Florida Department of Transportation v. Armadillo Partners, Inc.

MR. CHIEF JUSTICE

GOOD MORNING AND THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS DEPARTMENT OF TRANSPORTATION VERSUS ARMADILLO PARTNERS.

THANK YOU, YOUR HONOR. MY NAME IS ROBERT SCANLAN, AND I AM REPRESENTING THE FLORIDA DEPARTMENT OF TRANSPORTATION. AT COUNSEL TABLE WITH ME IS MARIANNE TRUSSELL, HEAD OF THE FLORIDA DEPARTMENT OF TRANSPORTATION. WE ARE HERE BEFORE THE COURT REGARDING THE TAKING TO WIDEN GRIFFIN ROAD, THE PROPERTY IN QUESTION AT GRIFFIN ROAD AND DAVEY BOULEVARD, IN DAVEY, FLORIDA, AND KNOWN AS ARMADILLO SQUARE. THE PROPERTY IS TAKING 46 FEET OFF THE ROAD SIDE AND A 9-FOOT STRIP OFF THE DAVEY ROADSIDE. THE ISSUE THAT EVOLVED IN THIS CASE, CAME DOWN TO WHAT WERE THE SEVERANCE DAMAGES THAT THIS PROPERTY SUFFERED AS A RESULT OF THIS TAKING? THE TAKING TOOK 49 OR MORE PARKING PLACES, BECAUSE OF THE GRIFFIN ROAD GOING FROM BASICALLY A TWO TO THREE LANE ROAD TO SIX LANES, SO THERE WAS A SIGNIFICANT IMPACT ON THE PROPERTY. BOTH APPRAISERS LOOKED AT THE PROPERTY IN TRYING TO DETERMINE WHAT THE VALUE WAS AFTER THE TAKING. THEY BOTH DECIDED THAT, IF NOTHING WERE DONE TO THE SITE, IF THE PARK LOT WAS LEFT THE WAY IT WAS, THE SITE HAD NO VALUE, OTHER THAN JUST RAW LAND VALUE. BOTH PPRAISERS CONCLUDED THAT. BOTH APPRAISERS THEN LOOKED AT IT AND SAID IS THERE SOMETHING WE CAN DO TO THIS PROPERTY TO BRING IT BACK TO ITS USE, AND THE DEPARTMENT PRESENTED A CURE PLAN. THE LANDOWNER PRESENTED A CURE PLAN. AND WHAT WE ARE HERE, TODAY, ON, IS THE TESTIMONY PRESENTED BY THE DEPARTMENT. THE FOURTH DCA SAID THAT THE CURE PLAN THE DEPARTMENT PRESENTED WAS NOT ADMISSIBLE, BECAUSE THE DEPARTMENT, NUMBER ONE, DID NOT CHANGE THEIR PLANS TO MOVE THE DRIVEWAYS TO THE LOCATION ON THE DEPARTMENT'S CURE PLAN, AND NUMBER TWO, THEY DIDN'T PRESENT EVIDENCE OF THAT AT SOME TIME IN THE FUTURE, THEY WOULD ACTUALLY CONSTRUCT THOSE NEW DRIVEWAYS. THE SECOND ISSUE, THAT THE COURT SAID WAS OUR APPRAISER, MR. GALLEON'S TESTIMONY, WAS INADMISSIBLE, AND THE TESTIMONY COMES DOWN TO THE AREA THAT WAS USED TO DO THE CURE. THE DEPARTMENT'S CURE, THERE WAS A WIDE SIDEWALK, 25 FEET WIDE. THE DEPARTMENT, IN ORDER TO GET SOME MORE PARKING IN, SAID THAT YOU WOULD TAKE OUT ABOUT NINE FEET OF THIS PARKING AREA, NINE FEET BY 180 FEET LONG, AND MOVE YOUR PARKING CLOSER TO THE BUILDING. WITHIN THAT AREA WAS A COVERED WALKWAY TRELLIS AREA THAT BECAME KNOWN AS THE ARBOR AREA IN THE OPINION. THE ISSUES THAT THIS KOUFERT NEEDS TO LOOK AT IS, NUMBER ONE, MUST -- THAT THIS COURT NEEDS TO LOOK AT IS, NUMBER ONE, MUST APPRAISER LOOK AT THE PROPERTY TO BE USED FOR A CURE AND COMPENSATE, PAY FOR THE LAND UNDERNEATH THAT CURE, ON TOP OF DETERMINING THE LOSS OF MARKET VALUE TO THE REMAINDER, AS A RESULT OF THE TAKING.

WHILE YOU ARE IN THAT, TELL ME HOW THE EXPERT OR WHERE DID HE FACTOR IN THE AMBIANCE OF WHERE HE WAS GOING TO MOVE THIS PARKING? I GATHER THERE WAS TRELLISES AND A TABLE AND THAT WAS PART OF THE AMBIANCE OF THE CENTER, OF THE SHOPPING AREA.

CORRECT.

SO HOW WAS HIS CURE, HOW WAS THAT FACTORED INTO HIS CURE?

WHEN HE DID HIS INITIAL ANALYSIS OF THE SALES AND IN DETERMINING THE "BEFORE" VALUE

YOUTHFUL THE SITE, HE SAID WHAT DO APPRAISERS LOOK AT ON A SHOPPING CENTER LIKE THIS, IS THE LEASEABLE AREA, THEN ON, SO HE DIDN'T REALLY LOOK AT ALL OF THE AMENITIES. THOSE ARE IMPORTANT, BUT THE IMPORTANT FACTOR, REALLY, IS HOW MUCH SPACE CAN WE RENT. IN LOOKING AT THE REMAINDER ON CROSS-EXAMINATION, IT IS THOROUGHLY CROSS-EXAMINED ABOUT THAT, AND HE SAID HE USED TWO METHODS TO ANALYZE THE REMAINDER REMAINDER. ONE WAS THE COMPARABLE SALES APPROACH. WHEN ASKED ABOUT IT, HE SAID LOOK AT MY SALES THAT I USED IN THE "AFTER" VALUE. I HAVE DROPPED THE SKRAL VALUE FROM $-- I HAVE DROPPED THE VALUE FROM $65 TO $50 A FOOT. THE PROPERTIES THAT I RELIED UPON ARE MANY CLOSE TO THE ROAD, VERY LITTLE PARKING, VERY LITTLE AMENITIES, AND THOSE KINDS OF THINGS, AND BECAUSE OF THOSE KINDS OF THINGS, I FOUND THAT THE PROPERTY VALUE HAD DROPPED, THEN HE WAS ASKED ABOUT HIS RENTAL RATES, AND HE SAID THE SAME THING. THE PROPERTIES THAT I AM RELYING ON IN MY ANALYSIS OF THE REMAINDER HAVE LESS FEATURES, LESS PARKING, CLOSER TO THE ROAD. THEY DON'T HAVE THE ARBOR AREAS AND LESS AMENITIES. THEN, THIS CROSS-EXAMINATION, HE WAS PINNED DOWN, WHAT ABOUT THIS AREA? WHY DIDN'T YOU PUT A VALUE ON THIS? AND BASICALLY HE SAID I DON'T THINK IT MATTERS WHETHER THIS AREA IS A SIDEWALK OR A PARKING LOT. WHEN I AM LOOKING AT THE OVERALL VALUE OF THIS SMOPING CENTER, IT ISN'T GOING -- OF THIS SHOPPING CENTER, IT ISN'T GOING TO MAKE ANY DIFFERENCE. THE IMPORTANT THING IS WHAT WILL IT RENT FOR, BASED ON THE AREA THAT HE IS LOOKING AT, AND THE ARBOR AREA, TO HIM, DIDN'T ADD ANY EXTRA AREA TO THE LAND VALUE BUT PROBABLY ADDED SOME INCREMENTAL VALUE TO THE RESTAURANT BUSINESS THAT WAS THERE. THAT IS WHAT HE SAID, AND IT IS OUR POSITION THAT, WHEN THE APPELLATE COURT SAYS THAT HE SHOULD HAVE PUT A VALUE ON THAT, THAT HE SHOULD HAVE RECOGNIZED SOME AESTHETIC ADDITIONAL VALUE TO THAT, ALL THEY ARE DOING IS SUBSTITUTING THEIR JUDGMENT FOR THE APPRAISER. THEY DIDN'T AGREE WITH HIM. HE DIDN'T THINK THERE WAS ANY ADDED VALUE TO THAT. THAT HE SHOULD PAY THE PERSON FOR THAT.

IN MY UNDERSTANDING, IF THE LANDOWNER HAS DEVELOPED A GAZEBO AND BRICKED-IN PATIOS AND ALL OF THIS TYPE OF THING IN FRONT OF HIS BUILDING, AND THIS, HE FIGURES IT ENHANCES HIS PROPERTY VALUES, IS IT THE DEPARTMENT'S POSITION THAT THEY CAN NOW, SINCE THEY ARE GOING TO TAKE HIS PARKING LOT, TURN THIS AREA INTO A PARKING LOT? AND SOMEHOW NOT FACTOR IN, SOMEHOW NOT GIVE HIM CREDIT, I GUESS, FOR THE AESTHETICS OF IT? IS THAT WHAT WE ARE TALKING ABOUT?

I DON'T THINK THAT WE ARE SAYING THAT AN APPRAISER MAY NOT VERY WELL FIND THAT THOSE AESTHETICS SOMEHOW ADD VALUE OVER AND ABOVE ANOTHER SHOPPING CENTER NEARBY. WE ARE NOT SAYING. THAT WHAT WE ARE SAYING IS THIS COURT'S OPINION IN PATEL SAYS THAT THESE FUTURE THINGS THAT COULD BE DONE TO THE PROPERTY, WE DON'T KNOW WHETHER THEY WILL EVER DO. THAT MATTER OF FACT, THE TESTIMONY AT TRIAL WAS WE ARE NOT EVEN TAKING DOT'S APPROACH. WE ARE GOING TO CUT OFF PART OF THE BUILDING AND REPLACE SOME OF THAT AREA WHERE THE BUILDING WAS WITH PARKING. THESE ARE ALL THINGS THAT A POTENTIAL PURCHASER, IF THEY WERE GOING TO BUY THIS REMAINDER THEY WOULD LOOK AT THAT AND SAY HOW CAN I MAKE IT BETTER? CAN I MAKE IT BETTER? THE TESTIMONY COULD HAVE BEEN WE CAN'T DO ANYTHING WITH THE SITE. WE NEED TO KNOCK THE BUILDING DOWN AND BUILD A WALGREENS.

IS IT AN OBLIGATION OF THE DEPARTMENT TO SHOW THAT IT IS ZONED TO ACCOMMODATE THE CURE?

BASED ON THIS COURT'S DECISION IN PATEL, THEY HAVE EITHER GOT TO SHOW IT ZONED FOR OR PERMITABLE. THE CURE IS PERMITABLE IN TWO-WAYS. EITHER IT IS PERMITTED UNDER THE CODE OR THERE IS A REASONABLE PROBABILITY THAT ANY VARIANCE THAT WAS NECESSARY COULD BE OBTAINED TO DO THE CURE. MATTER OF FACT, BOTH SIDES' CURES REQUIRED VARIANCES, IN ORDER TO GET TO THE LOCAL GOVERNMENT AND ITS PERMISSION TO BUILD THEM. THOSE ARE

ALL FACTORS, AND WHAT THIS COURT SAID IN PATEL IS A BUYER IS GOING TO LOOK AT THIS. I HAVE GOT THIS SITE. THE D.O.T. HAS JUST TAKEN THESE TWO STRIPS OFF OF IT. THEY HAVE TAKEN 49 TO 70, DEPENDING ON THE TESTIMONY, OF 140 PARKING PLACES. IF I AM BUYING THIS, AM I GOING TO JUST TEAR DOWN TH BUILDING, OR IS THERE SOMETHING I CAN DO TO THIS BUILDING TO MAKE IT MORE VALUABLE? AND THAT IS WHAT YOU DO. YOU LOOK AT POTENTIAL CURES. MR. GALLION LOOKED AT TWO YEARS. HE LOOKED AT THE CUT OFF, THE BUILDING CURE, AND HE SAYS IF I DO THAT, I DON'T THINK IT GETS IT BACK ENOUGH, AS MUCH VALUE AS IF I PUT IN MORE PARKING, THAT THE PARKING, TO MY APPRAISER, WAS THE MOST IMPORTANT THING, IN ORDER TO LEAST PROPERTY. SO WHAT YOU DO IS YOU LOOK AT THOSE. YOU LOOK AT THE POTENTIAL FOR HAVING TO GO GET PERMITS. CAN YOU GET THEM. WE ARE LOOKING AT A PROPERTY, AS OF JUNE 1997, THAT DIDN'T HAVE THESE PERMITS, THAT SOMEBODY WOULD HAVE TO GO GET THEM, AND ANYBODY BUYING THIS PROPERTY WOULD LOOK AT THAT AND SAY I HAVE GOT A RISK THERE. ONE WAY I KIND OF LOOKED AT IT WAS I WAS THINKING ABOUT IF YOU WERE BUYING A HOUSE DOWN ON SAINT MARKS RIVER. LET'S SAY IT HAS GOT A DEFECTIVE SEPTIC TANK. THE SEPTIC TANK HAS BEEN THERE FOR 30 YEARS. YOU BUY THIS PROPERTY. YOU ARE GOING TO HAVE TO PUT IN A NEW SEPTIC TANK. WELL, LET'S SAY THE SEPTIC TANK COSTS $5,000, BUT YOU DON'T KNOW WHETHER YOU ARE GOING TO BE ABLE TO GET THE PERMITS. YOU DON'T KNOW HOW MUCH TROUBLE YOU ARE GOING TO HAVE, TO GET THE PERMITS, SO ARE YOU GOING TO PAY, LET'S SAY IT IS WORTH $100,000, AND YOU HAVE GOT THIS DEFECTIVE 5,000. ARE YOU GOING TO PAY $95,000 FOR IT OR ARE YOU GOING TO PAY, MAYBE, $90,000 FOR IT, BECAUSE YOU HAVE GOT THE RISK OF TRYING TO GET THE PERMITS AND WHATEVER, AND WE BELIEVE THAT THIS COURT, IN PATEL, SAID THAT AN APPRAISER SHOULD DO.

PLEASE HELP ME WITH THIS. I HAVE STUDIED ALL THESE BRIEFS AND LOOKED AT ALL THESE CONCEPTS AND ON THIS CURE ISSUE, AND CORRECT ME IF MY PERCEPTION IS INCORRECT, SIR, THAT THE CURE PLAN, AS PRESENTED BY THE D.O.T. SIMPLY COULD NOT BE COMPLETED, UNLESS DOT DID CERTAIN OTHER THINGS, AND THERE WAS A WITNESS WHO WAS GOING TO PROVIDE THESE PROMISES FROM THE WITNESS STAND THAT DOT WOULD DO THAT THIS -- WOULD DO THEM.

RIGHT.

IS THAT THE SUM AND SUBSTANCE OF WHAT WE ARE TALKING ABOUT?

THE CURE PLANS ARE NOT BUILT BY D.O.T..

I UNDERSTAND THAT. ANOTHER CURE PLAN IS BUILT BY SOMETHING THE OWNER WOULD DO IN THE FUTURE. NOW, IF, LET'S SAY THE DRIVEWAY IS HERE, AND WE NEED TO MOVE THE DRIVEWAY OVER HERE. WHAT THE FOURTH DISTRICT COURT IS SAYING, DOT HAS GOT TO DO. THAT WELL, SOMEBODY BUYING THIS PROPERTY ISN'T GOING TO, CAN'T MAKE DOT BUILD THEM A NEW DRIVEWAY.

I THOUGHT THAT THERE WERE, AS I HAVE READ THIS, AND THAT WAS NOT RESPONSIVE TO MY QUESTION, IS THAT YOU PRESENTED, THE D.O.T. PRESENTED A PLAN THROUGH ITS EXPERT WITNESS, THAT COULD NOT BE BUILT, UNLESS DOT DID SOMETHING TO ITS OWN PROJECT.

WHAT THE TESTIMONY WAS, THAT THE PLANS PUT THE DRIVEWAYS IN THE CERTAIN LOCATION. BUILD A CURE. ONE OF THE DRIVEWAYS NEED TO BE MOVED ABOUT NINE FEET AWAY. IT COULD NOT BE BUILT ON, AS DESIGNED IN THE PLANS. THE PLANS DIDN'T CALL FOR IT TO BE BUILT OVER THERE. THE CONSTRUCTION EASEMENT THAT DOT HAD TO BUILD THE DRIVEWAYS AND THE PLANS, THIS WOULD HAVE BEEN OFF THAT EASEMENT.

RIGHT. SO THERE WAS, THEN, LET'S JUST STOP RIGHT THERE, SO THAT DO. IT WAS GOING TO HAVE TO DO SOMETHING ELSE, ITSELF, FOR THIS TO EVEN BE WORKABLE.

I THINK THAT IS WHERE THE MISUNDERSTANDING OF THE DISTRICT COURT HAS COME. THE D.O.T. WOULD NOT BUILD A NEW DRIVEWAY. THE OWNER WOULD BUILD IT. HE WOULD HAVE TO GO GET PERMITS TO BUILD THIS NEW DRIVEWAY. THE TESTIMONY THAT WAS PRESENTED BY THE DEPARTMENT OF TRANSPORTATION WAS THAT THEY BROUGHT IN ENGINEER, HAD A RESOLUTION FROM THE SECRETARY, ALLOWING HIM TO BIND THE DEPARTMENT ON DRIVEWAY LOCATIONS. HE SAID WE WILL PERMIT THE OWNER TO BUILD HIS NEW DRIVEWAY NINE FEET TO THE EAST. IN OUR CURE PLAN, WE PUT IN DOLLARS TO DO THAT. OUR CURE PLAN, WHEN WE ANALYZED THE CURE TO BUILD A CURE, WE PUT EXTRA DOLLARS IN FOR THE OWNER TO DO, TO MOVE THE DRIVEWAY, CLOSE THE OLD ONE, PUT IN THE NEW CURB CUTS AND ALL OF THAT, AND THAT IS HOW IT IS HANDLED. THAT IS HOW ALL CURE PLANS ARE, I MEAN, YOU GO UP AND DOWN CAPITAL CIRCLE AND WIDEN CAPITAL CIRCLE. A LOT OF PARKING LOTS WERE AFFECTED. A LOT OF PEOPLE CAME IN WITH CURE PLANS. SOME WERE BUILT AND SOME WEREN'T. BUT A CURE PLAN IS A HYPOTHETICAL CONCEPT, A CONCEPT THAT THE APPRAISERS USE, TO TRY TO ANALYZE WHAT IS THIS PROPERTY WORTH? IS IT JUST WORTH RAW LAND VALUE? WOULD I TEAR DOWN THE BUILDINGS? OR WOULD SOMEBODY BUYING THE SITE PAY A LITTLE MORE FROM THAT?

BUT THAT CURE PLAN WAS DEFINITELY AT BEST, WHERE THE D.O.T. SAYS, OKAY, I AM GOING TO LET YOU DO IT. WE WOULD LET YOU DO IT.

RIGHT.

BUT IT WAS TOTALLY SPECULATIVE. COULD IT BE DONE BECAUSE OF THE OTHER UNDERLYING PERMITTING? CORRECT?

BUT THAT IS WHERE THE TRIAL TESTIMONY COMES IN. THE TRIAL TESTIMONY IN THIS CASE THE LANDOWNER TOOK THE POSITION DOT'S CURE PLAN CANNOT BE PERMITTED. DOT PUT ON TESTIMONY THAT IT COULD BE PERMITTED. THAT IS WHAT THE PATEL CASE STARTED AS. WHY CAN'T IT BE PERMITTED? A VARIANCE HAS TO BE OBTAINED. DOT TESTIFIED THREE VARIANCES WOULD HAVE TO BE OBTAINED FOR THEIR CURE PLAN, BUT THEY PUT ON TESTIMONY, AND IT WAS ACCEPTED BY THE COURT THAT IT REACHED THE LEVEL FOR THE JURY TO DECIDE THAT ISSUE. THEY ATTACKED THAT ISSUE. THEY PUT ON TESTIMONY IT COULDN'T BE DONE. THEY PUT ON TESTIMONY THAT THERE WERE SITE PROBLEMS AND PROBLEMS WITH OUR CURE, AND ALL THAT IS WELL AND GOOD. MATTER OF FACT, THE JURY GAVE THE VERDICT IS $100,000 TO $100 MORE THAN THE CURE COST WAS, SO OBVIOUSLY THE JURY CONSIDERED IT AND THAT IS WHAT WE ARE SAYING. THIS IS FOR THE JURY TO CONSIDER. IT IS NOT FOR THE COURT TO SAY I DON'T AGREE WITH THE NUMBERS HE ARRIVED AT, AND THAT IS BASICALLY WHAT THE DCA DID HERE. HE SAYS THAT ARBOR AREA HAD NO VALUE. WE THINK THAT IS WRONG AS A MATTER OF LAW. HOW CAN THAT BE WRONG AS A MATTER OF LAW, WHEN THAT S AN ISSUE OF FACT? AND THAT IS WHY WE CITE THE FALCON CASE AT ROCHELLE, BASICALLY SAYING THAT IS NOT THE ROLE OF THE APPELLATE COURT. THAT IS NOT THE ROLE OF THE TRIAL JUDGE. THAT IS THE ROLE OF THE JURY.

LET ME ASK YOU A QUESTION. ON THIS ISSUE WHETHER COMES TO THE CURE SHOULD BE A SEPARATE ITEM OF DAMAGES OR ONE DAMAGE FACTOR IN DETERMINING THE SEVERANCE DAMAGES.

RIGHT.

THE SPECIAL VERDICT LISTED COST TO CURE AS A SEPARATE ITEM, AND YOUR BRIEF SAYS THAT DOT AGREED TO THAT. IS IT, IF THE JURY IS INSTRUCTED ON THESE VARIOUS LLTS, THEN IS IT, AS A MATTER OF FACT AND PRACTICALITY, COST TO CURE IS BEING CONSIDERED AS A TOTALLY SEPARATE ELEMENT OF DAMAGES?

IN THIS CASE, THE COST TO CURE IS THE ACTUAL COST OF PERFORMING THE CONSTRUCTION. IT IS NOT THE VALUE OF THE AREA THAT IS BEING USED FOR THAT CURE.

BECAUSE YOU ARE SAYING THAT IS SUPPOSED TO GO INTO THE SEVERANCE DAMAGE CALCULATION.

AND WHAT I AM SAYING --

IS THAT YOUR ARGUMENT? THAT THAT WAS ADEQUATELY TAKEN INTO CONSIDERATION IN THE SEVERANCE DAMAGE TO SAY THE REMAINDER OF THE PROPERTY?

YES. BOTH APPRAISERS DID IT THE SAME WAY. EXACT SAME WAY. THEY LOOKED AT WHAT IT WOULD BE WORTH AFTER THE CURE IS DONE AND THEN LOOKED AT THE COSTS TO GET TO THAT POINT, AND THEN SEPARATED OUT THAT COST AS A SEPARATE ITEM. THEN YOU HAVE THE LOSS IN VALUE, THE LOSS OF MARKET VALUE WAS WHAT WAS INCLUDED ON THE SEVERANCE DAMAGE LINE. I WOULD LIKE TO SAVE A COUPLE OF MINUTES FOR REBUTTAL. THANK YOU.

YOU MAY. THANK YOU. MR. JONES.

MAY IT PLEASE THE COURT. JEFF JONES ON BEHALF OF RESPONDENT ARMADILLO PARTNERS. THE STRICT COURT DECISION WAS CORRECT, BECAUSE IT APPLIED 31 YEARS OF PRECEDENT. IT APPLIED THE PATEL DECISION BY THIS KOURKTS THE WILLIAMS CASE AND THE BYRD CASE, AND THE DISTRICT COURT DECISION ON THE CURE IS CONSISTENT. AS A MATTER OF LAW, COMPENSATION MUST BE INCLUDED FOR PROPERTY THAT IS APPROPRIATED AS PART OF A CURE. THE PURPOSE OF FULL COMPENSATION IS TO MAKE THE OWNER WHOLE, AND WITHOUT PROVIDING COMPENSATION FOR PROPERTY TAKEN AS PART OF THE DEPARTMENT'S APPROPRIATION, THE OWNER IS NOT BEING MADE WHOLE.

WHAT CASE OUT OF THIS COURT SAYS THAT?

YOUR HONOR, OUR INTERPRETATION OF PATEL, WILLIAMS, AND BYRD, IS THAT IT IS IMPROPER, AS A MATTER OF LAW, FOR THE DEPARTMENT'S APPRAISER NOT TO CONSIDER --

NOT TO TAKE INTO ACCOUNT, BUT I AM HAVING DIFFICULTY WITH YOU SAYING THAT THERE HAS TO BE A SEPARATE VALUATION FOR SOME OTHER PORTION OF THE PROPERTY THAT MAY BE INCLUDED IN A KUFER PLAN -- IN A CURE PLAN FOR A DIFFERENT USE THAN IT WAS PUT TO BEFORE. I DON'T SEE ANY CASE OUT OF THIS COURT THAT SAYS THAT.

WELL --

DO YOU AGREE WITH THAT, THAT THERE IS NOT A CASE OUT OF THIS COURT, AND THE DECISIONS OUT OF THE FIRST DISTRICT, IT SEEMS TO ME, HAVE BEEN BROUGHT INTO SERIOUS QUESTION, BECAUSE IN PATEL, WE SPECIFICALLY SAID TO THE EXTENT THAT THEY MIGHT CONFLICT WITH PATEL, AND I REALIZE THAT IS AMBIGUOUS, NOW, IN TERMS OF WHAT THE LEAD ISSUE OF PATEL WAS DECIDED ON, AND THEN THE COURT'S BROAD DISCUSSION AFTER THAT, BUT WOULDN'T YOU AGREE THERE IS NO CASE OUT OF THIS COURT THAT SAYS THAT THERE HAS TO BE SOME SEPARATE VALUATION AND AWARD TO THE PROPERTY OWNER FOR OTHER PORTIONS OF HIS PROPERTY THAT ARE -- THAT A COST TO CURE PROPOSED BY THE STATE BE CO-OPTED. WOULD YOU --

YOU ARE ABSOLUTELY CORRECT, YOUR HONOR, IN THAT THAT WAS NOT HELD BY THE COURT. ONE WOULD HAVE TO IGNORE THE SECOND TO THE LAST PARAGRAPH OF PATEL, IN WHICH THE COURT FOUND THAT, IN FACT, THERE WAS ERROR AS A MATTER LAW, NOT TO PROVIDE VALUE, NOT TO PROVIDE COMPENSATION FOR THE PROPERTY.

NOW, THIS IS, I AM NOT SURE WHERE WE HAVE GONE, NOW, WITH THESE CASES AND THE SPECIFIC VERDICTS THAT WE HAVE. PATEL, IT SEEMS TO ME, GENERALLY STANDS FOR THE PROPOSITION

THAT YOU HAVE GOT TWO ELEMENTS OF DAMAGE. ONE IS THEY TOOK SOME PROPERTY HERE. RIGHT? FOR THIS HIGHWAY WIDENING PROJECT.

YES, YOUR HONOR.

AND EVERYBODY AGREES THAT THE LANDOWNER IS ENTITLED TO BE COMPENSATED FOR THE TAKING OF THAT PART OF THE PROPERTY, CORRECT?

YES.

NOW, THESE ISSUES ARISE, WITH REFERENCE TO THE DAMAGE, THE REDUCED VALUE OF THE REMAINDER OF THE PROPERTY. RIGHT?

THAT'S CORRECT, YOUR HONOR.

BUT IN PATEL, THIS COURT BASICALLY SAID THAT THE SECOND ELEMENT OF DAMAGE IS, REALLY, THE "AFTER" VALUE OF THE PROPERTY, AFTER THIS PARTIAL TAKING HAS OCCURRED, AND AT LEAST THAT SOUNDS FAIRLY SIMPTOLL GRASP. THAT IS THAT -- SIMPLE TO GRASP. THAT IS A SINGLE ELEMENT OF DAMAGE. BUT IF I UNDERSTAND IT CORRECTLY NOW, THE PRACTICE IS TO HAVE THESE VERDICT FORMS ACTUALLY DETAIL THE EVIDENCE ADVANCED BY EACH SIDE, IN TERMS OF AS TO HOW THAT REDUCED VALUE COMES ABOUT, AND THEN THE DISPARITY. IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

IT DOESN'T JUST HAVE THE JURY SAY WHAT IS THE REDUCED VALUE? ICHT E THAT SECOND ELEMENT OF DAMAGE. IS THAT RIGHT?

WELL, THAT'S CORRECT, YOUR HONOR. IT IS A COMBINATION OF WHAT PRACTITIONERS ARE USING. IT IS A COMBINATION OF AUTHORITY OUT THERE THAT RELATE TO THE COST TO CURE. THE BYRD COMPENSATION FOR PROPERTY APPROPRIATED, THE METHODOLOGY SET FORTH IN PATEL, AND PATEL, TO SOME EXTENT, PRIMARILY IT RELATED TO IF THERE IS A GRANT OR DENIAL OF VARIANCE IT MAY NOT INVOLVE, IN THAT PHASE OF THE PROCEEDINGS, AS REFERENCED IN PATEL, A TAKING OF PROPERTY, BUT IF, IN FACT, A VARIANCE IS GRANTED, THAT FOR INSTANCE IN THIS CASE WOULD REQUIRE THE TAKING OF THIS ARBOR AREA, WE READ THE CASE LAW TO INDICATE THAT PROPERTY, IN FACT, HAS TO BE COMPENSATED FOR BY THE DEPARTMENT. THAT IS PART OF THE PROBLEM. THE MINIMUM PROBLEM THAT MR. GALLION FACED, THE DEPARTMENT'S APPRAISER FACED, WAS THAT THERE WAS NO COMPENSATION FOR THE I AM PROFLTS THAT WERE TAKEN WITH -- FOR THE IMPROVEMENTS THAT WERE TAKEN WITHIN THIS 1600 ARBOR AREA, SIMILAR TO "THE BIRDCAGE", SHOVEL BOARD COURT.

IF THE ULTIMATE GOAL IS THE REDUCED VALUE, THEN WHY COULDN'T AN APPRAISER AN OR AN EXPERT SIMPLY SAY, WELL -- AN APPRAISER OR AN EXPERT SIMPLY SAY, WELL, THE BEST WAY IN MY VIEW TO DO THIS, IS TO RETAIN AS MUCH SQUARE FOOTAGE OF OFFICE SPACE OR WHATEVER, WITHIN THIS FACILITY, BUT TO REMOVE THIS LANDSCAPED AREA OR HOWEVER WE WANT TO DESCRIBE THAT OTHER AMENITY, AND USE THAT FOR PARKING, REALIZING THAT THAT IS GOING TO HAVE AN EFFECT ON THE VALUE OF THE PROPERTY, BECAUSE IT IS NOT GOING TO BE BEAUTIFULBLY LANDSCAPED AT WHICH TIME IS NOT GOING TO HAVE THAT AMENITY, AND HERE WHY WOULDN'T WE CONSTRUE HIS TESTIMONY TO BE IN ESSENCE THAT I HAVE DISCOUNTED THAT, BECAUSE I THINK IT IS MORE IMPORTANT TO FOCUS ON THE SQUARE FOOTAGE INSIDE OF THE BUILDINGS, AND I HAVE ACCOUNTED FOR THAT BY LOOKING AT THESE OTHER SMALL SHOPPING CENTERS AND SAYING, YOU KNOW, THEY DON'T HAVE ANY AMENITIES, BUT AS A RESULT OF THAT, THEIR RENTAL VALUES ARE MUCH LESS THAN THIS WOULD HAVE BEEN, WITH ALL OF THOSE AMENITIES, AND THEREFORE I HAVE ACCOUNTED FOR IT. I HAVE ACCOUNTED FOR IT IN A WAY THAT PUTS A LOWER RENTAL VALUE OF THE RENTAL SPACES HERE. WHY WOULDN'T

THAT BE A FAIR INTERPRETATION OF HIS TESTIMONY?

WELL, YOUR HONOR, BECAUSE I THINK IT IS THE DEPARTMENT GOING BACK TO, FOR INSTANCE, THE BYRD CASE. WE ARE INDICATING, ALTHOUGH WE ARE TAKING CERTAIN PROPERTY, WE ARE MAKING YOU WHOLE. WHERE, IN FACT, THAT IS NOT THE CASE. KEEP IN MIND THAT THE RECORD DEMONSTRATES IN THIS PARTICULAR CASE, WE ARE DEALING WITH PROPERTY THAT DOES NOT HAVE A CONTRIBUTE OTHER VALUE TO THE INCOME STREAM, SO IN FACT, HE IS LOOKING AT COMPARABLE RENT ALWAYS -- RENTALS AND SAYING THAT I AM SIMPLY LOOKING AT PROPERTY THAT NEVER HAD THAT ARBOR AREA AND NEVER HAD THIS IRRIGATION SYSTEM, NEVER HAD THAT LANDSCAPING FENCE WORK, LATTIS WORK RESPECT AND THAT IS WHERE HE IS COMING UP WITH THIS RENTAL LOSS. THE RECORD, ALSO, INDICATES THAT THE RENTAL LOSS WAS PURELY AS A RESULT OF THE LOSS OF PARKING. THIS WAS A SITUATION IN WHICH THE PARKING AREA LOST ABOUT 50 PERCENT OF ITS PARKING SPACES, AND IN FACT HE WAS ATTEMPTING TO RESTORE THAT PARKING. USING THE RENT COMPARABLES, IT SIMPLY ASSUMES THE APPROPRIATION OF THE ARBOR AREA, SO THAT THERE WAS NO COMPENSATION BEING PROVIDED TO THE OWNER, SO THE EXAMPLE PROVIDED IN THE BRIEF IS LET'S SAY THERE IS IMPROVEMENTS IN THE ARBOR AREA THAT ARE WORTH $50,000 TO THE PROPERTY OWNER. HE IS MERELY LOOKING AT COMPARABLE RENTALS. THE ANALOGY THAT COMES TO MIND IS THE PORT ORLEANS RESORT AT DISNEY, WHERE DISNEY SPENT $1 MILLION TO MOVE THIS HUGE OAK TREE INTO THIS PORT ORLEANS RESORT. WELL, THAT DOES NOT CONTRIBUTE TO ADDITIONAL RENTS, BUT IN FACT THEY SPENT THAT MONEY, AND THAT IS, IN SOME RESPECTS, SIMILAR TO THIS ARBOR AREA.

BUT IF THE WHOLE, IF THE FOCUS HERE, THE GOAL IS TO SAY, NOW, LOOK, SOME PROSPECTIVE BUYER IS GOING TO COME AND LOOK AT THIS DAMAGED PROPERTY, AND TO AVOID THIS SITUATION, WHERE YOU SAY JUST DEMOLISH THE WHOLE BUILDING AND THE VALUE IS ONLY GOING TO BE THE VALUE OF THE RAW LAND, BOTH SIDES HERE SAID, YES, YOU CAN DO SOMETHING, YOU KNOW, WITH THE PREMISES SHORT OF THAT, AND IN LOOKING AT THAT, THIS IS JUST ONE PLAN THAT WOULD COME TO MIND OR BE PRESENTED TO A PROSPECTIVE BUYER, WHO, THEN, WOULD SAY, WELL, YES, NOW I SEE THAT YOU DON'T HAVE TO TEAR DOWN THE WHOLE BUILDING, AND IF THE ULTIMATE GOAL IS FOCUSING ON THIS DEPRECIATION IN VALUE, ASPHALT OF THE TAKING, WHY WOULD WE LIMIT THE PRESENTATIONS OF OPTIONS THAT A PROSPECTIVE BUYER WOULD HAVE, IN GAUGING WHETHER THIS ARTIFICIAL THING OF AN ORDINARY PURCHASER OUT THERE WOULD PURCHASE THIS PROPERTY, KNOWING ABOUT THAT? WHY WOULD WE LIMIT TESTIMONY ABOUT POSSIBLE CURES LIKE THIS, IN GAUGING WHAT THAT VALUE WOULD BE?

YOUR HONOR, WE DO NOT UNDERSTAND THAT FLORIDA HAS MOVED TO AN ENTIRELY "BEFORE AND AFTER" ANALYSIS, BECAUSE OF THE HIS TRAIN THE PRECEDENT OF -- BECAUSE OF THE HISTORY AND THE PRECEDENT OF SEVERANCE DAMAGES, BECAUSE OF THE PRECEDENT RELATING TO THE COST TO CURE. IN THIS SITUATION, THIS CURE IS A MITIGATION OF DAMAGES. BETWEEN THE TWO APPRAISERS, THE DEPARTMENT'S APPRAISER INDICATED YOU DON'T CURE THIS PROPERTY. IT IS DAMAGED BY APPROXIMATELY $1.1 MILLION. THE OWNER'S APPRAISER SAID APPROXIMATELY $1.4 MILLION. THE CURE THAT THE DEPARTMENT AND THE APPRAISER TESTIFIED TO MITIGATED APPROXIMATELY $650,000 OF THAT. WHAT I AM HEARING IS THE DEPARTMENT WANTS TO MITIGATE ITS OWN MITIGATION. IN OTHER WORDS, ALTHOUGH WE HAVE MITIGATED THAT MUCH BY PRESENTING THIS CURE, WHICH WE CONTEND PROVIDES WHOE COMPENSATION, WE DON'T WANT TO PROVIDE YOU ANY ADDITIONAL COMPENSATION FOR PROPERTY THAT IS ACTUALLY APPROPRIATED AS --

WHAT IF THERE WAS AN UNUSED PART OF THIS PROPERTY THAT WAS LEFT, AND IT WAS JUST, LET'S SAY IT WAS JUST GRASSED OVER AD WEEDS OR WHATEVER IN THE BACK OF THE PROPERTY, AND IT WAS ADEQUATE, THOUGH, FOR PROVIDING HOWEVER MANY PARKING SPACES WERE LOST HERE, BUT THAT ISN'T WHAT THE OWNER WAS DOING WITH IT AT THE TIME. THE OWNER JUST HAD IT IN WEEDS AND IN GRASS OR WHATEVER. IF A COST, IF A CURE APPROACH WAS

DEVELOPED, SAY, ON THIS REMAINING PROPERTY, THERE IS LAND ENOUGH TO PUT PARKING SPACES THERE THAT WILL MAKE UP FOR ALL OF THE PARKING PLACES THAT ARE LOST. NOW, OF COURSE THAT IS GOING TO COST MONEY TO SOMEBODY. THEY ARE GOING TO HAVE TO DIG THAT OUT AND DO WHATEVER THEY DO TO BUILD PARKING PLACES. NOW, WHY, ARE YOU SAYING THAT IF THAT HAPPENED, THAT THE STATE WOULD NOT ONLY HAVE TO PUT UP THE COST IN TERMS OF ESTIMATING THAT FOR A PROSPECTIVE BUYER, BUT WHAT IT WOULD COST TO TAKE THAT LAND AND DEVELOP IT INTO PARKING PLACES, BUT THEY, ALSO, WOULD HAVE TO SAY, NOW, FOR HAVING THAT GO TO PARKING PLACES AND INSTEAD OF JUST GREEN GRASS OR WEEDS THAT WE ARE GOING TO HAVE TO GIVE THE OWNER A SEPARATE ITEM, LINE ITEM OF DAMAGE FOR USING THAT PROPERTY FOR PARKING. IS THAT WHAT YOU ARE CLAIMING?

YOUR HONOR, YES, IT IS SIMILAR TO THE SITUATION WITH WILLIAMS, AS WELL AS WITH PATEL AS WELL. BECAUSE WHAT THE APPRAISER IS DOING, WHAT THE DEPARTMENT DOES NOT WISH TO DO, IS TAKE INTO CONSIDERATION WHAT OTHER USE COULD HAVE BEEN MADE TO THAT PARTICULAR PROPERTY. IF THE PROPERTY OWNER WISHED TO EXPAND HIS BUILDING, THAT PROPERTY WOULD NO LONGER BE AVAILABLE FOR EXPANSION. IF A MYRIAD OF OTHER CIRCUMSTANCES A ROSE, IN WHICH THE OWNER WISHED TO USE THAT PROPERTY FOR SOME OTHER REASON, THE DEPARTMENT IS SAYING WE ARE LIMITING YOUR WHOLE COMPENSATION THE COMPENSATION YOU ARE RECEIVING AS A PART OF THIS TAKE BY USING AND CATAGORIZING THAT PROPERTY, AS THAT SHALL BE USED FOR PARKING.

SO IN MY HYPOTHETICAL, IN ADDITION TO WHATEVER THE DAMAGES WOULD BE, THERE WOULD AND SEPARATE LINE ITEM OF DAMAGE FOR THE VALUE OF THAT PROPERTY FOR THOSE PARKING PLACES THAT HAD NOT BEEN USED FOR THAT PURPOSE BEFORE.

IT WOULD BE PART OF THE SEVERANCE DAMAGES. THE COST TO CURE DAMAGES WOULD RELATE TO THE ACTUAL PHYSICAL CONSTRUCTION COSTS.

AND WHAT CASE IS IT THAT STANDS FOR THAT PROPOSITION MOST CLEARLY?

YOUR HONOR, I WOULD SUGGEST WILLIAMS, BECAUSE IN WILLIAMS, THE COURT ACTUALLY LOOKED AT THE DEPARTMENT'S APPRAISER AND SAID YOU HAVE FAIL TO CONSIDER THIS MYRIAD OF CIRCUMSTANCES. THE PROPERTY OWNER COULD USE THIS PROPERTY FOR, OTHER THAN PARKING. THE REAL SIGNIFICANCE, AGAIN, IS THE CURE AND THE SEVERANCE DAMAGE, THE DEPARTMENT IS ATTEMPTING TO COME UP WITH A FIGURE THAT PROVIDES THE FULL COMPENSATION FOR THE PROPERTY OWNER. THAT FULL COMPENSATION IS NOT BEING PROVIDED, IF, IN FACT, THE DEPARTMENT IS NOT PROVIDING COMPENSATION FOR THE APPROPRIATION, AND THAT, AGAIN, THAT VERB IS USED IN THE SAME CONTEXT AS PATEL, WILLIAMS AND BYRD.

HOW DO YOU COME UP, HOWEVER, WITH THIS OTHER ITEM OF DAMAGES YOU HAVE JUST BEEN TALKING ABOUT THE POSSIBLE FUTURE USE OF THE PROPERTY THAT IS NOW GOING TO BE A PART OF THE CURE? THE PROPERTY OWNER, THEN, CAN PRESENT ANY PLAN THAT CAN POSSIBLY BE USED OR SEVERAL PLANS THAT PROPERTY COULD POSSIBLY BE USED FOR, AND THEN YOU WOULD HAVE TO ADD THAT INTO THE SEVERANCE DAMAGE? IS THAT WHAT YOU ARE TELLING US?

WELL, THE ONLY TIME ANY COST OF CURE IS EVER GOING TO BE PRESENTED, IS IF IT IN FACT MITIGATES THE DAMAGE TO THE PROPERTY THAT WOLD HAE EXSTED IF, IN FACT, NO CURE -- IN OTHER WORDS BOTH APPRAISERS IN THIS SITUATION DECIDEDTHIS COULD NO LONGER OPERATE AS A SHOPPING CENTER. THE HIGHEST AND BEST USE WOULD NOT BE AVAILABLE. IT SIMPLY WOULD BE REDUCED IN VALUE TO RAW LAND.

IF YOU DON'T ADD ANYMORE.

IF YOU DON'T CURE IN SOME FASHION. TO ANSWER YOUR QUESTION, THE DEPARTMENT WILL COME UP WITH ITS CURE. THE OWNER CAN COME UP WITH ITS CURE.

WHAT I THOUGHT I WAS HEARING WAS SOMETHING BEYOND COMING UP WITH A CURE BUT SOME OTHER FUTURE POSSIBLE USE OF SOME OTHER PART OF THE PROPERTY. THE PROPERTY THAT IS BEING USED IS PART OF THE CURE. THE DEPARTMENT WANTS TO USE AS PART OF THE CURE. I THOUGHT YOU WERE SAYING THAT YOU, ALSO, HAVE TO CONSIDER THE FACT THAT THAT SAME PROPERTY COULD POSSIBLY BE USED FOR A NUMBER OF OTHER PURPOSES, AND SO YOU HAVE TO FACTOR THAT IN.

THAT'S CORRECT.

SO HOW, SO MY QUESTION BECOMES HOW DO YOU FACTOR THAT IN? THE OWNER COMES UP WITH ANY NUMBER OF POSSIBLE FUTURE USES, AND YOU USE THOSE FIGURES?

TO A GREAT EXTENT, IT WOULD BE UP TO AN APPRAISER. FOR INSTANCE, IN THIS PARTICULAR SITUATION, THIS PARTICULAR CASE, THE OWNER'S CURE INVOLVED REDUCING THE SIZE OF THE BUILDING BY APPROXIMATELY 7500 SQUARE FEET, IN ORDER TO REDUCE THE TENANT SPACE-TO-PARKING RATIO, CLOSER TO WHAT IT WAS PRE-TAKE,AN WHAT, IN FACT, THE OWNER'S APPRAISER DID, IN THAT INSTANCE, WAS HE DETERMINED WHAT TICKSTURES WOULD BE LOSS IN THE THAT 7500 CUT OFF THAT IS BEING USED FOR -- WHAT FIXTURES WOULD BE LOST, IN THE 7500 CUT OFF THAT IS BEING USED FOR THAT PARKING, AND WHAT WOULD BE DONE WITH THAT ADDITIONAL SPACE. HERE IT DID NOT CONTRIBUTE TO IN THE COME STREAM OF THE PROPERTY. AND THAT IS WHY WE CONTEND THE DEPARTMENT --

IT SEEMS TO ME IT WOULD MAKE IT EVEN MORE DIFFICULT TO TRY TO FIGURE OUT WHAT WAS THE VALUE OF THE FUTURE USE OF THIS SAME PROPERTY THAT WAS NOT BRINGING IN ANY CONTRIBUTING TO THE INCOME STREAM?

WELL, YOUR HONOR, WE ARE NOT ATTEMPTING TO STEP OVER A LINE AND DIRECT APPRAISERS IN HOW TO CALCULATE THAT TYPE OF DAMAGE. WHAT WE ARE SUITING IS, AS A MATTER OF LAW -- WHAT WE ARE SUGGESTING IS, AS A MATTER OF LAW, APPRAISERS MUST INCLUDE CERTAIN ELEMENTS OF COMPENSATION. FOR INSTANCE THE ARBOR AREAS OR THE IMPROVEMENTS WITHIN THE ARBOR AREAS. WITHIN THE TAKING --

HOW DO WE KNOW, KEEPING THAT IN MIND, THE ARBOR AREA, HOW DO WE KNOW THAT THE PROPOSEDOSAL MADE -- THAT THE PROPOSAL MADE BY THE D.O.T.'s APPRAISAL DID NOT INCLUDE BOTH THE LOSS OF THE ARBOR AREA AND THE LOSS OF THE PARKING SPACES?

WELL, INITIALLY THE EXAMPLE I WOULD USE IS WITHIN THE TAKE, ITSELF, PARCEL 122 THAT WAS TAKEN, NEXT TO THE ROADWAY, THE DEPARTMENT DETERMINED THERE WERE $32,000 OF IMPROVEMENTS WITHIN THAT TAKING THIS. IS IRRIGATION, LIGHTING, ASPHALT ASPHALT. WITHIN THE ARBOR AREA, AGAIN THERE, IS IRRIGATION. THERE IS 1600, APPROXIMATELY, FEET OF THESE BRICK PAVERS, THE LATTIS WORK, ITSELF, FENCING, THERE IS NO COMPONENT THAT RELATES TO THOSE IMPROVEMENTS, SO AT A MINIMUM THOSE IMPROVEMENTS SHOULD HAVE BEEN COMPENSATED FOR, AS PART OF THE APPRAISER'S DAMAGES METHODOLOGY.

IF YOU SAY THE TAKING OF THE PARKING SPACES DESTROYED THE VALUE OF THE PROPERTY, AND THE JURY WAS THEN, THERE WASN'T ANY COST TO CURE, AND THE JURY WAS THEN GOING TO VALUE WHAT WAS TAKEN, YOU ARE LOOKING AT THE FAIR MARKET VALUE OF THAT PROPERTY. WHAT COULD YOU SELL IT FOR ON THE OPEN MARKET, CORRECT?

THAT'S CORRECT, YOUR HONOR.

IF THE DEVELOPER OR THE OWNER HAD PUT INSERT IMPROVEMENTS, THAT MAY OR MAY NOT BE REFLECTED IN THE ULTIMATE MARKET VALUE, BUT THAT IS NOT, THE APPRAISERS DON'T SAY THIS GUY, THE YEAR BEFORE, SPENT THIS MUCH MONEY FOR UP KEEP AND THIS MUCH MONEY TO

HAVE THE SHRUBS TRIMMED, I MEAN, YOU ARE LOOKING AT A VALUE AND WHAT I UNDERSTAND, THIS APPRAISER DID IS, IN THE "AFTER" OR AFTER THE CURE, SAID I UNDERSTAND THAT, WITHOUT THIS ARBOR AREA, THIS WILL NOT BE AS VALUABLE AS IT WAS BEFORE, AND THAT HE, AT LEAST THAT IS HIS TESTIMONY, AND THE JURY EITHER COULD REJECT OR ACCEPT IT, TOOK THAT INTO ACCOUNT IN LOOKING AT THE MARKET VALUE BUT DIDN'T TAKE IT TO ACCOUNT AND SAY, WELL, THE TREES ARE, YOU KNOW, THAT THEY JUST PUT IN TWO YEARS AGO, WE ARE GOING TO GIVE A VALUE FOR THOSE, WHATEVER WAS IN THERE, TREES. SO WHY ISN'T THAT ONE ACCEPTABLE WAY TO LOOK AT IT, AND THE JURY, THEN, MAKES A DECISION? I MEAN, HERE IT LOOKS LIKE THE JURY, MIDWAY BETWEEN ON YOUR CURES, SEND THE VALUE OF THE D.O.T. APPRAISER AS TO THE SEVERANCE VALUE, SO , AGAIN, AS OPOSED TO THIS MATTER OF LAW, THAT EVERYTHING MUST BE SEPARATELY, INDIVIDUALLY VALUED.

WELL, --

DO YOU UNDERSTAND WHAT I AM ASKING, I HOPE?

I THINK SO. WHAT WE ARE SUGGESTING IS THAT ALL HE SIMPLY DID WAS LOOK AT "BEFORE AND AFTER", AS FAR AS RENTAL COMPS. HE DID NOT TAKE INTO CONSIDERATION, AS IN THE WILLIAMS CASE, WHAT ELSE COULD BE DONE WITH THIS PARTICULAR PIECE OF PROPERTY. THAT WAS NOT FACTORED INTO HIS OPINION IN OUR VIEW, AND WE THINK THE RECORD SUBSTANTIAL YATES THAT. SECONDLY, HE CONTENDS THAT HIS DAMAGES METHODOLOGY IS A LOSS OF RENTAL, PURELY AS A RESULT OF THE LOSS OF PARKING, NOT AS A RESULT OF THE TAKING OF THIS 1600 SQUARE FEET. I WOULD REFER TO THE AMICUS BRIEF AS WELL, BUT SPECIFICALLY RELATES TO ALTERNATE USES OF THE PROPERTY AND THE BURDEN THAT IS BEING PLACED ON THE PROPERTY THAT IS BEING DESIGNATED AS PART OF THE APPROPRIATION AND A PART OF THE DEPARTMENT'S CURE. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU FOR YOUR TIME. REBUTTAL?

I WANT TO BE, TRY TO SUMMARIZE WHAT WE ARE TRYING TO SAY HERE. THE STATUTE SAYS THAT THE VERY FORM WILL HAVE A LINE FOR THE VALUE OF THE PROPERTY IMPROVEMENTS TAKEN, SEVERANCE DAMAGES, AND THOSE ARE THE ONLY TWO LINES THAT ARE IN THE STATUTE. WE ARE SAYING THAT THAT IS THE ONLY TWO LINES THAT OUGHT TO BE ON A VERDICT FORM, THAT THE LINE TO DETERMINING SEVERANCE DAMAGES IS WHAT IS, AND QUOTING FROM THIS COURT'S OPINION IN KENDRY, DAMAGES TO THE REMAINDER CAUSED SEVERANCE DAMAGES AND ARE MEASURED BY THE REDUCTION IN VALUE OF THE REMAINING PROPERTY. NOW, HOW DO YOU GET TO THE VALUE OF THE REMAINING PROPERTY? ONE OF THE THINGS YOU LOOK AT, IT IS A SMALLER SIZE. IT MAY BE A DIFFERENT SHAPE. THEORIES ALWAYS CONSIDERED. AND IN IMPROVED PROPERTY, SUCH AS THIS, YOU HAVE GOT THE CONSIDERATION OF OUR IMPROVEMENTS ARE IMPACTED, SO WHAT SHOULD WE CONSIDER? NUMBER ONE, CAN IT BE FIXED? NUMBER TWO, HOW MUCH WOULD IT COST TO FIX? NUMBER THREE, F I FX IT, WILL IT BE WORTH AS MCH AFTERWARDS AS IT IS BEFORE? IN THIS CASE, NO. BUT THERE ARE A LOT OF CASES, JUST A SIMPLE EXAMPLE, WE DO A TAKING ON A FENCE. CUT A HOLE IN A FENCE. YOU FIX THE FENCE FOR $500. TCHNICALLY THAT IS A $500 SEVERANCE DAMAGE, AND THAT WOULD BE CONSIDERED, IF SOMEBODY WERE BUYING THIS PROPERTY, THEY WOULD KNOCKTH PRIE OFF $500 ON A $10,000 ACRE FARM TO PUT THE FENCE BACK. IT MAY BE AS SIMPLE AS THAT OR AS COMPLEX AS THIS, OR THE APPRAISER CAN CONSIDER WHAT CAN BE DONE, WHAT WOULD IT COST TO DO IT, AND WHAT WOULD IT BE WORTH WITH THAT, AND WHAT IS THE HASSLE IN GETTING TO THAT POINT? AND WHERE I CITE TO ONE OF THE APPRAISAL MANUALS, IT CALLS IT THE RISK, AND THEY SAY YOU HAVE GOT TO PUT SOME KIND OF PROFIT VALUE ON TOP OF THAT COST, BECAUSE THERE IS A RISK THAT, IF YOU UNDERTAKE THAT, THE OWNER UNDERTAKES TO DO THAT, IT IS ACTUALLY A BIGGER HASSLE THAN JUST DOLLAR FOR THE STICKS AND MORTAR TO DO THE WORK. THE APPRAISER SHOULD CONSIDER ALL OF THOSE AND COME UP WITH THE VALUE OF THE REMAINDER, SUBTRACT IT FROM THE VALUE AS BEFORE, AND THAT IS YOUR SEVERANCE

DAMAGE.

SO DOT'S POSITION IS THAT YOU DON'T HAVE TO CONSIDER FUTURE USE, POSSIBLE FUTURE USE OF THE PROPERTY THAT IS NOW BEING USED TO EFFECTUATE THE CURE?

NO, MA'AM. I THINK IT WOULD BE, WHEN YOU REDUCE THE SIZE, YOU HAVE LOST SOME POTENTIAL EXPANSION. HERE WE TOOK 16,000 SQUARE FEET. IF THERE WERE NOTHING ON THIS PROPERTY, THE APPRAISERS WOULD HAVE TO LOOK AT WE HAVE GOT A SMALLER PIECE OF PROPERTY. WHAT CAN WE DO WITH IT? WE CAN'T DO AS MANY THINGS AS WE COULD BEFORE. THEY ALWAYS CONSIDER THAT.

THE VALUE OF THE PRICE OF THE PROPERTY THAT YOU TOOK AND THE VALUE OF THE PROPERTY THAT IS REMAINING?

YES, MA'AM. YOU WOULD HAVE, LET'S SAY WE HAVE A TEN-ACRE TRACT. YOU VALUE TEN ACRES. WE TAKE FIVE ACRES. YOU NOW HAVE A FIVE-ACRE TRACT. YOU OBVIOUSLY CAN'T DO AS MUCH ON A FIVE' ACRE TRACT AS A TEN ---ON A FIVE-ACRE TRACT AS A TEN TEN-ACRE TRACT. THAT IS ONE OF THE THING THAT IS THE APPRAISER WILL LOOK AT IN PUTTING A VALUE ON THAT REMAINDER.

SO IN THIS INSTANCE, SAY THE PRICE OF THE SQUARE FOOTAGE WAS $65 A SQUARE FOOT AND NOW, AFTER THIS SEVERANCE, IT IS $50 A SQUARE FOOT. THAT TAKES INTO CONSIDERATION THAT IT IS A SMALLER PARCEL AND THE FACT THAT YOU CAN'T DO AS MUCH WITH IT?

IT, ALL OF IT THAT SHOULD BE TAKEN INTO CONSIDERATION, RIGHT. AND IN THIS CASE, THIS SHOPPING CENTER IS NOT AS ATTRACTIVE AS IT WAS BEFORE. JUST BYRD THING THAT HAS ALWAYS BOTHERED ME IS LET'S SAY YOU HAVE A GRASSY AREA AND YOU HAVE TO MOVE A DRIVEWAY OVER THERE AND NOW THE OLD DRIVEWAY SITE BECOME AS GRASSY AREA. THEY NEVER SAY WE GET CREDIT BECAUSE WE HAVE RETURNED THIS LAND TO SOME FUTURE USE. IT IS ALWAYS PAY US FOR THE CURRENT LAND, AND WE WOULD SUBMIT THAT WILLIAMS AND BYRD WERE WRONG AND IF YOU JUST FOLLOW PATEL, YOU WILL BE ALL RIGHT. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.