IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE MEDINA, joined by JUSTICE LEHRMANN and, in part, by JUSTICE GUZMAN, dissenting.

Texas beaches have always been open to the public. The public has used Texas beaches for transportation, commerce, and recreation continuously for nearly 200 years.[1] The Texas shoreline

[1] Historical records indicate that a ferry from Galveston Island at San Luis Pass was established in 1836. *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 931 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). To travel between the City of Galveston Island and the ferry, the public traveled by beach route. *Id.* There is evidence of an established stage coach route traveling across the beach, and on May 23, 1838, the Republic of Texas authorized a mail route to run across the beach, which ran every two weeks. *Id.* Until Termini Road was built in 1956, "the only way to travel, except by private road inland within fenced land, was by way of the beach." *Id.* at 932. Testimony from earlier cases indicates that both locals and visitors to Galveston Island used the entire beach, "from the water line to the line of vegetation[,]" for driving, camping, fishing, and swimming. *Id.* (testimony of lifetime resident born in 1879). Cars parked between the dunes for camping. *Id.* at 933. Finally, there is no evidence that fences were ever erected across any part of the beach, only evidence that they were landward of the vegetation line to prevent cattle from going onto the beach. *Id.* (testimony of lifetime resident since 1875 reasoning that there were no fences because "[n]o one would dream any such thing as to block the driveway, . . . and the driveway was in use, I am satisfied, at least more than a hundred years ago").

is an expansive yet diminishing[2] public resource, and we have the most comprehensive public beach access laws in the nation. Since its enactment in 1959, the Texas Open Beaches Act ("OBA") has provided an enforcement mechanism for the public's common law right to access and to use Texas beaches.[3] The OBA enforces a reasoned balance between private property rights and the public's right to free and unrestricted use of the beach.[4] Today, the Court's holding disturbs this balance and jeopardizes the public's right to free and open beaches.

After chronicling the history of Texas property law, the Court concludes that easements defined by natural boundaries are, by definition, dynamic. ___ S.W.3d ___. Yet, in a game of semantics, the Court finds that such dynamic easements do not "roll." *Id*. at ___. The Court further distinguishes between movements by accretion and erosion and movements by avulsion, finding that gradual movements shift the easement's boundaries but sudden movements do not. The Court's distinction protects public beach rights from so-called gradual events such as erosion but not from

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[2] Not only is Texas's coastline expansive, we also have the highest erosion rate in the nation, affecting "five to six feet of sand annually." Michael Hofrichter, *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT'L & ENERGY L. & POL'Y J. 147, 148 (2009). This erosion rate causes coastal property lines to change annually.

[3] The OBA only applies to public beaches that border the Gulf of Mexico and are accessible by public road or ferry. TEX. NAT. RES. CODE §§ 61.013(c), 61.021.

[4] *See id.* § 61.0184 (providing procedural safeguards for property subject to OBA enforcement actions). It should be noted that while the General Land Office contacted Severance to tell her that it *might* file an enforcement action to remove her encroachment on the public beach, the Office had not yet initiated such an action at the time of the litigation that gave rise to these certified questions. Justice Wiener's dissent in Severance's federal action is particularly worth noting. He maintains that this action "has the unintentional effect of enlisting the federal courts and, via certification, the Supreme Court of Texas, as unwitting foot-soldiers in this thinly veiled Libertarian crusade" whose quest ends with the evisceration of the Open Beaches Act. *Severance v. Patterson*, 566 F.3d 490, 504 (5th Cir. 2009) (Wiener, J., dissenting). He argues further that beyond her claim not being ripe, Severance does not have standing because she attempts "to seek a benefit based on prior state action to which she has not only acceded and thereby forfeited or waived any related claim, but for which she has presumably been remunerated through an intrinsic diminution in the purchase price that she paid when she bought the already burdened beachfront land." *Id.* at 505.

more dramatic events like storms, even though both events are natural risks known to the property owner. Because the Court's vague distinction between gradual and sudden or slight and dramatic changes to the coastline jeopardizes the public's right to free and open beaches, recognized over the past 200 years, and threatens to embroil the state in beach-front litigation for the next 200 years, I respectfully dissent.

I. Texas Coastal Property Ownership

Property lines on the coast are defined by migratory, dynamic boundaries. In *Luttes v. State*, we determined that Anglo-American common law applied to land grants after 1840[5] and thus affixed the mean high tide as the boundary between state and private ownership of land abutting tidal waters. 324 S.W.2d 167 (Tex. 1958). The beach is commonly known to lie between the mean low tide and vegetation line. For over fifty years, the OBA has assimilated that common knowledge as a statutory definition as well. All land seaward of the mean high tide,[6] known as the wet beach, is held by the state in public trust. *Luttes*, 324 S.W.2d at 191–93; *see State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1945) (recognizing the "ancient maxim that seashore is common property and never passes to private hands"). The land between the mean high tide and the vegetation line is the dry beach and may be privately owned. *Luttes*, 324 S.W.2d at 191–93. I agree with the Court that "[w]e

[5] Texas adopted the common law in 1840, which established the mean high tide as the boundary dividing the state-owned seashore from private property. *Luttes*, 324 S.W.2d at 169. For land grants or patents that became effective before 1840, Mexican/Spanish civil law applies, which recognized this tidal boundary to be the mean higher high tide. *Id*. Because the mean high tide is measured with tide gauges and calculates both daily high tides, it provides a more definitive boundary line than the mean higher high tide, which only considers the higher of the two daily tides. *Id*. at 187 (recognizing the difficulty in proving "on such and such an occasion in such and such a year or years one or more 'highest waves' actually reached this or that irregular line on the ground").

[6] "[T]he average of highest daily water computed over or corrected to the regular tidal cycle of 18.6 years" is the mean high tide. *Luttes*, 324 S.W.2d at 187.

have never held the dry beach to be encompassed in the public trust." ___ S.W.3d ___. If this case were a matter of title, *Luttes* would provide the answer: the mean high tide separates public and private property ownership interests. But this case is about the enforcement of a common law easement that preserves the public's right to access the dry beach.

The mean low tide, mean high tide, and vegetation line are transitory.[7] Landowners may own property up to the mean high tide. But the exact metes and bounds of the beachfront property line cannot be ascertained with any specificity at any given time other than by reference to the mean high tide. Through shoreline erosion, hurricanes, and tropical storms, these lines are constantly moving both inland and seaward. In the West Bay system, whence this litigation arose, forty-eight percent of the shoreline is retreating, forty-seven percent is stable, and six percent is advancing, at an average rate of -2.9 feet per year.[8] The beaches on west Galveston Island, where Severance's property is located, have even higher retreat rates (a loss of over seven feet per year) because of their

[7] The mean low tide and high tide are averages assessed over a period of years. Their "actual determination at a given point on the coastline requires scientific measuring equipment and complex calculations extending over a lengthy period. Thus, as a practical matter, such physical determination of the landowner's actual boundary is not normally feasible." Richard Elliot, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 385 (1976). "The line of vegetation, on the other hand, is readily determinable with the naked eye at most points along the Gulf beaches." *Id*. However, all three lines are subject to the daily movements of ocean, which shift these lines both gradually and suddenly.

[8] Gibeaut, J. C., Waldinger, Rachel, Hepner, Tiffany, Tremblay, T. A., and White, W. A., 2003, Changes in bay shoreline position, West Bay system, Texas: The University of Texas at Austin, Bureau of Economic Geology, report of the Texas Coastal Coordination Council pursuant to National Oceanic and Atmospheric Administration Award No. NA07OZ0134, under GLO contract no. 02-225R, 27 p. 14.

exposure to winds and waves.[9] Natural erosion from waves and currents causes an overall shoreline retreat for the entire Texas coast.[10]

These natural laws have compelled Texas common law to recognize rolling easements.[11] Easements that allow the public access to the beach must roll with the changing coastline in order to protect the public's right of use. The dynamic principles that govern vegetation and tide lines must therefore apply to determine the boundaries of pre-existing public beachfront easements. *See Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.) *cert. denied*, 481 U.S. 1024 (1987) ("An easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore. Such an easement, meant to preserve the public right to use and enjoy the beach, would then cease functioning for that purpose."). "The law cannot freeze such an easement at one place anymore than the law can freeze the beach itself." *Id*.

II. Texas Recognizes Rolling Easements

The first certified question asks whether Texas recognizes rolling beachfront access easements that move with the natural boundaries by which they are defined. The answer is yes. The rolling easement "is not a novel idea." *Feinman*, 717 S.W.2d at 110. Courts consistently recognize

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[9] *Id.*

[10] *Id.*

[11] The Open Beaches Act recognizes that beaches on the Gulf should be free and unrestricted for the public's use and enjoyment. *See* TEX. NAT. RES. CODE § 61.011(a). And Texas case law has recognized the rolling nature of public beachfront easements. *Feinman v. State*, 717 S.W.2d 106, 111 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Matcha v. Mattox*, 711 S.W.2d at 99; *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073 (1990).

the migrating boundaries of easements abutting waterways to uphold their purpose.[12] *Id*. After all, "an easement is not so inflexible that it cannot accommodate changes in the terrain it covers." *Id*.

The law of easements, Texas law, and public policy support the enforcement of rolling easements. Such easements follow the movement of the dry beach in order to maintain their purpose and are defined by such purpose rather than geographic location. They are therefore affected by changes to the coast but never rendered ineffective by the change. The primary objective is not to ensure the easement's boundaries are fixed but rather that its purpose is never defeated.

A. Texas Easement Law

An easement is a non-possessory property interest that authorizes its holder to use the property of another for a particular purpose. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). "A grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). However, the burden on the servient estate is secondary to ensuring that the purpose of the easement is reasonably fulfilled. For example, oil and gas leases convey an implied easement to use the surface as

[12] This concept has long been recognized by courts across numerous jurisdictions. *See Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324, 339–40 (1876) (finding no taking and public use easement boundaries moved after city filled in and expanded street that wharfed out to banks of Mississippi River for public use); *Luttes*, 324 S.W.2d at 167; *Cnty. of Hawaii v. Sotomura*, 517 P.2d 57, 62 (Haw. 1973) (defining seaward property boundary to fall on the "upper reaches of the wash of the waves"); *Horgan v. Town Council of Jamestown*, 80 A. 271, 276 (R.I. 1911) (defining boundaries of public highway abutting waterway to be flexible); *City of Chi. v. Ward*, 48 N.E.927 (Ill. 1897) (upholding a statute mandating that lands shall be held for the use and purposes expressed or intended); *Godfrey v. City of Alton*, 12 Ill. 29, 35 (1850) (finding easement by dedication for public landing must attach to the waterway, "however that may fluctuate," otherwise "its enjoyment would be precarious, and often destroyed"); *Mercer v. Denne*, [1905] 2 ch. 538 (Eng.) (recognizing a public easement by custom for fishermen to dry nets on the new portion of the beach that had been added to the old beach overtime); *Louisiana v. Mississippi et al.*, 516 U.S. 22, 25 (1995) (applying rule that boundaries between states along a river may naturally shift in accordance with changes in the river channel); *Georgia v. South Carolina*, 497 U.S. 376, 403-04 (1990) (same); *Nebraska v. Iowa*, 143 U.S. 359, 360 (1892) (same).

reasonably necessary to fulfill the purpose of the lease. *See Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972) (recognizing that the use easement is not limited by fixed boundaries but rather its purpose and use). The purpose of the easement cannot expand, but under certain circumstances, the geographic location of the easement may. *Compare Marcus Cable Assocs.*, 90 S.W.3d at 701 (preventing easement holder from expanding purpose of maintaining electric transmission or distribution line to also include cable-television lines regardless of fact that lines could be run on exact same geographic location) *with Godfrey v. City of Alton*, 12 Ill. 29, (1850) (recognizing that a public easement for a public landing on specific waterway is necessarily "inseparable from the margin of the water, however that may fluctuate").

Easements may be express or implied. Implied easements are defined by the circumstances that create the implication. *Ulbricht v. Friedman*, 325 S.W.2d 669, 677 (Tex. 1959) (finding an implied easement to use lake water for cattle as they were located upland and without any water source). Express easements, however, must comply with the Statute of Frauds, which requires a description of the easement's location. *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983). Under certain circumstances, even express easement boundaries may be altered to maintain the purpose of the easement. *See Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex. App.—Amarillo 2009, no pet.) (recognizing movement of drainage tracts to maintain easement's purpose despite the expansion of original easement location); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 (2000) (providing that an easement "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created").

Rolling beachfront access easements are implied by prescription or continuous use of the dry beach and are defined by their purpose and their dynamic, non-static natural boundaries. To apply static real property concepts to beachfront easements is to presume their destruction. Hurricanes and tropical storms frequently batter Texas's coast. Avulsive events are not uncommon. The Court's failure to recognize the rolling easement places a costly and unnecessary burden on the state if it is to preserve our heritage of open beaches.

The Court's conclusion that beachfront easements are dynamic but do not roll defies not only existing law but logic as well. The definition of "roll" is "to impel forward by causing to turn over and over on a surface." Webster's Ninth New Collegiate Dictionary (Merriam-Webster Inc. 1983). "Dynamic" means "of or relating to physical force or energy" and "marked by continuous activity or change." *Id*. Both terms express movement, but neither term is limited by speed or degree of movement.

The Court also illogically distinguishes between shoreline movements by accretion and avulsion. On the one hand, the Court correctly declines to apply the avulsion doctrine to the mean high tide. ___ S.W.3d ___. This means a property owner loses title to land if, after a hurricane or tropical storm, such land falls seaward of the mean high tide. On the other hand, this same hurricane, under the Court's analysis, requires the state to compensate a property owner for the land that now falls seaward of the vegetation line unless it was already a part of the public beachfront easement. Under the Court's analysis, the property line may be dynamic but beachfront easements

must always remain temporary; the public's right to the beach can never be established and will never be secure.[13]

The Court's distinctions nullify the purpose of rolling easements. I submit (in accord with several other Texas appellate courts that have addressed the issue of rolling easements) that natural movements of the mean high tide and vegetation line, sudden or gradual, re-establish the dynamic boundaries separating public and private ownership of the beach, as well as a pre-existing public beachfront access easement. So long as an easement was established over the dry beach before the avulsive event, it must remain over the new dry beach without the burden of having to re-establish a previously existing easement whose boundaries have naturally shifted.

Finally, I submit that once an easement is established, it attaches to the entire tract. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963). Regardless of how many times the original tract is subdivided, the easement remains. *Id*. (enforcing pre-existing implied easement across subsequently divided tracts to fulfill its purpose).

Private ownership of Galveston Island originated in two land grants issued by the Republic of Texas. First, it arose from the Menard Grant in 1838, which covers the east end of the Island. *See Seaway Co.*, 375 S.W.2d at 928; *City of Galveston v. Menard*, 23 Tex. 349, 403–04 (1859). Second, it issued from the Jones and Hall Grant in 1840, which encompasses 18,215 acres, and includes the West Beach, where Severance's property is located. *See Seaway Co.*, 375 S.W.2d at

[13] The Court treats the public's easement as "fixed and definite," which creates "a legal fiction that has no factual basis." Mike Ratliff, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 1014 (1976). Only a "rolling easement will realistically and accurately depict the actual occurrences on the beach." *Id*.

928 (covering "all of Galveston Island except the land covered by the Menard Grant covering the east portion of the Island").

The Court today reasons that because no *express* easement was made in these original land grants, no public easement can exist over the dry beach. ___ S.W.3d ___. The Court, however, ignores the implied easement arising from the public's continuous use of the beach for nearly 200 years. The state may have relinquished title in these original grants, but it did not relinquish the public's right to access, use, and enjoy the beach. *See* Ratliff, 13 HOUS. L. REV. at 994 (recognizing that until *Luttes*, the public, as well as private landowners, believed beaches to be public domain).

By implied prescription, implied dedication, or customary and continuous use, overwhelming evidence exists that Texans have been using the beach for nearly 200 years. *See Seaway Co.*, 375 S.W.2d at 936 (finding that "owners, beginning with the original ones, have thrown open the beach to public use and it has remained open"); *see also supra* note 1. This evidence establishes that public beachfront access easements have been implied across this Texas coastline since statehood. As long as a dry beach exists, so too must beachfront access easements. Any other result deprives the public of its pre-existing, dominant right to unrestricted use and enjoyment of the public beach.

B. Texas Case Law

Texas case law not only recognizes the existence of public beachfront access easements but also that such easements "roll" with the movements of their dynamic, natural boundaries.[14] Before

[14] *See Feinman*, 717 S.W.2d at 111 (finding that rolling easement shifted after Hurricane Alicia moved the vegetation line landward causing homes to be seaward of vegetation line and subject to removal under OBA)*; Matcha*, 711 S.W.2d at 98–100 (finding public easement shifts with natural movements of the beach); *Arrington v. Tex. Gen.*

Luttes, the public assumed it had unrestricted access to use and enjoy the beach.[15] After *Luttes*, in response to public concern over its right to access Texas beaches, the Texas Legislature passed the OBA to ensure that Texas beaches remained open for public use. Challenged five years later, the Houston Court of Civil Appeals found that a public easement existed on the West Beach of Galveston Island, forcing landowners to remove barriers and structures that prevented the public's access to and use of the public beach. *Seaway Co. v. Attorney General*, 375 S.W.2d at 940; *see also Moody v. White*, 593 S.W.2d 372, 376-79 (finding public easement over dry beach on Mustang Island and requiring removal of structure preventing public access).

In the years following the passage of the OBA, the shoreline naturally and predictably moved both gradually and suddenly. Texas courts have repeatedly held that once an easement is established, it expands or contracts ("rolls"), despite the sudden shift of the vegetation line. *See Feinman*, 717 S.W.2d at 109–10 (after Hurricane Alicia); *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d at 765 (after Tropical Storm Frances); *Brannan v. State*, No. 01-08-00179-CV, 2010 WL 375921, at *2 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, pet. filed) (after unusually high tide or "bull tide"); *Matcha*, 711 S.W.2d at 100 (after hurricane of 1983); *Arrington v. Mattox*, 767 S.W.2d at 958 (after Hurricane Alicia). In short, Texas law has adopted "the rolling easement concept."

Land Office, 38 S.W.3d at 766 (affirming summary judgment for Land Office because once public easement is established "it is implied that the easement moves up or back to each new vegetation line"); *Arrington v. Mattox*, 767 S.W.2d at 958 (affirming that the "easement migrates and moves . . . with the natural movements of the natural line of vegetation and the line of mean low tide"); *Moody*, 593 S.W.2d at 379 (recognizing that the boundary lines shift just like navigable rivers but can "be determined at any given point of time"). *See also Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (recognizing public beach easement's "natural demarcation lines are not static" but rather "change with their physical counterparts"); *Hirtz v. Texas*, 974 F.2d 663, 664 (5th Cir. 1992) (recognizing location of public beach easement "shifts as the vegetation line shifts").

[15] Ratliff, *supra* note13, at 994.

Feinman, 717 S.W.2d at 110–11. The Court's refusal to follow existing Texas law means that every hurricane season will bring new burdens not only on the public's ability to access Texas's beaches but on the public treasury as well.

C. Texas Public Policy

The OBA codifies the public's pre-existing right of open access to Texas beaches:

> It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if 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, 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*.

TEX. NAT. RES. CODE § 61.011(a) (emphasis added). Migratory boundaries define rolling easements, rather than fixed points. The line of vegetation is "the extreme seaward boundary of natural vegetation which spreads *continuously* inland." TEX. NAT. RES. CODE § 61.001(5) (emphasis added). Public beach means

> any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

TEX. NAT. RES. CODE § 61.001(8). The OBA recognizes the dynamic nature of beach boundaries by defining the public beach by reference to the vegetation line and tide lines, which shift with the movements of the ocean, whether those movements are gradual from erosion or dramatic from storm

events. Requiring that existing easements be re-established after every hurricane season defeats the purpose of the OBA: to maintain public beach access.

i. Disclosure of Risk Requirement

For almost twenty-five years, the state has taken the further step of informing beachfront property purchasers of the rolling nature of the easement burdening their property. Amendments to the OBA in 1985 make "pellucid that once an easement on the dry beach is established, its landward boundary may therefore 'roll,' *including over private property*." *Severance v. Patterson*, 566 F.3d 490, 506 (5th Cir. 2009) (Wiener, J., dissenting) (emphasis in original); *see also* Act of May 24, 1985, 69th Leg., R.S., ch. 350, § 1, 1985 Tex. Gen. Laws 1419 (codified as TEX. NAT. RES. CODE § 61.025). Sellers of property on or near the coastline are required to include in the sales contract a "Disclosure Notice Concerning Legal and Economic Risks of Purchasing Coastal Real Property Near a Beach." TEX. NAT. RES. CODE § 61.025(a). Applicable law specifically warns that

> 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.* . . . 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.

Id. § 61.025(a) (emphasis added). The language of the Act itself clearly identifies the line of vegetation as an easement boundary and clearly recognizes the transient nature of these boundary lines. The vegetation line, "given the vagaries of nature, will always be in a state of intermittent flux[,]" and consequently, "[s]hifts in the vegetation line do not create new easements; rather they expand (or in the case of seaward shifts, reduce) the size and reach of one dynamic easement."

Severance v. Patterson, 566 F.3d 490, 506 (5th Cir. 2009) (Wiener, J., dissenting). Severance purchased her properties with contracts that notified her of these risks and nature of the rolling easement.

ii. Constitutional Amendment Adopting the Open Beaches Act

In November 2009, Texans adopted a constitutional amendment that mirrors the policy and language of the OBA. The amendment adopts the OBA's definition of "public beach" and reiterates that the public's easement is established under Texas common law. TEX. CONST. art. I, § 33(a). It further acknowledges the permanent nature of the easement. *Id*. at § 33(b). To be consistent with the Texas Constitution, these easements must roll with the natural changes of the beach. The Court's failure to recognize the rolling nature of these easements is thus not only contrary to common law and the public policy of the state but also the will of the people expressed in our constitution.

iii. Presumption of Public Easement Over Dry Beach

Finally, in an OBA enforcement action, there is a presumption that the public has acquired an easement over the dry beach, and a landowner like Severance may present evidence to rebut the presumption. *See* TEX. NAT. RES. CODE § 61.020. The "title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea[,]" and "there is imposed on the area [from mean low tide to the line of vegetation] a common law right or easement in favor of the public for ingress and egress to the sea." *Id.* Once a public beach easement is established, it is implied that the easement moves up or back to each new vegetation line, and the

state is not required to repeatedly re-establish that an easement exists up to that new vegetation line. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d at 766.

III. Rolling Easements Are Creatures of Texas Common Law

The answer to the second certified question is that the common law rather than the OBA is the source of public beachfront access easements. The OBA, however, is consistent with the common law of rolling easements and faithfully articulates the longstanding policy of the state. The OBA is not a rights-creating document but a mechanism for enforcing property rights that the state has previously and independently obtained. *See Arrington v. Mattox*, 767 S.W.2d at 958. Such easements are established by prescription, dedication, or customary and continuous use. Guided by the common law, "[t]he OBA safeguards the public's common law easement[,]" protecting the public's access to public beaches. *Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (citing TEX. NAT. RES. CODE § 61.001(8)).

IV. No Compensation Owed to Beachfront Property Owners Whose Property Is Encumbered by a Rolling Easement

The third certified question asks whether compensation is owed to landowners whose property becomes subject to a public beachfront access easement after it rolls with natural shifts in the shoreline. When an act of nature destroys a piece of coastal property, no compensation is owed because there is no taking by the government. Likewise, when an act of nature changes the boundaries of the beach, no compensation is owed when the government seeks to protect the already existent public right of access to the beach. The government is merely enforcing an easement whose

boundaries have shifted. The enforcement of rolling easements does not constitute a physical taking nor does it constitute a regulatory taking. Pre-existing rolling easements affect a property right that the landowner never owned, namely, excluding the public from the beach. Because no property is taken, no compensation is owed.

A. No Physical Taking

The Texas Constitution guarantees that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I § 17. Texas landowners may assert an inverse condemnation claim "when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property." *Westgate Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). By enforcing a pre-existing rolling easement, the state is not physically taking private property.

For property purchased after October 1986, landowners were expressly warned that a pre-existing public easement of the dry beach restricts the landowner's right to develop, maintain, or repair structures that would prevent the public from using and accessing the public beach. *See* TEX. NAT. RES. CODE § 61.025. The right to exclude the public from the dry beach was never in the landowner's bundle of sticks when she purchased the property.[16] With such express notice, the state's enforcement of the public easement cannot be said to diminish the landowner's reasonable

[16] Severance purchased her property in 2005, and thus her land sales contract contained this express deed restriction. Severance was also put on notice before the purchase on two separate occasions. In 1999, the General Land Office released a list of homes, including Severance's, that were located seaward of the vegetation line following Tropical Storm Frances. In 2004, the property was again listed as being on the public beach but subject to a two-year moratorium order.

investment-backed expectations. *See Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). The state owes no compensation for a property right that the landowner does not actually possess.

For property purchased before 1986, enforcement of a pre-existing rolling easement also does not constitute a physical taking. First, rolling easements are rooted in the common law as a single easement with dynamic boundaries. The public beach has been "historically dedicated to the public use." *Brannan*, 2010 WL 375921, at *21. It is not state action that subjects beachfront property to this rolling easement but rather a *force majeure*. *Id*. The state merely enforces what has long been established in the common law. Almost every case addressing this issue agrees there is no taking and that the landowner should bear the risks assumed by purchasing property near the beach. "There is nothing in the [OBA] which seeks to take rights from an owner of land . . . . [I]t merely furnishes a means by which the members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription or which may have been retained by continuous right." *Seaway Co.*, 375 S.W.2d at 930; *see Arrington v. Mattox*, 767 S.W.2d at 958; *Moody*, 593 S.W.2d at 379; *Brannan*, 2010 WL 375921 at *19–20.

B. No Regulatory Taking

The enforcement of rolling easements does not constitute a regulatory taking. "When the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1994) (establishing the total takings test).[17] But there are two exceptions. First, if the regulation restricts a use the owner does not have in his title, no taking has occurred. *Id.* at 1027. Second, if state common law nuisance and property principles prohibit the desired use of the land, no taking has occurred. *Id.* at 1029.

The first exception certainly applies to property purchased after 1986. As explained above, the landowner cannot receive compensation for a property right that she never owned. Beachfront property purchasers whose sales contracts contained such a deed restriction never owned the right to exclude the public from using and enjoying the dry beach.

The second exception involves the state's common law nuisance laws and other background property principles that prohibit or restrict the landowner's specific use of property. As explained above, the rolling easement is rooted in background principles of Texas common law and is supported by the OBA and the Texas Constitution. Due to natural processes, as land moves seaward of the vegetation line, that strip of land becomes subject to the pre-existing public easement established by either prescription, dedication, or continuous and customary use. This strip of land is the servient estate, encumbered by the dominant estate, the rolling easement, to reasonably fulfill its stated purpose. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963). The common law has always restricted a landowner's use of the dry beach. *Arrington v. Mattox*, 767 S.W.2d at 958 (citing Texas cases that found no taking and recognizing "fundamental distinction between a

[17] After the *Lucas* decision, which found a taking, and Hurricane Hugo, the South Carolina Legislature amended their Beach Management Act to incorporate a rolling easement on any lot that moved seaward of the setback line, specifically to avoid takings claims. The easement permits some structures but maintains the right to implement some erosion control methods. National Oceanic and Atmospheric Administration, Erosion Control Easements, http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_easements.html. (last visited Nov. 3, 2010).

governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use"); *see Lucas*, 505 U.S. at 1028–29 (finding enforcement of existing easement not a taking).

C. Texas Nuisance Law

Texas nuisance laws permit the enforcement of rolling easements without requiring compensation. This area of the law imposes a general limitation on landowners. Property owners may not use their property in a way that unreasonably interferes with the property rights of others. *See Schneider Nat'l. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004). An action that does not begin as a nuisance may nevertheless become a nuisance due to changing circumstances. *See Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 685–86 (Tex. 1975) (finding that heavy rains causing previously discharged pollutants from upstream manufacturing plant to spread more broadly across downstream land to be a nuisance). Movements of the coast change circumstances and thus affect property rights of both private beachfront owners and the public. As a result, a beach house that moves seaward of the vegetation line because of natural changes to the coast becomes a nuisance, restricting the public's ability to use and enjoy the beach.

In this unique area of property law, rolling beachfront easements are unlike any other type of easement abutting a waterway. They are not only subject to the ebb and flow of the tide but also the ocean's surging waves. The ocean is unlike any other body of water.[18] The primary movement

[18] The Court correctly declines to apply the traditional avulsion rule to the mean high tide boundary established in *Luttes*. I would also extend this to the vegetation line. The reason avulsion does not change title on rivers does not extend to coastline. Generally, avulsive events create an entirely new river bed, and "just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations [or states], not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary." *Nebraska v. Iowa*, 143 U.S. 359, 362

of the coastline is through hurricanes and tropical storms.[19] Requiring the state to re-establish public beach easements after storms places an unreasonable burden on the state, a burden that was actually assumed by the landowner who purchased property near the beach.

V. Conclusion

The Texas coastline is constantly changing and the risks of purchasing property abutting the ocean are well known. The OBA further mandates the disclosure of these risks in coastal purchase contracts. Insurance is available for some of these risks.[20] It is unreasonable, however, to require the state and its taxpayers to shoulder the burden of these risks. In my view, coastal property is encumbered by a pre-existing rolling easement rooted in the common law. The state is not responsible for the ocean's movement and therefore owes no compensation when enforcing this existing easement. Because the Court requires the state to re-establish its easement after avulsive

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(1892). However, the running water at issue is the Gulf of Mexico, and it does not flow in a given channel *between* banks but rather constantly washes against the beaches. Here, the "stone pillar" is the Gulf of Mexico, and it stands as the boundary, not because of its specific, fixed location, but rather because it is the Gulf. Further, avulsive events on rivers merely cuts a new river bed, separating identifiable land from its original tract. Here, when an avulsive event occurs on the beach, there is no identifiable land. Rather, the previous beach becomes entirely submerged under the Gulf, and land previously above the vegetation line is now seaward of it.

[19] Since 1851, Galveston Island has endured more than fifty tropical storms and at least twenty-three hurricanes. The worst hurricane of the nineteenth century, however, was on October 6, 1837, leaving a two thousand mile destruction path. The Hurricane of 1900, "The Great Storm," still holds title as the deadliest natural disaster to strike the United States. It claimed the lives of at least eight thousand and left thirty thousand homeless. In 1983, Hurricane Alicia eroded fifty to two hundred feet of Galveston's coastline.

[20] The National Flood Insurance Program, and the Texas counterpart, the Texas Windstorm Insurance Association, helps shield beachfront property owners from the risks of a naturally changing coastline. Michael Hofrichter, *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT'L & ENERGY L. & POL'Y J. 147, 151 (2009). Also, the U.S. Tax Code provides for certain casualty loss deductions for buildings damages from storms along the coast. *Id*. at 150 (citing I.R.C. § 165).

events and to pay landowners for risks they have voluntarily assumed, I must dissent. I would instead follow the constitution and the long-standing public policy of this state and hold that the beaches of Texas are, and forever will be, open to the public.

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David M. Medina
Justice

Opinion Delivered: March 30, 2012