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

CERTIFIED QUESTION ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Argued November 19, 2009

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

JUSTICE MEDINA delivered a dissenting opinion, in which JUSTICE LEHRMANN joined.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

This case comes before us in the form of certified questions from the United States Court of Appeals for the Fifth Circuit. Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we answer the following questions:

1. Does Texas recognize a "rolling" public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line,

without proof of prescription, dedication or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the [Open Beaches Act]?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

Severance v. Patterson, 566 F.3d 490, 503–04 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009).[1] The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

Oceanfront beaches change every day. Over time and sometimes rather suddenly, they shrink or grow, and the tide and vegetation lines make corresponding shifts. Beachfront property lines retract or extend as previously dry lands become submerged by the surf or become dry after being submerged. Accordingly, public easements that burden these properties along the sea are also dynamic. They may shrink or expand gradually with the properties they encumber. Once established, we do not require the State to re-establish easements each time boundaries move due to gradual and imperceptible changes to the coastal landscape. However, when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public

[1] We received amicus briefs from the Texas Landowners Council; the Texas Wildlife Foundation; the Surfrider Foundation; the Galveston Chamber of Commerce; Matthew J. Festa, Professor, South Texas College of Law; and Property Owners in Surfside Beach, Texas.

easement on the public beach does not "roll" inland to other parts of the parcel or onto a new parcel of land. Instead, when land and the attached easement are swallowed by the Gulf of Mexico in an avulsive event, a new easement must be established by sufficient proof to encumber the newly created dry beach bordering the ocean. These public easements may gradually change size and shape as the respective Gulf-front properties they burden imperceptibly change, but they do not "roll" onto previously unencumbered private beachfront property when avulsive events cause dramatic changes in the coastline.

Legal encumbrances or reservations on private property titles on West Beach in Galveston Island dating from original land grants during the Republic of Texas or at the inception of the State of Texas could provide a basis for a public easement by custom or reveal inherent restrictions on the titles of the privately owned portions of these beaches. Under Mexican law, which governed Texas prior to 1836, colonization of beachfront lands was precluded for national defense and commercial purposes without approval of the "federal Supreme Executive Power" of Mexico, presumably the Mexican President. However, in 1840 the Republic of Texas, as later confirmed by the State of Texas, granted private title to West Galveston Island without reservation by the State of either title to beachfront property or any public right to use the now privately owned beaches. Public rights to use of privately owned property on West Beach in Galveston Island, if such rights existed at that time, were extinguished in the land patents by the Republic of Texas to private parties. In some states, background principles of property law governing oceanfront property provide a basis for public ownership or use of the beachfront property. Such expansive principles are not extant in the origins of Texas. Indeed, the original transfer by the Republic to private parties forecloses the

argument that background principles in Texas common law provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.

The Texas Open Beaches Act (OBA) provides the State with a means of enforcing public rights to use of State-owned beaches along the Gulf of Mexico and of privately owned beach property along the Gulf of Mexico where an easement is established in favor of the public by prescription or dedication, or where a right of public use exists "by virtue of continuous right in the public." TEX. NAT. RES. CODE §§ 61.012, .013(a). When promulgated in 1959, the OBA did not purport to create new substantive rights for public easements along Texas's ocean beaches and recognized that mere pronouncements of encumbrances on private property rights are improper. Because we find no right of public use in historic grants to private owners on West Beach, the State must comply with principles of law to encumber privately owned realty along the West Beach of Galveston Island.

I. Background

In April 2005, Carol Severance purchased three properties on Galveston Island's West Beach. "West Beach" extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive property, is at issue in this case.[2] A rental home occupies the property. The parties do not dispute that no easement has ever been established on the Kennedy Drive property. A public easement for use of a privately owned parcel

[2] Severance owned three properties on West Beach—on Gulf Drive, Kennedy Drive and Bermuda Beach Drive. Her original lawsuit included all three properties, but she only appealed the trial court's judgment dismissing her claims as to two properties. After oral argument to this Court on the certified questions, Severance sold one of two remaining homes at issue in a FEMA-funded buy-out program. Only the Kennedy Drive property remains subject to this litigation.

seaward of Severance's Kennedy Drive property preexisted her purchase. That easement was established in a 1975 judgment in the case of *John L. Hill, Attorney General v. West Beach Encroachment, et al.*, Cause No. 108,156 in the 122nd District Court, Galveston County, Texas. Five months after Severance's purchase, Hurricane Rita devastated the property subject to the easement and moved the line of vegetation landward. The entirety of the house on Severance's property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several State officials in federal district court. She argued that the State, in attempting to enforce a public easement, without proving its existence, on property not previously encumbered by an easement, infringed her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

The State officials filed motions to dismiss on the merits and for lack of jurisdiction. The district court dismissed Severance's case after determining her arguments regarding the constitutionality of a rolling easement were "arguably ripe," but deficient on the merits. Not presented with the information concerning the Republic's land grant, the court held that, according to Texas property law, an easement on a parcel landward of Severance's property pre-existed her ownership of the property and that after an easement to private beachfront property had been established between the mean high tide and vegetation lines, it "rolls" onto new parcels of realty

according to natural changes to those boundaries. *Severance v. Patterson*, 485 F. Supp. 2d 793, 802–04 (S.D. Tex. 2007). Severance only appealed her Fourth and Fifth Amendment challenges to the rolling easement theory. On appeal, the United States Court of Appeals for the Fifth Circuit determined her Fifth Amendment takings claim was not ripe, but certified unsettled questions of state law to this Court to guide its determination on her Fourth Amendment unreasonable seizure claim. *Severance*, 566 F.3d at 500.

A. Texas Property Law in Coastal Areas

We have not been asked to determine whether a taking would occur if the State ordered removal of Severance's house, although constitutional protections of property rights fortify the conclusions we reach. The certified questions require us to address the competing interests between the State's asserted right to a migratory public easement to use privately owned beachfront property on Galveston Island's West Beach and the rights of the private property owner to exclude others from her property. The "law of real property is, under [the federal] Constitution, left to the individual states to develop and administer." *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592, 2612 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 377 (1977) (explaining that "subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law" (citation omitted)).

Texas has a history of public use of Texas beaches, including on Galveston Island's West Beach. *See, e.g.*, *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (holding that "[n]o one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach by custom"), *cert. denied*, 481 U.S. 1024 (1987); *Feinman v. State*, 717 S.W.2d 106, 113 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (discussing evidence presented at the trial court that showed "public use of West Beach since before Texas gained its independence from Mexico"). These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas. But that history does not extend to use of West Beach properties, recently moved landward of the vegetation line by a dramatic event, that before and after the event have been owned by private property owners and were not impressed with pre-existing public easements. On one hand, the public has an important interest in the enjoyment of Texas's public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.

1. Defining Public Beaches in Texas

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property. TEX. NAT. RES. CODE § 61.011(a). It defines public beaches as:

> 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 a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom. This definition does not include a beach that is not accessible by a public road or public ferry as provided in Section 61.021 of this code.

Id. § 61.001(8).[3] Privately owned beaches may be included in the definition of public beaches. *Id.* The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border on the Gulf of Mexico. *Id.* The OBA does not specifically refer to inland bodies of water. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement explained below. *Id.* The area from mean low tide to mean high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach."

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[3] In 2009, Texas voters approved an amendment to the Constitution to protect the public's right to "state-owned beach[es]" of the Gulf of Mexico. TEX. CONST. art. I, § 33. It protects public use of public beaches which, like the OBA, are defined as State-owned beaches and privately owned beachland "to which the public has acquired a right of use or easement . . . ." Although not at issue in this case, the amendment provides:

> Section 1. Article I, Texas Constitution, is amended by adding Section 33 to read as follows:
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> Sec. 33. (a) In this section, "public beach" means a state-owned beach bordering on the seaward shore of the Gulf of Mexico, extending from mean low tide to the landward boundary of state-owned submerged land, and any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired a right of use or easement to or over the area by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law.
>
> (b) The public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public.
>
> (c) The legislature may enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments.
>
> (d) This section does not create a private right of enforcement.

The second requirement for a Gulf-shore beach to fall within the definition of "public beach" is the public must have a right to use the beach. This right may be "acquired" through a "right of use or easement" or it may be "retained" in the public by virtue of continuous "right in the public since time immemorial." *Id*.

The wet beaches are all owned by the State of Texas,[4] which leaves no dispute over the public's right of use. *See Luttes v. State,* 324 S.W.2d 167, 169, 191–92 (Tex. 1958); TEX. NAT. RES. CODE §§ 61.011, .161 (recognizing the public policies of the public's right to use public beaches and the public's right to ingress and egress to the sea). However, the dry beach often is privately owned and the right to use it is not presumed under the OBA.[5] The Legislature recognized that the existence of a public right to an easement in privately owned dry beach area of West Beach is dependant on the government's establishing an easement in the dry beach or the public's right to use of the beach "by virtue of continuous right in the public since time immemorial . . . ." TEX. NAT RES. CODE § 61.001(8). Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. *See id.* Thus, a "public beach" includes but is broader than beaches owned by the State in those instances in which an easement for

[4] State-owned beaches are the strips of coastal property "between mean low tide and mean high tide, which runs along the entire Gulf Coast, regardless of whether the property immediately landward is privately or state owned." Richard J. Elliott, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 384 (1976).

[5] The OBA includes two stated presumptions for purposes of ingress and egress to the sea. It provides that the title of private owners of dry beach area in Gulf beaches "does not include the right to prevent the public from using the area for ingress and egress to the sea." TEX. NAT. RES. CODE § 61.020(a)(1). In 1991, the OBA was amended to add a second presumption that imposed "on the area a common law right or easement in favor of the public for ingress and egress to the sea." *Id.* § 61.020(a)(2). Although the constitutionality of these presumptions has been questioned, that issue is not before us. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929–30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

public use is established in the dry beach area. *Id*. Public beaches include Gulf-front wet beaches, State-owned dry beaches and private property in the dry beaches on which a public easement has been established.

In this case, before Hurricane Rita, Severance's Kennedy Drive property was landward of the vegetation line. After Hurricane Rita, because the storm moved the vegetation line landward, the property between Severance's land and the sea that was subject to a public easement was submerged in the surf or became part of the wet beach. Severance's Kennedy Drive parcel and her house are no longer behind the vegetation line but neither are they located in the wet beach owned by the State. At least a portion of Severance's Kennedy Drive property and all of her house are now located in the dry beach. The question is did the easement on the property seaward of Severance's property "roll" onto Severance's property? In other words, is Severance's house now located on part of the "public beach" and thereby subject to an enforcement action to remove it under the OBA? From the Fifth Circuit's statement of the case, we understand that no easement has been proven to exist on Severance's property under the OBA or the common law.[6] We also presume that there are no express limitations or reservations in Severance's title giving rise to a public easement. The answer to the rolling easement question thus turns on whether Texas common law recognizes such an inherent limitation on private property rights along Galveston's West Beach, and if not, whether principles of Texas property law provide for a right of public use of beaches along the Gulf Coast.

[6] That issue is not before us, but it may be addressed in the federal courts.

2. History of Beach Ownership Along the Gulf of Mexico

Long-standing principles of Texas property law establish parameters for our analysis. It is well-established that the "soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people." *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943); *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920) ("For our decisions are unanimous in the declaration that by the principles of the civil and common law, soil under navigable waters was treated as held by the state or nation in trust for the whole people."[7]); *De Meritt v. Robison Land Comm'r*, 116 S.W. 796, 797 (Tex. 1909) (holding "[i]n the contemplation of law," soil lying below the line of ordinary high tide, "was not land, but water"); *see also* TEX. NAT. RES. CODE § 11.012(c) ("The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide."). These lands are part of the public trust, and only the Legislature can grant to private parties title to submerged lands that are part of the public trust. *Lorino*, 175 S.W.2d at 414; *see also TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182–83 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that lands submerged in the Gulf belong to the State) (citations omitted), *cert. denied*, ___ U.S. ___, 129 S. Ct. 899 (2009).

[7] "The bays, inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters.'" *Lorino*, 175 S.W.2d at 413 (citing *City of Galveston v. Mann*, 135 Tex. 319 (1940); *Crary v. Port Author Channel & Dock Co.*, 92 Tex. 275 (1898)).

Current title to realty and corresponding encumbrances on the property may be affected in important ways by the breadth of and limitations on prior grants and titles. We review the original Mexican and Republic of Texas grants and patents to lands abutting the sea in West Galveston Island.[8] The Republic of Texas won her independence from Mexico in 1836. Mexico's laws prohibited colonization of land within ten leagues of the coast without approval from the president. General Law of Colonization, art. 4 (Mex., Aug. 18, 1824), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897 [hereinafter "GAMMEL, THE LAWS OF TEXAS"], at 97, 97 (Austin, Gammel Book Co. 1898).[9] Title to West Beach property was first granted in November 1840 by the Republic of Texas to Levi Jones and Edward Hall in a single patent (the "Jones and Hall Grant"). *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 928 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).[10] After admission to the Union in 1845, the State of Texas by legislation in 1852 and 1854 first confirmed the validity of the Jones and Hall Grant and then disclaimed title to those lands. In 1852, the State declared that it "hereby releases and relinquishes forever, all of her title to such lots on Galveston Island as are now in the actual possession and occupation of persons who purchased under the [Jones and Hall Grant]." Act approved Feb. 16, 1852, 4th Leg., R.S., ch. 119, § 1, 1852 Tex. Gen. Laws 142, 142, *reprinted in* 3 GAMMEL, THE LAWS OF TEXAS, at 1020, 1020; Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125, 125–26, *reprinted in* 4 GAMMEL,

[8] The briefs and the record do not address the early land grant of Galveston's West Beach.

[9] The Mexican federal government "feared that an influx of foreigners along the border of the United States, or along the coast, might become too powerful, and betray the country to a foreign power." LEWIS N. DEMBITZ, A TREATISE ON LAND TITLES IN THE UNITED STATES § 73, at 558 (1895).

[10] *See also* Jones and Hall Grant Papers, *available at* http://wwwdb.glo.state.tx.us/central/LandGrants/LandGrantsSearch.cfm (search abstract number 121, Galveston County).

THE LAWS OF TEXAS, at 125, 125–26 (confirming the 1840 Jones and Hall Grant and "disclaim[ing] any title in and to the lands described in said patent, in favor of the grantees and those claiming under them").[11] In 1854, the State affirmed its intent to grant ownership of all land in West Beach up to the public trust to Jones and Hall with no express reservation of either title to the property or a public right to use the beaches.[12] The government relinquished all title in the Jones and Hall Grant, without reserving any right to use of the property. The Republic could have reserved the right of the public to use the beachfront property, "but the plain language of the grant shows the Republic of Texas did not do so." *Seaway Co.*, 375 S.W.2d at 929. All the Gulf beachland in West Galveston Island that extended to the public trust was conveyed to private parties by the sovereign Republic of Texas as later affirmed by the State of Texas.

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[11] The act reads: "Be it enacted by the Legislature of the State of Texas, That the patent issued by the Commissioner of the General Land[O]ffice, on the twenty-eighth day of November, eighteen hundred and forty, to Levi Jones and Edward Hall, for lands on Galveston Island, be, and the same is hereby confirmed, and the State of Texas disclaims any title in and to the lands described in said patent, in favor of the grantees and those claiming under them." Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125, 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 125, 125–26.

[12] There is some historical evidence that the Republic made an abortive attempt to parcel and sell title to lands on West Galveston Island starting in 1837. *See* Act approved June 12, 1837, 1st Cong., 1 Repub. Tex. Laws 267, 267 (1838), *reprinted in* 1GAMMEL, THE LAWS OF TEXAS, at 1327, 1327 (authorizing sales of title to lots on Galveston Island by auction); Annual Report of the Secretary of the Treasury, Nov. 1839, *reprinted in* 3 HARRIET SMITHER, JOURNALS OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS 1839–1840, at 35, 45 (Austin, Texas State Library 1931) (reporting treasury receipts "on account Sales Galveston Island"). In an 1860 mandamus proceeding, in light of then-lingering questions about the validity of Jones and Hall's title to West Beach, a district court directed the land commissioner to issue a single land patent to Jones and Hall for all of West Beach. *See Franklin v. Kesler*, 25 Tex. 138, 142–43(1860) (describing the patent issued pursuant to mandamus). The February 15, 1852 act expressly vested title in those claiming successor title under the Jones and Hall Grant, and the February 8, 1854 act confirms the Jones and Hall Grant in its entirety. Further, *Wilcox v. Chambers* confirmed that if title of coastal lands were granted to foreigners (non-Mexican individuals) prior to 1840, the grants are presumed void absent specific approval by the Mexican President. 26 Tex. 181, 187 (1862).

Legislation and a patent (the "Menard Grant") conveyed oceanfront property on the east side of Galveston Island to private parties in 1836 and 1838. *Mayor, Aldermen & Inhabitants of the City of Galveston v. Menard*, 23 Tex. 349, 391 (1859).

Having established that the State of Texas owned the land under Gulf tidal waters, the question remained how far inland from the low tide line did the public trust—the State's title—extend. We answered that question in *Luttes v. State*. This Court held that the delineation between State-owned submerged tidal lands (held in trust for the public) and coastal property that could be privately owned was the "mean higher high tide" line under Spanish or Mexican grants and the "mean high tide" line under Anglo-American law.[13] 324 S.W.2d 167, 191–92 (Tex. 1958). The wet beach is owned by the State as part of the public trust, and the dry beach is not part of the public trust and may be privately owned. *See generally id*. Prior to *Luttes*, there was a question whether the public trust extended to the vegetation line. *Luttes* established the landward boundary of the public trust at the mean high tide line. *Luttes*, 324 S.W.2d at 187–88.

These boundary demarcations are a direct response to the ever-changing nature of the coastal landscape because it is impractical to apply static real property boundary concepts to property lines that are delineated by the ocean's edge. The sand does not stay in one place, nor does the tide line. While the vegetation line may appear static because it does not move daily like the tide, it is constantly affected by the tide, wind, and other weather and natural occurrences.

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[13] Severance's parcel is not subject to Spanish or Mexican law. So, we refer to the mean high tide line throughout this opinion. On January 20, 1840, Texas adopted the common law of England as its rule of decision, to the extent it was not inconsistent with the Constitution of the Republic of Texas or acts of its Congress. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3, 3–4, *reprinted in* 2 GAMMEL, THE LAWS OF TEXAS, at 177, 177–80; *Miller v. Letzerich*, 49 S.W.2d 404, 408 (Tex. 1932) (explaining that "the validity and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants"). Because the Jones and Hall Grant was made in November 1840, land granted under that patent is governed by the common law. *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEX. L. REV. 523 (1960) (discussing the history of Spanish and Mexican land patents and common law basis for shoreline boundaries).

A person purchasing beachfront property along the Texas coast does so with the risk that their property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust. We explained in *State v. Balli*:

> Any distinction that can be drawn between the alluvion of rivers and accretions cast up by the sea must arise out of the law of the seashore rather than that of accession and be based . . . upon the ancient maxim that the seashore is common property and never passes to private hands . . . . [This] remains as a guiding principle in all or nearly all jurisdictions which acknowledge the common law . . . .

190 S.W.2d 71, 100 (Tex. 1945). Likewise, if the ocean gradually recedes away from the land moving the high tide line seaward, a private property owner's land may increase at the expense of the public trust. *See id.* Regardless of these changes, the boundary remains fixed (relatively) at the mean high tide line. *See Luttes*, 324 S.W.2d at 191–93. Any other approach would leave locating that boundary to pure guesswork. *See Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 n.1 (Tex. 1976).

In 1959, the Legislature enacted the Open Beaches Act to address responses to the *Luttes* opinion establishing the common law landward boundary of State-owned beaches at the mean high tide line. The Legislature feared that this holding might "give encouragement to some overanxious developers to fence the seashore" as some private landowners had "erected barricades upon many beaches, some of these barricades extending into the water." TEX. LEGIS. BEACH STUDY COMM., 57TH LEG., R.S., THE BEACHES AND ISLANDS OF TEXAS [hereinafter "BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS"] 1 (1961), *available at* http://www.lrl.state.tx.us/scanned/interim/56/56_B352.pdf; TEX. LEG. INTERIM BEACH STUDY

COMM., 65TH LEG., R.S., FOOTPRINTS ON THE SANDS OF TIME [hereinafter "BEACH STUDY COMM., FOOTPRINTS"] 22 (1969), *available at* http://www.lrl.state.tx.us/scanned/interim/60/B352.pdf. The OBA declared the State's public policy for the public to have "free and unrestricted access" to State-owned beaches, the wet beach, and the dry beach where the public "has acquired" an easement or other right to use that property. TEX. NAT. RES. CODE § 61.011(a). To enforce this policy, the OBA prohibits anyone from creating, erecting, or constructing any "obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public" to access Texas beaches where the public has acquired a right of use or easement. *Id.* § 61.013(a). The Act authorizes the removal of barriers or other obstructions on

> state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico *if the public has acquired* a right of use or easement to or over the area by prescription, dedication, or has *retained a right by virtue of continuous right in the public*.

Id. §§ 61.012, .013(a) (emphasis added).

The OBA does not alter *Luttes.* It enforces the public's right to use the dry beach on private property where an easement exists and enforces public rights to access and use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. BEACH STUDY COMM., FOOTPRINTS 22 (stating that the "statute cannot truly be said to create any new rights"); Richard J. Elliott, *Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 392 (1976) ("In terms of pure substantive law, the Open Beaches Act probably creates no rights in the public which did not previously exist under the common law."). In promulgating the OBA, the Legislature seemed careful to preserve private property rights by emphasizing that the

enforcement of public use of private beachfront property can occur when a historic right of use is retained in the public or is proven by dedication or prescription. *See* TEX. NAT. RES. CODE § 61.013(a), (c). The OBA also specifically disclaims any intent to take rights from private owners to Gulf-shore beach property. *Id.* § 61.023; *see Seaway Co.*, 375 S.W.2d at 930 ("There is nothing in the Act which seeks to take rights from an owner of land."). Within these acknowledgments, the OBA proclaims that beaches should be open to the public. Certainly, the OBA guards the right of the public to use public beaches against infringement by private interests. But, as explained, the OBA is not contrary to private property rights at issue in this case under principles of Texas law. The public has a right to use the West Galveston beaches when the State owns the beaches or the government obtains or proves an easement for use of the dry beach under the common law or by other means set forth in the OBA.[14]

In 1969, the Legislature's Interim Beach Study Committee, chaired by Senator A.R. Schwartz of Galveston County, confirmed the view that:

> [The OBA] does not, and can not, declare that the public has an easement on the beach, a right of access over private property to and from the State-owned beaches bordering on the Gulf of Mexico. *An easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner*.

[14] In 1961, The Texas Legislative Beach Study Committee further evidenced its recognition that private property rights exist in the dry beaches by proposing to the 57th Legislature that it come up with practical methods for not only procuring easements for ingress and egress to beaches but also methods of "negotiations with landowners for additional easements" for the "use and pleasure of the public, provided such lands or easements can be obtained without cost to the State." BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS xi. If Gulf-front dry beach property were State-owned or already impressed with an easement for public use (as compared to ingress and egress), negotiations to obtain them would not be necessary.

BEACH STUDY COMM., FOOTPRINTS 17. The Interim Beach Study Committee was created, among other reasons, to assure that beach development be undertaken to serve the best interests of the people of Texas and to study methods of procuring right-of-ways for roads parallel to the beaches, easements for ingress and egress to the beach, parking for beach access, methods for negotiating with landowners for additional easements, and rights for landowners to construct works for the protection of their property. *Id.* at 1–2.

B. Background on Severance's Property

Carol Severance purchased the Kennedy Drive property on Galveston Island's West Beach in 2005. The Fifth Circuit explained that "[n]o easement has ever been established on [her] parcel via prescription, implied dedication, or continuous right." 566 F.3d at 494. The State obtained the *Hill* judgment in 1975 that encumbered a strip of beach seaward of Severance's property. Severance's Kennedy Drive parcel was not included in the 1975 judgment. However, the parties dispute whether or not Severance's parcel was ever subject to a public easement.

In 1999, the Kennedy Drive house was on a Texas General Land Office (GLO) list of approximately 107 Texas homes located seaward of the vegetation line after Tropical Storm Frances hit the island in 1998. In 2004, the GLO again determined that the Kennedy Drive home was located "wholly or in part" on the dry beach in 2004, but did not threaten public health or safety and, at the time, was subject to a GLO two-year moratorium order. When Severance purchased the property, she received an OBA-mandated disclosure explaining that the property may become located on a public beach due to natural processes such as shoreline erosion, and if that happened, the State could sue seeking to forcibly remove any structures that come to be located on the public beach. *See* TEX.

NAT. RES. CODE § 61.025. Winds attributed to Hurricane Rita shifted the vegetation line further inland in September 2005. In 2006, the GLO determined that Severance's house was entirely within the public beach.

The moratorium for enforcing the OBA on Severance's properties expired on June 7, 2006. Severance received a letter from the GLO requiring her to remove the Kennedy Drive home because it was located on a public beach. A second letter reiterated that the home was in violation of the OBA and must be removed from the beach, and offered her $40,000 to remove or relocate it if she acted before October 2006. She initiated suit in federal court. The Fifth Circuit certified questions of Texas law to this Court.

II. Dynamic Public Beachfront Easements

The first certified question asks if Texas recognizes "a 'rolling' public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication, or customary rights in the property so occupied?" 566 F.3d at 504. We have never held that the State has a right in privately owned beachfront property for public use that exists without proof of the normal means of creating an easement. And there is no support presented for the proposition that, during the time of the Republic of Texas or at the inception of our State, the State reserved the oceanfront for public use. In fact, as discussed above, the Texas Legislature expressly disclaimed any interest in title obtained from the Jones and Hall Grant after our State was admitted to the Union. *See* Section I.A.2, *supra*; *see also Seaway Co.*, 375 S.W.2d at 928 ("On November 28, 1840, the Republic of Texas

issued its patent to Levi Jones and Edward Hall to 18,215 acres of land on Galveston Island. This grant covered all of Galveston Island except the land covered by the Menard Grant covering the east portion of the Island."). Therefore, considering the absence of any historic custom or inherent title limitations for public use on private West Beach property, principles of property law answer the first certified question.

Easements exist for the benefit of the easement holder for a specific purpose. An easement does not divest a property owner of title, but allows another to use the property for that purpose. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (explaining that an easement relinquishes a property owner's right to exclude someone from their property for a particular purpose) (citations omitted). The existence 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). An easement appurtenant "defines the relationship of two pieces of land"—a dominant and a servient estate. *See* 7 THOMPSON ON REAL PROPERTY § 60.02(f)(1), at 469 (David A. Thomas, ed. 2006). Because the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the easement. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963) (citation omitted); *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987).

Easement boundaries are generally static and attached to a specific portion of private property. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the

parties."); *see also* 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. "As a general rule, once the location of an easement has been established, neither the servient estate owner nor the easement holder may unilaterally relocate the servitude." JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7-30 (2009). Therefore, a new easement must be re-established for it to encumber a part of the parcel not previously encumbered. *See id.*

While the boundaries of easements on the beach are necessarily dynamic due to the composition of the beach and its constantly changing boundaries, easements for public use of privately owned dry beach do not necessarily burden the area between the mean high tide and vegetation lines when the land originally burdened by the easement becomes submerged by the ocean. They do not automatically move to the new properties; they must be proven.

Like easements, real property boundaries are generally static as well. But property boundaries established by bodies of water are necessarily dynamic. Because those boundaries are dynamic due to natural forces that affect the shoreline or banks, the legal rules developed for static boundaries are somewhat different. *See York*, 532 S.W.2d at 952 (discussing erosion, accretion, and avulsion doctrines affecting property boundaries and riparian ownership in the Houston Ship Channel).

The nature of littoral property boundaries abutting the ocean not only incorporates the daily ebbs and flows of the tide, but also more permanent changes to the coastal landscape due to weather and other natural forces.[15] Shoreline property ownership is typically delineated by boundaries such

[15] "Riparian" means "[o]f, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake)." BLACK'S LAW DICTIONARY 1352 (8th ed. 2004). "Littoral" means "[o]f or relating to the coast or shore of an ocean, sea, or lake." BLACK'S LAW DICTIONARY 952 (8th ed. 2004).

as the mean high tide and vegetation lines because they are easy to reference and locate. Sand and water are constantly moving and changing the landscape whether it is gradual and imperceptible or sudden and perceptible.

Courts generally adhere to the principle that littoral property owners gain or lose land that is gradually or imperceptibly added to or taken away from their banks or shores through erosion, the wearing away of land, and accretion, the enlargement of the land. *Id.* at 952. Avulsion, as derived from English common law, is the sudden and perceptible change in land and is said not to divest an owner of title. *Id.* We have never applied the avulsion doctrine to upset the mean high tide line boundary as established by *Luttes*.[16] 324 S.W.2d at 191.

Property along the Gulf of Mexico is subjected to seasonal hurricanes and tropical storms, on top of the every-day natural forces of wind, rain, and tidal ebbs and flows that affect coastal properties and shift sand and the vegetation line. This is an ordinary hazard of owning littoral property. And, while losing property to the public trust as it becomes part of the wet beach or submerged under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property that was not previously subject to that right of use. *See, e.g.*, *Phillips Petrol.*, 484 U.S. at 482 (discussing the importance of "honoring reasonable expectations in property

[16] Some states apply avulsion to determine that the mean high tide line as it existed before the avulsive event remains the boundary between public and private ownership of beach property after the avulsive event; therefore, allowing private property owners to retain ownership of property that becomes submerged under the ocean. *See Walton Cnty. v. Stop the Beach Renourishment*, 998 So. 2d 1102, 1116–17 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592 (2010); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 520 (Miss. 1986). We have not accepted such an expansive view of the doctrine, but, we need not make that determination in this case.

interests[,]" but ultimately holding the property owner's expectations in that situation were unreasonable). Gradual movement of the vegetation line and mean high tide line due to erosion or accretion have very different practical implications.

Like littoral property boundaries along the Gulf Coast, the boundaries of corresponding public easements are also dynamic. The easements' boundaries may move according to gradual and imperceptible changes in the mean high tide and vegetation lines. However, if an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly causing the former dry beach to become part of State-owned wet beach or completely submerged, the private property owner is not automatically deprived of her right to exclude the public from the new dry beach. In those situations, when changes occur suddenly and perceptibly to materially alter littoral boundaries, the land encumbered by the easement is lost to the public trust, along with the easement attached to that land. Then, the State may seek to establish another easement as permitted by law on the newly created dry beach to enforce an asserted public right to use private land.

It would be an unnecessary waste of public resources to require the State to obtain a new judgment for each gradual and nearly imperceptible movement of coastal boundaries exposing a new portion of dry beach. These easements are established in terms of boundaries such as the mean high tide line and vegetation line; presumably public use moves according to and with those boundaries so the change in public use would likewise be imperceptible. Also, when movement is gradual, landowners and the State have ample time to reach a solution as the easement slowly migrates landward with the vegetation line. Conversely, when drastic changes expose new dry beach and the former dry beach that may have been encumbered by a public easement is now part of the wet beach

or completely submerged under water, the State must prove a new easement on the area. Because sudden and perceptible changes by nature occur very quickly, it would be impossible to prove continued public use in the new dry beach, and it would be unfair to impose such drastic restrictions through the OBA upon an owner in those circumstances without compensation. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992) (explaining the circumstances from which an action for inverse condemnation may arise).

If the public has an easement in newly created dry beach, as with any other property, the State must prove it. Having divested title to all such West Beach property in the early years of the Republic, the State of Texas can only acquire or burden private property according to the law. Thus, a public beachfront easement in West Beach, although dynamic, does not roll. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land the easement originally attached to is eroded. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004) (referring to the right to exclude as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)). We have never held the dry beach to be encompassed in the public trust. *See Luttes*, 324 S.W.2d at 191–92.

On this issue of first impression, we hold that Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly.[17] The State, as always, may act within a valid exercise of police power to impose reasonable regulations on coastal property or prove the existence of an easement for public use, consistent with the Texas Constitution and real property law.

The dissent would reach a different result by arguing the public has the right to use the dry beach regardless of the boundaries of private property or the constitutional protections accorded those rights. That approach would raise constitutional concerns. "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citation omitted); *see* Elliott, 28 BAYLOR L. REV. at 385–86 ("Since a simple legislative declaration of policy

[17] We also do not address how artificial accretions or other artificial changes in the coastal landscape affect ownership. *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (explaining the littoral boundaries remained as they were before artificial land-filling increased the surface area of Ellis Island).

[such as declaring a right to an easement across private property], cannot provide the requisite due process, the affirmative policy statement of the Open Beaches Act, without more would appear patently unconstitutional. The legislature has apparently sought to avoid such constitutional problems by qualifying affirmatively-declared public rights with an interesting condition precedent. That condition is that the public must have *already acquired* these identical rights under the common law doctrines of prescription or dedication.").

According to the dissent, an easement could remain in the dry beach even if the land encumbered by the original easement becomes submerged by the ocean and the dry beach is composed of new land that was not previously encumbered by an easement. Its argument is likewise based on the premise that an alleged easement previously established did not just encumber the dry beach portion of Severance's parcel, but that it encumbered the entire lot. This is inconsistent with easement law. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the parties."); 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. While the specific use granted by an easement is a fundamental consideration, there is no law to support the dissent's contention that an easement forever remains in the dry beach (i.e., can move onto a new portion of the parcel or a different parcel) absent mutual consent. *See* JON W. BRUCE & JAMES W. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7-30 (2009). This would result in depriving oceanfront property owners of a substantial right (the right to exclude) without requiring compensation or proof of actual use of the property allegedly encumbered whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry beach becomes

part of the dry beach. This argument blurs the line between ownership and right to use of a portion of a parcel—the dry beach—and is in tension with our decision in *Luttes* that set the boundary between State and privately owned property at the mean high tide line. *See* 324 S.W.2d at 191–92.

The dissent further dismisses Severance's grievance as a gamble she took and lost by purchasing oceanfront property in Galveston and argues that she would not be entitled to compensation even though an easement had never been established on the portion of her parcel that is now in the dry beach. It notes the OBA requirement of disclosure in sales contracts of the risk that property could become located on a public beach and subject to an easement in the future. *See* TEX. NAT. RES. CODE § 61.025. This is incorrect for three reasons. First, beachfront property owners take the risk that their property could be lost to the sea, not that their property will be encumbered by a easement they never agreed to and that the State never had to prove. Second, putting a property owner on notice that the State may attempt to take her property for public use at some undetermined point in the future does not relieve the State from the legal requirement of proving or purchasing an easement nor from the constitutional requirement of compensation if a taking occurs. We do not hold that circumstances do not exist under which the government can require conveyance of property or valuable property rights, such as the right to exclude, but it must pay to validly obtain such right or have a sufficient basis under its police power to do so. *See Nollan*, 483 U.S. at 841–42 (noting that public use of private beaches may be a "good idea" but "if [the state] wants an easement across [private] property, it must pay for it"). As Justice Oliver Wendell Holmes, Jr. explained, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S.

393, 416 (1922). Third, simply advising in a disclosure that the State may attempt to enforce an easement on privately owned beachfront property does not dispose of the owner's rights.

Our holding does not necessarily preclude a finding that an easement exists. We have determined that the history of land ownership in West Beach refutes the existence of a public easement by virtue of continuous right "in the public since time immemorial, as recognized in law and custom," TEX. NAT. RES. CODE § 61.001(8), and Texas law does not countenance an easement migrating onto previously unencumbered beachfront property due to the Hurricane. We do not have a sufficient record to determine whether an easement has been proven, and the question was not certified. *See id.*

The public may have a superior interest in use of privately owned dry beach when an easement has been established on the beachfront. But it does not follow that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists on that land. A few states have declared that long-standing property principles give the state (and therefore, the public) the right to all beachfront property or the right to use even privately owned beachfront property *ipse dixit*. For example, the Oregon Supreme Court has held that the dry beach was subject to public use because the public use was inherent in the history of title to such lands. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993) (citing *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)). The state of Oregon's view is that private property owners along the beach "never had the property interests that they claim were taken" in the dry sand, the area between the high water line and vegetation line. *Id.* at 457. The Court explained "the common-law doctrine of custom as applied to Oregon's ocean

shores . . . is not 'newly legislated or decreed'; to the contrary, to use the words of the *Lucas* court, it 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.*, 854 P.2d at 456 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992)). The Supreme Court of Hawaii has held that issuance of a Hawaiian land patent confirms only a limited property interest as compared to typical land patents on the continental United States. S*ee Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246 (Haw. 1995) (noting that "the western concept of exclusivity is not universally applicable in Hawai'i"). New Jersey extends the public trust doctrine to encompass the dry beach as well as the wet beach. *See Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 49 (N.J. 1972) ("[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference . . . ."); *see also Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984). Unlike the West Beach of Galveston Island, these jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights.

On the other hand, the Supreme Court of New Hampshire held that a statute that recognized a general recreational easement for public use in the "dry sand area" (comparable to our dry beach), violates the takings provisions of the state and federal constitutions, except for those areas where there is an "established and acknowledged public easement." *Opinion of the Justices*, 649 A.2d 604, 608 (N.H. 1994). The public trust ends at the high water mark and private property extends landward beyond that. *Id.* The Supreme Court of Idaho applied the public trust doctrine to Lake Coeur d'Alene and held that the public trust doctrine was inapplicable in an action to force owners

to remove a seawall. *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979). The private property at issue was obtained by patent from the U.S. Government in 1892 and the seawall was built above the mean high water mark of the lake. *Id.*

A few Texas courts of appeals have reached results contrary to the holding in this opinion. In *Feinman*, the court held that public easements for use of dry beach can roll with movements of the vegetation line. 717 S.W.2d at 110–11. *Feinman* could find no continuous right or custom dating from "time immemorial" or even back to the origins of the Republic or the State of Texas as a basis to encumber private property rights along West Beach. *Id.* *Feinman* states that "[c]ourts have upheld the concept of a rolling easement along rivers and the sea for many years without using the phrase 'rolling easement,'" and cites, but does not discuss, seven cases for its holding.[18] *Id.* at 110. Only one of the opinions is from a Texas court, *Luttes*, and neither it nor the other cited cases discuss rolling or migratory easements. *Luttes* established the landward boundary of title to the public trust along Gulf-front beaches. The *Sotomura* opinion is based on different common law notions of public rights to and limitations on private ownership of beaches in Hawaii, as discussed above. *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973). *Feinman* neither addressed the legal significance of the Jones and Hall grant on the question of public encumbrance on private beach properties of Galveston's West Beach nor identified any basis in Texas law or history for a continuous legal right or custom on which to ground the existence of a migratory easement. One

[18] The cited cases are *Barney v. City of Keokuk*, 94 U.S. 324, 339–40 (1876); *Luttes*, 324 S.W.2d 167; *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); *Horgan v. Town Council*, 80 A. 271 (R.I. 1911); *City of Chicago v. Ward*, 48 N.E. 927 (Ill. 1897); *Godfrey v. City of Alton*, 12 Ill. 29, 36 (1850); and *Mercer v. Denne*, [1905] 2 Ch. 538 (Eng.). *Feinman* issued two months after *Matcha* and does not cite it for support.

other appellate decision also recognizes a rolling easement, relying on *Feinman*. *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

The first Texas case to address the concept of a rolling easement in Galveston's West Beach is *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In 1983, Hurricane Alicia shifted the vegetation line on the beach such that the Matchas' home had moved into the dry beach. The court held that legal custom—"a reflection in law of long-standing public practice"—supported the trial court's determination that a public easement had "migrated" onto private property. *Id*. at 101. The court reasoned that Texas law gives effect to the long history of recognized public use of Galveston's beaches, citing accounts of public use dating back to time immemorial, 1836 in this case. However, the legal custom germane to the matter is not the public use of beaches, it is whether the right in the public to a rolling easement has existed since time immemorial. The *Matcha* court's recognition of long-standing "custom" in public use of Galveston's beaches misses the point of whether a custom existed to give effect to a legal concept of a rolling beach, which would impose inherent limitations on private property rights. As explained above, the original patent of Galveston's West Beach from the Republic to Jones and Hall refutes the existence of custom, as private owners who purchased beach properties obtained title without limitation on private rights of ownership and without encumbrances for public use.

We disapprove of courts of appeals opinions to the extent they are inconsistent with our holding in this case. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Feinman*, 717 S.W.2d at 108–11; *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Matcha*, 711 S.W.2d at 98–100;

See Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1106–07 (1994) (questioning whether the rolling easement theory should apply to easements by prescription and dedication).

III. Conclusion

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beaches Act or the common law.[19]

_____

Dale Wainwright
Justice

[19] We have not addressed in this opinion state police power, nuisance or other remedies that may authorize the government to act in the interests of the health, safety and welfare of the public.

OPINION DELIVERED: November 5, 2010