

## **Public Access to Beaches Has Been Severely Weakened by the Texas Supreme Court's *Severance* Decision**

On Friday, November 5<sup>th</sup>, the Texas Supreme Court overturned decades of judicial precedent by ruling that an important feature of the Texas Open Beaches Act known as the "rolling easement" may no longer be applied to provide the public with access to beaches that have been impacted by hurricanes and other storm events. In the long-awaited decision of *Severance v. Patterson*, the Court modified existing law to allow many private property owners to exclude the public from using significant portions of the State's beaches and to prevent the State from removing structures that are currently obstructing the public easement.

Public use of State beaches is rooted in an over 150 year old Texas tradition of using the beaches along barrier islands facing the Gulf of Mexico for transportation, camping, fishing, swimming and other public uses. These public uses were so well accepted that historically, the public as well as most private landowners believed that the state retained ownership of both the "wet" and "dry" sand portions of beaches. This understanding came to an end in 1958 when the Texas Supreme Court in *Luttes v. State*, ruled that the state only owned the wet sand portion of the beach and that private landowners possessed ownership rights over the dry sand portion above the mean high tide line and could prevent the public from trespassing on their property.

The *Luttes* ruling shocked the public and generated sufficient political pressure from affected citizens to force the Texas Legislature to enact the Open Beaches Act (OBA) the following year. The Act specifically provides that it shall be the State's public policy that "the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." Any public easement is conditioned upon a showing that the "public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public." Additionally, the public's right of access is protected by prohibiting persons from "creat[ing], erect[ing], or construct[ing] any obstruction, barrier, or restraint" that interferes with the public easement. Over the years, courts have ruled that houses or other structures that are located on the public's easement must be removed.

In the 1980s and early 1990s the Legislature amended the OBA to enhance enforcement of the public easement. These changes included requiring every real estate contract in coastal areas to include the following language, "STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF NATURAL PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES."

In 2009, the State's citizens further strengthened the OBA when 77 percent of voters approved a referendum that incorporates the most important provisions of the Act into the State Constitution. This referendum came about in response to controversial legislation introduced in the aftermath of Hurricane *Ike* in 2008 that exempted some areas of the coast from the requirements of the Act. The

purpose of the referendum was to make any legislative attempts to weaken the OBA in the future much more difficult to achieve. As a direct consequence of the OBA and a long line of judicial decisions supporting the Act, the public has free access to the State's most popular beaches.

However, many of Texas' beaches are shrinking due to a variety of natural and human causes and storm events. It has been estimated that 62 percent of the Texas coast is eroding at an average rate of about 7 feet per year with some locations losing more than 30 feet per year. As these beaches are eroding, the vegetation line which marks the inland boundary of the public easement moves landward also. Erosion of the beaches has also caused a large number of homes and other structures to be located partially or wholly seaward of the vegetation line and therefore within the public's easement. Many of the State's formerly wide dry sand beaches are being narrowed to the point that if homes or other structures remain on the beach, the public is no longer able to use the beach, especially at high tide.

After years of litigation and political debate as well as a two year moratorium to study the matter, State General Land Commissioner, Jerry Patterson, enacted a plan in 2006 to offer property owners \$40,000 to remove their homes from the public portion of the beach. Carol Severance, who owned three rental properties on Galveston Islands West Beach, and a number of other beach-front property owners refused the compensation and filed suit to prevent the State from enforcing the OBA.

Until last week's *Severance* decision, an unbroken line of judicial decisions have ruled that the public has acquired easements by prescription or dedication along large portions of the State's Gulf-facing beaches. A prescriptive easement is established if there is proof that the public used the area without the property owner's permission for a period of more than ten years. An easement by implied dedication may be found if the landowner induced the public to believe that the area was open for their use and they relied on that belief. Moreover, courts have ruled that once these easements are established they "roll" with the changes of the vegetation line. In other words, it is not necessary for the State to re-establish the easement each time the vegetation line shifts.

As a result of last week's *Severance* decision, this well established line of cases has been overturned and the public's right to access beaches severely weakened. In a decision that will be extraordinarily difficult to implement, the Supreme Court found that rolling easements **do** exist under Texas law if they were created by the slow process of erosion, but that they **do not** exist if created by a sudden and rapid change known as "avulsion." According to the Court, the public no longer has access to the beach where Ms. Severance's home is located because Hurricane Rita caused the shift of the vegetation line. Consequently, the existing prescriptive easement does not "roll" and the State must provide proof that a prescriptive easement has been reestablished on the beach up to the new vegetation line. It is very unlikely that the State can make this showing because until Hurricane Rita shifted the vegetation line in 2005 the public did not use that portion of the beach. Consequently, Ms. Severance and all of the other beach-front property owners whose properties may have been impacted by severe weather events in the past may remain on the beach and may exclude the public from that portion of the beach until these legal issues are resolved at some undetermined point in the future, if ever.

Making matters worse is the fact that the Supreme Court provided no guidance as to how to determine when the vegetation line has shifted due to gradual movements such as erosion versus when it has shifted due to rapid movements such as storms. In fact, it is difficult to conceive of any sudden and severe weather event that could be entirely separated from those non-storm wind and wave actions that carve and contour the State's beaches on a daily basis. Hurricanes, tropical storms, strong winds, and high tides are always present along the Gulf of Mexico and how all of these natural events can be separated and disentangled from one another as envisioned by the Supreme Court seems an impossible task. For example, two of Ms. Severance's beach properties were already on a list published in 1999 of homes that were "on the public beach easement." What proportion of the shift in the vegetation line occurred as a result of ongoing erosion and what was due to Hurricane Rita may never be known.

What is clear is that the Supreme Court's decision has rejected a rational, well accepted and easy to apply policy that recognizes that easements in coastal areas are dynamic and by necessity need to move with physical changes of the beach. Instead, it has chosen a policy that freezes the easement in place and guarantees that the State will be involved in expensive litigation for many decades. The only people who should be happy about Friday's Supreme Court ruling are the relatively small number of beach homeowners who will be allowed to keep their properties on the beach and the large contingent of coastal geologists, meteorologists, historians and attorneys who will be asked to sort out this unworkable new rule.

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