No. 10-0142

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

ANGELA MAE BRANNAN, Individually and as
Independent Executrix of the Estate of
Bob Albert Brannan, deceased, *et al.*,

Plaintiffs-Appellants,

v.

STATE OF TEXAS, *et al.*,

Defendants-Appellees.

On Appeal from the District Court of
Brazoria County, Texas, 239th Judicial District
(Case No. 15802, The Honorable Patrick E. Sebesta, Presiding)

REPLY TO THE JOINT RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This case is not really about "the beach." It is about private land, residentially developed, which the State and Village (collectively, the State) has taken without compensation to create a public park. The Owners' elevated beach houses stood on this private land for decades. In the chain of title and on the ground there has never been public use, or a public right-of-way. The only event which the State cites to justify its taking is that this private land has lost its vegetation. Using its interpretation of the Open Beaches Act (OBA) and a recently developed concept it claims to be a "rolling easement," the State has taken over this private land and now exercises exclusive dominion over it. The State barricaded vehicle access, denied the Owners the right to repair, terminated utility services and, ultimately, demands the Owners remove their homes, all without compensation. *Brannan v. State*, 2010 Tex. App. LEXIS 799, at *9 (Tex. App. – Houston [1st Dist.] 2010). The homes are valueless and at the mercy of the elements.

The appellate court wrongly held that the de facto destruction and removal of homes was a lawful and constitutional application of the OBA. This case accordingly raises a number of important issues arising under the OBA, Texas' common law of easements, and the federal and state constitutions. In particular, as the court of appeals noted, this case raises an "issue of first impression" as to whether the disappearance of vegetation—and alleged appearance of the rolling easement—terminates rights in preexisting homes built before the easement encroached onto the land. Put another way, must a newly activated public access easement accommodate reasonable use of existing homes when it rolls onto and around the

land hosting the homes (1) as a matter of common law or, alternatively, (2) if the homes do not significantly impede public beach access?

The Court should take this case to provide fairness and clarity on these important issues. It should also address the other related issues, including whether removing the homes to effectuate a new easement causes an unconstitutional taking, and whether the State can establish an easement of implied dedication on land seaward of the Owners' homes by gathering the affidavits of three interested parties who state only that they have seen others near the shore without any proof where, when, or by whom the implied dedication was made. Also at issue is whether the State, if it can establish the existence of an easement, may "roll" that easement landward onto new, previously unburdened land without causing a compensable taking of private property.

ARGUMENT

IV

THE COURT SHOULD DECIDE WHETHER A PUBLIC PEDESTRIAN ACCESS EASEMENT THAT NEWLY ARISES ON LAND WHERE HOMES WERE LAWFULLY BUILT MUST ACCOMMODATE THE HOMES OR BE ACCOMPANIED BY COMPENSATION

A far-reaching issue of public and private beach property rights is presented here: whether a rolling easement that encroaches onto new areas of developed land without compensation must wrap around and allow continued existence of any existing, lawful structures either as a matter of common law or if the facts show the homes can coexist with public beach access. Assuming the rolling easement policy continues, this "scope of the

easement" issue will determine whether the OBA will operate in the future fairly, with due consideration for private as well as public rights, or whether it will become a draconian big State tool to instantly grab homes and businesses, without compensation, based on nothing but the loss of surrounding beach grass. This Court should decide.

A. The Private Homes Here Are Vested Property Rights Because They Predate Any Easement

The State rests its defense of its extreme position—that public access easement arising after homes are lawfully built eviscerates rights in those preexisting homes—on the common law. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). Yet, it offers no relevant common law support. It therefore spends most of its energy on presenting a skewed version of the facts. A short response is warranted:

> 1. The homes on the land were lawfully built on fee simple land in the 1960s. 2010 Tex. App. LEXIS 799, at *4. At that time, the sea (and any purported public way along the shore) was far away from the homes. CR at 0211 ¶ 30; 2010 Tex. App. LEXIS 799, at *4. The homes were then used without State interference for decades. CR at 0971-73. No public easement was ever established on the land under the homes. 2010 Tex. App. LEXIS 799, at *11.
>
> 2. There is no evidence the land where the homes sit was ever used for vehicle travel. Only land seaward of the homes was so used, and even this ceased seaward of the homes 30 years ago. *Id.* at *4.
>
> 3. It is "undisputed" that the land under the homes has never been impliedly dedicated to public use. *Id.* at *33.
>
> 4. The Texas Attorney General decided, after Tropical Storm Frances, that the homes did not impede public access at Surfside Beach. *Id.* at *4-*5. There has never been any finding that they presented a safety threat in their post-Frances state.

Given these facts, when Tropical Storm Frances washed away the vegetation in 1998, and an easement supposedly rolled inland onto the Owners' denuded land, that easement was

surrounding land built out with existing, safe private homes. A new public easement—new because public access now covered a previously private area of land—was contacting old, *vested* (*i.e.*, lawful, preexisting) private property interests. The homes were in place and first in time. The homes did not encroach; the alleged easement did.

B. Reasonable and Necessary Use Standards Require That a New Pedestrian Access Easement Accommodate Any Preexisting Homes

The question for this Court is what happens, under common law, when an easement newly appears on lawfully, developed land. In most circumstances, a public access easement is limited in location to the path of public use that created the easement. 26 C.J.S. Dedication § 18, at 434 (1956); 4 Tiffany on Real Property § 1218 (1975). The State cannot and does not contend that area of land physically supporting the Owners' homes is part of any established public path. Public access should go around the homes.

An easement must allow for continued reasonable use of the underlying estate, and take no private rights unnecessary to enjoyment of the easement. *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). The State tries to avoid this standard by stressing that an easement is the "dominant" estate while the underlying land is "servient" estate. Joint Response at 10. But whatever those labels mean, the State provides no authority that they do away with basic law holding that an easement cannot unnecessarily or unreasonably interfere with the title holders' rights. 2010 LEXIS 799, at *53. Morever, a "dominant" estate does not mean a total one, but that is exactly what the State seeks. It argues, and the court of appeals held, that the easement empties the landowners' estate—no homes, no right to use or control their land, or to exclude trespassers. This is simply not an application of the common law of easements,

and this Court should say so.

The reasonable and necessary use standards controlling here must be interpreted in light of the purpose of the subject easement. While a public access purpose might include public vehicular travel in some places, it does *not* do so *here* because vehicular travel was terminated by local law 30 years ago. The public and private rights allowed by a rolling easement here must be decided in light of pedestrian use only.

The State does not deny that the issue of whether it is necessary or reasonable to destroy vested homes that predate that easement to perpetuate pedestrian access is an important issue. Nor does it adequately explain why it is reasonable or necessary as a matter of law to destroy homes for pedestrian access to the sea. The easement can wrap around the homes, effectively requiring the Owners to give up their right to exclude others from their yards, while accommodating the homes. Thompson on Real Property § 60.02(d) at 394 (3d. ed.) (The easement holder cannot "make alterations in the Servient tenement, which are not necessary for the exercise of the easement, even though they conduce to the convenience of its exercise, if such alterations will injuriously affect the servient tenement."). At the very least, the issue of whether home removal is reasonable or necessary is a material fact issue that cannot be decided on summary judgment. Again, this Court should address the scope of easement issue and the proper judicial procedure for resolving it.

Finally, the State's response avoids the reality that the court of appeals sanctioned removal of the homes because it wrongly applied an "unobstructed use" OBA standard, rather than the common law reasonable and necessary use test. 2010 Tex. App. LEXIS 799,

at *54-*55. The switch is important because, if common law principles would not justify removal of the homes, removing the homes is occurring under the OBA, which means that the State is engaged in a statutory taking of property. This always requires just compensation. *See*, *e.g.*, *Lucas*, 505 U.S. at 1029; *Estate of W. T. Waggoner v. Gleghorn*, 378 S.W.2d 47, 50 (Tex. 1964). Even if the homes are removed under a purported common law rule, compensation is warranted because the homes are vested property rights.

The Court should take this case to apply the correct common law rules and to clarify whether the common law scope of the rolling beach access easement (here, pedestrian only) permits continued existence of the homes. If removal must proceed, the Court should decide whether just compensation is constitutionally due to the Owners.

V

THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER THE STATE CAN ESTABLISH AN IMPLIED DEDICATION OF AN INDEFINITE SPACE BY EVIDENCE OF PEOPLE IN THE AREA AND DRIVING THAT ENDED DECADES AGO

Contrary to the State's position, the court of appeals did not properly apply the law in holding that the State had established the existence of an implied dedication along some vague strip of shore between the high tide and vegetation line by submitting testimony that people walked in the general area. The State implies that it is the Owners' burden to prove there is *no* easement, but it is not. It is the State's burden to make the requisite evidentiary showing that one exists. Thus, the fact that the Owners did not contradict testimony that people walk near the sea does not make the testimony sufficient to establish an easement.

The State's evidence must rise to the level of meeting the elements of a dedicated easement on its own. *Broussard v. Jablecki*, 792 S.W.2d 535, 537-38 (Tex. App.-Houston [1st Dist.] 1990). It does not do so here.

Dedication requires donative intent. *Owens v. Hockett*, 151 Tex. 503, 505-06 (Tex. 1952). It is also competency or authority to dedicate. Here, the court of appeals held there was a dedication of undeveloped land all along the seashore (an area encompassing numerous, distinct private lots of property) and inland from the high tide line to the vegetation line. But neither the State nor the court of appeals can say when and by whom and where exactly this massive dedication of land occurred. Without some specificity, it cannot be said that the State has met the elements of intent. In particular, did the assumed intent include a grant of right in the public to remove structures if the alleged easement space should shift? *Cf.* Restatement (Third) of the Law (Servitudes) § 74.10 Comment G ("[I]t is not assumed that the servient owner intends to permit the easement owner to remove existing structures or terminate existing uses.").

The indeterminacy as to circumstances of the purported dedication also make it impossible to show competency on summary judgment. *Broussard*, 792 S.W.2d at 537-38. Indeed, there is a question as to whether any single owner or set of owners ever has authority to dedicate such an ill-defined and changeable area as the area between the high tide line and the vegetation line. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 211 (Tex. 1963) ("Some degree of definiteness in the scope or extent of an interest is essential."). The Court should take the case to clarify the State's burden to prove an implied dedication and,

specifically, to hold that more must be done than submitting evidence that people walk "in the area" or relying on an alleged dedicatory purpose that is defunct. *Griffith v. Allison*, 128 Tex. 86 (Tex. 1936) (When the object of dedication can no longer be sustained, the dedication for that purpose may be abandoned.).

VI

THE ROLLING EASEMENT TAKINGS ISSUE IS LIVE HERE

The State is wrong in contending that the Owners waived a challenge to the constitutionality of the OBA policy of rolling (imposing) a public easement on their land simply because it lost vegetation. In the appellate court, the Owners argued that the imposition of a "rolling" easement on their land caused an unconstitutional taking. *See* Opening Brief at 2, 21, 47-49; *see also* Reply Brief at 21. The Owners later advised the appellate court that their case did not "focus" on the rolling easement takings issue, but they never waived or conceded the issue.

Further, contrary to the State's claims, the court of appeals never said the Owners waived a challenge to the constitutionality of the rolling easement policy. 2010 Tex. App. 799, at *39. Indeed, the court of appeals recognized the issue was at hand and *addressed it* in its published opinion. 2010 Tex. App. LEXIS 799, at *57 n.8, *40 n.7, *37-*39, *64-*65. This Court may address any issue argued or passed on by a lower court. Even if one concludes (against the record) that the Owners did not sufficiently raise the issue of whether it is constitutional to roll an easement on their developed beachfront land, the issue was passed on by the lower court, *id.*, rendering it live before this Court.

DATED: September 16, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE

I, DONNA M. GREENE, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On September 16, 2010, true copies of the REPLY TO THE JOINT RESPONSE TO PETITION FOR REVIEW were placed in envelopes addressed to:

Ken Cross
Natural Resources Division
P.O Box 12548, Capitol Station
Austin, TX 78711-2548
For the State of Texas, General Land Office,
Attorney General and Land Commissioner

George W. Vie, III
Mills Shirley L.L.P.
2228 Mechanic Street, Suite 400
Galveston, Texas 77550
For the Village of Surfside Beach, Texas and its Mayor

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under the penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 16th day of September, 2010.

DONNA M. GREENE

.