

# RECENT DEVELOPMENT

## TEXAS'S OPEN BEACHES ACT: PROPOSED REFORMS DUE TO COASTAL EROSION

### I. INTRODUCTION

Texas is one of the few states mandating all beaches in the state be open to the public.<sup>1</sup> The Open Beaches Act (“OBA”) codifies Texas’s common-law right to public use of all beaches as open thoroughfares along the Gulf of Mexico.<sup>2</sup> The intent of the OBA was to maintain the coastline as a resource for the entire public, to maintain efficient access to it and to adequately define what qualified as the beach.<sup>3</sup> In May 2008, the Land Commissioner proposed modifications of regulations regarding how close to the beach physical improvements can be made. These proposed regulations were later withdrawn in November 2008 because the agency failed to adopt them within six months of publication.<sup>4</sup> While there was no change in the law, the proposals and the critiques of them can inform future changes.

### II. BACKGROUND

The OBA 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

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1. TEX. OPEN BEACH ADVOCATES, WHAT ARE OPEN BEACHES?, <http://www.texasopenbeaches.org/open.htm> (last visited Mar. 28, 2009). The other states include Oregon, Florida, and North Carolina, but among those, Texas has one of the strongest codified laws.

2. TEX. GEN. LAND OFFICE, HURRICANE IKE INFORMATION AND LINKS, <http://www.glo.state.tx.us/ike/situation.html> (last visited Mar. 28, 2009); TEX. OPEN BEACH ADVOCATES, *supra* note 1.

3. TEX. NAT. RES. CODE ANN. §61 (2008).

4. TEX GOV'T CODE ANN. § 2001.27 (2008); 1 TEX. ADMIN. CODE § 91.38(d) (2008).

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 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.<sup>5</sup>

The OBA defines beach to be the area between the Gulf and the vegetation line, with the vegetation line being defined as the line of plant growth on the land side of the sand dunes.<sup>6</sup> It also gives the Texas General Land Office (“GLO”) control over surveying and enforcing these boundaries.<sup>7</sup>

While the Texas OBA refers to a “line of vegetation,” this is not a permanently fixed boundary, causing difficulty in delineating private property rights.<sup>8</sup> The boundaries of real property in Texas change on an almost annual basis as a result of major events, such as Hurricane Ike in September 2008, as well as regular erosion, which affects about five to six feet of sand annually (the highest rate in the nation).<sup>9</sup> The effects are such that the Texas Real Estate Commission (“TREC”) has a specific form ensuring notice of the legal and economic risks of purchasing coastal property.<sup>10</sup> The GLO and the OBA have established limits on what physical improvements are allowed to be maintained on the seaward side of the vegetation line, as well as what can be built near the line. To add to the uncertainty created in the aftermath of Hurricane Ike, the GLO outlined several proposals in May 2008 to limit new construction near the vegetation line, all voluntary, for cities to adopt.<sup>11</sup> These

5. TEX. NAT. RES. CODE ANN. §61.011(a).

6. *Id.* at § 61.012

7. *Id.* at §61. The Coastal Zone Management Act of 1972 (“CZMA”), provides “broad guidance and standards,” while leaving the details to the individual states. HEINZ CTR., HUMAN LINKS TO COASTAL DISASTERS 1, 42 (2002), available at <http://www.heinzctr.org>. Texas was one of the last states to submit their plans to the federal government for approval under the CZMA. KRISTEN DEES & GAIL DAVIS, ENVTL. L. PROJECT, GALVESTON COASTAL EROSION: AN OVERVIEW OF CAUSES, PROBLEMS AND WHERE WE STAND (June 29, 2001), available at <http://coastal.tamug.edu>. However, federal funding under the CZMA is used by local community projects in Texas ninety percent of the time, unlike many other states where a majority is used for administrative costs. HEINZ CTR., COASTAL ZONE MANAGEMENT ACT: DEVELOPING A FRAMEWORK FOR IDENTIFYING PERFORMANCE INDICATORS 9 (2003), available at <http://www.heinzctr.org>.

8. TEX. NAT. RES. CODE ANN. §61.

9. SURFRIDER FOUND., STATE OF THE BEACH: TEXAS` [http://www.surfrider.org/stateofthebeach/05-sr/state\\_summary.asp?zone=GS&state=tx](http://www.surfrider.org/stateofthebeach/05-sr/state_summary.asp?zone=GS&state=tx) (last visited Mar 28, 2009).

10. TEX. REAL ESTATE COMM’N, ADDENDUM FOR PROPERTY LOCATED SEAWARD OF THE GULF INTRACOASTAL WATERWAY (2007).

11. Jessica Hamilton, *GLO Offers Recommendations on Beach Set-Backs*,

proposals came as a response to the 2007 State Legislative session where the legislature ordered “new rules . . . to reduce the cost of storm damage, disaster response and erosion.”<sup>12</sup> The proposals expired in November 2008, but a review of the reasons for and criticisms of the proposals can inform and shape future reforms to the OBA.<sup>13</sup>

As reported by one news source, Jerry Patterson, the State’s Land Commissioner and the director of the GLO, intent with the proposals:

“[I]s not to trample on property rights, but to confront what he considers a crucial problem. In addition to the eroding shoreline, he is concerned that the high cost of rebuilding highways and pipelines and restoring beaches on barrier lands will become a perpetual burden on state taxpayers.”<sup>14</sup>

Coastal erosion is a steady drain on the economy, forcing the closure and flooding of some roads used in hurricane evacuations.<sup>15</sup> In the case of State Highway 87 in Jefferson County, Texas, the road was closed indefinitely after Hurricane Jerry in October 1989; although a draft environmental impact statement was developed, the road was never restored.<sup>16</sup>

Beach erosion in Texas has a myriad of causes, many of which are linked to human activity. The causes in Texas include: (1) dams reducing sediment deposits, (2) diverted rivers, (3) navigation structures along the coast, (4) regular dredging of navigational channels, (5) seawalls, (6) waves and water movement from boats and ships, (7) land subsidence due to groundwater and oil removal, and (8) wetland loss.<sup>17</sup> Erosion also occurs naturally as a result of storms and environmental conditions, with sixty-three percent of Texas’s shoreline seeing regular, continuing erosion.<sup>18</sup> Erosion is further classified as

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<http://www.thefacts.com>, June 29, 2008,  
<http://www.thefacts.com/story.lasso?ewcd=cb99dfc6bb7583f0>.

12. Matthew Tresaugue, *Building May Not Be an Option*, HOUSTON CHRON., Sept. 15, 2008, at B4.

13. TEX. GEN. LAND OFFICE, COASTAL ISSUES, BEACHES AND DUNES, <http://www.glo.state.tx.us/coastal/beachdune.html> (last visited Mar. 28, 2009).

14. John Adams, *Hurricane Ike Recharges Coastal Development Debate*, STORMWIRE, Sept. 23, 2008, <http://stormwire.stormexchange.com/2008/09/hurricane-ike-recharges-coastal.html>.

15. JERRY PATTERSON, TEXAS GEN. LAND OFFICE, CEPR: REPORT TO THE 80TH TEXAS LEGISLATURE, I-6 (FEB. 2007) [hereinafter CEPR]; JEFFERSON COUNTY, SH 87 ENVIRONMENTAL STUDY—JEFFERSON COUNTY, <http://www.co.jefferson.tx.us/eng/sh87/News.htm> (last visited Mar. 28, 2009).

16. SH 87 ENVIRONMENTAL STUDY, *supra* note 15.

17. CEPR, *supra* note 15, at I-4.

18. *Id.* at I-4, I-5.

either being the result of a long-term process resulting from gradual shifts or a short-term process stemming from extreme weather.<sup>19</sup> Sand is transported off of the beach, but can, over time, return with tidal events.<sup>20</sup> After weak storms, a beach may recover naturally, but severe hurricanes may cause damage that takes decades for nature to restore, as with the recent case of Hurricane Ike, the dune line (and the vegetation line) may have moved 100 feet due to the storm.<sup>21</sup>

There are four major methods of responding to coastal erosion.<sup>22</sup> First, beaches can be defended with seawalls and groins, typically sacrificing the land beyond the improvement for the beach it protects. Texas began these projects in 1876 with the jetty at Bolivar Roads.<sup>23</sup> Second, sand and dunes can be replaced with imported material.<sup>24</sup> Third, wetland restoration can occur, returning the shore to a natural breakwater with state parks and similar public works.<sup>25</sup> The fourth method is to retreat from the coast by removing structures too close to fluctuations in the shoreline.<sup>26</sup> This last method requires the least investment by the state, and it is clear that the proposed rules were meant to fall in that vein.

While as a matter of public policy the State of Texas desires that the beaches remain open to the general public, there are several facets of society that encourage (or, at least, do not discourage) risky coastal development. In the U.S. Tax Code, the casualty loss deduction allows for a deduction of storm losses from buildings damaged along the coast.<sup>27</sup> This has since been reinforced by emergency measures such as extending the time limit before reinvestment of involuntary conversions in a Presidential Federal Disaster Zone (as was the case following Katrina and Rita).<sup>28</sup> Furthermore, the ability to deduct mortgage interest and local property taxes on a second home has increased the demand for development.<sup>29</sup> Also, the availability of the

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19. *Id.* at I-5.

20. *Id.*

21. Rhiannon Meyers, *Ike's Fury Alters Island's Beaches*, DAILY NEWS, Sep. 28, 2008, <http://galvestondailynews.com/story.lasso?ewcd=3aab27db4b4e4d1cc8545f57966c90b3>.

22. CEPR, *supra* note 15, at I-5, I-6.

23. RICHARD L. WATSON, COASTAL LAW AND THE GEOLOGY OF A CHANGING SHORELINE 1, 4 (2006), available at <http://texascoastgeology.com/report.htm>.

24. CEPR, *supra* note 15, at I-5, I-6.

25. *Id.*

26. *Id.*

27. HEINZ CTR., *supra* note 7; I.R.C. §165 (2008).

28. I.R.C. §1033(h) (2008).

29. HEINZ CTR., *supra* note 7, at 43.

National Flood Insurance Program as the only source for flood insurance is effectively a service provided by the government to allow for development in flood prone areas.<sup>30</sup> As a Texas counterpart, the Texas Windstorm Insurance Association, while not a state organization, effectively aids in shielding coastal homeowners from some of the risks involved with coastal development.<sup>31</sup>

As a method of enforcing the OBA, the GLO has the authority to contact individuals who own buildings that obstruct the public beach and offer them a cash settlement to move their buildings.<sup>32</sup> As a temporary response in the wake of the hurricane, some limitations have been raised—houses now seaward of the 4.5 foot elevation line can be stabilized and made habitable; houses completely or partially landward of the line can, with a permit, repair their property to pre-Ike conditions.<sup>33</sup> While the GLO has stated that it will wait one year before initiating any suits to remove homes on the seaward side of the vegetation line, the people who own those houses have no option of rebuilding and have no legal authority to remove trespassers since the land is now public.<sup>34</sup> There is also no guarantee that property owners who lost their homes due to the OBA and Ike will be compensated by the state.<sup>35</sup> However, enforcement under the OBA can result in a penalty of \$50-\$2,000 per day and the violation continues after final judgment.<sup>36</sup>

### III. PROPOSED REFORMS

The GLO, in the form of proposed reforms, requested that local coastal counties adopt new regulations as part of an erosion

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30. *Id.* at 56.

31. TEX. WINDSTORM INS. ASS'N, <http://www.TWIA.org> (last visited Mar. 28, 2009).

32. Tresaugue, *supra* note 12, at B4 (stating that in one instance on Surfside Beach, Commissioner Patterson made an offer of \$50,000 to each of fourteen landowners to move their houses; he was sued as a result). Following Hurricane Ike, only four of those houses on Surfside Beach survived (and the houses were condemned following the storm). *See id.*; John Tompkins, *General Land Office Faces Reconstruction Challenge*, DAILY NEWS, Sept. 20, 2008, available at <http://galvestondailynews.com>.

33. TEX. GEN. LAND OFFICE, GLO EARTH - IKE SHORELINE ASSESSMENT, [http://www.glo.state.tx.us/ike/press/gunite\\_4-5line111708.pdf](http://www.glo.state.tx.us/ike/press/gunite_4-5line111708.pdf) (last visited Mar. 28, 2009); Chris Paschenko, *First Public Beach Line Revealed*, DAILY NEWS, Nov. 11, 2008, <http://galvestondailynews.com/story.lasso?ewcd=e43223c90c74e668c8545f57966c90b3>.

34. J. David Breemer, *Reform the Open Beaches Act After Ike*, DAILY NEWS, Sept. 26, 2008, available at <http://galvestondailynews.com>.

35. *Id.*

36. TEX. NAT. RES. CODE ANN. § 61.018 (2008).

response plan.<sup>37</sup> Under the proposed Rule 15.16, communities would have to establish a set-back line, limiting new construction from the edge of the beach by one of three calculations: “[(1)] 60 times the annual erosion rate, measured from the line of vegetation[; (2)] 25 feet landward of the landward toe of the dunes[; or (3)] 300 feet landward of the mean-high-water line.”<sup>38</sup> If the vegetation line is uncertain, the assumption is that it will form around 4.5 feet above mean sea level.<sup>39</sup> Under current law there is no statewide restriction against building right against the vegetation line, even if the line will change by the next year. However, the proposed regulation would require that where the erosion rate is ten feet per year, the closest a new building can come to the vegetation line is 600 feet.<sup>40</sup> In Galveston, the existing set-back distance is merely twenty-five feet.<sup>41</sup> The thought is that a set-back of sixty times the erosion rate “represents an approximate time period for depreciation of new buildings being subjected to erosion, especially modern hotels and condominiums.”<sup>42</sup>

The new rules would have been voluntary for local municipalities to enact but would affect Coastal Erosion Planning and Response Act (“CEPRA”) grants.<sup>43</sup> Also, the State Land Commissioner proposed adding certain limitations to the proposals. The plan would only affect new construction while existing legal construction would be grandfathered.<sup>44</sup> Additionally, local governments would institute the reforms, allowing them to tailor the solutions directly to the issues they saw in their communities.<sup>45</sup>

The Commissioner proposed a number of other exceptions to the rule beyond the grandfather clause. Areas that had accretion of at least two feet per year instead of erosion were exempt from the rule.<sup>46</sup> Properties where the owner has shown that there are

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37. Adams, *supra* note 14.

38. Jerry Patterson, *Beach Rule Proposals are Fair and Flexible*, DAILY NEWS, June 12, 2008, <http://galvestondailynews.com/story.lasso?ewcd=cfb4eafa36eb920c854> [hereinafter *Beach Rule Proposals*]. The historical erosion rate used is that determined by the University of Texas at Austin, Bureau of Economic Geology. 33 Tex. Reg. 3885 (proposed May 16, 2008).

39. Paschenko, *supra* note 33.

40. See 33 Tex. Reg. 3885.

41. Leigh Jones, *Locals Still Suspicious of Beach Setback Rules*, DAILY NEWS, July 9, 2008, available at <http://galvestondailynews.com>.

42. 33 Tex. Reg. 3885.

43. *Id.*

44. *Beach Rule Proposals*, *supra* note 38.

45. 33 Tex. Reg. 3885.

46. *Id.*

“no practicable alternatives to construction seaward of the building set-back line” were also exempt.<sup>47</sup> This exemption could be an opportunity for anyone wanting to avoid the rule as “practicable” is undefined in the statute. Grandfathered buildings that were damaged more than fifty percent by a meteorological event lose their grandfathered status.<sup>48</sup> Finally, a platted subdivision that had been previously planned for development could continue with local government approval.<sup>49</sup> In the case of all the exempt property, there were a number of construction requirements, including the feasibility of relocating the structure.<sup>50</sup>

#### IV. CRITICISMS

The major critiques of the proposal address a variety of issues. Local government officials see the new rules as overly restrictive and thus negatively affecting their tax base.<sup>51</sup> Further, they are worried about property owners litigating due to decreases in their property values. Patterson counters that “[t]he flexibility of these proposed rules — along with the many opportunities for exemptions — ensure that private property rights are respected. These proposed rules [are not] intended to keep anyone from building on their property. They will, however, help to protect that private property.”<sup>52</sup>

The problem with this view is that the new regulations would only affect future property development and would not do anything to protect existing property ownership. One coastal resident pointed out that the GLO is proposing cities adopt “erosion response plans” and not “erosion prevention plans.”<sup>53</sup> The money being allocated by the state is not going toward halting or reversing the erosion processes, but rather to programs minimizing the effects of erosion.

As Galveston County has been one of the most vocal opponents to these rules, their official comments are worth

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47. *Id.*

48. The term meteorological event is not defined anywhere in the existing act or the proposed changes. The question of whether this would include regular storms and foul weather or just tropical storms and hurricanes remains unanswered. See GALVESTON COUNTY, COMMENTS ON PROPOSED AMENDMENTS AND ADDITIONS TO GLO BEACH/DUNE RULES PUBLISHED IN MAY 16, 2008 TEXAS REGISTER 13 (Aug. 13, 2008).

49. 33 Tex. Reg. 3885.

50. *Id.*

51. Jones, *supra* note 41.

52. *Beach Rule Proposals*, *supra* note 38.

53. Ron Pearrow, *Retreatist GLO Beach Policy is Defeatist*, DAILY NEWS, June 15, 2008, available at <http://galvestondailynews.com/story.lasso?ewcd=2b6bbc44c7c165a1>.

examining.<sup>54</sup> Galveston County took offense to the takings analysis and the basis for the proposals.<sup>55</sup> The county questioned all of the findings present in the preamble of the regulation, and called into question the purpose of the reforms.<sup>56</sup> Under various sections of the Texas Government Code, these are flaws that need to be addressed for the rule to be upheld on appeal, should a lawsuit ensue.<sup>57</sup>

Galveston argued that under *Penn Central Transportation v. City of New York* and *Sheffield Development Company v. City of Glenn Heights*, the regulatory taking by a governmental agency required a factual determination.<sup>58</sup> The GLO cited *Lucas v. South Carolina Coastal Council* in arguing that the taking of structures on the public beach is not a “total regulatory taking” and therefore not necessarily compensable.<sup>59</sup> Much of the litigation under the OBA deals with the taking of land on the seaward side of the vegetation line, not the landward side of the vegetation line as this proposed section would require. Indeed, even the cases cited by the GLO show that the public easement is on the seaward side of the vegetation.<sup>60</sup> The fact that the GLO provides no case law for the restriction of rights on the landward side of the dunes leaves them open to the unsettled limitations of the takings power.

Galveston also raised a number of concerns regarding the substance of the proposed rule. The County expressed concerns with the Bureau of Economic Geology’s methodology for establishing the rates of erosion.<sup>61</sup> The Bureau used Light Detection and Ranging (“Lidar”) surveys, which is a relatively new technology without a long track record.<sup>62</sup> Further, the most recent published rates by the Bureau of Economic Geology are from 2000.<sup>63</sup> In response to the three set-back options, Galveston

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54. I Said, Power to the People!, <http://offthekuff.com/mt/archives2/2008/09/> (Sept. 21, 2008) (last visited May 25, 2009).

55. 33 Tex. Reg. 3885.

56. *Id.* (noting that “the preamble finds that: no estimation of costs, fiscal note, to the local government is required; no takings impact analysis is required; no major environmental rule analysis is required; and no local employment impact analysis is required.”).

57. *Id.*

58. *Pa. Central Transp. v. City of New York*, 438 U.S. 104, 124 (1978); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 673 (Tex. 2002).

59. 33 Tex. Reg. 3885; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

60. *Feinman v. State*, 717 S.W.2d 106, 111-14 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1986, writ ref’d n.r.e.); 33 Tex. Reg. 3885.

61. 33 Tex. Reg. 3885.

62. *Id.*

63. *Id.*

wanted an explanation for denying property rights, as no reasoning was provided for the details for the setback provisions (For example, why sixty times the erosion rate or 300 feet from mean high water was used?).<sup>64</sup> In regard to local governmental acquisition of seaward buildings, Galveston critiqued the usurpation of local authority by the state.<sup>65</sup> By requiring local government to acquire these properties or potentially lose state grant money, Galveston was concerned about the authority of the local government to act. A Galveston county commissioner likened it to an unfunded mandate where “it is voluntary, but if we [do not comply], we [do not] get the [grant] dollars.”<sup>66</sup>

While the county officials opposed the proposed reforms, some individuals with a more environmentally conscious perspective approved of them.<sup>67</sup> They welcomed them as rules based on science, not politics. To them, the rules would have been a responsible choice because allowing new construction on land that may not be there in a few years due to erosion would be foolish. However, a review of the letters to the editor and contributed columns in the Galveston County Daily News indicated far more vocal opponents than supporters.

## V. CONCLUSION

While the proposed rules in Texas were withdrawn as of November 17, 2008, the approach taken and the responses to the rules can contribute to future revisions of the OBA.<sup>68</sup> It is clear that erosion is a strong and regular force that the state cannot ignore when considering coastal property rights. An attempt must be made to keep new property owners and developers from making investments that will be lost to erosion rather than regular depreciation. The GLO’s attempt to limit the scope of the beach is a valid public policy. However, it appears from reactions in Galveston and elsewhere that the method suggested is too strong a response.

If instead of the Texas approach, an approach more like Florida’s were employed, there might be additional positive

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64. *Id.*

65. *Id.*

66. Jones, *supra* note 41. In comparison to other states such as Florida, where the requirement is that there be some plan, but no arbitrary set of guidelines is imposed on the local municipalities with a threat of losing state funding if not included. *FLA. STAT. § 161.053 (2008)*.

67. *Id.*

68. Press Release, Texas General Land Office, Post Ike Questions and Answers from the GLO (Sept. 26, 2008), *available at* <http://www.crystalbeach.com/PR-Questions.pdf>.

benefits. Because each construction control line in Florida is set by the local county, the decisions are made on the local level with state approval, rather than state mandated changes without due concern for the local situation. The ability to make local level decisions is a highly valued right in Texas and would free some communities from their problems with the proposed rules, as they could adapt them to local circumstances. If each community could define its own set-back provisions, then the individual members of the community would bear more of the risk. Unfortunately, due to the nature of pooled risks, damage to structures built too close to the shore affects the entire population with higher insurance rates and lost tax dollars.

The modern Texas shore is a study in contradictions. Most Texans are strongly defensive of their property rights, yet those who purchase property on the coast know that their property will be at risk due to erosion.<sup>69</sup> When the state tried to enact new rules, the comments were such that the GLO allowed it to lapse. There were some flaws in the proposal, but despite these flaws, Texas shorelines would have benefited from the proposal. By better limiting of shoreline building, future use could be prolonged and property rights would be better defined.

*Michael Hofrichter*

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<sup>69</sup> See Press Release, Rick Perry, Office of the Governor, Gov. Perry Signs New Law Protecting Property Rights (Aug. 31, 2005) (emphasizing Texans' desire to protect their property from the government), available at <http://governor.state.tx.us/news/press-release/3239/>.