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





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Overview

- The reality we face
- Local government tradeoffs and perspectives
- Legal liability for infrastructure
- Zoning and land-use controls—finding the limits of your actions
- Addressing vacated or abandoned properties
- Providing information and engaging the community



Elevating Roads in Miami Beach

Back-flow preventer in Tampa Bay neighborhood





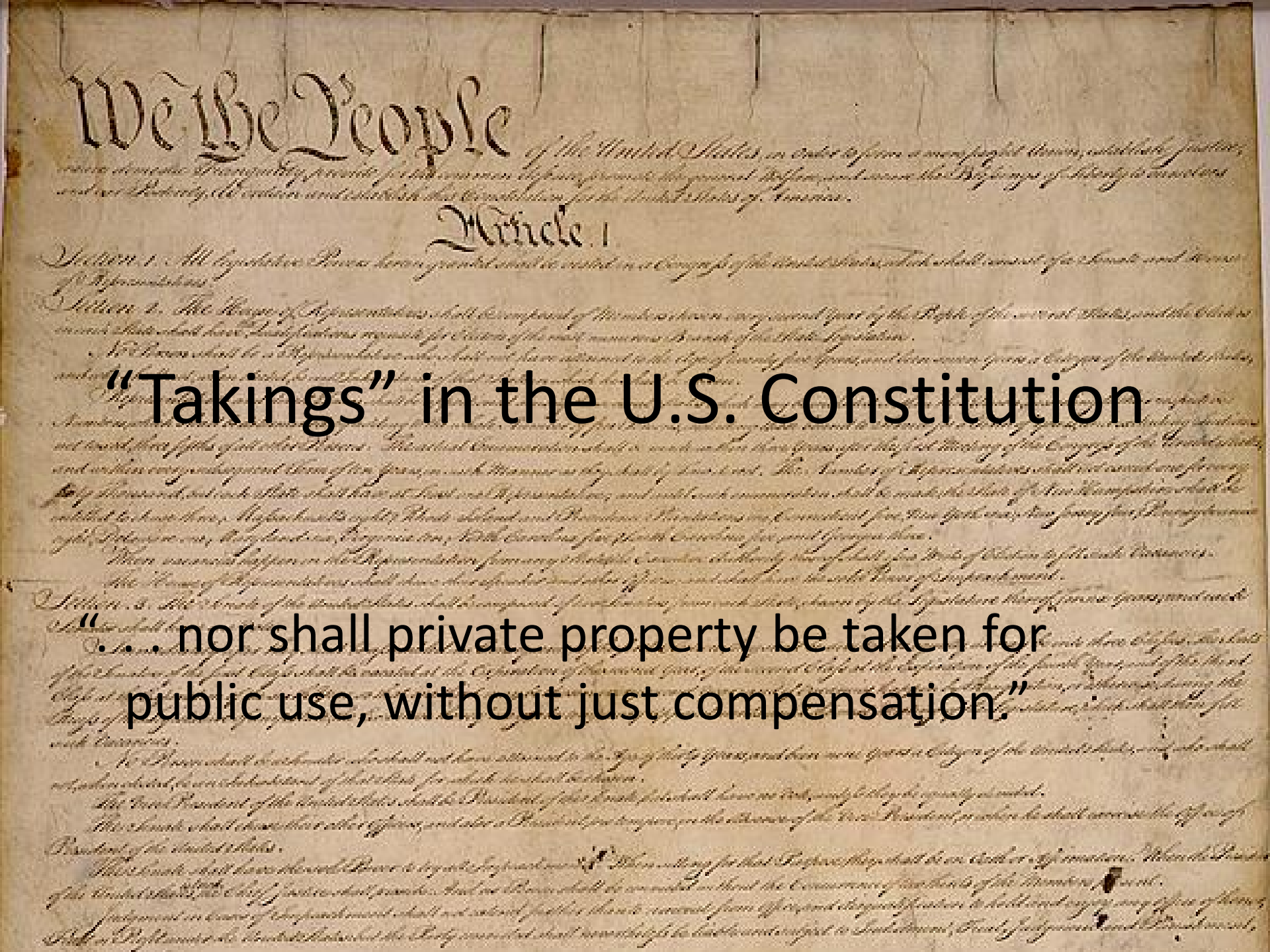
Elevated injection pump station: Key West


ROAD
CLOSED
LOCAL TRAFFIC ONLY
4X4 ONLY
SOFT SAND
YOU WILL
GET STUCK
NO TURN AROUND
DRIVE IN
BACK OUT

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





"Takings" in the U.S. Constitution

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



Jordan v. St. Johns County

Thesis: Judicial interpretation of "maintenance" responsibilities for infrastructure may determine extent of local government discretion in how local governments address sea-level rise.

Non-discretionary/maintenance/ministerial duties vs. Discretionary/planning/policy







Separation of Powers

"The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government. . . .

We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor."

- City of Chicago v. Jefferson B. Sessions, No. 17-2991 (7th Circ., April 19, 2018)

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

- Thomas Ruppert & Carly Grimm, *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

- Thomas Ruppert, *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

What Will Become of Our Beaches?





Oct. 2018, CHARM workshop

Vacated and Abandoned Property

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

- Ugly
- Squatters
- Illegal activities
- Pollution



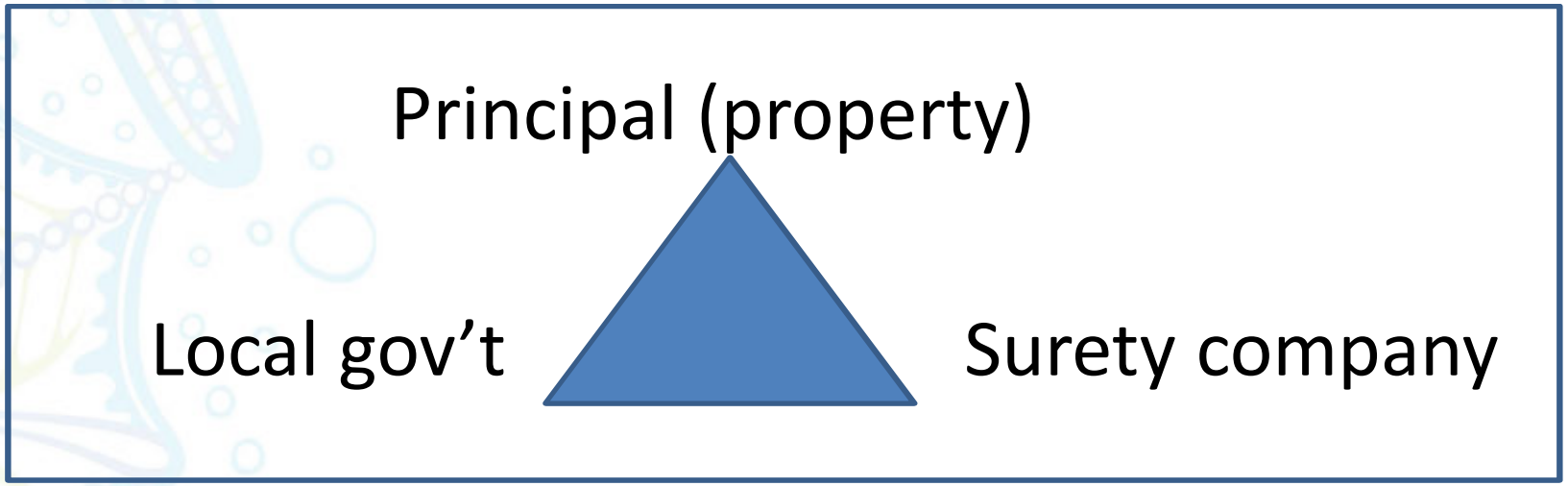
Need for Cleanup



- How to fund?
- General tax revenue?
- Surety bonds?
- Property Assessed Clean Up and Preservation?

Surety Bonds

- If contract not properly performed, surety co. pays
  - NOT the same as insurance: purchaser of bond remains liable to surety for costs



Surety Bonds

- Federal and state laws require use in contracting
- Common tools for:
  - Mine reclamation
  - General contractors
  - Maintenance obligations (e.g. for HOAs responsible for stormwater facilities permitted by WMDs)
- Challenge: assumes continued financial stability of bond purchaser

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

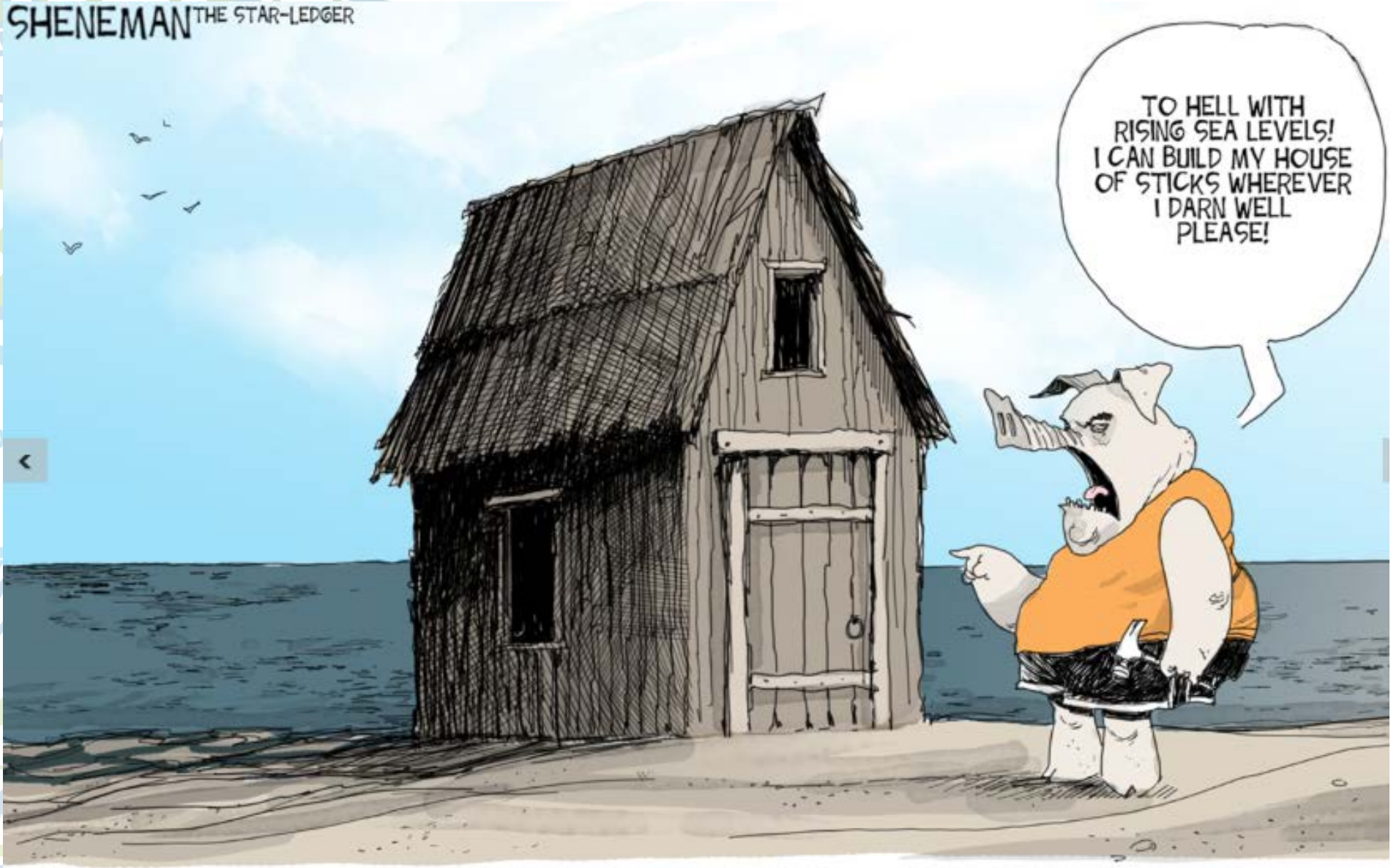


Can we do it?

- 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

What to Do

1. Engage the community and talk about *values*
2. Avoid adding more people or infrastructure to current and future hazard-prone areas
3. Inform those that are there about current and future risk
4. Downzone the most hazardous areas
5. Increase design standards based on future scenarios (elevation, drainage)
6. Realistic long-term CIP acknowledging future increases in costs and decreased revenue

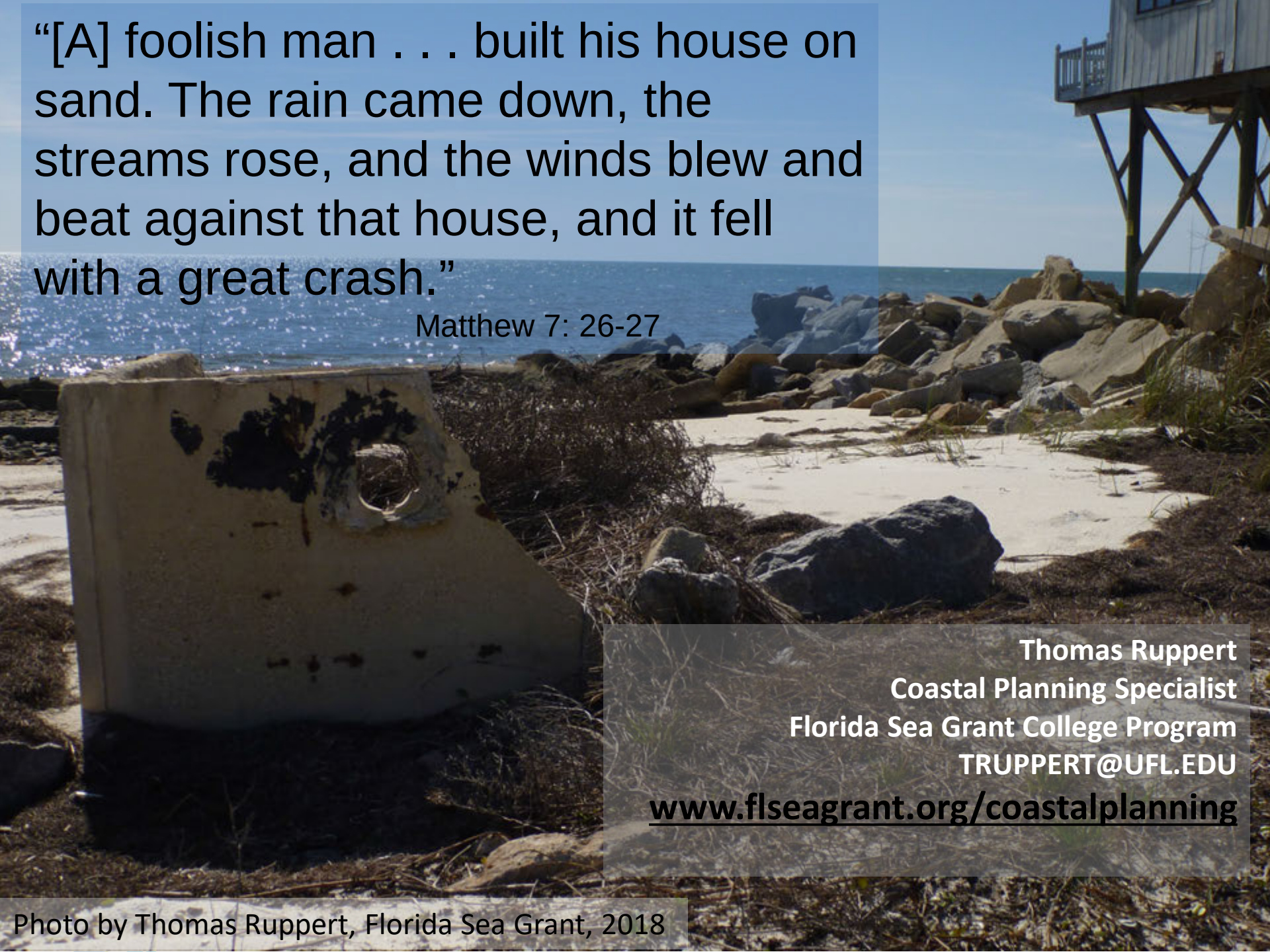


THE THREE LITTLE PIGS: CLIMATE CHANGE EDITION

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