A New Paradigm for Texas Beaches: Implications of the Severance Decision on Public Beach Access

by Chris O'Shea Roper and Tom Linton
Cover Photo: The Severance ruling established that no easement exists to provide public access to Texas beaches above the mean high-tide line. The implications of this decision are slowly becoming clear. (photo courtesy Ellis Pickett)

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Based on a series of articles that appeared in The Galveston Daily News in 2012
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Chris O'Shea Roper and Tom Linton
Table of Contents

1. Why All the Fuss? The Impact of the Severance Case on Public Beach Access
2. Understanding the Severance v Patterson Case
3. Beach Management Paradigms Have Shifted Many Times
4. Beaches Belong to All of Us, Don’t They?
5. What Gives You the Right? The Issue of Easements and Access
6. What Beachfront Property Owners Want: The “Takings” Issue and Public Funds for Private Property
7. The Legislative Wheels Begin to Turn – Call to Action!
8. So… What Have We Learned?

Bibliography

About the Authors
1. Why All the Fuss?
The Impact of the Severance Case on Public Beach Access

On June 16, 2012, the front page story in *The Galveston Daily News* hit close to home: “Park Board to discontinue voluntary seaweed maintenance.” The story said that, effective one week from that date, crews of the Galveston Park Board of Trustees would discontinue voluntary seaweed maintenance on the West End of Galveston Island.

With this change in beach management, the discussion was shifting from the controversy over the *Severance decision* to a focus on the future. “*Severance decision*” refers to the *Severance v. Patterson* ruling redefining private versus public beach property in Texas (see “Understanding the *Severance v Patterson* Case” for more on the legal case).

It seemed that we were finally beginning to look forward instead of arguing about which side in the case was right and which was wrong, or refusing to comply with the Supreme Court decision, or threatening to continue to litigate. Now we were hearing questions such as, “How will activities on and around the beaches of Texas be affected in the long run?” Or “How do other coastal states manage public access to THEIR beaches?”

Of even greater importance, “How will our decisions today impact our coastal ecosystem and economy?”

Most importantly, “What changes will be required to our constitutional or statutory laws going forward?”

Management of Texas beaches in the future will require a paradigm shift – an approach sometimes described as looking at the train wreck from the other side of the tracks.

But why all the fuss? Because our coastlines matter. According to the Texas General Land Office:

- Texas has 367 miles of coastline, primarily sandy beaches
- The slight slope of these beaches creates many large expanses of beach where the public can enjoy a variety of activities such as beachcombing, surfing, swimming, and surf fishing
- Communities that manage these areas rely heavily on tourism as a primary source of income
- Texas beach tourism generates approximately $7 billion a year
- Areas of the Texas Gulf Coast area eroding at an alarming rate
Texas Beaches: Implications of the *Severance* Decision

![Map of Critical Eroding Areas of the Texas Gulf Coast]

**Texas Has 18 Coastal Counties**

*Source: Texas General Land Office*
The Texas Gulf Coast is made up of eighteen coastal counties with 3,300 miles of bays and estuaries. It comprises one of the longest coastlines in the country.

According to the Texas General Land Office website, “Fragile coastal environments and wildlife thrive alongside bustling ports and petrochemical facilities. Coastal industries, tourism and fisheries generate billions of dollars for the state, and the state Constitution protects the right of Texans to access their beaches. No matter where you live in the Lone Star State, the Texas coast affects your life.”

On average, 235 acres of land are lost – per year – along the Texas Gulf Coast bays, estuaries and channels, and some locations along the upper Texas coast (Jefferson, Galveston and Brazoria counties) lose vital coastline at a rate of more than ten feet per year.

While *Severance v Patterson* focused on three parcels of beachfront property on the West End of Galveston Island, the issues are broader than that, and the scope of this decision is the entire Texas coastline, with major impact on centers of population and/or beach usage (Bolivar Peninsula, Galveston, Port Aransas, Corpus Christi, Surfside and Padre Island).

Interest in this issue has come from varied organizations local to Galveston such as the West Galveston Island Property Owners Association, as well as from others states such as Rhode Island, California, North Carolina and Maine, and the Coastal States Organization in Washington, DC.

The audience for the information included here is anyone with an interest in the questions of public access and private property rights along the Texas Coast – which, to one degree or another, is everyone who lives, works or plays on the coast.
In November of 2009, 77% of ALL Texas voters approved Proposition 9 to make the Open Beaches Act a part of the Texas Constitution as an expression of how strongly they felt about public access for all.

In January of 2013, A bill (H.B. No. 325, 83R536 TRH-D) was filed with the 83rd session of the Texas legislature, with an accompanying joint resolution (H.J.R. No. 53, 83R439 TRH-D). This legislation proposes “a constitutional amendment establishing the boundaries of public beaches and declaring that the state holds public beaches in trust for the use of the public.”

It appears that there will be legislative remedies to the Severance issues sought during the 2013 legislative session. Therefore, it is imperative that the members of the legislature, regardless of the region of the state they represent, make informed decisions that can be implemented effectively. We need to persuade those who do not live on the coast that Texas beaches are a vital asset to all.

The purpose of this booklet is to ensure that they have information to aid them in making informed decisions for the coast and the people of Texas.
2. Understanding the Severance v Patterson Case

Carol Severance, an attorney from California, purchased three beachfront properties on West Beach, Galveston, in 2005. Prior to that, in 1998, Tropical Storm Francis had caused erosive damage to these properties and, in 1999, the General Land office (GLO) added the properties to a list of 107 Texas homes that were located seaward of the vegetation line because of that storm.

In 2004, the GLO again noted that the houses were located at least in part on the dry beach but did not “threaten public health or safety” at the time.

When she purchased the properties, Carol Severance signed a disclosure statement acknowledging that she knew that natural processes (erosion and avulsion) could result in her houses being located on a public beach and, according to the Texas Open Beaches Act, they would then be subject to removal.

In September 2005, Hurricane Rita further eroded the beach in front of her houses and shifted the vegetation line so that, in 2006, the GLO determined that the houses were entirely within the public beach.

In mid-2006, the GLO notified Carol Severance that her houses would need to be moved, and offered $40,000 to pay for relocation of each. She filed suit in federal court instead.

Carol Severance has since sold the properties. And, after appeals and dismissals throughout this process, only one property, on Kennedy Drive, remains subject to the litigation.
Texas Beaches: Implications of the *Severance* Decision
Procedurally, the case of *Severance vs Patterson* was a complicated one. It has made its way back and forth through the Southern District Court of Texas, the Fifth Circuit Court of Appeals, the Texas Supreme Court, then back to the Fifth Circuit and down to the Southern District Court again. While most interested parties acknowledge that the major points of the case are resolved, there are outstanding minor points that cause it to continue to exist somewhere in the court system. It is a case that has, by almost any standard, an exceptionally checkered past and annoying, lingering presence!

As of this writing in early 2013, the case is now back in the Southern District of Texas. Settlement negotiations have been underway for a while, but as of February 15, 2013, the parties have not reached agreement and have filed to request a schedule and restart litigation.

The case has included a number of legal doctrines pertaining to jurisdiction (e.g., ripeness, mootness, certifying questions to a state court) that would take more than this one chapter to explain. But it’s important to understand the fundamental issues, definitions and decisions.

Conflict between public beach access and developed private property along eroding shores is not unique to Texas, nor is it a new phenomenon. As we have researched the subject, we have found similar situations over the years – and court cases – in Maine, North Carolina, Oregon and Florida, to name a few. Wherever the coastline is changing or where increasing populations present challenges to coastline and/or beach usage, you will find conflict of this sort.

There have been a few previous court cases in Texas that challenged either public access or property boundaries. In the past, the most notable (and most referenced) of which was *Luttes vs State of Texas* (1959). The decision in this case confirmed the Public Trust Doctrine delineation of state ownership of the seashore inland to the mean high tide line, rather than the vegetation line (see the chapter “Beaches Belong to All of Us, Don’t They?” for details on these cases).

While the *Luttes* case is similar to the *Severance* case, the current challenge regards whether or not a “rolling easement” exists in Texas law, specifically the Open Beaches Act. When beach property landward of mean high tide is privately owned, an easement can be established that provides legitimate access to the water through general use (such as walking on it), which is referred to as “by prescription, dedication, common law or custom.”

Because the shoreline is dynamic – ever-changing – erosion will push mean high tide and the vegetation line landward either gradually by erosive forces or quickly through a storm event, commonly called “avulsion.” This then raises the question, “Can the public acquire beach access (an easement) over areas of property that have previously been exclusively in private use but have now become “dry beach” seaward of the vegetation line? In some cases, the dry
sand beach could then exist underneath a privately owned house rather than on a sandy shore between the house and the Gulf of Mexico. And the other question that is now being asked is, “Is there a difference in how we treat an easement when impacted by gradual erosion and avulsion?”

By the time the case came to the Texas Supreme Court, some aspects of the case had been dismissed and the case took the form of questions to the court:

- 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?

- If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the (Open Beaches Act)?

- To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the house) 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?

To some, the last question is the critical one (See chapter on “What Beachfront Property Owners Want”).

The State of Texas, represented by the GLO, believes the answer to the first two questions is “yes,” and references wording to that effect in the Texas Open Beaches Act, now part of the Texas Constitution, as follows:

“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”

The state also established a regulatory system, including local ordinances for enforcement, on the foundation of the rolling easement doctrine. While these ordinances, local policies and rules are not always aligned or coordinated, they are intended to preserve, restore, maintain and otherwise protect and regulate the use of the coast.
The ordinances include significant restrictions when private property comes to be seaward of the vegetation line because the property is then considered to be on the public beach easement.

For example, following a storm, “any structure on land seaward of the vegetation is subject to uncompensated removal as an encroachment on the public beach easement”\textsuperscript{xii}. If storms damage or destroy a home on this land, it cannot be repaired or rebuilt, and landowners can no longer represent that their property is private.\textsuperscript{xiv}

However, the Texas Supreme Court disagreed. In the \textit{Severance} decision, they said:

- The State of Texas did not prove that a rolling easement existed in Texas state law (Open Beaches Act or otherwise)
- There is no common law doctrine in Texas that can accomplish the boundary shift that occurs when an easement “rolls” based on the movement of the vegetation line
- Imposition of public access on previously private property without proof of a pre-existing easement for that property is an unreasonable seizure and constitutes an illegal “taking” without compensation
- However, the court stated that there is a distinction between the effects of gradual erosion and an “avulsive” event where the beach is significantly reduced and the mean high water line and vegetation line are moved significantly inland very quickly.

One example often used in explanation of the \textit{Severance} position that an easement doesn’t roll with an avulsive event is based on the damage done by Hurricane Ike on Bolivar Peninsula in October 2008. Aerial photos of Bolivar prior to the storm show significant vegetation landward of the Gulf of Mexico, across the main road that runs parallel to the beach and through pastures and fields. Because the area was completely inundated during the storm, the vegetation was destroyed for hundreds of yards inland from the shore. If the premise of a migrating rolling easement based on the line of vegetation holds true, then all of this denuded property would be considered part of the easement and open to public access. While this is an extreme example, the issue remains.

However, this distinction between gradual erosion and an avulsive event is also the elephant in the room:
In the case of gradual erosion, the public has the ability to maintain an easement through prescription, dedication or custom; therefore, the easement can move with the gradually moving shoreline. This is not the case after an avulsive event.

But there is currently no definition of “avulsion” in Texas state law, so how do we know what is an avulsive event and what is not?

In addition, there was no discussion in the Severance decision of “avulsive accretion” or what happens when sand is deposited on a beach rather than washed away during a storm. According to state law, this new land becomes the property of the upland property owner, without cost. But if the easement doesn’t roll, it is possibly now in the middle of the property owner’s yard, significantly landward from the new shoreline.

Theoretically, the Severance decision would require the public to re-establish its right to access the beach after every avulsive event (e.g., hurricane) that changes the configuration of the shoreline.

Some observers say that this case is not a property rights issue but a “bail out” issue and that property owners are only concerned with compensation for the loss of their property to nature’s whims. Currently, buyers are required to sign a disclosure statement upon purchase of beachfront property (as was Ms Severance) that acknowledges the risk that their houses could end up on the public easement. To other observers, it is unrealistic to expect the government to bail property owners out after the fact.

Whether you sit on the side of property rights or public beach access in Texas, most people with whom we have spoken agree that the Severance decision did nothing to clarify or settle the issue. Some people have indicated that a change in the membership of the Texas Supreme Court could radically change the decision, and continue the pendulum movement we have experienced with the previous court challenges.

Whatever else happens, legislation to clarify the public’s right to access Texas beaches is necessary.

One very good analysis of the details of the case was written by attorney Val Perkins of Gardere Wynne Sewell LLP in Houston. The following appeared in The Houston Lawyer magazine in 2012. It is reprinted here with permission.
In March 2012, for the third time in less than four months, the Texas Supreme Court dealt a substantial setback to the efforts of state and local governments to regulate or restrict private property rights by determining that, notwithstanding the Texas Open Beaches Act and long held common law principles, public beachfront access easements do not “roll” with shifts in the water and vegetation lines and, thus, the State cannot force the relocation of a home built on the beach now within the beachfront access easement without the payment of compensation. The Texas Supreme Court’s decision in Severance v. Patterson, No. 09-0387, 2012 WL 1059341 (Tex. 2012), has drawn national and even worldwide interest and prompted the filing of nearly fifty separate amicus briefs from such diverse corners as the City of Galveston, Texas Chamber of Commerce, the Surf Rider Foundation and the Save Our Beach Association and Friends of Surfside. The court’s opinion has prompted an outpouring of commentary, both pro and con, and even induced the Commissioner of the General Land Office of Texas, Jerry Patterson, to urge that the members of the majority be ousted at their next election.¹

The facts of the case begin in April 2005, when Carol Severance purchased three properties on Galveston Island’s West Beach for rental income. Pursuant to the Open Beaches Act, at the time of the purchase, Severance was informed by Disclosure Notices contained in each Sales Contract that if the structures she purchased became seaward of the vegetation line as a result of coastal erosion or a storm event, her property might be subject to a demand by the State of Texas that she remove the structure because it would then be on a public beach. By way of background, the Open Beaches Act was passed in 1959 after a Supreme Court case called into question the public’s access to Texas beaches. The Open Beaches Act codified that all land seaward of the mean high tide, known as the “wet beach,” is held by the State in public trust. The land between the mean high tide and the vegetation line is the “dry beach” and may be privately owned but the landowner cannot place any obstructions on the “dry beach” that might prevent the public’s access to the beach and the waters of the Gulf of Mexico. Of course, the mean low tide, mean high

ENDNOTES

tide, and vegetation line are transitory, constantly moving both inland and seaward given the vagaries of tidal conditions and natural erosion from waves. As a result, the wet beach and dry beach are likewise transitory, as was the public beachfront access easement recognized in Texas since the days of the Republic.

In *Severance*, one of Severance’s houses—known as the “Kennedy Drive property”—was landward of the vegetation line and clearly was private property. However, following Hurricane Rita in 2005, the property between Severance’s land and the sea on which a public easement had been established was submerged in the surf and, thus, became part of the “wet beach.” As a result, Severance’s house was no longer behind the vegetation line, but it was also not located on the wet beach owned by the State. In 2006, as part of a plan to offer property owners financial assistance to remove their homes from the “public beach,” Severance was offered $40,000 for removal of her home. She refused and filed suit in federal court to prevent the state from enforcing the Open Beaches Act and taking her property, now on a public beach.

The federal district court dismissed the suit, ruling that her constitutional claims were not ripe because the State had not yet enforced the Act, but also noting that the public’s easement to her property had been established long before Severance purchased her lot and, as the court said, was one of the “background principles” of Texas property law involving open beaches. The basis for the court’s determination and the key issue throughout the remainder of the *Severance* case was whether the public easement “rolled” with the inward migration of the waters of the Gulf of Mexico. Historically, Texas common law has recognized that the public’s easement to the public beach rolls with the landward migration of the waters of the Gulf of Mexico and at least four separate Courts of Appeals decisions, from the 1st and 14th Courts in Houston and the Court of Appeals in Austin, have held that easements that allow the public access to the beach must roll with the changing coastline in order to protect the public’s right of use.

Severance, however, appealed the district court’s determination to the United States Court of Appeals for the Fifth Circuit which, in a 2-1 decision, affirmed the district court’s dismissal of Severance’s takings claims because the claims were not ripe, but also found that her other claims were ripe and certified three questions to the Texas Supreme Court, as follows:

1. Does Texas recognize a rolling public beachfront access easement, *i.e.*, an easement in favor of the public that allows access and use of the beach 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?
2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act?

3. To what extent would a landowner be entitled to receive compensation (other than the amount already offered for the removal of the houses) under Texas law or Constitution for the limitation on use of her property affected by the landward migration of a rolling easement onto property on which no public easement had been found by dedication, prescription or custom?²

In a 5-3 decision (Chief Justice Jefferson did not participate) sparking three emphatic dissents, the Supreme Court, in an opinion by Justice Wainwright, determined that while the public beachfront access easement might be “dynamic,” it does not “roll.” Instead, while conceding that “ocean front beaches change every day” and, thus, that “public easements that burden these properties along the sea are also dynamic,” the Court held:

[W]hen a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not “roll” inland to other parts of the parcel onto a new parcel of land. Instead, when land and the attached easement are swallowed by the Gulf of Mexico in an avulsive event, a new easement must be established by sufficient proof to encumber the newly created dry beach bordering the ocean.³

Justice Wainwright recognized the competing public policy interests at play in Severance, noting that:

Certainly, there is a history in Texas of public use of public Gulf-front beaches, including on Galveston Island’s West Beach. On the one hand, the public has an important interest in the enjoyment of the public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.⁴


⁴ Id. at 11.
Texas Beaches: Implications of the *Severance* Decision

In order to reach this ruling affirming private property rights at the clear expense of public beachfront access, the Court’s majority had to rely on, as Justice Medina put it in his dissent, “a game of semantics.”\(^5\) As noted above, the Court held that while the public’s access easement was dynamic, it did not roll and, as Justice Medina again put it:

The court further distinguishes between movements by accretion and erosion and movements by avulsion, finding a gradual movement shifts the easement boundaries, but sudden movements do not.\(^6\)

Justice Medina, joined by Justice Lehrmann and, in part by Justice Guzman, was startlingly frank in his sharp dissent. He began by noting that “Texas beaches have always been open to the public” and applauded the fact that Texas has “the most comprehensive public beach access laws in the nation.” He continued:

Since its enactment in 1959, the Texas Open Beaches Act (“OBA”) has provided an enforcement mechanism for the public’s common law right to access and to use Texas beaches. The OBA enforces a reasoned balance between private property rights and the public’s right to free and unrestricted use of the beach. Today the Court’s ruling disturbs this balance and jeopardizes the public’s right to free and open beaches.\(^7\)

After surveying the history of Texas coastal property ownership, Justice Medina concluded that the “[e]asements that allow the public access to the beach must roll with the changing coastline in order to protect the public’s right of use.” He then went on to make clear that Texas law has always recognized rolling easements for beachfront access and notes that “the Court’s conclusion that beachfront easements are dynamic but do not roll defies not only existing law but logic as well.”\(^8\) Further, he criticized the Court’s arbitrary distinction of easement movement caused by erosion or accretion and that caused by avulsion by noting:

\(^5\) *Id.* (Medina, J., dissenting at 2).
\(^6\) *Id.* (Medina, J., dissenting at 2).
\(^7\) *Id.* (Medina, J., dissenting at 2).
\(^8\) *Id.* (Medina, J., dissenting at 8).
On the one hand, the Court correctly declines to apply the avulsion doctrine to the mean high tide. This means 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 part of the public beachfront easement. Under the Court’s analysis, the property line may be dynamic but beachfront easements must always remain temporary; the public’s right to the beach can never be established and will never be secure.9

Finally, Justice Medina spent a portion of his dissent discussing the public policy of the Open Beaches Act and how the majority’s decision, requiring that existing easements be re-established after every hurricane season “defeats the purpose of the OBA: to maintain public beach access.”10

Justice Guzman, also dissenting, found that “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.”11 Likewise, Justice Lehrmann in her dissent noted that the Court’s decision casts the legacy of Texas public beaches aside without any “coherent rationale.” But Justice Lehrmann also infused her dissent with a practical lean, complaining that the majority’s decision “undermines the public interests in beach access, the ability of the State and local governments to protect coastal resources, and the private property interest of non-littoral Galveston homeowners.”12 She predicted in her dissent that the result of the Court’s decision will be “the placement of structures on newly exposed dry beach” that will result in the degradation of the beach. She also noted that since provisions of the Texas Constitution prohibit the expenditure of public funds for private purposes, public entities in Texas will not be able to re-nourish eroded beaches now found by the Court to be held by private citizens. Finally, she noted that the Court’s decision restricting beach access will decrease the rental value of non-beachfront properties on Galveston Island and, thus, will result in a loss of property values to non-beachfront residents of the island.

9 id. (Medina, J., dissenting at 8-9).
10 id. (Medina, J., dissenting at 17).
11 id. (Guzman, J., dissenting at 1).
12 id. (Lehrmann, J., dissenting at 2).
Texas Beaches: Implications of the *Severance* Decision

Notwithstanding these forceful dissents, the Court entered its decision, a determination that caused one commentator, himself a former Texas Land Commissioner, to complain:

The ruling means that the subsequent owners and some neighbors on the west end of Galveston Island can now fence off the dry beach and deny public access. It could well mean that litigious chaos ensues along our 367 mile shoreline and the Open Beaches Act perishes tried by trial, the proverbial death of a thousand cuts.\(^{13}\)

Indeed, it appears that much of Justice Lehrmann’s predictions have or soon will come true. The Texas Land Commissioner, Jerry Patterson, has already canceled a long-scheduled $40 million project that would have placed new sand in front of approximately 450 homes on six miles of the most rapidly eroding beach on the West End of Galveston Island, determining that the constitutional prohibition against spending public money to improve private property prohibited the project once the *Severance* case decided that the beachfront property was now owned by private individuals and not the public. And a recent article in the Houston Chronicle makes clear that at least one homeowner’s association on Galveston Island, the Sands of Kahala Beach Homeowner’s Association, is planning to place bulkheads in front of their newly acquired private property on the beach to prevent erosion from overtaking their homes and the highway running behind them.\(^{14}\)

As for Ms. Severance the Fifth Circuit noted the Texas Supreme Court’s declaration that “... Texas law does not recognize a rolling easement created by avulsive events affecting the dry beach of Galveston’s West Beach.”\(^{15}\) The federal court held that the Supreme Court’s answer “... reifies the claim of Appellant Severance to an “unreasonable” seizure violation of the


\(^{15}\) *Severance v. Patterson*, No. 07-20409, at 1 (5th Cir. filed May 21, 2012).
Texas Beaches: Implications of the *Severance* Decision

Fourth Amendment....”\textsuperscript{16} The court remanded the case to the federal district court for further proceedings in connection with her claim, including on “… attorney’s fees accruing to the appellant.”\textsuperscript{17}

Thus, litigation, expensive to both the State and those funding any further challenges to the Open Beaches Act, appears inevitable. And, of course, another hurricane season is only months away.

*Val Perkins*, a partner in the Government Affairs group at Gardere Wynne Sewell LLP, has 30 years’ experience representing clients before the Texas Legislature and in public law related litigation matters. He has lobbied the Legislature and handled litigation on a wide range of topics including water use and rights, business, construction, healthcare, real estate development, water and wastewater, affordable housing, special district creation and other issues.

\textsuperscript{16} *Id.* at 1.

\textsuperscript{17} *Id.* at 2.
3. Beach Management Paradigms Have Shifted Many Times

People have viewed our sandy shorelines from many perspectives (or paradigms) over the last few hundred years. This puts the discussion of our current paradigm shift in a broader scope. In fact, paradigms about the beach have shifted many times over the years.

As America was being settled, the beach was the only access to the shore – there were no roads leading from inland, and the beach was used by fishermen and other mariners for work.

Early maps of Galveston Island, for example, acknowledge and represent the “road” as running along the beach.

The beach was not a place of relaxation until much later, when city workers went looking for a place to spend the weekend or summer. It was then that the idea of private ownership of beachfront began to take shape. Roads were built, houses erected near or on the shore – but away from the centers of marine commerce.

Historically, these shifts took place over time, usually at the state level, gradually and with layered legislation in reaction to evolving needs. In response to some of these changes, specific areas for public beaches and parks were established.

Fast forward to the present and the desire for people to turn their backs “not just on the world at large but also on our inland selves.” Much of our nation’s tourism today is beach-oriented, with visitors coming from inland states as well as coastal states.

So now we fight over our rights to the beach and question who has access – public or private -- to different parts of the beach.

Today comes the latest paradigm shift: the Texas Supreme Court decision on the Severance case, which states that, where “an avulsive event (such as a hurricane) moves the mean high tide line and vegetation line suddenly and perceptibly causing the former dry beach to become part of state-owned wet beach…, the private property owner is not automatically deprived of her right to exclude the public from the new dry beach….

And, “The land encumbered by the easement is lost… (and) the state may seek to establish another easement as permitted by law….
Again, “Avulsive events such as storms and hurricanes…do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.”

Thus, it is important to understand the impact that the Severance decision may have on long-standing expectations for public beach access, which go back to components of Roman law.
4. Beaches Belong to All of Us, Don’t They?

Part of the legal discovery process in *Severance v Patterson* included digging deep into the history of private property ownership and public beach access to find precedents. A huge amount of research was conducted, going back to the Justinian Code, English Common Law, Spanish land grants, the Public Trust Doctrine, and ultimately to the Texas Open Beaches Act.

The right of the public to access the coast or waterfront is largely based on the principle of “the public trust doctrine.” This first appeared in Roman civil law in the mid-sixth century, when it was decreed that:

> “By the law of nature, these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.”

This quote is from the Justinian Code of 530 AD, on what has become known as the Public Trust Doctrine in jurisprudence. Justinian, the sage Roman Emperor who gave us much of what we now think of as “common law,” continued:

> “The seashore extends as far as the greatest winter flood runs up…. The public use of the seashore, too, is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shoers may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it.”

Roman law later influenced English Common Law after the Magna Carta, which gave protection of the tidelands “in the King’s name to all English subjects.”

In the Northeastern U.S., the remnants of English Common Law can be seen in laws governing the coastline in Maine and Massachusetts, for example, where publicly owned tidelands exist seaward of the mean low-water line rather than the mean high-water line.

Along the Texas Gulf Coast, delineation of public vs. private property is also influenced by the Spanish land grants of the 19th century. Under Mexican law prior to 1836, the beachfront was protected for national defense and commercial
purposes under power from the Mexican president. In 1840, the Republic of Texas (and later the State of Texas) granted private title of beachfront property without mention of requirements for public access.

Historical public use of the beaches on Galveston Island, for example, included; a ferry from Galveston Island at San Luis Pass, established in 1836 with travel to and from the ferry across the beach; a stage coach route on the beach; and a mail route along the beach established in 1838 by the Republic of Texas. Later, locals used the beach for driving, fishing and swimming, parking their cars between the dunes for camping.

Today, all navigable waters in the U.S. – and the lands beneath them – are governed by the common law principle of the “Public Trust Doctrine,” which states that these lands are held by the state in trust for the benefit of all of the people and which establishes the right for people to use (and enjoy) those lands forever. According to Putting the Public Trust Doctrine to Work, all “public lands, waters and living resources in a state are held by the state in trust and...(it) establishes the right of the public to fully enjoy public trust lands and waters for a wide variety of public uses.” xvii

However, each state has the right and authority to interpret and apply the doctrine based on its own coastal geography, history, local laws, and needs. Thus, while some states manage their coastlines in a similar fashion, each has its own unique set of laws, ordinances, policies and provisions.

While there is a common core of principles in the Public Trust Doctrine, this means that Maine can manage differently from California and Oregon can manage differently from Texas. These differences are most evident in delineation of public access to the dry sand beach. (See the chapter “What Gives You the Right? The Issue of Easements and Access” for more details.)

Hence, there are many levels of mandates, acts, and policies that govern public trust lands and waters in each state, although not all of them address public vs private property questions.

In Texas, the Open Beaches Act (OBA) was enacted for the express purpose of ensuring the public’s right of beach access. Enacted in 1959, the OBA was sponsored by Representative Bob Eckhardt and was the first state legislation of its kind to define all land seaward of the vegetation line as being accessible for use by the people. It is part of the Texas Natural Resource Code and the Texas State Constitution and 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
pensation, 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.\textsuperscript{xviii}

The people of Texas have historically felt strongly about public beach access, and in 2009, 77\% of ALL Texans voted on – and passed -- Proposition 9, a state-wide bond issue, which made the OBA part of the Texas State Constitution.

However, the \textit{Severance} decision significantly changed the manner in which the OBA is interpreted and enforced. While the Open Beaches Act refers to “a right of use or easement,” it does not create an easement or any other right for the public which did not previously exist. “Free and unrestricted access” is dependent on an easement that previously existed. The Texas Supreme Court determined that the State did not adequately prove that an easement existed in response to one of the three questions posed by the case (see the chapter “Understanding the \textit{Severance v Patterson} Case”).

Over the years, several court cases in Texas have challenged different aspects of private beach ownership and public access rights. Following is a very brief summary of the key elements of decisions in these cases that are applicable to the discussion here:\textsuperscript{xix}

\textbf{Denny v Cotton} (1893) on movement of property boundaries resulting from slow, imperceptible changes in the shoreline caused by accretion or erosion: “Accretion by alluvion, or the addition and gains to the soil by a recession of the water and the channel of the river, must be by a process that is gradual and imperceptible.”

\textbf{Lorino v Crawford Packing} (1943) on the effect of man-made changes to the shoreline: “Accretions along the shores of the Gulf of Mexico and bays which have been added by artificial means do not belong to the upland owners, but remain the property of the state.” Where a man-made structure caused the current to build up a sand bank, “title is held to be in state.” And, in the case of filled land, “No one should have an exclusive right to the enjoyment of [lands covered by tidal waters] unless and until the legislature has granted such right.” In addition, termination of the public’s right in public trust lands must be accomplished through legislation.

\textbf{Luttes v State} (1959) on the definition of the upper boundary of state-owned tidelands: “The boundary of tidelands in Texas is in substance mean high tide.”
Seaway Company Inc vs Attorney General (1964) evaluated the public’s continued use of the beaches and declared, via the Open Beaches Act, an access easement had been historically established on the properties in question by both dedication and prescription.

Brannan v State (2010), the court found a rolling public easement existed through implied dedication; the court also held the rolling easement is not a taking because the concept is inherent in the background of Texas property law; historical dedication created the easement, not the government, so there is no taking; the easement shifted due to natural movement, not any action by the government; the government was merely enforcing the easement rather than creating it. The case continues through appeals.xx

Feinman v State (1986) on the difference between erosion and avulsion as they affect the seaward boundary of a property owner: “Erosion or avulsion immaterial as to landward movement of natural vegetation line that constitutes boundary of public easement on beach.” In establishing historical use of the land between shore and the line of vegetation: “By 1851, the use of the beach between San Luis Pass and Galveston was of such magnitude that the beach was designated a road on an official map of Texas that year… By 1858, the Texas Almanac reported that the beach… afforded such room at ordinary tides for six or eight carriages to drive abreast.”

Matcha v Mattox (1986) on ownership of land added to a shoreline by accretion or lost due to erosion: “It is established that the line of mean high tide marks the boundary between private beachfront property and the state’s submerged property. Furthermore, this boundary line may move inland or seaward as the beach moves, and the property lines move accordingly.” This was confirmed in Luttes vs State (1959), Seaway Company vs Attorney General (1964) and the Texas Natural Resource Code. The case also confirmed the doctrine of “customary use” or long-standing custom applied.
5. What Gives You the Right? The Issue of Easements and Access

In the Estuarine Conference that was held at Galveston’s Convention Center in November, 2010, there was a lot of talk inside the building about what was outside the building – the marine environment. Little did the participants know that there were some rather momentous events taking place in that marine environment at that very moment ---- a paradigm was shifting.

Tom Linton happened to be on the second floor of the Convention Center, looking out through the big picture windows that face the Gulf, taking in what looked like a normal beach and bay.

The boat traffic at 10:00 am on the 15th of November, 2010, was light, primarily two small boats. But they were noticeably different from normal ----- there was a pipe or a large hose, maybe 100 feet in length, connecting them.

Mid-way along the hose was a flat-decked barge with an A-frame attached to the hose.

An employee of the Texas General Land Office came up to Tom and said, “There goes our $40-million project. That is the contractor going out to set up on the West End to begin pumping sand onto the beach.”

His phone rang; he answered, listened awhile and then dashed off to a corner for a conference call with the Commissioner of the Texas General Land Office.

When he came back, he was wearing a long face.

By that time the two boats – hose, barge and all – had reversed course and were headed east.

He pointed to the boats and said, “There goes a cancelled $40-million project.”

His comment was based on information he received in the conference call and the substance of a press release that was being given out at that very moment in Austin.

It read as follows:
“AUSTIN — Work on a vital West Galveston Island beach renourishment project (CEPRA 1391) has stopped and the project is cancelled, Texas Land Commissioner Jerry Patterson announced today.

“The $40 million effort to restore and nourish six miles of beach – from the west end of the Galveston seawall to 13 Mile Road – was vital as a defense against high erosion rates…. The project would have been funded by the General Land Office’s Coastal Erosion Planning and Response Act Program with a mix of local, state and federal money.”

Storm events over the previous few years had seriously eroded parts of Galveston’s West Beach, and the GLO had committed to renourish beach that, according to the Open Beaches Act, was public.

However, the Texas Supreme Court, in upholding the Severance decision, called into question the definition of a public beach easement. Without this easement, the renourishment project would have been “spending public money to improve private property,” which is prohibited by law.

So the boats turned around.

The issue of establishing – and maintaining – easements as the primary method of ensuring public beach access has generated many court cases in the coastal states, not just in Texas. At the time of this writing, the Severance case is still alive, and another case was recently settled in Maine (October 2012), and two are pending in North Carolina, among others.

The issue carries enough significance in all coastal states that the Environmental Protection Agency published the Rolling Easement Primer in 2011 to explain what an easement is, how it can be used for public access to the beach, how it can “roll,” where to apply the concept, how to establish one, and what it can accomplish.

According to the primer, the definition of a rolling easement is “a legally enforceable expectation that the shore or human access along the shore can migrate inland instead of being squeezed between an advancing sea and a fixed property line or physical structure…. Usually a rolling easement would be...a property right to ensure that wetlands, beaches, barrier islands, or access along the shore moves inland with the natural retreat of the shore.”

Easements can be established through longstanding use (also called prescription, dedication, common law or custom), through local or state governments purchasing property, or property owners agreeing to provide a public access way. The latter is usually done in return for something such as beach nourishment. (Federal policy precludes funding for shore protection unless the public has access to the entire dry beach, according to the Rolling Easement Primer.)
Because the primer covers all of the coastal states and territories, including the Great Lakes states, we found it very valuable in understanding the scope of utilization of easements for public beach access and comparing Texas against other states. In fact, at the time of publication of the primer in 2011, the authors included a disclaimer saying, “As this report went to press, courts and government officials in Texas were revising and refining how the rolling easement applies along the Gulf of Mexico coast.”

The primer identifies four degrees of public beach access, all of which align to the common-law Public Trust Doctrine as the source of public access. However, each state has interpreted the doctrine in its own way based on habitual waterfront use or long-established laws. They represent both public/private ownership and access:

1. The public owns below mean low water line; access to wet beach (to mean high water line) for hunting, fishing, navigation only
   a. Maine, Massachusetts, Delaware, Pennsylvania, Virginia

2. The public owns the beach below mean high water line with the same access (wet beach)
   a. New Hampshire, New York, Connecticut, Rhode Island, Maryland, South Carolina, North Carolina, Georgia, Alabama, Mississippi, Alaska, California

3. The public owns below the mean high water line (wet beach), with access along dry beach by easement
   a. Oregon, Texas, New Jersey

4. The public owns both the wet and dry beach, with unlimited access
   a. Washington, Louisiana, Hawaii

In the most restricted states such as Maine, legal challenges to public access involve what is considered the wet beach, where access was limited to hunting, fishing, and navigation by an ordinance dating from 1641 – which is still in effect.

At the opposite end of the spectrum in Hawaii, for example, public ownership extends across the dry beach and private ownership begins landward of the vegetation line.

See the following illustration from the EPA’s Rolling Easement Primer:
What Can a Rolling Easement Accomplish?

The Public Owns:
- Below mean low water; access to wet beach for hunting, fishing, navigation
- Wet beach below high water
- Wet beach; access along dry beach
- Wet and dry beach

Figure 3 Public ownership and public access to beaches based on the public trust doctrine or other common law doctrines. The public has access along some dry beaches in most states, in addition to the six shown here, where access is universal.

Photo credit: Rolling Easement Primer, Environmental Protection Agency
In the majority of states, public ownership and public access occur on the wet beach below high water only, except on publicly owned lands such as community beaches or state parks. Thus, in Connecticut, for example, there is no public access across the dry beach because the latter is, in most cases, privately owned.

In some cases, the consequences of these delineations can even seem amusing, such as a recent incident in California (where private property owners are allowed to fence off their property to prevent public access). On December 7, 2012, an article appeared in *The Houston Chronicle* (“Rotting whale a big problem in Malibu”) about a 40,000-pound whale that had died and was rotting on the beach in Malibu, California—totally unacceptable for Malibu residents, as can be imagined.

When this happens, a tugboat is usually dispatched to grab the carcass and drag it out to sea. However, in this case, it was determined that the whale was on a private beach (with no easement for public access) and therefore no public entity could access the whale to drag it out to sea.

In Texas, Oregon and New Jersey, because of the dynamic and changeable nature of the ocean/land interface, the concept that has been applied to determine the shoreward boundary of the public beach has been through the use of rolling easements.

With the limits put on the Open Beaches Act from the *Severance* decision, the need for easements was the first—and possibly the most contentious—of the issues that would require a paradigm shift.

Historically, the Texas Open Beaches Act said that along the coast, “the area between mean high tide and vegetation on the sand dunes was set aside for public access. Land on the other side of the dunes was private property. If the vegetation migrated inland because of erosion, the public beach moved with it by way of a rolling easement.”

The *Severance* decision ruled that, if the erosion was the result of an “avulsive” event, the easement did not move. And a new easement did not exist because the state did not prove that the public had established one by longstanding use of the property, etc.

So here is the elephant in the room: If gradual erosion moves the beach, an easement can be maintained by habitual or longstanding use. If an avulsive event moves the beach, the easement does not move.
Many people are now saying, “How can it be proved that an avulsive event occurred?” There is currently no definition of “avulsion” in the law as it applies to the shore. Or, “Where is the line drawn that says a powerful winter storm, resulting in the movement of a small amount of sand from one part of the beach to another, is natural and gradual erosion or the result of avulsion?” Or vice versa.

The same questions can be applied to accretion or growth of the beach. How will it be determined that avulsive accretion occurred where the easement would NOT move, as opposed to gradual accretion where the easement would move?

In this case, the property owner now owns a larger beach, but the easement apparently remains in the same place, potentially much closer to his home than he might like. The Texas Supreme Court did not address this issue in the Severance case.

Hence, we have the current need for definitions in the law.

Following are two examples where local communities have sought approaches to renourish their beaches: Galveston, Texas, and Topsail Beach, North Carolina.

On Galveston Island, the issue is not as simple as yes/no to easements: it is a question of “rolling” vs “static” easements.

While the rolling easement moves according to natural forces, a “static” easement does not move in response to either erosion or avulsion. It has GPS coordinates, specific and measurable boundaries and does not move regardless of whether the beach grows by accretion or is reduced by erosion or avulsion.

Commissioner Jerry Patterson of the General Land Office has insisted that beach renourishment be tied to the acquisition of rolling easements from property owners. His premise is a sound one: the coastal boundary is constantly changing, it is not static; therefore, a static easement is inaccurate almost from the time it is established. On the other hand, some beachfront property owners insist on static easements and have said that they would re-negotiate a new static easement whenever beach renourishment is required. However, many agree that it is almost impossible to achieve 100% compliance with this kind of requirement.

In late October, 2012, The Galveston City Council voted to give the City Manager the power to negotiate static easements for public access on private beaches. While this was done specifically in support of a planned beach
renourishment project at the city’s Dellanera Park, Beach Pocket Park No. 1 and three private properties that are in between these two publicly owned properties, some property owners are claiming that this agreement by the Galveston City Council to use static easements is precedent for the future.

This particular project covers approximately 2,000 feet of shoreline and will cost approximately $4.1 million. It is designed to mitigate erosion at the single highest erosion point on the island, at the western end of the Galveston seawall, which protects one of only two evacuation routes off the island. Further deterioration of the dunes in that area by another avulsive event (like Hurricane Ike) could significantly undermine the ability of the public to evacuate in case of an emergency.

This is the first inter-agency collaboration on beach renourishment in Galveston since the Severance case, with federal, state and local agencies working together with private land owners. Land owners have agreed to document public recreation easements and are contributing financially to the project.

Another example of a recently designated easement belongs to the Town of Topsail Beach, North Carolina. North Carolina faces many of the same coastal and access issues that are being addressed in Texas. An easement is just one of their solutions.

The Town of Topsail Beach has a “Thirty-Year Beach, Inlet and Sound Maintenance Plan (BIS),” under which the easement will exist. Thus, the easement grant is for thirty years. Notable about this easement document:

- It is a “rolling” easement (although it does not use that term), with boundaries on the targeted area established by the line of vegetation or the toe of the frontal sand dune, whichever is most landward
- Activities to be conducted within the easement area are not restricted to beach nourishment but include erosion control and storm damage reduction measures that include sand renourishment
- The document includes a statement of indemnity for the property owner by the town
6. What Beachfront Property Owners Want:  
The “Takings” Issue and Using Public Funds for Private Property

Over the past few months, we have spoken with many beachfront property owners and have asked them what they want out of the Severance decision in terms of legislation and/or local agreements. Many have said they are confident that the Severance decision has provided protection for them and their property will not be “taken after an avulsive event.

We have heard suggestions that range from making the entire West End of Galveston Island into a national seashore to having the state pay each property owner on an annual basis to allow the public access to the beach. At this point, we are assuming that neither of these options is realistic in this discussion.

Following are some of the issues that can be addressed through legislation or at the local level:

**Regular beach cleaning, seaweed removal and debris pick-up after a storm:**

In high traffic areas, Texas beaches need to be cleaned on a regular basis. On many, the management system includes placing and maintaining garbage cans on the beach. Without regular attention, these fill and overflow. Seaweed piles up on the beach and may become mixed with debris—glass, plastic, syringes, boards with rusty nails, etc. The seaweed makes the beach unpleasant for visitors; debris in the seaweed makes the beach unsafe for users as well as coastal wildlife. After strong storms, large debris collects on the beach, some natural and some man-made, all of which can pose a health and/or safety risk.

However, the Constitution of the State of Texas prohibits spending public money to improve private property unless there is an over-riding public interest. In this case, an “over-riding public interest” is defined as an easement for access to the beach. Specifically, the law states:

“All free men when they form a social compact have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.”

In October 2012, the Galveston Island Park Board of Trustees instituted new beach cleaning policies in response to the Severance decision and the restriction on spending public money on private property, as follows:
Texas Beaches: Implications of the *Severance* Decision

- Regular beach cleaning would be provided only on those public beach parks and seawall beaches formally delineated in the organization’s governing documents. Other garbage cans would be moved from beaches that no longer have public access and relocated to public access points where the City of Galveston would pick it up.

- Seaweed movement off of the dry beach would only be provided in the same beaches and parks as above. Seaweed management on beaches with no access would be the responsibility of private property owners.

- Large debris left on the beaches after a storm event would still be collected to prevent health and/or safety issues.
State law prohibits the use of public money to improve private property without a compelling public interest. *(Photo courtesy Tom Linton)*
Texas Beaches: Implications of the Severance Decision

The 2012 tourist season in Galveston was record setting. But there has been concern that unclean beaches and/or piles of seaweed would prevent visitors from coming back. We sought comments from recent customer satisfaction surveys provided to us by a member of the Galveston Association of Rental Managers (GARM). Some of the comments were, “the beach was covered with seaweed and sea trash...we will be heading to Port Aransas or South Padre.” And, “For $4000 we could not get to the water because of the seaweed.” Some were also positive, “The seaweed was bad this year, but that just happens. We would definitely request this place again!”

A static easement tied to beach renourishment:

For many beachfront property owners, there is really only one issue: They do not want to lose their property – and in many cases, their homes – to a beach that is no longer there. Beach nourishment is critical to maintaining stability of their property and many are looking for a guarantee for renourishment on a regular basis. It is imperative to them that they have leverage to negotiate for it going forward. In their eyes, a rolling easement precludes this leverage. A static easement retains control and leverage against encroachments onto private property, and requires a public entity to come to the owners for permission whenever it wants access to the property.

For example, the West Galveston Island Property Owners Association (WGIPOA) has suggested that property owners provide a static easement, which can be static both in time and in place and can be renewed on a regular basis. In return, they ask for a guarantee of beach nourishment, according to standard Corps of Engineers and Galveston guidelines. The beach nourishment provides motivation for property owners to gather easement agreements from every homeowner (or homeowners’ association on behalf of homeowners) on the West End of the island, which could be a huge undertaking.

It should be noted that, in the case of the Dellanera renourishment project on the West End of the Galveston seawall, this kind of arrangement has been agreed upon, but there are only three private property owners involved, and the project has been defined as a “one-off” by the General Land Office (see chapter “What Gives You the Right? The Issue of Easements and Access” for more information.)

In some states, such as North Carolina, public funds are used to nourish private beaches, and two things enable this to happen: easements and a dedicated source of funds (i.e., tax allocation). Legislation is required to enable this in Texas.
Protection from liability:

Another question exists regarding liability of homeowners when a member of the public is injured (or worse) while recreating on the beach in front of their homes. Providing an easement for public access assumes that the public is no longer “trespassing” on private property. Some property owners have indicated an interest in posting signage on the beach explaining local ordinances and indicating the limits of public access.

There are precedents, such as California, where the state holds harmless land owners who allow the public to recreate on their property. Texas has this type of statute that applies to hunters recreating on agricultural land. It has been modified to include activities such as swimming and fishing, but the statute is part of the Texas Agricultural Code and is not specifically targeted to the coastline. Topsail Beach, North Carolina, has included wording in their easement document to hold the property owners harmless and defend them against claims arising from activities on the property.

However, legislation is a more permanent solution and clearly more robust in terms of implementation. (See chapter “the Legislative Wheels Begin to Turn – Again” for more information.)

The ability to renourish their own property or rebuild a dune system:

While only a few people have asked what is preventing them from taking action to protect their own property from erosion or avulsion in the absence of public assistance, other voices have clearly responded:

- Beach maintenance policies and dune protection acts remain in place to protect the integrity of the beach
- Action to protect one property often results in a negative impact (e.g., further or worsening erosion) on neighboring properties
- Protected and endangered wildlife species (e.g., Kemp’s Ridley Sea Turtles) nest in many of the dune systems along the Texas coast, and any action to change the dunes would have a potential negative effect on the nesting sites
- Changes to the beach/dune system that would impede access for emergency personnel could present a public health/safety issue and would potentially be challenged.
Protection from a “taking” without compensation

As it made its way through the court system, Carol Severance’s case included claims that her Fourth Amendment rights AND her Fifth Amendment rights had been violated. At issue was the question of the State attempting to seize her private property for public use – without compensation – by saying that the easement had moved inland and she, therefore, needed to move her house. While funds were available to cover the cost of moving the house, compensation for the property that was now under water was not. The property underwater was now considered part of the public trust, with the conclusion that the ocean took the land, not the government – therefore, no compensation was due.

The State argued that the Fourth Amendment seizure claim was redundant of the Fifth Amendment takings claim, but a panel of Fifth Circuit judges rejected the argument.

However, the overall outcome of the court rulings is still unclear. Again, some observers have stated that this makes the overall issue for property owners one of compensation or “bail out” rather than private property rights.

A modified Open Beaches Act in the Texas Constitution will resolve the issue.
7. The Legislative Wheels Begin to Turn: A Call to Action

Resolving the current public access issues will take place not only in Galveston and in other Texas coastal communities, but also in Austin through legislative action.

GLO Commissioner Jerry Patterson has stated, “We’re going to look at what we can do legislatively to protect private property rights while allowing the public to have the traditional beach access that they have had since 1836.”

In our conversations with Commissioner Patterson, he has sent a clear message that there are three things the Legislature can do to ensure clear definition of public beach access:

1. Definition of Avulsion

Texas law currently does not include a definition of “avulsion” as it applies to the coastline. In the dictionary, it states that “Avulsion is the rapid abandonment of a river channel and the formation of a new river channel. Avulsions occur as a result of channel slopes that are much lower than the slope that the river could travel if it took a new course.” (Wikipedia). The term has been applied to the coast (e.g. in the EPA’s Rolling Easement Primer), but without clear legal definition as it relates to the coast, it remains an ambiguous term that can be interpreted by the courts in various ways and result in confusion, as we have seen. Even the Rolling Easement Primer gives a caveat: “the logic for the rule (of avulsion) is not as clear in the case of a sudden retreat of the shoreline.”

In the Severance decision, the courts have said that the results of avulsive action on the shore are to be treated differently from the results of gradual erosion. While the results of both actions on the coast is either the loss of beach or the gain of beach, it begs the question of where gradual erosion begins and avulsive action ends. Again, lack of clarification will continue to cause confusion.

It is recommended that legislation be enacted to clarify the term “avulsion” and ensure that the law treats the results of avulsive and erosive action on the beach the same.
2. Amendment Language

In January, 2013, a bill was filed in the Texas Legislature, along with a joint resolution relating to the boundaries and the nature of the State’s interest in public beaches. The intent of the legislation is to amend the Natural Resources Code in order to:

- Clarify the language that ensures the public has free and unrestricted access to the state-owned beaches
- Eliminate the references to easements in defining the “public beach”
- Establish the expectation that the line of vegetation will shift over time – and that shift can be as a result of gradual erosion OR avulsive events
- Reiterate that nothing should hinder the public’s ability to access the beach

The bill can be found at the following URL: http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB325.

The joint resolution can be found at the following: http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HJR54

It is recommended that the amendment language be submitted as a constitutional amendment, to be voted and approved by voters in November, 2013.

3. Enabling Legislation

Enabling legislation will be needed both at the State and local levels, the specifics of which will be established in alignment with the amendment language (e.g., changes to language in the Open Beaches Act). Support will be needed from legislators representing both inland and coastal constituencies.

It is recommended that support be given to enabling legislation that provides the authority to implement changes both at the State and local levels.
8. So… What Have We Learned?

So we are finally at the place where we should ask, “So what?” or “How do we summarize everything we have learned?” and “What are the next steps?”

The “so what” question is answered by the sheer number of people who have been helpful in putting this information together – as well as by the sheer numbers of people who either live, work or visit the Texas coast each year. As said before, we all have a vested interest in the health of our coast and the “fundamental right of Texans” to access the beach.

There are multiple answers to the second and third questions, as follows:

1. **While resolution of the public access question on the Texas coast is not yet at hand, progress has been made.**

   One of the first things we have learned is that the *Severance* decision is a “done deal” and an established part of the law and we now need to figure out how to deal with it. So now, move on.

   The key players are in place. Commissioner Patterson of the GLO has met with us as well as homeowners, attorneys, legislators and other key stakeholders.
The key issues are better defined and simply stated: public access on the one hand and protection against losing beachfront property on the other.

We finally understand that the semantics of a “rolling” vs “static” easement should not be a “deal breaker” because other states have found resolution to similar issues without getting bogged down in the words.

There will be a legislative answer to the questions, including amendment language, enabling legislation, and definitions of terms like “avulsion.”
And, perhaps most importantly, we have learned how critical it is that we go forward with a consensus along the entire eighteen coastal counties so we can influence the other 200-plus non-coastal counties.

Put into a broader perspective, the Severance issue becomes only one aspect of preservation of a wonderful natural resource that all Texans have been blessed with. Our coastline is unique. We all have an obligation to take this responsibility seriously.

2. **Texas is not alone.**

All of the coastal states are dealing with issues such as public vs private property rights, beach renourishment, funding for maintenance and rebuilding of infrastructure along the coast, the balance between environmental and commercial/industrial interests, and others. As we have learned, some states have dedicated funding sources for beach renourishment, others question the sanity of continuing to put sand on a beach that will erode and need it again in a few years. Finding state and federal funding sources is an uphill battle in many states because of the view that renourishing the beach provides financial benefit to a few wealthy beachfront property owners.

Partnerships among coastal states such as the Coastal States Organization, the American Shore and Beach Preservation Association, and the Surfrider Foundation, have proven track records in pursuing solutions across boundaries, including legislation, to support coastal initiatives. Local partnerships among beach managers are in place within states, including Texas, to leverage creative ideas and long-range planning.

These multi-level partnerships will be just as important in addressing the issues of global warming and climate change going forward.

3. **Making our coasts resilient is going to be an ongoing challenge.**

This is particularly evident after the devastation of Superstorm Sandy in the Northeast, where it was unexpected and communities were unprepared for such an event. Global warming and climate change will put ever more pressure on our coasts.
The concepts of “survivability” and “resiliency” require all of us to be stewards of our shorelines, working for a balance among all of the competing coastal interests. But both concepts begin with the acknowledgement of the value of our coastal resources and the need to protect them.

4. Technologies and strategies for protecting our coastlines will continue to change.

Many of us remember when we were asked to donate used Christmas trees to be placed along the dune lines on upper Texas beaches to prevent erosion. Unfortunately, after the next big storm the trees were washed away, and so were the dunes. Then there were geo-tubes or sand socks, “speed bump technology,” the use of sand fences, and bulldozing sargassum in front of the dunes to protect them. Today, we see a new concept of rolling and placing sargassum under the dunes to provide a foothold for dune grasses and plants. Maintaining and/or restoring dwindling beaches provides storm protection, habitat restoration and recreation.

Because no one size fits all, the best recommendations are those that adapt to the coastal conditions of the local area, taking into consideration geological and hydrological, ecological and historical forces. And the approach looks at the beachfront, nearshore and upland as a system that works together; thus solutions must take all three into account, enabling an enhanced natural beachfront system to protect upland infrastructure such as homes. An example of the systemic approach includes a broad beach, a healthy dune system, wetlands and/or seagrass areas, and wide areas of larger plantings, all to absorb and dissipate the effects of wave action and/or storm surge.

5. Whatever the issues, “sustainability” is the silver bullet because it is based on systems thinking.

None of the solutions or technologies works in a vacuum. With so many competing interests – financial, environmental, industrial, military, commercial, economic, personal – the future will require all interested parties to be at the table together. Federal or state legislation, local ordinances, community policies must be aligned. Rebuilding infrastructure, creating new residential, industrial or commercial building, protecting our coastal military presence, and preserving natural habitat must be able to co-exist along our Texas coast. Long-range planning is a necessity for the Texas Gulf Coast as a whole, and it is being done in some of the other coastal states, such as North Carolina.
“Sustainable tourism” has been defined as “tourism that takes full account of its current and future economic, social and environmental impacts, addressing the needs of visitors, the industry, the environment and host communities.” This is the future we all want for the Texas Gulf Coast.

6. Let’s talk about a culture change rather than paradigm change.

When the issue is about how to pick up garbage on the beach or fighting to gain respect for the coast from inland constituencies, maybe we are asking the wrong questions altogether. The emphasis must be on acknowledging the value of the coastline and its natural resources, on taking pride in the beach and every Texan’s right to access it, and working to boost coastal tourism and local economies in balance with industrial and other interests.

Statewide programs such as “Texas: Star of America’s Energy Coast”, the GLO’s branding campaign on sustaining the Texas coast, is a very good start. Local programs such as Galveston’s “Clean, Green, Pristine” are moving Texas in the right direction. Many states have these programs in place.

While the State can enact legislation to give clear direction to this kind of culture change, the rubber will meet the road at the local level, with such actions as:

- campaigns to educate and create pride in the coastline
- programs to clean up the beach and keep it clean
- efforts to set new expectations for beachgoers to “pack it in, pack it out” to reduce garbage on the beach
- signage to remind people that the beach belongs to all of us
- use of volunteers in improvement projects to get people involved in environmental management

Finding solutions to public beach access is a part of this system and has an impact (one way or the other) on coastal tourism and the health of local economies. Texas is in a strong position to develop sustainable solutions to all of our coastal issues, to insist on a systems approach to resolving issues, to implement long-range planning for the coast, and to partner with – and lead – the other coastal states in preserving the natural wonders of our coast.
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About the Authors

Chris O’Shea Roper is a free-lance writer and editor who has collaborated on more than 25 nature- and environment-related books, including guidebooks to national parks. She is a Master Naturalist with a specialization in water quality, a member of the Board of Directors of the Galveston Island Nature Tourism Council, the Texas Outdoor Writers Association, and the American Shore and Beach Preservation Association.

Tom Linton, PhD, is a retired professor of Wildlife and Fisheries Science from Texas A&M University and a senior lecturer in Marine Resource Management at Texas A&M University Galveston. As Director of the Office of Marine Affairs of North Carolina, he helped draft legislation which became the state’s Coastal Zone Management Program. He also served as the Director of Environmental Studies at the Ministry for Conservation in Victoria, Australia. He is the author of numerous nature-related articles and a book on Galveston County parks.

This is the third collaboration for these authors: previously they worked together on the series of articles that appeared in the Galveston Daily News and which serve as the basis for this booklet and a book entitled How the Parks of Galveston County Got Their Names that commemorates the development of the park system in the county.
Texas Beaches: Implications of the *Severance* Decision

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Texas Beaches: Implications of the *Severance* Decision

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