COMMENT

WHAT ABOUT MY BEACH HOUSE? A LOOK AT THE TAKINGS ISSUE AS APPLIED TO THE TEXAS OPEN BEACHES ACT

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I. INTRODUCTION

A. An Introduction to the Texas Open Beaches Act

The Texas coast consists of approximately 367 miles of beaches, bays, and flats stretching from Louisiana to Mexico.[1] This coastal area not only houses thousands of Texas residents, but also provides revenue to many Texas coastal cities.[2] Historically, there was never much conflict between private individuals and the Texas government regarding public access to and use of coastal beaches because people presumed the state owned and controlled these coastal areas.[3] Yet as the value of the land increased, private landowners began to challenge this presumption.[4] These owners wanted title to the areas in order to keep the public away. With the public gone, the owners could lease the land for drilling or commercial development.[5] Conversely, the State of Texas and coastal cities, such as Galveston, wanted ownership of the areas to preserve public access to and use of the beach.[6] By ensuring public access, Texas could guarantee the public a place to swim, suntan, and fish, thereby keeping tourists (and their money) from going elsewhere.[7]

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1. *See* Texas Environmental Profiles, *Beach Ownership and Beach Access*, *at* http://www.texasep.org/html/lnd/lnd_7bch_access.html (last visited Mar. 15, 2003) (noting that 293 of the 367 miles of Texas beaches are open to the public, of which 173 miles are considered accessible by the public).

2. LONNIE L. JONES & AYSEN TANYERI-ABUR, TEX. WATER RESOURCES INST., TR-184, IMPACTS OF RECREATIONAL AND COMMERCIAL FISHING AND COASTAL RESOURCE-BASED TOURISM ON REGIONAL AND STATE ECONOMIES 19 (2001) (reporting that water-related recreational activities generated $1.565 billion worth of sales and an estimated 32,000 jobs in the Gulf Coast region), *available at* http://twri.tamu.edu/reports/2001/tr184/tr184.pdf (last visited Mar. 15, 2003).

3. *See* Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1093 (1994) (discussing the "unquestioned assumption that the state either owned, or effectively controlled, the Texas coastal beaches").

4. *See* Kenneth Roberts, *The* Luttes *Case—Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 142 (1960) (stating that it became necessary to determine a boundary line that separated the state-owned tidelands from the privately-held uplands because of the increased value of the mineral rights in the land).

5. *See id*. (noting that "[i]n more recent years commercial and industrial developers have found it imperative to know the exact location of this [boundary] line").

6. *Id*. at 170–71 (explaining that right of access to the sea is an extremely valuable property right).

7. *See* Mike Ratliff, Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 984–85 (1976) (discussing the importance of providing the public the right of access to coastal beach areas).

In *Luttes v. State*,[8] the Texas Supreme Court resolved this dispute by establishing the boundary line separating private beach from state-owned beach.[9] J.W. Luttes claimed title to certain areas of mud flats located between the Texas mainland and Padre Island.[10] Luttes maintained that the mud flats were not part of the sea bottom or seashore but had become part of the mainland due to accretion.[11] Because he owned the mainland, Luttes argued he also owned the mud flats.[12] The State, on the other hand, claimed it owned the mud flats because the tidal waters still covered the flats, making them a part of the seashore and not the mainland.[13] The State also argued that the boundary separating private property from state property should be the highest point reached by the tidal waters on any one occasion.[14] In determining ownership of the flats, the Texas Supreme Court held that any land located seaward of the "mean high tide" belonged to the state, whereas any area landward of the "mean high tide" belonged to the private individual holding title to that land.[15] The *Luttes* court defined "mean high tide" as the "average of highest daily water computed over or corrected to the regular tidal cycle of 18.6 years."[16]

While *Luttes* involved mud flats, the Texas Supreme Court has adopted the mean high tide boundary line as the line separating private and state-owned beaches.[17] After *Luttes*, however, another problem arose when developers began excluding the public from the use of the littoral land[18]—the land

8. 324 S.W.2d 167 (Tex. 1958).

9. *Id.* at 186–87.

10. *Id.* at 168 (describing Luttes's claim that he owned approximately 3400 acres of mud flats bordered by the mainland on the west and Padre Island on the east).

11. *Id.* at 169 (noting the tidal waters did not regularly cover the disputed land and the land had actually increased up to one foot above mean high tide).

12. *Id.*

13. *Id.* at 169–70 (stating that although the State agreed the flats were not part of the sea bottom, it maintained that the tidal waters still covered the mud flats at certain times during the year).

14. *Id.* at 169 (noting that the plaintiff landowner must be able to prove such a point and that storm waters are not to be considered in the determination of the boundary).

15. *Id.* at 186–87 (commenting that a rule of "mean high tide" over a rule of "highest annual water" may not favor Texas in the amount of land it owns but that it does favor Texas in litigation because of the definitive evidence that can be used to prove the mean high tide prior to litigation).

16. *Id.* at 187.

17. John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 270 (Tex. 2002) (stating that "the rule in *Luttes* applies whenever a civil law shoreline boundary is in question").

18. Robert C. Eckhardt, The Case of the Open Beaches 2 (undated) (unpublished manuscript, on file with the Houston Law Review) (noting that developers placed wood

running along the coast or shore of an ocean, sea, or lake.[19] To counteract this problem and to protect public access to the coastal areas, the Texas legislature enacted the Texas Open Beaches Act (OBA).[20] In its current form, the OBA declares:

> [T]he 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.[21]

The purpose of the OBA is to ensure the public's right to "free and unrestricted" access to Texas public beaches.[22] Under the OBA, it is illegal for a beachfront owner to construct or maintain an improvement on his land that blocks or interferes with public access to or use of the public beach.[23] This improvement could be a barricade, fence, or in some cases a house.[24] In addition, a structure built on private property that subsequently becomes located on the public beach could also fall under the provisions of the OBA.[25] If an owner builds such a structure, the attorney general can remove the obstruction under the OBA to guarantee the public's right of access to that beach.[26] In the past few years, the attorney general has removed or prevented reconstruction of houses that have subsequently

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pilings at three-foot intervals along the beach to prevent cars from passing).

19. BLACK'S LAW DICTIONARY 945 (7th ed. 1999) (defining "littoral" as being "[o]f or relating to the coast or shore of an ocean, sea, or lake").

20. *See* Ratliff, *supra* note 7, at 994 (stating that the Texas legislature enacted the OBA in 1959 in response to the erection of barriers by private landowners to keep the public from accessing the beaches).

21. TEX. NAT. RES. CODE ANN. § 61.011(a) (Vernon 2001).

22. *Id.* ("It is . . . the public policy of [Texas] that the public . . . shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches . . . .").

23. *See id.* § 61.013(a) (stating that "[i]t is an offense . . . for any person to create, erect, or construct any obstruction . . . that will interfere with the . . . right of the public . . . to enter or to leave . . . or to use any public beach").

24. *Id.* (applying the OBA to "any obstruction, barrier, or restraint").

25. Letter from David Dewhurst, Texas Land Commissioner, to John Cornyn, Attorney General of Texas (May 13, 1999) (on file with the Houston Law Review) [hereinafter Letter from David Dewhurst] (informing the attorney general that 107 houses had become subject to removal under the OBA because they had become located on the public beach).

26. TEX. NAT. RES. CODE ANN. § 61.011(c) (requiring the attorney general to develop and publicize an enforcement policy preventing and removing "any encroachments and interferences on the public beach").

become located on the public beach without compensating the owners of these houses.[27] Because of these actions, some owners have sued the state and the attorney general, claiming the OBA results in a "taking" of private property and thus requires compensation.[28]

B. An Introduction to the Takings Issue

A "taking" occurs when the government restricts, condemns, or takes possession of private property for public use.[29] According to the Fifth Amendment, the government cannot take private property for public use without compensating the owners of that property.[30] While the basic premise of a taking seems simple enough, there has been endless litigation regarding whether a governmental taking has actually occurred and what requirements are needed to effectuate a compensable taking.[31] In cases involving the removal of houses under the OBA, the most applicable takings case is *Lucas v. South Carolina Coastal Council*[32] because it established a "total takings" test to determine when a government regulation results in a taking.[33]

Using the "total takings" standard established in *Lucas*, some owners could argue that the removal of a house under the OBA is a taking and requires compensation as provided by the Fifth Amendment. The main argument is that the removal of a house under the OBA is a taking because it takes away all economically viable use of the land. Furthermore, owners argue the OBA is a taking because it converts private land into public

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27. Letter from John Cornyn, Attorney General of Texas, to Council Members, Coastal Coordination Council (Nov. 15, 1999) (on file with the Houston Law Review) [hereinafter Letter from John Cornyn] (determining that under the policy guidelines providing for the removal of houses under the OBA, only four out of the 107 houses considered may be removed).

28. *See* Plaintiffs' Original Petition at 6–7, Brannan v. Texas, No. B14-88-00314-CR, 1989 WL 1188 (Tex. App.—Houston [14th Dist.] Jan. 12, 1989, writ ref'd) (No.15802-JG01) (claiming that the OBA is a taking of private property).

29. *See* U.S. CONST. amend. V (providing that private property shall not "be taken for public use, without just compensation").

30. *See id.* The takings clause in the Texas Constitution mirrors the wording of the U.S. Constitution, making a distinctive argument unnecessary. *See* TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."); *see also* Mayhew v. Town of Sunnydale, 964 S.W.2d 922, 928, 933 (Tex. 1998) (deciding a takings claim brought under both the U.S. and Texas Constitutions and applying the more familiar federal takings jurisprudence).

31. Refer to note 177 *infra* and accompanying text (listing various tests for takings established by the U.S. Supreme Court).

32. 505 U.S. 1003 (1992).

33. *Id.* at 1015 (holding that a categorical taking occurs when a government regulation denies the owner all economically viable use of the land).

land for public use.[34] However, there are two main problems with these arguments. First, due to its enforcement policy, the OBA only removes a house when the structure violates Texas state nuisance laws.[35] Therefore, under *Lucas*, compensation is not required because a taking of private property has not occurred. Second, the OBA merely provides a way for the public to enforce its right to access the public beach. The OBA does not convert private property into public property. Rather, this conversion occurs via natural or storm-induced erosion—not by government action.

This Comment examines and explains why the removal of a house under the OBA does not constitute a taking under the Fifth Amendment. Part II examines the requirements of the OBA and how the public may gain the right to access and use property where a beach house is located. Part III analyzes the applicable takings jurisprudence set forth by the U.S. Supreme Court. Part IV explains why the OBA is not a taking as it relates to the removal of houses owned by private landowners.

II. THE TEXAS OPEN BEACHES ACT

A. Applicability of the Open Beaches Act

When applicable, the OBA gives the state the power to remove a house once it is located on a public beach.[36] The OBA, however, does not apply to all property located on the beach. For the OBA to apply to beachfront property, (1) the public must be able to access the beach by either public road or ferry;[37] (2) the public must have acquired an easement to access or use the beachfront area by dedication, prescription, or custom;[38] and (3) the property (or any part of it) must be located on the public beach.[39]

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34. *Id.* at 1018–20 (noting that a compensation requirement for regulations that deprive the owner of all economically beneficial use of his land is further supported by the fact that regulations requiring land to be left in its natural state "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm").

35. *See* Letter from John Cornyn, *supra* note 27.

36. TEX. NAT. RES. CODE ANN. § 61.011(c) (Vernon 2001). Refer also to note 25 *supra* and accompanying text (discussing the attorney general's power under the OBA).

37. TEX. NAT. RES. CODE ANN. § 61.021(a) ("None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exists."). This criteria is easily discernable; therefore, this Comment will focus on the latter two requirements. Refer to notes 38–39 *infra* and accompanying text.

38. *See id.* § 61.011(a) (giving the public the free and unrestricted right of access to an area seaward of the line of vegetation if it has acquired an easement on that area).

39. *See id.* § 61.011(c). It is important to note that the OBA also applies to all

1. Acquiring an Easement to Access the Property. For the OBA to apply, the public must acquire an easement to access or use the beachfront property.[40] An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose."[41] There are many ways the public can establish an easement on a disputed area of beach. For purposes of the OBA, however, the public must acquire an easement to the beachfront area via dedication, prescription, or continuous use.[42]

a. Easement by Dedication. An easement by dedication is one way the public can acquire the right to access or use a beachfront area under the OBA.[43] In Texas, the public acquires an easement by dedication if the owner dedicates the land for public use.[44] A dedication is a "donation of land or creation of an easement for public use"[45] and can be express or implied.[46] An express dedication occurs when the owner expressly manifests intent to dedicate his land for public use.[47] An express dedication usually occurs through a deed or other written instrument.[48]

While it is easy to determine if an owner has expressly dedicated his land for public use, it is more difficult to determine when an owner has implicitly dedicated private land to the public.[49] Implied dedications evolved from the theory of equitable estoppel.[50] An implied dedication occurs when the "owner's conduct reasonably implies that he or she intended a dedication."[51] With definitions including subjective legal terms like "reasonably" and "intended," it

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property that potentially obstructs the public's access to and use of the public beach. However, this Comment will analyze situations where a privately owned beach house has become located on the public beach.

40. *Id*. § 61.011(a).

41. BLACK'S LAW DICTIONARY 527 (7th ed. 1999).

42. TEX. NAT. RES. CODE ANN. § 61.011(a) (noting that the OBA only applies when the public has acquired a right via "prescription, dedication, or . . . continuous right").

43. *See id*.; *see also* Pirkle, *supra* note 3, at 1097 (observing that, historically, Texas courts have liberally recognized public easements to beaches through dedications).

44. *See* Pirkle, *supra* note 3, at 1097.

45. BLACK'S LAW DICTIONARY 421 (7th ed. 1999).

46. *See* Pirkle, *supra* note 3, at 1097 (noting implied dedications "are more common because property owners often fail to make an express grant to the public").

47. *Id*. (defining a dedication as "express" when an "owner makes an oral or written declaration . . . stating his intent to dedicate the land for some public purpose").

48. *See id*.

49. *See id*. at 1097–98 (determining that the existence of an implied dedication depends upon whether the owner's conduct reasonably implies intent to dedicate the land).

50. *See* Moody v. White, 593 S.W.2d 372, 378 (Tex. Civ. App.—Corpus Christi 1979, no writ) (discussing the origins of implied dedications).

51. *See* Pirkle, *supra* note 3, at 1097 (defining an implied dedication).

is difficult to objectively examine a set of facts and determine if an implied dedication has occurred.

Because of this problem, Texas courts have established clearly defined elements to help determine whether an implied dedication exists. *Moody v. White* provides a good example.[52] In *Moody*, the attorney general sued the owners of Kody's Kabana Motel for violating the OBA.[53] The attorney general claimed that the motel violated the statute because the structures were located on the public beach and the public had acquired the right to access and use the area through an easement by dedication.[54] Consequently, the attorney general asserted the motel interfered with the public's right to access and use the beach area.[55] Based on this interference, the attorney general sued to remove the motel from the beach area under the OBA.[56] The owners, on the other hand, claimed they owned the disputed beach area all the way up to the edge of the water via a patent originating from the Republic of Texas.[57] Because they believed it was private property, the owners argued that they were entitled to build their motel on the disputed area.[58] At trial, the jury found that the motel was located on a public beach and that it interfered with the public right of access to that beach.[59] As a result, the trial court ordered the removal of the motel to preserve public access to and use of the disputed area.[60]

On appeal, the Texas appellate court affirmed the trial court's decision, finding the public had acquired a right to use the disputed area via an implied dedication.[61] According to *Moody*, there are four distinct elements of an implied dedication:[62] (1) the owner making the dedication must have title to the land prior to

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52. *See Moody*, 593 S.W.2d at 378 ("Whether dedication is implied or expressed, there are four distinct elements that must be present.").

53. *See id.* at 374.

54. *Id.* (noting that the disputed beach area consisted of land located between the mean low tide and the line of vegetation in Port Aransas).

55. *Id.*

56. *Id.* (alleging that "the public has the right of use and easement to and over an area claimed by the defendants").

57. *Id.* (claiming "title from the State of Texas to the water's edge by direct patent in an unbroken chain deraigned from sovereignty").

58. *Id.*

59. *See id.* Specifically, the jury determined that the public had established an easement on the property through dedication and custom. *Id.*

60. *See id.* (reciting that the trial court also permanently enjoined the owners from building any additional structures on the beach).

61. *See id.* at 378–79 (noting there was "sufficient evidence to support the jury's findings regarding dedication").

62. *Id.* at 378 (stating that these elements are necessary to both express and implied dedications).

the dedication; (2) the dedication must serve a public purpose; (3) the owner must make either an express or implied offer to dedicate his land; and (4) the public must accept the offer.[63]

In finding an implied dedication, the *Moody* trial court relied on the testimony of various eyewitnesses.[64] This testimony consisted of long-time residents who watched other residents and vacationers use the beach for over forty years.[65] In addition, commercial fishermen testified to their use of and reliance on the beach as their source of income, and police officers who patrolled the disputed area testified about their interactions with the public on that beach.[66] Finally, ferryboat operators testified to transporting the public both to and from the disputed beach area.[67]

Based on this testimony, the appellate court found the previous owners of the land had implicitly dedicated the disputed beach area to the public.[68] In its decision, the court focused on whether the previous owners offered to dedicate the land and whether the public accepted that offer.[69] According to the court, an owner's offer to dedicate his land to the public does not have to be explicit; rather, an implicit offer can be made through the owner's conduct, open acts, and circumstances showing his intent.[70] In fact, the court noted that an implicit offer to dedicate occurs whenever an owner "throw[s] open [private] property to the public use, without any other formality."[71] In *Moody*, the prior owner "stood by and watched the public use 'his' beach for many years."[72] In the eyes of the court, this action (or inaction) by the previous owner was an implicit offer to dedicate his land to the public.[73]

After finding an implicit offer to dedicate by the owner, the *Moody* court focused on whether the public had accepted the offer.[74] The public's acceptance, like an offer to dedicate, does not

63. *Id*.

64. *Id*. at 374.

65. *Id*. (recounting that the trial testimony "consisted of testimony from many people from all walks of life who were familiar with the region").

66. *See id*.

67. *Id*.

68. *Id*. at 379 (determining that the trial court's decision could be "affirmed on either the theory of prescription or dedication").

69. *Id*. at 378–79.

70. *Id*. (noting an implied dedication "presumes an intent on the part of the landowner to give his property to the public").

71. *Id*. at 379 (quoting Seaway Co. v. Attorney General, 375 S.W.2d 923, 936 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.)).

72. *Id*.

73. *Id*. Refer to note 73 *supra* and accompanying text (noting the presumption that an owner intends to dedicate can be implied).

74. *See Moody*, 593 S.W.2d at 379 (identifying the acceptance of an offer as the final step in establishing an easement by dedication).

require a "formal or express act"; rather, the public can accept this offer through "general and customary use" of the land.[75] The court found that fishing, swimming, and other recreational activities constituted "general and customary use."[76] Therefore, the court determined that the public had accepted the previous owner's implicit offer to dedicate.[77] Based upon the implicit dedication and subsequent public acceptance, the *Moody* court held that the public had gained a right to access and use the beach area where the motel was located.[78] As a result, the attorney general was free to remove the motel for violating the OBA.[79]

b. Easement by Prescription. An easement by prescription is another way the public can acquire the right to access or use the public beach under the OBA.[80] Historically, Texas courts have depended upon prescriptive rights to grant public access to the beach.[81] The prescriptive rights theory dictates that public use of property for an extended time period is equivalent to obtaining a grant from the owner of the property.[82] According to Texas common law, the public can obtain an easement by prescription "by proving [all of] the elements of adverse possession."[83] The elements of adverse possession in Texas are: (1) actual possession of the land;[84] (2) an adverse claim to the land;[85] (3) notorious use

75. *Id*.

76. *Id*. (asserting that the land at issue had been dedicated to the public before the previous owners acquired the property).

77. *Id*.

78. *Id*. (noting there was also enough evidence to find the public had acquired a right to the beach area via prescription).

79. *Id*. Refer to notes 25–26 *supra* and accompanying text (discussing the attorney general's power to remove obstructions under the OBA).

80. Refer to notes 36–39 *supra* and accompanying text (discussing the requirements of the OBA).

81. *See* Pirkle, *supra* note 3, at 1097 (stating that Texas courts "have consistently found prescriptive easements in an attempt to maintain the public's right of access to Texas coastal beaches").

82. *See* Ratliff, *supra* note 7, at 987 ("[P]rescriptive rights were based upon the theory 'that the use of . . . an easement for a time beyond memory was a worthy substitute for a grant.'" (quoting W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 31, at 77 (3d ed. 1965))).

83. *See* Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127 (Tex. App.—Corpus Christi 1986, no writ).

84. *See id*. (finding that use of the land by the public for swimming, fishing, and

of the land;[86] (4) exclusivity;[87] and (5) continuous use of the land.[88]

Seaway Co. v. Attorney General[89] is a prime example of a Texas court finding that the public had acquired a prescriptive easement over beachfront property.[90] The attorney general sued Seaway to remove barriers located on the beach seaward of the vegetation line on the west end of Galveston Island.[91] This area had previously belonged to Levi Jones and Edward Hall, both of whom had acquired the land through a grant issued by the Republic of Texas in 1840.[92] Seaway claimed that it owned the land where it erected the barriers and argued it had a right to exclude the public from accessing and using the beach area.[93] The attorney general countered by arguing that the public had gained a right to the obstructed beach through an easement by prescription.[94] As a result of the easement, the attorney general demanded the removal of the barriers to preserve public access to and use of the disputed beach area.[95] The *Seaway* court agreed with the attorney general and held that the public had acquired a prescriptive easement.[96]

In finding a prescriptive easement, the *Seaway* court relied both on the testimony presented at trial[97] and Texas Supreme Court precedent in *Othen v. Rosier*[98] and *O'Connor v. Gragg*.[99] In

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other recreational activities establishes actual possession of the land).

85. *See id*. (establishing hostile use of the land through public testimony revealing that, because there were no restrictions, they believed the land was open to the public).

86. *See id*. (noting that the open use and enjoyment of the disputed area by the public establishes the notorious use of the land).

87. *See id*. The exclusivity and adverse claim elements are perhaps the best defense a landowner can use to defeat a prescriptive easement claim. *See* Pirkle, *supra* note 3, at 1096 (recanting the argument used by landowners that a lack of exclusivity indicates a lack of adversity).

88. *See Villa Nova*, 711 S.W.2d at 127 (identifying testimony by the public that the land had been used for over ten years, fulfilling the statutory requirement of continuous use).

89. 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

90. *Id*. at 937 (finding the evidence sufficient to support an easement by prescription).

91. *Id*. at 926.

92. *See id*. at 928 (discussing the chain of title ownership in the land).

93. *Id*. at 926–27 (noting Seaway's argument that the State's title claim to the property was barred by the three-, five-, ten-, and twenty-five-year statutes of limitations).

94. *Id*. at 926 (asserting the existence of a prescriptive easement).

95. *Id*. at 925–26 (arguing the barriers violated the OBA).

96. *Id*. at 932–34, 937 (recounting testimony by residents as to the continuous use of the public, dating back to the 1880s).

97. *Id*. at 930 (discussing the extensive trial testimony supporting the attorney general's claim that there was a prescriptive easement).

98. 226 S.W.2d 622 (Tex. 1950).

99. 339 S.W.2d 878 (Tex. 1960).

Othen v. Rosier, the Texas Supreme Court found that a prescriptive easement did not exist because the public's use of the roadway was not adverse to the owner's.[100] The *Othen* court stressed that if express or implied permission is given to use another's land, then that use is not adverse and will never "ripen into an easement by prescription."[101] The court found that permission is given when the use of land is in the same manner and at the same time as the owner's.[102]

O'Connor v. Gragg involved a dispute over a twenty-foot wide roadway running across 560 acres of private property owned by O'Connor.[103] Gragg owned land south of O'Connor's property and sued O'Connor, claiming he and the public had acquired an easement by prescription over the roadway.[104] The trial court found for Gragg and held that the roadway across O'Connor's land was a public roadway by both dedication and prescriptive right.[105] The Texas Supreme Court, however, reversed in part and found the public had not acquired an easement by prescription.[106]

The *O'Connor* court denied the prescriptive easement because there was no adverse use of the roadway.[107] The court found that because both parties had used the roadway to get to a public road north of the O'Connor's land, "[t]here [was] no evidence . . . to show a right or a claim of right, of either the Graggs or the public to use the roadway to the exclusion of [O'Connor's] right."[108] The court further stated that "[t]he permissive use of a roadway over the land of another contemporaneously with the owner's use of the same roadway is *not* adverse."[109]

While *O'Connor* and *Othen* both held that a prescriptive easement can never arise when the use is in the same manner

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100. *Othen*, 226 S.W.2d at 626–27 (observing that the adverse use in a prescriptive easement shares the same characteristics as the hostile element in adverse possession).

101. *Id.* at 626 (noting that the adverse use of property is essential to acquiring an easement by prescription).

102. *Id.* at 626–27 (stating that when the enjoyment of the land is consistent with the owner's, then there is no right in opposition to the land).

103. *O'Connor*, 339 S.W.2d at 879–80.

104. *Id.* (noting that the roadway was the only means by which Gragg could access his land).

105. *See id.* at 879 (adding that O'Connor was enjoined from obstructing the roadway or interfering with its use by Gragg or the general public).

106. *Id.* at 885 (finding an easement by dedication and setting aside the part of the judgment regarding easement by prescription).

107. *Id.* at 880–81.

108. *Id.*

109. *Id.* at 881 (emphasis added).

and at the same time as the owner's, the *Seaway* court noted that, under both *O'Connor* and *Othen*, "mere joint use is not destructive . . . of adverseness if there are other facts present to show use by others is under a claim of right in themselves."[110] According to the *Seaway* court, the public use of the beach was a sufficient example of the public showing a claim of right.[111] For example, fishermen may use the beach to dock their boats or to fish, while tourists may use the beach to suntan, swim, or for other various recreational activities. Others may use the beach as a source of exercise or employment. Based on these different uses, the *Seaway* court found that an adverse use exists when evidence shows a different use of the disputed area by the public.[112] Therefore, in order to prove the adverse use of beachfront property, the public must be able to show its use differs from that of the owner's.[113] Considering the various uses the public has for the beach, the public will almost always have a different use of the beach than the owner.[114]

c. Easement by Custom. An easement by custom is the final way the public can acquire access to the beach under the OBA.[115] An easement by custom is established through "usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates."[116] Customary rights originate when a community has used a piece of land for so long that such use becomes a relative necessity.[117] While customary and prescriptive rights are very similar, customary rights have two defining characteristics that distinguish them.[118] First, customary rights vest only in an undefined group of people, while prescriptive rights can vest in an

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110. Seaway Co. v. Attorney General, 375 S.W.2d 923, 938 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (using the trial court's reasoning to determine that a prescriptive easement did exist).

111. *Id*.

112. *Id*. (discussing the different uses of the beach as a factor in determining an adverse use of the beach).

113. *See id*.

114. Refer to note 7 *supra* and accompanying text (discussing the public's various uses of the public beach as adverse to the private owner).

115. Refer to note 21 *supra* and accompanying text (quoting the OBA). Also, an easement by continuous right is the equivalent of an easement by custom.

116. BLACK'S LAW DICTIONARY 385 (6th ed. 1990).

117. *See* Pirkle, *supra* note 3, at 1101 (discussing the seven requirements imposed by English common law to establish an easement by custom).

118. *See* Ratliff, *supra* note 7, at 991 (stating that "[c]ustomary rights, although quite similar to prescription, [do] not automatically evolve into prescriptive rights" (footnote omitted)).

individual.[119] Second, customary rights must be "immemorial"[120]—rights that have existed "for so long that 'the memory of man runneth not to the contrary.'"[121]

The first OBA case in Texas recognizing an easement by custom was *Matcha v. Mattox*.[122] In *Matcha*, an owner attempted to overturn a trial judgment prohibiting him from reconstructing his beach house after Hurricane Alicia partially destroyed it.[123] At trial, the attorney general successfully argued that the public had acquired the "free and unrestricted" right to access and use the disputed beach area through prescription, dedication, and custom.[124] The appellate court affirmed the lower court's decision, holding that the public had acquired an easement by custom "in the vicinity" of the owner's property.[125] Specifically, the court found that the public had used the disputed beach for travel as far back as 1836.[126] Because the land was in the vicinity of the land in *Seaway*, the *Matcha* court relied on portions of the recorded testimony in *Seaway* where witnesses recalled "a lifetime of driving, swimming and fishing along the Galveston beach."[127] As a result, the *Matcha* court found that the public use of the beach was immemorial and granted the public an easement by custom.[128]

2. Private Property Located on Public Property. Once an easement by dedication, prescription, or custom has been established, the attorney general must show that an obstruction is located on public beach before removing it under the OBA.[129] The OBA states that any property located between the line of vegetation and the line of mean

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119. *See id.*

120. *Id.* (distinguishing customary rights as having existed for longer than anyone can remember).

121. *Id.* (quoting J. LAWSON, THE LAW OF USAGES AND CUSTOMS § 7 (1881)).

122. 711 S.W.2d 95, 96 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (holding that the Matchas could not "[interfere] with the public's right of free access to and over the beach").

123. *Id.* (noting that only portions of the foundation, walls, and floor remained after the storm, all of which were entirely located seaward of the vegetation line).

124. *Id.* at 96–97.

125. *Id.* at 98 (affirming the judgment "upon the basis that the public acquired a right of use or an easement . . . by custom").

126. *Id.* at 99 (recounting the history of Galveston's West Beach (citing DYER, THE EARLY HISTORY OF TEXAS 59 (1916))).

127. *Id.* (noting that persons who had used the beach for "a lifetime" did not seek permission, figuring that everyone had the right of use).

128. *Id.* at 98–99, 101 (acknowledging two Texas opinions that granted easements by custom in affirming the district court).

129. TEX. NAT. RES. CODE ANN. § 61.011(c) (Vernon 2001). Refer to note 25 *supra* and accompanying text (discussing the power of the attorney general to remove houses under the OBA).

low tide is considered part of the public beach.[130]

The "line of vegetation" is defined as "the extreme seaward boundary of natural vegetation which spreads continuously inland."[131] When a distinct vegetation line does not exist, vegetation lines on either side of the unmarked area are used to determine its location by extrapolation.[132] The "unmarked" vegetation line is the line of constant elevation that connects the "marked" lines on both sides.[133] However, if there is not a clearly marked vegetation line on either side of the unmarked area, then the vegetation line for the unmarked area is located no further than two hundred feet inland from the seaward line of mean low tide.[134] The line of mean low tide is the average of all the daily low tides at that place during a nineteen-year period.[135]

B. Enforcement of the Open Beaches Act

When a house is (or becomes) located on a public beach, the public can only enforce its right to access that part of the beach if the attorney general initiates a lawsuit for removal or prevention of any "improvement, maintenance, obstruction, barrier, or other encroachment."[136] In addition, the attorney general may seek reimbursement from the owner for any removal costs incurred by the state.[137]

In a letter dated May 13, 1999, Texas Land Commissioner David Dewhurst identified approximately 107 houses in Galveston and Brazoria counties as being located seaward of the

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130. TEX. NAT. RES. CODE ANN. § 61.001(8). The OBA defines "public beach" as:

> [A]ny beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

Id.

131. *Id.* § 61.001(5).

132. *Id.* § 61.016(a) ("To determine the 'line of vegetation' in any area of public beach in which there is no clearly marked line of vegetation . . . recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.").

133. *Id.* § 61.016(b).

134. *See id.* § 61.016(c).

135. *See* Roberts, *supra* note 4, at 151–52 (defining "mean high tide" and noting the similarities between the definitions of high and low waters).

136. TEX. NAT. RES. CODE ANN. § 61.018(a) (stating that "[t]he attorney general, individually or at the request of the commissioner, or any county attorney, district attorney, or criminal district attorney" has the authority to bring suit under the OBA).

137. *Id.* at § 61.018(b) ("In the same suit, the attorney general . . . may recover penalties and the costs of removing [any obstruction] if it is removed by public authorities pursuant to an order of the court.").

vegetation line, interfering with "the public's historical right to free and unrestricted access" to the public beaches.[138] According to Dewhurst, all 107 of the houses were consequently subject to removal under the OBA.[139] However, in response, then-Texas Attorney General John Cornyn announced that current enforcement policy did not require the attorney general to follow through with removal; instead, the attorney general will "remove a house from the beach when the house either significantly blocks public access to the beach or presents an imminent threat to public health."[140] Because they risked losing valuable property, beachfront owners sued the state, challenging: (1) whether the public had acquired property easements; and (2) whether the OBA was constitutional.[141]

1. Has a Public Easement Been Established? Property owners frequently contest the applicability of the OBA when the public has not established an easement over their property. For example, a landowner whose private property has not been used continuously, exclusively, or adversely by the public to access the public beach may argue that an easement by prescription or custom does not exist.[142] Without an established easement or immemorial public right, the OBA does not apply.[143] This limitation also applies to easements by implied dedication.[144] Traditionally, landowners have offered two arguments against implied dedications. First, landowners argue that they cannot implicitly dedicate their land simply by sitting on the front porch and watching the public use the beach. Second, the presence of fences or gates surrounding the house would provide solid evidence against an implicit offer to dedicate their land. However, both of these arguments are susceptible to the

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138. Letter from David Dewhurst, *supra* note 25 (explaining that 107 houses were "encroachments on the public beach" as defined by the OBA).

139. *Id.* (suggesting that Attorney General Cornyn take measures to enforce the OBA). Refer to note 26 *supra* and accompanying text (discussing the attorney general's authority under the OBA).

140. Press Release, Office of the Attorney General of the State of Texas, Cornyn Announces Relief for Homeowners: Attorney General and Land Commissioner Clarify Status of Homes on the Beach (July 30, 1999), *at* http://www.oag.state.tx.us/newspubs/releases/1999/19990730openbeaches.htm (announcing that only four of the 107 homes in violation of the OBA would be removed).

141. In one of the more recent actions, *Arrington v. Texas General Land Office*, 38 S.W.3d 764 (Tex. App.—Houston [14th Dist.] 2001, no pet.), the property owners claimed that enforcement of the OBA was a "taking" of their land and, on appeal, challenged the location of the public beach easement boundary. *Id.* at 765.

142. Refer to notes 85–86 *supra* and accompanying text (discussing the prescriptive rights theory and its requirements).

143. *See* TEX. NAT. RES. CODE ANN. § 61.001(8) (Vernon 2001).

144. Refer to notes 49–51 *supra* and accompanying text (defining "implied dedication").

"rolling easement doctrine."

2. The Rolling Easement Doctrine. The rolling easement doctrine is the most powerful and controversial aspect of the OBA. It allows a public easement to shift with the changing shoreline; because the easement shifts involuntarily, the public may gain an easement through property on which it never actually sets foot.[145] For example, assume the public has acquired an easement along a beach on Galveston Island that ends one hundred feet from mean low tide.[146] Also assume the private property line starts at the vegetation line (one hundred feet from mean low tide) and extends landward another five hundred feet. The result would be a one hundred foot easement separated by a line of vegetation from five hundred feet of private property. Now assume a hurricane hits Galveston Island, erasing the first vegetation line and establishing a new one further inland. According to the rolling easement doctrine, the public easement previously established now shifts with the erosion of the beach and ends at the new vegetation line, even though the public had not previously acquired an easement on *that particular property*.[147] If the new vegetation line is located fifty feet landward of the old vegetation line, approximately fifty feet of what was once private property is now located on public beach.[148] Under the rolling easement doctrine, the public would have an easement on the "new" public beach, ending where the new vegetation line was established.[149] Therefore, because the private property is now located on public beach, where the public has acquired right of access, any private home located between the new vegetation line and the mean low tide is subject to removal under the OBA.[150]

Because the rolling easement doctrine greatly increases the scope of the OBA, property owners have challenged its applicability to the Act. For example, in *Feinman v. Texas*,[151] the

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145. *See* Pirkle, *supra* note 3, at 1106–07 (noting that Texas courts justify the rolling easement doctrine by both "comparing it with landowner rights along rivers" and striving to "maintain the purpose of the public easement").

146. This example also assumes the public acquired the easement originally by either dedication, prescription, or custom and that, as a result, the OBA applies.

147. Refer to notes 134–38 *supra* and accompanying text (discussing how the line of vegetation is established under the OBA).

148. Refer to note 133 *supra* and accompanying text (citing the OBA definition of "public beach").

149. Refer to text accompanying note 150 *supra* (explaining that, under the rolling easement doctrine, the previously established public easement shifts with the erosion of the beach).

150. Refer to note 26 *supra* and accompanying text (discussing the attorney general's ability to remove houses that interfere with the public's right of access to the public beach).

151. 717 S.W.2d 106 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

attorney general prevented several homeowners from repairing their houses and threatened to remove the structures because they were located seaward of the new vegetation line created by Hurricane Alicia.[152] The owners then sought a declaratory judgment, requesting that the trial court (1) declare that the post-hurricane vegetation line was not the landward boundary of the public's easement; (2) place the new vegetation line at the pre-Alicia vegetation line; and (3) pronounce that property ownership rights had not changed after Alicia.[153] The trial court ruled against the homeowners, finding that the public easement established prior to Alicia was a "rolling easement," which is "consistent with, and implicit in," the OBA.[154] The owners appealed, arguing that rolling easements were inconsistent with the OBA and claiming that the public easement could not shift to the new vegetation line absent evidence of prescriptive use, implied dedication, or customary use.[155]

The appellate court affirmed the district court's suggestion that rolling easements are implicit in the OBA.[156] In reaching its conclusion, the court relied on the relevant case law, the stated purposes of the OBA, the consequences of finding for the landowners, and the public and private interests in the beach.[157] The court noted that, according to Texas case law, the division between private and state-owned beaches is determined in part by the daily ebb and flow of the sea.[158] Additionally, the court recognized that the concept of a rolling easement is "not a novel idea," and that Texas courts "have held that an easement is not so inflexible that it cannot accommodate changes in the terrain it covers."[159] Next, the *Feinman* court observed that the purpose of the OBA is to provide the public with unrestricted access to public beaches or to any larger area below the vegetation line

152. *See id.* at 107.

153. *Id.* The property owners also argued that the State was barred by *res judicata* from using the rolling easement theory, as that issue had already been unsuccessfully litigated by the State in 1975. *Id.*

154. *Id.* (finding that *res judicata* did not preclude the State's suit against the property owners).

155. *Id.* Appellants also disputed the constitutionality of the OBA, arguing that their due process and equal protection rights were violated. *Id.* at 107–08.

156. *Id.* at 110 ("Although the Act does not specifically state that the public's easement moves with the vegetation line, we conclude that such intent is implicit in the Act.").

157. *Id.* (recognizing that these factors aid in determining whether the public's easement moves with the vegetation line).

158. *Id.* at 110 (noting that "[o]ne cannot determine the boundary between the state and the private landowner's land without considering the changing tides").

159. *Id.* (recalling that courts have upheld the concept of a rolling easement for many years without explicitly using that term).

over which it has already acquired an easement.[160] As a result, the court concluded the "rigid construction" suggested by the landowners would greatly diminish the purpose of the OBA and would favor private interests over public interests because private citizens would eventually end up "owning [the] land under the sea."[161]

While these arguments against the rolling easement doctrine are not "takings" claims, they are important to understand because they increase both the scope and extent of the OBA.[162] In addition, the rolling easement doctrine is extremely important due to the effects on the Texas coastline following natural erosion,[163] tropical storms, and hurricanes.[164] Without the rolling easement doctrine, the OBA would apply to fewer houses because the public easement would remain virtually static.[165]

III. TAKINGS AND BEACHFRONT PROPERTY

Because of the broad scope of the OBA, many beachfront homeowners fear losing their houses following a hurricane or tropical storm. Additionally, many worry that Texas will not compensate them if their homes are removed pursuant to the OBA. According to the Fifth Amendment, the government must compensate a landowner when it takes his private property for public use.[166]

Takings are classified as either physical or regulatory.[167] A physical taking occurs when the government invades or physically takes possession of an interest in private property for

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160. *Id.* at 111.

161. *Id.* (noting that a public easement could possibly disappear along the coastal beach without the rolling easement doctrine).

162. Refer to notes 148–53 *supra* and accompanying text (explaining how the rolling easement doctrine increases the scope of the OBA).

163. *See* STATE OF TEX. COASTAL COORDINATION COUNCIL, TEXAS COASTAL MANAGEMENT PROGRAM: FINAL ENVIRONMENTAL IMPACT STATEMENT (pt. II), I-2 (1996) (stating that over one-third of Texas Gulf beaches are currently eroding due to natural processes and human activity).

164. National Weather Service: Southern Region Headquarters, *Texas Hurricane History: Late 20th Century*, *at* http://www.srh.noaa.gov/lch/research/txlate20hur.htm (last visited Mar. 15, 2003) (noting that, in the late twentieth century, approximately twenty tropical storms and hurricanes have hit the Texas Gulf coast, producing heavy rains, tornadoes, and storm surges as high as twenty feet).

165. Refer to note 148 *supra* and accompanying text (explaining the rolling easement doctrine).

166. U.S. CONST. amend. V (providing that private property shall not "be taken for public use, without just compensation").

167. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002) (discussing the distinction between physical and regulatory takings).

some public purpose.[168] In these situations, the government must compensate the former owner of the property.[169] Examples of physical takings include government occupation of property in spite of a landowner's long-term lease[170] and appropriating part of a rooftop in order to provide cable TV access for apartment tenants.[171] Regulatory takings, on the other hand, are more complex. A regulatory taking occurs when a law or regulation imposes restrictions so severe as to equal condemnation or appropriation.[172] Regulatory takings require an "ad hoc, factual inquir[y] . . . designed to allow careful examination and weighing of all the relevant circumstances."[173] As a result, the U.S. Supreme Court has established numerous tests for determining whether a regulatory taking has occurred.[174] Each test addresses different facts and standards. Because many tests exist, courts must pay close attention to the facts and circumstances of each takings claim to determine the most applicable test.

Cases involving the OBA properly fall under a regulatory takings analysis. There is no physical invasion or appropriation by the government. Texas does not own the property, nor can it exclude people from the area. Any property located between the vegetation line and the water is public domain and belongs to the public.[175] However, the OBA does severely limit an owner's use and enjoyment of his land by removing his house and preventing

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168. *Id*. (noting the government's duty to compensate if it physically takes possession of private property or condemns private property for a public purpose).

169. *Id*. at 322 (noting that the government has a categorical duty to compensate the former owner in this type of situation (citing United States v. Pewee Coal Co., 341 U.S. 114 (1951))).

170. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (finding that even the federal government's temporary use of premises held under a long-term lease constituted a taking requiring just compensation).

171. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that cable installations occupying portions of the roof and side of the building constituted a taking).

172. *See Tahoe-Sierra*, 535 U.S. at 322 n.17, 326 (noting there is no set formula or rule for identifying regulatory takings).

173. *Id*. at 322 (citations omitted) (quotation marks omitted).

174. *Compare Loretto*, 458 U.S. at 425–26 (ruling that any permanent physical invasion on private property by the government is an automatic taking), *and* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (emphasizing the diminution in value of the property affected by the government's action as an important factor in a takings analysis), *with* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (stating that the harm incurred by the owner and the benefit received by the public must be roughly proportional to satisfy the Takings Clause), *and* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (noting that a taking occurs when a governmental regulation deprives the owner of all economically viable use of privately owned land).

175. TEX. NAT. RES. CODE ANN. § 61.001(8) (Vernon 2001) (defining "public beach"). Refer to note 133 *supra* and accompanying text (same).

reconstruction.[176] Therefore, as the OBA severely limits the use of private property, regulatory-takings jurisprudence applies.

The most appropriate test for cases involving the removal of a house under the OBA is the "total takings" test established in *Lucas v. South Carolina Coastal Council*.[177] In *Lucas*, a South Carolina developer (Lucas) bought two vacant beachfront lots in 1986, upon which he hoped to build single-family homes.[178] When Lucas bought the lots, the 1977 South Carolina Coastal Zone Management Act (the Act) required owners of coastal property located in a "critical area" to obtain a permit from the South Carolina Coastal Council (the Council) before building houses on the land.[179] Lucas's property, when purchased, was not located in a "critical area" as defined in the Act; therefore, the Act did not apply to him.[180] In 1988, however, the South Carolina legislature enacted the Beachfront Management Act (BMA).[181]

The BMA, like the OBA, applied to beachfront property and, in effect, restricted development on lots located on the South Carolina coast.[182] The BMA required the Council to establish a "baseline."[183] After extensive research, the Council placed the baseline landward of Lucas's vacant lots.[184] The baseline placement prohibited construction of houses seaward of the setback line, a parallel line drawn twenty feet landward of the baseline.[185] As a result, the BMA prohibited Lucas from building on his land.[186] Lucas sued, arguing the BMA restrictions effected a taking without payment of just compensation.[187] Specifically,

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176. TEX. NAT. RES. CODE ANN. § 61.013(a). Refer to notes 23–24 *supra* and accompanying text (listing limitations the OBA puts on private owners).

177. 505 U.S. at 1003.

178. *Id.* at 1008.

179. *Id.*at 1007–08 (noting that the South Carolina legislature enacted the Act to control development activities in coastal areas).

180. *Id.* at 1008.

181. S.C. CODE ANN. § 48-39-280 (Law. Co-op. Supp. 2002).

182. *Lucas*, 505 U.S. at 1008–09 (noting that the enactment of the BMA ended Lucas's development plans).

183. *Id.* at 1008 (quoting S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1988)).

184. *Id*.

185. *Id.* at 1008–09 (stating that "construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline" (footnote omitted)).

186. The South Carolina legislature amended the BMA in 1990 to allow the construction of housing seaward of the setback line. *See* S.C. CODE ANN. § 48-39-290(B)(1)(a) (Law. Co-op. 1990) (outlining the restrictions placed on building new houses across the setback line).

187. *See Lucas*, 505 U.S. at 1009 (arguing that the ban on construction was a taking under the Fifth Amendment and required just compensation, but not challenging the general constitutionality of the BMA).

Lucas claimed the BMA's construction restrictions deprived him of the economic value of his land.[188] The trial court found a taking had occurred because the BMA prohibitions deprived Lucas of "any reasonable economic use of the lots."[189] However, the South Carolina Supreme Court reversed, stating that "when a regulation . . . is designed 'to prevent serious public harm,' no compensation is ow[ed] under the Takings Clause regardless of the regulation's effect on the property's value."[190]

The U.S. Supreme Court reversed the state supreme court.[191] In its decision, the Court held that a categorical taking exists "where [a state] regulation denies all economically beneficial or productive use of land."[192] The Court determined that a categorical taking arises when a regulation or law "requir[es] land to be left substantially in its natural state."[193] According to the Court, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[194] This "total taking" established by *Lucas* does have exceptions. One such exception exists when the regulation restricts a use that the property owner does not have in his title.[195] The Court noted that, in accordance with the "bundle of rights" theory of property, a taking does not occur when a state regulation prohibits a use of property the owner was never entitled to upon purchase of the property.[196]

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188. *Id*. (arguing that enforcement of the BMA resulted in "complete extinguishment of his property's value").

189. *Id*. (noting that the trial court ordered the Council to pay Lucas just compensation in the amount of $1,232,387.50).

190. *Id*. at 1009–10 (finding that the BMA was "properly and validly designed to preserve South Carolina's beaches").

191. *Id*. at 1032 (reversing the decision and remanding the case for factual inquiries).

192. *Id*. at 1015 (noting an additional categorical taking exists when a property owner "suffer[s] a physical 'invasion' of his property").

193. *Id*. at 1018 (noting that compensation is required in order to prevent private property from "being pressed into . . . public service under the guise of mitigating serious public harm").

194. *Id*. at 1019. The *Lucas* Court itself did not decide whether a taking had occurred. Instead, it remanded the case for further factual inquiry. *Id*. at 1032.

195. *Id*. at 1027.

196. *Id*. The Court found:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the . . . inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords . . . with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.

Id. (footnote omitted).

The second exception involves state common law nuisance principles. The *Lucas* Court noted that if South Carolina could identify background principles of nuisance and property law prohibiting Lucas's desired use of his land, then "the [BMA] is taking nothing."[197] In other words, under the rule established by the Court, if Lucas's lots contained deed restrictions prohibiting his desired use of the land, or if state nuisance laws prevented such use, the BMA would not be a "taking" of his land, and compensation would not be required.[198]

Because the OBA potentially deprives an owner of all economically viable use of his land, the "total takings" test established in *Lucas* is the most applicable. For instance, owners who have had their houses removed under the OBA are required to maintain their property in a natural state.[199] These owners are no longer allowed to exclude the public.[200] In addition, the owner can no longer borrow money against the land and has also effectively lost the right to re-sell it. In essence, the owner's land is completely valueless.

IV. TYING IT ALL TOGETHER: A LOOK AT WHETHER A TAKING OCCURS UNDER THE OBA

Before addressing the takings issue and the OBA, owners of beachfront property must be placed into one of two distinct classes: (1) those who bought their property after October 1, 1986, and (2) those who bought their property before October 1, 1986.

A. Beachfront Property Bought After October 1, 1986

It is important to distinguish between the two groups of property owners because the Texas legislature requires all owners of beachfront property who sell their property after October 1, 1986, to include in the deed a disclosure statement warning buyers of the potential loss of their house or business.[201] This statement reads in part:

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197. *Id.* at 1029–32 (explaining that if nuisance or property law already prohibited the desired use of the land, then the regulatory taking would "not proscribe a productive use that was previously permissible").

198. *Id.* at 1031 (commenting that it would be unlikely for common law principles to prohibit his desired use to construct residential improvements on the land).

199. *See* TEX. NAT. RES. CODE ANN. § 61.013 (Vernon 2001) (prohibiting construction of any improvement to the land that poses an obstruction to public passage).

200. *See id.* § 61.011(a) (outlining the state objective to preserve free unrestricted public access to beaches).

201. *See id.* § 61.025.

> STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF NATURAL PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES.[202]

In essence, this statement notifies owners that they do not have the right to maintain or own a house or business on the property if it becomes located seaward of the vegetation line as a result of erosion. Remembering the "bundle of rights" exception in *Lucas*,[203] beachfront owners purchasing under notice have waived their right to have, maintain, or own a beach house (or business) seaward of the vegetation line. These owners must concede any takings claims they may have because they have recognized the possessory limits of their beachfront property.[204] Therefore, according to *Lucas*, removal of a structure located on beachfront property, bought after October 1, 1986, is not a taking because the owner never had the right to own or possess that structure once it became located seaward of the vegetation line.[205]

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202. *Id*.

203. *Lucas*, 505 U.S. at 1027. Refer to note 199 *supra*.

204. Property rights are best described as a "bundle of sticks." Some of the rights that make up this bundle include the rights to possess, exclude, and transfer title. *See* Marcus Cable Assoc., L.P. v. Krohn, 90 S.W.3d 697, 700 (Tex. 2002) ("A property owner's right to exclude others from his or her property is recognized as one of the most essential sticks in the bundle of rights . . . ." (quotation marks omitted)); FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n, No. 03-02-00477-CV, 2003 WL 745256 (Tex. App.—Austin Feb. 6, 2003, no pet. h.) (noting "the three rights associated with the ownership of property: the power to possess, use, and dispose"). However, property rights are not absolute and, instead, can be limited. *See* Barber v. Tex. Dep't of Transp., 49 S.W.3d 12, 17–18 (Tex. App.—Austin 2001, pet. granted). For example, one can own the right to possess property but can lose some or all of it to adverse possession. *See* La. Pac. Corp. v. Holmes, 94 S.W.3d 834, 838 (Tex. App.—San Antonio 2002, pet. denied). In the case at hand, this disclosure clause limits the right of beachfront property owners to own and possess a house once it becomes seaward of the line of vegetation.

205. This argument is based on the assumption that this deed restriction is not an unreasonable or onerous exercise of state regulatory power. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (stating that the Takings Clause allows a landowner to assert "that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation"). In *Palazzolo*, the U.S. Supreme Court found that landowners could still bring takings claims against the state even though they purchased the land or took title with notice of the limitation. *See id*. at 628 (noting that a "blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken"). Therefore, the validity of the deed restriction imposed by the Texas legislature depends on whether it is a reasonable exercise of state authority. *See id*. at 627 (noting the right to improve property is subject to the "reasonable exercise of state authority, including the enforcement of valid . . . land-use restrictions"). Taking into account the value of these coastal beaches, a court will most likely find the deed restriction is a reasonable exercise of state authority. Refer to notes 2–7 *supra* and accompanying text (discussing the

B. Beachfront Property Bought Before October 1, 1986

People who bought beachfront property before October 1, 1986, did not sign this disclosure statement. Consequently, the "bundle of sticks" exception does not apply to them.[206] In fact, unlike their counterparts, these owners have potential takings claims against the state for removing a house under the OBA. Using *Lucas*, these owners could argue that the OBA deprives them of all economically viable use of the land because it completely removes their houses and prevents any reconstruction.[207] Because the OBA prohibits these owners from excluding people from their land,[208] the owners effectively lose any realistic opportunity to re-sell the land for profit. Therefore, the OBA leaves an owner's property "economically idle" as described in *Lucas*.[209]

While at first glance this appears to be a valid argument, a closer look shows its flaw—that the OBA's current enforcement policy removes a house only "when the house either significantly blocks public access to the beach or presents an imminent threat to public health."[210] In both of these situations, the house violates Texas state nuisance laws, and according to the second exception in *Lucas*, the state can remove the house and prevent its reconstruction under the OBA without compensating the owner.[211]

1. Texas Nuisance Law and the OBA. Applying *Lucas*, a state can enjoin an owner's use of a land without compensation—even if it deprives the owner of all economically viable use of the land—if that use violates the common law nuisance principles of that state.[212] Under Texas law, a public nuisance exists "wherever acts or conditions . . . constitute an obstruction of public rights."[213] In

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importance of preserving the access to and use of the Texas coastal beaches). However, if a court finds this deed restriction is unreasonable, then these owners are now in the same position as those who bought their property absent such a restriction.

206. Refer to note 199 *supra*.

207. Refer to notes 199–201 *supra* and accompanying text (explaining that, in the absence of a previous restriction on the land, a taking will be found if a regulation removes all viable economic interest in the land).

208. TEX. NAT. RES. CODE ANN. § 61.011(a) (Vernon 2001) (reserving free unrestricted public access to beaches).

209. *Lucas*, 505 U.S. at 1019 (justifying the finding of a taking).

210. Refer to note 143 *supra* and accompanying text (quoting the enforcement policy of the attorney general).

211. *See Lucas*, 505 U.S. at 1032.

212. Refer to notes 200–01 *supra* and accompanying text (finding that prohibiting a use that violates existing nuisance law does not constitute a taking).

213. Stoughton v. City of Fort Worth, 277 S.W.2d 150, 153 (Tex. Civ. App.—Fort Worth 1955, no writ) (holding that keeping and selling fireworks within 5000 feet of city limits is a public nuisance the city may properly enjoin).

addition, a public nuisance is anything that injures, harms, or causes a well-founded apprehension of danger to the public.[214] Under these common law nuisance principles, the state will remove a house under the OBA only when it violates Texas nuisance law.[215]

First, when a house "significantly obstructs public access" to the public beach, that house is obstructing a public right. As is evident in the OBA and *Seaway*, both the Texas legislature and the courts recognize the public right to free access of Texas's public beaches.[216] Therefore, when a house significantly obstructs public access to the beach, it is a nuisance under Texas law, and according to *Lucas*, the state can remove the house without compensation under the OBA.[217] Second, when a house "presents an imminent threat to public health," it violates the Texas nuisance law because the house could injure, harm, or cause a well-founded apprehension of danger to the public.[218] Whether or not a house "significantly obstructs public access" or "presents an imminent threat to public health" is a question of fact to be determined on a case-by-case basis by the attorney general.[219] However, an example of obstructed public access occurs when a house is located too close to the water, requiring the public to detour around the house when using the beach. This situation may also be an example of an imminent public health threat because, if present, the septic tanks for such a home are at the mercy of rising tides, posing a potential sanitary disaster for the public, the environment, and Gulf Coast residents.

2. The OBA Does Not Convert Private Property into Public Property. Another argument owners may make is that the OBA effects a physical taking because it physically takes their property for public use.[220] Owners could argue that, under the OBA and the rolling easement doctrine, private property is converted into public property when the private property becomes located seaward of the vegetation line. As a result, the owners lose the right to exclude,

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214. *Id.* at 152.

215. Refer to note 143 *supra* and accompanying text (outlining the attorney general's enforcement policy of OBA).

216. Refer to note 22 *supra* and accompanying text (noting the public right to use and access the beach).

217. Refer to note 143 *supra* and accompanying text (stating that under the current enforcement policy, the attorney general will remove a house that "significantly blocks public access" or "presents an imminent threat to public health").

218. *Stoughton*, 277 S.W.2d at 152.

219. TEX. NAT. RES. CODE ANN. § 61.011(c) (Vernon 2001). Refer to note 26 *supra* and accompanying text.

220. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (noting that a taking exists when an owner "suffer[s] a physical 'invasion' of his property").

possess, and enjoy their land,[221] leaving it essentially valueless.

The problem with this argument is that the OBA does *not* convert private property into public property. The actual conversion of the beachfront property occurs due to either slow, gradual erosion of the beach or fast, sudden erosion caused by a tropical storm or hurricane, both entirely natural processes. As a result of erosion, the rolling easement doctrine shifts the public easement to the newly formed line of vegetation.[222] Consequently, beachfront property once located on private property is now considered public beach.[223] Owners are aware of this risk of erosion before buying their property.[224] Furthermore, because owners can receive more property by accretion, they must also bear the risk of losing property due to erosion. Such is the case when buying beachfront property. To put the burden on the taxpayers to compensate owners for a burden homeowners have accepted is unfair. Therefore, because the OBA does not convert private beach houses into public beach, it does not effectuate a taking under the Fifth Amendment.

To win, private landowners would have to convince a court that the rolling easement doctrine somehow effects a taking or is not applicable in combination with the OBA. However, considering the fact that the rolling easement doctrine is a product of Texas common law and precedent regarding this issue,[225] an attorney would be hard pressed to convince a court that the doctrine should be considered a taking under the Fifth Amendment.

V. CONCLUSION

Property is hard law, especially in Texas. A person's right to own and use his house or property without public or governmental interference is perhaps the most fundamental of all property rights. However, in Texas, the value of public beaches to coastal cities and the public must be protected. For this reason, the Texas legislature enacted the OBA, which allows for the removal of, and prevents reconstruction of, houses after

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221. Refer to note 204 *supra* (discussing the "bundle of rights" afforded a property owner).

222. Refer to text accompanying note 166 *supra* (discussing the effects of the rolling easement doctrine).

223. TEX. NAT. RES. CODE ANN. § 61.011(a). Refer to notes 20–21 *supra* and accompanying text (quoting the OBA).

224. Refer to note 205 *supra* and accompanying text (noting the required disclosure of the effects of erosion on property rights).

225. *See* Feinman v. State, 717 S.W.2d 106, 110 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (finding that the rolling easement doctrine is implicit in the OBA).

they become located on the public beach. Some property owners may argue this removal is a taking under the Fifth Amendment and requires compensation because it deprives them of all economically viable and productive use of their land. However, under the current enforcement policy of the OBA, the attorney general only removes a house if it significantly blocks access to the beach or if it presents an imminent health risk to the public. In either situation, the house violates Texas common law nuisance principles, and under *Lucas*, a state can prevent a use of private land if such use violates these principles.[226] Therefore, when the attorney general removes a house under the OBA, a taking does not occur and compensation is not required.

The OBA is a just compromise. It recognizes not only the rights of beachfront owners to own property without interference from either the public or the government, but also the rights of the public to enjoy public beaches without interference from beachfront owners.

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226. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992).