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Orange County v. Costco Wholesale Corp.

THE NEXT CASE ON THE COURT'S CALENDAR IS ORANGE COUNTY VERSUS COSTCO. GOOD MORNING, MR. DILG.

MAY IT PLEASE THE COURT. WITH ME I HAVE JIM PAGE AND PAUL C. HIPOF IF F OF GRAY HARRIS AND ROBINSON. WE REPRESENT ORANGE COUNTY IN THIS MATTER. AT ISSUE IS THE ORANGE COUNTY ORDINANCE WHICH PROHIBITS A PACKAGE LIQUOR OPERATOR TO OPERATE WITHIN 5,000 FEET OF AN EXISTING PACKAGE LIQUOR OPERATOR OPERATOR. YOUR HONOR, UNDER THE 21st AMENDMENT, THE STATES ARE AWARDED EXTRAORDINARY POWERS TO REGULATE THE SALE OF ALCOHOLIC BEVERAGES. UNDER THE EXTENSION OF THE LAW, THAT POWER WAS EXTENDED TO LOCAL GOVERNMENTS. THIS COURT HAS REPEATEDLY RECOGNIZED THE POWER OF THE FLORIDA BEVERAGE LAW AND HAS REPEATEDLY REBUFFED EFFORTS TO CHALLENGE THAT AUTHORITY IN CASES VERY SIMILAR, AT LEAST IN TWO CASES THAT ARE VERY SIMILAR TO THE ONE AT ISSUE.

WOULD YOU GO RIGHT TO THOSE CASES AND OUTLINE, FOR US, THE ANALYSIS AND STANDARD THAT WAS ADOPTED IN THOSE CASES, AND YOU ARE TALKING ABOUT CASES THAT INVOLVEED DISTANT STANDARDS SET BY GOVERNING BODIES. IS THAT CORRECT?

YES, YOUR HONOR. I WOULD BE HAPPY TO, YOUR HONOR. IF I CAN GIVE JUST A SLIGHT BACKGROUND.

YOU GO AHEAD.

THE FIRST CASE IS THAT OF DIXIE INN. THAT IS A CASE IN 1946. YOU NEED TO UNDERSTAND THAT, IN 1935, THE FLORIDA BEVERAGE LAW WAS ENACTED. WITHIN THE BEVERAGE LAW ITSELF, AT THAT TIME, WAS A 2500 FOOT SEPARATION REQUIREMENT FROM CHURCHES AND SCHOOLS, BUT, ALSO, AT THAT TIME, MUNICIPALITIES WERE GIVEN THE POWER TO SET THEIR OWN STANDARDS. NOW, FOLLOWING THE ENACTMENT, THERE WERE A SERIES OF CASES. THE TWO FIRST PRESBYTERIAN CASES THE PATRICIAN HOTEL CASE AND CHINKO. THOSE CASES DID TWO THINGS. FIRST THEY TESTED THE VALIDITY OF THE FLORIDA BEVERAGE LAW AND SECONDLY THEY RECOGNIZED THAT, UNDER THE LAW, LOCAL GOVERNMENTS COULD ESTABLISH ZONES WHERE IN BEVERAGES COULD NOT BE SOLD, AND FINALLY THEY RECOGNIZED THAT THE LICENSE TO SELL ALCOHOLIC BEVERAGES IS A SPECIAL, REVOCABLE PRIVILEGE. IT IS NOT A RIGHT OR A VESTED INTEREST. IT IS CERTAINLY NOT A CONSTITUTIONALLY-PROTECTED RIGHT. NOW, THE FIRST APPLICATION OF THOSE PRINCIPLES COMES WITH THE DIXIE INN CASE IN 1946. AND I, FIRST, OWE THE COURT THE COURT AN APOLOGY. IN MY DISCUSSION OF THAT, I SOMEHOW, BY TYPE-OR OTHERWISE, PICKED UP THE 500-FOOT DISTANCE REQUIREMENT RATHER THAN THE 2500-FOOT REQUIREMENT, WHICH WAS THE CASE AND IN MIAMI THE SEPARATION REQUIREMENT BETWEEN ESTABLISHMENTS SELLING ALCOHOLIC BEVERAGES WITHIN WHAT WAS CALLED A DOWNTOWN BUSINESS ZONE. WITHIN AREAS THAT WERE DESIGNATED FOR MIXED RESIDENTIAL AND COMMERCIAL OR DOWNTOWN BUSINESS, THERE WAS A SECOND DISTANCE REQUIREMENT, WHICH WAS 2500 FEET. IF YOU LOOK AT THAT CASE, YOUR HONOR, YOU WILL SEE THAT THE FIRST THING THIS COURT DOES IS TO START OUT WITH THE ASSERTION THAT COURTS USUALLY WILL HOLD A ZONING ORDINANCE INVALID, WHEN IT CLEARLY APPEARS THAT THE RESTRICTIONS ARE ARBITRARY AND UNREASONABLE AND HAVE NO SUBSTANTIAL RELATION TO THE HEALTH, SAFETY, MORALS AND GENERAL WELFARE. NOW, THAT IS WHAT THE FIFTH DCA DID IN THE CASE AT ISSUE, BUT THIS COURT RECOGNIZED THAT USUALLY THAT IS THE CASE, AND THEN IT GOES DIRECTLY ON TO LOOK AT THE FLORIDA BEVERAGE LAW, AND IT RECOGNIZES THAT, UNDER THE

FLORIDA BEVERAGE LAW, IN ITS EARLIER DECISIONS, THE LOCAL GOVERNMENTS HAVE THE RIGHT TO DETERMINE WHERE IN ALCOHOLIC BEVERAGES MAY BE SOLD. THE BEVERAGE LAW, ITSELF, SPECIFICALLY STAYS THAT THEY HAVE THE RIGHT TO ENACT ORDINANCES WHICH REGULATE LOCATION OF PLACES OF BUSINESS OF SUCH ESTABLISHMENTS, AND SO THE COURT, THEN, WINDS UP CONCLUDING THAT THE STATE, IN THE EXERCISE OF ITS POLICE POWER MAY ENACT A VALID LAW FORBIDDING THE SALE OF INTOXICATEING LIQUORS IN A PARTICULAR LOCALITY, SUCH AS PROHIBITING SALES WITHIN SPECIFIED DISTANCES OF CHURCHES, SCHOOLS, AND OTHER BUILDINGS. SIMILAR POWER MAY BE CONFERRED UPON MUNICIPALITIES. IT HAS THE POWER TO REGULATE, HE HAVE TONE PROHIBIT THE SALE OF INTOXICATING LIQUORS IN DESIGNATED AREAS AND MAY CONFER ON MUNICIPALITIES, SIMILAR POWERS. NOW, RECING ON THIGHS THAT, IN THAT CASE, THE PLAINTIFF WAS CHALLENGING THE ORDINANCE AS BEING UNREASONABLE, ARBITRARY AND SKIM NOR. -- AND DISCRIMINATORY. THOSE ISSUES WERE NOT ONES THAT THE COURT FELT COULD OVERRIDE THE AUTHORITY OF THE FLORIDA BEVERAGE LAW, TO ALLOW LOCAL GOVERNMENTS TO DETERMINE WHERE ALCOHOLIC BEVERAGES MAY BE SOLD.

SO ARE YOU SAYING THAT, UNDER OUR PRIOR CASE LAW, THAT WE ARE TO JUDGE THIS ORDINANCE THAT CREATES A DISTANCE SEPARATION REQUIREMENT, DIFFERENT FROM AN ORDINANCE THAT WOULD REGULATE, SAY, THE DISTANCE BETWEEN ADULT BOOKSTORES OR BETWEEN DAYCARE CENTERS, WHICH WOULD BE JUDGED AS ZONING REGULATIONS, THAT SOMEHOW THIS IS A, BECAUSE IT IS LIQUOR, THAT IT GOES TO A, THE LEAST LEVEL OF SCRUTINY? IS THAT THE ORANGE COUNTY'S POSITION?

YES, YES, YOUR HONOR.

IS IT YOUR POSITION THAT, IF WE TOOK, WE SAID THAT THIS SHOULD BE JUDGED AS A DISTANCE REQUIREMENT ORDINANCE AND A ZONING REGULATION, THAT IT, COULD IT STILL SUSTAIN THE SUBSTANTIAL RELATIONSHIP STANDARD OF REVIEW, OR DOES THIS FAIL?

I THINK THERE WOULD STILL BE THE SUBSTANTIAL RELATIONSHIP, BUT A SUBSTANTIAL RELATIONSHIP SHOULD NOT HAVE BEEN APPLIED IN THIS CASE. THIS IS A CASE UNDER THE FLORIDA BEVERAGE LAW --

ONE OTHER QUESTION IS ON THAT.

YES.

IS THE SUBSTANTIAL RELATIONSHIP TEST, AS ENUNCIATED INSERT OF THESE ZONING CASES, A HIGHER STANDARD THAN THE ORDINARY REASONABLE RELATIONSHIP TEST THAT TELLS THE COURTS THAT, IF THERE IS ANY CONCEIVABLE REASON TO UPHOLD AN ORDINANCE, THAT ORDINANCE SHOULD BE UPHELD.

I THINK IT IS INTENDED TO BE, YOUR HONOR. WHEN YOU LOOK AT THE CASE LAW, YOU FIND A GOOD DEAL OF SLOPPINESS WITH REASONABLE AND SUBSTANTIAL BEING SOMETIMES INTERCHANGED, BUT I THINK LOGICALLY A SUBSTANTIAL RELATION TEST SHOULD BE A HIGHER STANDARD AND IT IS APPROPRIATE IN THE ZONING CONTEST -- CONTEXT, BECAUSE IN THE ZONING, YOU BEGIN WITH THE PREMIES THAT THE PROPERTY OWNER HAS A RIGHT TO MAKE ANY LAWFUL USE OF HIS PROPERTY. IF YOU WERE GOING TO INFRINGE UPON THAT, THEN IT SEEMS LOGICAL THAT ONE SHOULD MEET A HIGHER STANDARD. NO ONE HAS THE RIGHT TO USE HIS PROPERTY TO SELL ALCOHOLIC BEVERAGES. THAT IS THE DISTINCTION. SO THAT, UNDER THE, THE APPROPRIATE STANDARD TO APPLY HERE, IS ONE WHICH WOULD BE THE BEDROCK OF ANY LEGISLATION THAT SIMPLY CANNOT BE ARBITRARY --

SO ORANGE COUNTY COULD, RATHER THAN 5,000 FEET, COULD MAKE THIS FIVE MILES.

I THINK UNDER THE FLORIDA BEVERAGE LAW THAT IS CORRECT, YOUR HONOR. THERE MAY BE OTHER ISSUES, IT IF YOU WENT THAT FAR OUT.

WHAT WOULD THE OTHER ISSUES BE?

IF YOU HAD ONE, FOR EXAMPLE, SO THAT IT HAD TOTAL MONOPOLY POWER, THAT WOULD RAISE ISSUES, BUT WHEN YOU ARE GOING OUT ABOUT A MILE, THAT IS ABOUT THE DISTANCE AFTER PRIMARY MARKET. THAT IS WHAT MR. WILLIAMS SAID. IT IS THE DISTANCE THAT MOST PEOPLE HAVE TO TRAVEL TO GET TO A GROCERY STORE, SO IT IS NOT AN INORDINATE DISTANCE.

IS THIS CORRECT THAT THIS IS NOT A DISTANCE THAT CONFORMS WITH WHAT IS USED IN OTHER COUNTIES?

THAT'S CORRECT, YOUR HONOR. IT IS A GREATER DISTANCE --

SUBSTANTIALLY MORE THAN OTHER COUNTIES.

I BELIEVE NOW THERE ARE VERY FEW THAT ARE 2500 FEET. MOST ARE IN THE NEIGHBORHOOD OF 1500 FEET. THAT'S CORRECT, YOUR HONOR.

OKAY.

BUT, THEN, THAT POWER, THE DETERMINATION OF WHAT DISTANCE TO IMPOSE, IS PROPERLY LEFT UP TO THE LOCAL GOVERNMENT, AND I THINK ONE HAS TO RECOGNIZE THAT THERE ARE REAL DIFFERENCES BETWEEN AN URBAN AREA, AN INCORPORATED AREA, AND AN AREA LIKE ORANGE COUNTY, THAT DEALS WITH THE UNINCORPORATED AREAS, THAT THERE ARE DIFFERENT PROBLEMS THAT CAN ARISE, AS YOU GO FROM ONE TO ANOTHER. THE PRICE'S CORNER LIQUOR STORE CASE FROM DELAWARE, UPHELD, AND THAT CASE WAS AFFIRMED ON APPEAL AND I APOLOGIZE FOR NOT PICKING THAT UP IN THE BRIEF, BUT IN THAT CASE, THE DISTANCE IN UNINCORPORATED AREAS WAS A MILE, JUST AS-IS TRUE HERE. IN INCORPORATED AREAS, THE DISTANCE SEPARATION WAS 1200 FEET.

YOU TALK ABOUT PACKAGE STORES.

YES, MA'AM.

DOES THE DEFINITION OF PACKAGE STORE, WOULD THAT INCLUDE, SAY, A GROCERY STORE THAT SELLS WINE AND BEER? OR ARE WE TALKING ABOUT A STORE THAT IS EXCLUSIVELY, IT IS EXCLUSIVE -- ITS EXCLUSIVE PRODUCT IS ALCOHOLIC BEVERAGES?

YOUR HONOR, WHAT WE ARE TALKING ABOUT ARE STORES THAT CAN SELL THE, NOT BEER AND WINE. IT IS THE ONES THAT HAVE A HEAVIER ALCOHOLIC CONTENT. WHISKEY FOR OFF-PREMISES CON ASSUMPTION.

SO THESE ARE PLACES, COSTCO WOULD SELL IT JUST LIKE ALBERTSONS, SELLS IT IN A SEPARATE, THERE IS A SEPARATE ENTRANCE.

THAT'S CORRECT.

SO COSTCO GETS TO BUILD ITS FACILITY WHEREVER IT IS BUILDING IT, BUT BECAUSE IT IS 2100 FEET FROM ABC LIQUOR, THE PUBLIC HEALTH, WELFARE IS GOING TO SUFFER BY HAVING THIS SEPARATE PACKAGE STORE THERE?

CERTAINLY UNDER THE ORDINANCE COSTCO IS NOT ALLOWED TO HAVE A SEPARATE BUILDING OR A SEPARATE SECTION OF ITS BUILDING WHERE PACKAGE LIQUORS ARE SOLD. NOW, BEAR IN

MIND THE PURPOSE OF THIS, THE STANDARD THAT THIS COURT MUST APPLY IS WHETHER THERE IS ANY CONCEIVABLE BASIS FOR THIS ORDINANCE. THAT IS REALLY WHAT IS IMPLICIT IN THE DIXIE INN CASE AND IN BLACK MAN.

THAT IS REALLY THE SAME THING THAT WOULD BE WITH ANY OTHER POLICE POWER REGULATION, OTHER THAN ONE THAT IS A ZONING REGULATION. IS THAT CORRECT? I MEAN, AND UNLESS FUNDAMENTAL RIGHTS ARE INVOLVED, AND WE ARE DEALING WITH ANOTHER DEFINITELY OF SCRUTINY, BUT IN AN ORDINARY STATUTE OR LEGISLATURE, IT IS THE ANY CONCEIVABLE REASON IS THE STANDARD.

THAT WOULD BE TRUE UNDER EITHER AN EQUAL PROTECTION OR A SUBSTANTIVE DUE PROCESS ANALYSIS. YES.

AND 5,000, IT DOESN'T MATTER THAT ORANGE COUNTY, BACK IN 1964 JUST PICKED THAT NUMBER OUT OF THIN AIR, BECAUSE THERE IS NOTHING IN THIS RECORD THAT EXPLAINS WHERE THEY GOT 5,000 FEET. WE CAN JUST GUESS 5,000, A MILE IS OKAY, BECAUSE WE CAN DRIVE A MILE. IS THAT WHAT WE ARE SUPPOSED TO DO?

AGAIN THE RECORD DOES NOT SHOW WHAT MOTIVATED THE COUNTY COMMISSIONERS IN 1986 TO ESTABLISH A 5,000 FOOT DISTANCE REQUIREMENT, ANY MORE THAN WHAT MOTIVATED THE LEGISLATURE IN 1935 TO DETERMINE 2500 FEET. AGAIN THAT, IS SOMETHING THAT IS BEST LEFT TO THE LEGISLATURES TO DETERMINE, BUT AS THE COUNTY JUDGE RECOGNIZED, BECAUSE THE COUNTIES HAVE THE AUTHORITY TO REGULATE WHERE ALCOHOLIC BEVERAGES MAY BE SOLD, THEY CAN PROHIBIT IT THROUGHOUT THE COUNTY OR THEY CAN PROHIBIT IT, AS COCHINKO SAID, IN DISTANCE IN THE COUNTY. BUT, AGAIN, THAT IS THE PURPOSE, THAT IS THE REAL QUESTION, IS THERE ANY CONCEIVABLE REAL PURPOSE FOR THIS ORDINANCE, AND I WOULD SUBMIT THERE ARE TWO VERY REAL PURPOSES, AND ONE IS TO PROHIBIT THE CONGRESSGATION OF ESTABLISHMENTS IN PARTICULAR LOCATIONS.

BUT AS I AM UNDERSTANDING IT, IT IS JUST THAT THAT 5,000 FEET IS BASED ON WHATEVER HAS GONE AROUND THE WHOLE STATE, TO BE SO FAR IN EXCESS OF A NUMBER, AND I GUESS, IN ANSWER TO JUSTICE WELLS'S QUESTION, YOU COULD SAY, WELL, THERE COULD BE SOME NUMBER OUT THERE THAT, IF IT GOT TOO GREAT, WOULD BE ARBITRARY.

PERHAPS, YES. AND I THINK THE COURT NEEDS TO UNDERSTAND THAT, ESSENTIALLY ANY NUMBER IS A BIT ARBITRARY, AND THAT IS WHY IT IS BEST LEFT UP TO THE LEGISLATURE RATHER THAN TO THE COURTS. THE PROBLEM HERE IS THAT, IF YOU APPLY THE REASONING OF THE FIFTH DISTRICT COURT OF APPEAL, IT WOULD MEAN THE REVERSAL OF THE DIXIE INN CASE FROM THIS COURT AND OF GLACKMAN, BECAUSE THAT SAME REASONING IS WHETHER YOU ARE TALKING ABOUT A 1,000 FOOT DISTANCE REQUIREMENT OR A 2500 FOOT DISTANCE REQUIREMENT IN GLACKMAN. IT WOULD STILL GIVE THE FIRST PERSON WHO CAME THE RIGHT TO SELL ALCOHOLIC BEVERAGES AND ANYONE WHO WANTED TO DO SO THEREAFTER AT WHAT EVER DISTANCE WOULD BE PROHIBITED FROM DOING SO. THERE WAS NEVER ANALOGOUS TESTIMONY THAT, IF YOU MOVE BEYOND 2500 FEET AND GO TO 5,000 FEET THERE, IS LESS OF A PROBLEM. IF 2500 FEET IS ACCEPTABLE, THERE IS ABSOLUTELY NO REASON, PARTICULARLY UNDER THE FLORIDA BEV RANCH LAW UNDER THE 21 -- BEVERAGE LAW, UNDER THE 21st AMENDMENT, WHY THIS WOULDN'T APPLY TO ORANGE COUNTY, AND I WOULD SUBMIT THERE ARE TWO REASONS AS TO THE AGGRAVATION OF MORE THAN ONE OR TWO IN THE SAME LOCATION, BECAUSE ONCE YOU HAVE THAT, THERE IS A TENDENCY TO HAVE GREATER TRAFFIC, PARTICULARLY AT NIGHT. YOU CAN HAVE MORE NOISE ASSOCIATED WITH IT, FIGHTING IN THE LOTS AND A KIND OF ROW IISM. -- A KIND OF ROWDYISM. NOW, THERE IS A CASE CITED THAT THIS WAS SUPPORT O'CLOCK PARTICULAR BUSINESSES, BUT -- THAT THIS WAS SUPPORTING PARTICULAR BUSINESSES, BUT THE COURT WENT ON TO NOTE THAT, SOMEHOW IF IT DID CREATE MORE TRAFFIC, NOISE, ROWDYISM, THEN THAT MAY BE MORE NOBLE TO PROHIBIT A DRIVE-IN DAIRY. THAT IS ASAP APPLIES TO

DRIVE-IN DAREIES.

-- AS APPLIES TO DRIVE-IN DAIRIES. AND THAT THOSE WHO ARE PERMITTED WOULD LEAVE THE AREA, AND NOT CONGREGATE AROUND WHERE YOU HAVE ANYONE SELLING PACKAGE LIQUORS, BY FORCING THE VENDORS TO DISPERSE THEMSELVES AND DISTRIBUTE THEMSELVES THROUGHOUT THE COUNTY, THEN WHAT JUDGE HARRIS SAID IN HIS CONCURRING OPINION, WHERE HE INDICATED IF YOU DIDN'T HAVE ANY CONTROLS FROM ORANGE COUNTY, MAYBE PEOPLE WOULD HAVE ONE DOWN THE ROAD 500 FEET AND MAYBE THEY COULD WALK BACK AND FORTH, RATHER THAN DRIVING UNDER THE INFLUENCE, WHAT REALLY MIGHT HAPPEN IS YOU WOULD HAVE LARGE AREAS OF THE COUNTY WHICH MIGHT NOT HAVE ANY PACKAGE LIQUOR STORE IN CLOSE PROXIMITY AND THOSE PEOPLE WOULD HAVE TO DRIVE LARGE DISTANCES.

LET ME ASK ONE QUESTION.

YES, SIR.

IS THIS BEING DONE UNDER THE POLICE POWER OR SIMPLY UNDER THE PREMISE THAT ORANGE COUNTY CAN PREFUSE TO GIVE A LICENSE AT ALL SO IT KS, IF IT HAS ANY REASON -- SO IT CAN, IF IT HAS ANY REASONABLE BASIS AT ALL, IT CAN RESTRICT LICENSE. CERTAINLY IF WE HAVE ANY CASE LAW AT ALL, THEN WE MUST SAY THAT THE PUBLIC HEALTH AND SO FORTH MUST COME INTO PLAY.

IT IS REALLY UNDER BOTH, YOUR HONOR. THE FLORIDA BEVERAGE LAW, WHICH ALLOWS YOU TO DETERMINE ZONES, AND THEN IN THE GLACKMAN CASE,, WHICH AGAIN, INVOLVED AN ARBITRARY, UNREASONABLE, DISCRIMINATORY CHALLENGE AND A 14th AMENDMENT CHALLENGE, THIS COURT CAME BACK AND SAID THAT IT SEEMS THAT THE POWER TO DETERMINE WHERE BEVERAGES MAY BE SOLD IS WELL-FOUNDED IN THE RIGHT AFTER COUNTY TO PROTECT THE HEALTH AND WELL-BEING OF THE CITIZENS, SO YOUR ANSWER IS YES. IT IS BOTH, YOUR HONOR. MR. CHIEF JUSTICE

THANK YOU. YOU ARE IN YOUR REBUTTAL. RESPONDENT. MR. RICHARD.

MAY IT PLEASE THE COURT. MY NAME IS BARRY RICHARD, AND I AM COUNSEL FOR COSTCO, THE PELL LEE. -- THE PELL LEE. THERE WAS -- THE APPELLEE. THERE WAS ACTION CHANGE BETWEEN CHIEF JUSTICE WELLS AND OPPOSING COUNSEL THAT I THINK WAS HIGHLY SIGNIFICANT. CHIEF JUSTICE SAID TO HIM WOULD IT BE PERMISSIBLE TO HAVE A FIVE-MILE SEPARATION. AGAIN, WE COULD EXTEND THAT QUESTION TO 20 MILES OR THE ENTIRE CITY OR THE ENTIRE COUNTY AND THE RESPONSE FROM OPPOSING COUNSEL WAS, WELL, IF YOU HAD A TOTAL MONOPOLY POWER WITHIN THAT AREA, I BELIEVE IT COULD CREATE PROBLEMS. INDEED WHAT WE HAVE HERE IS PRECISELY THAT. WHAT ORANGE COUNTY HAS DONE IS IT HAS CREATED NOT ONLY A TOTAL MONOPOLY, WITHIN EACH OF THESE FIVE 3.5 SQUARE MILE ZONES, BUT MORE SIGNIFICANTLY, A PERPETUAL MONOPOLY, SO LONG AS EACH OF THESE ENTITIES CONTINUE TO MAINTAIN THEIR LICENSE, WITHIN EACH OF THESE ZONES, NO ONE ELSE --

LET ME POSE THE REVERSE QUESTION TO YOU, MR. RICHARD, AND THAT IS WOULD YOU AGREE THAT IF, THAT THE COUNTY CAN SET SOME DISTANCE?

YES, YOUR HONOR, I HAVE NO CHOICE BUT TO AGREE WITH THAT.

AND THE COUNTY CAN SET 1500 FEET. WOULD YOU AGREE WITH THAT?

YES, YOUR HONOR.

THAT IS APPARENTLY WHAT IS DONE IN, I THINK, DADE COUNTY. IS THAT CORRECT?

YES, YOUR HONOR FORMED I WOULD AGREE.

SO -- YES, YOUR HONOR, I WOULD AGREE.

SO WHY DOESN'T THIS COME DOWN TO WHO IS GOING TO MAKE THE DETERMINATION AS TO HOW MANY FEET, AND SO THE, AND UNLESS THE MATTER IS TOTALLY UNREASONABLE, LIKE COUNSEL WOULD AGREE FIVE MILES WOULD BE TOTALLY UNREASONABLE, THEN IT OUGHT TO BE SOMETHING THAT IS LEFT TO THE COUNTY TO MAKE THAT DETERMINATION.

I THINK THE COUNTY IS ENTITLED TO CONSIDERABLE DEFERENCE IN THAT REGARD, AND ALL COURTS HAVE ALWAYS RECOGNIZED THAT, AND I THINK THERE IS NO MAGIC NUMBER. WHEN IT COMES TO THIS COURT FOR REVIEW, THE COURT MUST CONSIDER, AS MUST ALL COURTS BELOW, ALL OF THE CIRCUMSTANCES PERSONALLY. I THINK THE REAL SIGNIFICANT ISSUE HERE IS NOT SO MUCH WHETHER WE ARE TALKING ABOUT A TEST THAT WE CALL SUBSTANTIAL RELATIONSHIP OR RATIONALE BASIS, BECAUSE TO BE CANDID WITH THIS COURT, I FIND IT DIFFICULT TO IDENTIFY ANY PRACTICAL DISTINCTION IN WHAT THE COURT DOES BETWEEN THOSE TWO TESTS, IF IN FACT THEY ARE DIFFERENT TESTS. WHAT I THINK IS THE MOST SIGNIFICANT ISSUE HERE, IN TERMS OF THE DEGREE OF BURDEN THAT THE GOVERNMENTAL ENTITY MAY HAVE, IS THE QUESTION THAT OPPOSING COUNSEL IDENTIFIED, WHICH IS ONE OF PERPETUAL MONOPOLY. THIS COURT HAS CONSISTENTLY STRUCK DOWN STATUTES THAT CREATE PERPETUAL MONOPOLIES, AND MOST PROMINENTLY IT IS DONE IN THE MUTUAL FIELD AND I CITED SUPPLEMENTAL AUTHORITY, IN WHICH I CITED THREE OF THOSE CASES, ONE OF WHICH THIS COURT WILL RECALL A FEW MONTHS AGO WAS THE OCALA BREEDERS CASE. I BELIEVE THAT THERE IS ALWAYS A HIGHLY SUSPECT CONSTITUTIONAL QUESTION, WHEN ANY GOVERNMENTAL BODY CREATES A PERPETUAL MONOPOLY.

BUT ISN'T THAT TRUE FOR ANY OF THESE DISTANCE SEPARATION ORDINANCES? THEY HAVE, THEY REGULATE AND HAVE DISTANCE REQUIREMENTS FOR DAYCARE AND ADULT ENTERTAINMENT. WHOEVER IS THEIR FIRST IS GOING TO BE HAVING THE PERPETUAL MONOPOLY?

YES, YOUR HONOR.

IF THAT IS GOING TO BE THE STANDARD, THEN IT SEEMS TO ME THAT IT IMPLICATES EVERY DISTANCE SEPARATION ORDINANCE THAT EXISTS IN EVERY MUNICIPALITY AND COUNTY WITHIN THE STATE.

WELL, I THINK THE KEY WORD, YOUR HONOR, IS IMPLICATES, AND I AGREE WITH YOU PERSONALLY. I THINK IT IS DIFFICULT TO CONCEIVE OF A RATIONALE BASIS, WHICH IS NOT ARBITRARY, FOR A PERPETUAL MONOPOLY FOR ANYTHING, BECAUSE IF YOU BEGIN TO ANALYZE IT AND SAY WHAT IS THE REASON TO SAY ONLY ONE ENTITY FOREVER SHALL BE ABLE TO OPERATE WITHIN THIS ZONE, IT BECOMES VERY DIFFICULT TO COME UP WITH A RATIONALE BASIS. BY THAT I DON'T MEAN THAT THEY ARE ALL INVALID, BUT I MEAN THAT THEY IMPLICATE A CONSTITUTIONAL QUESTION, AND HOW SERIOUS IT BECOMES DEPENDS UPON WHAT THE PURPOSE IS THAT THEY ARE SEEKING TO ACHIEVE AND HOW WIDE THE ZONE IS. THIS IS NOT UNUSUAL FOR THE COURTS. WE OFTEN HAVE CASES IN WHICH THE COURT HAS TO ADDRESS THE ISSUE, BASED UPON HOW DRACONIAN THE REQUIREMENT IS. WE HAVE THAT, WHEN WE HAVE NONCOMPETE CLAUSES.

HOW WOULD WE DO THIS -- I MEAN, 2500 FEET HAS BEEN APPROVED, AND THAT WOULDN'T HELP YOUR CLIENT. YOU ARE AT 2100 FEET. SO IF THIS ORDINANCE SAID 2500 FEET, YOU STILL ARE ARGUING, NOW WE ARE TALKING ABOUT A PERPETUAL MONOPOLY? SAME ARGUMENT?

WELL, YOUR HONOR, THOSE CASES THAT HAVE MENTIONED 2500 FEET, AND COUNSEL CITES TWO OF THEM, ARE NOT CASES THAT HAVE SAID THAT 2500 FEET IS AUTOMATICALLY VALID AND CONSTITUTIONAL. IF YOU READ THOSE CASES, THERE IS REALLY NO DISCUSSION AT ALL OF THE

FACTS AND THE CASES OR THE CIRCUMSTANCES THAT JUSTIFIED IT. THEY WERE BOTH VERY EARLY CASES. THEY PROCEEDED A 44 LIQUOR MART. MY PERSONAL OPINION IS THAT THE COURTS WERE PROBABLY WORKING ON THE ASSUMPTION THAT THIS IS LIQUOR AND THAT IS OKAY, BUT I BELIEVE THE FACT IS THAT WE CAME HERE WITH 2500 FEET AND IT WAS EQUAL PROTECTION OR SUBJECT TO DUE PROCESS BASIS, AND IT WAS A RECORD AS SKIMPY AS THIS ONE IS, THEN THE COUNTY WOULD HAVE OBLIGATION TO JUSTIFY THE 2500 FEET.

MR. RICHARD, WHAT MUST GOVERNMENTAL ENTITY COME IN AND PROVE, UNDER CIRCUMSTANCES SUCH AS THIS, BECAUSE WE HAVE THE TESTIMONY THAT GENERALLY OF THESE THINGS THAT WE HAVE ALL BANTERED AROUND THE ROOM THIS MORNING, AS TO THE PROBLEMS THAT ARE ASSOCIATED WITH THEM, ARE YOU SUGGESTING THAT, TO UPHOLD THIS ORDINANCE, THAT WE WOULD HAVE TO HAVE STUDIES THAT WOULD DEMONSTRATE THAT YOU HAVE "X" PROBLEM, IF IT IS WITHIN CERTAIN FOOTAGE, AS OPPOSED TO GENERAL CONCEPTS OF REGULATION OF ALCOHOL, REGULATION OF NIGHTTIME BUSINESSES IN RESIDENTIAL AREAS, SO WOULD THE FLORIDA LEGISLATURE FOR EXAMPLE, BE REQUIRED TO FACTUALLY SUPPORT, DOWN TO THE MINUTE DETAILS, AREAS IN AREAS SUCH AS ALCOHOLIC BEVERAGE REGULATION, IN ORDER TO WITHSTAND THE CHALLENGE THAT YOU MAKE TODAY?

NO, YOUR HONOR, I DO NOT BELIEVE SO. I THINK THAT THE COUNTY IS ENTITLED TO CONSIDERABLE DISCRETION CERTAINLY UNDER THE RATIONALE BASIS TEST, BUT AS THE UNITED STATES SUPREME COURT HAS SAID A NUMBER OF TIMES, THAT TEST IS NOT TOOTHLESS. THERE IS STILL A REQUIREMENT TO MAKE SOME SHOWING THAT THERE IS A RATIONAL RELATIONSHIP BETWEEN THE PURPORTED PURPOSE OF THE ENACTMENT AND WHAT IT IS THAT THE COUNTY HAS DONE.

THAT IS WHERE I AM TRYING TO GO. WHAT IS IT THAT THEY WERE RIRD REQUIRED TO SHOW THAT THEY DID NOT -- THAT THEY WERE REQUIRED TO SHOW THAT THEY DID NOT SHOW, UNDER THE CIRCUMSTANCES OF THIS CASE?

IN THIS CASE IN THE LOWER COURT THEY DID NOT SHOW THAT THERE WAS ANY FACTUAL BASIS FOR THIS, AND THAT IS THE PROBLEM WITH THIS CASE. WE HAVE A RECORD OF THE DEPARTMENT THAT SHOWS THAT THE ZONEING OF THE COUNTY RECOMMENDED REPEAL OF THIS ORDINANCE, BECAUSE THEY FOUND NO HEALTH, SAFETY OR MORAL WELFARE PURPOSE WHATSOEVER.

AND THE ELECTED OFFICIALS REJECTED THAT. THEY DID NOT ENACT FORM THEY DID NOT REPEAL IT.

THEY DID -- THEY DID NOT ENACT. THEY DID NOT REPEAL IT, CORRECT?

THEY DID NOT ENACT. WHAT YOU ARE SAYING, IS THAT WITH RESPECT TO LIQUOR, THE COUNTY CAN DO ANYTHING IT WANTS, TO AND THAT IS NOT THE LAW.

BUT IT SEEMS TO ME THAT THE COUNTY DID HAVE A WITNESS WHO APPEARED AND TESTIFIED AS TO THE GENERAL REASONS. AM I MISTAKEN BY THAT? THERE IS A GENTLEMAN BY THE NAME OF WALTERS THAT TESTIFIED IN THIS CASE AT TRIAL LEVEL.

THAT'S CORRECT, YOUR HONOR.

AS TO THE REASONS FOR UTILIZATION, AND YOU ARE SAYING THAT IS NOT SUFFICIENT. DO I UNDERSTAND YOU CORRECTLY?

IT DEPENDS ON WHAT HE IS SAYING AND WHETHER IT MADE SENSE LOGICALLY AND WAS SUPPORTED BY THE RECORD.

GENERALLY HE CAME UP WITH OPINIONS, JUST AS WITH THE OTHER PEOPLE. HE SAID IT IS

SOMETHING THAT TENDS TO LEND ITSELF TO VIOLENCE AND THE FIGHTING IN THE PARKING LOTS AND THAT THE SALE OF ALCOHOLIC BEVERAGES GENERALLY FALLS UNDER A CATEGORY OF THAT GENERAL NATURE. AM I CORRECT?

YES, YOUR HONOR.

AND YOU ARE SAYING THAT THIS IS INSUFFICIENT, AS A MATTER OF LAW, TO SUPPORT LEGISLATION. THAT IS WHAT I AM ASKING. WHAT MORE DID THEY NEED? DID THEY HAVE TO SHOW A STUDY AS TO THE NUMBER OF FEET, OR IS THIS SOMETHING THAT YOU TOTALLY DISREGARD?

THEY CAN DO IT ANY WAY THAT MAKES SENSE. WHAT I AM SAYING IS IT IS NOT SUFFICIENT FOR THE COURT FOR A GOVERNMENTAL ENTITY TO COME BEFORE THE COURT AND SAY HERE IS A REASON, AND THE COURT IS NOT OBLIGATED TO ACCEPT THAT REASON, REGARDLESS OF WHAT IT IS, AND IGNORE THE FACTUAL CIRCUMSTANCES THAT ARE IN THE RECORD ENTIRELY, BECAUSE THAT WOULD GIVE A REASON BECAUSE THAT WOULD MAKE THE EQUAL PROTECTION CLAUSE AND THE RATIONALE BASIS TEST, TO USE THE U.S. SUPREME COURT'S WORDS, USELESS, MEANINGLESS. MR. CHIEF JUSTICE

JUSTICE QUINCE HAD A QUESTION.

HE CAN GO ON. MR. CHIEF JUSTICE

OKAY.

IN BEING CANDID HERE, IN SAYING THAT THE RATIONALE RELATIONSHIP TEST OR WHATEVER WE ARE GOING TO CALL IT, THAT WE ARE REALLY GOING TO END UP WITH THE SAME BOTTOM LINE, THAN IS SUBSTANTIAL DISCRETION IN THE LEGISLATIVE BODY TO PICK THESE STANDARDS THAT ARE INVOLVED HERE AND DON'T COURTS REGULARLY, WITH REFERENCE TO LEGISLATIVE ACTS, REALLY, STRETCH THEIR MINDS COMPLETELY, AND NOT JUST WHAT MAY HAVE BEEN BEFORE THE LEGISLATURE IN HEARINGS OR STUDIES OR FACTUAL PRESENTATIONS BUT TO DISCOVER WHETHER THERE WOULD BE ANY RATIONAL RELATIONSHIP BETWEEN WHAT THE LEGISLATIVE BODY DECIDED TO DO AND A PERCEIVED PROBLEM WITH REFERENCE TO PUBLIC HEALTH, WELFARE AND SAFETY? SO IF WE HAD SOMETHING HERE, WHERE THE MADD ORGANIZATION, FOR INSTANCE, WENT BEFORE THE COUNTY COMMISSION AND SAID, YOU KNOW, IN THE ADJACENT COUNTY, THEY HAVE A 2500 FEET, BUT WE ARE TRYING TO CREATE SAFETY HERE ON OUR ROADS, AND AT HOME, AND THE ALCOHOL, WE THINK, YOU KNOW, CONTRIBUTES TO ALL THESE PROBLEMS LIKE THIS, AND WE WANT YOU TO DOUBLE THE THING TO 5,000. NOW, WHY WOULDN'T JUST ISSUE THAT WE ALL ARE AWARE OF, IN TERMS OF THE REGULATION OF ALCOHOL, BE ENOUGH, AS A LEGISLATIVE FACT, FOR THIS LEGISLATIVE BODY TO DECIDE TO MAKE IT DOUBLE THE 2500 AND MAKE IT 5,000? IN OTHER WORDS THAT CLEARLY, YOU KNOW, BY DOING THAT, YOU ARE GOING TO HAVE FEWER PACKAGE STORES, AND THEY ARE KBHING -- THEY ARE GOING TO BE SPACED MORE AND THAT MAY NOT BE EFFECTIVE AT ALL, YOU KNOW, BUT THEY GET TO CHOOSE, YOU KNOW, THE WAY THEY ARE GOING TO COMBAT THIS PERCEIVED PROBLEM, DO THEY NOT? SO DON'T WE DO THAT ALL THE TIME REACH OUT AND LOOK FOR A RATIONAL REASON?

FIRST OF ALL, YOU ARE CORRECT. YOU DO LOOK FOR A RATIONAL REASON, BUT YOU DON'T HAVE TO IGNORE THE CIRCUMSTANCES. YOU DON'T HAVE TO IGNORE THE RECORD. IN THE FIRST PLACE, IT DOESN'T MEAN, UNDER ANY EQUAL PROTECTION CASE, THAT THE PROPONENTS THAT THE GOVERNMENTAL AGENCY HAS THE RIGHT, CARTE BLANCHE, TO DO WHATEVER IT PLEASES AND COME UP WITH REASONS THAT HAVE NO SUPPORT IN REALITY. THAT IS ESSENTIALLY THE DEFINITION OF ARBITRARINESS, BUT MORE THAN THAT, THIS COURT HAS BEEN LESS WILLING TO GRANT A WIDE DEGREE OF DISCRETION INSERT TYPES OF CASES, AND THIS IS PRECISELY ONE OF THEM, WHICH IS THE CASE IN WHICH THE LEGISLATION WE ARE DEALING WITH CREATES A PERPETUAL, NONCOMPETITIVE MONOPOLY, AND THE OCALA BREADERS CASE IS AN EXCELLENT

EXMPLE. THIS CASE WENT INTO CONSIDERABLE DETAIL IN OCALA BREEDERS, JUST FOUR MONTHS AGO, TO ASK WHETHER OR NOT ANY PURPOSE THAT THE STATE WAS SUGGESTING FOR THE MONOPOLY THAT THEY WERE CREATING BASICALLY FOR ONE PARI-MUTUEL AGENCY IN A GIVEN AREA OF THE STATE, IN MARION COUNTY, WHETHER OR NOT THERE WERE ANY REASONABLE FACTUAL BASIS THAT WOULD SUPPORT THE CONDITIONS, GIVEN THE ENTITY.

BUT DOESN'T THAT SUGGEST AN INCIDENTAL EFFECT TO ANY REGULATION LIKE THIS? THAT IS THERE IS GOING TO BE AN INCIDENTAL EFFECT, WHETHER IT IS 5,000 FEET OR 2500 FEET OR 12,000 FEET, AND NOW YOU SEEM TO BE SAYING, WELL, IT IS NOT JUST AN INCIDENTAL EFFECT TO 5,000 FEET.

WELL, I BELIEVE THAT THE COUNTY, IN THIS INSTANCE, HAD THE OBLIGATION TO PRESENT AT LEAST SOME BASIS FOR THE REASON THAT IT WAS REQUIRING MORE THAN TWICE, ALMOST THREE TIMES THE SEPARATION THAT HAS EVER BEEN REQUIRED IN ANY OTHER COUNTY. WELL, TWICE THAT HAS EVER BEEN REQUIRED IN ANY OTHER COUNTY IN THE STATE OF FLORIDA'S HISTORY, AND MORE THAN TWICE THE LARGEST ONE THAT NOW EXISTS, WHICH IS 1500 FEET. THEY HAD AN OBLIGATION TO DO SOMETHING MORE, TO SUGGEST WHY THEY WERE DOING SOMETHING THAT THEIR OWN COUNTY ZONING DEPARTMENT SAID SERVES NO PURPOSE BUT TO BE ANTI-COMPETITIVE, TO PROTECT THE ENTITIES THAT ARE CURRENTLY THERE. I BELIEVE THAT THE LOWER COURT, PARTICULARLY THE CONCURRING THE OPINION BY JUDGE HARRIS, DID A VERY EFFECTIVE JOB BY TAKING EACH OF THE SUGGESTED REASONS AND SHOWING WHY IT WAS INTERNALLY ILLOGICAL THAT, IT DIDN'T MAKE ANY SENSE, JUST FROM A LOGICAL STANDPOINT, AND SECONDLY IT WAS INCONSISTENT, THAT THE EVIDENCE THAT WAS PRESENTED IN THE HEARING BEFORE THE ZONING COMMISSION AND BEFORE THE LOWER COURT. I WON'T GO INTO ALL OF THOSE DETAILS, BECAUSE I THINK THAT IN THE OPINION OF THE LOWER COURT, A VERY EFFECTIVE JOB IS DONE OF SHOWING THAT, BUT I COME BACK ONCE AGAIN TO THE FACT THAT WAS RAISED BY CHIEF JUSTICE WELLS, WHICH IS WHERE DO YOU DRAW THE LINE. THERE HAS TO BE SOME PROOF OF SOMETHING. COULD ORANGE COUNTY COME INTO THIS COURT, FOR INSTANCE, AND SAY WE HAVE A 25-MILE RADIUS OR WE ARE GOING TO ONLY ALLOW THE PACKAGE STORES THAT CURRENTLY EXIST IN THE ENTIRE COUNTY TO CONTINUE TO SELL LIQUOR FOREVER.

BUT IT HASN'T DONE THAT. SO IS 3,000 VIOLATIVE?

WELL, I DON'T BELIEVE THAT THERE IS A NUMBER. I BELIEVE THAT THE COUNTY, FRANKLY, CAME IN HERE OR WENT INTO THE LOWER COURT AND SHOWED SOME REASON THAT THERE WAS A NECESSITY FOR 3,000 FEET INSTEAD OF 1500 FEET, THEN THIS COURT WOULD GRANT IT THE DEFERENCE OF CONCEDING THAT IT HAD THE RIGHT TO DO THAT. I DON'T THINK THEY ARE REQUIRED TO ESTABLISH, BY PRECISION, THE NUMBER OF FEET THAT ARE NECESSARY TO SUPPORT A PURPOSE, BUT THEY ARE REQUIRED TO ESTABLISH THE EXISTENCE OF A PURPOSE THAT IS GROUNDED IN REALITY. THEY CAN'T JUST HAVE THE RULE FOR EQUAL PROTECTION ISN'T JUST GIVE US ANY EXCUSE THAT YOU CAN THINK OF, AND WE MUST ACCEPT IT. THAT IS NOT THE RULE. IF IT WERE THE RULE, WE WOULD HAVE TOOTHLESS EQUAL PROTECTION REQUIREMENT, AND WE DON'T. IT IS STILL THERE. IT STILL EXISTS, AND THERE IS STILL A REQUIREMENT TO JUSTIFY WHAT YOU ARE DOING THAT GIVES EVERY APPEARANCE OF BEING ARBITRARY.

YOU HAVE, NOW, YOU HAVE SORT OF, WE HAVE GOT SEVERAL WAYS THIS CASE HAS BEEN CHARACTERIZED. WE HAVE HAD ONE EXTREME CHARACTERIZED AS IT IS ABOUT SELLING LIQUOR AND THERE IS A PRIVILEGE NOT A RIGHT, AND THE COUNTY CAN DO WHATEVER IT WANTS. THEN WE HAVE GOT ONE OF THE AMICUS SAYING THIS IS REALLY A PROPERTY RIGHTS CASE, AND WE HAVE GOT TO BE CHANGING THE WAY THE BURDENS ARE PLACED IN A PROPERTY RIGHTS CASE, AND NOW, TODAY, WE HAVE GOT, THIS IS A PERPETUAL MONOPOLY CASE. IF WE ACCEPT YOUR VERSION, WHERE IN THE RECORDS DOES IT SHOW THAT COSTCO, WHO HAD ITS LICENSE WHEREVER IT WAS, THAT THERE ARE OTHER, ALL THE OTHER PACKAGE STORES ARE REALLY THE

ONES THAT HAVE THE MONOPOLY IN THIS AREA? IS THERE ANY RECORD EVIDENCE TO SHOW WHO ARE THE HOLDERS OF THESE LICENSES, WHERE THEY ARE LOCATED, YOU KNOW, WHY IT HAS CREATED A MONOPOLY, HOW COSTCO IS GOING TO BE HARMED FROM A BUSINESS POINT OF VIEW, TO, YOU KNOW, TO THE BENEFIT OF ABC LIQUOR? NOW WE ARE, DOESN'T THAT REQUIRE US TO, REALLY, COME UP WITH OUR OWN CONSTRUCTION OF THIS CASE, BASED ON YOUR NEW ARGUMENT?

WELL, YOUR HONOR, I MIGHT NOTE, BY THE WAY, IT IS NOT A NEW ARGUMENT. THE LOWER COURT MADE NOTE OF THE FACT.

YOU SAY THE LOWER COURT. YOU MEAN THE FIFTH DISTRICT.

THE DISTRICT COURT OF APPEAL MADE NOTE OF THE FACT THAT THIS WAS A MONOPOLY ISSUE, AND WHILE THEY USED THE TERM IN THAT OPINION AND I MAY FOCUS ON IT MORE IN THIS ORAL ARGUMENT MORE THAN IT WAS FOCUSED BY THE PARTIES IN THE BRIEF, IT IS CERTAINLY NOT A NEW ISSUE. I FOCUS ON IT, BECAUSE HAVING ATTEMPTED TO ANALYZE THE DEBATE OVER WHICH OF THE TESTS WAS APPROPRIATE, IT BECAME CLEAR, TO ME, THAT THAT WAS THE MORE SIGNIFICANT ISSUE HERE THAT RAISED THE BAR FOR THE COUNTY, BECAUSE THIS COURT HAS ALWAYS REQUIRED A HIGHER BAR, WHEN WE DEALT WITH THAT KIND OF AN ANTI-COMPETITIVE PROVISION.

DO YOU SEE THIS, ALSO, AS A PROPERTY RIGHTS ISSUE?

IT IS A PROPERTY RIGHTS ISSUE. I BELIEVE THAT MOST SUBSTANTIVE DUE PROCESS CASES, IF YOU ANALYZE THEM, TURN OUT TO BE PROPERTY RIGHTS CASES T IF YOU ARE ASKING ME THE QUESTION DO I BELIEVE THAT IT REQUIRES A HIGHER DEGREE OF SCRUTINY BECAUSE IT IS PROPERTY RIGHTS, SURELY THE LANGUAGE OF THE CASES THAT WE HAVE CITED SEEM TO SUGGEST THAT.

BUT YOU SAY THE SIGNIFICANT PART IS IN THE BURDEN, BECAUSE, AS JUSTICE ANSTEAD POINTS OUT, WHEN YOU ARE TALKING ABOUT REASONABLE RELATIONSHIP, THE COURTS HAVE BASICALLY SAID, IF THERE IS ANY CONCEIVABLE REASON, WE ARE GOING TO UPHOLD IT, WHEREAS WITH A ZONING REGULATION THERE SEEMS TO BE MORE OF A REQUIREMENT OF THE MUNICIPALITY OR GOVERNMENTAL AGENCY, JUSTIFYING ITS DECISION.

WELL, I DON'T THINK IT MAKES A DIFFERENCE, BECAUSE I DON'T THINK THAT THIS CASE, THAT THE COUNTY HAS CARRIED THE BURDEN, WHICH IT DOES HAVE IN THIS CASE, OF MEETING EVEN THE LEAST RESTRICTIVE TEST, WHICH IS THE RATIONAL BASIS TEST. THE RATIONALE BASIS TEST IS NOT, ALTHOUGH IT IS SOMETIMES CHARACTERIZED THAT WAY, IS THERE ANY CONCEIVABLE BASIS. THAT IS NOT REALLY WHAT THE TEST HOLDS. IF YOU LOOK AT THE CASE LAW WHAT THE TEST SAYS IS THAT THE GOVERNMENTAL AGENCY, IF THERE IS ANY CONCEIVABLE PURPOSE, THAT THE GOVERNMENTAL AGENCY HAS, THEN WE MUST PRESUME THAT THAT IS THEIR PURPOSE. WE ARE NOT ALLOWED TO LOOK INTO THE LEGISLATIVE HISTORY TO SAY WHAT REALLY MOTIVATED THEM. THAT IS WHAT WE ARE TALKING ABOUT, IS THAT THEY DON'T HAVE TO STATE WHAT THEIR MOTIVES ARE, AND IF THEY PROPOSE ANY CONCEIVABLE PURPOSE THAT WE MUST SAY, OKAY THAT, IS THEIR PURPOSE --

BUT OPPOSING COUNSEL HAS SAID THAT, HAS GIVEN TWO PURPOSES, HASN'T IT?

YES.

ARE YOU SAYING THAT THOSE ARE NOT LEGITIMATE PURPOSES OR THOSE TWO PURPOSES ARE NOT SUFFICIENT?

WHAT I AM SAYING, YOUR HONOR, IS THAT, ONCE THEY TELL US WHAT THEIR PURPOSE, WHICH

WE MUST ACCEPT, YOU CAN'T QUSTION THE VALIDITY OF THE PURPOSE. THAT IS WHAT WE SAY, ANY CONCEIVABLE PURPOSE, THEY, THEN, HAVE AN OBLIGATION TO ESTABLISH FOR THE COURT THAT WHAT THEY HAVE DONE TO SERVE THAT PURPOSE MAKES SENSE, GIVEN THE FACTS BEFORE THE COURT. THEY CAN'T COME UP WITH A PURPOSE WHICH IS COMPLETELY IRRATIONAL, AS IT RELATES TO WHAT THEY HAVE DONE, SO WHAT THEY HAVE SAID IS HERE IS, JUST AS AN EXAMPLE, THEY HAVE SAID HERE IS OUR PURPOSE. ONE OF OUR PURPOSES IS WE DON'T WANT PEOPLE TO CONGREGATE WITHIN THE PARKING LOTS OF A PACKAGE STORE, AND THEREFORE WE WANT TO SEPARATE THE PACKAGE STORES. AND WHAT JUDGE HARRIS SAID, IN THE FIFTH DISTRICT CASE, WAS THERE IS NOTHING IN THE RECORD TO SUGGEST THAT THERE IS GOING TO BE ANY DIFFERENCE BETWEEN 5,000 FEET OR ANY LESSER NUMBER OF FEET, IN TERMS OF PARKING LOTS, AND LOGIC SUGGESTS JUST OPPOSITE.

BUT IS THAT A JUDICIAL DETERMINATION OR A LEGISLATIVE DETERMINATION, AND THE LEGISLATURE, IN A BETTER POSITION TO FACT FINDING THAN THE COURT, TO MAKE THIS DETERMINATION?

WELL, FIRST I HAVE SUGGESTED TO YOUR HONOR THAT THERE WAS NO FACT FINDING. THE ONLY FACTS IN THE RECORD ARE CONTRARY TO THE POSTURE THAT THE COUNTY HAS TAKEN. THE COUNTY TOOK NO ACTION AND MADE NO FACT FINDING. THE SECOND THING I WOULD SUGGEST TO THE COURT IS THAT, IF WE ACCEPT WHAT THE COUNTY IS SAYING HERE, WE ACCEPT THIS AS BEING SUFFICIENT, THEN WE ARE BASICALLY SAYING THAT A COUNTY CAN ESTABLISH ANY ZONE OF NONCOMPETITIVENESS, ANY PERPETUAL MONOPOLY, AS LONG AS THEY WISH, AND ALL THEY HAVE TO DO IS SAY THIS WAS OUR REASON, AND THEY DON'T HAVE TO PROVIDE THIS COURT WITH A RECORD BELOW, WITH ANY SUBSTANTIATION OF THE FACT THAT THIS REASON MAKES SENSE, GIVEN THE KNOWN FACTS. MR. CHIEF JUSTICE

THANK YOU, MR. RICHARD. YOUR TIME IS UP.

THANK YOU.

MAY IT PLEASE THE COURT. I BELIEVE JUSTICE PARIENTE PUT HER FINGER ON THE MONOPOLY QUESTION. THIS WOULD BE TRUE FOR ANY DISTANCE SEPARATION REQUIREMENT. MOREOVER, IF WE DEAL WITH THE REALITY, AS OPPOSING COUNSEL WISHES TO DO, THEN THERE ARE TWENTY LICENSES FOR PACKAGE LIQUOR STORE VENDORS IN ORANGE COUNTY. MOREOVER THE COUNTY IS INFLUX CONSTANTLY. AS AREAS EXPAND, BECOME MORE URBAN, THEY ARE ONE AND EX-ED -- THEY ARE OFTEN ANNEXED. IF THEY COME INTO ORLANDO, THEN THERE WOULD BE DIFFERENT REQUIREMENTS WOULD BE THE CASE, SO IF IT IS CALL AN OLD VENDOR WHO CAME INTO POWER AND GOT THE FIRST LICENSE, IS THEN FACED WITH COMPETITION, THE SAME THING IS TRUE, FOR EXAMPLE, IF WE ARE PROTECTING, AS THE COUNTY WISHES THE SMALL, UNINCORPORATED TOWNS AS THEY GROW LARGER AND BECOME MORE URBAN AND INCORPORATE THEMSELVES, THEY CAN IMPOSE DISTANCE SEPARATION REQUIREMENTS OR NONE AT ALL. SO THE AREA IS INFLUX. THE OPPOSING COUNSEL IS -- IS IN FLUX. OPPOSING COUNSEL IS ATTEMPTING TO MAKE THIS A DISTANCE SEPARATION CASE AND IT ISN'T.

IS THE DISTANCE FOR PACKAGE STORES SIMILAR TO WHAT IT IS FOR ADULT ENTERTAINMENT? IS IT MORE THAN 5,000 FOR ADULT ENTERTAINMENT AND BARS?

I CANNOT ANSWER THAT QUESTION YOUR HONOR. I AM SORRY. I DON'T KNOW THE ANSWER TO THAT.

BUT THEY IMPOSE THE PACKAGE -- IS THERE ANYTHING IN THE RECORD AS TO WHY BARS ARE NOT UNDER THE SAME DISTANCE SEPARATION?

I THINK AND REASON IS WHEN PACKAGE LIQUOR PEOPLE GO INTO THE STORE, THEY BUY THE PACKAGE LIQUOR, THERE IS SOME TENDENCY, THEN, TO CONSUME THE PACKAGE LIQUOR IN THE

PARKING LOT BEFORE THEY GO HOME. THERE IS NOT A BAR WHERE THEY CAN GO IN AND SIT DOWN AND CONSUME IT, AND ONE OF THE PURPOSES IS, WHEN YOU ARE DEALING WITH AN AREA LIKE BITHLO OR GOTHAM OR ONE OF THE SMALLER COMMUNITIES, IS THEY ARE TRYING TO PREVENT RESIDENCES CLOSEST TO THE COMMERCIAL AREAS, NOT TO HAVE TO PUT UP WITH TWO OR THREE OF THESE ESTABLISHMENTS IN PROXIMITY. THERE IS NO CLASSIFICATION INVOLVED IN THIS CASE. THE FIRST PERSON THAT COMES IN HAS AN ABSOLUTE RIGHT, IF HE MEETS ALL QUALIFICATIONS, TO GET A LICENSE. ANYONE WHO COMES IN AFTER THAT TIME HAS NO RIGHT WITHIN 2500 FEET. THERE IS NO FUNDAMENTAL RIGHT THIS. IS A PRIVILEGE NOT A RICHLT NO SUBSTANTIVE DUE PROCESS ANALYSIS. EVEN -- NOT A RIGHT. NO SUBSTANTIVE DUE PROCESS ANALYSIS. YOU CAN COME IN AND LOOK AT THE RECORD AND SEE WHETHER THERE IS A CONCEIVABLE BASIS. THE LEGISLATURE DOESN'T HAVE TO CONCEIVE OF WHAT IT WAS OR DEFEND IT. EVEN IF THE COURT CAN RECOGNIZE A CONCEIVABLE LEGITIMATE BASIS FOR THE ORDINANCE, THEN, UNDER THE SEPARATION OF POWERS DOCTRINE, IT NEEDS TO LEAVE THE DETERMINATION UP TO THE LEGISLATURE.

IF WE WERE DEALING WITH THE COUNTY GIVING OUT TAXICAB PERMITS, WOULD THIS BE A DIFFERENT CASE THAN DEALING WITH LIQUOR LICENSES?

IT MIGHT BE, YOUR HONOR, BECAUSE THERE IS AN ADDITIONAL POWER. SOMETHING MORE THAT GOES IN THE AREA OF THE REGULATION OF PLACES SELLING ALCOHOLIC BEVERAGES. IF IT IS A TAXI CASE, AND IF THEY CAN SHOW THERE IS SOME KIND OF A CLASSIFICATION INVOLVING PEOPLE NOT DISTANCES, THEN YOU MAY HAVE AN EQUAL PROTECTION QUESTION. THEN YOU WOULD HAVE TO SHOW THE RATIONALE BASIS. MR. CHIEF JUSTICE

THANK YOU, MR. DILG. YOUR TIME IS UP. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE. THE COURT WILL TAKE ITS MORNING RECESS. THE COURT WILL BE IN RECESS FOR 15 MINUTES.