

SUBJECT: Suspending enforcement of the law guaranteeing access to public beaches

COMMITTEE: Land and Resource Management — favorable, without amendment

VOTE: 5 ayes — Mowery, J. Jones, Guillen, Haggerty, Howard

0 nays

3 absent — Hochberg, Noriega, Pickett

WITNESSES: For — Sidney McClendon, Galveston County Beach Erosion Task Force, West Galveston Island POA; Jerry Mohn, West Galveston Island Property Owners Association; Jerry Patterson, Texas General Land Office

Against — Jim Marston, Environmental Defense; Dan McNamara, Lone Star Chapter of the Sierra Club; A.R. “Babe” Schwartz; Keeton Turner, Surfrider Foundation (*Registered, but did not testify.*) Jamie Mitchell and Dr. Terry Hallmark, Surfrider Foundation

On — Karen W. Kornell, Office of the Attorney General

BACKGROUND: Natural Resources Code, ch. 61, subch. B concerns access to public beaches. Under sec. 61.011, the public, individually and collectively, has free and unrestricted access to state-owned beaches. Specifically, the public owns the land that extends between the mean low tide and a point about 10 miles offshore. The public also owns the area between the mean low tide and average mean high tide — “wet beach.” Finally, the public has an easement right of ingress and egress in the “dry beach” area between the average high tide mark and the line of vegetation. This public easement is said to be a “rolling easement” because the vegetation and high tide marks change as time passes.

Sec. 61.013 prohibits any person from constructing any obstruction, barrier, or restraint (including a residence) that interferes with the lawful and unrestricted right of the public to enter or to leave beach areas where the public has acquired a right of use or easement. Sec. 61.011(c) requires the attorney general to strictly and vigorously enforce this prohibition against

encroachments on the public beach easement and authorizes the General Land Office (GLO) to assist in enforcing this requirement.

Under sec. 61.018, the attorney general, individually or at the request of another party, must file a suit to obtain either a court order to remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or to prohibit any unlawful restraint on the public's right of access to and use of a public beach or other activity that violates this chapter. The attorney general also may bring a suit for a declaratory judgment to try any issue affecting the public's right of access to or use of the public beach.

A state attorney may recover penalties and the costs of removing any encroachment if it is removed by public authorities pursuant to an order of the court. A person who violates this chapter is liable for a civil penalty of not less than \$50 nor more than \$1,000. Each day the violation occurs or continues is a separate violation.

DIGEST:

HB 1457 would authorize the GLO commissioner to prohibit for a period of two years the filing of a suit under sec. 61.018 by the attorney general or any county, district, or criminal district attorney to remove any improvement, obstruction, barrier, or other encroachment from a public beach if the commissioner determined that:

- the line of vegetation establishing the boundary of the public beach had moved as a result of a meteorological event;
- the improvement, obstruction, barrier, or other encroachment was located landward of the line of vegetation before the meteorological event; and
- the line of vegetation has not stabilized.

The GLO commissioner could extend for an additional two years a prohibition on filing suit by the attorney general or county, district, or criminal district attorney if the commissioner determined that the public beach and line of vegetation were showing signs of recovery from a hurricane or tropical storm but had not yet fully recovered.

HB 1457 would require the GLO commissioner to notify the attorney general and other state attorneys of the issuance of any order the bill would authorize.

During the period a GLO prohibition on filing suit to remove an encroachment from a public beach was in effect, the owner of a structure located on the public beach could not improve or repair the structure or the land on which it was located, except to make the structure habitable.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

HB 1457 would provide state and local governments flexibility to assess the difficult case of a property owner whose home or other investment in became located in public beach area — wet beach or dry — where it was prohibited by state law. Vegetation lines sometimes restore themselves during the months or few years following a storm, hurricane, or other meteorological event. Coastal homeowners, who often have large investments in property, should not be forced unjustly from land they purchased when beach restoration that could occur later would once again make them rightful owners of that land.

The bill properly would grant discretion to the GLO commissioner to prohibit legal actions by the state against the owners of affected beach property. The GLO commissioner is the proper party to hold this authority because GLO already has legal obligations and technical expertise in regard to public beaches. GLO may assist the attorney general in bringing cases against prohibited constructions on public beaches and must make determinations about coastal erosion in issuing permits. In addition, the GLO commissioner is more of a policymaker than the attorney general, whose role should be the enforcement of state laws.

The bill would not encourage property owners to invest significantly in their constructions during this period. They could do so only to restore an existing home's habitability.

**OPPONENTS
SAY:**

HB 1457 would compromise the rights and remedies of the public with respect to Texas beaches, which trace to common law, Spanish Civil Law, and the Justinian Code. For centuries, unrestricted public access to beaches has provided inhabitants with access to food and recreation. As a result, the

law charges the attorney general to strictly and vigorously enforce the state's prohibition against encroachments on the public beach easement. HB 1457 would erode that mandate.

Buyers of coastal property receive ample notice that certain coastal lands are subject to public ownership or easement. They receive notice by exemption to their title policy, a document they sign when providing earnest money for their purchase, and an addendum they also sign at closing. As a result, buyers of coastal property should not gain easy relief when coastlines erode and their properties become located where they are prohibited.

Current law has proven workable in managing difficult cases of shifting property rights and ownership along the coasts. In 1999, following Tropical Storm Francis, the attorney general evaluated more than 100 homes that had become located on public beaches. In exercising the inherent discretionary authority of his office, the attorney general determined that all but about four of the prohibited structures could remain because they did not create substantial obstruction or endanger public health, safety, or welfare.

HB 1457 improperly would create an incentive for people to invest in coastal home ownership now and during any moratorium period. Protections the bill would give coastal property owners, including the right to repair a property to make it habitable even after it became located on public beach, could encourage more home ownership near existing public beaches and create more conflicts in the future as beach erosion continued to advance. Since the 1930s, most Texas beaches have eroded five to 15 feet a year.

NOTES:

The companion bill, SB 554 by Janek, was heard by Senate Natural Resources on May 6 and left pending.