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Brian P. Patchen v. Florida Dept. of Agriculture

CHIEF JUSTICE: GOOD MORNING, EVERYONE. IS JUSTTIS CANTERO -- JUSTICE CANTERO IS RECUSED FROM THE FIRST CASE, AND HE WILL REJOIN THE PANEL IMMEDIATELY AFTER THE FIRST ARGUMENT IN THE FIRST CASE. BRIAN PATCHEN VERSUS FLORIDA DEPARTMENT OF AGRICULTURE. I SEE YOU ALL ARE READY. YOU MAY BEGIN.

CHIEF JUSTICE: --

GOOD MORNING. WE EVER JOINED BY PLE PATCHEN AS WELL AS CO-COUNSEL. I AM JOSEPH SEROTA. THE 1990 DECISION DOES NOT INCLUDE AS A MATTER OF LAW THE PATCHENS AND OTHER PROPERTY OWNERS THROUGHOUT THE STATE OF FLORIDA FOR PURSUING RECOVERY AND FULL AND JUST COMPENSATION FOR TAKING OF THEIR CITRUS TREES, MERELY BECAUSE THOSE TREES WERE DESTROYED WITHIN THE LOCATION OF 1900 FEET DETERMINED BY THE DEPARTMENT OF AGRICULTURE TO BE INFECTED WITH CITRUS CANKER.

IS PART OF YOUR ARGUMENT THE FACT THAT THESE ARE RESIDENTIAL TREES, AND IF SO, WHAT MAKES THE DIFFERENCE BETWEEN A RESIDENTIAL TREE AND THE COMMERCIAL TREES?

YOUR HONOR, A SUBSTANTIAL PART OF OUR ARGUMENT, PERHAPS THE MOST COMPELLING PART OF OUR ARGUMENT IS THE FACT THAT THESE ARE RESIDENTIAL TREES VERSUS COMMERCIAL TREES, AND THE DIFFERENCE BETWEEN THE TWO IS NOT ONLY IN THEIR USE BUT IN THE MEASURE OF THEIR VALUE. AS IN POLK, IT WAS CLEAR, AS IN MIDFLEA, THE 19 -- IN MID-FLORIDA, WE WERE TALKING ABOUT COMMERCIAL TREES IN THE 1998 DECISION. PARTICULARLY TO OTHER CITRUS NURSERIES OR FOR THE PURPOSE OF RAISING FRUIT TO BE SOLD ON THE MARKET. HERE WE ARE TALKING ABOUT TREES RAISED IN THE BACKYARDS OF PEOPLE LIKE MR. AND MRS. PATCHEN.

BUT THE ISSUE OF WHETHER THERE IS VALUE, IF THEY ARE EXPOSED AND POTENTIALLY INFECTED, ISN'T THAT THE INQUIRY IS HE THE SAME? MAYBE THE MEASURE HE HAVE DAMAGES -- THE INQUIRY IS THE SAME? MAYBE THE MEASURE OF DAMAGES WOULD BE DIFFERENT, BUT WOULDN'T THE INQUIRY AS TO WHETHER THEY, IN FACT, HAVE ANY VALUE, BE SOMETHING THAT WOULD BE SIMILAR TO THE POLK CASE?

JUSTICE PARIENTE, WE DON'T BELIEVE SO. THE QUESTION HE HAVE WHETHER THE RESIDENTIAL TREES HAVE VALUE IS A QUESTION OF FACT. THE REASON BEING THAT THESE TREES, THE, IN POLK, THE DECISION ABOUT NO VALUE, NO MARKETABLE VALUE, WAS BASED ON A FACT FINDER'S DECISION AFTER HEARING EVIDENCE.

THIS WAS A SUMMARY JUDGMENT, AND WHAT EVIDENCE DID YOU PUT IN THE RECORD TO SHOW THAT THERE WAS VALUE?

THE EVIDENCE, THE ONLY EVIDENCE IN THE RECORD OF VALUE, WAS THE UNCONTROVERTED AFFIDAVIT OF VALUE OF MRS. PATCHEN, THAT THESE WERE SIX LARGE, HEALTHY, UNINFECTED CITRUS TREES THAT WERE FRUIT-BEARING INNATE AND HAD BEEN ON THEIR PROPERTY FOR MANY -- IN NATURE AND HAD BEEN ON THEIR PROPERTY FOR MANY, MANY YEARS. THE DEPARTMENT OF AGRICULTURE DID NOT DISPUTE THAT. THERE IS NO QUESTION ABOUT THAT. THEY ACKNOWLEDGED IT.

BUT WE ARE AT THE LIABILITY PORTION OF THIS, CORRECT?

YES.

AND SO REALLY THE QUERY AT THAT POINT IS WHETHER THERE WAS, IN FACT, A TAKING.

THAT'S CORRECT. AND IT MIGHT BE EASY TO CONFUSE WHETHER THEY HAD VALUE WITH THE QUESTION OF HOW MUCH THE VALUE WAS, AT THE LIABILITY STAGE. THE QUESTION OF WHETHER THEY HAD VALUE WAS UNNECESSARY AREA TO BE PROVEN AT THE LIABILITY PHASE, AND THAT WAS THE ISSUE IN POLK AND THE ISSUE THAT HAS GIVEN RISE TO SO MUCH CONTROVERSY.

WHAT IS YOUR UNDERSTANDING AS TO WHY THE TREES HAD NO VALUE IN POLK? WHAT IS YOUR UNDERSTANDING OF THE RATIONALE FOR THAT?

MY UNDERSTANDING IS THAT THE TRIAL JUDGE DETERMINED THAT THESE TREES, LOCATED WITHIN 125 FEET, WOULD HAVE A STIGMA ATTACHED TO THEM THAT THEY WOULD NOT BE SALE ABLE TO OTHER COMMERCIALERS INRIES THAT WOULD BUY TREES.

IS THE STIGMA ATTACHED TO THE TREES, RIGHT? TO A TREE, TO TREES. NOT WHETHER THEY ARE RESIDENTIAL OR NURSERY TREES. THE STIGMA TO THE TREES, CORRECT?

YOU ARE CORRECT, JUSTICE WELLS. THE STIGMA IS ATTACHED TO THE TREES, BECAUSE THEY ARE EXPRESSLY BEING RAISED FOR RESALE, AND NO ONE WHO IS IN THE COMMERCIAL BUSINESS OF SELLING PRODUCTS WOULD WANT TO BUY A PRODUCT THAT BEARS A LIKELIHOOD OF HAVING A BACTERIAL DISEASE DEVELOP.

HOW DO YOU ARRIVE, THOUGH, AT A VALUE, UNDER OUR LAW? A MARKET VALUE, UNLESS YOU TAKE INTO CONSIDERATION THAT THESE, WHATEVER IT IS, TREES OR ANIMALS OR WHATEVER, ARE WHAT THEY WOULD SELL FOR? I MEAN THAT IS WHAT WE ARE TALKING ABOUT, AS FAR AS VALUE IS CONCERNED, RIGHT? WHETHER THEY ARE RESIDENTIAL OR NURSERY TREES.

THERE IS DIFFERENT WAYS OF MEASURING VALUE, YOUR HONOR. TRADITIONALLY IN AN INVERSE CONDEMNATION CASE, ONE WOULD MEASURE VALUE, BASED ON THE DIM UNIONITION IN THE VALUE OF REAL ESTATE, BUT WHERE THE DIMINUTION IS INCONSEQUENTIAL, AS IN THE CASE OF INVOLVING OF TAKING OF THESE TREES, ONE CAN MEASURE VALUE, AS THE FISKE CASE SAYS, BASED ON THE REPLACEMENT COST OF THE PRODUCT OR THE ITEM, THE PROPERTY THAT HAS BEEN TAKEN. YOU WOULD MEASURE VALUE OF THE CITRUS TREES THAT WERE DESTROYED AT THE PATCHEN'S HOME, BY -- AT THE PATCHENS'S HOME, BY GOING OUT TO A LANDSCAPE ARCHITECT AND HAVE THAT PERSON PROVIDE YOU WITH A DAMAGE ESTIMATE OF HOW MUCH IT WOULD COST TO GO OUT AND GET A SIMILAR VARIETY, SIMILARLY-SIZED TREE, AND THAT IS DONE ALL THE TIME.

DO WE EVEN GET TO THAT, UNLESS WE, IN FACT, FIND THERE WAS A TAKING? ISN'T THAT THE DAMAGES PORTION THAT YOU ARE TALKING ABOUT NOW, WHICH YOU WOULD HAVE TO HAVE YOUR JURY TRIAL AND EVERYTHING ON, BUT WE HAVE TOE DECIDE WHETHER OR NOT -- BUT WE HAVE TO DECIDE WHETHER OR NOT THIS SUMMARY JUDGMENT WAS APPROPRIATE THAT, IN ESSENCE SAYS THERE WAS NO TAKING BY THE DEPARTMENT.

YOUR HONOR, I BELIEVE WE HAVE TO ADDRESS IT IN PART, BECAUSE THIS SUMMARY JUDGMENT, IN THIS CASE, DECIDED AS A MATTER OF LAW, THAT THE PATCHENS SHOULD NOT BE ENTITLED TO COME IN AND PROVE THAT THERE WAS VALUE, BECAUSE EVEN IF THEY BROUGHT IN AN EXPERT WHO SAID EACH OF THESE TREES WAS WORTH \$5,000, THE TRIAL JUDGE DETERMINED THAT HE COULDN'T LISTEN TO THAT EVIDENCE, BECAUSE AS A MATTER HE HAVE LAW, THEY HAD NO VALUE.

BUT LET'S GO BACK TO THIS. IF, INSTEAD OF THERE BEING A REGULATION THAT REQUIRED THAT THE DEPARTMENT TAKE DO YOU KNOW THESE TREES, THE DEPARTMENT, AS PART OF, THE DEPARTMENT OF TRANSPORTATION, AS PART OF ROAD WIDENING, HAD SAID THAT BOTH THE HOUSE AND THE TREES HAD TO GO, AND NOW YOU YOU ARE GETTING TO A TRADITIONAL INVERSE OR IMMINENT DOMAIN CASE. YOU WOULD, THEN, HAVE REPLACEMENT VALUE OF THE TREES WITH THAT IS WHAT --.

THAT'S CORRECT.

BUT NOW WE GET BACK TO MY INITIAL QUESTION, WHICH IS THAT THIS WAS A REGULATORY TAKING. IS THE THRESHOLD QUESTION WHETHER THE REGULATION, WHICH HAD THE 1900-FOOT REQUIREMENT, DIDN'T THAT, IN FACT, EXPOSE THOSE TREES TO CITRUS CANCER, AND WHAT IS THE EVIDENCE IN THE RECORD ABOUT WHETHER THE TREES THAT WERE TAKEN BY THE DEPARTMENT HAD BEEN EXPOSED TO CITRUS CANCER, SO THAT, IN FACT, THEY HAD NO VALUE AT ALL, BECAUSE OF THEIR EXPOSURE?

LET ME TRY TO ANSWER ALL YOUR QUESTIONS.

ALL RIGHT.

FIRST OF ALL, THERE WAS NO REGULATION IN PLACE AT THE TIME THE PATCHENS'S TREES WERE DESTROYED ON OCTOBER 31, 2000. THERE WAS A POLICY OF THE DEPARTMENT. THERE WAS NO RULE THAT HAD BEEN ADOPTED. THERE WAS NO STATUTE THAT HAD BEEN ADOPTED BY THE LEGISLATURE. IT WAS A POLICY THAT THE DEPARTMENT WAS OPERATING UNDER, AN UNWRITTEN, UNIMPLEMENTED RULE THAT THEY HAD ADOPTED. SECOND OF ALL, IN THIS RECORD, THERE IS SOME DISPUTED EVIDENCE ABOUT WHETHER THERE WERE ANY INFECTED TREES WITHIN 1900 FEET. FOR PURPOSES OF YOUR DECISION IN THIS CASE, WE SUBMIT THAT YOU SHOULD ASSUME THAT THE PATCHENS'S TREES WERE LOCATED WITHIN 1900 FEET OF AT LEAST ONE INFECTED TREE. THAT IS THE WAY THE QUESTION HAS BEEN FRAMED, AND THAT IS THE ISSUE THAT THE COURT NEEDS TO ADDRESS, AND THERE APPEARS TO BE AT LEAST SUFFICIENT EVIDENCE IN THIS RECORD THAT ONE TREE WAS WITHIN, ONE INFECTED TREE WAS LOCATED WITHIN 1900 FEET. NOW, FOR PURPOSES OF DETERMINING VALUE, WE SIMPLY, IN THE TAKING PHASE OF THE CASE, IN THE LIABILITY PHASE, YOUR HONORS, WE SHE BE ENTITLED TO PRESENT EVIDENCE THAT THERE IS A VALUE, NOT HOW MUCH THAT VALUE IS. HERE, THE TRIAL COURT REJECTED THE NEED FOR ANY EVIDENCE ON THAT ISSUE.

WELL, IF YOU ARE, IF THESE TREES ARE, IN FACT, WITHIN THE 1900-FOOT ZONE, AND THERE HAS BEEN A DETERMINATION THAT CITRUS CANCER IS A NUISANCE, AND THAT YOU HAVE TO GO THROUGH THIS 1900-FOOT ZONE, WHAT, WHAT WAS LEFT FOR THE TRIAL COURT TO DECIDE AT THIS LIABILITY POINT?

THE SAME THING THAT A TRIAL COURT WOULD HAVE TO DECIDE, IF THE DEPARTMENT OF AGRICULTURE DECLARED THE ENTIRE STATE OF FLORIDA TO BE OFF-LIMITS FOR CITRUS CANCER. THE TRIAL COURT HAS THE AUTHORITY, AND IN FACT, THE DUTY TO DETERMINE WHETHER A REGULATION ADOPTED BY ANY ARM OF STATE GOVERNMENT IS SO INVASIVE TO THE PRIVATE PROPERTY INTERESTS OF THE CITIZENS, THAT THAT REGULATION AMOUNTS TO A TAKING. IT DOESN'T MATTER WHETHER IT WAS 19 FEET OR 1900 FEET OR 19,000 FEET. THE COURTS HAVE THAT EXCLUSIVE AUTHORITY TO DO THAT.

JUSTICE BARKETT'S CONCURRENCE IN THE POLK CASE SUGGESTS THAT IT REALLY, THAT, THE INQUIRY ISN'T WHETHER IT WAS A LEGITIMATE EXERCISE OF THE POLICE POWER. GET BACK TO THE QUESTION OF, IN THIS CASE, WHY DOESN'T THE RECORD ESTABLISH THAT THESE TREES, BECAUSE THEY WERE WITHIN THE 1900-FOOT RADIUS, WOULD CONSTITUTE A NUISANCE, AND SO UNDER KEZBROWE THAERTION THAT WOULD BE THE REASON THERE WOULD BE NO --, THAT THAT

WOULD BE THE REASON THERE WOULD BE NO COMPENSATION DUE.

UNDER KESBROWE, YOUR HONOR, THE CITIES WHAT IN AND ESTABLISHED THAT THERE WAS A LEVEL OF CRIMINAL ACTIVITY THAT TOOK PLACE AT THE MOTEL IN MIAMI VERSUS THE APARTMENT COMPLEX IN ST. PETE, AND IT WAS THE CONDEMNING AUTHORITY, IF YOU WILL, THE REGULATING AUTHORITY THAT BROUGHT IN THAT AFFIRMATIVE EVIDENCE. HERE, THE DEPARTMENT OF AGRICULTURE BROUGHT IN NOTHING. THERE IS ABSOLUTELY NO EVIDENCE IN THIS RECORD THAT THESE TREES HAVE NO VALUE.

SO YOU WOULD AGREE, THOUGH, THIS IS SOMETHING THAT, IF THE SUMMARY JUDGMENT WAS REVERSED, THAT, IF THE DEPARTMENT COULD SHOW THAT THAT 1900 RADIUS DID EXPOSE THOSE TREES, THAT THERE WAS, TO CITRUS CANCER, THAT THAT WOULD, THEY COULD MEET THE THRESHOLD OF ESTABLISHING THAT THIS IS A NUISANCE, BUT YOU ARE SAYING THE RECORD DOESN'T ESTABLISH THAT.

I AM NOT SURE THAT I AGREE WITH THE STATEMENT AS YOU PHRASED IT. I AM SAYING THAT THE DEPARTMENT COULD COME IN AND PROVE, THROUGH ITS SCIENTIFIC EVIDENCE, THAT ALL TREES WITHIN 1900 FEET WERE EXPOSED, AND THEY COULD BRING IN EVIDENCE THAT SAID THAT THEY ARE WORTHLESS, THAT THEY HAVE NO VALUE, AND WE, ON THE OTHER HAND, COULD COME IN AND SHOW THAT RESIDENTIAL TREES WITHIN THIS PROXIMITY, WITHIN THESE 262 ACRES THAT SURROUND AN INFECTED TREE, DO HAVE VALUE, AND THEN THE FACT FINDER WOULD HAVE TO MAKE HIS DECISION.

THE TRIAL JUDGE.

THE TRIAL JUDGE.

IF THE TREES WERE ACTUALLY DEMONSTRATED TO BE INFECTED TREES, WOULD IT BE A DIFFERENT SCENARIO?

I WOULD BELIEVE THAT IT WOULD BE A DIFFERENT SCENARIO, AND I WOULD BELIEVE THAT, IF THE TREES WERE INFECTED, THEY WOULD BE PROPERLY REMOVED WITHOUT COMPENSATION, IN ACCORDANCE WITH THIS COURT'S PRIOR RULINGS.

WELL, IF THIS IS APPROACHED FROM A PUBLIC NUISANCE STANDPOINT, THEN, AND CITRUS CANCER IS, THE INDICATION OF IT IS THE INDICATION UNDER POLICE POWER OF PUBLIC NUISANCE, THERE IS NO BASIS FOR IT TO BE COMPENSATION, IS THAT RIGHT?

JUSTICE WELLS, THE POLICE POWER HELD IN FLORIDA IS NOT EXCLUSIVE WITH THE FACT THAT A TAKING MAY HAVE OCCURRED. THE FACT THAT THE DEPARTMENT OF AGRICULTURE DETERMINES THAT ALL TREES IN THIS STATE, ALL CITRUS TREES ARE NUISANCES, DOESN'T MEAN IT SO. THEY HAVE THE BURDEN TO ESTABLISH THAT, THROUGH RELIABLE METHODS IN A COURT OF LAW. OTHERWISE, THE DEPARTMENT OR ANY OTHER ARM OF GOVERNMENT, COULD COME INTO, COME ON TO THE PROPERTY OF PROPERTY OWNERS IN THIS STATE AND TAKE WHATEVER PROPERTY THEY, IN THEIR EXCLUSIVE DOMAIN, DETERMINE WAS A NUISANCE. THAT JUST ISN'T THE WAY IT WORKS. I WOULD LIKE TO MAKE ONE POINT, AND THAT IS, IF THERE IS ANY QUESTION IN THE COURT'S MIND, ABOUT WHETHER THE DECISION IN POLK WAS A FACTUALLY-BASED DECISION OR A LEGAL DECISION, IT IS ANSWERED, I BELIEVE, BY THE COURT STATEMENT, THIS COURT'S STATEMENT, ON PAGE 40 OF THE OPINION, AND I QUOTE, WE CONCLUDE, BASED UPON A REVIEW OF THE RECORD, THAT THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE PRESENTED AT THE LIABILITY PHASE, TO SUPPORT THE TRIAL COURT'S FINDING THAT POLK WAS ENTITLED TO COMPENSATION FOR ALL NURSERY STOCK DESTROYED, EXCEPT FOR THOSE TREES EXHIBITING SYMPTOMS OF THE BACTERIAL DISEASE AND THOSE WITHIN 125 FEET. THIS COURT AFFIRMED, THIS COURT, AS COURT, AN APPELLATE COURT OF FIRST IMPRESSION, IN FACT, AFFIRMED THE FACTUAL FINDINGS OF THE TRIAL COURT JUDGE, AND IN THE IMMINENT DOMAIN AND INVERSE

CONDEMNATION FIELD, THE APPELLATE COURTS ARE RELUCTANT TO REVERSE THOSE FACTUAL DETERMINATIONS.

WHAT ABOUT THE DANGER, IF WE FOLLOW YOUR REASONING HERE, OF INCONSISTENT OUTCOMES ALL OVER THE STATE OF FLORIDA, AND THAT IS THAT ONE TRIAL JUDGE IN AN ACTION LIKE THIS, WITH THE SAME EXACT FACTS THAT YOU PRESENT HERE, MAKES A DETERMINATION THAT THERE IS VALUE, AND YOU JUST GO OVER TO THE NEXT COUNTY, AND A JUDGE, UNDER THE SAME IDENTICAL FACTS MAKES A DECISION THAT THERE IS NO VALUE, AND SO ON AND SO ON, AND WE ALL KNOW, AND I THINK WE CAN PROBABLY TAKE JUDICIAL NOTICE OF THE FACT THAT THIS IS NOT A PLACE SPECIFIC. THIS IS OVER A LARGE GEOGRAPHIC AREA THAT WE ARE TALKING ABOUT HERE. WOULDN'T YOUR OUTCOME INEVITABLY RESULT IN THESE INCONSISTENT SPOTTY DIFFERENT FINDINGS BY THE CHIEF TRIAL JUDGES OUT THERE?

THAT IS ONE OF THE REASONS BEHIND RULE 1.220 OF THE FLORIDA RULES OF CIVIL PROCEDURE, THE CLASS ACTION RULE. WE HAVE THAT RULE IN PLACE, SO THAT WE CAN BRING CASES WHICH MIGHT RESULT IN INCONSISTENT ADJUDICATIONS THROUGHOUT THE STATE, AND RECEIVE A CONSISTENT, RECEIVE ONE ADJUDICATION IN ONE FORUM, THAT WILL BE BINDING FOR ALL EFFECTS ACROSS THE STATE, AND IN FACT, WE HAVE BROUGHT SUCH A CASE. IT IS NOT THIS CASE, BUT THE COURT HAS BEEN ADVISED OF IT THROUGH SUPPLEMENTAL FILINGS IN BROWARD COUNTY AND HAD A CLASS CERTIFIED, AND THAT CERTIFICATION HAS BEEN AFFIRMED IN PART, BY THE FOURTH DISTRICT.

BUT ISN'T THE PROPER INQUIRY, WHATEVER WE MIGHT HAVE SAID IN POLK, IN READING BACK TO CORNEAL, ABOUT THE FACT THAT WHEN THE STATE SEEKS TO ABSOLUTELY DESTROY PROPERTY, THAT IT IS ONLY JUSTIFIED WITHIN THE NARROWEST LIMITS, THAT THE ISSUE STILL COMES BACK TO WHETHER DESTROYING TREES WITHIN A 1900-FOOT RADIUS IS THE NARROWEST LIMIT, SO IN THE END AREN'T WE GETTING BACK TO, REALLY, QUESTIONING THE REASONABLENESS OF THE DEPARTMENT'S REGULATION? WHICH IS A QUESTION OF, THAT IS OF GENERAL APPLICABILITY ACROSS THE STATE, NOT ON A CASE-BY-CASE BASIS.

I SEE THAT I AM MOVING INTO MY REBUTTAL TIME, AND I WANT TO SAVE AS MUCH AS POSSIBLE OF IT, BUT I DON'T BELIEVE THAT WE ARE, YOUR HONOR. I BELIEVE THAT IT IS THE DUTY OF THE COURTS TO EXAMINE WHETHER THE REGULATION, WHETHER THE POLICY APPLIED BY THE DEPARTMENT OF AGRICULTURE HERE IS A REASONABLE ONE AND IN FACT, DOES INTRUDE IN THE LEAST IN THE VASE I HAVE WAY. THAT IS WHAT THE DEPARTMENT HAS THE BURDEN OF SUSTAINING.

CHIEF JUSTICE: OKAY. YOU CAN PAUSE AT THIS TIME AND SAVE THE REST OF YOUR TIME FOR REBUTTAL. COUNSEL. GOOD MORNING.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM JACK REITER AND WITH ME IS HE JACK PARSONS ON BEHALF OF THE DEPARTMENT OF AGRICULTURE. YOUR HONORS, THE QUESTION POSED TO THE THIRD DISTRICT MUST BE ANSWERED IN THE AFFIRMATIVE, BECAUSE THE UNDERLYING QUESTION THAT THIS COURT MUST ANSWER TODAY IS THAT CITRUS CANKER WILL SPREAD FROM TREE TO TREE AND IT DOES NOT DISTINGUISH BETWEEN A RESIDENTIAL TREE AND A COMMERCIAL TREE, AND THAT IS THE LINCHPIN, IN TERMS OF THE QUESTION POSED TO YOUR HONORS, WITH RESPECT TO THE QUESTION WHAT MAKES THE DIFFERENCE. WHAT IS THE DIFFERENCE BETWEEN A RESIDENTIAL TREE AND A COMMERCIAL TREE, FOR PURPOSES OF EVALUATING WHETHER OR NOT IT HAS BEEN EXPOSED TO CANKER AND CONSTITUTES A NUISANCE WHICH MUST BE ABATED.

SO IS THAT THE DECISION OF THE DEPARTMENT, WHETHER THIS CAN BE DECIDED ODD A SIMPLE NIECE ANSWER PRINCIPLE, WHICH IS THAT, AS A MATTER HE HAVE LAW, THAT THE DEPARTMENT HAS USED THE LEAST, THE MOST, THE LEAST RESTRICTIVE MEANS TO DESTROY THE TREES THAT

ARE LIKELY TO CAUSE THE SPREAD OF CITRUS CANCKER, AND THAT IF THEY DIDN'T DO IT, THOSE TREES IN FACT CONSTITUTE A NUISANCE. IS THAT WHAT THE POSITION OF THE DEPARTMENT IS?

YOUR HONOR, LET ME ANSWER THAT IN TWO WAYS. FIRST OF ALL, WITH RESPECT TO THE QUESTION AS IT RELATES TO THE NUISANCE EXCEPTION, THE NUISANCE EXCEPTION IS CERTAINLY ONE OF THE PRIMARY PRINCIPLES THAT WE ARE RELYING UPON. IN THE SENSE THAT A TREE THAT HAS BEEN EXPOSED TO CONTAININGER IS A NUISANCE. IT HAS NO LAWFUL VALUE. IT HAS NO PUBLIC USE. IT MUST BE DESTROYED, IN ORDER TO PREVENT, IN ORDER TO PREVENT FURTHER SPREAD. WITH FORCE WHETHER OR NOT THE QUESTION OF ARE WE EVALUATING THE 1900-FOOT RULE, TO DETERMINE WHETHER OR NOT IT IS THE LEAST RESTRICTIVE MECHANISM FOR THE DEPARTMENT, I WOULD SUGGEST TO THIS COURT THAT, UNDER THE KEY HAVEN CONCEPT, THE INVERSE CONDEMNATION PLAINTIFF MUST ACCEPT AGENCY ACTION AS COMPLETELY APPROPRIATE, NOT ONLY IN TERMS OF THE UNDERLYING STATUTES OR RULES THAT GUIDE THE AGENCY'S RATIONALE, BUT IN THE INVERSE CONDEMNATION SET FORTH IN KEY HAVEN, POLK, AND I BELIEVE THE DEPARTMENT OF AGRICULTURE VERSUS VERRALLO SAID THIS AS ALL, THAT THE DEPARTMENT ACTION MUST BE CONSIDERED CORRECT. I DON'T BELIEVE THE INVERSE CONDEMNATION CASE SHOULD COME IN TO EVALUATE WHETHER OR NOT THE 1900-FOOT RULE IS OR IS NOT APPROPRIATE.

SO WHAT DO WE DO AT THIS POINT? THIS IS AN INVERSE CONDEMNATION ACTION AND THE TRIAL JUDGE WAS AT THE LIABILITY POINT. WHAT ARE THE ISSUES THAT THE TRIAL JUDGE MUST LOOK AT, IN THE LIABILITY PORTION?

THE TRIAL JUDGE MUST HE VALE WAIT WHETHER OR NOT THE TREE WAS OR WAS NOT EXPOSED. WAS IT OR WAS IT NOT WITHIN THE 1900-FOOT RADIUS SET BY THE DEPARTMENT AS THE APPROPRIATE GUIDELINE FOR WHETHER OR NOT A TREE IS EXPOSED?

THEN WHAT DOES THAT LANGUAGE MEAN IN POLK? POLK SEND THE TRIAL JUDGE'S DETERMINATION THAT THE ACTION, AT LEAST AS FAR AS THE TREES THAT WERE OUTSIDE OF THE 125-FOOT RADIUS, THAT THE ACTION WAS ARBITRARY AND CAP RISH US. WHAT ARE YOU LOOKING AT, WHEN YOU LOOK AT THAT?

THE DISTINCTION IN POLK THAT WE NEED TO LOOK AT, AND I SAY DISTINCTION, I FEEL POLK IS RIGHT ON POINT IN BINDING WITH RESPECT TO THE LEGAL PRINCIPLES ENUNCIATEED IN POLK, BUT THE DISTINCTION THERE, OF COURSE, WAS IN THAT CASE, AT THE TIME OF THAT CASE, THE DEPARTMENT WAS UTILIZING THE 125-FOOT RADIUS, BUT AS A MATTER OF LAW, WHAT THIS COURT HELD IS SPECIFICALLY OUTLINED IN FOOTNOTE FOUR OF THIS COURT'S DECISION, WAS THAT THE TRIAL COURT CORRECTLY DECIDED, AS A LEGAL SCHROOINGS CONCLUSION, THAT -- AS A LEGAL CONCLUSION, THAT THOSE TREES WITHIN THE 125-FOOT OF INFECTED TREES, CONSTITUTEED NO MARKET VALUE BECAUSE THEY HAD NO LAWFUL USE. THIS COURT CITED IN THE SMITH CASE THAT, WHEN THE DEPARTMENT REMOVES OR DESTROYS A TREE THAT HAS BEEN EXPOSED, AND I THINK THE EXAMPLES USED WERE SUCH THINGS AS INFECTED CLOTHING OR DECEASED CATTLE, THEN THOSE THINGS DO NOT CONSTITUTE A TAKING. THE REMOVAL OR DESTRUCTION OF THOSE THINGS DO NOT CONSTITUTE A TAKING, BECAUSE THEY HAD NO LAWFUL USE, SO THE APPROPRIATE INQUIRY FOR A TRIAL COURT IN AN INVERSE CONDEMNATION CASE, IS TO ACCEPT THE AGENCY'S ACTIONS AND THE IMPLEMENTATION OF ITS RULES AND REGULATIONS CORRECT, AND THEN TO EVALUATE WHETHER OR NOT, AS THE PATCHENS HAD THE OPPORTUNITY TO DO, WHETHER OR NOT THE TREES AT ISSUE WERE WITHIN OR OUTSIDE THE 1900-FOOT ZONE, WHICH DEFINES WHETHER OR NOT A TREE IS EXPOSED.

ARE YOU SAYING THAT, AS A MATTER OF LAW, THAT 1900 FEET IS NOW, WOULD BE THAT ANY TREE WITHIN THE STATE OF FLORIDA WITHIN 1900 FEET OF AN INFECTED TREE, IS A PUBLIC NUISANCE AND NO COURT CAN GO BEYOND THAT DECISION BY THE DEPARTMENT OF AGRICULTURE?

YOUR HONOR, THAT, THE POSITION IS THAT, IN AN INVERSE CONDEMNATION CASE, THE COURT CANNOT GO BEYOND THIS AGENCY RATIONALE. THERE ARE OTHER ALTERNATIVES. THERE ARE OTHER AVENUES OF CHALLENGING DEPARTMENT DECISIONS.

IS THAT DEPENDENT UPON THERE BEING AN APPROPRIATE PROMULGATION OF A RULE? FOR EXAMPLE IN POLK, THE 125 FOOT, HELP ME OUT. WAS THERE ACTUALLY AN AGENCY RULE APPROPRIATELY PROMULGATED, UNDER 120?

YOUR HONOR, THE POLK CASE DOESN'T OUTLINE WHETHER OR NOT THERE WAS A RULE ACTUALLY IN PLACE.

IT DOES ON ITS FACE. THAT IS WHY I AM ASKING.

WELL, YOUR HONOR -- IT DOESN'T ON ITS FACE. THAT IS WHY I AM ASKING.

WELL, YOUR HONOR, I DON'T THINK THE ISSUE IS BASED UPON WHETHER THERE WAS OR NOT A PROMULGATED RULE.

WAS THERE A PROMULGATED RULE HERE?

YOUR HONOR, THERE WAS A POLICY OF THE DEPARTMENT, AT THE TIME OF THIS SPECIFIC TAKING, BASED ON SCIENTIFIC EVIDENCE THAT THE 1900-FOOT BENCHMARK WAS THE APPROPRIATE GUIDELINE TO DETERMINE WHETHER OR NOT A TREE WAS EXPOSED.

I AM CONCERNED, YOU KNOW, WHEN THE INDIVIDUAL PROPERTY OWNER, REALLY, SORT OF HAS NOTICE OF THIS OR IT HAS SOME IMPACT ON HIM, I ASSUME IN MOST INSTANCES, IS WHEN THE DEPARTMENT ACTUALLY COMES AND CUTS DOWN OR TAKES THE TREE. NOW, DOESN'T IT STRIKE YOU AS HAVING ENORMOUS POTENTIAL FOR ARBITRARINESS, IF THE DEPARTMENT, TODAY IT IS 1900. TOMORROW AT THE IS 3,000. THE NEXT DAY IT IS A MILE. AND THE INDIVIDUAL DOESN'T FIND OUT ABOUT THAT UNTIL SOMEBODY SHOWS UP WITH A UNIFORMED POLICE OFFICER TO CUT DOWN THE TREES. I AM JUST VERY CONCERNED ABOUT WHERE THIS TAKES US, IN TERMS OF WHAT, YOU KNOW, WE RESPECT INDIVIDUAL AND CONSTITUTIONAL RIGHTS VERY MUCH HERE, IN THIS STATE, AND PROPERTY RIGHTS, ESPECIALLY, SO WHERE IS THIS GOING TO, IN OTHER WORDS IS IT YOUR VIEW THAT THE DEPARTMENT CAN SIMPLY HAVE NOT, THEY DON'T GO THROUGH THE RULE-MAKING PROCESS OR WHATEVER. THEY CAN CHANGE THEIR POLICY TOMORROW, AND THAT THE COURTS HAVE TO ACCEPT THAT, IN TERMS OF ANY COMPLAINTS BY ITS CITIZENS THAT THE DEPARTMENT SHOWED UP, AND NOW THEY ARE TAKING DOWN TREES WITHIN A MILE?

YOUR HONOR, IT IS A FAIR QUESTION, BUT THE WAY YOU ASKED THE QUESTION, REALLY PROVIDES THE ANSWER. YOU ASKED IF THE DEPARTMENT WERE TO ACT BE IN A WAY THAT WAS ARBITRARY, AND THERE ARE SPECIFIC METHODS OF CHALLENGING AGENCY ACTION THAT IS ARBITRARY AND CAP RISH US, BEYOND THE INVERSE -- CAP RISH US, BEYOND THE INVERSE -- CAPRICIOUS, BEYOND THE INVERSE CONDEMNATION CHALLENGE. THE INVERSE CONDEMNATION PLAINTIFF CANNOT, IN THE SAME ARGUMENT, SUGGEST THAT A SPECIFIC STATUTE IS ARBITRARY OR CAP RISH US OR AN AGENCY ACTION IS ARBITRARY AND CAP RISH US AND AT THE SAME TIME SAY, BUT NOTWITHSTANDING THAT, I AM GOING TO SUE FOR INVERSE CONDEMNATION DAMAGES.

I THOUGHT IN THIS CASE, THOUGH, THERE WAS ALSO A DUE PROCESS ARGUMENT MADE THAT THEY HAD NO NOTICE BEFORE THE DEPARTMENT CAME IN AND DESTROYED THESE TREES, SO DOESN'T, ISN'T THAT A SEPARATE CLAIM THAT THEY ARE ACTUALLY MAKING, THAT THEY HAD HE NO WAY OF CHALLENGING THE PROPRIETY OF THE OF THE AGENCY'S ACTIONS BEFORE THE TREES WERE ACTUALLY TAKEN HE?

THERE IS A FEW WAYS TO LOOK AT THAT, YOUR HONOR. FIRST OF ALL, WE HAD TAKEN THE POSITION, AND THE THIRD DISTRICT CORRECTLY FOUND THAT THE PATCHENS DID NOT ATTEMPT

TO INITIATE AN INDEPENDENT DUE PROCESS VIOLATION CLAIM. WHAT THE PATCHENS DID, IN THE THIRD DISTRICT AND I BELIEVE, IN THE BRIEF BEFORE THIS COURT, IS REALLY ATTEMPT TO COLLAPSE THE CONCEPTS OF DUE PROCESS, AS THEY RELATE TO THE NOTION OF DUE PROCESS AS WE USE THE TERM TO DEFINE A TAKING, AND AS WE USE THE TERM TO DEFINE NOTICE AND OPPORTUNITY TO BE HEARD. THE ISSUE HERE, WITH RESPECT TO THE PATCHENS, IS THAT, AND THE THIRD DISTRICT CORRECTLY FOUND, THEY ARGUED THAT NOTICE WAS THE GUIDEPOST OR THE LINCHPIN FOR AN INVERSE CONDEMNATION CLAIM, AND I WOULD SUGGEST TO THE COURT THAT NOTICE IS NOT RELATED TO INVERSE CONDEMNATION. NOTICE AND INVERSE CONDEMNATION ARE NOT RELATED, IN THE SENSE THAT, AGAIN, THE LITIGANT IN INVERSE CONDEMNATION SAYS THAT WE ACCEPT THE AGENCY ACTION AS CORRECT. WE ACCEPT IT AS BEING ACCURATE. TO SUGGEST THAT NOTICE AND INVERSE CONDEMNATION COULD BE COMBINED, WOULD, COULD CREATE THE RESULT, THE FLIP SIDE THAT NOTICE COULD INSULATE AN INVERSE CONDEMNATION.

WHAT SHOULD THE PATCHENS HAVE DONE, ONCE THE DEPARTMENT CAME IN AND DESTROYED THEIR TREES? WHAT WOULD BE THE PROPER METHOD FOR CHALLENGING WHETHER, IN FACT, THESE TREES WERE EXPOSED TO CITRUS CANCKER OR NOT?

WELL, IN TERMS OF WHETHER THEY WERE EXPOSED, THE PATCHENS DID IT THE CORRECT WAY. THEY SUED FOR INVERSE CONDEMNATION AND HAD THE OPPORTUNITY TO DEMONSTRATE WHETHER OR NOT THE TREES WERE EXPOSED.

YEAH, BUT YOU ARE SAYING THAT THE ONLY WAY TO SHOW THAT 1900 FEET IS NOW WHAT IS GOING TO BE THE GUIDEPOST, AS TO WHETHER TREES WITHIN THAT ARE PRESUMED TO BE EXPOSED, BECAUSE THE DEPARTMENT OF AGRICULTURE HAS DETERMINED THAT. ISN'T THAT WHAT YOUR ARGUMENT IS?

IT IS NOW 1900 FEET, YES.

AND WHERE, LET ME JUST GET BACK, WHERE, HAS A COURT OF LAW OR HAS THE DEPARTMENT OF, HAS DOA MADE A DETERMINATION THAT THAT 1900 FEET IS, IN FACT, THE NECESSARY RADIUS, IN ORDER TO PROTECT THE STATE FROM THE SPREADING OF CITRUS CONTAININGER?

WELL, AT LEAST ONE COURT HAS SPECIFICALLY, THAT COMES TO MIND RIGHT AWAY IN SAP FARMS, THE THIRD DISTRICT COURT OF APPEALS SPECIFICALLY ACKNOWLEDGED AT THAT TIME THAT THE 1900-FOOT RULE WHICH WAS IN PLACE WAS APPROPRIATE.

IN HAIR, IN DEPARTMENT OF AGRICULTURE, I THOUGHT THAT THERE IS SOME CASE OUT OF THE FIRST DISTRICT THAT HAS SAID THAT THE 1900-FOOT RULE WAS NOT PROPERLY PROMISE YOU WILL GAITED.

-- PROMULGATED.

THERE ARE DIFFERENT SHIFTING CONCEPTS THAT APPLY HERE, YOUR HONOR, BECAUSE THERE WAS A RULE IN PLACE, AT THE TIME THE PATCHENS'S TREES WERE REMOVED. THERE WAS AN ADMINISTRATIVE RULE THAT ALLOWED THE DEPARTMENT TO DETERMINE WHAT WAS AN APPROPRIATE GUIDELINE. THE DECISION YOU ARE REFERRING TO WAS WHEN AN ADMINISTRATIVE LAW JUDGE AFFIRMED, THE FIRST DISTRICT AFFIRMED AN ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT THERE SHOULD HAVE BEEN A PROPERLY PROMULGATED 1900-FOOT RULE SET FORTH WITHIN THE PROVISIONS, AND THE COURT REFERRED TO THAT AS A RULE BY DEFINITION, BUT WHAT THE COURT DID NOT FIND, ALTHOUGH THAT WAS SIMPLY A MATTER OF WAS IT OR WAS IT NOT PROMULGATED, THE COURT DID NOT IN ANY WAY IN THAT SITUATION, DETERMINE THAT THE DEPARTMENT'S UNDERLYING SCIENCE WAS IN ANY WAY INACCURATE WITH RESPECT TO THE DETERMINATION, THAT IT IN FACT WAS EXPOSED AND THAT IT CONSTITUTED A NUISANCE. THE THIRD DISTRICT, IN THE BIS CASE, WHICH WAS A FINAL ORDER ON A MOTION TO

STAY, ADDRESSED THAT POINT. IT STATED THAT THE DEPARTMENT'S INTERPRETATION OF A RULE OR STATUTE THAT IT HAS BEEN AUTHORIZED TO IMPLEMENT AND EXECUTE, IS NOT IN AND OF ITSELF THE CREATION AFTER RULE. WE HAVE TO GIVE A LEVEL OF DEFERENCE TO THE AGENCY, WAS THE LEGISLATURE EMPOWERS IT TO DO CERTAIN THINGS, TO DECLARE WHAT IS IN FACT A QARNTEEN ZONE, TO DECLARE WHAT PLANTS, PESTS AND PETS ARE NUISANCES, TO -- TOE DETERMINE WHAT PESTS AND PLANTS ARE NEWS -- TOE DETERMINE WHAT PESTS AND PLANTS ARE NUISANCES, AND TO DETERMINE IF, IN FACT, THAT TREE IS A NUISANCE.

DOESN'T THE TREE OWNER HAVE THE OPPORTUNITY TO CHALLENGE AS TO WHETHER THE DEPARTMENT'S 1900 OR 1500 OR 125 IS A REASONABLE IS DISTANCE? DOESN'T THERE HAVE TO BE SOME WAY THAT THAT CAN BE CHALLENGED?

WELL, THERE ARE WAY TO SAY CHALLENGE THOSE DECISION, YOUR HONOR.

WHAT WAS THE WAY THAT IT COULD BE CHALLENGED, IN THIS PARTICULAR SITUATION?

WHAT THE PATCHENS THEORETICALLY COULD HAVE DONE AGAIN, ASSUMING FOR PURPOSES OF ANSWERING THE QUESTION, THAT THERE WAS A DISPUTED FACT AS TO NOTICE, WHAT IS TO WHETHER OR NOT -- AS TO WHETHER OR NOT THEY RECEIVED A FINAL ORDER. THAT WAS ONE OF THE CLAIMS THAT THEY RAISED. AGAIN, WE DID NOT CONTEND THAT THEY RAISED A SEPARATE DUE PROCESS CLAIM, BUT ASSUMING FOR ANSWERING YOUR QUESTION THAT HE THEY DID, THEY WOULD HAVE THE ABILITY TO SUE FOR DUE PROCESS VIOLATION, UNDER SOME RULE.

WHAT WOULD THE CAUSE OF ACTION BE? YOU ARE NOT GOING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE.

NO.

THERE IS NO RULE TO CHALLENGE IT. IT IS SIMPLY AGENCY POLICY, SO WHAT SORT OF CAUSE OF ACTION WOULD HAVE THE PATCHENS HAVE HAD?

AGAIN, YOUR HONOR, I AM NOT SUGGESTING THAT THEY WOULD OR WOULD NOT. I AM ONLY TALKING ABOUT POTENTIAL CAUSE OF ACTION THAT THEY MIGHT OR MIGHT NOT HAVE BEEN ABLE TO ARTICULATE. WITH RESPECT TO AN INVERSE CONDEMNATION, I IMAGINE THAT AN INDIVIDUAL WHO DID NOT RECEIVE NOTICE AFTER FINAL ACTION, FOR EXAMPLE A FINAL ORDER, MIGHT BE ABLE TO SUGGEST THAT THE AGENCY TOOK ACTION WITHOUT REQUISITE NOTICE. THAT IS WHAT THE PATCHENS MIGHT OR MIGHT NOT HAVE BEEN ABLE TO DO IN THIS KIND OF SITUATION, BUT FOR ANSWER YOUR OTHER QUESTION, WE MUST ADHERE TO THE KEY HAVEN CONCEPT THAT SAYS THAT YOU DO NOT UNDERMINE OR LOOK IN HINDSIGHT AT AGENCY DETERMINATIONS, EITHER WITH RESPECT TO A POLICY DECISION OR WITH FORCE A STATUTE OR RULE THAT THEY HAVE BEEN AUTHORIZED TO IMPLEMENT AND EXECUTE. TO DO THAT WOULD BE DIRECTLY CONTRARY TO THE KEY HAVEN DECISION AND THE UNDERLYING POLICIES OF SEPARATION OF POWERS THAT ADHERE TO THOSE KINDS OF SITUATIONS.

I GUESS THE REAL PROBLEM THAT SEEMS TO BE ARTICULATED HERE IS THAT, IF THERE HAD BEEN, IN FACT, AN AGENCY RULE THAT TALKED ABOUT THE 1900 FEET, THEN CLEARLY THERE COULD HAVE BEEN AN ADMINISTRATIVE CHALLENGE TO THAT 1900 FEET. THE PATCHENS WOULD HAVE HAD AN OPPORTUNITY TO DO THAT. CORRECT?

BUT SINCE -- CORRECT? BUT SINCE THERE WAS NO 1900-FOOT RULE, THEN YOU ARE SORT OF LEFT WITH NOTHING TO DO BUT BRING AN INVERSE CONDEMNATION ACTION.

WELL, BUT, AGAIN, YOUR HONOR, THERE ARE, TO GO BACK TO JUSTICE ANSTEAD'S COMMENT ABOUT THE ACTION BEING ARBITRARY AND CAP RISH US, IF THERE WAS A SITUATION -- AND CAPRICIOUS, IF THERE WAS A SITUATION THAT WERE TO ARISE WHERE IT BECAME CLEAR THAT

ANY AGENCY WAS GOING OFF ON AN ARBITRARY COURSE OF CONDUCT, WITHOUT HAVING ANY SORT OF BACKING, DOING THING THAT IS SEEMED COMPLETELY OUTRAGEOUS, THERE ARE ALL SORTS OF CHALLENGES THAT COULD BE BROUGHT. THERE ARE RULE CHALLENGES UNDER THE DWIFINGS ADMINISTRATIVE HEARINGS UNDER CHAPTER 120. THERE ARE SPECIFIC CHALLENGES TO THE CONSTITUTION.

BUT THE PROBLEM IS THERE IS NO RULE SO THERE COULDN'T AND RULE CHALLENGE HERE.

YOUR HONOR, THERE WAS A RULE CHALLENGE BROUGHT SUCCESSFULLY NOT BY THE PATCHENS, BUT BY OTHER LITIGANTS, WHO, WHEN THE RULE WAS PROMULGATED, WENT IN --

WHEN IT WAS PROMULGATED. WHAT HAPPENS UP TO THAT POINT? I MEAN, ISN'T THAT WHERE WE ARE?

YOUR HONOR, AGAIN, WITH RESPECT TO WHETHER OR NOT A RULE IS PROMULGATED, I THINK WE HAVE TO LOOK BACK AS TO HOW THE LEGISLATURE EMPOWERED THE DEPARTMENT TO ACT IN A CERTAIN WAY. IF WE LOOK AT THE STATUTE 570 AND THEY PROVIDE, THE LEGISLATURE GAVE VERY CLEAR AND SPECIFIC INSTRUCTIONS TO THE DEPARTMENT. THOSE INSTRUCTION WERE TO GO FORWARD AND STOP CITRUS CANCKER, TO -- TO ERADICATE PLANT PESTS.

BUT A BROAD DIRECTIVE TO TAKE ACTION INSERT AREAS, AND THE PROPERTY OWNERS WOULD SUFFER CONSEQUENCES AS THE AGENCY WOULD GO ABOUT THEIR WAY WITH NO RULES OR REGULATIONS ON WHATEVER THEIR POLICY MAY BE, AND SO NOW WE HAVE A SITUATION WHERE WE HAVE A HOMEOWNER, A PROPERTY OWNER AND THEY HAVE ALREADY SUFFERED THE LOSS. IT IS A DONE DEAL. SO CAN YOU EXPLAIN HOW YOU CAN GO BACK IN AND CHALLENGE AND SAVE THAT PROPERTY THAT HAS ALREADY BEEN DESTROYED, BY GOING IN AND CHALLENGING A NONEXISTENT RULE, A NONEXISTENT REGULATION?

WELL, AGAIN, YOUR HONOR, THERE MAY BE A SITUATION, AND IT IS HARD TO IMAGINE THAT IN A VACUUM, BECAUSE THE DEPARTMENT HAS GONE FROM, THE DEPARTMENT HAS NOT, HAD GONE HAYWIRE, IN THE SENSE THAT, OVER THE SIX YEARS SINCE CITRUS CANCKER HAS RESUMED ITS COURSE IN FLORIDA, THE DEPARTMENT STARTED BY NOT CUTTING ANY TREES IN AN EXPOSED ZONE BUT INSTEAD BY PRUNING THE BRANCHES AROUND TREES AND THEN, WHEN THAT DIDN'T WORK, WENT TO 125 FEET AND THEN, WHEN THAT DID NOT WORK, WENT TO 1900 FEET. NOW, THAT HAPPENED OVER A SIX-YEAR PERIOD.

WAS THE 125-FOOT RULE STILL IN EFFECT AT THE TIME THAT THIS ACTION TOOK PLACE? I MEAN, WE KNOW 1900, WE KNOW NO 1900-FOOT RULE WAS IN PLACE, SO WAS THE 125-FOOT RULE STILL ON THE BOOKS, AS IT WERE?

NO, YOUR HONOR, I DON'T BELIEVE IT WAS. MY UNDERSTANDING WAS AT THAT TIME THE POLICY OF THE DEPARTMENT WAS TO YOUTH LOOIINGS A 1900-FOOT -- WAS TO UTILIZE A 1900-FOOT RADIUS. THAT WAS THE POLICY --

YOU HAVEN'T ANSWERED THE QUESTION. THAT QUESTION WAS WHAT HAPPENED TO THE 125-FOOT RULE?

YOUR HONOR, I DO NOT BELIEVE THAT THE 125-FOOT RADIUS RULE WAS STILL IN PLACE.

WAS THERE ANY RULE SET FORTH?

THE RULE SET FORTH WAS WITH RESPECT TO DEPARTMENT POLICY AT THIS SPECIFIC TIME.

COULD YOU GO BEAK. I AM NOT SURE I GOT AN ANSWER TO THE QUESTION I HAD PROPOUNDED INITIALLY. WHAT WAS THE PROPERTY OWNER TO DO UNDER THESE CIRCUMSTANCES? I DON'T

THINK WE HAVE HAD AN ANSWER THIS MORNING.

WELL, I THINK THE PROPERTY OWNER CAN DO, AS I HAD SAID BEFORE, WAS ARGUABLY HAVE INITIATED A DUE PROCESS CLAIM, ARGUABLY. AGAIN --

ALLEGING AND ASSERTING WHAT?

THE FAILURE TO RECEIVE NOTICE OF AGENCY ACTION, THE IMMEDIATE FINAL ORDER.

AND TO RECEIVE WHAT KIND OF COMPENSATION AFTER THE PROPERTY WAS ALREADY TAKEN?

WHAT IS THE REMEDY?

YEAH.

WELL, THE REMEDY, AGAIN, YOUR HONORS, THE REMEDY, WITH RESPECT TO A PROPERTY OWNER, THE REMEDY FOR A PROPERTY OWNER, WHEN A TREE IS EXPOSED TO CANKER, WHEN A TREE IS EXPOSED, IF IT IS A NUISANCE, THE REALITY IS THAT IF IT IS A NUISANCE, THERE IS NO REMEDY.

BUT IT IS A THEORY. LET'S ASSUME IT IS NOT A NUISANCE. WE ARE TALKING SOMETHING DIFFERENT. WE HAVE GOT A POLICY, NOT A RULE, NOT A REGULATION, AND PROPERTY HAS BEEN DESTROYED, AND, AGAIN, WHAT KIND OF REMEDY DOES THE FLORIDA CITIZEN HAVE UNDER THOSE CIRCUMSTANCES, ASSUMING IT HAS NOT BEEN DEMONSTRATED TO BE A NUISANCE?

IF SOMETHING HAS NOT BEEN DEMONSTRATED TO BE A NUISANCE, IN THE SENSE THAT IT IS BEYOND THE PERIMETER THAT HAS BEEN ESTABLISHED BY THE DEPARTMENT AS BEING A NUISANCE, THEN THERE IS A HOST OF ACTIONS THAT A PERSON CAN BRING. THERE IS NO VERSE CONDEMNATION. IF SOMETHING IS NOT A NUISANCE, A PERSON CAN SUE FOR INVERSE CONDEMNATION.

SO THIS CASE MUST TURN ON THE BASIS THAT IT HAS TO BE DECIDED THAT THESE TREES WERE A PUBLIC NUISANCE.

THAT'S CORRECT. THAT IS, OF COURSE, ONE OF THE MAJOR FACTORS THAT --.

WITH OUR HELP, WE HAVE USED UP YOUR TIME. THANK YOU VERY MUCH FOR YOUR ASSISTANCE.

THANK YOU VERY MUCH AND QUESTION E WE ASKED THAT YOU ANSWER THE QUESTION IN THE AFFIRMATIVE.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME?

FIRST OF ALL, THERE WAS NO NO 125-FOOT RULE. IT WAS A POLICY OF THE DEPARTMENT THEN.

IN OTHER WORDS THERE WAS NO 125-FOOT RULE?

NOT ACCORDING TO THE DEPARTMENT.

ARE POLICIES MADE AVAILABLE TO THE GENERAL PUBLIC?

I FRANKLY NOT DON -- I FRANKLY DON'T KNOW WHETHER IT IS MADE AVAILABLE TO THE PUBLIC, BUT THE GENERAL POLICY, IF THE PROPERTY IS TAKEN, THE PROPERTY OWNER HAS THE RIGHT TO CLAIM THAT HIS PROPERTY WAS TAKEN FOR PUBLIC PURPOSE, WITHOUT COMPENSATION.

WOULD YOU AGREE THAT, IF A RULE WAS PROPERLY PROMULGATED AND THE ADMINISTRATIVE PROCESS WAS SHOWN THAT THAT 1900-FOOT RADIUS WAS NECESSARY, BECAUSE TREES WITHIN

THAT WOULD BE EXPOSED TO CITRUS CANKER, THAT THE IDEA THAT AT THAT POINT, THAT ON A CASE-BY-CASE BASIS, THERE WOULD BE CHALLENGE TO WHETHER THAT IS REASONABLE OR NOT, WOULD NOT, WOULD BE A DIFFERENT SITUATION? IN OTHER WORDS AT SOME POINT THAT YOU WOULD HAVE TO SAY THAT THAT IS AN ESTABLISHMENT OF THOSE TREES WITHIN 1900 FEET WERE NUISANCES.

JUSTICE PARIENTE, I WOULD NOT AGREE THAT IT WOULD FORECLOSE THE RIGHT OF PROPERTY OWNERS TO BRING A CLAIM FOR INVERSE CONDEMNATION FOR THE TAKING OF THEIR PROPERTY. IF AN ADMINISTRATIVE PROCEDURE TOOK PLACE, WHERE THE DEPARTMENT CARRIED ITS BURDEN OF ESTABLISHING THAT THE SCIENCE REQUIRED 1900 FEET, THE FACT REMAINS THAT, IF THEY TOOK THOSE TREES AND THOSE TREES WERE HEALTHY AND UNINFECTED, THAT THE PROPERTY OWNER WOULD STILL HAVE A RIGHT TO BE COMPENSATED FOR THE TAKING OF HIS PROPERTY. THEY VENT DECLARED, THEY HAVEN'T SHOWN THAT THEY ARE A NUISANCE. THEY HAVEN'T SHOWN THAT THEY ARE A DANGER TO ANY OTHER TREES. THE ONLY TREES THAT ARE A DANGER TO OTHER TREES ARE INFECTED TREES, AND IT WOULD BE THE SAME THING IN MY, RESPECTFULLY, AS IF THE LEGISLATURE TOLD THE DEPARTMENT OF AGRICULTURE TO GET RID OF FLEAS IN THE STATE.

YOUR ARGUMENT, REALLY, IS THAT NO MATTER, WHAT FOOTAGE WE ARE TALKING ABOUT, THAT IF YOUR TREE IS NOT SHOWING SIGNS OF CITRUS CANKER, THEN YOU ARE ENTITLED TO COMPENSATION?

IF YOUR TREE IS NOT DETERMINED BY THE DEPARTMENT TO BE INFECTED WITH CITRUS CANKER, AND THEY TAKE IT, TO FURTHER THE POLICY OF PROTECTING THE COMMERCIAL CITRUS INDUSTRY, YOU ARE ENTITLED TO SEEK COMPENSATION.

IS THERE A MECHANISM TO DETERMINE INFECTION, PRIOR TO THE OUTWARD SIGNS? I WOULD ALLUDE TO HIV/AIDS.

IS THERE A WAY TO DETERMINE IT?

INFECTION AS TO BEING ABLE TO SEE INFECTION ON THE FRUIT.

THERE ARE LESS INVASIVE MEANS OF PREVENTING ITS SPREAD AND LESS INVASIVE METHODS.

WHAT IS THE TRIAL COURT REFERRING TO IN THE SUMMARY JUDGMENT, WHERE THE ORDER SAYS THAT THE COMMISSIONER DECLARED AGRICULTURAL EMERGENCY AND ENACTED RULE 5-B, WHICH ESTABLISHED A QUARANTINE AREA. WHAT DOES THAT REFER?

THAT WAS THE RULE THAT WAS ESTABLISHED, DIRECTING THE DEPARTMENT OF AGRICULTURE, TO TAKE WHAT MEANS IT DETERMINED WERE APPROPRIATE TO CONTAIN THE SPREAD OF CITRUS CANKER. THERE WAS NO 1900-FOOT DESCRIPTION IN THAT RULE.

WE WILL HAVE TO LOOK AT IT THE. THANK YOU.

CHIEF JUSTICE: THANK YOU ALL. THANK YOU ALL VERY MUCH.

THANK YOU, YOUR HONORS.