No. 09-0387

In the Supreme Court 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,
KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS,
Defendants-Appellees.

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

AMICUS CURIAE BRIEF OF SONYA PORRETTO SUPPORTING CAROL SEVERANCE

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RULE 11 FEE DISCLOSURE

No fee has been incurred for the preparation of this brief.[1]

BRIEF OF AMICUS CURIAE SONYA PORRETTO

Sonya Porretto is a Texas citizen and the owner of approximately 27 acres of beach property on Galveston Island's East End; this land has been in her family since the late 1950s. Sonya Porretto files this brief in support of Carol Severance, and asks this Court not to disturb its original opinion as it rehears this case.

Immediately west of Stewart Beach, the land between 6th and 10th Streets is referred to as "Porretto Beach." Ms. Porretto also owns several parcels between 10th and 21st Streets, and 26th and 27th Streets in Galveston. This property emanates from the civil law Menard Grant, unlike the common law Jones and Hall Grant from which Carol Severance's property was granted. The Porretto family began acquiring the property in the late 1950s, and has a continuous and uncontroverted chain of title back to the Sovereign. The Porretto family has maintained, paid taxes on, and insured the property, and has earned income from the Property for more than 40 years, offering concessions such as umbrellas, chairs, floats and drinks. They charge for parking, and have always

[1] This firm represents Sonya Porretto as an Appellee in *Texas General Land Office and Jerry Patterson, in his official capacity as Texas Land Commissioner v. Sonya Porretto and Rosemarie Porretto*, No. 01-09-00520-CV, currently pending before the First Court of Appeals (the "*Porretto* Appeal"). The *Porretto* Appeal involves whether private, dry beach was taken by the State without compensation, and whether the Texas Open Beaches Act applies to Porretto Beach. The First Court of Appeals panel, which consists of Justices Keyes, Higley, and Bland, requested briefing on how this Court's opinion in *Severance* impacts the *Porretto* Appeal. That briefing was filed by the parties prior to this Court's grant of rehearing in this case. This firm has a contingency fee agreement with Sonya Porretto for the *Porretto* Appeal and related trial cause. The firm has also been retained to handle Porretto Beach permitting issues with the City of Galveston.

encouraged free public access to the beach from the sides pursuant to their rules, which are consistent with their liability insurance carrier's requirements and are distinct from rules on other Galveston beaches. Porretto Beach, between 6th and 10th Streets, contains a bollard line to separate the private parking area from an easement that the Porretto family dedicated to public use long ago.

Despite this dedicated easement, the Texas General Land Office ("GLO") wanted more. During the 1994 seawall beach nourishment project, the GLO declared that no private beach existed in front of Galveston's seawall—which includes Porretto Beach, which is a valuable and accreting parcel. This pervasive and ipse dixit claim to ownership halted sales contracts and was refuted as improper by Jerry Patterson (who stated in a 1998 press conference held on Porretto Beach that "The land office tries to maintain that this is state land, and it is not"). Another amicus in this case, A.R. "Babe" Schwartz, wrote a guest column in a July 1998 local paper denouncing the State's overbroad claim to own all land in front of the Galveston seawall because Porretto Beach between 6th and 10th Streets was different—it was (and still is) an accreting beach.

After years of litigation—and a court finding against its position—the State no longer claims to own Ms. Porretto's private, dry beach. But the State does continue to claim, however wrongfully, that if any easement exists over private property, the State (using the Open Beaches Act or "OBA") can expand that easement to occupy a larger geographic area, and can apply more uses and restrictions to the easement than are allowed.

I. The State must legally acquire an easement over private property, and cannot unilaterally expand the scope of a pre-existing easement.

This Court stood by long-standing property law in finding that the GLO may not assert a public easement where none has been proven to have been created under applicable real property principles. The GLO's attempts to shortcut legal acquisition of easement rights is simply another example of how it has been overrunning the rights of private landowners.

Expanding the scope of an easement in favor of the public at large without bargained-for consideration or proper condemnation is inconsistent with Texas law. As this Court has rightly noted, the OBA concerns access to state-owned beaches, and does not create property rights. The State is required, and has always been required, to compensate property owners when it takes away rights and/or expands the scope of public rights.

The GLO has employed a careful plan to present to this Court not only its own briefing, but that of many "supporters." As this Court knows from other briefing presented, the State cancelled an erosion response project on the West End of Galveston Island, citing this Court's opinion. The State claims the erosion response project had to be cancelled due to fears of enriching private landowners with public funds; however, the legislature has already considered coastal erosion projects over both public and private land, and has provided for such projects. *See* TEX. NAT. RES. CODE § 33.609 (2010); 31 TEX. ADMIN. CODE §15.43(b)–(c) (2010) (Tex. Gen. Land Office, Coastal Boundary Surveys and Landowner Consent). The GLO also completed nourishment on Surfside

Beach in Brazoria County this year. Patterson recently threatened that the Surfside renourishment "will be the last for a long time if the Texas Supreme Court doesn't reverse its decision limiting public access to beaches." Harvey Rice, *Surfside's Pride May Be Last For a While*, Hou. Chron., Apr. 9, 2011, at B1. This strong-arm tactic is also a public misstatement of this Court's ruling, which did not limit public access to beaches. Various amici have espoused fears that the public will lose access to Galveston beaches, but give no concrete examples that would justify those fears. Even if private landowners were to attempt to impede public access to the water, the State could rectify the situation by establishing an easement—whether by purchase, proof or condemnation.[2] The GLO's post-hurricane tactic was based on its decision not to pay for the public's right to use and/or cross private property—and this Court has rightly noted that allowing public use of privately owned dry beach raises takings concerns.

II. The State's actions related to erosion and accretion are based on bad data that cannot be challenged.

Although the OBA focuses on public access to State-owned beaches, the State's real concern is in regulating private property—including permitting for sand scraping and construction. The GLO implements such regulations through the OBA and other legislation with reference to erosion rates. The GLO uses "erosion" as a reason to prevent landowners from fully using their land. However, the only allowable measurements of accretion and erosion under the applicable regulatory scheme are those

[2] Jerry Patterson recognized that the Surfside nourishment was "a great example of how a big coastal project can make economic sense," noting that Surfside Beach "was a wise investment." Press Release, Tex. Gen. Land Office, *Surfside Beach Restored to Former Glory* (Mar. 11, 2011) (on file with author and available at http://www.chron.com/disp/story.mpl/metropolitan/7513998.html).

taken by the Bureau of Economic Geology ("BEG") at the largely State-funded University of Texas at Austin. 31 TEX. ADMIN. CODE §15.2(31) (2010) (Tex. Gen. Land Office, Definitions). The BEG uses a technology called LIDAR, which essentially measures erosion by using lasers to measure changes in elevation.[3] The Texas Administrative Code contains no method for challenging BEG findings. Further, any artificial manipulation of a beach's elevation skews the data. This is true for normal beach maintenance, which removes elevation without actually subtracting sand, and for more complicated projects which add or remove sand, like the various erosion response projects for the West End of Galveston Island which are discussed extensively in the other briefing in the *Severance* case.

Many beachfront property owners regularly, permissibly move the sand on their beaches for many reasons. In fact, the Porrettos and their neighbors at Stewart Beach Park, a public beach park, regularly scrape their upland beach sand with front-end loaders in order to maintain parking lots. That this basic maintenance is enough to skew the Island's erosion and accretion data and it creates problems under the GLO's complicated regulatory scheme, and calls into question any arguments based on erosion rates as determined by the BEG.

[3] Bureau of Economic Geology, Coastal Studies Group: Measuring Shoreline Change Along Bays and Oceans Using Historical Aerial Photography and Airborne Topographic Lidar Surveys, http://www.beg.utexas.edu/coastal/poster_measuringchange.htm (last visited Apr. 11, 2011).

III. The State's complex regulatory scheme prevents landowners from the normal use and maintenance of their private property.

The GLO's argument that the line of vegetation controls the determination of public rights is merely another attempt to regulate a swath of land wider than any pre-existing public easement. The State adopts regulations consistent with the OBA, under the Texas Administrative Code, which then requires local governments to promulgate their own rules, regulations, and ordinances consistent with those adopted by the State. 31 TEX. ADMIN. CODE §15.3(a) (2010) (Tex. Gen. Land Office, Administration).

IV. The GLO's 200-foot line is a purely statutory construct, has no origin in custom or historic use, and redefines public rights.

Porretto Beach is what the State calls the "unusual case" in which there is no naturally occurring line of vegetation on the property. In fact, having no naturally occurring line of vegetation is not unusual—most seawall beaches have no vegetation line. Vegetation, therefore, cannot be the sole possible easement boundary. For such beaches, the OBA "simply" pretends as though a vegetation line exists 200 feet from an invisible line near the water that can only be located by Licensed State Land Surveyor. To determine where the invisible 200-foot line is, the surveyor measures from mean low tide and applies an 18.6-year average of tidal measurements. 31 TEX. ADMIN. CODE §15.3(b)(2) (2010) (Tex. Gen. Land Office, Administration). Assertions by the GLO and its various amici that the 200-foot line is easily discerned are therefore wholly false. This 200-foot line has no support in the historic rights of the public from which the OBA purports to derive its authority.

The application of the OBA impacts private property owners in a real and

profound way. In the case of Sonya Porretto, this regulatory scheme involving a statutorily created line of vegetation – despite her specifically dedicated easement area – prohibits her from taking certain actions on her property. As beachfront property implicates different layers of governmental jurisdiction, actions on beachfront property may be regulated by the GLO, the County of Galveston, the City of Galveston, and/or the United States Army Corps of Engineers. As there is no naturally occurring line of vegetation on Porretto Beach from which to judge where the purported "public beach easement" under the OBA should be protected, Ms. Porretto has been required to hire, at great expense, a Licensed State Land Surveyor to conduct surveys depicting her property, the various tide lines, and the statutorily created 200-foot line every time she applies for a Beachfront Construction Permit, which includes a permit for normal beach maintenance.

For instance, in 2009 Ms. Porretto applied for a City of Galveston "Beachfront Construction Permit" in order to scrape the sand at her own expense on her beach (to keep beachgoers' vehicles from becoming stuck in the sand during the summer beach season), as she or her family have always done. As the City permit application makes evident, anyone wanting to perform maintenance or construction on beachfront property in Galveston must submit information – including surveys depicting the line of vegetation – for review not only by the City of Galveston, but by the GLO as well. In the case of the permit application for parking lot maintenance, review by the GLO took more than six months, despite regulations requiring a review period of, at most, 30 days. 31 TEX. ADMIN. CODE §15.3(s)(6)(B) (2010) (Tex. Gen. Land Office, Administration). As in Carol Severance's case, the GLO sought to prevent a private landowner from maintaining

or using her private beachfront property; rather than legally condemn the property, the GLO tied up a simple permit application review as long as possible.

The GLO therefore applies OBA regulations despite the Porrettos' dedication of an easement with specific geographic and use parameters (and without proof to support the expansion of this easement), and has applied a 200-foot line that lacks any basis in historic use or custom. This Court's opinion in *Severance* is a necessary reminder that even the GLO must comply with the law to achieve public policy. This Amicus therefore respectfully requests the Court refuse to alter its opinion on rehearing.

CONCLUSION

Beachfront property is a unique property situation, implicating private, governmental, and public interests (and various jurisdictions, as well) as well as a vast and rich historical context. In its original opinion, the Court has carefully navigated these waters regarding the law of easements on the Texas Gulf Coast. With regard to the law concerning establishment and proof of easements, the Court should not disturb its sound judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14 day of April, 2011, a copy of the foregoing document was served pursuant to the Texas Rule of Appellate Procedure 9.5 upon the following counsel of record:

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