The Law's the Limit: Sea-Level Rise Adaptation and Local Government

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Overview

- A Dramatically Different Future
- Legal (and FINANCIAL) Liability:
  - For flooding generally
  - Drainage system
  - Roads
  - Vacated or abandoned properties
- Policy Responses
  - Least/no legal risk
  - Some legal risk
  - Higher legal risk

A Dramatically Different Future

How we have been planning:

Local Government Tradeoffs and Perspectives

- Desire to grow and increase tax base
- Desire to protect people and property
- Minimize risk to public infrastructure and cost of maintenance/rebuilding/construction
- Short-term costs and politics vs. long-term vision, safety, and financial viability

A Civil Wrong for Which the Law Provides a Remedy

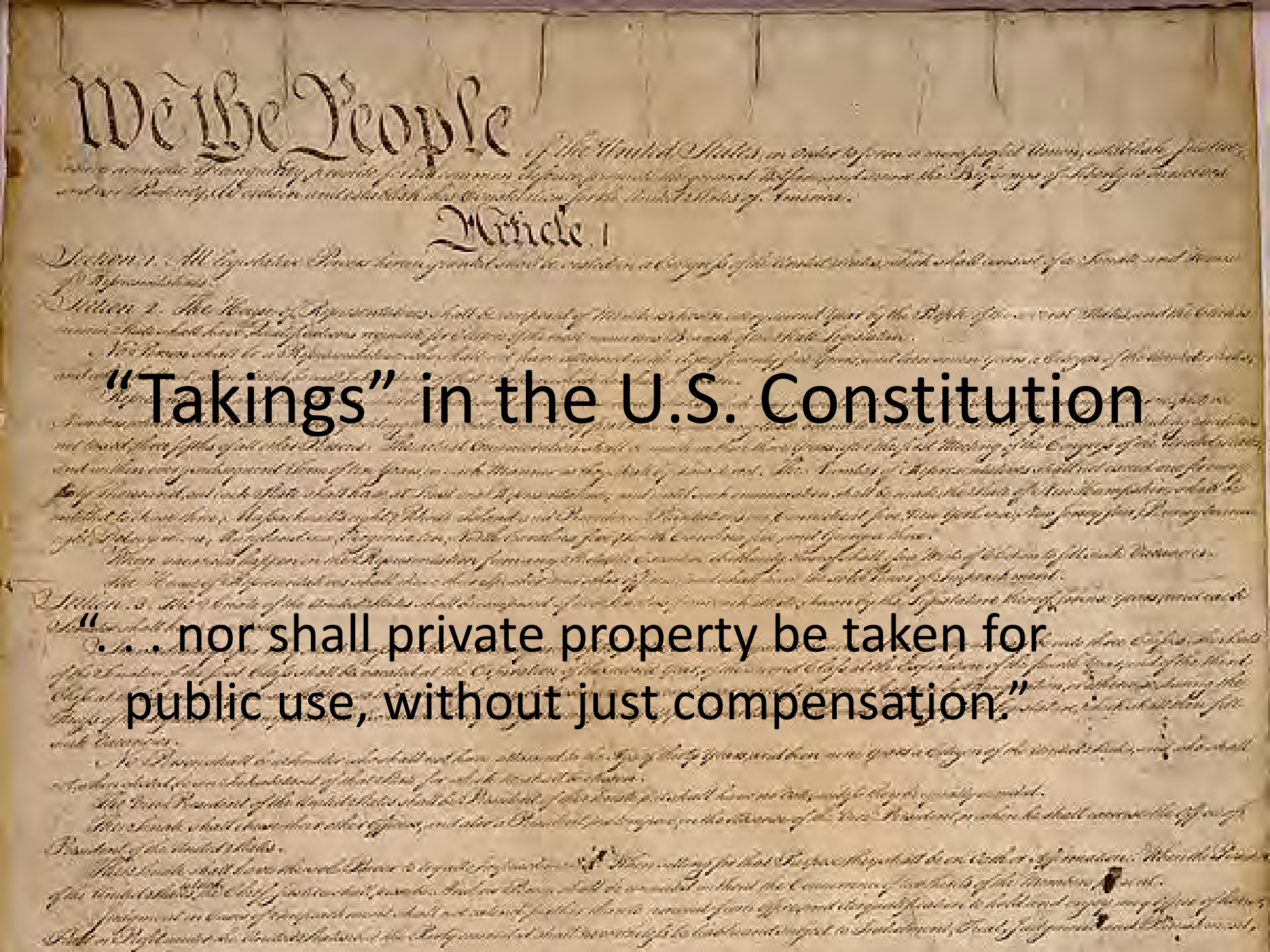
Intentional Torts

- Not our focus

Negligence

- **Duty of Care**
- **Breach**
- **Causation**
- **Damages**

But,
SOVEREIGN IMMUNITY



"Takings" in the U.S. Constitution

". . . nor shall private property be taken for public use, without just compensation."

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Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-level Rise

by Thomas Ruppert and Carly Grimm

- No duty to provide drainage
  - As with many services (fire, police, etc.), *authority* or *power* to provide
- If provided, duty to maintain

Maintenance vs. Upgrade

- No duty to upgrade
- Why the difference?
  - For existing, people now depend on it
  - No right to depend on what hasn't been built
  - Separation of gov't powers
  - Need to preserve the discretionary power of the legislative branch

Maintenance vs. Upgrade

- Immunity through “planning” vs. “operational” distinction
  - Immunity for planning as this is legislative
  - No immunity for “operations;” always a duty to act with reasonable care to avoid harm to others

- Local government has immunity from damage that occurs as a result of a local government's policy decision not to upgrade a drainage system
  - Christopherson v. City of Albert Lea, 623 N.W.2d 272, 276 (MN Ct. App.2001)
- Failure to upgrade is a failure of design and construction, for which political subdivisions enjoy immunity, and not a claim based on a failure to properly maintain, for which there may be liability
  - Coleman v. Portage Cty. Eng'r, 975 N.E.2d 952, 960 (Ohio 2012)

Jordan v. St. Johns County

Example home prior to hurricanes Matthew (2016) And Irma (2017)

Photo by Thomas Ruppert, Florida Sea Grant, 2016

Photo by Thomas Ruppert, Florida Sea Grant, 2018

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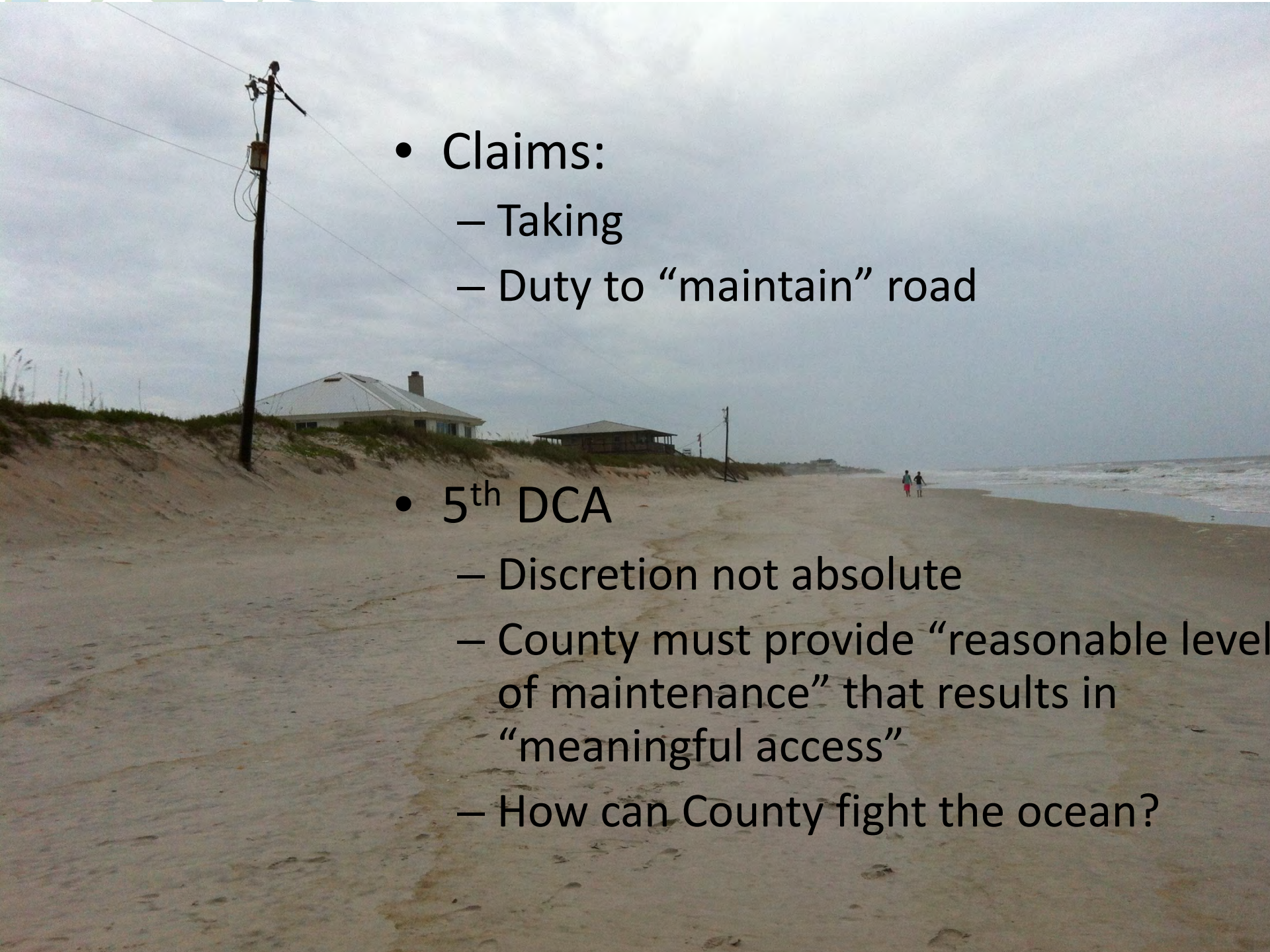


- Claims:
  - Taking
  - Duty to “maintain” road
- 5th DCA
  - Discretion not absolute
  - County must provide “reasonable level of maintenance” that results in “meaningful access”
  - How can County fight the ocean?

Capital Improvement Planning

- Capital improvement planning (CIP) is a clear representation of the legislative duty
  - Involves extensive discretion
  - All about planning and making choices balancing different policy considerations
- Integrate limits on infrastructure expansion or rebuild/redesign and creating more clarity on "ministerial/maintence" activities vs. "discretionary/planning/legislative" actions

Supporting Articles & Resources

- *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, FLORIDA BAR JOURNAL, Vol 87, No. 9 (2013), at https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/D1CD8A7E6519800885257C1200482C39
- *Castles—and Roads—in the Sand: Do All Roads Lead to a "Taking"?,* 48 Envt'l Law Reporter 10914 (2018)), at https://www.flseagrant.org/wp-content/uploads/Castles-and-Roads-In-the-Sand_2018_48_ELR_10914.pdf
- *Roads to Nowhere in Four States: State and Local Governments in the Atlantic Southeast Facing Sea-Level Rise*, 44 COLUMB. J. ENVTL. L 67 (2019), at https://www.flseagrant.org/wp-content/uploads/Jones-et-al_Roads-to-Nowhere_Vol.44.1.pdf
- *Environmentally Compromised Road Segments—A Model Ordinance* (2015), available at https://www.flseagrant.org/wp-content/uploads/Envirntly-Comp-Rds-FINAL_10.20.15.pdf

What Will Become of Our Beaches?

Vacated and Abandoned Property

- Will anyone really want the “new” waterfront property created by SLR?

Ugly

Squatters

Illegal activities

Pollution

Sea Grant Florida

Property Assessed Clean Up and Preservation

- PACUP
  - Establish clean up costs on a parcel-by-parcel basis
  - Projected timeline to reach full cleanup amount
  - Set payment schedule based on info and including safe interest rate calculation
- Administrative costs but less than local gov't liability and coastal mess

Safest Policy Responses

- Provide “notice” to those in at-risk areas about current and future risk
- Increase design standards based on future scenarios (elevation, drainage)
- CIP acknowledging future increases in costs and decreased revenue
- Public bdg. siting & design
- Public purchase of at-risk properties (fee or ease-ment)

Moderate Risk Policy Responses

- Increased buffers and setbacks for landowners directly affected by SLR/flooding
- Prohibition of government-financed hard-engineered structures (armoring) in designated SLR zones
- Large-scale public land acquisition in vulnerable areas and areas nearby financed by new taxes and bond issues followed by resale or rental/lease with restrictions to private owners
- Zoning – Overlays, TDRs, dev. limitations, elevation, downzoning/non-conf. use, set backs, floodplain regs, moratoria

Riskiest Policy Responses

Riskiest Policy Responses (more)

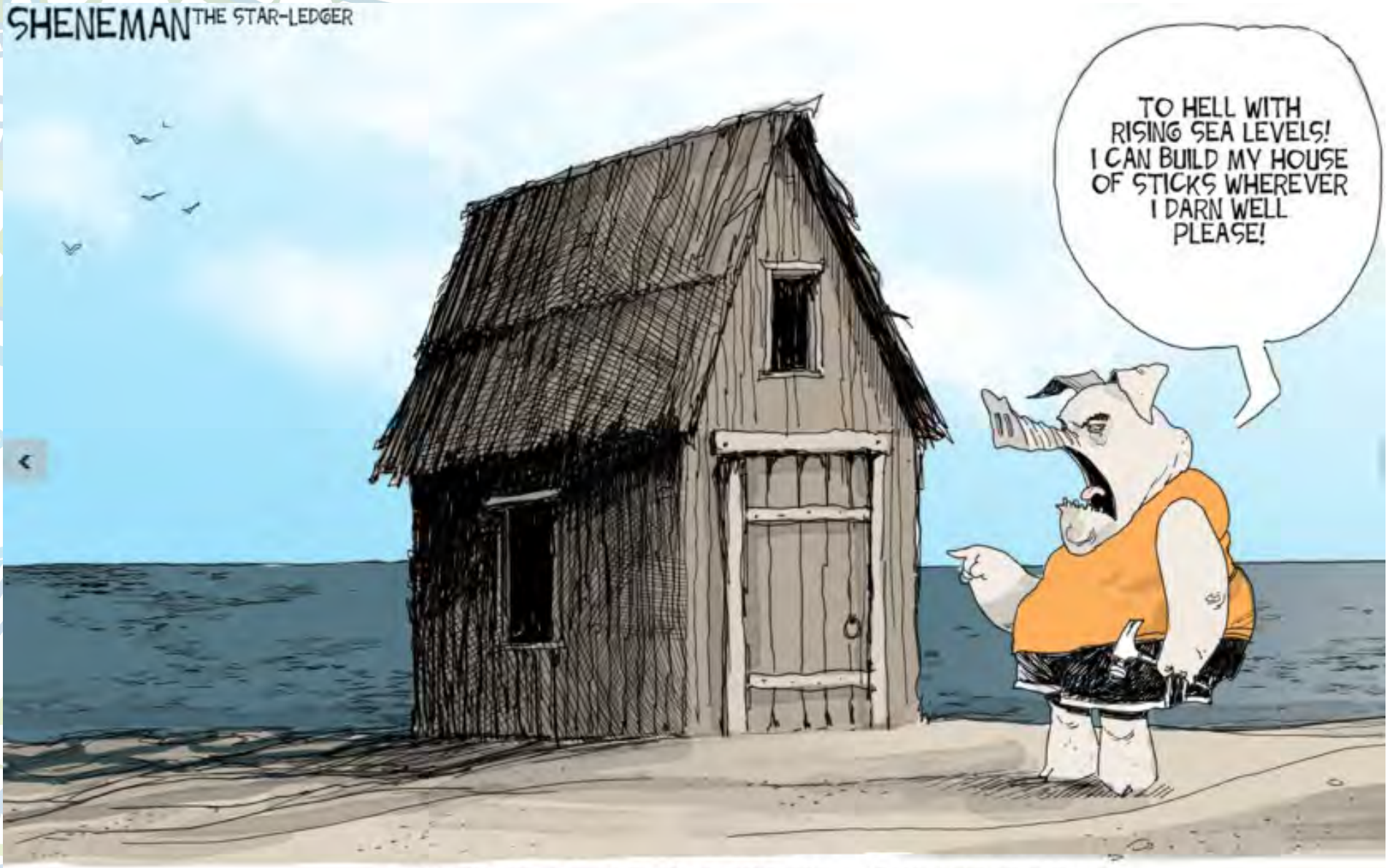
- Severe restrictions on development/ redevelopment in the most at-risk areas
- Exactions
  - Money, property interest, or waiver/release form for certain types of potential claims
  - Prohibition on hard armoring

Adaptation Tools (More Challenging)

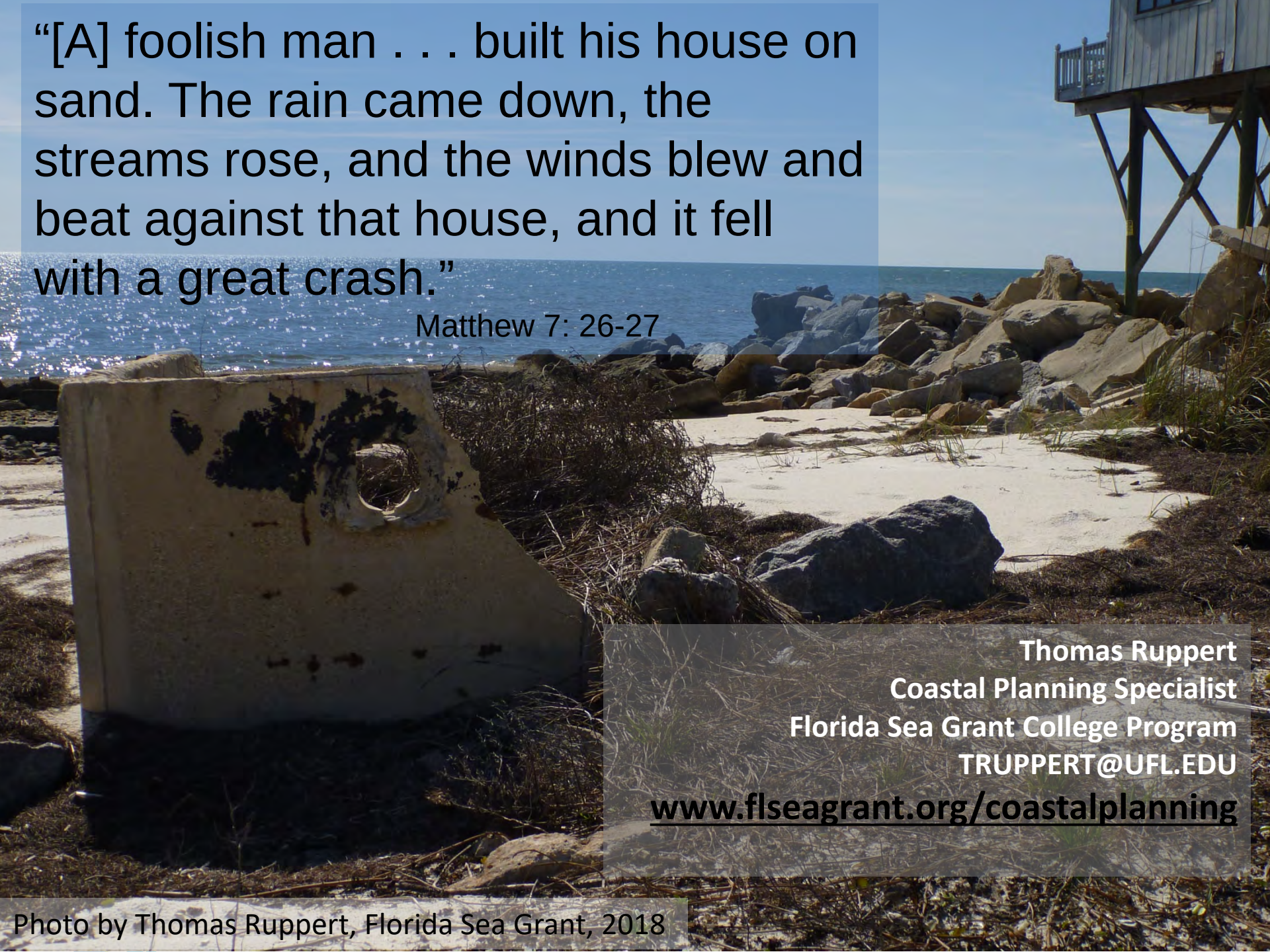
- Planning – longer time frames
- Zoning – Overlays, TDRs, dev. limitations, elevation, downzoning/non-conf. use, set backs, floodplain regs, moratoria
- Exactions
  - Money, property interest, or waiver/release form for certain types of potential claims
  - Prohibition on hard armoring

Can we do it?

- Drivers and impediments
- Can innovation and creativity overcome the same impediments that have stopped us to date?
  - Myopia, amnesia, optimism, inertia, simplification, and herding (psychological biases from “The Ostrich Paradox”)
  - Politics, limited pool of worry, immediacy
- Community engagement to build support for action is key



THE THREE LITTLE PIGS: CLIMATE CHANGE EDITION



"[A] foolish man . . . built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash."

Matthew 7: 26-27

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Photo by Thomas Ruppert, Florida Sea Grant, 2018