REASONABLE INVESTMENT-BACKED EXPECTATIONS: SHOULD NOTICE OF RISING SEAS LEAD TO FALLING EXPECTATIONS FOR COASTAL PROPERTY PURCHASERS?

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I. INTRODUCTION

Sea level is rising, and the rate of this rise is increasing.[1] As a result, past trends and problems with coastal flooding, storm

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1. Andrew C. Kemp et al., *Timing and Magnitude of Recent Accelerated Sea-Level Rise (North Carolina, United States)*, 37 GEOLOGY 1035, 1035, 1037-38 (2009); Stefan

surge, salt water intrusion, and erosion will be even worse going forward.[2] As government's role is to help protect its people, their property, and the resources common to the people, the changes in coastal areas present enormous challenges for coastal areas and government entities with responsibility or authority in these areas. Such entities should be utilizing the tools at their disposal to keep people, property, and infrastructure safe from the rising seas.

Keeping people and property safe does not only mean protecting property through "'armoring'" such as sea walls, bulkheads, or levees.[3] While such armoring has appropriate applications in certain circumstances, it also carries costs. Two significant costs include potentially increasing the overall risk of flood damage due to increased development in protected areas and the loss of natural resources as beaches and estuarine systems drown out between a moving shoreline and stationary armoring.[4] Instead of armoring, a number of land use planning and regulatory structures can assist in moving development away from areas at risk of direct sea level rise (hereinafter "SLR") or erosion or storm surges that can be exacerbated by SLR.

While each potential planning approach to the problem carries its own costs and difficulties, the potential cost of a constitutional claim of a taking of private property for public use[5] poses a significant barrier in the United States to entertaining serious consideration of many adaptive planning and hazard mitigation

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Rahmstorf, *A New View on Sea-Level Rise: Has the IPCC Underestimated the Risk of Sea-Level Rise?*, 4 NATURE REPORTS: CLIMATE CHANGE 44, 44-45 (2010).

2. FLORIDA OCEANS AND COASTAL COUNCIL, CLIMATE CHANGE AND SEA-LEVEL RISE IN FLORIDA: AN UPDATE OF THE EFFECTS OF CLIMATE CHANGE ON FLORIDA'S OCEAN & COASTAL RESOURCES 5-8, 11 (2010) *available at* http://www.floridaoceanscouncil.org/reports/Climate_Change_and_Sea_Level_Rise.pdf.

3. Armoring is defined as

> a manmade structure designed to either prevent erosion of the upland property or protect eligible structures from the effects of coastal wave and current action. Armoring includes certain rigid coastal structures such as geotextile bags or tubes, seawalls, revetments, bulkheads, retaining walls, or similar structures but does not include jetties, groins, or other construction whose purpose is to add sand to the beach and dune system, alter the natural coastal currents, or stabilize the mouths of inlets.

FLA. ADMIN. CODE R. 63B-33.002(5) (2008).

4. Jenifer E. Dugan & David M. Hubbard, *Ecological Responses to Coastal Armoring on Exposed Sandy Beaches*, 74 SHORE & BEACH 10, 15 (2006) (identifying risks and frequent use or armoring in certain locales). *Cf.* ORRIN H. PILKEY & ROB YOUNG, THE RISING SEA 159 (2009); THOMAS K. RUPPERT ET AL., ERODING LONG-TERM PROSPECTS FOR FLORIDA'S BEACHES: FLORIDA'S COASTAL MANAGEMENT POLICY 14 (2008), *available at* http://www.law.ufl.edu/conservation/pdf/coastal_management_finalreport.pdf (highlighting temporary and atypical nature of armoring).

5. *See infra* Part IV.

policies.[6] Even when takings claims fail, the time and expense of litigating the issue can dramatically impact the regulating entity as many, particularly with the current economic situation, already lack funds for basic operations. While specific numbers on the chilling impact of takings claims on potential planning for adaptation to SLR do not exist, there is evidence that takings claims have significantly chilled enactment of regulations to protect our environment.[7]

To minimize the barrier posed by potential takings liability, this Article focuses on one specific—and key—concept in regulatory takings law: reasonable investment-backed expectations (hereinafter "RIBE"). This Article examines how increasing awareness of SLR and its impacts as well as distribution of such information should inform analysis of coastal owners' RIBE in legal claims that government regulation or action has taken private property. Even absent any intent to alter takings analysis, notice requirements promote better free market operation in real property transactions since an ideal free market requires that consumers have sufficient knowledge to make informed choices. In addition, more informed choices strengthen the case that those making the choice to purchase coastal property accept the risks inherent in owning coastal property.[8]

Part II gives examples of the evidence for SLR, estimates for the future, and the impact of SLR. Part III briefly discusses the development of regulatory takings and RIBE. Part IV discusses the evolution of RIBE through case law, primarily at the level of the U.S. Supreme Court, and its role in takings analysis. Part V specifically looks at notice as an element of RIBE. Part VI discusses various notice statutes for coastal property owners and the impact of such notice statutes. The conclusion and recommendations follow in Part VII.

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6. Booz Allen Hamilton, Inc., NAT'L OCEANIC AND ATMOSPHERIC ADMIN. COASTAL SERVS. CTR., *Hazard and Resiliency Planning: Perceived Benefits and Barriers Among Land Use Planners*, 10, 22, 31-32 (2010), *available at* http://csc.noaa.gov/publications/social_science/NOAACSCResearchReport.pdf.

7. *Id.* For discussion of a similar dynamic of a chilling effect due to takings claims based on statutes instead of the U.S. Constitution, see John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, GEORGETOWN ENVTL. LAW & POLICY INST. (2008) http://www.law.georgetown.edu/gelpi/TrackRecord.pdf.

8. *But see* Order for Final Summary Judgment, Jordan v. St. Johns County, No. CA05-694, at 17 n. 2, (Fla.7th Cir. Ct. May 21, 2009) (referring to as "coercive and repugnant" a policy of St. Johns County, Florida requiring residents of an at-risk area to sign "Assumptions of Risk" agreements to receive development permission).

II. RISING SEAS: THE NEED TO CONFRONT COASTAL CHANGE

After about six thousand years of unusual relative stability, sea level is rising.[9] In Florida, our relative sea level has risen about eight inches over the past century.[10] Relative rates in other parts of the world are higher or lower depending on many local factors.[11] The current rates of SLR are projected to increase over the next century.[12] Part of this rise is due to thermal expansion of ocean waters as they warm and part is due to the meltwater of glaciers and polar ice sheets.[13] While estimates vary, most peer-reviewed scientific estimates fall within the range of 0.8–1.8 meters of SLR during the next 100 years.[14]

Current SLR has already significantly impacted our world,[15] but the projected rates will be far worse than anything we have seen yet. That coastal areas are the fastest-growing areas only exacerbates the risks we face.[16] Proactively adapting to changing sea levels presents the best option for protecting life, infrastructure, and property. Many organizations, governments, municipalities,

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9. Anny Cazenave & William Llovel, *Contemporary Sea Level Rise*, 2 ANN. REV. OF MARINE SCI. 145, 146 (2010).

10. *See, e.g., Obtaining Tide Gauge Data*, PERMANENT SERV. FOR MEAN SEA LEVEL, http://www.psmsl.org/data/obtaining/ (last updated Mar. 23, 2011) (providing links to Florida tide gauge charts). *See also Key West*, PERMANENT SERV. FOR MEAN SEA LEVEL, http://www.psmsl.org/data/obtaining/stations/188.php (last updated Feb. 23, 2011); FLORIDA ATLANTIC UNIVERSITY, FLORIDA'S RESILIENT COASTS: A STATE POLICY FRAMEWORK FOR ADAPTATION TO CLIMATE CHANGE 15, *available at* www.ces.fau.edu/files/projects/climate_change/Fl_ResilientCoast.pdf.

11. *Sea Level Trends: Frequently Asked Questions*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://tidesandcurrents.noaa.gov/sltrends/faq.shtml#q1 (last visited May 9, 2011). *See generally Sea Level Trends*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://tidesandcurrents.noaa.gov/sltrends/sltrends.html (last visited May 9, 2011) (showing sea level trends in the United States and globally).

12. Cazenave & Llovel, *supra* note 9, at 165-66; Aslak Grinsted et al., *Reconstructing Sea Level from Paleo and Projected Temperatures 200 to 2100AD*, 34 CLIMATE DYNAMICS 461, 470 (2009).

13. Cazenave & Llovel, *supra* note 9, at 152.

14. *See, e.g.*, Rahmstorf, *supra* note 1, at 44-45. *See also* Grinsted *supra* note 12, at 461, 463.

15. *See, e.g.*, Larisa R. G. Desantis et al., *Sea-level Rise and Drought Interactions Accelerate Forest Decline on the Gulf Coast of Florida, USA*, 13 GLOBAL CHANGE BIOLOGY 2349 (2007) (chronicling impacts of SLR on coastal forests in Florida for more than two decades); Nirmala George, *Disputed Isle in Bay of Bengal Disappears into Sea*, U.S. NEWS & WORLD REPORT, Mar. 24, 2010, *available at* http://www.usnews.com/science/articles/2010/03/24/disputed-isle-in-bay-of-bengal-disappears-into-sea.html.

16. For example, the Atlantic coastal counties experienced population growth of 58% between 1980 and 2003. KRISTEN M. CROSSETT ET AL., NAT'L OCEAN & ATMOSPHERIC ADMIN., POPULATION TRENDS ALONG THE COASTAL UNITED STATES: 1980-2008, 3 (2004) *available at* http://oceanservice.noaa.gov/programs/mb/pdfs/coastal_pop_trends_complete.pdf. While land below thirty feet above sea level which is particularly vulnerable to coastal hazards comprises only 2% of the world's land area, this area is home to almost 10% of the world's population. Gordon McGranahan et al., *The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Zones*, 19 ENVT. & URBANIZATION 17, 22 (2007).

and commentators have argued for adaptive planning and have begun to discuss its tools and methods.[17] In some countries the focus has been on armoring coastlines; some have combined armoring with relocation out of certain areas;[18] yet few places are talking seriously about protecting people and natural coastal ecosystems by allowing natural movement of these areas through removing human development that interferes with such movement. Part of this reluctance has been attributed to the potential cost to regulators of regulatory takings claims if policies implementing relocation strategies are utilized. The next section briefly describes the basis in U.S. constitutional law for regulatory takings.

III. TAKINGS BACKGROUND

While much of the public may view real property as a static notion, this is incorrect;[19] few concepts have provoked more writing, discussions, and conflict. The history of property through many ages and cultures included the ability of the leader or leaders to significantly modify—even freely redistribute—property.[20] Such great power over property could be used for good or ill; cases of abuse in Europe during the Middle Ages eventually led to the *Magna Carta*, a document which sought to limit the power of feudal kings to arbitrarily take away property. This represented a watershed moment in the history of property in the western world as it heralded the beginnings of development of a conception of prop-

17. *See, e.g.*, COASTAL SERVS. CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.csc.noaa.gov/ (last visited May 9, 2011); *Climate Ready Estuaries*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/climatereadyestuaries/ (last visited May 9, 2011); *Climate Adaptation*, ICLEI http://www.icleiusa.org/programs/climate/Climate_Adaptation (last visited May 9, 2011); *Maryland at Risk: Sea-Level Rise Adaptation & Response*, MD. DEPT. OF NATURAL RES. (2008), *available at* http://www.dnr.state.md.us/CoastSmart/pdfs/SeaLevel_AdaptationResponse.pdf. *See also Planning for Climate Change: Resources for Bay Area Local Government*, SAN FRANCISCO BAY CONSERVATION & DEV. COMM'N, http://www.bcdc.ca.gov/planning/climate_change/adaptation.shtml (last visited May 9, 2011); *Framework for Implementation—Sea Level Rise Task Force*, N.Y. STATE DEPT. OF ENVTL CONSERV., http://www.dec.ny.gov/energy/48459.html (last visited May 9, 2011); *Sea Level Rise*, SATELLITE BEACH COMPREHENSIVE PLANNING ADVISORY BOARD, http://satellitebeachfl.org/CPABSeaLevelRise.aspx (last visited May 9, 2011) (Satelite Beach, Fla.); *City of Punta Gorda Adaptation Plan*, SW. FLA. REGIONAL PLANNING COUNCIL (2009), *available at* http://www.chnep.org/projects/climate/PuntaGordaAdaptationPlan.pdf.

18. Arguably Venice, Italy is taking the approach of both armoring and relocation. Italy is pursuing a tidal flood barrier to protect Venice even as the residents of Venice vote with their (soggy) feet, and the population of Venice has dropped from 121,000 in 1996 to 62,000 in 2009. PILKEY & YOUNG, *supra* note 4, at 22.

19. *See generally*, ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND xvii-xix, 145-56 (2007).

20. *See, e.g.*, Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 76-78 (2006); Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681, 689-90 (2006).

erty focused more on the individual than on the community. This conception of property grew stronger and stronger in the west, finding substantial philosophical support in the writings of John Locke, who promoted the individual's right to property as a "natural right" that preceded the formation of government.[21] In fact, said Locke, the primary purpose for which men—and it was men in Locke's time and culture—formed government was to protect the property that natural law granted to them.[22]

This concept of an *a priori* natural law right to property stands in stark contrast to concepts of property that view property not as a natural law creation, but rather as a creation of the positive law of the state. Once government exists to define and exercise control that protects the rights to property the State defines, then property begins to exist; without the State to define the rights of property and sanction and protect those rights, the rights to property do not exist.[23]

One might believe that such arcane discussions about the origins and history of property have no relevance to property today, but in truth, these concepts matter greatly since awareness of them—or lack thereof—color our expectations related to property.[24] The U.S. Supreme Court has long held for more than three decades that our expectations related to property form one of the factors to consider when analyzing whether government regulation has "taken" private property for public use in contravention of the Fifth Amendment to the U.S. Constitution.[25]

The Bill of Rights was adopted in 1791 and added to the 1788 Constitution of the United States. The Fifth Amendment states, in part, "nor shall private property be taken for public use, without just compensation."[26] For most of the United States's history, this was understood to only limit physical invasions and expropriations of property.[27] This understanding fits comfortably with the notion of a right to property that had been constantly evolving since adop-

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21. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (A. Millar et al. eds., 6th ed. 1764) (1689).

22. *Id.* § 222.

23. For information on the republican/positivist view of law vs. federalist/natural law view, see A. Dan Tarlock, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555, 588 (1993). *See also* Ankersen & Ruppert, *Defending the Polygon*, *supra* note 20, at 689-90; Ankersen & Ruppert, *Tierra y Libertad*, *supra* note 20, at 89-91.

24. *See generally* FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 19 (discussing changes in property law in the history of the United States and its colonies).

26. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). *Cf.* Vill. of Euclid v. Ambler Realty Co., 387 (1926) (discussing how changing times and context can alter what a property owner might reasonably expect for property restrictions).

27. U.S. CONST. amend. V.

27. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

tion of the *Magna Carta* in 1215 first limited the right of the sovereign to take property from those who held it.[28]

This understanding of the Fifth Amendment being limited to government actions that either physically invade or take title to property remained our law for more than a century until 1922 when, in *Pennsylvania Coal Co. v. Mahon*, the U.S. Supreme Court held that a regulation that goes "too far" in limiting the use of property can be treated as equivalent to a physical invasion of property.[29] This new type of taking has been called a regulatory taking or inverse condemnation. This Article refers to these as regulatory takings or simply as takings.

Prior to as well as after the *Mahon* case, other U.S. Supreme Court takings cases did not require compensation for situations in which regulations had severely diminished the value of property. This line of cases, stretching from 1887 to 1962,[30] indicated that when the State exercises its power to protect the health, morals, and safety of the public from a use of property that works contrary to these interests, no compensation is required unless the burden on the property owner is too onerous.[31]

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29. *See* U.S. NAT'L ARCHIVES & RECORDS ADMIN., MAGNA CARTA (Nicholas Vincent trans. 2007) (1215) *available at* http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

29. 260 U.S. 393, 415 (1922).

30. *See generally* Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 125 (1978) (stating that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." (citing Nectow v Cambridge, 277 U.S. 183, 188 (1928))); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962) (indicating that a valid police-power exercise of the right to regulate land use "'as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.'" (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887))); Miller v. Schoene, 276 U.S. 272, 277-78 (1928) (allowing destruction of cedar trees, without compensation for the resulting decrease in property value, in order to protect the valuable apple industry from cedar rust); Gorieb v. Fox, 274 U.S. 603, 605 (1927) (requirement that portions of parcels be left unbuilt as set-backs); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384-85 (1926) (prohibition of industrial use); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (barring operation of brick mill in residential area); Mugler v. Kansas, 123 U.S. 623 (1887) (prohibiting manufacture of alcoholic beverages).

It might be argued that *Lingle* essentially overturned this aspect of several of these cases on the basis that these cases were actually due process cases, not regulatory takings cases. *Cf.* 544 U.S. at 541. However, *Lingle* likely did not overrule *Goldblatt* or the others since these cases were still, at least in part, properly takings cases. *Goldblatt* serves as an example. On the one hand, *Goldblatt's* holding is that the claimant did not meet its burden to demonstrate that the regulation was not reasonable—a due process argument. *Goldblatt*, 369 U.S. at 596. However, the Court only examined the due process question of whether the regulation was reasonable after disposing of the issue of whether the regulation was a taking in light of the regulation going too far in imposing a financial burden. *Id.* at 592-94.

31. *Goldblatt*, 369 U.S. at 592-94.

IV. THE EVOLUTION OF REASONABLE INVESTMENT-BACKED EXPECTATIONS

Under current regulatory takings law analysis, most regulatory takings cases will be decided under rules that must consider RIBE.[32] This section briefly discusses a small number of the seminal U.S. Supreme Court cases that help determine the scope of RIBE to give the non-lawyer greater context within which to understand the subsequent discussion of RIBE.[33]

A. Introduction to Reasonable Investment-Backed Expectations and Penn Central

The precursor to RIBE first made its U.S. Supreme Court appearance in the seminal case of *Penn Central Transportation Co. v. City of New York* in 1978.[34] In *Penn Central,* the City of New York's Landmarks Preservation Committee had refused to allow construction of a more than fifty-story office building over Grand Central Terminal, which had been declared an historic landmark.[35] In response, Penn Central sued and claimed that the historic landmark designation and related denial of permission to construct a fifty-plus story office building on top of Grand Central Terminal resulted in a taking of Penn Central's property without payment of "just compensation."[36] The U.S. Supreme Court held that the historic preservation law and denial to Penn Central of the permit did not constitute a "taking" of property.[37] In doing so, the U.S. Supreme Court reviewed the development of Fifth Amendment takings jurisprudence and noted that the Court had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated[.]"[38] Instead, the Court uses "ad hoc, factual inquiries" to determine when a taking has occurred.[39] This

32. *See, e.g., Lingle*, 544 U.S. at 539; Jason E. Holloway & Donald C. Guy, Palazzolo's *Impact on Determining the Extent of Interference with Investment-Backed Expectations*, 32 REAL EST. L.J. 19, 28 (2003) (noting that only rare cases fall within the "per se" rule for a taking enunciated by the *Lucas* case that excludes consideration of RIBE).

33. Many additional Supreme Court cases mention RIBE, but this section focuses on those cases that involve real property (as opposed to personal property) and include RIBE as an important consideration in the decision.

34. 438 U.S. 104 (1978). Despite being used by the U.S. Supreme Court for the first time in 1978, the phrase "investment-backed expectations" traces its roots to a seminal article of 1967 by Professor Frank I. Michelman. *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165, 1213 (1967).

35. *Penn Central*, 438 U.S. at 116-18.

36. *Id.* at 119.

37. *Id.* at 131, 136.

38. *Id.* at 124.

39. *Id.*

analysis occurs through a three-pronged inquiry,[40] one factor of which is "the extent to which the regulation has interfered with distinct investment-backed expectations[.]"[41] The Court observed that this does not always mean you get to do what you thought you could.[42] The Court noted that the primary expectation of *Penn Central* was to be able to continue to use Grand Central Terminal as it had been used for the past sixty-five years and that *Penn Central* could obtain a "reasonable return" on its investment.[43]

B. Kaiser Aetna

Only one year after *Penn Central*, the case of *Kaiser Aetna v. United States* changed the phrase to "*reasonable* investment-backed expectations."[44] It did this with little fanfare and without even noting that the phrase was any different than what had been put forth in *Penn Central* the prior year. While the word "reasonable" carries significance,[45] adding it only made clearer the "reasonableness" standard that was likely already intended in *Penn Central*'s version.[46]

Kaiser Aetna also added an interesting twist: Government action may impact the "expectancies" related to property. In *Kaiser Aetna,* the court found that the government's action made the relevant property expectation stronger for the private property owner.[47] This leads one to ask whether the obverse also applies: May government action similarly reduce the relevant "expectancies" of property owners? While this appears clearly true in cases of reg-

40. The three prongs include: 1) the character of the government action, 2) the economic impact on the claimant, and 3) the "distinct investment-backed expectations" of the claimant. *Id.*

41. *Id.* The Court twice referred to *Pennsylvania Coal Co. v. Mahon* as the leading case indicating that sufficient frustration of "distinct investment-backed expectations" could result in a taking. *Id.* at 124, 127.

42. *Id.* at 130.

43. *Id.* at 136.

44. 444 U.S. 164, 175 (1979) (emphasis added).

45. Using the example of tort law—i.e. the "reasonable man" standard—"reasonable" investment-backed expectations are not those of the particular owner but rather are those of the "reasonable" person. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS §283, cmt. c (1965) (noting that the "reasonable man" standard is objective and external to the individual). For a bizarre analysis that turns this upside-down and claims that expectations of an individual are "objective" and those based on broader context and evidence independent of any specific individual's "distinct" beliefs are "subjective," see Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?,* 23 VA. ENVTL. L.J. 43, 56-67 (2004) (arguing that adding "reasonable" to "investment-backed expectations" is more subjective than the "distinct" investment-backed expectations of individual claimants).

46. *See* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW 215, 217 (1995). *See also* Zach Whitney, Comment, *Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 MARQ. L. REV. 617, 637 n.145 (2002).

47. *Kaiser Aetna*, 444 U.S. at 179-80.

ulation of business,[48] the answer remains less clear when applied to real property.[49]

C. Nollan

In the case of *Nollan v. California Coastal Commission,* the Court held that requiring a lateral public easement across the beach in exchange for a development permit constituted a taking.[50] The Court held this exaction an unconstitutional condition and taking because the required easement—which allowed public access to property in violation of the fundamental right to exclude outsiders from private property—lacked an essential nexus with the reason why the local government could have rejected the permit application.[51] The local government argued that it could have rejected the permit application based on impacts to visual access to the beach.[52]

Footnote two in the opinion dismisses the argument made in the dissent that because the Commission publicly announced its intention to require lateral easements in these circumstances, the owners had no RIBE.[53] Justice Scalia distinguished the precedent cited by the dissent by noting that there it was an application for a "'valuable [g]overnment benefit'" not including real property and that a permit to build on your own property "cannot remotely be described as a 'governmental benefit.'"[54]

While some intimated that *Nollan* may have limited the reach of the importance of notice in takings,[55] subsequent cases

48. *See, e.g.,* Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998); Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645-47 (1993) (noting that the business should have anticipated the potential for substantial new regulation since the industry in which it was involved was already highly regulated by a complex regulatory structure); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 226-28 (1986) (standing for the same principle as *Concrete Pipe & Products*).

49. In *Lucas v. South Carolina Coastal Council,* Justice Scalia announced that the state can entirely destroy the value of personal property, but not real property. 505 U.S. 1003, 1027-29 (1992). This distinction between real and personal property led some to assume that the "notice" rule in the *Monsanto* case (i.e., that one could have no RIBE of something when one was on notice of a law to the contrary) had added, but see *infra* notes 125-126 and accompanying text (discussing how *Tahoe-Sierra Regional Planning Agency* seems to back away from language in previous case law that could have been construed as limiting the importance of RIBE and notice).

51. 483 U.S. 825, 841-42 (1987).

52. *Id.* at 837.

53. *Id.* at 836.

53. *Id.* at 833 n.2.

54. *Id.* (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984)) (emphasis omitted).

55. *See, e.g.,* Mandelker, *supra* note 46, at 221-23.

continued to reference notice as an element of RIBE in regulatory takings analysis.[56]

D. Lucas

In *Lucas v. South Carolina Coastal Council,* property owner Lucas had purchased coastal property with the intent of building single-family homes on the lots.[57] South Carolina subsequently passed the Beachfront Management Act, which directly prohibited Lucas from building any permanent structures on his lots.[58] Lucas sued, and a trial court found the law had rendered Lucas's property valueless.[59] The U.S. Supreme Court concluded that a taking of property occurs when a regulation removes all economically-beneficial use from a property.[60]

Lucas's majority opinion overtly mentions expectations only once in its analysis.[61] The Court noted that examination of the owner's reasonable expectations, as shaped by the State's property law, can help to explain seemingly contradictory takings cases analyzed under the *Penn Central* factors of economic impact, RIBE, and nature of the government action.[62]

In addition, the concurring opinion is dedicated largely to a discussion of how RIBE should figure into takings analysis.[63] The concurrence asserts that a finding of "no value" should be determined "by reference to the owner's reasonable, investment-backed expectations"[64] as this retains the ability of state property law to continue to evolve in response to our "complex and interdependent society."[65] For the concurrence, had the "reasonable expectations" of the claimant in the case been more in line with the prohibition on construction as evidenced by both such a finding by the legislature and by having imposed the regulation prior to development of

56. *See, e.g.,* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

57. 505 U.S. 1003, 1006-07 (1992).

58. *Id.* at 1007.

61. *Id.*

60. *Id.* at 1027. The Court then proceeded to outline an exception to this rule for instances in which "background principles" of common law would also have had the same effect as the challenged regulation. *Id.* at 1027-32.

61. *Id.* at 1016 n.7. In addition, a footnote in the majority opinion addressing an issue from the dissent uses the phrase "'distinct investment-backed expectations'" when quoting from *Penn Central. Id.* at 1019 n.8 (quoting 438 U.S. 104, 124 (1978)).

62. *Id.* at 1016 n.7.

63. *Id.* at 1032-36 (Kennedy, J., concurring).

64. *Id.* at 1034 (Kennedy, J., concurring) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

65. *Id.* at 1035 (Kennedy, J., concurring) (citing Goldblatt v. Hempstead, 369 U.S. 590, 593 (1962)).

adjacent lots and not imposing it on Lucas until after his purchase, there might have been no taking.[66]

While *Lucas* left in doubt what, if any, role RIBE plays in determining a taking in the rare case when regulation eliminates all economically-beneficial use, it remained clear that RIBE still played an important role in the *Penn Central* analysis of regulatory takings.

E. Palazzolo v. Rhode Island

The case of *Palazzolo v. Rhode Island* is factually complex, but one of the two issues in the case is whether acquiring land after regulations limiting development have been passed automatically precludes a takings claim based on those regulations.[67] The Rhode Island Supreme Court had, in fact, ruled specifically that the challenged regulation could not be a taking under the *Penn Central* analysis because "[Palazzolo] could have had 'no reasonable investment-backed expectations that were affected by this regulation' because [the regulation] predated his ownership."[68]

Palazzolo presented particularly difficult facts since the claimant legally acquired the property after the regulation alleged to have caused the taking. However, the claimant acquired the property through the operation of law; the claimant was the sole remaining shareholder of the corporation that owned the property for many years prior to enactment of the challenged regulation.[69] After the new regulation was enacted, the corporation's charter was revoked for failure to pay corporate income taxes.[70]

In a highly fractured set of opinions, the U.S. Supreme Court disagreed with the Rhode Island Supreme Court's ruling that the claimant could not challenge the regulations that were enacted when the now-dissolved corporation owned the property but before the claimant took personal ownership of the property.[71] The Court refused to allow a rule that acquiring property after a new regulation takes effect—in other words, with notice—shields the new regulation from challenge as a taking.[72] Such a rule would put an "expiration date" on the Takings Clause and fail to take into account owners at the time regulation takes effect.[73]

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66. *Id.* at 1035-36 (Kennedy, J., concurring).
67. 533 U.S. 606, 616, 626 (2001).
68. *Id.* at 616 (quoting Palazzolo v. State, 746 A.2d 707, 717 (R.I. 2000)).
69. *Id.* at 613-14.
70. *Id.* at 614.
71. *Id.* at 616, 630.
72. *Id.* at 627.
73. *Id.*

Palazzolo itself addresses both *Nollan* and *Lucas*. *Palazzolo* said that *Nollan's* rule was that notice did not prohibit challenging a regulation under the Takings Clause and that *Lucas* did not mean that mere enactment of a regulation makes it a "background principle" that is immune from a takings challenge.[74] While a majority of the Court agreed on these points, Justices Scalia and O'Connor filed separate concurring opinions that were diametrically opposed in their respective "understanding[s]" of the majority's opinion and how it should be interpreted.[75] Justice O'Connor indicated her understanding that the Court was saying that notice was still a factor in the *Penn Central* analysis[76] whereas Justice Scalia indicated the opposite, saying that notice via previous enactment of regulation was irrelevant to takings analysis.[77]

Ignoring the pre- and post-enactment status of the owner, as Scalia advocated, presents problems as it would eviscerate the Penn Central analysis.[78] Considering the time of acquisition of property relative to enactment of regulation in takings analysis of RIBE amounts, said Scalia, to assuming the constitutionality of the regulation in question.[79] In a sense this is correct; if one assumes the validity of the regulation in order to determine RIBE, then the owner had no RIBE. However, Scalia failed to appreciate that the converse also holds true. Assuming the invalidity of the regulation to calculate RIBE virtually eliminates the "reasonable" in RIBE as one could harbor RIBE completely contrary to existing regulations. In fact, the more out-of-line a proposed development is with existing regulation, the better chance the plaintiff has at winning a takings claim under this approach.[80] This creates incentive for developers to speculate on heavily regulated land in hopes of getting compensation or getting the regulation invalidated.[81] Subsequent court rulings seem to favor O'Connor's approach over Scalia's.[82]

So the question becomes how to calculate RIBE when the "reasonableness" in RIBE relates to the validity or invalidity of

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74. *Id.* at 629-30.

78. *Id.* at 632, 636 (O'Connor, J., & Scalia, J., concurring). *Compare id.* at 633-36 (O'Connor, J., concurring) *with id.* at 636-37 (Scalia, J., concurring).

76. *Id.* at 632 (O'Connor, J., concurring).

77. *Id.* at 637 (Scalia, J., concurring).

78. *Id.* at 635 (O'Connor, J., concurring).

79. *Id.* at 637 (Scalia, J., concurring).

80. *Cf. id.* at 634-35 (O'Connor, J., concurring) ("[T]he development sought by the claimant may also shape legitimate expectations . . . .").

81. *See id.* at 636 (Scalia, J., concurring). *See also*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1070 n.5 (1992) (Stevens, J., dissenting) (expressing fear that the categorical rule of a taking for elimination of all value will lead developers to overinvest).

82. *See, e.g.,* Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004).

the questioned regulation. Yet this very validity or invalidity depends in part on defining the RIBE involved. Justice Kennedy explicitly acknowledged such circularity in his concurrence in *Lucas* and said some amount of it cannot be avoided.[83] Yet, objective standards in the legal tradition limit circularity.[84] Kennedy's statement that "courts must consider all reasonable expectations whatever their source"[85] echoes O'Connor's approach in her *Palazzolo* concurrence.[86]

F. Tahoe Sierra

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[87] resoundingly reaffirmed the importance of an existing regulatory scheme in assessing RIBE. In *Tahoe-Sierra*, the U.S. Supreme Court upheld the district court's finding that the challenged moratorium on development was not a regulatory taking under the *Penn Central* analysis.[88] *Tahoe-Sierra* indicated that consideration of the RIBE of the property owners contributed heavily to this finding of no taking. *Tahoe-Sierra* observed that "the 'average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years,'"[89] and that the claimants had time to build before restrictions went into effect, and "almost everyone . . . knew . . . that a crackdown on develop-

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83. *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring). *See also* Mandelker, *supra* note 46, at 228-29.

84. *Lucas*, 505 U.S. at 1034-35 ("Some circularity must be tolerated in these matters, however, as it is in other spheres. *E.g., Katz v. United States,* 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."). For an extensive treatment of the issue of circularity and the problem of those that assert a regulatory takings claim on a property that was subject to the regulation when they acquired the property, see Tal Dickstein, *Escaping Logical Circularity: The Postenactment Purchaser Problem and Reasonable Investment-Backed Expectations*, 34 ENVTL. L. REP. 10865 (2004). The article's proposed solution is to review the investment-backed expectations of the owner prior to the "postenactment" purchaser. *Id.* at 10889. However, even this proposed solution remains significantly subjective. *Id.* While some subjectivity is allowable, only very few of the factors typically considered by federal courts in evaluations of RIBE are subjective. *See infra* notes 94-99 and accompanying text (listing objective factors to consider in RIBE from various cases) *and* notes 103-105 and accompanying text (listing at least five additional factors considered by courts, three of which are objective, and two subjective, with one of the subjective factors—whether the plaintiff was aware of the problem giving rise to the contested regulation at the time plaintiff purchased the property—arguably more objective than subjective if notice requirements actually informed the purchaser of the problems spawning the regulation).

85. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

86. *Palazzolo*, 535 U.S. at 634-36 (O'Connor, J., concurring).

87. 535 U.S. 302 (2002).

88. *Id.* at 341-42

89. *Id.* at 315 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999)).

ment was in the works."[90] The court also cited the intent of the "'average'" purchaser in support of the conclusion that the purchasers "'did not have reasonable, investment-backed expectations . . . '" contravened by the challenged moratorium.[91]

In further support of the lack of RIBE, the U.S. Supreme Court noted that claimants had purchased the land "amidst a heavily regulated zoning scheme."[92] The importance of such existing regulatory regimes will be taken up again in the next section.

G. The State of RIBE Today

Confusion sometimes surfaces around RIBE because it can include so many different factors.[93] Factors include, among others, current use of the property,[94] purchase price,[95] use of adjacent properties,[96] appropriateness of the property for the proposed use,[97] time of purchase relevant to the contested regulation(s),[98] and prior existence of similar or related regulations.[99] As with the *Penn Central* analysis itself, RIBE defies set rules and instead is an *ad hoc*, case-specific inquiry—which has been defended as the appropriate, albeit difficult, approach for regulatory takings.[100] While the specific parameters of RIBE may be subject to debate as applied in any given case, what is clear is that RIBE remains part of our takings law: *Tahoe-Sierra*[101] and *Lingle v. Chevron*[102] made this clear at the U.S. Supreme Court level and other federal courts have continued to apply RIBE in regulatory takings analysis for real property.[103]

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90. *Id.* at 315 n.11 (quoting *Tahoe-Sierra*, 34 F. Supp 2d at 1241).

91. *Id.* at 315 (quoting *Tahoe-Sierra*, 34 F. Supp 2d at 1241).

92. *Id.* at 313 n.5.

93. Many commentators have criticized RIBE for its lack of specificity and definiteness. *See, e.g.*, R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U ENVTL. L.J. 449, 449 n.3 (2001) (listing articles critical of the lack of clarity in RIBE).

94. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

95. Gazza v. N.Y. State Dep't of Envtl. Conservation, 605 N.Y.S.2d 642, 643-44 (N.Y. 1993) (citations omitted).

96. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1375 (Conn. 1991); McNulty v. Town of Indialantic, 727 F. Supp. 604, 611 (M.D. Fla. 1989).

97. *Cf., e.g., Tahoe-Sierra* 535 U.S. at 315, 315 n.11 (2002).

98. Palazzolo v. Rhode Island, 533 U.S. 606, 613-15 (2001); *McNulty*, 727 F. Supp. at 611-12.

99. *Tahoe-Sierra*, 535 U.S. at 313; *McNulty*, 727 F. Supp. at 612.

100. *Palazzolo*, 533 U.S. at 633-36 (O'Connor, J., concurring).

101. 535 U.S. 302 (2002).

102. 544 U.S. 528, 538-39 (2005) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

103. *See, e.g.*, Cienega Gardens v. United States, 503 F.3d 1266, 1289-91 (Fed. Cir. 2007); Webster v. United States, 90 Fed. Cl. 107, 114 (Fed. Ct. Cl. 2009); Res. Invs., Inc. v.

In fact, federal courts are not so confused about how to evaluate RIBE as some commentators seem to be. For example, the Court of Appeals for the Federal Circuit noted:

> [T]hree factors relevant to the determination of a party's reasonable expectations: (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase.[104]

Note that of these three, the second is based entirely on a claimant's actual knowledge. An additional—and related—factor considered in determining RIBE includes the appropriateness of property for the proposed use (i.e., would the proposed use harm resources or the public due to the nature or location of the property?); in other words, environmentally sensitive land is a good example of land that is likely to be regulated in the future, even if it is not now.[105] Finally, as a threshold matter, courts have required that the claimant has had an actual, subjective expectation that has been frustrated.[106]

Careful case-by-case analysis including these factors should effectively serve to promote justice and fairness[107] and avoidance of arbitrariness.[108] Even avoiding arbitrariness will not be enough to satisfy everyone; many property owners simply do not want to see

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United States, 85 Fed. Cl. 447, 474 (Fed. Ct. Cl. 2009). In addition, courts also continue to apply expectations analysis in non-real property cases. *See, e.g.,* Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1261-1262 (Fed. Cir. 2009).

104. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (2004) (citing Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001)) (internal quotation marks omitted); *Webster*, 90 Fed. Cl. at 114 (citing *Appolo Fuels* for the three relevant factors in determining the reasonableness of investment-backed expectations); *Res. Invs.*, 85 Fed. Cl. at 513-14 (same); Kemp v. United States, 65 Fed. Cl. 818, 821 (Fed. Ct. Cl. 2005) (same); *See also* Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (discussing the appellant's necessary awareness of regulations and increasing environmental concerns).

105. *Good*, 189 F.3d at 1363. *Cf. Tahoe-Sierra*, 535 U.S. at 307-12 (2002) (citing extensively to the appeals court opinion that noted the likelihood of increased future regulation of the property around Lake Tahoe since existing regulations were clearly insufficient to protect the quality of Lake Tahoe); Michael C. Blumm & Lucus Ritchie, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 344-46 (2005) (discussing the "Natural Use Doctrine" as a defense to a takings claim).

106. *See Appolo Fuels*, 381 F.3d at 1349.

107. *See, e.g., Tahoe-Sierra*, 535 U.S. at 334 (noting that concepts of justice and fairness underlie the Takings Clause).

108. *Cf.* Mandelker, *supra* note 46, at 228-29.

property law ever change, even though such a desire remains entirely unreasonable in the face of historical precedent.[109] In other words, some believe that the only way any change in the rules of property should be allowed is through payment to property owners for the change. Aside from being impracticable,[110] no historical precedent supports freezing the meaning of property independent of the society that creates and protects property. Rather, property has and remains a dynamic concept that evolves in direct relationship with the society that defines it.[111] RIBE holds the balance between the need for property concepts to evolve and the need for certainty or consistency in definitions of property. Too much flexibility in the definition of property can leave property owners subject to unfair losses while too little flexibility in the definition of property can lead to grave harms to the society that makes property possible and protects it. Harms to society can include making society shoulder the environmental costs of activities on private property, loss of public access to resources, foisting the costs of risk-taking onto the public,[112] and, in the most extreme case, the inability of society to advance.[113]

Realization that the property involves a dynamic balance allows us to then see why some have said that the measure of a taking is whether the action was arbitrary. Assuring that the public and property owners have notice of changing knowledge and un-

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109. *See supra* notes 20-24 and accompanying text.

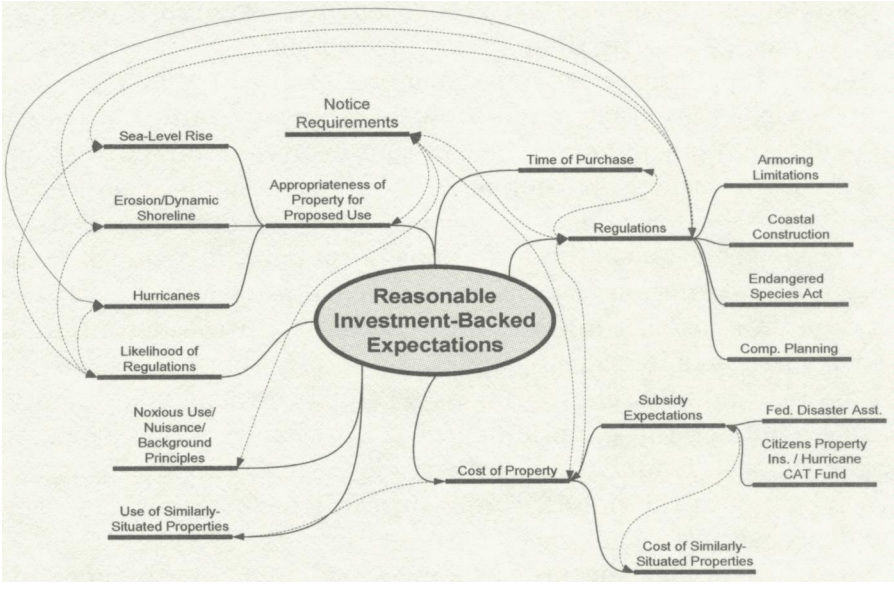
110. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

111. *See, e.g.*, ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 62, 65, 73-78 (2003) (explaining the importance of continued development of property law to meet society's evolving needs).

112. Taxpayer liability may accrue at the federal, state, or local level. At the federal level, taxpayers are on the hook via the federally subsidized National Flood Insurance Program. This program has long been criticized as a financial boondoggle that improperly benefits those that take risks by locating in floodplain areas; the program is sustained by tax dollars as premiums paid into the program by policy holders that are insufficient to cover its costs. Ernest B. Abbott, Floods, *Flood Insurance, Litigation, Politics—and Catastrophe: The National Flood Insurance Program*, 1 SEA GRANT L. & POL'Y J. 129, 129-30 (2008), *available at* http://nsglc.olemiss.edu/SGLPJ/Vol1No1/vol1no1.pdf. For a discussion of a dynamic in river floodplains similar to what may happen in coastal areas subject to flooding, see Adam Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 3, 6 (2007) (discussing the "self-destructive pattern" of flood mitigation efforts that includes flood control works, followed by increased development, followed by eventual system failure and flooding in the context of levees). At the state level, some states provide direct subsidies through state-sponsored and guaranteed, subsidized property insurance. *See, e.g.*, Michael Hofrichter, Comment, *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT'L & ENERGY L. & POL'Y J. 147, 151 (2009) (discussing Texas's "Texas Windstorm Insurance Corporation"); Florida's Hurricane Catastrophe Fund, FLA. STAT. § 215.555 (2010) (outlining Florida's state-sponsored and required reinsurance program for companies offering hurricane insurance in the state); Florida's Citizens Property Insurance, FLA. STAT. § 627.351(6) (2010). Florida's Citizens Property Insurance can fund deficits by assessing charges on other insurance policies in the state, including auto insurance. RUPPERT ET AL., *supra* note 4, at 51.

113. *See generally* FREYFOGLE, THE LAND WE SHARE, *supra* note 111 at 74-75.

derstandings that impact our understanding of how we balance the rights and relationships of property helps ensure that incremental changes do not undermine fairness and justice.



V. THE IMPACT OF "NOTICE" ON RIBE

At this point it should be clear that in some sense notice and RIBE cannot be separated; while RIBE is far broader than just notice, notice still plays an important role.[114] If no obvious forms of notice exist for potential regulations, hazards, or other problems with a property and most people are not aware of the issue, expectations contrary to them could potentially still seem reasonable. As part of shaping expectations, notice also assists in decision-making about property purchases. For example, situations arise that offend our sense of fairness and justice when, after saving for a lifetime, a couple buys their dream retirement home on the beach without understanding the risks, and they lose everything to

114. Numerous articles on takings issues address the notice issue, especially after the *Palazzolo* case. *See, e.g.,* Dickstein, *supra* note 84; Chipchase, *supra* note 45; Dana Larkin, Comment, *Dramatic Decreases in Clarity: Using the* Penn Central *Analysis to Solve the* Tahoe-Sierra *Controversy*, 40 SAN DIEGO L. REV. 1597, 1616-17 (2003). Courts have taken differing positions on how notice of existing regulations affects purchasers after the regulation takes effect. Dickstein, *supra* note 84, at 10866-67. Some courts find that notice of existing regulations offers an insurmountable bar to a takings claim, while others do not see it as a bar but rather as part of the *Penn Central* regulatory takings inquiry. *Id.* at 10866-67. Since *Palazzolo*, courts are no longer free to find that notice due to pre-existing regulations forms an absolute bar to a takings claim. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626-28 (2001).

coastal dynamics.[115] Laws that help avoid such situations serve to ensure that coastal property owners indeed understand the inherent risks, limitations, and responsibilities of owning coastal property rather than being unpleasantly—and maybe even unfairly—surprised by them.[116] Additionally, notice helps overcome the general lack of awareness of the public that laws controlling property have historically changed and will continue to do so.[117] Such notice of the risks and limitations should, then, color property owners' expectations. Thus, while notice is not itself the same thing as RIBE, the quality of notice about the factors affecting RIBE helps determine the reasonableness of their expectations.

Notice impacting RIBE can be broken down into two general types: 1) notice of existing regulations and 2) notice of context/appropriateness of land use.

Notice of existing regulations can be further dissected into two parts: 1A) notice that a proposed land use is prohibited and 1B) that an existing regulatory framework indicates the likelihood of future changes. Type 1A)—notice of current regulatory prohibition—was addressed primarily in the *Palazzolo* case for real property. As noted above, *Palazzolo* resulted in the narrow holding that enactment of regulations that predate ownership of property does not preclude a takings claim based on the prior-enacted regulation; strong disagreement emerged as to whether prior enactment of regulations should be irrelevant in takings analysis or simply constitute another case-specific factor for consideration in the *Penn Central* analysis of a regulatory taking. Case law since *Palazzolo* indicates that acquisition of property after notice via regulation remains a factor to consider in RIBE, but is not dispositive.[118]

As to 1B) notice—notice via current regulation that future regulation may occur—*Tahoe-Sierra* noted that claimants had purchased the land "amidst a heavily regulated zoning scheme."[119] This phraseology evokes the Court's language in several regulatory takings cases that did not include real property. These cases, sometimes referred to as the "heavily-regulated-industries" cases, reason that when one involves oneself in an area of business that is already highly regulated, one must expect that further regula-

115. *See, e.g.,* David P. Hendricks, *Silence is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina,* 25 N.C. CENT. L.J. 96, 96-97 (2002).

116. While the former rule in real property transactions used to be *caveat emptor*, all states in the United States now have statutes relating to disclosures for at least some issue in residential property transfers.

117. *Cf.,* FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 19, at 102-04.

118. *See, e.g.,* Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348-49 (2004).

119. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 313 n.5 (2002).

tion may occur.[120] This is so, say courts, for two reasons: 1) the businesses involved in highly regulated areas are already aware of the existence of complex regulation and the dynamic nature of that regulation and 2) based on knowledge of past change in regulations, such businesses should plan on future changes to regulations that may not be favorable. After all, accounting for uncertainty is a landmark of business planning.

Do we really believe, however, that private individuals purchasing beach-front or coastal property are so sophisticated as to understand the complexity of regulatory regimes potentially affecting their property as well as the ocean and coastal dynamics? While some might be this sophisticated, we may not currently ascribe such knowledge to all purchasers. But, even if this is so, at what point must we attribute constructive notice to the general public? In our increasingly complex world, just as in business, change has become the rule rather than the exception to the rule. This applies also to legal and regulatory matters. Thus, even with regard to real property, courts have stated that "[i]n light of the growing consciousness of and sensitivity toward environmental issues, [the owner] must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get."[121] Strong notice statutes thus can help protect potential coastal property owners by ensuring they are aware of the dynamic physical and regulatory environments into which they are considering purchasing. Those that choose to enter the fray of owning coastal property should not then expect the public to shoulder the financial burden if existing or foreseeable regulations then limit the uses of their property to protect the public's health and welfare.

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120. *See, e.g.*, Holliday Amusement Co. of Charleston, Inc. v. South Carolina, 493 F.3d 404, 410 (4th Cir. 2007); Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645-46 (1993) (noting that pension plans had long been subject to federal regulation so the plaintiff "could have had no reasonable expectation that it would not be faced with liability"); Mitchell Arms, Inc. v. United States, 26 Cl. Ct. 1, 5 (Cl. Ct. 1992), *aff'd*, 7 F.3d 212 (Fed. Cir. 1993) (rejecting claim that suspension of import permits constituted taking, noting that "government as we know it would soon cease to exist if such exclusively governmental functions as the control over foreign commerce could not be accomplished without the payment of compensation to those business interests that have chosen to operate within this highly regulated area"). *But see* Philip Morris, Inc. v. Reilly, 312 F.3d 24, 26 (1st Cir. 2002) (en banc) (finding that Massachusetts's Disclosure Act, requiring cigarette companies to disclose ingredients, constituted taking of manufacturers' trade secrets even though "[u]nquestionably, tobacco is subject to heavy regulation by federal and state governments").

121. Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (finding no taking where property owner applied for and received federal permits over many years but could not secure state permits; in the meantime, federal regulatory scheme changed and owner could no longer secure federal permits to replace the expired permits).

The second type of notice, i.e., notice of context/appropriateness of land use, also remains a factor under current case law, though its application has been less clear. The *Tahoe-Sierra* case implied that this type of notice militated against the RIBE of the claimants since, in that case, it had been widely understood for about four decades that land development was damaging Lake Tahoe. In addition, no one disputed that the claimants' lands were lands that, if developed, would contribute to the damage to Lake Tahoe.[122] The Court seemed to be saying that the claimants could have little RIBE in development that clearly harms an important public resource. This backs away from previous language of the U.S. Supreme Court in *Nollan* and *Lucas* that could have been interpreted as minimizing the importance of RIBE in takings analysis.[123]

Ultimately, notice of the vulnerability of coastal property to storm surge, flooding, erosion, SLR, and other coastal dynamics should impact the takings analysis for owners. For owners that purchased their land forty or fifty years ago, the import of such notice should be less since widespread understanding of storm surge, flooding, erosion, and SLR did not exist.[124] Today, however, we have such detailed information on historic storm tracks, storm surges, erosion, and flooding as well as growing capabilities for estimating future storm surge and SLR—not to mention extensive experience tracking historical coastal erosion and SLR—that failure to impute these to property purchasers burdens the public with the cost of coastal property risks that are largely controlled by the private property owners. Guaranteeing that potential coastal property owners understand the coastal dynamics—including SLR—that can threaten the property they may purchase, helps ensure that the private property owners are properly informed and can best evaluate their own exposure to risk. In addition, notice of the risks inherent in coastal property fairly colors the RIBE of owners that purchase with such notice.

Current knowledge of existing hazards and coastal exposure, the increasing rate of SLR, and greater climate extremes make it likely that federal, state, and local governments may seek to limit exposure to hazards through greater regulation within coastal areas.[125] Indeed, failure of the federal, state, or local governments to

122. *Tahoe-Sierra Pres. Council*, 535 U.S. at 314 n.9.

123. *Cf, e.g.*, Karen M. Brunner, Comment, *A Missed Opportunity:* Palazzolo v. Rhode Island *Leaves Investment-Backed Expectations Unclear as Ever*, 25 HAMLINE L. REV. 117, 142 (2001).

124. *Cf* Nordlinher v. Hahn, 505 U.S. 1, 14 (1992) (treating otherwise similarly situated landowners differently for a takings analysis based on time of purchase of property and justifying this based on RIBE).

125. Coastal Zone Management Act, 16 U.S.C. §§ 1451(l), 1452(2)(B), 1452(2)(K) (2006) (encouraging states to address SLR in state and coastal zone management).

act increases the financial burden on the public when disasters do strike and may even give rise to liability for a local government allowing construction in areas it knows to be hazardous.[126]

VI. EXAMPLES OF NOTICE STATUTES AND RELATED CASES

A. Examples of Notice Statutes

All states already have statues related to disclosures[127] in residential property transfers. For example, Oregon has one of the most comprehensive notice statutes in the country. Oregon requires that sellers of dwelling units with one to four dwellings, condominiums, timeshares, and manufactured homes owned by the same owner as the lot must provide a disclosure statement.[128] The disclosure form in statute contains an extensive list of questions about the property, such as whether there are other legal claims or limitations on the property, about the water, insulation, structural integrity, insurance claims, repairs, and soil settling.[129] The disclosure also inquires whether there is "any material damage to the property or any of the structure(s) from . . . floods [or] beach movement. . . ."[130] Connecticut has a high-hazard dam notice requirement.[131] California also has notice requirements for hazards,[132] including location within a delineated earthquake fault zone.[133] Several disclosure statutes require inclusion of whether the property has been affected by floods or is in a flood zone or plain.[134] These disclosure statutes seek to require a seller to inform purchasers of risks, hazards, or attributes that might not be apparent from viewing the property or to someone unfamiliar with the area.

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126. *See generally* James Wilkins, *Is Sea Level Rise "Foreseeable"? Does it Matter*," 26 J. LAND USE & ENVTL. L. 437 (2011).

127. Many states refer to these as disclosure statutes since the statutes developed to require sellers to disclose known hazards and problems to potential purchasers. Due to this article's focus on the impact of this on purchasers, this article refers to disclosure statutes as notice statutes.

128. OR. REV. STAT. § 105.465(1)(a) (2009).

129. *Id.* § 105.464.

130. *Id.*

131. CONN. GEN. STAT. § 22a-409(a) (2011). This notice does not actually require a property owner to tell a prospective purchaser about the high-hazard dam, but it does require that the owner file a notice of the dam in the land records; such a notice should alert the prospective purchaser to the dam's status during a routine title search for the property.

132. CAL. CIV. CODE § 1103.2 (2010).

133. CAL. PUB. RES. CODE § 2621.9 (2010).

134. *See, e.g.*, CAL. CIV. CODE § 1103(c)(1)(A) (2010).

In most cases, the obligation to complete a disclosure is on the seller of property,[135] and the seller's agent is responsible for delivery of the disclosure to the buyer.[136] Disclosure is typically not required on all types of property or transactions;[137] disclosure is usually limited to sale, exchange, contract, or lease with purchase option for residential property.[138] Some states allow waiver of disclosure by purchasers.[139] Some states require that the disclosure be supplied prior to an offer[140] whereas others allow it to be offered at signing of the contract.[141] Some statutes note that the buyer is required to indicate receipt of the disclosure.[142]

Disclosure statutes mandating notice to potential purchasers often utilize a standard form to provide this notice.[143] A standard disclosure form assists the seller in complying with the law and provides standard information formatting for purchasers, allowing for more informed decision-making—a key part of a healthy free market. Several disclosure statutes decrease the risk and burden to sellers by allowing sellers some flexibility when information is not readily available,[144] based on erroneous public information,[145] or by limiting liability if previously correct information subsequently changes through no action of the seller.[146]

Once notice is delivered, it can only serve its purpose of promoting more-informed decision-making if the notice allows a potential purchaser to reconsider, without penalty, in light of the in-

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135. *See, e.g.*, MD. CODE ANN. REAL PROP. § 10-702(e)(3)(iii) (LexisNexis 2010) (noting that representations of disclosure are those of the vendor, not the vendor's agent). Some states even specifically provide that agents for sellers are not liable for any omissions or inaccuracies unless they have actual knowledge of them. *See, e.g.*, LA. REV. STAT. ANN. § 9:3199B (2010).

136. *See, e.g.*, HAW. REV. STAT. § 508D-7 (2010); MD. CODE ANN. REAL PROP. § 10-702(f)(1) (LexisNexis 2010).

137. *See, e.g.*, HAW. REV. STAT. §§ 508D-1, 508D-3 (2010); CAL. CIV. CODE § 1103.1 (2010); MAINE REV. STAT. tit. 33 § 172 (2010); S.C. CODE ANN. § 27-50-30 (2010).

138. *See, e.g.*, ALASKA STAT. § 34.70.200 (2010); CAL. CIV. CODE § 1103(a) (2010); LA. REV. STAT. § 9:3197 (2010); MD. CODE ANN. REAL PROP. § 10-702(b) (LexisNexis 2010); S.C. CODE ANN. § 27-50-20 (2010).

139. *See, e.g.*, ALASKA STAT. § 34.70.110 (2010); WASH. REV. CODE § 64.06.010(7) (2010) (allowing for limited waiver).

140. *See, e.g.*, FLA. STAT. § 161.57(2) (2010); LA. REV. STAT. ANN. § 9:3198B(2) (2010); ME. REV. STAT. tit. 33 § 174.1 (2010) (requiring delivery before or at acceptance of an offer by seller).

141. MD. CODE REAL PROP. § 10-702(f) (2010).

142. *See, e.g.*, HAW. REV. STAT. § 508D-12 (2010).

143. For disclosure forms, see, e.g., CAL. CIV. CODE § 1103.2 (2010); 21 N.C. ADMIN. CODE 58A.0114 (2010); WASH. REV. CODE §§ 64.06.013, 64.06.015, 64.06.020 (2010); OR. REV. STAT. § 105.464 (2010).

144. *See, e.g.*, ALASKA STAT. § 34.70.040 (2010); 33 ME. REV. STAT. § 176.1 (2010).

145. *See, e.g.*, CAL. CIV. CODE § 1103.4 (2010); LA. REV. STAT. ANN. § 9:3198E (2010).

146. *See, e.g.*, CAL. CIV. CODE § 1103.5 (2010). Hawaii also requires additional information discovered by seller prior to recording of the property sale to be supplied to the purchaser, who then again has fifteen calendar days to rescind unless the property transaction has already been recorded. HAW. REV. STAT. § 508D-13 (2010).

formation in the disclosure. While in some instances statutes require delivery of notice prior to proffering or accepting a written offer,[147] others allow notice to come after acceptance of a purchase contract.[148] In either case, it is critical that the buyer has time to review the disclosure and related information before making a decision about whether to move forward with the transaction. One of the more generous statutory regimes allows fifteen calendar days from receipt of the disclosure during which the purchaser may decide whether or not to go through with the purchase.[149] Statutes that allow for voiding or rescinding a contract based on the disclosure specify that the purchaser be refunded all deposits, escrow funds, or earnest money.[150]

In cases in which disclosure requirements have not been met, some states do not invalidate the property transfer,[151] but many allow the purchaser to rescind the contract within a specified period.[152] In cases in which the contract is not invalidated, statutes often specify that the seller is liable for the actual damages incurred by the purchaser due to failure to comply with the notice requirements.[153] However, it is difficult to imagine how a court can effectively assess the damages a property owner will incur in the coastal context since, in theory, the damages could be the entire value of the property but might not occur for years after the transfer due to a flood, erosion, wind, or storm surge.

Only a few state disclosure requirements specifically refer to coastal property. South Carolina requires a contract for the sale or transfer of coastal property to include information on the regulatory setback line and the most recent local erosion rates available,

147. *See, e.g.*, ALASKA STAT. § 34.70.010 (2010). Alaska also allows delivery of the required disclosure after a written offer, but in such a case, delivery of the disclosure then allows the purchaser the option to terminate the offer. *Id.* § 34.70.020.

148. *See, e.g.*, HAW. REV. STAT. § 508D-5 (2010).

149. *Id.* § 508D-5. A less generous time frame of seventy-two hours is allowed to buyers to rescind according to statutes in some states. LA. REV. STAT. § 9:3198B(3)(a) (2010); WASH. REV. CODE § 64.06.030 (2010); 33 ME. REV. STAT. § 174.2 (2010).

150. *See, e.g.*, HAW. REV. STAT. § 508D-16(c) (2010); LA. REV. STAT. ANN. § 9:3198(B)(3)(a) (2010); WASH. REV. CODE § 64.06.030 (2010).

151. *See, e.g.*, FLA. STAT. § 161.57(4) (2010); ALASKA STAT. § 34.70.090 (2010); LA. REV. STAT. ANN. § 9:3198(B)(3)(c) (2010); 33 ME. REV. STAT. § 174.5 (2010); S.C. CODE ANN. §27-50-50 (2010).

152. WASH. REV. CODE § 64.06.040(1),(3) (2010); HAW. REV. STAT. §§ 508D-13, 508D-16.5 (2010) (allowing rescission for failure to provide the disclosure, provided that the property sale has not been recorded); N.C. GEN. STAT. § 47E-5(b)(1)-(2) (2010) (allowing rescission of the contract for three days time after making the contract or for three days after receiving the disclosure, whichever occurs first).

153. *See, e.g.*, ALASKA STAT. § 34.70.090(b)-(d) (2010); S.C. CODE ANN. § 27-50-65 (2010).

but failure to do so does not affect the legality of the contract.[154] Florida law requires notice to a potential purchaser of property affected by Florida's Coastal Construction Control Line;[155] although, like in South Carolina, failure to comply with the disclosure requirement does not affect the related purchase contract.[156] Washington could be included with those states specifically referencing coastal property, but just barely. Washington statutes require a seller to disclose "any material damage to the property from . . . beach movements[.]"[157] North Carolina has seen various notice laws for prospective purchasers proposed,[158] most recently in 2009,[159] but these have not passed the legislature.

The most detailed and explicit notice statute for coastal property occurs in Texas. Texas requires that the sales contract for certain property near its coasts include a disclosure in substantially the following form:

> DISCLOSURE NOTICE CONCERNING LEGAL AND ECONOMIC RISKS OF PURCHASING COASTAL REAL PROPERTY NEAR A BEACH
>
> WARNING: THE FOLLOWING NOTICE OF POTENTIAL RISKS OF ECONOMIC LOSS TO YOU AS THE PURCHASER OF COASTAL REAL PROPERTY IS REQUIRED BY STATE LAW.
>
> * READ THIS NOTICE CAREFULLY. DO NOT SIGN THIS CONTRACT UNTIL YOU FULLY UNDERSTAND THE RISKS YOU ARE ASSUMING.

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154. S.C. CODE ANN. § 48-39-330 (2010):

> Thirty days after the initial adoption by the department of setback lines, a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plane Coordinate System (N.A.D.-1983) and include the local erosion rate most recently made available by the department for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.
>
> The provisions of this section are regulatory in nature and do not affect the legality of an instrument violating the provisions.

Id.

155. FLA. STAT. § 161.57 (2010).

156. *Id.* § 161.57(4).

157. WASH. REV. CODE §§ 64.06.013, 64.06.015, 64.06.020 (2010).

158. *See, e.g.*, H.R. 1512, 2005 Gen. Assemb. (N.C. 2005).

159. *See, e.g.*, H.R. DRH30151-RI-12, 2009 Gen. Assemb. (N.C. 2009) *available at* http://ftp.legislature.state.nc.us/Sessions/2009/Bills/House/HTML/H605v0.html.

* BY PURCHASING THIS PROPERTY, YOU MAY BE ASSUMING ECONOMIC RISKS OVER AND ABOVE THE RISKS INVOLVED IN PURCHASING INLAND REAL PROPERTY.

* IF YOU OWN A STRUCTURE LOCATED ON COASTAL REAL PROPERTY NEAR A GULF COAST BEACH, IT MAY COME TO BE LOCATED ON THE PUBLIC BEACH BECAUSE OF COASTAL EROSION AND STORM EVENTS.

* AS THE OWNER OF A STRUCTURE LOCATED ON THE PUBLIC BEACH, YOU COULD BE SUED BY THE STATE OF TEXAS AND ORDERED TO REMOVE THE STRUCTURE.

* THE COSTS OF REMOVING A STRUCTURE FROM THE PUBLIC BEACH AND ANY OTHER ECONOMIC LOSS INCURRED BECAUSE OF A REMOVAL ORDER WOULD BE SOLELY YOUR RESPONSIBILITY.

The real property described in this contract is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. If the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public has acquired a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

The extreme seaward boundary of natural vegetation that spreads continuously inland customarily marks the landward boundary of the public easement. If there is no clearly marked natural vegetation line, the landward boundary of the easement is

> as provided by Sections 61.016 and 61.017, Natural Resources Code.
>
> Much of the Gulf of Mexico coastline is eroding at rates of more than five feet per year. Erosion rates for all Texas Gulf property subject to the open beaches act are available from the Texas General Land Office.
>
> State law prohibits any obstruction, barrier, restraint, or interference with the use of the public easement, including the placement of structures seaward of the landward boundary of the easement. OWNERS OF STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES.
>
> The purchaser is hereby notified that the purchaser should:
>
> (1) determine the rate of shoreline erosion in the vicinity of the real property; and
>
> (2) seek the advice of an attorney or other qualified person before executing this contract or instrument of conveyance as to the relevance of these statutes and facts to the value of the property the purchaser is hereby purchasing or contracting to purchase.[160]

In addition to states, local governments in many states have the authority to require their own notice ordinances. For example, Miami-Dade County has an ordinance that requires notice to property purchasers if the property being sold is in the "Coastal High Hazard Area"[161] or in the county's "Special Flood Hazard Ar-

160. TEX. NAT. RES. CODE § 61.025(a) (2010).

161. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES § 11C-17(a) (2010) ("In any contract for the sale of improved real estate located in unincorporated Metropolitan Miami-Dade County which is in a Coastal High Hazard Area, the seller shall include in the contract or a rider to the contract the following disclosure in not less than ten-point bold-faced type: THIS HOME OR STRUCTURE IS LOCATED IN A COASTAL HIGH HAZARD AR-

ea."[162] California statutes include a specific section guaranteeing the validity of existing local government notice requirements and specifying a form for those local governments to use for such requirements.[163]

Potential sale of property is not the only time available to guarantee that a property owner has notice of coastal hazards affecting property; application for a development permit offers another opportunity.[164] For example, North Carolina requires that applicants for permits in coastal areas receive—and acknowledge receipt in writing—information on the special hazards such as erosion, floods, and storms in coastal areas.[165] While use of notice codes within the context of permitting is very valuable and highly recommended, it should be a compliment to—rather than a replacement for—required notice in property transfers.

B. Coastal Hazards Notice in Case Law

As so few states' disclosure laws contain any mention of coastal hazards in notice requirements, it comes as little surprise that few cases related to coastal hazards mention disclosure or notice requirements. In fact, research revealed only two cases that directly reference a statutory notice requirement for coastal properties. Both of these cases originate in Texas.

The first case, *Brannan v. State*, the Texas First District Court of Appeal noted that several of those claiming a regulatory taking of their coastal property in the case had purchased their property after receiving the notice to purchasers required by Texas law.[166] The court then cited the notice portion of the law which, as indicated above, specifically states that if a house comes to be on the beach subject to the public's access easement seaward of the vegetation line, then the house is subject to removal at the expense of the property owner.[167] The court also cited to the notice provision

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EA. IF THIS HOME OR STRUCTURE IS BELOW THE APPLICABLE FLOOD ELEVATION LEVEL AND IS SUBSTANTIALLY DAMAGED OR SUBSTANTIALLY IMPROVED, AS DEFINED IN CHAPTER 11C OF THE METROPOLITAN Miami-Dade COUNTY CODE, IT MAY, AMONG OTHER THINGS, BE REQUIRED TO BE RAISED TO THE APPLICABLE FLOOD ELEVATION LEVEL.").

162. *Id.* § 11C-17(b).

163. CAL. CIV. CODE § 1102.6a (2010).

164. For example, Snohomish County, Washington requires signing and recording of a "Tsunami Hazards Area Disclosure" prior to issuance of development permits. SNOHOMISH COUNTY, WASH., CODE OF ORDINANCES ch. 30.62.B (2010). This same approach is used by Skamania County, Washington for identified landslide or erosion hazard areas. SKAMANIA COUNTY, WASH., CODE OF ORDINANCES ch. 21A.06 (2010).

165. 15A N.C. ADMIN. CODE 07H .0306(i) (2010).

166. No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799, at *4-*5 (1st Dist. Houston Feb. 4, 2010).

167. *Id.* at *19-*21.

as evidence of the intent of the Texas Open Beaches Act to preserve the public beach.[168] However, the court did not go on to treat any differently the owners that purchased properties more recently with notice versus those that had owned for longer periods and without the benefit of notice.

The second and most recent case, *Severance v. Patterson*,[169] also refers to the notice requirement in Texas statute. In *Severance*, the Texas Supreme Court addressed certified questions from the United States Fifth Circuit Court of Appeal about Texas property law.[170] The certified questions on Texas property law stemmed from the federal takings claim case that arose from Texas's injunction requiring Severance and others to remove their houses from the beach after the beach moved to their houses because of a storm.[171] The majority opinion spent its last pages[172] responding to the dissent, including disagreeing with the dissent that Severance had no takings claim because she willingly took the risk that her house could end up on the beach and subject to removal.[173] This latest case, if it stands,[174] appears to mean that Texas courts will be able to give little or no consideration to any form of notice in cases of coastal avulsion. Nonetheless, since property law is part of state law, other states may still give consideration to purchasers who were on notice of likely regulations or hazards. In addition, in a federal takings claim RIBE and notice still play a role under a *Penn Central* analysis.

VII. DRAFTING THE BEST POSSIBLE NOTICE REQUIREMENT

Notice is not a talisman that government should be able to use to destroy private property rights.[175] However, properly designed notice statutes can help in ensuring that those purchasing coastal property understand the unique risks and hazards associated with coastal property, particularly in the face of current SLR and projected future SLR. Also, federal, state, and local governments should not be hamstrung in their efforts to protect people and

168. *Id.* at *37.

169. No. 09-0387, 2010 Tex. LEXIS 854 (Tex. Nov. 5, 2010) *reh'g granted* (Mar. 11, 2011).

170. *Id.* at *1-*2.

171. *Id.*

172. *Id.* at *43-*53. The majority may have felt the need to spend so much time addressing the dissent because the case overruled and disapproved numerous court decisions in Texas. *Id.* at *53, *72-*75 (Medina, J., dissenting).

173. *Id.* at *45 -*47.

174. A petition for rehearing was submitted to the Texas Supreme Court in *Severance v. Patterson*, and was granted on March 11, 2011.

175. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring).

property from the impacts of SLR in our coastal areas. Nor should the public have to shoulder the price of losses incurred by those that take the risk of purchasing property subject to coastal hazards.[176] Just as there are some burdens that should be shared by all, burdens that property owners are aware of and inhere in the nature of their property and that purchasers accept as part of their ownership should not accrue to the public. Our understanding of coastal processes makes clear that as SLR occurs, coastal areas will suffer increasingly from flooding, storms, and erosion. At minimum in such areas, we need to limit the development that creates additional hazards for which federal, state, and local governments then share the burden and limit public expenditures for public infrastructure that is itself then subject to loss from coastal hazards.[177] Properly designed notice statutes may play a positive role in helping shape the actions and RIBE of coastal property owners, thus decreasing the takings liability risk for regulators seeking to protect property owners from hazardous development and the public fisc from the liability of paying for property owners that willingly assume the risks inherent in owning coastal property.

What attributes does a properly designed notice statute contain? A properly designed notice statute should address four key components: 1) what property is affected, 2) timing and process related to the notice, 3) the content and form of the notice, and 4) results of compliance or noncompliance with the notice requirements. The following recommendations emanate primarily from the review of notice statutes above in Part VI.A. In the following paragraphs, the notice referred to *only* encompasses the notice issues related to coastal hazards and not the contents of other disclosure requirements.

A. What Property Is Affected

The question of what property is affected breaks down into two parts: 1. What property zoning classifications are impacted? and 2. Where must property be located to be affected by the notice requirement?

176. Severance v. Patterson, No. 09-0387, 2010 Tex. LEXIS 854, at *89 (Tex. Nov. 5, 2010) *reh'g granted* (Mar. 11, 2011) (Medina, J., dissenting). The costs of disasters and insurance for them are significant, with a large portion of the cost born by the public through federal and state government.

177. The cost to local governments of improperly sited infrastructure can be substantial. *See, e.g.,* Order for Final Summary Judgment, Jordan v. St. Johns County, No. CA05-694 at ¶ 13 (Fla.7th Cir. Ct. May 21, 2009) (noting a 5-year average of $244,305/mile/year for maintenance of a county road subject to storms and beach erosion versus an average of $9,656/mile/year for other county roads).

Notice requirements should, at a minimum, apply to all property zoned for residential uses whether the property is improved or not.[178] Jurisdictions might also want to consider applying notice requirements to all other properties as well even though current disclosure statutes typically focus on residential property.[179] While one might expect that this would be unnecessary for commercial transactions since commercial purchasers should exercise due diligence in researching potential commercial acquisitions, efficiency might be better served by having the owner supply information which the owner should already possess.

Since most disclosure statutes do not specifically include coastal issues, few examples exist for determining the geographic extent to which a coastal notice statute should apply. Of the few examples that refer specifically to coastal property, the area will still vary in definition from one state to the next. For example, in Florida, the notice statute applies to properties "partially or totally seaward of the coastal construction control line[.]"[180] Unfortunately the coastal construction control line only applies to "sand beaches . . . fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida[,]"[181] which means that heavily regulated and at-risk coastal properties not on such beaches are not subject to this notice requirement.

In South Carolina, "real property located in whole or in part seaward of the setback line or the jurisdictional line" is subject to a requirement of notice in property transfer documents.[182] Texas applies its notice requirements to property "seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel."[183]

The ideal geographic scope of a notice statute will inherently vary from state to state based on the unique regulatory structure in each state. Nonetheless, the goal in drafting should remain focused on the intent to inform potential property purchasers of possible risks to their safety and property as well as their legal rights due to coastal hazards and associated regulation. To accomplish

178. *See, e.g.*, WASH. REV. CODE §§ 64.06.015, 64.06.020 (2010) (applying disclosure requirements to developed and undeveloped property).

179. *But see* WASH. REV. CODE § 64.04.013(1) (2010) (applying disclosure requirements to commercial property).

180. FLA. STAT. § 161.57(1) (2010).

181. *Id.* § 161.053(1)(a).

182. S.C. CODE ANN. § 48-39-330 (2010).

183. TEX. NAT. RES. CODE ANN. § 61.025(a) (2010).

this, the notice requirements should apply to at least to all property partially or totally in:

- A coastal area regulated by state coastal building and construction standards;
- Any FEMA "V" zones;[184]
- Any area defined as a coastal high hazard area;
- Properties within areas predicted by the SLOSH model[185] to be within the storm surge area of hurricanes (may select from Category 1 to Category 5 storm surge areas); and
- A coastal property categorized as having a defined level of significant coastal erosion, special zoning or overlay zones related to coastal hazards, or, if the information is available readily from state sources, property within areas likely subject to inundation due to a specified amount of SLR.

Further protection may be provided to property owners by extending this requirement to all properties partially or entirely within a specified distance and elevation from any of the enumerated areas. The distances and elevations used for safety should vary according to coastal geomorphology, coastal dynamics, land form, and land use; a relatively easy way in the southeast and eastern United States to calculate distances and elevations might be to use the Sea, Lake, and Overland Surges from Hurricanes (SLOSH) model and add any hurricane storm surge levels not otherwise already included in coastal notice requirements.

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184. "V" zones in the Federal Emergency Management Agency's National Flood Insurance Plan are defined as "an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources." 44 C.F.R. § 59.1 (2009) (providing the definition of "coastal high hazard area," which is referred to for the definition of "V Zone"). While not the focus of this article, properties within FEMA "A" zones—representing the 100-year floodplain—should have their own notice requirements independent of coastal notice requirements.

185. "The **S**ea, **L**ake and **O**verland **S**urges from **H**urricanes (SLOSH) model is a computerized numerical model developed by the National Weather Service (NWS) to estimate storm surge heights resulting from historical, hypothetical, or predicted hurricanes by taking into account the atmospheric pressure, size, forward speed, and track data." Nat'l Hurricane Ctr., *Sea, Lake, and Overland Surges from Hurricanes (SLOSH)*, NAT'L WEATHER SERV. (Nov. 2, 2010), http://www.nhc.noaa.gov/ssurge/ssurge_slosh.shtml. The SLOSH model is utilized by federal agencies to assist in hurricane evacuation studies and contribute to creation of the Flood Insurance Rate Maps utilized by the Federal Emergency Management Agency. *No Adverse Impact in the Coastal Zone*, *in* COASTAL NO ADVERSE IMPACT HANDBOOK 17 (May 2007), *available at* http://www.floods.org/NoAdverseImpact/CNAI_Handbook/CNAI_Handbook_Chapter2.pdf; *Reorganizing and Comprehending Your Flood Risk*, UNIV. OF R.I. http://www.hurricanescience.org/society/risk/recognizingcomprehendingfloodrisk/ (last visited May 9, 2011).

Applying notice requirements this broadly will result in some costs for sellers of coastal property. Potential savings in lives, property damage (both public and private), and decreased taxpayer liability that should result from more informed purchasers will likely outweigh the transactional costs involved.[186] Another cost to coastal property owners could be a decrease in property value were potential purchasers to have better information on risks; any such loss by existing owners would also accrue as savings to purchasers and represents a more efficient market in land.[187] In other words, anything characterized as a "loss" to existing owners resulting from coastal notice actually represents a correction of overvaluation of the property due to the lack of information possessed by potential purchasers; it is hard to imagine that local government could be held liable for ensuring that property purchasers have additional information germane to their decision on whether to purchase coastal property.

B. Which Property Transactions Are Affected

Coastal notice requirements do not necessarily need to apply to certain types of transfer of property, such as between co-owners, spouses, pursuant to court order, or to a government agency. Most existing general disclosure statutes exempt such transfers of property.[188]

C. Timing and Process Related to the Notice

The method of notice should also be carefully considered. Two potentially conflicting goals should inform this decision. The first goal is to maximize the utility of the information to the potential purchaser and the second goal is to minimize the burden on the seller and agent. One aspect of this is the work involved for the seller to disclose information. Use of a standard form simplifies this process and ensures consistency.

Some states require that the seller provide notice to the buyer prior to the seller accepting an offer.[189] While this is good since it is very early in the process and comes before the potential purchaser has invested significantly in trying to purchase the property, it

186. *See* FREYFOGLE, *supra* note 111, at 190-91.

187. *Cf.* JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 21-22 (2d ed. 2000) (discussing the role of information as a component of a perfectly competitive market and how absence of information for purchasers gives rise to market power allowing sellers to sell goods at higher than competitive prices).

188. *See, e.g.*, CAL. CIV. CODE § 1103.1 (2010).

189. *See, e.g.*, ALASKA STAT. § 34.70.010 (2010); MD. CODE ANN. REAL PROP. § 10-702(f)(1) (LexisNexis 2010).

creates a heavier burden on the seller since the seller may not accept an offer without first supplying the notice. This means that a seller must essentially fully prepare the notice as part of marketing the property rather than waiting for an offer. Other states allow the seller to provide notice at the signing of the contract.[190] Many states have balanced the burden of timing by allowing the notice to be supplied within a set number of days after the signing of a contract for the sale. Thus, supplying notice to the prospective purchaser within ten days following the signing of a contract, and a minimum of two weeks prior to closing, represents a good balance. It allows time for sellers to prepare the notice for identified purchasers and would typically allow the purchasers to receive the notice before making significant investments of time and money to purchase a property they might not purchase if they were aware of the contents of the notice. Notice should be personally delivered with signed acknowledgment of receipt or by certified mail, return receipt requested, to the potential buyer.[191]

Notice requirements should require the seller's agent to supply the notice. In some disclosure statutes the agent's duty to supply the requisite disclosure only applies if the agent receives the information from the seller. In the case of coastal-related notice, however, the seller's agent should have the expertise necessary to supply the required information, especially once internal procedures for real estate agents develop along with state and local electronic information portals that facilitate such information exchange. If the seller has no agent, then the responsibility rests with the seller.[192] To reduce liability concerns, no liability attaches to a seller or agent for the use of information supplied by a public agency, even if it is inaccurate.[193]

D. Content and Form of Notice

Effective notice requires that the notice itself describe why the property under consideration is subject to notice requirements. In other words, the notice should explain that the property involves a FEMA flood zone, involves a state coastal high-hazard area, resides within a special regulatory area (such as a setback area, storm surge area, special zoning overlay zone, etc.), or is in an area otherwise categorized as being at risk. Each area in which the property resides in whole or in part and which justifies

190. *See, e.g.*, FLA. STAT. § 161.57(2) (2010); 33 ME. REV. STAT. § 174.1 (2010) (requiring delivery before or at acceptance of an offer by seller).

191. *Cf., e.g.*, HAW. REV. STAT. § 508D-12 (2010).

192. *See, e.g.*, CAL. CIV. CODE § 1103(c)(1) (2010).

193. *See, e.g., Id.* § 1103.4.

the notice requirement should have its own section in the notice which would describe:

- The purpose of the specific area;
- The geographic extent of the area;
- Reference to the science on which the area's boundary is based, if relevant;
- Reference to regulations and laws specifically applicable to the area;
- Contact information for officials that can supply more information on the applicable area; and
- The likelihood of future changes to regulations in the area due to factors supporting creation of the area.

Coastal notice should also include coastal erosion rates for the area if these are available from state or local government[194] as well as future projections of coastal erosion. This information should be complemented with information about past beach nourishment projects within a specified range of the property along with a statement that protective measures such as ongoing nourishment are not necessarily guaranteed and will be subject to federal, state, and local government discretion and funding.

For property in FEMA flood zones, the notice should include that flood insurance from the National Flood Insurance Program will be required for bank financing of purchase or construction; that National Flood Insurance Program rates may increase; that National Flood Insurance Program benefits may be decreased; and that continued availability of insurance through the National Flood Insurance Program is not guaranteed. Similarly, for states with state-backed insurance, the property notice should indicate that access to such programs may be limited or ended at any time, that rates may rise, and that benefits may be decreased regardless of rates. While such changes may and have occurred legally without notice, such notice contributes to more informed purchasers and decreased perceived unfairness.

Other information that should be included in coastal notice includes:

- Information on storm surge projections (based on FEMA information);
- Information on past storms (could be based on the Historical Hurricane Tracks tool developed

194. Many states now calculate erosion rates of coastal areas. Some states include reference to erosion rates in their notice statutes. *See, e.g.*, FLA. STAT. § 161.57(2) (2010); S.C. CODE ANN. § 48-39-330 (2010); *and* TEX. NAT. RES. CODE ANN. § 61.025(a) (2010).

by NOAA's Coastal Services Center and the National Hurricane Center[195]);
- Concise statement of lateral beach access law in the state, including discussion of the public trust doctrine; and
- Information on insurance claims related to flooding or wind damage submitted by seller.

E. Results of Compliance with Notice Requirements

Compliance with the disclosure requirements should allow the purchaser a minimum amount of time—such as fifteen days—to examine the notice and conduct any additional research deemed necessary to understand the potential risks associated with the property. If the purchaser determines during this time that the risk is larger than the purchaser understood prior to receiving the notice, the purchaser may, in writing, notify the seller of the purchaser's decision to rescind the contract and receive a refund of all escrow or earnest money given by the purchaser. If the purchaser does not give notice during the specified time, the purchase contract remains binding as if there were no notice requirement.

F. Results of Non-Compliance with Notice Requirements

Noncompliance by the seller (or seller's agent) with a notice requirement gives the purchaser the option of terminating the agreement and recouping any earnest money or escrow funds.[196] In the interest of not introducing too much uncertainty or confusion into land markets, the right to rescission might be limited to the time prior to the recording of the property sale.[197] At the same time, such a limitation may hurt purchasers that immediately recorded their purchase and only later learn that they should have received more information that might have impacted their decision.

195. *Historical Hurricane Tracks*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. COASTAL SERVS. CTR., http://csc.noaa.gov/hurricanes/# (last visited May 9, 2011).

196. *See, e.g.*, HAW. REV. STAT. § 508D-16(c) (2010); TEX. NAT. RES. CODE ANN. § 61.025(c) (2010); WASH. REV. CODE § 64.06.040(1), (3) (2010).

197. HAW. REV. STAT. § 508D-16.5 (2010) (allowing rescission provided that the property sale has not been recorded); *See also* N.C. GEN. STAT. § 47E-5(b)(1)-(2) (2010) (setting a three-day time limit for cancellation).

VIII. CONCLUSION AND RECOMMENDATIONS

Coastal hazards have exacted high costs—in both dollars and lives—in the United States. As migrations to our coastal areas cause them to grow much more rapidly than other parts of the country, it is no surprise that many people purchasing property have a limited understanding or appreciation of the dynamics of coastal areas and the risks that accompany ownership of coastal property. Similarly, many of those new to the coasts lack awareness of the complex regulatory controls that have evolved to balance protection of people, property, and the environment. Since the benefits of coastal living are obvious to all while the costs are not, requirements for detailed notice of coastal dynamics, regulations, and hazards can help ensure that those purchasing property do so with appropriate appreciation of the risks and limitations associated with coastal property.

Failure to ensure well-structured notice for coastal property purchasers contributes to sad stories of people that spend their life savings to purchase coastal property only to lose everything to a storm. Such stories tug at us for sympathy when those that lost were not aware of the risk. Coastal property notice can help avoid this scenario by ensuring that purchasers of coastal property know the risks and factor these into their purchase decision.

Finally, coastal notice can help state and local governments fulfill their mission to protect the health, safety, and welfare of their citizens by enacting regulations that protect people and property from the most dangerous coastal hazards. Currently many regulators with responsibility for protecting people and property from coastal hazards feel that they lack the legal maneuvering space to properly regulate land use and construction for protection from coastal hazards due to threats of regulatory takings claims. Proper and comprehensive notice may impact the viability of takings claims analyzed under the takings analysis established by the U.S. Supreme Court's *Penn Central* case. One part of this analysis includes examination of a regulation's impact on investment-backed expectations.

While no one part of the *Penn Central* analysis necessarily trumps, ensuring that coastal property owners have full understanding of the nature of the hazards, the dynamic coastal environment, and existing and potential regulatory limitations should demonstrate that owners' expectations which are drastically out of line with these realities and information are not reasonable. While some will complain that this means redefining property, the proper response should be a lesson in the long, rich history of

property and how it is filled with examples of the evolution of property law to fit with societies' changing needs and understandings. Inquiry into RIBE in a takings case helps to focus on keeping the necessary flexibility of property concepts limited to incremental changes that, while they may negatively impact some property owners, do not reach the level of arbitrary or unforeseen changes that would undermine the justice and fairness concerns that underlie takings law. Incorporating some level of notice as an element of RIBE supports the notion that has motivated protection of property for centuries: Property shall not be taken *arbitrarily*.[198] The institution of property should not be allowed to ossify while the purposes and justification served by the institution continue to change and evolve.

198. In this case, "arbitrary" has its common meaning of "not restrained or limited in the exercise of power" and "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will[,]" rather than its legal meaning in the test of the extent of the states' police powers. *Arbitrary*, MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/arbitrary (last visited May 9, 2011). Allowing the latter to be the meaning here would, indeed, remove protections from property. Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW 437, 446 (2000). However, avoidance of arbitrariness here means that alterations in property law would have to be reasonable in light of existing law and understanding. "Reasonable" incremental change justified by specific, well-understood threats to public health, safety, or welfare, can hardly be called "arbitrary."