prepayment to a reasonable investor. 503 F.3d at 1290. "Contemporaneous documents," such as "actual contemporaneous offering memoranda," provide the best evidence of "industry expectations with respect to the general prepayment right." Id. Consequently, on remand, the parties were directed to "provide the Court of Federal Claims with sufficient contemporaneous documents for the court to determine . . . the expectations of the industry at the time." Id.

At the remand trial, the United States presented (1) a learned treatise written in 1972 by Charles Edson and Bruce Lane, (2) six contemporaneous private placement memoranda, and (3) unrebutted expert testimony. JA1100-09, 1114, 1150-484, 1632-40. This evidence established that the principal expectation for reasonable program participants was a small equity investment and dramatic tax benefits. JA58-59, 1155, 1191, 1229, 1266, 1314, 1475, 1632, 1634. The ability to

prepay 20 years in the future was insignificant. JA67, 1100-09, 1154, 1210, 1229, 1296-97, 1389.

CCA, by contrast, offered no evidence whatsoever of industry-wide expectations.[6] CCA thus failed to carry its burden of establishing the expectations of a reasonable investor in Chateau Cleary. See Cienega X, 503 F.3d at 1288; Forest Properties, 177 F.3d at 1367.

The trial court sidesteps this shortcoming in CCA's case by postulating – without an evidentiary basis – a second class of investors "interested primarily in long-term enhancement." A39. Neither the Edson & Lane treatise, nor private placement memoranda, nor any other record evidence, established the existence of a second class of investors that was interested simply in long-term gains. See JA1150-484, 1632-40. This is hardly surprising. An owner need not forego immediate tax benefits or annual dividends payments in order to realize any appreciation in the project's value by prepaying after 20 years. A reasonable investor would seek each of these returns to maximize total gain. See JA1632-40 (Edson & Lane). When all potential returns from an investment in moderate- or low-income housing are considered, the owner's principal return results from tax

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[6] CCA relied solely upon the project owner's testimony about subjective expectations for Chateau Cleary purportedly held by now-deceased family members. See A31, 39.

benefits and, to a lesser extent, annual cash distributions. JA61, 65-66, 1632, 1634. For this reason, as uniformly reflected in contemporaneous offering memoranda, the industry as a whole placed little value on the option to prepay 20 years down the road. JA1100-09, 1154, 1210, 1229, 1296-97, 1389.

This industry understanding makes perfect sense. A reasonable developer of Chateau Cleary – like any other developer of multi-family housing in 1970 – was faced with a choice: it could develop Chateau Cleary as conventional multi-family housing or, alternatively, under the section 221(d)(3) program. As a conventional project, Chateau Cleary would not have been subject to a regulatory agreement that limited prepayment, specified the income level of tenants, and required documentation to support rent increases. On the other hand, the project would have been ineligible for Government-insured financing, would have been unable to obtain a 90 percent mortgage and Government credits, would have generated far lower tax benefits, and would have lacked a reliable pool of moderate- and low-income tenants. See JA55-57, 1632-36. Put differently, by participating in section 221(d)(3) program, the developer could make a much smaller equity investment, obtain substantially more in tax benefits, and avoid the vagaries of the conventional rental market. JA61, 63, 65-66, 1632-36.

Discounting these clear benefits, the court concluded that the option to prepay after 20 years was the "primary" reason for a developer to participate in the section 221(d)(3) program. A39. This conclusion is nonsensical. If Chateau Cleary's developer had declined to participate in the section 221(d)(3) program, it would have been eligible to prepay its mortgage from day one – not after a 20 year wait. The opportunity to prepay was superior for conventional projects; it could not have been the reason to forego conventional development in favor of participating in the section 221(d)(3) program. Nor could the ability to exit the program (via prepayment) have been the principal benefit conferred by the program because, if that were the case, no one would have chosen to join in the first instance.

The record establishes that the general prepayment right was of little importance to the industry as a whole. The reasonable investment-backed expectations prong of Penn Central does not therefore support CCA's claim that the Preservation Statutes effected a regulatory taking.

D. The Trial Court Misapplied The "Character Prong" Of The *Penn Central* Test

The final criterion under Penn Central is the character of the Government action. The trial court found that the character prong "weighs in favor of a finding of a regulatory taking" by "re-adopt[ing]" its vacated 2007 decision. A29. The 2007 decision, however, expressly failed to consider statutory benefits. CCA, 75

Fed. Cl. at 189-90. It was this disregard of statutory benefits that led the trial court to mistakenly conclude that "[t]he preservation statutes did not place the burden of maintaining low-income housing on all taxpayers, but instead targeted only the owners of low-income housing." Id. at 189-90.

Under Cienega X, the Court of Federal Claims was required to consider the statutory sale and use agreement options – options that unquestionably affected the Preservation Statutes' character. Cienega X, 503 F.3d at 1287. These taxpayer-funded options provided owners "considerable" benefits "which were specifically designed to ameliorate the effect of the prepayment restrictions." Id. at 1283, 1286. Indeed, concern was frequently expressed that the statutory options were overly generous:

> When signing LIHPRHA, President Bush expressed concern that the incentives were in fact too generous:
>
> > One important preservation strategy is to provide project owners with economic incentives to maintain their properties for low-income use. I am concerned, however, that the incentives in S. 566 are more generous than are necessary, providing excessive benefits over the long term that will be paid by all taxpayers.
>
> Statement on Signing the Cranston-Gonzalez Nation Affordable Housing Act, 26 Weekly Comp. Pres. Doc.1931 (Nov. 28, 1990). The President's sentiment was echoed in the hearings leading to the enactment of HOPE, where HUD's Inspector General testified that the government should "[d]iscontinue paying owners windfall profits for projects that threaten to prepay their mortgages and remove the low

> income character of the units." Hearing Before the Subcomm. on VA, HUD, and Independent Agencies of the H. Comm. on Appropriations, 104th Cong., 1st Sess. (Jan. 24, 1995) (statement of Susan Gaffney, HUD Inspector General).

503 F.3d at 1286 (emphasis added).

The Congressional effort to protect the interests of project owners is reflected not merely in legislative history, but also in the terms of the Preservation Statutes. For example, ELIHPA and LIHPRHA allowed projects that were not necessary for the Congressional preservation strategy to exit the program through prepayment. JA91; ELIHPA § 225(a); 12 U.S.C. § 4108. The Preservation Statutes also permitted project owners to realize the equity in a project (i.e., residual value) and exit the HUD program by selling at fair market value. JA34, 80; ELIHPA § 224(b); 12 U.S.C. § 4110. The Preservation Statutes allowed owners to reduce overall regulation and increase the project's return on equity through use agreements.[7] ELIHPA §§ 224, 225(b); 12 U.S.C. § 4109. Finally, in the unlikely event that a sale could not be consummated, or incentives were unavailable, the owner was allowed to prepay. JA80; 12 U.S.C. § 4114. The statutory options thus ensured that the Preservation Statutes would not shift a public burden on to project owners such as CCA.

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[7] HUD funded both the sale and use agreement options using taxpayer dollars. See 12 U.S.C. § 4110(d); JA1082.

The trial court failed to comply with both Cienega X, 503 F.3d at 1286, and the mandate in this action, see CCA, 284 Fed. Appx. at 811, when it neglected to consider the sale and use agreement options in its analysis of character. If the trial court had properly considered the statutory options, it would have concluded that the Preservation Statutes did not have the character of a taking because the Government acted to protect project owners from the financial burden of housing the poor.

Of course, the court should have concluded that the Preservation Statutes did not have the character of a taking in any event. The restrictions imposed by the Preservation Statutes are akin to standard rent control measures. Under the Preservation Statutes, the property owner maintained physical control of the apartment complex, retained the ability to manage the property, and was allowed to turn away prospective tenants. JA26-27, 35, 1083-84. The Preservation Statutes merely limited the owner's ability to unilaterally raise tenant rents.[8] Rent control statutes are not generally considered to have the character of a taking. See Yee v. City of Escondido, 503 U.S. 519, 528-29 (1992); FCC v. Florida Power Corp., 480

[8] According to Mr. Norman, if the Preservation Statutes had not been enacted, CCA would have terminated the regulatory agreement with HUD by prepaying its mortgage, converted Chateau Cleary to a conventional project, and rented apartments to tenants at the going market rate. See JA2. Thus, the only material effect of the Preservation Statutes on CCA concerned the ability to move to market-rate rents after the project's 20-year anniversary date. See id.

U.S. 245, 251-52 (1987). Consequently, even if the statutory options were disregarded, the Preservation Statutes would not have the character of a taking.

E. The Court Should Enter Judgment For The United States On CCA's Regulatory Taking Claim

The trial court's Penn Central analysis in this action is replete with errors stemming principally from the failure to faithfully apply Cienega X.

Perhaps most significant is the trial court's persistent disregard of statutory benefits – benefits that under Cienega X "must be taken into account." 503 F.3d at 1286. When statutory benefits are considered, the economic impact of the Preservation Statutes on CCA drops to a mere five percent. JA1120-23. In addition, it becomes clear that the Government's action was a balanced approach that preserved low-income housing, while protecting the interests of property owners by providing generous, taxpayer-funded benefits to ameliorate the effect of the restriction on prepayment.

Equally unsound is the trial court's analysis of reasonable investment-backed expectations. The court wrongly treats the Preservation Statutes as a permanent restriction. See Cienega X, 503 F.3d at 1290 (the owner was not "entirely denied the right to prepay; rather that right was denied for a short period"). And it disregards contemporaneous documents that invariably confirm that prepayment was of little significance to reasonable investors. See id. at 1291 (directing the trial

court to use "contemporaneous offering memoranda," which provide "reliable evidence of industry expectations").

When analyzed in accordance with Cienega X, none of the Penn Central factors support CCA's regulatory taking claim. Accordingly, the Court should reverse the decision below and enter judgment in favor of the United States.

III. The Court Of Federal Claims Erred When It Awarded Compensation Based Upon An *Ex Post* Valuation Of Lost Cash Flows

If the Court affirms the trial court's holding that a regulatory taking occurred, the Court should still reverse the compensation award. Reasoning that the Federal Circuit's remand instructions and its decision in Cienega X "included no instructions regarding just compensation," the trial court applied the same measure of just compensation as it did in its 2007 decision. A50. Accordingly, the trial court concluded that the relevant date for valuing plaintiff's prepayment rights should be the end of the temporary takings period. Id.

The court's approach to calculating just compensation is contrary to the law, overstates compensation, and will lead to bizarre outcomes. It is a settled principle in takings law that the proper date for valuing property taken by Government action – whether by condemnation, occupation, or regulation – is the date on which the taking occurred. See, e.g., First English Evangelical Lutheran Church of Glendale

v. County of Los Angeles, 482 U.S. 304, 320 (1987) (noting "the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking").

Both the Supreme Court and this Court have rejected the notion that temporary takings and permanent takings are somehow subject to different valuation rules. In First English, itself a temporary takings case, the Supreme Court explained that temporary takings "are not different in kind from permanent takings." 482 U.S. at 318. Similarly, this Court explained in a regulatory takings case that "[f]air market value under the Fifth Amendment is normally ascertained at the date the governmental restrictions are imposed, which is the date of the taking." Yancey v. United States, 915 F.2d 1534, 1543 (Fed. Cir. 1990).

A. The Court's Approach Would Produce Unjust Results

The court offers no justification for its departure from this settled law. Moreover, the court's approach will produce odd and unjust results. For example, as CCA's expert economist admitted, in cases where market values fall after the taking, the Government would owe compensation only for the value remaining in the property at the end of the period, not for the value that the Government originally took from the owner. JA102-103; 106. CCA's expert also acknowledged that, in other circumstances, a claimant would be paid less for a permanent taking

than for a temporary taking of the same property. JA96, 104-05; see also Cienega X, 503 F.3d at 1282 n.13 ("A determination that damages exceed the value of the property should be indicative that the method of computing damages is flawed.").

The court's approach is flatly contrary to the policies underlying the "time of the taking" rule. Measuring just compensation at the time of the taking ensures that the Government bears the risk of diminutions in property value after the taking. United States v. Dow, 357 U.S. 17, 24 (1958); see also Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 477-78 (1973). Additionally, the effect of the court's approach denies the Government the ability, ex ante, to estimate the cost to the public fisc of proceeding with a temporary taking, because the compensation award will depend not on the market value of the property at the time of the taking, but on unknowable events occurring during the takings period. JA95-96; 102. Such a result cannot be reconciled with the established principle that "just" compensation is no more or less than "the market value of the property at the time of the taking contemporaneously paid in money." United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (emphasis added). Under that standard, the determinative question in calculating just compensation is "what a willing buyer would pay in cash to a willing seller at the time of the taking." United States v.

564.54 Acres of Land, 441 U.S. 506, 511 (1979) (internal quotation omitted) (collecting cases). The test logically precludes the notion that post hoc fluctuations in value affect compensation.

The practical effect of the court's choice of valuation date is to cause a material increase in the compensation award in this case, as the plaintiffs' annual nominal damages must be properly discounted to real-dollar terms to calculate a final total. JA97, 98. Because valuation must occur as of the time of the taking, all such nominal losses should have been adjusted downward by the discount rate. This difference arises because the discount rate used in the valuation process (here 10 percent) is greater than prejudgment interest rate. Thus, discounting CCA's nominal losses forward (and thus upward) at 10 percent to the end of the alleged takings period is erroneous. The correct approach is to discount nominal losses backward (and thus downward) to the time of the taking, and then apply the lower prejudgment interest rate going forward.

Using the end of the takings period as the valuation date, the court adjusts CCA's nominal losses upward by the discount rate. JA98. As noted above, the court's ex post methodology also permits plaintiffs to seek compensation based upon actual market increases that occurred after the taking and, indeed, could require greater compensation for a temporary taking than for a permanent taking.

JA96, 104-05 A proper ex ante valuation – based upon information available to the parties at the time of the taking – could not result in such a nonsensical outcome. JA99-100; 101; 545-88.

Accordingly, because "the valuation of property which has been taken must be calculated as of the time of the taking" using an ex ante approach, First English, 482 U.S. at 320, the Court should reverse the trial court's award of compensation.

B. The Court Further Erred By Ignoring The Proper Approach For Calculating Just Compensation Proffered By The Government's Expert

The trial court further erred by ignoring the Government's proffered method for calculating just compensation. At trial, Dr. Dickey, the Government's expert, proffered an ex ante model of just compensation – i.e., a model that does not take into account subsequent events but, rather, only considers information available to the parties at the time of the taking. Dr. Dickey based his valuation upon the diminution-in-value that resulted from the Preservation Statutes. This represents the amount a willing buyer would have paid, at the time the governmental restrictions were imposed, to acquire rights to the plaintiff's property for the duration of the takings period. See Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (holding that market value should be determined at the time of the taking).

This method of calculating just compensation is consistent with the well-settled approach for measuring just compensation for permanent takings. See, supra, § IV.A; see also First English, 482 U.S. at 320. Moreover, it is entirely appropriate to take into account the passage of the HOPE Act, because, as a matter of law, the HOPE Act reinstated the right to prepay and ended the plaintiff's alleged taking. Cienega X, 503 F.3d at 1274. As this Court recognized in Independence Park v. United States, where a permanent taking is cut short by Government action, compensation for the resulting temporary taking should be the same as the compensation due for that part of the permanent taking that actually occurred. 465 F.3d 1308, 1311 (Fed. Cir. 2006) (holding that "[w]hen subsequent action converts an otherwise permanent taking into a temporary one, just compensation is typically calculated in the same manner, adjusted to account for the subsequent events so that the damages will accurately reflect the value of what was taken."); see also Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973) (just compensation for a taking is measured as of the time of the taking).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and judgment entered in favor of the United States upon CCA's taking claim. In the

alternative, if the Court affirms the judgment on CCA's taking claim, this action should be remanded for a redetermination of just compensation.

Respectfully submitted,

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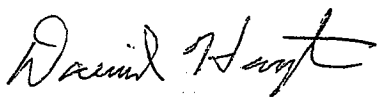

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July 19, 2010

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 19th day of July, 2010, I caused to be placed in the U.S. Mail (postage prepaid) copies of the "BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES," addressed as follows:

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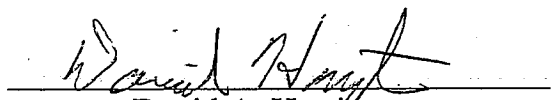
CERTIFICATE PURSUANT TO RULE 32(A)(7)(C)

I, David A. Harrington, an attorney in the Department of Justice, Civil Division, Commercial Litigation Branch, certify that this brief, which used Times New Roman font with 14 point type, contains 9,738 words (relying upon the Corel Word Perfect word count feature of the word processing program used to prepare this brief) and complies with the type-volume limitation contained in Rule 32(a)(7)(B).



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