
No. 09-0387

IN THE SUPREME COURT OF THE STATE OF TEXAS

CAROL SEVERANCE,

Plaintiff-Appellant,

v.

JERRY PATTERSON, Commissioner of the Texas General Land Office;
GREG ABBOTT, Attorney General for the State of Texas; and
KIRK SISTRUNK, District Attorney for the County of Galveston, Texas,

Defendants-Appellees.

On Certified Questions from the United States
Court of Appeal for the Fifth Circuit

**BRIEF AMICUS CURIAE OF PROFESSOR MATTHEW J. FESTA
IN SUPPORT OF CAROL SEVERANCE**

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DECLARATIONS

Interest and Identity of Amicus

The author of this brief is a faculty member at a Texas law school accredited by the American Bar Association, and whose students overwhelmingly apply for membership in the State Bar of Texas. The author is an Assistant Professor of Law who conducts teaching and research in the areas of property law, land use law, and state and local government law. In the interest of interpreting and applying Texas state and U.S. constitutional property law, the author respectfully submits this amicus curiae brief to the Court.

Statement Regarding Fees

The author of this brief has received no fees or any other compensation or consideration for this brief.

ISSUES PRESENTED

1. Does Texas recognize a “rolling” public beachfront access easement, *i.e.*, and 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?
2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act (OBA)?
3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas law or Constitution for the limitation on the 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?

INTRODUCTION

This case involves the interpretation of the Texas Open Beaches Act (TOBA), as well as of the similarly-worded amendment to the Texas Constitution that was approved by the voters on November 3, 2009. The parties to the case have briefed the merits of the controversy before the court. The purpose of this amicus curiae brief is to address the issue of the *creation* of public access easements to beachfront property under Texas law. The first question certified to this Court by the U.S. Court of Appeals for the Fifth Circuit asks whether Texas law recognizes a “rolling” easement “without proof of prescription, dedication, or customary rights in the property so occupied.” It does not. An easement is an interest in land for which the elements must be established with respect to particular properties. Under the plain language of the statute, and notwithstanding the merits of any argument about rolling easements, the TOBA cannot impose public access without first proving the elements of an easement by dedication, prescription, or customary rights for each property. Asserting such property rights without establishing an easement would require compensation under U.S. and Texas constitutional law.

ARGUMENT

I. The Texas Open Beaches Act does not Create a Statewide Easement over the Entire Texas Gulf Coast

The plain text of the Texas Open Beaches Act states that the public access rights only apply to private properties on which the legal elements of an easement are already established:

It is declared and affirmed to be the public policy of this state that . . . [I]f the public *has acquired a right of use or easement* to or over an area *by prescription, dedication, or has retained a right by virtue of continuous right* in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

TEX. NAT. RES. CODE § 61.011 (emphasis added). Regardless of whether the TOBA can be said to properly establish beach access rights that “roll” inland with the vegetation line, by its clear textual terms the Act does not even apply to privately-owned property unless it has been established that a public-access easement for use of the dry-sand area has already been established. In other words, the TOBA applies to an individual property only if “the public has acquired a right of use or easement” on that property through the traditional common law rules for the creation of easements. *Id.*

Texas courts have consistently upheld this clear textual command of the statute. In cases interpreting the TOBA, the courts have ruled that the Act does not create new property rights in the public over privately-owned land, but rather that it only affects the scope of an easement that has otherwise been established through common law doctrines governing the creation of easements. In *Arrington v. Mattox*, the Texas Court of Appeals

gave a narrow construction to the TOBA, ruling that the Act does not empower the state to create new rights in private land, but “merely furnishes a means for the public to enforce its existing collective rights.” 767 S.W.2d 957, 958 (Tex. App. Austin—1989). Likewise, the federal courts have ruled that the TOBA does not create any new rights, but merely codifies existing rights that have already been established. *Hirtz v. State of Texas*, 773 F. Supp. 6, 9 (S.D. Tex. 1991).

Part of the rationale that the Texas courts have applied in these decisions is the understanding that if the TOBA were to *create* new property rights for the public over privately-owned land, it would effect a taking of property without just compensation. *Id.* An easement is an interest in another’s land. Creating a *new* public beach-access easement by statute would require compensation to the fee simple landholder under the U.S. and Texas Constitutions. U.S. CONST., amend. V; TEX. CONST., article I, sec. 17. Therefore, courts have rejected any argument that the TOBA creates new easement rights in the State unless the public has already “acquired” a beach-access easement under the elements of common law for a particular property.

While it may be inconvenient or costly for the State or other public body to prove up the elements of a common law easement with respect to each particular property on which it asserts the provisions of the TOBA, both the clear text of the statute and the caselaw show that the TOBA does not apply to any property unless there has been proof an easement by common law. Otherwise, compensation is required.

II. The Government must Prove the Elements of an Easement by Dedication, Prescription, or Customary rights in each Property Before the Texas Open Beaches Act may Apply

As the language of the TOBA indicates, the government¹ may not assert that the TOBA establishes by fiat a rolling easement statewide along the entire Gulf Coast. Instead, it must demonstrate that a public beach-access easement has already been created with respect to individual properties. Before the government can show that a public use right “rolls” with the vegetation line on any particular property, then, the statute requires that it prove an easement has already been created on that property through common law doctrines of dedication, prescription, or customary rights. None of these doctrines permit the assertion of a general public-access easement without proving the elements with respect to particular properties.

A. Dedication

When an easement has not been granted expressly by agreement, parties seeking to assert a use right over another’s land must persuade the court that it should nonetheless decide that an easement was created by implication. One method of asserting an implied easement in the general public is through the doctrine of implied dedication. But the key element of implied dedication is the intent of the landowner to dedicate property to public use. Implied dedication can only be based on acts or circumstances that indicate the landowner intended to donate some property right to the public. *See* JON W. BRUCE &

¹ For the purposes of this amicus brief, I will occasionally refer to state and local government agencies, legislatures, or regulatory bodies that may implement the TOBA collectively as “government” actors.

JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND, § 4:35 (2008) (hereinafter “LAW OF EASEMENTS AND LICENSES”). Under the TOBA, the government must show that each individual property over whose land it asserts a public easement has had an owner who *intended* to create an easement in the public.

Under Texas law, the existence of an implied dedication of an easement is a question of fact. *Viscardi v. Pajestka*, 576 S.W.2d 16 (Tex. 1978). As such, it must be proven with respect to individual parcels of property. In order to determine the difficult factual question of a landowner’s intent, courts generally rely on a standard of reasonableness. LAW OF EASEMENTS AND LICENSES § 4:36. Implied intent to dedicate must be shown by acts “which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use.” *Id.* (quoting *Dept. of Transp. V. Kivett*, 328 S.E.2d 776, 779 (N.C. App. 1985)). In the instant case, it does not appear from the record that the Appellees have established any particular acts which by an owner in Appellant’s chain of title may have manifested such intent to dedicate an easement to the public. Such acts may or may not exist as matters of fact, but without establishing them with respect to Appellant’s property, the government cannot show the element of intent required to assert that the public has “acquired” an easement by implied dedication.

Past public use may be an element in divining the landowner’s intent, but merely demonstrating that members of the public have in fact used the dry sand areas has generally not been held sufficient to establish unequivocal intent to *dedicate* use rights to

the public. Other jurisdictions have addressed the argument that a general public access easement has been established by implied dedication over all dry-sand beach property. California is at the extreme end of the spectrum for having found the intent element of implied dedication solely from public recreational use of the beach. *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970). But as the leading scholarly treatise on easements states, California’s approach is both an outlier and bad policy: “Focusing solely on the intent and activities of the public is inconsistent with the fundamental notion that dedication is predicated on a *landowner’s* express or implied intent to donate property to the public.” LAW OF EASEMENTS AND LICENSES § 4:38 (emphasis added).

Texas law holds the intention of the landowner to be the “vital principle, as seen from the authorities, upon which the doctrine of dedication rests.” *City of Houston v. Scanlan*, 120 Tex. 264. Dedication in favor of the public is not presumed; it must be made manifest by “*unequivocal acts*” by the landowner. *Henderson v. Frio County*, 362 S.W.2d 406 (Tex. Civ. App.—San Antonio, 1962) (emphasis added). The very fact that much of the Texas coastal property can be traced back to grants from the sovereign in fee simple undermines the notion that there was implied intent to dedicate any property right to the public.

Such facts proving or disproving intent may or may not exist, but without any attempt to establish the individual landowner’s intent to dedicate an easement to the public, the government may not assert that the TOBA applies to a particular parcel of land. In *Seaway Co. v. Attorney General*, the court found intent to dedicate beach access

(up to a fixed line) through factors other than mere public use, and was based on a specific findings of fact by a jury regarding the particular property in question. 375 S.W.2d 923, 926-27 (Tex. Civ. App.—Houston, 1964). The government cannot assert the TOBA over any particular property unless it first establishes proof of intent under the common law of implied dedication.

B. Prescription

The second avenue toward proving the creation of a public beach access easement under the TOBA is by prescription. Asking a court to rule that an easement was created by prescription requires virtually identical elements to the doctrine of adverse possession. The modern trend is to restrict the acquisition of prescriptive easements. LAW OF EASEMENTS AND LICENSES § 5:1. Particularly in Texas, courts have long held that when a landowner and a claimant *both* use an alleged easement, the use is nonexclusive, and therefore cannot establish the elements of adverse use. *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987). Therefore, unless the government can show that the fee simple owners of a particular property did *not* use it for beach access, it will be difficult to establish a public easement by prescription over Texas Gulf Coast lands.

Numerous other jurisdictions have ruled that the public cannot acquire a prescriptive easement. LAW OF EASEMENTS AND LICENCES § 5:25. Even though Texas courts have in the past found a prescriptive public beach access easement, *e.g.*, *Seaway*, 375 S.W.2d at 937-939, such a finding must be predicated on the facts as applied to a particular property. Scholars have noted that the doctrine of prescription is unlikely to

provide theoretical justification for universal public use of beaches, in large part because of significant practical problems in demonstrating all of the traditional adverse-possession elements regarding its case-by-case application to specific properties. LAW OF EASEMENTS AND LICENSES § 5:27. Regardless of the ultimate merit of any such arguments, the government must first establish the elements of an easement by prescription with respect to individual parcels of land.

C. Custom

The third and final mechanism that the text of the TOBA contemplates for the potential establishment of an existing public access easement over private land is the doctrine of easements implied through customary rights. While past Texas cases have departed from the majority rule and recognized recreational easements in certain beach property based on custom, *e.g.*, *Matcha v. Mattox*, 711 S.W.2d 957, 958 (Tex. App.—Austin, 1989), the conceptual and practical requirements of the doctrine make it difficult to apply, and inapposite unless the government has established facts with respect to historical custom on specific property. There is no general customary easement to access the entirety of the Texas Gulf Coast.

The majority of American jurisdictions have not recognized the creation of recreational easements in beach property through custom. LAW OF EASEMENTS AND LICENSES § 6:2. This is in large part because of practical problems with applying the doctrine to beach access rights. Private beachfront development interrupts public usage

and therefore defeats any rights based on custom. *Id.* As an evidentiary issue, the courts again must find the historical facts of custom with respect to each particular property. And to the extent that the customary rights principle derives from English common law, it cannot be held to apply universally to the Texas Gulf Coast, because original fee simple title to the land came from various sovereigns, including Spanish and Mexican governments—with legal traditions that do not recognize customary rights.²

Furthermore, applying the doctrine to establish public recreational rights raises constitutional takings and due process issues. As Justices Scalia and O'Connor have stated: “No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation.” *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (dissenting from denial of writ of certiorari). Even if a public access easement is found through custom, it is not an absolute right; courts must balance the rights of the public and of the landowners. *See* Steven Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests in Oregon's Beaches*, 77 OREGON L. REV. 913, 926-42 (1998). In any event, the TOBA provisions that purport to determine the scope of any easement over prior land do not apply until after the establishment of facts about the customs of public use sufficient to imply an easement with respect to that particular land.

² The origin of certain Texas land titles in Mexican land grants also undercuts any assertion of the public trust doctrine as a rationale for universal public access rights to coastal property. This brief does not address the public trust doctrine directly, as it is not one of the textual means for establishing a common law easement set forth in the

III. The State and U.S. Constitutions Require Compensation if the Government Asserts an Easement without Proof of Dedication, Prescription, or Customary Rights

The Fifth Amendment to the U.S. Constitution mandates that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Texas Constitution similarly provides: “No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” TEX. CONST. art. I, sec. 17. The drafters of the TOBA may have been well aware of the requirements of the federal and state Takings Clauses, because the clear language of the Act states that any public access easement over private land does not create a new interest in land, but instead may only be based on pre-existing easements established by proving the common law requirements for creation of an easement by dedication, prescription, or customary use. TEX. NAT. RES. CODE § 61.011.

Courts have certainly been aware of the commands of the Takings Clauses in interpreting the Act; the caselaw is clear that the TOBA does not create any new property rights, but rather only speaks about the enforcement of existing rights already established. *Arrington v. Mattox*, 767 S.W.2d at 958; *Hirtz*, 773 F. Supp. at 9. Therefore, the government must show that the elements of an easement have already been established with respect to each particular property on which the government asserts the operation of the TOBA. The reason that the courts have construed the TOBA to apply only where existing easements can be established by facts supporting the common-law elements is

TOBA. In *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984), the U.S. Supreme Court

that it is abundantly clear that the creation of any universal, statewide public easement—an interest in land—over the entire Texas Gulf Coast would be a significant taking of individual property rights that would require just compensation as a matter of basic constitutional law.

CONCLUSION

The Fifth Circuit’s question regarding whether a “rolling” easement has been established “without proof of prescription, dedication, or customary rights in the property” must be answered in the negative. Before the TOBA can apply to any particular property, the government must first prove the elements of a common law easement, either by express grant or, as the statute itself sets forth, through the doctrines of dedication, prescription, or customary rights. If the TOBA is construed to establish public property rights over privately-owned land without proof of the elements of a pre-existing common law easement, then the enforcement of the TOBA will require just compensation under the U.S. and Texas Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 18th day of November, 2009, a true and correct copy of the foregoing Brief of Amicus Curiae was served via fax, email, and overnight mail to:

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