

*"Of shoes and ships, eggs and farms;  
Or, Penn Central thru the Looking Glass"*

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Fans of arcane takings decisions will not find a more economically confused record and decision than *Rose Acre Farms VI*. (*Rose Acre Farms, Inc., v. United States*, United States Court of Appeals for the Federal Circuit, 2007-5169, March 12, 2009.) *Rose Acre Farms VI* revisited the question of "whether the economic impact . . . should be calculated by a diminution in value analysis or a diminution in return analysis." Whether the temporary taking case was about eggs or farms, gross revenues or net profits, lost income or lost value, marginal costs or average costs apparently eluded the judges, the instant parties and experts. The decision relied on diminution in gross revenues over diminution in net revenues – a textbook-obvious error – to evaluate severity of economic impact for a temporary taking.

In 15 years of writing about the economic underpinnings of regulatory takings case decisions, I have to award both the expert testimony and judicial interpretations in this case some sort of pinnacle award for sophistry, obfuscation and confusion. The clearest remark in the decision about the lost return or lost revenues approach to measurement of economic impact appears at FN 7, where the decision left resolution of the return v. value issue to future cases. Resolution and understanding by jurists and lawyers is essential before more cases are decided on bad economics. But that is beyond the intent of this little note.

I want to focus on one simple question: Have any lawyers noticed that the government's arguments in *Cienega X* and *Rose Acre Farms VI* do away with temporary takings?

*Cienega X* addressed the question of whether valuation of the lost income from use of the plaintiff's property or valuation of the change in real property value measured before and after the taking period is the more appropriate measure of the *Penn Central* test. While inconsistent with the received canon of finance and economics,<sup>1</sup> the government relied on *Tahoe-Sierra* and won the point in *Cienega X* that the change in real property values of the buildings should govern the *Penn Central* test because the buildings would recover value after the period of the taking.

The government's brief in *Rose Acre Farms VI* argues that in light of the *Tahoe Sierra* parcel as a temporal whole language, "[t]he exclusive focus upon Rose Acre's lost profitability *during* the temporary period [of the restrictions] is an erroneous assessment of the economic impact of a temporary regulatory restriction upon the property as a whole." They conclude that "[t]he obvious purpose for this requirement

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<sup>1</sup> See "Confusion About "Change in Value" and "Return on Equity" Approaches to the *Penn Central* Test in Temporary Takings," 38 ELR 10486, July 2008, for support of this claim.

is to assess the economic impact of the temporary regulatory action in relation to *the entire life of the property.*" (Emphasis added.)

The implication of this claim would be that the plaintiff's expert must evaluate the economic impact of a temporary loss of income with evidence to prove that the loss *during* the temporary taking period eviscerates the economic prospects of the business for all time to come.

Time values of money are important to this determination. Depending on the length of the taking period and discount rate, plaintiff may or may not ever recover from the economic loss of a temporary loss of revenues. If it were true that a temporary taking must prove *Penn Central's* economic impact prong "in relation to *the entire life of the property,*" then the temporary taking actually would be equivalent to a permanent taking to surmount this hurdle. If so, temporary takings do not exist.

On reflection, both *Cienega X* and *Rose Acre Farms VI* so confused standard economic measurement and evaluation benchmarks that proving a temporary taking is tantamount to proving a permanent taking. But then, why does a body of temporary takings law exist?

*Tahoe-Sierra* is the bedrock source of these subsequent economic errors. The recovery of value of the *Tahoe-Sierra* plaintiffs' tangible real property clearly is not a competent comparison to a business' ability to resume operations after the end of a temporary business interruption. Abundant case decisions show that earnings lost in time are lost forever. The Federal Circuit Court's decisions suggest that the inability to recover and continue in business is now the relevant criterion for payment of compensation for a temporary taking. But then, why does a body of temporary takings law exist?

*Rose Acre Farms VI* is the best example yet where faulty understanding of (or obfuscation of) economics undermined judicial thinking. I concluded in my cited 2008 ELR article that "the line of [Court of Federal Claims HUD] cases prior to *Cienega X* needs to become the fabric of broader jurisprudence to inform legal practitioners and jurists. The implications of [*Cienega X*] are broader than the plaintiffs' losses in *Cienega IX.*" *Rose Acre Farms VI* shoves takings jurisprudence thru the looking glass.