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The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases

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THE PARCEL AS A WHOLE: DEFINING THE RELEVANT PARCEL IN TEMPORARY REGULATORY TAKINGS CASES

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Abstract: In regulatory takings cases, courts must look at the "parcel as a whole" rather than individual property interests to determine whether a taking has occurred. The Supreme Court, however, has not clarified how exactly the relevant parcel should be defined. The Federal Circuit's recent decision in *CCA Associates v. United States* highlights the confusion surrounding the parcel as a whole. It also highlights the continuing need to clarify how the relevant parcel should be defined in temporary regulatory takings cases. This Comment analyzes the parcel as a whole in temporary regulatory takings cases, specifically those involving lost income. It argues that the relevant parcel should not be measured by the property's entire lifetime value, as the Federal Circuit decided in *Cienega Gardens v. United States* (*Cienega X*) and ultimately reaffirmed in *CCA Associates*. Neither Supreme Court jurisprudence nor standard economics supports this interpretation of the parcel as a whole. Instead, this Comment argues that the relevant parcel should be determined by the owner's investment in the property in consideration with principles of fairness and justice. This approach harmonizes Supreme Court jurisprudence and standard economics. It also achieves uniformity and equitability in temporary regulatory takings cases involving lost income.

INTRODUCTION

> *The world of the relevant parcel is indeed a wonderland, where size seems to change in confusing ways.*[1]

Thirty-six years ago, the United States Supreme Court decided that courts must look at the "parcel as a whole" rather than individual property interests[2] when deciding whether a regulatory taking[3] has occurred. The Court, however, did not clarify how exactly the parcel as a

1. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 415 (2003).

2. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

3. A regulatory taking occurs when the government restricts a private owner's property use without any physical invasion. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). For example, the government must provide compensation when a zoning regulation deprives private property of all economic use. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). Although it may be difficult to see that any property has been "taken" by the government in this situation, the owner has nevertheless suffered a diminution in his or her property rights. WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 18 (1977). The property owner is therefore entitled to just compensation under the Takings Clause of the U.S. Constitution. U.S. CONST. amend. V; *Penn Cent.*, 438 U.S. at 127–28 (citing *Mahon*, 260 U.S. 393).

whole should be defined.[4] Consequently, courts have struggled to define the relevant parcel in regulatory takings cases.[5] As one court explained, "[r]epeated admonitions to use the 'parcel as whole,' . . . do little to define the contours of that whole parcel in any particular case."[6]

A recent case from the Federal Circuit[7] highlights the confusion surrounding the parcel as a whole. In *CCA Associates v. United States*,[8] apartment building owners sued the federal government under the Takings Clause of the United States Constitution.[9] The owners argued that a temporary regulatory taking[10] occurred when two federal housing acts deprived them of their contractual right to prepay their mortgage and exit a low-income housing program.[11]

Initially, the Court of Federal Claims determined that the relevant parcel was the owners' investment in the property.[12] In doing so, the trial court relied on the Federal Circuit's parcel as a whole approach in *Cienega Gardens v. United States* (*Cienega VIII*),[13] a temporary

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4. *Penn Cent.*, 438 U.S. at 130–31; *see also* Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 623–24, 629.

5. *See, e.g.*, CCA Assocs. v. United States, 667 F.3d 1239 (Fed. Cir. 2011); Cienega Gardens v. United States (*Cienega X*), 503 F.3d 1266 (Fed. Cir. 2007); Cienega Gardens v. United States (*Cienega VIII*), 331 F.3d 1319 (Fed. Cir. 2003); Dunes West Golf Club, LLC v. Town of Mt. Pleasant, 737 S.E.2d 601, 617 (S.C. 2013) (referring to the parcel as a whole as a "Gordian Knot"); Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 456 (Mass. 2006).

6. *Giovanella*, 857 N.E.2d at 456.

7. The Federal Circuit plays an important role in takings law due to the statutory requirement that litigants must file their actions in the Court of Federal Claims when seeking more than $10,000 from the federal government. *See* 28 U.S.C. § 1346(a)(2) (establishing concurrent jurisdiction in Court of Federal Claims for claims not exceeding $10,000); *id.* § 1491(a) (2006) (establishing Court of Federal Claims jurisdiction for monetary claims under federal law); *see also infra* Part III.

8. 667 F.3d 1239.

9. Under the Takings Clause, private property shall not "be taken for public use without just compensation." U.S. CONST. amend. V. Notably, the Takings Clause does not prohibit the taking of private property. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005). Instead, the Takings Clause places a condition on the government's exercise of that power. *Id.* "In other words, it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 536–37 (emphasis in original) (internal quotation marks omitted).

10. "A temporary [regulatory] taking occurs when what would otherwise be a permanent [regulatory] taking is temporally cut short . . . . The essential element of a temporary taking is a finite start and end to the taking." Wyatt v. United States, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001).

11. *CCA Assocs.*, 667 F.3d at 1243. The issues presented in *CCA Associates* were not unique. *Id.* at 1244. The two federal housing statutes at issue prompted numerous lawsuits from similarly situated apartment building owners. *Id.*

12. CCA Assocs. v. United States, 75 Fed. Cl. 170, 197–98 (2007).

13. 331 F.3d 1319 (Fed. Cir. 2003).

regulatory takings case involving the same federal housing acts.[14] Using *Cienega VIII*'s approach, the trial court held that a temporary regulatory taking had occurred.[15]

While *CCA Associates* was pending appeal, the Federal Circuit changed its parcel as a whole approach in *Cienega Gardens v. United States* (*Cienega X*).[16] In *Cienega X*, the Federal Circuit determined that the relevant parcel was actually the property's entire lifetime value.[17]

The Federal Circuit's change in methodology created a considerably different result in *CCA Associates*.[18] Using *Cienega X*'s lifetime value approach, the Federal Circuit held that no temporary regulatory taking had occurred in *CCA Associates*.[19] Although the facts remained the same, the court changed the relevant parcel—thereby also changing the case's outcome.[20]

As *CCA Associates* demonstrates, the parcel as a whole impacts whether a regulatory taking has occurred.[21] If the parcel is defined too broadly, a taking can be disguised.[22] Conversely, if the parcel is defined too narrowly, a taking can appear to emerge.[23] As a result, the parcel as a whole plays an important role in regulatory takings cases,[24] particularly those involving temporary regulations, as in *CCA Associates*. But despite the relevant parcel's importance, significant confusion remains as to how the parcel should be defined.

This Comment analyzes the parcel as a whole in temporary regulatory takings cases, specifically those involving lost income. Part I traces the Supreme Court's regulatory takings jurisprudence. Part II examines the development of the parcel as a whole in the Court's regulatory takings jurisprudence. Part III discusses current confusion in the Federal Circuit regarding how the relevant parcel should be defined in temporary regulatory takings cases. Finally, Part IV argues that the relevant parcel

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14. *Id.*

15. *CCA Assocs.*, 75 Fed. Cl. at 199.

16. 503 F.3d 1266 (Fed. Cir. 2007).

17. *Id.* at 1280–82.

18. 667 F.3d 1239, 1246 (2011).

19. *Id.* at 1248.

20. *Id.* at 1246–47.

21. Lost Tree Village Corp. v. United States, 707 F.3d 1286, 1292 (Fed. Cir. 2013); Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 605 (2012).

22. Ciampitti v. United States, 22 Cl. Ct. 310, 318–19 (1991).

23. *Id.* at 319.

24. *Lost Tree*, 707 F.3d at 1292.

in temporary regulatory takings involving lost income should not be determined by the property's entire lifetime value. Neither Supreme Court jurisprudence nor standard economics supports this interpretation of the parcel as a whole. Instead, this Comment argues that the relevant parcel should be determined by the owner's investment in the property in consideration with principles of fairness and justice.

I. THE SUPREME COURT AND REGULATORY TAKINGS: GUIDING PRINCIPLES, BALANCING TESTS, AND TEMPORARY TAKINGS

The Supreme Court generally avoids drawing bright-line rules in regulatory takings cases.[25] Instead, the Court prefers to examine "a number of factors" rather than use a "mathematically precise" formula.[26] Unfortunately, these fact-specific inquiries have created confusion and inconsistent results in regulatory takings jurisprudence,[27] particularly in regards to the parcel as a whole.[28] Commentators have repeatedly criticized the Court's regulatory takings jurisprudence for being "famously incoherent"[29] and "incomprehensible."[30] Even Supreme Court Justices have recognized this confusion—Justice Stevens once explained that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about . . . this Court's takings jurisprudence."[31]

This Part analyzes the Supreme Court's "famously incoherent" regulatory takings jurisprudence. Subpart A summarizes guiding principles in regulatory takings cases. Subpart B explains the Court's three-part regulatory takings test. Finally, Subpart C discusses temporary

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25. Ark. Game & Fish Comm'n v. United States, __U.S.__, 133 S. Ct. 511, 518 (2012) ("We have recognized . . . that no magic formula enables a court to judge, in every case, whether a government interference with property is a taking. . . . [T]he Court has recognized few invariable rules in this area."); *see also* William W. Wade, Penn Central*'s Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 550 (2010).

26. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002).

27. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); *see also* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 309–11 (1998).

28. Wade, *supra* note 25, at 550.

29. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003).

30. Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 61 (1996).

31. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). In another dissent that same year, Justice Stevens described regulatory takings cases as more confusing and standardless than criminal procedure cases. First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting).

regulatory takings.

A. The Supreme Court Is Guided by Principles of Fairness and Justice in Regulatory Takings Cases

Generally, property ownership includes broad rights to "possess, use and dispose of it."[32] The government, however, may impose regulations that infringe upon private ownership rights.[33] While almost any government regulation can impact private property rights, not all government regulations constitute a taking.[34] Most regulatory burdens must be borne by private property owners "as concomitants of the advantage of living and doing business in a civilized community."[35] Moreover, the "[g]overnment hardly could go on" if it was required to compensate property owners for every regulation that affected private property.[36] Yet some regulations can be so substantial and unforeseeable that they constitute a regulatory taking.[37]

In order to balance the government's interests with private property interests in regulatory takings cases, the Supreme Court relies on principles of fairness and justice,[38] such as the property owner's reasonable expectations.[39] "While scholars have offered various justifications for [the Takings Clause]," the Court has emphasized its role in "bar[ring] 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."[40]

Some commentators have criticized the Court's emphasis on fairness and justice in regulatory takings cases. These commentators argue that basing judicial outcomes on notions of fairness and justice is an

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32. United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

33. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979); Lochner v. New York, 198 U.S. 45, 53 (1905).

34. Woffinden, *supra* note 4, at 636–37.

35. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984) (internal quotation marks omitted).

36. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

37. *Kirby Forest*, 467 U.S. at 14.

38. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960).

39. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

40. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (internal quotation marks omitted); *see also Kirby Forest*, 467 U.S. at 14 ("[W]hile most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." (quoting Andrus v. Allard, 444 U.S. 51, 67 (1979))).

undesirable approach,[41] because "[f]airness, like beauty, is often in the eye of the beholder."[42] Despite these critiques, "the Court has long affirmed that 'fairness and justice' is at the heart of the takings inquiry."[43] Indeed, recent Supreme Court cases suggest that fairness and justice is one of the principal considerations in regulatory takings cases.[44]

B. The Supreme Court Uses a Three-Part Balancing Test in Regulatory Takings Cases

Until the early twentieth century, only physical takings were recognized under the Takings Clause.[45] The Supreme Court first recognized regulatory takings in 1922 in *Pennsylvania Coal Co. v. Mahon*.[46] In *Mahon*, a coal company sold its surface rights to a parcel of property, but expressly reserved the right to mine coal beneath the surface.[47] After the sale, the Pennsylvania state legislature enacted a statute that prohibited any coal mining that would cause homes and surfaces near residential property to sink.[48] This regulation made it commercially impracticable for the company to mine coal beneath the property it had sold.[49] Thus, the regulation had almost the same effect as if the government had appropriated or destroyed the property.[50]

In light of these facts, the Court determined that the regulation constituted a taking.[51] Writing for the Court, Justice Holmes announced: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[52] Justice Holmes, however, did

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41. Lise Johnson, Note, *After* Tahoe-Sierra, *One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 376 (2004).

42. Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 4–5 (2010).

43. *Id.* at 3.

44. *See, e.g.*, *Lingle*, 544 U.S. at 537, 542–43; Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 35–37 (2008).

45. Woffinden, *supra* note 4, at 626.

46. 260 U.S. 393 (1922).

47. *Id.* at 412.

48. *Id.* at 412–13.

49. *Id.* at 414.

50. *Id.* at 414–15.

51. *Id.*

52. *Id.* at 415.

not explain how to determine if a regulation has gone "too far."[53]

Almost fifty years after *Mahon*, the Court developed an "ad hoc, factual inquir[y]" to determine if a regulation goes "too far" and constitutes a taking.[54] In *Penn Central Transportation Co. v. City of New York*,[55] the Court listed three factors that should be weighed in regulatory takings cases: (1) the regulation's economic impact on the property owner; (2) the extent to which the regulation has interfered with the owner's distinct investment-backed expectations; and (3) the character of the government action.[56] In theory, these factors are not decisive by themselves;[57] each factor must be weighed together, taking into account all of the relevant circumstances.[58] In practice, however, the regulation's economic impact largely determines whether a regulatory taking has occurred.[59]

Although there are indications that the Justices saw *Penn Central* as a routine decision,[60] it was a judicial landmark in the Court's regulatory takings jurisprudence.[61] Recently, however, the Court's *Penn Central* decision has received increasing criticism.[62] Commentators have attacked *Penn Central*'s "nebulous test"[63] because it creates confusion and inconsistent results in regulatory takings cases.[64] In a *Harvard Law*

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53. *Id.*

54. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

55. 438 U.S. 104.

56. *Id.* at 124.

57. Palazzolo v. Rhode Island, 533 U.S. 606, 635–36 (2001) (O'Connor, J., concurring).

58. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (citing *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

59. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact.").

60. Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 556 (2012); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 691 (2005); *see also* Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 307–08 (2004) (recollections of Justice Brennan's clerk, David Carpenter, who worked on the *Penn Central* opinion) ("At the time I thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was . . . in disarray. . . . [O]ther clerks had told me that the opinion better not say very much before I started work on the draft and in fact after it was circulated, Justice Stewart's clerk read it and said he was pretty sure it doesn't say anything at all.").

61. Eagle, *supra* note 60, at 557.

62. Michael M. Berger, Tahoe-Sierra*: Much Ado About-What?*, 25 U. HAW. L. REV. 295, 310 (2003).

63. Johnson, *supra* note 41, at 376.

64. *Id.*; Kanner, *supra* note 27, at 310; James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 613 (1981).

Review commentary on regulatory takings, the authors noted that "[t]he Court has saved the *Penn Central* edifice, though it is unclear that this structure is worth preserving."[65] Nevertheless, *Penn Central*'s three-part test remains the Court's "polestar" in regulatory takings cases.[66]

C. The Supreme Court Recognizes that Temporary Regulatory Takings Require Just Compensation Under the Takings Clause

Although the Supreme Court recognized that regulatory takings were compensable under the Takings Clause in *Mahon*, the Court did not address temporary regulatory takings until *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[67] In 1957, the First English Evangelical Lutheran Church purchased property in the Angeles National Forest for a retreat center and recreational area.[68] The church's property was located next to a watershed, which became a serious flood hazard after a forest fire in 1977.[69] A year later, the watershed flooded and destroyed the church's retreat center.[70] In response to the flooding, Los Angeles County adopted an interim ordinance that prohibited construction on the church's property.[71] Shortly after the interim ordinance was adopted, the church sued the County, arguing that the ordinance denied it all use of the property.[72]

Prior to *First English*, some courts interpreted the Takings Clause as not requiring compensation for government regulations imposed for only temporary amounts of time.[73] The Court rejected this interpretation in *First English*, holding that temporary regulatory takings also require compensation under the Takings Clause.[74] Writing for the majority, Chief Justice Rehnquist explained, "temporary [regulatory] takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly

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65. Leading Cases, *Constitutional Law — Takings Clause*, 116 HARV. L. REV. 321, 322 (2002); *see also* Kanner, *supra* note 27, at 309 n.8.

66. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar instead remains the principles set forth in *Penn Central* . . . .").

67. 482 U.S. 304 (1987).

68. *Id.* at 307.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 308.

73. Daniel L. Siegel, *The Impact of* Tahoe-Sierra *on Temporary Regulatory Takings Law*, 23 UCLA J. ENVTL. L. & POL'Y 273, 273–74 (2005).

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

requires compensation."[75] The Court, however, did not decide whether a temporary regulatory taking actually occurred in *First English*.[76] Instead, the Court remanded the case for a determination of whether a taking occurred under *Penn Central*'s three-part test.[77]

II. THE PARCEL AS A WHOLE PLAYS AN IMPORTANT ROLE IN REGULATORY TAKINGS CASES

The parcel as a whole is an important factor in determining whether a regulatory taking has occurred under *Penn Central*'s three-part test.[78] The relevant parcel impacts the severity of a regulation's economic impact[79]—the factor that largely determines whether a regulatory taking has occurred.[80] For example, the larger the relevant parcel, the smaller the regulation's economic impact will be on the property.[81] In this scenario, it is less likely a court will find a taking has occurred.[82] In contrast, the smaller the parcel, the greater the regulation's economic impact will be on the property.[83] In this scenario, it is more likely a court will find a taking has occurred.[84] Despite the importance of the parcel as a whole in regulatory takings cases, the Court has not clarified how exactly the parcel as a whole should be defined.[85]

This Part examines the parcel as a whole in greater detail. Subpart A traces the development of the parcel as a whole in the Supreme Court's regulatory takings jurisprudence, while Subparts B and C discuss the Court's somewhat unsettled relationship with the parcel as a whole.

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75. *Id.* at 318 (internal quotation marks omitted).

76. *Id.* at 322.

77. *Id.* On remand, the California Court of Appeal held that no temporary regulatory taking had occurred. First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).

78. Lost Tree Village Corp. v. United States, 707 F.3d 1286, 1292 (Fed. Cir. 2013).

79. *Id.*; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496 (1987).

80. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact.").

81. Woffinden, *supra* note 4, at 624.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 623–24.

A. Courts Must Look at the "Parcel as a Whole" Rather than Individual Property Interests in Regulatory Takings Cases

In addition to developing a three-part test, the Supreme Court established the "parcel as a whole" rule in *Penn Central*.[86] In *Penn Central*, New York City's landmark preservation law prohibited the owners of Grand Central Terminal from constructing a high-rise on the top of their building.[87] The owners sued the City, arguing that the City had taken their air rights in the terminal.[88]

The Supreme Court rejected the owners' argument.[89] The Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . [on] the parcel as a whole.[90]

In other words, the Court looks at the entire property interest at stake rather than individual property interests to determine if a regulatory taking has occurred.[91]

After establishing the parcel as a whole rule, the Court focused on the entire terminal rather than only the air rights above the terminal.[92] The Court decided that no taking had occurred, because the owners' property interests—including their railroad franchise, ownership of the block, and subsurface rights—retained enough value that the diminution did not constitute a taking.[93]

The Court, however, did not explain how it determined that the terminal was the relevant parcel in *Penn Central*.[94] The Court also did not cite precedent or provide any doctrinal basis for its parcel as whole rule.[95] Moreover, the Court did not offer any guidance as to how the relevant parcel should be defined in future cases.[96] As a result, the parcel

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86. Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

87. *Id.* at 109, 117.

88. *Id.* at 119, 130.

89. *Id.* at 130–31.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; Kanner, *supra* note 27, at 309 n.8.

96. *Penn Cent.*, 438 U.S. at 130–31; *see also* Woffinden, *supra* note 4, at 623–24, 629.

as a whole rule became a significant source of confusion in later regulatory takings cases.

B. The Supreme Court Questioned the Parcel as a Whole in Lucas *and* Palazzolo

Although the Supreme Court has relied on the parcel as a whole rule since *Penn Central*, the Court has periodically hinted that it might want to revisit it.[97] For example, in *Lucas v. South Carolina Coastal Council*,[98] the Court noted that "the [parcel as a whole] does not make clear the 'property interest' against which the loss of [economic] value is to be measured."[99] While the Court recognized that this uncertainty has produced inconsistent holdings in the Court's jurisprudence,[100] it declined to clarify how to define the relevant parcel.[101]

Similarly, the Court referenced the "difficult, persisting question of what is the proper [parcel]" in *Palazzolo v. Rhode Island*.[102] But even though the Court expressed "discomfort with the logic of [the parcel as a whole]," the Court again did not provide any clarification as to how the relevant parcel should be defined.[103]

C. The Supreme Court Reaffirmed the Parcel as a Whole in Tahoe-Sierra

Less than a year after questioning the parcel as a whole rule in *Lucas* and *Palazzolo*, the Court embraced it in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[104] In *Tahoe-Sierra*, a regional planning agency imposed various ordinances that restricted

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97. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

98. 505 U.S. 1003.

99. *Id.* at 1016 n.7.

100. *Id. Compare* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that a law prohibiting subsurface coal mining was a taking), *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that a nearly identical law was not a taking). Although the Court distinguished *Keystone* from *Mahon* on two grounds, some courts and commentators consider the two decisions to be inconsistent. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7 (referring to the two decisions as "inconsistent"); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. CT. REV. 1, 4–5 (arguing that *Keystone* gutted, but did not explicitly overrule, *Mahon*).

101. *Lucas*, 505 U.S. at 1016 n.7 ("[W]e avoid this difficulty in the present case, since . . . [the state regulation] left each of Lucas's beachfront lots without economic value.").

102. 533 U.S. at 631.

103. *Id.* ("[W]e will not explore the point here. Petitioner did not press the [parcel as a whole issue] in the state courts, and the issue was not presented in the petition for certiorari.").

104. 535 U.S. 302 (2002).

development in the Lake Tahoe region.[105] These moratoria lasted for thirty-two months.[106] Landowners brought suit against the agency, arguing that the moratoria constituted a categorical taking[107] of their property under *Lucas*.[108] Notably, the landowners did not argue that a temporary regulatory taking had occurred under *Penn Central*'s balancing test.[109]

The Court rejected the landowners' argument that a categorical taking under *Lucas* had occurred in *Tahoe-Sierra*.[110] According to the Court, "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[111] The Court therefore held that the moratoria did not constitute a categorical taking.[112]

Although the Court's holding in *Tahoe-Sierra* was narrow,[113] the majority opinion contained dicta regarding temporary regulatory takings and the parcel as a whole.[114] For example, the Court reiterated that courts must look at the parcel as a whole when analyzing the economic impact of a regulation.[115] The Court also stated that "[a]n interest in real property is defined by . . . the term of years that describes the temporal aspect of the owner's interest."[116] The Court, however, observed that the temporary nature of a land-use restriction does not necessarily preclude a finding that a taking has occurred under *Penn Central*.[117] As the Court

105. *Id.* at 306.

106. *Id.*

107. In *Lucas*, the Court held that a categorical taking occurs when a government regulation denies "all economically beneficial" use of private property. 505 U.S. 1003, 1015 (1992). The *Lucas* decision is an exception to the *Penn Central* balancing test. *Id.* Aside from situations involving a *Lucas* categorical taking, "regulatory takings challenges are governed by the standards set forth in *Penn Central*." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

108. *Tahoe-Sierra*, 535 U.S. at 320–21. The district court held that there was no taking under a *Penn Central* analysis. Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999). The landowners did not challenge the district court's *Penn Central* findings or conclusions on subsequent appeals. *Tahoe-Sierra*, 535 U.S. at 317–18.

109. *Tahoe-Sierra*, 535 U.S. at 317–18.

110. *Id.* at 332.

111. *Id.*

112. *Id.*

113. *Id.* at 307; *see also* Berger, *supra* note 62, at 308.

114. David L. Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings:* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 25 U. HAW. L. REV. 279, 281, 291 (2003).

115. *Tahoe-Sierra*, 535 U.S. at 331.

116. *Id.* at 331–32.

117. *Id.* at 337.

explained, "we simply recognize that it should not be given exclusive significance one way or the other."[118] Finally, the Court reaffirmed the role of fairness and justice in regulatory takings cases.[119]

Meanwhile, Justice Thomas—joined by Justice Scalia—objected to the majority's reliance on the "questionable" parcel as a whole rule in his dissenting opinion.[120] Citing to *Lucas* and *Palazzolo*, Justice Thomas described the majority's decision to embrace the parcel as a whole rule as "puzzling."[121]

III. AFTER *TAHOE-SIERRA*, THE FEDERAL CIRCUIT HAS STRUGGLED TO DEFINE THE RELEVANT PARCEL IN TEMPORARY REGULATORY TAKINGS CASES

The Federal Circuit plays an important role in takings law due to the statutory requirement that litigants must file their actions in the Court of Federal Claims when seeking more than $10,000 from the federal government.[122] As a result, many decisions regarding temporary regulatory takings and the parcel as a whole can be found in the Federal Circuit.[123] This Part discusses current confusion in the Federal Circuit regarding how the relevant parcel should be defined in temporary regulatory takings cases involving lost income.

Following the Supreme Court's decision in *Tahoe-Sierra*, the Federal Circuit has struggled tremendously to define the relevant parcel in temporary regulatory takings cases.[124] For example, in *CCA Associates*, apartment building owners argued that a temporary regulatory taking occurred when two federal housing acts deprived them of their contractual right to prepay their mortgage and exit a low-income housing program.[125] In contrast to the landowners in *Tahoe-Sierra*, the apartment

118. *Id.*

119. *Id.* at 334 ("[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases.").

120. *Id.* at 355 (Thomas, J., dissenting).

121. *Id.* n.*.

122. *See* 28 U.S.C. § 1346(a)(2) (establishing concurrent jurisdiction in Court of Federal Claims for claims not exceeding $10,000); *id.* § 1491(a) (2006) (establishing United States Court of Federal Claims jurisdiction for monetary claims under federal law).

123. Siegel, *supra* note 21, at 611.

124. *See, e.g.*, CCA Assocs. v. United States, 667 F.3d 1239, 1244, 1248 (Fed. Cir. 2011); *Cienega X*, 503 F.3d 1266, 1280 (Fed. Cir. 2007); *Cienega VIII*, 331 F.3d 1319, 1344–45 (Fed. Cir. 2003).

125. 667 F.3d at 1243–44.

owners in *CCA Associates* argued for recovery under *Penn Central*'s balancing test rather than *Lucas*' categorical exception.[126] As a result, *Tahoe-Sierra* did not provide any guidance as to how the relevant parcel should have be determined in *CCA Associates*.[127]

Initially, the Court of Federal Claims determined that the owners' investment in the property[128]—meaning the owners' invested capital[129]—was the relevant parcel.[130] In doing so, the trial court relied on the Federal Circuit's parcel as a whole approach in *Cienega VIII*,[131] a temporary regulatory takings case involving the same two federal housing acts.[132] Using *Cienega VIII*'s approach, the trial court determined that there was an 81.25% economic impact on the property in *CCA Associates*.[133] The court therefore held that a temporary regulatory taking had occurred.[134]

While *CCA Associates* was pending appeal, the Federal Circuit reversed its *Cienega VIII* decision in *Cienega X*.[135] In *Cienega X*, the Federal Circuit determined that the property's *entire lifetime value*[136] was the relevant parcel.[137] The Federal Circuit changed its relevant parcel approach as a result of the Supreme Court's decision in *Tahoe-Sierra*.[138] According to the *Cienega X* court, *Tahoe-Sierra* "explicitly confirmed" that the property's entire lifetime value was the relevant parcel in temporary regulatory takings cases.[139]

The Federal Circuit's change in approach created a considerably

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126. *Id.* at 1244.

127. William W. Wade, *Federal Circuit's Economic Failings Undo the* Penn Central *Test*, [2010] 40 Envtl. L. Rep. (Envtl. Law Inst.) 10,914, 10,920.

128. The Federal Circuit often uses "owner's equity" to refer to the owner's investment in the property. *See, e.g.*, *CCA Assocs.*, 667 F.3d 1239. This Comment uses "owner's investment" throughout for consistency.

129. Wade, *supra* note 127, at 10,921.

130. CCA Assocs. v. United States, 75 Fed. Cl. 170, 197 (2007). In *CCA Associates*, the building owners' investment in the property was $811,700 at the time of the temporary taking. *Id.* at 198.

131. *Id.* at 195–96.

132. 331 F.3d 1319 (Fed. Cir. 2003).

133. *CCA Assocs.*, 75 Fed. Cl. at 198.

134. *Id.* at 198.

135. 503 F.3d 1266, 1280–82 (Fed. Cir. 2007); *see also* CCA Assocs. v. United States, 667 F.3d 1239, 1246 n.3 (Fed. Cir. 2011).

136. In *CCA Associates*, the Federal Circuit determined that the entire lifetime value of the property was the remainder of the mortgage, which is generally twenty years. 667 F.3d at 1246–47.

137. *Cienega X*, 503 F.3d at 1280–82.

138. *Id.* at 1280–81; *see also CCA Assocs.*, 667 F.3d at 1246 n.3.

139. *Cienega X*, 503 F.3d at 1281.

different result in *CCA Associates*.[140] Using this new "lifetime value" approach, the Federal Circuit determined that there was only an 18% economic impact on the property in *CCA Associates*.[141] By changing the relevant parcel, the economic impact went from 81.25% to only 18%.[142] Although the apartment owners lost over $700,000 of net income as a result of the two government regulations, the court determined that an economic impact of 18% was not substantial enough[143] to support a taking.[144]

Notably, the Federal Circuit expressed discomfort with its new parcel as a whole approach in *CCA Associates*.[145] The court explained: "If this methodology were to apply beyond [this case], 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 [relevant parcel]. This would virtually eliminate all [temporary] regulatory takings."[146] Bound by *Cienega X*,[147] however, the *CCA Associates* court ultimately employed the lifetime value concept resulting in an 18% economic impact[148] and held that no temporary regulatory taking had occurred.[149]

IV. DETERMINING THE RELEVANT PARCEL IN TEMPORARY REGULATORY TAKINGS CASES

The Federal Circuit's recent decision in *CCA Associates* highlights the confusion surrounding the parcel as a whole. It also highlights the continuing need to clarify how the relevant parcel should be defined in

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140. 667 F.3d at 1246.

141. *Id.* at 1244.

142. *Id.* at 1246.

143. While there is no per se rule to determine what economic impact will be substantial enough to support a taking, the economic impact "must be more than a mere diminution." *Id.* (citing *Cienega VIII*, 331 F.3d 1319, 1343 (Fed. Cl. 2003)). It is extremely unlikely that an economic impact of less than 50% will support a taking. *Id.*

144. *Id.*

145. *Id.* at 1247 ("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."); *see also Cienega X*, 503 F.3d 1266, 1295 (Fed. Cir. 2007) (Newman, J., dissenting) ("The creative theories propounded by my colleagues for redetermining whether a taking occurred ignore the law of this case . . . .").

146. *CCA Assocs.*, 667 F.3d at 1247.

147. In the Federal Circuit, "[p]anels are bound by the law of prior panels." *Id.* at 1244; *see also* Hometown Fin., Inc. v. United States, 409 F.3d 1360, 1365 (Fed. Cir. 2005).

148. *CCA Assocs.*, 667 F.3d at 1247.

149. *Id.* at 1242.

temporary regulatory takings cases. Unfortunately, clarification regarding the relevant parcel does not appear to be forthcoming; the Supreme Court has denied several relevant petitions for certiorari in recent years, including one in *CCA Associates*.[150]

This Part proposes a framework for defining the relevant parcel in temporary takings cases involving lost income. Subpart A argues that the relevant parcel should not be determined by the property's entire lifetime value. Subpart B then suggests that the relevant parcel should be determined by the owner's investment in the property in consideration with principles of fairness and justice.

A. Courts Should Not Use the Property's Entire Lifetime Value to Determine the Relevant Parcel

The relevant parcel should be not be determined by the property's entire lifetime value in temporary regulatory takings cases involving lost income. Neither Supreme Court jurisprudence nor standard economics supports this interpretation of the parcel as a whole.

1. Supreme Court Jurisprudence Does Not Support the Lifetime Value Concept

First, *Tahoe-Sierra* does not support the Federal Circuit's lifetime value concept. Although the Federal Circuit relied on *Tahoe-Sierra* when it determined that the property's entire lifetime value should be the relevant parcel in *Cienega X*[151]—a decision that the Federal Circuit ultimately reaffirmed in *CCA Associates*[152]—such reliance is misplaced. *Tahoe-Sierra* concerned a categorical taking of property under *Lucas*.[153] The landowners in *Tahoe-Sierra* did not argue for recovery under *Penn Central*'s balancing test,[154] as the apartment owners did in *CCA*

150. *See, e.g.*, Petition for a Writ of Certiorari, CCA Assocs. v. United States, __U.S.__, 133 S. Ct. 422 (2012) (No. 11-1352), 2012 WL 1636907; Petition for a Writ of Certiorari, Rose Acre Farms, Inc. v. United States, __U.S.__, 130 S. Ct. 1501 (2010) (No. 09-342), 2009 WL 3006231; *see also* Johnson, *supra* note 41, at 378.

151. 503 F.3d 1266, 1281 (Fed. Cir. 2007) ("In *Tahoe-Sierra*, the necessity of considering of the overall value of the property was explicitly confirmed in the temporary regulatory takings context. . . . Thus we conclude that in a temporary regulatory takings analysis context the impact on the value of the property as a whole is an important consideration . . . ."); *see also CCA Assocs.*, 667 F.3d at 1246 n.3 ("*Cienega X* bases this 'life of property' requirement on the Supreme Court decision in *Tahoe-Sierra*." (citations omitted)).

152. 667 F.3d at 1247.

153. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 317–18 (2002).

154. *Id.*

Associates.[155]

As a result of this posture, the Supreme Court analyzed the relevant parcel in *Tahoe-Sierra* under *Lucas*' categorical exception rather than *Penn Central*'s balancing test.[156] Under *Lucas*, the *Tahoe-Sierra* Court determined that "[a]n interest in real property is defined by . . . the term of years that describes the temporal aspect of the owner's interest."[157] The Court clarified, however, that "[a]nything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*."[158] Thus, *Tahoe-Sierra* does not provide any guidance as to how the relevant parcel should be determined under *Penn Central*'s balancing test.[159]

Further, *Tahoe-Sierra* concerned lost property use rather than lost income.[160] The landowners in *Tahoe-Sierra* argued that they had been denied "all viable economic use" of their property.[161] Lost income was not at issue in *Tahoe-Sierra*,[162] as it was in *CCA Associates*.[163] As a result, *Tahoe-Sierra*'s relevant parcel determination does not account for lost income during the temporary regulation.[164] *Tahoe-Sierra* should not be read to provide any guidance as to how the parcel as a whole should be determined in cases involving lost income.[165] Ultimately, the Federal Circuit erroneously relied on *Tahoe-Sierra* for its lifetime value concept.

First English also does not support the Federal Circuit's lifetime value concept. In *First English*, the Supreme Court held that temporary regulatory takings are compensable under the Takings Clause.[166] Under the lifetime value concept, however, the relevant parcel is defined as "all income earned over the entire remaining useful life of the real property."[167] Income losses during the temporary regulation must therefore be greater than any subsequent income returns after the

155. 667 F.3d at 1244.

156. 535 U.S. at 330–32.

157. *Id.* at 331–32.

158. *Id.* at 330 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019–20 n.8 (1992)).

159. Wade, *supra* note 127, at 10,920.

160. *Tahoe-Sierra*, 535 U.S. at 320; Wade, *supra* note 127, at 10,920.

161. *Tahoe-Sierra*, 535 U.S. at 320.

162. *Id.*; Wade, *supra* note 127, at 10,920.

163. 667 F.3d 1239, 1246 (Fed. Cir. 2011).

164. Wade, *supra* note 127, at 10,920.

165. *Id.*

166. 482 U.S. 304, 318–19 (1987).

167. *CCA Assocs.*, 667 F.3d at 1247.

temporary regulation in order to constitute a temporary taking.[168] Given land's infinite life, no temporary regulation will ever cause a loss substantial enough to constitute a taking.[169] In effect, the Federal Circuit's lifetime value concept would "virtually eliminate all [temporary] regulatory takings."[170]

Finally, a temporary taking is defined as a taking with a finite start and end.[171] Temporary regulatory takings inherently supply a "temporal framework under which the underlying takings claim is to be analyzed."[172] The period of the temporary taking is therefore the relevant period for assessing the regulation's economic impact.[173] It is illogical to ignore the limited duration of a temporary taking and define the relevant parcel by a timeframe that extends beyond the end of the temporary regulation at issue.[174]

2. Standard Economics Does Not Support the Lifetime Value Concept

Standard economics also does not support the Federal Circuit's lifetime value concept. Temporary regulatory takings that involve lost income—as in *CCA Associates*—are fundamentally different from those that involve lost property—as in *Tahoe-Sierra*.[175] For example, a temporary taking of a bar of gold has different consequences than a temporary taking of an income-producing apartment building.[176] The owner of the gold bar receives the same property at the end of the temporary taking,[177] while the owner of the apartment building forever loses income for the duration of the taking.[178] Returning the use of property after a temporary taking does not return the income that was lost during the temporary taking;[179] "the income-generating opportunity

168. Wade, *supra* note 127, at 10,920.

169. Petition for a Writ of Certiorari at 21, CCA Assocs. v. United States, __U.S.__, 133 S. Ct. 422 (2012) (No. 11-1352), 2012 WL 1636907, at *21.

170. *CCA Assocs.*, 667 F.3d at 1247.

171. Wyatt v. United States, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001).

172. J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 47 (2002).

173. Seiber v. United States, 364 F.3d 1356, 1371 (Fed. Cir. 2004) ("[T]he period of the alleged temporary taking . . . is the relevant period for purposes of assessing the economic impact.").

174. William W. Wade, *Temporary Takings,* Tahoe-Sierra*, and the Denominator Problem*, [2013] 43 Envtl. L. Rep. (Envtl. Law Inst.) 10,189, 10,199–200.

175. *Id.* at 10,200.

176. Independence Park Apts. v. United States, 61 Fed. Cl. 692, 707 n.12 (2004).

177. *Id.*

178. *Id.*

179. Wade, *supra* note 174, at 10,200.

the property provided [is] entirely lost during the period of the temporary taking."[180] At the end of the temporary taking, the owner of the gold bar is essentially made whole, whereas the owner of the apartment building is not.

Given this difference, the relevant parcel in temporary takings cases involving lost income should not be treated the same as the relevant parcel in cases involving lost property. The standard method to evaluate the economic impact of lost income is to compare the lost income to the owner's investment in the property at the time of the loss.[181] Accordingly, the relevant parcel should be determined by the owners' investment in the property.[182] As one economist explained, "this is black-letter economics."[183]

B. Courts Should Use the Owner's Investment in the Property in Consideration with Principles of Fairness and Justice to Determine the Relevant Parcel

In temporary regulatory takings cases involving lost income, the relevant parcel should be determined by the owner's investment in the property in consideration with principles of fairness and justice. This approach harmonizes standard economics and Supreme Court jurisprudence. It also achieves uniformity and equitability in temporary regulatory takings cases involving lost income.

As discussed above, standard economics requires that the relevant parcel be determined by the owner's investment in the property,[184] meaning the owner's invested capital.[185] For example, in *CCA Associates* the building owners' investment in the property was $811,700 at the time of the temporary taking.[186] Thus, the relevant parcel would be $811,700.[187] This number should have been compared with the building owners' lost income during the Federal Circuit's economic impact analysis[188]—the first factor in the *Penn Central*'s three-part

180. *Independence Park*, 61 Fed. Cl. at 707.

181. Wade, *supra* note 174, at 10,196; *see also* Wade, *supra* note 127, at 10,916.

182. Wade, *supra* note 127, at 10,921; *see also* CCA Assocs. v. United States, 75 Fed. Cl. 170, 195 (2007).

183. Wade, *supra* note 174, at 10,199.

184. *See* Wade, *supra* note 127, at 10,921; *supra* Part IV.A.

185. Wade, *supra* note 127, at 10,921.

186. *CCA Assocs.*, 75 Fed. Cl. at 198; Wade, *supra* note 127, at 10,916.

187. Wade, *supra* note 127, at 10,916.

188. *Id.*; Wade, *supra* note 174, at 10,189. The economic impact analysis is outside the scope of this Comment.

test.[189]

However, the relevant parcel analysis should not end with the owner's investment in the property. Regulatory takings cases are ultimately concerned with fairness and justice.[190] In addition to the owner's investment, courts should also consider principles of fairness and justice, such as the owner's reasonable expectations[191] and the regulation's equitable impact.[192] Incorporating principles of fairness and justice into the relevant parcel determination would create a "standard of review"[193] that achieves both uniformity and equitability in temporary regulatory takings cases.

1. Courts Should Consider the Property Owner's Reasonable Expectations

When determining the relevant parcel, courts should consider the property owner's reasonable expectations.[194] In several cases, the Supreme Court has hinted that the owner's reasonable expectations may impact the relevant parcel.[195] The Court speculated in *Lucas* that the answer to the parcel as a whole problem "may lie in how the owner's reasonable expectations have been shaped by the State's law of property."[196] The *Lucas* Court further suggested that the degree to which the law recognized and protected the particular property interest at stake may be relevant.[197] Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[198] the Supreme Court noted that the relevant parcel should be viewed in the context of the owner's reasonable operations and financial-backed expectations.[199]

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189. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

190. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005); Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333–34, 342 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *see also* Cordes, *supra* note 42, at 3.

191. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

192. Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 585–86 (2007); James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 315, 349 (2010).

193. Holloway & Guy, *supra* note 192, at 349.

194. *Lucas*, 505 U.S. at 1016 n.7; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987); Woffinden, *supra* note 4, at 641–42.

195. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7; *Keystone*, 480 U.S. at 499.

196. *Lucas*, 505 U.S. at 1016 n.7.

197. *Id.*

198. 480 U.S. 470.

199. *Id.* at 499.

The Federal Circuit has examined the owner's expectations when deciding what constitutes the relevant parcel.[200] For example, in *Forest Properties, Inc. v. United States*,[201] the Federal Circuit held that the district court correctly "[f]ocus[ed] on how the [owner's] economic expectations . . . have shaped the owner's actual and projected use of the property" when it determined the relevant parcel.[202]

Ultimately, focusing on the owner's reasonable expectations "reflect[s] a concern with the fairness of imposing costs on a landowner who has reasonably relied on a state of law."[203] While regulatory changes are part of the risk that property owners take when they invest in property,[204] unanticipated changes in the permissible uses of property may be unfair to private property owners.[205] Unanticipated regulatory changes may be particularly unfair when the property owner substantially relied on earlier rules.[206] Courts should therefore look at the property owner's reliance on previous law when determining the relevant parcel.[207]

2. Courts Should Consider the Regulation's Equitable Impact on the Property Owner

In addition to the property owner's reasonable expectations, courts should also consider the regulation's equitable impact on the property owner. The Supreme Court has repeatedly emphasized that regulatory takings cases should focus on the regulation's equitable impact on the property owner.[208] In *Kirby Forest Industries, Inc. v. United States*,[209]

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200. *See, e.g.*, Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1346 (Fed. Cir. 2004); Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

201. 177 F.3d 1360.

202. *Id.* at 1365 (quoting Forest Props., Inc. v. United States, 39 Fed. Cl. 56, 73 (1997)).

203. Gaba, *supra* note 192, at 589.

204. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . ."); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409, 415 (1995) ("[R]egulation [is] an ordinary part of background risk and opportunity, against which we all take our chances . . . as investors in property.").

205. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169–71 (2002); Cordes, *supra* note 42, at 34.

206. Cordes, *supra* note 42, at 34.

207. *Id.* at 35.

208. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005); Pumpelly v. Green Bay Co., 80 U.S. 166, 177–78 (1871).

209. 467 U.S. 1.

the Court explained that while most regulatory burdens must be borne "as concomitants of the advantage of living and doing business in a civilized community," some regulatory burdens may be so substantial that "they [must] be borne by the public as a whole."[210] The Court also stated in *Lingle v. Chevron U.S.A. Inc.*[211] that regulatory takings cases should focus on "the magnitude or character of the burden a particular regulation imposes upon private property rights."[212]

Lower courts—particularly in the Federal Circuit—are increasingly considering the regulation's equitable impact in regulatory takings cases.[213] For example, in *Cienega Gardens v. United States* (*Cienega IX*),[214] the Court of Federal Claims emphasized that the regulation at issue imposed disproportionate burdens on only a few property owners.[215] The *Cienega IX* court ultimately determined that a temporary regulatory taking had occurred.[216] Conversely, in *Brace v. United States*,[217] the Court of Federal Claims held that a regulatory taking had not occurred, because the regulation at issue was "generally applicable to all similarly situated property owners and can in no way be viewed as being directed at [the] plaintiffs."[218]

Focusing on the regulation's equitable impact on the property owner during the relevant parcel analysis addresses questions of equality and proportionality.[219] In other words, it ensures that some property owners are not forced to bear public burdens that should be borne by the public as a whole.[220] Courts should therefore weigh the regulatory benefits and burdens on the property owner when determining the relevant parcel.[221]

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210. *Id.* at 14 (internal quotation marks omitted).

211. 544 U.S. 528.

212. *Id.* at 542 (emphasis in original omitted).

213. *See, e.g.*, Brace v. United States, 72 Fed. Cl. 337, 356 (2006); Cienega Gardens v. United States (*Cienega IX*), 67 Fed. Cl. 434, 467 (2005); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 858 (N.D. 2005); *see also* Davidson, *supra* note 44, at 36–37.

214. 67 Fed. Cl. 434.

215. *Id.* at 467 ("Congress's decision to enact the [federal housing] statutes targeting specific property owners of low-income housing who had rights to prepay and exit the program, and not all owners of rental properties or all taxpayers, raises a concern under the Takings Clause . . . .").

216. *Id.* at 479.

217. 72 Fed. Cl. 337.

218. *Id.* at 356.

219. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001); Davidson, *supra* note 44, at 36.

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

221. Gaba, *supra* note 192, at 585.

CONCLUSION

Despite its importance in regulatory takings cases, it is unclear how the parcel as a whole should be defined. The Federal Circuit's recent decision in *CCA Associates* highlights the confusion surrounding the parcel as a whole. It also highlights the continuing need to clarify how the relevant parcel should be determined in temporary regulatory takings cases involving lost income. This Comment argues that the relevant parcel in temporary regulatory takings cases involving lost income should not be determined by the property's entire lifetime value. Neither Supreme Court jurisprudence nor standard economics supports this interpretation of the parcel as a whole. Instead, the relevant parcel should be determined by the owner's investment in the property in consideration with fairness and justice. This approach harmonizes standard economics and Supreme Court jurisprudence. It also achieves uniformity and equitability in temporary regulatory takings cases involving lost income.