No.

IN THE

Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to a regulatory agreement with the Department of Housing and Urban Development ("HUD"), Petitioner agreed to maintain and operate an apartment complex as low-income housing for as long as a government-insured, 40-year mortgage on the property remained outstanding. The transaction documents entered into among Petitioner, HUD, and the lender provided Petitioner with the express right to prepay this government-insured mortgage after 20 years and thereby regain complete control of the property. In response to concerns that owners would prepay their government-insured mortgages and cease providing low-income housing, Congress outlawed prepayment. Against that background, the questions presented are:

1. Whether the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking of Petitioner's property without just compensation in violation of the Fifth Amendment of the Constitution because the legislation required Petitioner to house qualifying tenants for a period of years and otherwise unfairly compelled Petitioner, rather than the public as a whole, to bear the societal cost of low-income housing.

2. Whether the government breached its contractual obligations to Petitioner when it outlawed prepayment because the prepayment right formed part of the overall agreement among Petitioner, HUD, and the lender.

RULE 29.6 STATEMENT

Petitioner CCA Associates is a general partnership consisting of Ernest B. Norman, III, John H. Norman, Margaret H. Norman, and the Ernest B. Norman Jr. and Emma Couret Norman Grandchildren's Trust. No company has an ownership interest in Petitioner.

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JURISDICTION

The Federal Circuit entered judgment on November 21, 2011. App. 1a. Petitioner thereafter petitioned for rehearing and rehearing en banc. The Federal Circuit denied the petition for rehearing and rehearing en banc by order dated February 9, 2012. App. 235a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the relevant text of Pub. L. No. 100-242, 101 Stat. 1815 (codified at 12 U.S.C. § 1715*l* note); Pub. L. No. 101-625, 104 Stat. 4079 (codified at 12 U.S.C. § 4101 et seq.); and the Fifth Amendment of the Constitution. App. 237a-290a.

STATEMENT OF THE CASE

This case concerns the Norman Family's 1971 agreement with HUD to provide low-income housing in metropolitan New Orleans for a period of 20 years and the government's decision to renege on that agreement and to compel the Norman Family to submit to HUD regulations and to house low-income, HUD-approved tenants for an additional 20 years. The government obtained this housing by legislative fiat when Congress, concerned about a national shortage of low-income housing units, confiscated the Norman Family's contractual right to exit the HUD program. Congress thus succeeded in providing low-income housing in a politically expedient, "off budget" method: by compelling the Norman Family, rather than society as a whole, to bear the cost of providing low-income housing.

The Federal Housing Programs And The Norman Family's Agreement With HUD

The Federal Government historically encouraged the creation of low-income housing units by supporting non-profit organizations and public housing authorities. However, in the 1960s, Congress adopted a different approach: use the private sector. Congress then authorized HUD, *inter alia*, to provide mortgage insurance and interest-rate subsidies to private investors who agreed to construct and operate low- and/or moderate-income housing units. App. 50a-52a.

Ernest B. Norman, Jr. and J. Robert Norman (the "Norman Brothers"), the predecessors-in-interest to Petitioner CCA Associates ("CCA" or "Norman Family"), agreed to participate in this new HUD program at the urging of HUD agents. In pressing the Norman Brothers to invest in low-income housing and thereby to accept years of minimal returns, HUD touted the program's so-called "prepayment right," which effectively limited owners' participation to a 20-year term. App. 101a. Thus, the property would be subject to HUD regulations, restrictions, and oversight for 20 years; after 20 years, the Norman Brothers could "prepay" and exit the HUD program and operate the property however they saw fit.

The Norman Brothers thus agreed to construct and operate as low-income housing a 104-unit apartment complex in West Metairie, Louisiana, known as Chateau Cleary Apartments ("Chateau Cleary"). App. 52a. For its part, HUD agreed to provide the Norman Brothers with mortgage insurance, which facilitated a low-interest, 40-year mortgage. App. 3a, 53a-54a.

Three interlocking documents, all appearing on pre-printed HUD forms and all executed contemporaneously at HUD's office in New Orleans, comprised this transaction: (i) a regulatory agreement between the Norman Brothers and HUD; (ii) a mortgage between the Norman Brothers and a lending institution; and (iii) a promissory note between the Norman Brothers and the lender, endorsed by HUD. App. 4a-5a. The lender essentially acted as a placeholder in the transaction because Ginnie Mae, a HUD-administered government corporation, thereafter purchased the loan from the lender. App. 51a, n.3.

The regulatory agreement between the Norman Brothers and HUD sharply restricted the Norman Brothers' use of the property and bound the Norman Brothers for the length of the mortgage (ostensibly 40 years). *Inter alia*, the regulatory agreement:

- limited the occupancy of Chateau Cleary to low- or moderate-income families;
- provided that all rents had to be approved by HUD;
- required that Chateau Cleary be managed "in a manner satisfactory to [HUD]";

- required HUD approval for any conveyance of the property;
- required the Norman Brothers to submit to HUD audits and to furnish annual financial reports to HUD; and
- limited the Norman Brothers' annual return to just $12,952, or 6% of their initial equity investment.

App. 148a, 212a-213a.

The Prepayment Right

The regulatory agreement's use restrictions, including the requirement that the Norman Family house HUD-approved tenants at HUD-approved rates, applied for as long as the mortgage remained outstanding. App. 3a. Thus, the moment that the Norman Family extinguished the debt owed on Chateau Cleary was the moment that the Family could rent the apartment units at market rates, tear down Chateau Cleary or otherwise re-purpose the property. That moment was May 17, 1991, or 20 years after execution of the mortgage and note, because the Norman Family enjoyed an unfettered right to prepay the mortgage after 20 years. App. 5a.

The HUD-drafted and HUD-endorsed note set forth the prepayment right: "a maker which is a limited dividend mortgagor may prepay without [HUD] approval after twenty (20) years from the date of final endorsement of this note by [HUD]." App. 54a, n.6. The same prepayment right was embodied in HUD's regulations: The "mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner where . . . the prepayment occurs after the expiration of 20 years from the date of final insurance endorsement of the mortgage . . . ." 24 C.F.R. § 236.30 (1970); *Cienega Gardens v. United States,* 331 F.3d 1319, 1330 (Fed. Cir. 2003) ("Owners had unequivocal contractual rights after twenty years to prepay their mortgages[.]"); *cf. Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (ELIHPA repudiated prepayment right).

HUD promoted this prepayment right in negotiations with the Norman Family, App. 101a, and, as found by the Court of Federal Claims ("COFC"), the prepayment right formed the *primary* investment-backed expectation to proceed with the Chateau Cleary project, not only for the Norman Family but also for any reasonable investor. App. 115a-117a. The reason is simple: At the time of the transaction, the land on which Chateau Cleary was to be built sat in the path of anticipated middle-class development in the New Orleans metropolitan area. App. 197a-198a. The Norman Family thus could construct a quality complex, maintain it well, and then convert the property to conventional housing at year 20 – at the time when development was expected to reach Chateau Cleary and when conventional housing would be in high demand. App. 197a-198a.

The Norman Family executed this plan, and the development toward (and beyond) Chateau Cleary occurred just as anticipated. By 1991, West Metairie had the benefit of two large, popular shopping malls, one of the area's premier medical complexes, good public schools, low crime, a new regional library, easy access to Interstate 10, and proximity to downtown New Orleans. App. 201a.

ELIHPA And LIHPRHA

The Norman Family satisfied its end of the bargain. The government did not. In the late 1980s, when Congress feared that thousands of low-income housing units might be lost through mortgage prepayments, Congress took the politically expedient method of outlawing prepayment rather than funding new construction projects or providing payment vouchers to tenants. The Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"),[1] App. 238a-249a, initially imposed a two-year moratorium on prepayment. The Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA"),[2] App. 250a-290a (excerpts), made the moratorium on prepayment permanent.

The decision to confiscate the Norman Family's and other owners' prepayment rights was not inadvertent. Congress consciously made the decision to redress a societal need on the backs of those property owners who had already dedicated their properties to low-income housing for 20 years. Thus, Senator Armstrong observed with irony that HUD had "enter[ed] into contracts with owners and developers" and that the owners "probably had the mistaken notion that the Federal Government was going to honor its word." 136 Cong. Rec. 26,382-83 (1990). Senator Heflin acknowledged that

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[1] Pub. L. No. 100-242, 101 Stat. 1815 (codified at 12 U.S.C. § 1715*l* note).

[2] Pub. L. No. 101-625, 104 Stat. 4079 (codified at 12 U.S.C. § 4101 et seq.).

"unilaterally abrogating a contract, which has been adhered to by one party for 20 years, flies in the face of the law." 136 Cong. Rec. 26,372 (1990). But Representative Joseph Kennedy justified the legislation by explaining that "some fine print allowing prepayment" should not defeat the goal of providing low-income housing. *Preservation and the Loss of Subsidized Housing Stock*, Hearing Before the Subcomm. on Housing and Community Dev. of the H. Comm. on Banking, Finance and Urban Affairs (Feb. 28, 1990) at 6.

The HOPE Act And Restoration Of The Right To Prepay

LIHPRHA permanently confiscated the Norman Family's right to prepay its mortgage. However, in March 1996 Congress reversed course and restored owners' prepayment rights as part of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996) ("HOPE").

Economic Impact Of LIHPRHA

HOPE restored the Norman Family's prepayment right as of May 27, 1996, five years after the contracted-for prepayment date of May 17, 1991.[3] App. 5a, 96a. During the five-year forced occupation of Chateau Cleary, the Norman Family did not (and could not) earn more than the maximum annual dividend of $12,952. App. 212a. The Family lost more than 80% of the return on equity it otherwise

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[3] HUD continued to prevent prepayments after enactment of HOPE. App. 60a-63a. The Norman Family finally was able to prepay in September 1998 and leave the HUD program. App. 63a.

would have earned, App. 10a, 213a, and suffered lost rental income of more than $700,000, App. 142a.

The Norman Family Waits While The Federal Circuit Addresses LIHPRHA

The Norman Family filed this lawsuit in the COFC in May 1997. The Complaint alleged that the United States, in enacting ELIPHA and LIHPRHA, breached its contractual obligations and took the Norman Family's property without providing just compensation, in violation of the Takings Clause of the Fifth Amendment of the Constitution.

Then nothing happened in this lawsuit for years. The COFC stayed the litigation to permit the Federal Circuit to delineate the applicable legal rules. App. 49a. At present, the Federal Circuit has published no fewer than twelve "LIHPRHA" decisions.

The Federal Circuit's rulings include the following:

1. *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*"), *cert. denied*, 528 U.S. 820 (1999). In the *Cienega IV* decision, a divided panel vacated summary judgment for the owners on their breach of contract claims, holding that the notes guaranteeing the prepayment right – although endorsed by HUD – constituted a contract only between the owners and the lender; thus, HUD never was contractually obligated to honor the owners' prepayment rights. The panel refused to read the transaction documents together. Judge Archer dissented, concluding that the contemporaneous and interlocking transaction documents should be read as an integrated whole, rather than in isolation, and that the government

therefore breached its contractual obligations by forbidding prepayment.

2. *Cienega Gardens v. United States*, 265 F.3d 1237 (Fed. Cir. 2001) ("*Cienega VI*"). The Cienega Gardens plaintiffs subsequently litigated their takings claims against the government, and, in the *Cienega VI* decision, the Federal Circuit rejected the owners' physical takings claims. In one summary paragraph, the court concluded that just compensation was not required under a physical-takings analysis because "the effect of the prepayment restrictions … [was] merely to enhance an existing tenant's possessory interest." *Id.* at 1248. The court ignored that LIHPRHA compelled owners to submit to the physical occupation of their property by low-income tenants for 20 additional years.

3. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"). In *Cienega VIII*, the Federal Circuit first addressed the owners' regulatory takings claims under this Court's decision in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). The Federal Circuit directed entry of judgment in favor of the four model plaintiffs, holding that they had suffered a regulatory taking requiring the government to pay just compensation. *Inter alia*, the court determined:

- **LIHPRHA had the character of a taking**. The Federal Circuit agreed with plaintiffs that the character of LIHPRHA was "extraordinary." *Cienega VIII*, 331 F.3d at 1338. According to the court, LIHPRHA "intentionally defeated the Owners' real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years." *Id.* at 1328.

▪ **LIHPRHA interfered with the owners' reasonable, investment-backed expectations**. The court found that the "prepayment rights provided, from all objective analyses, the crucial economic incentive here" and that LIHPRHA could not have been anticipated. *Id.* at 1352.

▪ **The owners suffered a severe economic loss as a result of LIHPRHA**. In finding a severe economic impact, the court focused on the model plaintiffs' minimal return on equity. The court noted its "own determination[ ]" that the return-on-equity measure was "an appropriate foundation for the analysis of 'economic impact.'" *Id.* at 1341.

4. *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"). In *Cienega X*, a seven-judge panel performed a 180° turnabout, vacating judgment for owners on their regulatory takings claims. The panel concluded that the COFC had erred – not because the COFC had misapplied the governing *Cienega VIII* precedent but because the COFC had failed to anticipate the new and contradictory standards decreed by it.

Thus, the court ruled that the COFC erred in applying the return-on-equity approach to analyzing economic impact, *even though the Federal Circuit had embraced this very approach in Cienega VIII* and in *Chancellor Manor v. United States*, 331 F.3d 891, 905 (Fed. Cir. 2003), another LIHPRHA takings case. According to the panel, the return-on-equity analysis failed to consider the *lifetime value* of the real properties. *Cienega X*, 503 F.3d at 1280-82. The *Cienega X* panel also held that the trial court erred in not determining whether the prepayment right was the "primary" or "but for" investment expectation. *Id.* at 1290. The panel so ruled *even* *though the Cienega VIII panel previously had held that the owners' investment-backed expectations were presumptively reasonable* because the "prepayment rights provided, from all objective analyses, the crucial economic incentive." 331 F.3d at 1352.

Judge Newman dissented on the ground that the opinion in *Cienega VIII* was controlling on the court. 503 F.3d at 1291.

The Norman Family Prevails In The First Trial; The Federal Circuit Reverses And Remands In Light Of *Cienega X*

Both the Norman Family and the United States believed that the Federal Circuit finally had determined the applicable legal framework after *Cienega VIII*: that is, in the view of the Federal Circuit, owners such as the Norman Family did not have valid contract claims or physical-takings claims against the government but likely did have meritorious regulatory takings claims requiring the government to pay just compensation. The COFC therefore lifted the stay in November 2003, soon after *Cienega VIII* had been decided, and the case proceeded to a seven-day trial before Judge Charles Lettow in September 2006 on whether the Norman Family had suffered a regulatory taking as a result of passage of ELIHPA and LIHPRHA.

In an opinion dated January 31, 2007, Judge Lettow ruled that all three "*Penn Central* factors" strongly supported a taking, requiring the payment of just compensation. App. 187a-217a. For example, LIHPRHA had the character of a taking because the legislation unfairly "targeted only the owners of low-income housing," App. 189a, and "created a situation analogous to a physical invasion or a holdover tenancy." App. 191a. The legislation also had a severe economic impact on the Norman Family, as the Family lost "more than eighty percent of the returns that a conservative financial investment would have earned during the takings period." App. 216a. Finally, LIHPRHA confiscated the Norman Family's primary investment-backed expectation. According to Judge Lettow, "[t]he prepayment right was the *sine qua non* of the deal the Norman brothers struck with HUD and the original developers." App. 216a.

The United States appealed. During the pendency of the appeal, the Federal Circuit issued its decision in *Cienega X*. The Norman Family defended the judgment below by explaining, *inter alia*, that *Cienega X* conflicted with and fundamentally misconstrued Supreme Court and Federal Circuit precedent. The Federal Circuit summarily rejected these arguments, vacated judgment, and remanded for further proceedings in light of *Cienega X*. App. 44a-46a.[4]

The Norman Family Prevails In The Second Trial On Its Takings Claim

The parties then conducted a second trial in July 2009 to address the new requirements of *Cienega X*.

The Norman Family again prevailed on its takings claim. Now for the second time, Judge

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4 The Norman Family petitioned for a writ of certiorari. The government opposed, principally arguing that the petition was premature in light of the Federal Circuit's remand order. *See* No. 08-505. The Court denied the petition on February 23, 2009.

Lettow concluded that LIHPRHA effected a taking because the legislation unfairly burdened the Norman Family, worked a severe economic deprivation, and confiscated the Norman Family's primary investment-backed expectation (and the primary investment-backed expectation for any reasonable investor in Chateau Cleary). App. 92a-139a.

Judge Lettow found that LIHPRHA caused a severe economic impact notwithstanding the Federal Circuit's decree that only the loss in the property's lifetime value could be considered – an 18% diminution in this case (comparable to a more than 80% loss of income during the takings period). While an 18% loss in lifetime value for a *permanent* restriction might not be severe, the same could not be said for an 18% loss in lifetime value resulting from a *temporary* restriction lasting five years. As explained by Judge Lettow, "an 18% economic loss concentrated over approximately five years constitutes a 'serious financial loss.'" App. 138a.

Regarding the Norman Family's breach-of-contract claim, Judge Lettow reluctantly concluded that he had no choice but to follow the Federal Circuit's decision in *Cienega IV* and to dismiss the claim for lack of contractual privity. However, Judge Lettow made clear his position that the Federal Circuit incorrectly decided *Cienega IV* and that "but for *Cienega IV* this court would find that Congress breached the government's contract with CCA with respect to its prepayment rights when it enacted ELIHPA and LIHPRHA." App. 85a. In finding HUD's privity of contract regarding the prepayment right, Judge Lettow explained that "[i]t is black letter contract law that multiple documents, executed contemporaneously and relating to the same transaction, should be read together to determine the intent of the parties." App. 71a (citing, *inter alia*, *Joy v. City of St. Louis*, 138 U.S. 1, 38 (1891)).

The Federal Circuit Reverses The Judgment Of Just Compensation

The government again appealed the judgment in favor of the Norman Family, and the Norman Family cross-appealed the COFC's dismissal of its contract claim. In a decision dated November 21, 2011, the Federal Circuit affirmed dismissal of the contract claim and reversed the judgment awarding just compensation. App. 1a-20a. In all respects, the Federal Circuit issued a "final decision." The court did not provide for any remand proceeding, concluding instead that "CCA failed to establish that the denial of the prepayment right constituted a regulatory taking." App. 16a.

But the panel majority indicated its discomfort with the ruling ending 15 years of litigation in which the Norman Family had twice prevailed at trial. For example, regarding the dismissal of the contract claim, the panel majority described Judge Lettow's analysis, in which Judge Lettow concluded that *Cienega IV* had been wrongly decided, as "exceedingly thoughtful and thorough." App. 17a. The panel majority also discussed the Tenth Circuit's decision in *Aspenwood Investment Company v. Martinez*, 355 F.3d 1256 (10th Cir. 2004), in which, in direct conflict with *Cienega IV*, the Tenth Circuit found privity of contract between the government and owners regarding the prepayment right here at issue. App. 18a. The panel majority nonetheless held – as Judge Lettow had held – that this case could not be distinguished from the facts in *Cienega IV* and that the contract claim had to be dismissed. App. 19a.

With respect to the takings claim, the panel majority concluded that it had no choice but to follow *Cienega X* and deem the economic impact to be 18%, a quantum of loss that it said was insufficient to support a taking. App. 10a. However, the panel majority made clear that the Federal Circuit's decision in *Cienega X* not only ran afoul of longstanding precedent but, if not overruled, "would *virtually eliminate all regulatory takings*." App. 12a (emphasis added). According to the panel majority, the Federal Circuit in *Cienega X* "deviated from the traditional lost rent or return on equity approach" in determining the economic impact of a temporary regulation "and instead required that the lost income be compared to all of the money the property would earn over its remaining life." App. 12a. However, "[i]f the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to severe economic deprivation when compared to our prior regulatory takings jurisprudence." App. 12a. The panel majority so disagreed with the *Cienega X* "lifetime value" rule that, in dictum, it stated that the decision should be limited to ELIHPA and LIHPRHA takings cases. App. 12a.

The Norman Family thus had the misfortune of having its appeal decided after *Cienega X* rather than after *Cienega VIII*. The panel majority explained:

> Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the economic analysis between the two cases. While the plaintiff stipulated to the 18% economic impact, CCA continued to dispute the propriety of the *Cienega X* methodology. *Cienega X makes it **virtually impossible** for any ELIHPA or LIHPRHA plaintiff to establish the severe economic impact necessary for a taking[].*

App. 11a (emphasis added).

The panel majority also concluded that the *Penn Central* "investment-backed expectations" factor did not support a taking. The majority accepted the COFC's findings of fact, including that (i) HUD touted the prepayment right to the Norman Brothers in convincing them to invest, App. 101a; (ii) owners like the Norman Family could not reasonably have anticipated LIHPRHA, App. 99a; (iii) the prepayment right was the *sine qua non* of the deal, App. 116a; (iv) the prepayment right formed the *primary* investment-backed expectation for the Norman Family, App. 115a-117a; and (v) the prepayment right formed the primary investment-backed expectation for *any* reasonable investor in Chateau Cleary, App. 117a.

The Federal Circuit accepted all of these facts yet ruled against the Norman Family based on the check-the-box test set forth in *Cienega X*, requiring the Norman Family to prove that the "industry" as a whole shared the Norman Family's investment-backed expectation. In other words, the expectations of owners of properties in Maine, North Dakota, and California needed to be proven even though, as the Norman Family argued extensively, an owner's expectations differed greatly based on location, quality of construction, and other considerations related to the unique character of real property. The COFC itself determined that there was no "industry practice" and that "it is not possible to derive investment expectations of participants in the Section 221(D)(3) and Section 236 programs as a whole." App. 114a. The Federal Circuit ignored this factual finding and ruled that "CCA failed to carry its burden" in establishing industry expectations. App. 14a.

Finally, the panel majority affirmed prior Federal Circuit precedent recognizing that "the character of the government's action supports a taking." App. 16a. However, the Federal Circuit addressed none of the Norman Family's arguments explaining why the extraordinary character of the governmental action in and of itself compelled just compensation. Instead, the panel majority merely stated that the character of LIHPRHA "is not dispositive of this issue." App. 16a.

Judge Dyk, the author of *Cienega X*, concurred in the judgment but dissented from much of the panel's analysis, including its analysis of economic impact and the character of LIHPRHA. App. 21a-43a.

The Norman Family Seeks Rehearing And Rehearing En Banc

The panel majority all but requested the Norman Family to petition for rehearing en banc. Repeatedly, the panel majority stressed that it was "bound" to follow *Cienega X* and *Cienega IV*. App.

2a. According to the majority, "[e]ven if we are sympathetic to the arguments challenging the propriety of the economic analysis required by *Cienega X* and the breach of contract law of *Cienega IV*, we cannot consider these arguments at the panel stage." App. 6a.

The Norman Family accepted the invitation and filed a petition for panel rehearing and rehearing en banc. However, the court denied rehearing and rehearing en banc by order dated February 9, 2012. App. 235a.

REASONS FOR GRANTING THE WRIT

This petition concerns the Federal Circuit's inability or unwillingness to address important constitutional and contractual issues involving the federal government in a manner consistent with this Court's jurisprudence. The panel majority itself confessed error. According to the panel majority, controlling Federal Circuit precedent "deviated" from longstanding precedent and "would virtually eliminate all regulatory takings" (and certainly eliminate all temporary regulatory takings). App. 12a. Yet, for whatever reason, the Federal Circuit refused to correct its *admittedly wrong* precedent en banc, content to have the Norman Family suffer the consequences of the Federal Circuit's admitted mistakes after having litigated this case for 15 years, including through two trials.

The Federal Circuit's decision cries out for review for at least three separate reasons. *First*, the Federal Circuit fundamentally misconstrued this Court's precedent in failing to recognize a physical taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court explained that the Takings Clause requires just compensation whenever the government requires an owner to acquiesce in the physical occupation of his property. Here, LIHPRHA compelled the Norman Family, against its will, to submit to a 20-year physical occupation of Chateau Cleary by low-income, HUD-approved tenants so that Congress could escape having to allocate money for tenant vouchers or for new construction. The government must pay just compensation for this physical invasion.

Second, and with regard to the Federal Circuit's "regulatory takings" jurisprudence, the Federal Circuit fundamentally has misapplied this Court's precedent and, in the process, has made a successful regulatory takings claim "virtually impossible." App. 11a. This Court repeatedly has stressed that there is no "set formula" in determining a regulatory taking and that the inquiry is ad hoc. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). Yet, as this case demonstrates, the Federal Circuit has disregarded this Court's precedent by concocting a mechanical, check-the-box test for determining a regulatory taking.

For example, the Federal Circuit ruled that the "economic impact" factor could be satisfied only if the plaintiff suffered some threshold percentage loss with respect to the *lifetime value* of the property, apparently on the order of 75% or more. This check-the-box rule would, as explained by the panel majority, eliminate all temporary regulatory takings cases because, given land's infinite life and the laws of mathematics, no temporary regulation will ever cause a loss on the magnitude of 75% of the property's lifetime value.

Finally, this Court's review is needed to resolve a conflict regarding whether the government breached its contractual obligations in enacting LIHPRHA. The Tenth Circuit, when confronted with the exact same issue, addressed and rejected the Federal Circuit's holding. This Court should resolve the circuit conflict and otherwise should exercise its supervisory responsibility to correct the Federal Circuit's misapplication of this Court's precedent. The panel majority all but admitted legal error, describing the COFC's pages of attack on the controlling Federal Circuit precedent as "exceedingly thoughtful and thorough" and inviting an en banc petition. App. 17a. The Federal Circuit nonetheless denied en banc review confirming (again) that the court will continue to apply its incorrect precedent rather than correct its errors.

I. THE FEDERAL CIRCUIT HAS DECIDED IMPORTANT TAKINGS ISSUES IN CONFLICT WITH THIS COURT'S PRECEDENT

A. The Federal Circuit's Holding Conflicts With *Loretto* And *Kaiser Aetna*

This Court in *Loretto* stated that any government-authorized physical invasion of property is "determinative" in a takings analysis and requires the government to pay just compensation for the invasion. 458 U.S. at 426. The Court therefore held that a New York statute compelling a landlord to permit the installation of cable television facilities on an apartment building effected a taking. *Id.* at 441. The law cannot be that a landlord compelled to accommodate one 30-foot cable and two small cable boxes has a compensable takings claim but a landlord compelled *to house* hundreds of tenants for 20 years does not.

Yet this is precisely what the Federal Circuit has held. In four sentences, without citation to *Loretto*, the court ruled in *Cienega VI* that "the effect" of LIHPRHA was "merely to enhance an existing tenant's possessory interest." 265 F.3d at 1248 (citation and quotation marks omitted). Likewise here, the panel decision dismissed as "not dispositive" the Norman Family's argument that LIHPRHA had the character of a physical invasion and that this physical invasion alone required just compensation.[5]

But LIHPRHA did not "merely" enhance an existing tenant's possessory interest. The entire point of the legislation was to compel owners' continued participation in the HUD programs and thereby "preserve" units for existing *and future* low-income tenants. The legislation *required* the Norman Family, against its will, to lodge an entire

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5 In light of the controlling *Cienega VI* precedent and the fact that the COFC had found a regulatory, as opposed to a physical, taking the Norman Family presented this argument in a section of its brief defending the COFC's finding of a regulatory taking. The Family nonetheless cited and discussed *Loretto* in arguing that the extraordinary governmental action here – a physical invasion – singularly required the finding of a taking. *See* Principal and Response Brief of Plaintiff-Cross Appellant CCA Associates at 20-28. Before the COFC, the Norman Family argued that *Cienega VI* had been wrongly decided and that the court should find a physical taking under *Loretto*. *See* Plaintiff CCA Associates' Post-Trial Memorandum at 45-47.

class of individuals, i.e., qualifying low- and moderate-income, HUD-approved tenants, for 20 years. The Norman Family lost completely the right to evict tenants, tear down Chateau Cleary, and make some other use of its land. The Family lost the right to convey the property (absent HUD approval). And the Family lost the right to rent units at market rates. When one HUD-approved tenant left, the Family had no choice but to rent to some other HUD-approved tenant at a HUD-approved rate. The legislation confiscated the fundamental right to exclude others, which, as this Court has held, requires the payment of just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

The Federal Circuit itself confirmed these points. In *Cienega VIII*, the court explained that ELIHPA and LIHPRHA "*intentionally defeated* the Owners' real property rights *to sole and exclusive possession* after twenty years and to convey or encumber their properties after twenty years." 331 F.3d at 1328 (emphasis added). The court went on to compare the government to a *holdover tenant* and stated that "[w]e agree that the enactment of ELIHPA and LIHPRHA could fairly be characterized as *akin to this type of physical invasion*." *Id.* at 1338 (emphasis added). In another case, the Federal Circuit described ELIHPA and LIHPRHA as "authoriz[ing] what amounted to a traditional appropriation of real property rights." *Palmyra Pac. Seafoods, LLC v. United States*, 561 F.3d 1361, 1368 (Fed. Cir. 2009).

The Federal Circuit's holdings on ELIHPA and LIHPRHA are internally incoherent and conflict with *Loretto* and *Kaiser Aetna*.

This petition presents exactly the "different" or "future" case referenced in both *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). In *Yee*, the Court held that a rent control ordinance directed at mobile home parks did not amount to a physical taking. In so holding, the Court stressed that the mobile park owners *voluntarily* rented their land and "neither the city nor the State compels [the owners], once they have rented their property to tenants, to continue doing so." *Yee*, 503 U.S. at 527-28. In *Florida Power*, the Court similarly rejected the physical takings claims of utility companies that claimed the government had physically taken their property by regulating the rates that they could charge for carrying cable lines on their poles. 480 U.S. at 253. The Court emphasized that the utility companies could not complain of a *physical occupation* when they themselves authorized the carrying of the cable lines. "[I]t is the invitation, not the rent, that makes the difference." *Id.* at 252.

But both *Yee* and *Florida Power* indicated that the result would be different if the government had *required* the owners to submit to the physical occupation. The *Yee* Court thus observed that "[a] different case would be presented [if] the statute . . . compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. The *Florida Power* Court noted that its ruling likely would be different "if the FCC in a future case *required* utilities, over objection to enter into . . . pole attachment agreements." 480 U.S. at 252 n.6 (emphasis added).

Here, LIHPRHA required the Norman Family, against its will, to refrain from terminating tenancies for 20 years; moreover, when one tenant left, the Family had no choice but to rent to some other HUD-qualified tenant. App. 192a. The legislation compelled the Norman Family's acquiescence in a 20-year trespass. This was a physical invasion, and an abrogation of the right to exclude, the same as if Congress had enacted legislation directing landlords of existing conventional properties to henceforth lease units only to HUD-approved, low-income tenants, charge tenants a below-market rate, forbid any other use of the property, and comply with the panoply of HUD regulations.

B. The Federal Circuit's Check-The-Box Requirements For Establishing A Regulatory Taking Conflict With And Undermine This Court's Precedent

In decision after decision, this Court has "resist[ed] the temptation to adopt *per se* rules in [its] cases involving partial regulatory takings." *Tahoe-Sierra*, 535 U.S. at 326 (citation omitted); *see also, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far. . . .").

The three *Penn Central* factors are "guidelines" in determining a regulatory taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). These "guidelines" help "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." *Id.* The ultimate question is whether the government has "forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Federal Circuit precedent pays lip service to this Court's requirement of a flexible, ad hoc inquiry, and then proceeds to ignore it, as exemplified in this decision. In this case, the court ruled not only that each *Penn Central* factor must be independently satisfied but also that various sub-tests must be satisfied as well. The practical effect of all of these check-the-box requirements is to foreclose any determination of a regulatory taking, in contravention of this Court's precedent. These inflexible, invented requirements include the following:

- **Requirement #1: The economic impact of even temporary regulations must be determined in reference to the property's lifetime value.**

During the five years in which ELIHPA and LIHPRHA conscripted the Norman Family to house HUD tenants, the Norman Family could earn no more than the maximum annual dividend of $12,952, a return described by the COFC as "meager." App. 197a, 212a. As a consequence, for one 104-unit apartment complex, the Norman Family lost more than $700,000 in rental income over five years, App. 142a, and more than 80% of the return it otherwise would have earned on its equity in the property, App. 212a-213a. However, the panel disregarded as irrelevant the "meager" available return and the more than $700,000 in lost rental income because, according to it, controlling Federal Circuit precedent required consideration only of the loss in the "lifetime value" of the property. App. 10a-13a.

In its *Cienega X* decision, the Federal Circuit claimed that the "parcel-as-a-whole" rule, as set forth in *Tahoe-Sierra*, required courts to analyze economic impact only in terms of the diminution in the property's lifetime value, even for regulations of temporary duration. *Cienega X*, 503 F.3d at 1281. This is nonsense.

In *Tahoe-Sierra*, this Court cited the so-called parcel-as-a-whole rule in holding that a 32-month temporary moratorium on construction did not constitute a compensable taking. But critically important, and not mentioned by the Federal Circuit, the plaintiffs in *Tahoe-Sierra* did not proceed under a *Penn Central* theory; instead, the plaintiffs alleged a "categorical" taking depriving them of all economic value under *Lucas*. *See Tahoe-Sierra*, 535 U.S. at 317-18, 320. *Tahoe-Sierra* stands for the proposition that a 32-month *temporary* moratorium on construction does not *wholly* deprive the owner of all economic value and does not, therefore, result in a categorical taking. *Id.* at 332.

To the extent *Tahoe-Sierra* addresses *Penn Central*, its discussion entirely undermines the reasoning and holding of *Cienega X*. The *Tahoe-Sierra* Court observed that certain of the plaintiffs "might have *prevailed* under a *Penn Central* analysis." *Id.* at 334 (emphasis added).[6] But, obviously, these plaintiffs, had they made a *Penn Central* claim, would have stood no chance of recovery under *Cienega X*'s rigid application of the property-as-a-whole rule, as any 32-month moratorium would not have had a dramatic impact on the *lifetime* value of the property.

The panel majority itself acknowledged that *Tahoe-Sierra* provided no support for the Federal Circuit's rigid lifetime value rule. App. 11a, n.3. The panel majority further explained that the Federal Circuit's lifetime value rule "deviate[s] from the traditional lost rent or return on equity approach." App. 12a. This "traditional" approach is embodied in cases such as *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944), in which the Court held that regulations resulting in a confiscatory rate of return required the payment of just compensation and never considered diminution in the lifetime value of the utility. Likewise, in *Penn Central*, this Court did not inquire regarding the loss in the property's lifetime value but instead declined to find a regulatory taking, *inter alia*, because the plaintiff continued "to obtain a 'reasonable return' on its investment." 438 U.S. at 136.

Recognizing this conflict, the panel majority purported to limit the Federal Circuit's lifetime value rule to ELIHPA and LIHPRHA cases, leaving the Norman Family and other affected owners to

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6 The Court pointedly noted that, from a takings perspective, "any moratorium that lasts for more than one year [may] be viewed with special skepticism." *Tahoe-Sierra*, 535 U.S. 341.

suffer the consequences of the Federal Circuit's errors. App. 12a. But there is no reason to think that this dictum will be followed in subsequent cases. After all, the seven judges who decided *Cienega X* (only one of whom dissented) expressly *held*, purportedly by applying Supreme Court precedent, that economic impact in regulatory takings cases may *only* be determined in reference to the property's lifetime value and affirmatively *rejected* alternative methodologies. 503 F.3d at 1280-82.

- **Requirement #2: The property owner must suffer some threshold percentage loss of the property's lifetime value.**

LIHPRHA confiscated fully 18% of the lifetime value of the Norman Family's property before the HOPE legislation restored the prepayment right five years after the contracted-for prepayment date. The Federal Circuit might have concluded, as did the COFC, that a five-year restriction confiscating fully 18% of the lifetime value of a property is a severe economic loss. App. 138a ("[A]n 18% economic loss concentrated over approximately five years constitutes a 'serious financial loss.'").

The Federal Circuit did not so rule because the court has coupled its lifetime value rule with a separate requirement that the owner establish some minimum loss, apparently on the order of 75%. *See Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2005) (citing Federal Circuit authority for proposition that 75% loss is the "tipping point"). The panel majority stated that it had to consider the 18% loss in lifetime value as insufficient to support a taking because it was "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." App. 10a (quoting government's appellate brief).

The Federal Circuit's rigid rule cannot be reconciled with this Court's precedent. For example, in *Hodel v. Irving*, the Court found a compensable taking notwithstanding a minimal economic loss and the likely absence of any investment-backed expectations. 481 U.S. 704, 716 (1987). In *Eastern Enterprises v. Apfel*, the plurality explained that a company's potential liability of $50-$100 million represented a "considerable financial burden" supporting a regulatory taking notwithstanding the company's right to pursue indemnification. 524 U.S. 498, 529-31 (1998). And in *Kaiser Aetna*, without discussion regarding the plaintiff's economic loss, the Court *held* that the right to exclude "falls within [the] category of interests that the Government cannot take without compensation." 444 U.S. at 180.

As a matter of mathematics, the Federal Circuit's inflexible 75% loss requirement eliminates all temporary regulatory takings claims (because no temporary regulation, no matter how draconian, will cause a 75% loss in the lifetime value of real property) and empowers the federal government to avoid having to pay just compensation in every case: The government need only rescind the regulation, converting it to a "temporary" restriction (as Congress did here). As Judge Lettow observed, the Federal Circuit's rule

> could allow the government to take an owner's $10 million annual income stream from a $100 million property for four and a half years – yielding the government $45 million – and then assert that the owner had not suffered a severe economic impact because he or she had

> only been deprived of 45% of the value of his property.

App. 211a.

The panel majority similarly recognized this unfair and unsupportable result. According to the majority, "*Cienega X* makes it virtually impossible for any ELIHPA or LIHPRHA plaintiff to establish the severe economic impact necessary for a taking[]." App. 11a. The majority continued:

> If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to severe economic deprivation when compared to our prior regulatory takings jurisprudence. If this methodology were to apply beyond ELIHPA and LIHPRHA cases, for example to temporary regulatory restrictions on fee simples, then all income earned over the entire remaining useful life of the real property would be the denominator. *This would virtually eliminate all regulatory takings*. Quite frankly, the selection of the denominator in these cases is going to determine the severity of the economic impact. In *Cienega X*, *we deviated from the traditional lost rent or return on equity approach*. . . .

App. 12a (emphasis added).

The panel majority thus admitted that Federal Circuit law "deviated" from "traditional" precedent, admitted a "conflict between *Cienega VIII* and *Cienega X*," and admitted that its precedent "would virtually eliminate all regulatory takings." App. 12a-13a. The court still denied en banc review.

- **Requirement #3: The economic impact of a regulation must be reduced by any offsetting statutory benefits, whether or not the owner actually received any benefit.**

The panel decision also reaffirmed the Federal Circuit rule that statutory payments and other benefits "must" be considered in determining the economic impact of any regulation (thus further reducing the numerical percentage of loss). App. 8a. Consideration of these statutory benefits, such as the potential for a sale to a HUD-approved purchaser (who had to agree to maintain the property as a HUD property for its remaining useful life), ultimately had no impact in this case because the majority (but not Judge Dyk in dissent) accepted the COFC's factual finding that the statutory benefits here were "speculative." App. 10a. Nonetheless, the Federal Circuit's check-the-box rule *requiring* consideration of statutory benefits cannot be squared with this Court's precedent and serves to make a successful regulatory takings claim against the federal government all the more impossible.

According to the Federal Circuit, this Court in *Penn Central* "clearly held that offsetting benefits must be accounted for as part of the takings analysis itself." *Cienega X*, 503 F.3d at 1283. To be sure, the *Penn Central* opinion notes that the value of transferable development rights ("TDRs") "undoubtedly mitigate[s] whatever financial burdens the law has imposed on appellants and, for that reason, [is] to be taken into account in considering the impact of regulation." 438 U.S. at 137. However, this Court in *Suitum v. Tahoe Regional*

Planning Agency did not view this passing remark as binding. 520 U.S. 725 (1997). Instead, the Court expressly reserved the question "whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking." *Id.* at 728.

Justice Scalia's concurrence in *Suitum*, joined by Justices O'Connor and Thomas, confirms the Federal Circuit's overreach in holding that offsetting benefits "must" be considered in the takings calculus. Justice Scalia analogized TDRs to "a cash payment from the government," *id.* at 747, and explained:

> If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here.

Id. at 748 (emphasis in original).

But the Federal Circuit has done much more mischief than aggressively applying dicta from *Penn Central*. The claimants in *Penn Central* actually received the benefit of TDRs. In contrast, the Norman Family received no monetary or other benefit. Yet, the Federal Circuit remarkably confirmed in this case that the mere *availability* of offsetting statutory benefits must factor into the takings analysis, even where the owner actually receives nothing. App. 8a. Thus, in this case, the parties litigated the availability of the so-called sale option under LIHPRHA even though the Norman Family never wanted to sell its property and did not sell its property. Under Federal Circuit law, the mere *potential* to sell a $1.0 million property for $700,000 renders the "economic impact" 30%, even if the owner never receives $700,000. This result cannot be correct. Federal Circuit precedent on offsetting statutory benefits serves only to "render much of [this Court's] regulatory takings jurisprudence a nullity." *Suitum*, 520 U.S. at 750 (Scalia, J., concurring).

- **Requirement #4: The owner must satisfy a rigid, four-part test for proving that the regulation interfered with investment-backed expectations.**

This Court has never required that the property right taken must invariably be investment-backed for there to be a regulatory taking. To the contrary, in *Hodel*, the Court found a taking notwithstanding the "dubious" nature of plaintiffs' investment-backed expectations. 481 U.S. at 715.

In contravention of *Hodel* and other decisions of this Court explaining the flexible, ad hoc nature of the regulatory takings inquiry, the Federal Circuit has imposed upon owners the burden of proving four separate elements to establish interference with investment-backed expectations. The Federal Circuit requires the owner to prove: (i) the change in regulatory approach could not have been expected; (ii) the primary or but-for reason for the investment was to obtain the benefits denied or restricted by the regulation, rather than the remaining benefits; (iii) for any reasonable investor in the property, the primary or but-for reason for the investment would have been to obtain the benefits denied or restricted by the regulation; and (iv) the "industry as a whole" shared the same investment-backed expectation. *Cienega X*, 503 F.3d at 1288-91.

The COFC addressed LIHPRHA's interference with the Norman Family's investment-backed expectation to prepay the HUD-insured mortgage at year 20 in detail, making extensive factual findings in its two decisions. App. 97a-117a, 195a-204a. As found by the COFC, the government's decision to renege on its promise and forbid prepayment could not have been anticipated. App. 99a. The COFC further found that HUD touted the prepayment right in negotiations, App. 101a, and that the prepayment right was the *sine qua non* of the entire deal, App. 116a. The COFC determined that the right to prepay at year 20 formed the *primary* investment-backed expectation for the Norman Family and would have formed the primary investment-backed expectation *for any reasonable investor*, given Chateau Cleary's quality construction and location in an area of anticipated development. App. 115a-117a. The COFC addressed each and every other possible investment expectation, including the "meager" annual return of $12,952 and tax benefits, and found that the prepayment right trumped them all in importance. App. 100a-114a.

The Federal Circuit accepted these factual findings yet, incredibly, still ruled that the Norman Family failed to satisfy the "investment-backed expectations requirement" and therefore failed to prove a taking. According to the Federal Circuit, the Norman Family put forward insufficient evidence regarding the "industry practice as a whole, as required by *Cienega X*." App. 15a. The panel faulted the Norman Family for not introducing "industry" evidence from the 1960s and early 1970s on what *other* owners of *other* properties expected in entering into the HUD programs.

The panel so ruled even though the COFC expressly found there to be an *absence* of any industry-wide expectation. According to the COFC: "The evidence thus shows that *it is not possible* to derive investment expectations of participants in the Section 221(d)(3) and Section 236 programs as a whole." App. 114a (emphasis added). The Norman Family pointed out this factual finding in both its appellate briefing and in petitioning for rehearing, noting that investment expectations differed widely depending on the location of the real property and its condition. Yet the court still applied its rigid rule that the "industry" expectation must be proven for there to be a taking and reversed judgment for the Norman Family on that basis.

* * *

The Federal Circuit's antipathy for this Court's precedent recognizing regulatory takings has resulted in its imposing rigid, check-the-box requirements for regulatory takings, the practical effect of which is to prevent application of this Court's precedent and to close the door on regulatory takings. Even here, where the panel majority acknowledged that Federal Circuit precedent ran contrary to longstanding precedent and "would virtually eliminate all regulatory takings," App. 12a, the court still refused en banc review. This Court should grant certiorari and restore the supremacy of its precedent on regulatory takings.

II. THE FEDERAL CIRCUIT'S CONTRACT HOLDING CONFLICTS WITH A DECISION OF THE TENTH CIRCUIT AND DISREGARDS SETTLED LAW ON CONTRACT FORMATION

In *Cienega IV*, the Federal Circuit ruled that the multiple documents comprising the transaction among owners, HUD, and the lender had to be read separately because each document was "unambiguous" and executed by "distinct parties." 194 F.3d at 1243. Reading each document in isolation, the Federal Circuit concluded that HUD lacked privity of contract regarding the very prepayment term that HUD touted to investors because HUD merely endorsed the promissory note setting forth the prepayment right.

This is not the law and never has been the law. The question is whether, as a matter of *contract formation*, not interpretation, the parties intended the various transaction documents to form a single, overall agreement. *See, e.g., Joy*, 138 U.S. at 38 (two tripartite agreements and a deed "constituted a single transaction, relating to the same subject-matter, and should be construed together in such a way as to *carry into effect the intention of the parties*, in view of their situation at the time and of the subject-matter of the instruments") (emphasis added).

Both the panel majority and the COFC recognized the direct conflict between *Cienega IV* and the Tenth Circuit's decision in *Aspenwood*. App. 18a, 74a-75a. In *Aspenwood*, the Tenth Circuit rejected the Federal Circuit's analysis and concluded that the same transaction documents formed "a single, overarching agreement" whereby HUD agreed "to be bound by the terms of all of the parts of the transaction," including the prepayment term. 355 F.3d at 1260.

The panel majority and the COFC also recognized that Federal Circuit precedent conflicted with longstanding common law and this Court's precedent. The COFC explained at length how the Federal Circuit had failed to follow "black letter contract law that multiple documents, executed contemporaneously and relating to the same transaction, should be read together to determine the intent of the parties." App. 71a (citing *Joy*, 138 U.S. 1). The panel majority, in turn, described the COFC's criticisms as "exceedingly thoughtful and thorough." App. 17a.

The Federal Circuit still refused en banc review, content to have its erroneous precedent stand.

This Court should grant review not only to resolve the express conflict between the Tenth and Federal Circuits but also, as part of its supervisory role, to ensure that the Federal Circuit properly analyzes important contract-formation issues by applying the longstanding, black-letter principles announced by this Court. The Federal Circuit decides the overwhelming majority of these cases involving the federal government, and, as this case demonstrates, the court has no interest in correcting its flawed precedent. Granting certiorari on this issue also will permit the Court to address all of the interrelated issues raised by this case in their full legal context.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CCA ASSOCIATES,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

2010-5100, -5101

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

DECIDED: November 21, 2011

ELLIOT E. POLEBAUM, Fried, Frank, Harris, Shriver & Jacobson, LLP, of Washington, DC, argued for plaintiff-cross appellant.

DAVID A. HARRINGTON, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, BRIAN M. SIMKIN, Assistant Director, ELIZABETH SPECK and KENNETH D. WOODROW, Trial Attorneys.

Before DYK, MOORE, and O'MALLEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* Moore.
Opinion concurring in the judgments and dissenting-in-part filed by *Circuit Judge* Dyk.

MOORE, *Circuit Judge*.

The United States appeals from the decision of the Court of Federal Claims that the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, § 202, 101 Stat. 1877 (1988) (ELIHPA), and the Low-Income Housing Preservation and Resident Homeownership Act, Pub. L. No. 101-625, 104 Stat. 4249 (1990) (LIHPRHA) resulted in a temporary regulatory taking. CCA Associates (CCA) cross-appeals, asserting that ELIHPA and LIHPRHA resulted in a breach of the government's contractual obligations. Because we are bound to apply the economic analysis outlined in *Cienega X*, we conclude that the Court of Federal Claims determination on the temporary taking must be reversed. Because the Court of Federal Claims correctly held that our *Cienega IV* precedent forecloses CCA's breach of contract claim, we affirm the judgment against CCA on the breach of contract claim.

BACKGROUND

The history of the statutes involved in ELIHPA and LIHPRHA takings cases was summarized by this court on several occasions. *See, e.g.*, *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) (*Cienega X*); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (*Cienega VIII*); *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) (*Cienega IV*). A brief recap of the legislative background leading up to ELIHPA and LIHPRHA is necessary to understand the issues in this case. In 1961, Congress amended the National Housing Act to allow private developers to meet the needs of moderate income families. *Cienega X*, 503 F.3d at 1270. Among other things, the amendment provided financial incentives to private developers to build low income housing. *Id.* These incentives included below-market mortgages, which permitted the owners to borrow 90% of the cost of the project. *Id.* While the term of the mortgage was 40 years, the contracts allowed the developer to prepay the mortgage after 20 years. *Id.* Congress also protected the lenders against default by authorizing the Federal Housing Administration to insure the mortgages. *Id.* at 1270-71. The tax laws at the time provided a number of tax incentives, which allowed general and limited partners to take large deductions in the earlier years of the investment. *Id.* at 1271. The highly leveraged nature of the investment made the tax benefits large in comparison to the small up-front investment. *Id.*

These development programs were regulated by the Department of Housing and Urban Development (HUD), and the developers were required to sign a regulatory agreement binding them to get approval from HUD for certain relevant decisions, for example increases in rent. *Id.* The developer also signed a secured note and a mortgage. HUD, in turn, provided mortgage insurance for the investment. *Id.* The restrictions in the regulatory agreement were in effect as long as HUD insured the mortgage on the property; for practical purposes this meant the developers were subject to HUD regulation until the mortgage was paid off. *Id.* The twenty year prepayment option in the mortgage therefore gave the developers an opportunity to cast off the regulatory burden and convert their development to market rate housing.

While this plan induced developers to provide low income housing, Congress ultimately grew worried that participants would prepay their mortgages and exit the program en mass. *Id.* at 1272. In order to avoid the resulting shortage of low income housing, Congress enacted ELIHPA and LIHPRHA. *Id.* The exact restrictions placed on the developers are detailed in, e.g., *Cienega X*, but the salient issue in this case is that an owner was no longer free to prepay the mortgage after twenty years. Instead, the owner either needed HUD approval to prepay the mortgage (which was not a viable option, *id.* at 1272 n.2), or go through a series of regulatory hoops that would delay prepayment and therefore extend the time the landowner was subject to HUD regulation, *id.* at 1272-73. Among other restrictions, while under HUD regulation the landowner could not charge market rates for renting the property. Eventually, Congress restored prepayment rights to the program participants. *Id.* at 1274.

In order to enter the program, the developer signed three documents: the regulatory agreement, the secured note, and the mortgage. In this case, each of these three documents were contemporaneously signed by Ernest B. Norman and J. Robert Norman in a conference room at HUD's New Orleans office in 1969. *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 585-86 (2010).[1] Each

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1 HUD later approved an increase in the amount of the mortgage, and the Norman brothers signed a second secured note and second mortgage—once again on HUD forms—in 1971. *CCA*, 91 Fed. Cl. at 586 n.7.

document was drafted by HUD, and these agreements were written on either HUD or Federal Housing Authority forms. *Id.* at 586. The secured note, which was endorsed by HUD, included a term allowing prepayment after 20 years, and also incorporated the mortgage by reference. *Id.* The mortgage, in turn, incorporated the secured note and regulatory agreement by reference, and was signed by the Norman brothers and the Pringle-Associated Mortgage Corporation (but not by HUD). *Id.* Finally, the regulatory agreement was signed by HUD and the Norman brothers. In the regulatory agreement, the Norman brothers agreed to charge HUD-approved rents to HUD-approved tenants as long as the contract for mortgage insurance continued in effect. The regulatory agreement incorporated by reference legislation and regulations related to the program. *Id.* In sum, HUD was a signatory to only the regulatory agreement, which did not expressly include the 20 year prepayment provision. The Norman brothers later transferred their interest to CCA. *Id.* at 586-87.

Under the terms of the documents signed by the Norman brothers, the 20 year prohibition on prepayment expired in May 1991. *Id.* at 602. As a result of LIHPRHA, however, CCA was not allowed to prepay the mortgage and was forced to continue to operate the development (Chateau Cleary) as low income housing. In 1996, Congress lifted its prior restriction on prepayment with the HOPE Act. The total time that CCA was prohibited from prepayment was five years and ten days. *Id.*

This case involves two issues related to the restriction on prepayment effectuated by ELIHPA and LIHPRHA (the "preservation statutes"). First, does the restriction on prepayment, which resulted in limitations on the property owner's use of its land due to the required continued participation in the HUD program, constitute a temporary regulatory taking? The Court of Federal Claims held that the statutory restriction of prepayment rights constituted a taking. The United States appeals this portion of the decision. Second, did Congress breach the contract between HUD and CCA by abrogating the prepayment right, thereby mandating the property continue to be subject to use and rent restrictions? The Court of Federal Claims held that the statutory restriction of prepayment rights did not constitute a breach of contract. CCA cross-appeals this portion of the decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

ANALYSIS

The issues presented in this case are not unique to CCA. The ELIHPA and LIHPRHA statues spurred a number of claims from parties similarly situated to CCA. Much of our jurisprudence in the area stems from the *Cienega Gardens* line of cases, which sets out a framework that we are bound as a panel to apply to the case at hand. Indeed, CCA's claims in this case were previously remanded for consideration and application of our decision in *Cienega X*, 503 F.3d 1266. *CCA*, 91 Fed. Cl. at 584.

Many of CCA's arguments in this case are directed at issues resolved by *Cienega X* and *Cienega IV*. Even if we are sympathetic to the arguments challenging the propriety of the economic analysis required by *Cienega X* and the breach of contract law of *Cienega IV*, we cannot consider these arguments at the panel stage. Panels are bound by the law of prior panels. *See 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.").

I. CCA'S TAKINGS CLAIM

Typically, when considering whether government action constitutes a regulatory taking, we apply factors set forth in *Penn Central*: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). We will consider each of these factors in light of the legal rules of *Cienega X*, by which we are bound.

A. Economic Impact

The first factor in a takings analysis is the "economic impact on the claimant." *Penn Cent.*, 438 U.S. at 124. The economic impact of the five year delay in prepayment has admittedly been a bit of a moving target. Applying an analytical approach previously affirmed by this court in *Cienega VIII*, the trial court initially found an 81.25% diminution in return on equity as a result of the five years that the preservation statutes prohibited prepayment. *CCA*, 91 Fed. Cl. at 611. This return on equity approach compared the return on equity under the preservation statutes with the return on equity CCA would have received but for the preservation statutes. *Id.* In *Cienega X*, however, we held that any economic impact must be evaluated with respect to the value of the property as a whole, and not limited to the discrete time period that the taking was in force. *Cienega X*, 503 F.3d at 1280. After noting that "[i]n temporary takings cases, the courts ordinarily have looked to rental value or other equivalent measures of non-permanent use," *id.*, the Court of Federal Claims applied our revised *Cienega X* approach to the calculation of economic impact. Though CCA disagreed with the approach required by *Cienega X*, the parties stipulated that in light of *Cienega X*, "'CCA suffered an economic impact of 18 percent as a result of ELIHPA and LIHPRHA,'" not accounting for any offsetting benefits. *CCA*, 91 Fed. Cl. at 612 (quoting the Joint Stipulation of Facts).

In *Cienega X*, however, we held that any economic impact to the plaintiffs must be weighed against any offsetting benefits that they received from the preservation statutes. *Id.* at 1282-83. We identified a number of possible benefits and reasoned that these benefits might serve to offset any economic harm. *Id.* at 1284-87. When these benefits are established, they "must be considered as part of the takings analysis." *Id.* at 1283-84.

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." *Id.* at 618. It then analyzed different benefits, concluding, *inter alia*, that "a fair-market sale under LIHPRHA before September 1996 is too speculative to offset the economic loss imposed on CCA by the prepayment restrictions." *Id.* 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. *Id.* at 613-14.

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. *Cf. Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1275 (Fed. Cir. 2009) (refusing to apply offsetting benefits when the "government points to no economic data in the record to support its assertion of offsetting benefits"). 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.[2] 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

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[2] The trial court correctly held that the government must prove (1) the existence of offsetting benefits and (2) the value of those benefits. A non-speculative valuation of any potential benefits is necessary to accurately establish whether they offset the economic impact on the landowner. The Court of Federal Claims found that the government failed to prove by a preponderance of the evidence that the proffered offsetting benefits in this case had any non-speculative value. *See, e.g., CCA*, 91 Fed. Cl. at 614 (discussing whether sale was "probable"); *id.* at 617 (while "possible" that a buyer could be identified, that "possibility is uncertain" and a sale therefore too speculative to offset harm); *id.* at 618 (possibility of sale "too speculative to offset the economic loss" of prepayment restriction). Preponderance of the evidence is the correct standard, and we see no error in this analysis.

takings has occurred, "available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs." 503 F.3d at 1287. This is precisely what was done here. The Court of Federal Claims conducted a thorough analysis of the offsetting benefits evidence proffered by the government, and concluded the potential benefits were too speculative to mitigate CCA's proof of economic harm. We see no error in this analysis and no clear error in the extensive fact findings of the trial court on the offsetting benefits.

Since the government failed to establish any offsetting benefits, the economic impact, given the requirements of *Cienega X*, is stipulated to be 18%. Although CCA lost over $700,000 of net income (81.25% during the five years), using the economic impact methodology of *Cienega X*, the economic impact of 18% is not substantial enough to favor a takings in this specific case. While there is no per se rule, the economic impact must be more than a mere diminution. *Cienega VIII*, 331 F.3d at 1343. For example, we have previously held that a loss of 77% of the value in the property is a compensable taking. *Id.* Like the government, we are "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." Appellant Br. 19 (citing cases, all of which have at least a 50 percent diminution in value). 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.

Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the economic analysis between the two cases. While the plaintiff stipulated to the 18% economic impact, CCA continued to dispute the propriety of the *Cienega X* methodology. *Cienega X* makes it virtually impossible for any ELIHPA or LIHPRHA plaintiff to establish the severe economic impact necessary for a takings. Rather than consider the impact the regulation had on the property during the time it was in effect, such as the amount of money the plaintiffs actually lost in rents during that time period, *Cienega X* requires that the impact be measured against the total value over the remaining life of the property. *See id.* at 1281-82 (stating the test for a regulatory taking must "'compare the value that has been taken from the property with the value that remains in the property'" (quoting *Penn Central*, 508 U.S. at 644)).[3]

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3 *Cienega X* bases this "life of the property" requirement on the Supreme Court decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). *Cienega VIII* actually addressed the relevance of *Tahoe Sierra* expressly holding that the impact to the property as a whole was employed in *Tahoe Sierra* in order to determine whether the regulatory taking should be treated as a *Lucas* style per se taking. 331 F.3d 1344-45. The *Cienega VIII* court explained that this "whole property" concept was not employed in the context of analyzing the economic impact under the *Penn Central* regulatory taking factors. *Id.* In fact, the relatively short timespan of the 32 month moratorium in *Tahoe-Sierra*, as compared to the entire life of the property, did not cause the Supreme Court to dismiss the possibility that "if petitioners had challenged the application of the moratoria to their

In the case of ELIHPA or LIHPRHA plaintiffs the mortgage notes lasted 40 years with 20 year prepayment options. ELIHPA and LIHPRHA prevented prepayment for at most 8 years. Hence, HUD participants had to maintain the property as low income housing for at most 8 years longer than they should have under the mortgage contracts. This means the denominator for the takings analysis in these cases is the total net income over the entire remaining useful life of the property (the net income over the rest of the mortgage – generally 20 years). If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to severe economic deprivation when compared to our prior regulatory takings jurisprudence. If this methodology were to apply beyond ELIHPA and LIHPRHA cases, for example to temporary regulatory restrictions on fee simples, then all income earned over the entire remaining useful life of the real property would be the denominator. This would virtually eliminate all regulatory takings. Quite frankly, the selection of the denominator in these cases is going to determine the severity of the economic impact. In *Cienega X*, we deviated from the traditional lost rent or return on equity approach, and instead required that the lost income be compared to all of the money the property would earn over its remaining life. We are bound by *Cienega X*, but note that its application is limited to the ELIHPA and LIHPRHA cases.

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individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis." 535 U.S. at 334.

While the parties may be correct that this economic impact analysis required by *Cienega X* virtually forecloses the finding of a takings in these cases, that there is conflict between *Cienega VIII* and *Cienega X*, and that this analysis was not required by *Tahoe-Sierra*, it is clearly required by *Cienega X*, and we are bound to follow that case. Therefore, we conclude that the Court of Federal Claims erred when it held that the 18% economic impact weighed in favor of a taking.

B. Investment-Backed Expectations

In *Cienega X*, we explained that in LIHPRHA and ELIHPA takings cases, the analysis of whether the landowner had a reasonable investment-backed expectation in the pre-payment of the mortgage requires a multistep analysis. *Cienega X*, 503 F.3d at 1289. By comparing the individual's expectations with the "expectations of the industry as a whole," we aimed to separate unreasonable, though subjectively believed, investment backed expectations from objectively reasonable expectations. *Id.* at 1290. The government argues that CCA's expectations of prepayment are unreasonable since many developers participated in the program primarily for the tax benefits.

Cienega X, however, does not suggest that there can only be one objectively reasonable investment strategy for the industry, and we hold that there can potentially be multiple objectively reasonable investment strategies dictated by geography, economics, or other factors. While the government's evidence in this case suggests that one class of investors was motivated primarily by the tax benefits, this does not end the inquiry: the plaintiff can offer proof that other investment strategies are also objectively reasonable. CCA has the burden to present sufficient evidence of these other strategies to establish that it was objectively reasonable for it to view the 20 year prepayment clause as the primary or "but for" reason for investment. *Id.*

We believe CCA failed to carry its burden. The Court of Federal Claims explained that "factors associated with the location and character of projects strongly influenced the reasonable expectation of the owners, judged on an objective and not a subjective basis." *CCA*, 91 Fed. Cl. at 609. While this may be true, the only objective evidence of the industry's investment backed expectations is a quote from a 1972 guide which indicated that a project located "in a growing suburban or exurban area, it *may* increase in value over the years, thus creating *substantial residual profits* to the investors upon sale or other disposition." *Id.* (quotations, citations omitted, emphasis added). This hypothetical statement, however, does not support the ultimate conclusion that it was objectively reasonable to view the 20 year prepayment as either the principle or but for cause of investment. In fact, the same guide indicates that one of the principal benefits of the investment is the tax shelter. *Id.*

The Court of Federal Claims also cited evidence that some developers (three out of the six considered) retained residual proceeds from a sale or other disposition of a project. *Id.* at 608. Again, however, the prospectuses for these developers "described the potential benefits for investing in the projects as being *primarily* tax benefits and *secondarily* cash distributions." *Id.* (emphasis added). While the trial court conducted a thoughtful analysis of the disparate treatment of tax benefits, the fact that "the general partners in three of the six instances were willing to sell short-term tax benefits and dividends but wanted to retain a significant portion of the long-term benefits from property appreciation" is not enough to demonstrate it was objectively reasonable to view the 20 year prepayment clause as the but for or primary reason for investment. The fact that the prospectuses[4] in question "do not assign any weight to the ability to prepay after 20 years as a reason to invest, with most dismissing the possible net proceeds from prepayment after 20 years at a nominal value of one dollar," *id.* at 608, further undercuts the evidence that CCA's subjectively believed investment strategy was objectively reasonable. Because the evidence in this case fails to demonstrate that CCA's investment backed expectations were objectively reasonable in light of industry practice as a whole, as required by *Cienega X*, the Court of Federal Claims erred by holding this factor weighed in favor of a taking.

C. Character of the Governmental Action

Cienega X did not disturb our prior precedent relating to the character of the government action. As a result, when we remanded this case to the Court of Federal Claims, it was reasonable for the trial court to reinstate its prior character analysis. *CCA*, 91 Fed. Cl. at 601-02. Indeed, *Cienega VIII* explained that "as a matter of law, that the

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[4] *Cienega X* indicates that contemporaneous documents, such as prospectuses, may help prove the existence of objectively reasonable investment strategies. 503 F.3d at 1290-91. *Cienega X*, however, does not require the use of prospectuses, and other kinds of evidence may be equally enlightening.

government's actions in enacting ELIHPA and LIHPRHA, insofar as they abrogated the [plaintiffs'] . . . contractual rights to prepay their mortgages and thereby exit the housing programs, had a character that supports a holding of a compensable taking." *Cienega VIII*, 331 F.3d at 1340. As such, the Court of Federal Claims correctly held that "the character of the government action is not such as to deliver the dispositive blow that CCA has hoped, [but] it nonetheless weighs in favor of a finding of a regulatory taking." *CCA*, 91 Fed. Cl. at 602.

D. Summary

While the character of the government's action supports finding a taking, it is not dispositive of this issue. Because we are bound by the analysis of *Cienega X*, and the other factors weigh against a taking, we conclude that CCA failed to establish that the denial of the prepayment right constituted a regulatory taking.

II. CCA'S CONTRACT CLAIM

CCA cross-appeals the holding that there is no privity of contract between HUD and CCA.[5] The Court of Federal Claims held CCA's contract claim in this case is foreclosed by *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) (*Cienega IV*). *CCA*, 91 Fed. Cl. at 598. Although CCA attempts to distinguish *Cienega IV* on the facts, we agree with the trial court that these distinctions are unavailing. Simply holding that *Cienega IV* controls this issue,

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[5] The government argues CCA waived its contract claim. We disagree: the Court of Federal Claims properly allowed CCA to proceed on this issue in light of our previous remand. *See CCA*, 91 Fed. Cl. at 591 n.14.

however, ignores the exceedingly thoughtful and thorough analysis of this issue carried out by the Court of Federal Claims in its opinion.

There are three relevant documents in this case: the regulatory agreement, the secured note, and the mortgage. CCA argued that these three documents constitute one overall transaction. *CCA*, 91 Fed. Cl. at 592. The three documents are pre-printed, standard HUD forms, and were signed contemporaneously in a single room in HUD's New Orleans office. *Id.* HUD only signed one of the three documents, the regulatory agreement, *id.* at 591, which did not mention the right to prepay the mortgage or incorporate the secured note (which did include the right to prepay), *id.* at 592. The regulatory agreement does, however, reference HUD's regulations, which specified the prepayment right. *Id.* HUD also endorsed the secured note, which explicitly articulated CCA's right to prepay the mortgage. *Id.* at 591.

Ultimately, all three documents are intended to reach a single goal: to induce developers to provide low income housing. Each of these three documents forms a critical part of the overall transaction, and without any one of these documents, the overall terms binding CCA would be substantially different. *Id.* at 592. Faced with these interrelated documents, the trial court asked: "Does the failure of the regulatory agreement to expressly incorporate the other two instruments negate the general contractual principle that interrelated instruments should be considered together?" *Id.* at 594-95. While our opinion in *Cienega IV* answers this question in the negative, the Court of Federal Claims pointed out that reading the three documents together "gives effect to the fact that the 20-year limit on prepayment contained in the secured note was a provision drafted by HUD that replicated HUD's regulations on prepayment and was used by HUD to induce participation in the program." *Id.* at 595. The Court of Federal Claims ultimately concluded that "[c]onsidering that the documents at issue constitute an integrated transaction, and in light of the other circumstances surrounding the transaction, this court, but for the precedent in *Cienega IV*, would hold that HUD and CCA were in privity as to the 20-year prepayment provision." *Id.* at 598.

The trial court is not alone in its criticism of *Cienega IV*. In *Aspenwood Investment Co. v. Martinez*, 355 F.3d 1256 (10th Cir. 2004), the Tenth Circuit confronted an analogous issue in the context of a declaratory judgment action. While it noted that *Cienega IV* was the case "most directly on point," it nevertheless found "the analysis of the dissent [in *Cienega IV*] . . . more persuasive than that of the majority." *Id.* at 1260. The Tenth Circuit reasoned "that by executing the regulatory agreement, the note, and related documents," the landowner promised to operate the housing project to effectuate the purpose of the HUD regulations, and noted that the landowner's "promises were primarily for the benefit of HUD (and the participants in the low income housing program), not for the lender." *Id.* In light of these circumstances, the Tenth Circuit concluded that the three documents constituted "a single, overarching agreement," and held that "it was the demonstrated intent of HUD (and of plaintiff and of the lender) to be bound by the terms of all of the parts of the transaction." *Id.*

Cienega IV turned on our conclusion that "there was not privity of contract between HUD and the [landowners] with respect to prepayment of the deed of trust notes." 194 F.3d at 1246. In reaching this conclusion, we started "from the premise that the United States, i.e., HUD, was a named party to only one contract," the regulatory agreement. *Id.* at 1241-42. We acknowledged the *Restatement (Second) of Contracts* § 202(2) (1981) rule that "'all writings that are part of the same transaction are interpreted together.'" *Id.* at 1243 (quoting the *Restatement*). We also acknowledged that this rule "does 'not depend upon any determination that there is an ambiguity, but [is] used in determining what meanings are reasonably possible as well as in choosing among possible meanings.'" *Id.* (quoting the *Restatement*). We even conceded that "the deed of trust note . . . and the regulatory agreement were part of the same transaction." *Id.* Thus, as highlighted by the dissent in *Cienega IV*, the Tenth Circuit in *Aspenwood*, and the Court of Federal Claims in this case, it is certainly possible that the three agreements should be interpreted together. We nevertheless found that "each document stands alone and is unambiguous on its face," and that the "documents evidence separate agreements between distinct parties." *Id.*

The facts in this case do not distinguish it from *Cienega IV*, which we must apply to the case at hand. We therefore hold that the Court of Federal Claims correctly determined that *Cienega IV* forecloses CCA's contract claims in this case. To the extent CCA believes either *Cienega IV* or *Cienega X* was wrongly decided, en banc review is its only course of action.

AFFIRMED-IN-PART and REVERSED-IN-PART

COSTS

No costs.

DYK, *Circuit Judge*, concurring in the judgment and dissenting-in-part.

I agree with the majority's decision to reverse the Claims Court judgment finding a regulatory taking and with the majority's affirmance of the Claims Court's dismissal of the contract claim. I write separately because I disagree with the majority's reasoning in significant respects. In particular, I disagree with the majority's incorrect and wholly unnecessary dictum approving aspects of the Claims Court's takings analysis. In my view, the majority's decision refusing to consider offsetting benefits is directly contrary to our precedent, and its treatment of the character of the government action fails to recognize that the government's action is a form of rent control that the Supreme Court and other circuits have found to be legitimate.

I The Economic Impact Analysis

This case again presents the question whether the rent-control restrictions of ELIHPA and LIHPRHA constituted a regulatory taking. In *Cienega Gardens v. United States* ("*Cienega X*"), 503 F.3d 1266, 1282-87 (Fed. Cir. 2007), we held that an analysis of the economic impact prong of the takings analysis required a consideration of offsetting benefits during the period that the restrictions of ELIHPA and LIHPRHA were in place, namely consideration of the right to sell the property for fair market value and, failing such a sale, the right to exit the program and to be free of the rent control and other restrictions. The necessity of considering such benefits was not merely a suggestion. It was a direct holding expressed repeatedly in the language of the opinion. We held in *Cienega X* that the "error committed by the [Claims Court] lies in its failure to consider the offsetting benefits that the statutory scheme afforded which where specifically designed to ameliorate the impact of the prepayment restrictions." *Id.* at 1282-83. "The [offsetting] benefits must be considered as part of the takings analysis" itself, not merely as part of a just compensation calculation. *Id.* at 1283-84.

The Claims Court here, in direct contradiction of our holding in *Cienega X*, refused to consider offsetting benefits in the economic impact analysis, finding those benefits to be "speculative." *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 618 (2010). While reversing the decision of the Claims Court, the majority, without justification, approves the Claims Court's refusal to follow *Cienega X*.

The Claims Court's justification for refusing to consider offsetting benefits rests on two subordinate and incorrect propositions—first, that the burden of proof on offsetting benefits rested with the government, and second, that the government could not bear its burden of proof unless it established that CCA, the owner of the property, could actually have sold the property during the period of the restrictions. I consider each of these in turn.

A The Burden of Proof

As I discuss in greater detail below, the design of LIHPRHA was to impose a form of rent control on the developers of low-income housing that received federal financial assistance.[1] The impact of

[1] The majority analyzes both ELIHPA and LIHPRHA. *See* Majority Op. at 11. However, only the provisions of LIHPRHA impacted the plaintiffs. Congress enacted ELIHPA on February 5, 1988. ELIHPA was then superseded by LIHPRHA,

LIHPRHA was to keep this rent control in place for an additional five years subject to the ability of the owners to sell their property for fair market value or to prepay the mortgage and exit the program. The claim is that the developers here lost money because they were forced to charge below-market rents for this five-year period.

The economic impact analysis is, of course, part of the three-part *Penn Central* test for regulatory takings. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The object of the economic impact analysis is to determine the economic impact of the regulatory scheme as a whole on the affected parties. In order to determine the economic impact, the overall nature of the scheme must be evaluated, including any exceptions to the regulation. For example, if a zoning regulation or permitting scheme provides variances or exceptions, the economic impact of those must be taken into account. *See id.* at 137. Thus we held in *Cienega X*, 503 F.3d at 1282-87, that simply treating LIHPRHA as extending rent control for five years was not accurate. This was because the developer had other options to escape the rent-control regulation, options that we characterized as "offsetting benefits," that is, exceptions to the regulatory obligations. *Id.* The owner could escape the rent controls by selling the property for fair market value or prepaying the mortgage and exiting the program. If an owner wished to prepay and exit the program, the owner was required to first offer the property for sale to

which was enacted on November 28, 1990, before CCA's predecessor became eligible to prepay its mortgage on May 17, 1991.

purchasers who would pay fair market value to the seller and maintain the property as low-income housing for its remaining useful life. An appraisal process, involving two appraisers (one selected by the Department of Housing and Urban Development ("HUD") and the other by the owner), determined "the fair market value of the housing based on the highest and best use of the property." 12 U.S.C. § 4103(b)(2). Then, HUD would provide financial incentives to the purchasers to assist them in purchasing the property. *Id.* §§ 4110(d), 4111(d). If HUD failed to provide financial assistance or a willing buyer could not be found, owners could prepay their mortgages and exit the program. *Id.* §§ 4113(c)(1)-(3), 4114(a). While this process unfolded, the prepayment restriction preserved the status quo and kept the HUD rent control restrictions in place.[2]

The Supreme Court has repeatedly held that the burden of proof for takings claims lies with the plaintiff. In *Eastern Enterprises v. Apfel*, the Court stated that "a party challenging governmental action as an unconstitutional taking bears a substantial burden." 524 U.S. 498, 523 (1998). The Court also held in *Keystone Bituminous Coalition Ass'n v. DeBenedictis* that there was no taking because the plaintiffs had not satisfied their "heavy" "burden of

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2 In addition to permitting the owner to escape the regulation, the statute also offered incentives (so-called use agreements) if an owner agreed to maintain the property as low-income housing subject to rent control for its remaining useful life. Congress viewed this as a "fair and reasonable exchange" because the rates of return provided for under these use agreements "compare[d] well to rates of return expected . . . in market rate housing," taking into account the low risk of the government program. S. Rep. No. 101-316, at 105 (1990).

proving that they [had] been denied [an] economically viable use of [their] property." 480 U.S. 470, 493, 499 (1987).

Under the Supreme Court's decision in *Penn Central*, the economic impact analysis is a critical element of the takings analysis. 438 U.S. at 124. The burden of proof on economic impact, as with other elements of the *Penn Central* test, rests with the claimant, as this court has confirmed in *Cienega X* and other cases. As we said in *Cienega X*, for each of the *Penn Central* factors, "the burden is on the owners." 503 F.3d at 1288. *See also Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999). Both the Claims Court and the majority agree that the burden of proof on economic impact rests with the plaintiff. Majority Op. at 8 ("The plaintiff must establish economic impact . . . ."); *CCA Assocs.*, 91 Fed. Cl. at 613 ("CCA undoubtedly ha[d] the burden of proof on each of the *Penn Central* factors, including that of economic impact.").

The error of the Claims Court and the majority is in viewing offsetting benefits as not part of the economic impact analysis.[3] In *Cienega X*, we directly held that offsetting benefits are part of the economic impact analysis, not a separate analysis relating to the calculation of just compensation. 503 F.3d at 1283-84. Simply put, the "offsetting benefits must be accounted for as part of the takings

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[3] *See* Majority Op. at 8 ("Offsetting benefits, if there are any, must be established by the government to rebut the plaintiff's economic impact case."); *CCA Assocs.*, 91 Fed. Cl. at 613-14 ("Once CCA [had] established the economic impact of the restriction in question, the burden [was] on the government to show that other statutory benefits should offset that impact.").

analysis." *Id.* at 1283 (citing *Penn Central*, 438 U.S. at 137). In *Cienega X*, moreover, we held that the question of economic impact had to be determined taking account of the regulatory scheme as a whole. *Id.* at 1282-83. We specifically held that the Claims Court had erred "in its failure to consider the offsetting benefits that the statutory scheme afforded which were specifically designed to ameliorate the impact of the prepayment restrictions." *Id.* at 1282-83; *see also id.* at 1283 (distinguishing the statutory framework based on its "amelioration of the restrictions imposed on the existing property"). In assessing economic impact, it was not permissible to treat the statute as though it simply imposed rent control for a five-year period; it was necessary to consider the economic impact of the fact that opportunities existed to eliminate the rent control restrictions. *Id.* at 1283-85.

The Supreme Court has similarly held that the complete nature of a challenged statute must be considered in an economic impact analysis. For example, in *Penn Central*, the offsetting benefits "undoubtedly mitigate[d] whatever financial burdens the law [had] imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation." 438 U.S. at 137. In *Connolly v. Pension Benefit Guaranty Corp.*, the Court held that the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), requiring employers to pay into a pension fund, was not on its face a taking because of the lack of serious economic impact. 475 U.S. 211, 225-26, 228 (1986). "[A]s to the severity of the economic impact of the MPPAA, there [was] no doubt that the Act completely deprive[d] an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." *Id.* at 225. But there, as here, "there [were] a significant number of provisions in the Act that moderate[d] and mitigate[d] the economic impact of an individual employer's liability." *Id.* at 225-26. Such offsets included "sections of the Act [that] moderate[d] the impact . . . by exempting certain transactions" and other "sections [that] reduce[d] the size of the financial liability in various instances." *Id.* at 226 n.8. These moderating and ameliorating features were required to be taken into account in the economic impact analysis.

Similarly, in *Forest Properties*, 177 F.3d at 1367, we placed the burden of proving the entire economic impact, including costs saved, on the plaintiff. *Forest Properties* involved a tract of land, a portion of which could not be developed as planned due to the denial of a permit. *Id.* at 1366. The plaintiff provided evidence of what the post-development value of the restricted land would be, but did not account for the development costs that the plaintiff would incur to develop the land. *Id.* at 1367. The evidence "reflect[ed] the development of the lots following the denial of the permit," but "[did] not necessarily reflect [the] [fair market] value immediately after the permit was denied." *Id.* Accordingly, we held that "Forest had the burden of proof to establish a regulatory taking, and it failed to carry that burden." *Id.*

Furthermore, this is not a situation where the necessary information regarding offsets was in possession of the government but not the plaintiffs. The plaintiffs were well aware of the scope of the regulatory scheme. Even if this were a situation where the relevant information was in possession of the government but not the plaintiffs, that would suggest merely shifting the burden of production, as we have done in recent government contract cases with respect to avoided costs, while maintaining the ultimate burden of proof on the plaintiffs. We held in those contract cases that "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." *Boston Edison Co. v. United States*, 658 F.3d 1361, 1369 (Fed. Cir. 2011). In 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." *Id.* (citing *S. Nuclear Operating Co. v. United States*, 637 F.3d 1298, 1304 (Fed. Cir. 2011); *Energy Nw. v. United States*, 641 F.3d 1300, 1307-08 & n.5 (Fed. Cir. 2011)).

In light of the Supreme Court's and our own precedents, there is simply no basis for shifting the burden of proof from the plaintiffs to the government for offsetting benefits or for separating those benefits from the overall impact of the statutory scheme. The majority's sole basis for holding otherwise is a snippet of language in *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), in which the government argued a plaintiff egg producer "benefitted from operating in an environment [created by the regulation] that protected the public from the spread of salmonella" because, without government action, "the public's confidence in th[e] market would have deteriorated, reducing demand" for eggs. Brief of Defendant-Appellant at 47-48, *Rose Acre*, 559 F.3d 1260 (No. 2007-5169). We rejected this claim, noting that the government had "point[ed] to no economic data in the record to support its assertion." *Rose Acre*, 559 F.3d at 1275. However, *Rose Acre* involved indirect benefits flowing from the solution to the regulatory problem, rather than specific benefits provided to those affected by government regulation which were "designed to ameliorate the impact of [the regulation]." *Cienega X*, 503 F.3d at 1283. It provides no support for the Claims Court's impermissible shifting of the burden of proof concerning the direct impact, or lack of impact, of the regulation itself.

B The Failure to Consider Offsetting Benefits as Part of the Economic Impact Analysis

I also disagree with the majority's approval of the Claims Court's decision in another aspect of the economic impact analysis: its characterization of the offsetting benefits as "speculative." *See CCA Assocs.*, 91 Fed. Cl. at 618. While I agree with the majority that an 18% economic impact (not considering offsetting benefits) is not sufficient to establish a taking, the majority is entirely off base in suggesting that the impact here was in the 18% range. This analysis entirely ignores offsetting benefits. In *Cienega X*, we held that these offsetting benefits must be taken into account, *id.* at 1283-84, and even in this case, the record establishes that the economic impact was far less than the 18% figure assumed by the majority. This is so regardless of whether the burden of proof on economic impact rested with the plaintiffs or the government.

The parties here agreed that the economic impact would be measured based on the diminution in value of CCA's property due to the rent control (i.e., the difference between what a buyer would have paid in May 1991 for Chateau Cleary unencumbered by HUD restrictions and what a buyer would have paid in May 1991 encumbered by the HUD restrictions). The parties stipulated that the economic impact without considering offsetting benefits was 18%. CCA introduced no evidence as to the impact of offsetting benefits, i.e., the ability to sell the property or to otherwise escape future rent control. Only the government supplemented the record to provide further evidence of the economic impact of offsetting benefits. The government submitted expert testimony that the potential to sell the property for fair market value, or to exit the program and raise rents to market rates, necessarily would affect the value of the property. The government's expert report adjusted the stipulated value calculation to account for offsetting benefits, concluding that continuing the restrictions reduced the value of the property by only 5%.

However, 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.[4] *CCA Assocs.*, 91 Fed. Cl. at 618. The possibility that CCA could exit the program was therefore "speculative." *Id.* The finding underlying this conclusion is based on a misunderstanding of

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[4] Similarly, the Claims Court held that "to adopt [the government expert's] estimate [of a 5% economic impact], this court must find that it was probable that CCA could have pursued a sale and have successfully sold the property under ELIHPA if it had sought to do so." *CCA Assocs.*, 91 Fed. Cl. at 614.

the relevant statutes and, insofar as it represents a finding of fact, is clearly erroneous.[5] But more importantly, the Claims Court's approach reflects a fundamental misunderstanding of the valuation process, one that CCA continues to urge on appeal. CCA argued that its "position throughout has been that the value of these statutory 'options' cannot be quantified because, *inter alia*, CCA never availed itself of any options, and therefore to quantify the 'value' of the options would be an exercise in

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[5] The Claims Court concluded that it was uncertain whether a sale would have occurred because there was no notice of a sale option under ELIHPA, no reasonable certainty that CCA could have found a willing buyer, and a sale under LIHPRHA would have taken so much time that HUD funding would have no longer been available. The first of these findings is legally erroneous. As noted above, the ELIHPA statute and regulations specifically mentioned the possibility of a sale, and CCA itself filed a notice of intent under ELIHPA which mentioned that it might pursue a sale of the property. The second and third findings are immaterial. If a buyer could not be found or funding was not available, CCA could have exited the program. 12 U.S.C. § 4114(a). Moreover, the second and third findings are clearly erroneous. The owner of four separate properties in the New Orleans area found a buyer for his properties. Indeed, the government's expert testified that he was unaware of any owners who were unable to find willing purchasers. And in November 1990, CCA itself was approached (through an executive of the company servicing CCA's mortgage) by a non-profit buyer that was potentially interested in purchasing Chateau Cleary. The evidence established that the LIHPRHA sale process could be completed in two and a half years or less, meaning that a LIHPRHA sale begun in April 1992 could have been completed before 1995 when HUD began to encounter problems funding sales. And the funding problems might not have been fatal to a sale even after 1995, as four properties in the New Orleans area were still sold after the funding problems arose.

speculation." Plaintiff-Cross Appellant's Br. 51. The question is not whether CCA would have availed itself of the offsetting benefits or whether a sale would have occurred. The proper analysis is whether a prospective purchaser in May 1991 would have attributed value to the opportunities offered by the statutory scheme to exit the program and escape the rent control obligations. Determining market value involves consideration of "[a]ll facts which the owner would properly and naturally press upon the attention of a buyer with whom he is negotiating a sale, as well as those facts which would naturally influence a person of ordinary prudence desiring to purchase the property." 4 *Nichols on Eminent Domain* § 12.02 (2010). "[C]ourt[s] must consider any aspect of the property that could have affected the amount a reasonable buyer would be willing to pay." *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 585 (11th Cir. 2001).

As discussed above, cases such as *Penn Central* and *Connolly* require that ameliorating sections in the statutory scheme be taken into account in the economic impact analysis. The Supreme Court has also recognized that a valuation analysis must take into account other possibilities that could affect market value even when they are not certain to occur. In *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973), the government condemned a lessee's property interest (including improvements the lessee had made to the land), and the Ninth Circuit held that it was not necessary to take into account the possibility that the lease might have been renewed because that would be "speculati[ve]." The Supreme Court rejected this argument, holding that "[b]y failing to

. . . tak[e] into account the possibility that the lease might be renewed as well as the possibility that it might not [the lower court] failed to recognize what a willing buyer would have paid for the improvements." *Id.* at 474. The Court explained that failing to account for this possibility "is not how the market would have valued [the] improvements" because a buyer would not have assumed that "there [was] no possibility of" a lease renewal. *Id.* at 478.

Similarly, in *Great Northern Nekoosa Corp. v. United States*, 711 F.2d 473 (1st Cir. 1983), the First Circuit reiterated this principle in the context of a valuation for tax purposes. The court held that the federal government's designation of a piece of plaintiff's property as a "possible part" of a national wildlife system had to be considered in determining the property's market value even though the parcel would only become part of the system if the state agreed. *Id.* at 475. Though such an event was "uncertain," the possibility "substantially reduced its market value because it would necessarily affect the price which would be paid by a willing seller." *Id.*[6] A leading appraisal guide also confirms that the "right to sell an interest" in one's property is an "individual right" in the property that "has some potential value." Appraisal Institute, *The Appraisal of Real Estate* 112 (13th ed. 2008).

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6 *See also State Highway Comm'n v. Stockhoff*, 519 P.2d 1281, 1284 (Or. Ct. App. 1974) (noting that the possibility Oregon might exercise its contractual option to build a road over plaintiff's right of way that would decrease the value of plaintiff's property would affect market value because "a prospective buyer would likely be influenced by the existence of the option in determining the purchase price").

In keeping with this standard approach, the government's appraisal expert, Dr. Dickey, testified that the possibility of a sale, or the possibility of prepayment if a sale did not occur, "provided potential avenues to realize at least some value in the property" and that "accounting for these options would lower the measure of economic impact." Transcript of Record at 1631, *CCA Assocs. v. United States*, 75 Fed. Cl. 170 (2007) (No. 98-CV-334) ("Transcript"). In fact, CCA itself filed a notice of intent under ELIHPA to preserve these very options.

These opportunities were, moreover, hardly remote possibilities. Sales of rent controlled properties occurred nationwide under LIHPRHA, including four in the New Orleans area where CCA's property was located, and the government's expert testified that he was unaware of any instance where an owner could not find a willing purchaser. Hundreds of such transactions nationwide were completed. The government's expert also testified that the process could be commenced a year before the prepayment date and was usually completed in eighteen to twenty-four months. *See* 12 U.S.C. § 4101 (2000). The Claims Court here acknowledged that it was "possible" that CCA could have "found a buyer and obtained the necessary approval from HUD to complete a sale" before HOPE lifted the prepayment restrictions. *CCA Assocs.*, 91 Fed. Cl. at 618.

Even in the unlikely event that a buyer could not be found, LIHPRHA allowed owners to exit the program if they could not consummate a sale because they did not find a willing purchaser or did not receive HUD funding for the sale. 12 U.S.C. § 4114(a)(1)-(2). Owners who exited the program were allowed to raise their rents to market rates unless their project was located in a "low vacancy area" (defined by HUD as a less than 3% vacancy rate), in which case owners could not raise rates on existing tenants for three years. 12 U.S.C. § 4113(c)(1)–(3). Even if the three-year grace period applied here (a matter in dispute), it applied only to tenants who occupied their apartments when the owner filed his notice of intent. 12 U.S.C. § 4113(c)(1). Owners could raise the rents on other units.

Under standard valuation theory, it is particularly inappropriate to focus (as the Claims Court did here) on whether CCA itself could have sold its property for market value. "To establish market value, it is not necessary to point out any designated person able and willing to buy the property at the price alleged (or at any price), or to show that the owner is in fact willing, or even has the legal capacity, to sell it." 4 *Nichols on Eminent Domain* § 12.02. "[T]he application of this concept [of market value] involves, at best, a guess by informed persons." *United States v. Miller*, 317 U.S. 369, 375 (1943). Appraisals are "based on market comparisons" to comparable properties. Appraisal Institute, *supra*, at 297, 301-02, 377. Therefore, the fact that numerous other comparable owners in the same program took advantage of the statute's opportunities and consummated sales is clearly relevant and indicates that the benefits had value. Significantly, the Claims Court made no finding that the possibility of a sale or other option was without value.

The government's expert report showed that the possibility of a sale of the property would have resulted in only a 5% diminution in value from the

LIHPRHA rent control. The report assumed that a sale could have occurred by November 1992 and the fair market sale would have effectively allowed CCA to realize market-rate income for the period following November 1992.

Whether or not the 5% figure represented the definitive measure of the economic impact in this case, the evidence, at a minimum, indicates that the value of the benefits was substantial. The economic impact was far less severe than the 18% figure.

II The Character of the Government Action

Finally, I dissent from one other aspect of the majority's decision—its approval of the Claims Court's prior analysis as to the character of the government action, which it held to be "analogous to a physical invasion" rather than a mere form of transitional rent control. *CCA Assocs.*, 75 Fed. Cl. at 190. Although in *Cienega Gardens v. United States* ("*Cienega VIII*"), 331 F.3d 1319 (Fed. Cir. 2003), a panel of this court determined the government action had the character of a taking because it was akin to a physical invasion, *id.* at 1338, the panel also recognized that a different result was possible based on different arguments and a different record, *id.* at 1355. Here, in contrast to *Cienega VIII*, the government urged that LIHPRHA imposed a form of rent control, and therefore, a form of permissible government action. Specifically, the government argued that the "Preservation Statutes merely limited the owner's ability to unilaterally raise tenant rents," and "[r]ent control statutes are not generally considered to have the character of a taking." Defendant-Appellant's Br. at 38-39.

In its post-trial brief to the Claims Court, the government similarly urged that "the character of the Preservation Statutes [was] akin to standard rent control statutes" because "the statutes merely limited the owner's ability to raise rents." Defendant's Post-Trial Memorandum of Contentions of Fact and Law at 47, *CCA Assocs.*, 91 Fed. Cl. 580 (No. 97-CV-334). CCA also viewed the preservation statutes as primarily imposing rent control, urging that the preservation statutes effected a taking by limiting CCA's ability to charge market rents.[7] CCA argued that LIHPRHA curtailed its "ability to prepay the mortgage . . . and thereby to operate Chateau Cleary as a market-rate property." Plaintiff's Post-Trial Memorandum of Contentions of Fact and Law at 18, *CCA Assocs.*, 91 Fed. Cl. 580 (No. 97-CV-334). At trial, CCA's managing partner testified that the regulatory agreement allowed HUD to "control the rents," which would have been higher if CCA had been permitted to prepay in May 1991, allowing for greater income and cash flow. J.A. 2. He complained that CCA could have charged "at least 20, 25 percent higher" rents. J.A. 4. Similarly, in its brief to this court, CCA stressed that it had to charge "HUD-approved" rents and that it "lost the right to rent units at market rates." Plaintiff-Cross Appellant's Br. at 4, 20.

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7 *See* Plaintiff's Pre-Trial Memorandum of Contentions of Fact and Law at 1, *CCA Assocs.*, 75 Fed. Cl. 170 (No. 97-CV-334) (arguing that "[t]he government effected a regulatory taking of CCA's right to exist HUD's low-income housing program and to convert its property to conventional market rate rentals").

Commentators have agreed that LIHPRHA imposed "a type of rent regulation."[8]

The Congressional justification for the continuing rent control after the prepayment date was clear enough. As the first prepayment dates grew near during the 1980s, Congress grew concerned that project owners would eliminate rent control by exiting the program, severely depleting the supply of affordable housing units. Congress feared the loss of over 330,000 units due to mortgage prepayments and the elimination of rent control. Congress stressed that absent government action, tenants whose landlords prepaid their mortgages would be forced either to "stay in [the] project and pay substantial rent increases or begin a search for housing in markets where comparable affordable housing does not exist." S. Rep. No. 101-316, at 103 (1990). Congress feared "that elderly and low income tenants [would] have no alternative but to be thrown in the street without further action" by the government to continue rent control. H. Rep. No. 100-122, at 48 (1987) (Conf. Rep.), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3370. The statute "protected low-income tenants from evictions or sharp increases in rent." S. Rep. No. 101-316, at 98.

The "substantial public purpose" of a statute weighs against the finding of a taking. *Penn Central*,

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8 Robert Meltz, et. al., The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 300 (1999); see also Daniel L. Siegel, et. al., Temporary Takings: Settled Principles and Unresolved Questions, 11 Vt. J. Envtl. L. 479, 501 n.176 (2010) (describing preservation statutes as "provisions which restricted the ability of [project owners] from . . . avoiding rent control requirements").

438 U.S. at 127. As this court said in *Rose Acre*, 559 F.3d at 1281, "[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong." There is no doubt that rent control has a significant harm-preventing purpose. In *Block v. Hirsch*, 256 U.S. 135, 154, 156 (1921), the Supreme Court recognized that "[h]ousing is a necessary of life," and that rent-control statutes are designed to prevent conditions "dangerous to the public health."

Rent control and rent stabilization laws have been almost invariably held to represent legitimate government acts and not to support either physical or regulatory takings challenges. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Block*, 256 U.S. 135; *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc); *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45 (2d Cir. 1996); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997); *Rent Stabilization Ass'n v. Higgins*, 630 N.E.2d 626 (N.Y. 1993). The Supreme Court in *Yee* recognized the legitimacy of rent control and expressed concern with such regulations only if the statute "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. However, this is not such a case. LIHPRHA only restricted the landlord's rights for approximately five years, and owners had opportunities to exit the program through sale or prepayment before that.[9]

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9 In rejecting the *Cienega* plaintiffs' physical takings claims, we recognized that *Yee* was "controlling" because "the effect of

CCA does not contest that rent control statutes have a vital public purpose, and that it retained the ability to select tenants within the eligible group of low and moderate income individuals, to evict tenants for cause, and even to leave the units vacant. But, CCA contends that the LIHPRHA rent control scheme is distinguishable from the type of rent control approved in other cases because it (1) restricted CCA's ability to evict tenants and prevented CCA from choosing tenants who did not fit HUD's income requirements, (2) prevented CCA from converting the property to another use, and (3) prevented CCA from selling the property without HUD approval. Rent control schemes that impose restrictions, including some or all of these features, have frequently been upheld.

First, many rent control regimes restrict a landlord's ability to evict tenants or to select tenants but have been held not to result in takings. *See, e.g.*, *Yee*, 503 U.S. at 524-27 (upholding a local rent-control ordinance that prevented owners of mobile home parks from evicting their tenants and from selecting their tenants); *Block*, 256 U.S. at 154 (upholding a District of Columbia rent control statute that, inter alia, allowed a tenant to remain in possession after expiration of his lease as long as he continued to pay the rent fixed by a government commission); *Troy Ltd. v. Renna*, 727 F.2d 287, 290-91, 301-02 (3rd Cir. 1984) (sustaining a New Jersey statute that prevented landlords who

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the prepayment restrictions . . . [was] merely to enhance an existing tenant's possessory interest" rather than authorize a permanent occupation. *Cienega Gardens v. United States* ("*Cienega VI*"), 265 F.3d 1237, 1248 (Fed. Cir. 2001) (quoting *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 217 (1995)).

converted an apartment building to a condominium from evicting senior citizens and disabled tenants for forty years unless, inter alia, the tenants' income level was above a certain threshold).

Second, courts have upheld against takings challenges regulatory schemes that put severe restrictions on a property owner's ability to convert rent regulated properties to new uses, such as condominiums. In fact, the District of Columbia Circuit has recognized that "takings clause challenges in th[e] context [of restrictions on conversion of rental property] have not fared well." *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984); *see Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875 (1983) (statute preventing removal of a rent controlled property from the rental housing market absent a permit from the rent control board); *Gilbert v. City of Cambridge*, 932 F.2d 51, 54, 56-57 (1st Cir. 1991) (upholding ordinance which "prohibit[ed] an owner from 'removing' any [housing units offered for rent before August 1979] from the rental market without first obtaining a permit from the Rent Control Board"); *Nash v. City of Santa Monica*, 688 P.2d 894, 896, 898 (Cal. 1984) (upholding a rent control law that "prohibit[ed] removal of rental units from the housing market by conversion or demolition absent a removal permit"); *see also Sadowsky v. City of New York*, 732 F.2d 312, 318-19 (2d Cir. 1984) (rejecting regulatory takings claim against ordinance restricting conversion).

Third, the fact that CCA could sell its property only to purchasers who promised to maintain the rent restrictions is a feature of many rent-control provisions and has not been held to create a taking.

See Fresh Pond, 464 U.S. 875 (statute requiring any purchasers of the rent controlled property to abide by the rent control restrictions); *Silverman v. Barry*, 845 F.2d 1072, 1077 (D.C. Cir. 1988) (upholding conversion law requiring that owners offer to sell their rent-controlled properties to tenant cooperatives before other prospective purchasers).

Far from imposing unusual restrictions, the LIHPRHA scheme, as discussed above, was less intrusive than other rent control regimes by allowing owners to sell their property and to exit the program.

LIHPRHA did not place the burdens solely on the owners. Rather, there was a substantial sharing of the burden between the program owners and the general taxpayers at large, a feature that cuts against takings. *See Penn Central*, 438 U.S. at 148 (describing the design of the Takings Clause "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" (internal quotation marks omitted)). From the outset, the section 221(d)(3) program involved a transfer of substantial benefits from taxpayers as a whole to the projects owners. Government subsidies provided the owners with below-market interest rates, and the government also insured the owners' nonrecourse loans and provided substantial tax breaks. Under LIHPRHA, HUD expended federal funds to entice non-profit organizations or other buyers to purchase owners' properties at fair market value and to provide incentives for owners to enter into use agreements. Congress authorized HUD to spend $638 million on these incentives during the 1993 fiscal year alone. 12 U.S.C. § 4124(a). Through the end of 2006, the federal government spent about $1.2

billion to preserve 751 projects containing about 19,000 units, constituting an outlay of approximately $19,000 per unit. Maggie McCarty, *Congressional Research Service Report: Preservation of HUD-Assisted Housing* 23 (2010), *available at* http://www.preserveoregonhousing.org/CRS_Pres_Report. pdf. In fact, Congress wanted to end LIHPRHA's prepayment restrictions because it viewed the program as too "costly" and the benefits as providing a "windfall" for project owners. S. Rep. No. 104-140, at 37 (1995).

For these reasons, I conclude that the character of the government action does not support CCA's takings claim.[10]

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[10] I also note my disagreement with the majority opinion to the extent that it seeks to cast doubt on our decision in *Cienega Gardens v. United States* ("*Cienega IV*"), 194 F.3d 1231 (Fed. Cir. 1998), rejecting a similar contract claim.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5094

CCA ASSOCIATES,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

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

DECIDED: JULY 21, 2008

Before DYK, PROST, and MOORE, <u>Circuit Judges.</u>

PER CURIAM.

This is another case involving a regulatory takings claim arising out of the enactment of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) ("ELIHPA") and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249

(1990) (codified at 12 U.S.C. §§ 4101-4124) ("LIHPRHA") (collectively "the Preservation Statutes"). Defendant-Appellant United States ("the government") appeals from a final judgment of the Court of Federal Claims, finding that Plaintiff-Appellee CCA Associates ("CCA") suffered a temporary taking and awarding CCA just compensation. *CCA Assocs. v. United States*, 75 Fed. Cl. 170, 206 (2007). We affirm-in-part, vacate-in-part, and remand.

We most recently addressed these issues in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"). That decision, which issued after the decision of the Court of Federal Claims in this case and the submission of the government's opening brief, addressed arguments that are in many respects identical to those presented here.

As a panel of this court, we are obligated to follow our earlier decision in *Cienega X*. However, notwithstanding *Cienega X*, the government argues that CCA's takings claims are not ripe because CCA did not apply for permission to prepay the loan, or, alternatively, that it did not apply for either of the two other benefits available under the Preservation Statutes—the use agreement option and the sale option.

We find that there is no distinction between the government's contention here that CCA's claim is not ripe, and the contention made in *Cienega X*, which we rejected. Just as applying for permission to prepay was shown in *Cienega X* to be futile and therefore not necessary for ripeness, so too here the Court of Federal Claims did not err in finding that an application to prepay would be futile and that the takings claim was ripe. In *Cienega X*, we also rejected the argument that an owner must pursue other statutory options in order to achieve ripeness, holding that "the ripeness doctrine does not require the owners to apply for voluntary incentives such as the sale option that they did not wish to pursue." *Id.* at 1275 n.9. We therefore affirm the Court of Federal Claims' determination that CCA's takings claim is ripe.

CCA urges that we not follow *Cienega X*, and that the Court of Federal Claims' conclusion that a taking occurred should be affirmed. We disagree. On the merits of the takings analysis, *Cienega X* requires that we vacate the judgment here and remand for further consideration in accordance with *Cienega X*. Here, as in *Cienega X*, the Court of Federal Claims "should allow both sides to supplement the record with additional relevant evidence if they wish to do so." *Id.* at 1291.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

No costs.

In the United States Court of Federal Claims
No. 97-334C

(Filed: January 28, 2010)

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CCA ASSOCIATES,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES,	)
	)
Defendant.	)

* * * * * * * * * * * * * * * * * * *

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OPINION AND ORDER

LETTOW, Judge.

This case has a lengthy and somewhat convoluted history. It was originally brought as a breach-of-contract case with a secondary takings claim, *see* Compl. ¶¶ 38-40 (breach of contract), 41-43 (just compensation).[1] That initial focus has been colored by developments in other cases raising similar claims, particularly the *Cienega-Independence Park* chain of decisions. *See Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*"); *Cienega Gardens v. United States*, 265 F.3d 1237 (Fed. Cir. 2001) ("*Cienega VI*"); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"); *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"); *see also Independence Park Apts. v. United States*, 465 F.3d 1308 (Fed. Cir. 2006); *Independence Park Apts. v. United States*, 449 F.3d 1235 (Fed. Cir. 2006).

Plaintiff, CCA Associates ("CCA"), is a Louisiana partnership that owns an apartment complex in Metairie, Louisiana. CCA claims that the government, in enacting the Emergency Low-Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815, 1877 (1988) ("ELIHPA") (codified at 12 U.S.C. § 1715*l* note), and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079, 4249 ("LIHPRHA") (codified in scattered sections of Title 12 of the U.S. Code,

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[1] The Answer, filed July 14, 1997, sets out a general denial to both counts. Ans. ¶¶ 43-45.

including 12 U.S.C. §§ 4101 to 4124), breached its contractual obligations to CCA or alternatively effected a temporary taking of its property without just compensation in contravention of the Fifth Amendment of the United States Constitution. The action was stayed for a number of years to permit the Federal Circuit to clarify the law in pertinent respects by addressing the *Cienega* and *Independence Park* cases. After *Cienega VIII* was decided by the Federal Circuit, essentially mandating that a judgment entered for contractual damages be reinstated as a temporary takings award, CCA's case was prepared for and proceeded to trial along the lines outlined in *Cienega VIII*. Based upon the resulting evidentiary record, this court ruled that the case was ripe for decision, that the government had taken CCA's property, and that the government must provide just compensation. *CCA Assocs. v. United States*, 75 Fed. Cl. 170 (2007). That decision was rendered after *Cienega VIII* but before *Cienega X*. Thereafter, *Cienega X* substantially recast the legal framework explicated in *Cienega VIII*. Then, on appeal in *CCA Associates*, the Federal Circuit affirmed the trial court's ruling that the case was ripe for adjudication but vacated the disposition of the takings analysis in light of *Cienega X* and remanded the case for further proceedings. *CCA Assocs. v. United States*, 284 Fed. Appx. 810, 811 (Fed. Cir. 2008). In its remand, the court of appeals provided that "[h]ere, as in *Cienega X*, the Court of Federal Claims 'should allow both sides to supplement the record with additional evidence if they wish to do so.'" *Id.* (quoting *Cienega X*, 503 F.3d at 1291).

Honoring that remand, the court reopened the record and conducted a further trial on both the contract and takings claims, commencing on July 20, 2009. After post-trial briefing, the case is again ready for disposition.

FACTS[2]

A. *Housing Program*

During the Depression, Congress passed the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934), in an effort to encourage private lending for home repairs and home construction. Until the 1960s, the National Housing Act principally subsidized projects of local public housing authorities. Congress amended the National Housing Act in 1961 to "enable private enterprise to participate to the maximum extent in meeting the housing needs of moderate-income families." S. Rep. No. 87-281, at 5 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1923, 1926; *see* Pub. L. No. 87-70, § 101(a)(2)(a)(6), 75 Stat. 149, 149-50 (1961) ("Section 221(d)(3)"). The Housing Act of 1961 restricted mortgage insurance under Section 221(d)(3) to projects containing five or more units, § 101(a)(12), 75 Stat. at 152 (codified, as amended, at 12 U.S.C. § 1715*l*(f)), but also provided two key incentives for investors: (1) authorization for waivers of mortgage insurance premiums paid to the

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2 This recitation of facts constitutes the court's principal findings of fact in accord with Rule 52(a) of the Rules of the Court of Federal Claims ("RCFC"). Other findings of fact and rulings on questions of mixed fact and law are set out in the analysis. The court also adopts the findings of fact laid out in its prior decision, 75 Fed. Cl. 170, except insofar as they are explicitly superseded by the findings of fact in this decision.

Federal Housing Administration ("FHA"), a component part of the United States Department of Housing and Urban Development ("HUD"), and (2) loans at below-market interest rates. *See id.* §§ 101(a)(6), (11), (c), 75 Stat. at 150, 152, 153 (codified, as amended, at 12 U.S.C. § 1715*l*(d)(5), (f)); *see* S. Rep. No. 87-281, at 97, *reprinted in* 1961 U.S.C.C.A.N. at 2016.[3] In 1968, Congress added a

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[3] The Housing Act of 1961 did not authorize the FHA itself to make loans with below-market interest rates, but it effectively guaranteed those rates by granting the Federal National Mortgage Association ("Fannie Mae") the power to purchase mortgages insured under the Section 221(d)(3) program. § 101(c), 75 Stat. at 153. As the House report accompanying the 1961 Act explained: "The essence of the new proposal is to provide long-term loans at a very low interest rate, using the FHA insurance machinery and providing the necessary funds through the resources of the special assistance programs of [Fannie Mae]." H.R. Rep. No. 87-447, at 11 (1961); *see also* S. Rep. No. 87-281, at 8, *reprinted in* 1961 U.S.C.C.A.N. at 1930 ("The [Section 221(d)(3)] mortgage loans could be purchased from the lender under the special assistance program of [Fannie Mae]."). In practice, only Fannie Mae purchased these loans, so the Section 221(d)(3) program "amount[ed] to a[] [Fannie Mae] loan to FHA-approved cooperative projects." Edward P. Scott, Note, *The Cooperative Apartment in Government-Assisted Low-Middle Income Housing*, 111 U. Pa. L. Rev. 638, 650 (1963); *see also* Nathaniel S. Keith, *An Assessment of National Housing Needs*, 32 Law & Contemp. Probs. 209, 214 (1967) (Under the Section 221(d)(3) program, "the permanent mortgage is purchased by [Fannie Mae]."). *See, e.g.,* PX 33 at 3 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)) (indicating that CCA's original mortgagee, Pringle-Associated Mortgage Corporation, had sold the mortgage to the Government National Mortgage Association ("Ginnie Mae"), a successor to the original Fannie Mae); *see also* 12 U.S.C. § 1717(a), (b)(1) (providing that the original Fannie Mae was split into Fannie

"Section 236" program, which subsidized owners' monthly mortgage payments and provided mortgage insurance. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498-501 (codified, as amended, at 12 U.S.C. § 1715z-1(a), (j)). The subsidies were coupled with regulatory restrictions requiring participating owners to limit rentals to low- or moderate-income families, restrict rents to a HUD-approved schedule, manage the properties in accord with HUD guidelines, abide by restrictions on the rate of return the owner could receive from the project, and sell the property only upon HUD's approval. *See Cienega Gardens v. United States*, 33 Fed. Cl. 196, 203 (1995) (citing the regulatory agreement executed by the owner and the government in that case), *vacated and remanded by Cienega IV*, 194 F.3d at 1231. Among other things, both the Section 221(d)(3) and Section 236 programs contemplated forty-year mortgages which could be prepaid after twenty years. *See* 24 C.F.R. §§ 221.524(a)(1)(ii), 236.30(a)(ii) (1969) (amended at 34 Fed. Reg. 12,889 (Aug. 8, 1969)). Prepayment removed regulatory restrictions and allowed participation in the conventional housing market.

B. *Chateau Cleary – A Family Partnership*

Chateau Cleary Apartments ("Chateau Cleary") is a 104-unit apartment complex in West Metairie, Louisiana, relatively near the city of New Orleans. PX 106 at 17 (Expert Report of Dr. Wade R. Ragas, an economist and real estate expert called to testify by CCA (May 30, 2005)) ("Second Ragas Report"); DX 140 at 13-15 (Management Plan of Chateau Cleary

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Mae and Ginnie Mae, both of which have statutory authority to purchase mortgages insured under Section 221(d)(3)).

Apartments by Mr. Jim Alexander (May 31, 1997)) ("Alexander Report").[4]

On October 6, 1969, Ernest B. Norman, Jr. and J. Robert Norman (the "Norman brothers") purchased from New Orleans investors the land on which to build Chateau Cleary, as well as the plans that the selling investors had developed for the complex. 2006 Tr. 53:24 to 54:8, 55:12-15 (Test. of Ernest B. Norman, III, the managing partner of CCA);[5] PX 1 (Cash Sale of Property, signed by the Norman brothers and Patrick J. Tomeny, Anthony D. Lewis, and Paul Atwood (Oct. 6, 1969)). In conjunction with the sale, the Norman brothers entered into the Section 221(d)(3) program. On November 7, 1969, they contemporaneously signed three documentary instruments – a secured note, a regulatory agreement, and a mortgage – in a conference room at HUD's offices in New Orleans. 2009 Tr. 33:10 to 35:16 (Norman). Each document was drafted by HUD. *Id.* The secured note was set out on HUD Form 1734 and was in the amount of $1,601,100.00. PX 3 (1969 Note). It was endorsed by HUD and incorporated the mortgage by reference. *Id.* The secured note prohibited the mortgagor from prepaying the mortgage without prior written approval of the Federal Housing Commissioner,

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4 "PX __" denotes plaintiff's exhibits; correspondingly, "DX __" refers to defendant's exhibits.

5 References to the transcript of the trial conducted in September 2006 will be to "2006 Tr. __." References to the transcript of the further trial conducted in July 2009 will be to "2009 Tr. __." The identity of the testifying witness will be set out in parentheses following a citation to the evidentiary transcript.

except that no prior approval was necessary after 20 years.[6] *Id.* The mortgage, signed by the Norman brothers and Pringle-Associated Mortgage Corporation, was written on FHA Form 4123-D and incorporated by reference the terms of the secured note and the regulatory agreement. PX 4 at first undesignated paragraph, ¶ 3 (1969 Mortgage). The regulatory agreement, written on FHA Form 1730 and entitled "Regulatory Agreement for Limited Distribution Mortgagor Projects Under Section 221(d)(3) of the National Housing Act, As Amended," was signed by the Norman brothers and HUD. PX 2 (1969 Regulatory Agreement). Under the regulatory agreement, in exchange for HUD's action to provide mortgage insurance, endorse the secured note, and agree to the transfer of the mortgaged property, the Norman brothers agreed to charge HUD-approved rents to HUD-approved tenants for "so long as the contract of mortgage insurance continues in effect." *See id.* at second undesignated paragraph, ¶¶ 4(b), 5(c). The regulatory agreement also incorporated by reference the mandates of Section 221(d)(3) and the implementing regulations, which included the mortgagors' right to prepay their mortgages after 20

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[6] The provision in the note guaranteeing the Norman brothers' right to prepay after 20 years stated:

> The debt evidenced by this note may not be prepaid either in whole or in part, prior to the final maturity date hereof without the prior written approval of the Federal Housing Commissioner except a maker which is a limited dividend corporation may prepay without such approval after 20 years from the date of final endorsement of this note by the Federal Housing Commissioner.

PX 3 (1969 Note).

years. *See id.* at second undesignated paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969).[7]

On March 27, 1985, Ernest B. Norman, Jr. formed the CCA Associates partnership, with the partners consisting of his children, a trust for his grandchildren, and himself. PX 30 (CCA Articles of Partnership). On April 2, 1985, with HUD's approval, J. Robert Norman sold his fifty percent interest in Chateau Cleary to CCA for $677,550. PX 28A (Act of Sale conveying J. Robert Norman's interest in Chateau Cleary to CCA) (Apr. 2, 1985)). CCA also assumed the Chateau Cleary mortgage. PX 28 (Assumption Agreement between Ginnie Mae and CCA (Apr. 2, 1985)). As a consequence, HUD also required CCA to sign a new regulatory agreement for Chateau Cleary. PX 29 (Regulatory Agreement, signed by HUD and Ernest B. Norman, III, acting on behalf of CCA (Apr. 26, 1985)) ("1985 Regulatory Agreement"). The 1985 Regulatory Agreement mirrored that executed in 1969, *see generally id.*; PX 2 (1969 Regulatory Agreement), including the HUD restrictions related to tenants and rent, PX 29 at ¶ 4 (1985 Regulatory Agreement), and incorporating by

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[7] Due to an increase in labor costs in the New Orleans area from late 1969 to mid-1971, the Norman brothers requested and HUD approved an increase in the mortgage amount. As a result, on May 17, 1971, the Norman brothers signed on HUD forms a second secured note for $1,699,500.00 and a second mortgage. PX 5 (1971 Note); PX 6 (1971 Mortgage). The new note explicitly referred to the prepayment right and incorporated by reference Section 221(d)(3) and HUD's implementing regulations. PX 5 (1971 Note); 24 C.F.R. § 221.524(a)(1)(ii) (1971). The new mortgage incorporated by reference the 1971 note and the original 1969 regulatory agreement. PX 6 at first undesignated paragraph, ¶ 3 (1971 Mortgage).

reference the mandates of Section 221(d)(3) and the associated regulations, which continued to include the right to prepay the mortgage after 20 years. *Id.* at second undesignated paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985); 2006 Tr. 172:2 to 173:10 (Norman). Eight months later, on December 31, 1985, Ernest B. Norman, Jr. transferred his one-half interest in Chateau Cleary to CCA, giving CCA full ownership of the property. PX 33 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)).

C. *Emergency Low-Income Housing Preservation Act of 1987*

In the mid-1980s, Congress became concerned that owners of housing insured under Section 221(d)(3) would begin to exercise their prepayment rights, thereby reducing the total number of low-income housing units. H.R. Rep. No. 100-122(I), at 35 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3351. In consequence, Congress enacted ELIHPA, § 202(a)(1), 101 Stat. at 1877 (codified at 12 U.S.C. § 1715*l* note), which took effect on February 5, 1998 and "placed a two-year moratorium on mortgage prepayments to allow Congress time to devise a permanent solution to the possible shortage of low-income housing." *See Cienega IV*, 194 F.3d at 1235. ELIHPA did not foreclose prepayment of Section 221(d)(3) mortgages altogether, but required mortgagors to obtain HUD approval prior to prepayment, even if the twenty-year period had already elapsed. ELIHPA § 221(a), 101 Stat. at 1878-79; 24 C.F.R. § 221.524(a)(1)(ii) (1971). ELIHPA also contained provisions allowing owners to seek several incentives from HUD for extending the use their housing units for low-income tenants, including an increase in the allowable annual distribution, alteration of the method of calculating an owner's equity in the property, an increase in the owner's access to accounts it maintained for residual receipts and replacements,[8] and insurance for a second mortgage. ELIHPA § 224(b)(1)-(4), (7), 101 Stat. at 1880. In September 1990, HUD issued regulations implementing ELIHPA. *See Prepayment of a HUD-Insured Mortgage by an Owner of Low-Income Housing*, 55 Fed. Reg. 38,944 (Sept. 21, 1990) (codified at 24 C.F.R. §§ 248.101-248.261 (1991)).

D. *Low-Income Housing Preservation and Resident Homeownership Act of 1990*

On November 28, 1990, Congress enacted LIHPRHA, § 601(a), 104 Stat. at 4249-50 (1990) (codified at 12 U.S.C. §§ 4101-4124 and other scattered sections of Title 12 of the U.S. Code), which extended indefinitely ELIHPA's temporary requirement that barred owners of housing insured under Section 221(d)(3) from prepaying their mortgages and thus removing the attendant regulatory restrictions, without HUD approval. LIHPRHA § 601(a), 104 Stat. at 4249; *Cienega VIII*, 331 F.3d at 1326. HUD promulgated regulations implementing LIHPRHA in April 1992. *See Prepayment of Low Income Housing Mortgages*, 57

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8 Regulatory agreements under Section 221(d)(3) required owners to maintain a "reserve fund for replacements" to cover repair expenses and a "residual receipts fund," which consisted of cash remaining after a limited-dividend entity had declared and paid its distributions. *See* PX 2 at ¶ 2 (1969 Regulatory Agreement).

Fed. Reg. 12,041 (Apr. 8, 1992) (codified at 24 C.F.R. §§ 248.1-248.319 (1993)).

LIHPRHA's restrictions on prepayment were similar but not identical to those in ELIHPA. The criteria in LIHPRHA for approval of prepayment were more stringent than those in ELIHPA. *See CCA Assocs.*, 75 Fed. Cl. at 176. And while LIHPRHA offered owners incentives to continue in the Section 221(d)(3) program that were similar to those of ELIHPA, the procedures for receiving incentives were more onerous than they were under ELIHPA. *Id.*[9] LIHPRHA also provided an explicit option to sell the property to a HUD-approved purchaser, such as a non-profit organization, a public agency, or a tenant cooperative. *See* 12 U.S.C. § 4101(a).[10] If a sale to a qualified non-profit

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[9] LIHPRHA was also substantively more stringent than ELIHPA. Among other things, LIHPRHA removed from ELIHPA's list of possible incentives an increase in the owner's annual distributions. *Compare* § 224(b), 101 Stat. at 1880, *with* 12 U.S.C. § 4109(b). In addition, respecting the extension of use for low-income tenants, LIHPRHA required the extension to be effective for the life of the property, rather than for the remaining period of the 40-year mortgage as ELIHPA had done. *Compare* 12 U.S.C. § 4112(a)(2)(A), *and* 24 C.F.R. § 248.145(a)(2) (1993), *with* ELIHPA, § 224(b)(1), 101 Stat. at 1880-81, *and* 24 C.F.R. § 248.233(d)(1) (1991).

[10] The parties disagree whether a sale option was available under ELIHPA. CCA argues that ELIHPA had no statutory sale option, Pl.'s Post-Trial Br. at 28-32 ("Pl.'s Br."), noting that most pertinent provisions of ELIHPA specified that the Secretary of HUD might take "[o]ther actions, authorized in other provisions of law, to facilitate a transfer or sale of the project to a qualified nonprofit organization, limited equity tenant cooperative, public agency, or other entity acceptable to the Secretary." ELIHPA, § 224(b)(7). CCA further argues that HUD's regulations did not explicate a procedure or mechanism

entity could not be accomplished within a year after a second notice of intent was filed by an owner, LIHPRHA authorized HUD to approve sale to for-profit purchasers who agreed to retain the affordability restrictions for the life of the property. 12 U.S.C. § 4110(c); 24 C.F.R. § 248.101 (1993).

E. *The Housing Opportunity Program Extension Act of 1996*

In the mid-1990s, Congress sought to change its approach to prepayment. Congress' first attempt in December of 1995 was reflected in a bill, H.R. 2099, that would have allowed owners to prepay mortgages if they agreed not to raise rents for sixty days after prepayment. *See* H.R. 2099, 104th Cong. (1st Sess. 1995) (undesignated second paragraph of Title II). Although passed by Congress, *see* 141 Cong. Rec. S18,657-58 (1995) (Senate passage of H.R. 2099), H.R. 2099 was vetoed by President Clinton. *See* *CCA Assocs.*, 75 Fed. Cl. at 178 (citing 141 Cong. Rec. H15,061 (1995)). Within months of President Clinton's veto of H.R. 2099, however, Congress passed and President Clinton signed into law the Housing Opportunity Program Extension Act of 1996

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for addressing a sale, but rather regarding incentives simply referred to "[o]ther actions to facilitate a transfer or sale of the housing to a qualified nonprofit organization, limited equity tenant cooperative, public agency, or other entity acceptable to the Commissioner [of FHA], such as expedited review of a request for approval of a transfer of physical assets." 24 C.F.R. § 248.231 (1991). The government contends that under ELIHPA, HUD could "assist with facilitating the project's sale to [qualified groups]," and that HUD did so. Def.'s Post-Trial Br. at 7 ("Def.'s Br."). This dispute was addressed by considerable testimony at trial and will be considered in the analysis which follows.

("HOPE"), Pub. L. No. 104-120, 110 Stat. 834. HOPE, enacted on March 28, 1996, reinstated the prepayment rights of owners whose mortgages were insured under Section 221(d)(3). *Id.* § 2(b), 110 Stat. at 834-35 (Mar. 28, 1996). HOPE did so expressly by incorporating the various conditions on HUD funding set out in H.R. 2099, including the condition making appropriations related to ELIHPA and LIHPRHA contingent on HUD's permitting owners of eligible low-income housing to prepay their mortgages, provided the owners did not raise their rents for sixty days following prepayment. *Id.* HOPE thus lifted the prepayment restrictions imposed by ELIHPA and LIHPRHA. *See Cienega VIII,* 331 F.3d at 1326-27.

F. *HUD's Preservation Letters*

Notwithstanding the enactment of HOPE, reinstating owners' rights to prepay their mortgages after 20 years without HUD approval, HUD sent to its regional offices a series of so-called preservation letters, each of which asserted that certain restrictions on prepayment still were in effect. Less than a month after HOPE became law, a second preservation letter averred that prepayment required HUD approval. PX 63 at 5 (Mem. from Chris Greer, Acting Deputy Assistant Secretary for Multifamily Housing Programs, to Directors of Housing, et al. (Apr. 12, 1996)) ("Preservation Letter No. 2"); 2006 Tr. 216:18 to 218:9 (Norman). A subsequent preservation letter stated that owners need not obtain HUD approval for prepayment, but it set out other requirements, including: (1) that the owner notify HUD of its intention to prepay, (2) that the owner pay fifty percent of the relocation expenses of any tenant, (3) that the lender submit a form to HUD requesting prepayment of the mortgage, and (4) that owners of low-income housing located in low-vacancy areas – three percent or lower vacancies – not raise rents for three years except as necessitated by increased operating costs. PX 65 at 2-6 (Mem. from Nicholas P. Retsinas, Assistant Secretary for Housing, to Directors of Housing, et. al. (May 3, 1996)) ("Preservation Letter No. 4"); 2006 Tr. 219:22 to 222:19 (Norman). In a sixth preservation letter, HUD scaled back the requirement to pay tenants' relocation expenses to cover only moves "in the area where the project . . . is located," but reiterated the three-year restriction on rent increases for housing in low-vacancy areas. PX 67 at 3, 6-7 (Mem. from Retsinas to Directors of Housing, et al. (July 1, 1996)) ("Preservation Letter No. 6"); 2006 Tr. 223:19 to 224:20 (Norman). With the constantly changing requirements of the preservation letters layered over the statutory mandate of HOPE, the prepayment process remained in a state of flux until HUD released Preservation Letter 97-1 on December 16, 1996, which preservation letter stated that, following the HOPE-mandated sixty-day moratorium on rent increases, there was "no limit to how high the owner [could] raise the rent." 2006 Tr. 234:4 to 235:3 (Norman); PX 75, Attach. at 7 (Mem. from Retsinas to Directors of Housing, et al. (Dec. 16, 1996)) ("Preservation Letter No. 97-1").

G. *The Alexander Study and CCA's Eventual Prepayment*

Following the passage of LIHPRHA, CCA filed a notice of intent with HUD in December 1990 to preserve its options under ELIHPA and LIHPRHA. PX 42 (CCA Notice of Intent (Dec. 28, 1990)). A year and one-half later, in June 1992, CCA filed a notice of election to proceed under ELIHPA, while reserving its rights to proceed under LIHPRHA. PX 51 (CCA Notice of Election to Proceed (June 8, 1992)). Prior to the passage of HOPE, however, CCA never filed a plan of action with HUD seeking incentives or permission to sell the property. 2006 Tr. 383:8-16 (Norman). Following the passage of HOPE and despite the confusion caused by the preservation letters, by October 1996 CCA had begun inquiring into options for refinancing its mortgage loan, anticipating that the time when it might be able to prepay its mortgage was approaching. 2006 Tr. 236:7-16 (Norman).

In late 1996, with CCA's permission, Mr. Jim Alexander, then a HUD employee, began a study to examine CCA's options after prepayment, including selling Chateau Cleary or refinancing the property with a conventional mortgage. PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)); 2006 Tr. 240:6-10 (Norman), 557:22 to 558:1 (Alexander).[11]

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[11] Mr. Alexander's report was not an official HUD report, 2006 Tr. 1077:11 to 1078:22 (Test. of Gladys Ann Kizzier, a HUD employee who supervised Mr. Alexander), but it was the culmination of a HUD-funded and HUD-approved course of study through which Mr. Alexander received the designation of "certified property manager" from the Institute of Real Estate Management ("IREM"). *See* 2006 Tr. 512:23-25, 514:17-20, 515:20 to 516:2, 520:13 to 521:5 (Alexander). Mr. Alexander's report listed his work address at HUD and was forwarded to Mr. Ernest B. Norman, III, CCA's managing partner, with a cover letter printed on HUD letterhead. *See* DX 140 at 1, 3 (Alexander Report); *but see* 2006 Tr. 1078:14 to 1079:1 (Kizzier) (indicating that Mr. Alexander did not have permission, and would not have received permission, from his direct supervisor to use the HUD letterhead).

Mr. Alexander's study, sent to CCA in April 1997, examined four "possible solutions" for CCA: (1) remain a HUD-insured property, (2) prepay the mortgage and sell the property in one year, (3) prepay the mortgage, make minimal upgrades to the property, and sell the property in seven years, and (4) prepay the mortgage, make major upgrades to the property, and sell the property in seven years. DX 140 at 137 (Alexander Report); 2006 Tr. 558:2-5 (Alexander).[12]

After reviewing the conclusions of the study and discussing them with Mr. Alexander, 2006 Tr. 247:21 to 248:7 (Norman), Mr. Norman adopted a hybrid of two options Mr. Alexander had proposed and began undertaking some improvements to Chateau Cleary. 2006 Tr. 270:13-19, 273:10-13 (Norman). On April 29, 1998, CCA signed a contract with Hampstead Partners to guide CCA through the prepayment process, delivered the required prepayment notifications to HUD, and after several months of HUD-related administrative delays, prepaid its HUD-insured mortgage on September 30, 1998. 2006 Tr. 1776:19-24, 1780:4 to 1782:15, 1793:4-12 (Test. of Norman Root, a real estate consultant with

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[12] Although Mr. Norman had explained to Mr. Alexander that CCA planned to prepay its mortgage, PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)), Mr. Alexander included in his report the option to remain in the Section 221(d)(3) program, *see* DX 140 at 137 (Alexander Report), apparently because the IREM curriculum required that the study include maintaining the *status quo* among the options to be considered. 2006 Tr. 559:15-20 (Alexander).

Hampstead Partners);[13] 2006 Tr. 280:17-22 (Norman); PX 83 (Prepayment Service Consulting Agreement (Apr. 29, 1998)); PX 86 (Letters from Hampstead Partners to HUD, the mortgagee, and a local councilman, announcing CCA's intent to prepay its mortgage (May 11, 1998)).

STANDARDS FOR DECISION

The Tucker Act provides this court with jurisdiction over claims based on "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). Although the Tucker Act confers jurisdiction only where a substantive right already exists, *see United States v. Testan*, 424 U.S. 392, 398 (1976), a contract between a claimant and the government may establish that right. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Specifically, "there must be privity of contract between the plaintiff and the United States." *Cienega IV*, 194 F.3d at 1239 (citing *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) ("The government consents to be sued only by those with whom it has privity of contract.")); *see also National Leased Hous. Ass'n v. United States*, 105 F.3d 1423, 1436 (Fed. Cir. 1997) (privity of contract exists only where there is "direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity, the inevitable result of finding privity of contract"). In deciding whether privity of contract exists as to a particular provision, the court must ascertain whether it was the intent of the parties to be bound by that provision. *See*

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[13] Mr. Root did not testify at trial, but by agreement of the parties, his deposition testimony, taken on May 24, 2000, was read into the trial record. 2006 Tr. 1770:18-23.

Aspenwood Inv. Co. v. Martinez, 355 F.3d 1256, 1260 (10th Cir. 2004). The plaintiff bears the burden of proof of establishing this element, just as it does other jurisdictional predicates for a claim. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

CCA's takings claim arises from the Fifth Amendment, which provides in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction." *Jan's Helicopter Serv., Inc. v. Federal Aviation Admin.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008). The government must pay just compensation when its actions amount to a compensable taking of a legally cognizable property interest. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). Precedents of long standing have established two types of takings cases, physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992). A physical taking consists of an occupation of all or part of an individual's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 426 (1982) (holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). A regulatory taking occurs "when a regulatory or administrative action places such burdens on the ownership of private property that essential elements of such ownership must be viewed as having been taken." *Hendler v. United States*, 36 Fed. Cl. 574, 585 (1996), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999). "The focus of the regulatory takings analysis is on fundamental fairness–is it fair for the government to impose the cost of a regulation on private parties rather than on the public as a whole through public spending?" *Cienega X*, 503 F.3d at 1278 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978)). A *per se* regulatory taking occurs where a regulation deprives a landowner of all economically beneficial uses of his or her property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Where the property has not been deprived of all economically viable uses, the court will conduct an "essentially ad hoc, factual inquir[y]" focused on three factors: (1) the character of the governmental action, (2) the degree of interference with the reasonable, investment-backed expectations of the property owner, and (3) the economic impact of the action. *See Penn Central*, 438 U.S. at 124-28; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325-328 (2002); *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). And, for regulatory takings claims of a temporary nature, *Tahoe-Sierra* adds a fourth factor to those explicated in *Penn Central*, *viz.*, (4) the duration of the restriction. *See Tahoe-Sierra*, 535 U.S. at 342. No *Penn Central* factor by itself is determinative; rather, all of the factors are to be weighed in a balance that takes into account all of the circumstances. *Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring).

ANALYSIS

I. CCA's CONTRACTUAL CLAIM

Countering CCA's allegation that the government abrogated its contractual obligations with CCA when Congress passed legislation preventing CCA from prepaying its mortgage, the government argues that there is no privity of contract between CCA and the government as to the right to prepay. Def.'s Br. at 14.[14] In support of its argument, the government points to the *Cienega IV* decision, in which the Federal Circuit ruled that HUD was not in privity with property owners under the same statutory scheme and concerning a contractual arrangement similar to that in this case. *See* Def.'s Br. at 14 (citing *Cienega IV*, 194 F.3d at 1246). CCA argues that *Cienega IV* is not controlling because it is distinguishable on the facts. Pl.'s Br. at 36.

A. Integrated Documents

The government bases its contention that privity is lacking between CCA and HUD on the fact that HUD was an endorser on, not a primary party to, the secured note, the only document in the triad of secured note, mortgage, and regulatory agreement to

[14] The government also resists CCA's contractual claim on the grounds that the Federal Circuit's remand instructions preclude consideration of the claim and because the claim was waived by CCA when it was not tried in the 2006 trial. *See* Def.'s Br. at 13-14. This court has already addressed these arguments. In an order prior to the retrial, this court held that the Federal Circuit's remand specifically directed this court to "allow both sides to supplement the record with additional relevant evidence," and that CCA "neither waived nor abandoned its contractual claim." *CCA Assocs. v. United States*, 87 Fed. Cl. 715, 721 (2009) (citing *CCA Assocs.*, 284 Fed. Appx. at 811). Accordingly, at the retrial CCA pursued its breach-of-contract claim along with its temporary takings claim.

explicitly set forth CCA's prepayment right. *See* Def.'s Br. at 18-19.[15] While HUD was a party to the

[15] The question arises why HUD's endorsement of the secured note (or, in the case of *Cienega IV*, the deed of trust note) did not of itself establish privity of contract, a result that the court in *Cienega IV* and the parties to this case took for granted. *See Cienega IV*, 194 F.3d at 1241-42 (stating that the government was a named party to only one contract, the regulatory agreement). The situation here is analogous to that created with a surety bond, by which a surety provides either a payment bond or a performance bond, or both. "A surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee." *Insurance Co. of the W. v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001) (citing *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985)). That relationship alone does not create privity of contract; rather it evinces a nascent equitable right of subrogation in which the surety can, under appropriate circumstances, "step into the shoes of the contractor for the purpose of satisfying . . . jurisdictional requirements." *Travelers Indem. Co. v. United States*, 72 Fed. Cl. 56, 60 (2006) (citing *Insurance Co. of the W.*, 243 F.3d at 1373). The doctrine of equitable subrogation has been described by the Supreme Court as one "not founded on contract[, but rather,] . . . a creature of equity . . . enforced solely for the purpose of accomplishing the ends of substantial justice[] and . . . independent of any contractual relations between the parties." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136 n.12 (1962) (internal quotation marks omitted) (citation omitted). "[A] surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed." *Id.* at 137.

Applying this analogy to the instant case, HUD's endorsement insuring the secured note created a three-party relationship obligating HUD to pay the mortgage if CCA defaulted, but it also provided HUD with a potential right of equitable subrogation to assume the lender's rights against CCA. Something similar to this actually happened in *City Line Joint Venture v. United States*, 503 F.3d 1319 (Fed. Cir. 2007). City Line was a developer that entered the Section 221(d)(3) regulatory agreement, that document did not mention the prepayment right or incorporate the secured note, *see id.*, although it did refer to HUD's regulations which specified the prepayment right. DX 1 at second undesignated paragraph.

CCA argues that the three relevant documents – the regulatory agreement (DX 1), the secured note (PX 3), and the mortgage (PX 4) – constitute "one overall transaction among the Norman Brothers, HUD[,] and the lender." Pl.'s Br. at 36. In support of this contention, CCA points out that all three documents were drawn up on pre-printed, standard HUD forms and were signed contemporaneously in a conference room in HUD's New Orleans office. *See* DX 1 (Regulatory Agreement, FHA Form No. 1730); PX 3 (1969 Note, FHA Form No. 1734); PX 4 (1969 Mortgage, FHA Form No. 4123-B); 2009 Tr. 35:7-12 (Norman). Each document was also essential to the transaction; none of the documents taken alone would have sufficed to provide the parameters of the agreement.

For obvious reasons, the secured note expressly incorporated the mortgage. PX 3 at seventh undesignated paragraph. HUD regulations were

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program by obtaining a mortgage from a private lender, the loan being insured by HUD. *Id.* at 1320-21. When City Line defaulted on its loan, the lender assigned its rights to the mortgage to the insurer, HUD. *Id.* at 1321. City Line caught up on its mortgage payments and then, after the passage of ELIHPA and LIHPRHA, sued the government for breach of contract for abrogating its prepayment right. *Id.* at 1322. Privity of contract was not contested by the government because, as the court explained, "the mortgage and note were assigned to HUD in 1977, [and thus] HUD was a party to the mortgage agreement which allowed prepayment without HUD approval after twenty years." *Id.* at 1322.

also incorporated into HUD's endorsement of the note. HUD's endorsement states that HUD's provision of insurance is "under Section 221(d)(3) of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner," PX 3, which regulations provided for prepayment by owners such as CCA after 20 years. *See* 24 C.F.R. § 221.524(a)(1)(ii) (1971); 24 C.F.R. § 236.30(a)(1)(i) (1970). Correlatively, the regulatory agreement between CCA and HUD expressly referred to HUD's provision of insurance, accomplished via the endorsement by HUD of the secured note, as well as to Section 221(d)(3) of the National Housing Act and the accompanying regulations. DX 1 at second undesignated paragraph. The regulatory agreement thus incorporated by reference the mandates of Section 221(d)(3) and the associated regulations, which included the right to prepay the mortgage after 20 years. *CCA Assocs.*, 75 Fed. Cl. at 188. In addition, the mortgage referred to and incorporated by reference both the secured note and the regulatory agreement. PX 4 at first undesignated paragraph ("Said Note and all of its terms are incorporated herein by reference."); *id.* at ¶ 3 ("[T]he Regulatory Agreement, executed by the Mortgagor and the Federal Housing Commissioner, which is being recorded simultaneously herewith, is incorporated in and made a part of this Mortgage."). Thus, 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.

The common law is directly relevant. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) (internal quotation marks omitted) (citation omitted). It is black letter contract law that multiple documents, executed contemporaneously and relating to the same transaction, should be read together to determine the intent of the parties. *See, e.g., Joy v. City of St. Louis*, 138 U.S. 1, 38 (1891) (Two tripartite agreements and a deed "constituted a single transaction, relating to the same subject-matter, and should be construed together in such a way as to carry into effect the intention of the parties, in view of their situation at the time and of the subject-matter of the instruments."); *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1513 (3d Cir. 1994) ("Where two or more contracts are part of the same transaction and relate to the same subject-matter, are known to all the parties, and are delivered at the same time to accomplish an agreed purpose, such contracts must be construed together as parts of the same transaction; and this is so even though the contracts are not executed between the same parties.") (citation omitted); *Restatement (Second) of Contracts* § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); 5 *Corbin on Contracts* § 24.21 at 216 (1998) (Where the terms of an agreement are expressed in two or more separate documents, "these documents should be interpreted together, each one assisting in determining the meaning intended to be expressed by the others.").

The applicability of this fundamental contract principle was brought into sharp focus in the

Cienega IV case, on facts similar to those here. Landowner plaintiffs who had entered into the Section 221(d)(3) and Section 236 programs with HUD brought suit in this court alleging that the government breached its contract with the owners when Congress enacted ELIHPA and LIHPRHA, which eliminated their right to prepay their mortgages after 20 years. *Cienega IV*, 194 F.3d at 1235-36.[16] The government argued that there was no privity between HUD and the owners as to the prepayment right because "[t]he prepayment provisions . . . were contained in [riders to] the deed of trust notes entered into by plaintiffs and their lenders, not in the regulatory agreement into which HUD entered with the owners." *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 208 (1995) ("*Cienega I*"). A judge of this court rejected this argument, reasoning that "[t]he two documents, which were signed contemporaneously, must be read together in order to determine the full intentions of the parties when they initially entered into their relationship." *Id.* at 210 (citing *Restatement (Second) of Contracts* § 202). The court granted summary judgment for the plaintiffs on their breach of contract claim, finding "that when the parties . . . entered into the regulatory agreement they also intended to be mutually bound by the prepayment rules." *Id.* The trial court then proceeded with the contractual claim and ultimately entered judgment for the property

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16 The plaintiffs in that case also raised a Fifth Amendment takings claim, which was deferred and not perfected until after the *Cienega IV* decision struck down their breach of contract claim.

owners on that claim. *See Cienega Gardens v. United States*, 38 Fed. Cl. 64 (1997) ("*Cienega III*").

A divided panel of the Court of Appeals for the Federal Circuit reversed this ruling. *Cienega IV*, 194 F.3d at 1246. The majority acknowledged the contract principle upon which the lower court had relied, stating, "[w]e agree with the Court of Federal Claims that all of the agreements before us are relevant in determining the meaning of each separate contract." *Id.* at 1243.[17] But the majority found instead that "[w]hile the deed of trust note (and the incorporated Rider A) and the regulatory agreement were part of the same transaction, each document stands alone and is unambiguous on its face. The documents evidence separate agreements between distinct parties." *Id.* Apart from the rider to the note, HUD was only a party to the regulatory agreement, which did not address prepayment. *Id.* While the deed of trust note and rider incorporated the regulatory agreement, the regulatory agreement did not incorporate the note or the rider. *Id.* at 1242. The court held that "the contract documents simply do not show privity of contract between the Owners and HUD with respect to a right to prepay the mortgage loans after twenty years without HUD approval." *Id.* at 1243.

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[17] The majority's statement misconstrued the contract principle upon which the lower court relied. The purpose of reading integrated documents together is to determine the scope of the contract rights created between or among the parties; it asks what the agreement is. The majority instead assumed that each document represented a "separate contract" without first determining, from an analysis of the entire transaction, what obligations were involved overall.

Senior Judge Archer, in dissent, criticized the majority for "consider[ing] each of the documents . . . in virtual isolation." *Cienega IV*, 194 F.3d at 1249 (Archer, J., dissenting). Instead he argued that "in [a] complex integrated transaction[] of this sort, where multiple parties execute[] multiple documents at closing[,]" the lower court was "entirely appropriate" in "find[ing] the parties' intent based on all of the documents and the surrounding facts and circumstances." *Id.* Senior Judge Archer pointed to four factors that supported the conclusion that privity existed between the owners and the government regarding prepayment: "[1] the overall purpose and nature of the transactions, [2] the intent of the parties, [3] the terms and conditions of HUD's Commitments for Insurance of Advances, and [4] the references in the HUD's Commitments and endorsements of the Notes to specific, dated HUD regulations governing these transactions." *Id.* at 1247. Given these factors, he would have affirmed the trial court's determination that the parties, in entering into the regulatory agreement, "also intended to be mutually bound by the prepayment rules set forth in the rider to the contemporaneous deed of trust note." *Id.* at 1248 (internal quotation marks omitted) (citation omitted).

The Tenth Circuit also addressed this identical issue but reached a divergent result from that of the majority in *Cienega IV. Aspenwood Investment Co.*, 355 F.3d at 1257-58, involved an owner who entered into the Section 236 program with HUD and executed a note, deed of trust, and regulatory agreement similar to those executed in this case. The court addressed whether the owner's prepayment rights were governed by the terms of the note or by the applicable agency regulations. *See id.* at 1259. If HUD was not bound by the terms of the note because it was not in privity with the owner or the lender, then the owner's prepayment rights would "turn on the validity of HUD's interpretation of its own regulations, to which federal courts owe considerable deference." *Id.* If, however, HUD was bound by the terms of the note, then ordinary rules of contract interpretation would apply. *Id.* The Tenth Circuit looked to the decision in *Cienega IV* as "[t]he case most directly on point," but found "the analysis of the dissent . . . more persuasive." *Id.* at 1260. The court held:

> [T]he manifest intent of the parties was to enter into a transaction in which each part, as represented by the various documents, was an essential element of the whole; the meaning of each element can be understood only in the context of all of the other elements. In other words, there is a single, overarching agreement. We conclude that it was the demonstrated intent of HUD (and of plaintiff and of the lender) to be bound by the terms of all of the parts of the transaction.

Id.[18]

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[18] In this same vein, a law review article has also criticized the majority's result in *Cienega IV*: "In holding that HUD created no privity on the prepayment issue, the *Cienega Gardens* court ignored fundamental principles of contract law." Henry A. Herrman, *Privity: How HUD Avoided Contract Liability Under ELIHPA and LIHPRHA*, 30 Sw. U. L. Rev. 323, 325 (2001). In his critique, Mr. Herrman argued that the court erred when it skipped the question of whether an agreement was formed between HUD and the owners to focus on contract interpretation. *Id.* at 342-43. "The critical question in *Cienega*

The interrelationship of the three documents in this case is evident. The salient problem is that the regulatory agreement does not expressly incorporate the terms of the secured note and the mortgage. By contrast, the mortgage expressly incorporates the secured note and the regulatory agreement, and the secured note explicitly incorporates the mortgage and thus also the regulatory agreement. Does the failure of the regulatory agreement to expressly incorporate the other two instruments negate the general contractual principle that interrelated instruments should be considered together? This court respectfully doubts that this question should be answered in the affirmative or that the majority in *Cienega IV* was correct in considering that the regulatory agreement should be construed as a separate contract. Rather, each of the three documents should be read together to determine what contractual obligations the parties undertook. Doing so gives effect to the fact that the 20-year limit on prepayment contained in the secured note was a provision drafted by HUD that replicated HUD's regulations on prepayment and was used by HUD to induce participation in the program. PX 3 (secured note printed on FHA Form No. 1734); 24 C.F.R. § 221.524(a)(1)(ii) (1971); 24 C.F.R. § 236.30(a)(1)(i) (1970); 2006 Tr. 57:18 to 58:15 (Norman); *cf. Cienega*

Gardens was whether HUD and the Owners each bargained for, and each received, mutual assent to enter into an agreement concerning the Owners' prepayment rights." *Id.* at 345. There was "convincing evidence that HUD bargained for a promise from the Owners that they would operate the projects for twenty years before prepaying the mortgages and canceling the affordability restrictions, and in return agreed to insure the mortgage Note." *Id.* at 350.

VIII, 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the public housing programs"). The three documents were drawn up on HUD forms and signed contemporaneously at HUD's office. *See* DX 1 (Regulatory Agreement, FHA Form No. 1730); PX 3 (1969 Note, FHA Form No. 1734); PX 4 (1969 Mortgage, FHA Form No. 4123-B); 2009 Tr. 35:7-12 (Norman). The 20-year limitation on prepayment was not negotiated between CCA and the lender but was instituted by HUD, as evidenced by the HUD regulations and by the language of the secured note drafted by HUD.

B. Congress' Awareness It Was Abrogating Contracts by Adopting ELIPHA and LIHPRHA

Congress, in debating the proposed bills that would become ELIHPA and LIHPRHA, considered the issue of whether it would, by eliminating the prepayment option, abrogate contracts with the property owners who had entered the Section 221(d)(3) program. During the Senate debate on LIHPRHA, questions arose whether it would be legal to abrogate the contracts and whether there were sufficient measures to compensate the owners. *See* 136 Cong. Rec. 26,372 (1990) (Senator Heflin describing the proposed legislation as "unilaterally abrogating a contract, which has been adhered to by one party for 20 years," and Senator Breaux stating, "[u]nilateral abrogation of 20-year-old contracts is not the way to build confidence"); *see also id.* at 26,383-84 (Senator Armstrong observing that property owners who entered into contracts with HUD "probably had the mistaken notion that the Federal Government was going to honor its word").

While it is true that "statements in the legislative histories of ELIHPA and LIHPRHA cannot alter the content of the documents on which the Owners attempt to base their contractual claims," *Cienega IV*, 194 F.3d at 1244, the legislators' observations evidence Congress' understanding that contractual obligations did exist between HUD and the owners.

C. The Amendment Clause of HUD's Regulations

To bolster its conclusion that HUD did not intend to be bound by the prepayment provision, the majority in *Cienega IV* pointed to a clause in the regulations relating to amendments:

> The regulations in this subpart may be amended by the Commissioner [of FHA] at any time and from time to time, in whole or in part, but such amendments shall not adversely affect the interest of a mortgagee or lender under the contract of insurance on any mortgage or loan already insured and shall not adversely affect the interests of a mortgagee or lender on any mortgage or loan to be insured on which the Commissioner has made a commitment to insure.

Cienega IV, 194 F.3d at 1244 (citing 24 C.F.R. §§ 221.749, 236.249 (1970)). The majority opined that "it would have been inconsistent for HUD to have entered into the regulatory agreement if the agreement fixed the prepayment rights of the Owners, in view of the express power to amend the Section 221(d)(3) and Section 236 program regulations at any time that was reserved to HUD, subject only to the caveat that *mortgagees'* interests not be adversely affected." *Cienega IV*, 194 F.3d at 1244. The court stated that HUD had the "express power" to amend the regulations and have the amended regulations apply retroactively to property owners already in the Section 221(d)(3) program. *Id.* The second part of that postulate is questionable because it assumes that the regulations contemplate retroactive application to mortgagors. The regulations do not so state. Rather, the amendment clause is written as a declaration – that the Commissioner can amend the regulations at any time – with a caveat – as long as an amendment does not adversely affect the interest of a mortgagee or lender.

Retroactive application of a law or regulation is generally disfavored and usually requires an express Congressional statement that a law or regulation is intended to apply retroactively. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (The "presumption against retroactive legislation is deeply rooted in our jurisprudence."); *Sierra Med. Ctr. v. Sullivan*, 902 F.2d 388, 392 (5th Cir. 1990) ("Generally, courts will not apply regulations retroactively unless their language so requires.").[19]

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[19] In addressing the retroactivity question, courts have been careful first to decide whether retroactivity was intended:

> Determination of whether a regulation or statute is impermissibly retroactive requires a two-step analysis. First, we must determine whether the statute or regulation clearly expresses that the law is to be applied retroactively. If it does, then the statute or regulation may be applied as such. . . . However, if the statute or regulation does not contain an express command that it be applied retroactively, we must go to the second step which requires us to determine whether the statute or regulation would have a retroactive effect.

As the dissent in *Cienega IV* points out, "these transactions were consummated under the provisions of regulations in effect as of specific dates." *Cienega IV*, 194 F.3d at 1250 (Archer, J., dissenting). HUD "expressly stated that the insurance endorsements would be made under the pertinent provisions of the National Housing Act and 'the Regulations thereunder *now in* effect.'" *Id.* In short, the owners were subject to the regulations in effect at the time they entered into their contracts, which permitted them to prepay their mortgage notes after twenty years without HUD approval. *See id.*

To reach the majority's conclusion contrary to HUD's express statement that the regulations in existence at the time of the insurance endorsement were to be applied, one would have to draw a negative inference from the caveat in the amendment clause. *See* 24 C.F.R. §§ 221.749, 236.249 (1970). The caveat states that amendments may not adversely affect mortgagees or lenders under contract. The negative implication would be that HUD may amend the regulations to retroactively affect others such as mortgagors who

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Kankamalage v. INS, 335 F.3d 858, 862 (9th Cir. 2003) (citing *Landgraf*, 511 U.S. 244). "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted) (citation omitted). "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (internal quotation marks omitted) (citation omitted).

are under contract. This implication is problematic because it does not constitute an express affirmative statement and runs counter to the constraints on applying regulations retroactively. Moreover, the negative implication would create an illusory contract. "[A] party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void." *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) (internal quotation marks omitted); *see also Ridge Runner Forestry v. Secretary of Agric.*, 287 F.3d 1058, 1062 (Fed. Cir. 2002) ("It is axiomatic that a valid contract cannot be based upon the illusory promise of one party[.]"); *System Fuels, Inc. v. United States*, 66 Fed. Cl. 722, 731 (2005) ("As a matter of law . . . the [g]overnment cannot amend the terms of [a contract] *sua sponte* and without separate consideration evidencing acceptance of new terms.") (citing *California Fed. Bank v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001)); 1 *Corbin on Contracts* § 145 at 627 (1963) ("If what appears to be a promise is an illusion, there is no promise."). The Section 221(d)(3) program set up a framework in which HUD, lenders, and property owners entered into an agreement to establish low-income housing. If one reads the amendment clause as giving HUD the ability to unilaterally amend the regulations to the owners' detriment, then the contract is illusory.

That the result in *Cienega IV* is questionable is bolstered by the *Franconia* cases, which involved a housing program that permitted the Farmers Home Administration ("FmHA") to issue loans to promote the development of affordable rental housing in rural areas. *See Franconia Assocs. v. United States*, 536

U.S. 129, 132-33 (2002).[20] The developers who obtained loans from FmHA under this program signed promissory notes which included a prepayment option permitting loan repayment "at any time at the option of [the] [b]orrower." *Id.* at 135. However, Congress acted to remove this prepayment option in virtually the same way that it did for the prepayment right attendant to loans made under HUD's Section 221(d)(3) program. Noting a "dwindling supply of low- and moderate-income rural housing in the face of increasing prepayments of mortgages," Congress passed provisions in ELIHPA which "impose[d] [p]ermanent restrictions upon prepayment of § 515 mortgages." *Id.* at 136. The plaintiffs in *Franconia*, developers under the FmHA program who wished to prepay but were no longer able to, sued on a breach of contract theory. *Id.* at 138.

After the Supreme Court rejected a contention that the *Franconia* suit was barred by the statute of limitations, *see* 536 U.S. at 149, the case was duly remanded to the Court of Federal Claims for trial. *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 728-29 (2004). In contrast to the case before this court, privity was not at issue because the government was the lender. However, the government argued that, notwithstanding the prepayment provision, it had the authority to impose substantial conditions upon that prepayment through subsequent regulation. *Id.* at 730 n.13. The court rejected this argument, stating that to give meaning to the prepayment provision, "prepayment

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[20] This loan program was enacted under §§ 515 and 521 of the Housing Act of 1949, 42 U.S.C. §§ 1485, 1490a.

could not be subject to anything more than perhaps simple procedural requirements (*e.g.*, filing an application and allowing for processing time), and otherwise [be] without restriction." *Id.* More specifically, the government relied on language in the loan agreements stating "any loan made or insured . . . will be administered subject to the limitations of the authorizing act of Congress and related regulations" to contend that the owners were subject to changing terms. *Id.* at 732. The court dismissed this argument, reasoning that "were this 'subject to' language to mean that the prepayment option could be limited by Congress or the FmHA virtually at will, the same would hold true of all the government's obligations under the agreements, rendering these contracts illusory." *Id.*; *see also Mobil Oil*, 530 U.S. at 616-17 (reference in lease that it was "subject" to certain "future regulations" makes "clear" that a catchall provision referring to "all other applicable . . . regulations," must include only statutes and regulations already existing at the time of the contract); *United States v. Winstar Corp.*, 518 U.S. 839, 868 (1996) (rejecting an argument by the government that its "obligations could change along with the relevant regulations" because then-current regulations were specifically incorporated as part of the pertinent agreement); *Marathon Oil Co. v. United States*, 177 F.3d 1331, 1337 (Fed. Cir. 1999) ("To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns.").

In sum, because of the lack of an express term requiring retroactive application of regulations, the disfavor shown to any such retroactive application because of due process considerations, and the guide to interpretation that would avoid creation of an illusory promise, the amendment provision of HUD's regulations should not be read to grant HUD the ability retroactively to amend the regulations against the interests of property owners.

D. Plaintiff's Attempt to Distinguish Cienega IV

Considering that the documents at issue constitute an integrated transaction, and in light of the other circumstances surrounding the transaction, this court, but for the precedent in *Cienega IV*, would hold that HUD and CCA were in privity as to the 20-year prepayment provision. The mutually supportive promises by CCA and by HUD resulted in a transaction succinctly described by the trial court in *Cienega III*, as follows:

> [B]y signing the regulatory agreement and the deed of trust note to which the regulatory agreement referred, plaintiffs promised to construct and maintain housing in accordance with HUD's specifications, to accept only low- or moderate-income persons as tenants, to charge no higher rents than those permitted by HUD, to distribute profits to shareholders in accordance with specified limitations, to make timely payments on their mortgages and to maintain cash reserves to self-insure against mortgage default. These promises were made expressly to and for the benefit of the government, not third parties. In exchange, the government agreed to endorse and insure the mortgages, allowing plaintiffs

> to obtain either subsidized commercial loans or loans at favorable interest rates, and to allow plaintiffs to free themselves of HUD's regulatory strictures after the first 20 years.

Cienega III, 38 Fed. Cl. at 70-71. Accordingly, but for *Cienega IV* this court would find that Congress breached the government's contract with CCA with respect to its prepayment rights when it enacted ELIHPA and LIHPRHA.

The government asserts that this court is bound by the Federal Circuit's ruling in *Cienega IV*. Def.'s Br. at 14. The court agrees that it "may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit." *Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir. 2005). That is so however much this court might question the decision in *Cienega IV*. As a consequence, CCA makes a valiant effort to distinguish *Cienega IV* on its facts. As distinguishing facts, it posits that: "(i) [t]he Norman Brothers specifically understood that the transaction documents formed three essential parts of one agreement, *see* 2009 Tr. 35:17-25 (Norman); (ii) HUD touted the prepayment right in contract negotiations, *see* [*CCA Assocs.*,] 75 Fed. Cl. at 192; and (iii) [t]he parties signed the agreements together, in a HUD conference room. 2009 Tr. 35:7-12 (Norman)." Pl.'s Reply at 18. The latter two proffered facts fail to distinguish *Cienega IV*. *See Cienega I*, 33 Fed. Cl. at 210 (the relevant documents "were signed contemporaneously"); *Cienega VIII*, 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the public housing programs"); *see also Cienega IV*, 194 F.3d at 1245

("HUD's involvement in the contracts between the private lending institutions and the Owners[, such as conceiving the structure of the transaction, prescribing and approving all of the relevant documents and furnishing most of the specific language,] could not create . . . a contractual relationship."). In addition, the first proffered distinction by CCA, *viz.*, whether the property owners understood the documents to form three essential parts of one agreement, does not change the Federal Circuit's analysis in *Cienega IV*. There, as discussed previously, the Federal Circuit's majority stated that "[w]hile the deed of trust note (and the incorporated Rider A) and the regulatory agreement were part of the same transaction, each document stands alone and is unambiguous on its face. The documents evidence separate agreements between distinct parties." *Cienega IV*, 194 F.3d at 1243.

Consequently, the court reluctantly must conclude that the majority's view in *Cienega IV* is controlling. Accordingly, the court has no choice but to find that there is no privity of contract between HUD and CCA. CCA's breach of contract claim therefore must be dismissed for lack of subject matter jurisdiction. *See Cienega IV*, 194 F.3d at 1239 (citing *Erickson Air Crane*, 731 F.2d at 813 ("The government consents to be sued only by those with whom it has privity of contract.").

II. TAKINGS CLAIM

Where a viable contract claim exists, the court generally will not proceed to an accompanying takings claim. A contractual breach typically precludes a taking because a plaintiff retains "the full range of remedies associated with its contractual property rights." *City Line Joint Venture*, 503 F.3d at 1323. Having dismissed CCA's contract claim, the court proceeds to its takings claim.

CCA contends that the government effected a temporary regulatory taking of its property when Congress passed ELIHPA and LIHPRHA and abrogated its prepayment rights. This court conducted an earlier *Penn Central* analysis and found that a taking did in fact occur. *CCA Assocs.*, 75 Fed. Cl. at 188-99. However, the Federal Circuit vacated that decision on appeal, instructing the court to reconsider the takings issue in light of the *Cienega X* decision. *CCA Assocs.*, 284 Fed. Appx. at 811.[21] The majority in *Cienega X* raised four issues

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[21] The takings claims in the *Cienega* litigation were first tried by the court of federal claims with four model plaintiffs. *See Cienega X*, 503 F.3d at 1274-75. After the trial court had found in plaintiffs' favor on their contractual claims, followed by a reversal on privity grounds by the Federal Circuit in *Cienega IV*, the trial court ruled in the government's favor respecting the takings claims, finding that those claims were not ripe for consideration. *Cienega Gardens v. United States*, 46 Fed. Cl. 506 (2000). On appeal, the Federal Circuit ruled that the takings claims were ripe notwithstanding the owners' failure to seek HUD approval for prepayment because any request for approval would have been futile. *Cienega VI*, 265 F.3d 1237. On remand, the trial court again denied relief, holding that there was no regulatory taking under a *Penn Central* analysis. *See Cienega Gardens v. United States*, No. 94-1C (Fed. Cl. Jan. 8, 2002) (adopting the rationale of a decision in *Alexander Inv. v. United States*, 51 Fed. Cl. 102 (2001)). On appeal, the Federal Circuit again reversed, finding a taking and ordering that the judgment previously entered on the contractual claims should be reinstated, subject to adjustment. *Cienega VIII*, 331 F.3d at 1324. The cases were transferred to the undersigned judge and then the claims of the non-model *Cienega* plaintiffs

that it instructed this court to address anew: (1) the economic effect of the regulation on the property as a whole; (2) the offsetting benefits under ELIHPA and LIHPRHA; (3) the limited duration of ELIHPA and LIHPRHA; and (4) the nexus between the owners' expectations and their investment in the property. *Cienega X*, 503 F.3d at 1277-78. The first two issues relate to the economic-impact prong of the *Penn*

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were consolidated with those of three plaintiffs from the *Chancellor Manor* case. *See Cienega X*, 503 F.3d at 1276-77 (referring to *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003), a case raising the same types of claims as those in the *Cienega* case). After retrial, the court found a taking, applying the takings analysis used by the Federal Circuit in *Cienega VIII*. *See Cienega Gardens v. United States*, 67 Fed. Cl. 434, 437-38 (2005) ("*Cienega IX*"). The Federal Circuit, however, vacated the judgment on appeal and remanded, departing in significant respects from the *Penn Central* analysis employed in *Cienega VIII*, opining that the *Cienega VIII* decision was "based on a partial record and limited arguments made by the government." *See Cienega X*, 503 F.3d at 1275-76 (stating that "the holdings of *Cienega VIII* were unique to the four model plaintiffs and based on the particular arguments that the government made").

The claims of the four model plaintiffs addressed in *Cienega IV*, *VI*, and *VIII* were subsequently resolved under the *Independence Park* caption. *See Independence Park Apts. v. United States*, 61 Fed. Cl. 692 (2004), *on reconsideration in part*, 62 Fed. Cl. 684 (2004), *reversed and remanded*, 449 F.3d 1235, *clarified on rehearing*, 465 F.3d 1308.

A petition for writ of certiorari was filed *sub nom. Cienega Gardens v. United States*, No. 07-1100, but the petition was dismissed based upon an agreed settlement between the parties, *see* 129 S. Ct. 17 (2008), which settlement entailed payment by the government of $37 million, inclusive of interest. *See* Stipulation of Dismissal With Prejudice, *Cienega Gardens v. United States*, No. 94-1 (Fed. Cl. July 18, 2008) (docketed item no. 284).

Central analysis, the third issue concerns the fourth "*Penn Central*" factor added by the Supreme Court's decision in *Tahoe-Sierra*, and the last issue relates to the reasonable investment-backed expectations of the property owners.

A. Kaiser Aetna *Analog*

Before applying the three *Penn Central* factors plus the factor added by *Tahoe-Sierra* in light of the *Cienega X* decision, CCA argues preemptively that "consideration of the character of the governmental action here alone supports the finding of a taking." Pl.'s Reply at 2 n.1. CCA contends that "[t]he character of the governmental action here – abrogating CCA's fundamental right to exclude others (as well as sharply restricting CCA's right to sell, assign or make some other use of the land on which Chateau Cleary sits) – approximates a conventional, physical taking and therefore *requires* the government to pay just compensation without regard to the quantum of economic impact and regardless of whether CCA had investment-backed expectations." Pl.'s Br. at 14. Essentially, CCA argues that consideration of the character-of-the-government-action factor alone dictates the finding of a taking.

The Supreme Court has held that the right to exclude, "so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("[T]he owner's right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests."). CCA asserts that its fundamental right to exclude has been abrogated by ELIHPA and LIHPRHA. Pl.'s Br. at 13. Correlatively, this court has noted that "by allowing HUD to control CCA's tenant pool beyond the twenty-year mark, the preservation statutes created a situation analogous to a physical invasion or a holdover tenancy." *CCA Assocs.*, 75 Fed. Cl. at 190. Correspondingly, the Federal Circuit in *Cienega VIII* characterized the government action as "intentionally defeat[ing] the Owners' real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years." *Cienega VIII*, 331 F.3d at 1328; *see also Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1368 (Fed. Cir. 2009) (reading *Cienega VIII* as holding that the preservation statutes "authorized what amounted to a traditional appropriation of real property rights, just as if the government had ordered the owners to continue devoting their properties to low-income housing use after their contractual obligation to do so had expired").

However, the government's abrogation of CCA's prepayment right does not by itself "*require*[] the government to pay just compensation without regard to the quantum of economic impact and regardless of whether CCA had investment-backed expectations." Pl.'s Br. at 14. CCA reaches too far when it asserts that it was "wholly deprived . . . of its fundamental property right to exclude others from Chateau Cleary." Pl.'s Br. at 10. The two cases on which CCA primarily relies, *Kaiser Aetna* and *Hodel v. Irving*, 481 U.S. 704 (1987), are not analogous. This is not an instance of the government creating a public easement on plaintiff's property, as in *Kaiser Aetna*. In *Kaiser Aetna*, an owner-lessee of a private lagoon, with the consent of the Army Corps of Engineers, dredged a channel to convert a shallow pond into a marina connected to Maunalua Bay, in Hawaii. *Kaiser Aetna*, 444 U.S. at 167. The government subsequently claimed that the pond, "as a result of the improvements, . . . had become a navigable water of the United States" and as such the owners were precluded from denying the public access. *Id.* at 168. The Court held that the marina could not be subjected to a public right of access unless the government invoked its power of eminent domain and paid just compensation. *Id.* at 172, 180. While the Court opined that "the 'right to exclude[]' . . . falls within [the] category of interests that the Government cannot take without compensation," it also stated that "[t]his is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id.* at 179-80.

In *Hodel*, a federal statute barred members of an Indian tribe from transferring highly fractionalized land holdings through intestacy or devise. 481 U.S. at 709. The Court held that the statute had destroyed an essential stick in the bundle of property rights, *viz.*, "the right to pass on a . . . small undivided interest . . . to one's heirs," a right that, "[i]n one form or another, . . . has been part of the Anglo-American legal system since feudal times." *Id.* at 716. The Court held that the abolition of both descent and devise constituted a taking. *Id.* at 718.

Here, CCA did not become subject to a public easement, nor was its right to exclude others from its property wholly abolished. Rather, restrictions were placed on CCA's ability to remove existing tenants and approve new tenants.[22] Its right to prepay the mortgage and escape HUD regulations was abrogated; however, that alone does not require a finding that a taking has occurred. *See PruneYard*, 447 U.S. at 84.

B. Penn Central *Test*

Justice Black famously wrote that the Takings Clause was "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Tahoe-Sierra*, 535

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[22] In this vein, the parties have debated the application of principles that provided the basis for the Supreme Court's decision in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In that case, the Supreme Court upheld a California Supreme Court ruling that a privately owned shopping center that invited the public onto its premises also had to allow people to exercise their free speech and petition rights. The Court acknowledged that "there ha[d] literally been a 'taking' of [the right to exclude others]" but nonetheless engaged in a multi-factor inquiry in holding that no taking had occurred. *Id.* at 82-84. The shopping center had "failed to demonstrate that the 'right to exclude others' [was] so essential to the use or economic value of [its] property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84.

The Supreme Court in *PruneYard* also indicated that the finding of a taking in *Kaiser Aetna* did not rest solely on the government's abrogation of the right to exclude, but rather also reflected that the "creat[ion] of a public right of access to the improved pond interfered with Kaiser Aetna's 'reasonable investment backed expectations.'" *PruneYard*, 447 U.S. at 84.

U.S. at 332 n.27 (stating that Justice Black's comment "applies to partial takings as well as total takings"). "The purpose of the takings clause is to ensure fairness, to both the property owner and the public." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009) (citing *Armstrong*, 364 U.S. at 49). "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). For regulatory takings, the Supreme court "'generally eschew[s]' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries.'" *Tahoe-Sierra*, 535 U.S. at 326 (quoting *Lucas*, 505 U.S. at 1015). "The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." *Id.* at 326 n.23 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)); *see also Rose Acre Farms*, 559 F.3d at 1282 ("[T]here is no magic number or formula in takings cases.").

CCA's takings claim must be decided by an "inquiry into all of the relevant circumstances in [the] particular case[,]" *Tahoe-Sierra*, 535 U.S. at 334, taking account of the principles set forth in *Penn Central* and other Supreme Court regulatory takings cases, *see Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), without putting undue weight on any one *Penn Central* factor. *See Rose Acre Farms*, 559 F.3d at 1282; *see also Cienega X*, 503 F.3d at 1278.

1. Character of the governmental action.

This court analyzed the character of the government's action in its prior opinion, which applied the analytical regime explicated in *Cienega VIII*. *See CCA Assocs.*, 75 Fed. Cl. at 188-91. In *Cienega X*, the Federal Circuit did not alter or even address the application of the character factor of the *Penn Central* test. Accordingly, this court's earlier analysis on that factor is re-adopted and need not be revisited, except in one respect. The Federal Circuit this past year noted that the Supreme Court's decision in *Lingle* "altered the analytical framework . . . [of] the character prong of *Penn Central*." *Rose Acre Farms*, 559 F.3d at 1278 (citing *Lingle*, 544 U.S. 528). In *Lingle*, the Supreme Court unanimously discarded the "substantially advances" test drawn from an earlier Supreme Court opinion which had stated that "'[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.'" *Lingle*, 544 U.S. at 540 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). The "substantially advances" test had been applied by lower courts as a stand-alone criterion for adjudging whether a regulatory taking had occurred. *Id.* The Supreme Court held that such a focus was more appropriate for a due process inquiry and had "no proper place in . . . takings jurisprudence." *Id.* Consequently, in takings cases, the Federal Circuit instructs that "[w]e can no longer ask whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill." *Rose Acre Farms*, 559 F.3d at 1278. Rather, "instead of looking at the rationality of the regulation, we must consider 'the actual burden imposed on property rights, or how that burden is allocated.'" *Id.* (quoting *Lingle*, 544 U.S. at 543).

Nonetheless, the analysis in this court's prior opinion of the character of the governmental action did not rely on or even mention the "substantially advances" test. It did address the government's argument that "the preservation statutes did not have the character of a taking because they promoted an important governmental objective[,]" which argument might be understood as appealing to the "substantially advances" test. *CCA Assocs.*, 75 Fed. Cl. at 188. However, this court rejected that argument because the statutes "did not place the burden of maintaining low-income housing on all taxpayers, but instead targeted only the owners of low-income housing whose regulatory agreements included the right to prepay their mortgages after twenty years." *Id.* at 189. Accordingly, this court analyzed the character factor by considering "the actual burden imposed on property rights," and "how [that] regulatory burden [was] *distributed* among property owners." *Rose Acre Farms*, 559 F.3d at 1278. That prior analysis is fully consistent with the *Lingle* decision, and the court therefore maintains its prior analysis of the character factor as that to be applied for purposes of this decision on remand.

While the character of the government action is not such as to deliver the dispositive blow that CCA has hoped, it nonetheless weighs in favor of a finding of a regulatory taking. Rather than distributing the burden of providing subsidized housing for thousands of low- and moderate-income families on taxpayers as a whole, the preservation statutes placed the burden on CCA and other owners who were participating in the HUD programs.

2. Duration of the restriction.

In applying the *Penn Central* standards, the court must "first determine the precise scope of the benefits denied." *Id.* at 1290 (noting that "owners were not . . . entirely denied the right to prepay; rather that right was denied for a short period, and rents were frozen for a period after prepayment"). "Short" is a relative term; in this instance, the denial ended up being 5 years and ten days. *See* Joint Stipulation of Facts ¶ 4 (July 14, 2009) (stipulating that the prepayment eligibility date for Chateau Cleary was May 17, 1991, and that the date on which under the HOPE Act it could convert to market-rate operation was May 27, 1996).[23] As the Supreme Court said in *Tahoe-Sierra*, "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." 535 U.S. at 342. In *Tahoe-Sierra*, the majority of the Supreme Court rejected the suggestion by Chief Justice Rehnquist "'that delays of six years or more should be treated as *per se* takings," 535 at 338 n.34, opining that the

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[23] The 20-year prepayment date was May 1991. The HOPE Act, enacted on March 28, 1996, ostensibly reinstated the prepayment right disabled by ELIHPA and LIHPRHA, but the subsequent HUD preservation letters precluded reliance on the HOPE Act until HUD released Preservation Letter 97-1 on December 16, 1996. *See supra*, at 8. The HOPE Act added a further 60-day moratorium on rent increases. *See id.* The effective period of disallowing the prepayment right thus was 5 ¾ years. However, the Federal Circuit majority in *Cienega X* ruled that the period in which HUD used the preservation letters to extend the preservation statute after the enactment of the HOPE Act could not be taken into account in the takings analysis because the preservation letters were unauthorized. *See Cienega X*, 503 F.3d at 1287 n.18.

"'temptation to adopt what amount to *per se* rules in either direction must be resisted.'" *Id.* at 342 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). The majority did comment that "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism." *Id.* at 341. The duration of the restriction in this case was sufficiently lengthy that it weighs in favor of finding a taking, but not so heavily that it eliminates any need to evaluate other factors in the balancing process.

3. Reasonable investment-backed expectations.

In *Cienega X*, the Federal Circuit outlined the analysis that must be applied for the investment-backed expectations prong of the *Penn Central* analysis. First, the court should consider CCA's actual expectation. *Cienega X*, 503 F.3d at 1288. That is, did CCA subjectively rely on the prepayment provision when it invested in the property? Second, the court should consider whether that expectation was reasonable. *Id.* at 1289. As to determining the reasonableness of the expectations, the Federal Circuit explained that the court should consider whether the expectation is "investment backed." *Id.*[24] In other words, "the claimant must establish

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[24] The Federal Circuit noted that "[o]ne important aspect of [the reasonableness analysis] is whether, in the regulatory environment, it would be expected that the law might change to impose liability," *Cienega X*, 503 F.3d at 1288, meaning, presumably, whether a change in the law respecting prepayment should have been anticipated. The Court of Appeals answered this question when it reaffirmed its prior holding in *Cienega VIII* that "the plaintiffs could not reasonably have expected the change in regulatory approach."

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.* Accordingly, the court must determine how important the benefit allegedly taken or restricted by the government action was to the initial investment in light of the entire range of benefits the owner reasonably could have expected at the time it entered into the investment. The Court of Appeals identified two possible standards to apply in this analysis: (1) there is no taking unless the expectation was the "primary" investment-backed expectation, or (2) the expectation is "investment-backed" if an investor would not have invested "but for" the expectation, even if it is not the primary expectation. *Id.* at 1290. The court did not determine which standard should be applied, though it indicated that the "primary" standard "appears to be supported by *Penn Central*." *Id.*; *see Penn Central*, 438 U.S. at 136 (concluding that a zoning restriction did "not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel").

(a.) The prepayment right.

The analysis of CCA's subjective expectations is straightforward. The Norman brothers originally purchased Chateau Cleary with an actual "plan[], expect[ation], and inten[t] to prepay the mortgage . . . after twenty years." *CCA Assocs.*, 75 Fed. Cl. at 192. When CCA acquired Chateau Cleary from the Norman brothers in 1985, its "plan was the same . . . – to prepay the Chateau Cleary mortgage at the

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Id. at 1289 (citing *Cienega VIII*, 331 F.3d at 1350). Accordingly, this court sees no need to revisit that issue here.

twenty-year point, raise the rents to market levels, and operate the apartment complex free of HUD restrictions." *Id.* (citing 2006 Tr. 174:21 to 172:25 (Norman)).[25] Manifestly, CCA had a subjective expectation to prepay their mortgage after 20 years.

In considering whether the prepayment option was the "primary" or "but-for" cause for the investment, this court first must determine the scope of the benefits denied. *See Cienega X*, 503 F.3d at 1290. The preservation statutes focused specifically on the prepayment right. In this respect, it bears reiterating that there is no evidentiary basis for concluding that CCA (and its predecessors in interest) could or should have anticipated that the prepayment right it relied upon in entering the Section 221(d)(3) program would be curtailed or forestalled. ELIHPA, discussed *supra*, placed a two-year moratorium on prepayments absent HUD

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[25] CCA, in a footnote, suggests that the court should give consideration to CCA's expectations at the time it acquired its interest in the property in 1985. *See* Pl.'s Reply at 8 n.6 (arguing that a reasonable investor in Chateau Cleary in 1985 would not have relied upon expiring tax benefits but would have relied upon prepayment rights which were just six years away). This raises the question of whether CCA's acquisition relates back to, or is independent from, the Norman brothers' investment expectations when they purchased the property in 1969. While J. Robert Norman sold his interest in the property, his brother Ernest B. Norman, Jr., consistently maintained control over the investment. That his interest went from being a half-owner in 1985 to owner of a 62.5% partnership interest, *see* PX 33 at 2 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)), does not change the takings analysis. In all events, CCA's expectations in 1985 were not different from the Norman brothers' expectations in 1969.

approval. LIHPRHA, passed as the two-year moratorium in ELIHPA was about to expire, made the prepayment moratorium permanent, also absent HUD approval.[26] As a result, the preservation statutes had the effect of permanently depriving CCA of its ability to prepay its mortgage and escape the restrictions of the HUD regulations. Correlatively, although the HOPE statute reinstated the prepayment right in 1996, after the enactment of LIHPRHA, owners could not have anticipated that the permanent restrictions contained in LIHPRHA would be removed. Therefore, in evaluating the reasonableness of investment-backed expectations, the court will focus on the ability to prepay the mortgage after 20 years, which was permanently restricted by the enactment of the preservation statutes, although that "permanent" restriction was subsequently removed.

The court must consider the prepayment right in light of all the benefits that the plaintiff reasonably could have expected at the time of its investment. In making this determination, the court must consider "the expectations of the industry as a whole." *Cienega X*, 503 F.3d at 1290. CCA argues that the

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[26] Both ELIHPA and LIHPRHA required HUD approval to prepay, which required an owner to obtain the Secretary's certification that prepayment would not have adverse effects on the low-income housing stock or on current tenants. ELIHPA § 225(a), 101 Stat. at 1880; 12 U.S.C.§ 4108(a)(1)(A). However, as this court found previously, prepayment was not a possibility for CCA because it did not meet the statutory criteria and therefore would not have succeeded in obtaining HUD approval. *CCA Assocs.*, 75 Fed. Cl. at 186. Notably, no property owners in the New Orleans area even applied for prepayment under the preservation statutes. *Id.* at 183.

ability to prepay the mortgage after 20 years was both the "but for" and the primary expectation for the investment. Pl.'s Br. at 18. The prepayment option was touted by HUD during contract negotiations. *See CCA Assocs.*, 75 Fed. Cl. at 192 (citing 2006 Tr. 57:18 to 58:15 (Norman); *Cienega VIII*, 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the . . . housing programs")). There is no doubt that the prepayment right was important. Moreover, the evidence shows that for CCA the prepayment right was paramount. The question arises whether other benefits were as important, judged on an objective standard for either the subsidized housing industry as a whole or for an identifiable subset of housing industry participants that included CCA. The government argues that the primary investment-backed expectations were tax benefits and subsidies arising from the ability to make a highly-leveraged investment. Def.'s Br. at 5. This argument is made generally for any and all participants in the Section 221(d)(3) and Section 236 programs.

(b.) Builder's allowance and distributions.

By entering the Section 221(d)(3) program, CCA (and its predecessor in interest) was able to make a highly leveraged financial investment in low-income housing. It was able to "borrow 90 percent of the purchase price on the basis of a forty-year amortization period," *CCA Assocs.*, 75 Fed. Cl. at 173 (citing 12 U.S.C. § 1715*l*(d)(3)(iii), (i)(2)(A)(iv); 2006 Tr. 1161:3-6 (Test. of Kenneth Malek, a tax accountant called to testify as an expert by the government)), and was also "given a Builder's and

Sponsor's Profit and Risk Allowance ("Builder's Allowance") that, when coupled with the loan, typically reduced an investor's initial cash outlay to 1.5 to 3 percent of the cost of the project." *Id.* (citing 2006 Tr. 1160:12-19 (Malek)).[27] Additionally, the government provided an interest-rate subsidy for the Chateau Cleary project which put the actual loan rate at 3 percent rather than the 7 percent market rate at the time. *See* 2006 Tr. 1162:24 to 1164:4 (Malek) (opining that the interest subsidy was largely offset by the requirement to charge lower rents to tenants, but that owners of subsidized housing had reduced risk because a steady supply of tenants was more likely).

For this leveraged and subsidized investment, CCA was entitled under the regulatory agreement to extract an annual cash distribution, or cash dividend, from the Chateau Cleary project, to the extent such a dividend or distribution was earned and available. DX 1 at 3 (Regulatory Agreement).[28]

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[27] Project developers were awarded a Builder's Allowance as a credit for their work in preparing and developing the project, which work required the expenditure of time and preparatory costs. *See* 2006 Tr. 93:10 to 94:14 (Norman) (describing the Builder's Allowance as something they worked for, earned, and essentially put back into the project, as they would in developing a conventional complex). Their work to earn the Builder's Allowance reflects a real economic investment and, like any start-up cost, represented an essential outlay of resources that should not be ignored in evaluating returns on an investment.

[28] Owners shall not without the prior written approval of the Commissioner:

. . .

This dividend was limited to six percent of the owner's equity in a project, and could only be paid out of "surplus cash." *Id.*; 2006 Tr. 1172:13-25 (Malek). If the distribution was not paid in any year, it was carried into the next year. DX 1 at 3 (Regulatory Agreement). The owner's equity included both the owner's cash outlay and the Builder's Allowance. *See* 2006 Tr. 1173:5-19 (Malek).[29]

(e) Make, or receive and retain, any distribution of assets or any income of any kind of the project except from "surplus cash" and except on the following conditions:

(1) All distributions shall be made only as of or after the end of a semi-annual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction; all such distributions in any one fiscal year shall be limited to six per centum on the initial equity investment, as determined by the Commissioner; and the right to such distribution shall be cumulative.

(2) No distribution shall be made from borrowed funds, prior to the completion of the project or when there is any default under this Agreement or under the note or mortgage;

(3) Any distribution or any funds of the project, which the party receiving such funds is not entitled to retain hereunder, shall be held in trust separate and apart from any other funds;

(4) There shall have been compliance with all outstanding notices of requirements for proper maintenance of the project.

DX 1 at 3 (Regulatory Agreement).

[29] The Builder's Allowance represented ten percent of the project cost exclusive of the land, or approximately 7 to 8.5 percent of the total project. *See* 2006 Tr. 1161:8-16, 1166:7-11 (Malek). Because the 6% distribution was calculated from the

Mr. Malek suggested that the low distribution rate allowed was matched economically by the risk associated with the projects. He considered that these housing projects entailed a "very low risk" for developers because they involved low initial capital, a low interest rate, and "a ready supply of tenants." 2006 Tr. 1163:22 to 1164:12 (Malek); *see also* 2006 Tr. 420:5-14 (Norman) (acknowledging that one advantage a HUD development had over conventional real estate was that "there is some less risk in the first 20 years because you . . . [are] more likely to have a lower vacancy rate. You are not subject generally to the vagaries of fluctuations, certain economic fluctuations because there are more people of low and moderate income means than there are people of higher means, so you generally have a larger segment of society to serve, which is an advantage.").

In actuality, the projects entailed considerable risk. Rental income was subject to regulatory risk because HUD might not timely approve rental increases to correspond to inflation. Projects were also not immune from general economic declines in the local area, which might reduce the availability of jobs and thus induce population migration. Neighborhoods also could decline. Moreover, the annual cash dividend was only a possibility, not a guarantee. It operated as a cap, limiting the amount

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total owner's equity rather than just the owner's cash contribution, Mr. Malek considered that it represented between a 20 and 40 percent return on the owner's cash contribution. *See* 2006 Tr. 1162:3-12 (Malek). Mr. Malek did not assign any cost to the Builder's Allowance. CCA's cash contribution represented approximately 2.7% of the Chateau Cleary project. *See* 2006 Tr. 1168:12 to 1169:2 (Malek).

of profits an owner could realize. Payment of the distribution was dependent on the owner's having surplus cash for the year in excess of the requisite cash reserve fund. *See supra*, at 6 n.8 (describing the mandatory reserve funds).

The inherent risk involved in these projects is apparent when one considers that many projects struggled to stay afloat, *see, e.g.*, *City Line Joint Venture*, 503 F.3d at 1321 (describing how an owner of a Section 221(d)(3) project ran into financial difficulties and defaulted on its loan), while others failed completely, including a number in the New Orleans area. *See* 2006 Tr. 502:18 to 503:3 (Alexander). Mr. Alexander was the Director of Community Planning and Development Division in the New Orleans office of HUD, and he indicated that much of his time was spent on problem projects that were in default. *Id.*; *see also* 2006 Tr. 515:10-13 (Alexander) (testifying about a HUD training program instituted in response to "many defaults across the country"). The court does not have before it any quantitative analysis of the failure rate of HUD projects; however, it seems apparent that the projects could not be classified as "very low risk" or even "low risk."

The cash distributions did not prove to be of significant benefit to CCA and its predecessors in interest; from the outset of the investment in 1971, they did not take out a cash distribution until 1983. *See* PX 26 at 14 (Chateau Cleary Financial Statement for Fiscal Year 1983) (indicating a cash distribution of $8,521 from an accumulated and unpaid total of $159,855). Through 1990, CCA had taken distributions totaling $112,692,[30] while its potential distributions were $259,040.[31] In short, CCA received less than half of the potential amount it could receive. 2006 Tr. 154:21 to 155:10 (Norman). Mr. Norman attributed the inability to receive the full cash distributions to HUD delays in approving rent increases and rising costs. 2006 Tr. 331:11 to 332:9 (Norman); *see also* 2006 Tr. 337:5 to 338:8 (Norman) (explaining that when CCA petitioned HUD for a rent increase to capture accumulated dividends, HUD insisted the rent increase had to be spread over several years, thus delaying capture of those dividends).

CCA did not consider the cash distribution to be significant. "It was nice, but it was not something that made much difference." 2006 Tr. 93:5-9 (Norman). The distribution was dependant on keeping the property occupied, obtaining rent increases, and limiting costs. Mr. Norman testified that the limited dividend was not typically available "[b]ecause we were playing catch-up [with costs]. It just - we never caught up. And also if we did have extra cash and had discretionary cash, things were running so tight, we would put it back in the property rather than try to force a surplus cash." 2006 Tr. 158:22 to 159:9 (Norman). A recession in 1986, especially affecting the local petroleum

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[30] CCA took a distribution of $8,521 in 1983, PX 26 at 14, $61,141 in 1984, PX 27 at 15, $35,578 in 1985, PX 32 at 14, and $7,452 in 1988. PX 36 at 15.

[31] CCA accrued a potential annual distribution of $12,952 each year. *See, e.g.*, PX 36 at 5 (Chateau Cleary Financial Statement for 1988, noting provision for owner's return on equity investment to be 6% of $215,863, or $12,952).

industry, affected the rental market and made cash distributions even more difficult. *See* 2006 Tr. 155:15 to 156:12 (Norman).

The evidence thus shows that the ability to make a leveraged investment because of a Builder's Allowance and the option to receive some return on equity through cash distributions were benefits that constituted incentives, but not significant ones, for CCA to enter the program. *See* 2006 Tr. 417:6-17 (Norman). Notably, the government's opinion evidence presented by its testifying expert, Mr. Malek, also supports the conclusion that the Builder's Allowance and potential cash distributions were not the primary bases for investment expectations in the industry. *See* 2009 Tr. 179:19-24 (Malek) (syndication prospectuses tout cash distributions as a secondary benefit to investing, after tax benefits).

(c.) Tax benefits.

The government puts more emphasis on tax benefits as a primary driver of investment in subsidized housing projects, arguing that "tax benefits were the primary economic return that would be expected from an investment in a [S]ection 221(d)(3) project and were far greater than the tax benefits for comparable conventional projects." Def.'s Br. at 5. The government's expert opined that the tax benefits were "close to the raison d['être]" for investing in the HUD program. 2006 Tr. 1182:2-6 (Malek). A 1972 guide to low- and moderate-income housing stated that "[o]ne of the principal benefits of ownership of a federally assisted housing project is the tax shelter that it generates." Charles L. Edson & Bruce S. Lane, Bureau of National Affairs, Inc., *A*

Practical Guide to Low- and Moderate-Income Housing 11:6 (student ed. 1972) (DX 176 at 8); *see also id*. at 10:1 ("Accelerated depreciation, the high leverage available . . ., and the possibility of favorable capital gains treatment have all combined to create a tax shelter which is quickly becoming a center of attention in the investment community.") (DX 210 at 55).

The tax benefit cited by Mr. Malek was the ability of a property owner to take accelerated depreciation of the building and use that depreciation as a deduction to offset other income, including earned income. *See* 2006 Tr. 1174:15 to 1176:1 (Malek). The relevant tax laws applied equally and without distinction or difference to both conventional and subsidized buildings. 2006 Tr. 1182:10-18 (Malek). The reason the tax benefits were potentially more advantageous for owners in the HUD programs was because of the proportionately lower initial cash investment, which gave the equity owner more leverage. 2006 Tr. 1164:22 to 1165:2 (Malek). Owners could take advantage of this accelerated depreciation in one of two ways: either they could use the depreciation for their own benefit to offset gains, or they could "syndicate" a part of their ownership interest, which involved packaging and selling ownership interests, thereby conveying tax benefits as a tax shelter for purchasing investors, cashing out the initial owner from the portion of the ownership interest which was syndicated. *See* 2006 Tr. 1158:14 to 1159:19 (Malek).

CCA did not realize any such "benefit." It did not take accelerated depreciation, and it did not syndicate any of the equity ownership interest. 2006

Tr. 92:9-11, 23-25 (Norman). Mr. Malek testified that CCA, although it did not use accelerated depreciation, achieved some benefit by using component depreciation, with different components of the building being accorded different life spans for purposes of depreciation. *See* 2006 Tr. 1178:8-18, 1180:10 to 1181:24 (Malek). Component depreciation, combined with leveraging, would have enabled CCA to obtain a less aggressive, more conservative tax benefit. *See* 2006 Tr. 1183:9-15 (Malek). Accelerated depreciation, inherently by its nature, throws off greater tax benefits in the early years, but it eventually generates a tax detriment later, with the tipping point ordinarily coming between years 19 and 22. *See* 2006 Tr. 1270:18 to 1273:10 (Malek). Accelerated depreciation as a result was favored for syndication to purchasers who wanted a short-term shelter for ordinary income and were not interested in long-term benefits.

Some HUD projects employed syndication. *See* 2006 Tr. 1177:4-5 (Malek). The government at the 2009 trial submitted six prospectuses of properties that were syndicated. *See* DX 200-205. These prospectuses were private placement memoranda, "investment[-]offering circular[s] that [were] designed to provide information to potential investors that would allow them to make an informed decision regarding the benefits or risks and merits of an investment in [the] project." 2009 Tr. 165:23 to 166:3 (Malek). They represented four properties in Massachusetts, *see* DX 200, 201, 202, 203,[32] one in California, *see* DX 204, and one in

[32] A cottage industry for syndication was based in Boston. *See* 2009 Tr. 195:11-13 (Malek).

Minnesota, *see* DX 205.[33] The prospectuses described the potential benefits for investing in the projects as being primarily tax benefits and secondarily cash distributions. *See, e.g.*, 2009 Tr. 179:19-24 (Malek) (referencing a prospectus for Cromwell Court, DX-201). The prospectuses do not assign any weight to the ability to prepay after 20 years as a reason to invest, with most dismissing the possible net proceeds from prepayment after 20 years at a nominal value of one dollar, *see, e.g.*, 2009 Tr. 180:6-12 (Malek) (citing the prospectus for Cromwell Court, DX-201), although one of the six prospectuses made no projections after 20 years. *See* 2009 Tr. 197:9-24 (Malek) (citing the prospectus for Chancellor Manor, DX 205).

However, the details of the prospectuses indicate that the possibility of prepaying the mortgage after 20 years and of realizing an increase in equity was a considerable benefit. For instance, the general partners for the Chauncy House Company sold 95% of the profits, losses, and cash flow of the project to the investing limited partners, but retained 50% of residual proceeds from a refinancing, sale, or other disposition of the project. DX 203 at 6. Similarly, the general partners in the Skyline View Gardens project sold 95% of the profits, losses, and cash flow of the project to the limited partners, but retained 35% of "residual proceeds from the sale, other disposition or refinancing of the Project." DX 204 at iv-v. For the Chancellor Manor project, if a "sale, refinancing, condemnation, or casualty" occurred after 17 years, then the limited partners received

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[33] The court assumes that each of these prospectuses resulted in a completed transaction.

only 50% of the proceeds once their initial capital contribution had been returned. DX 205 at 21-23. The limited partners in Chancellor Manor were allocated 100% of all profits and losses for the first five years of the project, and 96 1/2% of profits and losses thereafter, subject to the post-17-year reallocation of 50% to the general partner. *Id.* These reallocation provisions suggest that the general partners in three of the six instances were willing to sell short-term tax benefits and dividends but wanted to retain a significant portion of the long-term benefits from property appreciation, particularly those following the prepayment date.

The evidence as to syndication does not indicate how common it was for participants in the HUD programs to syndicate. Mr. Malek testified that a number of Section 221(d)(3) and Section 236 projects were syndicated through private placement memoranda, 2009 Tr. 178:2-7 (Malek), but he offered no quantitative indicia of the practice. The court is left with the understanding that syndication was not unusual but that the majority of initial owners did not syndicate their ownership, and also those that did syndicate often retained an enhanced interest in the long-term proceeds, *i.e.*, those that might arise after 20 years when prepayment could occur.[34]

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[34] This court has held trials involving sixteen properties under the HUD programs, of which three appear to have been syndicated. *See Cienega IX*, 67 Fed. Cl. at 446-57, *vacated and remanded by Cienega X*, 503 F.3d 1266 (two syndicated properties, six non-syndicated properties in the *Cienega* set of plaintiffs, and one syndicated property in the *Chancellor Manor* set of three properties); *Independence Park Apts.*, 61 Fed. Cl. at 696 (four non-syndicated properties); 2006 Tr. 92:9-11 (Norman) (ownership of CCA not syndicated). Sixteen is too

Significantly, the evidence at trial showed that investment expectations varied between projects roughly grouped into two types – those built in areas where development or neighborhood-enhancement was projected and those built in areas that were economically depressed or not expected to show significant improvement over time. Mr. Malek claimed that the returns of a typical private placement memorandum did not depend on the project's locus (development area) or character (*i.e.*, the quality of construction, type of amenities provided, etc.). *See* 2009 Tr. 169:13-16 (Malek). But in the instance of Chateau Cleary, the potential returns very much depended on its geographical location. "[T]he Norman Brothers chose . . . to invest in a property in West Metairie, then considered to be in the path of future development in the New Orleans area and an emerging middle-class neighborhood." *CCA Assocs.*, 75 Fed. Cl. at 192. The reasonableness of this projection was confirmed by the development of West Metairie, as evident from a site visit in 2006. *Id.* at 193. CCA became involved with, and did not syndicate, Chateau Cleary because it wanted to retain the benefits to be gained after prepaying the mortgage in the 20th year. *See* 2006 Tr. 92:13-22 (Norman). CCA's long-term business plan probably would not be reasonable for a property located in an economically depressed area that offered little, if any, opportunity for future

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small a sample size from which to extrapolate a percentage for the universe of participants in the Section 221(d)(3) and Section 236 programs, although the resulting proportion of properties syndicated in the cases before the court – three of sixteen – does provide some indication that syndication was not the norm.

appreciation. From the evidence, because housing projects are not homogenous, it is possible for different projects to have divergent, yet nonetheless reasonable, investment expectations. As this court stated in *Cienega IX*,

> There is not one magical, reasonable set of expectations that a business could have; hundreds of business plans could be deemed reasonable. For example, the Blossom Hill and Skyline View partnerships chose to syndicate limited partnership interests, while other partnerships whose properties were managed by G&K Management did not. Similarly, although both the *Cienega Gardens* and *Chancellor Manor* sets of plaintiffs implemented a strong "buy and hold" strategy, the *Cienega Gardens*-related set planned to borrow more heavily against the properties, while the *Chancellor Manor* set planned to refinance with very small, seven to ten-year, fully-amortizing mortgages in the interests of having "as little debt as possible." In fact, by the time of trial, Oak Grove had already paid its conventional mortgage and was operating as a conventional property on a debt-free basis. Because such a wide range of business expectations and plans could be deemed reasonable, it is important to determine what plaintiffs expected and then determine whether that baseline was reasonable.

Cienega IX, 67 Fed. Cl. at 473 n.47 (internal quotation marks omitted) (citations omitted). In short, factors associated with the location and character of projects strongly influenced the reasonable expectations of the owners, judged on an objective and not a subjective basis.

Reliance on tax benefits involved a short-term focus for the reasons explained earlier, and it also entailed greater risk, being dependent on provisions in the tax code that applied to both conventional and subsidized properties and that could change at any time. In fact, when the tax code did change in 1986, some of the syndicated investments went into foreclosure because the depreciation that remained available by that date was a passive item, deductible only to the extent of passive income, and could no longer be used to offset earned income. *See* 2009 Tr. 222:6-22 (Malek).

The evidence thus shows that it is not possible to derive investment expectations of participants in the Section 221(d)(3) and Section 236 programs as a whole. To reiterate, a 1972 guide to low- and moderate-income housing stated that "[o]ne of the principal benefits of ownership of a federally assisted housing project is the tax shelter that it generates." Edson & Lane, at 11:6. Yet, in a section summarizing the advantages of obtaining a limited partnership interest in federally assisted projects, the guide also states, "[w]here a project is located in a growing suburban or exurban area, it may increase in value over the years, thus creating substantial residual profits to the investors upon sale or other disposition." *Id.* at 11:8. CCA's Chateau Cleary project falls into this latter category where the prospect of long-term appreciation was the chief incentive and thus the prepayment right was critically important.

(d.) "Primary" and "but-for" test.

Having considered the potential investment expectations for CCA and the two general types of projects into which participants in the Section 221(d)(3) and Section 236 programs can be classified, the court must address whether CCA has established that it "made the investment because of its reasonable expectation of [prepaying the mortgage after 20 years, which ability was curtailed by the preservation statutes,] rather than the remaining benefits." *Cienega X*, 503 F.3d at 1289. As noted earlier, the Federal Circuit suggested two possible standards: the "primary" benefit standard, and the "but-for" benefit standard. CCA asserts that they have met both standards, *see* Pl.'s Br. at 17-18, while the government contends that CCA has met neither. *See* Def.'s Br. at 41-42.

Penn Central constitutes ambiguous support for a "primary" expectation rule. The statement that the regulation "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel" is made in the context of a broader analysis of "the severity of the impact of the law." *Penn Central*, 438 U.S. at 136. And creation of a primary-expectation rule would seem to run counter to the Supreme Court's statements about the *Penn Central* test because the Supreme Court has been notably reluctant to establish special rules for regulatory takings cases, and a "primary" expectation rule would impose heightened evidentiary burdens on a plaintiff. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 326 n.23 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted. The

Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."); *see also Rose Acre Farms*, 559 F.3d at 1282 ("[T]here is no magic number or formula in takings cases."). The "but-for" test reflects generally applicable concepts of causation, *see Mittal Steel Point Lisas Ltd. v. United* States, 542 F.3d 867, 876 (Fed. Cir. 2008) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)), and is not peculiar to takings jurisprudence. Nonetheless, this court "need not determine . . . whether the reason for the investment must be the 'primary' expectation or simply that reasonable owners would not have invested 'but for' the expectation," *Cienega X*, 503 F.3d at 1290, for CCA has satisfied both standards.

CCA has set forth sufficient facts to establish that the 20-year prepayment option was the primary expectation underlying the decision by the Norman brothers to invest in the HUD program. "The prepayment right was the *sine qua non* of the deal," *CCA Assocs.*, 75 Fed. Cl. at 199, and the Norman brothers "wouldn't have done [the deal] without it." 2006 Tr. 91:22-25 (Norman). CCA had a long-term strategy based on Chateau Cleary's location. CCA invested in a property they considered to be "located in a growing suburban or exurban area" that they hoped would "increase in value over the years" and "creat[e] substantial residual profits . . . upon sale or other disposition." Edson & Lane, at 11:8. Subsequent events have born out CCA's investment strategy, as growth has come to the area. Chateau Cleary was recently appraised at approximately $5 million. 2009 Tr. 46:1-12 (Norman).

The government has sought to establish that industry-wide expectations were primarily focused on short-term potential tax benefits, with capped distributions as secondary benefits. They have established that these expectations were probably principal ones for a class of investors in HUD's Section 221(d)(3) and Section 236 programs. However, evidence shows that these investment expectations would not have been those primarily held by another class of investors in those programs – those interested primarily in long-term enhancement. Chateau Cleary was similar to properties where long-term results, not short-term gains, were the basis of the owners' expectations.

In sum, CCA had an objectively reasonable, investment-backed expectation with respect to the right to prepay. That expectation constituted the "but for" and "primary" reason for CCA to develop and operate Chateau Cleary.

4. Economic impact.

The third factor of the *Penn Central* analysis examines the severity of the economic impact of the regulation on the property owner, *see Penn Central*, 438 U.S. at 124, and involves a "weigh[ing of] all the relevant considerations." *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990). Although courts must determine whether the plaintiff has suffered a "serious financial loss," *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994), there is no "magic number" below which compensation must be denied. *Rose Acre Farms*, 559 F.3d at 1282; *see also Yancey*, 915 F.2d at 1541 (no "automatic numerical barrier").

In its prior decision, this court calculated economic impact for the period the prepayment right was extinguished as a measure of CCA's return on equity under the preservation statutes in comparison to the return on equity that it would have received but for the statutes. *See CCA Assocs.*, 75 Fed. Cl. at 195. This approach had been used by the Federal Circuit in *Cienega VIII*. *See* 331 F.3d at 1342-45. Following the lead of *Cienega VIII*, this court in its initial decision concluded that under such a calculation, CCA suffered an 81.25% diminution in return on equity due to ELIHPA and LIHPRHA, which constituted a "serious financial loss." *CCA Assocs.*, 75 Fed. Cl. at 199 (quotation omitted).[35] This court used the same return-on-equity approach in calculating economic impact in the *Cienega IX* case. *See Cienega IX*, 67 Fed. Cl. at 474-79. However, the Federal Circuit's decision in *Cienega X* vacating and remanding that decision criticized this mode of calculating economic impact. The Court of Appeals considered that the economic impact of the termination of the prepayment right had to be evaluated on the value of the project as a whole, *i.e.*, comparing the economic detriment during the period the prepayment right was disabled to the ability of the project to generate income over its

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[35] The court accepted and adopted the calculations performed by Dr. Wade R. Ragas, an economist and real estate expert called to testify by CCA. Dr. Ragas divided the maximum HUD-allowed annual dividend, $12,925, by the aggregate equity in the property at the time of prepayment, $811,700, giving CCA a 1.6% return on its equity. *CCA Assocs.*, 75 Fed. Cl. at 198 (citations omitted). "Comparing this 1.6% return to a conservative 8.5% return on 15-year mortgage-backed securities, the comparative benchmark used in *Cienega VIII*, yields an economic impact of 81.25%." *Id.* (citations omitted). This calculation actually undervalued the economic impact because it was based on the maximum possible annual return fixed by HUD, and not CCA's actual returns. *Id.*

entire useful life. *Cienega X*, 503 F.3d at 1280. The Court of Appeals also indicated that LIHPRHA's offsetting benefits should be taken into account. *Id.* at 1282-83. As instructed, the remand in this case will proceed "in accordance with *Cienega X*." *CCA Assocs.*, 284 Fed. Appx. at 811.

(a.) Parcel as a whole.

In temporary taking cases, the courts ordinarily have looked to rental value or other equivalent measures of non-permanent use. *See United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 117-18, 119 (1951) (Black, J., writing for the plurality) (Reed, J., concurring in the judgment) (upholding award of just compensation to owner of a coal mine that the government had occupied and operated for over five months); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 16 (1949) (referring to "the record of its past earnings" and holding that the "proper measure of compensation [for a temporary taking] is the rental that probably could have been obtained"); *United States v. General Motors Corp.*, 323 U.S. 373, 379-83 (1945). In the *Peewee Coal* case, Justice Reed, concurring in the judgment, and casting the vote that established a majority for the judgment, contrasted this focus on lost returns of revenue with the method that compared a change in market value:

> Market value, despite its difficulties, provides a fairly acceptable test for just compensation when the property is taken absolutely. But in the temporary taking of operating properties, market value is too uncertain a measure to have any practical significance. . . . The most reasonable solution is to award compensation

> to the owner as determined by a court under all the circumstances of the particular case.

341 U.S. at 119-120 (Reed, J., concurring) (internal citations omitted) (emphasis added).

In *Cienega X*, the Federal Circuit distinguished *Kimball Laundry* as inapplicable because it was a physical takings case, not a regulatory takings case, and because the economic analysis in that case was performed in the context of determining just compensation, not whether a taking had occurred. 503 F.3d at 1281-82. Instead, the Court of Appeals required that the economic detriment attributable to the temporary restriction of the prepayment right be compared to the value of the property as a whole because plaintiffs are required to show "severe economic deprivation" in a regulatory taking case, whether the case addresses a temporary or a permanent restriction. *Id.* In reaching this conclusion, the Federal Circuit relied on the Supreme Court's *Tahoe-Sierra* decision. *Id.* at 1281. In *Tahoe-Sierra*, the Supreme Court considered whether a temporary development moratorium constituted a regulatory deprivation of "all economically beneficial uses" of land such that the *Lucas* categorical takings rule applied, or whether the court should instead apply a *Penn Central* analysis. 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019). The petitioners argued that the moratorium on building was a *per se* regulatory taking because there was a complete taking of development rights during a thirty-two-month period. The Supreme Court rejected this argument:

> Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so

> divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on "the parcel as a whole."

Id. at 331. Based upon these observations, the Federal Circuit concluded that "in a temporary regulatory takings analysis context the impact on the value of the property as a whole is an important consideration, just as it is in the context of a permanent regulatory taking." *Cienega X*, 503 F.3d at 1281.

The Federal Circuit proposed two possible ways "to compare the value of the restriction to the value of the property as a whole." *Cienega X*, 503 F.3d at 1282.

> 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).

Id. The Federal Circuit instructed the court to consider these two measures "as well as any other possible approaches that determine the economic impact of the regulation on the value of the property as a whole." *Id.*

The parties did not present evidence at trial that would enable the court to apply the second measure. Although there is evidence of the "lost net income due to the restriction,"[36] there is no evidence as to "the total net income without the restriction over the entire useful life of the property." *Cienega X*, 503 F.3d at 1282. Instead, the parties in this case entered into a joint stipulation as to the first calculation:

> CCA suffered an economic impact of 18 percent as a result of ELIHPA and LIHPRHA (the "Preservation Statutes") if one does not consider any statutory benefits conferred by the Preservation Statutes and compares (i) the market value of Chateau Cleary on its prepayment eligibility date of May 17, 1991, assuming that CCA could have prepaid and converted to market-rate operations immediately on this date, and (ii) the market value of Chateau Cleary on its prepayment eligibility date assuming that the property

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[36] CCA's lost net income due to the preservation statutes is $714,430, calculated as of May 1996, when the 60-day moratorium on rent increases enacted by HOPE ended. *See* PX 106 at 48 (Second Ragas Report); *see also CCA Assocs.*, 75 Fed. Cl. at 204 (calculating lost rents through February 1997 as $841,839); Pl.'s Br. at 47-48. As noted previously, in *Cienega X*, the Federal Circuit majority ruled that the period in which HUD used the preservation letters to extend the effect of the preservation statutes after the enactment of the HOPE Act could not be taken into account in the takings analysis because the preservation letters were unauthorized. *See Cienega X*, 503 F.3d at 1287 n.18.

> would remain in the Section 221(d)(3) program until May 27, 1996, at which point it would convert to market-rate operation.

Joint Stipulation of Facts ¶ 4 (July 14, 2009). CCA argues that this is the correct measure of economic impact under *Cienega X*, though it disagrees with that decision. *See* Pl.'s Br. at 23, n.15. The government agrees with the calculation, but contends that there are statutory benefits conferred by the preservation statutes that reduce the economic impact and shorten the relevant time period. *See* Def.'s Br. at 29-30.

(b.) Offsetting benefits.

The Federal Circuit's decision in *Cienega X* calls upon this court to consider any offsetting benefits from the preservation statutes "which were specifically designed to ameliorate the impact of the prepayment restrictions." 503 F.3d at 1283. That aspect of *Cienega X* overturned the approach applied by this court in *Cienega IX* and *CCA Associates*, which held that offsetting benefits did not affect the *Penn Central* takings analysis, but rather should be addressed in the determination of just compensation. *See Cienega IX*, 67 Fed. Cl. at 470; *CCA Assocs.*, 75 Fed. Cl. at 198.[37]

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[37] In *Cienega IX*, the court reasoned that considering offsetting benefits in the takings analysis could enable the government to "evade paying the constitutionally-required just compensation" by paying "forty, or fifty, or sixty cents on the dollar." 67 Fed. Cl. at 470. "The government's argument, if accepted, . . . would enable the government to take property with impunity, so long as it offered a modicum of recompense by statutory action." *Id.* The court distinguished between "value provided by extrinsic means, as, for example, by statutory options that previously did not inhere in and with the

property," which should only be taken into account in computing just compensation, and "any residual value of the property itself, which would be considered during the economic-impact portion of the takings analysis." *Id.*

The Federal Circuit relied on *Penn Central* in holding that "offsetting benefits must be accounted for as part of the takings analysis itself." *Cienega X*, 503 F.3d at 1283. In *Penn Central*, the appellants' air development rights had been restricted at their Penn Central Terminal property, but were transferrable to other parcels in the vicinity. *Id.* (citing *Penn Central*, 438 U.S. at 113-14). "[T]hese benefits '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 the regulation.'" *Id.* (quoting *Penn Central*, 438 U.S. at 113-14).

The Federal Circuit distinguished the *Whitney Benefits* cases upon which this court had relied, which disregarded offsetting benefits in the takings analysis. *Cienega X*, 503 F.3d at 1283 (citing *Whitney Benefits*, 926 F.2d 1169, and *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554 (Fed. Cir. 1985)). In *Whitney Benefits*, the government offset mining restrictions on land owners by authorizing the sale or lease of other federal land to the owners. *Id.* "[T]he value of the new property offered in exchange for the restriction could not be considered under the takings analysis because 'the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants.'" *Id.* (quoting *Whitney Benefits*, 926 F.2d at 1175). The Federal Circuit distinguished this situation from *Penn Central* because "in *Whitney Benefits* the government offered those parties *new* properties," whereas in *Penn Central* "the benefits were tied to the property already owned." *Id.*

The Federal Circuit's distinction potentially permits the government to take property by regulation and escape paying just compensation by providing offsetting benefits "tied to the property." *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 748 (1997) (Scalia, J., concurring) ("If money that the government-regulator gives to the landowner can be counted on

The government asserts that CCA bears the burden of proof to establish the economic impact of any offsetting statutory benefits. *See* Def.'s Br. at 30-31. CCA demurs, contending that the government has the burden in this regard. Pl.'s Reply at 13. CCA undoubtedly has the burden of proof on each of the *Penn Central* factors, including that of economic impact. *See Cienega X*, 503 F.3d at 1288. However, the government's contention reaches too far and is not accepted. Once 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. *See Rose Acre Farms*, 559 F.3d at 1275 (refusing to consider offsetting economic benefits because "the government points to no economic data in the record to support its assertion of offsetting benefits"); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1175 (Fed. Cir. 1991) (rejecting the government's argument that a coal exchange should be considered in assessing economic impact). To hold otherwise would require CCA to prove a negative – to prove that nothing else in the statute could provide any offsetting economic benefit.

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the question of whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less."). Moreover, in *Penn Central*, the offsetting benefits applied wholly apart from any choice made by the property owner, whereas in this instance, as in *Whitney Benefits*, any offset applied only for those property owners who chose to seek one of the options and to forego waiting for the restrictions to end.

The government offers proof of a benefit that could be obtained under one, and only one, of the several options that ELIHPA and LIHPHRA made available to owners whose prepayment rights were restricted. Def.'s Br. at 30. Specifically, the government contends that CCA had the option to sell the property at market value under both ELIHPA and LIHPRHA. Def.'s Br. at 30.[38] The government's calculation of a potential sale benefit is based on three assumptions: first, that "CCA could have found a buyer for the property;" second, that "HUD would provide the funding to facilitate [such a] sale[;]" and third, that "if CCA diligently pursued the sale process, a sale would have been completed by November 1992." Def.'s Br. at 33 (citing 2009 Tr. 246:22 to 247:5 (Test. of Dr. Bret Dickey, an economic consultant called to testify as an expert by the government)).

By arguing that CCA could have completed a sale by November 1992, the government necessarily contends that CCA could have proceeded with a sale under ELIHPA rather than LIHPRHA. Under ELIHPA, an owner was permitted to file a notice of intent to prepay or to seek incentives, including a

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[38] The other major option under ELIHPA or LIHPRHA consisted of entering into a use agreement to maintain the property as low-income housing for an extended period of time. The government did not adduce evidence of benefits attributable to this option. Evidence in the record shows that entry by HUD into a use agreement depended on HUD obtaining the necessary funding from Congress. At least three properties in the New Orleans area sought such incentives and were approved, but could not proceed due to a lack of funding. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.).

sale, up to one year before its prepayment eligibility date. *See* ELIHPA § 232(2). Regulations implementing ELIHPA took effect in May 1988. *See* Prepayment of a HUD-Insured Mortgage by an Owner of Low Income Housing, 53 Fed. Reg. 11,224, 11,229 (Apr. 5, 1988); 24 C.F.R. § 248.231(g) (1991). CCA thus could have filed a notice of intent in May 1990, a year before its prepayment date. *See* 2009 Tr. 248:1-11 (Dickey). HUD would then provide the owner with information as to how to prepare a plan of action, including information as to possible incentives. 24 C.F.R. § 248.211 (1991). Mr. Kevin East, Chief of the Affordable Housing Branch of HUD during the 1990s, testified that the sale process under ELIHPA in the years 1991 and 1992 typically took between 15 and 18 months, *see* 2009 Tr. 135:14-17 (East), and Dr. Dickey used an estimate of two-and-a-half years to arrive at an estimated sale completion date of November 1992. The provisions of LIHPRHA would not come into play because regulations implementing LIHPRHA were not adopted until April 1992. *See* 24 C.F.R. § 248 Subpart B (1993); Prepayment of a HUD-Insured Mortgage by an Owner of Low-Income Housing, 57 Fed. Reg. 11,992, 12,041 (Apr. 8, 1992).[39] Therefore, to adopt Dr. Dickey's estimate,

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[39] Following the passage of LIHPRHA, CCA filed a notice of intent with HUD in December 1990 to preserve its options under ELIHPA and LIHPRHA. PX 42 (CCA Notice of Intent (Dec. 28, 1990)). In June 1992, CCA filed a notice of election to proceed under ELIHPA, while reserving its rights to proceed under LIHPRHA. PX 51 (CCA Notice of Election to Proceed (June 8, 1992)). A plan of action could not be filed under LIHPRHA until after the regulations were published on April 8, 1992. *See* 2009 Tr. 151:19-23 (East).

this court must find that it was probable that CCA could have pursued a sale and have successfully sold the property under ELIHPA if it had sought to do so.

The parties disagree as to whether a sale option existed under ELIHPA. *Compare* Pl.'s Br. at 29-30 (arguing that ELIHPA and its accompanying regulations do not specify a process or procedure for achieving a sale), *with* Def.'s Br. at 31 (arguing that ELIHPA provided for a sale option). ELIHPA lists a number of incentives for owners to extend low income use, but it did not include a sale option among those optional incentives. Rather, it authorized the Secretary of HUD to take "[o]ther actions, *authorized in other provisions of law*, to facilitate a transfer or sale of the project to a qualified nonprofit organization, limited equity tenant cooperative, public agency, or other entity acceptable to the Secretary." ELIHPA § 224(b)(7) (emphasis added). In this respect, the government has not pointed to any "other provision[] of law" that authorized a sale option under ELIHPA.[40] And, a process for arranging for a HUD-assisted sale of a property was not specified in HUD's implementing regulations. *See* 24 C.F.R. § 248.231 (1991) (noting only that HUD would facilitate such a sale by providing an "expedited review of a request for approval of a transfer of physical assets").

There were no sales under ELIHPA in the New Orleans area. *See* PX 124a (Def.'s Resp. to Pl.'s

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[40] The Housing Act provided a limited sale option for a sale to a lower-income home purchaser or to a nonprofit organization or to a public body or agency for subsequent resale to lower-income home purchasers. *See* 12 U.S.C. §§ 1715*l*(i), (j), 1715z(i), (j).

Second Set of Interrogs. to Def.) (listing Section 236 and 221(d)(3) projects falling within jurisdiction of New Orleans HUD office that submitted plans of action for incentives or sale pursuant to ELIHPA or LIHPRHA from February 1, 1988 through March 28, 1996).[41] But there were apparently some sales under ELIHPA in other parts of the country. *See* 2009 Tr. 95:16-21, 135:3-13 (East). Mr. East testified that in these sales, the sales prices were set by an appraisal assuming no HUD restrictions, that the owner selected the appraiser, and that although purchasers had to agree to maintain the properties as a moderate- or low-income project, HUD provided incentives in the form of loans to facilitate the sales. 2009 Tr. 90:21 to 91:21 (East). Mr. East testified that to his knowledge, all approved plans of action for sale were funded, and that all owners who sought a sale were able to find buyers. 2009 Tr. 92:25 to 93:10, 95:24 to 96:9 (East).

CCA contends that even if a sale option existed under ELIHPA, it had no notice of such an option. *See* Pl.'s Br. at 31. Mr. East testified that two internal HUD memoranda from 1988 provided guidance on how to proceed with the incentives process under ELIHPA. *See* 2009 Tr. 144:4-22 (East); DX 211 (Mem. from Thomas T. Demery, Assistant Secy. for Housing, HUD, to all Regional Administrators, et al. (May 20, 1988); DX 212 (Mem. from Demery to all Regional Administrators, et al. (July 1988)). Remarkably, however, these memoranda do not even mention a sale option

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[41] Four sales did occur under LIHPRHA in 1996 and 1997, by one seller to affiliates of one non-profit entity. *See* PX 124a (Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.).

among the potential incentives, which the memoranda purported to set forth *in toto*. *See* DX 212 at 7-8 (Plan of Action: Review and Analyses). There is no evidence that Mr. Norman was aware that he could sell the property under ELIHPA, although he learned late in 1990 that he could sell the property under LIHPRHA. *See* 2006 Tr. 439:16 to 440:5 (Norman) (testifying that as of December 1990 he was aware he could have sold the property through the preservation process); PX 41 at 1 (Mr. Norman's notes following a conversation with Ms. Andrea Lockitt, a representative of the HUD-insured mortgagee, about the new statute, LIHPHRA, "address[ing] the prepayment situation in a slightly different fashion" and providing a sale option (Nov. 6, 1990)).[42]

The pertinent question thus becomes whether the statute and regulations provided CCA and others who were similarly situated with legal notice of a sale option under ELIHPA. *See, e.g., 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). Apart from the fact that ELIHPA states that

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[42] Thereafter, on December 28, 1990, CCA filed a notice of intent under ELIHPA requesting incentives to maintain the property as a low-income project or alternatively sell the property to a non-profit entity. PX 42 (Notice of Intent (Dec. 28, 1990)). The notice of intent specifies that it requests the changes under either ELIHPA or the then-recently-enacted LIHPRHA. *Id.* at 3.

the facilitation of a sale must be "authorized in other provisions of law," § 224(b)(7), and there is no evident source of such other authorizing law, ELIHPA and HUD's regulations do not outline a procedure for facilitating a sale. That some owners, working with HUD, negotiated and completed sales, *see* 2009 Tr. 90:21 to 91:21 (East), does not cure the lack of guidance in the statute and regulations, and it does not put CCA on sufficient legal notice that it could have attempted a sale to seek to obtain fair market value for Chateau Cleary under ELIHPA.

HUD also was not able to provide assurance that it would fund incentives for a sale. As Mr. East testified, to induce and enable a buyer to purchase a property at its restriction-free value, yet agree to maintain the property as a low-income housing project, HUD had to provide financial incentives to the buyers, and those financial incentives were funded through Congressional appropriations. 2009 Tr. 92:25 to 93:6 (East). The regulations specified that cost was a factor, as HUD was directed to only approve incentives that constituted "the least costly alternative for the Federal Government to achieve the purposes" of ELIHPA. 24 C.F.R. § 248.233(c) (1991). Mr. East testified that funding was not a problem between 1990 and 1993 for the sales of which he was aware. *See* 2009 Tr. 93:7-10 (East). Although Chateau Cleary's market value in 1992 is unknown, Chateau Cleary was appraised at $2,300,000 absent HUD restrictions in 1996. PX 74 (Mem. from Ernest Norman, III to John Sibal, Vice President, Eustis Mortgage Corporation (Nov. 26, 1996)). The property was located in a neighborhood that had seen considerable growth of a desirable nature, making it a prime market rental property.

CCA Assocs., 75 Fed. Cl. at 193. It is reasonable to assume that a purchaser would have required considerable financial incentives before agreeing to pay the market price for a property that would need to remain low-income housing for close to twenty years. Mr. East testified that at least between 1990 and 1993 money would have been available had CCA diligently pursued a sale. 2009 Tr. 93:11-15 (East). However, starting in 1995, funding became an issue, 2009 Tr. 152:14-25 (East), and three properties in the New Orleans area that qualified for incentives were denied for lack of funding. *See* PX 124a at 2 ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.).

Another assumption upon which the government relies in its economic calculation is that CCA could have found a buyer for Chateau Cleary. *See* Def.'s Br. at 33. In support of this contention, the government points to three pieces of evidence. First, Mr. East testified that he was unaware of any owner pursuing the sale option who was unable to find a buyer. *See* 2009 Tr. 93, 95-96, 139 (East). Second, four properties in New Orleans were sold by a particular seller to affiliates of a nonprofit organization through HUD-facilitated sales. *See* PX 124a at 3 ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.); 2009 Tr. 94:2-20 (East). And third, an unidentified non-profit buyer expressed interest in purchasing Chateau Cleary. *See* 2006 Tr. 379:4 to 380:10 (Norman); DX 124 (Letter from Andrea Lockitt, Vice President, Hunton Hastings, Inc., to Earnest Norman, Jr. (Nov. 26, 1990) (raising the possibility of purchasing Chateau Cleary).

The first item raised by the government provides little utility for this analysis as it concerns areas of the country other than the New Orleans market. Mr. East's testimony also relates only to owners who actively pursued the sale option at an early stage. The second item turns on the fact that affiliates of one purchaser came forward and bought properties in the New Orleans area. However, as discussed *infra*, those purchases took place in 1996 and 1997 under LIHPRHA, and are therefore not particularly helpful in determining whether a buyer would have been available around 1992 when the government contends CCA would have been able to sell the property. The third item focuses on the fact that Mr. Norman discussed the LIHPRHA sale option with Andrea Lockitt, a representative of the company servicing CCA's HUD-insured mortgage. 2006 Tr. 371-76 (Norman). Ms. Lockitt indicated that the mortgage-servicer had aligned with a non-profit buyer that was potentially interested in purchasing Chateau Cleary. *See* PX 41. However, the record neither reveals the name of the non-profit entity nor its financial circumstances. Based upon this evidence, it is possible that a potential buyer for Chateau Cleary could have been identified particularly in 1991 or 1992, but that possibility is uncertain. The most salient fact is that no sales occurred under ELIHPA in the New Orleans area, which meant that no sales occurred there during the period assumed by Dr. Dickey.

In sum, the possibility of a sale option under ELIHPA cannot be used to offset the economic impact of the preservation statutes because it is too speculative. ELIHPA and its implementing regulations lack any defined procedures, standards, or guidelines for effecting such a sale. They fail to put the property owner on notice of such a sale option. The absence of any defined sale process under ELIHPA also meant there was no assurance that the property owner would receive fair market value. In addition, there is uncertainty as to whether HUD would have had funding for such a sale and whether CCA could have found a willing and qualified buyer. Therefore, the assumption that CCA could have completed a sale by November 1992 if it had diligently pursued one is unsupported.

There is no question that LIHPRHA contained a sale option. *See* 12 U.S.C. § 4110; 24 C.F.R. § 248.133 (1993). Both LIHPRHA and the implementing regulations set forth a detailed sale or transfer procedure.[43] And the evidence indicates that sales took place under LIHPHRA, including four in the New Orleans area. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.); 2009 Tr. 93:20 to 95:6 (East). However, owners seeking to

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[43] The process in LIHPRHA of seeking to prepay or obtain incentives was similar to that in ELIHPA, but differed in material respects. For instance, under LIHPRHA both HUD and the owners would obtain appraisals of the fair market value of the property. 12 U.S.C. § 4103(b)(2); 24 C.F.R. § 248.111. The purchaser had to agree to retain the property under the low-income housing restrictions for the useful life of the property. 12 U.S.C. § 4121(a). To proceed with a sale required the filing of a second notice of intent, 12 U.S.C. § 4110(b)(1); 24 C.F.R. § 248.133, after which the owner was required to keep the offer to sell open for a fifteen-month period. 12 U.S.C. § 4110(b)(1). If no qualified purchaser came forward in that time period, the owner was permitted to prepay the mortgage and thereby terminate the low-income affordability restrictions. 24 C.F.R. § 248.169(a)(4). However, the prepaying owner was not allowed to raise rents for an additional three years for any tenants who were residents of the property when the owner originally filed its notice of intent. 12 U.S.C. §§ 4113(c)(1), 4114(a); 24 C.F.R. § 248.165.

sell under LIHPRHA could not commence the sale process until April 1992. *See* 2009 Tr. 116:5-8 (East) (stating that HUD could not receive notices of intent until regulations and appraisal guidelines pertinent to LIHPRHA were put in place). For the four properties sold under LIHPRHA in the New Orleans area, the owner of those properties filed notices of intent in May 1994, and the sales were completed between September 1996 and February 1997, indicating that the total sales process under LIHPRHA could be accomplished within two years and four months and two years and nine months. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.). Mr. East testified that this time frame exceeded what was typical in his experience when he was working for HUD. *See* 2009 Tr. 147:16 to 149:25 (East). But he also acknowledged that any issues arising with a seller or buyer could delay or derail the process. *See id.* HUD provided a general estimate of 41 months (three years and five months) to complete the sale process. *See* PX 201 at Appendix 1-1C.

A shortfall in funding for incentives under LIHPRHA also occurred. Three properties in the New Orleans area sought incentives under LIHPRHA and were approved by HUD, but could not be implemented because HUD lacked the requisite funding. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.). Mr. East testified that up until 1994, funding was readily available, but that "funding did become an issue in 1995, 1996, and 1997." 2009 Tr. 152:14-25 (East).

And the likelihood of a sale under LIHPRHA, as with ELIHPA, depended upon a ready and willing buyer. As discussed *supra*, there was no reasonable certainty that a buyer would be available. The court lacks sufficient evidence to determine whether the indirect expression of interest in purchasing Chateau Cleary, conveyed through a representative of CCA's HUD-insured lender, reflected an entity that would have been able and willing to purchase the property. All of the four sales that took place in the New Orleans area occurred in 1996 and 1997 and involved buyers that were affiliates of one entity. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.); 2009 Tr. 93:20 to 94:20 (East).

It is conceptually possible within the statutory and regulatory framework of LIHPRHA that CCA, had it filed a notice of intent in 1992, could have found a buyer and obtained the necessary approval from HUD to complete a sale before funding began to dry up, or alternatively prepaid the mortgage in the event that a buyer did not appear, and been subject to the three-year restriction on raising rents. However, the court must consider facts as they existed in New Orleans at the time, not merely what the regulations indicate was possible. The facts indicate that there was one owner of four properties who successfully pursued the sale option under LIHPRHA, with sales to affiliates of one entity, *see* 2009 Tr. 94:2-20 (East), and that the earliest that owner was able to accomplish a sale was in September 1996. *See* PX 124a ((Def.'s Resps. to Pl.'s Second Set of Interrogs. to Def.). That CCA might have been able to realize a fair-market sale under LIHPRHA before September 1996 is too speculative to offset the economic loss imposed on CCA by the prepayment restrictions.

In conclusion, the preservation statutes restricted CCA's ability to prepay its mortgage and thereby free itself of the housing restrictions and realize its full market-based earning potential and thus value. While Congress sought to provide offsetting benefits to ameliorate this restriction, the evidence that a sales option or other incentive could have been used by CCA prior to September 1996 is too speculative to establish an offset in this case. Therefore, this court finds that CCA suffered an economic impact of 18 percent to its market value as a result of the temporary restrictions in place under the preservation statutes even considering potentially available statutory benefits. *See* Joint Stipulation of Facts at ¶ 4 (July 14, 2009).

5. Takings Synopsis.

Having examined each of the *Penn Central* factors, the ultimate question becomes whether the statutory restriction on prepayment in this case went too far by forcing CCA and other property owners within the HUD programs to bear alone the burden of providing housing for low-income populations "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see Pennsylvania Coal*, 260 U.S. at 415. "The preservation statues [had] the character of a taking in that they disproportionately placed the burden of providing low-income housing on owners of Section 221(d)(3) properties, such as CCA." *CCA Assocs.*, 75 Fed. Cl. at 199. CCA also had reasonable, investment-backed expectations that were frustrated by ELIHPA and LIHPRHA. For CCA, the ability to prepay their mortgage after 20 years was both the "but-for" and the primary investment expectation. Other benefits, such as annual distributions and tax benefits, may have been significant for investors in different circumstances; but for CCA and others who built similar projects in areas that were developing or improving, the other benefits were secondary, peripheral reasons for their investment. Chateau Cleary was ideally located in the path of future development, positioning it for conversion to a market-rate conventional apartment complex.

As a result of the temporary taking, and considering the entire, whole, useful life of Chateau Cleary, CCA suffered an 18% economic loss in its total market value. In determining how far is too far, there is "no magic number," *Rose Acre Farms*, 559 F.3d at 1282, and "no set formula." *Cienega X*, 503 F.3d at 1278. Here, an 18% economic loss concentrated over approximately five years constitutes a "serious financial loss." *Loveladies Harbor*, 28 F.3d at 1177. The duration of the deprivation, five years and ten days, is significant in this regard. Although there is no magic number for duration, just as there is none for economic loss, *see Tahoe-Sierra*, 535 U.S. at 342 (in a temporary regulatory takings case, "the duration of the restriction is one of the important factors that a court must consider," but rejecting a six-year *per se* takings rule), the five-year period of restriction is definitely greater than the more-than-one-year duration that the Supreme Court in *Tahoe-Sierra* said "should be viewed with special skepticism." *Id.* at 341. The Supreme Court in *Tahoe-Sierra* addressed a 32-month moratorium and held that the *Lucas* categorical-taking rule did not apply. Nonetheless, it commented that if plaintiffs had sought relief on a non-categorical-taking claim related to individual parcels, "some of them might have prevailed on a *Penn-Central* analysis." *Id.* at 334. That observation applies to this case. The economic loss suffered here, when combined with the character of the government's actions and CCA's reasonable investment-backed expectations, which both factor heavily in CCA's favor, is sufficient to establish that CCA suffered a temporary regulatory taking.[44]

C. Just Compensation

Just compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943); *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (there is "no doubt that the compensation must be a full and perfect equivalent for the property taken"); *Narramore v. United States*, 960 F.2d 1048, 1051 (Fed. Cir. 1992) ("The Fifth Amendment guarantees a property owner the right to seek damages for the full extent of a taking.").

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[44] The *Rose Acre Farms* case is instructive in how economic loss must be considered in light of the other *Penn Central* factors in a temporary regulatory takings case. In that case, over a twenty-five month period, the plaintiff suffered a 10% loss in value to 43% of its eggs. *Rose Acre Farms*, 559 F.3d at 1264, 1283. This economic impact was considered "not severe" by the Federal Circuit. *Id.* at 1283. And while reasonable investment-backed expectations favored the plaintiff, the character of the government's regulations strongly favored a non-taking. *Id.* On balance, therefore, the Federal Circuit viewed the factors as requiring a holding of no compensable taking. *Id.*

This court's prior judgment was vacated and remanded for further consideration in accordance with *Cienega X, see CCA Assocs.*, 284 Fed. Appx. at 811, and included no instructions regarding just compensation, except that the decision in *Cienega X* noted that offsetting benefits are pertinent to the analysis. *See Cienega X*, 503 F.3d at 1284 n.14.[45] This court previously held that "[t]he proper measure of damages for a temporary taking of a going business concern [is] the difference between the fair market rent the owner could have earned, but for the taking, and the rent, if any, the owner earned during the takings period." *CCA Assocs.*, 75 Fed. Cl. at 200 (citing *Kimball Laundry*, 338 U.S. at 7 ("the proper measure of compensation is the rental that probably could have been obtained [but for the taking]."); *United States v. Petty Motor*, 327 U.S. 372, 381 (1946) (just compensation is measured by "the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew . . . less the agreed rent which the tenant would pay for such use and occupancy."); *see also United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all

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[45] As explained *supra* at 42-47, the availability of a sale option to CCA during the time of the temporary taking is too speculative to offset economic losses or, in this case, reduce just compensation. Other potential benefits, such as those available with use agreements to extend the life of low-income use, were not addressed at trial. Accordingly, just compensation will not be offset by any potential offsetting benefits CCA might have opted to receive under the preservation statutes.

cases.")); *Pewee Coal*, 341 U.S. at 117 ("Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use," but the better measure on the facts of that case was the operating losses suffered during the temporary period of governmental control.). This court previously rejected the government's contention, renewed here (*see* Def.'s Br. at 49-50), that compensation should be calculated as of the start of the alleged takings period. *See CCA Assocs.*, 75 Fed. Cl. at 202 (rejecting this contention because it is derived from permanent taking cases, and explaining that in a temporary taking case, the time of the taking is the full period during which governmental action constrained the owner's property rights).[46]

As this court's prior methodology was implicitly approved by the Federal Circuit in *Independence Park Aparts.*, 449 F.3d at 1248 (holding that an owner who signed a use agreement during the takings period was entitled to just compensation for the term of the use agreement), the same analysis will be applied here, with one exception. The court adopted the model of damages developed by CCA's expert, Dr. Ragas, who calculated "the difference between the cash flow CCA would have received had it been allowed to prepay its mortgage and operate

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[46] As the court explained previously, the government's proposed just compensation model is not a true *ex ante* approach because, while it purports to calculate different valuations as of May 1, 1991, it assumes that reasonable investors would know with certainty that HOPE would be enacted in 1996. *See CCA Assocs.*, 75 Fed. Cl. at 202 n.43. A proper *ex ante* analysis should be based only on the facts and circumstances known at the time of the start of the taking. *Id.*

the property as a conventional apartment complex . . . and the cash flow CCA actually received from operating the property as a HUD-restricted property." *CCA Assocs.*, 75 Fed. Cl. at 200. Dr. Ragas's calculations assumed a takings period from January 1991 to February 1997. However, as explained *supra*, at 27 n.24, the Federal Circuit has concluded that the period of restriction attributable to HUD's post-HOPE preservation letters should be disregarded, and thus the takings period only extends to the enactment of HOPE, plus the 60-day restriction on rent increases – that is, until May 27, 1996. Accordingly, the total estimated foregone net rental income for Chateau Cleary apartments suffered by CCA Associates from May 1991 to May 1996 was $714,430. *See* PX 106 at 47-48 (Second Ragas Report); *compare CCA Assocs.*, 75 Fed. Cl. at 204. Further, CCA is entitled to compound interest at the ten-year Treasury STRIPS rate. *See CCA Assocs.*, 75 Fed. Cl. at 205.

CONCLUSION

For the reasons stated, the court is bound by precedent established by the decision in *Cienega IV* to conclude that the government was not in privity with CCA in regards to CCA's contractual right to prepay its mortgage after twenty years. The government therefore is not liable on CCA's breach-of-contract claim. However, the court finds that CCA has suffered a temporary taking for which just compensation is due. The amount of just compensation awarded CCA is $714,430 as of the end of the temporary takings period, May 27, 1996, plus compound interest at the ten-year STRIPS rate from that date to the date the judgment is actually paid.

Final judgment to this effect shall be issued under RCFC 54(b) because there is no just reason for delay. In due course, the court will also award costs to plaintiff, including an award of attorneys' fees and expenses under Section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). Given the high likelihood of appeal in this case and in the interest of efficiency, proceedings on award of attorneys' fees and costs should be deferred until after any appellate process has been concluded.

The clerk shall enter final judgment as specified above. It is so ORDERED.

s/ Charles. F. Lettow
Charles F. Lettow
Judge

UNITED STATES COURT OF FEDERAL CLAIMS

CCA ASSOCIATES, Plaintiff,

v.

UNITED STATES, Defendant.

No. 97-334C.

Jan. 31, 2007.

LETTOW, Judge.

This case raises issues that reprise those addressed, tried, and decided in *Cienega Gardens v. United States,* 67 Fed.Cl. 434 (2005) ("*Cienega IX*"), on remand from *Cienega Gardens v. United States,* 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"), and *Chancellor Manor v. United States,* 331 F.3d 891 (Fed. Cir. 2003). Plaintiff, CCA Associates ("CCA"), is a Louisiana partnership that owns an apartment complex in Metairie, Louisiana. CCA claims that the United States effected a temporary taking of its property without just compensation in contravention of the Fifth Amendment of the United States Constitution. Specifically, CCA avers that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715*l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") (codified in scattered sections of Title 12 of the U.S. Code, including 12 U.S.C. §§ 4101 to 4124), stripped the partnership of its contractual right to prepay its mortgage and thereby to exit the low-income housing program under which it was operating and begin to operate the apartment complex on a conventional basis.

A seven-day trial was held on September 5-8, 12, and 26-27, 2006, and a site visit was conducted on September 11, 2006. Following post-trial briefing, closing argument, and supplemental briefing, this case is now ready for disposition. For the reasons set forth, the court finds that the government's actions constituted a temporary taking of CCA's property for which CCA is entitled to just compensation.

FACTS[1]

A. *Statutory and Regulatory Framework*

1. *Evolution of the Section 221(d)(3) program.*

During the Great Depression, Congress sought to encourage private lending for home repairs and home construction by passing the National Housing Act, Pub.L. No. 73-479, 48 Stat. 1246 (1934). The Act created the Federal Housing Administration and authorized its administrator to insure home mortgages under two programs: one for residences designed for up to four families and another for multifamily housing units. *Id.* §§ 201, 203, 207, 48 Stat. at 1247-48, 1252. A more direct effort to aid

[1] This recitation of facts constitutes the court's primary findings of fact in accord with Rule 52(a) of the Rules of the Court of Federal Claims ("RCFC"). Other findings of fact and rulings on questions of mixed fact and law are set out in the analysis.

In this opinion, references to plaintiff's exhibits are to "PX __" and to defendant's exhibits are to "DX __" References to plaintiff's demonstrative exhibits are to "PDX __" and to defendant's demonstrative exhibits are to "DDX __."

low-income families followed three years later with the passage of the United States Housing Act of 1937, Pub.L. No. 75-412, 50 Stat. 888, which created a federally-funded public housing program. *Id.* §§ 9-11, 50 Stat. at 891-93; *see* HUD Historical Background, http:// www. hud. gov/ offices/ adm/ about/ admguide/ history. cfm (last visited Jan. 26, 2007).

Beginning with the Housing Act of 1949, Pub.L. No. 81-171, 63 Stat. 413, Congress also attempted to support low-income housing through various slum-clearance and urban-redevelopment projects. *Id.* §§ 101-10, 63 Stat. at 414-421. To aid families displaced by these urban redevelopment projects, Congress amended the National Housing Act in 1954 to add Section 221(d)(3), which authorized mortgage insurance for non-profit organizations and public housing authorities assisting such families. *See* Housing Act of 1954, Pub.L. No. 83-560, § 123, 68 Stat. 590, 599-601 (codified as amended at 12 U.S.C. § 1715*l* (d)(3)).

The Housing Act of 1961, Pub.L. No. 87-70, 75 Stat. 149, expanded the Section 221(d)(3) program by broadening the purpose of the program to include "moderate income families," not just families displaced by urban redevelopment projects, and by opening the program to private-sector investors. *Id.* §§ 101(a)(2), (a)(6), 75 Stat. at 149-50 (codified as amended at 12 U.S.C. § 1715*l*(a), (d)(3)); *see* S.Rep. No. 87-281, at 5, 96 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1923, 1926, 2014. The Housing Act of 1961 restricted mortgage insurance under Section 221(d)(3) to projects containing five or more units, § 101(a)(12), 75 Stat. at 152 (codified, as amended, at 12 U.S.C. § 1715*l*(f)), but also provided two key incentives for investors: authorization for waivers of FHA mortgage insurance premiums and loans at below-market interest rates. *See id.* §§ 101(a)(6), (11), (c), 75 Stat. at 150, 152, 153 (codified, as amended, at 12 U.S.C. § 1715*l*(d)(5), (f)); *see* S.Rep. No. 87-281, at 97, *reprinted in* 1961 U.S.C.C.A.N. at 2016.[2] In 1968, Congress added a "Section 236"

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[2] The Housing Act of 1961 did not authorize the FHA itself to make loans with below-market interest rates, but it effectively guaranteed those rates by granting the Federal National Mortgage Association ("Fannie Mae") the power to purchase mortgages insured under the Section 221(d)(3) program. § 101(c), 75 Stat. at 153. As the House report accompanying the 1961 Act explained: "The essence of the new proposal is to provide long-term loans at a very low interest rate, using the FHA insurance machinery and providing the necessary funds through the resources of the special assistance programs of [Fannie Mae]." H.R.Rep. No. 87-447, at 11 (1961); *see also* S.Rep. No. 87-281, at 8, *reprinted in* 1961 U.S.C.C.A.N. at 1930 ("The [Section 221(d)(3)] mortgage loans could be purchased from the lender under the special assistance program of [Fannie Mae]."). In practice, only Fannie Mae purchased these loans, so the Section 221(d)(3) program "amount[ed] to a[ ] [Fannie Mae] loan to FHA-approved cooperative projects." Note, *The Cooperative Apartment in Government-Assisted Low-Middle Income Housing,* 111 U.Pa. L. Rev. 638, 650 (1963); *see also* Nathaniel S. Keith, *An Assessment of National Housing Needs,* 32 Law & Contemp. Probs. 209, 214 (1967) (Under the Section 221(d)(3) program, "the permanent mortgage is purchased by [Fannie Mae]."). *See, e.g.,* PX 33 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)) ("Ernest B. Norman, Jr. transfer to CCA") at 3 (indicating that CCA's original mortgagee, Pringle-Associates Mortgage Corporation, had sold the mortgage to the Government National Mortgage Association ("Ginnie Mae"), a successor to the original Fannie Mae); *see also* 12 U.S.C. § 1717(a), (b)(1) (providing that the original Fannie Mae was split into Fannie Mae and Ginnie

program, which subsidized owners' monthly mortgage payments and provided mortgage insurance. Housing and Urban Development Act of 1968, Pub.L. No. 90-448, § 201(a), 82 Stat. 476, 498-501 (codified, as amended, at 12 U.S.C. § 1715z-1(a), (j)).

By statute, the Secretary of HUD has authority to condition participation in the Section 221(d)(3) program on an owner's agreement to restrictions on the use of his property. 12 U.S.C. § 1715*l*(b), (f). Under a regulatory agreement co-signed with HUD, participating owners were required to limit occupancy to low- or moderate-income families, charge rents in accord with a HUD-approved rental schedule, manage their properties "in a manner satisfactory to [HUD]," and refrain from conveying the property without HUD approval. PX 2 (Regulatory Agreement, signed by HUD, Ernest B. Norman, Jr., and J. Robert Norman (November 7, 1969)) ("1969 regulatory agreement"), ¶¶ 4(b), 5(c), 6(c), 9(a). Owners were subject to HUD audits and were required to submit annual financial reports to HUD. *Id.,* ¶¶ 9(c), (e). In addition, an owner's annual return was limited to six percent of the initial equity investment. *Id.* ¶ 6(e)(1).

Owners assented to these restrictions in part because they could borrow 90 percent of the purchase price on the basis of a forty-year amortization period, 12 U.S.C. § 1715*l*(d)(3)(iii), (*i*)(2)(A)(iv); Tr. 1161:3-6 (Test. of Kenneth Malek, a

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Mae, both of which have statutory authority to purchase mortgages insured under Section 221(d)(3)).

tax accounting expert called by the government),[3] and they also were given a Builder's and Sponsor's Profit and Risk Allowance ("Builder's Allowance") that, when coupled with the loan, typically reduced an investor's initial cash outlay to 1.5 to 3 percent of the cost of the project. Tr. 1160:12-19 (Test. of Malek).[4] Owners additionally were permitted to take out non-recourse loans, thereby avoiding personal liability for the debt. *See, e.g.,* PX 3 (secured note co-signed by Ernest B. Norman, Jr. and J. Robert Norman (November 7, 1969)) ("1969 note"); Tr. 94:23 to 95:1 (Test. of Mr. Ernest B. Norman, III, the managing partner of CCA). Lastly, although the Section 221(d)(3) program generally precluded prepayment of the forty-year mortgages without prior HUD approval, owners of so-called limited-dividend corporations were entitled to prepay their mortgages after twenty years. 24 C.F.R. § 221.524(a)(1)(ii) (1971); *see also* PX 3 (1969 note) (referring to prepayment by a "limited dividend

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[3] The Housing Act of 1961 initially permitted owners of newly constructed projects to obtain no-equity loans under the Section 221(d)(3) program. §§ 101(a)(6), (c), 75 Stat. at 150-51, 153; *see also* H.R.Rep. No. 87-447, at 11 (stating that the Housing Act of 1961 broadened the Section 221(d)(3) program "to authorize a new program of long-term, low-interest-rate, 100-percent loans for rental and cooperative housing projects containing five or more dwelling units"). The Housing Act of 1964, Pub.L. No. 88-560, 78 Stat. 769, later limited the loan amount to ninety percent of the replacement cost of the property for governmental, non-profit, and other qualified owners. *See* § 114(c), 78 Stat. at 779 (codified as amended at 12 U.S.C. § 1715*l* (d)(3)(iii)).

[4] The Builder's Allowance was equal to ten percent of the total estimated cost of the project, exclusive of the value of the land. Tr. 1166:7-11 (Test. of Malek).

corporation"); PX 5 (secured note co-signed by Ernest B. Norman, Jr. and J. Robert Norman (May 17, 1971)) ("1971 note") (same).[5] This prepayment right was dictated by regulation, 24 C.F.R. § 221.524(a)(1)(ii) (1971), was explicitly stated in the mortgage note, PX 3 (1969 note); PX 5 (1971 note), and was incorporated by reference in the mortgages. PX 4 (mortgage signed by Ernest B. Norman, Jr., J. Robert Norman, and Pringle-Associated Mortgage Corporation (November 7, 1969)) ("1969 mortgage"); PX 6 (mortgage signed by Ernest B. Norman, Jr., J. Robert Norman, and Pringle-Associated Mortgage Corporation (May 17, 1971)) ("1971 mortgage").[6] Prepayment removed the regulatory restrictions and allowed participation in the conventional rental housing market.

2. *Emergency Low Income Housing Preservation Act of 1987.*

By the mid-1980s, Congress realized that if owners of housing insured under Section 221(d)(3) began to exercise their prepayment rights, the stock

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5 HUD defined a "limited dividend mortgagor" as "a corporation, trust, partnership, association, other entity, or an individual ... restricted by law (or by the [FHA] Commissioner) as to distribution of income and shall be regulated as to rents, charges, rate of return, and methods of operation in such form and manner as is satisfactory to the Commissioner." 24 C.F.R. § 221.510(c) (1971).

6 The pertinent regulation read: "A mortgage indebtedness may be prepaid in full and the [FHA] Commissioner's controls terminated without the prior consent of the Commissioner ... [w]here the mortgagor is a limited distribution type ... and where the prepayment occurs after the expiration of 20 years from the date of final endorsement of the mortgage." 24 C.F.R. § 221.524(a)(1)(ii) (1971).

of low-income housing units would decline in volume. H.R.Rep. No. 100-122(I), at 35, *reprinted in* 1987 U.S.C.C.A.N. 3317, 3351 (1987). Reciting that "in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 could be lost as a result of the termination of low income affordability restrictions," Congress enacted ELIHPA, § 202(a)(1), 101 Stat. at 1877 (codified at 12 U.S.C. § 1715*l* note). ELIHPA forestalled prepayment of Section 221(d)(3) mortgages by conditioning prepayment on HUD's prior approval, abrogating the unrestricted prepayment right specified in HUD's regulations and the owners' mortgage notes. ELIHPA § 221(a), 101 Stat. at 1878-79; 24 C.F.R. § 221.524(a)(1)(ii) (1971); PX 3 (1969 note); PX 5 (1971 note). In September 1990, HUD issued regulations implementing ELIHPA. *See* Prepayment of a HUD-Insure Mortgage by an Owner of Low-Income Housing, 55 Fed.Reg. 38,944 (Sept. 21, 1990) (codified at 24 C.F.R. §§ 248.101-248.261 (1991)).

Under ELIHPA, an owner seeking to prepay or to alter the terms of the mortgage or the regulatory agreement had first to file with HUD a notice of intent outlining his or her plans. ELIHPA § 222, 101 Stat. at 1879. After HUD received the owner's notice of intent, the department would provide the owner with information needed to file a so-called plan of action and a list of ELIHPA-established incentives available upon an agreement to extend the use of the owner's housing units for low-income tenants. ELIHPA § 223(a), 101 Stat. at 1879. Those incentives included HUD's agreement to increase the allowable annual distribution, alter the method of calculating an owner's equity in the property, increase the owner's access to accounts it maintained for residual receipts and replacements,[7] provide insurance for a second mortgage, or facilitate the sale of the property to a non-profit organization, a public agency, or a tenant cooperative. ELIHPA § 224(b)(1)-(4), (7), 101 Stat. at 1880. The plan of action that the owner submitted to HUD was to include any proposed changes to the regulatory agreement, the mortgage, or the low-income affordability restrictions, as well as an assessment of the effect of proposed changes on existing tenants and the local supply of low- and very-low-income housing. ELIHPA § 223(b)(1),(3),(5)-(6), 101 Stat. at 1879.

Within 60 days of an owner's submission of a plan of action, HUD was to advise the owner of any "deficiencies" that prevented the plan of action from being approved and to suggest revisions to the plan that would lead to its approval by HUD. ELIHPA § 227(a), 101 Stat. at 1883. No later than 180 days after receipt of an owner's plan of action, HUD was required to notify the owner in writing whether HUD had approved the plan and, if HUD had rejected the plan, what steps the owner could take to obtain approval. ELIHPA § 227(b)(1), 101 Stat. at 1883. Before HUD could permit owners to prepay, the Secretary had to make written findings that:

> (1) implementation of the plan of action will not materially increase economic hardship for

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7 Section 221(d)(3) regulatory agreements required owners to maintain a "reserve fund for replacements" to cover repair expenses and a "residual receipts fund," which consisted of cash remaining after a limited dividend entity had declared and paid its distributions. *See* PX 2 (1969 regulatory agreement).

current tenants or involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available; and

(2)(A) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect-

(i) the availability of decent, safe, and sanitary housing affordable to lower income and very low-income families or persons in the area that the housing could reasonably be expected to serve;

(ii) the ability of lower income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

(iii) the housing opportunities of minorities in the community within which the housing is located; or

(B) the plan has been approved by the appropriate State agency and any appropriate local government agency for the jurisdiction within which the housing is located as being in accordance with a State strategy approved by the Secretary under section 226.

ELIHPA § 225(a), 101 Stat. at 1880.[8]

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8 In November 1988, Congress amended ELIHPA to clarify that the phrase "materially increase economic hardship" included "a monthly rental payment by a current tenant that exceeds 30 percent of the monthly adjusted income of the tenant or an increase in the monthly rental payment in any year that exceeds 10 percent (whichever is lower), or ... in the case of a current tenant who already pays more than such percentage, an increase in the monthly rental payment in any

If the submitted plan of action requested incentives in exchange for extending the low-income affordability restrictions, ELIHPA conditioned approval of the plan upon a Secretarial finding that: (1) the housing would remain affordable to very-low-, low-, and moderate-income tenants for the remaining term of the mortgage, (2) the owner would expend adequate funds for maintenance and operation of the property, (3) the current tenants would not be involuntarily displaced, except for good cause, (4) any rent increase would not exceed thirty percent of a tenant's adjusted gross income or the fair market rent for comparable Section 8(b) housing,[9] whichever was lower, (5) rent increases, except those based on increased operating expenses, would be phased in, and (6) any rent increases, to the extent practicable, would not decrease the proportion of low-income tenants for whom such housing units were available and affordable. ELIHPA § 225(b)(3), 101 Stat. at 1881. The approved plans locking in the affordability restrictions for the life of the mortgages were known as "use agreements." Tr. 627:23 to 628:18 (Test. of Jim E. Alexander, a former HUD employee); *Cienega Gardens IX,* 67 Fed. Cl. at 441-42.

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year that exceeds the increase in the Consumer Price Index or 10 percent (whichever is lower)." Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub.L. No. 100-628, § 1024(1), 102 Stat. 3224, 3270-71.

[9] Section 8(b) of the United States Housing Act of 1937 provides rent subsidies via direct payments through public housing authorities to owners of low-income housing. *See* United States Housing Act of 1937, § 8 (codified, as amended, at 42 U.S.C. § 1437f(b)).

In sum, after the enactment of ELIHPA, the owner of a property insured under Section 221(d)(3) had four options. First, he or she could do nothing and let the forty-year mortgage run its course with the regulatory restrictions remaining in place. Second, he or she could attempt to gain HUD approval for prepayment, a process that required the Secretary's certification that prepayment would not have adverse effects on the low-income housing stock or on current tenants. ELIHPA § 225(a), 101 Stat. at 1880. Third, an owner could agree to extend the affordability restrictions in exchange for HUD-provided incentives, such as increasing annual distributions. ELIHPA § 224(b)(1), 101 Stat. at 1880-81. Fourth, the owner could ask HUD to arrange for a sale to HUD-approved buyers. ELIHPA §§ 224(b)(7); 225(b)(3), 101 Stat. at 1880-81.[10]

3. *Low-Income Housing Preservation and Resident Homeownership Act of 1990.*

With the passage of LIHPRHA, § 601(a), 104 Stat. at 4249-50 (1990) (codified at 12 U.S.C. § 4101, *et seq.*), Congress extended indefinitely ELIHPA's temporary requirement that barred owners of housing insured under Section 221(d)(3) from prepaying their mortgages and removing the attendant regulatory restrictions without HUD approval. LIHPRHA § 601(a), 104 Stat. at 4249; *Cienega Gardens VIII,* 331 F.3d at 1326. HUD

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10 The precise process for arranging for a HUD-assisted sale of the property was not specified either in ELIHPA or in HUD's implementing regulations. *See* ELIHPA, §§ 223(b)(4), 224(b)(7); 24 C.F.R. § 248.231 (1991) (noting only that HUD would facilitate such a sale, by providing an "expedited review of a request for approval of a transfer of physical assets").

promulgated regulations implementing LIHPRHA in April 1992. *See* Prepayment of Low Income Housing Mortgages, 57 Fed. Reg. 12,041 (Apr. 8, 1992) (codified at 24 C.F.R. §§ 248.1-248.319 (1993)).

LIHPRHA's restrictions on prepayment were similar, but not identical, to those in ELIHPA. As with ELIHPA, the owner had four options, three of which required HUD approval: do nothing, prepay the mortgage, seek incentives to extend the affordability restrictions, or sell the property to a HUD-approved buyer. 12 U.S.C. § 4101(a). The process for obtaining HUD's approval also began in the same way, *i.e.,* with the filing of a notice of intent.[11] Thereafter, HUD would provide the owner with information on the criteria for termination and the available incentives, and the owner would then submit a plan of action. 12 U.S.C. §§ 4101-02, 4106.

The LIHPRHA criteria for approval of prepayment were more stringent than those in ELIHPA. Prior to amendment of ELIHPA in the Stewart B. McKinney Homeless Amendments Act of 1988, *see supra,* at 175, n. 8, ELIHPA had left the phrase "materially increase economic hardship" undefined, but LIHPRHA defined that phrase to include (1) monthly rental increases exceeding ten percent or exceeding thirty percent of a tenant's monthly adjusted income, whichever was lower, or (2) if a tenant already was paying more than such percentages, monthly rental increases exceeding ten

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[11] Under LIHPRHA, owners seeking to sell their properties actually were required to submit two notices of intent-one to initiate the process and a second, 30 days after receiving from HUD information necessary to prepare a plan of action for the sale. 12 U.S.C. §§ 4102(a), 4106(b), (d).

percent or exceeding the increase in the Consumer Price Index. 12 U.S.C. § 4108(a)(1)(A). If prepayment would result in increases beyond these thresholds, the Secretary was not permitted to approve prepayment. 12 U.S.C. § 4108(a).

The procedures under LIHPRHA for receiving incentives or arranging for a sale were also more onerous than they were under ELIHPA. HUD was only permitted to approve plans of action seeking incentives or a sale upon the Secretary's finding that the housing would be retained for very-low, low-, and moderate-income tenants "for the remaining useful life" of the property in question. 12 U.S.C. § 4112(a)(2)(A). Owners were required to petition HUD for a determination of when the useful life of the property had expired, but the owner could not submit such a petition until 50 years after the approval of a plan of action for the property. 12 U.S.C. § 4112(c)(3). LIHPRHA also removed from ELIHPA's list of possible incentives an increase in the owner's annual distributions. *Compare* § 224(b), 101 Stat. at 1880, *with* 12 U.S.C. § 4109(b).

Under LIHPRHA, owners seeking to obtain incentives in exchange for extending affordability restrictions or to sell their property to a HUD-approved purchaser had to overcome more hurdles than those required under ELIHPA. For an owner who had filed a notice of intent, LIHPRHA mandated a process for appraising the so-called "preservation value" of the property – *i.e.*, the fair market value of the property "based on [its] highest and best use," taking into account the costs of converting the property to market-rate rental housing. 12 U.S.C. § 4103.[12] An owner was not permitted to sell his or her property for more than the preservation value. 12 U.S.C. § 4110(b)(1).

For properties appraised under LIHPRHA, HUD also required calculation of the so-called "aggregate preservation rents" by a formula that estimated the "gross potential income for the project;" such an estimate entailed covering various costs, such as debt service and operating expenses, and, in the case of owners seeking incentives to extend the affordability restrictions, taking into account an annual authorized return. 12 U.S.C. § 4104(b). HUD then would determine if the aggregate-preservation rents for a property exceeded an aggregate statutory cap, which was determined by "multiplying 120 percent of the fair market rental (established [in accord with statutory procedures]) for the market area in which the housing is located by the number of dwelling units in the project." 12 U.S.C. § 4105(a).

If the aggregate-preservation rents exceeded the cap, the owner could: (1) request incentives, provided "the amount of the incentives [would] not exceed an amount that [could] be supported by a projected income stream equal to the [cap]," 24 C.F.R. § 248.127(a) (1993); 12 U.S.C. § 4105(b)(2)(A), (2) sell the property at a price that did not exceed the cap, 12 U.S.C. § 4105(b)(2)(B), or (3) file a second notice of intent indicating his or her desire to prepay the mortgage or voluntarily terminate the FHA

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12 The owner and HUD each chose appraisers to assess the "preservation value" of the property. If neither the two appraisers, nor the owner and HUD, could agree on a value, the owner and HUD would jointly choose a third appraiser, whose appraisal would be binding. 12 U.S.C. § 4110(b)(1).

insurance, on the condition that if a HUD-approved purchaser offered within fifteen months to pay the appraised "preservation value," the owner was required to make the sale. 12 U.S.C. §§ 4105(b)(2)(C), 4111(b),(c). If the preservation rents did not exceed the cap, the owner could file a plan of action to request incentives or seek a HUD-approved sale. 12 U.S.C. § 4105(b)(1).[13]

As noted, a HUD-approved sale required the owner to file a second notice of intent with HUD. 12 U.S.C. § 4106(d). For a year following HUD's receipt of this second notice of intent, an owner could sell only to so-called priority purchasers, which were limited to HUD-approved resident homeownership groups and non-profits agreeing to maintain the affordability restrictions "for the remaining useful life of the project." 12 U.S.C. §§ 4110(b)(1), 4116; 24 C.F.R. § 248.101 (1993). For the succeeding three months, owners could sell only to so-called qualified purchasers, which included for-profit purchasers, but only those pledging to retain the affordability restrictions for the life of the property. 12 U.S.C. § 4110(c); 24 C.F.R. § 248.101 (1993). LIHPRHA authorized HUD to provide, in addition to incentives, direct financial assistance to facilitate a sale, under statutory conditions restricting the sales price and the potential buyers. *See* 12 U.S.C. § 4110(d).

In the event HUD did approve an owner's plan of action to obtain incentives or to sell his or her property, LIHPRHA permitted prepayment in particular cases in which the plan was not fulfilled.

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13 HUD was required to consider the rent caps in determining whether to provide incentives to owners seeking them. 12 U.S.C. § 4109(a).

If HUD failed to satisfy any of three separate timelines for providing incentives it already had approved, the owner could prepay the mortgage. 12 U.S.C. § 4114(a)(3). Similarly, if HUD had approved the sale of the property, but the owner could not find a *bona fide* purchaser, the owner also could prepay. 12 U.S.C. § 4114(a)(2).

LIHPRHA also permitted owners whose properties would become "eligible low-income housing" before January 1, 1991, and who had filed a notice of intent by that date, to elect to follow the regulatory scheme under either ELIHPA or LIHPRHA. *See* LIHPRHA § 604(a), 104 Stat. at 4277 (codified at 12 U.S.C. § 4101 note). For purposes of this election, "eligible low-income housing" included properties whose mortgages or loans were insured under Section 221(d)(3) with a below-market interest rate and were eligible for prepayment within 24 months of LIHPRHA's enactment. 12 U.S.C. § 4119(1)(A)(ii), (1)(B).

4. *H.R. 2099.*

Five years after the enactment of LIHPRHA, Congress sought to change its approach to prepayment. On December 14, 1995, Congress passed H.R. 2099, which provided appropriations for various federal agencies, including HUD. The bill conditioned HUD's funding for assistance under ELIHPA and LIHPRHA on numerous requirements including that "an owner of eligible low-income housing [be able to] prepay the mortgage or request voluntary terminat[i]on of a mortgage insurance contract, so long as said owner agrees not to raise rents for sixty days after such prepayment." H.R. 2099, 104th Cong. (1st Sess. 1995) (undesignated second paragraph of Title II); 141 Cong. Rec. S18,657-58 (1995) (Senate passage of H.R. 2099). President Clinton vetoed H.R. 2099, *see* 141 Cong. Rec. H15,061 (1995), and the bill did not become law.

5. *The Housing Opportunity Program Extension Act of 1996.*

Within months of President Clinton's veto of H.R. 2099, however, Congress passed and President Clinton signed into law the Housing Opportunity Program Extension Act of 1996 ("HOPE"), Pub.L. No. 104-120, 110 Stat. 834. HOPE reinstated the prepayment rights of owners whose mortgages were insured under Section 221(d)(3). *Id.* § 2(b), 110 Stat. at 834-35 (March 28, 1996). HOPE did so expressly by incorporating the various conditions on HUD funding set out in H.R. 2099, including the condition making appropriations related to ELIHPA and LIHPRHA contingent on HUD's permitting owners of eligible low-income housing to prepay their mortgages, provided the owners did not raise their rents for sixty days following prepayment. *Id.* HOPE thus lifted the prepayment restrictions imposed by ELIHPA and LIHPRHA. *See Cienega VIII,* 331 F.3d at 1326-27. HOPE provided that, except as otherwise stated in future appropriation acts, the conditions of H.R. 2099 would apply to ELIHPA and LIHPRHA funds "provided in any appropriation Act enacted after the date of the enactment of this Act." HOPE, § 2(b)(2), 110 Stat. at 834-35.[14] Subsequent

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[14] In pertinent part, HOPE provided:

(b) Low-Income Housing Preservation.-

(1) Use of Amounts-Notwithstanding any provision of the Balanced Budget Downpayment Act, I (Public Law

appropriation acts reiterated HOPE's reinstatement of owners' prepayment rights. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321, 1321-267 (codified at 12 U.S.C. § 4101 note); Departments of Veterans Affairs and Housing and Urban

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104-99; 110 Stat. 26) or any other law, the Secretary shall use the amounts described in paragraph (2) of this subsection under the authority and conditions provided in the second undesignated paragraph of the item relating to "Housing Programs-Annual Contributions for Assisted Housing" in title II of the bill, H.R. 2099 (104th Congress), as passed [by] the House of Representatives on December 7, 1995; except that for purposes of this subsection, any reference in such undesignated paragraph to March 1, 1996, shall be construed to refer to April 15, 1996, any reference in such paragraph to July 1, 1996, shall be construed to refer to August 15, 1996, and any reference in such paragraph to August 1, 1996, shall be construed to refer to September 15, 1996.

(2) Description of Amounts.-Except as otherwise provided in any future appropriation Act, the amounts described under this paragraph are any amounts that-

(A) are-

(i) unreserved, unobligated amounts provided in an appropriation Act enacted before the date of the enactment of this Act;

(ii) provided under the Balanced Budget Downpayment Act, I; or

(iii) provided in any appropriation Act enacted after the date of the enactment of this Act; and

(B) are provided for use in conjunction with properties that are eligible for assistance under the Low-Income Housing Preservation and Resident Homeownership Act of 1990 or the Emergency Low Income Housing Preservation Act of 1987.

Development, and Independent Agencies Appropriations Act, 1977, Pub.L. No. 104-204, 110 Stat. 2874, 2883-84 (codified at 12 U.S.C. § 4101 note); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub.L. No. 105-276, § 219, 112 Stat. 2461, 2487-88 (1998).

6. *Preservation letters.*

Notwithstanding the enactment of HOPE, reinstating owners' rights to prepay their mortgages after 20 years *without* HUD approval, HUD sent to its regional offices a series of so-called preservation letters, asserting that certain restrictions on prepayment still were in effect. Less than a month after HOPE became law, a second preservation letter expressly asserted that prepayment required HUD approval. PX 63 (Mem. from Chris Greer, Acting Deputy Assistant Secretary for Multifamily Housing Programs, to Directors of Housing, et al. (April 12, 1996)) ("Preservation Letter No. 2") at 5; Tr. 216:18 to 218:9 (Test. of Norman). A subsequent preservation letter stated that owners need not obtain HUD approval for prepayment, but it set out other requirements, including: (1) that the owner notify HUD of its intention to prepay, (2) that the owner pay fifty percent of the relocation expenses of any tenant, (3) that the lender submit a form to HUD requesting prepayment of the mortgage, and (4) that owners of low-income housing located in low-vacancy areas–three percent or lower vacancies–not raise rents for three years except as necessitated by increased operating costs. PX 65 (Mem. from Nicholas P. Retsinas, Assistant Secretary for Housing, to Directors of Housing, et. al. (May 3, 1996)) ("Preservation Letter No. 4"), Preservation Questions and Answers, at 2-6; Tr. 219:22 to 222:19 (Test. of Norman). In the sixth preservation letter, HUD scaled back the requirement to pay tenant's relocation expenses to cover only moves "in the area where the project ... is located," but reiterated the three-year restriction on rent increases for housing in low-vacancy areas. PX 67 (Mem. from Retsinas to Directors of Housing, et al. (July 1, 1996)) ("Preservation Letter No. 6"), Preservation Questions and Answers at 3, 6-7; Tr. 223:19 to 224:20 (Test. of Norman). With the constantly changing requirements of the preservation letters layered over the statutory mandate of HOPE, the prepayment process remained in a state of flux until HUD released Preservation Letter 97-1 on December 16, 1997, which Preservation Letter stated that, following the HOPE-mandated sixty-day moratorium on rent increases, there was "no limit to how high the owner [could] raise the rent." Tr. 234:4 to 235:3 (Test. of Norman); PX 75 (Mem. from Retsinas to Directors of Housing, et al. (Dec. 16, 1996)) ("Preservation Letter No. 97-1"), Attach. at 7.

B. *CCA's Property*

Chateau Cleary Apartments ("Chateau Cleary") is a 104-unit apartment complex in West Metairie, Louisiana, just outside the city of New Orleans. PX 106 (Expert Report of Dr. Wade R. Ragas, an economist and real estate expert called to testify by CCA) (May 30, 2005) ("second Ragas report") at 17; DX 140 (Management Plan of Chateau Cleary Apartments by Mr. Jim Alexander (May 31, 1997)) ("Alexander report") at 13-15. The complex consists of one-, two-, and three-bedroom apartments and is located in a residential neighborhood that boasts a low crime rate, good schools, major shopping centers, and hospitals and other medical facilities, plus access to major roads such as Interstate 10. Tr. 52:14-23 (Test. of Norman); 562:13 to 563:7 (Test. of Alexander), 1122:20 to 1123:11 (Test. of Ann Kizzier, a supervisory official in HUD's New Orleans office); DX 140 (Alexander report) at 22-24; PX 106 (second Ragas report) at 14, 17. The site visit and testimony at trial revealed that Chateau Cleary was sturdily built such that it suffered relatively minor damage from Hurricane Katrina, Tr. 52:5-13 (Test. of Norman); the site visit also revealed that the complex is well maintained and in good condition.

On October 6, 1969, Ernest B. Norman, Jr. and J. Robert Norman ("Norman brothers") purchased from New Orleans investors the land on which to build Chateau Cleary, as well as the plans that the selling investors had developed for the complex. Tr. 53:24 to 54:8, 55:12-15 (Test. of Norman); PX 1 (Cash Sale of Property, signed by the Norman brothers and Patrick J. Tomeny, Anthony D. Lewis, and Paul Atwood (October 6, 1969)). In conjunction with the sale, on November 7, 1969, the Norman brothers signed three interrelated documents: a secured note, a mortgage, and a regulatory agreement. The secured note was set out on HUD Form 1734 and was in the amount of $1,601,100.00. PX 3 (1969 note). The secured note was endorsed by HUD, explicitly referred to the mortgagor's right to prepay the mortgage after 20 years, and incorporated by reference a mortgage signed the same day by the Norman brothers and Pringle-Associated Mortgage Corporation. PX 3 (1969 note); PX 4 (1969 mortgage).[15] The mortgage was written on FHA Form 4123-D and incorporated by reference the terms of the secured note and the regulatory agreement. PX 4 (1969 mortgage), first undesignated paragraph, ¶ 3. The Norman brothers and HUD also signed on FHA Form 1730 an agreement entitled "Regulatory Agreement for Limited Distribution Mortgagor Projects Under Section 221(d)(3) of the National Housing Act, As Amended." PX 2 (1969 regulatory agreement), undesignated second paragraph. Under the regulatory agreement, in exchange for HUD's action to provide mortgage insurance, endorse the secured note, and agree to the transfer of the mortgaged property, the Norman brothers agreed to charge HUD-approved rents to HUD-approved tenants. *See id.* ¶¶ 4(b), 5(c), undesignated second paragraph. The regulatory agreement also incorporated by reference the mandates of Section 221(d)(3) and the implementing regulations, which included the right to prepay the mortgage after 20 years. *See id.,* undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969).

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[15] The provision in the note guaranteeing the Norman brothers' right to prepay read:

> The debt evidenced by this note may not be prepaid either in whole or in part, prior to the final maturity date hereof without the prior written approval of the Federal Housing Commissioner except a maker which is a limited dividend corporation may prepay without such approval after 20 years from the date of final endorsement of this note by the Federal Housing Commissioner.

PX 3 (1969 note).

Due to an increase in labor costs in the New Orleans area from late 1969 to mid-1971, the Norman brothers requested and HUD approved an increased mortgage amount. As a result, on May 17, 1971, the Norman brothers signed on HUD forms a second secured note for $1,699,500.00 and a second mortgage. PX 5 (1971 note); PX 6 (1971 mortgage). The new note explicitly referred to the prepayment right and incorporated by reference Section 221(d)(3) and HUD's implementing regulations. PX 5 (1971 note); 24 C.F.R. § 221.524(a)(1)(ii) (1971). The new mortgage incorporated by reference the 1971 note and the original 1969 regulatory agreement. PX 6 (1971 mortgage), undesignated first paragraph, ¶ 3. HUD calculated the Norman brothers' initial equity investment as $215,867, entitling them to a maximum annual dividend of $12,952, in accord with the six percent cap on dividends contained in the regulatory agreement. *See* PX 106 (second Ragas report) at 54 (showing the "earned" but unpaid amount increasing by $12,952, less any dividend paid, each year); PX 2 (1969 regulatory agreement), ¶ 6(e)(1); *see also* Tr. 76:21 to 77:2 (Test. of Norman).[16]

On March 27, 1985, Ernest B. Norman, Jr. formed the CCA Associates partnership, with the partners consisting of him, his children, and a trust for his grandchildren. PX 30 (CCA Articles of

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[16] CCA's financial statements record the HUD-determined equity as $215,863, rather than $215,867 as used by Dr. Ragas, plaintiff's expert, in his second expert report. The minuscule difference is without consequence. Both the financial statements and Dr. Ragas's report cite an annual dividend cap of $12,952.

Partnership). On April 2, 1985, with HUD's approval, J. Robert Norman sold his fifty percent interest in Chateau Cleary to CCA for $677,550. PX 28A (Act of Sale conveying J. Robert Norman's interest in Chateau Cleary to CCA (Apr. 2, 1985)). CCA also assumed the Chateau Cleary mortgage. PX 28 (Assumption Agreement between Ginnie Mae and CCA (April 2, 1985)). As a consequence, HUD also required CCA to sign a new regulatory agreement for Chateau Cleary. PX 29 (Regulatory Agreement, signed by HUD and Ernest B. Norman, III, acting on behalf of CCA (Apr. 26, 1985)) ("1985 regulatory agreement"). The 1985 regulatory agreement mirrored that executed in 1969, *see generally id.;* PX 2 (1969 regulatory agreement), included the HUD restrictions related to tenants and rent, PX 29 (1985 regulatory agreement) ¶ 4, and incorporated by reference the mandates of Section 221(d)(3) and the associated regulations, which continued to include the right to prepay the mortgage after 20 years. *Id.,* undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985); Tr. 172:2 to 173:10 (Test. of Norman). Eight months later, on December 31, 1985, Ernest B. Norman, Jr. transferred his one-half interest in Chateau Cleary to CCA, giving CCA full ownership of the property. PX 33 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)).

Following the passage of LIHPRHA, CCA filed a notice of intent with HUD in December 1990 to preserve its options under ELIHPA and LIHPRHA. PX 42 (CCA Notice of Intent (Dec. 28, 1990)). In June 1992, CCA filed a notice of election to proceed under ELIHPA, while reserving its rights to proceed under LIHPRHA. PX 51 (CCA Notice of Election to

Proceed (June 8, 1992)). Prior to the passage of HOPE, however, CCA never filed a plan of action with HUD seeking incentives or permission to sell the property. Tr. 383:8-16 (Test. of Norman). Following the passage of HOPE and despite the confusion caused by the preservation letters, by October 1996 CCA had begun inquiring into options for refinancing its mortgage loan, anticipating that the time when it might be able to prepay its mortgage was approaching. Tr. 236:7-16 (Test. of Norman). In November 1996, CCA also retained an appraiser who valued Chateau Cleary at $2,300,000, absent the HUD restrictions. PX 74 (Mem. from Ernest Norman[, III] to John Sibal, Vice President, Eustis Mortgage (Nov. 16, 1996)) (forwarding appraisal to potential mortgagee).

In late 1996, with CCA's permission, Mr. Jim Alexander, then a HUD employee, began a study to examine CCA's options after prepayment, including selling Chateau Cleary or refinancing the property with a conventional mortgage. PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)); Tr. 240:6-10 (Test of Norman), 557:22-558:1 (Test of Alexander).[17]

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[17] Mr. Alexander's report was not an official HUD report, Tr. 1077:11 to 1078:22 (Test. of Gladys Ann Kizzier, a HUD employee who supervised Mr. Alexander), but it was the culmination of a HUD-funded and HUD-approved course of study under which Mr. Alexander received the designation of "certified property manager" from the Institute of Real Estate Management ("IREM"). *See* Tr. 512:23-25, 514:17-20, 515:20 to 516:2, 520:13 to 521:5 (Test. of Alexander). Mr. Alexander's report listed his HUD work address and was forwarded to Mr. Ernest B. Norman, III, CCA's managing partner, with a cover letter on HUD letterhead. *See* DX 140 (Alexander report) at 1, 3; *but see* Tr. 1078:14 to 1079:1 (Test. of Kizzier) (indicating that Mr. Alexander did not have permission, and would not

Ernest B. Norman, III, managing partner of CCA, awaited the results of Mr. Alexander's study, which he received in April 1997. Tr. 558:2-5 (Test. of Alexander). Mr. Alexander's study examined four "possible solutions" for CCA: (1) remain a HUD-insured property, (2) prepay the mortgage and sell the property in a year, (3) prepay the mortgage, make minimal upgrades to the property, and sell the property in seven years, and (4) prepay the mortgage, make major upgrades to the property, and sell the property in seven years. DX 140 (Alexander report) at 137.[18]

After reviewing the conclusions of the study and discussing them with Mr. Alexander, Tr. 247:21 to 248:7 (Test. of Norman), Mr. Norman adopted a hybrid of two options Mr. Alexander had proposed and began undertaking some improvements to Chateau Cleary. Tr. 270:13-19, 273:10-13 (Test. of Norman). On April 29, 1998, CCA signed a contract with Hampstead Partners to guide CCA through the prepayment process, delivered the required prepayment notifications to HUD, and after several months of HUD-related administrative delays, prepaid its HUD-insured mortgage on September 30, 1998. Tr. 1776:19-24, 1780:4 to 1782:15, 1793:4-12

have received permission, from his direct supervisor to use the HUD letterhead).

[18] Although Mr. Norman had explained to Mr. Alexander that CCA planned to prepay its mortgage, PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)), Mr. Alexander included in his report the option to remain in the Section 221(d)(3) program, DX 140 (Alexander report) at 137, apparently because the IREM curriculum required that the study include maintaining the *status quo* among the options being considered. Tr. 559:15-20 (Test. of Alexander).

(Test. of Norman Root);[19] 280:17-22 (Test. of Norman); PX 83 (Prepayment Service Consulting Agreement (Apr. 29, 1998)); PX 86 (letters from Hampstead Partners to HUD, the mortgagee, and a local councilman announcing CCA's intent to prepay its mortgage (May 11, 1998)); Pl.'s Post-Trial Br. ("Pl.'s Br.") at 22.

C. *Procedural History*

CCA filed its complaint on May 13, 1997, alleging that the government had breached its contract with CCA by terminating its unconditional right to prepay its HUD-insured mortgage after 20 years and also seeking just compensation under the Fifth Amendment for the temporary taking of CCA's property. Compl. ¶¶ 3, 39, 42. The case was stayed for a considerable period pending decisions in the *Cienega* case. After the decision in *Cienega VIII* was rendered, the stay was lifted, *see* Order of November 25, 2003, and the case was prepared for trial. Trial was held on September 5-8, 12, and 26-27, 2006, followed by post-trial briefing, closing argument on November 30, 2006, and supplemental briefings by plaintiff on December 6, 2006, and by the government on December 13, 2006. The case is now ready for decision.

ANALYSIS

A. *Ripeness*

As a threshold matter, the government challenges the justiciability of CCA's claims on the

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[19] Mr. Norman Root, a real estate consultant with Hampstead Partners, did not testify at trial, but by agreement of the parties, his deposition testimony, taken on May 24, 2000, was read into the trial record. Tr. 1770:18-23.

ground that they are not ripe. *See* Def.'s Post-Trial Mem. of Contentions of Fact and Law ("Def.'s Br.") at 20. The government avers that CCA failed to exhaust a required administrative process because HUD never made a "final decision regarding the application of the regulations to the property at issue." *Id.* at 20-21 (quoting *Palazzolo v. Rhode Island,* 533 U.S. 606, 618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)). Specifically, the government focuses on CCA's failure to (1) seek permission from HUD to prepay or (2) submit a plan of action to sell Chateau Cleary or seek incentives to remain in the Section 221(d)(3) program. Def.'s Br. at 20-21. CCA counters that any request to prepay would have been futile because CCA could not have satisfied the statutory criteria for prepayment in the preservation statutes, leaving HUD no discretion to approve prepayment. Pl.'s Br. at 34. CCA also contends that CCA was not required to pursue the statutory options to seek a sale or financial incentives. *Id.*

A regulatory takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448 ("a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."); *see also Stearns Co. v. United States,* 396 F.3d 1354, 1358 (Fed. Cir. 2005). This principle generally requires a regulatory-taking claimant to seek an agency decision on the application of the pertinent statute or regulation to his or her property before asserting that the government has taken the property. *See Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448; *Williamson,* 473 U.S. at 186, 105 S.Ct. 3108. The Supreme Court has excepted from this general rule the circumstance where the agency "has no discretion to exercise over [the landowner's] right to use her land." *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 739, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). In a similar vein, the Federal Circuit has stated that "[o]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Cienega Gardens v. United States,* 265 F.3d 1237, 1246 (Fed. Cir. 2001) ("*Cienega VI*") (quoting *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448).

The government argues that ELIHPA and LIHPRHA gave HUD discretion to determine whether prepayment would be allowed and that this discretion renders CCA's futility argument unavailing. *See* Def.'s Br. at 24. HUD concededly had authority to determine whether an owner's prepayment would meet the statutory criteria; the pertinent question becomes whether those statutory criteria effectively barred CCA's prepayment. *See* ELIHPA § 225(a), 101 Stat. at 1880; 12 U.S.C. § 4108(a)(1)(B), (2); Tr. 586:2-5 ("HUD had the discretion under [LIHPRHA] to approve or deny, but there were two primary tests that Congress directed HUD to apply.") (Test. of Alexander); Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub.L. No. 100-628, § 1024(1), 102 Stat. 3224, 3270-71 ("McKinney 1988 Act") (amending ELIHPA to specify numerical criteria by which to determine whether prepayment would "materially increase economic hardship" for tenants); 12 U.S.C. § 4108(a)(1)(A)(i) (same). Under ELIHPA, as amended in November 1988, and under LIHPRHA, the phrase "materially increase economic hardship" was defined with specificity as monthly rental increases exceeding ten percent or exceeding thirty percent of a tenant's monthly adjusted income, whichever was lower. McKinney 1988 Act § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(i).[20] As the Federal Circuit explained in *Cienega VI,* "[S]ection 4108 sets forth strict numerical criteria that must be met before HUD may exercise any discretion it has to approve prepayment requests." 265 F.3d at 1246. If prepayment would run afoul of these strict numerical restrictions or the other statutory standards, HUD then had *no* discretion to permit prepayment. ELIHPA § 225(a), 101 Stat. at 1880 (Secretary may approve prepayment "*only* upon a written finding" that the statutory criteria would be satisfied) (emphasis added); 12 U.S.C. § 4108(c) (if the statutory criteria are not satisfied "the Secretary shall disapprove the plan"); *see also* Tr. 587:18 to 589:6 (Test. of Alexander) (HUD was required to abide by the statutory criteria).

The government's ripeness arguments run headlong into two fundamental facts about HUD-subsidized housing in the New Orleans area. First,

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[20] If a tenant already was paying more than these percentages, monthly rental increases were limited to ten percent or the increase in the CPI, whichever was lower. McKinney 1988 Act § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(ii).

not a single owner of such properties even sought to prepay under the preservation statutes. Tr. 596:3-9 (Test. of Alexander); 1103:10-13 (Test. of Kizzier). Second, by contrast, *after* enactment of HOPE, eight owners of Section 221 or 236 properties prepaid from February 1997 to June 2003. PX 124a (Def.'s Resp. to Pl.'s Interrogatories to Def. (July 5, 2005)) at 5-7. The government thus cannot show that other owners of Section 221(d)(3) properties in the New Orleans area succeeded in pursuing prepayment under the preservation statutes. The ripeness dispute consequently touches on peripheral aspects of plaintiff's proofs that an application to prepay under the preservation statute would have been futile.

The first set of contentions focuses on the requirement in ELIHPA and LIHPRHA that prepayment not lead to rental increases exceeding thirty percent of a tenant's monthly adjusted income, and refers to the testimony of Mr. Alexander. Pl.'s Br. at 35 (citing Tr. 610:7 to 611:11 (Test. of Alexander)); *see* § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(i). In response to plaintiff's counsel's question as to whether tenants of Section 221(d)(3) properties could have "afforded to pay the rents charged by conventional properties," Mr. Alexander said: "Not without having received Section 8 vouchers, it is highly unlikely, no." Tr. 610:20-24 (Test. of Alexander). The government points out that the question Mr. Alexander was asked was neither specific to 1991 nor to CCA, and argues that his statement that such tenants would be "unlikely" to be able to afford market rents is not sufficient to establish futility. Def.'s Reply at 7-8. In this respect, viewed in the context of the immediately preceding questions, Mr. Alexander's testimony was focused on the period 1990 to 1995, *see* Tr. 609:5 to 610:19 (Test. of Alexander), and his answer covered the universe of tenants in Section 221(d)(3) housing in the New Orleans metropolitan area, CCA included. *See* Tr. 609:5 to 610:19 (Test. of Alexander). The government asserts that Mr. Alexander's answer-"highly unlikely, no"-is insufficient to prove ripeness, suggesting that only an unqualified "no" would satisfy the statutory criterion. Def.'s Reply at 7-8. Mr. Alexander's unrebutted testimony, however, was based on his experience as the director of the Division of Housing Management in HUD's New Orleans office from the late 1980s until January 1995, and his testimony showed that he was generally quite knowledgeable about the types of tenants living in Section 221(d)(3) properties and specifically familiar with Chateau Cleary. Tr. 496:25 to 497:24, 498:7-12 (Test. of Alexander).[21] LIHPRHA's plain language banned prepayment if the rent of "*any* current" CCA tenant would exceed thirty percent of her adjusted income as a result of prepayment. *See* 12 U.S.C. § 4108(a)(1)(A)(i) (emphasis added).[22] Mr. Alexander's

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[21] Just as the Federal Circuit in *Cienega VI* relied, in part, on the opinion of a former HUD official as to whether the plaintiff would have met the preservation statutes' statutory criteria for prepayment, *Cienega VI,* 265 F.3d at 1243, 1246, this court bases its decision on this point on Mr. Alexander's unrebutted testimony.

[22] ELIHPA, as amended, barred prepayment if "*a* current tenant['s]" rent increased beyond thirty percent of her adjusted income. *See* § 1024(1), 102 Stat. at 3270 (emphasis added). The meaning is essentially the same as that in LIHPRHA-if a single tenant's rent would exceed the statutory cap, prepayment was not permitted. *Compare* 12 U.S.C. § 4108(a)(1)(A)(i) ("any

testimony is sufficient to establish to "a reasonable degree of certainty" that prepayment would have caused *one* CCA tenant's rent to increase beyond the threshold of thirty percent of her adjusted income. *See Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448 ("once ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened"); *accord Anaheim Gardens v. United States,* 444 F.3d 1309, 1315-16 (Fed. Cir. 2006); *Cienega VI,* 265 F.3d at 1246.

In addition, both plaintiff's economic and real estate expert, Dr. Ragas, and the government's real estate expert, Mr. Lewis J. Derbes, concurred that the rents CCA could have charged upon prepayment in May 1991 would have exceeded the ten percent threshold. *See* PX 106 (second Ragas report) at 39; PX 100 (Expert Report of Lewis J. Derbes (Mar. 7, 2005)) ("Derbes report") at 66; Tr. 841:3-16 (Test. of Ragas), 1492:17 to 1493:13 (Test. of Derbes). Dr. Ragas estimated CCA's market rents would have exceeded its HUD-restricted rents by between twenty-nine and thirty-nine percent, depending on the unit type, *see* PX 106 (second Ragas report) at 39; Tr. 841:3-16 (Test. of Ragas), while Mr. Derbes estimated a differential between sixteen and twenty-nine percent, depending on the unit type. PX 100 (Derbes report) at 66; Tr. 1492:17 to 1493:13 (Test. of Derbes).

The government objects that this evidence should be disregarded because both experts' estimates assumed that CCA would incur "significant expenditures for improvements and upgrades, which

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current tenant"), *with* § 1024(1), 102 Stat. at 3270 ("a current tenant").

would in turn result in higher rents after prepayment." Def.'s Post-Trial Reply Brief ("Def.'s Reply") at 4. The government claims that a "well-conceived plan of action to prepay would include *no* project upgrades." *Id.* at 4 (emphasis added); *accord* Def.'s Br. at 26. Expenses for improvements were incorporated by Dr. Ragas and Mr. Derbes into their analyses. *See* PX 106 (second Ragas expert report) at 17-19; PX 100 (Derbes expert report) at 74. The improvements contemplated by Dr. Ragas and Mr. Derbes were relatively minor, *see* Tr. 857:11-16 (Test. of Ragas); Tr. 1402:20 to 1404:4 (Test. of Derbes), reflecting those accomplished by CCA upon prepayment, *see* Tr. 269:5 to 270:21; 272:22 to 273:9 (Test. of Norman), not even extending so far as the "minor rehabilitation" considered by Mr. Alexander in his third option.[23] These minor steps provide no basis to claim that the experts' analyses of rent increases on prepayment were inappropriate at Chateau Cleary. *See* DX 140 (Alexander report) at 139.

In a similar vein, the government attempts to graft another requirement onto the regulatory agreement and the preservation statutes by suggesting that CCA should have sought annual rent increases under the regulatory agreement. *See* Def.'s Reply at 4-5. If CCA had sought these increases prior to prepayment, the government argues, its HUD-regulated rents would have been

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[23] Instructively, even LIHPRHA's appraisal process for determining a HUD-regulated property's fair market value required the incorporation of the costs of converting the property to market-rate rental housing. *See* 12 U.S.C. § 4103(b).

within ten percent of market rents and prepayment would not have been precluded under ELIHPA and LIHPRHA. *See id.* The government then goes further: "Given that the difference between market rents and HUD-rents w[as] increasing during the 1990's, and given that [the] difference between CCA's HUD rents and market rents in 1998 was only 10 percent, the differential in 1991 was *necessarily* less than 10 percent." *Id.* at 26 (emphasis added). The government's argument implies that, at least if CCA planned to prepay, it was violating the relevant HUD regulations and its regulatory agreement by *not* seeking the maximum rent increases that were permitted, but not guaranteed, by the regulatory agreement. *See* Def.'s Br. at 4-5; PX 2 (1969 regulatory agreement) ¶ 4(c); PX 29 (1985 regulatory agreement) ¶ 4(f). However, the regulatory agreements placed a cap on CCA's annual distribution; they did not mandate that CCA seek rent increases. PX 2 (1969 regulatory agreement) ¶ 6(e)(1); PX 29 (1985 regulatory agreement) ¶ 6(e)(1). The evidence at trial also rebuts the government's conclusory statement that CCA's rents were "necessarily less than 10 percent" below market rents in 1991. The New Orleans area suffered a marked economic decline in the late 1980s due to difficulties experienced by the petroleum industry, and rents remained relatively constant due to the restricted ability of tenants to pay rents. Tr. 155:18 to 156:12 (Test. of Norman). Also, Dr. Ragas testified that the market in the West Metairie and surrounding areas in 1998 was far more competitive at the more expensive portion of the rental market than it was in 1991 due to an influx in the mid-to late-1990s of new apartment complexes with more attractive amenities than those in older properties, such as Chateau Cleary. Tr. 824:3 to 825:13, 829:2 to 830:20 (Test. of Ragas). The increased competition affected to some extent the rents CCA could demand after prepayment. Tr. 1063:13 to 1065:18 (Test. of Ragas). Thus, the link the government draws between market rents in 1998 and market rents in 1991 is unsupported by the trial record. In short, Mr. Alexander's testimony and CCA's proofs of market rental conditions in West Metairie and the New Orleans area show that CCA could not have satisfied the ten-percent requirement, and HUD would have had no discretion to allow CCA to prepay. *See* Tr. 610:20-24 (Test. of Alexander); PX 100 (Derbes report) at 66; PX 106 (second Ragas report) at 39; Tr. 841:3-16 (Test. of Ragas), 1492:17 to 1493:13 (Derbes); *see also Palazzolo,* 533 U.S. at 620-21, 121 S.Ct. 2448; *Anaheim Gardens,* 444 F.3d at 1316; *Cienega VI,* 265 F.3d at 1246.

ELIHPA and LIHPRHA both also precluded prepayment if it would "involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available." ELIHPA, § 225(a)(1), 101 Stat. at 1880; 12 U.S.C. § 4108(a)(1)(B). CCA argues that Chateau Cleary could not have satisfied this statutory criterion for prepayment. *See* Pl.'s Br. at 36. The government concedes that higher rents following prepayment would have led some Chateau Cleary tenants to move to other housing, Def.'s Reply at 8, but argues that a "well-designed plan of action" to prepay would not have required the "eviction" of tenants, equating the statutory phrase "involuntarily displace" with "evict." *See id.* at 8-9; *see also* Def.'s Br. at 28.

The government's argument is without merit. The government's attempt to equate "involuntarily displace" with "evict" is unavailing. Although the terms "displace" and "evict" can both mean "to expel," *Webster's New Collegiate Dictionary* 241, 288 (7th ed. 1970), "evict" typically refers to the removal of a tenant by legal process. *Id.* at 288; *see also Black's Law Dictionary* 575 (7th ed. 1999). In any event, in housing statutes Congress drew a distinction between the terms "evict" and "involuntarily displace." *Compare* ELIHPA, Pub.L. No. 100-242, § 225(a)(1), 101 Stat. 1815, 1880 ("involuntarily displace"); LIHPRHA § 601(a), 104 Stat. 4079, 4256 (1990) (same), *with* ELIHPA §§ 119(d), 122, 123, 101 Stat. at 1831, 1840, 1846 ("evict" or "eviction"); Cranston-Gonzalez National Affordable Housing Act, Pub.L. No 101-625, §§ 411, 424(g)(1), 445(e), 501, 503(a), (b), 601, 104 Stat. at 4155, 4167, 4178, 4181, 4184-85, 4269 (same). The focus on "involuntarily displace" in the preservation statutes thus focuses on the effects of rent increases upon conversion to conventional rental housing after prepayment, not on the legal process of eviction. That focus was confirmed by evidence adduced at trial.

Mr. Alexander testified that, given his experience in HUD's New Orleans office, he "would ... have expected that [following prepayment] *at least some portion* of those 221[(d)(3)] tenants would have sought to live in other HUD properties and thus ha[ve] gone on to waiting lists that were maintained." Tr. 611:12-21 (Test. of Alexander) (emphasis added); *see also* Tr. 610:11 to 611:11 (Test. of Alexander). Moreover, Mr. Norman, CCA's managing partner, testified that in 1991 comparable subsidized housing was five to eight miles away. Tr. 190:12, 191:12-22 (Test. of Norman). This evidence suffices to establish that the involuntary displacement criterion in ELIHPA and LIHPRHA for prepayment could not have been satisfied, making an application by CCA for prepayment futile. *See Palazzolo,* 533 U.S. at 626, 121 S.Ct. 2448; *Anaheim Gardens,* 444 F.3d at 1316; *Cienega VI,* 265 F.3d at 1246.

In sum, CCA has proven that it would have been futile to apply to HUD for prepayment of its mortgage under ELIHPA or LIHPRHA because HUD lacked the discretion to approve prepayment. Specifically, CCA proved that it could not have satisfied the statutory criteria mandating that prepayment was precluded where rent increases would (1) exceed ten percent or exceed thirty percent of a tenant's monthly adjusted income or (2) involuntarily displace current tenants. In this respect, CCA's experience appears to have been typical for owners of Section 221(d)(3) properties in New Orleans.

The government finally argues that CCA's claims are not ripe because it failed to seek incentives to remain in the HUD program or to pursue a sale to a HUD-approved buyer. Def.'s Br. at 30-31. CCA responds that it was not required to seek incentives or a HUD-approved sale and that any HUD-regulated sale would not have resulted in a fair market transaction at a fair market price. Pl.'s Br. at 37. As the Federal Circuit observed, "regulatory takings cases based on contracts containing key guarantees later negated by Congress may be fundamentally different from those involving only the generalized 'regulatory environment' seen in earlier statutes, regulations, agency policies and practices, and industry understandings." *Cienega VIII,* 331 F.3d at 1354. As the government would have it, even if the preservation statutes barred CCA from prepaying, CCA should have sought incentives or a HUD-approved sale. Def.'s Br. at 30-31. But CCA's suit is based on the government's failure to allow CCA to prepay, not on the government's failure to provide alternatives to prepayment. *See Cienega IX,* 67 Fed. Cl. at 461; Compl. ¶¶ 3, 14, 39, 42. CCA chose not to seek incentives or sell under HUD-imposed restrictions. Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.). As Mr. Norman explained:

> [Seeking incentives] didn't come close to what we thought we were entitled to, based on ... living up to our end of the deal over the years. It would not have produced the return on equity, reduction in stress in management and expense that going market rent would have done.... It didn't equate to what we expected and lived up to all those years.... [W]e felt we had ... no reason not to be able to enjoy the fruits of the 20th year. So, it just was not a viable alternative, and it didn't satisfy our desires or our expectations.

Tr. 207:12 to 208:25 (Test. of Norman.). In effect, the government is arguing that for CCA to vindicate its right to prepay, it must have applied to receive something it did not want–government-provided alternatives. Def.'s Br. at 30-31; Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.).

Neither the regulatory agreement nor the preservation statutes mandated that CCA seek incentives or a HUD-approved sale. *See* PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement); ELIHPA §§ 224(b)(1), (7); 225(b)(3), 101 Stat. at 1880-81; 12 U.S.C. §§ 4108-11; *see also* Tr. 1081:2-8 (Test. of Kizzier) ("[Owners] had a lot of choices [under the preservation statutes].... They could choose *not* to come into the program.") (emphasis added). In short, CCA was not required "separately [to] seek incentives and receive a determination of whether those incentives would be funded." *See Cienega IX,* 67 Fed. Cl. at 462; *see also Cienega VI,* 265 F.3d at 1248. The government's argument to the contrary is unavailing.

CCA's claims are ripe for adjudication.

B. *Takings Analysis*

The Takings Clause of the Fifth Amendment specifies that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause "was designed to bar [the] 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." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). In a regulatory takings case, a court must engage in a two-tiered inquiry. First, the court must examine whether the property owner possessed a "distinct property interest" at the time of the alleged taking. *Cienega VIII,* 331 F.3d at 1328; *Chancellor Manor,* 331 F.3d at 901. Second, the court must determine whether a compensable taking occurred. *Chancellor Manor,* 331 F.3d at 902. In the regulatory context, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322

(1922). To determine whether the regulation has "gone too far," the court conducts an "essentially ad hoc, factual inquir[y]" focused on three factors: (1) the character of the governmental action, (2) the degree of interference with the reasonable, investment-backed expectations of the property owner, and (3) the economic impact of the action. *See Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124-28, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 325-328, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Palazzolo,* 533 U.S. at 634, 121 S.Ct. 2448 (O'Connor, J., concurring). None of the Penn Central factors is itself determinative, but rather all of the factors are to be weighed in a balance that takes into account all of the circumstances. *Palazzolo,* 533 U.S. at 635-36, 121 S.Ct. 2448 (O'Connor, J., concurring).

1. *CCA's property rights in Chateau Cleary.*

An owner's property rights compensable under the Fifth Amendment are defined by "existing rules or understandings" and "background principles" derived from independent sources, such as state statutes or common law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029-30, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Maritrans v. United States,* 342 F.3d 1344, 1352 (Fed. Cir. 2003) (*citing Board of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). CCA is the owner in fee simple of the land on which Chateau Cleary is built. PX 1 (Tomeny sale to Norman brothers); PX 28A (J. Robert Norman sale to CCA); PX 33 (Ernest B. Norman, Jr. transfer to CCA). As an owner of land in fee simple, CCA possesses "inherent rights to rent [its] land at any price [it] can command." *Cienega VIII,* 331 F.3d at 1328-29.[24] By signing the regulatory agreement and assenting to HUD restrictions on tenants and rent, CCA agreed–for a limited time–to constrain the property rights it was otherwise entitled to exercise, all the while retaining a valid property interest for all purposes, including for the Takings Clause. *See Chancellor Manor,* 331 F.3d at 902-03; *Cienega VIII,* 331 F.3d at 1329; *Wyatt v. United States,* 271 F.3d 1090, 1097 (Fed. Cir. 2001); PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement).

CCA also possesses contractual rights cognizable under the Takings Clause. *See Cienega VIII,* 331 F.3d at 1329 ("[T]here is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment"). CCA's regulatory agreement incorporated by reference the mandates of Section 221(d)(3) and the associated regulations, which included the right to prepay the mortgage after 20 years. See PX 2 (1969 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985). Under the regulatory agreement, CCA had "unequivocal contractual rights after twenty years to prepay [its] mortgage[ ]." *See Cienega VIII,* 331 F.3d at 1330. Those rights vested when the Norman brothers, and later CCA, signed the regulatory

24 The government effectively concedes that CCA possessed vested property rights in Chateau Cleary by not disputing this fact at trial. *See* Def.'s Br. at i-iv; Def.'s Reply at i-iii; Def.'s Supplemental Post-Trial Brief at 1-3.

agreements in 1969 and 1985. *Cienega VIII,* 331 F.3d at 1330 ("contract rights vested when the contracts were signed"); *see* PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement).

2. *Penn Central analysis.*

a. *Character of governmental action.*

In analyzing the first of the *Penn Central* factors, the character of the governmental action, a court must "consider the purpose and importance of the public interest reflected in the regulatory imposition[, and] balance the liberty interest of the private property owner against the [g]overnment's need to protect the public interest through imposition of the restraint." *Cienega VIII,* 331 F.3d at 1337-38 (quoting *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1176 (1994)). This analysis focuses not only on the intended benefits of the governmental action, but also on whether the burdens the action imposed were borne disproportionately by relatively few property owners. *Cienega VIII,* 331 F.3d at 1338-40; *see also Armstrong,* 364 U.S. at 49, 80 S.Ct. 1563; *Cienega IX,* 67 Fed. Cl. at 466.

The government argues that the preservation statutes did not have the character of a taking because they promoted an important governmental objective-ensuring that subsidized housing remained in place for thousands of poor families. Def.'s Br. at 46-48. The government also avers that the preservation statutes did not institute improper burden-shifting because they offered owners alternatives such as a HUD-approved sale and financial incentives to remain in the HUD programs. *Id.* at 48-49. CCA counters that the preservation statutes disproportionately imposed the burden of maintaining low-income housing on CCA and other owners of subsidized low-income housing. Pl.'s Br. at 38-39.

The expressly stated goal of ELIHPA and LIHPRHA was to extend the availability of low-income housing. *Cienega VIII,* 331 F.3d at 1338-40; *Chancellor Manor,* 331 F.3d at 905-06; ELIHPA § 202(b)(1)-(2), 101 Stat. at 1878; Tr. 1079:11-17, 1080:16-20 (Test. of Kizzier) ("Congress passed Title [II] to extend affordable housing. They had thought with prepayments, [Sections] 236 and [221(d)(3)], that there were going to be a lot of poor people out on the street without housing."). The method for implementing this goal was in effect to bar owners from prepaying their mortgages, forcing them to remain in the housing programs. *Cienega VIII,* 331 F.3d at 1335 ("ELIHPA and LIHPRHA directly and intentionally abrogated the contracts."). That retaining Section 221(d)(3) properties under HUD regulations was the key aim of the government was further emphasized after the passage of HOPE by HUD's issuance of preservation letters which sought to impede prepayment. *See* PX 63 (Preservation Letter No. 2) at 3 (prepayment required HUD approval); PX 65 (Preservation Letter No. 4), Preservation Questions and Answers, at 2-6 (three-year moratorium on rent increases for low-income housing in low-vacancy areas; owner required to pay fifty percent of the relocation expenses of any tenant); PX 67 (Preservation Letter No. 6), Preservation Questions and Answers at 3, 6-7 (three-year moratorium on rent increases for low-income housing in low-vacancy areas). The government argues that ELIHPA and LIHPRHA were promoting important government policies, Def.'s Br. at 47, but, as the Federal Circuit explained, that fact does not justify abrogating owners' prepayment rights:

> Congress' *purpose* in enacting the statutes may have been entirely legitimate but the government has not shown that the *actions* Congress took-the enactment of ELIHPA and LIHPRHA-were within its powers to exercise without also granting compensation. The disproportionate imposition on the Owners of the public's burden of providing low-income housing is not rendered any more acceptable by worthiness of purpose.

Cienega VIII, 331 F.3d at 1340.

The 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 whose regulatory agreements included the right to prepay their mortgages after twenty years. *See Cienega VIII,* 331 F.3d at 1338-39; PX 2 (1969 regulatory agreement), undesignated second paragraph; PX 29 (1985 regulatory agreement), undesignated second paragraph; *cf. Centex Corp. v. United States,* 395 F.3d 1283, 1306 (Fed. Cir. 2005) (legislation deemed targeted when it "was directed at a small and specifically identified group of taxpayers having contracts with the government ... and ... was designed to reduce the cost of those contracts to the government.").

The Federal Circuit described the burden-shifting that ELIHPA and LIHPRHA imposed on owners of Section 221(d)(3) and Section 236 properties, such as CCA, as follows:

> The character of the government's action is that of a taking of a property interest, albeit temporarily.... Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA and LIHPRHA–preserving low-income housing–and method–forcing some owners to keep accepting below-market rents–is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program.

Cienega VIII, 331 F.3d at 1338-39 (footnote omitted); *see also* S.Rep. No. 101-316, at 10, *reprinted in* 1990 U.S.C.C.A.N. 5763, 5869 ("the most cost-effective strategy available to the government" to resolve the low-income housing problem is to seek to retain existing owners in the HUD-subsidized programs). Mr. Alexander, the former HUD official, contrasted that chosen solution of the preservation statutes to the "enhanced vouchers" that HUD employed after the passage of HOPE, which vouchers spread the burden much more broadly. Tr. 594:8-23 (Test. of Alexander).

Despite the Federal Circuit's clarity in addressing the governmental action involved in the preservation statutes, the government avers that the preservation statutes did not inappropriately shift the burden of providing low-income housing to owners, such as CCA. Pointing to the financial incentives offered to remain in the HUD programs and the opportunity to sell the property to HUD-approved buyers, *see* Def.'s Br. at 48-49, the government contends that the benefits offered to owners under the preservation statutes offset any burden imposed on them. *Id.*[25]

The government's arguments are fatally flawed. First, the congressional materials actually demonstrate the inherent conflict between the public purpose of the preservation statutes–maintaining affordable low-income housing–and the owners' property rights. *See Cienega VIII,* 331 F.3d at 1340. Second, by allowing HUD to control CCA's tenant pool beyond the twenty-year mark, the preservation statutes created a situation analogous to a physical invasion or a holdover tenancy. *Cienega VIII,* 331 F.3d at 1338 ("We agree that the enactment of ELIHPA and LIHPRHA could fairly be characterized as akin to this type of physical invasion."); *Cienega*

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[25] The government cites congressional committee reports on the bills that became the preservation statutes to support its contention that Congress was attempting to balance the private interests of the owners with the public interest, providing affordable low-income housing. The Senate committee report accompanying the bill that became LIHPRHA stated: "A Federal preservation strategy is, by far, the most cost-effective strategy available to the government and, if structured correctly, can be accomplished in a way that protects the interests of the owners, the tenants and the communities in which the housing is located." Sen. Rep. No. 101-316, *reprinted in* 1990 U.S.C.C.A.N. 5763, 5869.

IX, 67 Fed. Cl. at 467; *see also United States v. General Motors Corp.,* 323 U.S. 373, 380, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (addressing federal government's taking of temporary use of property held under long-term lease). By losing its right to prepay its mortgage, CCA effectively was forced to house HUD-approved tenants in Chateau Cleary, rather than tenants of its own choosing. *See Cienega IX,* 67 Fed. Cl. at 467; Tr. 186:4-6 (Test. of Norman) (the preservation statutes affected CCA's freedom to rent to "all categories of tenants"). This barring of CCA's right to exclude has the character of a taking. *Cienega VIII,* 331 F.3d at 1338; *Cienega IX,* 67 Fed. Cl. at 467.

Third, the incentives themselves had characteristics of a taking. ELIHPA and LIHPRHA took from CCA the right to sell its property on the open market to a buyer of its choosing. Tr. 186:1-3 (Test. of Norman). Under ELIHPA, before approving a sale of a Section 221(d)(3) property, the Secretary was required to make findings at least as stringent as those required for prepayment. *Compare* ELIHPA §§ 224(b)(7), 225(b), 101 Stat. at 1880-81, *with* ELIHPA § 225(a), 101 Stat. at 1880. Prospective buyers would have been required to rent at below-market rents. *See* ELIHPA §§ 224(b)(7), 225(b), 101 Stat. at 1880-81. Under LIHPRHA, a sale of Chateau Cleary would have required that Chateau Cleary be retained for very-low, low-, and moderate-income tenants "for the remaining useful life" of the property, *see* 12 U.S.C. § 4112(a)(2)(A), that Chateau Cleary not be sold for more than a HUD-regulated price, *see* 12 U.S.C. §§ 4110(b)(1), (c), 4105(b)(2)(B), and that Chateau Cleary only be sold to HUD-approved buyers. *See* 12 U.S.C. §§ 4110(b)(1), (c),

4116. These restrictions on CCA's right to sell its own property constitute fundamental impingements on CCA's property rights. *See Cienega VIII,* 331 F.3d at 1338; *Cienega IX,* 67 Fed. Cl. at 467-68; *cf. Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (statute that virtually abrogated appellees' right to devise a portion of their land was an "extraordinary" governmental action amounting to a taking).[26]

Fourth, the fact that the owners of Section 221(d)(3) properties received various benefits from participating in the Section 221(d)(3) program, such as a below-market interest rate loan, *see* Def.'s Reply at 15-16, does not alter the character of the

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[26] The government disputes CCA's assertion that under the preservation statutes CCA could not have sold Chateau Cleary at a fair market price. Def.'s Reply at 11. Putting aside that this issue is immaterial because CCA was not required to seek a sale under the HUD restrictions, the government's argument fails on its own terms. The government points to a provision in LIHPRHA stating that in a HUD-approved sale the "preservation value" would be determined through an appraisal process based on the "fair market value of the housing based on the highest and best use of the property." *Id.;* 12 U.S.C. § 4103(b)(2). Conducting an appraisal, however, particularly one under the strictures imposed by LIHPRHA, does not itself guarantee that a seller will receive fair market value. Tr. 1873:11 to 1874:8 (Test. of Dr. Robert Stillman) ("an appraisal process may or may not produce" a sale at fair market value); *see also* Tr. 640:13-18 (Test. of Alexander) (sales under the preservation statutes and sales under a "fair market process" were "very different processes"). Moreover, the HUD restrictions on the eligible buyers and on the future use of the properties, *see* 12 U.S.C. §§ 4112(a)(2)(A), 4110(b)(1), (c), 4116, would reduce the number of potential buyers and in all likelihood the price that CCA could have sought for Chateau Cleary.

governmental action. CCA received those benefits in exchange for its agreement to abide by certain restrictions for twenty years. Those restrictions included limiting occupancy to low- or moderate-income families, charging rents according to a HUD-approved rental schedule, and refraining from conveying the property without HUD approval, *during the twenty-year period. See* PX 2 (1969 regulatory agreement); ¶¶ 4(b), 5(c), 6(c); PX 29 (1985 regulatory agreement), ¶¶ 4(b), (f), 6(c). The government in effect unilaterally expanded the bargain that it struck with the Norman brothers in 1969 and CCA in 1985 by extending its duration. The government thus claims that the benefits it provided to CCA (*e.g.,* a below market loan) were given in exchange for CCA's agreement to *two* types of restrictions: (1) those contained in the regulatory agreement, and (2) any subsequent ones the government chose to impose, such as abrogation of CCA's prepayment rights. In *Cienega VI,* in rejecting the government's argument that the plaintiffs possessed no property interest cognizable under the Takings Clause, the Federal Circuit emphatically rejected the sort of retroactive alteration of CCA's contractual right to prepay that the government advocates here. *Cienega VIII,* 331 F.3d at 1331. The government's analogous argument that the incentives available under the preservation statutes mitigated the taking character of those statutes is similarly unavailing.[27]

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[27] To the extent that the government suggests that the incentives to remain in the Section 221(d)(3) program or to sell Chateau Cleary would have compensated CCA for the preservation statutes' abrogation of CCA's property rights, that

b. *Reasonable investment-backed expectations of Chateau Cleary's owners.*

Under the second factor identified in *Penn Central,* the court must consider "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646. Examination of this factor is intended to "limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Cienega VIII,* 331 F.3d at 1345-46 (quoting *Loveladies,* 28 F.3d at 1177). Beyond these actual, subjective expectations, an owner must demonstrate that his or her expectations were reasonable. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005-06, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). Thus, a court must first verify that the property owner actually had investment-backed expectations and then examine whether those expectations were objectively reasonable. *Cienega VIII,* 331 F.3d at 1346; *but see Chancellor Manor,* 331 F.3d at 904 ("The subjective expectations of the [owners] are irrelevant."). In the

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argument, too, is rejected. The value of the options available under the preservation statutes might affect the just compensation due a plaintiff who has suffered a regulatory taking, to the extent the owner realized value from one or more options, but the existence of the options does not affect the takings analysis itself. *See Independence Park Apts. v. United States,* 449 F.3d 1235, 1246-48 (Fed. Cir. 2006) ("*Independence Park III*"), *on reconsideration,* 465 F.3d 1308, 1311-12 (Fed. Cir. 2006) ("*Independence Park IV*"); *Cienega IX,* 67 Fed. Cl. at 470 ("[V]alue provided by extrinsic means, as, for example, by statutory options that previously did not inhere in and with the property should not be made part of the takings analysis but rather should be part of the just-compensation calculus.").

context of the preservation statutes, the court must determine "whether a reasonable developer confronted with the particular circumstances facing the [o]wners would have expected the government to nullify the twentieth-year prepayment right in the mortgage contract and in the regulations." *Cienega VIII,* 331 F.3d at 1346; *Chancellor Manor,* 331 F.3d at 904 ("The critical question is what a reasonable owner in the [plaintiffs'] position should have anticipated.") (citing *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc)).[28]

Mr. Norman stressed the importance of the prepayment right in 1969, when the Norman brothers-Mr. Norman's father and uncle-bought the land on which Chateau Cleary was constructed and signed the regulatory agreement with HUD. Tr. 54:1 to 57:23 (Test. of Norman). Mr. Norman testified that, coupled with the ability to obtain a non-recourse loan, the right to prepay the mortgage after twenty years was the central feature of the deal that the Norman brothers struck with HUD to take over the low-income housing project from a group of local developers. Tr. 54:1 to 57:23, 80:5-14, 94:23 to 95:1 (Test. of Norman) (noting the prepayment "prize at the end of the 20 years"). HUD officials highlighted

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[28] The relevant time frame for measuring an owner's investment-backed expectations is that "at which the [owner] entered into the activity that triggered the obligation, specifically when the [owners] entered the programs." *Chancellor Manor,* 331 F.3d at 904 (internal citations omitted). For CCA, the relevant time periods are 1969 to 1971, when the Norman brothers signed the relevant notes, mortgages, and the regulatory agreement, and 1985, when CCA signed the second regulatory agreement.

the prepayment right as an inducement to convince the Norman brothers to accept the deal and enter the subsidized housing program. *See* Tr. 57:18 to 58:15 (Test. of Norman); *cf. Cienega VIII,* 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the ... housing programs"). Noting the meager returns permitted to a limited dividend corporation under the Section 221(d)(3) program, Tr. 77:3-7, 93:5-9, 94:18 to 95:1 (Test. of Norman), Mr. Norman emphasized that the prepayment right was the "engine that drove" the Norman brothers' decision and that the brothers "wouldn't have done [the deal] without it." *See* Tr. 56:9 to 57:17, 80:5-14, 94:23 to 95:1 (Test. of Norman); *see also* Tr. 57:18-23 (Test. of Norman) (without the prepayment right "the project would not have gone forward").

For the Norman brothers, the ability to prepay the mortgage after twenty years was an integral part of a long-term strategy. Foreseeing that prepayment eventually would allow them to convert a HUD-restricted property to a conventional property, the Norman brothers chose in 1969 to invest in a property in West Metairie, then considered to be in the path of future development in the New Orleans area and an emerging middle-class neighborhood. Tr. 60:3 to 61:17, 95:7-12 (Test. of Norman), 1475:2-14 (Test. of Derbes). As Mr. Norman explained:

> There was a plan. And the plan was you spend more money, you build a better product, you put it in an area where nobody else is building subsidized housing, you wait for the growth and the 20th year, you pay your dues to society, and you then take that asset that's

> grown and you nurtured, and you have it turned around and start realizing your equity on that value.

Tr. 57:8-17 (Test. of Norman). In making this assessment of the long-term value of investing in West Metairie, the Norman brothers relied not only on their own experience, but also on the advice of local builders and consultants. Tr. 60:3 to 62:21 (Test. of Norman). In short, the Norman brothers planned, expected, and intended to prepay the mortgage on Chateau Cleary after twenty years. Tr. 67:15-22 (Test. of Norman).

In 1985, CCA acquired Chateau Cleary from the Norman brothers. PX 28A (J. Robert Norman's sale to CCA); PX 33 (Ernest B. Norman, Jr. transfer to CCA). CCA purchased J. Robert Norman's fifty percent interest for $677,550 "based on what it would be worth slightly discounted in 1991, when it would be converted to a market rate apartment complex," Tr. 163:17-20 (Test. of Norman), and signed a new regulatory agreement with HUD. PX 29 (1985 regulatory agreement). With prepayment eligibility only six years away when CCA purchased J. Robert Norman's share, CCA had the prepayment right firmly in mind. Tr. 174:15-20 (Test. of Norman). CCA's plan was the same as the Norman brothers'–to prepay the Chateau Cleary mortgage at the twenty-year point, raise the rents to market levels, and operate the apartment complex free of HUD restrictions. Tr. 174:21 to 175:25 (Test. of Norman). Thus, CCA's investment was backed by the partnership's subjective expectation that it would be able to prepay its mortgage. *See* Tr. 174:15

to 175:25 (Test. of Norman); *Cienega VIII,* 331 F.3d at 1346.[29]

CCA's investment-backed expectations also were objectively reasonable. The prepayment right was legally binding on the government. The secured notes in 1969 and 1971 were endorsed by HUD and referred specifically to CCA's right to prepay its mortgage after twenty years. PX 3 (1969 note); PX 5 (1971 note). The regulatory agreements referred to the requirements of Section 221(d)(3) and the associated regulations, which, in 1969 and in 1985, included the right to prepay the mortgage after twenty years. *See* PX 2 (1969 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985). The associated mortgages, completed on HUD forms, incorporated by reference the terms of the notes and the regulatory agreement. PX 4 (1969 mortgage), first undesignated paragraph, ¶ 3; PX 6 (1971 mortgage), first undesignated paragraph, ¶ 3. Given that the prepayment right was an integral part of the bargain that owners of Section 221(d)(3) housing struck with HUD, the expectation of the Norman brothers and CCA that the government would not abrogate this right, *see* Tr. 79:12 to 80:14, 175:3-8 (Test. of

[29] The government generally does not contest CCA's claim that the Norman brothers and CCA expected to be able to prepay the Chateau Cleary mortgage after twenty years, but rather it disputes whether these expectations were objectively reasonable. *See* Def.'s Br. at 39-46; Def.'s Reply at 17-22; *but see* Def.'s Reply at 20 (referring to Mr. Norman's testimony as to the Norman brothers' investment-backed expectations as "self-serving.").

Norman), was reasonable. *See Cienega VIII,* 331 F.3d at 1348-49. Having the opportunity to terminate HUD-regulated rents at and after the twenty-year anniversary "would be a significant factor in the calculation of total profit that could be expected over the lifetime of the investment in the property." *Id.* at 1349.[30] HUD's role in the deal that led to the Norman brothers' entry into the Section 221(d)(3) program and HUD's use of the prepayment right as an inducement in that process, confirms that the prepayment right was a material part of the bargain. *See* Tr. 57:18 to 58:15 (Test. of Norman); *cf. Cienega VIII,* 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the ... housing programs.").[31]

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[30] The possibility that the Section 221(d)(3) program might be altered by statute or regulation does not undercut the reasonableness of a property owner's expectation. *See Cienega VIII,* 331 F.3d at 1349 ("Because without the prepayment right the developers might have earned more profit investing elsewhere and therefore have declined to enter the programs, abrogation of this right would not reasonably be expected simply because the regulations were amendable or subject to legislative alteration.").

[31] CCA possessed documents that are nearly identical to those in *Cienega VIII* and *Chancellor Manor* and that incorporated the twenty-year prepayment term. *Compare* PX 2 (1969 regulatory agreement), undesignated second paragraph; PX 3 (1969 note); PX 4 (1969 mortgage); 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 5 (1971 note); PX 6 (1971 mortgage); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985), *with Cienega VIII,* 331 F.3d at 1325-26 *and Chancellor Manor,* 331 F.3d at 894-95; *see also Cienega IX,* 67 Fed. Cl. at 473 (citing deed of trust notes

The objective reasonableness of the Norman brothers' and CCA's expectations was also evident from the site visit. Chateau Cleary is close to an interchange to Interstate 10, which provides a major transportation corridor to and from New Orleans proper. The property is located in a largely residential neighborhood made up of well-maintained homes. Two other conventional apartment complexes are nearby, one of which is relatively new and the other of which was constructed a few years after Chateau Cleary. Regional shopping centers and major hospitals are readily accessible. Schools are good, and the area has a relatively low incidence of crime. Moreover, Chateau Cleary was well built and is well maintained, the structural integrity of its construction having been demonstrated by, among other things, the fact that it suffered virtually no damage as a result of Hurricane Katrina in 2005. The Chateau Cleary complex is well positioned to be, and is, a viable competitor in the conventional rental housing market, reflecting its favorable location, design, and construction.[32]

Faced with this evidence, to shore up its contention that the owners' expectations were not objectively reasonable, the government contests the idea that a property owner would be interested in

incorporating the plaintiffs' right to prepay their mortgage after twenty years).

32 At the time of the site visit in September 2006, Chateau Cleary had cut off its waiting list for available apartments at 250 names. This reflection of high demand can be attributed in substantial part to the property's having withstood Hurricane Katrina.

realizing a property's residual value after twenty years. The government defines such realization as the value of selling the property or converting it to more profitable use. Def.'s Br. at 44-45. In support of this argument the government quotes from a treatise on low-income housing:

> [N]ormally a developer of real estate hopes to make a profit on the sale of the property at some time in the future. He hopes that the property's residual value will be such that he is able to recover his total equity investment ..., plus an additional profit by reason of appreciation. There are several reasons why in normal course this expectation might not be realized in federally-assisted housing.

Def.'s Br. at 44-45 (quoting Charles L. Edison & Bruce S. Lane, *A Practical Guide to Low- and Moderate-Income Housing* 11:6 (1972) (read into the record at trial, Tr. 1192:13-24)). The quoted text, however, does not adequately address the circumstances of this case, failing to identify *when* a sale is unlikely to recover the owner's total equity investment plus a profit (*e.g.,* after five years, twenty years, or forty years). Prepayment focuses explicitly on a twenty-year time horizon. The quoted passage also refers only to a scenario under which the owner of subsidized housing *sells* the property and does not consider the value of retaining the property after conversion into a market-rate property. The long-term plan for CCA was not to sell Chateau Cleary upon prepayment, but to convert it into a conventional apartment complex. *See* Tr. 60:3 to 61:17, 95:7-12 (Test. of Norman); *cf. Cienega IX,* 67 Fed. Cl. at 472 (citing plaintiffs' long-term plans to prepay and convert their properties to market-rate rentals). Most importantly, the government's argument fails for a far more fundamental reason: the pertinent question is not whether it was reasonable for CCA to expect "to recover [its] total equity investment" plus a profit at or by any given time, Def.'s Br. at 45, but rather whether it was reasonable for CCA to expect that the government would honor the prepayment terms of the contract. *See Cienega VIII,* 331 F.3d at 1348.

The government next repeats an argument made in *Cienega IX*—that CCA's investment-backed expectations were not reasonable because the principal motivating factors for a developer of a HUD-subsidized complex were the "immediate subsidies and incentives" HUD provided, not the right to prepayment. *See* Def.'s Br. at 40. The government cites the testimony of Mr. Malek, a tax accounting expert, who described various advantages of investing in Section 221(d)(3) housing.[33] The advantages Mr. Malek cited included the ability to obtain a highly-leveraged loan, to be credited for the Builder's Allowance that reduced an investor's initial cash investment, and to opt to use accelerated depreciation (which depreciation method could be applied to all buildings, subsidized or not, prior to tax legislation in 1986). Tr. 1160:12-19, 1161:3-6, 1166:7-11, 1173:20 to 1176:1 (Test. of Malek).[34] CCA

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[33] Mr. Malek was retained by the government and was qualified as an expert in tax accounting. Tr. 1155:3-10.

[34] The government also insists that among the benefits CCA received were the fees its affiliated construction and management companies earned in building and managing Chateau Cleary. Def.'s Reply at 21. This argument is without merit. When asked about the management fees CCA's affiliated

does not dispute these benefits, but points to the very limited actual returns realized by Chateau Cleary during its HUD-subsidized tenure and argues that the prepayment right "had unique value" because it offered the prospect of much higher returns after prepayment when the property could enter the conventional market. Pl.'s Reply at 10. For conservative investors such as the Norman brothers and CCA, a very low immediate return was an acceptable price to pay for a much greater future return. The government's endeavor to give undue weight to instant economic gratification while according none to longer-term horizons fails. Moreover, the paucity of the return available during the HUD-subsidized years undercuts even the government's short-term arguments. The investment-backed expectations of Chateau Cleary's owners were objectively reasonable.

c. *Economic impact.*

The third factor in the *Penn Central* test addresses the severity of the economic impact of the regulatory action on the property owner, *see Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646, and involves a "weigh[ing of] all the relevant considerations." *Yancey v. United States,* 915 F.2d 1534, 1541 (Fed. Cir. 1990). The consideration of economic impact is "intended to ensure that not every restraint imposed by government to adjust the competing demands of private owners [will] result in a takings claim." *Cienega VIII,* 331 F.3d at 1340 (alteration in original) (quoting *Loveladies,* 28 F.3d at 1176).

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company earned, Mr. Norman explained: "If you don't do it [yourself], you have to pay somebody else to do it." Tr. 94:5-6 (Test. of Norman).

Although courts must determine whether the plaintiff has suffered a "serious financial loss," *Loveladies,* 28 F.3d at 1177, there is no "automatic numerical barrier" below which compensation must be denied. *Yancey,* 915 F.2d at 1541.

Conceptually, courts have employed three different methods of measuring economic impact, depending on the circumstances. One method measures the value taken from the property by regulatory action against the overall initial value. *See Maritrans,* 342 F.3d at 1358 (upholding a trial court's decision to evaluate economic impact based on "the change in fair market value of [plaintiffs'] vessels"); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (When considering *Penn Central's* economic impact factor, a court must "compare the value that has been taken from the property with the value that remains in the property."). A second measure looks to the claimant's ability to recoup its capital. *See Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1363 (Fed. Cir. 2001) ("In determining whether a taking is categorical, 'the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.'") (quoting *Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 905 (Fed. Cir. 1986)). The third method 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. *See Penn Central,* 438 U.S. at 129, 98 S.Ct. 2646 ("capable of earning a reasonable return"); *United States v. Pewee Coal Co.,* 341 U.S. 114, 115, 117-18, 119, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (Black, J., plurality) (Reed, J., concurring in the judgment) (upholding award of just compensation to owner of a coal mine the government had occupied and operated for over five months); *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7, 16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (referring to "the record of its past earnings" and holding that the "proper measure of compensation [for a temporary taking] is the rental that probably could have been obtained"); *Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1188-89 (Fed.Cir.2004); *Cienega VIII,* 331 F.3d at 1342-43; *Chancellor Manor,* 331 F.3d at 905. The task of a trial court is to determine which method best measures the economic impact of the governmental action. *Rose Acre Farms,* 373 F.3d at 1190.

In *Cienega VIII,* the Federal Circuit applied the return-on-equity approach to a temporary taking similar in all respects to that at issue here. 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." *Cienega VIII,* 331 F.3d at 1342.[35] This approach "best measures the impact of

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35 The government argues that the Federal Circuit accepted the return-on-equity approach used by the plaintiffs' expert "solely" 'in view of the lack of any specific challenge by the government of the trial court's findings or of the Model Plaintiffs' methods and data.'" Def.'s Reply at 28 (quoting *Cienega VIII,* 331 F.3d at 1345). This criticism is mistaken. The government quotes the Federal Circuit out of context and mischaracterizes the court's approach in *Cienega VIII.* First, the court did not modify the quoted phrase with the word "solely." It used instead the word "especially," meaning the court did not apply the return-on-equity approach merely because the government did not challenge that approach. *Cienega VIII,* 331 F.3d at 1345. Second, the Federal Circuit

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. *See Cienega IX,* 67 Fed. Cl. at 475. 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 property 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.

Cienega VIII, 331 F.3d at 1344; *see also Independence Park III,* 449 F.3d at 1246, 1248 (where property owners had entered into long-term use agreements, remanding for application of a compensatory model that would "determine what [the plaintiffs] lost by not being able to charge market-level rents" over the period covered by the use agreements); *Independence Park Apts. v. United*

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concluded that the trial court's findings of fact, which relied on the lost-profits analysis of the plaintiffs' expert, were "an appropriate foundation for the analysis of 'economic impact,'" and it rejected the government's diminution-in-value approach because it did not take into account that the plaintiffs had been "barred from the unregulated rental market and other more lucrative property uses." *Id.* 331 F.3d at 1341, 1344.

States, 61 Fed. Cl. 692, 707 (2004) ("*Independence Park I*") ("[T]he income-generating opportunity the property provided had been entirely lost during the period of the temporary taking, not just postponed."), *rev'd and remanded on other grounds, Independence Park III,* 449 F.3d at 1235. In the context of the preservation statutes, measuring the economic impact by assessing the change in fair market value runs the risk of substantially understating the effect on the owner's property interest. *Kimball Laundry,* 338 U.S. at 7, 69 S.Ct. 1434 (noting that if the change in market value "were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy.").

In resisting the return-on-equity approach and favoring the change-in-value method of economic analysis, the government manifestly errs by suggesting that in *Cienega VIII* the Federal Circuit broke new ground in Fifth Amendment Takings Clause jurisprudence. Def.'s Reply at 28 (citing *Cienega VIII* as "the first case to ever reference the 'rate of return' analysis."). The return-on-equity approach was relatively novel at one time–over fifty years ago–but not today. Actions taken by the government during World War II led to a series of temporary takings cases that posed the issue. Those cases primarily focused on rental value for the short-term taking period, *see Kimball Laundry,* 338 U.S. at 5-12, 69 S.Ct. 1434; *United States v. Petty Motor Co.,* 327 U.S. 372, 374-81, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *General Motors,* 323 U.S. at 379, 65 S.Ct. 357, treating the lost rental returns as an appropriate measure of the economic impact. In the last of the World War II cases, *Pewee Coal,* the Supreme Court confronted the takings claim of a plaintiff whose coal mine the government had occupied and operated in 1943. 341 U.S. at 115, 71 S.Ct. 670. The Court upheld a district court's award of just compensation to the plaintiff for a *negative* return; *i.e.,* "the portion of the operating loss which the court found attributable to Government operation of the mine." *Id.* at 115, 71 S.Ct. 670. Concurring in the judgment, and casting the vote that established a majority for the judgment, Justice Reed contrasted this focus on a return with the method that compared a change in market value:

> *Market value,* despite its difficulties, *provides a fairly acceptable test for just compensation when the property is taken absolutely.* But *in the temporary taking of operating properties, market value is too uncertain a measure to have any practical significance* .... The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case.

Id. at 119-120, 71 S.Ct. 670 (Reed, J., concurring) (internal citations omitted) (emphasis added).[36] In short, for a temporary taking of an operating property, the Supreme Court looked to returns over

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[36] Justice Reed went on to say: "When, in a temporary taking, no agreement is reached with the owners, the courts must determine what payments the Government must make. Whatever the nature of the 'taking,' the test should be the constitutional requirement of 'just compensation.' However, there is no inflexible requirement that the same incidents must be used in each application of the test." *Pewee Coal,* 341 U.S. at 120-21, 71 S.Ct. 670 (Reed, J., concurring).

the period of the taking, not changes in market value.

Lower courts have reached similar conclusions in other takings cases. In *Wheeler v. City of Pleasant Grove,* 833 F.2d 267 (11th Cir. 1987), the Eleventh Circuit explained:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the *return* on the portion of fair market value that is lost as a result of the regulatory restriction.

833 F.2d at 271 (internal citations omitted) (emphasis added). *See also A.A. Profiles, Inc. v. City of Fort Lauderdale,* 253 F.3d 576, 584 (11th Cir. 2001) (lost income is the proper measure of compensation "when the property owner's losses are limited to the temporary use of its property and the concomitant income."); *Wheeler v. City of Pleasant Grove,* 896 F.2d 1347, 1351 (11th Cir. 1990) ("The unconstitutional taking which this court found compensable was not a denial of all use of the Pleasant Grove property, as the district court's computation of damages would imply," but the lost income that the plaintiff suffered.).

Nonetheless, the government further avers that a return-on-equity analysis provides only a "snapshot" at a given point in time and does not adequately take into account the duration of the taking. Def.'s Br. at 38. However, the government's proffered metaphor is mistaken and misleading. Rather than a snapshot, the return-on-equity approach more closely resembles a composite, long-exposure photograph taken over the entire period of the temporary taking. Because it covers the period of the temporary taking, it addresses the economic results over the whole of the pertinent time, not merely an instant within that period. As the Federal Circuit has stated, "the period of the alleged temporary taking ... is the relevant period for purposes of assessing the economic impact." *Seiber v. United States,* 364 F.3d 1356, 1371 (Fed. Cir. 2004). By contrast, as pointed out in *Cienega IX,* using the diminution-in-value approach in a case such as this could allow the government to take an owner's $10 million annual income stream from a $100 million property for four and a half years–yielding the government $45 million–and then assert that the owner had not suffered a severe economic impact because he or she had only been deprived of 45% of the value of his property. *Cienega IX,* 67 Fed.Cl. at 476. The estimate of Dr. Brett Dickey, an expert testifying on behalf of the government, provides a less extreme, but informative example. His diminution in value model estimated that CCA had only suffered an economic impact of 18.1 to 20 percent. DX 160 (Dickey report) at 12; Tr. 1627:16 to 1629:18 (Test. of Dickey). By its very nature, Dr. Dickey's model simply examined the decline in the value of Chateau Cleary caused by the preservation statutes, effectively assuming that the only value of Chateau Cleary to CCA was the value it could recover upon sale while ignoring the lost income streams.

In all the circumstances, the government's objections to use of the return-on-equity approach to measuring economic impact are not well received. Those objections in this case contravene the lessons of the temporary takings cases arising with operating properties during World War II, including *Pewee Coal* and *General Motors,* as well as the more recent decisions in *Cienega VIII, Chancellor Manor, Rose Acre Farms, A.A. Profiles, Wheeler*, and *Cienega IX.* Factually also, a return-on-equity method measures what happens during the entire period of the temporary taking, which is the relevant time span, not just at a single point in time. Moreover, it avoids the problem that, for an income-producing, operating property, a change-in-value approach tends to disregard the loss of the full income stream for a substantial period of time. For these reasons, the court determines that the return-on-equity approach provides the most appropriate measure of economic impact in this temporary taking case of an income-producing property.

Dr. Ragas measured the diminution in return on equity to CCA by dividing the maximum HUD-allowed annual dividend, $12,952, by the aggregate equity in the property at the time of prepayment, $811,700. PX 125 (Ragas updated expert report) (June 22, 2006) ("Ragas updated report") at 2, Table Thirty-Three. This methodology followed that employed in *Cienega VIII. See* 331 F.3d at 1342 (using the same approach); *Cienega IX,* 67 Fed. Cl. at 476 (same).[37] Under this measure, CCA received a 1.6% return on its real equity. PX 125 at Table Thirty-Three. Comparing this 1.6% return to a conservative 8.5% return on 15-year mortgage-backed securities, the comparative benchmark used

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[37] Dr. Ragas calculated the equity by adding CCA's cumulative principal repayments from 1976 to 1991, to its HUD-approved equity in 1976. PX 125 at Table Thirty-Three.

in *Cienega VIII,* yields an economic impact of 81.25%. *Id.; see* PX 125 at Table Thirty-Three.

Dr. Ragas's calculation is based on the maximum annual return, *fixed by HUD,* that CCA could have received during the alleged temporary takings period–expressed as a percentage of the aggregate equity CCA had invested in Chateau Cleary at the time for prepayment. *See, e.g.,* PX 125 (Ragas updated expert report) at 2, Table Thirty-Three.

The government challenges Dr. Ragas's calculation of economic impact in two ways. First, the government claims that CCA's failure to pursue a sale of Chateau Cleary under the preservation statutes "eliminates any potential economic impact" to CCA because any adverse impact "resulted from [CCA's] own decision to maintain the *status quo*–not from the challenged regulations." Def.'s Br. at 33-35. This contention rests on the same faulty premise as the government's analogous argument that CCA's claims are not ripe: that to vindicate its right to prepay its mortgage, CCA was obligated to pursue the secondary preservation-option scheme established under the preservation statutes. CCA was under no such obligation, and in any event, any value these extrinsic options had would only be taken into account in determining just compensation. *See supra* at 191 n. 27; *Cienega IX,* 67 Fed. Cl. at 478.

Second, the government avers that CCA's failure to request regular rent increases undercuts CCA's claim that, in the absence of the preservation statutes, it would have prepaid on schedule in May 1991. Def.'s Br. at 35-36. As the government would have it, because CCA allegedly would not have prepaid its mortgage in 1991, ELIHPA and

LIHPRHA could not have caused CCA a severe economic deprivation. *See id.* This criticism disregards the fact that Dr. Ragas computed the *maximum* annual return CCA *could have received* and did not rely on the lesser actual returns that CCA earned. PX 125 (Ragas updated report) at 3, Table Thirty-Three. Moreover, that CCA did not seek rent increases from 1985 to 1994 is of no significance for the separate reason that the regulatory agreements did not mandate that CCA seek rent increases. *See supra,* at 22; PDX 33 (Chateau Cleary Operating Expenses and Rent Increases).[38]

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[38] CCA also had practical reasons for foregoing rent increases. From the mid-1980s until about 1990-1991, New Orleans was in the midst of a severe recession due to the decline of the oil and gas industries, resulting in bank failures and "widespread failures in the apartment marketplace." Tr. 822:7-22 (Test. of Ragas). The recession drove market-rate properties in West Metairie to lower their rents to levels near those at Chateau Cleary, causing CCA to "tighten [its] belt[ ]" and decrease its operating expenses. Tr. 155:18 to 156:12 (Test. of Norman). After receiving a rent increase in 1984, based on 1983 operating expenses, Chateau Cleary's operating expenses increased in 1985 and then decreased for three consecutive years. PDX 33 (Chateau Cleary Operating Expenses and Rent Increases). Operating expenses then increased every year from 1989 to 1992, declined in 1993, and rose again in 1994. PDX 33 (Chateau Cleary Operating Expenses and Rent Increases). CCA points out that not until 1992 did Chateau Cleary's operating expenses exceed in absolute terms the 1985 levels. Pl.'s Br. at 31. (The proofs at trial showed that HUD would approve rent increases generally on the basis that the property's operating expenses had increased. Tr. 155:18 to 156:25) (Test. of Norman). The government notes that CCA's operating expenses from 1985 to 1994 were higher in absolute terms than the 1983 levels. Def.'s Br. at 16. These arguments are beside the point. Even if HUD would have approved of rent increases for a

The government also observes that after HOPE was enacted, CCA could have moved more expeditiously than it did to prepay its mortgage. Def.'s Br. at 36. CCA prepaid on September 30, 1998, well after the issuance of Preservation Letter No. 97-1, under which HUD halted its efforts to forestall post-HOPE prepayment. Pl.'s Br. at 22; PX 75 (Preservation Letter No. 97-1), Attach. at 7. This delay, however, has no effect on the economic impact of the alleged taking because CCA claims the takings period ended no later than February 28, 1997. *See* Pl.'s Br. at 60.

Based upon the evidence adduced, the court concludes that the methodology Dr. Ragas employed for calculating economic impact was reasonable and that the calculations he performed were accurate. The court accepts Dr. Ragas's estimate of an 81.25% diminution in value and concludes that this economic impact is a "serious financial loss" caused by ELIHPA and LIHPRHA. *See Cienega VIII,* 331 F.3d at 1343; *see also Cienega IX,* 67 Fed. Cl. at 477.

d. *Takings synopsis.*

Having examined the three *Penn Central* factors and weighed all of the relevant circumstances, *see Tahoe-Sierra,* 535 U.S. at 322, 122 S.Ct. 1465, the court concludes that ELIHPA and LIHPRHA effected a temporary taking of CCA's property. The preservation statutes have the character of a taking in that they disproportionately placed the burden of

property serving economically disadvantaged tenants during a recession, raising rent would not have been feasible for CCA. *See* Tr. 156:1-12 (Test. of Norman). Most importantly, Dr. Ragas's comparative use of *maximum* allowable returns on CCA's equity eliminates this consideration in all events.

providing low-income housing on owners of Section 221(d)(3) properties, such as CCA. ELIHPA and LIHPRHA also frustrated the reasonable investment-backed expectations of the Norman brothers and, later, CCA. The prepayment right was the *sine qua non* of the deal the Norman brothers struck with HUD and the original developers. The Norman brothers purposely invested in a property located in an area, West Metairie, that possessed qualities ideal for eventual conversion of the property into a market-rate apartment complex, and they built a complex that would be an appropriate participant in a conventional rental housing market. Likewise, the expectation that the government would honor its commitment to allow CCA to prepay and exit the HUD program after twenty years was reasonable. CCA suffered a severe economic deprivation, losing more than eighty percent of the returns that a conservative financial investment would have earned during the takings period. Having shown through evidence that each of the three *Penn Central* factors has been satisfied, CCA has proven that it suffered a temporary regulatory taking.

e. *Duration of the temporary taking.*

The Norman brothers signed their second mortgage and the secured note on Chateau Cleary on May 17, 1971, PX 5 (1971 note); PX 6 (1971 mortgage), meaning that on May 17, 1991, CCA was eligible to prepay in the absence of the preservation statutes. The only dispute between the parties is the date upon which the taking ended. CCA advocates an end-of-taking date of February 28, 1997, Pl.'s Br. at 60, while the government argues that the taking ended on May 31, 1996, slightly over sixty days after the passage of HOPE. Def.'s Reply at 36.

HOPE reinstated the prepayment rights of owners whose mortgages were insured under Section 221(d)(3), § 2(b), 110 Stat. at 834-35, but the preservation letters, *see supra* at 12, were purposely intended to deter or delay prepayment of Section 221(d)(3) mortgages. *See* Tr. 1090:12 to 1091:1 (Test. of Kizzier). Mr. Norman also testified that the preservation letters–in part because of their ever-shifting standards–created significant uncertainty, leading CCA to delay its plans for prepayment. Tr. 234:17 to 235:3 (Test. of Norman). Preservation Letter 97-1, issued on December 16, 1996, finally ended that uncertainty. PX 75 (Preservation Letter No. 97-1), Attach. at 7. As noted earlier, CCA did not actually prepay until September 30, 1998. Pl.'s Br. at 22. In these circumstances, the court finds that following Preservation Letter 97-1, CCA reasonably could have prepaid by December 31, 1996. Factoring in HOPE's 60-day moratorium on rent increases, the court accepts CCA's end-of-taking date of February 28, 1997. *Cf. Cienega IX,* 67 Fed. Cl. at 481 (end-of-taking date of March 1, 1997 for plaintiffs in somewhat analogous situation).

3. *Just compensation.*

Just compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1943); *see also Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326, 13 S.Ct. 622, 37 L.Ed. 463 (1893) (there is "no doubt that the compensation must be a full and perfect equivalent for the property taken."); *Narramore v. United States,* 960 F.2d 1048, 1051 (Fed. Cir. 1992) ("The Fifth Amendment guarantees a property owner the right to seek damages for the full extent of a taking."). The proper measure of damages for a temporary taking of a going business concern can be the difference between the fair market rent the owner could have earned, but for the taking, and the rent, if any, the owner earned during the takings period. *See Kimball Laundry,* 338 U.S. at 7, 69 S.Ct. 1434 ("the proper measure of compensation is the rental that probably could have been obtained [but for the taking]."); *Petty Motor,* 327 U.S. at 381, 66 S.Ct. 596 (just compensation measured by "the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew ... less the agreed rent which the tenant would pay for such use and occupancy."); *see also Pewee Coal,* 341 U.S. at 117, 71 S.Ct. 670 ("Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use," but the better measure on the facts was the operating losses suffered during the temporary period of governmental control.); *United States v. Commodities Trading Corp.,* 339 U.S. 121, 123, 70 S.Ct. 547, 94 L.Ed. 707 (1950) ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases.").

a. *Net rental value.*

CCA's model of damages, developed by Dr. Ragas, measures "the difference between the cash flow CCA would have received had it been allowed to prepay its mortgage and operate the property as a conventional apartment complex ('the [m]arket [s]cenario') and the cash flow CCA actually received from operating the property as a HUD-restricted property (the 'HUD [s]cenario')." Pl.'s Br. at 26. Dr. Ragas first determined under the market scenario the gross income, operating expenses, and financing costs for CCA. PDX 17 (Damages Calculation Methodology); *see also* Tr. 815:16 to 817:14 (Test. of Ragas); *see generally* PX 106 (second Ragas report). To calculate gross income, Dr. Ragas used *The New Orleans and South Central Gulf Real Estate Market Analysis,* a survey done under the auspices of the University of New Orleans ("UNO"), that Dr. Ragas had conducted at least once every year since 1978. PX 106 (second Ragas report) at 20, 23.[39] The UNO survey reported apartment rents in the New Orleans area by unit type and geographic submarket, enabling Dr. Ragas to derive market rents and occupancy levels based on properties comparable to Chateau Cleary and located in the same submarket. *See id.* at 20, 22-23. Dr. Ragas concluded, based on the property's construction, amenities, and unit sizes, that Chateau Cleary was an average quality apartment complex in the West Metairie submarket. Tr. 1927:12 to 1928:3, 1930:25 to 1933:8 (Test. of Ragas).[40] In a similar fashion, Dr. Ragas estimated

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[39] For approximately thirty years, Dr. Ragas conducted the survey while serving as a professor and the director of a real estate research center at UNO. Tr. 743:1-7 (Test. of Ragas).

[40] Based on a survey of apartments in the West Metairie submarket, Dr. Ragas found that Chateau Cleary's 22 one-bedroom, one-bath units and its 22 two-bedroom, one-bath

Chateau Cleary's operating expenses based on Chateau Cleary's experience and that of comparable properties, also incorporating the initial costs for converting the property to a market-rate complex. PX 106 (second Ragas report) at 19, 26-30, 35; Tr. 837:4-8 (Test. of Ragas). Financing costs were based on market interest rates. PX 106 (second Ragas report) at 31-32. From these figures, Dr. Ragas derived CCA's estimated net cash flows under the market scenario. *See* Tr. 817:6-14 (Test. of Ragas); PDX 17 (Damages Calculation Methodology).

Second, Dr. Ragas calculated for each year of the takings period the difference between the market-rate net cash flows and the net cash flows CCA actually received during the temporary takings period under the HUD restrictions. *See* PDX 17 (Damages Calculation Methodology); PDX 30 (Damages Totals, June 1991-February 1997, Scenario 2) ("Damages Totals").[41] Third, Dr. Ragas then applied a ten percent discount rate to those unadjusted net amounts to determine the present value of the lost rents at the end of the taking,

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units were slightly larger than average. Chateau Cleary's 44 two-bedroom, one-and-a-half-bath townhouses were smaller than average, but in high demand because of the increased privacy they offered due to their design. The complex's 16 three-bedroom, two-bath units were also smaller than average, but were in short supply in the area and thus in high demand. Tr. 1930:25 to 1933:8 (Test. of Ragas); PX 106 (second Ragas report) at 40.

[41] Dr. Ragas calculated lost rents for the following seven time periods: June 1991 to December 1991 (-$20,293); 1992 ($136,497); 1993 ($134,744); 1994 ($164,987); 1995 ($148,151); 1996 ($104,810), and January 1997 through February 1997 ($17,467). PDX 30 (Damages Totals). The sum of these unadjusted damage totals is $686,363.

February 28, 1997. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 31 (Adjustment of Damages-Scenario 2). Applying a ten-year Treasury STRIPS rate of 6.4 percent from the end of the taking to an estimated judgment date of September 30, 2006, Dr. Ragas arrived at a final damages calculation of $1,528,629. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 32 (Calculation of Interest-Scenario 2 (Feb. 28, 1997 takings period end date)). The court finds that Dr. Ragas's methodology is reliable and provides a sound basis for determining damages.[42]

The government contests Dr. Ragas's calculation of just compensation on several grounds. First, the government argues that CCA is owed no compensation because "CCA was free to exit the [original HUD] program" in the limited sense that it could invoke options under the preservation statutes to sell or seek incentives. *See* Def.'s Reply at 30-31. The court has rejected this contention in the context of other issues addressed in this opinion, but the argument cannot be rejected summarily when addressing just compensation because the value of

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[42] The soundness of Dr. Ragas's methodology can be seen by a comparison of comparable lost-rent estimates performed by Dr. Ragas and the government's expert, Mr. Derbes. Dr. Ragas calculated unadjusted net rental income from May 1991 to May 30, 1996 as $607,757. PDX 28 (Adjustment of Damages-Scenario 1). Mr Derbes calculated CCA's "loss of income" from May 1991 to April 30, 1996 as $526,971, only $80,786 less than Dr. Ragas's estimate. DX 173 (Derbes Supplemental Report) (April 29, 2005) at 13; Tr. 1523:16 to 1525:23 (Test. of Derbes). The similarity in the two estimates provides a useful sensitivity test and reinforces the court's decision to accept Dr. Ragas's methodology as reliable.

any options that were exercised properly relates to just compensation. *See supra,* at 191 n. 27. The government in effect contends that CCA is owed no compensation because of the mere existence of the options, even though CCA did not exercise any of them. Def.'s Reply at 30-31. The shortest answer to the government's contention is that CCA had no obligation to seek incentives or sale options it manifestly did not want. *See* Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.). By filing a notice of intent, CCA kept open the possibility that at a later time it might choose to seek a sale or a use agreement under the preservation statutes, but at least during the temporary takings period when the prepayment bar of the preservation statutes remained in effect, any action it would have undertaken to pursue those options would not have been a voluntary choice. *See Independence Park IV,* 465 F.3d at 1311-12; *Cienega IX,* 67 Fed. Cl. at 482. After HOPE was enacted, CCA had no reason to pursue those options because prepayment was near at hand. Moreover, the options were not attractive to CCA. A use agreement would have locked Chateau Cleary into the HUD program for a long period. And, despite LIHPRHA's language calling for determining the "fair market value" of a sale, 12 U.S.C. § 4103(b)(2), the testimony at trial established that the preservation statutes provided no guarantees of the owner receiving fair market value. *See supra,* at 190 n. 26.

Second, the government argues that Dr. Ragas inappropriately used an *ex post* analytical approach, by "calculat[ing] compensation at the end of the alleged takings," rather than at the start of that period. *See* Def.'s Reply at 31. In support of this argument, the government cites cases that conclude that *where a permanent taking occurs,* just compensation must be measured "as of the time of the taking." Def.'s Br. at 52. The government takes this to mean that *in all temporary taking cases* the time of the taking is the point in time at which the taking begins. However, in the case of a temporary taking, such as this one, the "time of the taking" is the *full* period during which the governmental action constrained the owner's property rights, not just the start of that period. Therefore, the valuation date for temporary takings is appropriately designated as the end of the takings period because "the end of the temporary taking sets a boundary for just compensation and, apart from duration, events that transpired during the temporary takings period 'have to be taken into account in setting a valuation.'" *Cienega IX,* 67 Fed. Cl. at 490 (quoting *Independence Park I,* 61 Fed. Cl. at 709). The Federal Circuit implicitly approved of this methodology when it ruled on appeal in *Independence Park III* that an owner who signed a use agreement during the takings period was entitled to just compensation for the term of the use agreement. *See* 449 F.3d at 1248 ("[T]he calculation of damages should be adjusted in the case of [owners who signed use agreements] to treat the ban on prepayment as lasting as long as the use agreements provided for, with the amount of damages adjusted to account for any benefits [those owners] obtained as a result of the use agreements."); *see also Independence Park IV,* 465 F.3d at 1312 (same on reconsideration).[43]

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43 In an argument related to the government's critique of Dr.

Third, the government argues that CCA is a below-average property, not an average property, as Dr. Ragas concluded. Def.'s Br. at 57-58. The government relies, in part, on the fact that after prepayment in 1998, CCA did not charge the average rents for the West Metairie submarket. *Id.* However, the apartment rental market changed substantially from 1991 to 1998. New complexes with better amenities were coming on the market in areas just south of West Metairie beginning in 1996, shifting the average upward. Tr. 824:3 to 825:13, 829:2 to 830:20, 1063:13 to 1065:18, 1942:2-9, 1991:2-9 (Test. of Ragas). Noting that these new complexes were not built in West Metairie itself, the government disputes the effect they could have on CCA's rents.

Ragas's so-called *ex post* approach taking into account the end of the taking, the government avers that the court should use the *ex ante* approach advocated by its expert, Dr. Dickey. Def.'s Br. at 55. However, while initially purporting to be an *ex ante* analysis, Dr. Dickey's damages calculation incorporated a valuation performed by Mr. Derbes that *assumed* that an owner, as of May 1, 1991, knew with certainty that HOPE would be enacted in 1996. DX 160 (Dickey report) at 4; Tr. 1723:3-23, 1725:21-24 (Test. of Dickey). Dr. Robert Stillman, CCA's economics expert, criticized Dr. Dickey's methodology by arguing that a proper *ex ante* analysis should be based only on the facts and circumstances known at the time of the start of the taking (*i.e.,* May 1991). Tr. 1852:11 to 1853:14 (Test. of Stillman). From a perspective as of May 1991, Dr. Dickey should not have "peek[ed]" at the so-called *ex post* fact of HOPE's enactment. *See* Tr. 1861:14 to 1862:24 (Test. of Stillman). When the government's counsel asked Dr. Stillman whether Dr. Dickey's assumption about HOPE was the "*only ex post* information" that he had incorporated into his analysis, Dr. Stillman responded: "[Y]es, that's the only–'how was the play, Mrs. Lincoln,' but yes." Tr. 1870:2-9 (Test. of Stillman) (emphasis added).

Def.'s Reply at 34.[44] Mr. Derbes, the government's expert, opined that the newer complexes had not affected CCA's rents because CCA served a different class of tenants, Tr. 1429:11 to 1432:2 (Test. of Derbes), while Dr. Ragas believed that the newer projects had affected CCA. Tr. 1063:13 to 1065:18, 1942:2-9, 1991:2-9 (Test. of Ragas). Indeed, Dr. Ragas testified that the entry of the newer complexes immediately south of West Metairie had a significant impact on the *overall* New Orleans market–leading him to begin to publish one annual rental survey for these higher-quality apartments and one for the rest of the market "because the rest of the market was lagging in not [experiencing] nearly the gains that the new[er] ... units were achieving." Tr. 1063:6 to 1065:7 (Test. of Ragas). The court credits Mr. Ragas's testimony, given his greater detailed knowledge of the rental housing market throughout the New Orleans area.

Dr. Ragas also criticized Mr. Derbes's conclusion that Chateau Cleary was a below-average property. *See* Tr. 1927:8 to 1928:4 (Test. of Ragas); *see also* Tr. 1424:6 to 1429:10 (Test. of Derbes). He faulted Mr. Derbes for using his own *forecasts* of market rents based on comparable properties given that *actual* data on market rents was available from the annual UNO survey. PX 119 (Ragas rebuttal report) (May 30, 2005) at 10. Dr. Ragas also pointed out that Mr.

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44 The government objects to another minor aspect of Dr. Ragas's damages calculations-an error he made as to the square footage of the three-bedroom units at Chateau Cleary, leading to a difference of "$1,000 a year out of some $350,000 in rent." Def.'s Br. at 58-59; Tr. 1985:5-21 (Test. of Ragas). This error is insignificant, and the court will disregard it.

Derbes had characterized the comparable properties he used in his analysis as being in average to good condition and yet characterized Chateau Cleary as below-average. *See id.* at 4. Finally, Dr. Ragas noted that in estimating per-unit sales prices, Mr. Derbes assigned Chateau Cleary a higher market value per unit than the average comparable per-unit sales price. *Id.* Based upon these factors, the court adopts Dr. Ragas's testimony that Chateau Cleary was at least an average property in the relevant market. First, Mr. Derbes' own sales estimates support the fact that Chateau Cleary should be valued as a better-than-average property. Second, the site visit showed Chateau Cleary's quality construction, good overall average room size, the value of having three-bedroom units, which were in short supply, and ideal location. *See also* Tr. 1927:12 to 1928:3, 1930:25 to 1933:8 (Test. of Ragas). Lastly, Dr. Ragas had long-standing expertise in this area and the breadth of the survey data he used based on *actual* market rents charged in the West Metairie submarket during the takings period supported his observations over those of Mr. Derbes. Chateau Cleary was an average property.[45]

b. *Discounting.*

To put an owner of a going business concern in as good a position as it would have been in if its property had not been taken, *see Miller,* 317 U.S. at 373, 63 S.Ct. 276, a court must apply a discount rate

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[45] The government also objects to Dr. Ragas's use of the rents CCA actually charged for the actual HUD-restricted case during the years from 1991 to early 1995 because CCA failed to seek rent increases. Def.'s Br. at 56-57. For the reasons cited *supra,* at 198 & n. 38, this argument is rejected.

to the foregone stream of net rents. *See Whitney Benefits, Inc. v. United States,* 18 Cl. Ct. 394, 412-13 (1989), *aff'd,*926 F.2d 1169, 1178 (Fed. Cir. 1991). "[T]he discount rate performs two functions: (i) it accounts for the time value of money; and (ii) it adjusts the value of the cash flow stream to account for risk." *Energy Capital Corp. v. United States,* 302 F.3d 1314, 1333 (Fed. Cir. 2002). The discount rate "reflects returns required to attract investment capital" and incorporates a risk premium "to account for the potential investor's uncertainty about future events." *Cienega IX,* 67 Fed. Cl. at 490. For temporary takings, the valuation date is the end of the takings period, giving full consideration to events that transpired during the takings period, including the finite end to that period. *See Seiber,* 364 F.3d at 1364; *see also Cienega IX,* 67 Fed. Cl. at 490.[46]

Dr. Ragas applied a ten percent discount rate at the end of the takings period, February 28, 1997. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 31 (Adjustment of Damages-Scenario 2). The ten percent rate reflected a slight premium over the

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[46] The government again argues that the proper valuation date is "the time of the taking," but it means only the beginning of the takings period, not also the time to the end. *See* Def.'s Br. at 54-55 & n. 12; *see also* Def.'s Reply at 31. In this connection the government contends that CCA's damages should be adjusted *downward* by the discount rate using the finite starting time as a measuring point. Among other things, the government avers that the market-rate rents that CCA could have charged in the absence of the preservation statutes consist of inappropriate *ex post* information. This argument is unavailing because "the time of the [temporary] taking" is *not* a single point in time, but rather the entire time period. *See supra,* at 197, 201.

relatively riskless rate of 8.5 percent to account for the "opportunity cost" CCA lost due to the preservation statutes. *See* Tr. 863:2-10 (Test. of Ragas). Mr. Norman testified that had CCA received the extra cash flows that market rents would have brought, it would have invested them with the goal of a fifteen to twenty percent annual return. Tr. 291:25 to 292:9 (Test. of Norman). Dr. Ragas believed that a discount rate based on these alternative investments was too high, but that a rate that reflected some risk, such as that found in utility bonds, corporate bonds, or real estate investments in comparable properties in the Jefferson Parish submarket, was appropriate. Tr. 863:2 to 864:14 (describing ten percent discount rate for a nominal takings period that ended in May 1996), 867:1 to 869:19 (indicating use of an identical approach for the takings period ending in February 1997) (Test. of Ragas); PX 106 (second Ragas report) at 45, 51. Based on these considerations, Dr. Ragas arrived at a ten percent discount rate. *See* Tr. 863:2-10 (Test. of Ragas).

Relying on the testimony of the government's and CCA's economics experts, Tr. 1687:6-12, 1688:1-13 (Test. of Dickey), 1867:4-13, 1869:9-20 (Test. of Stillman), the government argues that a single, risk-free rate interest rate should be used to bring cash flows forward, not only to the date the taking ended or to the date the judgment is entered, but to the date the judgment is paid. *See* Def.'s Br. at 59; Def.'s Reply at 40. Specifically, the government contends that the defendant's debt rate should be used because an owner's claim at the time of the taking is against the government, and such a claim bears no risk. Def.'s Br. at 59; Tr. 1687:6-12, 1688:1-13 (Test.

of Dickey).[47] The government's approach, however, does not adequately "adjust [ ] the value of [CCA's lost] cash flow stream to account for risk." *See Energy Capital,* 302 F.3d at 1333. Therefore, the court accepts Dr. Ragas's proffered ten percent discount rate.

Applying a ten percent discount rate to the year-by-year lost rents for CCA, to the end of the temporary takings period, yields the following values:

time period	lost rents	value as of Feb. 28, 1997
6/91-12/91	($ 20,293)	($ 33,102)
1992	136,497	202,412
1993	134,744	181,648
1994	164,987	202,198
1995	148,151	165,059
1996	104,810	106,156

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47 The government also asserts that the discount rate for rents earned as a conventional property should be higher than those earned while under HUD restrictions. Def.'s Br. at 59 n. 14; *see also* DX 160 (Dickey report) at 34, 37. The government discounts Chateau Cleary's quality of construction, the value of its three-bedroom units, which were in short supply, and its ideal location, as well as testimony at trial of the "scores" of defaults of HUD-restricted properties in the New Orleans area during the recession from the late 1980s through the early 1990s. Tr. 1927:8 to 1928:4, 1930:25 to 1933:8 (Test. of Ragas), 502:22-25 (Test. of Alexander); DX 140 (Alexander report) at 80 ("scores of other projects defaulted, went into bankruptcy, and were eventually foreclosed."); *cf. Cienega IX,* 67 Fed. Cl. at 491. Dr. Ragas's estimate that the risk rates under either the market scenario or the HUD scenario would be roughly the same is accepted.

1/97-2/97	17,467	17,467
		$841,839

See PX 125, Table Thirty-Two. Accordingly, the just compensation due CCA as of February 28, 1997, not including interest, is $841,839.

c. *Interest.*

"If the Government pays the owner before or at the time the property is taken, no interest is due on the award ... [b]ut if disbursement of the award is delayed, the owner is entitled to interest thereon." *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 10, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) (internal citation omitted). If the government does not pay compensation at the time of the taking, the Takings Clause requires a payment of interest. *Seaboard Air Line Ry. v. United States,* 261 U.S. 299, 306, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *see also Library of Congress v. Shaw,* 478 U.S. 310, 317 n. 5, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) *superseded on other grounds by statute,* Civil Rights Act of 1991, Pub.L. No. 102-66, 105 Stat. 1071; *Cienega IX,* 67 Fed. Cl. at 492. Because the government did not compensate CCA at the time of the taking, CCA is owed interest on the present value of the damages CCA suffered from and after February 28, 1997, the end of the temporary taking.

Dr. Ragas applied a compound interest rate of 6.4 percent, the ten-year Treasury STRIPS rate, from the end of the taking, February 28, 1997, to an estimated judgment date of September 30, 2006. PX 125 (Ragas updated report) at Table Thirty-Two (referring to a 6.4 percent rate); PDX 32 (Calculation of Interest-Scenario 2 (Feb. 28, 1997 takings period end date)) (same); *see also* Tr. 865:21 to 866:14, 868:23 to 869:1 (Test. of Ragas). The government argues that the single riskless interest rate it advocates should be applied using simple, not compound interest, but, in the alternative, concurs that the ten-year STRIPS rate is appropriate. *See* Def.'s Br. at 59; Def.'s Reply at 39-40.

(i.) *Interest rate.*

The determination of an appropriate interest rate is based on the so-called "prudent investor rule," which measures "how 'a reasonably prudent person' would have invested the funds to 'produce a reasonable return while maintaining safety of principal.'" *Tulare Lake Basin Water Storage Dist. v. United States,* 61 Fed. Cl. 624, 627 (2004) (quoting *United States v. 429.59 Acres of Land,* 612 F.2d 459, 464-65 (9th Cir. 1980)). In *Cienega IX,* this court, under similar circumstances, applied the ten-year STRIPS rate for three key reasons: (1) Treasury STRIPS reflect the minimal risk that the United States government will default on its obligations, (2) in that case, the ten-year STRIPS rate roughly approximated the length of time from the end of the taking to the date of judgment, and (3) the court has a strong judicial policy in favor of uniform interest rates for similarly situated plaintiffs. *Cienega IX,* 67 Fed. Cl. at 493; *Georgia-Pacific Corp. v. United States,* 226 Ct. Cl. 95, 640 F.2d 328, 365-66 (1980) (favoring uniform interest rates); *Tulare Lake,* 61 Fed. Cl. at 627 (same); *Independence Park I,* 61 Fed. Cl. at 716-17 (applying ten-year STRIPS rate). These reasons are equally applicable to CCA's case; here also, approximately ten years have passed since the end of the takings period. Therefore, the interest rate represented by ten-year STRIPS is appropriate.

(ii.) *Compounding.*

Dr. Ragas's damages model employed compound interest, but the government claims that simple interest would provide adequate compensation to CCA because CCA allegedly bore no risk and its damages model "more than captures the full investment opportunity at the time of the alleged taking." Def.'s Reply at 38. A first principle of Takings Clause jurisprudence is that the just compensation should put CCA in as good a position as if its property had never been taken. *See Miller,* 317 U.S. at 373, 63 S.Ct. 276; *Monongahela Navigation,* 148 U.S. at 326, 13 S.Ct. 622; *Narramore,* 960 F.2d at 1051. The Federal Circuit has said that in some cases compound interest may be necessary "'to accomplish complete justice'" under the Takings Clause. *Dynamics Corp. of Am. v. United States,* 766 F.2d 518, 520 (Fed. Cir. 1985) (quoting *Waite v. United States,* 282 U.S. 508, 509, 51 S.Ct. 227, 75 L.Ed. 494 (1931)).

In this case, compounding is necessary to satisfy the mandate of the Takings Clause. "Income-producing property would generate an income stream that would be available for continual investment, at compound rates. Just compensation requires the payment of compound interest to replace the investment opportunities plaintiffs lost when the government took their property." *Whitney Benefits, Inc. v. United States,* 30 Fed. Cl. 411, 415-16 (1994); *see also Vaizburd v. United States,* 67 Fed. Cl. 499, 504 (2005) ("Compounding we view as a routine means by which a reasonable person would protect [himself or herself], over an extended period of time, from erosion of [his or her] investment."). Had the government properly compensated CCA in February 1997, CCA would have reinvested that money. The lengthy passage of time since the end of the taking also is a pertinent factor in this determination. *See Whitney Benefits,* 30 Fed. Cl. at 415 ("[B]ecause of the long delay since the date of taking in this case, the award of compound interest is not only proper, but its denial would effectively undercut the protections of the fifth amendment to our Constitution."). In light of these facts, compound interest is an appropriate and just means of compensating CCA. *See Cienega IX,* 67 Fed. Cl. at 493.

CONCLUSION

For the reasons stated, the court finds that CCA has suffered a temporary taking for which just compensation is due. The amount of just compensation awarded CCA is $841,839 as of the end of the temporary takings period, February 28, 1997, plus compound interest at the ten-year STRIPS rate from that date to the date the judgment is actually paid.

Final judgment to this effect shall be issued under RCFC 54(b) because there is no just reason for delay. In due course, the court will also award costs to plaintiffs, including an award of attorneys' fees and expenses under Section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). Given the high likelihood of appeal in this case and in the interest of efficiency, proceedings on award of attorneys' fees and costs should be deferred until after any appellate process has been concluded.

The clerk shall enter final judgment as specified above.

It is so ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5100, -5101

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.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 16, 2012.

FOR THE COURT

Jan Horbaly
Clerk

Dated: 02/09/2012

cc: Kenneth D. Woodrow
Elliot E. Polebaum

CCA ASSOCIATES V US, 2010-5100, -5101
(CFC - 97-CV-334)

U.S. Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law No. 100-242
101 Stat. 1815
Feb. 5, 1988

* * *

TITLE II—PRESERVATION OF LOW INCOME HOUSING

Subtitle A—General Provisions

SEC. 201. SHORT TITLE.

This title may be cited as the “Emergency Low Income Housing Preservation Act of 1987”.

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 of the National Housing Act could be lost as a result of the termination of low income affordability restrictions;

(2) in the next decade, more than 465,000 low income housing units produced with assistance under section 8 of the United States Housing Act of 1937 could be lost as a result of the expiration of the rental assistance contracts;

(3) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners;

(4) the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into;

(5) the loss of this affordable housing, to encourage the production of which the public has provided substantial benefits over past years, would irreparably damage hard-won progress toward such important and long-established national objectives as—

(A) providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans;

(B) increasing the supply of housing affordable to low income Americans that is accessible to employment opportunities; and

(C) expanding housing opportunities for all Americans, particularly members of disadvantaged minorities;

(6) the provision of an adequate supply of low income housing has depended and will continue to depend upon a strong, long-term partnership between the public and private sectors that accommodates a fair return on investment;

(7) recent reductions in Federal housing assistance and tax benefits related to low income housing have increased the incentives for private

industry to withdraw from the production and management of low income housing;

(8) efforts to retain this housing must take account of specific financial and market conditions that differ markedly from project to project;

(9) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations; and

(10) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

(b) PURPOSE.—It is the purpose of this title—

(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance;

(2) to minimize the involuntary displacement of tenants currently residing in such housing; and

(3) to continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

* * *

Subtitle B—Prepayment of Mortgages Insured Under National Housing Act

SEC. 221. GENERAL PREPAYMENT LIMITATION.

(a) PRIOR APPROVAL OF PLAN OF ACTION.—An owner of eligible low income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary of Housing and Urban Development under this subtitle.

(b) ALTERNATIVE PREPAYMENT MORATORIUM.—In the event any court of the United States or any State invalidates the requirements established in this subtitle, an owner of eligible low income housing located in the geographic area subject to the jurisdiction of such court may not prepay, and a mortgagee may not accept prepayment of, a mortgage on such housing during the 2-year period following the date of such invalidation.

SEC. 222. NOTICE OF INTENT.

An owner of eligible low income housing seeking to initiate prepayment or other changes in the status or terms of the mortgage or regulatory agreement shall file with the Secretary a notice of the intent of the owner in such form and manner as the Secretary shall prescribe. The owner shall simultaneously file the notice or intent with any appropriate State or local government agency for the jurisdiction within which the housing is located.

SEC. 223. PLAN OF ACTION.

(a) PREPARATION AND SUBMISSION.—Upon receipt of a notice of intent, the Secretary shall provide the owner with such information as the owner needs to prepare a plan of action, which information shall include a description of the Federal incentives authorized under this title. The owner shall submit the plan of action to the Secretary in such form and manner as the Secretary shall prescribe. The owner may simultaneously submit the plan of action to any appropriate State or local government agency for the jurisdiction within which the housing is located, which agency shall, in reviewing the plan, consult with representatives of the tenants of the housing.

(b) CONTENTS.—The plan of action shall include—

(1) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement, which may include a request for incentives to extend the low income use of the housing;

(2) a description of any assistance that could be provided by State or local government agencies, as determined by prior consultation between the owner and any appropriate State or local agencies;

(3) a description of any proposed changes in the low income affordability restrictions;

(4) a description of any change in ownership that is related to prepayment;

(5) an assessment of the effect of the proposed changes on existing tenants;

(6) a statement of the effect of the proposed changes on the supply of housing affordable to lower and very low income families or persons in the community within which the housing is located and in the area that the housing could reasonably be expected to serve; and

(7) any other information that the Secretary determines is necessary to achieve the purposes of this title.

(c) REVISIONS.—The owner may from time to time revise and amend the plan of action as may be necessary to obtain approval of the plan under this subtitle.

SEC. 224. INCENTIVES TO EXTEND LOW INCOME USE.

(a) AGREEMENTS BY SECRETARY.—After receiving a plan of action from an owner of eligible low income housing, the Secretary may enter into such agreements as are necessary to satisfy the criteria for approval under section 225.

(b) PERMISSIBLE INCENTIVES.—Such agreements may include one or more of the following incentives that the Secretary, after taking into account local market conditions, determines to be necessary to achieve the purposes of this title:

(1) An increase in the allowable distribution or other measures to increase the rate of return on investment.

(2) Revisions to the method of calculating equity.

(3) Increased access to residual receipts accounts or excess replacement reserves.

(4) Provision of insurance for a second mortgage under section 241(f) of the National Housing Act.

(5) An increase in the rents permitted under an existing contract under section 8 of the United States Housing Act of 1937, or (subject to the availability of amounts provided in appropriation Acts) additional assistance under

such section 8 or an extension of any project-based assistance attached to the housing.

(6) Financing of capital improvements under section 201 of the Housing and Community Development Amendments of 1978.

(7) Other actions, authorized in other provisions of law, to facilitate a transfer or sale of the project to a qualified nonprofit organization, limited equity tenant cooperative, public agency, or other entity acceptable to the Secretary.

(8) Other incentives authorized in law.

SEC. 225. CRITERIA FOR APPROVAL OF PLAN OF ACTION.

(a) PLAN OF ACTION INVOLVING TERMINATION OF LOW INCOME AFFORDABILITY RESTRICTIONS.—The Secretary may approve a plan of action that involves termination of the low income affordability restrictions only upon a written finding that—

(1) implementation of the plan of action will not materially increase economic hardship for current tenants or involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available; and

(2)(A) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect—

(i) the availability of decent, safe, and sanitary housing affordable to lower income and very low-income families or persons in the area that the housing could reasonably be expected to serve;

(ii) the ability of lower income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

(iii) the housing opportunities of minorities in the community within which the housing is located; or

(B) the plan has been approved by the appropriate State agency and any appropriate local government agency for the jurisdiction within which the housing is located as being in accordance with a State strategy approved by the Secretary under section 226.

(b) PLAN OF ACTION INCLUDING INCENTIVES.—The Secretary may approve a plan of action that includes incentives only upon finding that—

(1) the package of incentives is necessary to provide a fair return on the investment of the owner;

(2) due diligence has been given to ensuring that the package of incentives is, for the Federal Government, the least costly alternative that is consistent with the full achievement of the purposes of this title; and

(3) binding commitments have been made to ensure that—

(A) the housing will be retained as housing affordable for very low-income families or persons, lower income families or persons, and moderate income families or persons for the remaining term of the mortgage;

(B) throughout such period, adequate expenditures will be made for maintenance and operation of the housing;

(C) current tenants shall not be involuntarily displaced (except for good cause);

(D) any increase in rent contributions for current tenants shall be to a level that does not exceed 30 percent of the adjusted income of the tenant or the fair market rent for comparable housing under section 8(b) of the United States Housing Act of 1937, whichever is lower;

(E)(i) any resulting increase in rents for current tenants (except for increases made necessary by increased operating costs)—

(I) shall be phased in equally over a period of not less than 3 years, if such increase is 30 percent or more; and

(II) shall be limited to not more than 10 percent per year if such increase is more than 10 percent but less than 30 percent; and

(ii) assistance under section 8 of the United States Housing Act of 1937 shall be provided if necessary to mitigate any adverse affect on current income eligible tenants; and

(F)(i) rents for units becoming available to new tenants shall be at levels approved by the Secretary that will ensure, to the extent practicable, that the units will be available and affordable to the same proportions of very low-income families or persons, lower income families or persons, and moderate income families or persons (including families or persons whose incomes are 95 percent or more of area median income) as resided in the housing as of January 1, 1987; and

(ii) in approving rents under this paragraph, the Secretary shall take into account any additional incentives provided under this subtitle and shall make provision for such annual rent adjustments as may be made necessary by future reasonable increases in operating costs.

* * *

SEC. 233. DEFINITIONS.

For purposes of this subtitle:

(1) The term "eligible low income housing" means any housing financed by a loan or mortgage—

(A) that is—

(i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act and assisted under section 101 of the Housing and Urban Development Act of 1965 or section 8 of the United States Housing Act of 1937;

(ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act;

(iii) insured, assisted, or held by the Secretary under section 236 of the National Housing Act; or

(iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and

(B) that, under regulation or contract in effect before the date of the enactment of this Act, is or will be within 1 year become eligible for prepayment without prior approval of the Secretary.

(2) The term "low income affordability restrictions" means limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility in eligible low income housing.

(3) The terms "lower income families or persons" and "very low-income families or persons" mean families or persons whose incomes do not exceed the respective levels established for lower income families and very low-income families under section 3(b)(2) of the United States Housing Act of 1937.

(4) The term "moderate income families or persons" means families or persons whose incomes are between 80 percent and 95 percent of median income for the area, as determined by the Secretary with adjustments for smaller and larger families.

(5) The term "owner" means the current or subsequent owner or owners of eligible low income housing.

(6) The term "Secretary" means the Secretary of Housing and Urban Development.

(7) The term "termination of low income affordability restrictions" means any elimination or relaxation of low income affordability restrictions (other than those permitted under an approved plan of action under section 225(b)).

SEC. 234. REGULATIONS.

The Secretary shall issue final regulations to carry out this subtitle not later than 60 days after the date of the enactment of this Act. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.

SEC. 235. EFFECTIVE DATE.

The requirements of this subtitle shall apply to any project that is eligible low income housing on or after November 1, 1987.

* * *

Public Law No. 101-625
104 Stat. 4079
Nov. 28, 1990

* * *

TITLE VI—PRESERVATION OF AFFORDABLE RENTAL HOUSING

Subtitle A—Prepayment of Mortgages Insured Under National Housing Act

SEC. 601. PREPAYMENT OF MORTGAGES.

(a) IN GENERAL.—Subtitles A and B of the Emergency Low Income Housing Preservation Act of 1987 (12 U.S.C. 1715*l* note) are amended to read as follows:

"Subtitle A—Short Title

SEC. 201. SHORT TITLE.

This title may be cited as the 'Low-Income Housing Preservation and Resident Homeownership Act of 1990'.

Subtitle B—Prepayment of Mortgages Insured Under National Housing Act

SEC. 211.—GENERAL PREPAYMENT LIMITATION.

(a) PREPAYMENT AND TERMINATION.—An owner of eligible low-income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary under this subtitle or in accordance with section 224. An insurance contract with respect to eligible low-income housing may be terminated pursuant to section 229 of the National

Housing Act only in accordance with a plan of action approved by the Secretary under this subtitle or in accordance with section 224.

(b) FORECLOSURE.—A mortgagee may foreclose the mortgage on, or acquire by deed in lieu of foreclosure, any eligible low-income housing project only if the mortgagee also conveys title to the project to the Secretary in connection with a claim for insurance benefits.

(c) EFFECT OF UNAUTHORIZED PREPAYMENT.—Any prepayment of a mortgage on eligible low-income housing or termination of the mortgage insurance on such housing not in compliance with the provisions of this subtitle shall be null and void and any low-income affordability restrictions on the housing shall continue to apply to the housing.

SEC. 212. NOTICE OF INTENT.

(a) FILING WITH THE SECRETARY.—An owner of eligible low-income housing that intends to terminate the low-income affordability restrictions through prepayment or voluntary termination in accordance with section 218, extend the low-income affordability restrictions of the housing in accordance with section 219, or transfer the housing to a qualified purchaser in accordance with section 220, shall file with the Secretary a notice indicating such intent in the form and manner as the Secretary shall prescribe.

(b) FILING WITH THE STATE OR LOCAL GOVERNMENT, TENANTS, AND MORTGAGEE.—The owner, upon filing a notice of intent under this section, shall simultaneously file the notice of intent with the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located and with the mortgagee, and shall inform the tenants of the housing of the filing.

(c) INELIGIBILITY FOR FILING.—An owner shall not be eligible to file a notice of intent under this section if the mortgage covering the housing—

(1) falls into default on or after the date of the enactment of the Cranston-Gonzalez National Affordable Housing Act; or

(2)(A) fell into default before, but is current as of, such date; and

(B) the owner does not agree to recompense the appropriate Insurance Fund, in the amount the Secretary determines appropriate, for any losses sustained by the Fund as a result of any work-out or other arrangement agreed to by the Secretary and the owner with respect to the defaulted mortgage.

The Secretary shall carry out this subsection in a manner consistent with the provisions of section 203 of the Housing and Community Development Amendments of 1978.

SEC. 213. APPRAISAL AND PRESERVATION VALUE OF ELIGIBLE LOW-INCOME HOUSING.

(a) APPRAISAL.—Upon receiving notice of intent regarding an eligible low-income housing project indicating an intent to extend the low-income affordability restrictions under section 219 or transfer the housing under section 220, the Secretary shall provide for determination of the preservation value of the housing, as follows:

(1) APPRAISERS.—The preservation value shall be determined by 2 independent appraisers, one of whom shall be selected by the

Secretary and one of whom shall be selected by the owner. The appraisals shall be conducted not later than 4 months after filing the notice of intent under section 212, and the owner shall submit to the Secretary the appraisal made by the owner's selected appraiser not later than 90 days after receipt of the notice under paragraph (2). If the 2 appraisers fail to agree on the preservation value, and the Secretary and the owner also fail to agree on the preservation value, the Secretary and the owner shall jointly select and jointly compensate a third appraiser, whose appraisal shall be binding on the parties.

(2) NOTICE.—Not later than 30 days after the filing of a notice of intent to seek incentives under section 219 or transfer the property under section 220, the Secretary shall provide written notice to the owner filing the notice of intent of—

(A) the need for the owner to acquire an appraisal of the property under paragraph (1);

(B) the rules and guidelines for such appraisals;

(C) the filing deadline for submission of the appraisal under paragraph (1);

(D) the need for an appraiser retained by the Secretary to inspect the housing and project financial records; and

(E) any delegation to the appropriate State agency by the Secretary of responsibilities regarding the appraisal.

(3) TIMELINESS.—The Secretary may approve a plan of action to receive incentives under section 219 or 220 only based upon an appraisal

conducted in accordance with this subsection that is not more than 30 months old.

(b) PRESERVATION VALUE.—For purposes of this subtitle, the preservation value of eligible low-income housing appraised under this section shall be—

(1) for purposes of extending the low-income affordability restrictions and receiving incentives under section 219, the fair market value of the property based on the highest and best use of the property as residential rental housing; and

(2) for purposes of transferring the property under section 220 or 221, the fair market value of the housing based on the highest and best use of the property.

(c) GUIDELINES.—The Secretary shall provide written guidelines for appraisals of preservation value, which shall assume repayment of the existing federally assisted mortgage, termination of the existing low-income affordability restrictions, and costs of compliance with any State or local laws of general applicability. The guidelines may permit reliance upon assessments of rehabilitation needs and other conversion costs determined by an appropriate State agency, as determined by the Secretary. The guidelines shall instruct the appraiser to use the greater of actual project operating expenses at the time of the appraisal (based on the average of the actual project operating expenses during the preceding 3 years) or projected operating expenses after conversion in determining preservation value. The guidelines established by the Secretary shall not be inconsistent with customary appraisal standards. The guidelines shall also meet the following requirements:

(1) RESIDENTIAL RENTAL VALUE.—In the case of preservation value determined under subsection (b)(1), the guidelines shall assume conversion of the housing to market-rate rental housing and shall establish methods for (A) determining rehabilitation expenditures that would be necessary to bring the housing up to quality standards required to attract and sustain a market rate tenancy upon conversion, and (B) assessing other costs that the owner could reasonably be expected to incur if the owner converted the property to market-rate multifamily rental housing.

(2) HIGHEST AND BEST USE VALUE.—In the case of preservation value determined under subsection (b)(2), the guidelines shall assume conversion of the housing to highest and best use for the property and shall establish methods for (A) determining any rehabilitation expenditures that would be necessary to convert the housing to such use, and (B) assessing other costs that the owner could reasonably be expected to incur if the owner converted the property to its highest and best use.

SEC. 214. ANNUAL AUTHORIZED RETURN AND PRESERVATION RENTS.

(a) ANNUAL AUTHORIZED RETURN.—Pursuant to an appraisal under section 213, the Secretary shall determine the annual authorized return on the appraised housing, which shall be equal to 8 percent of the preservation equity (as such term is defined in section 229(8)).

(b) PRESERVATION RENTS.—The Secretary shall also determine the aggregate preservation rents under this subsection for each project appraised under section 213. The aggregate preservation rents shall be used solely for the purposes of comparison with Federal cost limits under section 215. Actual rents received by an owner (or a qualified purchaser) shall be determined pursuant to section 219, 220, or 221. The aggregate preservation rents shall be established as follows:

(1) EXTENSION OF AFFORDABILITY LIMITS.—The aggregate preservation rent for purposes of receiving incentives pursuant to extension of the low-income affordability restrictions under section 219 shall be the gross potential income for the project, determined by the Secretary, that would be required to support the following costs:

(A) The annual authorized return determined under subsection (a).

(B) Debt service on any rehabilitation loan for the housing.

(C) Debt service on the federally-assisted mortgage for the housing.

(D) Project operating expenses.

(E) Adequate reserves.

(2) SALE.—The aggregate preservation rent for purposes of receiving incentives pursuant to sale under section 220 or 221 shall be the gross income for the project determined by the Secretary, that would be required to support the following costs:

(A) Debt service on the loan for acquisition of the housing.

(B) Debt service on any rehabilitation loan for the housing.

(C) Debt service on the federally-assisted mortgage for the housing.

(D) Project operating expenses.

(E) Adequate reserves.

SEC. 215. FEDERAL COST LIMITS AND LIMITATIONS ON PLANS OF ACTION.

(a) DETERMINATION OF RELATIONSHIP TO FEDERAL COST LIMITS.—

(1) INITIAL DETERMINATION.—For each eligible low-income housing project appraised under section 213(a), the Secretary shall determine whether the aggregate preservation rents for the project determined under paragraph (1) or (2) of section 214(b) exceed the amount determined by multiplying 120 percent of the fair market rental (established under section 8(c) of the United States Housing Act of 1937) for the market area in which the housing is located by the number of dwelling units in the project (according to appropriate unit sizes).

(2) RELEVANT LOCAL MARKETS.—If the aggregate preservation rents for a project exceeds the amount determined under paragraph (1), the Secretary shall determine whether such aggregate rents exceed the amount determined by multiplying 120 percent of the prevailing rents in the relevant local market area in which the housing is located by the number of units in the project (according to the appropriate unit sizes). A relevant local market area shall be an area geographically smaller than a market area established by the Secretary

under section 8(c)(1) of the United States Act of 1937 that is identifiable as a distinct rental market area. The Secretary may rely on the appraisal to determine the relevant local market areas and prevailing rents in such local areas and any other information the Secretary determines is appropriate.

(3) EFFECT.—For purposes of this subtitle, the aggregate preservation rents shall be considered to exceed the Federal cost limits under this subsection only if the aggregate preservation rents exceed the amount determined under paragraph (1) and the amount determined under paragraph (2).

(b) LIMITATIONS ON ACTION PURSUANT TO FEDERAL COST LIMITS.—

(1) HOUSING WITHIN FEDERAL COST LIMITS.—If the aggregate preservation rents for an eligible low-income housing project do not exceed the Federal cost limit, the owner may not prepay the mortgage on the housing or terminate the insurance contract with respect to the housing, except as permitted under section 224. The owner may—

(A) file a plan of action under section 217 to receive incentives under section 219; or

(B) file a second notice of intent under section 216(d) indicating an intention to transfer the housing under section 220 and take actions pursuant to such section.

(2) HOUSING EXCEEDING FEDERAL COST LIMITS.—If the aggregate preservation rents for an eligible low-income housing project exceed the Federal cost limit, the owner may—

(A) file a plan of action under section 217 to receive incentives under section 219 if the owner agrees to accept incentives under such sections in an amount that shall not exceed the Federal cost limit;

(B) file a second notice of intent under section 216(d) indicating an intention to transfer the housing under section 220 and take actions pursuant to such section if the owner agrees to transfer the housing at a price that shall not exceed the Federal cost limit; or

(C) file a second notice of intent under section 216(d) indicating an intention to prepay the mortgage or voluntarily terminate the insurance, subject to the mandatory sale provisions under section 221.

SEC. 216. INFORMATION FROM SECRETARY.

(a) INFORMATION TO OWNERS TERMINATING AFFORDABILITY RESTRICTIONS.—The Secretary shall provide each owner who submits a notice of intent to terminate the low-income affordability restrictions on the housing under section 218 with information under this section not later than 6 months after receipt of the notice of intent. The information shall include a description of the criteria for such termination specified under section 218 and the documentation required to satisfy such criteria.

(b) INFORMATION TO OWNERS EXTENDING LOW-INCOME AFFORDABILITY RESTRICTIONS.—The Secretary shall provide each owner who submits notice of intent to extend the low-income affordability restrictions on the housing under section 219 or transfer the housing under section 220 to a qualified purchaser with information under this subsection not later than 9 months after receipt of the notice of intent. The information shall include any information necessary for the owner to prepare a plan of action under section 217, including the following:

(1) PRESERVATION VALUES.—A statement of the preservation value of the housing determined under paragraphs (1) and (2) of section 213(b).

(2) PRESERVATION RENT.—A statement of the preservation rent for the housing as calculated under section 214(b).

(3) FEDERAL COST LIMITS.—A statement of the applicable Federal cost limits for the market area (or relevant local market area, if applicable) in which the housing is located, which shall explain the limitations under sections 219 and 220 of the amount of assistance that the Secretary may provide based on such cost limits.

(4) FEDERAL COST LIMIT ANALYSIS.—A statement of whether the aggregate preservation rents exceeds the Federal cost limits and a direction to the owner to file a plan of action under section 217 or submit a second notice of intent under section 216(d), whichever is applicable.

(c) AVAILABILITY TO TENANTS.—The Secretary shall make any information provided to the owner under subsections (a) and (b) available to the tenants of the housing, together with other information relating to the rights and opportunities of the tenants.

(d) SECOND NOTICE OF INTENT.—

(1) FILING.—Each owner of eligible low-income housing that elects to transfer housing under section 220 shall submit to the Secretary, in such form and manner as the Secretary prescribes, notice of intent to sell the housing under section 220. To be eligible to prepay the mortgage or voluntarily terminate the insurance contract on the mortgage, an owner of housing for which the preservation rents exceed the Federal cost limits under section 215(b) shall submit to the Secretary notice of such intent. The provisions of sections 221 and 223 shall apply to any owner submitting a notice under the preceding sentence.

(2) TIMING.—A second notice of intent under this subsection shall be submitted not later than 30 days after receipt of information from the Secretary under this section. If an owner fails to submit such notice within such period, the notice of intent submitted by the owner under section 212 shall be void and ineffective for purposes of this subtitle.

SEC. 217. PLAN OF ACTION.

(a) SUBMISSION TO SECRETARY.—

(1) TIMING.—Not later than 6 months after receipt of the information from the Secretary under section 216 an owner seeking to terminate the low-income affordability restrictions through prepayment of the mortgage or voluntary termination under section 218, or to extend the low-income affordability restriction on the housing under section 219, shall submit a plan of action to the Secretary in such form and manner

as the Secretary shall prescribe. Any owner or purchaser seeking a transfer of the housing under section 220 or 221 shall submit a plan of action under this section to the Secretary upon acceptance of a bona fide offer under section 220(b) or (c) or upon making of any bona fide offer under section 221.

(2) COPIES TO TENANTS.—Each owner submitting a plan of action under this section to the Secretary shall also submit a copy to the tenants of the housing. The owner shall simultaneously submit the plan of action to the office of the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located. An appropriate agency of such State or local government shall review the plan and advise the tenants of the housing of any programs that are available to assist the tenants in carrying out the purposes of this title.

(3) FAILURE TO SUBMIT.—If the owner does not submit a plan of action to the Secretary within the 6-month period referred to in paragraph (1) (or the applicable longer period), the notice of intent shall be ineffective for purposes of this subtitle and the owner may not submit another notice of intent under section 212 until 6 months after the expiration of such period.

(b) CONTENTS.—

(1) TERMINATION OF AFFORDABILITY RESTRICTIONS.—If the plan of action proposes to terminate the low-income affordability restrictions through prepayment or voluntary

termination in accordance with section 218, the plan shall include—

(A) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

(B) a description of any proposed changes in the low-income affordability restrictions;

(C) a description of any change in ownership that is related to prepayment or voluntary termination;

(D) an assessment of the effect of the proposed changes on existing tenants;

(E) an analysis of the effect of the proposed changes on the supply of housing affordable to low- and very low-income families or persons in the community within which the housing is located and in the area that the housing could reasonably be expected to serve; and

(F) any other information that the Secretary determines is necessary to achieve the purposes of this title.

(2) EXTENSION OF AFFORDABILITY RESTRICTIONS.—If the plan of action proposes to extend the low-income affordability restrictions of the housing in accordance with section 219 or transfer the housing to a qualified purchaser in accordance with section 220, the plan shall include—

(A) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

(B) a description of the Federal incentives requested (including cash flow projections), and analyses of how the owner will address any physical or financial deficiencies and maintain the low-income affordability restrictions of the housing;

(C) a description of any assistance from State or local government agencies, including low-income housing tax credits, that have been offered to the owner or purchaser or for which the owner or purchaser has applied or intends to apply;

(D) a description of any transfer of the property, including the identity of the transferee and a copy of any documents of sale; and

(E) any other information that the Secretary determines is necessary to achieve the purposes of this title.

(c) REVISIONS.—An owner may from time to time revise and amend the plan of action as may be necessary to obtain approval of the plan under this subtitle. The owner shall submit any revision to the Secretary and to the tenants of the housing.

SEC. 218. PREPAYMENT AND VOLUNTARY TERMINATION.

(a) APPROVAL.—The Secretary may approve a plan of action that provides for termination of the low-income affordability restrictions through prepayment of the mortgage or voluntary termination of the mortgage insurance contract only upon a written finding that—

(1) implementation of the plan of action will not—

(A) materially increase economic hardship for current tenants, and will not in any event result in (i) a monthly rental payment by any current tenant that exceeds 30 percent of the monthly adjusted income of the tenant or an increase in the monthly rental payment in any year that exceeds 10 percent (whichever is lower), or (ii) in the case of a current tenant who already pays more than such percentage, an increase in the monthly rental payment in any year that exceeds the increase in the Consumer Price Index or 10 percent (whichever is lower); or

(B) involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available determined without regard to the availability of Federal housing assistance that would address any such hardship or involuntary displacement; and

(2) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect—

(A) the availability of decent, safe, and sanitary housing affordable to low-income and very low-income families or persons in the area that the housing could reasonably be expected to serve;

(B) the ability of low-income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

(C) the housing opportunities of minorities in the community within which the housing is located.

(b) DISAPPROVAL.—If the Secretary determines a plan of action to prepay a mortgage or terminate an insurance contract fails to meet the requirements of subsection (a), the Secretary shall disapprove the plan, the notice of intent filed under section 212 by such owner shall not be effective for purposes of this subtitle, and the owner may, in order to receive incentives under this subtitle, file a new notice of intent under such section.

SEC. 219. INCENTIVES TO EXTEND LOW-INCOME USE.

(a) AGREEMENTS BY SECRETARY.—After approving a plan of action from an owner of eligible low-income housing that includes the owner's plan to extend the low-income affordability restrictions of the housing, the Secretary shall, subject to the availability of appropriations for such purpose, enter into such agreements as are necessary to enable the owner to receive the annual authorized return for the housing determined under section 214(a), pay debt service on the federally-assisted mortgage covering the housing, pay debt service on any loan for rehabilitation of the housing, and meet project operating expenses and establish adequate reserves. The Secretary shall take into account the Federal cost limits under section 215(a) for the housing when providing incentives under subsections (b)(2) and (3) of this section.

(b) PERMISSIBLE INCENTIVES.—Such agreements may include one or more of the following incentives:

(1) Increased access to residual receipts accounts.

(2) Subject to the availability of amounts provided in appropriations Acts—

(A) an increase in the rents permitted under an existing contract under section 8 of the United States Housing Act of 1937, or

(B) additional assistance under section 8 or an extension of any project-based assistance attached to the housing; and

(3) An increase in the rents on units occupied by current tenants as permitted under section 222.

(4) Financing of capital improvements under section 201 of the Housing and Community Development Amendments of 1978.

(5) Financing of capital improvements through provision of insurance for a second mortgage under section 241 of the National Housing Act.

(6) In the case of housing defined in section 229(1)(A)(iii), redirection of the Interest Reduction Payment subsidies to a second mortgage.

(7) Access by the owner to a portion of the preservation equity in the housing through provision of insurance for a second mortgage loan insured under section 241(f) of the National Housing Act or a non-insured mortgage loan approved by the Secretary and the mortgagee.

(8) Other incentives authorized in law.

With respect to any housing with a mortgage insured or otherwise assisted pursuant to section 236 of the National Housing Act, the provisions of subsections (f) and (g) of section 236 of such Act notwithstanding, the fair market rental charge for each unit in such housing may be increased in accordance with this subsection, but the owner shall pay to the Secretary all rental charges collected in excess of the basic rental charges, in an amount not greater than the fair market rental charges as such charges would have been established under section 236(f) of such Act absent the requirements of this paragraph.

SEC. 220. INCENTIVES FOR TRANSFER TO QUALIFIED PURCHASERS.

(a) IN GENERAL.—With respect to any eligible low-income housing for which an owner has submitted a second notice of intent under section 216(d) to transfer the housing to a qualified purchaser, the owner shall offer the housing for transfer to qualified purchasers as provided in this section. The Secretary shall issue regulations describing the means by which potential qualified purchasers shall be notified of the availability of the housing for sale. The Secretary shall take into account the Federal cost limits under section 215(a) for the housing when providing incentives under section 219(b)(2) and (b)(3) (pursuant to subsection (d)(3) of this section).

(b) RIGHT OF FIRST OFFER TO PRIORITY PURCHASERS.—

(1) NEGOTIATION PERIOD.—For the 12-month period beginning on the receipt by the Secretary of a second notice of intent under section 216(d) with respect to such housing, the owner may offer to sell and negotiate a sale of the housing only with priority purchasers. The negotiated sale price may not exceed the preservation value of the housing determined under section 213(b)(2). The owner or the purchaser shall submit a plan of action under section 217 for any

sale under this subsection, which shall include any request for assistance under this section, upon the acceptance of any bona fide offer meeting the requirements of this paragraph.

(2) EXPRESSION OF INTEREST.—During such period, priority purchasers may submit written notice to the Secretary stating their interest in acquiring the housing. Such notice shall be made in the form and include such information as the Secretary may prescribe.

(3) INFORMATION.—Within 30 days of receipt of an expression of interest by a priority purchaser, the Secretary shall provide such purchaser with information on the assistance available from the Federal Government to facilitate a transfer and the owner shall provide appropriate information on the housing, as determined by the Secretary.

(c) RIGHT OF REFUSAL FOR OTHER QUALIFIED PURCHASERS.—If no bona fide offer to purchase any eligible low-income housing subject to this section that meets the requirements of subsection (b) is made and accepted during the period under such subsection, during the 3-month period beginning upon the expiration of the 12-month period under subsection (b)(1), the owner of the housing may offer to sell and may sell the housing only to qualified purchasers. The negotiated sale price may not exceed the preservation value of the housing determined under section 213(b)(2). The owner or purchaser shall submit a plan of action under section 217 for any sale under this subsection, which shall include any request for assistance under this section, upon the acceptance of any bona fide offer meeting the requirements of this paragraph.

(d) ASSISTANCE.—

(1) APPROVAL.—If the qualified purchaser is a resident council, the Secretary may not approve a plan of action for assistance under this section unless the council's proposed resident homeownership program meets the requirements under section 226. For all other qualified purchasers, the Secretary may not approve the plan unless the Secretary finds that the criteria for approval under section 222 have been satisfied.

(2) AMOUNT.—Subject to the availability of amounts approved in appropriations Acts, the Secretary shall, for approvable plans of action, provide assistance sufficient to enable qualified purchasers to—

(A) acquire the eligible low-income housing from the current owner for a purchase price not greater than the preservation equity of the housing;

(B) pay the debt service on the federally-assisted mortgage covering the housing;

(C) pay the debt service on any loan for the rehabilitation of the housing;

(D) meet project operating expenses and establish adequate reserves for the housing;

(E) receive an adequate return (as determined by the Secretary) on any actual cash investment made to acquire the project;

(F) in the case of a priority purchaser, receive an adequate reimbursement for transaction expenses relating to acquisition of the housing, subject to approval by the Secretary; and

(G) in the case of an approved resident homeownership program, cover the costs of training for the resident council, homeownership counseling and training, the fees for the nonprofit entity or public agency working with the resident council and costs related to relocation of tenants who elect to move.

(3) INCENTIVES.—

(A) IN GENERAL.—For all qualified purchasers of housing under this subsection, the Secretary may provide assistance for an approved plan of action in the form of 1 or more of the incentives authorized under section 219(b), except that any residual receipts for the housing transferred to the selling owner shall be deducted from the sale price of the housing under subsection (b) or (c) and the incentive under such section 219(b)(7) may include an acquisition loan under section 241(f) of the National Housing Act.

(B) PRIORITY PURCHASERS.—Where the qualified purchaser is a priority purchaser, the Secretary may provide assistance for an approved plan of action (in the form of a grant) for each unit in the housing in an amount, as determined by the Secretary, that does not exceed the present value of the total of the projected published fair market rentals for existing housing (established by the Secretary under section 8(c) of the United States Housing Act of 1937) for the next 10 years (or such longer period if additional assistance is necessary to cover the costs referred to in paragraph (2)).

* * *

SEC. 222. CRITERIA FOR APPROVAL OF PLAN OF ACTION INVOLVING INCENTIVES.

(a) IN GENERAL.—The Secretary may approve a plan of action for extension of the low-income affordability restrictions on any eligible low-income housing or transfer the housing to a qualified purchaser (other than a resident council) only upon finding that—

(1) due diligence has been given to ensuring that the package of incentives is, for the Federal Government, the least costly alternative that is consistent with the full achievement of the purposes of this title;

(2) binding commitments have been made to ensure that—

(A) the housing will be retained as housing affordable for very low-income families or persons, low income families or persons, and moderate-income families or persons for the remaining useful life of such housing (as determined under subsection (c));

(B) throughout such period, adequate expenditures will be made for maintenance and operation of the housing and that the project meets housing standards established by the Secretary under subsection (d), as determined by inspections conducted under such subsection by the Secretary;

(C) current tenants will not be involuntarily displaced (except for good cause);

(D) any increase in rent contributions for current tenants will be to a level that does not exceed 30 percent of the adjusted income of the tenant or the published existing fair market rent for comparable housing established under section 8(c) of the United States Housing Act of 1937, whichever is lower, except that the rent contributions of any tenants occupying the housing at the time of any increase may not be reduced by reason of this subparagraph (except with respect to tenants receiving section 8 assistance in accordance with subparagraph (E)(ii) of this paragraph);

(E)(i) any resulting increase in rents for current tenants (except for increases made necessary by increased operating costs)—

(I) shall be phased in equally over a period of not less than 3 years, if such increase is 30 percent or more; and

(II) shall be limited to not more than 10 percent per year if such increase is more than 10 percent but less than 30 percent; and

(ii) assistance under section 8 of the United States Housing Act of 1937 shall be provided, to the extent available under appropriation Acts, if necessary to mitigate any adverse effect on current income-eligible very low-and low-income tenants; and

(F)(i) rents for units becoming available to new tenants shall be at levels approved by the Secretary that will ensure, to the extent practicable, that the units will be available and affordable to the same proportions of very low-income families or persons, low-income families or persons, and moderate-income families or persons (including families or persons whose incomes are 95 percent or more of area median income) as resided in the housing as of January 1, 1987 (based on the area median income limits established by the Secretary in February 1987), or the date the plan of action is approved, whichever date results in the highest proportion of very low-income families, except that this limitation shall not prohibit a higher proportion of very low-income families from occupying the housing; and

(ii) in approving rents under this paragraph, the Secretary shall take into account any additional incentives provided under this subtitle;

(G) future rent adjustments shall be—

(i) made by applying an annual factor (to be determined by the Secretary) to the portion of rent attributable to operating expenses for the housing and by making changes in the annual authorized return under section 214; and

"(ii) subject to a procedure, established by the Secretary, for owners to apply for rent increases not adequately compensated by annual adjustment under clause (i), under which the Secretary may increase rents in excess of the amount determined under clause (i) only if the Secretary determines such increases are necessary to reflect extraordinary necessary expenses of owning and maintaining the housing; and

(H) any savings from reductions in operating expenses due to management efficiencies shall be deposited in project reserves for replacement and the owner shall have periodic access to such reserves, to the extent the Secretary determines that the level of reserves is adequate and that the housing is maintained in accordance with the standards established under section 222(d); and

(3) no incentives under section 219 (other than to purchasers under section 220) may be provided until the Secretary determines the project meets housing standards under subsection (d), except that incentives under such section and other incentives designed to correct deficiencies in the project may be provided.

(b) IMPLEMENTATION.—Any agreement to maintain the low-income affordability restrictions for the remaining useful life of the housing may be made through execution of a new regulatory agreement, modifications to the existing regulatory agreement or mortgage, or, in the case of the prepayment of a mortgage or voluntary termination of mortgage insurance, a recorded instrument.

(c) DETERMINATION OF REMAINING USEFUL LIFE.—

(1) DEFINITION.—For purposes of this title, the term 'remaining useful life' means, with respect to eligible low-income housing, the period during which the physical characteristics of the housing remain in a condition suitable for occupancy, assuming normal maintenance and repairs are made and major systems and capital components are replaced as becomes necessary.

(2) STANDARDS.—The Secretary shall, by rule under section 553 of title 5, United States Code, establish standards for determining when the useful life of an eligible low-income housing project has expired. The determination shall be made on the record after opportunity for an hearing.

(3) OWNER PETITION.—The Secretary shall establish a procedure under which owners of eligible low-income housing may petition the Secretary for a determination that the useful life of such housing has expired. The procedure shall not permit such a petition before the expiration of the 50-year period beginning upon the approval of a plan of action under this subtitle with respect to such housing. In making a determination pursuant to a petition under this paragraph, the Secretary shall presume that the useful life of the housing has not expired, and the owner shall have the burden of proof in establishing such expiration. The Secretary may not determine that the useful life of any housing has expired if such determination results primarily from failure to make regular and

reasonable repairs and replacement, as became necessary.

(4) TENANT AND COMMUNITY COMMENT AND APPEAL.—In making a determination regarding the useful life of any housing pursuant to a petition submitted under paragraph (3), the Secretary shall provide for comment by tenants of the housing and interested persons and organizations with respect to the petition. The Secretary shall also provide the tenants and interested persons and organizations with an opportunity to appeal a determination under this subsection.

(d) HOUSING STANDARDS.—

(1) ESTABLISHMENT AND INSPECTION.—The Secretary shall, by regulation, establish standards regarding the physical condition in which any eligible low income housing project receiving incentives under this subtitle shall be maintained. The Secretary shall inspect each such project not less than annually to ensure that the project is in compliance with such standards.

(2) SANCTIONS.—

(A) IN GENERAL.—The Secretary shall take any action appropriate to require the owner of any housing not in compliance with such standards to bring such housing into compliance with the standards, including—

(i) directing the mortgagee, with respect to an equity take-out loan under section 241(f) of the National Housing Act, to withhold the disbursement to the owner of any escrowed loan proceeds and requiring that such proceeds be used for repair of the housing; and

(ii) reduce the amount of the annual authorized return, as determined by the Secretary, for the period ending upon a determination by the Secretary that the project is in compliance with the standards and requiring that such amounts be used for repair.

(B) CONTINUED COMPLIANCE.—To ensure continued compliance with the standards for a project subject to any action under subparagraph (A), the Secretary may also limit access of the owner to such amounts and use of such amounts for not more than the 2-year period beginning upon the determination that project is in compliance with the standards.

(C) REMOVAL OF ASSISTANCE.—If, upon inspection, the Secretary determines that any eligible low income housing project has failed to comply with the standards established under this subsection for 2 consecutive years, the Secretary may take 1 or more of the following actions:

(i) Subject to availability of amounts provided in appropriations Acts, provide assistance under sections 8(b) and 8(o) of the United States Housing Act of 1937 (other than project-based assistance attached to the housing) for any tenant eligible for such assistance who desires to terminate occupancy in the housing. For each unit in the housing vacated pursuant to the provision of assistance under this clause, the Secretary may, notwithstanding any other law or contract for assistance, cancel the provision of project-based assistance attached to the housing for 1 dwelling unit, if the housing is receiving such assistance.

(ii) In the case of housing for which an equity takeout loan has been made under section 241(f) of the National Housing Act, declare such loan to be default and accelerate the maturity date of the loan.

(iii) Declare any rehabilitation loan insured or provided by the Secretary (with respect to the housing) to be in default and accelerate the maturity date of the loan.

(iv) Suspend payments under or terminate any contract for project-based rental assistance under section 8 of the United States Housing Act of 1937.

(v) Take any other action authorized by law or the project regulatory agreement to ensure that the housing will be brought into compliance with the standards established under this subsection.

(e) WINDFALL PROFITS.—The Secretary shall submit a report to the Congress not later than 90 days after the enactment of the Cranston-Gonzalez National Affordable Housing Act, evaluating the availability, quality, and reliability of data to measure the accessibility of decent, affordable housing in all areas where properties are eligible to submit a notice of intent to prepay under section 212. To prevent payment of windfall profits, the Secretary may make available incentive payments under section 219 or 220 only to owners in those rental markets where there is an inadequate supply of decent, affordable housing, if the Secretary determines that adequate data can be obtained to permit objective and fair implementation or where necessary to accomplish the other public policy objectives under this subtitle. The Secretary shall implement this subsection in a manner consistent with the process established by this subtitle.

* * *

SEC. 224. PERMISSIBLE PREPAYMENT OR VOLUNTARY TERMINATION AND MODIFICATION OF COMMITMENTS.

(a) IN GENERAL.—Notwithstanding any limitations on prepayment or voluntary termination under this subtitle, an owner may terminate the low-income affordability restrictions through prepayment or voluntary termination, subject to compliance with the provisions of section 223, under one of the following circumstances:

(1)(A) The Secretary approves a plan of action under section 219(a), but does not provide the assistance approved in such plan during the 15-month period beginning on the date of approval.

(B) After the date that the housing would have been eligible for prepayment pursuant to the terms of the mortgage (notwithstanding this subtitle), the Secretary approves a plan of action under section 220 or 221, but does not provide the assistance approved in such plan before the earlier of (i) the expiration of the 2-month period beginning on the commencement of the 1st fiscal year beginning after such approval, or (ii) the expiration of the 6-month period beginning on the date of approval.

(C) The Secretary approves a plan of action under section 220 or 221 for any eligible low-income housing not covered by subparagraph (B), but does not provide the assistance approved in such plan before the earlier of (i) the expiration of the 2-month period beginning on the commencement of the 1st fiscal year beginning after such approval, or (ii) the expiration of the 9-month period beginning on the date of approval.

(2) An owner who intended to transfer the housing to a qualified purchaser under section 220 or 221, and fully complied with the provisions of such section, did not receive any bona fide offers from any qualified purchasers within the applicable time periods.

In the event that the purchaser under the plan of action is unable to consummate the purchase for reasons other than the failure of the Secretary to provide incentives, an owner may terminate the low-income affordability restrictions through prepayment or voluntary termination subject to the provisions of sections 220 and 221.

(b) SECTION 8 RENTAL ASSISTANCE.—When providing rental assistance under section 8, the Secretary may enter into a contract with an owner, contingent upon the future availability of appropriations for the purpose of renewing expiring contracts for rental assistance as provided in appropriations Acts, to extend the term of such rental assistance for such additional period or periods necessary to carry out an approved plan of action. The contract and the approved plan of action shall provide that, if the Secretary is unable to extend the term of such rental assistance or is unable to develop a revised package of incentives providing benefits to the owner comparable to those received under the original approved plan of action, the Secretary, upon the request of the owner, shall take the following actions (subject to the limitations under the following paragraphs):

(1) MODIFICATION OF COMMITMENTS.—Modify the binding commitments made pursuant to section 222(a)(2) that are dependent on such rental assistance.

(2) TERMINATION OF PLAN OF ACTION.—Permit the owner to prepay the mortgage and terminate the plan of action and any implementing use agreements or restrictions, but only if the owner agrees in writing to comply with provisions of section 223.

At least 30 days before making a request under this subsection, an owner shall notify the Secretary of the owner's intention to submit the request. The Secretary shall have a period of 90 days following receipt of such notice to take action to extend the rental assistance contract and to continue the binding commitments under section 222(a)(2).

SEC. 225. TIMETABLE FOR APPROVAL OF PLAN OF ACTION.

(a) NOTIFICATION OF DEFICIENCIES.—Not later than 60 days after receipt of a plan of action, the Secretary shall notify the owner in writing of any deficiencies that prevent the plan of action from being approved. If deficiencies are found, such notice shall describe alternative ways in which the plan may be revised to meet the criteria for approval.

(b) NOTIFICATION OF APPROVAL.—

(1) IN GENERAL.—Not later than 180 days after receipt of a plan of action, or such longer period as the owner requests, the Secretary shall notify the owner in writing whether the plan of action, including any revisions, is approved. If approval is withheld, the notice shall describe—

(A) the reasons for withholding approval; and

(B) the actions that could be taken to meet the criteria for approval.

(2) OPPORTUNITY TO REVISE.—The Secretary shall subsequently give the owner a reasonable opportunity to revise the plan of action and seek approval.

(c) DELAYED APPROVAL.—If the Secretary does not approve a plan of action within the period under subsection (b), the Secretary shall provide incentives and assistance under this subtitle in the amount that the owner would have received if the Secretary had complied with such time limitations. The preceding sentence shall not apply if the plan of action was not approved because of deficiencies. An owner may bring an action in the appropriate Federal district court to enforce this subsection.

* * *

SEC. 229. DEFINITIONS.

For purposes of this subtitle:

(1) The term 'eligible low-income housing' means any housing financed by a loan or mortgage—

(A) that is—

(i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act and assisted under section 101 of the Housing and Urban Development Act of 1965 or section 8 of the United States Housing Act of 1937;

(ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act;

(iii) insured, assisted, or held by the Secretary or a State or State agency under section 236 of the National Housing Act; or

(iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and

(B) that, under regulation or contract in effect before February 5, 1988, is or will within 24 months become eligible for prepayment without prior approval of the Secretary.

(2) The term 'Federal cost limit' means, for any eligible low-income housing, the amount determined under section 215(a).

(3) The term 'low-income affordability restrictions' means limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility in eligible low-income housing.

(4) The terms 'low-income families or persons' and 'very low-income families or persons' mean families or persons whose incomes do not exceed the respective levels established for low-income families and very low-income families, respectively, under section 3(b)(2) of the United States Housing Act of 1937.

(5) The term 'moderate-income families or persons' means families or persons whose incomes are between 80 percent and 95 percent of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families.

(6) The term 'nonprofit organization' means any private, nonprofit organization that—

(A) is organized or chartered under State or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) complies with standards of financial accountability acceptable to the Secretary; and

(D) has among its principal purposes significant activities related to the provision of decent housing that is affordable to very low-, low-, and moderate-income families.

(7) The term ‘owner’ means the current or subsequent owner or owners of eligible low-income housing.

(8) The term ‘preservation equity’ means, for any eligible low-income housing—

(A) for purposes of determining the authorized return under section 214(a) and providing incentives to extend the low-income affordability restrictions on the housing under section 219—

(i) the preservation value of the housing determined under section 213(b)(1); less

(ii) any debt secured by the property; and

(B) for purposes of determining incentives under section 220 and 221 and determining the amount of an acquisition loan under the provisions of section 241(f)(3) of the National Housing Act—

(i) the preservation value of the housing determined under section 213(b)(2); less

(ii) the outstanding balance of the federally-assisted mortgage or mortgages for the housing.

(9) The term ‘preservation value’ means, for any eligible low-income housing, the applicable value determined under paragraph (1) or (2) of section 213(b).

(10) The term ‘Secretary’ means the Secretary of Housing and Urban Development.

(11) The term ‘resident council’ means any incorporated nonprofit organization or association that—

(A) is representative of the resident of the housing;

(B) adopts written procedures providing for the election of officers on a regular basis; and

(C) has a democratically elected governing board, elected by the residents of the housing.

SEC. 230. NOTICE TO TENANTS.

Where a provision of this subtitle requires that information or material be given to tenants of the housing, the requirement may be met by (1) posting a copy of the information or material in readily accessible locations within each affected building, or posting notices in each such location describing the information or material and specifying a location, as convenient to the tenants as is reasonably practical, where a copy may be examined, and (2) supplying a copy of the information or material to a representative of the tenants.

SEC. 231. DEFINITIONS OF QUALIFIED AND PRIORITY PURCHASER AND RELATED PARTY RULE.

(a) PRIORITY PURCHASER.—The term ‘priority purchaser’ means (A) a resident council organized to acquire the housing in accordance with a resident homeownership program that meets the requirements of section 231; and (B) any nonprofit organization or State or local agency that agrees to maintain low-income affordability restrictions for the remaining useful life of the housing (as determined under section 222(d)).

(b) QUALIFIED PURCHASER.—The term 'qualified purchaser' means any entity that agrees to maintain low-income affordability restrictions for the remaining useful life of the housing (as determined under section 222(d)), and includes for-profit entities and priority purchasers.

(c) RELATED PARTIES.—Except as provided in subsection (d), the terms 'qualified purchaser' and 'priority purchaser' do not include any entity that, either directly or indirectly, is wholly or partially owned or controlled by the owner of the housing being transferred under this subtitle, is under whole or partial common control with such owner, or has any financial interest in such owner or in which such owner has any financial interest. The Secretary shall issue any regulations appropriate to implement the preceding sentence.

(d) MANAGEMENT EXCEPTION.—A qualified purchaser shall not be precluded from retaining as a property management entity a company that is owned or controlled by the selling owner or a principal thereof if retention of the management company is neither a condition of sale nor part of consideration paid for sale and the property management contract is negotiated by the qualified purchaser on an arm's length basis.

* * *

SEC. 604. TRANSITION PROVISIONS.

(a) HOUSING ELIGIBLE FOR ELECTION.—Any owner of housing that becomes eligible low-income housing before January 1, 1991 and who, before such date, filed a notice of intent under section 222 of the Emergency Low Income Housing Preservation Act of 1987 (as such section existed before the date of the enactment of this Act) or under section 212 of such Act (as amended by section 601(a)) may elect to be subject to (1) the provisions of such Act as in effect before the date of the enactment of this Act, or (2) the provisions of the Low-Income Housing Preservation and Resident Homeownership Act of 1990, after the date of the enactment of this Act. The Secretary shall establish procedures for owners to make the election under the preceding sentence.

(b) RIGHT OF CONVERSION TO NEW SYSTEM.—Any owner who has filed a plan of action on or before October 11, 1990, shall have the right to convert to the system of incentives and restrictions under this subtitle, with such adjustments as the Secretary determines to be appropriate to compensate for the value of any incentives the owner received under the Emergency Low Income Housing Preservation Act of 1987. Owners filing plans after such date shall not have any right under this subsection.

(c) EFFECTIVENESS OF REPEALED PROVISIONS.—Notwithstanding the amendment made by section 601(a), the provisions of the Emergency Low Income Housing Preservation Act of 1987 (as in effect immediately before the date of the enactment of this Act) shall apply with respect to any housing for which the election under subsection (a)(1) is made.

(d) REGULATIONS.—Not later than the expiration of the 90-day period beginning on the date of the enactment of this Act, the Secretary of Housing and Urban Development shall, subject to the provisions of section 553 of title 5, United States Code, publish proposed rules to implement this subtitle and the amendments made by this subtitle. Not later than 45 days after the expiration of the period under the preceding sentence the Secretary shall issue interim or final rules to implement such provisions.

SEC. 605. EFFECTIVE DATE.

This subtitle shall take effect on the date of the enactment of this Act.

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