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David M. Pomerance v. Homosassa Special Water District

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. LET ME, IF I MAY, ON BEHALF OF THE AMICUS, TRY TO POSE THE ISSUE IN SUCH AWAY THAT I THINK WILL AT LEAST START DOWN THE ROAD OF ANSWERING BOTH JUSTICE PARIENTE'S QUESTION A MOMENT AGO AND JUSTICE ANSTEAD'S QUESTION OF THE SLIPPERY SLOPE, I THINK, IS KIND OF HOW YOU PUT IT, AND I WILL DO THAT, IF I MAY, BY RAISE AGO POINT OR JUST TRYING TO STRESS A POINT THAT WE RAISED IN OUR BRIEF. WE SUBMIT TO THE COURT, ON BEHALF OF THE AMICUS IN THIS CASE, THAT THE CENTRAL ISSUE BEFORE THIS COURT THIS MORNING IS HOW THE ASSESSING BODY, NOT THE COURT, THAT IS THE SECOND STAGE, BUT HOW THE ASSESSING BODY SHOULD REGULATE, WHEN DETERMINING A SPECIAL ASSESSMENT. WE RESPECTFULLY SUGGEST THAT, BASED UPON THE CASE LAW OF THIS COURT, THAT A REGULATORY BURDEN ON THE TO BE TREATED NO DIFFERENTLY THAN ALL OF THE ON OTHER THINGS THAT HAVE PREVIOUSLY BEEN TREATED BY THIS COURT, IN THE CASE LAW, GOING BACK THROUGH THE PRIOR CENTURY TO ATLANTIC RAILROAD AND, PROBABLY, PRIOR TO. THAT THE ASSESSING BODY CONSIDERS SIZE, SHAPE, RESIDENTIAL OR COMMERCIAL, NEARNESS TO RESIDENTIAL OR COMMERCIAL, ALL OF THOSE THINGS. REGULATORY BURDENS ARE RELATIVELY KNEW TO REAL PROPERTY, MEANING RELATIVELY NEW IN THE LAST QUARTER OF A SENT URI OR SO, BUT -- CENTURY OR SO, BUT WE SUGGEST THAT THIS COURT ON THE NOT TO BE DISTRACTED BY THAT. GETTING BACK TO JUSTICE ANSTEAD'S COMMENT, A MOMENT AGO, ON THE SLIPPERY SLOPE TYPE OF ANALYSIS, THE ANSWER THAT I WOULD SUGGEST TO THAT IS THAT A PLAINTIFF, WHEN CONTESTING A SPECIAL ASSESSMENT, MUST PROVE THAT IT IS ARBITRARY. YOU JUST DON'T GO IN AND GET A NEW TRIAL BEFORE THE COURT, SO THAT, IN AND OF ITSELF, IS A STOP, IF YOU WILL, JUST AS IT IS FOR SIZE, IRREGULAR SHAPE, AND ANYTHING ELSE THAT ANYBODY WANTS TO RAISE. YOU MUST SHOW THAT IS THERE A SUBSTANTIAL BURDEN THAT DOES, IN FACT, RAISE THE ASSESSMENT. THE IS -- I AM SORRY.

THIS PROPERTY THAT WE ARE TALKING ABOUT HERE, IS IT ZONED COMMERCIAL?

I AM NOT AWARE OF WHAT THE ZONING IS, TO BE HONEST WITH YOU. PERHAPS MISS GAFFNEY -- THE ANSWER IS YES. IT IS ZONED COMMERCIAL, BUT THERE IS NO QUESTION THAT IT HAS EXTENSIVE WETLANDS ON IT, AND THERE IS NO QUESTION BUT THAT THERE WAS NO ACCOMMODATION MADE FOR THAT, AND PART OF THE REASON FOR THAT APPEARED TO BE, IF YOU LOOK AT THE TRIAL COURT'S OPINION, PAGE 4, AND THEN THE OPINION OF THE FIFTH DISTRICT COURT OF AND PIN, IN THE SLIP OPINION, PAGE 4, THAT THE COURT ATTEMPTED TO POSE A REGULATORY TAKINGS ANALYSIS UPON IT AND KIND OF GIVE KIND OF A DOUBLE WHAMMY, AS THE COURT -- AS YOU RAISED IN THE LAST ARGUMENT. THAT IS THAT YOU MUST PROVE A REGULATORY TAKINGS, WHICH IS TOTALLY OUTSIDE THE CONTEXT OF A SPECIAL ASSESSMENT CASE THAT APPLIES TO TOTALLY DIFFERENT TYPE OF CASE, WHERE THE GOVERNMENT, WHERE YOU ARE TRYING TO SEND THE GOVERNMENT OFF TO TAKE TITLE TO YOUR PROPERTY AND PAY YOU, THAT ON THE NOT TO -- OUGHT TO NOT BE AN ISSUE HERE WHATSOEVER. I AM TRYING TO BE VERY BRIEF HERE, BECAUSE MY TIME IS SHORT, BUT GO AHEAD. YES, SIR.

WHAT DO WE DO WITH THE LEGISLATIVE FINDING THAT THE PROPERTY HERE WILL BE ESPECIALLY BENEFITED BY CONSTRUCTION OF IMPROVEMENTS? HOW FOR WE TREAT THAT? -- HOW DO WE TREAT THAT? THE HEARING, THE RESOLUTION OF THIRTEEN.

YES. WELL, THERE WAS AN OVER ALL STATEMENT, I BELIEVE, THAT CAN BE POINTED OUT AT THE

THIRTEENTH AND --

HOW IS THE COURT TO TREAT THAT, IN YOUR OPINION, THAT LEGISLATIVE FIND SOMETHING.

THAT IS AN IMPORTANT FINDING THAT A DISTRICT MUST MAKE, IN ORDER TO JUSTIFY THE ASSESSMENT OVERALL. WHAT WE ARE TALKING ABOUT HERE, JUSTICE SHAW, IS SOMEBODY, AN INDIVIDUAL WHO WANTS TO CONTEST AN ASSESSMENT AND SUBMIT THAT IT IS ARBITRARY, AND SO IT IS -- YOU ARE LOOKING AT THE OVERALL SORT OF PICTURE VERSUS THE SPECIFIC POINT, AND IN REGARD TO JUSTICE PARIENTE'S QUESTION, EARLIER, ABOUT THE PROPORTIONALITY QUESTION, I WOULD JUST POINT OUT THAT POINT THREE OF THE FIFTH DISTRICT'S BRIEF RAISES THAT, IN RESPECT TO THE FOOTNOTE. I SEE MY TIME IS UP.

THANK VERY MUCH. MR. ANSWER BACKER.

-- MR. ANSBACHER.

THANK YOU VERY MUCH. SID ANSBAYHER, REPRESENTING HOMOSASSA SPECIAL WATER DISTRICT, A SPECIAL DISTRICT. THIS IS NOT OF THE LINE OF LAKE COUNTY AND HARRIS V WILSON AND SUCH, THAT HAS GIVEN JUST TUESDAY WELLS --

WOULD -- JUSTICE WELLS --

WOULD YOU START OUT BY ADDRESSING MY LAST QUESTION AND THE ANSWER THAT WAS GIVEN BY OPPOSING COUNSEL, WHICH I AM NOT QUITE SURE I UNDERSTOOD.

ABOUT BINDING? ANOTHER RESOLUTION OF THE THIRTEENTH FINDING THAT THERE WAS A BENEFIT, AND COUNSEL SAID, WELL, THAT IS A GENERAL FINDING, AS OPPOSED TO THEIR ATTACK UPON IT, ON A SPECIALIZED CASE.

THAT IS A MULTIFACETED.

THEY WANT TO CHALLENGE THE ASSESSMENT. HOW DO YOU RESPOND TO THAT?

I ANSWER AS WE DID IN OUR ANSWER BRIEF. FIRST, THE LEGISLATIVE FINDINGS ARE SUPPOSED TO BE UPHELD, UNLESS ARBITRARY. SECOND, IN RESPONSE TO COUNSEL'S COMMENT, THERE IS A PLETHORA OF CASE LAW, OUT OF THIS COURT, THAT STATES THAT THERE IS NOT THE NECESSITY FOR INDIVIDUAL LOT BY LOT FINDINGS TO BENEFIT IT, SO WE ARE GOING DOWN ANOTHER SLIPPERY SLOPE, WITH APOLOGIES TO JUSTICE ANSTEAD. ADDITIONALLY, THE CASE LAW THAT WE HAVE PROVIDED, INCLUDING, I BELIEVE, TREASURE ISLAND V STRONG. I BELIEVE THERE IS CERTAINLY, A CASE THAT PROVIDES THAT, WHEN YOU HAVE THIS SORT OF DEVELOPMENT, THAT IS A LINEAR DEVELOPMENT, WHETHER IT IS THE STREET, OR AS I WAS GETTING TO, IN JANUARY 11, WHILE IT WAS A USER FEE, WHILE IT WAS ANALOGIZEED TO A SPECIAL ASSESSMENT, WHILE YOU HAVE A TRADITIONAL UTILITY OF WATER AND SEWER, THOSE PROPERTIES THAT ARE EITHER ADJACENT TO OR, THE LANGOF THE COURT IS, IN PROTECTIVE PROXIMITY, ARE DEEMED TO BE BENEFITED BY IT, SO EVEN IF WE -- YES, MA'AM.

ON THAT BENEFIT PRONG OF IT, YOU JUST SAID THAT YOU DON'T HAVE TO HAVE THESE INDIVIDUALIZED ASSESSMENTS, BUT HOW DOES THAT SQUARE WITH THE SECOND PRONG OF THE TEST CONCERNING THESE SPECIAL ASSESSMENTS, WHICH TALKS ABOUT THAT YOUR, I GUESS THE AMOUNT YOU HAVE TO PAY, IS IN PROPORTION TO THE BENEFIT THAT YOU ARE GOING TO GET, SO HOW DO YOU SQUARE THOSE TWO PRINCIPLES HERE?

BY CASE LAW OF THE U.S. SUPREME COURT, SINCE MATTINGLY IN 1878. THIS COURT, SINCE UTLEY, WHICH IS GOODNESS, 1911, I BELIEVE. CONSISTENT WITH SEX 170.02 -- CONSISTENT WITH SECTION 170.02 OF OUR FLORIDA STATUTE AND CONSISTENT WITH OUR CHARTER, THAT THE BENEFIT

OVERALL AND THE APPORTIONMENT ARE PRESUMPTIVELY BE DETERMINED BAY THE FRONT FOOTAGE.

THAT IS A REBUTTABLE PRESUMPTION, THOUGH, ISN'T IT?

IT IS A REBUTTABLE PRESUMPTION, BUT THE POINT, HERE, IS, AS WE NOTED IN OUR BRIEF, WE DON'T BELIEVE IT WAS REBUTTED AT ALL. WHAT WE FOUND IS ARGUMENTS THAT THERE ARE WET LABDZ, IN VARYING DEGREES, AS JUSTICE PARIENTE, I BELIEVE, STATED DURING THE ARGUMENT OF THE PETITIONERS. THERE IS A GENERAL SET OF FINDINGS OF FACT, ABOUT QUESTIONS OF HOW MUCH OF THIS PROPERTY IS DEVELOPABLE. AND WHAT WE WOULD NOTE IS EVEN THOUGH THERE IS EXPERT TESTIMONY ON BOTH SIDES, AS TO WHETHER OR NOT THE PROPERTY IS DEVELOPABLE AND TO WHAT DEGREE, AT PAGE, I BELIEVE IT IS 236 OF THE TRANSCRIPT, THEIR OWN APPRAISER STATES I DON'T OBJECT WHAT THE VALUE -- STATES I DON'T KNOW WHAT THE VALUE OF THIS PROPERTY IS. I DON'T KNOW WHAT THE IMPACT OR BENEFIT IS GOING TO BE TO THIS PROPERTY, UNTIL I KNOW WHETHER IT IS ONE ACRE, TWO ACRES, THREE ACRES, WHAT CAN BE DEVELOPED.

WELL, THEN, LET ME MAKE SURE I UNDERSTAND, AS FAR AS THIS CASE IS CONCERNED. HAVE NINE ACRES. SEVEN OF THEM ARE WETLANDS OR SOMETHING AROUND THAT?

GIVE OR TAKE.

BUT THE ASSESSMENT, THE FRONT FOOTAGE WAS THE MESSAGE THAT WAS USED WAS REDUCED BY HALF BECAUSE OF THE IRREGULAR SHAPE.

YES, MA'AM.

BUT IF I AM UNDERSTANDING IT, THE AMOUNT OF THE ASSESSMENT IS NO DIFFERENT THAN IF ALL NINE OF THE ACRES WERE UP LAND, IS THAT CORRECT?

YES, MA'AM.

AND I GUESS WHAT I AM UNDERSTANDING FROM THE AMICUS IS, TO SAY IN THIS DAY AND AGE, WITH THE AMOUNT OF RESTRICTIONS, IN TERMS OF REGULATORY BODIES AND -- THAT SUBSTANTIAL LAND USE RESTRICTIONS SHOULD OR MUST BE TAKEN INTO ACCOUNT IN A PROPER ASSESSMENT. DO YOU HAVE DIFFICULTY WITH THAT CONCEPT?

IF, AS JUSTICE ANSTEAD, WAS DISCUSSING, OR I BELIEVE IT WAS JUSTICE ANSTEAD, WAS DISCUSSING THE DIFFERENCE BETWEEN CONCEPTUAL DEVELOPMENT AND NO DEVELOPMENT POTENTIAL AT ALL, IF, HYPOTHETICALLY, THEY HAD APPLIED FOR DEVELOPMENT PERMITS AND HAD BEEN DENIED ACROSS THE BOARD, I WOULD SAY, THEN, UNDER THIS COURT'S CASE LAW, YOU MIGHT HAVE A TAKING, IF WE --

BUT NOW WE ARE SAYING WE ARE NOT TALKING ABOUT A TAKING HERE. WE ARE TALKING ABOUT, REALLY, WHETHER, HYPOTHETICALLY OR NOT, REALISTICALLY TWO OUT OF THE NINE ACRES ARE THE, PROBABLY, THE MOST THAT CAN BE USED, IN THIS DEVELOPMENT.

AND I WOULD DISAGREE WITH THAT BEING THE ASSUMPTION.

WELL, LETSZ ASSUME THAT -- LET'S ASSUME THAT SEVEN ACRES OF WETLANDS TRANSLATES INTO SEVEN ACRES CAN'T BE DEVELOPED, BUT YET THE FRONT FOOTAGE METHOD DOES NOT TAKE THAT INTO ACCOUNT. ISN'T -- DOESN'T THAT RAISE AN ARBITRARY METHOD, IF YOU ARE NOT TAKING INTO ACCOUNT THAT A SUBSTANTIAL PORTION OF THE ACREAGE IS UNDEVELOPABLE, IS NOT CAPABLE OF BEING DEVELOPED.

IF IT WERE NOT CAPABLE OF DEVELOPMENT, I WOULD SAY THAT VIRTUALLY ANY PROPERTY IS GOING TO HAVE SOME DEGREE OF REGULATORY CONSTRAINT. IT DOESN'T RENDER IT COMPLETELY ARBITRARY.

YOU ARE SAYING THAT A BODY, IN MAKING AN ASSESSMENT, THEN, IT IS NOT, REALLY, THE COURT'S CONCERN AS TO WHAT THE RESTRICTIONS ARE ON DEVELOPMENT. THAT SHOULD NOT BE A CONCERN THAT SHOULD NOT BE WRITTEN IN THE CASE LAW, THAT THAT WOULD BE MORE PROBLEMATIC THAN JUST LEAVING IT AND SAYING, LISTEN, YOU JUST HAVE TO WORRY ABOUT WHETHER IT IS COMMERCIAL OR THE SIZE, THAT THAT CAN'T BE OR SHOULDN'T BE AN ADDITIONAL FACTOR.

THAT IS NOT EXACTLY WHAT OUR POSITION IS, TO BE CANDID. OUR POSITION IS THE U.S. SUPREME COURT, IN RIVERSIDE BAY VIEW HOMES, SAYS IF YOU HAVE JURISDICTIONAL WETLANDS OR ANY JURISDICTION, WHAT THAT MEANS IS CONCEPTUALLY YOU CAN BUILD. CONCEPTUALLY YOU CAN GET PERMISSION. WHAT WE HAVE, HERE, IS TESTIMONY WHICH IS, AT BEST, EDUCATED SPECULATION, BY EXPERTS ON BOTH SIDES, AS TO WHAT MIGHT BE DEVELOPABLE.

WAS IT TAKEN INTO CONSIDERATION IN THE ASSESSMENT HERE, WHAT, THIS LAND BEING COMMERCIAL, VERSUS RESIDENTIAL?

NO, MA'AM. BUT IT IS COMMERCIAL, AND IT IS ON US 19, BUT, NO, IT WAS NOT. IT WAS, AS STATED BY COUNSFOLT PETITIONERS, IT WAS A DIRECT, STRAIGHT, LINEAL FRONT FOOTAGE.

WAS IT TAKEN INTO CONSIDERATION THAT SEVEN ACRES OF IT IS WETLANDS? WAS THAT FACTORED IN AT ALL?

AND I REITERATE IT WAS A STRAIGHT LINEAL FRONT FOOTAGE ASSESSMENT, YOUR HONOR.

WHICH MEANS THAT WASN'T TAKEN INTO CONSIDERATION.

YES. IT WAS NOT.

ISN'T THERE A SORT OF A FACIAL ARBITRATION TO THAT KIND OF A SITUATION, AND IS THE TOTAL PARCEL NINE ACHEERS?

TOTAL PARCEL IS 8.5 ACRES.

LET'S SAY NINE ACRES. AND WE HAVE A PARCEL LIKE THIS, AND THEN THE VERY NEXT PARCEL IS THE SAME SHAPE, BUT IT IS ALL HIGHLANDS, IN OTHER WORDS, AND SO YOU HAVE GOT A DEVELOPER THAT CAN TAKE THE NEXT NINE-ACRE PARCEL AND HE CAN GO IN THERE AND DO A RESIDENTIAL DEVELOPMENT, YOU KNOW, WITH 50 OR 60-FOOT FRONTAGE, AND HERE WE HAVE GOT SEVEN ACRES OF WETLANDS, AND ANYBODY THAT LOOKED AT THAT, EVEN SUPERFICIALLY, SAID, WELL, HOW IS IT THAT THE PERSON THAT HAD ALL HIGHLAND PROPERTY AND EVERYTHING PAYS THE SAME ASSESSMENT, EVEN THOUGH OBVIOUSLY 100 PERCENT OF HIS PROPERTY IS GOING TO BE ECONOMICALLY DEVELOPED, AND YET THE PROPERTY OWNER HERE, 80 PERCENT OF THEIR PROPERTY ISN'T AND CAN'T BE DEVELOPED, AND ISN'T THERE A FACIAL ARBITRARY NECESSARY TO A LOCK STEP ASSESSMENT THAT DOESN'T TAKE THAT INTO CONSIDERATION?

AND, YOUR HONOR, I BELIEVE YOU ACTUALLY, IN QUESTIONING PETITIONER'S SIDE, GAVE MY RESPONSE, WHICH IS THAT, WHEN WE ARE LOOKING AT, PURSUANT TO THE WINTER HAVEN DECISION OF THIS COURT, WHEN WE ARE LOOKING AT AN OVERALL ASSESSMENT, WE ARE LOOKING AT 47 PROPERTIES. SOME PROPERTIES ARE GOING TO BE A LITTLE CLOSER TO THE EDGE THAN OTHERS. AND I REITERATE THAT, AT THIS POINT, ALL WE HAVE IS SPECULATION, AS TO WHAT CAN BE DEVELOPED OUT THERE.

WHERE IS THAT EDGE THOUGH?

DO YOU AGREE THAT THERE COMES A POINT THAT POINT THAT YOU FALL OFF THE EDGE, AND IF SO, WHAT IS THE NATURE OF THAT? ISN'T THAT WHAT WE ARE TALKING ABOUT?

I BELIEVE SO, AND I BELIEVE THE EDGE ACTUALLY CONSTITUTES A TAKING, AND LET ME ADDRESS THAT THE OTHER SIDE, PARTICULARLY AMICUS, HAS RAISED THE QUESTION OF THIS KIND OF AN ASSESSMENT ANALYSIS VERSUS A STANDARD REGULATORY TAKING. AND IF I MAY RESPOND TO THAT, AND A STANDARD REGULATORY TAKING, MY CLIENT, AS THE REGULATORY BODY, ALTHOUGH IT IS NOT ACTUALLY, TRADITIONALLY THE REGULATORY BODY THAT WE WOULD LOOK TO, BUT MY BODY, MY CLIENT, WOULD ACTUALLY OBTAIN THE PROPERTY. WOULD ACTUALLY TAKE OVER THE PROPERTY. ON THE OTHER HAND, HERE, IF YOU STRIKE THIS ASSESSMENT, THEN WHAT YOU HAVE IS THE BENEFIT OF A POTABLE WATER LINE FOR A NINE-ACRE PARCEL, WHICH MAY WELL BE DEVELOPABLE, BASED UPON FINDINGS OF FACT AT THE TRIAL COURT LEVEL, AND THEY STILL HAVE THE ABILITY TO DEVELOP, TO THE EXTENT THAT THEY MAY BE ABLE TO.

SO YOU ARE SAYING THAT THE EDGE OF THE BRIGHT-LINE IS WHEN IT CAN'T BE DEVELOPED AT ALL, CAN'T BE USED AT ALL.

AND I WOULD, ALSO, SAY --

IS THAT WHAT YOU SAID?

I WOULD SAY THAT THAT IS THE DEFINITIVE BRIGHT-LINE. I WOULD, ALSO, SAY THAT, IF THERE IS A REDUCED DEVELOPMENT RIGHT, WE MIGHT BE ABLE TO FACTOR THAT IN ON A CASE-BY-CASE BASIS. AS IT COURT HAS NOTED, ASSESSMENTS BY NATURE TEND TO BE VERY FACT INTENSIVE, HE HAVE THEN EVEN THOUGH THATER -- EVEN THOUGH THEY ARE LEGISLATIVE, AND THAT FINDINGS OF FACT --

ISN'T THAT WHAT YOU HAVE HERE?

NO. WE DO NOT HAVE THAT LEVEL OF DETERMINEABILITY.

WHAT LEVEL DOES ONE NEED TO REACH THAT POINT? I GUESS THAT IS REALLY WHAT WE ARE TALKING ABOUT THEN.

THAT IS WHAT WE HAVE BRIEFED. THAT IS PURSUANT TO THE HECKT CASE, PURSUANT TO RIVERSIDE BAY VIEW, TRADITIONALLY ONE MUST SHOW THAT ONE HAS REASONABLY ATTEMPTED TO OBTAIN PERMITS AND NOT JUST COME OUT AND SAY I CANNOT BUILD IT.

CAN'T THE COURT TAKE JUDICIAL NOTICE OF THE FACT THAT YOU CAN'T BUILD COMMERCIAL PROPERTIES ON WETLANDS?

I WOULD RESPECTFULLY DISAGREE. I THINK THAT WE HAD TESTIMONY THAT WAS BEFORE THE TRIAL COURT, BY RANDY ARMSTRONG, TWELVE-YEAR DER HEAD OF THE WETLANDS AND WATER RESOURCES PERMITTING DEVELOPMENT OR DIVISION. AND MR. ARMSTRONG TESTIFIED, I THINK, WITH REASONABLE MITIGATION, NOT AGGRESSIVE, REASONABLE MINIMAL MITIGATION, THREE ACRES COULD BE BUILT HERE. THAT WOULD GO BEYOND --

LET ME GET THIS STRAIGHT. ARE YOU TELLING THE COURT THAT YOU CAN BUILD COMMERCIALLY ON WETLANDS?

YOU CAN FILL. AS LONG AS YOU MITIGATE. AND BASICALLY THAT -- THOSE WERE FINDINGS OF FACT. THOSE WERE FACTUAL ISSUES THAT WERE BEFORE THE TRIAL COURT BELOW.

AND THE TRIAL JUDGE MADE A FINDING.

YES, YOUR HONOR. THE TRIAL COURT MADE FINDINGS THAT THIS PROPERTY MAY WELL BE DEVELOPABLE, AND THE TRIAL COURT JUDGE WENT FURTHER --

DOES THE TRIAL JUDGE MAKE A FINDING IN ANSWER TO JUSTICE SHAW'S QUESTION, AS TO THE DEVELOPABILITY OF THE WETLANDS AREA, OR JUST BECAUSE THERE WAS SOME PORTION THAT WAS UP LANDS, THAT THAT WAS DEVELOPMENT?

THERE WERE SUCCESSIVE FINDINGS. THE FIRST WAS THAT THERE WAS DEVELOPMENT POTENTIAL FOR THE PROPERTY, AND THAT, BY BEING CONSISTENT WITH SUBSECTION 17-A OF THE LAWS OF FLORIDA, 63.1222, I.E. OUR CHARTER, THAT IT WAS NOT AN ARBITRARY ASSESSMENT, THAT BEING THAT, BECAUSE IT WAS, IF I MAY, CONSISTENT WITH THE FRONT A.M. FOOT -- FRONTAGE FOOT ASSESSMENT AND NOT SET FORTH IN THE CHARTER, AS NECESSARY.

SHOULD THE LAND BE LOOKED AT IN ITS PRESENT CONDITION OR WHAT IS POSSIBLE SOMETIME IN THE FUTURE, BECAUSE I CAN SEE WHERE 1,000 TONS OF FILL MAY BE MIGHT MAKE IT USABLE. IF WE ARE GETTING TO THAT, THAT TYPE OF SPECULATION THAT, POSSIBLY, IT COULD BE USED IN THE FUTURE, BUT SHOULDN'T THE FOCUS BE ON WHAT IT IS CURRENTLY?

YOUR HONOR, THE CASE LAW IS WHAT CAN BE REASONABLY USED, AND IN FACT, IN ONE CASE, AND I BELIEVE IT IS THE MEEKINS DECISION. I COULD BE WRONG. THERE WAS AN ARGUMENT THAT A LINEAR ASSESSMENT WOULD PROVIDE NO BENEFIT FOR, I BELIEVE IT WAS A SEWAGE LINE, FOR A DOG TRACK PARKING LOT, AND THE COURT DETERMINATION THERE WAS YOU CAN REASONABLY CONVERT THIS PARKING LOT, WHICH DOES NOT HAVE ANY BENEFIT FROM A UTILITY LINE, TO A HIGH-RISE APARTMENT COMPLEX.

BUT WHAT WAS THE PROOF OF THE REASONABLE USE OF THIS LAND?

THE PROOF IS THAT IT IS COMMERCIALLY ZONED, AND I THINK IT IS GENERALLY ACCEPTED THAT AT LEAST A SMALL COMMERCIAL DEVELOPMENT COULD BE PLACED THERE, SUBJECT TO CERTAIN SET BACK ISSUES, AND, AGAIN, AS I SAID, WITHOUT PICKING UP THE HORSE AND RESUSCITATING IT, IT IS SPECULATION, AT THIS POINT, AS TO WHAT CAN BE DONE, YOU BELIEVE THEY AT LEAST -- CAN BE DONE, UNTIL THEY AT LEAST TRY TO DO SOMETHING TO SHOW THE DEVELOPMENT.

IN THIS CASE, YOU DIDN'T TAKE INTO ACCOUNT, WHEN YOU MADE THE ASSESSMENT, AS TO ANY PARCEL, WHETHER IT WAS COMMERCIAL OR RESIDENTIAL, CORRECT?

NO, YOUR HONOR.

AND SO NONE OF OUR CASE LAW SAYS THAT THAT RENDERS AN ASSESSMENT ARBITRARY.

NO, YOUR HONOR.

EVEN THOUGH, PERHAPS, WE WOULD KNOW THAT, IF IT IS COMMERCIAL, THERE IS GOING TO BE MORE OF A BEN FIT IN HAVING THE WATER LINE THAN IF IT IS RESIDENTIAL.

I AM SORRY.

AND YOU, ALSO, WITH THE FRONT FOOTAGE METHOD, THE FACT THAT THE DEVELOPERABLE -- I CAN'T SAY THAT WORD. THE PROPERTY TO BE DEVELOPED DOESN'T AND OUT THE FRONT OF THE PROPERTY. THAT, ALSO, WASN'T TAKEN INTO ACCOUNT. IN OTHER WORDS THE FACT THAT THE UP LAND PORTION AND PRESUMABLY THE PORTION THAT COULD BE FILLED WOULD BE IN THE REAR OF THE PROPERTY.

THERE IS A TENTH OF AN ACRE BETWEEN WHAT APPEARS TO BE THE UP LAND AND THE U.S. 19. SO, NO, IT WAS NOT. IT WAS THE FRONT FOOT OF THE ACTUAL PLATED --

SO THE PEOPLE THAT WANTED THIS DEVELOPMENT NORTH, THEY WERE GOING TO GET AN IMMEDIATE BENEFIT. THESE LANDOWNERS, AT THE MOST, WOULD ONLY GET THIS POTENTIAL BENEFIT, IF AND WHEN THEY WERE ABLE TO FIGURE OUT HOW TO DEVELOP A PORTION OF THE PROPERTY. ARE YOU SAYING THAT, UNDER THE CASE LAW, THAT THAT DOESN'T MAKE IT ARBITRARY, AND WE SHOULDN'T MESS WITH THAT PRECEDENT.

YOUR HONOR THAT, IS CONSISTENT WITH THE CASE LAW, AND IT IS NOT INCONSISTENT WITH THE COURT'S RECENT HOLDING IN PINELLAS COUNTY, WHERE THE QUESTION WAS VOLUNTARINESS OF TIE IN FOR THE RECLAIMED WATER. JUST BECAUSE SOMEONE CHOOSES NOT TO TIE IN, IT DOESN'T NECESSARILY RENDER THE FEE ILLEGAL, AND IF I MAY, THERE IS A SERIOUS POLICY ISSUE AS WELL, IF YOU FOLLOW DOWN THE SLIPPERY SLOPE THAT WE BELIEVE IS BEINGES PAUSED BY THE OTHER SIDE, AND THAT IS THIS COURT, AND JUSTICE WELLS IN PARTICULAR, HAS EXPRESSED CONCERNS ABOUT EXPANSION. I BELIEVE THAT, IN THE PINELLAS AND COLLIER COUNTY CASE OF A TAX AND FEES CLOTHING, AND THE CONCERN THAT I HAVE, IS THAT IF YOU HAVE EVERY ASSESSING AUTHORITY IN THIS STATE AND THE STATE OF FLORIDA, GOING IN AND DETERMINING, SITE BY SITE, WHAT THE DEVELOPMENT POTENTIAL IS, HYPOTHETICALLY, THE CHOICE IS WE DO AS WAS DETERMINED IN THE TRIAL COURT, A DOUBLING OF ASSESSMENT, RENDERING IT ECONOMICALLY IN FEASIBLE FOR MANY PEOPLE OR ALTERNATIVELY BACKING OFF OUT OF FEAR, BACKING OFF OF A SPECIAL ASSESSMENT, WHICH, AGAIN, IS A METHODOLOGY WITH THE FRONT AMMO-FRONTAGE FOOT THAT HAS BEEN APPROVED BY -- -- FRONTAGE FOOT THAT HAS BEEN APPROVED BY THE U.S. SUPREME COURT, AND GENERALLY SAY IT IS FINE. WE WILL DO IT WITH OUR TAXING AUTHORITY. WE WILL DO IT WITH ADVALOREM. SORRY.

CAN THE LEGISLATIVE BODY FACTOR IN SUCH THINGS AS, ALL RIGHT, IT IS NOT USABLE NOW, BUT IF A VARIANCE IS GOTTEN, AND IF SO MANY CUBIC FEET OF FILL IS PUT IN, THEN IT WOULD BE COMMERCIAL. AND IT COULD BE USED. CAN THIS TYPE OF SPECULATION BE USED BY THE LEGISLATURE TO MAKE ITS CASE?

YOUR HONOR, IN THEORY, YES. AS I MENTIONED BEFORE, WHAT THIS WOULD DO, BASED UPON THE TRIAL TESTIMONY, IT WOULD CONVERT A 20-FOOT, PER LINEAR FOOT COST TO A ROUGHLY 40 OR 50 FOOT PER LINEAR FOOT COST, BASED UPON THE TESTIMONY THAT WAS PRESENTED TO THE TRIAL COURT, IN OTHER WORDS DOUBLING OR MORE THE COST OF A SIMPLE WATER LINE ASSESSMENT, IN ORDER TO, AS I INDICATED, SPECULATE AS TO WHAT THE DEVELOPMENT POTENTIAL IS.

THANK YOU. YOUR TIME IS UP.

THANK YOU, YOUR HONOR. 6.

THANK YOU. I AM GOING --

WOULD YOU SPEAK DIRECTLY TO WHERE YOU SEE THE DISTRICT COURT'S DECISION IS IN CONFLICT WITH THIS COURT'S CASE LAW?

YES. AND TO CLARIFY YOUR EARLIER QUESTION ON THE ISSUE OF WHAT WAS THE FACTUAL FINDING BY THE TRIAL COURT, BOTH THE TRIAL COURT AND THE FIFTH DISTRICT COURT OF APPEAL PRIMARILY BASE THEIR DECISIONS ON WHAT IS AS CLOSE AS POSSIBLE TO A QUOTE AS I CAN GET, THAT THE PLAINTIFFS FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT THERE WAS NO BENEFIT, AND THAT IS WHERE THE FIFTH DISTRICT COURT OF APPEAL CONFLICTED WITH YOUR CASE LAW. YOUR CASE LAW SAYS THAT, FIRST, THERE MUST BE A BENEFIT, AND THEN IT MUST BE IN PROPORTION. SO IF WE LOOK AT ONLY THE STANDARD OF WAS THERE A BENEFIT AT ALL, THE FIFTH DISTRICT COURT OF APPEAL FAILED TO EVEN CONSIDER THE

SECOND PRONG OF THIS COURT'S TEST THAT HAS BEEN UTILIZED IN A NUMBER OF YOUR CASES. LAKE COUNTY, COLLIER COUNTY AND A NUMBER OF THEM. IN ADDITION, IF YOU GO BACK TO THE ISSUE THAT JUSTICE SHAW HAD, OF A LEGISLATIVE FINDING OF BENEFIT, I AM NOT SURE YOU EVER DID FEEL COMFORTABLE WITH THAT ANSWER. IN FISHER VERSUS BOARD OF COUNTY COMMISSIONERS, THIS COURT, IN 1956, SAID THAT THERE MUST BE SOME PROOF OF BENEFIT AT THE LEGISLATIVE LEVEL. IT MUST BE IN THE RECORD. IT IS NOT ENOUGH, IF IT IS THE ENGINEER'S BALD OPINION AS TO EFFORT. WHAT YOU FIND IN THIS RECORD IS A BARE CONCLUSION IN THE RESOLUTION THAT THERE IS BENEFIT AND THAT THERE IS PROPORTIONALITY. THERE IS NO FINDING OF BENEFIT, LIKE THERE WAS IN CITY OF ST. PETERSBURG, THAT IT WOULD BENEFIT BY, NOT ON A PARCEL BY PARS HE WILL -- PARCEL BASIS, BUT A GENIZED FINDING IN THE -- GENERALIZED FINDING IN THE RECORD. THE BENEFIT TO THE COST OF IMPROVEMENT, THAT IS NOT WHAT THIS COURT HAS SAID, AND IN FACT IN SNELL ISLE, WHICH THIS COURT REVIEWED SEARCHRARY ON, IT -- SERIOUS YEAR -- CERTIARORY, YOU MUST TIE IT INTO THE BENEFIT RECEIVED, AND THAT GOES BACK TO JUSTICE PARIENTE'S QUESTION REGARDING, OUT OF NINE ACRES, IF THERE IS ZERO POSSIBLE BENEFIT TO SEVEN OF THOSE NINE ACRES, THEN HOW DOES THE LINEAL FRONT FOOTAGE OF THOSE SEVEN ACRES RECEIVE A PROPORTIONAL PORTION OF THAT BENEFIT? IF YOU LOOK AT THE ROAD, THERE ISN'T ONE FOOT OF UP LAND PROPERTY ADJACENT TO THIS WATER LINE, SO THAT HAS NOT BEEN SHOWN, BECAUSE THERE IS NOTHING TO SUPPORT IT IN THE RECORD. PROPORTIONALITY IS NOT SHOWN, BECAUSE THERE IS NOTHING TO SUPPORT IT IN THE RECORD, AND IN FACT IT BELIES PROPORTIONAL PROPORTIONALITY, BECAUSE IT IS SELF EVIDENT THAT NINE ACRES OF PROPERTY ARE NOT RECEIVING THE SAME BENEFIT ASININE ACRES DOWN THE ROAD THAT -- AS NINE ACRES DOWN THE ROAD THAT CAN BE USED.

THANK YOU VERY MUCH. YOUR TIME IS UP. THE COURT APPRECIATES COUNSEL'S ASSISTANCE. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.