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Tough New Offshore Drilling Rules

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On November 5th, the Texas Supreme Court issued its much-anticipated decision regarding rolling easements along Gulf of Mexico beaches. In a somewhat surprising decision, the court concluded for the first time that the public's right to access the beach did not "roll" with the vegetation line following a storm event. In distinguishing between shoreline changes as a result of erosion versus shoreline changes as a result of storm events, the court has substantially weakened Texas's long history of public beach access along its Gulf of Mexico beaches.

Beach Access in Texas

For almost 200 years, Texans have enjoyed public access to their Gulf beaches. The beaches provide a source of transportation, commerce, and recreation. In Texas, the beach generally refers to the area between the mean low tide mark and the vegetation line. The mean high tide mark delineates the "wet beach" from the "dry beach." Landowners may own property extending to the mean high tide mark but the "wet beach" is held by the State in public trust. Because of Texas's historic use of the "dry beach," a public easement often exists along Gulf beaches.

Beaches are dynamic systems that shift and migrate as a result of naturally occurring events like wave induced erosion and coastal storm events. To address the migratory nature of shorelines (and therefore the migration of the dry beach), Texas recognizes a rolling easement to preserve existing public access to beaches. In other words, where the State can prove a historic use of the dry beach, the law recognizes a public access easement that migrates (or "rolls") with the vegetation line.

In 1959, Texas enacted the Texas Open Beaches Act (OBA) to provide an enforcement mechanism for protecting public access to Texas beaches bordering the Gulf of Mexico. The OBA embodies Texas's public policy of "free and unrestricted access" along publically owned beaches and to privately owned beaches where the public has acquired an easement.¹ In 2009, Texans went a step further and incorporated the OBA into the state Constitution.²

Lawsuit History

This case began when a property owner challenged the Texas General Land Office's (GLO) attempt to remove her house from the public beach for violation of the OBA. Carol Severance, a California resident, purchased the property on Galveston Island's West Beach in 2005, which she used as rental property. At that time, Severance received notice that should the property become located on the public beach as a result of natural processes (like erosion), the State could forcibly remove structures located on the public beach.³ In September 2005, winds from Hurricane Rita shifted the vegetation line further inland, and in 2006, the GLO concluded that the house was wholly located on the public beach. The GLO offered Severance \$40,000 to relocate or remove the house. In response, Severance filed a lawsuit in federal court challenging the GLO's authority.

The case reached the U.S. Court of Appeals for the Fifth Circuit in 2009.⁴ In resolving Severance's claims, the Fifth Circuit determined that it required greater clarification on matters of Texas property law before fully settling the matter. As property issues are a matter of state law, the Fifth Circuit turned to the Texas Supreme Court for guidance. The Fifth Circuit certified three questions to the Texas Supreme Court:

(1) -Does Texas recognize a rolling public beachfront access easement along Gulf of Mexico

(1) Does Texas recognize a rolling public beachfront access easement along Gulf of Mexico beaches whose boundary migrates with the vegetation line, without proof of prescription, dedication or customary rights in the property?

(2) -If so, is the easement derived from common law or from the Texas Open Beaches Act?

(3) -To what extent, if any, is a landowner entitled to compensation under Texas statutory law or the Constitution when an easement rolls over her property, when no easement has been found by dedication, prescription, or custom?

As summarized by the Texas Supreme Court, "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."⁵ After reviewing Texas property law, the majority concluded that no such right existed.

Rolling Beachfront Easements

The Texas Supreme Court focused on whether the public's right to use and access Gulf of Mexico beaches migrated with the vegetation line without proof of the easement. Turning to the principles of property law, the court rejected the notion that any right existed "without proof of prescription, dedication, or customary rights in the property."⁶ In essence, a rolling easement can exist but it must be proven based on principles of property law.

Properties and easements located along beaches and water bodies face the challenges of shifting sands and storm events which alter the otherwise static property lines. While recognizing rolling easements under Texas law, the court distinguished between boundaries that migrate as a result of natural erosion and boundary changes that occur suddenly due to storms (avulsive events). That is to say, where the vegetation and mean high tide lines move gradually, the easement rolls with the migration and the State is not required to seek a new judicial determination of the easement for each movement. However, where an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly, the land subject to the public easement is lost. In this situation, the State must establish a new easement for the newly created dry beach. To the extent the State is unable to prove an easement for this new dry beach area, no public access easement exists. Essentially, an easement rolls with erosion but the easement does not roll following a storm event.

Regarding the Severance property, the court determined that the public lost access to the beach there because the vegetation line moved as a result of Hurricane Rita rather than by gradual erosion. The court went on to acknowledge that this decision did not mean that the State could not attempt to prove a public easement along the property in question. Rather, the court concluded the easement that previously existed along the dry beach did not migrate on to the private property following the hurricane.

Dissent

Justice Medina, joined by Justice Lehrmann, dissented from the majority asserting that the majority's "vague distinction ... 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."⁷ According to the dissent, Texas law does recognize rolling beachfront access easements regardless of whether the vegetation line migrated as a result of storm event or natural erosion. In support, the dissent points to the overwhelming evidence that Texans have used the beaches for almost 200 years as establishing an implied public beachfront access easement.

In further support, the dissent notes prior Texas judicial decisions supporting the rolling easement concept and surmises that the majority's departure from existing law will result in both the loss of public access and the loss of state funds due to increased litigation. Likewise, according to the dissent, Texas public policy (in particular the OBA) reinforces the concept of rolling easements: "Requiring that existing easements be re-established after every hurricane season defeats the purpose of the OBA: to maintain public beach access."⁸

The dissent goes on to find that rolling easements are a creature of Texas common law rather than the OBA (which provides an enforcement mechanism but does not create property rights). Also, because the easements roll as a result of natural forces, the dissent concludes that a property owner is not entitled to compensation when the easement rolls onto their property.

Conclusion

Undoubtedly, the majority's newly announced distinction between gradual and avulsive events will cause greater confusion over public access along Texas beaches. Already, the decision has stymied efforts at beach renourishment along Galveston's west end. Texas Land Commissioner Jerry Patterson halted a project following the court's decision. Patterson cited concerns that the project would benefit private landowners rather than the public.⁹ Texas law prohibits expenditures of public money for the benefit of private property.

Endnotes

1. *Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, at *3 (Tex. Nov. 5, 2010).
2. Tex. Const. Art. 1, § 33 (2009).
3. *Severance v. Patterson*, 2010 WL 4371438, at *8.
4. *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009). See also Brian Fredieu, *U.S. Fifth Circuit Weighs in on Texas Open Beaches Act*, 29.2 Water Log 1 (2009).
5. *Severance v. Patterson*, 2010 WL 4371438, at *1.
6. *Id.* at *8.
7. *Id.* at *15 (J. Medina, dissenting).
8. *Id.* at *20.
9. Harvey Rice, *State calls off big Galveston beach project*, Houston Chronicle, Nov. 16, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/7295713.html>.

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