



The Office of Vince Ryan  
County Attorney

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December 29, 2010

**VIA CERTIFIED MAIL, RRR**

Honorable Blake A. Hawthorne, Clerk  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

Re: No. 09-0387; *Carol Severance v. Jerry Patterson, et al.*; In the Supreme Court of Texas

Dear Mr. Hawthorne:

As the Harris County Attorney, I am filing this amicus letter in the above-referenced case on behalf of my office and the Harris County Commissioners Court. Also joining this amicus letter is the Texas Conference of Urban Counties. We are writing in support of the Appellees (or the "State Officials"). By this amicus letter, we respectfully urge the Court to grant the Appellees' Joint Motion for Rehearing, vacate its earlier opinion, and render a new opinion that answers the Fifth Circuit's certified questions in a way that confirms the State's longstanding reservation of a dynamic easement that protects public access to the State's beaches even following an avulsive event.

**Statement of Interest**

Harris County, Texas is the largest county in Texas and it speaks on behalf of its millions of residents. The Texas Conference of Urban Counties ("Urban Counties") is a statewide organization of large urban counties that, in part, advocates for the collective benefit of its member counties in political, regulatory, legal and legislative arenas. Urban Counties submits this brief on behalf of its member counties, some of which are located along the Texas coast.

The amici joining this amicus letter have an interest in preserving the public's right of access to the State's beaches despite an avulsive event for several reasons. First, Texas residents and visitors to our State enjoy immense recreational opportunities due to Texas's venerable custom of protecting the public's access to its beaches. Many of the State's residents and residents of other states and countries have enjoyed and should

continue to enjoy Texas beaches due to the State's reservation of a public easement on its beaches.

Second, the rolling easement ensures aesthetic beauty of our coast. The Texas coastline is comprised of beautiful sandy beaches, dunes, marshes and the like. Varied types of native wildlife and vegetation inhabit these areas. The public easement helps protect these areas from most encroachment and preserves the natural beauty of the Gulf Coast.

Third, maintaining the buffer between the ocean and development during turbulent weather provides a measure of safety to coastal residents, employees and visitors. By moving structures away from the water, the likelihood the structures will be added to the debris and contamination thrown at coastal and inland residents by the storm surge is reduced. Fourth, accessibility to the State's beaches promotes tourism and provides a vital economic boost to coastal communities and to the State as a whole.

Finally, as set forth in the relevant briefing, the Court's responses to the Fifth Circuit's questions upset settled expectations of the law that have existed since the formation of the Republic and State of Texas.

Amici have no direct financial interest in this litigation.<sup>1</sup> The only interest, an interest shared by all, is to preserve the public's access to the State's beaches and to insure the protection afforded by the easement, rights and protections afforded the public since the founding of the Republic.

### **Argument**

In its opinion, the Court defined the "central issue [as] whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement." *Severance v. Patterson*, No. 09-0387, 2010 WL 4371438 at \*1 (Tex. Nov. 5, 2010). The Court found no public ownership rights or interests in the use of West Beach based on its review of early land patents granted by the Republic of Texas and early legislation promulgated by the State of Texas. *Id.* at \*1-2 & 15. The Court held "no inherent limitations on title or continuous rights in the public since time immemorial" existed to "serve as a basis for engrafting public easements for use of private West Beach property." *Id.* at \*15. The Court further held that existing easements do not roll or migrate landward following avulsive events despite

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<sup>1</sup> We wish to inform the Court that the Harris County Attorney, Vince Ryan, owns a lot on the third row of homes landward of the beach on Bolivar Peninsula. Should the Court grant the relief sought by the State Officials, Mr. Ryan's lot could be in the second row of homes from the beach. While Mr. Ryan believes he should disclose this fact as a matter of candor to the Court, it bears noting Mr. Ryan is signing this letter in his capacity as Harris County Attorney and on behalf of his client Harris County and not in his personal capacity.

holding that existing easements do migrate as mean high tide lines move gradually or imperceptibly. *Id.*

We respectfully disagree with the Court's conclusions. The Court's distinction between gradual or imperceptible accretion or erosion and avulsive events is seemingly contradictory and impracticable to apply. The Court held that Gulf Coast littoral property boundaries are dynamic like "the boundaries of corresponding public easements." *Id.* at \*10. The Court held the "easement's boundaries may move according to gradual and imperceptible changes in the mean high tide line and vegetation lines." *Id.* However, the Court created an exception for avulsive events that cause the mean high tide line and the vegetation line to move suddenly and perceptibly. *Id.* First, the holdings are inconsistent. Second, the holdings may be difficult to apply. For example, the dissenting opinion noted forty-eight percent of the West Bay shoreline is retreating and the beaches near Severance's property retreat at a loss of more than seven feet per year on average. *Id.* at \*16 (Medina, J., dissenting). Is seven feet per year perceptible or imperceptible? What about ten feet per year? What if most of the yearly retreat occurs in a short time period, say a month, due to particularly bad weather and strong waves? Where does one draw the line between erosion and avulsion? The Court's opinion seemingly raises more questions than it answers.

As the State Officials have demonstrated, a dynamic easement has existed in the common law and has been recognized by Texas courts on numerous occasions. While not itself creating the easement in question, the Open Beaches Act memorializes the Legislature's recognition and affirmance of the existence of a dynamic, rolling easement in the common law. And as pointed out by the State officials, Severance purchased her property pursuant to clear notice of the State's asserted public easement.

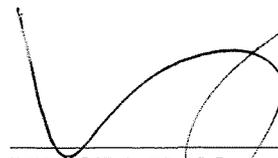
In any event, amici signing this amicus letter adopt the arguments raised in the briefs and motion for rehearing submitted by the State Officials. Other amici, the Surfrider Foundation, the Galveston Chamber of Commerce, the Texas Conference of Urban Counties, and Barbara Clark have submitted to the Court persuasive briefs urging the Court to answer the Fifth Circuit's certified questions in a manner that continues to recognize a rolling easement in Texas and the undersigned similarly incorporate that briefing as if set forth herein.

### **Conclusion**

The undersigned respectfully request the Court to grant the State Officials' motion for rehearing. The undersigned further urge the Court to confirm the longstanding common law rule that permits a public easement to shift with its natural boundaries even following an avulsive event.

Thank you for your consideration in this matter. By copy of this letter, all counsel of record in this matter have been served with this amicus letter.

Respectfully submitted,



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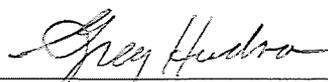
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