

A Need to Know: Providing Notice of Coastal Issues to Potential Property Purchasers

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Overview

- Reasons for notice
- Possible legal ramifications
- Drafting better notice requirements
- Conclusion

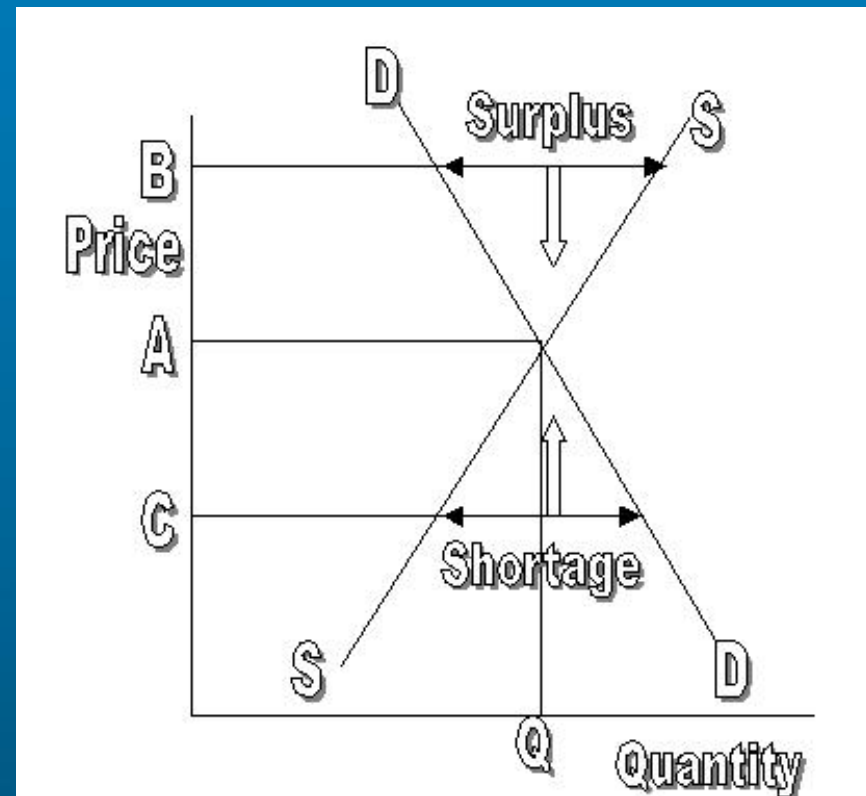
Reasons for Notice: Fairness



Reasons for Notice: Fairness



Reasons for Notice: Efficiency





KATRINA HIGH WATER 2005

Bay St. Louis officials oppose Hurricane Katrina high-water markers on highway

Published: Saturday, July 23, 2011, 9:00 PM



By The Associated Press



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Bay St. Louis, Miss., officials want **high-water markers** placed by the state at Mississippi Highway 603 and Interstate 10 camouflaged so they no longer commemorate the tragedies of **Hurricane Katrina** in 2005.



The **Sea Coast Echo** reports there are two high-water markers at the intersection, one facing north and the other facing south on Mississippi 603. They were placed there following Katrina to commemorate the area's comeback from the killer storm. In Katrina, water ran up the roadway so

Reasons for Notice: Possible Legal Ramifications

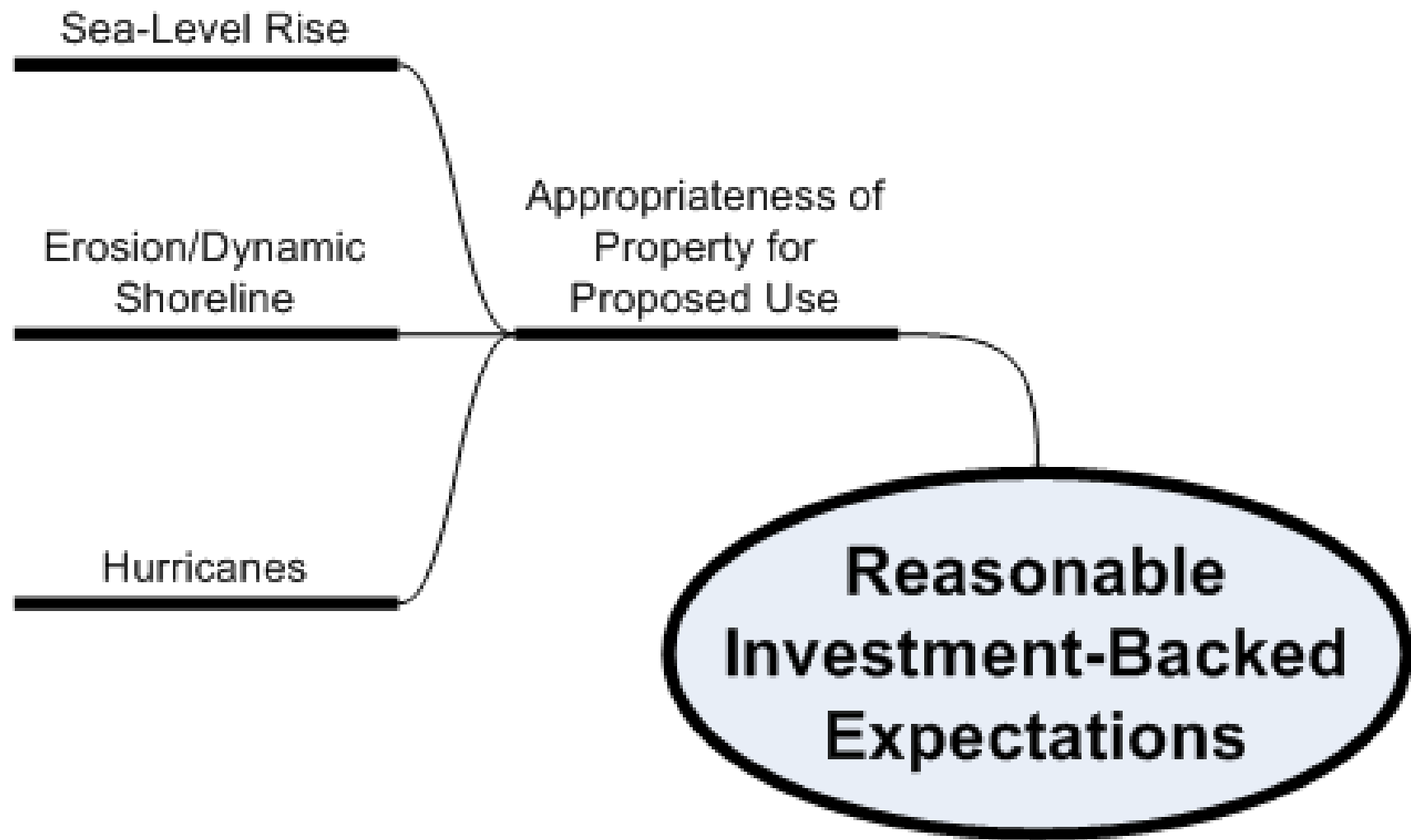
- Most takings: *Penn Central* analysis
 - Nature of the government action
 - Economic impact
 - Impact on “reasonable, investment-backed expectations”
- Expectations colored by knowledge—actual or “constructive”
- Notice not clearly reflected in case law to date

Evolution of Expectations

- *Penn Central* introduced “distinct investment-backed expectations”
 - Not purely subjective
- Changed to “reasonable” investment-backed expectations in *Kaiser Aetna v. U.S.*
- 20 S.Ct. cases, hundreds of federal court cases, and thousands of state cases



Reasonable Investment-Backed Expectations





Reasonable Investment-Backed Expectations

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graph LR; A([Reasonable Investment-Backed Expectations]) --- B[Likelihood of Regulations]; A --- C[Noxious Use/ Nuisance/ Background Principles]; A --- D[Use of Similarly-Situated Properties];
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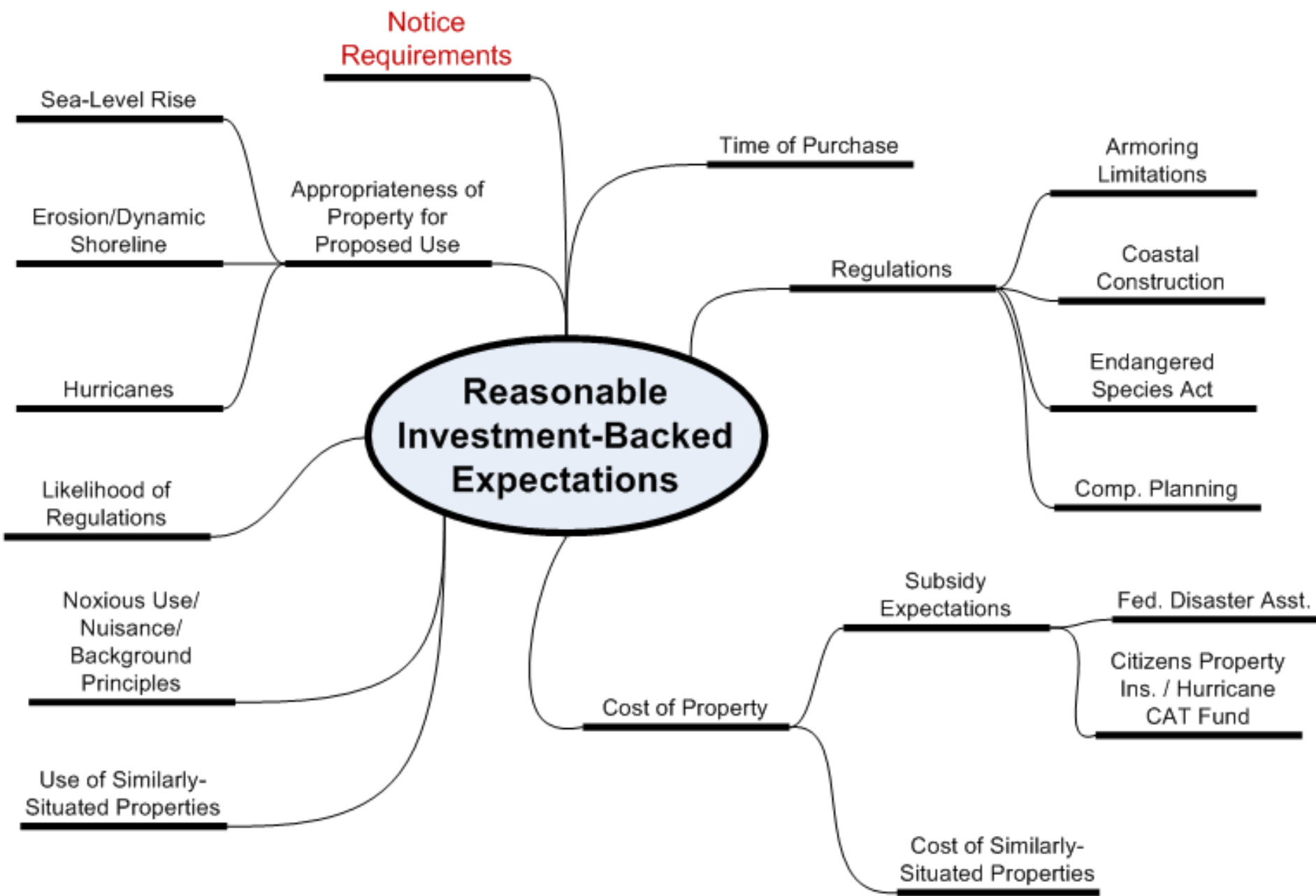
Likelihood of
Regulations

Noxious Use/
Nuisance/
Background
Principles

Use of Similarly-
Situated Properties







RIBE Today

- *Palazzolo*: Dueling conceptions of RIBE's role
- *Tahoe-Sierra Pres. Council*: reaffirming role of RIBE
 - Remains part of the *Penn Central* analysis


Current Notice Law

- Fla. Stat. §161.57 Coastal properties disclosure statement.—
 - At or prior to the time a seller and a purchaser both execute a contract for sale and purchase of any interest in real property located partially or totally seaward of the coastal construction control line . . . , the seller must give a written disclosure statement

Current Notice Law



The property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Florida Department of Environmental Protection, including whether there are significant erosion conditions associated with the shoreline of the property being purchased.



Florida's Coastal Hazards Disclosure Law: Property Owner Perceptions of the Physical and Regulatory Environment

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JULY 2012

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Recent study:

- Fla. statute ineffective
- 85.7% didn't receive or don't recall receiving notice
- 51.5% average correct response about CCCL program



Drafting a Notice Ordinance

- What property is affected?
- Timing and processes for notice
- Content of the notice
- Results of compliance or non-compliance

What Property Is Affected?


- Apply to residential property; potentially to others
- Located:
 - Seaward of CCCL
 - In any FEMA “V” zones
 - Areas defined as “coastal high hazard” or similar
 - In any “adaptation action areas”
 - In any other defined coastal hazard zone (i.e.—local high-erosion area, etc.)

Timing & Process

- Upon signing purchase contract or within 10 days
- At least two weeks prior to closing
- Provided by seller's agent
 - No liability for use of public information that is incorrect
- If seller has no agent, responsibility is on seller

Contents: Include in Notice



- Purpose of the specific area or areas in which the property is located that require the notice
 - Geographic extent of area(s)
 - Science on which area(s) based
 - References to laws and regulations that may apply in the area(s)
 - Contact information for officials with more information
- 

Contents: Include in Notice



- Beach dynamics information
- Erosion history
- Possibility of rolling public easement
- Storm surge maps
- References to SLR and climate change
- Relevant regulatory programs / setback lines

Contents: Include in Notice



- No guarantee of armoring or nourishment
- Likelihood of future regulation
- Limitations on public infrastructure (if relevant)
- Existing subsidies that may be discontinued (i.e.—insurance subsidies)
- Economic loss is responsibility of owner

Compliance & Non-Compliance

- Compliance—min. # of days to reconsider
- Non-compliance—right to rescission
 - For how long?
 - Until recording?
 - Damages after that time? How determined?

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

THOMAS RUPPERT*

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Conclusion

- Notice of hazards/laws important
 - Fairness, economics, and legal perspectives
- Property law changes and evolves with our technology, values, and understanding
- What role should knowledge of likely future conditions play in determining how the losses and costs of SLR are apportioned?

“[A] foolish man . . . built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash.”

Matthew 7: 26-27

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The Bert J. Harris, Jr., Private Property Rights Protection Act

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Outline

- The basics
- Recent cases and 2011-12 changes
- Assessing the potential impact of the Bert Harris Act on adaptation options
- Possible defense arguments for local governments

The Basics

- 1995
- Two original parts—law suit or dispute resolution process
- Liability of gov't for regulations that
 - impose an “inordinate burden” on
 - an “existing use or a vested right” of real property

The Basics

- A specific action . . .
- of a governmental entity that. . .
- **inordinately burdens** . . .
- an existing use of real property . . .
- or a vested right to a specific use of real property

Less Basic: “Inordinate Burden”

- Property owner unable to attain **reasonable, investment-backed expectations** for an existing use or vested use, or
- left with uses that are unreasonable such that the property owner **bears a disproportionate share of a burden** imposed for the public good and which should, in fairness, be borne by the public

Confusion of Terminology

- Many terms same as U.S. Const. takings law:
 - “Reasonable investment-backed expectations” (Penn Central)
 - “Permanently bears a disproportionate burden which should in fairness be borne by the public” (Armstrong v. United States, 364 U.S. 40, 49 (1960))

Recent Case Law & Changes

- “First applied. . . .”
 - Enactment enough?
 - *M&H Profit, Inc. v. Panama City* said “no”
 - *Citrus Cty. v. Halls River Dev.* said “yes”
- 2011 Legislature said “first applied”
 - Upon enactment & notice if impact is clear
 - Formal denial of a written request for development or permit

- “A **cause of action** may not be commenced under this section if the claim is presented more than **1 year after a law or regulation is first applied** by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, **the time for bringing an action under this section is tolled until the conclusion of such proceedings.**”

Recent Case Law & Changes

- *Wendler* case (pre-2011 law)
- When was ordinance “first applied”?
 - Not “readily ascertainable” like in *Hall’s River*
- How long to file claim/suit?
 - 4 years plus tolling
 - City of St. Augustine seeking certiorari

Local Gov't Defenses

- Procedural defenses
 - Notice filed in time?
 - Bona fide appraisal?
- Ripe?
 - Related to “specific action”
- Statute of limitations?

Local Gov't Defenses

- Gov't has not “directly restricted or limited the use of real property”
- Federal delegation of authority
 - CWA delegation to DEP?
 - ESA?
 - Habitat Cons. Plan—MOU where local gov't obligated to implement

Local Gov't Defenses

- “Existing use” can be a future use
 - (1) reasonably foreseeable,
 - (2) non-speculative,
 - (3) suitable for the subject property,
 - (4) compatible with the surrounding land uses,
and
 - (5) that the value of the property pre-regulation exceeds that of its post-regulation value

Local Gov't Defenses

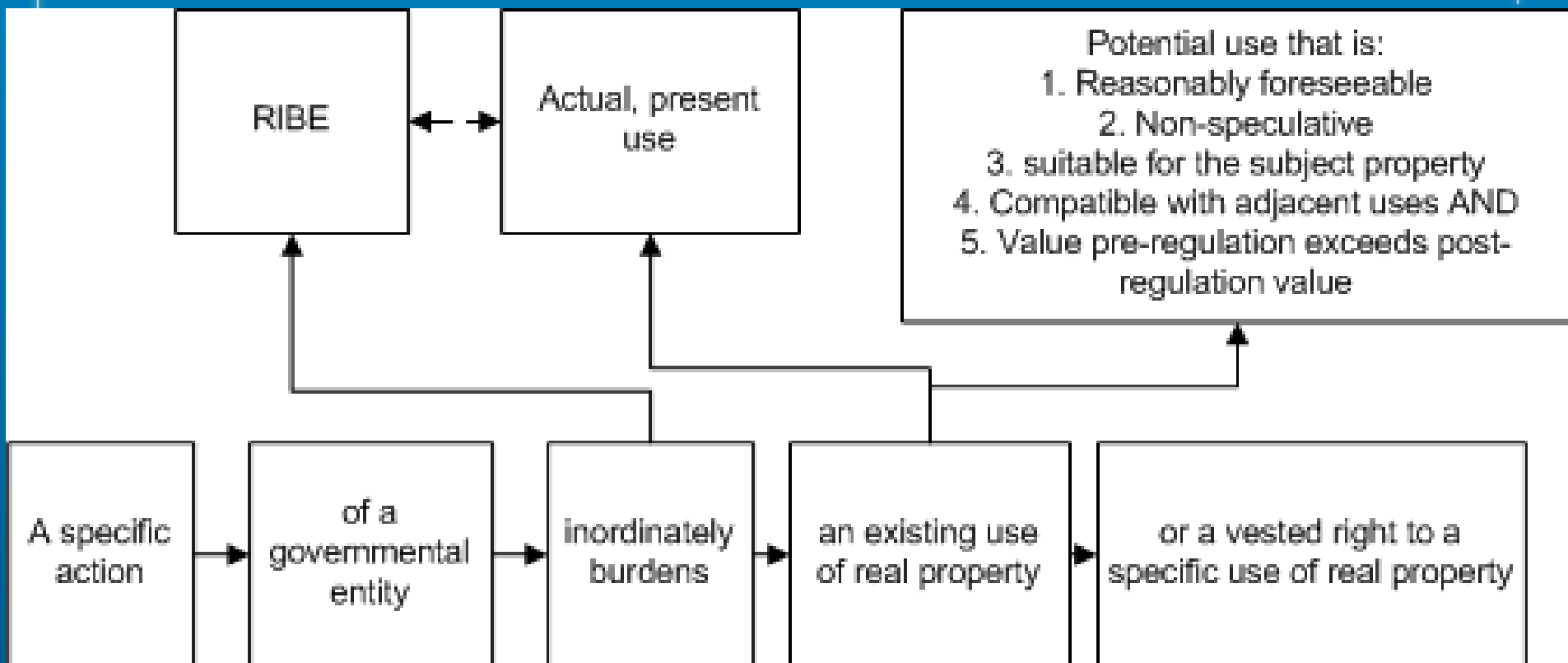
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Local Gov't Defenses

- Reasonable, investment-backed expectations
 - State vs. federal case law
 - *Palazzolo* (2001) and *Tahoe Sierra Pres. Council* (2002)
 - Like *Penn Central*, and *ad-hoc* inquiry
 - Awareness of problems and likely regulation

Impact of the Act?

- Qualitative vs. Quantitative assessment
- Variables
 - Depends local boards and resources of local government—often correlated with size
 - L.G. attys vs. L.G. governing board
 - Large vs. small local governments
 - Risk averseness (atty and board)
 - Which private attys involved

Impact of the Act?

- Heard as much/more in negotiation as in court
- Varied opinions on “chilling effect”
- Bert Harris always a concern
- Very few cases can make a huge impression
- Difficult for plaintiffs to win

Conclusions

- Not necessarily a bar
- Several potential defenses have not been ruled on by courts