

AN OVERVIEW OF COASTAL ACCESS RIGHTS IN TEXAS



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DISCLAIMER

This white paper is not intended as legal advice. It is not intended to, and cannot, substitute for sound legal advice from a competent, licensed attorney. Texas Sea Grant commissioned this white paper to assist the public with understanding coastal access rights in Texas. Research was performed by Casey Amsler while a student at the University of Houston Law Center and the National Sea Grant Law Center. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA, the U.S. Department of Commerce, or the Texas General Land Office.



AN OVERVIEW OF COASTAL ACCESS RIGHTS IN TEXAS

I. History of Coastal Access in Texas

Beginning when the state of Texas joined the Union in 1845, the public enjoyed extensive access to the state's Gulf beaches. The public used the coast for transportation, camping, fishing, and swimming. Public use of coastal lands and waters was so widely accepted that the public and most private landowners believed that the state owned both wet and dry portions of the beach. In 1958, this expansive public use of beaches was curtailed when the Texas Supreme Court ruled in *Luttet v. State* that private landowners retained ownership rights over the dry sand portion of the beach above the mean high tide line and the state only owned the wet sand portion of the beach.¹

This ruling disrupted long-held traditions presuming the public could use both the wet and dry portions of the beach.² Under the ruling, the public was limited to using the foreshore, or the area between the mean low and high tide lines. In addition to preventing the public from using the dry sand beach, the ruling severely limited the public's access to the foreshore, as the public is often required to use the privately owned dry sand part of the beach to access the public portion of the beaches. Further, high tides that completely submerged the foreshore frustrated the public's use of the beach. Following the *Luttet* ruling, the Texas legislature passed the Texas Open Beaches Act (TOBA) in an effort to codify the public's use of the state-owned wet beach *and* access to privately owned dry beach areas between the mean low tide and vegetation line where an easement has been established.³

TOBA does not apply to coastal land that is not on the Gulf Coast, such as land that faces a bay or Laguna Madre. Generally, littoral owners have the right to determine who can access this waterfront land. They have the right to exclude access to their waterfront land up to the seaward boundary line of their property.

1. 324 S.W.2d 167 (Tex. 1958).

2. Jacqueline Reeves, *The Challenge of Legislating Coastal Boundaries: One Property Owner's Attack on the Public's Beach*, 53 S. TEX. L. REV. 345, 350 (2011).

3. TEX. NAT. RES. CODE § 61.011(a).

A. Texas Open Beaches Act

Under TOBA, landowners are prohibited from constructing any barriers that would prevent public access.⁴ TOBA provides that “the public shall have 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.”⁵ This public easement is subject to a showing that “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...”⁶

An easement allows its holder the right to use another person’s land for a certain purpose. The landowner retains full ownership of the land and can use it in any way that does not interfere with the rights granted in the easement. Some easements are expressly granted by a landowner but others are implied by law. Easements implied by law include: easements by prescription, dedication, or custom. Texas courts have repeatedly ruled that the public has acquired easements by prescription or dedication on Gulf beaches.⁷

If a party wants a court to grant easements implied by law, they must meet certain elements. An easement by prescription is obtained without permission of the owner and requires continuous use over a period of time. For an easement by customary and continuous use, the public use must be “ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law.”⁸ This type of use must have been since “time immemorial” and is rarely used by courts. An easement by implied dedication is an easement necessary for enjoyment of the property. For example, if land is subdivided and access to a landowner’s property is cut off, a court may grant this type of easement.

Another important piece of TOBA is its recognition of a “rolling easement.”⁹ The rolling easement essentially allows the public beach to migrate in response to natural processes. In fact, TOBA requires that real estate deeds of sale seaward of the Gulf Intracoastal Waterway contain language indicating that structures erected seaward of the vegetation line or that become seaward of the vegetation line as a result of natural processes, such as shoreline erosion, are subject to removal. The rolling easement provision of TOBA has been weakened in recent years by a Texas Supreme Court decision, *Severance v. Patterson*, which is discussed below.

4. *Id.* § 61.013.

5. *Id.* § 61.011(a).

6. *Id.*

7. 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, 371 (2011).

8. *Almeder v. Town of Kennebunkport*, 2014 ME 139 (Apr. 16, 2015).

9. TEX. NAT. RES. CODE § 61.020.

B. *Severance v. Patterson*

Severance held that Texas law does not recognize a rolling easement after an avulsive event. An avulsive event is one that suddenly and perceptively alters the shoreline so dramatically that the once previous dry beach is now a part of the wet beach. Avulsion may occur as a result of a severe weather event such as a hurricane.

Only § 61.020 of TOBA was called into doubt by *Severance*. This section provides that in beach areas located seaward of the vegetation line, it is presumed that “there is imposed on the area a common law right or easement in favor of the public ...” While it was previously believed that the public’s easement recognized by TOBA would simply “roll” onto the new dry beach, the *Severance* court held that the new easement must either have already been established on the new dry beach or re-established after the avulsive event.

The *Severance* decision does not affect public access to the wet beach, or area between the mean low and mean high tide lines. The wet beach is still held in public trust by the state of Texas and thus the public has unrestricted access to this area. The decision affects public access to the dry beach, but only when an avulsive event drastically and suddenly alters the beach landscape. When the beach changes slowly over time due to erosion or accretion, the public’s easement over the dry beach remains unaffected.

The practical effect of *Severance* is that the public easement will not migrate landward onto previously unencumbered privately owned property after a change in the coastline caused by a hurricane or storm. However, the easement will migrate with the gradual, natural changes of the coastline over time.

In 2013, in response to *Severance*, the legislature amended TOBA to address the difference between avulsive events and slower-acting accretion and erosion processes.¹⁰ The amendments grant authority to the General Land Office (GLO) to establish a new line of vegetation or suspend the determination of the line of vegetation for three years after it is destroyed by a “meteorological event.”¹¹ A “meteorological event” is defined to include atmospheric conditions that cause avulsion, erosion, and accretion, as well as other impacts that alter the vegetation line.¹² Allowing the beach three years to recover, rather than requiring the line of vegetation to remain at its pre-avulsive location, may preserve more of the public beach. This, of course, depends on discretionary decisions by the GLO.

10. H.B. 3459, 83rd. Leg. (Tex. 2013).

11. TEX. NAT. RES. CODE ANN. § 61.0171.

12. *Id.* § 61.001.

II. Local Government Tools for Access

A. Beach Access and Use Plans

In addition to requiring access, TOBA requires cities and counties to establish and implement comprehensive Beach Access and Use plans that provide for the preservation and enhancement of access to the public beach by regulating development of beachfront property. Beachfront Construction Certificates are an integral part of the Beach Access and Use Plan. Developers proposing construction adjacent to and landward of a public beach must submit a development plan to the applicable local government. The local government must certify whether the proposed construction is consistent with the local government's Beach Access and Use Plan and may include in the certification any reasonable terms and conditions it finds necessary to assure adequate public beach access and use rights consistent with the dune protection provisions.

Using the GLO's Coastwide Erosion Response Plan as a reference, local governments are required to publish Erosion Response Plans (ERP) as an appendix to their Beach Access Plans. The ERPs must establish and implement procedures to reduce public expenditures for storm damages by establishing building setbacks and procedures for protecting critical sand dunes and the public beach easement. These setbacks and critical dune protection may help protect public access by limiting private development along the shoreline.

B. Dune Protection

Local governments are also required to establish a dune protection line beyond which a person cannot affect a sand dune or dune vegetation without first obtaining a permit and mitigating for adverse effects.¹³ The Dune Protection Act limits the geographic scope of critical dune areas and the location of the dune protection line to that portion of the beach within 1,000 feet of mean high tide of the Gulf of Mexico. These dune protection provisions may impede development of private coastal property, thus preserving beach access.

C. Beach User Fees

Local governments may charge beach users a fee in exchange for providing and maintaining beach-related services, including off-beach parking. Any new or amended beach user fee must meet specific requirements and be approved by the General Land Office.

13. TEX. NAT. RES. CODE ANN. §§ 63.001-63.181.

III. Private Tools for Access

Except at public beaches where there are public access points, the public often has to cross privately owned dry sand beach to access the public wet sand beach. Additionally, where high tides submerge the foreshore, the public will desire to use the dry sand part of the beach. When private property owners prohibit use of this area, the public's use may be frustrated. There are tools that can be used to gain perpendicular access to or use of the dry sand beach. For instance, people desiring access to privately-owned land can purchase the right either by buying/acquiring the land outright, or by buying a limited right just to cross it. Landowners can transfer, or "convey," by donation or sale, all or part of the ownership interest of their land. Acquisition or conveyance of land, also called transferring land, is typically achieved through a contract, although it could also be done through a will or some other legal instrument. An owner may also allow access, without a formal land conveyance. Below is an explanation of possible tools to provide access.

A. Conveyance of Property

Landowners can transfer property ownership interest (either the complete title, or partial rights) through a variety of means, including buying it outright or partially through easements, conservation easements, or development rights. These interests can often be purchased at a lower cost than buying the entire property, or can be donated depending on the wishes of and related tax benefits to the private property holder. The interests can be conveyed unconditionally or with conditions attached. In this circumstance, a landowner may even give herself the right to get the land back if terms or conditions aren't met. Landowners can transfer interest of their land to individuals, or to entities, organizations and agencies, which can include land trusts and local, state and federal governments.

1. Traditional Easements

An easement allows its holder the right to use another person's land for a certain purpose. The landowner retains full ownership of the land and can use it in any way that does not interfere with the rights granted in the easement. Some easements are expressly granted by a landowner but others are implied by law. Easements implied by law are discussed above in the TOBA section.

To expressly grant an easement, a landowner can transfer, or convey, by donation or sale, all or part of the ownership interest of their land. Acquisition or conveyance of land, also called transferring land, is typically achieved through a contract, known as a deed, although it could also be done through a will or some other legal instrument.

2. Conservation Easements

A conservation easement is when a landowner voluntarily limits, by sale or donation to a land trust or other public interest entity, the uses of the property for the purpose of protecting natural resources. It can also spell out how and if the public has access rights to those natural resources. A conservation easement can be held by the government, or by a non-profit or charitable trust that has conservation purposes. The conservation easement "runs with the land," meaning it is still in place even if the land changes hands, and is therefore considered a permanent protection. There are important tax implications and benefits associated with buying or donating a conservation easement (including decreased property, income, and estate taxes) and landowners should work with a lawyer or a land trust to explore the options.

3. Covenants

A covenant is a written legal promise contained in a contract or deed. A landowner promises to the limits on land use defined in the covenant. A covenant can be enforced by another party, which could include the state. Covenants can be used to specifically address ways that landowners legally promise to allow beach access.

B. Private Agreements

Landowners and waterfront users can enter into private agreements that define the terms of use of privately owned beaches. Private agreements differ from conveyance/acquisition in that the landowner is agreeing to permit a use of her land, but is not actually transferring the property interest in that land. In most private agreements the landowner continues to have all of the same property rights that were present before the agreement was made. A landowner may informally agree (verbally or in a non-binding statement) to allow certain people the privilege of gaining access to the shore across his or her property.

There are two general types of private agreements:

- Lease: best used when a defined time period is desired for the agreement. A lease is a written agreement, in which the owner of property (either real estate or some object like a boat) allows use of the property for a specified period of time (term) for specific periodic payments (rent), and other terms and conditions.
- Contract: most enforceable when both parties receive a benefit. A contract is an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration (a legal concept that requires both parties to give up something in exchange for receiving something). For a contract to be legally enforceable, it needs to include benefits for both parties otherwise it lacks "consideration," and can be easily revoked. For example, if a landowner gives permission for his or her land to be used for public access but does not receive anything in return, that agreement will not be enforceable if the landowner changes his or her mind.

These agreements are inexpensive to create and do not bind the landowner or subsequent purchasers of the land, but they can be risky for those acquiring access through informal agreement, as the access privilege could be revoked at any time. Landowners and beach users can also enter into more formal and binding agreements in which the landowner specifies how the land is to be used and to create conditions that, if not met, would allow access rights to be revoked.

Private agreements are ideal for landowners who are willing to consider certain types of coastal uses on their properties, but are not willing to transfer ownership, at least initially. In this same way, contracts allow landowners to test their comfort with particular uses before entering into a more binding long-term agreement such as an easement. Incentives such as use fees and property maintenance also may be negotiated with users to the benefit of the landowner. The ability of a landowner to change his mind is more present in private agreements than in a transfer of a property interest. Therefore, the use of private agreements may provide users with access locations and uses, even if temporarily, that might otherwise have been impossible.

To be effective, any type of private agreement should be drafted to address the following:

- Right of renewal: for a private agreement to be used for more than just a short term solution, the agreement should include a description of each party's right of renewal, such as in a contract that provided access for a specific period of time. The right to renew the agreement could be conditioned on one party performing specific obligations such as adequate policing or maintenance of the property.
- Specific use restrictions: agreements can limit public use to specific user groups.

IV. Liability Issues

If a private waterfront landowner allows someone to use her property to access the beach, liability questions may arise. Whether a landowner owes a duty to a visitor and the scope of liability depends on the visitor's status as an invitee, licensee, or trespasser. A landowner owes the lowest duty of care to the trespasser, who is there without the landowner's permission. Licensees, which are usually social guests, require a higher duty of care. Invitees, which are generally those invited on the premises to conduct business with the business owner, are owed the highest duty of care.

In Texas, there are different liability rules for landowners who permit the use on their land by others for recreational purposes, including beach access. A landowner likely would not incur increased risk of liability from such an arrangement because the Texas Recreational Use statute provides for limited liability for landowners allowing recreational use.

The statute offers protection to landowners, lessees, and occupiers of real property if a person who is given permission to enter the land for recreation is injured. It is important to note that the statute does not protect against those who were expressly invited to the land for recreation, with the exception of those *expressly invited* onto agricultural land. Under the statute “recreation” is broadly defined as including “any activity related to enjoying the outdoors.” This includes hunting, fishing, swimming, boating, camping, the use of ATVs, water skiing, biking, hiking, and sport activities.

The statute does not limit the liability of landowner, lessees, or occupiers from gross negligence, acting in bad faith, or with malicious intent. Essentially, landowners may not perform any act that directly puts a recreational user at risk. This is essentially the same duty owed to trespassers.

To be protected, a landowner, lessee, or occupier must meet one of the following criteria: 1) landowner, lessee, or occupier charges no fee to enter or participate in the recreation, 2) the amount received for recreation is not greater than twenty times the amount paid in taxes, or 3) the landowner, lessee, or occupier of agricultural land maintains insurance coverage as defined by statute. If a landowner, lessee, or occupier of real property follows the above criteria, the Texas Recreational Use Statute offers them protection from liability.

V. Conclusion

As the coastal and legal landscape in Texas continues to change, the status of public beach access remains in flux. Texas has often been upheld as a model state for the protection of public beach access. TOBA codifies the public’s right to access Gulf beaches and attempted to establish rolling easements to help protect that access. The court’s ruling in *Severance v. Patterson* weakened the rolling beach easement provisions; however, recent developments in the state, specifically the 2013 amendments to TOBA, indicate the state’s commitment to preserve public beach access. Where government tools are unavailable, landowners may look to other tools to find solutions that may provide public access and protect landowners’ rights at the same time.