Opinion issued August 28, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00179-CV

ANGELA MAE BRANNAN, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF BOB ALBERT BRANNAN, DECEASED, BROOKS PORTER AND MARY PORTER, RUSSELL AND JUDY CLINTON, RUSSELL CLINTON AS INDEPENDENT EXECUTOR OF THE ESTATE OF ELIZABETH CLINTON, DECEASED, REG APLIN AND BEAVER APLIN, PARTNERS D/B/A BENCHMARK DEVELOPING, LOUISE BULLARD, DIANE LOGGINS CLARK, JOSEPH CORNELL DEWITT AND LISA MARIE DEWITT FUKA, MACARIO RAMIREZ AND CHRISSIE DICKERSON, JEFFREY DYMENT, THE MARVIN JACOBSON FAMILY HOLDING COMPANY, CHARLES T. AND CATHY MEEK, JAMES AND PATRICIA MEEK, MARK PALMER, JAMES C. AND PATRICIA PURSLEY, KENNETH C. AND ANDREA REUTZEL, S & S HOLDINGS, LLC, and ROGERS THOMPSON, EXECUTOR OF THE ESTATE OF P.E. KINTZ, DECEASED, Appellants

V.

STATE OF TEXAS, TEXAS GENERAL LAND OFFICE, TEXAS LAND COMMISSIONER JERRY PATTERSON, IN HIS OFFICIAL CAPACITY, TEXAS ATTORNEY GENERAL GREG ABBOTT, IN HIS OFFICIAL CAPACITY, THE VILLAGE OF SURFSIDE BEACH, TEXAS, MAYOR JAMES BEDWARD, SURFSIDE BEACH, TEXAS, IN HIS OFFICIAL CAPACITY, ENVIRONMENTAL DEFENSE, SURFRIDER FOUNDATION, and CRIMINAL DISTRICT ATTORNEY JERI YENNE, IN HER OFFICIAL CAPACITY, Appellees

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On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 15802

O P I N I O N

This appeal concerns the Open Beaches Act.[1] Appellants, Angela Mae Brannan, Individually and as Independent Executrix of the Estate of Bob Albert Brannan, deceased, Brooks Porter and Mary Porter, Russell and Judy Clinton, Russell Clinton as Independent Executor of the Estate of Elizabeth Clinton, deceased, Reg Aplin and Beaver Aplin, Partners d/b/a Benchmark Developing, Louise Bullard, Diane Loggins Clark, Joseph Cornell Dewitt and Lisa Marie Dewitt Fuka, Macario Ramirez and Chrissie Dickerson, Jeffrey Dyment, the Marvin Jacobson Family Holding Company, Charles T. and Cathy Meek, James and Patricia Meek, Mark Palmer, James C. and Patricia Pursley, Kenneth C. and Andrea Reutzel, S & S

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[1] *See* TEX. NAT. RES. CODE ANN. §§ 61.001–.254 (Vernon 2001 & Supp. 2008).

Holdings, LLC, and Rogers Thompson, Executor of the Estate of P.E. Kintz, deceased, (collectively, "the Owners"), appeal from the trial court's judgment in favor of appellees, the State of Texas, Texas General Land Office, Texas Land Commissioner Jerry Patterson, in his official capacity, Texas Attorney General Greg Abbott, in his official capacity, the Village of Surfside Beach, Texas, Mayor James Bedward, Surfside Beach, Texas, in his official capacity, Environmental Defense, Surfrider Foundation, and Criminal District Attorney Jeri Yenne, in her official capacity.

In the portion of this appeal that challenges the injunction that orders the removal of the houses from the properties on the easement, the Owners make two contentions. First, the Owners assert the State has not proved a public beach easement to the line of vegetation. Second, and alternatively, the Owners assert the Open Beaches Act does not require the removal of their houses because the houses, when built, were not located within and did not interfere with the public beach easement.

In the portion of this appeal that challenges the trial court's refusal to award monetary damages, the Owners contend that they are entitled to damages because the ordered removal of their houses has resulted in a permanent taking of their property without compensation, and the denial of access to and utilities for their property by

the State and Village has resulted in a regulatory taking.

After the trial court issued the injunction ordering the removal of all of the 14 houses on the easement, 10 of those houses were removed by the force of nature, leaving only four houses. We conclude that the court properly ordered the removal of the four houses that remain on the easement that rolled to them and that the trial court properly denied these four owners's claim for damages due to a permanent taking. We also conclude the trial court properly denied all the Owners' claims for regulatory taking damages. We affirm.

Background

The Owners had houses on beachfront lots in the Village of Surfside Beach. The Owners lots are in an area known as "Pedestrian Beach" because the Village prohibited driving along that stretch of beach in the late 1970s or early 1980s.

For the most part, the Owners' houses were built in the 1960s, and, at the time of construction, were on the landward side of the vegetation line. In 1998, Tropical Storm Frances moved the vegetation line landward, making the houses stand between the water line and the vegetation line. David Dewhurst, commissioner of the General Land Office at the time, sent a letter to the Attorney General of Texas, identifying a number of houses in Surfside Beach that were seaward of the vegetation line, claiming these houses were encroachments on the public beach in violation of the

Open Beaches Act. The Attorney General decided to take action to remove houses that were an "immediate threat to public health and safety" or that "significantly blocked public access." The Attorney General informed the Owners (or their predecessors in title) that their houses did not meet either criteria and were not subject to removal. However, because the General Land Office had classified the Owners' houses as encroachments on the public beach, the Village refused permits to allow the Owners to repair septic systems and cut off water to some of the properties at issue.

In 2001, a number of property owners filed suit against the State and the Village, seeking a declaratory judgment affirming their right to repair, maintain, and access their houses and also seeking damages for the loss of use of the property following Tropical Storm Frances. The State filed a counterclaim, seeking removal of the houses pursuant to the Open Beaches Act.[2] Most of the original plaintiffs agreed to nonsuit their claims in return for the State dropping its counterclaim for removal of their houses. The remaining plaintiffs amended their petition, adding a claim that the imposition of the public beach easement and the removal of their houses were takings without just compensation. After Environmental Defense and the Surfrider Foundation intervened as defendants, a number of partial summary judgment motions were filed.

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[2] *See id.* § 61.018 (Vernon Supp. 2008).

On March 12, 2004, the trial court ruled on the motions for partial summary judgment. The rulings pertinent to this appeal were that imposition of the public beach easement and the removal of the plaintiffs' houses were not takings of property, and that the plaintiffs were not entitled to compensation. After these rulings, the Commissioner of the General Land Office suspended for two years the efforts to remove the plaintiffs' houses, pursuant to section 61.0185 of the Open Beaches Act.[3]

In October 2006, an unusually high tide or "bull tide" hit Pedestrian Beach. The tide removed a large amount of sand from the beach and damaged pilings and water and sewer connections to a number of houses. The State reasserted the right to remove houses seaward of the vegetation line as encroachments on the public beach easement. The State also asserted that some of the houses were on submerged lands, to which the State holds the title. The Village denied or ignored requests from Owners to repair their houses and to reconnect to utilities. A number of Owners intervened in the suit as plaintiffs. The State amended its counterclaim to include the houses of the intervening plaintiffs, and another round of summary judgment motions followed.

On September 12, 2007, the trial court ruled in favor of the Village on the

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[3] *See id.* § 61.0185 (Vernon Supp. 2008).

plaintiffs' taking claims. The trial court also granted the State's motion for summary judgment for an injunction to remove houses from the public beach easement, but denied the State's motion seeking civil fines pursuant to the Open Beaches Act.[4] After some plaintiffs settled and some of the claims were nonsuited, the trial court severed the submerged land claims and rendered a final judgment, affirming the earlier partial summary judgments and ordering the Owners to remove their houses. After the nonsuits and severance, the only issues and claims before us in this appeal are whether a public beach easement exists that should be imposed on the Owners' properties and, if so, whether the easement, in the scope asserted by the State, results in a taking of the Owners' properties for which they are entitled to just compensation.

On September 12 and 13, 2008, the tidal surge associated with Hurricane Ike destroyed 10 of the 14 houses at issue in this appeal. The remaining houses on the beach after the storm were those of Diane Loggins Clark, 221 Beach Drive; Louise Bullard, 411 Beach Drive; Marcario Ramirez and Chrissie Dickerson, 507 Beach Drive; and Brooks Porter and Mary Porter, 619 Beach Drive.

Standard of Review for Summary Judgments

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Summary judgment is proper only when a movant

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[4] *See* TEX. NAT. RES. CODE ANN. § 61.018(c) (Vernon Supp. 2008).

establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In reviewing a summary judgment, we must indulge every reasonable inference in favor of the nonmovant, take all evidence favorable to the nonmovant as true, and resolve any doubts in favor of the nonmovant. *Valence Operating Co.*, 164 S.W.3d at 661.

Law Pertaining to Texas Beaches

The Open Beaches Act protects the public's rights of access to and use of public beaches. The Texas Open Beaches Act states,

> It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if 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, 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 ANN. § 61.011(a) (Vernon 2001). Under the Act,

> Any county attorney, district attorney, or criminal district attorney, or the attorney general . . . *shall file* in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or to prohibit any unlawful restraint on the public's right of access to and use of a public beach or other activity that violates this chapter.

Id. § 61.018(a) (Vernon Supp. 2008) (emphasis added).

The Act defines "public beach" as

> [A]ny beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

Id. § 61.001(8) (Vernon 2001).

Cases applying and interpreting the Open Beaches Act help clarify the relative rights of private landowners and the public. First, the Open Beaches Act does not create a public beach easement where none exists. *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073, 110 S. Ct. 1119 (1990). If the public has acquired an easement or right of use by prescription, dedication, or custom, the Act provides a means of enforcing the public's rights. *Id.* As noted above, the Act provides that the appropriate official "shall file" a suit to enforce the public's rights. TEX. NAT. RES. CODE ANN. § 61.018(a). Second, once a public easement to the vegetation line exists, the boundaries of the easement shift as the line of mean high tide and the vegetation line shift. *Feinman v. State*, 717 S.W.2d 106, 115 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex.

App.—Houston [14th Dist.] 2001, no pet.) ("[O]nce 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)"); *Matcha v. Mattox ex rel. the People of Tex.*, 711 S.W.2d 95, 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1024, 107 S. Ct. 1911 (1987) ("[B]ecause legal title shifts with the natural movements of the beach, . . . this Court has concluded that the public easement also shifts with the natural movements of the beach."). This has been referred to in case law as a "rolling easement." *Feinman*, 717 S.W.2d at 115.

Jurisdiction

The trial court ordered the Owners' houses be removed from the easement, but none of the houses have been removed as a result of the trial court's order. Instead, forces of nature removed all but four of the houses. We have no jurisdiction to review whether the trial court properly ordered the removal of the houses that have been removed by forces of nature because that matter is moot due to the fact that these houses are no longer on the properties for reasons unrelated to the trial court's order. The mootness doctrine limits courts to deciding cases in which an actual controversy exists. *Camarena v. Tex. Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988). "[A] case is moot when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome.'" *BP Prods. N. America, Inc. v. Houston Chronicle Pub. Co.*, 263 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 1390 (2000)).

We hold the following:

- We lack jurisdiction over the claims concerning the injunction that had ordered the removal of those houses that have been removed by the force of nature and the damages sought due to any court ordered removal of those houses;

- We have jurisdiction to review the injunction ordering the removal of the four houses that remain at 221, 411, 507 and 619 Beach Drive, and damages sought from the removal of the four houses; and

- We have jurisdiction to review the damages asserted by all the Owners for regulatory takings for the period of time beginning when the services were declined by the State and Village to the period of time when the houses were or will be removed.

For clarity, the Owners with the four houses that remain standing will be referred to as the Four Owners.

Injunction to Remove the Houses

The Four Owners challenge the trial court's injunction ordering the removal of their houses.

A. The Existence of the Easement

In their third issue, the Four Owners contend the State never proved the existence of a common-law easement up to the line of vegetation, and therefore the "rolling easement" of the Open Beaches Act does not apply. The trial court's summary judgment ruling that the houses must be removed from the easement necessarily determined that there was an easement there because the finding of an easement was a condition precedent to the finding that the houses must be removed.

In their response to the State's motion for summary judgment, the Owners stated,

> The State has presented no evidence that the public has obtained an easement on Plaintiffs' lands by prescription.
>
> The State has presented no evidence that any Plaintiff has dedicated or granted an easement on his property to the public. The State has presented no evidence that any Plaintiff has impliedly dedicated his property for a public easement.
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> The State presented no evidence the public has established an easement on Plaintiff's lands by custom. At best, the State's Affidavits show some plaintiffs from time to time have merely allowed members of the public to make permissive use of Plaintiff's lands.
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> . . .[T]he State has failed to prove the public has established any easement on any strip of land on Follet's Island at Surfside, Texas seaward of Plaintiff's properties.

1. Applicable Law

Under the Open Beaches Act, the public may acquire an easement in one of three ways—by prescription, by dedication, or through continuous right. TEX. NAT. RES. CODE ANN. § 61.011(a); *Arrington*, 767 S.W.2d at 958. "It is well established in this State that there may be a dedication of land to public use." *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 935 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). "Implied dedication need not be shown by deed nor need public use b[e] shown for any particular length of time." *Id.* at 935–36. "The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public; and if individuals, in consequence of this act, become interested to have it continue so, the owner cannot resume it." *Id.* at 936 (citing *Owens v. Hockett*, 251 S.W.2d 957, 958 (Tex. 1952)).

2. The Summary Judgment Evidence

The State's summary judgment evidence included an affidavit from Karlyn Hamby, the Village's city secretary and building official. He stated he has lived in Surfside since 1989 and during that time has seen the public use the pedestrian beach up to the line of vegetation without asking permission of the owners of the land along the beach. Hamby also stated the beach was a public beach and had been "for as long as I can remember."

The State also produced the affidavit of Ellis Pickett, who stated he was familiar with the beaches in Galveston and Brazoria counties. Pickett stated he had surfed on the beach at Surfside for decades. He also stated that the public has used the beach up to the vegetation line. Pickett averred that when he first started visiting the beach in the 1960s, the public drove along the beach, using it as a public road, and that, after the Village prohibited driving on that section of beach, he and members of the public continued using that portion of the beach for passage and recreation.

The State also identified portions of Albert Brannan's deposition testimony. Brannan stated that he bought his property in the 1950s and later served as mayor of the Village. He was mayor at the time the section of beach at issue became pedestrian only. To keep people off his property, Brannan erected a 600 foot concrete bulkhead, later replaced by an aluminum barrier, at his property line that was landward of the vegetation line. He stated he had seen people use the beach seaward of his property for recreational purposes on the beach in Surfside "forever." The Owners did not produce any evidence to controvert the testimony by Hamby, Pickett, and Brannan.

3. Analysis

The summary judgment evidence shows that for a period of at least 40 years, the public has openly used the beach where these properties are located. Because the undisputed evidence shows the area up to the vegetation line has been open to the

public, the public acquired an easement or right of use by implied dedication. *See Seaway*, 375 S.W.2d at 936; *see also Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 125 (Tex. App.—Corpus Christi 1986, no writ) (holding evidence public had openly used beach without owner protesting for over 50 years sufficient to show public acquired easement or right of use by dedication); *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ) ("The mere fact that the prior owner stood by and watched the public use 'his' beach for many years indicates that he intended to give the beachfront to the public.") We hold the trial court properly determined the summary judgment evidence established an easement by dedication.

We overrule the Four Owners' third issue.

B. The Rolling Easement

In their first issue, the Four Owners contend the trial court erred by ordering houses removed and by impeding residential uses of the houses because when the rolling easement rolls landward, the rolling easement must accommodate a lawfully built, preexisting house where it intrudes. In short, the Owners request we reverse the trial court's order and render judgment that the Owners need not remove houses from where they stand, even if they stand on an easement, because the easement must accommodate the houses, since the houses were preexisting and the easement rolled

to the houses. The Four Owners contend their houses cannot be an "encroachment" on the public beach because the houses are stationary and the rolling easement moved landward to the houses. The Four Owners assert this is a question of first impression in Texas courts.

1. Applicable Law for Interpreting Statute

Statutory construction is a legal question that we review *de novo*. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009). In construing a statute, we must "ascertain and give effect to the Legislature's intent." *Id.* We begin with the "plain and common meaning of the statute's words" to ascertain the Legislature's intent. *Id.* (citing *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)). "We also consider the objective the Legislature sought to achieve through the statute, as well as the consequences of a particular construction." *Id.* (citing TEX. GOV'T CODE ANN. § 311.023(1), (5) (Vernon 2005). The Government Code provides the following criteria to consider when interpreting a statute:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:
>
> (a) object sought to be attained;
>
> (b) circumstances under which the statute was enacted;
>
> (c) legislative history;

(d) common law or former statutory provisions, including laws on the same or similar subjects;

(e) consequences of a particular construction;

(f) administrative construction of the statute; and

(g) title (caption), preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023.

2. Analysis of Plain Language of Statute

Under the Act, a public beach includes the "area extending from the line of mean low tide to the line of vegetation . . . if 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." TEX. NAT. RES. CODE ANN. § 61.012 (Vernon 2001). For the purposes of this issue, the Four Owners concede the public has acquired an easement or right of use to the line of vegetation.

The Four Owners argument focuses solely upon the word "encroachment." The Four Owners assert that the common definitions for the word "encroachment" indicate that the Act's authority to enjoin encroachments on the public easement targets the active introduction of a structure onto an existing public easement area. For example, the Four Owners cite the definition of "encroach" in Black's Law Dictionary. *See* BLACK'S LAW DICTIONARY 527 (6th ed. 1990) (defining "encroach"

as follows: "to enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude"). The Four Owners contend that by using the word "encroachment," 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."

The plain language of the statute contradicts this position. The Act gives the attorney general the power to file a suit "to remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach." *Id.* § 61.018(a). The Act provides "any" improvement, maintenance, barrier, obstruction or other encroachment is subject to removal. *Id.* The Act also provides a county attorney, a district attorney, or the attorney general shall file a suit "to prohibit *any* unlawful restraint on the public's right of . . . use of a public beach." *Id.* (emphasis added). The plain language of the Act, therefore, requires the removal of obstructions, barriers, and encroachments whether or not they existed when the easement first applied to the property.

3. Analysis of Criteria in Government Code

In examining a statute, in addition to the plain language, we consider the seven criteria in the Government Code listed above.

a. The Objective of the Legislature

The Act provides, "The commissioner shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement." TEX. NAT. RES. CODE ANN. § 61.011(c) (Vernon Supp. 2008). As noted below, the caption refers to "affirming and protecting" the rights of the public to use the public beach easement. The object sought to be attained, as expressed in the language and the caption of the Act, is the public's right to use the public beach easement.

b. The Circumstances Under Which the Act Was Enacted

The Open Beaches Act was passed in response to the Texas Supreme Court's decision in *Luttes* to protect the public's rights of access to and use of public beaches. *See* TEX. NAT. RES. CODE ANN. § 61.011(a) (Vernon Supp. 2008) (stating policy of Act). In 1958, the Texas Supreme Court decided *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958). In *Luttes*, the supreme court held that the common-law boundary line between State-owned submerged lands and privately owned property on the beach is the mean high tide line. *Luttes*, 324 S.W.2d at 191–93; *Feinman*, 717 S.W.2d at 110. *Luttes* confirmed State ownership of the "wet beach"—the area between the mean low and mean high tide lines. *Luttes*, 324 S.W.2d at 191–93; *Feinman*, 717 S.W.2d at 110. The "dry beach," or the area from the mean high tide

line to the line of vegetation, belonged to the private property owners. *Luttes*, 324 S.W.2d at 191–93; *Feinman*, 717 S.W.2d at 110. However, prior to *Luttes*, it was thought that the State owned *both* the wet and dry beaches. Neal Pirkle, *Maintaining Public Access to Texas Coastal Beaches the Past and the Future*, 46 BAYLOR L. REV. 1093, 1093–94 (1994). The circumstances under which the Open Beaches Act was enacted show that it was passed to protects the public's rights of access to and use of public beaches when title to the land belongs to private owners.

c. The Legislative History

We note again that the Open Beaches Act was passed in response to the Texas Supreme Court's decision in *Luttes*, to protect the public's rights of access to and use of public beaches. *See* TEX. NAT. RES. CODE ANN. § 61.011(a) (stating policy of the Act).

d. Common-law or Former Statutory Provisions

The parties have not identified any relevant common-law or former statutory provisions concerning whether a rolling easement must accommodate pre-existing structures. As noted above, the Four Owners assert this is a matter of first impression.

e. Consequences of a Particular Construction

The Owners' interpretation of the Act would defeat the purpose expressed in

the plain language of the Act and, as noted below, in the caption. If the State could not protect the right of the public when an easement rolled to existing structures, the public would soon lose the right to access the beach because forces of nature continually change the shoreline. *See Feinman*, 717 S.W.2d at 111 (noting that if boundaries and easement did not "roll" with changes to shoreline, it "would greatly diminish the public's easement" and "defeat the purposes of the Act").

f. Administrative Construction of the Act

The General Land Office has adopted a rule "to provide authority for local governments to issue permits or certificates for repairs to certain houses if any portion of the house is located seaward of the boundary of the public beach." 31 TEX. ADMIN. CODE § 15.11(a) (2006) (Gen. Land Office, Coastal Area Planning). A house is eligible for such a permit if, among other requirements, "[t]he line of vegetation establishing the boundary of the public beach has moved as a result of erosion or a meteorological event," and "[t]he house was located landward of the natural line of vegetation before the erosion or meteorological event occurred." *Id.* § 15.11(c)(1), (2). The rule does not expressly state existing improvements are subject to removal. However, this follows from the language of the rule. To be eligible for repairs the house must have been landward of the vegetation line until a meterological event moved the vegetation line. *Id.* If rolling of the vegetation line and the easement's

boundary does not apply to existing homes, the General Land Office would have no reason to adopt such a rule.

g. The Caption

The caption for the Open Beaches Act states, in pertinent part,

> An Act affirming and protecting the right of the public use of certain state-owned beaches or such larger area extending from the line of mean low tide to the line of vegetation, in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of a continuous right in the public bordering on the seaward shore of the Gulf of Mexico; affirming and protecting rights of the public to beaches upon which the public has acquired a prescriptive right . . . .

Act of July 16, 1959, 56th Leg., 2nd C.S., ch. 19, 1959 Tex. Gen. Laws 108. The caption mentions "protecting" the public's right of use of the easement.

4. Conclusion

Our analysis of the Act and the matters pertinent to determining the Legislature's intent leads to the conclusion that the Act applies to anything that interferes with the public's right to use the easement. This is so whether an owner of a property actively introduces an "improvement, maintenance, obstruction, barrier, or other encroachment" on to a public beach or whether the easement rolls to a portion of the property that had before not been located on the easement.

We overrule the Four Owners' first issue.

Refusal to Award Damages for the Takings Claims

In their second and fourth issues, the Owners challenge the trial court's rulings concerning their takings claims. Specifically, the Owners assert claims for regulatory takings based on the premise that the State and Village deprived them of the use of their properties by denying access to and utilities for the properties for the period of time starting when the actions of the State and Village deprived them of the use of their properties until the time either when their houses were destroyed by the force of nature or their houses will be destroyed due to the trial court's injunction. The Four Owners challenge the trial court's refusal to award damages for the physical taking of their houses due to the trial court's injunction ordering the removal of their houses.

A. Applicable Texas Law Concerning Taking of Property Generally

The Texas Constitution provides, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." TEX. CONST. art. I, § 17. To prevail on a takings claim, "the landowner must show that (1) the State intentionally performed certain acts in the exercise of its lawful authority (2) that resulted in a 'taking' of property (3) for public use." *Villarreal v. Harris County*, 226 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A compensable "regulatory

taking" occurs "where regulation denies all economically beneficial or productive use of land." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16, 112 S. Ct. 2886, 2893 (1992)). "A physical taking may occur when the government physically appropriates or invades private property, or unreasonably interferes with the landowner's right to use and enjoy it." *Porretto v. Patterson*, 251 S.W.3d 701, 707 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004)).

B. Applicable Federal Law Concerning Taking of Property Generally

"Although the Texas constitution's adequate compensation provision is worded differently than the just compensation clause of the Fifth Amendment to the United States Constitution, the Texas Supreme Court has described them as comparable and generally looks to federal cases for guidance in takings cases." *City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. App.—Dallas 2008, no pet.) (citing *Sheffield*, 140 S.W.3d at 669).

There is a difference between a taking and a limitation upon property use based upon "background principles" of state property law. *Lucas*, 505 U.S. at 1030, 112 S. Ct. at 2901. In *Lucas*, the Supreme Court held Lucas would not be entitled to damages if the State of South Carolina could "identify background principles of . . .

property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031, 112 S. Ct. at 2901–02. The Supreme Court explained, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027, 112 S. Ct. at 2899. The Supreme Court went on to note, "[W]e have refused to allow the government to decree it [a taking] anew (without compensation), no matter how weighty the asserted 'public interests' involved—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title." *Id.* at 1028–29, 112 S. Ct. at 2900 (emphasis in original, internal citation omitted).

C. Applicable Law Holding Open Beaches Act Is Not A Taking

This Court, the Austin court of appeals, and the Corpus Christi court of appeals have rejected claims that the Act results in a taking of private property without just compensation. *See Seaway*, 375 S.W.2d at 930 (holding Open Beaches Act does not take rights from owner of land because rights to easement that are being enforced are acquired by reason of dedication, prescription, or continuous right); *Arrington*, 767 S.W.2d at 959 (holding trial court properly denied damages based on claim that

property was taken under Open Beaches Act); *Moody*, 593 S.W.2d at 379–80 (following *Seaway* in holding Open Beaches Act is not taking of property without compensation because public acquired right to use beach and right was not taken by State); *see also Matcha*, 711 S.W.2d at 101 (overruling takings claim because "the public acquired the complained-of-easement not by virtue of the Open Beaches Act, but instead through prescription, dedication, and custom"). As this Court states in *Seaway*, "[T]here is nothing in the Act which seeks to take rights from an owner of land. . . . [I]t merely furnishes a means by which the members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription or which may have been retained by continuous right." 375 W.2d at 930. The Austin court explains that there is a "fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use." *Arrington*, 767 S.W.2d at 958.

D. Analysis

In the preceding portions of this opinion, we have already determined that

- the Open Beaches Act protects the public's free and unrestricted right to *use* the larger area extending from the line of mean low tide to the line of vegetation if the public acquires that right through prescription, dedication, or custom;

- courts of appeals, including this Court, have held that the easement "rolls" or moves with the shifting of the line of mean high tide and the line of vegetation;

- the undisputed evidence shows that there is an easement by implied dedication on these properties because the public has historically used the beach in the area where these properties are located;

- the Open Beaches Act applies to anything that interferes with the public's right to use the easement, whether an owner of a property actively introduces an "improvement, maintenance, obstruction, barrier, or other encroachment" on to a public beach or whether the easement rolls to a portion of the property that had before not been located on the easement.

These points show that we have already determined that because the easement rolled to the houses, the houses that sit on the easement now interfere with the public's use of the easement—the area extending from the line of mean low tide to the line of vegetation—that was historically dedicated for the public's use.

The specific question we answer today, which has not previously been addressed by this Court or another court of appeals of this State, is whether a taking occurs when an easement rolls to a house that was not initially on the easement. Although this specific question is a matter of first impression, Texas courts of appeals have consistently held that removal of a structure or obstruction from the public easement under the Open Beaches Act is not a taking because the Act does not create an easement, but provides a method of enforcing an easement acquired by other

means. *See Seaway*, 375 S.W.2d at 930; *see also Arrington*, 767 S.W.2d at 958; *Moody*, 593 S.W.2d at 379–80. The only difference between those cases and this case is that here the easement rolled to houses that were not initially on the easement. But that difference does not compel a different result because the pertinent inquiry focuses on whether the area extending from the line of mean low tide to the line of vegetation was historically dedicated for the public's use. If the area extending from the line of mean low tide to the line of vegetation was historically dedicated for the public's use, as here, then that land is subject to the easement because of the historical dedication. There is no taking of that land by the government because it was the force of nature that placed these houses on the area extending from the line of mean low tide to the line of vegetation, which was the property that was historically dedicated for the public's use. *See Seaway*, 375 S.W.2d at 930; *see also Arrington*, 767 S.W.2d at 958; *Moody*, 593 S.W.2d at 379–80. We hold the easement that rolled up to the houses located on these properties does not constitute a taking. *See Seaway*, 375 S.W.2d at 930; *see also Arrington*, 767 S.W.2d at 958; *Moody*, 593 S.W.2d at 379–80.

Our holding is consistent with the Supreme Court's decision in *Lucas*. In *Lucas*, the Supreme Court stated that no taking occurs when the restriction on the land was imposed under background principles of state property law. *See Lucas*, 505

U.S. at 1027, 1028–29, 112 S. Ct. at 2899, 2900. Under Texas property law concerning easements, the owners of land subject to an easement remain the title holders of the land. *See Brownlow v. State*, 251 S.W.3d 756, 761 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) (fee owner who grants easement retains title to land) (citing *Brunson v. State*, 418 S.W.2d 504, 506 (Tex. 1967)). The title owner of the land is the owner of the servient estate and the user of the easement is the owner of the dominant estate. *See Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963). "The owner of the servient estate [the land owner] simply may not interfere with the right of the owner of the dominant estate [the user of the easement] to use the servient estate for the purpose of the easement." *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987) (quoting *Drye*, 364 S.W.2d at 207); *see also Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 666 (Tex. App.—Austin 2005, no pet.); *Taylor Foundry Co. v. Wichita Falls Grain Co.*, 51 S.W.3d 766, 770 (Tex. App.—Fort Worth 2001, no pet.) ("Any use by the servient estate holder that interferes with the exercise of the dominant estate holder's rights must yield."). The undisputed evidence shows the public used the land seaward of the vegetation line for recreation and for passage, even using it as a road until Village ordinances prohibited driving on that section of beach. Under the law concerning easements, therefore, the Four Owners may not interfere with the public's

right to use the easement for the purposes of the easement. *See Vrazel*, 725 S.W.2d at 711. This restriction on the Four Owners' use of their property is part of the background principles of Texas law and, therefore, does not constitute a taking under *Lucas*. *See Lucas*, 505 U.S. at 1028–29, 112 S. Ct. at 2900 (stating enforcement of existing easement is not new taking entitled to compensation).

The bottom line here is that the easement applies to the land seaward of the vegetation line because that land was historically dedicated for the public's use. Although the Four Owners' land was not initially part of this easement due to the fact that their land was landward of the vegetation line, the force of nature has caused their land to become part of this easement now that their land is seaward of the vegetation line. This is not a governmental taking because the government did not create the easement that exists seaward of the vegetation line; rather, the historical dedication of the land seaward of the vegetation line created the easement. The act of nature moved the land of vegetation landward of where the Owners' houses were located; this was not the act of the government. The prior title owners of the land seaward of the vegetation line dedicated that land to the public; this was not the act of the government. By enforcing the easement, the government is not taking the Owners' property but instead enforcing the easement on the land seaward of the vegetation line that was historically dedicated to the public.

We conclude the government's enforcement of the public's existing easement is not a taking of property without just compensation. We hold the trial court properly denied the Owners' claims for damages based on the claim that the State and Village deprived them of all use of their property by denying access to and utilities for the property. We also hold the Four Owners are not entitled to damages for the removal of their houses.

We overrule the second and fourth issues.

Conclusion

We dismiss the appeal for lack of jurisdiction for all of the claims concerning the injunction to remove houses and claims for damages from any removal of those houses for the ten Owners whose houses have been removed from the easement by the force of nature. Except for those claims, we affirm the judgment of the trial court.[5] All pending motions are denied as moot.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Hanks.

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[5] A case involving the rolling easement and the Open Beaches Act is currently under submission to the Texas Supreme Court, set for argument on November 19, 2009. *See Carol Severance v. Jerry Patterson, Commissioner of the Texas General Land Office; Greg Abbott, Attorney General for the State of Texas; and Kurt Sistrunk, District Attorney for the County of Galveston, Texas*, No. 09-0387; *see also Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009) (certifying questions concerning (1) whether Texas recognizes a "rolling easement," (2) whether such an easement is derived from common law or the Open Beaches Act, and (3) to what extent, if any, a landowner is entitled to compensation for limitations on property use effected by the landward migration of a rolling easement).