# SAND WARS

AN OVERVIEW OF CURRENT LEGAL DISPUTES INVOLVING PUBLIC ACCESS ON PRIVATELY OWNED (AND DEVELOPED) DRY SAND BEACHES

# *SEVERANCE V. PATTERSON* CHALLENGES TEXAS' ROLLING BEACH EASEMENT SYSTEM

In Texas, the State (General Land Office) has long promoted the idea that a public beach easement- for walking, recreation, fishing- covers all dry sand areas from the mean high tide line to the natural line of vegetation- wherever that line goes.

This doctrine is based on what is called the rolling easement theory. This theory holds that, once a public easement is proven to have been created between the tide and the vegetation line --through actual public use of that area at a particular time- the same easement will move inland as the outer boundary marker – the vegetation line --is pushed inland by erosion, storms, and new dry sand areas are uncovered. In this way, the rolling easement allows public beaches to imposed on private beachfront land that has never been subject to public use whenever that land suddenly loses its vegetation and thus becomes a dry sandy area.

The State of Texas contends(ed) that the Open Beaches Act codified this idea when it was enacted in 1959.

# The Texas Open Beaches Act

**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."

OBA § 61.011(a)

# A Large and Restrictive Land Use Regulatory System Has Been Built on the Foundation of the Rolling Easement Doctrine

**When private property comes to be seaward of the vegetation line, the owner is subject to numerous restrictions because the property is considered on the "public beach" easement:**

* Any structure on land seaward of the vegetation is subject to uncompensated removal as an encroachment on the public beach easement; Tex. Nat. Res. Code Sec. 61.018.

* Homes on such property cannot be repaired after being significantly damaged by a storm; 31 TAC Sec. 15.11 (c).

* The landowner no longer has a right to exclude trespassers from the land or around their homes or to "represent" that their property is private;
Tex. Nat. Res. Code. Sec. 61.015;

* If storms completely destroy a home or other structure on such land, it cannot be rebuilt; 31 TAC 15.5 (c) (1).

* An owner of a vacant parcel that is seaward of the vegetation cannot build anything; 31 TAC 15.5 (c) (1).

Carol Severance bought several beachfront homes on West Galveston Island in 2005 As rental investments.  This is a picture of one of them prior to Hurricane Rita

# SEVERANCE HOUSE AFTER RITA

# June 2006 Letter to Severance: Your Homes Are Now On A “Public Beach” Because The Vegetation Line Has Moved Partly or Wholly Inland of Your Property, and Subject to Removal

TEXAS GENERAL LAND OFFICE
JERRY PATTERSON, COMMISSIONER

June 28, 2006

Ms. Carol Severance
[redacted]

Dear Ms. Severance:

Thank you for your letter of June 20, 2006 relating to the home you own at 22716 Kennedy Dr. in Galveston.

Under the Texas Open Beaches Act, if a structure becomes wholly or partially seaward of the line of vegetation (LOV), it becomes an encroachment on the public beach and is subject to enforcement for removal pursuant to Texas Natural Resource Code § 61.018. Texas Land Commissioner Jerry Patterson has determined that your house is wholly (100%) on the public beach and is subject to enforcement at any time. While litigation will continue to be used as a means for removing houses from the public beach, Commissioner Patterson prefers to offer assistance to homeowners before considering any litigation actions for removal.

The Commissioner's Plan for Texas Open Beaches allows homeowners with homes on the public beach the opportunity to relocate their structures, along with an offer of state financial assistance on a reimbursement basis to help offset the costs associated related to such relocation.

Regarding your second question as to when your home was determined to be 100% seaward of the LOV, which establishes the landward boundary of the public beach as defined under Texas Natural Resource Code §§61.012, 61.016, & 61.017, an onsite survey was conducted May 3rd and 4th 2006 to record the global position of the LOV. The data was then post-processed and provided to Commissioner Patterson for his determination. The final determination was made official by the press conference held on June 7, 2006 when the Commissioner announced the results of the survey and his Plan for Texas Open Beaches.

If you have further questions about this matter, please contact me at (512) 463-1192 or thomas.durnin@glo.state.tx.us, or Jim Weatherford, Beach/Dune Team Leader, at (512) 463-2572 or jim.weatherford@glo.state.tx.us.

Sincerely,

Thomas Durnin
Coastal Planner, Coastal Resources Program Area

Stephen F. Austin Building • 1700 North Congress Avenue • Austin, Texas 78701-1495
Post Office Box 12873 • Austin, Texas 78711-2873
512 463-5001 • 800-998 4GLO
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# Severance Comes to PLF- Complaint Filed in Federal Court, 2006; Includes a 4th Amend. Unreasonable Seizure Claim

J. DAVID BREEMER, CA. Bar No. 215039; Fed. No. 632473
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorney for Plaintiff Carol Severance

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

| | |
|---|---|
| CAROL SEVERANCE,<br><br>Plaintiff,<br><br>v.<br><br>JERRY PATTERSON, in his official capacity as the Commissioner of the Texas General Land Office; GREG ABBOT in his official capacity as Attorney General for the State of Texas; KURT SISTRUNK, in his official capacity as District Attorney for the County of Galveston, Texas,<br><br>Defendants. | No. 4:06-cv-2467<br><br>**THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF FEDERAL CONSTITUTIONAL RIGHTS** |

PACIFIC LEGAL FOUNDATION
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
(916) 419-7111 FAX (916) 419-7747

**INTRODUCTION**

1. Carol Severance (Plaintiff), an individual residing in California and owning property in Galveston, Texas, brings this complaint against state and local officials who are unlawfully enforcing the Texas Open Beaches Act (Act), Tex. Nat. Res. Code § 61.001, *et seq.*, in a manner that seizes and deprives Plaintiff of valuable real property and homes without a rational basis or just compensation in violation of the Takings Clause of the Fifth Amendment, the Fourth Amendment, both incorporated against the states through the Fourteenth Amendment, and the substantive protections of the Due Process Clause of the Fourteenth Amendment.

# Severance's Claim

An easement proven on a strip of shore between the tide line and the vegetation line under common law doctrines hinging on actual public use of the area (Prescription; Dedication, Custom) cannot "jump" inland to new areas of private land distant from the proven line of public travel and never before subject to public use simply because the vegetation line has migrated;

There is no common law "rolling easement" doctrine in Texas law that can accomplish the shift. The OBA statute cannot mandate public access on land never proven to be subject to an easement.

Therefore,

Imposition of public access on Severance's private dry sandy land based on nothing but the loss of vegetation and without proof of a pre-existing easement on the land under Texas common law is an unreasonable seizure of private property and taking without just compensation.

# HURRICANE IKE HITS


# *Severance* Home After Ike: Unrepairable, Unusable, Unrentable Due to Position Seaward of Vegetation; Mortgage ongoing.

# THE ROLLING EASEMENT IN THE *SEVERANCE* FEDERAL PROCEDINGS

**District Court** dismisses complaint. *Severance v. Patterson*, 485 F.Supp.2d 793 (S.D.Tex.,2007).

**Fifth Circuit,** in a 2-1 decision, affirms that Severance has stated a claim for a seizure of her land through imposition of public beach easement, but concludes that to determine whether the seizure was "unreasonable" it needed the Texas Supreme Court to answer certified questions about the lawfulness and scope of the rolling easement policy under state law. *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009).

Judge Edith Jones

Judge Edith Clement Brown

# The Certified Issues

**1**. Does Texas recognize a “rolling” public beachfront access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?

**2**. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the [Open Beaches Act]?

**3**. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

## In the Texas Supreme Court, the Case Focuses on Texas' Common Law of Beach Property Rights, as the State Declines to Argue that the OBA statute Itself Creates Public Access or an Easement on Previously Private Dry Beach Land (This would be a Taking)

- *Luttes* (1959) State Ownership of the seashore (& the public trust) extends inland from the sea only to the mean high tide line, not vegetation line;

- So, dry beach land landward of the mean high tide line is presumed to be in exclusive private ownership and control unless state proves an easement on the land it claims for public use (Severance's position) Or

- The State shows it has proven an easement on a strip of shoreline seaward of the land it claims for public beach access AND under Texas common law, such an easement will migrate (roll) inland onto new areas of private land –not previously subject to an easement- when a storm denudes such areas of vegetation, and makes them part of the "dry beach." (State's position)

# Nov. 5, 2010: THE TEXAS SUPREME COURT REJECTS THE ROLLING EASEMENT THEORY 6-2

- The Court initially holds that that state of Texas did not "reserve" any rights in the public when it sold off the dry beach land comprising the West Galveston Island shoreline.

- So the issue is whether the state could and did lawfully acquire a right in such private beach areas through easement law. Courts hold that easements must be proven through actual use or dedication of a specific area. Once proven along the shore, an easement of public use may move as erosion gradually pushes the waterline inland. However, an "avulsive" event (hurricane) that suddenly moves the beach and the vegetation inland, does not automatically move an easement onto new and previously unencumbered private land, depriving the owner of her right to exclude the public from the new dry beach.

- "Texas does not recognize a rolling easement." Court repudiates four prior court of appeals decisions.

- "In those situations, when changes occur suddenly and perceptibly to materially alter littoral boundaries, the land encumbered by the [proven] easement is lost to the public trust, along with the easement attached to that land. Then, the State may seek to establish another easement as permitted by law on the newly created dry beach to enforce an asserted public right to use private land."

# State Moves for Rehearing With Amicus Letter Campaign Supporting Rehearing

- Dec., 2010: State Officials move for rehearing, claiming “easements do move with avulsion: rule is illogical and unsupported, and opinion will have bad practical results, including ending beach access and beach re-nourishment projects.

- Local governments, environmental groups, individuals file several dozen amicus briefs supporting rehearing. Others –mainly property rights groups- file on behalf of Severance.

- **March 29, 2012**: After holding a second oral argument, the Court affirms its original decision 5-3. Adds additional language emphasizing importance of private property rights. One more Justice joins dissenters.

# Does the Erosion/Avulsion Distinction Make Sense?

Key to understanding the *Severance* court's decision to allow a proven easement to move with erosion, but not avulsion, lies in the nature of easements.

Under easement law, easements of public travel can shift incrementally as the public path changes to meet obstacles, but they do not dramatically expand or move onto areas wholly divorced from the traditional path of public use. By rejecting avulsive changes in the vegetation line (sudden and large shifts) as a basis for moving a public easement inland, the court's decision ensures that an easement created by public use along the water line does not become wholly disconnected from the path of public travel that created it and which defines it. On the other hand, allowing a public use easement to move inland incrementally as erosion gradually pushes the water and vegetation line inland keeps the easement tethered to the actual path and pattern of public travel that defines it, and conforms to easement law.

Also, allowing for erosion-based shifts limits the easement in much the same way the mean high tide rule limits title/ownership shifts

# *Brannan v. State*: The Surfside Beach Experience

# *BRANNAN v. STATE OF TEXAS*

*Brannan* is a Open Beaches Act/Rolling Easement case currently pending in the Texas Supreme Court.

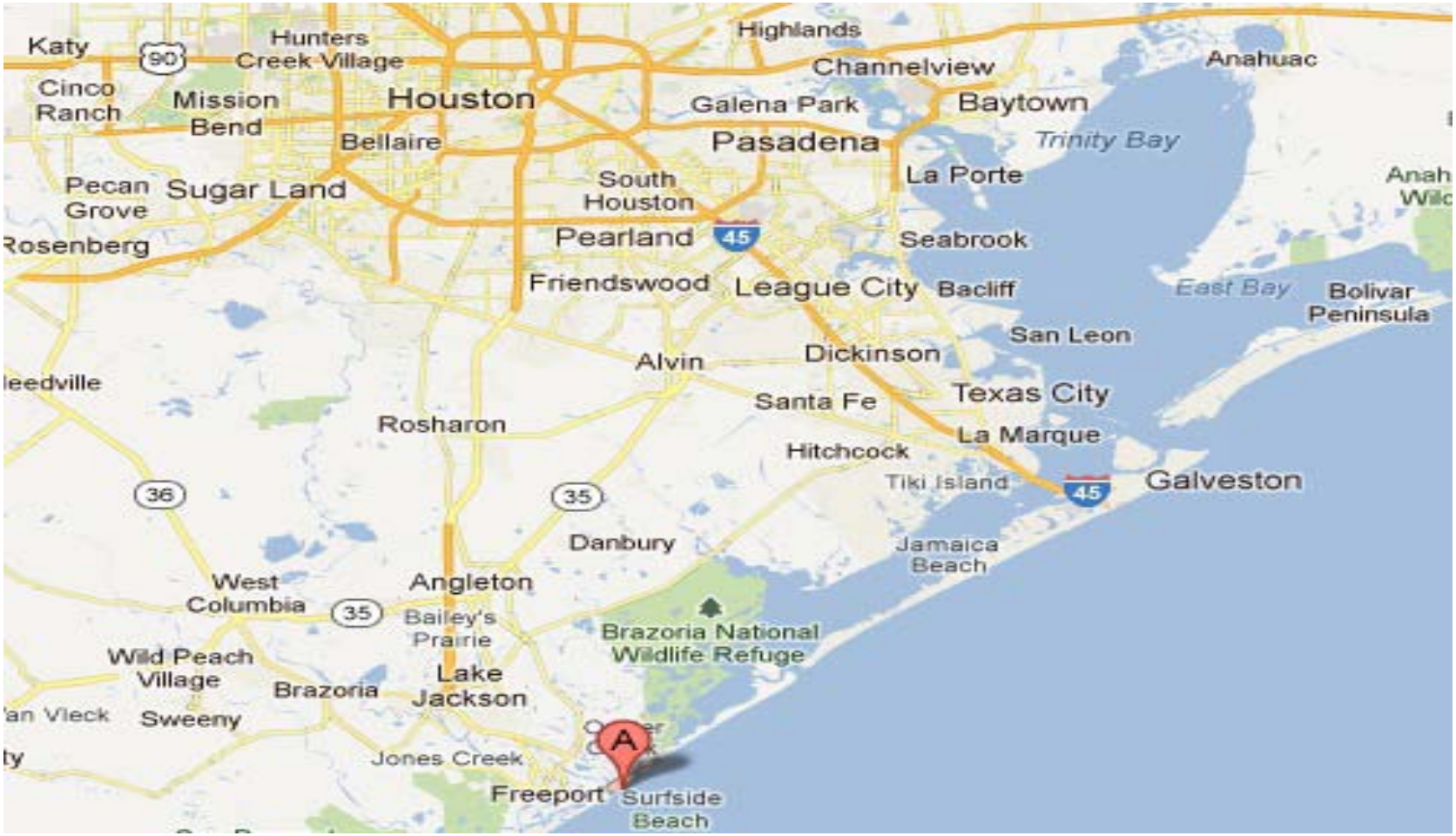
It deals with some of the issues left unresolved by *Severance*; namely:

1. What facts does the State need to prove to establish an easement of private use on dry beach areas under Texas' common law of prescription and dedication?

2. What types of erosive events are avulsive and thus subject to *Severance*'s limits on the rolling easement? Is a tropical storm an avulsive event?

3. If an easement of public use comes to exist on private land that was lawfully developed before the easement arose, must the easement take the land as it finds it? In other words, must a newly imposed public access easement accommodate pre-existing homes (attach around them), and is it an unconstitutional taking to instead order such homes removed so the public can have unfettered beach access?

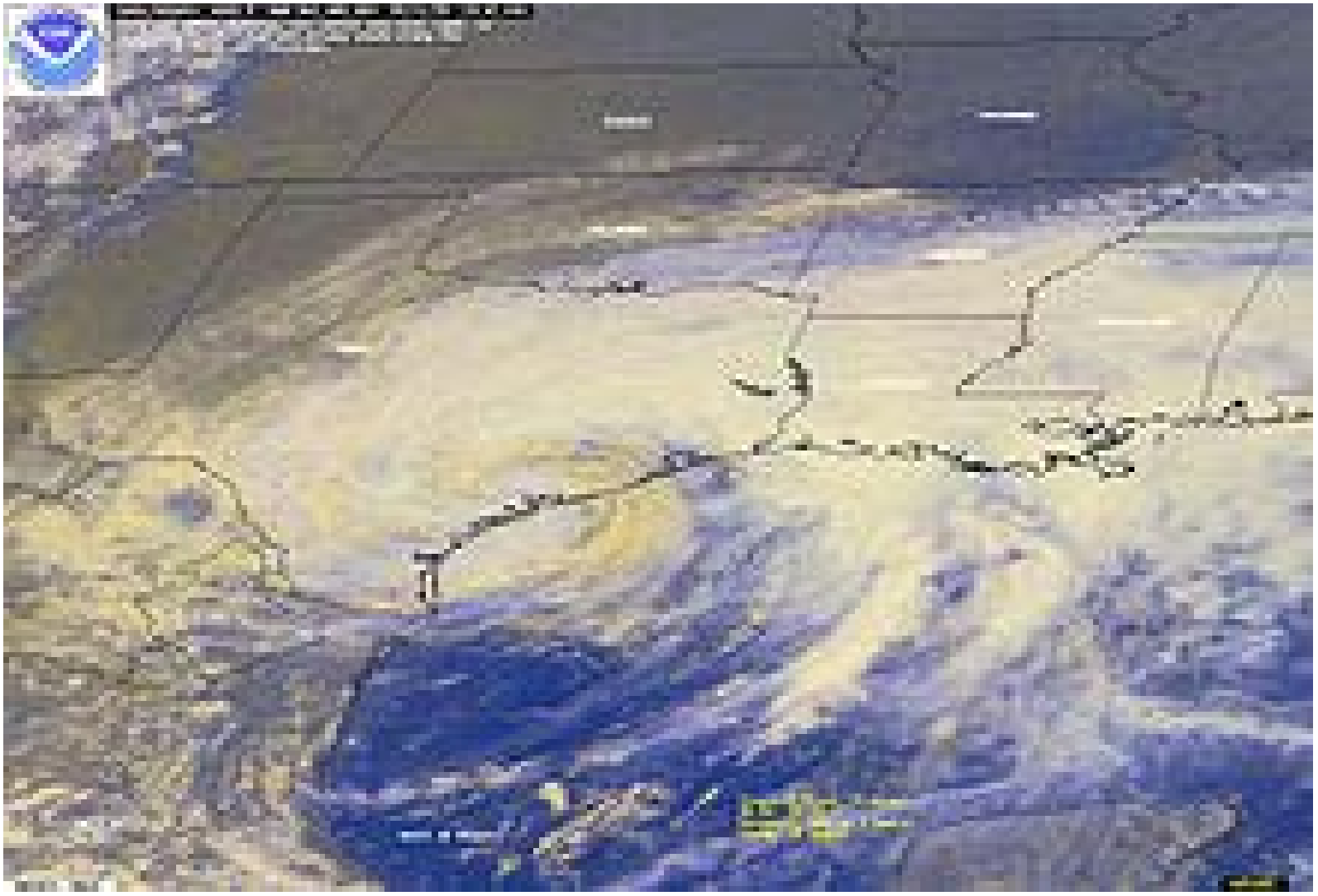
# Surfside Beach is located near Freeport, Texas, South of Galveston Island



# Jetties to the North of Beach Drive, Surfside

# Beach Drive, 1994, Homes Mostly Built in the 1960's

# TROPICAL STORM FRANCES (Sept. 11, 1998)



# Frances Causes Severe Erosion; Photos Show Before and After Storm Photos of Galveston Island State Park

# The Origin of the Case

* After Frances, dozens of Beach Drive home owners receive letters from the State saying that their homes have been put on a list of structures considered to be encroachments on the public beach because the vegetation line had moved landward, and that they had been referred to the Attorney General for potential initiation of an enforcement action under the Open Beaches Act to remove the homes.

* A handful of property owners sue the State in state court, seeking a declaration that the State the “rolling easement” policy is an illegal application of the OBA and a taking that eviscerates their vested property rights without compensation.

* State counterclaims for removal of the plaintiff’s homes. Owners answer that home removal would be an unconstitutional taking of their property.

# The Porters (Original *Brannan* Plaintiffs)


# Beach Drive, Surfside (2001)

# *Brannan* 2001-2006

1. Litigation in State Court
2. 2004-2006 (Enforcement Moratorium; Litigation Stayed);
3. 2006 Moratorium ends; State offers Beach Drive Homeowners 40K to voluntarily remove their homes off “the beach.” About a dozen agree. Two dozen of so refuse. Litigation Resumes;
4. State/Village Consider Various Beach Protection Plans & Erosion Control Devices.

# Beach Drive, Fall, 2006

## Just Before the October, 2006 “Bull” Tide

“Bull” tide: An unusually high tide event occurring along the Gulf coast around the time of the spring and fall equinoxes . The phenomenon is triggered by the gravitational conditions associated with the equinox and typically peaks with highest tides around the full moon closest to the date of the equinox.

# After 2006 “Bull” tide: Village Dumps Rubble Barricade On Top of Water/Sewer Lines, Blocks Access to Homes; Disconnects Electricity; Denies Repairs

# After the 2006 “Bull” tide Cont.


# Months After “Bull” tide: the Village (with State’s blessing) Begins to Plan for and Erect a More Permanent Barricade, One that (in the Village’s Words) Does not Contemplate Any Homes “On the Beach”

# 2008: Hurricane Ike Destroys Almost All of the Homes in the Suit (the Porters' Survives But then Collapses in 2009)

# The Litigation from 2006 -2010

1. After Village and State's 2006 actions, many more homeowners join *Brannan* suit;

2. State counterclaims against all to remove their homes;

3. Trial court holds that the rolling easement is not a taking, that State has authority under OBA to remove the homes as encroachments on the beach (due to location seaward of vegetation) without compensation; State and Village not liable for a taking; court stays immediate enforcement of an injunction against the homes requiring their removal pending appeal; denies motion to make repairs. State severs its 2006 "submerged lands" claims ,electing to proceed on appeal under the Open Beaches Act/Rolling Easement

4. Appellate court upholds trial court judgment, 365 S.W.3d 1 (Tex. Ct. App. 2010). Holds a rolling/vegetation line beach easement is a "background principle" of Texas law and enforcing it against homeowners is not a taking; rejects argument that the easement must accommodate the homes because they pre-date the easement and the easement is of limited scope (for access and recreation); removing homes not a taking since they are encroachments on a valid public easement; (i.e., home owners no longer have property interests to support their takings claim).

# One of the Two Remaining Homes (Ramirez) in late 2011

# November 2010, While Litigation Still Pending in the Texas Supreme Court, the State Embarks on A Sand Re-Nourishment Project at Surfside (No Notice Given, Or Consent Sought)

# 2011-Present

- Early 2011, the State files letter with court claiming the court no longer has jurisdiction over the *Brannan* case because the remaining homes have been on the state-owned “wet beach” since late 2009. State does not claim it used, nor does it provide, a survey of the mean high tide;

- Property owners argue that the State has waived its right to make such a “submerged lands” claim (by previously severing such a claim into a new lawsuit and proceeding on OBA grounds), that the claim is factually disputed and unsubstantiated, and that, in any event, the homes are on dry sand due to the renourishment project

- Opinion issued . . . .?

# North Carolina: The Battle of Nags Head:

# Central Issues:

(1) Does the "Public Trust Doctrine" Cover Private, Dry Sand Areas Between the High Tide Line and the Vegetation/Dune Line (and Migrate Inland as Erosion Moves That Line), and

(2) Can Local Governments Lawfully and Constitutionally Remove Homes that Come to be on Purported Public Trust-Impressed Areas?

# Relevant Cases:

*Sansotta v. Town of Nags Head,* pending, 4th Circuit COA,

*Town of Nags Head v. Toloczko,* pending, 4th Circuit COA,

*Town of Nags Head v. Cherry,* decided, 723 S.E.2d 156 (N.C. Ct. App. 2012), pet. rev. denied, Oct. 12, 2012.

# State Law Background

- Traditional North Carolina case law (common law) generally tracks the standard rule that the “wet beach” – the area between low and mean high tide line- is state owned, but held in trust for the public under the “public trust doctrine,” and thus, kept open for public access and recreational uses
- In 1998, the state legislature amended a law, N.C.G.S. 77 Sec. 20, which affirmed the common law rule that the ownership boundary between private and public beach property is the mean high tide line. The legislature specifically added language suggesting that privately owned areas between the mean high tide line and the vegetation/ dune line (i.e., the dry sand beach) may nevertheless be part of the “ocean beaches” subject to the public trust doctrine;
- However, the new law also stated that “public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State,” and “the landward extent of the [public trust] ocean beaches is established by the common law as interpreted and applied by the courts of this State,” thus apparently leaving the final word to the courts

# The Town of Nags Head Attempts to Enforce the Public Trust Doctrine On Private Dry Sand Areas to the First Line of Vegetation

The Town enacts ordinance provisions identifying any structure that is wholly or partially on a “public trust area” as a public nuisance;

Sec. 16-31(6) states:

The existence of any of the following conditions associated with storm-damaged or erosion- damaged structures or their resultant debris shall constitute a public nuisance.

a. Damaged structure in danger of collapsing;

b. Damaged structure or debris from damaged structures where it can reasonably be determined that there is a likelihood of personal or property injury;

c. ***Any structure, regardless of condition, or any debris from damaged structure which is located in whole or in part in a public trust area or public land***.

# By 2009, Erosion and Homes Near Sea Become a Political Issue; Current Mayor Runs in Part on Promise to Go After Offenders



Oakes for MAYOR

**The Future of Our Beaches**

For a response to Renée Cahoon's distortions visit: To Tell the Truth

Town's response to erosion is the single most critical issue we face. We must work to improve our beaches now and to plan to protect them in the future.

If elected I will work to develop and implement a long range plan for our beaches that will:

**The polls are open on Election Day - 6:30 am to 7:30 pm . There is no excuse not to vote**

**Reduce the use of sandbags** and remove those that have been there too long. Encourage the State to assist in the removal of sandbags. A beach lined with sandbags is the worst possible outcome for the public.

**Remove homes** that are **consistently east of the mean high tide line.** Follow due process, but these homes are on public land, and come to represent a health hazard with septic tanks on the beach.

**Plan for possible retreat, especially in South Nags Head.** Identify and assess the costs for retreat, compare this to the costs of nourishment.

**Fund the local beach nourishment plan** that uses appropriately sized sand from offshore through a combination of

Site Menu:
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Issues:
- The Green Agenda
- The Future of Our Beaches
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- Waste Water and Sewage

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EXHIBIT C

# Nor-Ida Storm, Nags Head, November 10-12, 2009: With Permits, *Sansotta* Owners Protect Homes From Erosion Until Stopped by Town Police

DSCN1897.JPG

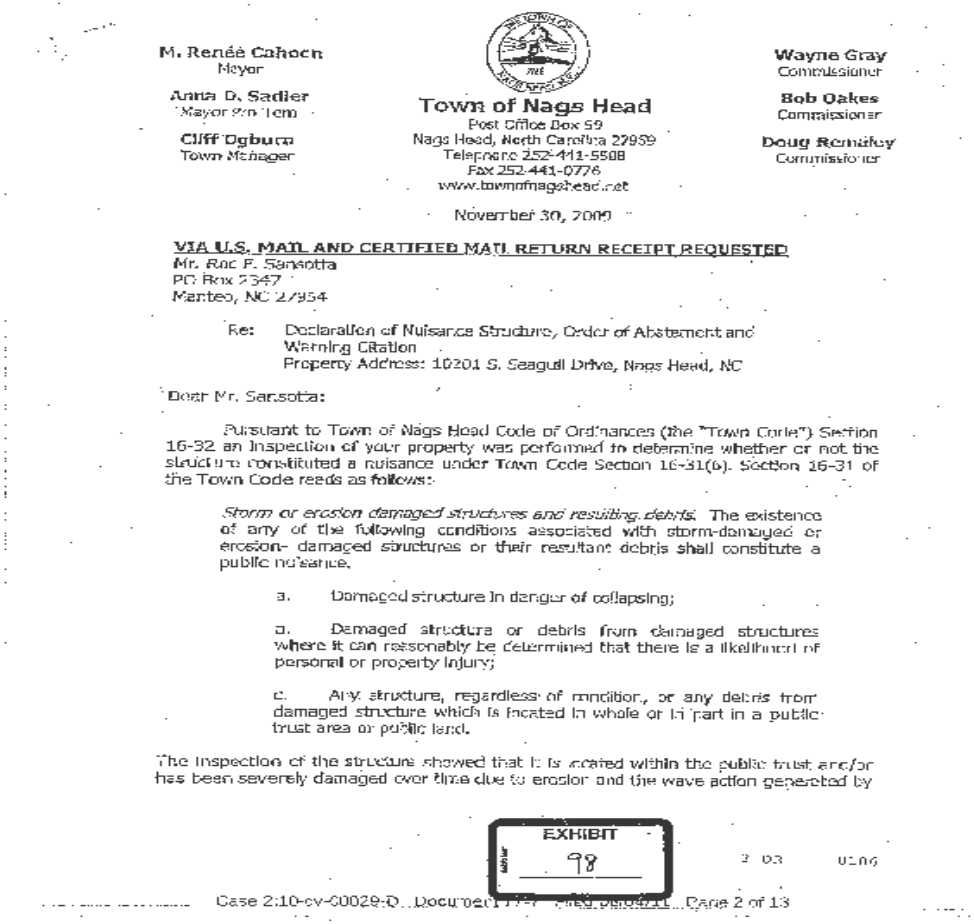



DSCN1877.JPG

# Without Protection, Severe Erosion Occurs; Homes' Exterior Suffers Damage

DSCN1958.JPG

# The *Sansotta-Toloczko* Cottage Owners Letter From the Town Declaring Their Homes to be In Violation of the Nuisance Ordinance; the Primary Basis is that Homes Are On a Public Trust Area; Letter Orders Their Removal, Refuses Damage Repair Permits, and Institutes Fines for Every Day the Homes Remain; No Administrative Hearings Provided



M. Renée Cahoon
Mayor

Anna D. Sadler
Mayor Pro Tem

Cliff Ogburn
Town Manager

**Town of Nags Head**
Post Office Box 99
Nags Head, North Carolina 27959
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www.townofnagshead.net

Wayne Gray
Commissioner

Bob Oakes
Commissioner

Doug Remley
Commissioner

November 30, 2009

**VIA U.S. MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED**
Mr. Roc F. Sansotta
PO Box 2347
Manteo, NC 27954

Re: Declaration of Nuisance Structure, Order of Abatement and Warning Citation
Property Address: 10201 S. Seagull Drive, Nags Head, NC

Dear Mr. Sansotta:

Pursuant to Town of Nags Head Code of Ordinances (the "Town Code") Section 16-32 an inspection of your property was performed to determine whether or not the structure constituted a nuisance under Town Code Section 16-31(b). Section 16-31 of the Town Code reads as follows:

*Storm or erosion damaged structures and resulting debris.* The existence of any of the following conditions associated with storm-damaged or erosion- damaged structures or their resultant debris shall constitute a public nuisance.

a. Damaged structure in danger of collapsing;

b. Damaged structure or debris from damaged structures where it can reasonably be determined that there is a likelihood of personal or property injury;

c. Any structure, regardless of condition, or any debris from damaged structure which is located in whole or in part in a public trust area or public land.

The inspection of the structure showed that it is located within the public trust area/or has been severely damaged over time due to erosion and the wave action generated by

EXHIBIT
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Case 2:10-cv-00029-D Document 1-2 Filed 04/06/11 Page 2 of 13

JA 00309

# The Town Relies on An Expansive Understanding of the Public Trust Doctrine

* Town had no survey of mean high tide line when it declared the homes to be on the public trust (owners dispute the homes were seaward of that line); the Town accordingly defends and upholds its public trust nuisance declaration based on a belief that the public extends inland to the vegetation line covering dry beaches (no dispute that homes are seaward of this line);

* July, 2010, the Town passes a new ordinance specifically defining the public trust area to include dry sand beaches to the vegetation line, prohibiting issuance of permits to all structures declared to be nuisances because they are on such areas; and prohibiting such structures in general if they are deemed to impede public access

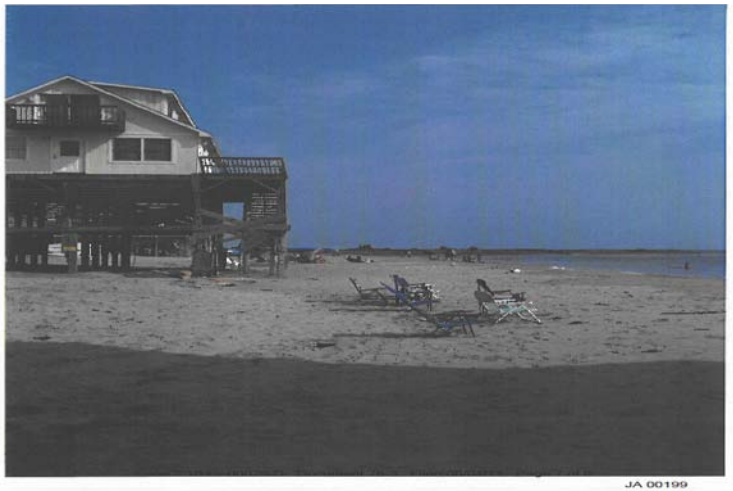
# Cottage Owners Refuse to Remove/Demolish Homes; Fines Accrue; Lawsuits Filed

- 6 Cottage Owners (*Sansotta* Plaintiffs) File Suit In State Court in Spring 2010; Town Sues the Toloczkos in State Court in Late 2010- Both Cases Removed to Federal Court

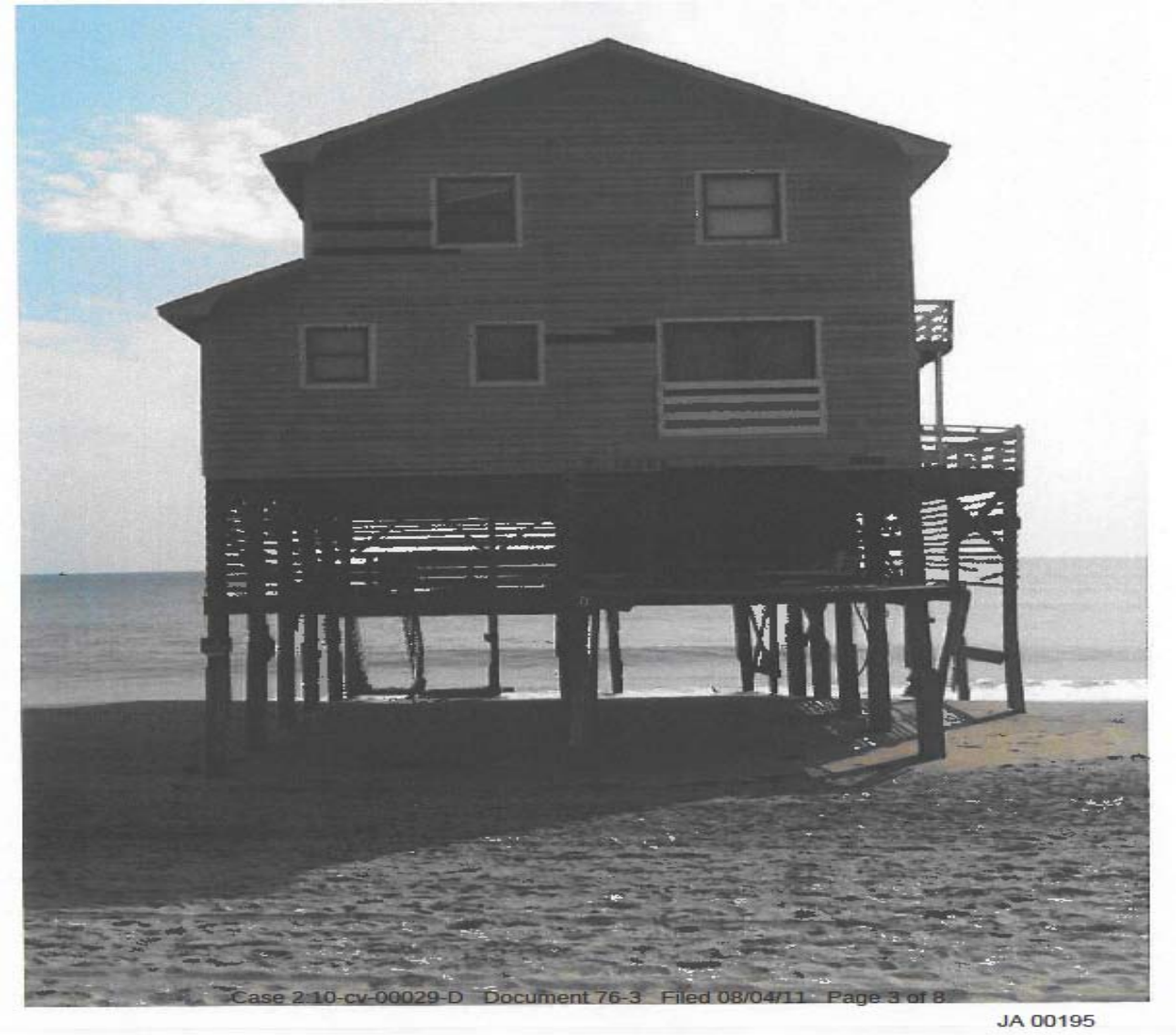
- *Sansotta* Claims/Counterclaims: Public trust does not extend to dry sand areas, Town lacks authority to enforce doctrine under state law; violation of constitutional rights to substantive due process (based on Town actions in preventing owners from protecting property), procedural due process (lack of hearing prior to Nuisance declaration and restrictions) just compensation, equal protection;

- *Toloczko*: Under state law, Town seeks an injunction against homes, order of nuisance abatement, fines; upon removing the case, Toloczkos assert same (counter) claims as *Sansotta* plaintiffs

# Meanwhile, the Cottages Sit Unprotected, Unmaintained Unrepaired, and Vacant (Toloczko Home 2010, 2011)



# Sansotta cottage, August 2011



Late August 2011: The Town Re-nourishes the Beaches; Afterward, it Rescinds the Nuisance Declarations, and Invites Repair Applications, But Still Considers the Cottages to be on A Public Trust Area and Subject to Re-Designation as a Nuisance at Any Time if they Impede Beach Access;

# *Cherry, Inc*.

While *Sansotta* and *Toloczko* are pending, the North Carolina Court of Appeals decides the case of *Town of Nags Head v. Cherry Inc*., another dispute dealing with the Town's attempt to remove a beach home as a nuisance, on public trust grounds.

The subject cottage is located in the middle of the line of homes owned by Sansotta.

The court holds the Town has no state law authority to enforce the public trust doctrine; only the state has that power. Bottom line: the Town could not obtain removal of a beach cottage on the basis that it was on a public trust area and interfered with public beach access.

# District Court Dismisses *Sansotta* &*Toloczko* in March, 2012

*Sansotta, 2012 U.S. Dist. LEXIS 42810*: Court holds that plaintiff's federal takings claim is unripe because they did not complete state court litigation (removal thwarted it); rejects due process and equal protection claims on merits; declines to address state law issues; refuses to consider *Cherry* because the Town had petitioned the state supreme court to review the case.

*Toloczko, 2012 U.S. Dist. LEXIS 42811*: Court abstains from deciding the issues; decides that case is not appropriate for federal resolution as it requires a court to resolve difficult and consequential issues of state law: namely, the geographical reach and functional scope of the state's public trust doctrine and the nature of the Town's authority under state law.

# PLF Takes Over On Appeal in the 4th Circuit


*Sansotta:* Owners' takings claim could not be dismissed from federal court (on ripeness grounds) for lack of state court exhaustion because the Owners filed in state court but were prevented from securing a ruling there only because the Town voluntarily removed the case to federal court. In essence, removal waived the exhaustion requirement. Town violated procedural due process by failing to provide a pre-deprivation hearing before issuing the Nuisance Declaration, removal order, permit ban and fines (substantive d.p. claims abandoned). Plaintiff's equal protection rights also violated because the Town targeted plaintiffs' homes on public trust grounds but not others who the Town knew were also on the allegedly public trust-impressed dry sand area (Portion of federal claims arising from Town's interference with protection of property during the storm not appealed;

*Toloczko*: Court could not abstain because the Toloczkos' federal constitutional claims do not hinge on issues of state law (i.e., the nature and scope of the public trust doctrine is irrelevant to their rights to a hearing and equal protection); court could not abstain on plaintiff's state law claims because they rest on settled precedent. *Cherry* comes back into play after the state supreme court denies review. This denial confirms it settled that the Town lacks authority under state law to target homes on public trust grounds, which in turn means that the court has no basis to abstain on this issue.

# Can Sand Wars Be Avoided?