

**ROLLING EASEMENTS AS A RESPONSE TO SEA LEVEL  
RISE IN COASTAL TEXAS: CURRENT STATUS OF  
THE LAW AFTER *SEVERANCE V. PATTERSON***

RICHARD J. MCLAUGHLIN\*

HARTE RESEARCH INSTITUTE FOR GULF OF MEXICO STUDIES

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I. IMPACTS OF SEA-LEVEL RISE ON GULF COASTS

Climate change during the next century is expected to cause significant modifications to the world’s coastal zones.<sup>1</sup> Increases in

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\* Endowed Chair for Marine Policy and Law, Harte Research Institute for Gulf of Mexico Studies, Texas A&M University—Corpus Christi. The author wishes to acknowledge the assistance and guidance provided by J.B. Ruhl and the other participants of the Symposium on Sea Level Rise and Takings Law held at Florida State University College of Law, April 23, 2010. Additional thanks to Jim Gibeaut, Fred McCutcheon, Arthur Park, and Sonia McLaughlin for their contributions. This research was funded under award number NA10OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

1. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (Martin Parry et al. eds., 2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg2.htm>.

storm severity due to changes in precipitation patterns coupled with sea level rise will inundate and erode coasts causing a net loss of shorefront, threatening infrastructure, and increasing the likelihood of coastal flooding. Coastal areas along much of the Gulf of Mexico are exceptionally susceptible to changes due to relative sea-level rise and storm damage because the land is relatively low-lying and is subject to high levels of land subsidence.<sup>2</sup> Rising sea levels will result in more frequent and longer inundation of freshwater marshes, swamps, and brackish marshes.<sup>3</sup> As coastal wetland areas are flooded by saline waters, they will be converted eventually to open water and their environmental benefits lost.<sup>4</sup> Changes to wetlands, beaches, dunes, and barrier islands will reshape public and private property boundaries on a vast scale and intensify existing coastal land use conflicts.

Without effective legal and policy approaches to deal with these changing conditions, litigation will become an increasingly common method of resolving disputes, and many of the gains provided by coastal management plans may be diminished. For example, many coastal managers are recognizing that decades of armoring projects (e.g., bulkheads, jetties, riprap, etc.) are causing natural sand and sediment migration processes to change, causing a large amount of beaches and coastal wetlands to be lost.<sup>5</sup> Armoring coasts comes with significant socioeconomic and ecological costs. These include new barriers to public access, aesthetic and visual impacts, and, most critically, loss of beaches and coastal wetlands due to their inability to retreat before the rising sea.<sup>6</sup>

For decades, the experiences of Texas in providing the public with access to its beaches, through the innovative Texas Open Beaches Act, have served as a model for those who seek to limit the detrimental effects of changes to the nation's shorelines, including sea-level rise.<sup>7</sup> One of the foundations of Texas' beach protection program is the incorporation of dynamic public

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2. See generally E.A. PENDLETON ET AL., U.S. GEOLOGICAL SURVEY, COASTAL VULNERABILITY ASSESSMENT OF THE NORTHERN GULF OF MEXICO TO SEA-LEVEL RISE AND COASTAL CHANGE (2010), available at <http://pubs.usgs.gov/of/2010/1146/pdf/ofr2010-1146.pdf>.

3. See Paul A. Montagna et al., *South Texas Climate 2100: Coastal Impacts*, in THE CHANGING CLIMATE OF SOUTH TEXAS 1900-2100: PROBLEMS AND PROSPECTS, IMPACTS AND IMPLICATIONS 57, 71 (Jim Norwine & Kuruvilla John eds., 2007), available at <http://www.texasclimate.org/Home/BookChangingClimateofSouthTexas/tabid/485/Default.aspx>.

4. *Id.*

5. Megan Higgins, *Legal and Policy Impacts of Sea Level Rise to Beaches and Coastal Property*, 1 SEA GRANT L. & POL'Y J. 43, 51 (2008).

6. Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 539-40 (2007).

7. See discussion *infra* Part II.

easements that move with the vegetation lines and allow the public to use the dry sand portions of the beach as well as prevent man-made structures or other obstacles from encroaching on the public's easement.<sup>8</sup> However, this well established "rolling easement doctrine," which is the centerpiece of Texas' open beaches program, was recently dealt a significant setback by the State Supreme Court in the case of *Severance v. Patterson*.<sup>9</sup> The decision has caused legal turmoil along much of the Texas coast and will likely subject the state to years of litigation.<sup>10</sup> For example, a few days after the decision was handed down, the Texas General Land Commissioner cancelled a \$40 million beach renourishment project because state law prohibits the spending of public money to benefit private property.<sup>11</sup> Simultaneously, private property owners are predicted to begin to erect hard structures to save their houses from the sea.<sup>12</sup> There is little question that the state's role as a test bed for innovative methods of dealing with coastal change, including sea-level rise, has been severely diminished as a result of these recent legal changes.

In coming years, as clearly illustrated by cases such as *Severance*, it is likely that legal conflicts will grow between coastal private property owners who are intent on protecting their property from the dangers of erosion and rising sea levels and the government, which seeks to restrict those actions to benefit the public. Disputes between these two competing interests will trigger additional regulatory takings issues and resulting litigation.<sup>13</sup> Moreover, traditional common law rules may not adequately address the unique circumstances created by global sea level rise.<sup>14</sup> Joseph Sax, in a recent article, contends that the common law rules, which generally allow the littoral owner to occupy and productively use the area landward of the mean high-tide line and conversely authorize the state to use the area seaward of that line for public passage and recreation and to protect coastal wetland

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8. See *infra* notes 21-55 and accompanying text.

9. No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010), *reh'g granted* (Mar. 11, 2011).

10. See discussion *infra* Part V.

11. Harvey Rice, *State Calls Off Big Galveston Beach Project: Recent Texas High Court Ruling on Open Beaches Act Gets Blame*, HOUS. CHRON., Nov. 16, 2010, at 1 [hereinafter Rice, *State Calls Off Beach Project*], available at <http://www.chron.com/dispatch/story.mpl/metropolitan/7295713.html>.

12. *Id.*

13. See Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENVTL. L. 641 (2010) (describing how the context of traditional regulatory takings law will change as a result of sea level rise). For a discussion of regulatory takings jurisprudence, see Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277 (2011).

14. Sax, *supra* note 13, at 645.

habitats, fail to address contemporary circumstances.<sup>15</sup> Sax argues that in the absence of sea level rise, the boundary between these two interests moves modestly back and forth over time and allows the two uses to coexist with relatively little conflict.<sup>16</sup> However, where the sea is substantially and continuously rising, and where storm surges more often wipe away large areas of beach and other coastal areas, littoral owners will be much more inclined to try to build protective devices to hold back the sea.<sup>17</sup> This will exacerbate all of the problems associated with armoring, causing coastal wetlands to disappear and triggering substantially more legal conflict and litigation.<sup>18</sup>

There are some circumstances where engineered solutions such as seawalls, groins, levees, or jetties may be a necessary response to the threat of sea-level rise. However, most experts in the field believe that these hard structure approaches should be reserved for truly “inevitable cities in impossible places,” and then only in those areas that are particularly well suited and defensible.<sup>19</sup> An alternative approach known as “living shorelines” is gaining increasing acceptance by the coastal scientific and policy communities.<sup>20</sup> The concept uses plants, including salt marsh grasses, mangroves, as well as structural materials such as oyster shells, earthen material, or riprap to protect property from erosion.<sup>21</sup> The purpose of living shorelines is to provide habitat that will grow and change as the levels of the sea change, in contrast to seawalls and other forms of armouring, which are a fixed height and lead to the conversion of coastal wetlands and other habitat to open water.<sup>22</sup>

## II. AN INTRODUCTION TO ROLLING EASEMENTS AND THE TEXAS OPEN BEACHES ACT

Implementing an effective policy/legal regime that discourages armoring and encourages alternative approaches to sea level rise, such as that envisioned under a living shoreline scenario,

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15. *Id.*

16. *Id.* at 642.

17. *Id.*

18. *See id.* at 642-644.

19. JOHN S. JACOB & STEPHANIE SHOWALTER, TEXAS SEA GRANT, THE RESILIENT COAST: POLICY FRAMEWORKS FOR ADAPTING THE BUILT ENVIRONMENT TO CLIMATE CHANGE AND GROWTH IN COASTAL AREAS OF THE U.S. GULF OF MEXICO 5, 9 (2007), available at [http://nsglc.olemiss.edu/TheBuiltEnvironment08-sm\\_000.pdf](http://nsglc.olemiss.edu/TheBuiltEnvironment08-sm_000.pdf).

20. *See generally*, Niki L. Pace, *Wetlands or Seawalls? Adapting Shoreline Regulation to Address Sea Level Rise and Wetland Preservation in the Gulf of Mexico*, 26 J. LAND USE & ENVTL. L. 327 (2011).

21. *See generally id.* *See also* MASGC *Focus on Living Shorelines*, MISS.-ALA. SEA GRANT CONSORTIUM, <http://www.masgc.org/page.asp?id=235> (last visited May 9, 2011).

22. *See id.* and sources cited within.

will be difficult to achieve. Lurking in the background will be an ongoing governmental concern that property owners will challenge such policies as regulatory takings requiring compensation. Despite this reality, a policy tool known as “rolling easements” has received significant attention as a potential response to future sea level rise while avoiding many of the risks associated with regulatory takings.

The concept of employing rolling easements as a method of dealing with sea level rise was originally proposed by Jim Titus, of the United States Environmental Protection Agency, in a series of articles beginning in the early 1990s.<sup>23</sup> In broad terms, a rolling easement allows publicly owned tidelands to migrate inland as a result of sea level rise or other natural forces at the expense of existing structures, thereby protecting ecosystem structure and function.<sup>24</sup> As envisioned by Titus, a state would enact “a statute declaring that all future development is subject to the rolling easement.”<sup>25</sup> All bulkheads, seawalls, etc., would be prohibited, and individual structures, coastal land development projects, and activities involving the filling of wetlands would “be subject to [a] rolling easement as [a] condition for [obtaining a] building permit.”<sup>26</sup> Titus believes that regulatory takings claims under the Fifth and Fourteenth Amendments of the United States Constitution would generally not be successful because affected property owners do not suffer large economic deprivations based on the fact that many decades may pass before the property is lost to the rising sea,<sup>27</sup> and this implies a small discounted value for any future loss.<sup>28</sup> Moreover, governments may wish to bypass takings issues by paying the relatively small cost of eminent domain purchases of the easement.<sup>29</sup>

Texas is most frequently associated with the rolling easement doctrine and has applied it more forcefully and for a longer period of time than any other U.S. state.<sup>30</sup> However, unlike Titus’ vision of a forward-looking doctrine that protects coastal habitats from future environmental loss, Texas’ application of the doctrine is based not on environmental concerns but on traditional notions

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23. See generally James G. Titus, *Greenhouse Effect and Coastal Wetland Policy: How Americans Could Abandon an Area the Size of Massachusetts at Minimum Cost*, 15 ENVTL. MGMT. 39 (1991); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998) [hereinafter Titus, *Rising Seas*].

24. See Higgins, *supra* note 5, at 51.

25. Titus, *Rising Seas*, *supra* note 23, at 1310 tbl.2.

26. *Id.*

27. *Id.* at 1384-85.

28. *Id.* at 1384-87, 1390.

29. *Id.* at 1390.

30. Caldwell & Segall, *supra* note 6, at 570.

of beach access and public exploitation of coastal areas.<sup>31</sup> It is in fact rooted in an over 150-year-old Texas tradition of using the beaches along barrier islands facing the Gulf of Mexico for transportation, camping, fishing, swimming, and other public uses.<sup>32</sup> These public uses were so well accepted that historically, the public as well as most private landowners believed “that the state retained ownership of both the ‘wet’ and ‘dry’ [portions of] beaches.”<sup>33</sup> This understanding came to an end in 1958 when the Texas Supreme Court in *Luttet v. State*<sup>34</sup> ruled that the state only owned the wet sand portion of the beach and that private landowners possessed ownership rights over the dry sand portion above the mean high tide line.<sup>35</sup>

The *Luttet* ruling shocked the public and generated sufficient public political pressure to force the Texas Legislature to enact the Texas Open Beaches Act<sup>36</sup> (TOBA) the following year. The Act specifically provides that it shall be the state’s public policy that “the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.”<sup>37</sup> Any public easement is conditioned upon a showing that “the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public . . . .”<sup>38</sup> Additionally, the public’s right of access is protected by prohibiting persons from “creat[ing], erect[ing], or construct[ing] any obstruction, barrier, or restraint” that interferes with the public easement.<sup>39</sup> It is important to note that TOBA applies only to the approximately 367 miles of beaches bordering the

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31. See *id.* at 570-71 (discussing Texas application of the “rolling easement concept” through the case of *Feinman v. Texas*, 717 S.W.2d 106 (Tex. App. 1986).

32. See *Seaway Co. v. Attorney Gen. of Tex.*, 375 S.W.2d 923, 930-37 (Tex. Civ. App. 1964) (providing a wonderful historical discussion from a variety of scholarly sources and witness testimony about how the state’s beaches have been used by the public since 1836).

33. Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1093 (1994).

34. 324 S.W.2d 167 (Tex. 1958).

35. *Id.* at 191. For an analysis of the *Luttet* case, see Kenneth Roberts, *The Luttet Case—Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141 (1960).

36. TEX. NAT. RES. CODE §§ 61.001–61.026 (1959).

37. TEX. NAT. RES. CODE § 61.011(a) (2009).

38. *Id.* Under Texas common law, establishing an easement by prescription requires the following five elements: “(1) possession of the land; (2) use or enjoyment of it; (3) an adverse or hostile claim; (4) an inclusive dominion over the area and appropriation of it for public use and benefit; and (5) for more than the ten year statutory period.” *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 127 (Tex. App. 1986). An easement by dedication requires either some form of written document, or the state must meet the following four criteria to prove an implied dedication: “(1) the landowner induced the belief that he intended to dedicate the area in question to public use; (2) the landowner was competent to do so, i.e., had fee simple title; (3) the public relied on the acts of the landowner and will be served by the dedication; and, (4) there was an offer and acceptance of the dedication.” *Id.* at 128.

39. TEX. NAT. RES. CODE § 61.013(a).

Gulf of Mexico and does not apply to the approximately 3,300 miles of tidal bay-facing shores in the state.<sup>40</sup>

At one time, it was thought that the public would have a difficult time proving the background principles of prescription, dedication, or continuous right that TOBA requires as a condition of creating a public easement on the dry sand portion of the beach.<sup>41</sup> However, since its inception, Texas courts have been exceedingly deferential to the policies established under TOBA. An unbroken line of decisions have found that the public has acquired easements by prescription or dedication along large portions of the state's Gulf-facing beaches.<sup>42</sup> One appellate court even found that the doctrine of custom, made famous by the well known Oregon State Supreme Court case of *State ex rel. Thornton v. Hay*,<sup>43</sup> could be applied in Texas so as to open up the entire system of Gulf-facing beaches to the public easement.<sup>44</sup> While the doctrine of custom has not gained judicial traction, the courts have historically been quite willing to interpret TOBA broadly.<sup>45</sup>

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40. See *Caring for the Coast*, TEX. GEN. LAND OFFICE, <http://www.glo.texas.gov/what-we-do/caring-for-the-coast/index.html> (last visited May 9, 2011). The Texas General Land Office has estimated that "64 percent of the Texas coast is eroding at an average rate of about 6 feet per year with some locations losing more than 30 feet per year." *Coastal Erosion*, TEX. GEN. LAND OFFICE, <http://www.glo.texas.gov/what-we-do/caring-for-the-coast/coastal-erosion/index.html> (last visited May 9, 2011). According to a report to the Texas Legislature in 2003, roughly 229 of the state's 367 miles of Gulf-facing beaches are experiencing measurable net erosion, and portions of the 3,300 miles of protected bay shoreline may also be experiencing net erosion as well. See TEXAS GENERAL LAND OFFICE, COASTAL EROSION PLANNING & RESPONSE ACT (CERPA) REPORT TO THE 78TH TEXAS LEGISLATURE 6, 15 (2003).

41. Proponents of public use would have the difficult task of meeting, on a parcel-by-parcel basis all of the traditional common law requirements associated with establishing prescription, dedication, or custom.

42. For analyses of these cases, see Mark D. Holmes, Comment, *What About My Beach House? A Look at the Takings Issue as Applied to the Texas Open Beaches Act*, 40 HOUS. L. REV. 119, 125-32 (2003); Pirkle, *supra* note 33, at 1097-1100.

43. 462 P.2d 671, 676 (Or. 1969).

44. *Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App. 1986). Neal Pirkle calls *Matcha* "weak precedent," but argues that the court affirmed based on the doctrine of custom to allow the easement to move as the beach changes rather than either prescription or dedication. Pirkle, *supra* note 33, at 1106.

45. According to one well known commentator, "a series of five intermediate decisions from 1979 to 1989 effectively eliminated the requirement that the existence of a public easement be affirmatively proved in any meaningful way." See Shannon H. Ratliff, *Shoreline Boundaries Part I: Legal Principles*, CLE INTERNATIONAL: TEXAS COASTAL LAW D-1, D-19-20 (2005) (footnote omitted). Similarly, Pirkle writes that "Courts have consistently found prescriptive easements in an attempt to maintain the public's right of access to Texas coastal beaches." Pirkle, *supra* note 33, at 1097. Regarding implied dedication, he notes

Although the Texas Supreme Court has not specifically held that an easement to the beach may be based on implied dedication, the court appears unconcerned with a line of appellate court rulings which consistently apply this doctrine. Absent legislative action, the Texas courts will probably continue to recognize the public's right in beaches through easements formed by implied dedication.

*Id.* at 1100.

In the 1980s and early 1990s the Legislature amended TOBA to further strengthen the public easement.<sup>46</sup> For every transaction since August 26, 1985 that conveys land located seaward of the Intracoastal Waterway,<sup>47</sup> all executory contracts must contain language that expressly acknowledges that the purchaser has acquired an easement up to the vegetation line.<sup>48</sup> Among other warnings, is the following:

If the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public *has acquired* a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.<sup>49</sup>

In addition the document must contain the following language in capital letters, “STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF NATURAL PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES.”<sup>50</sup>

The full consequence of this amendment is somewhat confusing because its use of the phrase, “the public *has acquired* a right of use or easement[,]” seems to declare *prima facie* the existence of an easement on all Gulf-facing beaches rather than to require a finding of a public easement by prescription, dedication, or custom, which is required in other parts of the Act.<sup>51</sup> Despite this confusion, it is clear that the intent of the amendment was to legislatively approve the rolling easement rule and to put all purchasers or lessees, after October 1, 1986, on notice that their structures will be subject to the easement and removed if in violation.<sup>52</sup>

In 1991, the legislature also eliminated the requirement that the public’s easement be “subject to proof” and replaced it with

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46. For a discussion of these amendments see Ratliff, *supra* note 45 at D21- D22.

47. The use of the language “seaward of the Gulf Intracoastal Waterway” is curious because it seems to be contrary to other references in TOBA that the Act is limited to beaches “bordering on the seaward shore of the Gulf of Mexico[.]” TEX. NAT. RES. CODE §§ 61.011(a), 61.012, 61.013(c), 61.023 (2009). This may imply that the Act also applies to the barrier island’s bayward-facing shores. Despite this confusion, in practice, the presumption is that TOBA only applies to Gulf-facing beaches. See Ratliff, *supra* note 45, at D-16-17.

48. TEX. NAT. RES. CODE § 61.025.

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.* (emphasis added). See Ratliff, *supra* note 45 at D21.

52. See Holmes, *supra* note 42, at 141-42.



language that provides that in beach areas located seaward of the vegetation line it is presumed that “there is imposed on the area a common law right or easement in favor of the public . . . .”<sup>53</sup> Again, the breadth and content of this presumption is unclear. However, these collective statutory and judicial developments during the 1980s and early 1990s have resulted in subsequent courts commonly granting summary judgment to the government to remove structures seaward of the vegetation line even in the absence of case-specific evidence of public use.<sup>54</sup>

In 2009, the state took another step toward strengthening TOBA when 77% of voters approved a referendum that incorporates the most important provisions of TOBA into the state constitution.<sup>55</sup> This referendum came about in response to controversial legislation introduced in the aftermath of Hurricane Ike in 2008 that exempted some areas of the coast from the requirements of TOBA.<sup>56</sup> The successful referendum makes it much more difficult for legislators in the future to weaken or change the popular piece of legislation. As a result of TOBA’s influence, it is well settled and accepted that most of the state’s most popular beaches are burdened by public easements through the background principles of prescription, dedication, or custom.<sup>57</sup>

### III. INCORPORATING ROLLING EASEMENTS INTO TEXAS COMMON LAW

Decades of judicial findings reflecting that the public has access to most of the state’s Gulf-facing beaches under the common law have generally been accepted by private property owners with minimal protest.<sup>58</sup> In contrast, littoral property owners<sup>59</sup> have been

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53. Compare TEX. NAT. RES. CODE § 61.020(2) (1978), with TEX. NAT. RES. CODE § 61.020 (2009).

54. See Ratliff, *supra* note 45, at D-21 to D-22.

55. TEX. CONST. art. 1, §33; *All 11 Proposed Constitutional Amendments Pass in Texas*, CALLER.COM (Nov. 4, 2009, 6:40 AM), <http://www.caller.com/news/2009/nov/04/all-11-proposed-constitutional-amendments-pass-tex/>.

56. See Harvey Rice & Matt Stiles, *Battle for a Beach*, HOUS. CHRON., Jun. 4, 2009, at 1, available at <http://www.chron.com/disp/story.mpl/ike/galveston/6457063.html>.

57. For a list of these beaches, see Jeffrey S. Boyd, *Enforcement Rights (and Wrongs) Under the Open Beaches Act*, CLE INTERNATIONAL: TEXAS COASTAL LAW B-1, B-5 (2005). See also Ratliff, *supra* note 45, at D-16 to D-25 (Agreeing that Texas Courts have unanimously found these background principles to apply, but disagreeing with the logic and legal authority used in the holdings).

58. This is not meant to imply that property owners didn’t challenge the application of these doctrines to their coastal property. However, these challenges involved factual matters relating to their specific beach parcels and not the existence of the doctrine itself. For a discussion of these cases, see Pirkle, *supra* note 33, at 1095-1100.

59. TEX. NAT. RES. CODE § 61.001(6) (2009) (defining “littoral owner” to include a “lessee, licensee, or anyone acting under the littoral owner’s authority”).

much more reluctant to accept that the public's easement shifts with naturally changing shorelines.<sup>60</sup> This is especially true given the fact that most of the state's beaches are eroding,<sup>61</sup> and a large number of beachfront structures eventually found themselves located partially or wholly seaward of the line of vegetation and in violation of the public easement.<sup>62</sup> As these beaches are eroding, the vegetation line which marks the inland boundary of the public easement moves landward also.<sup>63</sup> Many of the state's formerly wide dry-sand beaches are being narrowed to the point that if homes or other structures remain on the beach, the public is no longer able to use the beach, especially at high tide.<sup>64</sup> For example, in 2004, as a consequence of a series of major high tide events and tropical weather systems, 116 homes were documented to be seaward of the vegetation line and subject to removal.<sup>65</sup>

While the notion of a rolling easement is implied by the language in TOBA,<sup>66</sup> it wasn't until 1986 that the concept was judicially articulated for the first time in *Feinman v. State*.<sup>67</sup> After Hurricane Alicia caused several houses to be located seaward of the new vegetation line, the Texas Attorney General refused to allow the houses to be repaired and threatened to remove them from the beach.<sup>68</sup> The *Feinman* court was asked to answer "whether [TOBA] requires the State to re-establish its easement each time the line of vegetation moves, or whether the Act allows the public's easement to [automatically] move with the" changing vegetation line.<sup>69</sup> After describing the purposes and public policy intended by the Act, the court acknowledged that its language was ambiguous regarding whether the easement rolls automatically or must be reestablished whenever a new line is created.<sup>70</sup> However, analogizing to a long line of cases that upheld changes in

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60. The rolling easement doctrine is of great concern to private property owners because it increases both the scope and extent of the OBA. Without the doctrine, the OBA applies to fewer houses because the public easement would be static rather than dynamic. See discussion in Holmes, *supra* note 42, at 135-37.

61. See *Coastal Erosion*, *supra* note 40.

62. See EDDIE R. FISHER & ANGELA L. SUNLEY, A LINE IN THE SAND: BALANCING THE TEXAS OPEN BEACHES ACT AND COASTAL DEVELOPMENT (2007), available at [http://www.csc.noaa.gov/cz/CZ07\\_Proceedings/PDFs/Tuesday\\_Abstracts/2658.Fisher.pdf](http://www.csc.noaa.gov/cz/CZ07_Proceedings/PDFs/Tuesday_Abstracts/2658.Fisher.pdf).

63. *Id.*

64. *Id.*

65. *Id.*

66. TEX. NAT. RES. CODE § 61.011 (2009) (providing that "the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico"); TEX. NAT. RES. CODE § 61.001(5) (defining "line of vegetation" as "the extreme seaward boundary of natural vegetation which spreads continuously inland").

67. 717 S.W.2d 106, 108-11 (Tex. App.1986).

68. *Id.* at 107.

69. *Id.* at 108.

70. *Id.* at 109.

easements due to accretion or erosion, the court pointed out that “[t]his proposition that a public easement may move with the changes in the waterways it borders is not a novel idea. Courts have upheld the concept of a rolling easement along rivers and the sea for many years without using the phrase ‘rolling easement.’”<sup>71</sup> Additional emphasis was placed on the fact that the purpose of the Act was to provide the public with unrestricted access to public beaches and that not allowing the easement to shift would in some cases cause the easement to entirely disappear.<sup>72</sup> It concluded “that the vegetation line is not stationary and that a rolling easement is implicit in the Act.”<sup>73</sup>

Since *Feinman*, Texas courts have consistently held that the public beach easement automatically moved up or back to each new vegetation line and that the state did not have to re-establish that the easement exists with each new shift of the vegetation line. For example, in *Arrington v. Texas General Land Office*, the littoral owners argued that the boundary of the easement does not move with the new vegetation line unless the state proves that the public actually used the new area bounded by the line.<sup>74</sup> In rejecting this argument, the *Arrington* court ruled that

[o]n the contrary, 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 (but only that the line has moved).<sup>75</sup>

In the very important recent case of *Brannan v. State*,<sup>76</sup> the court went one step further in supporting the enforcement of the rolling easement doctrine by holding that the easement applies equally to existing structures as it does to the active introduction of a new structure.<sup>77</sup> As in the previously discussed cases, *Brannan* involved a number of houses that were ordered removed after a tropical storm moved the vegetation line landward of where the houses were located.<sup>78</sup> The homeowners, among other arguments, asserted that they were not in violation of the rolling easement because TOBA’s “authority to enjoin encroachments on the public

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71. *Id.* at 110.

72. *Id.* at 111.

73. *Id.*

74. 38 S.W.3d 764, 766 (Tex. App. 2001).

75. *Id.* at 766 (citation omitted).

76. No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799 (Tex. App. Feb. 4, 2010).

77. *Id.* at \*44-45.

78. *Id.* at \*4.

easement targets the active introduction of a structure onto an existing public easement area” and not existing structures such as their longstanding homes.<sup>79</sup> They contended that this was a matter of first impression<sup>80</sup> and focused solely on the definition of “encroachment” to support their contention that the Legislature “intended the Act to apply only to the active introduction of a new ‘improvement, maintenance, obstruction, barrier, or other encroachment on a public beach.’”<sup>81</sup> After examining TOBA’s legislative history, statutory construction, and the Legislature’s intent, the court refused to give the term “encroachment” such a narrow meaning and concluded that the Act applies to anything that interferes with the public’s use of the easement.<sup>82</sup> According to the court, it doesn’t matter whether the owner of the property actively introduces the obstruction or the easement rolls to a portion of the property that formerly had not been located on the easement.<sup>83</sup>

In addition, the *Brannan* court found that a regulatory taking did not occur “either under common law or under [TOBA] because the public’s easement was established by dedication under the common law.”<sup>84</sup> Because this constitutes a background principle of Texas law, it does not constitute a taking under the standard provided in the U.S. Supreme Court’s *Lucas* decision.<sup>85</sup>

The acceptance and judicial support of rolling easement doctrine as articulated by the *Feinman-Arrington-Brannan* line of cases is confined to the construction and policy implications of TOBA and to relevant state common law. Some commentators have questioned the decisions for not relying upon a broad public trust rationale rather than statutory and common law authority.<sup>86</sup> However, it is important to point out that unlike most states, the State of Texas may grant submerged lands to individuals unburdened by an implied reservation in favor of the public trust.<sup>87</sup> According to one court, imposing restrictions on the use and development of submerged lands under the public trust doctrine “has

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79. *Id.* at \*44.

80. *Id.* at \*63-64.

81. *Id.* at \*44.

82. *Id.* at \*47-50.

83. *Id.* at \*50.

84. *Id.* at \*65.

85. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992) (stating that the enforcement of existing easements would not entitle a landowner to compensation as a regulatory taking).

86. See Caldwell & Segall, *supra* note 6, at 571.

87. Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 181-82 (2010) [hereinafter, Craig, *Western States’ Public Trust Doctrines*].

not fared well in Texas jurisprudence.”<sup>88</sup> Given the reluctance of Texas courts to apply the public trust doctrine under well-accepted circumstances, such as the state granting submerged lands to individuals, it is highly unlikely that they will apply the doctrine to the more controversial situation of creating public easements on dry-sand beaches.<sup>89</sup>

#### IV. *SEVERANCE V. PATTERSON*—THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERS THE FRAY

The well-established line of state appellate court decisions that upheld the rolling easement doctrine was challenged most recently by Carol Severance, a California resident who purchased three rental homes on Galveston Island in April 2005.<sup>90</sup> At the time that she purchased the properties, Severance “had reason to know that the location of the vegetation line could pose a problem.”<sup>91</sup> In fact, in 1999, the state had listed two of her homes as “seaward of the vegetation line and referred them to the Attorney General for possible removal.”<sup>92</sup> Moreover, her sales contract contained the disclosure language warning that the structure could be removed by the state<sup>93</sup> as mandated by TOBA.<sup>94</sup> Five months after Severance’s purchase, Hurricane Rita damaged the properties and moved the vegetation further landward.<sup>95</sup>

In 2006, after years of litigation and political debate as well as a two-year moratorium to study the matter, State General Land Commissioner Jerry Patterson enacted a plan to offer property owners financial assistance to remove their homes from the public portion of the beach.<sup>96</sup> After state officials conducted a survey of the vegetation line and found that Severance’s property fell seaward of the line, she was contacted and offered \$40,000

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88. *Natland Corp. v. Baker’s Port, Inc.*, 865 S.W.2d 52, 60 (Tex. App. 1993). *See also* Ratliff, *supra* note 45, at D-20 to D-21.

89. For a state-by-state comparison of the public trust, see Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 21-24 (2007), and Craig, *Western States’ Public Trust Doctrines*, *supra* note 87, at 93-198.

90. *Severance v. Patterson*, 485 F. Supp. 2d 793, 797 (S.D. Tex. 2007).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* TEX. NAT. RES. CODE § 61.025 (2009).

95. Hurricane Rita hit Southeast Texas and Southwest Louisiana on September 23, 2005. TEXAS ALMANAC 141 (2010). It was a category-3 strength storm and resulted in three deaths, three injuries, and \$2.1 billion in property damage. *Id.*

96. *See Texas Open Beaches Enforcement Policy*, TEX. GEN. LAND OFFICE (Sept. 18, 2006), <http://www.glo.state.tx.us/coastal/beachdune/openbeaches.html>.

for removing the home.<sup>97</sup> Severance and a number of other homeowners refused the offer and filed suit to prevent the State from enforcing TOBA.<sup>98</sup>

She sought declaratory and injunctive relief in federal court to prevent the State from violating her rights under the Fourth, Fifth, and Fourteenth Amendments to the federal Constitution.<sup>99</sup> More “[s]pecifically, she allege[d] (1) regulatory and (2) ‘physical invasion’ takings . . . without just compensation; (3) violation of substantive due process; and (4) an unreasonable seizure of her property.”<sup>100</sup> The District Court dismissed the suit, ruling that the constitutional claims were not ripe and could not be adjudicated until the State enforces TOBA and removes the property from the beach.<sup>101</sup> It went on to point out that the public’s rolling easement was established long before Severance purchased her beach property and is one of the “background principles” of Texas littoral property law.<sup>102</sup> Severance appealed her Fourth and Fifth Amendment challenges to the rolling easement theory to the U.S. Court of Appeals for the Fifth Circuit.<sup>103</sup>

In a two to one decision, a Fifth Circuit panel affirmed the District Court’s dismissal of Severance’s takings claim under the Fifth Amendment of the U.S. Constitution, ruling that her claim was unripe.<sup>104</sup> However, the panel found the Fourth Amendment seizure claim to be ripe and certified three questions to the Texas Supreme Court to address Severance’s claim.<sup>105</sup> These questions included the following:

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?

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97. *Severance v. Patterson*, No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010), *reh’g granted* (Mar. 11, 2011); *Severance*, 485 F. Supp. 2d at 798.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 802.

102. *Id.* at 804.

103. *See Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009).

104. *Id.* at 504.

105. *Id.* at 500, 503-04.

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the OBA?
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?<sup>106</sup>

The Fifth Circuit panel majority was clearly skeptical of the analysis and authorities cited by the long line of lower Texas courts in support of the rolling easement doctrine calling them “utterly inconsistent.”<sup>107</sup> It noted that there are “obvious conceptual difficulties in concluding that an easement is established by implied dedication or prescription, for example, over areas on which the public has never set foot.”<sup>108</sup> It went on, in a footnote, to criticize each decision individually, commenting, “[i]ndubitably, no ‘fixed’ background principles of state law are articulated, only mutually inconsistent post hoc rationales.”<sup>109</sup>

Judge Wiener, in his dissent, accused the majority of not just erroneously interpreting Texas law, but also doing the bidding of ideologically-driven property rights advocates.<sup>110</sup> He pointed out that Ms. Severance was a California resident who was “represented by counsel furnished *gratis* by the Pacific Legal Foundation[,]” a California-based public interest law firm which has been long known for “defending the fundamental human right of private property.”<sup>111</sup> According to Judge Wiener, the real object of the suit is “not to obtain reasonable compensation for a taking of properties either actually or nominally purchased by Severance, but is to eviscerate the OBA, precisely the kind of legislation that, by its own declaration, the Foundation targets.”<sup>112</sup> He contended that the majority panel’s decision had the “unintentional effect of enlisting the federal courts and, via certification, the

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106. *Id.* at 504.

107. *Id.* at 499.

108. *Id.* at 502.

109. *Id.* at 499 n.8.

110. *Id.* at 504-05 (Wiener, J., dissenting).

111. *Id.* at 504 (internal alterations omitted).

112. *Id.*

Supreme Court of Texas, as unwitting foot-soldiers in this thinly veiled Libertarian crusade.”<sup>113</sup>

#### V. THE TEXAS SUPREME COURT SIGNIFICANTLY WEAKENS ROLLING EASEMENTS

The politically-charged missives contained in the Fifth Circuit’s majority and dissenting opinions set the stage for Texas Supreme Court’s entrance into the *Severance* dispute. Obviously aware of the controversy that its decision would generate, the Supreme Court waited to publicly release its opinion until Friday afternoon, November 5, 2010, three days after national and state elections that included the Governor’s race.<sup>114</sup>

Overtaking decades of state appellate precedent, the Texas Supreme Court ruled that rolling easements *do* exist under Texas law if they were created by the slow process of erosion, but that they *do not* exist if created by a sudden and rapid change known as “avulsion.”<sup>115</sup> According to the Court, the public may no longer have access to the beach where Ms. Severance’s home is located because Hurricane Rita allegedly caused the shift of the vegetation line.<sup>116</sup> Consequently, because an avulsive act caused the vegetation line to move, the existing prescriptive easement does not “roll,” and the state must provide proof that a prescriptive easement has been reestablished on the beach up to the new vegetation line.<sup>117</sup> Proof of a new prescriptive easement is required even though an existing easement was established as early as 1975 immediately seaward of Severance’s property.<sup>118</sup> It is very unlikely that the state will be able to make this showing because until Hur-

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113. *Id.*

114. On November 2, 2010, Republican Rick Perry was elected to an unprecedented third term as Governor.

115. *See Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, \*11 (Tex. Nov. 5, 2010), *reh’g granted* (Mar. 11, 2011). “*Erosion* is the gradual and imperceptible wearing away of land bordering on a body of water by the natural action of the elements. *Avulsion* is . . . the sudden and perceptible alteration of the shoreline by action of the water[.]” JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW: CASES AND MATERIALS* 50 (3d ed. 2007) (emphasis added). Under the English common law and as a general rule in most U.S. States, “where the shoreline is gradually and imperceptibly changed or shifted by accretion, reliction or erosion, the boundary line is extended or restricted in the same manner. The owner of the littoral property thus acquires title to all additions arising by accretion or reliction, and loses soil that is worn or washed away by erosion. However, any change in the shoreline that takes place suddenly and perceptibly does not result in a change of boundary or ownership.” *Id.*

116. *See Severance*, 2010 WL 4371438, at \*2. Whether the public has an easement on Severance’s property will be determined in federal court. *Id.* at \*4 n.6.

117. *Id.* at \*1.

118. *Id.* at \*2.



ricane Rita shifted the vegetation line in 2005, the public had no need to use that portion of the beach.

One very odd aspect of the Court's holding is the distinction that it created between the legal effects of avulsive versus erosional changes to the beach. Never before had the state adopted a distinction between erosion versus avulsion in the coastal context.<sup>119</sup> For example, in *City of Corpus Christi v. Davis*, a private land owner argued that he should be compensated because four acres of his eighteen-acre parcel had disappeared due mainly to hurricanes.<sup>120</sup> The State leased the by-then-submerged acres to the City of Corpus Christi, which filled them and used them as a public park.<sup>121</sup> The landowner sued the State arguing that he had never lost title to the tract because the loss of land resulted from avulsive actions of a hurricane.<sup>122</sup>

The court of appeals in *Davis* rejected the landowner's theory that avulsive changes should be treated differently than erosional changes. First, it noted that unlike some other states, Texas has only applied the distinction to river cases and that neither the Texas Supreme Court nor any other court had applied it to coastal property.<sup>123</sup> Second, it found the landowners had not proved that the loss was caused by a sudden avulsive event rather than by gradual erosion or a combination of the two and therefore it did not have to rule on the distinction.<sup>124</sup>

According to well-known Texas attorney and coastal boundary expert Shannon Ratliff, no published opinion since *Davis* has considered whether the erosion versus avulsion distinction could apply to coastal land.<sup>125</sup> In fact, Ratliff contends that it is difficult to conceive of any sudden and severe weather event that could be entirely separated from those non-storm wind and wave actions that carve and contour the state's beaches on a daily basis.<sup>126</sup>

As shown below, this view of coastal processes is borne out by scientific observation and analysis. Hurricanes, tropical storms, strong winds, and high tides are always present along the Gulf of Mexico. These episodic natural events cannot be separated and disentangled from one another as envisioned by the majority in

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119. See generally Ratliff, *supra* note 45, at D-29 to D-30.

120. *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 642 (Tex. App. 1981).

121. *Id.*

122. *Id.*

123. *Id.* at 643-46.

124. *Id.* at 642-46.

125. Ratliff, *supra* note 45, at D-30.

126. *Id.* See also Forrest J. Bass, Comment, *Calming the Storm: Public Access to Florida's Beaches in the Wake of Hurricane-Related Sand Loss*, 38 STETSON L. REV. 541, 561 (2009) (stating that compensation to private property owners is "unfeasible in light of the dynamic fluctuations resulting from daily changes in the tide and seasonal damage resulting from hurricanes and other severe weather events").

*Severance*; such an undertaking would be an extraordinarily difficult, if not impossible, task. For example, two of Ms. Severance's beach properties were already on a list published in 1999 of homes that were on the public beach easement.<sup>127</sup> Exactly how to allocate what proportion of the cause of the shift in the vegetation line that occurred as a result of ongoing erosion prior to and after 1999, as opposed to changes directly and solely caused by Hurricane Rita, may never be known. Rita was clearly not the sole cause of the exposure of Ms. Severance's property to the beach and Gulf; the property certainly has been subjected to episodic erosional events over centuries. An approach of applying a limited exception to the migration of a dynamic coastal right of access, by carving out avulsive events from the history of continual beach movement, would lead to a "proportional cause" analysis similar to the approach used in personal injury cases, and would always require a jury trial to determine the location of any easement for beach access.

*A. Severance Ignores the Geologic Realities Along the Texas Gulf Coast*

A more serious problem with the "avulsion" versus "erosion" approach is that it does not accurately reflect geologic reality along the Texas coast. No coastline can be viewed through the "snapshot" of a limited span of time. Coastal erosion is episodic, not either "imperceptible" or "avulsive" as indicated in the court's majority opinion. Viewed over time, and when tracked over seventy years of measurement by the University of Texas Bureau of Economic Geology,<sup>128</sup> erosion rates are not uniform or predictable but do exhibit trends that are discernable over time.<sup>129</sup>

Landward retreat of the vegetation line is caused by waves reaching above the normal wet line on the beach and eroding the vegetated sand, burying vegetation with eroded sand, or both.<sup>130</sup> This process requires only moderately high waves and elevated water levels of two to four feet depending on the width and height of the fronting beach.<sup>131</sup> Ongoing erosion of the beach is occurring as a historical constant on the majority of Texas' Gulf beaches. The ongoing nature of erosion causes a narrower beach

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127. See *Severance v. Patterson*, 485 F. Supp. 2d 793, 800 (S.D. Tex. 2007).

128. See James C. Gibeaut et al., *The Texas Shore Line Change Project*, BUREAU OF ECON. GEOLOGY, <http://www.beg.utexas.edu/coastal/intro.php> (last visited May 9, 2011).

129. See *id.*; *Index Map*, BUREAU OF ECON. GEOLOGY, <http://www.beg.utexas.edu/coastal/imsindexNew.php> (last visited May 9, 2011).

130. See James C. Gibeaut et al., *Threshold Conditions for Episodic Beach Erosion Along the Southeast Texas Coast*, 52 GULF COAST ASS'N OF GEOLOGICAL SOC'YS TRANSACTIONS 1, 1-4 (2002).

131. See *id.* at 8-10.

and a situation where a relatively small storm event may cut back the vegetation line. Any significant landward movement of the vegetation line is normally rare, but is often indistinguishable from an event that may be termed avulsive, except in degree. Thus, ongoing beach erosion before a storm increases the likelihood of such an avulsive event.<sup>132</sup>

The episodic nature of vegetation line retreat is in contrast to the relatively slow and gradual seaward movement of vegetation as fair-weather conditions prevail and vegetation is able to grow seaward. Furthermore, the seaward advance of vegetation does not usually occur as a line marching seaward but rather in a patchy pattern of vegetation that may eventually fill in and form a new vegetation line.<sup>133</sup> This process is critical to the coast because vegetation is essential for capturing windblown sand and establishing stable dunes that help protect landward areas from storm impacts and slow the rate of shoreline retreat.<sup>134</sup> This gradual advance and establishment of the vegetation line and protective dunes will not occur if houses or structures are in the area where the beach would normally build up and create conditions for vegetation to grow.<sup>135</sup> Thus, the presence of houses in the would-be vegetation zone prevents the establishment of vegetation and the formation of dunes, leaving the coast in a degraded and more hazardous state.

Given this geologic reality in which landward movements of dune vegetation lines are normally caused by episodic events, sometimes of relatively small size and duration, the reestablishment of protective dunes will not occur if structures exist on the beach, and the majority decision establishes a policy that exacerbates the degradation of Texas beaches. By weakening the ability of the state to control or remove structures seaward of the dune vegetation line, shoreline retreat will accelerate. The title held by private property owners will be lost, as stated in the majority's opinion, and the public will be excluded from larger and larger portions of Gulf-facing beaches.

### *B. Severance Treats Usage Rights and Property Rights Differently*

The *Severance* majority obviously recognized the practical and legal difficulties associated with applying the erosion versus avul-

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132. For similar insights on Florida's beaches, see Donna R. Christie, *Of Beaches, Boundaries and SOBS*, 25 J. LAND USE & ENVTL. L. 19, 52 (2009).

133. See Robert A. Morton et al., *Stages and Durations of Post-Storm Beach Recovery, Southeastern Texas Coast, U.S.A.*, 10 J. COASTAL RES. 884, 905 (1994).

134. See *id.*

135. See *id.* at 902.

sion distinction as it pertains to coastal public and private ownership of beach property. It rejected the distinction as it applies to the delineation of boundaries by noting that “[w]e have not accepted such an expansive view of the doctrine[.]”<sup>136</sup> It condoned the notion that losing title to private property to the public trust as it becomes part of the wet-sand beach or submerged land due to “natural forces of wind, rain, and tidal ebbs and flows” combined with seasonal hurricanes and tropical storms “is an ordinary hazard of owning [beach] property.”<sup>137</sup> Yet, under the same natural conditions, it felt that it is far less reasonable to encumber private property with incorporeal rights such as a public easement on a “portion of a landowner’s property that was not previously subject to that right of use.”<sup>138</sup> In his dissenting opinion, Judge Medina pointed to the illogical nature of such a ruling by noting that:

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.<sup>139</sup>

The majority refers to “honoring reasonable expectations in property interests.”<sup>140</sup> These reasonable expectations are applied in the context of the Fourth Amendment to the United States Constitution, as it must under the record in this case.<sup>141</sup> The court then applies this reasonableness standard as the basis for distinguishing between boundary delineation for ownership and boundary delineation for easements.<sup>142</sup> However, the court is much less concerned with preserving investment-backed expectations when the government action takes fee simple title to the land than when the government action invades a landowner’s interest, for example with an easement across the property. This concern over property-backed expectations is especially curious given the fact—noted by the court—that most coastal property owners were fully aware that the public may have an easement on their beach property at

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136. *Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, \*22 n.16 (Tex. Nov. 5, 2010), *reh’g granted* (Mar. 11, 2011).

137. *Id.* at \*10.

138. *Id.*

139. *Id.* at \*18 (Medina, J., dissenting).

140. *Id.* at \*10 (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988)).

141. *See id.* at \*2.

142. *Id.* at \*10.

least since the 1985 amendments to TOBA,<sup>143</sup> which required express disclosure of the possibility of rolling easements,<sup>144</sup> and the 1986 *Feinman* decision, which judicially recognized the doctrine.<sup>145</sup>

*C. Severance Rules that Easements Do Not Shift  
Due to the Forces of Nature*

In addition to the perceived unfairness of burdening property owners with easements created by sudden weather events, the majority also incorrectly found that easements, once established, cannot be changed without the consent of the parties.<sup>146</sup> It found no authority for the contention that in the absence of mutual consent, an easement forever remains in the dry sand and can move onto new portions of the parcel or a different parcel.<sup>147</sup>

Moreover, it dismissed as “inconsistent with easement law” a long line of Texas oil and gas cases cited by the dissent that establishes that easements may shift to ensure that the purpose of the dominant property interest is reasonably fulfilled.<sup>148</sup> For example, it is well established in Texas that “oil and gas leases convey an implied easement to use the surface as reasonably necessary to fulfill the purpose of the lease.”<sup>149</sup> While “[t]he purpose of the easement cannot expand, . . . under certain circumstances, the geographic location of the easement may.”<sup>150</sup> Similarly, Texas has long recognized that roads acquired by prescription “due to rains and washouts along a river bottom, would ordinarily vary some from a path established many years ago. It does not follow that rights acquired by the public years ago were lost by failure of the public to travel the full width of the old road.”<sup>151</sup> The *Restatement (Third) of Property (Servitudes)* supports this by providing that easements “should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.”<sup>152</sup>

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143. *Id.* at \*8.

144. TEX. NAT. RES. CODE § 61.025 (2009).

145. *Feinman v. State*, 717 S.W.2d 106, 108-11 (Tex. App. 1986).

146. *Severance*, 2010 WL 4371438, at \*9, \*12 (citing *Holmstrom v. Lee*, 26 SW.3d 526, 533 (Tex. App. 2000)).

147. *Id.* (citing JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LIENSES IN LAND* § 7.13, at 7-30 (2009)).

148. *Id.* at \*12 (citing *Holmstrom v. Lee*, 26 SW.3d 526, 533 (Tex. App. 2000)).

149. *Id.* at \*17 (Medina, J., dissenting) (citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972)).

150. *Id.* (comparing *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002) with *Godfrey v. City of Alton*, 12 Ill. 29 (1850)).

151. *Nonken v. Bexar Cnty.*, 221 S.W.2d 370, 374 (Tex. App. 1949).

152. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (2000).

The majority also failed to consider the trend in other coastal states to recognize easements on beachfront property as notably different from inland property as a result of daily-tidal fluctuations, sea level rises, and catastrophic weather events.<sup>153</sup> For example, the North Carolina Supreme Court relied on the Texas cases of *Seaway*<sup>154</sup> and *Feinman*,<sup>155</sup> among others, to hold that public easements over dry sand beaches should not be treated as precise, permanent boundaries, but should shift with dynamic natural changes of the beachfront.<sup>156</sup> The court made no distinction between erosion and avulsion and specifically mentioned "ocean storms" as agents of coastal change.<sup>157</sup> It reversed the lower court's ruling that required precisely defined easements finding that:

[t]o require that there be no change, or at most only very slight change, in a road traveled by many for the prescriptive period over an area highly vulnerable to the forces of wind, shifting sand, ocean tide, flooding from ocean or sound, etc., would effectively bar the acquisition of a prescriptive easement in many locales of the coastal area of our state.<sup>158</sup>

The Georgia Supreme Court has similarly ruled that a beachfront easement that allowed public access "is subject to expansion or contraction by the forces of nature."<sup>159</sup>

By creating this unwarranted legal distinction between coastal change caused by erosion versus avulsion, the Texas Supreme Court has enacted a rule that ignores geologic processes that shape Texas' beaches and accelerates continued coastal degradation. It rejects a rational, well-accepted, and easy-to-apply rule, which recognizes that easements in coastal areas are dynamic and by necessity need to move with physical changes of the beach. Instead, it has chosen a policy that freezes the easement in place and guarantees that the state and private property owners will be embroiled in expensive litigation for many decades. This approach fails to consider the nature and purpose of the public's right of access, which is unique to the coast. Additionally, though riverine and coastal boundaries are not completely analogous, even navigable

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153. See Bass, *supra* note 126, at 559-60.

154. *Seaway Co. v. Attorney Gen. of Tex.*, 375 S.W.2d 923 (Tex. App. 1964).

155. *Feinman v. State*, 717 S.W.2d 106 (Tex. App. 1986).

156. *Concerned Citizens of Brunswick Cnty. Taxpayers Assoc. v. Holden Beach Enters.*, 404 S.E.2d 677, 684-85 (N.C. 1991).

157. *Id.* at 683.

158. *Id.*

159. *Bruce v. Garges*, 379 S.E.2d 783, 785 (Ga. 1989) (footnote omitted).

rivers are burdened by their historic use as private and commercial routes, and where the riverbed shifts, the easement for navigation also shifts.<sup>160</sup>

## VI. ACTIONS SUBSEQUENT TO THE *SEVERANCE* DECISION

About one week after the *Severance* case was handed down, the Commissioner of the Texas General Land Office, Jerry Patterson, cancelled a long scheduled \$40 million project that would have placed new sand in front of 450 homes on six miles of the most rapidly eroding beach on the west end of Galveston Island.<sup>161</sup> This was the same area in which Carol Severance's properties were located.<sup>162</sup> According to Commissioner Patterson, the renourishment project had to be cancelled because of a constitutional prohibition against spending public money to improve private property.<sup>163</sup> Ironically, by the time that the project was cancelled, Severance had already accepted "more than \$1 million from the sale of two rental properties under the Federal Emergency Management Agency's hazard mitigation acquisition program, intended to buy homes in areas prone to repeated flooding . . . ."<sup>164</sup> Records indicated that these homes were sold at pre-storm market values of \$336,000 and \$813,000.<sup>165</sup>

Severance's neighbors on the west end of Galveston Island were understandably upset about the Commissioner's decision and an emergency meeting of the Galveston City Council was called to discuss the issue.<sup>166</sup> The city led an effort to get every property owner on the beach to approve an agreement restoring the public easement.<sup>167</sup> Several property owners asserted that they would only sign the easement document if it provided for a fixed boundary and not a rolling easement.<sup>168</sup> However, Commissioner Patterson took the position that they would give the property owners thirty days to come up with the signatures of all the affected property

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160. *Feinman*, 717 S.W.2d at 110 (citing *Barney v. City of Keokuk*, 94 U.S. 324, 339-40 (1876); *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958); *Cnty. of Hawaii 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 (Ill. 1850); *Mercer v. Denne*, 2 Ch. 538 (Eng. 1905)).

161. Rice, *State Calls Off Beach Project*, *supra* note 11.

162. *See id.*

163. *Id.*

164. Harvey Rice, *Buyout a Boon to Victor in Beach Suit*, HOUS. CHRON., Nov. 21, 2010, at B1 [hereinafter Rice, *Buyout a Boon*].

165. *Id.*

166. Rob Nixon, *Texas Open Beaches Act—The Fight Continues . . .*, TEX. GULF COAST SURFING MAG., Dec. 2010, at 12, 16.

167. Rice, *Buyout a Boon*, *supra* note 164.

168. *Id.*

owners but would only accept the reinstatement of the rolling easement as defined by the Open Beaches Act.<sup>169</sup> Given the fact that a single holdout property owner could stop the plan and that property owners are located throughout the nation and even out of the country,<sup>170</sup> it is highly unlikely that the compromise will succeed.

The Texas General Land Office is moving forward to petition the Texas Supreme Court for a rehearing on the case before it is transferred back to the U.S. Fifth Circuit Court of Appeals for its ruling.<sup>171</sup> By January 2011, nearly two dozen amicus briefs were submitted in favor of the Texas General Land Office request.<sup>172</sup> On March 11, 2011, the Texas Supreme Court granted the motion for rehearing.<sup>173</sup> Despite broad opposition to the *Severance* ruling from coastal cities and counties, grassroots citizens groups, the Chamber of Commerce, and academics, few observers believe that the Supreme Court will modify its decision on rehearing.

#### VII. POTENTIAL IMPACT OF *SEVERANCE* ON ROLLING EASEMENTS IN FLORIDA AND OTHER STATES

Texas has served as a model for many coastal states that have adopted versions of the rolling easement doctrine.<sup>174</sup> It is unlikely that the *Severance* decision will have much impact on most of these states. None have applied the doctrine as forcefully or broadly as Texas. Moreover, unlike Texas, which has applied it primarily to promote beach access, most states have adopted aspects of the doctrine to restrict coastal armoring and minimize damage to fragile and dynamic environmental resources such as sand dune systems.<sup>175</sup>

In the Gulf Region, Florida may be an exception to this observation and may be strongly impacted by the *Severance* ruling. Among all the states, Florida has moved furthest toward adopting a rolling easement doctrine similar to the one in place in Texas.

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169. *Id.*

170. *Id.*

171. See Joint Motion for Rehearing for Defendants-Appellees, *Severance v. Patterson*, 2010 WL 4371438 (Tex. Nov. 5, 2010) (No. 09-0387), available at <http://www.supreme.courts.state.tx.us/ebriefs/09/09038710.pdf>.

172. All briefs can be found at the Texas Supreme Court Website. *Case Search*, SUP. CT. TEX., <http://www.supreme.courts.state.tx.us/opinions/case.asp?FilingID=30434> (last visited May 9, 2011).

173. See Press Release, Texas General Land Office, Texas Open Beaches Act Gets Second Chance (Mar. 11, 2011), available at [http://www.glo.texas.gov/glo\\_news/press\\_releases/2011/MARCH/Open-Beaches.pdf](http://www.glo.texas.gov/glo_news/press_releases/2011/MARCH/Open-Beaches.pdf).

174. These include Maine, North and South Carolina, Massachusetts, Rhode Island, and Oregon. See Caldwell & Segall, *supra* note 6, at 572; Higgins, *supra* note 5, at 51.

175. See Caldwell & Segall, *supra* note 6, at 572.



The Florida Supreme Court's landmark case of *City of Daytona Beach v. Tona-Rama, Inc.*, found that the public may have a customary right of access to dry-sand portions of Florida's beaches.<sup>176</sup> While rejecting state-wide application, the court found that the public's right to access and use a particular area of privately-owned beach depends on proof that the general portion of the beach in question is consistent with the public's claim of recreational use of the sandy area that "has been ancient, reasonable, without interruption and free from dispute."<sup>177</sup> This acceptance of a customary easement as an underlying common law background principle provides a foundation for courts in the future to take the next step by ruling that the boundary between public and private property rolls with natural changes to the beach.

In fact, the doctrine of establishing rolling easements in the state was directly addressed by Florida's Fifth District Court of Appeal in *Trepanier v. County of Volusia*.<sup>178</sup> As a result of severe erosion caused by hurricanes occurring in 1999 and 2004, public use of the beach shifted inland and onto the Trepanier's beachfront property.<sup>179</sup> Like many Florida beaches, the public has long been allowed to drive and park on portions of the beach.<sup>180</sup> The County prohibited vehicles within a created thirty-foot Habitat Conservation Zone (HCZ) in order to ensure endangered sea turtles' health.<sup>181</sup> Posts reflecting driving lanes are moved periodically to reflect varying conditions on the beach.<sup>182</sup> Because of the erosion, the county moved the public-driving boundary and the HCZ inland onto a portion of the Trepanier's property.<sup>183</sup> The property owners claimed inverse condemnation, based on the county's alleged appropriation of their property for driving and parking lanes in the absence of a valid easement.<sup>184</sup>

In defense, the county argued that "[n]ot only can title change because of the advances and retreats of the sea, but also the location and extent of easements or right of use along waterways move with changes in the tide."<sup>185</sup> The court did not accept the county's rolling easement argument, primarily because it did not have proof as to whether boundary change occurred as a result of avulsion or

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176. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).

177. *Id.* at 77-78.

178. *Trepanier v. Cnty. of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007).

179. *Id.* at 278.

180. *Id.*

181. *Id.* at 279.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 292.

erosion and remanded for further findings.<sup>186</sup> It reiterated that Florida, unlike Texas, had a general rule that avulsion in coastal areas does not change boundaries.<sup>187</sup> It distinguished the public policy pronouncements made in the Texas case of *Matcha v. Mattox*<sup>188</sup> as unique to that jurisdiction and stated that the migration of the public's customary use of the beach is dependent on proof of avulsion versus erosion.<sup>189</sup> Finally, it made clear "that a question as important as the meaning and scope of *Tona-Rama* and the migration of the public's customary right to use of the beach will ultimately have to be determined by the Supreme Court of Florida, not this court."<sup>190</sup>

Given the inevitable and growing tensions between public beach access and private property rights along the heavily developed Florida coast, it is likely that the legal question deciding whether rolling easements do or do not exist will likely be addressed by the Florida Supreme Court in the relatively near future. How much impact the Texas Supreme Court's *Severance* decision may have should the Florida Supreme Court take up the issue is open to speculation. However, it is safe to assume that having the highest court in the state where the rolling easement doctrine is most visibly associated and actively applied reject an important portion of the doctrine will likely weaken its persuasive authority in Florida and elsewhere.

#### VIII. ARE ROLLING EASEMENTS A VIABLE TOOL TO ADDRESS SEA LEVEL RISE?

Commentators continue to advocate the viability of rolling easements as an effective tool to address sea level rise.<sup>191</sup> Their use in more rural, undeveloped coastal areas may be especially valuable. Unlike urban areas where ecological losses are lower and replacement costs higher, imposing rolling easements in undeveloped areas will allow nature to take its course so that dune areas and coastal wetlands may migrate inland with the rising seas.<sup>192</sup> Consequently, implementation in rural areas will be less expensive

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186. *Id.* at 292-293.

187. *Id.* at 293 (citing *Siesta Props. v. Hart*, 122 So. 2d 218 (Fla. 2d DCA 1960)).

188. 711 S.W.2d 95 (Tex. App. 1986).

189. See *Trepanier*, 965 So. 2d at 292-93.

190. *Id.* at 293 n.21. For further analysis, see Bass, *supra* note 125; Christie, *supra* note 132, at 48-50.

191. See Caldwell & Segall, *supra* note 6, at 550-78; Higgins, *supra* note 5, at 51-52, 64; Sandra S. Nichols & Carl Bruch, *New Frameworks for Managing Dynamic Coasts: Legal and Policy Tools for Adapting U.S. Coastal Zone Management to Climate Change*, 1 SEA GRANT L. & POL'Y J. 19, 28-30 (2008).

192. See Caldwell & Segall, *supra* note 6, at 551, 572-74.

should the state decide to purchase the easements and landowners will have an incentive to incorporate the risk caused by rising seas into their future land use decisions knowing that the possibility of armoring is not an option.<sup>193</sup>

Rolling easements remain an important policy tool to address sea level rise in Texas, albeit at a much reduced level of effectiveness as a result of the *Severance* decision. Along Gulf-facing beaches, the state can employ a three-prong strategy to respond to sea level rise and prevent inappropriate beach-front development. First, as a result of TOBA and decades of judicial deference aiding its active implementation, structures on the beach can be removed as the dune vegetation line moves inland as a result of sea level rise.<sup>194</sup> Second, the state has the very strong Dune Protection Act,<sup>195</sup> which requires counties with beaches bordering on the Gulf of Mexico to identify critical dunes and prevent construction too close to established dune protection lines.<sup>196</sup> Finally, based on this statutory authority, some counties are beginning to adopt strong setback rules that prevent development from up to 350 feet from dune protection lines.<sup>197</sup> By requiring all new construction to be located a significant distance landward of dune vegetation lines, and by having a legal mechanism to remove existing structures that encroach on the beach, the State is in a strong position to begin transitioning toward a living shorelines approach to sea level rise.

Of course, the *Severance* decision will cast a shadow for many years over this strategy to respond to sea level rise. No one can predict how the courts will apply the term “avulsion” to the coast. There is no workable basis for distinguishing between storms that cause the public easement to migrate versus storms that do not. As written, *Severance* invites beachfront property owners to characterize every storm as “avulsive.” In fact, in a companion case currently before the court, Pacific Legal Foundation, which represented Carol Severance, is now pointing to the findings of the *Severance* decision and labeling 1998’s Tropical Storm Frances “unusually strong avulsion.”<sup>198</sup> The success or failure of property owners to portray every storm as avulsive will determine whether Texas can respond to the threat posed by sea level rise along its Gulf-

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193. *See id.*

194. *See* discussion *supra* Parts II, III.

195. TEX. NAT. RES. CODE §§ 63.001-63.181 (2009).

196. TEX. NAT. RES. CODE §§ 63.011, 63.091.

197. Jessica Savage, *Nueces to Discuss Beach Setback Rule*, CORPUS CHRISTI CALLERTIMES, Dec. 16, 2010, at A1.

198. Personal communication from Ken Cross, Assistant Attorney General for the State of Texas (January 5, 2011).

facing beaches. If property owners are successful, and are allowed to rebuild and fortify structures seaward of dune vegetation lines, this will greatly diminish the state's ability to effective response to sea level rise. At the very least, the state will be embroiled for decades in repetitious and wasteful litigation.

It is also important to keep in mind that regardless of *Severance*, the protections provided by TOBA and the Dune Protection Act only apply to beaches facing the Gulf of Mexico.<sup>199</sup> The innovative beach protection practices for which Texas is best known do not apply to the 3,300 miles of shorelines in Texas that face bays rather than the Gulf of Mexico. The doctrine of rolling easements does not exist along the beaches facing the Laguna Madre or the state's other extensive bay systems. As a consequence, armoring and other engineered methods of protecting property from rising seas and other weather-related hazards continue to take place on a large scale in many coastal areas. Despite a state policy that favors non-structural erosion response techniques over structural methods and a trend toward regional bay planning efforts, such as those undertaken by the Galveston Bay Program<sup>200</sup> and the Coastal Bend Bays and Estuary Program,<sup>201</sup> hardened structures are still being constructed in bay-facing areas. For example, it is estimated that "10 percent of the [Galveston Bay] shoreline has been bulkheaded or converted to docks or revetments."<sup>202</sup> Absent an expansion of TOBA to non-Gulf-facing beaches, which no one foresees as a political possibility, rolling easements as a tool to respond to sea level rise will remain unavailable along the vast majority of the Texas coast.

## IX. CONCLUSION

Climate change and sea level rise are reshaping the world's coastlines. Low-lying coastal areas along the Gulf of Mexico are especially vulnerable to changes caused by rising sea levels and storm damage. Loss of beaches, critical dune systems, and coastal wetlands will accelerate due to their inability to retreat before the rising sea. The great promise of using the rolling easement doctrine as tool to respond to the impacts of sea level rise still exists

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199. See *supra* note 40 and accompanying text.

200. See GALVESTON BAY NAT'L ESTUARY PROGRAM, THE GALVESTON BAY PLAN: THE COMPREHENSIVE CONSERVATION AND MANAGEMENT PLAN FOR THE GALVESTON BAY ECOSYSTEM (1994), available at <http://gbic.tamug.edu/GBPlan/GBPlan.html>.

201. See COASTAL BEND BAYS & ESTUARIES PROGRAM, COASTAL BEND BAYS PLAN: TO CONSERVE AND MANAGE THE COASTAL BEND BAYS OF SOUTH TEXAS (1998), available at <http://www.cbbep.org/publications/virtuallibrary/cbbin.pdf>.

202. GALVESTON BAY NAT'L ESTUARY PROGRAM, *supra* note 200, at 129.

but has been dealt a heavy blow as a result of the recent *Severance* decision.<sup>203</sup> In that decision, the Texas Supreme Court overturned decades of judicial precedent by ruling that rolling easements may no longer be applied to provide the public with access to beaches that have been impacted by hurricanes and other storm events. Private beach-front property owners may now exclude the public from using significant portions of the state's beaches and prevent the state from removing structures that are currently obstructing the public easement and disrupting the rebuilding of healthy dunes that reduce the threat from high-water events associated with sea level rise.

The court ignored geologic reality and created a rule that treats "avulsion" and "erosion" as static and unrelated events. No coastline can be viewed through the snapshot of a limited span of time. Coastal erosion is episodic rather than "imperceptible" or "avulsive" as indicated by the *Severance* court. Judicial rules that treat boundaries on dry-sand beaches as precise, permanent features rather than constantly shifting dynamic systems misrepresent reality and distort informed coastal decision-making.

Once treated as the national model and test-bed of innovative uses of the rolling easement doctrine, Texas must now begin a long process of legislative and judicial retrenchment. As a result of the lack of guidance provided by the *Severance* court, years of protracted litigation between the state and private landowners will be required to redefine boundaries and determine the proper balance of interests along the coast. Long-planned responses to the encroachment of the sea will likely be put on hold until these property disputes are settled. For example, so-called soft defenses that include beach renourishment, dune restoration, and shoreline stabilization using vegetation have already been discontinued until public/private beachfront boundaries are clarified.<sup>204</sup> Moreover, other states such as Florida, which have traditionally looked to Texas' long experience as a leader in beach access and dune protection matters, will likely rethink this relationship as a consequence of the legal confusion created by the *Severance* decision.

Coastal communities are best served if authorities, with robust stakeholder involvement, develop "guidelines on preferred shoreline and buffer management practices that support adaptive strategies for responding to" sea level rise.<sup>205</sup> Prior to the *Severance* decision, Texas had a strong foundation for such an approach with

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203. *Supra* notes 114-160 and accompanying text.

204. See discussion of the cancellation of a \$40 million beach renourishment project as a result of *Severance* in Rice, *State Calls Off Beach Project*, *supra* note 11 and accompanying text.

205. Nichols & Bruch, *supra* note 191, at 34.

the combination of TOBA, Dune Protection Act, and local dune setback ordinances.<sup>206</sup> Instead, the Texas Supreme Court has rejected a rational, well-accepted, and easy to apply policy that recognizes that easements in coastal areas are dynamic and by necessity need to move with physical changes of the beach. Instead, it has chosen a policy that freezes the easement in place and guarantees that the state will be involved in expensive litigation for many decades. The only people who should be happy about the *Severance* ruling are the relatively small number of beach homeowners who will be allowed to keep their properties on the beach and the large contingent of coastal geologists, meteorologists, historians, and attorneys who will be asked to sort out this unworkable new rule.

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206. See discussion *supra* notes 194-197 and accompanying text.