

# **THE WAR ON CLIMATE CHANGE: LEGAL BARRIERS TO STOCKING THE LAND USE REGULATORY ARSENAL**

**Michael Allan Wolf**

*Sustainability Conference of American Legal Educators*

**Arizona State University**

**Sandra Day O'Connor College of Law**

**May 8, 2015**

# A STORMY CHILDHOOD (1)

## HURRICANE ROARS UP THE GULF COAST INTO CITRUS BELT

At Least 4 Killed in Florida  
—Orange and Grapefruit  
Crops Heavily Damaged

### FORT MYERS BUFFETED

Atlantic Shoreline Warned  
as Far North as Savannah  
—Winds Top 100 M.P.H

By The Associated Press.

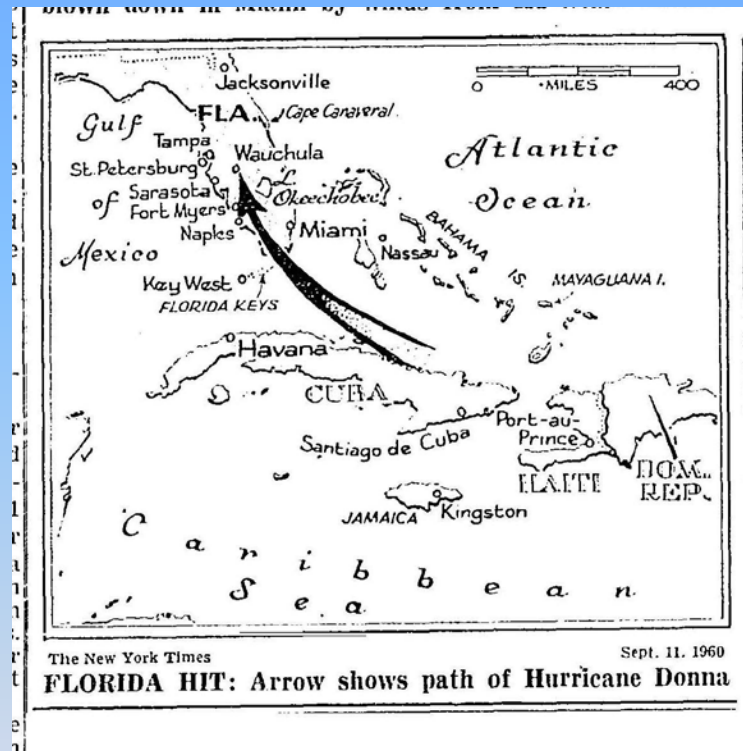
TAMPA, Fla., Sunday, Sept. 11—Hurricane Donna swirled inland through the heart of the Florida citrus belt early today, dealing vast damage to the multi-million-dollar crop of oranges and grapefruit. The crop was almost ripe.

Warnings were ordered along the Atlantic Coast as far north as Savannah, Ga.

Winds of 100 miles an hour rocked Lakeland. Early today the eye of the storm was moving steadily north through central Florida.

Behind it, the hurricane left much of the lower Florida Gulf Coast isolated. Four deaths had been reported. Fragmentary reports told of thirteen injured in Fort Myers.

Fort Myers Cut Off



# A Stormy Childhood (2)

FLORIDA TWISTERS KILL 9, INJURE 300: Tampa, St. Petersburg Hit—Property Damage in the Millions

## FLORIDA TWISTERS KILL 9, INJURE 300

Tampa, St. Petersburg and  
Lakeland Hit—Property  
Damage in the Millions

By The Associated Press

TAMPA, Fla., April 4—A squall line bristling with tornadoes cut across central Florida today from the west coast to the east, killing at least nine persons and injuring more than 300. Hundreds more were left homeless.

Millions of dollars worth of property was destroyed.

Homes were demolished or badly damaged, trees uprooted, telephone and power lines felled and automobiles overturned.

Gov. Haydon Burns declared Polk and Hillsborough Counties disaster areas. He sent in the National Guard and all available state troopers to help search for survivors and guard against looting.

### Hits Near Cape Kennedy

The tornadoes swirled out of the Gulf of Mexico into a St. Petersburg subdivision about 8 A.M. They skipped across Tampa Bay, creating water-spouts, and roared into northern Tampa.

They whirled inland through Lakeland and a cluster of smaller communities—Winter Haven, Auburndale, Haines City and Davenport — before striking Cocoa and sweeping just south of Cape Kennedy at about 10 A.M.

Three of the deaths were in Tampa, which, with a population of 274,000, is the largest city in the state, next to Miami. Six deaths were in Lakeland, a city of 42,000.

Nine persons were injured at St. Petersburg, 68 at Tampa, 92 at Lakeland and 133 at Cocoa.

The Red Cross said 158

Continued on Page 19, Column 1

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

More than 30 students were injured in Lakeland when the roof was torn from Southwest Junior High School. Most were cut by glass.

More than 90 persons were in-

# Eminent Domain

- Battlefields: Alternative energy transmission
- Carbon sinks and sequestration
- SLR adaptation and retreat
- Subterranean takings to prevent extraction harms
- 
- Barriers: Public Use and post-*Kelo* reforms
- Lack of political will
- Agenda 21

# Zoning and other state and local land use regulations

- ▣ Battlefields: SLR adaptation and retreat
- ▣ Regulation of hydrofracking and other fossil fuel extraction methods
- ▣ GHG reduction in building, transportation, industry, and energy supply
- ▣
- ▣ Barriers: Preemption
- ▣ Ultra vires/enabling acts
- ▣ Delegation doctrine
- ▣ Regulatory takings

# Recognizing climate change "dead zones"

- ▣ Battlefields: Barrier island and other coastal building and rebuilding
- ▣ Floodplain mapping
- ▣ Critical habitat
- ▣ Water supply for irrigation and human consumption
- ▣
- ▣ Barriers: Political failure – NFIP and Congress
- ▣ Government's failure to repair infrastructure and to allow rebuilding as a regulatory taking

# One Vote

- ▣ Public Use (*Kelo*)
- ▣ Exactions Takings (*Koontz*)
- ▣ Judicial Takings (*Stop the Beach Renourishment*)
- ▣ Standing (*Mass. v. EPA*)

# The Unaffordable Price Tag

- *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987): “The **interim flood protection area** described by the ordinance included the flat areas on either side of Mill Creek on which Lutherglen had stood.”
- *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987): “James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the **California Coastal Commission** could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their **beachfront property**.”
- *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992): “In October 1986, the Council appointed a ‘Blue Ribbon Committee on Beachfront Management’ to investigate **beach erosion** and propose possible solutions. In March 1987, the Committee found that South Carolina's **beaches were ‘critically eroding,’** and proposed land-use restrictions.”
- *Dolan v. City of Tigard*, 512 U.S. 374 (1994): “The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these **flooding problems**.”
- *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) “Regulations promulgated by the Council **designated salt marshes** like those on SGI's property as protected ‘**coastal wetlands**,’ on which development is limited to a great extent.”
- *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 “In 2003, the city of Destin and Walton County applied for the necessary permits to restore 6.9 miles of beach within their jurisdictions that had been **eroded by several hurricanes**.”
- *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012): “The question presented is whether a taking may occur, within the meaning of the Takings Clause, when **government-induced flood invasions**, although repetitive, are temporary.”
- *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) : “Consistent with the Henderson Act, the St. Johns River Water Management District . . . requires that permit applicants **wishing to build on wetlands offset the resulting environmental damage** by creating, enhancing, or preserving wetlands elsewhere.”