

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

CHARLES SHEFFIELD and  
PEDESTRIAN BEACH, LLC,

Plaintiffs,

v.

GEORGE P. BUSH, in his official capacity  
as Commissioner of the Texas General Land  
Office, and KEN PAXTON, in his official  
capacity as Attorney General for the State of  
Texas,

Defendants.

Civil Action No. 3:21-cv-00122

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND MEMORANDUM IN SUPPORT**

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## INTRODUCTION

We cannot agree that the right to exclude is an empty formality, subject to modification at the government’s pleasure. On the contrary, it is a “fundamental element of the property right,” that cannot be balanced away. Our cases establish that appropriations of a right to invade [private land] are *per se* physical takings . . . .

*Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (citation omitted).

Pursuant to Federal Rule of Civil Procedure Rule 65, Charles Sheffield and Pedestrian Beach, LLC, (Plaintiffs) hereby move the Court to issue a preliminary injunction halting the enforcement of an order issued by the Texas General Land Office Commissioner (“Commissioner”) that converts private beachfront land into a public beach area.

Sheffield and Pedestrian Beach, a family-run vacation rental business, own residentially developed beachfront properties in Surfside Beach, Texas. Plaintiffs personally use and rent their beach homes, which sport nicknames like “Paradise Point” and “Dos Vistas,” for family vacations. *See* Declaration of Merry C. Porter (Porter Dec.), attached as Ex. 1, at 1–3. The properties all lie on private lots located inland of the mean higher tide line, the boundary between the state-owned wet beach area and private upland property. *Id.* ¶ 38; Declaration of Charles Sheffield (Sheffield Dec.), attached as Ex. 2, at 1–3, *id.* at 7, ¶ 39.

The properties changed drastically on March 29, 2021, when the Commissioner of the General Land Office issued an Order that moved the public beach onto Plaintiffs’ properties. *See* Ex. 3 (Order). Citing storm damage to beach vegetation, the Order declares that, for the next two years, the “public beach shall extend to a line 200 feet inland from

the line of mean low tide (MLT).” Ex. 3 at 2. Many private, developed parcels, including those owned by Plaintiffs, are within the new, 200-foot public beach area created by the Order. As such, they are subject to Texas Open Beaches Act rules that guarantee public access to public beach areas. Tex. Nat. Res. Code § 61.013(a); *id.* § 61.014(b).

The Order has enormous consequences for all who own residentially developed beachfront lots within the new, 200-foot “public beach” area. Private titles to beachfront property in Texas include the fundamental “right to exclude” trespassers, whether for privacy, safety, or protection against accident liability. This right is subject to rigorous constitutional protection because it is fundamental to the concept of “private” property. The Commissioner’s determination that “the public beach” now covers all land between the MLT and 200 feet line eviscerates numerous owners’ right to exclusively possess and use their private property.

State officials have known for years that impressing private land with a “public beach” or “public beach easement” conflicts with constitutional and state law property protections. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987) (a taking results from government authorization of “a permanent and continuous right [in the public] to pass to and fro, so that the real property may continuously be traversed”); *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012) (holding that public beaches cannot be presumed on private Gulf-front land, but must first be established in court under common law doctrines); *Severance v. Patterson*, 682 F.3d 360 (5th Cir. 2012) (property owner stated a valid “unreasonable seizure” claim based on action moving the public beach onto her land). Yet, they took that step anyway with the Order. The action is unconstitutional several times

over. It unconstitutionally takes property, violates basic procedural due process norms, and arbitrary and unreasonably seizes residential land based on the loss of beach grass. The officials deserve to be preliminarily enjoined from enforcing the Order, and the Court has power to so. *Ex parte Young*, 209 U.S. 123 (1908); *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009) (On the issue of “whether the State may constitutionally impose an easement, . . . *Ex Parte Young* applies, and [the] suit is not barred by sovereign immunity.”) (citation omitted).

## LEGAL BACKGROUND AND FACTS

### A. Texas Coastal Property Law

#### 1. Background Principles

Gulf coast beaches in Texas are generally split into two zones. There is the “wet beach,” a periodically inundated area lying between the mean low tide line (MLT) and the high tide line. *Severance*, 370 S.W.3d at 714–15. Inland of the wet beach, there is a strip of generally dry beach land which terminates on its landward side where the coastal vegetation begins. *Id.* While the wet beach is state-controlled property held in trust for public use, *id.* (citing *Luttes v. State*, 324 S.W.2d 167, 169, 191–92 (Tex. 1958)), dry beaches inland of the mean high tide line are private, and are not inherently burdened by public access rights. *Severance*, 370 S.W.3d at 714; *id.* at 724.

Given this framework, the most important feature on Gulf coast beaches is the high tide line. At Surfside Beach, as with all coastal land derived from a Mexican land grant,<sup>1</sup>

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<sup>1</sup> *Luttes*, 324 S.W.2d at 174–75, 191.

the high tide line is defined as the *mean higher high tide* mark, which is itself calculated as an average of highest daily tides over a 19-year period, *Luttes*, 324 S.W.2d at 187. *Severance*, 370 S.W.3d at 717. Again property, whether sandy or vegetated, located landward of the mean higher high tide line is generally private. *Severance*, 370 S.W.3d at 714; *id.* at 726 (“*Luttes* [] set the boundary between State and privately owned property at the mean high tide line.”).

The public can, however, acquire access to private, upland beach areas through purchase (eminent domain), owner consent, or by establishing in court that a common law public easement—such as one arising from prescription or dedication<sup>2</sup>—exists. *Severance*, 370 S.W.3d at 715 (“[W]here the dry beach is privately owned, it is part of the ‘public beach’ if a right to public use has been established on it.”); *id.* at 719 (“The public has a right to use [the] beaches when the State owns the beaches or the government obtains or proves an easement for use of the dry beach under the common law[.]”). But until a court determines that a common law easement exists on private beach lands, the owner enjoys all the usual incidents of ownership, including the right to exclusively control and use the land. *Id.* at 714 (“the right to use [the privately held dry beach] is not presumed”); *id.* at 733 (Willett, J., concurring) (“Easements may well burden private Gulf Coast properties, including on West Galveston Island—but they must be proved, not merely presumed.”).

Where a public beach or easement exists, the Texas Open Beaches Act protects the

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<sup>2</sup> Establishing a public easement requires a judicial finding that the specific facts necessary to create a common law easement exist over a specific area. *See generally Brooks v. Jones*, 578 S.W.2d 669, 673–74 (Tex. 1979).

public’s right to use and access that area. *Severance*, 370 S.W.3d at 718–19 (citing Tex. Nat. Res. Code § 61.011(a)). The Act bars private beachfront property owners from taking any action—including construction, oral communications or erection of signs—that might interfere with public access to “public beaches.” Tex. Nat. Res. Code § 61.013(a) (“It is an offense . . . for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively, lawfully and legally to enter or to leave any public beach[.]”); Tex. Nat. Res. Code § 61.014(b) (“No person may display or cause to be displayed on or adjacent to any public beach any sign, marker, or warning, or make or cause to be made any written or oral communication which states that the public beach is private property or represent in any other manner that the public does not have the right of access to the public beach as guaranteed by this subchapter.”).<sup>3</sup>

## **2. *Severance* Rejects the Vegetation Line as the Default Public Beach Boundary and Confirms Traditional Property Rules**

In tension with the foregoing principles, for many decades, the Commissioner treated the first line of vegetation, rather than the mean high tide line, as the boundary between private and public beaches. *Severance*, 370 S.W.3d at 718 (noting that, in a 1959

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<sup>3</sup> These prohibitions are enforced through numerous state and local regulations. 31 Tex. Admin. Code § 15.1(7); *id.* § 15.16; *see also*, [GLO certified] Village of Surfside Dune Protection and Beach Access Plan at 40 (as amended Sept. 2015) (“No person shall display or cause to be displayed on or adjacent to any public beach any sign, marker, or warning, or make or cause to be made any written or oral communication or other representation that the public beach, or a public access way to and from the public beach, is private property not subject to use by the public.”), *available at* <https://www.glo.texas.gov/coast/coastal-management/forms/files/surfside.pdf>.

case, the State argued (unsuccessfully) that the public beach “extended to the vegetation line and included the dry beach”). Under past policy, the Commissioner presumed that all private dry beaches up to the vegetation line were public beaches, and he regulated them as such under the Act. *Feinman v. State*, 717 S.W.2d 106, 107 (Tex. Ct. App. 1986) (“The State counterclaimed, requesting that the trial court declare that the public has an easement over all land located seaward of the natural line of vegetation[.]”). The state’s practice included a “rolling easement” theory which officials claimed allowed them to move any established public beach easement inland, onto new areas of private land, whenever storms caused the vegetation line to shift landward. *Id.*

In *Severance*, the Texas Supreme Court rejected the Commissioner’s policy of automatically treating the vegetation-line as the landward boundary of public beach lands. The court confirmed that the mean high tide line is still the default boundary between public and private beach areas. It further held that private dry beaches lying landward of the mean high tide line, and between that line and the line of vegetation, cannot be presumed to be public beaches or subject to public easements. Instead, those private areas may be regulated as public beach areas or easements only after the state first judicially proves an easement exists under common law principles, like prescription. *Severance*, 370 S.W.3d at 714 (“the right to use [the privately held dry beach] is not presumed”); *id.* at 721 (“We have never held that the State has a right in privately owned beachfront property for public use . . . without proof of the normal means of creating an easement.”); *id.* at 733 (Willett, J., concurring).

Finally, *Severance* held that when the state establishes a prescriptive or other

common law public easement on private beach land, that easement does not move upland onto new areas of private land just because storms strip away grass and move the vegetation line farther inland. 370 S.W.3d at 723–24. After storms, public easements remain at their *pre*-storm location, unless and until the state once again judicially proves a common law easement over additional, upland areas. *Id.* at 724 (“If the public is to have an easement on newly created and privately owned dry beach after an avulsive event, the State must prove it, as with other property.”); *see also, id.* at 726.

The state has never established in court that a common law (prescriptive/dedicated-type) easement exists over coastal land lying between the mean higher high tide line and vegetation line in Surfside Beach.

## **B. Sheffield’s and Pedestrian Beach’s Properties**

Sheffield owns several residentially developed beachfront properties at 109, 111, and 814 Beach Drive, Surfside Beach (Beach Drive Properties). Sheffield Dec. at 1–4. Plaintiff Pedestrian Beach also owns beachfront property in Surfside Beach, including a developed lot at 1206/1207 Sargrasso Circle, Surfside Beach, Texas (Sargrasso Property). Porter Dec. at 1–2, ¶¶ 5–10.

### **1. Sheffield’s Properties**

The properties Sheffield owns at 109 and 111 Beach Drive are comprised of two adjacent, residentially developed parcels known as Lot 4 and 5 of Block 2 of the G.D Shanks Addition to the Town of Surfside. Sheffield Dec. at 2, ¶ 5. These lots include some of the adjacent dry beach area. *Id.* ¶ 6. The deed and titles to the properties at 109 and 111 Beach Drive do not include any public beach access easement or reserved public access

rights. *Id.* ¶ 7.

Sheffield's property at 109 Beach Drive contains a two-bedroom, A-frame style home that was lawfully built in approximately 2009. The property at 111 Beach Drive contains a "duplex" style structure which includes two separate, 2-bedroom units. 109 and 111 Beach Drive share a private stairway that runs from between the two homes to the beach below. Sheffield purchased the 109 and 111 Beach Drive properties together in 2019 for approximately \$570,000, and quickly invested another \$30,000 to make them suitable for rental and personal use. *See* Sheffield Dec. at 1–3, ¶¶ 2–12; Ex. A to Sheffield Dec. (Photos).

The home at 109 Beach Drive used to occupy a portion Sheffield's property that is closer to the Gulf waters. But, in approximately 2009, the home was moved landward to its current position. Prior to 2009, a home was also located in front (seaward) of the current structure on 111 Beach Drive. That older home was removed in 2009, and the existing, larger home was built in its present location at 111 Beach Drive. Sheffield Dec. at 2, ¶ 8.

Sheffield also owns a parcel at 814 Beach Drive, Surfside Beach, Texas 77541, which he purchased in 2015 for \$188,000. The parcel is on the landward side of Beach Drive, a two-lane, public road that separates his property from the Gulf shoreline. The 814 Beach Drive property is covered by vegetation, including vegetation seaward of the home. The deed and title to this property do not include a public beach access easement or any reserved public access rights. Sheffield Dec. at 3, ¶¶ 14–16. A three-bedroom home was lawfully built on the 814 Beach Drive parcel in approximately 1984. *See* Sheffield Dec. at 3, ¶ 17.

Sheffield rents all of his Beach Drive homes to families and others for beach visits. He also personally uses the properties for family get-togethers with his three sons and eight grandchildren. *Id.* at 4, ¶ 20. The income from renting the Beach Drive properties is one of his primary sources of income. *Id.* ¶ 21. Sheffield carefully maintains all of the Beach Drive properties and has invested tens of thousands of dollars in the last five years for maintenance, including for air conditioning repairs, sand replacement, and minor repairs to the stairway between 109 and 111 Beach Drive. On average, he invests approximately \$5,000–\$10,000 annually for maintenance. *Id.* ¶¶ 23–24.

When the homes on Sheffield’s Beach Drive lots were constructed, they were located landward of the mean higher high tide line and vegetation line. The homes were not constructed on a public beach area. Sheffield Dec. at 4, ¶ 19. None of his Beach Drive homes have been subject to an official enforcement proceeding seeking removal of the homes on the ground that they are on the public beach or an encroachment on a public easement. No one has ever sued Sheffield or his predecessors in title, to establish a public easement on the Beach Drive properties, and no court has ever issued a judgment establishing that such an easement burdens the title. *Id.* at 5, ¶¶ 26–27. On or about June 14, 2021, a state licensed land surveyor carried out a survey of Pedestrian Beach’s property. The survey found that the lot, and the duplex home on the lot, is located landward of the mean higher high tide line. *See id.* at 6–7, ¶¶ 36–37; Ex. F to Sheffield Dec. (June 14, 2021 survey).

## **2. Pedestrian Beach’s Duplex Property**

Merry Porter is the owner of Pedestrian Beach, LLC. In 1981, her now-deceased

husband purchased a residentially developed parcel known as “lot 2 block 2” of the Palm Beach Subdivision, Surfside Beach, for approximately \$19,000. It has a mailing address of 1206/1207 Sargrasso Circle, Surfside Beach, Texas 77541. The deed and title to this property does not include a public beach access easement or any reserved public access rights. In approximately 2007, the Property was transferred to Pedestrian Beach, LLC. Porter Dec. at 1–2, ¶¶ 5–7.

In 1985–1986, the Porter family built a two-unit duplex structure on the lot for approximately \$79,000. *Id.* at 2, ¶ 13. The duplex is approximately 2,400 square feet in size, including deck and porch areas. It is built on pilings, allowing occasional storm surges to flow beneath the home. Each unit in the duplex includes a two-bedroom, two-bathroom living space and is equipped with a wheelchair ramp that runs from dry land on the landward side of the building up to the units. *See* Ex. B to Porter Dec. (photos). When built, the duplex was located landward of the mean higher high tide line and vegetation line. It was not built on a public beach. Porter Dec. at 2–3, ¶ 14; *id.* at 3, ¶¶ 17–20.

Pedestrian Beach rents the duplex to families and others for beach visits. This practice generates approximately \$60,000 per year in rental income for Merry Porter. Pedestrian Beach has invested thousands of dollars in the last five years for permitted repairs and maintenance, including for painting, replacement of air conditioning units, and repair of the wheelchair ramps. Pedestrian Beach invests approximately \$6,000 annually in maintenance. Porter Dec. at 3–4, ¶¶ 20–21.

The Pedestrian Beach duplex has never been subject to an official enforcement proceeding to remove it on the ground that it is on the public beach or an encroachment on

a public beach easement. Members of the public have never continuously or consistently walked on the land under the duplex, where numerous, closely spaced pilings exist to support the structure. No one has ever sued Pedestrian Beach or its predecessors to establish the existence of a public easement on the Property, and no court has ever issued a judgment establishing such an easement on the Property. Porter Dec. at 4–5, ¶¶ 25–28.

On or about June 14, 2021, a state licensed land surveyor carried out a survey of Pedestrian Beach’s property. The survey found the lot, and the duplex home on the lot, is located landward of the mean higher high tide line. *See id.* at 6, ¶¶ 35–36; Ex. E to Porter Dec.

### **C. The GLO 200-foot Public Beach Order**

In late summer of 2020, two tropical storms—Hurricane Laura and Tropical Storm Beta—came ashore in Texas. These storms affected sand and coastal vegetation patterns along Surfside Beach. Ex. 3 at 1 (Order). The storms did little damage to the structures on Sheffield’s Beach Drive properties, but did remove sand from around the structures. The storms damaged three pilings and the wheelchair ramps on Pedestrian Beach’s property, but otherwise left the duplex unscathed. *See* Sheffield Dec. at 5, ¶¶ 30–31; Porter Dec. at 5, ¶¶ 29–30.

On March 29, 2021, the Commissioner issued an Order pursuant to Tex. Nat. Res. Code § 61, *et seq.* (The Open Beaches Act) entitled, “Temporary Order Suspending Determination of the Line of Vegetation and Suspending Enforcement of Certain Encroachments on the Public Beach.” Ex. 3. The Order declares that Hurricane Laura and Tropical Storm Beta caused a “loss in elevation and a loss of vegetation,” and that the line

of vegetation has been “obliterated” in the Village of Surfside Beach. *Id.* at 1. The Order then declares that, for a period of two years, “the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT[.]”<sup>4</sup> Ex. 3 at 1–2. It further states that “the public beach shall extend to a line 200 feet inland from the line of mean lot tide.” *Id.* at 2. Thus, adoption of the 200-foot line as the public beach boundary established that the public beach itself extends to that line. *Id.* The Order states: “[t]he area from MLT to 200 feet landward shall be the minimum public beach easement” area. *Id.* at 2. The Commissioner recognized that creating this 200-foot public beach area would “mean that a limited number of homes are now partially or wholly located on the public beach.” Ex. 4, at 1.

Upon issuing the Order, the Commissioner also issued aerial photos showing the approximate location of the new 200-foot public beach boundary line in Surfside Beach. Ex. D to Porter Dec.; Ex. E to Sheffield Dec. These photos show the 200-foot line crossing numerous residentially developed beachfront parcels. In many cases, the line appears to bisect beach homes.

A June 14, 2021 land survey commissioned by Sheffield and Pedestrian Beach shows the 200-foot public beach boundary located appreciably landward of the mean

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<sup>4</sup> The Order refers to Tex. Nat. Res. Code § 61.0171, as its enabling authority. That provision provides, in part, that if the Commissioner determines a “meteorological event,” “obliterated” the line of vegetation in a coastal area, he “may” issue an order that suspends line of vegetation determinations and sets the public beach boundary at a line 200 feet from MLT. The provision states that “[i]ssuance of an order under this section is purely within the discretion of the commissioner.” *Id.* Tex. Nat. Res. Code § 61.0171(c).

higher high tide line. *See* Ex. E to Porter Dec.; Ex. F to Sheffield Dec. (survey). According to the Order, all private land located between the mean higher high water mark and the 200-foot line is a public beach area. *Id.*; *see* Ex. 1. at 2.

With respect to Plaintiffs' parcels, the June 14, 2021 survey shows that the 200-foot public beach boundary line runs across the middle of Sheffield's 109 and 111 Beach Drive properties, and is located a few feet seaward of the homes. About half of those lots are within the 200-foot public beach area. The 200-foot boundary line runs through the stairs that serve the homes, putting about a 1/3 of the stairway on the 200-foot "public beach" area created by the Order. Sheffield Dec. at 7, ¶¶ 37–39; Ex. F to Sheffield Dec. With respect to Pedestrian Beach's Sargrasso property, the 200-foot boundary line lies landward of the duplex home and the vast majority of the lot on which it sits. Porter Dec. at 6, ¶¶ 36–38; Ex. E to Porter Dec. Most of the lot is thus subject to the public beach easement established by the Order.

Neither Sheffield, Pedestrian Beach, or anyone working in their behalf received notice of the Order prior to its issuance. No notice of the Order was posted on the properties or received through electronic or regular mail. Neither Sheffield nor Pedestrian Beach was provided with an opportunity to be heard about the Order, prior to its issuance. The Order does not require any preliminary judicial determination of a common law easement prior to enforcement of a public beach to the 200-foot line; it became effective upon issuance and is effective now.

### **STANDARD OF REVIEW**

A district court may grant preliminary injunctive relief if the moving party shows:

(1) a substantial likelihood of success on the merits; (2) it is likely to suffer irreparable harm in the absence of relief; (3) the balance of equities favors the movant; and (4) the injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). To prove a likelihood of success, the plaintiff must “present a prima facie case, but need not prove that he is entitled to summary judgment.” *Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). Put another way, the movant must show a “reasonable probability of success, not an overwhelming likelihood.” *Casarez v. Val Verde County*, 957 F. Supp. 847, 858–69 (W.D. Tex. 1997) (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991)). Further, when, as here, the complaint raises several claims, the plaintiff must only present a substantial case on one of the claims. *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 519 (S.D. Tex. 2020); *Texas v. United States*, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015).

## ARGUMENT

### I. THE OWNERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS

#### A. Plaintiffs Will Show That the Order Unconstitutionally Takes Private Property

Sheffield and Pedestrian Beach claim that the Order effects an unconstitutional taking of private property on its face. Such a claim asserts that a restriction, here, the Order, effects an unconstitutional taking upon enactment. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736 & n.10 (1997). The remedy for a law that facially takes property is declaratory relief and an injunction. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 345-46 (2005); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S.

264, 295 (1981). Here, the Order effects a taking on its face by extending the public beach to 200 feet landward of MLT, thereby re-making all private land within that 200-foot area, including Sheffield’s and Pedestrian Beach’s properties, into a “public beach” area. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“a State, by *ipse dixit*, may not transform private property into public property”).

### **1. Takings Standards**

The Takings Clause of the Fifth Amendment prohibits uncompensated takings of private property.<sup>5</sup> U.S. Const. amend V. A “taking” occurs when government engages in or authorizes a physical invasion of property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Indeed, a physical invasion of property is a *per se* taking, regardless of the public purpose for the invasion, its size or duration. *Cedar Point*, 141 S. Ct. at 2074 (“The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.”) (citation omitted).

The most obvious example of a physical taking is when the government invades property for its own use. But a taking also occurs when the government authorizes third parties, such as members of the public, to invade and use private land. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Nollan*, 483 U.S. at 833. The authorization of a public invasion of private land is sometimes described as a taking of an “easement,” and the Supreme Court has made clear that this too violates the Takings Clause. *Nollan*, 483 U.S. at 834 (“requiring uncompensated conveyance of the [access]

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<sup>5</sup> Takings claims are now justiciable in federal court without regard to the existence of overlapping state court remedies. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172-73 (2019).

easement outright would violate the Fourteenth Amendment”); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

The authorization of a physical invasion of property and related taking of an access easement so readily qualifies as a taking because such actions deprive a property owner of the “right to exclude others” from their property. *Nollan*, 483 U.S. at 831–32. This right, which includes the subsidiary right to control and limit entry onto one’s land, is one of “the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna*, 444 U.S. at 176. The right to exclude is in essence a privacy right, for without it, property is not “private” at all. For these reasons, a government action that interferes with the right to exclude strangers from private land is a per se taking. *Id.* at 179–80 (“[the ‘right to exclude,’ so universally held to be a fundamental element of the property right . . . cannot [be] take[n] without compensation.”) (footnote omitted); *Nollan*, 483 U.S. 831–32; *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991).

## **2. The Order Effects a Per Se, Physical Invasion Taking On Its Face**

In this case, the Order causes a per se taking by turning all private land between the mean low tide line and the 200-foot line, including Plaintiffs’ private lots, into a “public beach” area or a “public beach easement” *See* Ex. 3 at 2. This subjects the private land to continual public access under Open Beaches Act provisions that guarantee access to all public beach areas and prohibit private restrictions on public access to public beaches. Tex. Nat. Res. Code § 61.013; *id.* § 61.014(b). Indeed, property owners are subject to substantial fines if they attempt to prevent people from using any “public beach” or “public beach easement.” *See* Tex. Nat. Res. Code § 61.0181; 31 Tex. Admin. Code § 15.9(a)(1)(A)

(“Violations of . . . the Open Beaches Act, and the rules adopted pursuant to those statutes are separate violations, and the General Land Office may assess separate penalties.”). Thus, by converting all land “from MLT to 200 feet landward” into a “public beach” after Hurricane Laura and Tropical Storm Beta, enactment of the Order authorized a public invasion of private land and stripped the owners of their right to exclude others. This is a *per se*, facial taking. *Petworth Holdings, LLC v. District of Columbia*, — F. Supp. 3d —, 2021 WL 1167019, at \*7 (D.D.C. Mar. 26, 2021) (statute caused a taking by requiring continued public access to a gas station). That the public may actually use private land subject to the new, 200-foot public beach area “only from time to time” is irrelevant. The grant of the right to access is the taking. *Cedar Point*, 141 S. Ct. at 2075. Similarly, the temporary nature of the Order makes no differences: an authorized invasion is a taking “whether it is permanent or temporary.” *Id.* at 2074.

The officials may argue that extending the public beach to the 200-foot line after the 2020 tropical storms only increased the public “easement” area into private land by a small amount. They may do so based on a mistaken belief that the public beach boundary was located at the line of vegetation prior to the storms, rather than at the (more seaward) mean higher high tide line. The argument fails. The mean higher high tide line was the legitimate public/private beach boundary in front of Plaintiffs’ parcels, and at Surfside Beach in general, before the storms.<sup>6</sup> *Severance*, 370 S.W.3d at 714, 726. The extension of

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<sup>6</sup> Until state officials produce a court judgment that pre-dates the Order and establishes that a public beach easement was proven and established at somewhere other than the mean higher high tide line, that line must be treated as the pre-storm public beach boundary and all land lying landward of that line, presumed private. *Severance*, 370 S.W.3d at 314.

the public beach to the 200-foot line impressed and took the entire strip of private land that lies between the mean higher high tide line and the 200-foot line. *See* Ex. F to Sheffield Dec. (survey showing extent of land between high tide line and 200 foot line).

Even under the officials’ erroneous view—that a pre-storm line of vegetation, not the mean higher high tide line, marked the public beach boundary prior to the storms—the extension of the public beach to the 200-foot line increased the width of the public beach by some degree. *See* Porter Dec. at 5, ¶ 29. And even if the government only invades a few feet of private land, that is still a taking. *Tahoe–Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (It is taking “[w]hen the government physically takes possession of an interest in property . . . regardless of whether the interest that is taken constitutes an entire parcel or *merely a part thereof*.”) (citation omitted; emphasis added); *Lingle*, 544 U.S. at 538 (a taking results from a physical invasion—“however minor”).

Converting private, residential land, like that owned by Charles Sheffield and Merry Porter, into a “public beach” area is not an abstract injury. As the Commissioner knew, such action caused a “number of homes” to suddenly be “partially or wholly on the public beach” and thus, subject to regulation under the Open Beaches Act. Ex. 4. at 1. Plaintiffs and many other owners are now legally prohibited from excluding strangers from their land, including from around the doors, decks and windows of their beach homes. The Open Beaches Act does not contain limits on when, where, or how the public can use private land, like Plaintiffs’ lots, that is now a “public beach.” Yet, the owners of such land may not lawfully put up “no trespassing” signs or take other actions for privacy and safety and to protect themselves from liability for injuries to people who access the area. *See* Porter

Dec. at 8, ¶¶ 46–50; *see generally* Tex. Nat. Res. Code § 61.0181 (setting out administrative penalties). The subject owners are also barred from making repairs and improvements that might protect their homes from the next storm. *See* Ex. 4 (FAQ sheet).

A law that transforms beachfront property into a “public beach” area open for public invasion, depriving the owners of their right to exclusive and private enjoyment of their property, is a quintessential taking. *Nollan*, 483 U.S. at 834 (“requiring uncompensated conveyance of the [public access] easement outright would violate the Fourteenth Amendment”); *Cedar Point*, 141 S. Ct. at 2072 (a regulation granting union organizers “a right to physically enter and occupy” private property “at certain times” was “a per se physical taking” because it “appropriates for the enjoyment of third parties the owners’ right to exclude”); *Webb’s Fabulous Pharmacies*, 449 U.S. at 164 (government “may not transform private property into public property”); *Severance*, 370 S.W.3d at 725 (citing *Nollan* in noting that creation of a “public . . . right to use the dry beach regardless of the boundaries of private property . . . would raise constitutional concerns”).

#### **B. The Owners Will Show That the Order Violates Procedural Due Process Principles**

The Due Process Clause of the Fourteenth Amendment includes procedural protections “meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The basic requirements of due process are provision of (1) notice prior to a decision depriving a person of property, *Jones v. Flowers*, 547 U.S. 220 (2006), and (2) an “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S.

319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also*, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993).

Pre-deprivation notice and hearing requirements come into play when government interferes with a recognized “liberty or property interest.” *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Here, there is no question that Plaintiffs’ ownership of real property, including the attendant right to exclude others, is a constitutionally protected interest. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673, (1999) (the right to exclude is “[t]he hallmark of a protected property interest”). It is also plain that the Order interferes with these interests by establishing a 200-foot-wide public beach area that includes private land and which authorizes members of the public to use that land. Therefore, the central issue is whether issuance of the Order violates Sheffield’s and Pedestrian Beach’s right to notice and an opportunity to be heard. The answer is “yes.”

### **C. The Officials Made No Attempt to Provide Notice of the Order**

While due process requirements are not always clear when government provides concrete pre-deprivation procedures, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), what is clear is that the government must at least provide (1) some notice and (2) “some form of hearing” before taking private property. *Mathews*, 424 U.S. at 333; *Bowlby v. City of Aberdeen*, 681 F.3d 215, 221 (5th Cir. 2012) (“due process demands more than no hearing at all”).

With respect to notice, citizens are not entitled to *actual* notice of a pending action affecting their property. But they are entitled to “notice reasonably calculated, under all the

circumstances, to apprise interested parties *of the pendency of the action and afford them an opportunity to present their objections.*” *Jones*, 547 U.S. at 226 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) (emphasis added); *Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002). Implicit in this standard is the understanding that the government must try to provide notice while there is still time for the property owner to do something about a “pending” action. It must attempt notice *before* a decision impacting property is final. *Jones*, 547 U.S. at 238 (the notice requirement was not met because “additional reasonable steps were available for Arkansas to employ *before taking Jones’ property*”) (emphasis added); *id.* at 234 (noting the government must “provide adequate notice of the *impending taking*”) (emphasis added).

The Order is deficient under this basic test. While the Commissioner required the Order to be posted on the internet, submitted to the Texas Register, and sent to affected local governments, *see* Ex. 3, at 3, those steps were designed to occur, and did occur, *after* the Commissioner had signed the Order establishing the 200-foot public beach area at Surfside Beach. The Commissioner took no action reasonably calculated to notify people like Sheffield and Merry Porter of the decision to extend the public beach to the 200-foot line while it was still “pending,” i.e., *before* the Order went into effect. Even a few days prior notice would have given Plaintiffs a little time to send emails, make phone calls, or take other action to defend their interests and oppose the Order. But the Order was simply sprung on them, fully signed and in effect, on March 29, 2021. That is wholly inconsistent with pre-deprivation notice rules, particularly when the affected real property interests are

among the fundamental to property ownership.<sup>7</sup>

That the Open Beaches Act authorizes boundary orders, in certain circumstances, does supply adequate notice. After all, the Act does *not* require an order like the one here at any particular time, place, or at all. It makes clear that issuance of such an order is “purely discretionary” with the Commissioner, and that his use of that discretion is itself contingent on other, discretionary findings. Specifically, before deciding to issue a boundary order, the Commissioner must first find that (1) the vegetation line has been “obliterated” by a “meteorological event,” and that (2) normal Open Beaches Act rules should be suspended. These discretionary and indeterminant provisions did not give Plaintiffs fair notice that the Commissioner would issue an Order for Surfside Beach in late March 2021, six months after Tropical Storms Laura and Beta. Knowledge of the general possibility of government action is not constitutionally adequate notice. *Jones*, 547 U.S. at 232 (“[T]he common knowledge that property may become subject to government taking . . . does not excuse the government from complying with its constitutional obligation of notice before taking private property.”). Only the Commissioner could have provided “notice reasonably calculated . . . to apprise interested parties of the pendency,” the Order and expansion of the public beach to the 200-foot line, *id.* at 226 (quoting *Mullane*, 339 U.S. at 314), but he did not do so.

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<sup>7</sup> No emergency warranted the Commissioner’s failure to give pre-issuance notice of the Order. The Commissioner waited until about six months after the 2020 storms and three months after conducting surveys of the Surfside Beach to issue the Order. He had time to notify Surfside Beach property owners of the Order so they could “present their objections,” *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314), but did not.

**D. The Commissioner Failed to Provide a Pre-Deprivation Hearing**

In addition to proper notice, the government must also provide a meaningful opportunity for citizens to raise concerns about an action affecting private property. Normally, that opportunity must arise “prior to the deprivation of the liberty or property right at issue.” *Bowlby*, 681 F.3d at 220 (quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)); *see also*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

Given the lack of prior notice of the Order, it should come as no surprise that state officials also failed to give Sheffield and Pedestrian Beach an opportunity to be heard prior to the Order’s issuance. There were no pre-issuance public hearings about the Order or beach boundaries. There was no official, on-line forum for Surfside property owners to register their concerns with the creation of a 200-foot-wide public beach easement in their town. If they had been provided with a pre-Order hearing, Sheffield and others could have reminded the Commissioner of the limits of Texas law with respect to creating or shifting public beach easements on private land, and likely halted or changed the decision. In any event, the opportunity never came, and that administrative failure violates the Due Process Clause. *Wedgewood Ltd. P’ship I v. Township of Liberty*, 610 F.3d 340, 355 (6th Cir. 2010) (failure to provide notice and hearing prior to a zoning change violated due process); *Bowlby*, 681 F.3d at 220 (a city violated due process when it provided no process prior to revoking business permits).

**E. Plaintiffs Are Likely to Prove That the Order Is Arbitrary and Violates Due Process on Its Face and As-Applied**

Plaintiffs also assert that the Order violates the substantive component of the Due

Process Clause. Their claim is that creation of a public beach area and/or easement to the 200-foot line is arbitrary and irrational because that action has no connection to legitimate public beach areas, boundaries or interests. Plaintiffs are likely to prevail on this claim, too.

### **1. Substantive Due Process Standards**

Due process concepts include a substantive aspect that serves to prevent government from “arbitrarily abus[ing] its power to deprive individuals of constitutionally protected rights.” *Simi Inv. Co., Inc. v. Harris Cty.*, 236 F.3d 240, 249 (5th Cir. 2000). In substantive due process claims, the emphasis is not on the “process,” but on “law.” An arbitrary invasion of property rights is not “law.” *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995) (“[W]here the governmental decision in question impinges upon a landowner’s use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or irrationally reached.”).

In considering whether government action violates due process due to arbitrariness, courts generally ask whether the “action is rationally related to a legitimate government interest.” *FM Prop. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996); *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006). While this inquiry may be “the least demanding test,” “it is not ‘toothless.’” *Simi Inv. Co.*, 236 F.3d at 253 (quoting *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998)). The government’s actions must bear “a rational relation to a constitutionally permissible objective.” *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (Harlan, J., concurring)).

## **2. The 200-Foot Public Beach Boundary Order Is Arbitrary and Irrational On Its Face and As-Applied to Plaintiffs**

Here, the Order does not provide reasons for the decision to locate the public beach easement to the 200-foot (from MLT) line in Surfside Beach—other than that tropical storms altered the beach. But the effect of wind and waves in washing away beach grass is not a rational basis for placing a public beach easement on private parcels. 370 S.W.3d at 724 (When drastic changes destroy the vegetation and “expose new dry beach and the former dry beach that may have been encumbered by a public easement is now part of the wet beach or completely submerged . . . the State must *prove* a new easement[.]”) (emphasis added).

Even setting aside the arbitrariness of moving a public beach onto private land because a storm blows away the grass, the Order remains arbitrary. Specifically, there is no rational basis for setting the public beach boundary at the 200-foot line, as opposed to the 150-foot line, or 100-foot line. The 200-foot line is nowhere near the mean higher high tide line, so the public beach area established by the Order cannot be rationalized as an approximation of that traditional public/private beach boundary. The 200-foot line is also not tied to any known common law public easement or other established public beach boundary at Surfside Beach. *See Severance*, 370 S.W.3d at 717–18 (explaining that the state-owned, publicly accessible beach extends to the mean higher high tide line but no farther); *id.* at 715 (“[W]here the dry beach is privately owned, it is part of the ‘public beach’ if a right to public use has been established on it.”). Setting a public beach easement boundary at 200 feet inland of MLT has no connection to any established public beach area

or any legitimate method for locating easements and their boundaries.

The Order does suggest the 200-foot line is intended as a substitute for the location of the line of vegetation after the 2020 tropical storms. But linking the 200-foot line to the vegetation line does not provide rationality because post-storm vegetation lines are themselves illegitimate as public beach boundaries. *Id.* at 711 (“the State must establish under principles of property law encumbrances on privately owned realty”); *id.* at 715 (“[W]here the dry beach is privately owned, it is part of the ‘public beach’ if a right to public use has been established on it.”). Since the vegetation line alone is not a legitimate boundary line, especially after a storm, a proxy for that line—like the 200-foot line—is also arbitrary and irrational. *Brady v. Town of Colchester*, 863 F.2d 205, 215–16 (2d Cir. 1988) (reversing summary judgment on a due process claim where the government “had no authority under state law” to take actions interfering with “protected property interest in the . . . use of their property”). In creating a public beach area/easement on private land based on the loss of grass due to storms, and without any connection to legitimate beach boundary or easement principles, the Order arbitrarily and irrationally interferes with private property on its face.

The Order is also arbitrary and irrational as-applied to Sheffield and Pedestrian Beach, because there is no connection the 200-foot-wide public beach area established by the Order and their titles or actions. The property they own within the 200-foot area is not burdened by a common law public easement. It is not on the state-owned wet beach, but lies landward of the mean higher high water mark. They did not consent to an easement. *See* Porter Dec. at 4-5, ¶¶25–28; Sheffield Dec. at 5, ¶¶ 26–29. The only thing that

happened was that a couple of tropical storms moved sand around. But, as previously noted, such an event is not a rational basis for imposing a public beach easement. The 200-foot public beach area impressed on Sheffield and Pedestrian Beaches' properties is unrelated to their titles and unjustified by Texas law, and creation of a "nonexistent [beach] park" that "interfere[s] with private property interests is clearly arbitrary, capricious, and violative of due process." *Simi Inv. Co.*, 236 F.3d at 253.<sup>8</sup>

**F. The Owners Are Likely to Show That the Order Results in an Unreasonable Seizure of Residential Property**

Sheffield and Pedestrian Beach are also likely to prevail on their claim that the Order unreasonably seizes their interests, in violation of the Fourth Amendment. The Fourth Amendment protects certain species of property from unreasonable seizures in the civil context. *See Soldal v. Cook County*, 506 U.S. 56, 66–67 (1992). To establish an unreasonable seizure, one must show that (1) a protected property interest (2) has been seized, *id.* at 61; (3) in an unreasonable manner. *Severance*, 566 F.3d at 502; *Freeman v. City of Dallas*, 242 F.3d 642, 649 (5th Cir. 2001) (en banc).

The property at issue here is residentially developed land and its curtilage, all of which is protected by the Fourth Amendment. 566 F.3d at 502. The Order's determination that a "public beach" extends over this land is a "meaningful interference" with the

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<sup>8</sup> The officials will likely argue that the Order is rational because they believe the Open Beaches Act authorizes the 200-foot boundary. But due process limits apply to statutes, too. *Stern v. Tarrant Cty. Hosp. Dist.*, 778 F.2d 1052, 1056 (5th Cir. 1985) (The rational basis test governs "a legislative classification, whether the classes be distinguished in the text of the law or *in its administration*." (emphasis added)). As an application of the Act, the 200-foot public beach Order remains arbitrary because it is disconnected from legitimate public beach interests or methods for establishing their boundaries.

property, as it authorizes the public to use Plaintiffs' land, interfering with their right to exclusively and privately use their land. *See* Tex. Nat. Res. Code § 61.014; *Severance*, 566 F.3d at 502; *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006), and the temporary duration of the authorized invasion makes no difference. *Id.* (“[T]he Fourth Amendment also governs temporary or partial seizures.”).

The seizure of Sheffield's and Pedestrian Beach's land under the Order is unreasonable because it is based on nothing more than damage to beach grass and is wholly inconsistent with background principles of state law. *Severance*, 566 F.3d at 502. The Commissioner cannot move a public beach or easement over private property without first establishing in court that the public acquired rights in the land under traditional doctrines, like prescription or dedication. 370 S.W.3d at 714, *id.* at 721; *id.* at 733 (Willett, J., concurring). This rule is especially clear when dealing with post-storm boundary issues. *Id.* at 723–24. Compliance with these state law limits is necessary to ensure that private land is not taken in a precipitous and unreasonable manner. *Id.* at 723 (“[I]t is far less reasonable . . . to hold that a public easement can suddenly encumber a entirely new portion of a landowners property” after tropical storms.). Yet, here, the Commissioner ignored state procedures and leveraged the happenstance of storms to expand the public beach area onto private, developed land. Plaintiffs will thus prevail on their Fourth Amendment claim. *Severance*, 682 F.3d 360.

A preliminary injunction is proper “if plaintiff has raised questions going to the merits so serious and substantial as to make them fair ground for litigation and thus for more deliberate investigation.” *Casarez*, 957 F. Supp. at 858–59 (citing *Finlan v. City of*

*Dallas*, 888 F. Supp. 779, 791 (N.D. Tex. 1995)); *see also Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). Sheffield and Pedestrian Beach have raised serious and substantial questions about the Order, and have shown that it is likely to violate the Takings Clause, Due Process Clause and Fourth Amendment.

## **II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURIES, THE NEED TO REMEDY THESE INJURIES OUTWEIGHS ANY PURPORTED HARM, AND AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST**

The final three factors for a preliminary injunction are that (1) the movant will suffer irreparable harm without relief, (2) the equities favor the movant, and (3) the injunction is in the public interest. *Winter*, 555 U.S. at 20. As for the irreparable harm prong, courts treat the violation of constitutional rights, including violations like those shown here, as irreparable injuries. 11A Charles Alan Wright, et al., *Federal Practice & Procedure* § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary.”); *Hill v. Greene Cty. Sch. Dist.*, 848 F. Supp. 697, 706 (S.D. Miss. 1994) (“Violation of a constitutional right is irreparable harm[.]”); *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001) (a violation of the Takings Clause was sufficient injury).

While the violation of Plaintiffs’ constitutional rights is sufficient injury for an injunction, additional injuries are present. First, their privacy is at serious risk because the Order authorizes members of the public to use the land on which their homes sit. *See Porter Dec*, at 7–8 ¶¶ 42–49; *see generally, Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 280 n.15 (5th Cir. 2012) (affirming that a district court could treat a violation of

a right to privacy as “irreparable injury”) (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)). Second, without an injunction, Sheffield and Pedestrian Beach are at risk of being sued or otherwise held liable for any injuries to members of the public that attempt to enter and use their developed land for purposes of accessing a “public beach.” Porter Dec. at 8, ¶ 47. Third, Plaintiffs are barred from making certain repairs and improvements to their properties that may be essential to their continued rental use and to protection from storms. *See* Ex. 4. Fourth, state officials have recorded the Order in the land recording office of Brazoria County, creating an official encumbrance on title that will continue to burden their rights without an injunction. Ex. 1 at 4.

A preliminary injunction will not harm state officials. Since the public did not have a legitimate easement on Plaintiffs’ private land prior to Tropical Storms Laura and Beta, an injunction will take nothing from the public. It will simply return Plaintiffs’ properties and Surfside Beach to the pre-storm status quo. Requiring the Commissioner to abide by the Constitution and Texas law before taking private land is in the public interest.

Dated: July 22, 2021.

Respectfully submitted,  
s/ J. David Breemer  
 J. DAVID BREEMER, Attorney-in-Charge  
 Cal. Bar No. 215039  
 S.D. Tex. No. 632473  
 JEFFREY W. McCOY\*  
 Cal. Bar No. 317377  
 S.D. Tex. No. 3668776  
 Pacific Legal Foundation  
 930 G Street  
 Sacramento, California 95814  
 Telephone: (916) 419-7111  
 Facsimile: (916) 419-7747  
 Email: JBreemer@pacificlegal.org  
 Email: JMcCoy@pacificlegal.org  
*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendants are registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

s/ J. David Breemer  
J. DAVID BREEMER

# Exhibit 1

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

CHARLES SHEFFIELD and  
PEDESTRIAN BEACH, LLC,

Plaintiffs,

v.

GEORGE P. BUSH, in his official capacity  
as Commissioner of the Texas General Land  
Office, and KEN PAXTON, in his official  
capacity as Attorney General for the State of  
Texas,

Defendants.

Civil Action No. 3:21-cv-00122

**DECLARATION OF MERRY C. PORTER**

I, Merry C. Porter, do hereby declare and testify:

1. I have personal knowledge of the following facts and, if called upon to do so, could competently testify to these facts.
2. I am a United States citizen, a resident of Brazoria County, Texas, and owner of beachfront and other coastal properties in Surfside Beach, Texas.
3. I am 75 years old.
4. I was formerly married to Brooks Porter. He passed away in 2017.
5. In 1981, my husband purchased a plot of residentially developed coastal property at the western end of Surfside Beach (the Property) for approximately \$19,000.

6. The Property is officially known as “lot 2 block 2” of the Palm Beach Subdivision. To the best of my knowledge, the mailing address is 1206/1207 Sargrasso Circle, Surfside Beach, Texas 77541.

7. The deed and title to the Property is not encumbered by a public beach access easement or any reserved public access rights. The deed is attached here as Exhibit A.

8. The Property contains a 2,400-square-foot unit “duplex” home.

9. In approximately 2007, the Property was transferred to Pedestrian Beach, LLC.

10. Upon the death of my husband in 2017, I became the sole shareholder of Pedestrian Beach, LLC. I accordingly have authority to make decisions regarding the Property, including those related to use, repair, and disposition of the home and surrounding land.

11. When my husband purchased the Property, there was no legal impediment to its private use for rental and other private purposes, and we have put the Property to such use for the last 40 years. The title did not include any “disclosure” about the Open Beaches Act.

12. Originally, the Property contained a beach home called the “Hidden Treasure.” This structure burned down a few years after purchase of the Property.

13. My husband and I lawfully built a new home, the current 2-unit duplex building, around 1985-1986 at a cost of approximately \$79,000.

14. At the time of its construction and permitting, the duplex on the Property was located landward of the vegetation line and landward of the mean higher high tide line. The

duplex home was not located on a public beach area. If it had been, it is my understanding that we would have been denied permission to build due to the Open Beaches Act.

15. When my husband purchased the Property, and for many years afterward, a private home known as the "Clark" home existed on a lot lying seaward of the duplex. That structure is now gone.

16. In September 2019, Pedestrian Beach and my family (the Porters) retained Aaron Nelson, a professional photographer, to take photos of the Property. Pedestrian Beach owns and uses those photos for rental sales and advertisement purposes. Some of those photos of the Property are attached here as Exhibit B.

17. The existing duplex home on the Property is approximately 2,400 square feet in size, including deck and porch areas. It is built on pilings, allowing occasional storm surges to flow beneath the home without causing damage.

18. The units in the duplex are called the "Mar Vista" and "Dos Vistas." Each unit includes a two-bedroom, two-bathroom living space.

19. Each unit on the duplex is equipped with a wheelchair ramp that provides access to the units. Beginning on dry land located landward of the duplex, the ramps rise and extend along the side of the building to the units.

20. The units in the duplex are rented out to families and others for beach vacations and visits, year-round. In this way, the Property generates approximately \$60,000 per year in rental income, which I use for retirement income and for the maintenance of the Property and other Surfside Beach properties in which I have an interest.

21. The Property is well-maintained and always quickly repaired after occasional storm damage. Pedestrian Beach has invested thousands of dollars in the last five years for lawfully permitted repairs and maintenance, including for painting, replacement of air conditioning units, and repair of the wheelchair ramps.

22. On average, Pedestrian Beach invests approximately \$6,000 annually in the repair of the Property.

23. Pedestrian Beach, LLC, and its predecessors acquired and have used and maintained the Property with the expectation that it is a private parcel and could be residentially used for private benefit.

24. Although I have an interest in other beachfront rental properties in Surfside Beach, the duplex at 1206/1207 is my most successful and valuable property, in terms of the consistent generation of rental income.

25. The duplex has never been subject to an official enforcement proceeding to remove it on the ground that it is on the public beach or an encroachment on a public beach easement.

26. No one has ever sued Pedestrian Beach or its predecessors to establish the existence of a public easement on the Property, and no court has ever issued a judgment establishing such an easement on the Property. To my knowledge, the state never acquired or proved an easement on the land seaward of the duplex that was once developed with the "Clark" home.

27. Members of the public have never continuously or consistently walked on the land under the duplex, where numerous, closely spaced pilings exist to support the structure.

28. Pedestrian Beach and its predecessors in title have never consented to use the Property for public beach purposes, and never intended to or acted to dedicate it as a public beach area.

29. In late summer of 2020, two tropical storms—Hurricane Laura and Tropical Storm Beta—came ashore in Texas. Based on my observations, prior to these storms, the line of vegetation was not located as far inland as the 200 foot (from mean low tide) line.

30. The 2020 storms moved sand and coastal vegetation along Surfside Beach and damaged three pilings and the wheelchair ramps, which Pedestrian Beach intends to repair.

31. On March 29, 2021, General Land Office Commissioner George P. Bush issued an Order relating to coastal property in Surfside Beach. The Order, entitled, “Temporary Order Suspending Determination of the Line of Vegetation and Suspending Enforcement of Certain Encroachments on the Public Beach,” sets the boundary of the public beach in Surfside Beach at a “line 200 feet inland from the line of mean low tide.” The Order is effective for a period of two years. Exhibit C.

32. The Order specifically declares: “For the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT.” It states that the Order causes the “establishment of [a] public beach easement” on the 200 foot area between MLT and a line lying 200 feet inland of MLT.

33. Neither I, nor anyone associated with Pedestrian Beach, received notice of the Order and the 200-foot public beach boundary and public area it creates, through the mail or other means, prior to its issuance. No notice of the Order was posted on the Property.

34. With the Order, State officials publicly issued photographic maps showing the approximate location of the new 200-foot public beach area in Surfside Beach. These maps appear to show the 200-foot line entirely landward of the Property, which would mean the duplex home and Property is wholly within the new 200-foot public beach area. Exhibit D.

35. At our request, on or about, June 14, 2021, a state licensed land surveyor carried out a survey of the Property to determine the current, precise location of the 200-foot beach boundary, mean higher high water mark, and other topographical features relevant to the Property. *See* Exhibit E.

36. The survey shows, consistent with the General Land Office maps issued with the Order, that the new 200-foot public beach boundary line is almost entirely landward of the Property, thus putting almost all the Property on the newly created 200-foot wide public beach easement area.

37. The 200-foot public beach boundary line is entirely landward of the duplex, placing all of the home within the new 200-foot public beach easement area.

38. The June 14, 2021, survey also calculated the location of the mean higher high water line, relative to the Property. The survey found that the duplex is wholly landward of the mean higher high water line.

39. The duplex is not on submerged or state owned wet beaches, but entirely on private land possessed by Pedestrian Beach under its title to the Property.

40. As I understand it, the Texas Open Beaches Act gives the public the right to access and use all public beaches and prevents me from lawfully excluding people from any “public beach” area. The Order does not suspend enforcement of these rules.

41. Because the Order establishes that the land under and around the duplex is a “public beach,” I believe, fear, and understand that members of the general public are now allowed to access and use the Property for indefinite time periods for beach access, use, and recreation.

42. In past years, I have heard of people trespassing on private lots in Surfside Beach, in asserted pursuance of their Open Beaches Act rights, after the lots were deemed to be "on the public beach."

43. Occasionally, in the past, members of my family and employees have asked unknown members of the beachgoing public to move away from our Property, and periodically, people acting on behalf of Pedestrian Beach, LLC, have posted “no trespassing” signs on the Property.

44. Because all of the Property, including land near the duplex entryways and windows, is now a “public beach” under the Order and subject to the Open Beaches Act, I understand that members of the public can stand, sit, and otherwise station themselves immediately around the duplex and, perhaps, on the structure itself. This limits the privacy of the duplex and raises safety and liability concerns for Pedestrian Beach and its renters.

46. Neither the Order nor any provision of the Open Beaches Act limits the time, duration, or nature of activities that the public can engage in on land, such as that owned by Pedestrian Beach, that has been classified as a “public beach.”

47. I am concerned that people will attempt to access, occupy, and trespass on the Property because it is now classified as on a public beach easement under the Order and subject to the Open Beaches Act. I am concerned that Pedestrian Beach may be held liable for any incidents that happen to members of the public when they attempt to access and use Pedestrian Beach's land.

48. I understand that Pedestrian Beach will be fined if it attempts to exclude beachgoers from the Property while a public beach easement is on the Property under the Order, and therefore, Pedestrian Beach will have to accede to trespassing on the Property while the Order is in effect.

49. I object to the loss of the right to tell people to leave the land immediately around the duplex if and when it is necessary for privacy and safety.

50. Pedestrian Beach would like the option to place “no trespassing” signs on the Property during the next two years, as it has done in the past. I fear, however, that Pedestrian Beach would be fined for such action while the Property is classified as a “public beach” under the Order, and therefore, Pedestrian Beach will refrain from posting such signs for the next two years.

51. The Order prevents new construction and addition of any materials (other than sand) on land, such as the Property, that is classified as a public beach under the Order.

52. Pedestrian Beach would like to continue making repairs and improvements to the Property, as needed, including placement of fill material and other repairs to make the Property able to withstand future storms.

53. However, Pedestrian Beach will have to refrain from making certain repairs or additions to the Property for the next two years, due to the Property's status as a public beach under the Order. I am afraid the Property may unnecessarily sustain further damage, as a result.

54. I understand that Land Office officials have filed the Order and its recognition of a 200-foot public beach area that includes my Property in the "real property records" of Brazoria County. I consider this action to be a limit and encumbrance on Pedestrian Beach's title that inhibits its salability.

55. I believe I would have to disclose the Order and its recognition of the public beach on my Property if I attempt to sell the Property within the next two years. I therefore believe, based on my experience with owning and renting beach homes, that the Order reduces the value of the Property and may render the Property unsalable for the next two years.

56. The Order does not offer or guarantee just compensation to Pedestrian Beach for converting the Property into public beach area available for public use and access for the next two years.

57. Pedestrian Beach was not provided with an opportunity to object to the issuance of the Order and its effect on the Property before the land Commission issued the Order.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Attested and executed this 20<sup>th</sup> day of July, 2021, at Houston, Texas.

Merry C Porter  
MERRY C. PORTER

**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendants are registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

s/ J. David Breemer  
J. DAVID BREEMER

# Exhibit A

40202

## WARRANTY DEED

THE STATE OF TEXAS

COUNTY OF BRAZORIA

} KNOW ALL MEN BY THESE PRESENTS:

That FRANK E. HOOP, a baron sole

of the County of Brazoria and State of Texas for and in  
consideration of the sum of Ten and no/100---------- (\$10.00) DOLLARS  
and other valuable consideration to the undersigned paid by the grantee herein named, the receipt of  
which is hereby acknowledged,has ~~have~~ GRANTED, SOLD AND CONVEYED, and by these presents ~~do~~ GRANT, SELL AND CONVEY unto

BROOKS W. PORTER

of the County of Brazoria and State of Texas, all of

the following described real property in Brazoria County, Texas, to-wit:

Lot 2, Block 2, hereby subdivided out of that certain tract being out of the accretion lying SE of Block 555, in the Surfside Townsite, Frederick Calvit, Jr., League, Abst. 51, Brazoria County, Texas, and being out of the 16.071 acre tract described in a deed recorded in Volume 966, Page 145, Brazoria County Deed Records, said Lot 2, Block 2, being described by metes and bounds as follows, to-wit:

BEGINNING at an iron rod being the East corner of said Lot 2, Block 2, said point lying S 49 deg. 10' East 371.87 feet along the SW line of West 12th Street, and S 29 deg. 47' West 66.38 feet from an iron rod being at the intersection of the SE line of Surf Avenue and the SW line of West 12th Street;

THENCE South 29 deg. 47' West 62.00 feet to the South corner;

THENCE N 49 deg. 10' W 100.0 feet to the West corner;

THENCE N 29 deg. 47' E 62.00 feet to the North corner;

THENCE S 49 deg. 10' E 100.00 feet to PLACE OF BEGINNING.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said grantee, his heirs and assigns forever; and I do hereby bind myself my heirs, executors and administrators to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said grantee, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

THIS CONVEYANCE is made and accepted subject to any and all restrictions, conditions, covenants, easements and reservations, if any, affecting the use of the premises conveyed herein, now of record in the office of the County Clerk of Brazoria County, Texas.

EXECUTED this 28th day of December, A.D. 1981

*Frank E. Hoop*  
FRANK E. HOOP

RECORDED AS PER ORIGINAL

RECORDED AS PER ORIGINAL



American Title Company

## PURCHASER'S STATEMENT

DATE: 12-28-8j GF No.: 14224 MABSALE FROM: Frank E. Hoop TO: Brooks H. PorterPROPERTY Lot 2, Bk 2, out 7 Bk 555, Surfside 2/5  
PURCHASE PRICE \$ 18,800.00

## PLUS: CHARGES

Filing fees to County Clerk:

WD 7.00 REL \_\_\_\_\_ DT \_\_\_\_\_ TSF \_\_\_\_\_AFF \_\_\_\_\_ \$ 7.00

Loan Charges and Fees Due to \_\_\_\_\_

Appr. Fee \_\_\_\_\_ Cr. Rep. \_\_\_\_\_ Photo \_\_\_\_\_

Orig. Fee \_\_\_\_\_ Insp. Fee \_\_\_\_\_ \$ \_\_\_\_\_

\$ \_\_\_\_\_

Loan Transfer Fee or Assumption Fee \$ \_\_\_\_\_

## Fees to AMERICAN TITLE COMPANY

Title Policy: Owner \_\_\_\_\_ Mortgagee \_\_\_\_\_ Binder \_\_\_\_\_

Escrow 50.00 Restrictions \_\_\_\_\_\$ 50.00

Tax Certificates: \_\_\_\_\_

State and County \_\_\_\_\_ \$ 10.00

City and School \_\_\_\_\_ \$ \_\_\_\_\_

Other \_\_\_\_\_ \$ \_\_\_\_\_

Survey Fee to \_\_\_\_\_ \$ \_\_\_\_\_

Attorney's fees for preparation of papers to Robert E. May \$ 110.00

\$ \_\_\_\_\_

Flood Insurance premium to \_\_\_\_\_ \$ \_\_\_\_\_

Hazard Insurance premium to \_\_\_\_\_ \$ \_\_\_\_\_

Tax and Insurance escrowed with \_\_\_\_\_ \$ \_\_\_\_\_

\_\_\_\_\_ mos. tax deposit @ \_\_\_\_\_ per mo. \_\_\_\_\_

\_\_\_\_\_ mos. hazard insurance @ \_\_\_\_\_ per mo. \_\_\_\_\_

\_\_\_\_\_ mos. flood insurance @ \_\_\_\_\_ per mo. \_\_\_\_\_

\_\_\_\_\_ mos. mortgage insurance @ \_\_\_\_\_ per mo. \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

Interest from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

\$ \_\_\_\_\_

Proration of hazard insurance from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

Proration of flood insurance from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

Maintenance charge proration from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

Tax proration from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

\$ \_\_\_\_\_

Escrowed accounts with lender purchased from Seller \$ \_\_\_\_\_

\$ \_\_\_\_\_

TOTAL CHARGES \$ 177.00GROSS AMOUNT DUE BY PURCHASER \$ 18,977.00

## LESS: CREDITS

Down payment or earnest money paid to \_\_\_\_\_ \$ 1000.00

Loan from \_\_\_\_\_ \$ \_\_\_\_\_

Note assumed \_\_\_\_\_ \$ \_\_\_\_\_

Interest proration from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

Tax proration from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

\$ \_\_\_\_\_

Rent proration from \_\_\_\_\_ to \_\_\_\_\_ \$ \_\_\_\_\_

Other Credit \_\_\_\_\_ \$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

Orig. Fee	_____	\$	_____
Loan Transfer Fee or Assumption Fee	_____	\$	_____
Fees to AMERICAN TITLE COMPANY			
Title Policy: Owner	_____		
Mortgagee	_____		
Binder	_____		
Escrow	<u>50.00</u>		
Restrictions	_____	\$	<u>50.00</u>
Tax Certificates:			
State and County	_____	\$	<u>10.00</u>
City and School	_____	\$	_____
Other	_____	\$	_____
Survey Fee to	_____	\$	_____
Attorney's fees for preparation of papers to	<u>Robert E. May</u>	\$	<u>110.00</u>
Flood Insurance premium to	_____	\$	_____
Hazard Insurance premium to	_____	\$	_____
Tax and Insurance escrowed with	_____	\$	_____
_____ mos. tax deposit @ _____	per mo.	_____	_____
_____ mos. hazard insurance @ _____	per mo.	_____	_____
_____ mos. flood insurance @ _____	per mo.	_____	_____
_____ mos. mortgage insurance @ _____	per mo.	\$	_____
Interest from _____ to _____		\$	_____
Proration of hazard insurance from _____ to _____		\$	_____
Proration of flood insurance from _____ to _____		\$	_____
Maintenance charge proration from _____ to _____		\$	_____
Tax proration from _____ to _____		\$	_____
Escrowed accounts with lender purchased from Seller	_____	\$	_____

TOTAL CHARGES \$ 177.00GROSS AMOUNT DUE BY PURCHASER \$ 18,977.00

## LESS: CREDITS

Down payment or earnest money paid to	_____	\$	<u>1000.00</u>
Loan from	_____	\$	_____
Note assumed	_____	\$	_____
Interest proration from _____ to _____		\$	_____
Tax proration from _____ to _____		\$	_____
Rent proration from _____ to _____		\$	_____
Other Credit	_____	\$	_____

TOTAL CREDITS \$ 1000.00BALANCE DUE BY/TO PURCHASER \$ 17,977.00

Purchaser understands the Closing or Escrow Agent has assembled this information representing the transaction from the best information available from other sources and cannot guarantee the accuracy thereof. Any real estate agent or lender involved may be furnished a copy of this Statement.

Purchaser understands that tax and insurance prorations and reserves were based on figures for the preceding year or supplied by others or estimates for current year, and in the event of any change for current year, all necessary adjustments must be made between Purchaser and Seller direct.

The undersigned hereby authorizes AMERICAN TITLE COMPANY to make expenditures and disbursements as shown above and approves same for payment. The undersigned also acknowledges receipt of Loan funds, if applicable, in the amount shown above and receipt of a copy of this Statement.

Ruth Mann  
CLOSING OR ESCROW AGENT

\_\_\_\_\_  
ADDRESS

1564

DEED  
VOL. 1617 PAGE 723

THE STATE OF TEXAS

I

KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF BRAZORIA

I

WHEREAS, Brooks W. Porter, of Harris County, Texas (hereinafter called Grantee) is the owner in fee simple of the hereinafter described real property by virtue of his acceptance of a general warranty deed dated December 28, 1981 and filed for record in Volume 1614, Page 648 of the Deed Records of Brazoria County, Texas to-wit:

Lot Two (2), Block Two (2), hereby subdivided out of that certain tract being out of the accretion lying SE of Block 555, in the Surfside Townsite, Frederick Calvit, Jr., League, Abstract 51, Brazoria County, Texas, and being out of the 16.071 acre tract described in a deed recorded in Volume 966, Page 145, Brazoria County Deed Records, said Lot Two (2), Block Two (2), being described by metes and bounds as follows, to-wit:

BEGINNING at an iron rod being the East corner of said Lot Two (2), Block Two (2), said point lying S. 49 degrees 10' East 371.87 feet along the SW line of West 12th Street, and S. 29 degrees 47' West 66.38 feet from an iron rod being at the intersection of the SE line of Surf Avenue and the SW line of West 12th Street;

THENCE South 29 degrees 47' West 62.00 feet to the South corner;

THENCE North 49 degrees 10' West 100.0 feet to the West corner;

THENCE North 29 degrees 47' East 62.00 feet to the North corner;

THENCE South 49 degrees 10' East 100.00 feet to PLACE OF BEGINNING.

WHEREAS, Carl A. Clark, hereinafter called Grantor has the right of ingress and egress over and across a 60' wide parcel of land abutting the Southeast line of said Lot Two (2), Block Two (2) and extending North 29 degrees 47' East 128.38' to the Southwest line of West 12th Street as granted in instrument recorded in Volume 1003, Page 776 of the Deed Records of Brazoria County, Texas.

THEREFORE, for Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor grants unto Grantee, his heirs and assigns the right of ingress and egress across the 60' wide parcel of land.

05/11/20

DEED  
VOL 1617 PAGE 724

EXECUTED this 28th day of December, 1981.

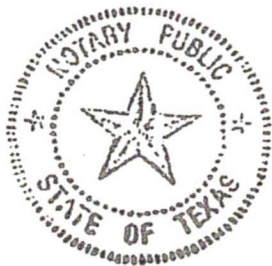
ADDRESS OF GRANTEE:  
4707 Braes Valley Drive  
Houston, Texas 77096

*Carl A. Clark*  
Carl A. Clark

THE STATE OF TEXAS X  
COUNTY OF BRAZORIA X

Before me, the undersigned authority, on this day personally appeared Carl A. Clark, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 15 day of January, 1981.



*Ruth Winn*  
Notary Public in and for Brazoria  
County, Texas

RUTH WINN  
Notary Public  
My Commission Expires 6-5-85

FILED FOR RECORD  
AT 1:34 O'CLOCK P M.  
JAN 18 1982  
H. R. STEVENS, JR.  
CLERK COUNTY COURT, BRAZORIA CO., TEXAS  
BY *[Signature]* DEPUTY

GF: 14224-MAB  
RNW /lbw

SCHEDULE A

Owner Policy No.: 14224-MAB-B1

Date of Policy: DECEMBER 31, 1981

Amount: \$18,800.00

Agent's Reference No.: 5069

1. Name of Insured: BROOKS W. PORTER
2. The estate or interest in the land insured by this policy is: FEE SIMPLE
3. The land referred to in this policy is described as follows:

Lot 2, Block 2, hereby subdivided out of that certain tract being out of the accretion lying SE of Block 555 in the Surfside Townsite, Frederick Calvit, Jr. League, Abstract 51, Brazoria County, Texas, and being out of the 16.071 acre tract described in a Deed recorded in Volume 966 Page 145, Brazoria County Deed Records, said Lot 2, Block 2, being described by metes and bounds as follows, to-wit:

BEGINNING at an iron rod being the East corner of said Lot 2, Block 2, said point lying S 49 deg. 10' East 371.87 feet along the SW line of West 12th Street and S 29 deg. 47' West 66.38 feet from an iron rod being at the intersection of the SE line of Surf Avenue and the SW line of West 12th Street;

THENCE South 29 deg. 47' West 62.00 feet to the South corner;

THENCE N 49 deg. 10' W 100.0 feet to the West corner;

THENCE N 29 deg. 47' E 62.00 feet to the North corner;

THENCE S 49 deg. 10' E 100.00 feet to the PLACE OF BEGINNING.

## Exhibit B

















## Exhibit C

**TEXAS GENERAL LAND OFFICE**

In Re: Hurricane Laura and	§	Before the Commissioner of the
	§	Texas General Land Office
Tropical Storm Beta	§	State of Texas

**TEMPORARY ORDER SUSPENDING DETERMINATION OF THE LINE OF VEGETATION  
AND SUSPENDING ENFORCEMENT ON CERTAIN ENCROACHMENTS  
ON THE PUBLIC BEACH**

The Commissioner of the Texas General Land Office (Commissioner) makes the following Findings of Fact and Conclusions of Law in support of this Temporary Order to suspend determination of the line of vegetation (LOV) for two years and to suspend enforcement of the prohibition against certain encroachments on the public beach easement for three years pursuant to Texas Natural Resources Code (TNRC) §§ 61.0171 and 61.0185.

**Findings of Fact**

1. Hurricane Laura made landfall at 1:00 a.m. on August 27, 2020 near Cameron, Louisiana, impacting the upper Texas coast. Tropical Storm Beta made landfall at 10:00 p.m. on September 21, 2020 near Matagorda Peninsula. These two meteorological events resulted in a loss in elevation and a loss of vegetation and dunes in both Galveston and Brazoria Counties.
2. The line of vegetation (LOV) has been obliterated within the city limits of the Village of Surfside Beach and on Galveston Island from the western terminus of the seawall to Thirteen Mile Road by storm tidal surges and overwash from Hurricane Laura and Tropical Storm Beta.
3. A temporary suspension of determination of the line of vegetation and a determination of the boundary of the public beach, setting a line at 200 feet inland from mean low tide, is necessary so local governments can issue permits for beachfront construction in accordance with the local Beach Access and Dune Protection Plans, while preventing construction on the public beach easement.
4. A primary purpose of the temporary suspension of enforcement is to allow natural recovery and stabilization of the beach system prior to enforcing against encroachments on the public beach.
5. GLO staff reviewed the LOV in Brazoria and Galveston Counties multiple times between October 2020 and January 2021 and determined that the LOV had been obliterated as a result of meteorological events.
6. In some areas, a common law public beach easement or other easement exists that extends landward of the area that is 200 feet landward of mean low tide.

**Conclusions of Law**

1. The General Land Office has jurisdiction over this matter pursuant to the Open Beaches Act, TNRC Chapter 61, and the Dune Protection Act, TNRC Chapter 63.
2. Pursuant to TNRC § 61.0171, the Commissioner is authorized to issue a temporary order suspending action on conducting a line of vegetation determination for a period of up to three years from the date

the Order is issued since the Commissioner has determined that the line of vegetation was obliterated as a result of Hurricane Laura and Tropical Storm Beta. For the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT as established by a licensed state land surveyor.

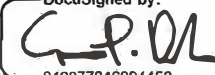
3. Pursuant to TNRC § 61.0185, the Commissioner is authorized to issue a temporary order suspending, for a period of three years from the date the order is issued, the submission of a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach if the Commissioner determines that the line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event, the house was located landward of the natural line of vegetation before the meteorological event, and the house does not present an imminent threat to public health and safety.
4. The boundary of the public beach easement established by this Order establishes a minimum landward boundary of the public beach and does not supersede all or any portions of an easement existing prior to the issuance of this Order to the extent such right of the public that has been established 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. A public beach easement or other easement that extends beyond 200 feet landward of MLT cannot be ceded under common law.
5. No construction of habitable structures is allowed on the public beach easement, whether the portion from MLT to 200 feet landward or farther landward in places with a public beach easement or other easement that extends beyond the 200-foot line. Construction may be allowed as specified in 31 TAC §§ 15.7(e) and 15.11.

It is accordingly **ORDERED** that:

1. Action on conducting a line of vegetation determination is suspended for a period of two years from the date of this Order within the Village of Surfside Beach city limits and from the western terminus of the Seawall west to Thirteen Mile Road on Galveston Island. For the duration of the order, the public beach shall extend to a line 200 feet inland from the line of mean low tide (MLT) as established by a licensed state land surveyor.
2. The area from MLT to 200 feet landward shall be the minimum public beach easement. The public beach easement or another easement may extend further landward than the line established at 200 feet from MLT in some areas if a public beach easement as set forth in TNRC § 61.011 existed in those areas prior to the issuance of this Order.
3. For permitting purposes, local governments shall use 200 feet landward of mean low tide as the LOV, as applicable depending on the local government's plan, for two years.
4. Action on the submission of a request that the attorney general file a suit to obtain a court order to remove a house from a public beach is suspended for a period of three years from the date of this Order. For the duration of the Order, the authority of the GLO or other local government to submit a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach is suspended unless the Commissioner determines that the house presents an imminent threat to public health and safety or that the house was not located landward of the natural line of vegetation before Hurricane Laura or Tropical Storm Beta.

5. Notice of this Temporary Order shall be:
  - a. posted on the Internet website of the GLO;
  - b. published by the GLO as a miscellaneous document in the *Texas Register*;
  - c. filed for record by the land office in the real property records of the county in which the areas of beach subject to the order are located; and
  - d. sent to the governing body of each local government to which this order applies.
9. The Temporary Order suspending determination of the LOV will expire two years from the date the Order is issued. The Temporary Order suspending enforcement of the prohibition against certain encroachments on the public beach easement will expire three years from the date it is issued.
10. Should any part of this Temporary Order be determined by a court of competent jurisdiction to be invalid, the validity of the remaining parts of this Order shall remain unaffected.

SIGNED this 29th day of March, 2021, in Austin, Texas.

DocuSigned by:  
  
840877346994453...

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GEORGE P. BUSH  
Commissioner, General Land Office

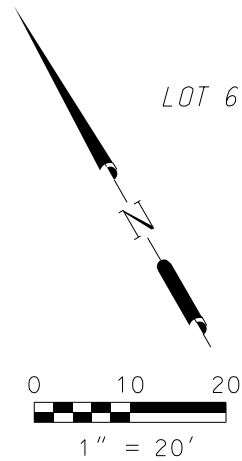
## Exhibit D

## Temporary Post-Storm Line of Vegetation 1-11-2021

Village of Surfside Beach



## Exhibit E

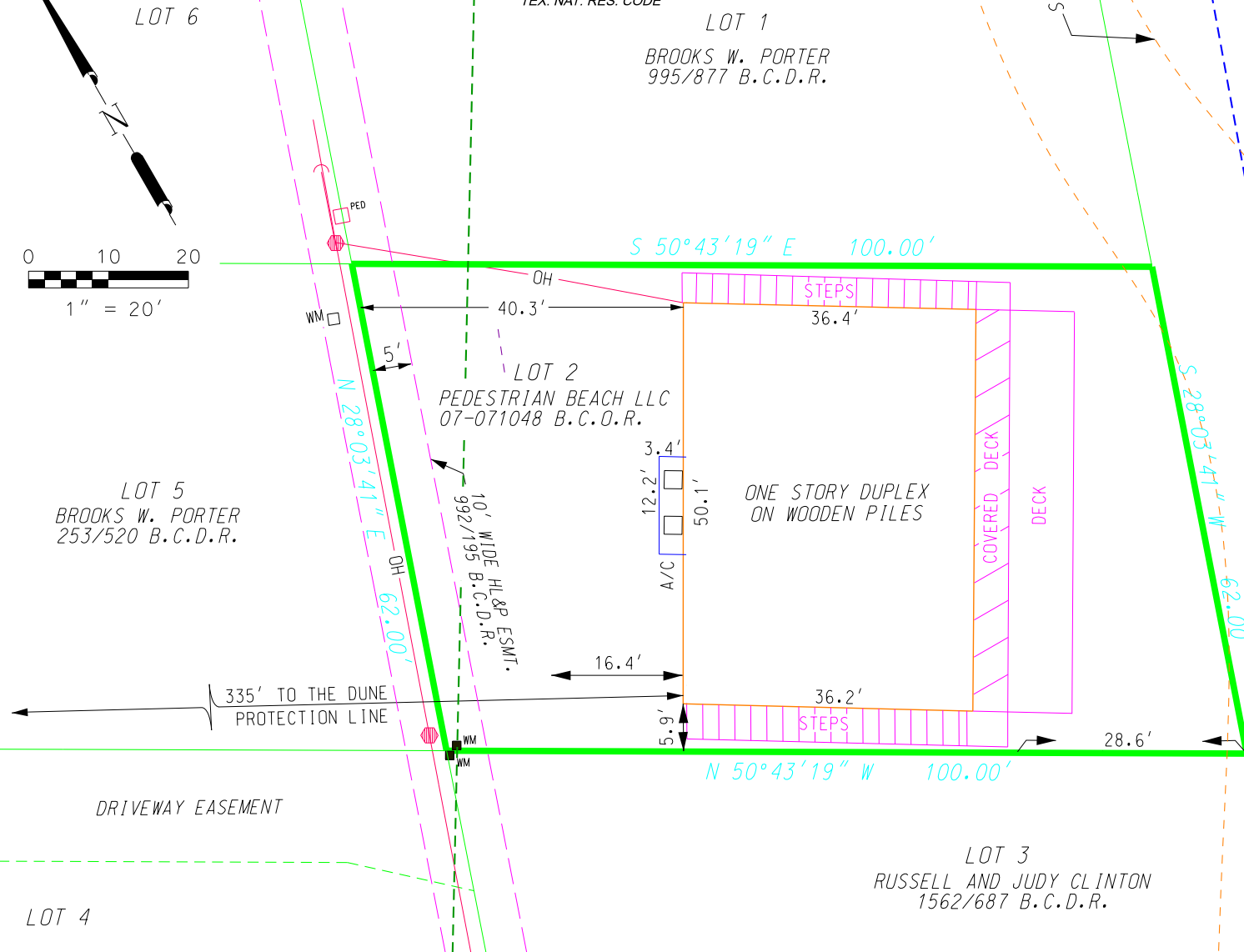


LINE OF VEGETATION  
(200' OFFSET FROM  
MEAN LOW TIDE)  
PER 61.016 (C)  
TEX. NAT. RES. CODE

MEAN HIGHER HIGH WATER  
DATE: MARCH 24, 2021  
ELEV.: 1.67'  
PER NOAA DATUM SHEET

MEAN LOW WATER  
DATE: MARCH 24, 2021  
ELEV.: 0.28'  
PER NOAA DATUM SHEET

GULF OF MEXICO



I, KIM THOMAS DOYLE, A LICENSED STATE LAND SURVEYOR, DO HEREBY CERTIFY THAT THIS PLAT WAS PREPARED FROM A SURVEY MADE ON THE GROUND UNDER MY DIRECTION AND SUPERVISION, ACCORDING TO LAW, AND THAT THE LIMITS, CORNERS AND BOUNDARIES, WITH MARKS OF THE SAME, NATURAL AND ARTIFICIAL, ARE TRULY AND CORRECTLY DESCRIBED AND SET FORTH.  
DATE OF PLAT/MAP: JUNE 14, 2021

NOTES:

1. ALL COORDINATES AND BEARINGS ARE RELATIVE TO THE TEXAS STATE PLANE COORDINATE SYSTEM, SOUTH CENTRAL ZONE (NAD 83), UNLESS OTHERWISE NOTED. NORTH ARROW SHOWN IS A GRAPHIC REPRESENTATION OF TEXAS STATE PLANE GRID NORTH.
2. ALL DISTANCES ARE HORIZONTAL SURFACE LEVEL LENGTHS UNLESS OTHERWISE NOTED. (C.S.F. = 0.999885825)
3. THIS SURVEY DID NOT RELY ON A CURRENT TITLE COMMITMENT. THE INFORMATION CONTAINED ON THIS SURVEY WAS COMPILED FROM DATA BOTH PRIVATE AND PUBLIC FROM THE BRAZORIA COUNTY COURTHOUSE, RESEARCHED BY AUTHOR. IT DOES NOT REPRESENT A COMPLETE DEED RESEARCH AND THIS PROPERTY MAY BE SUBJECT TO ADDITIONAL EASEMENTS, ENCUMBRANCES, RESTRICTIVE COVENANTS, OR OWNERSHIP TITLE EVIDENCE THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.
4. MEAN LOW WATER AND MEAN HIGHER HIGH WATER LINES SHOWN HEREON ARE BASED ON NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) MONUMENT "877 2447 E TIDAL", TIDAL EPOCH: 1983-2001, CONTROL TIDE STATION: 8771450 GALVESTON PIER 21, GALVESTON CHANNEL.
5. THERE ALSO EXISTS AN UNOBSTRUCTED AERIAL EASEMENT 5 FEETWIDE ADJACENT TO ALL H. L. & P. EASEMENTS.
6. THIS SURVEY IS BASED ON INFORMATION PORTRAYED ON PLAT OF SURVEY PERFORMED BY CHARLES D. WACHTSTETTER OF LOT 2, BLOCK 2, OF THE PALM BEACH SUBDIVISION (UNRECORDED), DATED 10-27-21. THE SCOPE OF THIS SURVEY IS LIMITED TO THE LOCATION OF MEAN HIGHER HIGH WATER, MEAN LOW WATER AND THE LINE OF VEGETATION (200' OFFSET FROM MEAN LOW TIDE), ALL OTHER FEATURES SHOWN HEREON ARE FOR REFERENCE ONLY.
6. FOR ADDITIONAL INFORMATION PLEASE CONTACT KIM T. DOYLE AT 979.265.3622, EXT. 1018.

LEGEND

- IRON ROD
- ⊙ MANHOLE
- POWER POLE
- PED TELEPHONE PEDESTAL
- OH OVERHEAD WIRE
- WM WATER METER
- - - EASEMENT LINE



KIM THOMAS DOYLE  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
TEXAS REGISTRATION NUMBER 6526

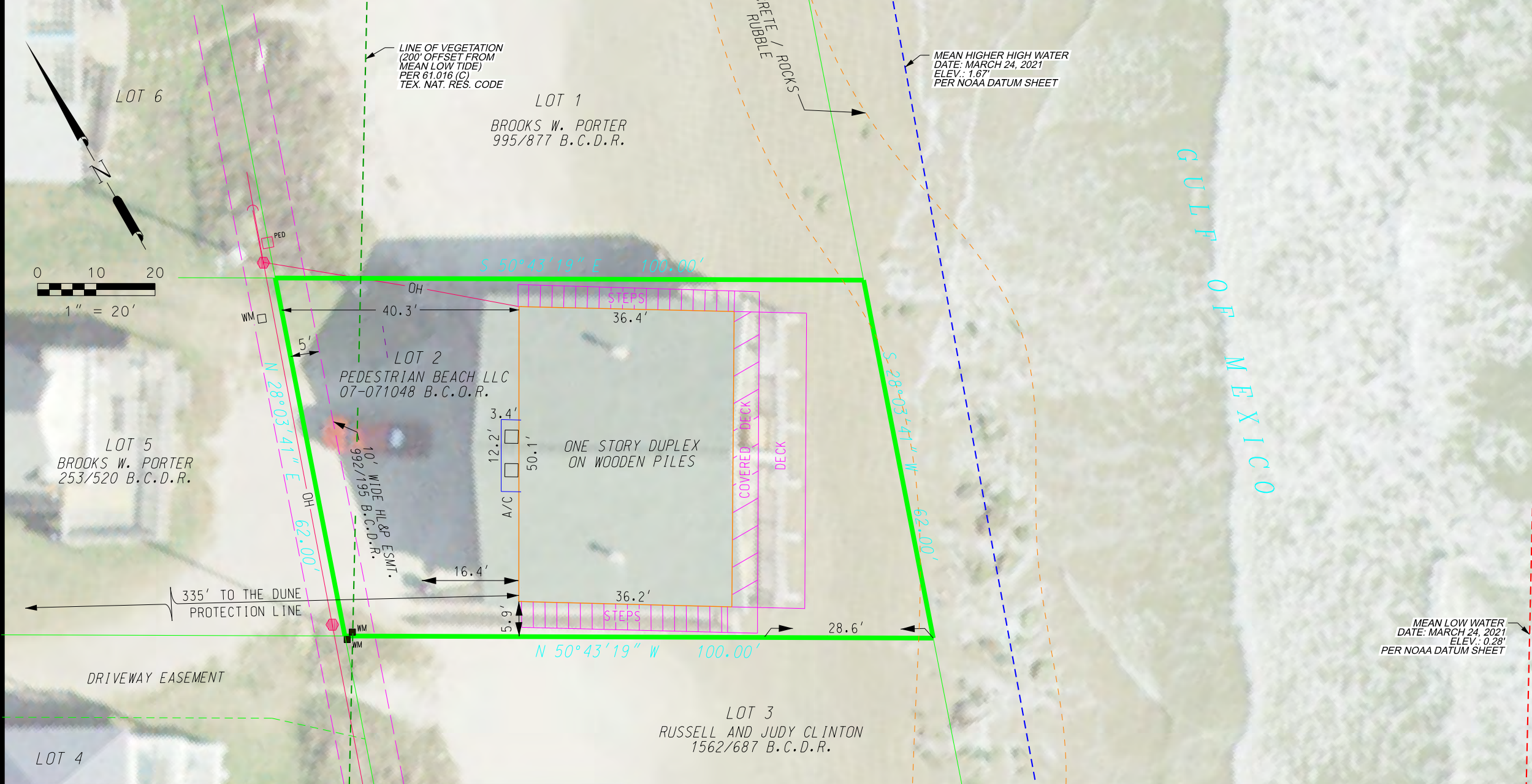
*Kim T. Doyle*

MAP SHOWING  
MHHW LINE FOR  
LOT 2, BLOCK 2  
OF  
PALM BEACH SUBDIVISION  
(UNRECORDED)  
OUT OF  
A CALLED 16.071 ACRE TRACT  
RECORDED IN  
VOLUME 966, PAGE 145  
OF THE  
BRAZORIA COUNTY DEED RECORDS  
AND BEING OUT OF THE ACCRETION  
LYING SOUTHEAST OF BLOCK 555  
OF THE  
SURFSIDE TOWNSITE  
IN THE  
F. J. CALVIT LEAGUE  
ABSTRACT 51  
BRAZORIA COUNTY, TEXAS  
FOR  
PACIFIC LEGAL FOUNDATION  
1206 AND 1207 SARGASSO LANE



Doyle & Wachtstetter, Inc.  
Surveying and Mapping GPS/GIS  
131 COMMERCE STREET, CLUTE, TEXAS 77531  
OFFICE: 979.265.3622 FAX: 979.265.9940

SURVEYED:	10-27-20	BOOK:	J.A.P. VOL. 18	PROJ. No.	11989-20-01
DRAWN BY:	MAC 10-27-20	CHECKED:	CDW 10-27-20	REVISED:	JDD 07-15-21



MAP SHOWING  
MHHW LINE FOR  
LOT 2, BLOCK 2

OF  
PALM BEACH SUBDIVISION  
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ABSTRACT 51  
BRAZORIA COUNTY, TEXAS  
FOR

PACIFIC LEGAL FOUNDATION

1206 AND 1207 SARGASSO LANE

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THAT THE LIMITS, CORNERS AND BOUNDARIES, WITH MARKS OF THE SAME,  
NATURAL AND ARTIFICIAL, ARE TRULY AND CORRECTLY DESCRIBED AND SET  
FORTH.

DATE OF PLAT/MAP: JUNE 14, 2021



KIM THOMAS DOYLE  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
TEXAS REGISTRATION NUMBER 6526

*Kim T. Doyle*

LEGEND

- IRON ROD
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SURVEYED: 10-27-20 BOOK: J.A.P. VOL. 18 PROJ. No. 11989-20-01  
DRAWN BY: MAC 10-27-20 CHECKED: CDW 10-27-20 REVISED: JDD 07-15-21

## Exhibit 2

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

CHARLES SHEFFIELD and  
PEDESTRIAN BEACH, LLC,

Plaintiffs,

v.

GEORGE P. BUSH, in his official capacity  
as Commissioner of the Texas General Land  
Office, and KEN PAXTON, in his official  
capacity as Attorney General for the State of  
Texas,

Defendants.

Civil Action No. 3:21-cv-00122

**DECLARATION OF CHARLES E. SHEFFIELD**

I, Charles E. Sheffield, do hereby declare and testify:

1. I have personal knowledge of the following facts and, if called upon to do so, could competently testify to these facts.
2. I am a United States citizen, a resident of Fort Bend County, Texas, and owner of coastal properties in Surfside Beach, Texas.
3. I am 67 years old.
4. I own three parcels of residentially developed Gulf front property in Surfside Beach, Texas, that are used for vacation rental purposes. These properties, located at 109,

111, and 814 Beach Drive, Surfside Beach, Texas 77514 (the Beach Drive properties), are the subject of this suit.

5. Two of my properties, those located 109 and 111 Beach Drive, are adjacent parcels known and recorded as Lots 4 and 5 of Block 2 of the G.D. Shanks Addition to the Town of Surfside.

6. The 109 and 111 Beach Drive properties include a portion of the dry beach lying seaward of the homes on the properties.

7. The deed and titles to the properties at 109 and 111 Beach Drive do not include a public beach access easement or any reserved public access rights.

8. The property at 109 Beach Drive contains a two-bedroom, one bathroom, A-frame style beach home, called the “Blue Mermaid.” This home was originally built and located closer to the Gulf waters, on land directly seaward of the portion of the lot that hosts the current home. After Hurricane Ike, the home was moved landward to its current position.

9. The property at 111 Beach Drive contains a duplex home which includes two separate units called “Paradise Point” and the “Lookout at Paradise Point.” The top unit, the “Lookout,” contains 2 bedrooms, and 1.5 bathrooms. The bottom unit, “Paradise Point,” contains 2 bedrooms and 1.5 bathrooms.

10. The home at 111 Beach Drive was lawfully built in its current location approximately 2009. Prior to 2009, a different, smaller home was located seaward of the current structure. The original home was removed in 2009, and the existing, larger home was built at its current site.

11. The homes at 109 and 111 share a stairway that runs from between the two homes to the dry beach below. This stairway is private.

12. In 2019, I purchased the properties at 109 and 111 Beach Drive, and furnishings, for approximately \$570,000, and quickly invested another \$30,000 in repairs to make them suitable for rental and personal use.

13. At approximately around the time of the purchase of the 109 and 111 Beach Drive properties in 2019, I authorized photographs of the properties for rental and advertisement purposes. Some of those photos are attached here as Exhibit A.

14. I also own property located at 814 Beach Drive, Surfside Beach, Texas 77541. The property at 814 Beach Drive is on the landward side of the two-lane, public road called Beach Drive. That road separates 814 Beach Drive from the Gulf waters. Exhibit B (Survey of 814 Beach Drive).

15. I purchased the 814 Beach drive property, including furnishings, in 2015 for \$235,000.

16. The deed and title to this property does not include a public beach access easement or any reserved public access rights.

17. In approximately 1984, a home was lawfully built on the 814 Beach Drive parcel. The home at 814 Beach Drive, called “the Chelsea,” is a three-bedroom, two-bathroom structure. Some photos of this property, taken since its purchase in 2015, are attached here as Exhibit C (photos).

18. The land at 814 Beach Drive is covered by grass and other vegetation, including vegetation located seaward of the home. It has a lawn that requires mowing.

19. To my knowledge, at the time of their construction, the homes on all of my Beach Drive properties were located landward of the mean higher high tide line, on land covered with vegetation. They were not constructed on a public beach area. If they had been, it is my understanding that the homes could not have been constructed due to the Open Beaches Act.

20. The homes on my Beach Drive properties are rented out to families and others for beach vacations and visits, year-round. I also occasionally use the Beach Drive homes for family visits and vacations with my three sons and their families, which include eight grandchildren.

21. The income from beach rentals, including from the rental of the Beach Drive properties, is one of my primary sources of income.

22. All of the Beach Drive properties are well-maintained and quickly repaired after occasional storm damage.

23. I have invested tens of thousands of dollars in the last five years for lawfully permitted repairs and maintenance, including for air conditioning repairs and replacement, sand replacement, and minor repairs to the stairway between 109 and 111 Beach Drive.

24. On average, I invest approximately \$5,000 \$10,000 annually in the upkeep and maintenance of the properties.

25. I purchased, and have used and maintained, the Beach Drive properties with the expectation that they are private and that I could continue their historical and preexisting residential use for private benefit.

26. To my knowledge, none of the homes on my Beach Drive properties have been subject to an official enforcement proceeding seeking removal of the homes on the ground that they are on a public beach or public beach easement.

27. No one has ever sued me or, to my knowledge, my predecessors in title to establish the existence of a public easement on my Beach Drive properties and no court has ever issued a judgment establishing that such an easement encumbers the titles to the properties.

28. To my knowledge, the state has never proved or obtained a public beach easement on the dry beach land lying seaward of my homes. Indeed, up until 2009, the land lying directly seaward of the home on 109 Beach Drive was not vacant, but the original site of the "Blue Mermaid" home.

29. I have never consented to use of my properties for public beach purposes, and I have never intended to or acted to dedicate my property as a public beach area. To my knowledge, my predecessors in title also never intended or acted to dedicate my properties as a public beach area.

30. In late summer of 2020, two tropical storms—Hurricane Laura and Tropical Storm Beta—came ashore in Texas. Based on my observations, prior to these storms, the line of vegetation was not located as far inland as the 200 foot (from mean low tide) line.

31. The 2020 storms moved sand and coastal vegetation along Surfside Beach. They did little damage to the structures on the Beach Drive properties but did remove sand from around the structures.

32. On March 29, 2021, General Land Office Commissioner George P. Bush issued an Order relating to coastal property in Surfside Beach. The Order, entitled, “Temporary Order Suspending Determination of the Line of Vegetation and Suspending Enforcement of Certain Encroachments on the Public Beach,” sets the boundary of the public beach in Surfside Beach at a “line 200 feet inland from the line of mean low tide.” The Order is effective for a period of two years. Exhibit D.

33. The Order specifically declares: “For the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT.”

34. I never received notice of the Order and the 200-foot public beach boundary and area it creates prior to its issuance. No one from the Commissioner’s office contacted me or my employees before the Order issued. No notice of the Order was posted on my Beach Drive properties.

35. With the Order, State officials publicly issued photographic maps showing the approximate location of the new 200-foot public beach area in Surfside Beach. These maps appear to show the 200-foot boundary line bisecting the structures on the properties at 109 and 111 Beach Drive. Exhibit E. This would mean that the homes are partially on the new 200-foot public beach area established by the Order.

36. At my request, on or about, June 14, 2021, a state licensed land surveyor carried out a survey of the properties at 109 and 111 Beach Drive to determine the current, precise location of the 200-foot beach boundary, mean higher high-water mark, and other relevant topographical features. *See* Exhibit F.

37. The survey shows that the new 200-foot public beach boundary line runs across the properties at 109 and 111 Beach Drive, and is located just a few feet seaward of my beach homes.

38. The 200-foot public beach boundary line bisects the private stairway used by 109 and 111 Beach Drive, placing the stairway partially within the new 200-foot-wide public beach easement area.

39. The June 14, 2021, survey also located the mean higher high-water line, relative to the properties at 109 and 111 Beach Drive. The survey found that the properties are wholly landward of the mean higher high-water line.

40. The properties at 109 and 111 Beach Drive are not on submerged or state-owned wet beaches, but are entirely on private land possessed under my deed to the properties.

41. Nevertheless, according to the June 14, 2021, survey, approximately 1/3 of the land I own at 109 and 111 Beach Drive, including land immediately adjacent to the homes, is now covered by the 200 foot “public beach easement” established by the Order.

42. With respect to the 814 Beach Drive property, I believe that the 200-foot public beach boundary line bisects that property, placing the home partially within the new, 200-foot-wide public beach easement area.

43. As I understand it, the Texas Open Beaches Act authorizes the public to access and use all public beaches and public beach easements and prohibits property owners from excluding people from areas classified as a public beach easement.

44. Because the 200-foot-wide “public beach easement” area established under the Order is now on portions of my Beach Drive properties, I understand that members of the general public may assert an Open Beach Act right to access and use those portions of property for indefinite time periods.

45. Since the new 200-foot public beach encroaches on my land to within a few feet of the homes at on the 109 and 111 Beach Drive properties, and likely covers the land under the home at 814 Beach Drive, I understand members of the public can now stand, sit, and otherwise station themselves on areas immediately around my homes, near entry ways and windows. This limits the homes’ privacy, safety and raises serious liability concerns.

46. Because a good portion of the private stairway serving 109 and 111 Beach Drive lies within the 200-foot public beach area, I fear and understand that the public may assert an Open Beaches Act right to use or “hang out” on the stairway, raising liability, safety, and damage concerns for me and my renters.

47. Neither the Order nor any provision of the Open Beaches Act limits the time, duration, or nature of activities that the public can engage on land, such as portions of my Beach Drive Properties, deemed to be a “public beach easement” under the Order.

48. I am concerned that people will attempt to access, occupy, and trespass on my properties because they are now within the public beach easement established by the Order. I am concerned that I may be held liable for any incidents that happen to members of the public when they attempt to access and use my land.

49. I understand that I will be fined if I attempt to exclude beachgoers from the portions of the Beach Drive properties within the new 200-foot public beach easement area, and therefore, I will have to accede (under protest) to trespassing while the Order is in effect.

50. I object to the loss of the right to tell people to move away from the Beach Drive homes when necessary to protect the safety and privacy of my family and renting families.

51. I would like the option to place “private property” and/or “no trespassing” signs on the properties, particularly on the stairway serving 109 and 111 Beach Drive, if necessary. I understand that I would be fined for doing so in the next two years because the stairs are now on a public beach easement area under the Order, and therefore, I will refrain from posting such signs.

52. The Order prevents new construction and addition of any materials (other than sand) on the Beach Drive properties because they are now within a public beach easement area under the Order.

53. I understand I will be fined if I place any materials other than sand on the properties or make certain repairs or additions to the properties because there is now a public beach easement on the properties under the Order. Therefore, I will have to refrain from placing items on the properties and making certain improvements for the next two years.

54. I understand that Land Office officials have filed the Order and its recognition of a 200-foot public beach area that includes my properties in the “real property

records” of Brazoria County. I consider this action to be a limit and encumbrance on my title to the properties.

55. I believe I would have to disclose the Order and its establishment of a public beach on my Beach Drive properties if I attempt to sell them within the next two years. I therefore believe, based on my experience with owning and renting beach homes, that the Order reduces the value of the properties and may render them unsalable for the next two years.

56. The Order does not offer or guarantee just compensation to me for converting the properties into public beach area available for public use and access for the next two years.

57. I was never provided with an opportunity to object to the issuance of the Order and its effect on my properties before the Land Commissioner issued the Order.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Attested and executed this 20<sup>th</sup> day of JULY, 2021, at HOUSTON, Texas.

  
CHARLES E. SHEFFIELD

**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendants are registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

s/ J. David Breemer  
J. DAVID BREEMER

# Exhibit A





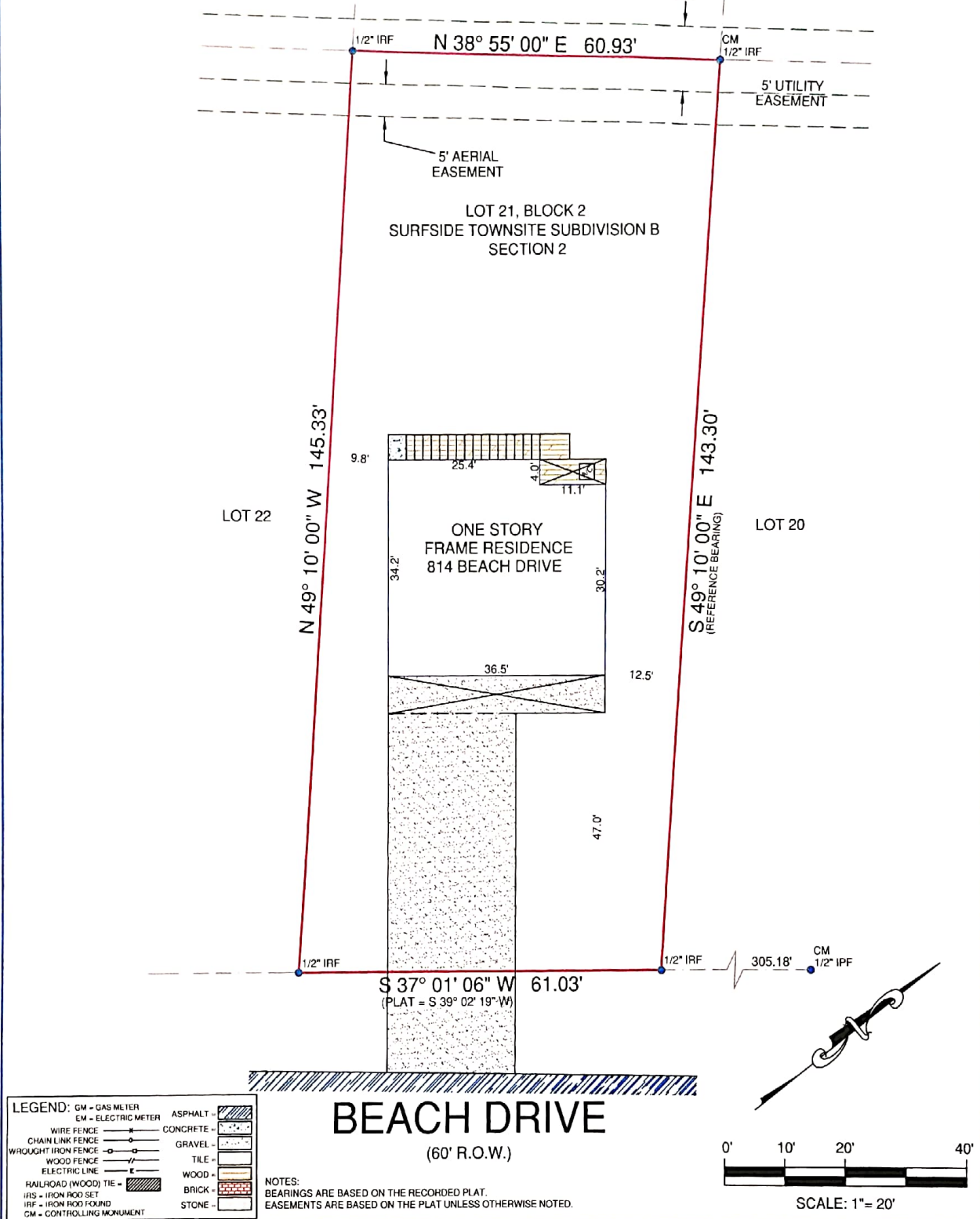








## Exhibit B



**LEGAL DESCRIPTION:**  
BEING LOT 21, BLOCK 2, OF SURFSIDE TOWNSITE SUBDIVISION B, SECTION 2, AN ADDITION IN BRAZORIA COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 8, PAGE 123, OF THE PLAT RECORDS OF BRAZORIA COUNTY, TEXAS.

**SURVEYOR'S CERTIFICATION:**  
THIS IS TO CERTIFY THAT ON THIS DATE A SURVEY WAS MADE ON THE GROUND, UNDER MY SUPERVISION, THAT THE SURVEY REFLECTS A TRUE AND CORRECT REPRESENTATION AS TO THE DIMENSIONS AND CALLS OF PROPERTY LINES; LOCATION AND TYPE OF IMPROVEMENTS. THERE ARE NO VISIBLE AND APPARENT EASEMENTS, ENCHROACHMENTS, CONFLICTS, OR PROTRUSIONS, EXCEPT AS SHOWN. THIS SURVEY IS NOT TO BE USED FOR CONSTRUCTION PURPOSES AND IS FOR THE EXCLUSIVE USE OF THE HEREON NAMED PURCHASER, MORTGAGE COMPANY, AND TITLE COMPANY AND THIS SURVEY IS MADE PURSUANT TO THAT CERTAIN TITLE COMMITMENT UNDER THE GF NUMBER SHOWN HEREON, PROVIDED BY THE TITLE COMPANY NAMED HEREON AND THAT THIS DATE, THE EASEMENTS, RIGHTS-OF-WAY, OR OTHER LOCATABLE MATTERS OF RECORD THAT THE UNDERSIGNED HAS KNOWLEDGE OR HAS BEEN ADVISED ARE AS SHOWN OR NOTED HEREON.

**GF. NO.** 21100200  
**BORROWER** CHARLES SHEFFIELD, TRUSTEE  
**TECH** TAG  
**FIELD** DT

**FLOOD INFORMATION:**  
THE SUBJECT PROPERTY APPEARS TO LIE WITHIN THE LIMITS OF A 100-YEAR FLOOD HAZARD ZONE ACCORDING TO THE MAP PUBLISHED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY, AND HAS A ZONE "VE" RATING AS SHOWN BY MAP NO. 48039C0785 I, DATED MAY 4, 1992.

**DATE:** 03/23/15 **JOB NO.:** 15-01875  
**FIELD DATE:** 03/23/15

**814 BEACH DRIVE, SURFSIDE BEACH, TX 77541**  
**LOT 21, BLOCK 2, SURFSIDE TOWNSITE SUBDIVISION B, SECTION 2**

**Premier Surveying LLC**  
5700 W. Plano Parkway  
Suite 2700  
Plano, Texas 75093  
972.612.3601 Office | 972.964.7021 Fax  
premier@premierurveying.com  
www.premiersurveying.com

**DATE:** \_\_\_\_\_  
**ACCEPTED BY:** \_\_\_\_\_

**Robert T. Paul, Jr.**  
REGISTERED PROFESSIONAL LAND SURVEYOR  
4984

**Premier Surveying LLC**  
5700 W. Plano Parkway, Suite 2700  
Plano, Texas 75093  
Office 972-612-3601  
Fax 972-964-7021

## Exhibit C





## Exhibit D

**TEXAS GENERAL LAND OFFICE**

In Re: Hurricane Laura and	§	Before the Commissioner of the
	§	Texas General Land Office
Tropical Storm Beta	§	State of Texas

**TEMPORARY ORDER SUSPENDING DETERMINATION OF THE LINE OF VEGETATION  
AND SUSPENDING ENFORCEMENT ON CERTAIN ENCROACHMENTS  
ON THE PUBLIC BEACH**

The Commissioner of the Texas General Land Office (Commissioner) makes the following Findings of Fact and Conclusions of Law in support of this Temporary Order to suspend determination of the line of vegetation (LOV) for two years and to suspend enforcement of the prohibition against certain encroachments on the public beach easement for three years pursuant to Texas Natural Resources Code (TNRC) §§ 61.0171 and 61.0185.

**Findings of Fact**

1. Hurricane Laura made landfall at 1:00 a.m. on August 27, 2020 near Cameron, Louisiana, impacting the upper Texas coast. Tropical Storm Beta made landfall at 10:00 p.m. on September 21, 2020 near Matagorda Peninsula. These two meteorological events resulted in a loss in elevation and a loss of vegetation and dunes in both Galveston and Brazoria Counties.
2. The line of vegetation (LOV) has been obliterated within the city limits of the Village of Surfside Beach and on Galveston Island from the western terminus of the seawall to Thirteen Mile Road by storm tidal surges and overwash from Hurricane Laura and Tropical Storm Beta.
3. A temporary suspension of determination of the line of vegetation and a determination of the boundary of the public beach, setting a line at 200 feet inland from mean low tide, is necessary so local governments can issue permits for beachfront construction in accordance with the local Beach Access and Dune Protection Plans, while preventing construction on the public beach easement.
4. A primary purpose of the temporary suspension of enforcement is to allow natural recovery and stabilization of the beach system prior to enforcing against encroachments on the public beach.
5. GLO staff reviewed the LOV in Brazoria and Galveston Counties multiple times between October 2020 and January 2021 and determined that the LOV had been obliterated as a result of meteorological events.
6. In some areas, a common law public beach easement or other easement exists that extends landward of the area that is 200 feet landward of mean low tide.

**Conclusions of Law**

1. The General Land Office has jurisdiction over this matter pursuant to the Open Beaches Act, TNRC Chapter 61, and the Dune Protection Act, TNRC Chapter 63.
2. Pursuant to TNRC § 61.0171, the Commissioner is authorized to issue a temporary order suspending action on conducting a line of vegetation determination for a period of up to three years from the date

the Order is issued since the Commissioner has determined that the line of vegetation was obliterated as a result of Hurricane Laura and Tropical Storm Beta. For the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT as established by a licensed state land surveyor.

3. Pursuant to TNRC § 61.0185, the Commissioner is authorized to issue a temporary order suspending, for a period of three years from the date the order is issued, the submission of a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach if the Commissioner determines that the line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event, the house was located landward of the natural line of vegetation before the meteorological event, and the house does not present an imminent threat to public health and safety.
4. The boundary of the public beach easement established by this Order establishes a minimum landward boundary of the public beach and does not supersede all or any portions of an easement existing prior to the issuance of this Order to the extent such right of the public that has been established 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. A public beach easement or other easement that extends beyond 200 feet landward of MLT cannot be ceded under common law.
5. No construction of habitable structures is allowed on the public beach easement, whether the portion from MLT to 200 feet landward or farther landward in places with a public beach easement or other easement that extends beyond the 200-foot line. Construction may be allowed as specified in 31 TAC §§ 15.7(e) and 15.11.

It is accordingly **ORDERED** that:

1. Action on conducting a line of vegetation determination is suspended for a period of two years from the date of this Order within the Village of Surfside Beach city limits and from the western terminus of the Seawall west to Thirteen Mile Road on Galveston Island. For the duration of the order, the public beach shall extend to a line 200 feet inland from the line of mean low tide (MLT) as established by a licensed state land surveyor.
2. The area from MLT to 200 feet landward shall be the minimum public beach easement. The public beach easement or another easement may extend further landward than the line established at 200 feet from MLT in some areas if a public beach easement as set forth in TNRC § 61.011 existed in those areas prior to the issuance of this Order.
3. For permitting purposes, local governments shall use 200 feet landward of mean low tide as the LOV, as applicable depending on the local government's plan, for two years.
4. Action on the submission of a request that the attorney general file a suit to obtain a court order to remove a house from a public beach is suspended for a period of three years from the date of this Order. For the duration of the Order, the authority of the GLO or other local government to submit a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach is suspended unless the Commissioner determines that the house presents an imminent threat to public health and safety or that the house was not located landward of the natural line of vegetation before Hurricane Laura or Tropical Storm Beta.

5. Notice of this Temporary Order shall be:
  - a. posted on the Internet website of the GLO;
  - b. published by the GLO as a miscellaneous document in the *Texas Register*;
  - c. filed for record by the land office in the real property records of the county in which the areas of beach subject to the order are located; and
  - d. sent to the governing body of each local government to which this order applies.
9. The Temporary Order suspending determination of the LOV will expire two years from the date the Order is issued. The Temporary Order suspending enforcement of the prohibition against certain encroachments on the public beach easement will expire three years from the date it is issued.
10. Should any part of this Temporary Order be determined by a court of competent jurisdiction to be invalid, the validity of the remaining parts of this Order shall remain unaffected.

SIGNED this 29th day of March, 2021, in Austin, Texas.

DocuSigned by:  
  
840877346994453...  
\_\_\_\_\_  
GEORGE P. BUSH  
Commissioner, General Land Office

## Exhibit E

## Temporary Post-Storm Line of Vegetation 1-11-2021

## Village of Surfside Beach



## Exhibit F

BRAZORIA COUNTY  
TEXASF. J. CALVIT LEAGUE  
ABSTRACT 51

## NOTES:

1. ALL COORDINATES AND BEARINGS ARE RELATIVE TO THE TEXAS STATE PLANE COORDINATE SYSTEM, SOUTH CENTRAL ZONE (NAD 83), UNLESS OTHERWISE NOTED. NORTH ARROW SHOWN IS A GRAPHIC REPRESENTATION OF TEXAS STATE PLANE GRID NORTH.

2. ALL DISTANCES ARE HORIZONTAL SURFACE LEVEL LENGTHS UNLESS OTHERWISE NOTED. (C.S.F. = 0.999885825)

3. THIS SURVEY DID NOT RELY ON A CURRENT TITLE COMMITMENT. THE INFORMATION CONTAINED ON THIS SURVEY WAS COMPILED FROM DATA BOTH PRIVATE AND PUBLIC FROM THE BRAZORIA COUNTY COURTHOUSE, RESEARCHED BY AUTHOR. IT DOES NOT REPRESENT A COMPLETE DEED RESEARCH AND THIS PROPERTY MAY BE SUBJECT TO ADDITIONAL EASEMENTS, ENCUMBERANCES, RESTRICTIVE COVENANTS, OR OWNERSHIP TITLE EVIDENCE THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.

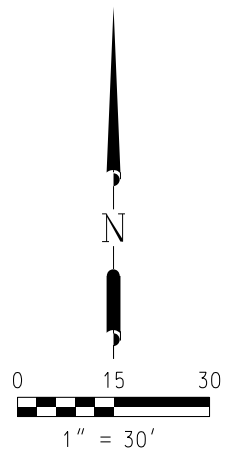
4. MEAN LOW WATER AND MEAN HIGHER HIGH WATER LINES SHOWN HEREON ARE BASED ON NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (N.O.A.A.) MONUMENT "877 2447 E TIDAL", TIDAL EPOCH: 1983- 2001, CONTROL TIDE STATION: 8771450 GALVESTON PIER 21, GALVESTON CHANNEL.

5. THIS SURVEY IS BASED ON INFORMATION PORTRAYED ON PLAT OF SURVEY PERFORMED BY CHARLES D. WATCHSTETTER OF LOS 4 AND 5, BLOCK 2, OF THE G. D. SHANKS ADDITION TO THE TOWN OF SURFSIDE, DATED 09-12-18. THE SCOPE OF THIS SURVEY IS LIMITED TO THE LOCATION OF MEAN HIGHER HIGH WATER, MEAN LOW WATER AND THE LINE OF VEGETATION (200' OFFSET FROM MEAN LOW TIDE), ALL OTHER FEATURES SHOWN HEREON ARE FOR REFERENCE ONLY.

6. FOR ADDITIONAL INFORMATION PLEASE CONTACT KIM T. DOYLE AT 979.265.3622, EXT. 1018.

## LEGEND

- FOUND IRON PIPE/ROD
- SET 5/8" IRON ROD W/ SURVEY CAP "CDW 4547"
- TELEPHONE PEDESTAL
- WM WATER METER
- ⊗ 2" STUB-UP
- POWER POLE
- OH OVERHEAD WIRE
- WOODEN FENCE
- BUILDING LINE



MAP SHOWING  
MHHW LINE FOR  
LOTS 4 AND 5, BLOCK 2

OF  
G.D. SHANKS ADDITION  
TO THE TOWN OF SURFSIDE

RECORDED IN  
VOLUME 5, PAGE 5  
OF THE  
BRAZORIA COUNTY PLAT RECORDS  
IN THE

F. J. CALVIT LEAGUE  
ABSTRACT 51  
BRAZORIA COUNTY, TEXAS  
FOR

PACIFIC LEGAL FOUNDATION

109 BEACH DRIVE



**Doyle & Wachtstetter, Inc.**  
Surveying and Mapping GPS/GIS  
131 COMMERCE STREET, CLUTE, TEXAS 77531  
OFFICE: 979.265.3622 FIRM NO.: 10024500 FAX: 979.265.9940

SURVEYED:	09-06-18	BOOK NO.:	J.A.P. VOL. 18	PROJECT NO.:	9551-18-01
DRAWN BY:	LOFTUS 09-12-18	CHECKED:	CDW 09-12-18	REVISED:	JDD 07-15-21

I, KIM THOMAS DOYLE, A LICENSED STATE LAND SURVEYOR, DO HEREBY CERTIFY THAT THIS PLAT WAS PREPARED FROM A SURVEY MADE ON THE GROUND UNDER MY DIRECTION AND SUPERVISION, ACCORDING TO LAW, AND THAT THE LIMITS, CORNERS AND BOUNDARIES, WITH MARKS OF THE SAME, NATURAL AND ARTIFICIAL, ARE TRULY AND CORRECTLY DESCRIBED AND SET FORTH.

DATE OF PLAT/MAP: JUNE 14, 2021



*Kim T. Doyle*

KIM THOMAS DOYLE  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
TEXAS REGISTRATION NUMBER 6526

SURFSIDE BEACH

MEAN HIGHER HIGH WATER  
DATE: MARCH 24, 2021  
ELEV.: 1.67'  
PER NOAA DATUM SHEET

MEAN LOW WATER  
DATE: MARCH 24, 2021  
ELEV.: 0.28'  
PER NOAA DATUM SHEET

BRAZORIA COUNTY  
TEXASF. J. CALVIT LEAGUE  
ABSTRACT 51

## NOTES:

1. ALL COORDINATES AND BEARINGS ARE RELATIVE TO THE TEXAS STATE PLANE COORDINATE SYSTEM, SOUTH CENTRAL ZONE (NAD 83), UNLESS OTHERWISE NOTED. NORTH ARROW SHOWN IS A GRAPHIC REPRESENTATION OF TEXAS STATE PLANE GRID NORTH.

2. ALL DISTANCES ARE HORIZONTAL SURFACE LEVEL LENGTHS UNLESS OTHERWISE NOTED. (C.S.F. = 0.999885825)

3. THIS SURVEY DID NOT RELY ON A CURRENT TITLE COMMITMENT. THE INFORMATION CONTAINED ON THIS SURVEY WAS COMPILED FROM DATA BOTH PRIVATE AND PUBLIC FROM THE BRAZORIA COUNTY COURTHOUSE, RESEARCHED BY AUTHOR. IT DOES NOT REPRESENT A COMPLETE DEED RESEARCH AND THIS PROPERTY MAY BE SUBJECT TO ADDITIONAL EASEMENTS, ENCUMBRANCES, RESTRICTIVE COVENANTS, OR OWNERSHIP TITLE EVIDENCE THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.

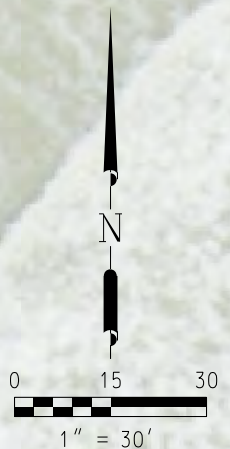
4. MEAN LOW WATER AND MEAN HIGHER HIGH WATER LINES SHOWN HEREON ARE BASED ON NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (N.O.A.A.) MONUMENT "877 2447 E TIDAL", TIDAL EPOCH: 1983- 2001, CONTROL TIDE STATION: 8771450 GALVESTON PIER 21, GALVESTON CHANNEL.

5. THIS SURVEY IS BASED ON INFORMATION PORTRAYED ON PLAT OF SURVEY PERFORMED BY CHARLES D. WATCHSTETTER OF LOS 4 AND 5, BLOCK 2, OF THE G. D. SHANKS ADDITION TO THE TOWN OF SURFSIDE, DATED 09-12-18. THE SCOPE OF THIS SURVEY IS LIMITED TO THE LOCATION OF MEAN HIGHER HIGH WATER, MEAN LOW WATER AND THE LINE OF VEGETATION (200' OFFSET FROM MEAN LOW TIDE), ALL OTHER FEATURES SHOWN HEREON ARE FOR REFERENCE ONLY.

6. FOR ADDITIONAL INFORMATION PLEASE CONTACT KIM T. DOYLE AT 979.265.3622, EXT. 1018.

## LEGEND

- FOUND IRON PIPE/ROD
- SET 5/8" IRON ROD W/ SURVEY CAP "CDW 4547"
- TELEPHONE PEDESTAL
- WM WATER METER
- ⊗ 2" STUB-UP
- POWER POLE
- OH OVERHEAD WIRE
- WOODEN FENCE
- BUILDING LINE



MAP SHOWING  
MHHW LINE FOR  
**LOTS 4 AND 5, BLOCK 2**

OF  
**G.D. SHANKS ADDITION  
TO THE TOWN OF SURFSIDE**

RECORDED IN  
VOLUME 5, PAGE 5  
OF THE  
BRAZORIA COUNTY PLAT RECORDS  
IN THE

**F. J. CALVIT LEAGUE  
ABSTRACT 51**  
BRAZORIA COUNTY, TEXAS  
FOR

**PACIFIC LEGAL FOUNDATION**

109 BEACH DRIVE



**Doyle & Wachtstetter, Inc.**  
Surveying and Mapping GPS/GIS  
131 COMMERCE STREET, CLUTE, TEXAS 77531  
OFFICE: 979.265.3622 FIRM NO.: 10024500 FAX: 979.265.9940

SURVEYED: 09-06-18 BOOK NO.: J.A.P. VOL. 18 PROJECT NO.: 9551-18-01  
DRAWN BY: LOFTUS 09-12-18 CHECKED: CDW 09-12-18 REVISED: JDD 07-15-21

I, KIM THOMAS DOYLE, A LICENSED STATE LAND SURVEYOR, DO HEREBY CERTIFY THAT THIS PLAT WAS PREPARED FROM A SURVEY MADE ON THE GROUND UNDER MY DIRECTION AND SUPERVISION, ACCORDING TO LAW, AND THAT THE LIMITS, CORNERS AND BOUNDARIES, WITH MARKS OF THE SAME, NATURAL AND ARTIFICIAL, ARE TRULY AND CORRECTLY DESCRIBED AND SET FORTH.

DATE OF PLAT/MAP: JUNE 14, 2021



*Kim T. Doyle*

KIM THOMAS DOYLE  
REGISTERED PROFESSIONAL LAND SURVEYOR  
LICENSED STATE LAND SURVEYOR  
TEXAS REGISTRATION NUMBER 6526

## Exhibit 3

**TEXAS GENERAL LAND OFFICE**

In Re: Hurricane Laura and	§	Before the Commissioner of the
	§	Texas General Land Office
Tropical Storm Beta	§	State of Texas

**TEMPORARY ORDER SUSPENDING DETERMINATION OF THE LINE OF VEGETATION  
AND SUSPENDING ENFORCEMENT ON CERTAIN ENCROACHMENTS  
ON THE PUBLIC BEACH**

The Commissioner of the Texas General Land Office (Commissioner) makes the following Findings of Fact and Conclusions of Law in support of this Temporary Order to suspend determination of the line of vegetation (LOV) for two years and to suspend enforcement of the prohibition against certain encroachments on the public beach easement for three years pursuant to Texas Natural Resources Code (TNRC) §§ 61.0171 and 61.0185.

**Findings of Fact**

1. Hurricane Laura made landfall at 1:00 a.m. on August 27, 2020 near Cameron, Louisiana, impacting the upper Texas coast. Tropical Storm Beta made landfall at 10:00 p.m. on September 21, 2020 near Matagorda Peninsula. These two meteorological events resulted in a loss in elevation and a loss of vegetation and dunes in both Galveston and Brazoria Counties.
2. The line of vegetation (LOV) has been obliterated within the city limits of the Village of Surfside Beach and on Galveston Island from the western terminus of the seawall to Thirteen Mile Road by storm tidal surges and overwash from Hurricane Laura and Tropical Storm Beta.
3. A temporary suspension of determination of the line of vegetation and a determination of the boundary of the public beach, setting a line at 200 feet inland from mean low tide, is necessary so local governments can issue permits for beachfront construction in accordance with the local Beach Access and Dune Protection Plans, while preventing construction on the public beach easement.
4. A primary purpose of the temporary suspension of enforcement is to allow natural recovery and stabilization of the beach system prior to enforcing against encroachments on the public beach.
5. GLO staff reviewed the LOV in Brazoria and Galveston Counties multiple times between October 2020 and January 2021 and determined that the LOV had been obliterated as a result of meteorological events.
6. In some areas, a common law public beach easement or other easement exists that extends landward of the area that is 200 feet landward of mean low tide.

**Conclusions of Law**

1. The General Land Office has jurisdiction over this matter pursuant to the Open Beaches Act, TNRC Chapter 61, and the Dune Protection Act, TNRC Chapter 63.
2. Pursuant to TNRC § 61.0171, the Commissioner is authorized to issue a temporary order suspending action on conducting a line of vegetation determination for a period of up to three years from the date

the Order is issued since the Commissioner has determined that the line of vegetation was obliterated as a result of Hurricane Laura and Tropical Storm Beta. For the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT as established by a licensed state land surveyor.

3. Pursuant to TNRC § 61.0185, the Commissioner is authorized to issue a temporary order suspending, for a period of three years from the date the order is issued, the submission of a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach if the Commissioner determines that the line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event, the house was located landward of the natural line of vegetation before the meteorological event, and the house does not present an imminent threat to public health and safety.
4. The boundary of the public beach easement established by this Order establishes a minimum landward boundary of the public beach and does not supersede all or any portions of an easement existing prior to the issuance of this Order to the extent such right of the public that has been established 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. A public beach easement or other easement that extends beyond 200 feet landward of MLT cannot be ceded under common law.
5. No construction of habitable structures is allowed on the public beach easement, whether the portion from MLT to 200 feet landward or farther landward in places with a public beach easement or other easement that extends beyond the 200-foot line. Construction may be allowed as specified in 31 TAC §§ 15.7(e) and 15.11.

It is accordingly **ORDERED** that:

1. Action on conducting a line of vegetation determination is suspended for a period of two years from the date of this Order within the Village of Surfside Beach city limits and from the western terminus of the Seawall west to Thirteen Mile Road on Galveston Island. For the duration of the order, the public beach shall extend to a line 200 feet inland from the line of mean low tide (MLT) as established by a licensed state land surveyor.
2. The area from MLT to 200 feet landward shall be the minimum public beach easement. The public beach easement or another easement may extend further landward than the line established at 200 feet from MLT in some areas if a public beach easement as set forth in TNRC § 61.011 existed in those areas prior to the issuance of this Order.
3. For permitting purposes, local governments shall use 200 feet landward of mean low tide as the LOV, as applicable depending on the local government's plan, for two years.
4. Action on the submission of a request that the attorney general file a suit to obtain a court order to remove a house from a public beach is suspended for a period of three years from the date of this Order. For the duration of the Order, the authority of the GLO or other local government to submit a request that the attorney general file a suit under TNRC § 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach is suspended unless the Commissioner determines that the house presents an imminent threat to public health and safety or that the house was not located landward of the natural line of vegetation before Hurricane Laura or Tropical Storm Beta.

5. Notice of this Temporary Order shall be:
  - a. posted on the Internet website of the GLO;
  - b. published by the GLO as a miscellaneous document in the *Texas Register*;
  - c. filed for record by the land office in the real property records of the county in which the areas of beach subject to the order are located; and
  - d. sent to the governing body of each local government to which this order applies.
9. The Temporary Order suspending determination of the LOV will expire two years from the date the Order is issued. The Temporary Order suspending enforcement of the prohibition against certain encroachments on the public beach easement will expire three years from the date it is issued.
10. Should any part of this Temporary Order be determined by a court of competent jurisdiction to be invalid, the validity of the remaining parts of this Order shall remain unaffected.

SIGNED this 29th day of March, 2021, in Austin, Texas.

DocuSigned by:  
  
840877346994453...  
\_\_\_\_\_  
GEORGE P. BUSH  
Commissioner, General Land Office

## Exhibit 4

### **Texas General Land Office Issues Temporary Suspension on the Line of Vegetation (LOV)**

The 2020 hurricane season brought an onslaught of particularly damaging effects, especially from Hurricane Laura and Tropical Storm Beta. The Galveston and Surfside areas experienced a loss of beach elevation and a significant loss of dunes and dune vegetation.

The Texas General Land Office conducted extensive beach surveys following the storms and determined that the line of vegetation (LOV) had been completely obliterated in certain areas.

Due to the damaging effects of the storms and the obliteration of the LOV in some areas, the Texas General Land Office has issued an Order under the authority of Texas Natural Resource Code Sections [61.0171](#) and [61.0185](#) that temporarily suspends the determination of the LOV for two years and suspends certain enforcement actions for removal of houses on the public beach for three years in Surfside and in parts of Galveston. This Temporary Order is necessary to give the beach and dune system time to recover naturally from the meteorological events and establish a new line of vegetation. This temporary Order also maintains the status quo for the duration of the order protecting the private property rights of littoral landowners.

Under the Order, for a period of two years, the public beach will extend to a line 200 feet inland from the line of mean low tide as established by a licensed state land surveyor. For permitting purposes, local governments will be required to use 200 feet landward of MLT as the LOV, as applicable depending on the local government's Beach Access & Dune Protection Plan. This Order applies to homeowners, businesses, and local governments during the permitting process.

The establishment of the LOV at 200 feet from mean low tide line will mean that a limited number of homes are now partially or wholly located on the public beach. One of the primary purposes of the Order is to give the beach and natural line of vegetation time to recover rather than seeking immediate enforcement regarding structures located on the public beach. The Order includes a three-year suspension of the ability for the Commissioner to request that the Texas Attorney General's Office file a suit to remove any home from the public beach. The only two exemptions to this rule are that:

1. The house must have been located landward of the natural LOV prior to the meteorological events that are the subject of this Order; and
2. The house must not present an imminent threat to public health and safety.

During the duration of this Order, property owners may make limited repairs to their homes that are seaward of the LOV in accordance with [31 TAC § 15.11](#).

The temporary suspension of the LOV and enforcement Order applies within the Village of Surfside Beach city limits and in the City of Galveston from the western terminus of the Seawall west to 13 Mile Road.

### **FAQ (FREQUENTLY ASKED QUESTIONS)**

- **Why is this action necessary?**

This action is necessary because the LOV was destroyed by Hurricane Laura and Tropical Storm Beta. The Open Beaches Act allows the Texas General Land Office to suspend usual LOV determinations and set the boundary of the public beach at 200 feet from Mean Low Tide for a

period of up to three years to allow for natural recovery of the vegetation line. Simultaneously, the Open Beaches Act also allows the Land Office to suspend requests to the Attorney General's office to remove homes that may now be located seaward of the boundary of the public beach for a period of three years. This is being done in order to maintain the status quo and protect private property rights while giving the beach and dune system time to recover naturally from the meteorological events.

- **How was the line decided upon?**

The temporary line was determined by a licensed state land surveyor through on-the-ground surveys that were conducted by the GLO in January 2021. The survey line located 200 feet from mean low tide marks the minimum extent of the public beach easement where the natural line of vegetation has been obliterated.

- **Where would the LOV be measured if the Commissioner had not issued this Order?**

By statute, the LOV is at 200 feet from mean low tide when it has been obliterated by a storm, even without the order. The purpose of the order is to make it easier for local governments and landowners to determine the location of the LOV, and to provide temporary relief from enforcement against homes determined to be located on the public beach.

- **What areas of the coast are affected?**

The portions of the Village of Surfside Beach city limits and the City of Galveston from the western terminus of the Seawall west to 13 Mile Road (See maps below for a more detailed outline).

- **Is the GLO going to remove houses that are seaward of 200 feet from mean low water?**

No. Not at this time. The Order issued by the Land Office suspends the ability to request that the Texas Attorney General's Office file a suit remove a home from the public beach for three years.

- **Will the GLO condemn my house when the three-year period is over?**

The GLO does not have condemnation authority. However, construction is not allowed on the public beach and the GLO is charged with ensuring that existing and new construction does not impact the public's ability to use or access the beach. Typically under the Open Beaches Act, if any portion of a structure is located within the public beach easement, it is considered an encroachment on the easement and may be subject to removal through an enforcement action if the structure is or becomes a health and safety risk or significantly impedes the public's ability to traverse the beach.

- **Does this Order suspend all enforcement action by the GLO for 3 years?**

No, the GLO can still pursue enforcement if you perform construction without a permit or in a manner not compliant with an existing permit. This Order only suspends enforcement for removal of homes or structures that are located on the public beach.

- **May a property owner repair a home that is encroaching on the public beach?**

Yes, in certain cases. However, under the Order and state rules for beachfront construction, there are limitations on what activities may be performed. A homeowner may be eligible to obtain a permit under [31 TAC § 15.11](#) which lays out the following conditions:

1. The line of vegetation establishing the boundary of the public beach has moved as a result of erosion or a meteorological event.
  2. The house was located landward of the line of vegetation before the erosion or meteorological event occurred.
  3. No portion of the house is located seaward of mean high tide.
  4. The house was not damaged more than 50 percent as the result of a meteorological event.
  5. The house does not present an imminent threat to public health and safety.
- **My house is located partially or entirely seaward of the 200 feet from mean low water line, what construction activities can I do?**  
A local government may issue a certificate or permit authorizing repair of an eligible house if the local government determines that the repair:
    1. is solely to make the house habitable including reconnecting the house to utilities;
    2. does not increase the footprint of the house;
    3. does not include the use of impervious material, including but not limited to concrete or fibercrete, seaward of the boundary of the public beach;
    4. does not include the construction of an enclosed space below the base flood elevation and seaward of the boundary of the public beach;
    5. does not include the repair, construction, or maintenance of an erosion response structure seaward of the boundary of the public beach;
    6. does not occur seaward of mean high water; and
    7. does not include construction underneath, outside or around the house other than for reasonable access to or structural integrity of the house, provided that such repair does not create an additional obstruction to public use of and access to the beach.

In addition, only beach-quality sand may be placed beneath the footprint of an eligible house and in an area up to five feet seaward of the house. The beach-quality sand must remain loose and cannot be placed in bags or other formed containment. The sand must also be an acceptable mineralogy and grain size when compared to the sediments found in the beach/dune system. The use of clay or clayey material is not allowed.

You may repair your septic system if the Texas Commission on Environmental Quality, Texas Department of Health, or a local official has determined that your septic system does not pose a public health and safety risk. Reconnection to water, sewer, electricity, and gas should be coordinated through the local government and must be made in accordance with other applicable laws and local ordinances.

- **What's not allowed in areas seaward of 200 ft from MLT?**
  1. You can't repair, replace, or construct a slab of concrete, fibercrete, or other impervious material.

2. You can't construct a room addition or increase the size of the structure's footprint or construct a new structure.
  3. You can't place materials other than beach quality sand on the public beach.
- **What if the 200-foot line goes through my house?**  
If the 200-foot line goes through any portion of your house, then your entire house will be limited to only the activities allowed under [31 TAC § 15.11](#). Some construction in areas landward of the public beach is allowed but must comply with the local government's Beach Access & Dune Protection Plan and state rules (see list of allowable construction activities above).
  - **May a property owner obtain a permit to build a new habitable structure, if a portion of the footprint is located seaward of the 200-foot line?**  
No, new construction of a habitable structure may only be permitted completely landward of the public beach easement, or 200 feet from mean low tide, whichever is farther landward.
  - **May I use my own survey to determine the location of 200 feet from mean low tide?**  
Yes, you may have an independent survey performed by a licensed state land surveyor. The local government and GLO will consider such surveys on a case by case basis. All surveys must be submitted to the local government and reviewed by the General Land Office.
  - **My bulkhead, retaining wall or geotube is exposed and damaged. Can I repair it?**  
No. Constructing, repairing, or maintaining a bulkhead, retaining wall erosion response structure or shore protection project on the public beach is prohibited.
  - **May dunes be restored seaward of the 200-foot line?**  
Only in select areas. Dune restoration projects may be constructed no farther seaward than 20 feet from the post-storm landward boundary of the public beach (which is 180 feet from mean low tide) as long as public beach access is not impacted. Other rules relating to dune restoration in [31 TAC § 15.7\(e\)](#) also apply.
  - **I previously received an emergency authorization to restore dunes seaward of the 200-foot line; will the GLO require me to move that restored dune?**  
No, the GLO will not require you to move a restored dune as long as the dune restoration work was completed in accordance with the emergency rules and the authorization from the local government and does not interfere with the public's use of the beach.
  - **If I restored dunes on the public beach previously or want to restore them in the future, will this change the location of the line of vegetation?**  
No, the line of vegetation will be set at 200 feet from Mean Low Tide until the Order expires.
  - **Where is the line of vegetation in areas where this Order does not apply?**  
The GLO will determine the location of the line of vegetation using its normal criteria under the Open Beaches Act in areas where this Order does not apply. The location of the natural line of

vegetation will be used to determine the landward boundary of the public beach easement, as determined by the GLO.

- **I don't agree with the 200-foot line, what is my recourse?**

The GLO has the authority to set the "line of vegetation," which is the statutory landward boundary of the public beach. The Order is a temporary measure designed to set the landward extent of the public beach following the impacts of a meteorological event. The line is based on the best information and technology available to the GLO. However, you may hire your own licensed state land surveyor to determine the location of the 200-foot line and submit their survey with the construction application to the local government.

- **How do I get a permit to perform construction or dune restoration?**

Apply to your local government for a regular Beachfront Construction Certificate & Dune Protection Permit for all construction projects. The normal permitting process includes a local review of the application and a ten-day review period for the GLO to comment on the proposed small-scale permit application. The local government that issues Beachfront Construction Certificates and Dune Protection Permits in the affected areas are:

City of Galveston: 409-797-3660

Village of Surfside Beach: 979-233-1531

## Kiren Mathews

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**From:** DCECF\_LiveDB@txs.uscourts.gov  
**Sent:** Thursday, July 22, 2021 12:42 PM  
**To:** DC\_Notices@txsd.uscourts.gov  
**Subject:** Activity in Case 3:21-cv-00122 Sheffield et al v. Bush et al Motion for Preliminary Injunction

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### U.S. District Court

### SOUTHERN DISTRICT OF TEXAS

#### Notice of Electronic Filing

The following transaction was entered by Breemer, Jan on 7/22/2021 at 2:41 PM CDT and filed on 7/22/2021

**Case Name:** Sheffield et al v. Bush et al

**Case Number:** [3:21-cv-00122](#)

**Filer:** Pedestrian Beach, LLC  
Charles Sheffield

**Document Number:** [16](#)

#### Docket Text:

**MOTION for Preliminary Injunction by Pedestrian Beach, LLC, Charles Sheffield, filed. Motion Docket Date 8/12/2021. (Attachments: # (1) Exhibit 1 - Declaration of Merry C. Porter, # (2) Exhibit A - Deed, # (3) Exhibit B - Photos of Property, # (4) Exhibit C - GLO Order, # (5) Exhibit D - Aerial Photographic Map, # (6) Exhibit E - June 2021 Survey, # (7) Exhibit 2 - Declaration of Charles E. Sheffield, # (8) Exhibit A - Photos of Property, # (9) Exhibit B - 2015 Survey, # (10) Exhibit C - Photos of Property, # (11) Exhibit D - GLO Order, # (12) Exhibit E - Aerial Photographic Map, # (13) Exhibit F - June 2021 Survey, # (14) Exhibit 3 - GLO Order, # (15) Exhibit 4 - FAQ Sheet)(Breemer, Jan)**

#### 3:21-cv-00122 Notice has been electronically mailed to:

Jan David Breemer jbreemer@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org

Jeffrey Wilson McCoy jmccoy@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org

Shelly Magan Doggett shelly.doggett@oag.texas.gov, janet.mcnutt@oag.texas.gov,

**3:21-cv-00122 Notice has not been electronically mailed to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit 1 - Declaration of Merry C. Porter

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit A - Deed

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit B - Photos of Property

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit C - GLO Order

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit D - Aerial Photographic Map

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit E - June 2021 Survey

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit 2 - Declaration of Charles E. Sheffield

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit A - Photos of Property

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit B - 2015 Survey

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit C - Photos of Property

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit D - GLO Order

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit E - Aerial Photographic Map

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit F - June 2021 Survey

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit 3 - GLO Order

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit 4 - FAQ Sheet

**Original filename:**n/a

**Electronic document Stamp:**

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