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A LINE IN THE SAND: BALANCING THE TEXAS OPEN BEACHES ACT AND COASTAL DEVELOPMENT

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INTRODUCTION

With the projected substantial increase in Texas' population¹, the demand for coastal land development on the Texas Coast will escalate as the public seeks refuge from a growing urban society for the comfort of sandy beaches and warm gulf waters. Texas' Gulf Coast beaches are among the last in the United States to be developed, but as large-scale developers from around the world eye this uncharted territory, balancing this expansion with the public's right to access the beach will be an ongoing challenge. As this development intensifies, so does the debate over beach access, and the Texas Open Beaches Act (OBA)² is the pivotal law in this debate. The OBA continues to be one of the most misunderstood Texas laws. Different sides of the debate have fashioned their own interpretation of the meanings of such terms as "line of vegetation", "unrestricted access", "encroachment", "dune restoration", and "critical dunes". The universal thread that weaves this debate from one generation to the next is the powerful force of erosion which, driven by both anthropogenic and natural causes, gnaws away at the defining line in the sand.

BACKGROUND

Historically Texans drove along the beach for miles, and in some cases the beach was used as a roadway between coastal communities; therefore, driving and parking along the beach developed into a cultural phenomenon which is still popular today. In truly Texas fashion, the impetus of the OBA had roots in the oil industry involving disputes over mineral right ownership. Beachfront and bay-front landowners contested the



common law property boundary that established the line of vegetation as the state lands boundary. The *Luttes vs. State* Supreme Court ruling changed the boundary between beachfront private property and state owned submerged lands to the Mean High Tide Line. Once this ruling was made, beachfront landowners began constructing fences and barriers to restrict vehicular access on the beach, and consequently the public responded

¹ It is estimated that the population will nearly double to 43 million in the next 50 years, according to Texas Water Development Board's 2007 State Water Plan.

² Natural Resources Code §61.001, Acts of the 56th Legislature, 2nd Called Session, 1959, Chapter 19, page 108. (Codified in 1977 as Subchapter B, Chapter 61, Texas Natural Resources Code).

with discontent. The state legislature took action in a special session by enacting the OBA in 1959. The OBA merely defined the public's common law rights, and did not give the public ownership nor did it create rights in private property, but rather it described the existing rights for public easement across private land. Littoral owners³ actually hold title to the dry beach above Mean High Tide (MHT), but if the public historically used and accessed the beach then they maintained that right of access.

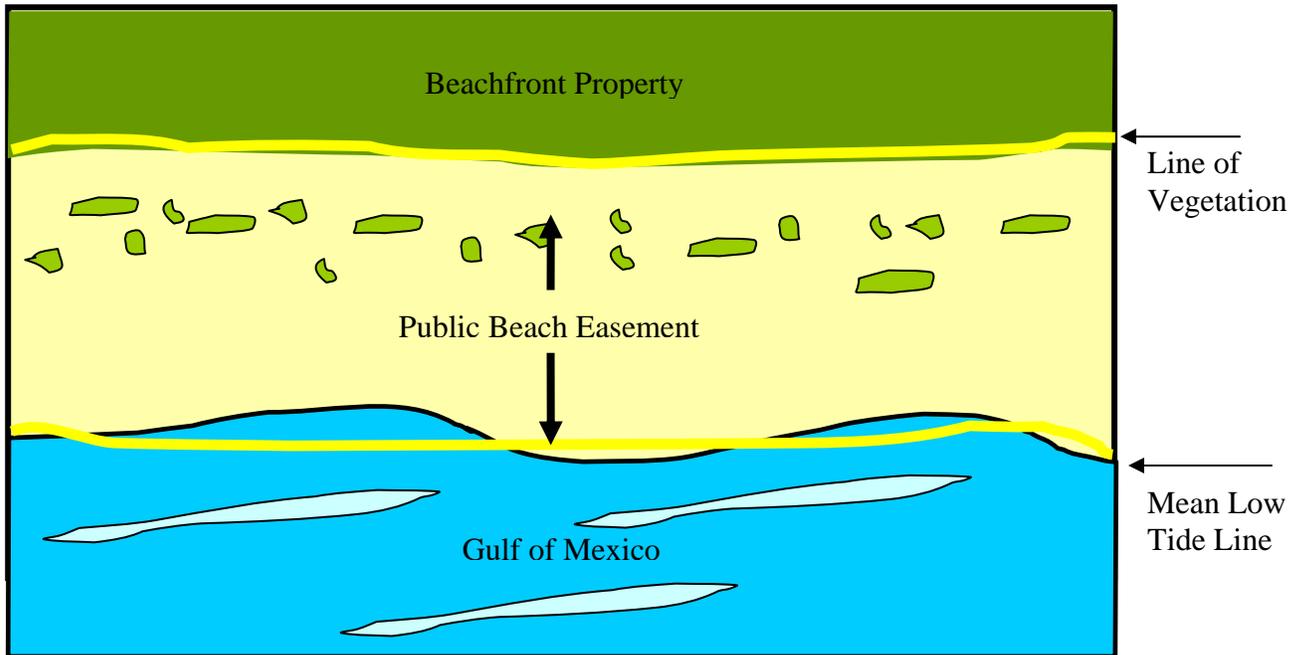


Figure 1. An illustration of the public beach⁴ easement across private property, Line of Vegetation, and Mean Low Tide Line

The OBA was authored during a time when there was little development on the Texas Coast, and foresight for the OBA did not include multimillion-dollar homes and condos. As development intensified, local communities struggled with enforcement of the OBA, and the duel between the property owners and beachgoers escalated. As property owners and developers systematically closed vehicular access to the beach, the public reacted by citing the OBA and questioned the local government's enforcement of the Act. In an effort to assist the local governments with increased beachfront development while balancing the economic importance beach access⁵, the OBA was amended in 1991 to give

³ As defined by §61.001 (6) means the owner of land adjacent to the shore and includes a lessee, licensee, or anyone acting under the littoral owner's authority.

⁴ Defined in §61.001 (8) 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 or 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 a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

⁵ According to a report by the Texas Shore and Beach Association, beach related expenditures contribute \$7.7 billion to the state and local communities in Texas each year.

the Commissioner of the General Land Office (GLO) authority to promulgate rules⁶, thus prompting the creation of the GLO's Beach/Dune rules. The rules established guidelines for local government to develop Beach Access and Dune Protection Plans consistent with the Beach/Dune (B/D) rules.

Once the plans were adopted, new challenges arose with overlaying these rules onto existing private developments. As an example, many of the private developments in Galveston established pedestrian only beaches without adequately providing parking for vehicles in an attempt to curtail the public's use of the beaches. Numerous other issues were encountered such as lack of space to provide public parking, inadequate signage defining public



access points and the beachfront property owner's attitude of NIMBY (Not In My BackYard) or rather NIFOMC (Not In Front Of My Condo). Although it has been more than 10 years since the establishment of the B/D rules, the GLO and local governments still struggle with enforcing the OBA and the B/D rules. But there are now positive signs that Developers are working in cooperation with the local and state governments to incorporate public beach access in the preliminary plans for development. As development intensifies on the coast, the lack of available land will create densely populated coastal areas, and local communities will grapple with providing adequate beach access for the public, especially vehicular access.

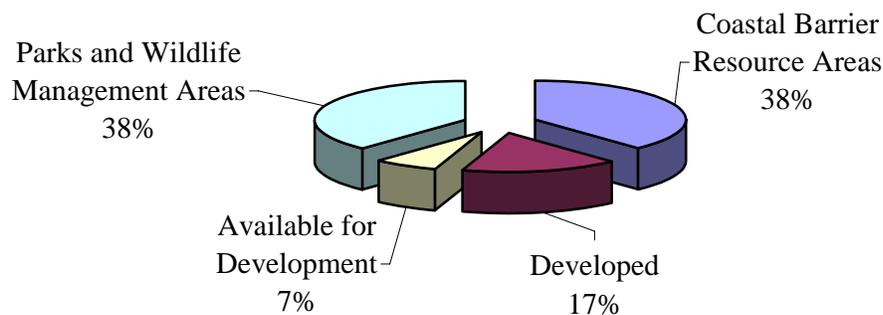


Figure 2. Out of 367 miles of coastline in Texas, approximately 80 miles are freely available for development today. Coastal Barrier Resource Areas do not prohibit development but rather economically discourage it through lack of federal insurance for structures, and federal funding is not provided for development of infrastructure within these areas.

⁶ §61.011 (d) of the Texas Natural Resources Code

The other major issue Texas faces is the effects of erosion on beachfront property and the location of homes seaward of the line of vegetation. These homes, as defined by the OBA, are located on the public beach easement and are subject to enforcement. In 2004, after various major high tide events and tropical systems caused substantial erosion on the upper Texas Coast and placed numerous homes seaward of the vegetation line, Texas General Land Office Commissioner Jerry Patterson enacted a plan to address this ongoing issue. First through legislative action, he placed 116 homes on a moratorium list, which protected these homes from enforcement actions. This action was intended to allow the GLO to further investigate ways to solve this issue and to see if the beach system would recover and the LOV would migrate to the front of the homes.

Unfortunately, Texas experienced significant erosion during the 2005 hurricane season and some of the homes subject to the moratorium suffered greater erosion. In June of 2006 the moratorium expired and Commissioner Patterson developed his *Plan for Texas Open Beaches*⁷ in which he outlined the next steps for enforcement. In this report, he defined the public beach easement as a rolling easement that is never fixed and is not subject to human manipulation. Commissioner Patterson clearly identified what generated enforcement action for structures on the moratorium list. The guidelines prioritized structures for removal by categorizing the immediate threat to public health and safety. For homes that were 100% seaward of the LOV or on state submerged lands, the Commissioner offered up to \$50,000 each for removal or relocation. In total the Land Office allocated \$1.3 million for this effort, and the process of removing homes from state owned submerged lands and the public beach easement continues today.



MANAGEMENT IMPLICATIONS

As available land area for development is reduced, regional coastal communities will become more densely populated. With this shift in development, local governments will be faced with more pressure to convert vehicular access to pedestrian only beaches. The OBA allows this shift, but the local and state governments must ensure that public access is preserved and enhanced.

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⁷ A written report published in June of 2006.

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