IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE GUZMAN, dissenting.

The boundaries of Texas's beaches are dynamic, as recognized by the laws of nature and our state's common law, statutes, and Constitution. I therefore join Justice Medina's dissent in part because I agree that (1) Texas common law establishes the concept of a migratory public beachfront access easement that moves in accordance with the ever-shifting boundaries of the dry beach, and (2) the Court's conclusion that *title* shifts due to both avulsive and accretive events, yet that any corresponding *easement* allowing public use of the dry beach shifts only due to accretion but not avulsion, has no basis in logic or Texas law. Thus, the answer to the first certified question must be yes. I further agree with Justice Medina that, in answer to the second certified question, the easement traversing Carol Severance's property is derived from common-law doctrines rather than a construction of the Open Beaches Act.

However, I do not believe that a coastal landowner like Severance, whose property is burdened with an easement, is required to remove or is otherwise unable to use and maintain her home in order to accommodate the easement. The common law of this state has long envisioned a proper balancing between public and private use of the dry beach, and the law of easements does not allow an easement holder to unreasonably burden the servient estate. Thus, in answer to the third certified question, I would hold that while the public's reasonable use of a rolling easement over a private beach does not generally entitle a property owner to compensation, such an easement would unreasonably burden the servient estate if the property owner was unable to use and maintain her home. In those circumstances, the property owner would be entitled to compensation for a taking.

I. Balance of Public and Private Interests at the Seashore

The law of this state has long recognized the need for a balance between public and private use of one of the state's most valuable resources: its seashore. *See City of Galveston v. Menard*, 23 Tex. 349, 393 (Tex. 1859) ("This species of property, being land covered with navigable water, embraces several rights that may be separated, and enjoyed by different persons, and may become thereby, *partly private and partly public*; as, the right to the soil, a right to fish in its waters, the right to navigate the waters covering it, etc." (emphasis added)). The need to balance public and private rights to the seashore dates back even further than the days of the Republic, when the Texas coast was governed by Spanish law. *See Luttes v. State*, 324 S.W.2d 167, 197 (Tex. 1959) (Smith, J., dissenting) ("Every man can build a house or a hut on the seashore where he can find shelter whenever he wishes; he can also build there another edifice whatsoever for his own benefit,

provided the common use (of the seashore) of the people is not hampered; and he can construct galleys and any other kind of ships and dry nets there and make new ones if he desires to do so . . . ." (quoting Law IV, Title 28, PARTIDAS III)).[1]

A customary easement is a recognized common-law principle, *see, e.g.*, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974); *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1096 (Idaho 1979); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969), and contemplates a balance of private and public property rights, *see City of Daytona Beach*, 294 So. 2d at 78 ("[T]he owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area."); Mike Ratliff, Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 991 (1975) (observing that only easements of use and passage are obtained by custom, with the fee and rights to profits of the land remaining with the land owner). Custom has deep roots in the English common law. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *74. The high courts of several states have recognized the proper operation of customary law in the specific context of public beaches. *See City of Daytona Beach*, 294 So. 2d at 78; *In re Application of Ashford*, 440 P.2d 76, 77 (Haw. 1968); *Fox*, 594 P.2d at 1101; *Hay*, 462 P.2d at 673. This Court has also observed that public rights to the shoreline can be established by immemorial custom. *Menard*, 23 Tex. at 393.

A customary easement is tied to a locale and is not vested in a particular piece of property

[1] *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEX. L. REV. 523, 528 n.37 (1960) (describing Las Siete Partidas as the basic law of Spain and Mexico until the modern Civil Codes were adopted in the late nineteenth century).

or defined by a particular path of use. *See City of Daytona Beach*, 294 So. 2d at 78 ("This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself."). Thus, an easement established by custom is not limited to one particular individual or the owner of a particular estate, nor is it constricted by metes and bounds. Instead, it attaches to a locale, in this case the dry beach. *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1396 (1996); *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *263 (observing that custom is applied to a place in general and not to any particular person).

The Court correctly observes that the Republic of Texas granted private title to West Beach property on Galveston Island in the Jones and Hall grant in 1840 without an express reservation of title or public use. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 928 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). And it is settled law that the land between the mean high tide line and the vegetation line constitutes the dry beach and may be privately owned. *See Luttes*, 324 S.W.2d at 191–93. But before this Court decided *Luttes*, both property owners and the public apparently assumed the public's right to freely use the dry beach, *see* Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1093 (1994), a right dating back to Spanish law, *see* LAS SIETE PARTIDAS, Third Partida, Title 28, Law IV (Samuel Parsons Scott trans., 1931) ("Every man can build a house or a hut on the sea shore which he can use whenever he wishes . . . provided the common custom of the people is not violated . . . ."); *see also Luttes*, 324 S.W.2d at 197 (Smith, J., dissenting) (observing that "[t]his definition [from the Partidas] is that the seashore is a place where every man may build a house or other building, build

boats and dry nets. Very few men would want to build a house out in the water and none would want to stand in the water while building their boats, and most conclusive of all, none would attempt to dry his nets in water or even on the wet portion of the beach."). Thus, although the Court denies that the public used the beach on Galveston Island dating back to "time immemorial," there are indications of this customary use from even before the existence of the Republic.

The Court concludes that even if such customary use of the beach existed, it was cut off following the Jones and Hall grant of 1840. __ S.W.3d __, __. But it is inaccurate to assume, solely based on the express terms of the Jones and Hall grant, that any right the public had to use the dry beach was completely eradicated in favor of private ownership from that point forward.

First, it is not clear that the Jones and Hall grant cut off any customary right of use the public may have had to West Beach. This Court's *Menard* decision suggests the contrary. Although *Menard* primarily concerned the wet beach on the east end of Galveston Island, its reasoning nonetheless indicates that land grants by the early Republic did not necessarily extinguish customary rights of use. *See Menard*, 23 Tex. at 394–97. There, the Court noted that under the common law, an ordinary grant of the shoreline did not generally "convey the shore or any of the land of the bay covered with water," and under civil law the seashore was generally "reserved for common use." *Id.* at 395. The *Menard* Court went on to conclude that the particular land grant in that case included the shore and water to a fixed point, but only because Menard and the government had specifically negotiated the unusual result. *Id*. at 397. The court considered their shared purpose of creating a city, harbor, and port of entry at Galveston, which required private ownership of "streets and lots running up to, and bordering on the channel of the bay" in order to allow the construction of

wharves. *Id*. The Court observed that the sovereign has the power to convey even submerged lands, and did so in that case because it was the shared purpose of the contracting parties, but explained that such a broad grant was unusual, and that normal grants would not extend so far. *Id.* at 392. Given the historic presumption of the public's right to use the dry beach, dating back to the days before the Republic, *see* LAS SIETE PARTIDAS, Third Partida, Title 28, Law IV (Samuel Parsons Scott trans., 1931), it is hardly definitive that an ordinary grant of the nature of the Jones and Hall grant automatically extinguished all public *use* of the shore, even when title shifted.

But even if any easement of customary use was revoked by the Jones and Hall grant, it was subsequently re-established as to West Beach in general, as demonstrated by the Houston court of appeals' *Feinman* and *Seaway* decisions which painstakingly detailed the public's use of West Beach over the past 150 years. *See Feinman v. State*, 717 S.W.2d 106, 111–13 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (surveying evidence and concluding that a public easement was established on West Beach, Galveston Island by implied dedication, with evidence also supporting the trial court's finding of an easement established by prescription and custom); *Seaway*, 375 S.W.2d at 930–39 (surveying evidence and concluding that a public easement was established on West Beach, Galveston Island by prescription and implied dedication).[2] The Court here perfunctorily notes the absence of any historic custom of public use on private West Beach property. But, as mentioned, this Court has observed a public right of use that could be acquired by

[2] Though the *Seaway* court specifically found a public easement established on West Beach by prescription and implied dedication, the detailed evidence surveyed in that opinion just as easily supports an easement established by customary use. *See Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (describing elements of easement by customary use as public use that is ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law) (citing *Hay*, 462 P.2d at 677).

immemorial custom, *see Menard*, 23 Tex. at 393, as have at least two courts of appeals, *see Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ). And the Court could easily take judicial notice of the detailed evidence set forth in *Seaway* and *Feinman* of widespread public use of West Beach over the past 150 years. It is therefore erroneous to conclude that a lack of evidence exists as to the public's customary use of that portion of Galveston Island.[3]

As noted, an easement established by custom is not limited to one particular individual or the owner of a particular estate, nor is it constricted by metes and bounds. Instead, it attaches to a locale, such as the dry beach of a particular area. *See* Bederman, 96 COLUM. L. REV. at 1396; *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *263.[4] I accordingly agree with Justice Medina that the public holds a dynamic easement on the dry sand of West Beach. But the public's right of use is not absolute. Instead, a private property owner like Severance continues to enjoy a strong property interest in her land that must be balanced with the public's use of the easement traversing her property, as reflected in rulings of this Court dating back to the 1800s, *see Luttes*, 324 S.W.2d

[3] The Court does acknowledge the easement established for use of a privately owned tract seaward of Severance's property in the 1975 default judgment in the case of *John L. Hill, Attorney General v. West Beach Encroachment, et al.*, Cause No. 108,156 in the 122nd District Court, Galveston County. That easement, which extended over the dry beach as demarcated by the vegetation line, was established by prescription, dedication, and continuous use of the public since time immemorial.

[4] The Court seems to also believe that an easement established by prescription or dedication may not shift in sync with the natural movements of the sea, a reasoning contradicted by the Court's conclusion that an easement may shift by accretion even to a previously unencumbered property. __ S.W.3d at __. Justice Medina ably addresses the infirmities of the Court's holding and reasoning, and so I do not replicate those arguments here. I do think it worth reiterating, however, that some portions of West Beach are eroding at a rate of seven feet a year. __ S.W.3d at __ (Medina, J., dissenting). It follows that, in the not-so-far-off future, the rolling easement by accretion that the Court acknowledges will inevitably move far enough to burden previously unencumbered properties.

at 191–93; *Menard*, 23 Tex. at 393, and in the law of easements.

II. The Law of Easements

An easement is a property interest in which the easement holder may use the property of another for a particular purpose. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). A grant or reservation of an easement generally implies a grant of "unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). Thus, an easement does not allow an easement holder complete and total use of the servient owner's land, nor does an easement enable its holder to use it in any manner, regardless of how burdensome its use is on the servient estate. Instead, the easement holder may only use the easement as is *reasonably* necessary and in a manner that is *as little burdensome* as possible. *See id*. As the Restatement of the Law provides:

> In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses. Aggregate utility is generally produced by interpreting an easement to strike a balance that maximizes its utility while minimizing the impact on the servient estate.

See RESTATEMENT (THIRD) OF THE LAW, PROPERTY (SERVITUDES) § 4.10, cmt. b.

In order to strike the proper balance between the property owner's interest in her land and the public's interest in its easement, I believe that the public has a right to use the beach around a house on the dry beach, and that a property owner may not erect fences or other barriers that impede the public's use of the easement. But it would unreasonably burden the servient estate to disallow

the property owner from using and maintaining her home. A public-use easement like that at issue here does not cede *exclusive* use of the land to the public, but instead leaves the rights of the property owner, with the exception of the right to exclude the public from access to the beach around the house. *See Coleman*, 514 S.W.2d at 903 ("No interest in real property passes by implication as incidental to a grant except what is reasonably necessary to its fair enjoyment."). If the State could claim a right to the public's absolute use of the private beach, the public's access easement would, in essence, constitute full fee simple title to the land, a result that does not comport with our decision in *Luttes* or Texas easement law. *See Coleman*, 514 S.W.2d at 903; *Luttes*, 324 S.W.2d at 191–93; *Cozby v. Armstrong*, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) ("[T]he owner of an easement does not acquire the right unnecessarily to continue it as originally used, if such use would in effect destroy the right of the owner of the fee to the enjoyment of his property."); *San Jacinto Co., Inc. v. Sw. Bell Tel. Co.*, 426 S.W.2d 338, 345 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) ("An easement . . . gives no exclusive dominant right over the servient land unnecessary to the enjoyment of such easement, and the dominant owner (easement owner) must make a reasonable use of the right so as not unreasonably to interfere with the property rights of the owner of the servient estate."); RESTATEMENT (THIRD) OF THE LAW, PROPERTY (SERVITUDES) § 4.10 ("[T]he [easement] holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.").

The public can easily walk around the house in its ingress and egress to and from the water and enjoy beach recreation in the area around the house. Thus, I would conclude that the public may use the dry beach around Severance's house in order to accomplish the purpose of the easement, but

that enforcing the easement so that Severance no longer has use of her home would unreasonably interfere with her rights as private property owner.

III. Takings Law

The third certified question asks us whether a landowner would be entitled to receive compensation under Texas's law or Constitution for limitations on use of her property effected by the landward migration of a rolling easement onto her property. The Texas Constitution requires the State to compensate a person if the person's property is "taken, damaged or destroyed for or applied to public use," absent the person's consent. TEX. CONST. art. I § 17(a). "An inverse condemnation may occur if, instead of initiating proceedings to condemn property through its powers of eminent domain, the government intentionally physically appropriates or otherwise unreasonably interferes with the owner's right to use and enjoy his or her property." *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010) (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)). Moreover, "[w]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Though I agree with Justice Medina that the right to exclude the public from the dry beach around Severance's property was never part of her bundle of property rights due to the pre-existing dynamic easement on the dry beach, I believe that preventing a property owner from using and maintaining her home would (1) unreasonably interfere with the owner's right to use and enjoy her property, *see Brownlow*, 319 S.W.3d at 652, and (2) require the property owner to sacrifice all

beneficial use of her property, *see Lucas*, 505 U.S. at 1019. If a property owner may not maintain and use her home, the property, in essence, loses all value to the owner. Under either theory, the property owner would be entitled to compensation because she has suffered a taking.

As Justice Medina observes, the Supreme Court enumerated two exceptions to the rule established in *Lucas*. No taking occurs if (1) the regulation restricts a use the owner does not have in her title, or (2) state common-law nuisance or property principles prohibit the desired use of the land. *See id.* at 1027, 1029. Neither of these exceptions applies here.

First, the Open Beaches Act's mandated disclosure, given to all purchasers of property seaward of the Gulf Intracoastal Waterway after 1986, does not constitute an actual divestment from the property owner of a land use in her *title*. The fact that the executory contracts in these sales contain this notice of risk does not constitute a restriction in the title to the property. *See Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988) (noting that the terms of a deed may vary from that of the contract, and that "the deed must be looked to alone to determine the rights of the parties" (quoting *Baker v. Baker*, 207 S.W.2d 244, 249 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.))).

Second, nothing in Texas property principles prohibits a property owner from maintaining and using her home on the beach, even when the property is burdened by an easement of public use. Rather, as discussed, Texas common law mandates the necessity of balancing private and public interests in beach property, and easement law does not require the servient landowner to yield all private interest in her property to the public use of the beach. *See Brownlow*, 319 S.W.3d at 656 (observing that an unlimited easement "carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use," but "the rights reasonably necessary for full enjoyment

of an easement are limited").

Third, the mere presence of a house on the dry beach does not automatically constitute a public nuisance. All property is held subject to the valid exercise of the government's police powers. *City of Dallas v. Stewart*, __ S.W.3d __, __ (Tex. 2012). Flowing from this, the government does not commit a taking when it abates that which is, in fact, a nuisance. *Id.* The government may—and has—used its valid police powers to impose reasonable regulations on coastal property. *See, e.g.*, TEX. NAT. RES. CODE §§ 61.011(d)(6), 61.015(g). But the Legislature has not declared the mere presence of a house on the dry beach a nuisance. And, even if it did, it is unlikely the mere presence of a house on the dry beach would constitute a nuisance in fact. *See City of Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) (observing that "even the State may not denounce that as a nuisance which is not in fact"); *see also State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 413 (Tex. 1969) (describing a nuisance in fact as a condition that "endangers the public health, public safety, public welfare, or offends the public morals"). Thus, I would conclude that a private owner of dry beach suffers a taking if she is forced to remove her home or is prohibited from using and maintaining her home, even if her property is burdened by a public-use easement.

IV. Conclusion

Because I agree with Justice Medina that a public use easement migrates with the dry beach boundaries, regardless of whether that movement is due to accretion or avulsion, and that such an easement is established under common-law principles, I join his dissent in part. However, I write separately because I also believe that a taking occurs when the government forbids a property owner from using and maintaining her home, even if the property is burdened by a public-use easement.

A public-use easement to the dry beach is not a total interest in a property owner's land, and as such cannot be used to divest the property owner of all use of her property. Accordingly, I join Justice Medina's dissent in part.

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Eva M. Guzman
Justice

OPINION DELIVERED: March 30, 2012