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Carbon Control News

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## **HEADLINE: SUPREME COURT REVIEW OF PROPERTY CASE MAY IMPACT CLIMATE PLANNING**

### **BODY:**

A property rights case pending before the Supreme Court could have broader implications for emerging strategies by state and local governments to respond to the impacts of climate change, with potential regulatory implications for developers and landowners that supplement current debates over strategies for addressing greenhouse gas emissions, according to legal experts.

Observers say they are monitoring the case for its impact on climate change adaptation strategies, though the case itself deals not with global warming but with a narrower dispute over beach restoration efforts financed by the government.

The Supreme Court in June agreed to review *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection, et al.* -- a case in which several beachfront property owners initially challenged an effort by Florida to restore the beach next to their property after damage caused by Hurricane Opal in the mid-1990s.

While the government effort might seem at first glance to be a boon to property owners, the use of public money for the project enabled increased public access to the beach under state law. Accordingly, plaintiffs in the case fought the change -- which makes public any additional beach property subsequently added under natural processes -- on the grounds that it was an unconstitutional taking of property. Specifically, the landowners argued that the application of the law, which established a new Erosion Control Line, took away an existing common law right to additional accretion of additional beach under natural processes. The Florida Supreme Court disagreed and found that the government restoration project essentially rendered the common law accretion argument moot, and the case was appealed to the U.S. Supreme Court.

In a commentary for the Environmental Law Institute, Columbia University Center for Climate Change Law Director Michael Gerrard notes that the case has implications for climate change adaptation, even as it is already being closely watched as the first takings case accepted for review by the high court since 2005 and the first case since John Roberts became chief justice. The commentary is available at [CarbonControlNews.com](http://CarbonControlNews.com).

On the specific issue of climate change, Gerrard says the case could ultimately affect the legal viability of rolling easements -- an emerging option for responding to climate change that envisions the edge of a no-development zone moving as natural conditions change. The concept is already in play, Gerrard notes, in California, where the California Natural Resources Agency encourages the idea in a discussion draft of its 2009 Climate Adaptation Strategy.

While the notion of adaptation is often talked about separately from emissions, California's draft strategy says the two "must complement each other, and efforts within and across sectors must be coordinated." On

the adaptation front, rolling easements are only one of the strategies the draft suggests to help respond to the public health and economic threats from climate change.

Should the high court decide to overturn the Florida Supreme Court's ruling, Gerrard says "it is easy to envision a holding that leads to the conclusion that imposition of a rolling easement to prevent development of previously-developable land is a regulatory taking. . . . If that happens the rolling easement and perhaps some other techniques to inhibit development in areas vulnerable to sea level rise may no longer be available."

In a separate article in the New York Law Journal, Pace University School of Law Professor John Nolon says a variety of groups should pay close attention to the case, including "planners, citizens and owners interested in the impacts of climate change which include storm surges, hurricanes and the gradual landward movement of the tide."

Initial briefs in the case are currently being filed, and at least for the moment appear to focus on narrower takings issues, according to one source following the case. -- Doug Obey

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