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, RESPONDENT

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

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting.

From the West Beach on Galveston Island to South Padre, the use and enjoyment of Texas public beaches by its citizens has a rich history. Today's decision casts that legacy aside, contrary to well-established easement law and supported by no coherent rationale. The Court acknowledges that littoral property owners may lose *title* to property due to changes in the shoreline, even sudden changes, as an "ordinary hazard of owning littoral property." ___ S.W.3d ___, ___. It also recognizes that the boundaries of public easements along the shoreline are dynamic and may be changed as a result of gradual shifts in the extent of the dry beach. *Id.* at ____. Yet the Court concludes that identical changes in the dry beach resulting from sudden, avulsive events do not shift the boundaries of the public's easement. *Id.* at ___. The Court's decision threatens to "exacerbate[] the degradation of Texas beaches." Richard J. McLaughlin, *Rolling Easements as a Response to Sea*

Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson, 26 J. LAND USE & ENVTL. L. 365, 383 (2011).[1] It undermines the public interest in beach access, the ability of the State and local governments to protect coastal resources, and the private property interests of nonlittoral Galveston homeowners. And the Court does so in deciding a certified question that will not be determinative of the parties' legal rights. I join Justice Medina's dissenting opinion, but write separately to emphasize a few additional points.

I. Easement Principles

A. An easement attached to Severance's property, and has not been abandoned

The Court devotes much of its attention to debunking the notion that an easement attached to Severance's property when the Republic of Texas granted the land to Edward Hall and Levi Jones in 1840. The Court reasons that no easement attached to the land at that time because the grant contained no express reservation of rights, and the Texas Legislature later disclaimed any title to the property. But regardless of the omission of language expressly reserving an easement or the Legislature's treatment of the entirely separate issue of title, a public easement on Galveston's West Beach by prescription, custom, or use under the common law has been recognized in several cases, based in part on historical records of public enjoyment of the beach extending back to years before the land grant. *See, e.g.*, *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (noting that since at least 1836 the public has consistently used the beach for travel); *Feinman v. State*, 717 S.W.2d 106, 111–13 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). The public's use of the beach has continued to this day, and it is a fundamental tenet of easement law that

[1] Professor McLaughlin has submitted an amicus brief reiterating many of the points his article articulates.

there must be clear evidence of intent before an easement will be found to have been abandoned. *See Dallas Cnty. v. Miller*, 166 S.W.2d 922, 924 (Tex. 1942) (abandonment of an easement requires a "definite act showing an intention to abandon and terminate the right possessed by the easement owner"). There is no such clear indication of abandonment in this case.

More importantly, the lack of any expressly reserved easement may be inconsequential once the record in the federal court is fully developed: according to the district court, Severance admitted that her property was subject to an easement. *Severance v. Patterson*, 485 F. Supp. 2d 793, 803 (S.D. Tex. 2007). The Court's extended historical discussion thus serves no purpose. Instead, it merely obscures the Court's error in departing from longstanding case law in resolving the real issue: whether the public's easement on the dry beach rolls.

B. Easements can roll

The Court's decision appears to be predicated upon the assumption that an easement's boundaries must be fixed to a specific metes and bounds location. If this were the case, an oceanfront easement could never be proven.[2] Littoral boundary markers continually shift, although often imperceptibly, due to wind, waves, and weather. A beachfront easement cannot be fixed in place any more than the migratory seashore itself can be frozen. *See Matcha*, 711 S.W.2d at 100. In doing so, the Court renders the Open Beach Act's invitation to prove the existence of an easement "by prescription, dedication, [or] . . . continuous right in the public" meaningless.

[2] The Court recognizes as much in holding that changes in the vegetation line resulting from erosion or accretion do not require proof of a new easement.

No case law compels the Court's decision; to the contrary, every Texas appellate court that has considered the issue has concluded that the public's easement on the dry beach rolls, even if they have not used the term "rolling easement." *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Feinman*, 717 S.W.2d at 108–11; *Matcha*, 711 S.W.2d at 98–100; *see also Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) ("To prevent destruction of the public beach from a landward shift of the mean low tide line, the legal boundaries of the public easement change with their physical counterparts.").

The idea that an easement's boundaries may not be fixed at a specific metes and bounds location, particularly an easement dictated by the contours of a body of water, is not novel. For example, the United States exercises a navigable servitude over the nation's navigable waters that extends to the waterway and its bed below the ordinary high-water mark. *United States v. Rands*, 389 U.S. 121, 123 (1967) (citing *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954)). In real terms, the navigable servitude gives the federal government the power to change the course of a navigable stream or utilize the stream of water for power generation without compensating riparian owners for diminution in the market value of their lands. *Id.* The servitude's boundary is natural and dynamic, responding to the ever-changing course of a navigable waterway. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634–35 (1912). The United States Supreme Court has long recognized that the easement moves in response to changes in the bed and banks of the stream. "The public right of navigation follows the stream and the authority of Congress goes with it." *Id.* (citations omitted).

Moreover, this Court's decision is contrary to other fundamental precepts of the law governing easements. In construing an easement, including its geographic extent, the easement's purpose is paramount. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 4.1, 4.8 (2000). Here, the easement provided the public with access to the Gulf and the associated recreational opportunities. The specific metes and bounds location of the easement is unimportant to that purpose; instead, proximity to the Gulf is the critical determinant of its utility and thus its location. *Cf.* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J.. 305, 353–54 (2010) (noting that "maintaining water adjacency for riparian/littoral landowners and assuring public use of overlying water (and some part of the foreshore) are the central goals of the law relating to migratory waters, and title should therefore follow a moving water boundary without regard to the rate, perceptibility, or suddenness of the movement"). We have acknowledged that the common law allows some flexibility in determining an easement holder's rights, although an easement's purposes may not be expanded. *Marcus Cable*, 90 S.W.3d at 701; *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:3 (2009) (noting that the nature of certain easements for recreational purposes means that they "cannot be located with precision [and] often entitle the holder to use the entire servient estate"). Furthermore, easements should be interpreted to preserve their utility over time. *See Mikeska*, 451 F.3d at 378; *Arrington*, 38 S.W.3d at 765 (holding that the public beach access easement shifted with the vegetation line affected by Tropical Storm Frances); *Bess v. Cnty. of Humboldt*, 5 Cal. Rptr. 2d 399, 403 (Cal. Ct. App.1992) (recognizing continued public access easement to gain entry to river despite shifts in river bed);

Bruce v. Garges, 379 S.E.2d 783, 785 (Ga. 1989) (concluding that rights of holders of recreational use and access easements to beach area expanded as rights of holder of underlying fee expanded with accreted land). In holding that the storms that routinely alter the Gulf shoreline can eliminate the public's easement on the dry beach, the Court violates these fundamental principles.

C. No legal support exists for the distinction between gradual and sudden movement

While Texas appellate courts have applied the avulsion/accretion distinction to changes in riparian boundaries, no appellate court in Texas has heretofore applied that distinction to littoral easements. That no court has applied the avulsion doctrine to littoral property is not surprising; the doctrine is simply incompatible with the types of changes that Gulf storms cause on Texas beaches. In an avulsive event, "a solid and compact mass . . . a solid body of earth" is moved by floodwaters and "instantaneous[ly] and visibl[y] creat[es]" a new bank. *Nebraska v. Iowa*, 143 U.S. 359, 369 (1892). In contrast, the landward movement of a littoral vegetation line occurs, not as the result of the movement of a discernable chunk of land, but instead as the result of "waves reaching above the normal wet line on the beach and eroding the vegetated sand, burying vegetation with eroded sand, or both." McLaughlin, *supra*, at 382.

The rule announced by the Court — that the public easement may shift if the shoreline boundaries move slowly, but not if the change occurs suddenly — is supported solely by the Court's conclusion that it would not be "reasonable . . . to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different landowner's property that was not previously subject to that right of use." ___ S.W.3d at ___. To the extent that "reasonableness" is an appropriate factor to consider in determining where an easement lies, the

Court should look to the impact on the easement holder as well as the burden on the owner of the servient estate. Severance, like all purchasers of beachfront property, took the property knowing that it could eventually become submerged.[3] She was expressly warned that the property she was purchasing "may come to be located on the public beach because of coastal erosion and storm events," *see* TEX. NAT. RES. CODE § 61.025, and, in fact, the property was already on a list of island properties that were wholly or partially within the public easement published by the Land Commissioner. The Court's decision provides Severance with a windfall she clearly did not bargain for — an encumbrance-free parcel of seafront property. The burden on a property owner in Severance's position pales in comparison to the burden the Court imposes on the public by requiring the State to pay for a new easement when vegetation lines inevitably shift due to hurricanes and tropical storms. As one author has noted, the balance struck by the Court's "approach fails to consider the nature and purpose of the public right of access, which is unique to the coast." McLaughlin, *supra*, at 386.

II. Practical Implications of the Court's Decision

A. The Court's ill-founded decision will contribute to the degradation of Texas's beaches, ultimately to the detriment of littoral property owners

The Court's decision rests on its application of a distinction that has been described as a "baffling riddle[]" in general, Sax, *supra*, at 306, and "unwarranted" as applied in this case. McLaughlin, *supra*, at 386. The Court's application of the avulsion/erosion distinction in its original

[3] Express warnings aside, a purchaser of beachfront property "should be aware[] of the risks involved. The beach is a constantly changing, dynamic phenomenon. While its enchantment demands the highest prices, its instability carries with it the greatest risks. Purchase of beachfront realty is little more than a calculated gamble." Mike Ratliff, Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 1013 (1976) (footnote omitted).

opinion in this case has been roundly criticized. According to Professor Richard McLaughlin of the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University-Corpus Christi, the Court's

> approach . . . does not accurately reflect geologic reality along the Texas coast. No coastline can be viewed through the "snapshot" of a limited span of time. Coastal erosion is episodic, not either "imperceptible" or "avulsive" as indicated in the court's majority opinion.
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> . . .
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> The ongoing nature of erosion [on Texas's Gulf beaches] causes a narrower beach and a situation where a relatively small storm event may cut back the vegetation line. Any significant landward movement of the vegetation line is normally rare, but is often indistinguishable from an event that may be termed avulsive, except in degree.

Id. at 382–83.

The Court's decision is likely to "exacerbate[] the degradation of Texas beaches." *Id.* at 383. Under the Court's decision, the State's ability to enforce the Open Beaches Act's restrictions on the placement of structures on the dry beach will be severely hampered, if not eliminated. See TEX. NAT. RES. CODE §§ 61.013, 61.018. The placement of structures on newly exposed dry beach will discourage the growth of vegetation that would normally "captur[e] windblown sand and establish[] stable dunes that help protect landward areas from storm impacts and slow the rate of shoreline retreat." McLaughlin, *supra*, at 382.

Furthermore, several provisions of the Texas Constitution restrict or prohibit the expenditure of public funds for private purposes. *See, e.g.*, TEX. CONST. art. III, §§ 50–52. Several amici have argued that the Court's decision will prevent the State and local governments from funding vital

beach renourishment programs since they will benefit beaches from which the public is excluded.[4] The Court's decision thus threatens to accelerate the degradation of Texas's Gulf beaches. McLaughlin, *supra*, at 386. As a result, littoral property owners like Severance may find that, though their property is no longer burdened by a public easement when the vegetation line shifts landward, they face the impending loss of their title as the mean high tide line also shifts landward.

B. The Court's decision disserves the interests of owners of nonlittoral Galveston property

Finally, the Court's decision is almost surely detrimental to the interests of nonlittoral Galveston property owners. As one author observed more than thirty-five years ago, "What good would it do to buy real estate near the beach, if you lack access to it? 'You might as well buy land in Midland, as buy halfway behind the beach front if you can't get to the beach anyway.'" Ratliff, *supra* note 3, at 1014 (quoting Eckhardt, *The National Open Beaches Bill*, in TEXAS LAW INSTITUTE OF COASTAL AND MARINE RESOURCES CONFERENCE ON THE BEACHES: PUBLIC RIGHTS AND PRIVATE USE 41 (1972)). More than five million tourists visit Galveston Island each year, and many of them rent vacation properties on Galveston. *See* Brief of Amicus Curiae Galveston Chamber of Commerce at 12. Gulf-front properties, of course, attract the highest rent. *See, e.g.*, Galveston West End Rentals, http://www.galvestonwestendrentals.com (last visited Mar. 16, 2012). But other properties, more distant from the beach, rely on public access to the beach as an enticement to potential renters. For example, one second row property advertises, "Whether you're enjoying the

[4] In the wake of the Court's initial opinion, the General Land Office cancelled a $40 million beach renourishment program after concluding that the vegetation line had shifted after Hurricane Ike. Harvey Rice, *Appeals Court Upholds Beach Act Challenge*, HOUSTON CHRONICLE, Sept. 28, 2011, http://www.chron.com/news/houston-texas/article/Appeals-court-upholds-beach-act-challenge-2193558.php

gulf breeze or *taking a walk along the nearby beach*, this home is perfect for a family get-a-way." Galveston West End Rentals, http://www.galvestonwestendrentals.com/sealegacy.htm (last visited Mar. 16, 2012) (emphasis added). It seems likely that the Court's decision restricting beach access will decrease the rental value of non-beachfront properties and thus their property value. Further, nonlittoral property owners in the Sea Isle subdivision in which Severance's former property lies likely believed that their purchase included an interest in the dry beach as common property.

III. The Court Should Decline to Answer the Certified Question

Finally, in light of recent developments, the Court should decline to answer the certified question. After this Court granted the public officials' motion for rehearing, Severance took advantage of a Federal Emergency Management Agency hazard mitigation grant program and sold her Kennedy Drive home to the City of Galveston. The Fifth Circuit determined that the sale did not moot the controversy because Severance might still be liable for penalties for past violations of the Open Beaches Act. The Fifth Circuit's short memorandum order did not offer any statutory analysis underlying its conclusion, but I believe it is founded on a misreading of the Act's penalty provisions. And even if the case is not moot in a technical sense, the Court's opinion decides a question of law that is determinative of no live controversy. Under these circumstances, the Court should exercise the discretion our rules afford it and decline to answer the certified question.

In 1985, Texas voters approved an amendment to the Constitution to allow both this Court and the Court of Criminal Appeals to answer certified questions. TEX. CONST. art. V, § 3-c(added Nov. 9, 1985). The amendment also authorized this Court to promulgate rules governing acceptance of certified questions. Tex. Const. art. V, § 3–c. Texas Rule of Appellate Procedure 58.1 provides

that the Court may accept and answer certified questions if the certifying court is presented with "determinative questions of Texas law having no controlling Supreme Court precedent." TEX. R. APP. P. 58.1. The rule expressly provides that the Court may decline to answer questions certified to it. *Id.* In my view, because the Court's decision will not be determinative of any pending controversy, the Court should decline to answer the certified question.

First, even assuming that an as-yet-unfiled penalty action could make the Court's answer determinative of the parties' rights, I do not believe that Severance is subject to penalties under the Open Beaches Act. The Act allows State officials and local prosecutors to recover statutory penalties in a judicial proceeding. TEX. NAT. RES. CODE § 61.018(b). However, the statute provides for recovery of those penalties only in conjunction with an action to obtain an injunction to remove or prevent the construction of structures on the beach. *Id.* § 61.018(a). Since Severance no longer owns the property, she would not be a proper party in such a suit. The Act also provides for the imposition of administrative penalties. *Id.* § 61.0184. But the administrative penalties provision applies to parties who presently own or are building or maintaining a structure on the public beach. *Id.* (requiring the Land Office Commissioner to give notice and an opportunity for a hearing to "a person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard on the public beach"). Since Severance no longer owns the Kennedy Drive property, she no longer maintains or possesses it. It seems clear that she would not be subject to administrative penalties under the statute.

The Court should exercise the discretion afforded it by Rule 58.1 and decline the certified question. Though this Court has not defined "determinative" in the context of certified questions,

the commonly understood meaning of the word should apply. *See Gilbert v. El Paso Cnty. Hosp. Dist.*, 38 S.W.3d 85, 89 (Tex. 2001) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999)) (noting that in cases involving statutory interpretation, where a term is undefined we apply its common accepted meaning). Therefore, under the common meaning of determinative, the Court should only answer questions that will "fix, settle, or define" the outcome of federal litigation. Determinative Definition, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/determinative (last visited Mar. 16, 2012); *see also* TEX. R. APP. P. 58.1. The Fifth Circuit characterized Severance's claims as an assertion that, "as applied to her properties, the migration of the rolling easement without a finding of prescription, dedication or custom, and without compensation, effects an unconstitutional taking and seizure." *Severance v. Patterson*, 566 F.3d 490, 494–95 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009). As to the takings claims, the Fifth Circuit held that Severance's federal claims were not ripe because "[a Texas court] might award relief under the facts Severance has alleged" under state law. *Id.* at 500 (citing *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996) (holding that two of plaintiff's claims were unripe where Supreme Court of Texas had expressly declined to address those exact claims)). As to the seizure claims, it held that the ripeness of Severance's seizure claims could not yet be determined because "[w]hether a 'reasonable' seizure has been accomplished by the Officials here depends on a definitive construction of Texas law." *Id.* at 503. Accordingly, the certified questions only encompass Severance's seizure claim as it relates to the Kennedy Drive property. The fact that Severance no longer owns the Kennedy Drive property means that the Court's opinion no longer answers questions that are determinative to the

outcome of Severance's seizure claim. Because any opinion this Court delivers would not be determinative of the parties' rights in the lawsuit as it is currently framed, the Court should decline to answer the certified questions and withdraw its original opinion.

IV. Conclusion

The Court's original opinion, which differs little from the replacement issued today, has drawn a storm of criticism from academics and a torrent of amicus curiae briefs from governmental entities and ordinary citizens imploring the Court to preserve the public's cherished right to access the seashore. In deciding whether, under the common law, a littoral easement can roll when natural processes shift an easement's boundary markers, the Court takes a course that diverges from the relevant precedents: Texas courts have long recognized the migratory nature of the public's easement on the dry beach and the Court's application of the avulsion/accretion distinction to seashores is equally unsupported. At a minimum, the Court should decline to answer any question that is certified to it, since its answer will not resolve any live controversy. I respectfully dissent.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: March 30, 2012