

Opinion issued November 21, 2019



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00870-CV

**PEDESTRIAN BEACH, LLC; MERRY PORTER, INDIVIDUALLY AND
AS INDEPENDENT EXECUTOR OF THE ESTATE OF BROOKS
PORTER, DECEASED; ANGELA MAE BRANNAN, INDIVIDUALLY AND
AS INDEPENDENT EXECUTRIX OF THE ESTATE OF BOB ALBERT
BRANNAN, DECEASED; RUSSELL AND JUDY CLINTON; RUSSELL
CLINTON AS ADMINISTRATOR OF THE ESTATE OF ELIZABETH
CLINTON, DECEASED; REG APLIN AND BEAVER APLIN D/B/A
BENCHMARK DEVELOPING; LOUISE BULLARD; DIANE LOGGINS
CLARK; JOSEPH CORNELL DEWITT AND LISA MARIE DEWITT
FUKA; MACARIO RAMIREZ AND CHRISSIE DICKERSON; JEFFREY
DYMENT; MARVIN JACOBSON FAMILY HOLDING COMPANY;
CATHY T. CHARLES; JAMES MEEK AND PATRICIA MEEK; MARK
PALMER; PATRICIA PURSLEY, INDIVIDUALLY AND AS
COMMUNITY SURVIVOR OF JAMES C. PURSLEY, DECEASED;
KENNETH C. REUTZEL AND ANDREA REUTZEL; S & S HOLDINGS,
LLC; ROGERS THOMPSON, EXECUTOR OF THE ESTATE OF P.E.
KINTZ, DECEASED, Appellants**

V.

**THE STATE OF TEXAS; TEXAS GENERAL LAND OFFICE; LAND
COMMISSIONER GEORGE P. BUSH; ATTORNEY GENERAL KEN
PAXTON; THE VILLAGE OF SURFSIDE BEACH; MAYOR LARRY
DAVISON IN HIS OFFICIAL CAPACITY, Appellees**

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Case No. 91156-CV**

MEMORANDUM OPINION

The appellants in this case challenge the trial court’s dismissal of their declaratory judgment claims regarding properties in the Village of Surfside Beach in Brazoria County. The court issued five separate orders, which together disposed of all claims for lack of jurisdiction. The appellants raise fourteen issues. Five issues challenge the trial court’s jurisdictional rulings. Nine issues pose questions of law, seeking answers to their requested legal declarations. The appellants argue that the trial court improperly failed to answer these legal questions.

We affirm.

Introduction

This case has spanned nearly 20 years. It began when a dispute arose between some of the appellants (“the original plaintiffs”) and the state and local governmental defendants (“State defendants”). The original plaintiffs owned beach houses in the Village of Surfside Beach (“the Village”), which were landward of

the vegetation line of “Pedestrian Beach” when they were built.¹ See *Brannan v. State*, 365 S.W.3d 1, 6 (Tex. App.—Houston [1st Dist.] 2010), *rev’d*, 390 S.W.3d 301 (Tex. 2013) (*Brannan I*). In 1998, Tropical Storm Frances moved the vegetation line landward, leaving the houses between the vegetation line and the water’s edge. *Id.* The Village refused to allow the houses to be repaired, and it denied access to utilities. The State defendants asserted that the houses encroached on a public beach access easement and must be removed.

In 2001, the original plaintiffs sued the State defendants alleging that these actions amounted to a “constitutionally compensable taking of their property.” *Brannan v. State*, 390 S.W.3d 301, 302 (Tex. 2013) (*Brannan II*). After the lawsuit was filed, several of the original plaintiffs’ neighbors intervened as plaintiffs. See *Brannan I*, 365 S.W.3d at 6. All the plaintiffs sought declaratory judgment to construe provisions of the Open Beaches Act and determine the existence and scope of easements in favor of the public on their properties. See TEX. NAT. RES. CODE §§ 61.001–.254 (Open Beaches Act).

The plaintiffs conceded that before 1998 an easement had existed that permitted the public to use the dry sand beach adjacent to the wet beach for lateral passage and recreational purposes. *Brannan I*, 365 S.W.3d at 6–7. The State

¹ The lawsuit was originally filed in 2001. The original plaintiffs were individuals who owned beachfront property in the Village. The following appellants were also original plaintiffs: Angela Mae Brannan, the Porters, and the Clintons.

defendants argued, and the trial court agreed, that the easement rolled onto the plaintiffs' properties after Tropical Storm Frances eroded the beach and shifted the shoreline in 1998. *Id.* at 26. The trial court ordered the removal of the remaining houses and denied the remainder of the plaintiffs' claims. *See id.*

We affirmed the trial court's judgment in part, *id.* at 27, and while the case was pending on appeal to the Supreme Court of Texas, the high court issued *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012), which held that "avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property." *Severance*, 370 S.W.3d at 725; *see Brannan II*, 390 S.W.3d at 302. *Severance* did not determine "whether a taking would occur if the State ordered removal of *Severance's* house" because that was not part of the certified question proceeding. 370 S.W.3d at 707, 712–13.

In light of *Severance*, the Supreme Court remanded *Brannan* to us for further consideration, specifically noting the takings issue. *See Brannan II*, 390 S.W.3d at 302 ("When the Village of Surfside Beach refused to allow the houses to be repaired or to have access to utilities, and the State asserted that the houses encroach on a public access easement and must be removed, petitioners sued, contending among other things that the State's assertion amounts to a constitutionally compensable taking of their property.").

We remanded the case to the trial court in the interest of justice, concluding that the record was not sufficiently developed to determine the parties' takings claims. *See Brannan v. State (Brannan III)*, No. 01-08-00179-CV, 2014 WL 1778276, at *1–2 (Tex. App.—Houston [1st Dist.] May 1, 2014, no pet.) (mem. op.). By the time the case was remanded to the trial court, several plaintiffs had passed away and most of the plaintiffs' houses were no longer standing, having been removed by forces of nature.

Background

In October 2015, the plaintiffs filed a supplemental pleading alleging that storms had washed away all but two of their beach houses. They alleged that the status of the two remaining houses presented “a host of complex legal issues.” They maintained that they had standing based on their prior ownership and their ownership of other littoral land in the Village, specifically: 1206-07 Sargasso Lane (the Porters), 1215 Sargasso Circle (Russell Clinton), 510 Beach Drive (Ramirez and Dickerson), 125 Driftwood Drive (S&S Holdings), and other unspecified property in the Village (the Porters, Brannan, and S&S Holdings). The following year, Pedestrian Beach, LLC intervened asserting ownership of 1206–1207 Sargasso Lane and alleging that Brooks and Merry Porter had created Pedestrian Beach, LLC for the purpose of owning the Sargasso Lane duplex, which was transferred to the LLC in December 2007.

In August 2017, the trial court severed the declaratory judgment claims into one suit, Cause No. 91156-v, leaving the takings claims in the original suit, Cause No. 15802. The trial court later abated the takings claims pending funding of a possible settlement by the Legislature in its 2019 session.

The severed declaratory judgments case concerned the following properties and appellants:

Table 1: Properties & Appellants in Severed Declaratory Judgments Case.

Property	Appellants
211 Beach Drive	Dianne Loggins Clark
303 Beach Drive	Angela Mae Brannan, individually and as independent executrix of the Estate of Bob Albert Brannan. Marvin Jacobson Family Holding Company
307 Beach Drive	Cathy T. Charles, James Meek, Patricia Meek
319 Beach Drive	S&S Holdings LLC
405 Beach Drive	Patricia Pursley, individually and as community survivor of James C. Pursley, deceased
407 Beach Drive	Mark Palmer
411 Beach Drive	Louise Bullard
415 Beach Drive	Rogers Thomson, Executor of the Estate of P.E. Kintz
507 Beach Drive	Macario Ramirez and Chrissie Dickerson
510 Beach Drive	Macario Ramirez and Chrissie Dickerson
511 Beach Drive	Macario Ramirez and Chrissie Dickerson
603 Beach Drive	Reg Aplin and Beaver Aplin d/b/a Benchmark Developing
619 Beach Drive	Merry Porter, individually and as Independent Executor of the Estate of Brooks Porter, deceased
701 Beach Drive	Joseph Cornell DeWitt and Lisa Marie DeWitt Fuka
705 Beach Drive	Jeffrey Dymont
809 Beach Drive	Merry Porter, individually and as Independent Executor of the Estate of Brooks Porter, deceased
819 Beach Drive	Judy A. Clinton
907 Beach Drive	Russell Clinton as administrator of the Estate of Elizabeth

	Clinton, deceased Kenneth C. Reutzel & Andrea Reutzel
919 Beach Drive	Russell Clinton
1206-07 Sargasso Ln.	Brooks Porter (Merry Porter, as Independent Executor of the Estate of Brooks Porter, deceased) Pedestrian Beach LLC
1215 Sargasso Cir.	Russell Clinton
125 Driftwood Dr.	S&S Holdings
Other properties in Surfside	Merry Porter, individually and as Independent Executor of the Estate of Brooks Porter, deceased; Angela Mae Brannan, individually and as independent executrix of the Estate of Bob Albert Brannan; S&S Holdings

The plaintiffs sought declaratory judgment on dozens of legal questions generally pertaining to: (1) constitutional takings claims;² (2) easements;³

² For example, the Plaintiffs' Second Amended Petition stated:

All Plaintiffs pray the Court to determine and to declare that the imposition of an easement of public use or of lateral passage on their real property without compensation is a taking of private property for public use in violation of Art. I, §§ 17 and 19 of the Texas Constitution and in violation of Amendments V and XIV of the United States Constitution and is further a denial of Equal Rights in violation of Art. I, § 3 of the Texas Constitution and the Equal Protection Clause of Amendment XIV of the United States Constitution.

Clerk's Record at 104.

Brooks and Merry Porter pray the Court to determine and to declare that they are entitled to adequate compensation and Due Course of Law for the removal of their beach house under Art. I, §§ 17 and 19 of the Texas Constitution.

Brooks and Merry Porter pray the Court to determine and to declare that they are entitled to just compensation and Due Process of Law

(3) provisions of the Open Beaches Act;⁴ (4) future, speculative, or hypothetical situations;⁵ and (5) questions of fact.⁶

for the removal of their beachhouses under Amendments V and XIV of the United States Constitution.

Clerk's Record at 109.

³ For example, the Plaintiffs' Amended Supplement to Plaintiffs' Second Amended Petition and to Plaintiff Intervenors' Individual Petitions stated:

Plaintiffs pray the Court to determine and to declare: that the public has not acquired Common Law beach easements on Plaintiffs' land by:

- a) Dedication; or
- b) Prescription; or
- c) Implied Dedication; or
- d) Estoppel.

Clerk's Record at 152–53.

⁴ For example, the Plaintiffs' Supplemental Pleadings after Remand stated:

Plaintiffs pray the Court to set forth with clarity in its declaratory judgment the true scope of the public common law beach easements of:

Access,
Lateral Transit along the Coast, and
General Beach Recreational Use.

Plaintiffs ask the Court to set forth the rights the public legitimately acquires in each of these easements.

Clerk's Record at 721.

That pleading also asked the court to make the following declaration:

Because of the Supreme Court's decision in *Severance* and the declarations of this Court, the Disclosure to Purchaser provision of the OBA [Open Beaches Act] must be completely rewritten.

The State defendants sought dismissal of some claims by filing pleas to the jurisdiction. They filed a plea to the jurisdiction regarding the properties added in October 2015, arguing that claims regarding the newly added properties were not justiciable because they were speculative, theoretical, and unripe.⁷ In light of

Clerk's Record at 729.

⁵ For example, the Plaintiffs' Second Amended Petition stated:

Plaintiffs pray the Court to determine and to declare that if a Plaintiff loses any rights or title to his land by erosion or submersion without regard to whether the causes are anthropogenic or natural, each Plaintiff regains his rights and title to his land by accretion or reclamation without regard to whether the causes are anthropogenic or natural.

Clerk's Record at 160. This case does not involve any claim of accretion or reclamation.

⁶ For example, the Plaintiffs' Supplemental Pleadings after Remand stated:

Plaintiffs pray the Court to determine and declare that man-generated activities are one of the proximate causes of erosion on the Pedestrian Beach at Surfside.

Clerk's Record at 730.

⁷ The State defendants filed a plea to the jurisdiction concerning the new properties added by the plaintiffs' October 2015 supplemental pleading. They argued that the plaintiffs did not allege that they had taken or threatened any actions against them regarding the new properties. The State defendants further argued that to the extent the plaintiffs wanted to build or rebuild on their lots, they had not submitted applications for building permits in accordance with the Village's Dune Protection and Beach Access Plan; therefore, they had not exhausted their administrative remedies. Although Brooks Porter had submitted an application in 2013, it was incomplete. And Clinton Russell's assertion that the Village denied him permission to build is based on a letter from a building official, not a permit application.

Severance, the State defendants nonsuited counterclaims that relied on the doctrine of rolling easement, and they conceded that there was no claim for an easement on any of the plaintiffs' properties, stating: "Now, the State Defendants cannot and do not rely upon any rolling easement theory nor do they base any defense or counterclaim on the relative locations of a line of vegetation." Clerk's Record at 876. The State defendants also filed a plea to the jurisdiction on Brannan's declaratory judgment claims on the grounds that she lacked standing because she sold the Beach Drive property before the lawsuit was filed in 2001.⁸

The State defendants moved to strike the intervention of Pedestrian Beach LLC.⁹ First, they argued that because Pedestrian Beach, LLC's claim differed from

In addition, Brooks Porter argued that there was then a current justiciable controversy "over the determination of the landward boundary of the public's common law beach easement and a justiciable controversy over the scope of the easement on his beachfront lot at 1206-07 Sargasso Lane." However, he also stated that he had "observed members of the public occasionally walk along the beach seaward of his duplex," but he had "rarely seen the public use that section of beach for other purposes." He also affirmed that he had "experienced no act by any member of the public asserting hostile rights against his ownership." Brooks Porter also stated that his duplex was unprotected and his 2013 application to build a breakwater to protect his property had been denied by the Village. Brooks Porter has since passed away.

⁸ In September 2016, the State defendants filed a plea to the jurisdiction regarding the declaratory judgment claims of Angela Mae Brannan, whose sole remaining claims sought the same declarations that the other plaintiffs had also requested.

⁹ Pedestrian Beach, LLC alleged that its property had not yet been lost to a public easement, an avulsive event, or submergence into the Gulf of Mexico, and it sought declarations about public easements in order to avoid protracted litigation in the future.

the original claims regarding properties on Beach Drive, intervention was not necessary to protect its interests and would excessively complicate the issues in the case. Second, the State defendants argued that Pedestrian Beach, LLC had no justiciable interest in the case because its property was not part of the original lawsuit and was not part of what was remanded after appeal. Third, the State defendants argued that the petition in intervention was untimely as it was filed 15 years after the original suit was filed and two years after remand to the trial court.

Finally, the State defendants filed a plea to the jurisdiction and alternative motion for summary judgment on the plaintiffs' claim for attorneys' fees. Among other things, they argued that there was no live case or controversy regarding their claims for declaratory relief that could serve as the basis for attorney's fees.¹⁰

The plaintiffs also filed a motion regarding jurisdiction. They asked the court to determine that it had jurisdiction to consider their declaratory judgment claims. They argued that, after the original trial, the trial court denied their petitions to repair their houses, ordered them to remove their houses without compensation, and enjoined them from future construction on their land. On

¹⁰ In response, the plaintiffs argued that they were entitled to recover attorneys' fees under the Uniform Declaratory Judgments Act ("UDJA"). See TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011 ("UDJA"). They contended that the Open Beaches Act was not inconsistent with the UDJA, and that they were entitled to rely on both statutes. They did not address the questions about justiciability or waiver of immunity under the UDJA or the Open Beaches Act for recovery of attorney's fees.

remand, they asked the trial court to reconsider its prior declaration that the State could “compel removal of an existing lawfully built house *without payment*.” However, the plaintiffs also stated: “No plaintiff is prosecuting a takings claim for the removal of his house.”

The State defendants responded that there was no justiciable issue relating to the requested declaratory relief, which pertained to easements. They conceded that after *Severance*, their rolling easement argument was unavailing, and they had abandoned all claims for easements on the plaintiffs’ properties. They noted that the plaintiffs’ former “upland” properties had become submerged in the Gulf of Mexico during the years between the original filing of the lawsuit and remand to the trial court. They argued that the plaintiffs’ claims for declaratory judgment were thus moot. In addition to their assertions of mootness and the lack of a justiciable controversy, the State defendants also asserted sovereign immunity. They reasoned that the plaintiffs’ claims could arise only under the declaratory judgment provisions of the Open Beaches Act, not the Declaratory Judgments Act.¹¹

The trial court granted the State defendants’ plea to the jurisdiction and alternative motion for summary judgment on the plaintiffs’ claims for attorney’s

¹¹ The UDJA waives sovereign immunity for a challenge to the validity of a statute, but it does not expressly waive immunity for a declaration of a party’s rights under a statute. *See Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

fees, and it dismissed the plaintiffs' claims for attorney's fees. The trial court later (1) granted the State defendants' plea to the jurisdiction concerning the properties added in the October 2015 supplemental pleading; (2) denied the plaintiffs' motion regarding jurisdiction on their claims for declaratory judgment and denied all the declarations that were sought; (3) granted the State defendants' plea to the jurisdiction on the declaratory judgment claims of Angela Mae Brannan; and (4) granted the State defendants' motion to strike the petition in intervention of Pedestrian Beach, LLC.

Analysis

I. Standards of review for a plea to the jurisdiction mirror the standards of review for traditional summary judgments.

A party may challenge a trial court's subject matter jurisdiction by filing a plea to the jurisdiction or a motion for summary judgment. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We review a trial court's ruling on a plea to the jurisdiction or a motion for summary judgment de novo. *Univ. of Texas M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)) (plea to the jurisdiction); *Barbara Techs. Corp. v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089, at *2 (Tex. June 28, 2019) (citing *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010) (citation omitted), and *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)) (summary judgment).

Ordinarily a plea to the jurisdiction challenges the plaintiff's pleadings, asserting that the alleged facts do not affirmatively demonstrate the court's jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). We "construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012).

A plea to the jurisdiction may also challenge the existence of jurisdictional facts, and when it does, the parties may present evidence. *Id.* "In those situations, a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion." *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 635. The movant must present summary-judgment proof demonstrating that the court lacks jurisdiction. *Id.* The burden then shifts to the nonmovant to show that there is a material question of disputed fact on the jurisdictional issue. *Id.*; see TEX. R. CIV. P. 166a(c) (to prevail on a traditional summary judgment motion, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law).

II. The Open Beaches Act includes a declaratory judgment provision.

The Legislature has expressly declared that the "public policy of this state" is 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 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.

TEX. NAT. RES. CODE § 61.011(a).

Under the Open Beaches Act, for a beach to be considered a public beach, (1) it must border the Gulf of Mexico and (2) the public must have a right to use it. *Severance*, 370 S.W.3d at 714. “The area from mean low tide to mean high tide is called the ‘wet beach,’ because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the ‘dry beach.’” *Id.* “The wet beaches are all owned by the State of Texas, which leaves no dispute over the public’s right of use.” *Id.*; see *Poretto v. Tex. Gen. Land Office*, 448 S.W.3d 393, 395 (Tex. 2014) (“The State owns the coastal land submerged by the Gulf of Mexico.”). Dry beaches may be privately owned, and the public’s right to use those beaches depends on whether an easement in favor of the public has been established by “prescription, dedication, presumption,” or the retention of “a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.” TEX. NAT. RES. CODE § 61.001(8) (defining public beach). Establishment of the existence of an easement or retained public right of

use may require examination of the original Spanish or Mexican land grants. *See Severance*, 370 S.W.3d at 717–18.

The State bears the burden to establish the existence of an easement in favor of the public on privately owned dry beach. *See id.* at 714–15 (“The Legislature recognized that the existence of a public right to an easement in the privately owned dry beach area of West Beach is dependent on *the government’s* establishing an easement in the dry beach or the public’s right to use of the beach ‘by virtue of continuous right in the public since time immemorial’” (emphasis added) (citation omitted)). The Open Beaches Act prohibits beachfront property owners from denying access to the public beach by posting a sign or otherwise communicating that “the public beach is private property.” TEX. NAT. RES. CODE § 61.014.

These two principles have the potential to create a conundrum for the private owner of beachfront property who wishes to exclude the public from a portion of the beach that he contends is not the “public beach.” This is particularly true considering the Supreme Court’s holdings that “sovereign immunity bars UDJA [Uniform Declaratory Judgment Act] actions against the state and its political subdivisions absent a legislative waiver.” *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011); *see City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009)); *see also* TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011

(Uniform Declaratory Judgments Act). The Open Beaches Act addresses this hypothetical conundrum by expressly permitting a littoral owner to seek declaratory judgment: “A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.”¹² TEX. NAT. RES. CODE § 61.019.

III. Justiciability is a necessary component of subject matter jurisdiction in all cases, including declaratory judgment actions.

“A declaratory judgment is available only when there is a justiciable controversy between the parties.” *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Brooks v. Northglen Ass’n*, 141 S.W.3d 158, 163–64 (Tex. 2004)). The statutory provision of the Open Beaches Act that permits a littoral owner to seek declaratory relief “does not supplant the constitutional requirement” that the court have subject matter jurisdiction. *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 231 (Tex. 2001).

Subject matter jurisdiction is essential to the authority of a court to decide a case.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). “Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable.” *The State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994)

¹² “‘Littoral owner’ means the owner of land adjacent to the shore and includes a lessee, licensee, or anyone acting under the littoral owner’s authority.” TEX. NAT. RES. CODE § 61.001(6).

(citing *Tex. Ass’n of Bus.*, 852 S.W.2d at 443). “If the district court lacks jurisdiction, in any of these senses, then its decision would not bind the parties.” *Id.* A decision that does not bind the parties is a prohibited advisory opinion. *Id.*; see *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) (“Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.”); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex. 1998) (“The courts of this state are not empowered to give advisory opinions.”); see also TEX. CONST. art. II, § 1 (separation of powers).

The requirements of standing, the existence of a live controversy, and justiciability are interrelated. “A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.” *Heckman*, 369 S.W.3d at 150. Standing “focuses on the question of who may bring an action.” *Patterson*, 971 S.W.2d at 442. “[S]tanding requires a justiciable injury that gives rise to a real controversy which judicial action can resolve.” *Fin. Comm’n of Tex. v. Norwood*, 418 S.W.3d 566, 590–91 (Tex. 2013) (citing *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex. 1995)). The open courts provision of the Texas Constitution “contemplates access to courts only for persons who have suffered an injury.” *Norwood*, 418 S.W.3d at 590–91 (citing TEX. CONST. art. I, § 13 (“All courts shall be open, and every person for an injury done him, in his lands, goods,

person or reputation, shall have remedy by due course of law.”)). Standing requires the existence of a controversy between the parties “at every stage of the legal proceedings.” *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

While standing concerns who may bring an action, the requirement that there be a live controversy—that the case be ripe and not moot—concerns when the action may be brought. See *Patterson*, 971 S.W.2d at 442. The ripeness doctrine avoids “premature adjudication” of issues. *Id.* “An issue is ripe when it presents a fully developed controversy.” *McAllen Med. Ctr.*, 66 S.W.3d at 234. Stated another way, an issue is ripe when “the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote.” *Patterson*, 971 S.W.2d at 442. The “ripeness analysis focuses on whether a case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all.” *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015).

“The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events.” *Matthews, on behalf of M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). Like the doctrines of ripeness and standing, the mootness doctrine prevents the rendition of advisory opinions. “A declaratory-judgment action does not give a court jurisdiction ‘to pass upon

hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication.” *Tesco Corp. (US) v. Steadfast Ins. Co.*, No. 01-13-00091-CV, 2015 WL 456466, at *2 (Tex. App.—Houston [1st Dist.] Feb. 3, 2015, pet. denied) (mem. op.) (quoting *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 130–31 (Tex. App.—Austin 2007, no pet.)).

“Justiciability is a matter of concern in every civil case and remains a live concern from the first filing through the final judgment.” *Heckman*, 369 S.W.3d at 147. For an issue to be justiciable, “there must be a real controversy between the parties that will be actually resolved by the judicial relief sought.” *Gomez*, 891 S.W.2d at 245.

IV. The trial court correctly determined that it lacked jurisdiction over the declaratory judgment claims.

1. Some appellants lack standing because they sold the subject properties before filing suit or they were not littoral owners of the subject property.

This appeal arises solely from the severed declaratory judgment action, which requested numerous declarations regarding each plaintiff’s rights regarding his or her properties. However, when the trial court dismissed the claims, some plaintiffs no longer owned the properties at issue. Angela Mae Brannan sold 303 Beach Drive to the Marvin Jacobson Family Holding Company in 2000, the year before the original lawsuit was filed. Similarly, Russell Clinton, acting as

administrator of the Estate of Elizabeth Clinton, his deceased mother, sold 907 Beach Drive to Kenneth C. Reutzel and Andrea Reutzel in 2000. Both successors—the Marvin Jacobson Family Holding Company and Kenneth C. and Andrea Reutzel—are parties to the underlying case and this appeal. Without a showing that a plaintiff is acting in a representative capacity, he or she ordinarily may assert only his or her own rights, “not somebody else’s.” *See Garcia*, 893 S.W.2d at 518. We hold that the trial court lacked jurisdiction to make declarations regarding the rights of Brannan to 303 Beach Drive and Russell Clinton, acting as administrator of the estate of his mother, Elizabeth Clinton, to 907 Beach Drive.

Upon remand in 2015, Macario Ramirez and Chrissie Dickerson added a claim regarding 510 Beach Drive. They alleged that this property was “presently landward of the State’s rock revetment and the asphalt topping of Beach Drive.” That is, accepting their factual pleading as true, the property was adjacent to the landward side of the road, not adjacent to the shore. The Open Beaches Act provides that a “littoral owner whose rights are determined or affected” by the subchapter regarding public access to beaches, may seek a declaratory judgment. TEX. NAT. RES. CODE § 61.019. A littoral owner is an owner of “land adjacent to the shore.” *Id.* § 61.001(6). Ramirez and Dickerson are not littoral owners of 510 Beach Drive. Therefore, they lacked standing to seek declarations under the Open

Beaches Act regarding that property, and the trial court had no jurisdiction to render them.

2. Some claims are not ripe or present no actual controversy.

Russell and Judy Clinton sought declarations of their rights regarding 1215 Sargasso Circle. They alleged that a 2012 letter from a Village building official asserted: “In my opinion this lot is not buildable at this time, as most of the lot is seaward of the line of vegetation.” But a governmental official’s expression of an opinion is insufficient to create an actual controversy that could be resolved by a declaration from the court. *Cf. Poretto*, 448 S.W.3d at 401 (statements made by lawyers for General Land Office were not binding, did not constitute a taking of property, and were “no more than mere expressions of their opinions”).

Merry Porter and Brooks Porter alleged that they had an ownership interest in 1206–1207 Sargasso Lane, which was sold to Pedestrian Beach LLC in 2007. The Porters’ individual claims were mooted by the sale to Pedestrian Beach. *See Garcia*, 893 S.W.2d at 518. Moreover, any interest in seeking declarations regarding ownership rights or the existence or extent of an easement on this property was nonjusticiable. Brooks Porter had initially alleged the need for clarifying declarations because the vegetation line “regularly migrate[d] landward and seaward under a portion of the duplex located on this littoral land.” However, after *Severance*, the State defendants acknowledged that the law did not permit a

beachfront easement to roll onto previously unencumbered property, and they abandoned all claims of easement on this property.

On remand to the trial court in 2015, Brannan, the Clintons, and S&S Holdings alleged generally that each owned “other properties in Surfside.” This allegation is insufficient to create a justiciable controversy because there is no indication whether the properties are littoral or whether any actual controversy about these properties exists. S&S Holdings also alleged that it owned 125 Driftwood, but the pleadings and evidence do not demonstrate the existence of a genuine controversy about this property.

We conclude that the trial court lacked jurisdiction to make the requested declarations regarding 1215 Sargasso Lane, 1206–07 Sargasso Lane, 125 Driftwood, and the “other properties in Surfside” because there were no live, genuine controversies concerning these properties.

The appellants also challenge the court’s grant of the motion to strike the intervention of Pedestrian Beach LLC, which alleged ownership of 1206-07 Sargasso Lane. We review a trial court’s order striking a party’s intervention for an abuse of discretion. *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 722 (Tex. 2006). “Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60. “The rule authorizes a party with a justiciable interest in a pending suit to intervene

in the suit as a matter of right.” *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008). An intervention may be challenged by a motion to strike.¹³ *See id.* To overcome a motion to strike, the intervenor must demonstrate a justiciable interest, i.e., that the intervenor could have brought the suit in its own name seeking the same relief. *Id.* Because we have concluded that there is no genuine controversy regarding 1206–07 Sargasso Lane, we hold that the trial court did not abuse its discretion by striking the intervention of Pedestrian Beach LLC.

3. Some issues have become moot.

The odd-numbered properties on Beach Drive that are part of this appeal were all seaward of Beach Drive. In their brief and at oral argument, the appellants concede that most of the properties had become fully or partially submerged. All but two houses—one belonging to Ramirez and Dickerson and one belonging to Louise Bullard—had been destroyed as a result of Hurricane Ike. The appellants argued that the State defendants had the burden to demonstrate that they had “lost all ownership in all of their beachfront lots seaward of Beach Drive,” and without such a showing, they retained ownership of the once-beachfront property. They argued that this was sufficient to prove that they had standing.

¹³ “Absent a motion to strike, one who files a petition in intervention generally becomes a party to the suit for all purposes.” *Abdullatif v. Erpile, LLC*, 460 S.W.3d 685, 694 n.9 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

In making this appellate argument, the plaintiffs relied on a 2014 coastal boundary survey conducted by James M. Naismith, see Clerk's Record 622, and attached to the State defendants' response to the plaintiffs' motion on jurisdiction, which showed that the following plaintiffs' Beach Drive lots were completely submerged by the Gulf of Mexico:

Table 2: Properties Submerged by Gulf of Mexico per 2014 Coastal Boundary Survey.

Property	Appellants
307 Beach Drive	Cathy T. Charles, James Meek, Patricia Meek
701 Beach Drive	Joseph Cornell DeWitt and Lisa Marie DeWitt Fuka
809 Beach Drive	Merry Porter, individually and as Independent Executor of the Estate of Brooks Porter, deceased
819 Beach Drive	Judy A. Clinton
907 Beach Drive	Kenneth C. Reutzel & Andrea Reutzel
919 Beach Drive	Russell Clinton

Because these properties are totally submerged, they are owned by the State of Texas. See *Poretto*, 448 S.W.3d at 395; *Severance*, 370 S.W.3d at 714. Thus, the claims of the appellants who asserted an interest in these properties have become moot, and the appellants have no standing to seek declarations as to these properties. See *Garcia*, 893 S.W.2d at 518.

The 2015 survey also showed that the following Beach Drive lots were only partially submerged by the Gulf of Mexico:

Table 3: Properties Not Totally Submerged by Gulf of Mexico per 2014 Coastal Boundary Survey.

Property	Appellants
211 Beach Drive	Dianne Loggins Clark
303 Beach Drive	Marvin Jacobson Family Holding Company
319 Beach Drive	S&S Holdings LLC
405 Beach Drive	Patricia Pursley, individually and as community survivor of James C. Pursley, deceased
407 Beach Drive	Mark Palmer
411 Beach Drive	Louise Bullard
415 Beach Drive	Rogers Thomson, Executor of the Estate of P.E. Kintz
507 Beach Drive	Macario Ramirez and Chrissie Dickerson
511 Beach Drive	Macario Ramirez and Chrissie Dickerson
603 Beach Drive	Reg Aplin and Beaver Aplin d/b/a Benchmark Developing
705 Beach Drive	Jeffrey Dymont

In the trial court, the State defendants provided other summary judgment evidence to support their argument that the court had no jurisdiction because the claims were moot and the plaintiffs lacked standing. They provided an affidavit and photograph taken by Thomas Durning, the “Coastal Erosion, Planning, and Response Act (CEPRA) project manager and coastal planner for the Coastal Resources Program Area of the Coastal Protection Division in the Texas General Land Office.” He averred that he was familiar with beach nourishment projects in the Village of Surfside Beach on the stretch of beach known as Pedestrian Beach. He further averred that the attached photograph was taken on September 11, 2014, showing 411 Beach Drive and 507 Beach Drive on pilings in the Gulf. He also stated: “I recall no storm or other weather or tidal event near the time I took this picture that would have made the water abnormally high.”

The photograph shows Beach Drive, the rock revetment on the seaward side, and water from the Gulf of Mexico lapping at the rock revetment. It also shows two elevated beach houses, 411 and 507 Beach Drive. The waters of the Gulf flowed beneath the houses, whose piers were sunk into land submerged by the Gulf.

The State defendants also provided an affidavit and photograph taken by John Gillen, the “Director, Planning, Permitting and Technical Assistance, Coastal Resources Division in the Texas General Land Office.” He averred that since 2008 he had become familiar with the beaches of Surfside Beach, “including in particular the beach area extending east from the jetties and adjacent to Beach Drive known as Pedestrian Beach.” Attached to his 2011 affidavit was a photograph showing the condition of the beach after the November 2009 high tides, which Gillen averred “accurately depicts that scene at that time.” He averred that the unusually high tides in November 2009 “eroded the already narrow beach to the point where, for all practical purposes, the dry beach above high tide was gone.” He also stated: “Over the next year the beach at this location washed away. The normal high tides commonly reached the revetment on the seaward edge of Beach Drive, as illustrated in the attached photo. The two remaining houses were on the wet beach, i.e., the water typically extended landward of the houses at high tide.” In an affidavit made two months after the first one, Gillen also averred that

after the 2009 tidal event, “the waters of the Gulf were so close to Beach Drive that they threatened the integrity of that street and other public infrastructure in the vicinity.”

The evidence provided by the State defendants is, in some respects, contradictory. The 2014 coastal boundary survey indicates that the properties shown in Table 3 were not totally submerged, but the photographs and affidavits from General Land Office employees demonstrate that at least two properties—411 and 507 Beach Drive—were on the wet beach. Because the State owns the submerged beach, there remains a question of fact as to ownership of property landward of the mean higher high tide line as shown on the 2014 Coastal Boundary Survey as to the Table 3 properties. On this record, we cannot conclude that the plaintiffs shown in Table 3 lack standing to assert claims regarding the properties in Table 3. However, because standing is only one component of subject matter jurisdiction, our analysis is not concluded.

4. The requested declarations sought redundant, advisory, or improper rulings.

Even if we assume that the appellants listed in Table 3 have standing to raise some claim, it does not necessarily follow that the claims in this case are justiciable. This appeal solely concerns the requests for declaratory relief, and the Table 3 appellants’ claims would be justiciable only if the requested declarations

could actually resolve a real controversy between the parties. *See Heckman*, 369 S.W.3d at 147; *Gomez*, 891 S.W.2d at 245.

The plaintiffs requested declarations on the following topics: (1) constitutional takings claims; (2) easements; (3) general legal questions about provisions of the Open Beaches Act; (4) future, speculative, or hypothetical situations; and (5) questions of fact. The requested declarations that related to the constitutional takings claims are redundant of the severed takings claims, and therefore, they are improper requests for declaratory judgment. *See Patel*, 469 S.W.3d at 79 (“Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels.”). The requested declarations that related to easements are moot because the State defendants abandoned all claims for easements on the appellants’ property after the Supreme Court’s ruling in *Severance*. *See Matthews*, 484 S.W.3d at 418; *Tesco Corp.*, 2015 WL 456466, at *2. The requested declarations relating to general legal questions about the proper construction of the Open Beaches Act are improper because they seek prohibited advisory opinions. *See Tex. Ass’n of Bus.*, 852 S.W.2d at 444; *Tex. Transp. Comm’n v. City of Jersey Vill.*, 478 S.W.3d 869, 878 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (“Were we to consider Jersey Village’s statutory construction request as an independent claim for a general declaration regarding the proper construction of a statute under a

hypothetical fact-pattern, any resulting opinion likely would run afoul of the prohibition against advisory opinions.”). Likewise, requests for declarations regarding future, speculative, or hypothetical situations are also improper because they relate to unripe claims and seek prohibited advisory opinions. Finally, the requests for declarations regarding factual matters are simply an improper use of the declaratory judgment procedure. *See Hot-Hed, Inc. v. Safehouse Habitats (Scotland), Ltd.*, 333 S.W.3d 719, 728 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (“If a factual dispute is the only issue to be resolved, a declaratory judgment is not the proper remedy.”).

* * *

Having considered the parties’ arguments regarding the trial court’s jurisdiction, we conclude that the court correctly dismissed all the requested declaratory judgment claims because the plaintiffs lacked standing, the claims were moot or not justiciable, and the requested declarations sought prohibited advisory opinions. Because we conclude that the court lacked jurisdiction over the declaratory judgment claims, we further conclude that it lacked jurisdiction over the request for attorney’s fees based on the declaratory judgment. We overrule the appellants first five issues that challenged the trial court’s rulings that collectively dismissed the case. We do not address the remaining nine issues that sought

answers to the legal questions presented in the requests for declaratory judgment.

See TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court. All pending motions are dismissed as moot.

Peter Kelly
Justice

Panel consists of Justices Keyes, Kelly, and Goodman.

Keyes, J., concurring in the judgment.

Goodman, J., concurring.