



Open Beaches act faces legal challenge

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Fifty years ago this week, state lawmakers adopted legislation giving the public free access to all Texas beaches.

Property rights activists and beach-front property owners challenged the Open Beaches Act from the beginning, but until now, none of the cases made it as far as the Texas Supreme Court.

On Nov. 19, the state's top justices will hear a claim by a Galveston property owner whose West End houses ended up in the public beach easement after Hurricane Rita.

Carol Severance asserts the state's threat to have her houses demolished in 2006 violated her constitutional protection against unreasonable seizures.

The court's ruling will either gut the Open Beaches Act, limiting access to the Gulf of Mexico to a few island parks, or uphold the state's ability to maintain a public beach easement as the coastline moves steadily inland.

Until the late 1950s, Galveston beachgoers could drive off the western end of the seawall onto the beach and travel unheeded all the way to the San Luis Pass.

But by 1959, developers and homeowners were starting to put up fences between their houses and the Gulf of Mexico, carving out a private slice of sand and blocking traffic.

Bob Eckhardt, a state representative from Houston, was determined to keep the beaches open, dedicating himself to a legislative crusade that would eventually end in the passage of the Open Beaches Act on July 16, 1959.

Developers and real estate interests, the same people who oppose the act today, fought Eckhardt tooth and nail, said A.R. "Babe" Schwartz, the former state senator from Galveston who often is credited for the open beaches legislation.

"The self-interested people who don't give a damn about public rights opposed it," he

said. “They still don’t give a damn about it.”

Eckhardt based his bill on Spanish and English common law, which had held for centuries that beaches were reserved for public use, said Schwartz, who will teach a course on coastal and ocean law at the University of Texas this fall.

A 1958 Texas Supreme Court case established the state’s ownership between the Gulf and the mean higher high-tide line. Eckhardt’s legislation created a public beach easement between state-owned land and the line of vegetation.

Filing Lawsuit

While Galveston’s beaches remained relatively stable, the public easement was easy to maintain.

But as storms and erosion ate away at the shoreline during the next 40 years, the publicly owned beach and the line of vegetation moved inland.

Beach-front houses eventually ended up between the line of vegetation and the Gulf. The Texas General Land Office began ordering property owners to have their houses moved or torn down.

In 2006, Severance, a California resident, was one of 116 coastal property owners who received a letter from the land office notifying her that her houses in Jamaica Beach and on Kennedy Drive were in the easement and could be removed.

Under a program designed by Land Commissioner Jerry Patterson to soften the blow, homeowners were offered \$40,000 to move their houses.

But Severance refused the offer, and represented by California-based Pacific Legal Foundation, a property rights advocacy group, she sued in federal court, claiming attempts to take her property violated her constitutional rights.

Rolling Easement

In May 2007, U.S. District Judge Kenneth M. Hoyt dismissed Severance’s claim, but on appeal, the Fifth Circuit Court of Appeals sent the case to the Texas Supreme Court for clarification of state law.

Before the court could decide whether Severance’s Fourth Amendment protection from “unreasonable seizure” had been violated, it needed to know whether Texas recognizes a “rolling” public beach easement, whether the easement is derived from common law doctrines or the Open Beaches Act, and to what extent a property owner should be entitled to compensation when the easement migrates onto private land.

J. David Breemer, the Pacific Legal Foundation attorney representing Severance, said he was confident the court would rule in his client's favor because the Open Beaches Act does not talk about a rolling beach easement.

When the act was adopted, its authors never envisioned the amount of erosion the island is experiencing today, so they never considered that the easement boundary would have to be redrawn constantly as the vegetation line moves, he said.

"Where does a rolling easement stop?" he asked. "It's unworkable in practice when you have development. No one ever intended that the public would acquire areas that it never used before."

Because the rolling easement is unworkable, the land office constantly comes up with ways to delay enforcement and to set arbitrary lines that allow property owners to keep houses that are on the public beach, Breemer said.

Constantly Changing

After Severance sued, Patterson abandoned threats to pursue houses in the easement and said instead he would focus on the houses seaward of the mean higher high tide line, on public property, or those completely blocking beach access.

Two years later, when Hurricane Ike gobbled up about 25 feet of beach and destroyed the line of vegetation, the land office set a temporary line of elevation at 4.5 feet to indicate where the edge of the public easement likely would be set at the storm's anniversary in September.

Leaders of the West Galveston Island Property Owners Association estimated 114 houses would end up on the public beach if the 4.5-foot elevation line were adopted.

Patterson initially said he would give the natural vegetation line another year to come back, but this week he said the state might do something different to mark the edge of the public beach easement.

New surveys expected out at the end of July should provide a great deal more information, he said.

"I think folks are going to like it when we publish the information," he said, hinting few houses actually would end up being subject to the removal action many owners feared.

'Not Taking'

Although he has tried to calm homeowners' fears of losing their houses, Patterson said he did not buy Breemer's argument the state is taking private property when the beach easement moves landward.

“The state is not taking property,” he said. “Mother nature is taking its course.”

When rivers that form international or state boundaries change course, those boundaries change as well, he said, echoing one of Eckhardt’s 50-year-old arguments.

If the Texas Supreme Court rules the public beach easement boundary does not change, it would eliminate the Open Beaches Act, Patterson said.

If the easement doesn’t move landward as the beach erodes and the public doesn’t have access to land that previously was private, the state will no longer have any public access, he said.

A Libertarian Crusade?

Patterson would not make any prediction about the Supreme Court’s decision, saying the justices had surprised him before.

But Schwartz said he was confident the court would rule in favor of Texas case law, all of which has upheld the Open Beaches Act.

The federal court, which now is questioning the state’s law, got involved in the case under false pretenses, Schwartz said, echoing the dissenting opinion of Fifth Circuit Judge Jacques L. Wiener Jr.

In voicing his opposition to his colleagues’ decision to send the case to the Supreme Court, Wiener described Severance’s plea as a “thinly veiled Libertarian crusade.”

“The real alignment between Severance and the Pacific Legal Foundation is not discernible from the record on appeal, but the real object of these Californians’ Cervantian tilting at Texas’s Open Beaches Act (‘OBA’) is clearly 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,” he wrote.

‘You Were Deceived’

Severance, a lawyer who holds real estate broker licenses in both California and Texas, obviously knew what she was getting into when she bought her beach-front properties, Schwartz said.

“She can’t claim any ignorance of the law or that she’s not seeking to milk the public of Texas for money,” he said.

But it’s not fair to assume that lawyers are any more careful about reading a stack of real

estate documents than the average buyer, Severance said.

She did read the notice all buyers must sign warning the properties could end up on the public beach and might have to be removed, but nothing she read said she could lose them without compensation, she said.

“I never thought they would be able to just come along and remove my house,” she said. “I never thought that would happen.”

Severance also denied accusations that she plotted with the Pacific Legal Foundation to buy the houses because she planned to challenge the Open Beaches Act.

She bought property in Galveston because she loved the city and wanted to have a place she could enjoy visiting, she said.

Severance thought state officials would have to buy her property if they wanted it, which is how other states handle the need to provide the public access to the beach, Breemer said.

“But in Texas, you were deceived into believing you could have it for free.”

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