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## **Miami-Dade County v. Omnipoint Holdings, Inc.**

NEXT CASE IS MIAMI-DADE COUNTY VERSUS OMNI POINT HOLDINGS INC..

GOOD MORNING. MAY IT PLEASE THE COURT. I AM JAY WILLIAMS HERE REPRESENTING MIAMI-DADE COUNTY AND HERE IS ROBERT KRAWCHECK, ALSO REPRESENTING MIAMI-DADE COUNTY AND WE HAVE MS. MEADOW REPRESENTING THE TWO BUILDERS ASSOCIATIONS, THE CHAMBER OF COMMERCE AND THE THREE CHURCHES THAT ALSO FILED AN AMICUS BRIEF IN THIS CASE. AND I WOULD LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL, AFTER HEARING WHAT MY OPPONENT HAS TO SAY.

MR. WILLIAMS, YOUR POSITION IS BASICALLY THAT THE THIRD DCA HAD NO BUSINESS REACHING THE CONSTITUTIONAL ISSUE IN THIS CASE, CORRECT?

THAT'S CORRECT. THAT SON OF OUR POSITIONS, YES.

YET YOU WANT US TO REACH THAT SAME ISSUE.

THAT IS EXACTLY RIGHT.

CAN YOU EXPLAIN THE DIKE ON THE ANY?

-- THE DICHOTOMY?

FIRST OF ALL, THE JURISDICTION IN THIS COURT IS DIFFERENT THAN IN THE SECOND DISTRICT'S CERTIORARI.

THE CONFLICT WHICH YOU PRESENTED AS THE EXPRESS AND DIRECT CONFLICT WAS THAT THE THIRD DCA'S OPINION REACHING THE CONSTITUTIONAL ISSUE EXPRESSLY AND DIRECTLY CONFLICTED WITH IVEY VERSUS ALLSTATE AND OTHER CASES FROM OUR COURT SAYING THAT, WHILE LIMITING THE SECOND TIER REVIEW IN CERTIORARI CASES, RIGHT?

YES.

SO ONCE WE SAY THAT WE AGREE WITH YOUR POSITION THAT IT DIDN'T VIOLATE IVEY AND IT SHOULDN'T REACH IT, WHY SHOULD WE GO FURTHER, THEN, AND REACH THE SAME ISSUE THAT WE SAY THEY SHOULDN'T HAVE REACHED?

THERE ARE BOTH PRACTICAL AND LEGAL REASONS. FOR INSTANCE, I BELIEVE IN IVEY, IN THAT CASE, ALTHOUGH IT WAS NOT A CONSTITUTIONAL ISSUE, THIS COURT RULED THAT THE THIRD DISTRICT COURT, AND I DON'T HAVE THE EXACT LANGUAGE IN FRONT OF ME, BASICALLY INVENTED A CAUSE OF ACTION OR A BUSINESS BAIZ FOR JURISDICTION THAT IT SHOULD -- OR A BASIS FOR JURISDICTION THAT IT SHOULD NOT HAVE DONE AND HAD NO ABILITY TO DETERMINE THE ISSUE AND YET THIS COURT IN ITS JURISDICTION, WENT AHEAD AND DETERMINED THE ISSUE. IN OUR JURISDICTIONAL BRIEF, WE NOT ONLY CRIED THE CONFLICT FINDING THAT THEY SHOULD NOT HAVE DECIDED THE ISSUE, WITH YOU WE ALSO CITED THE CONFLICT THAT THEY WRONGLY DECIDED THE JURISDICTIONAL ISSUE, IN DIRECT CONFLICT WITH OTHER COURTS THAT THESE EXACT STANDARDS HERE ARE CONSTITUTIONAL STANDARDS.

I THINK ONE OF THE QUESTIONS IN YOUR BRIEF AS YOUR BASIS FOR WHY THE THIRD DCA SHOULD

NOT HAVE REACHED THIS ISSUE WAS THAT THERE WAS NO EVIDENCE PRESENTED BELOW ON THAT ISSUE AND IT IS IN FACT NOT THE KIND OF ISSUE THAT ONE SHOULD PRESENT ON FIRST TIER CERTIORARI REVIEW. ONE SHOULD FILE A DECLARATORY JUDGMENT OR -- A DECLARATORY JUDGMENT OR OTHER INJUNCTION, AND THERE SHOULD BE NO ACTION ON THIS COURT, AND WOULDN'T WE BE REACHING THE EXACT SAME CONSTITUTIONAL ISSUE THAT THE THIRD DCA REACHED IT ON?

THERE IS NO JURISDICTIONAL ISSUE IN THIS CASE. A, THIS HAS BEEN A FACIAL FINDING. THE THIRD DISTRICT COURT DID NOT RULE THAT SOMEHOW OUR ORDINANCES WERE UNCONSTITUTIONAL AS APPLIED IN THIS PARTICULAR INSTANCE ON THIS PARTICULAR SET OF FACTS. THEY SAID THAT HE -- THEY SAID THEY ARE FACIALLY IN ALL COUNTIES. THERE IS NO NEW LAW N A FACIAL, WHAT WE NEED TO LOOK AT IS CAN THESE BE APPLIED LEGALLY IN ANY CONTEXT, AND THE LAW IS WELL ESTABLISHED IN THIS STATE OF WHAT IS REQUIRED FOR A DELEGATION OF AUTHORITY AND TO AVOID A GENERAL VAGUENESS CHALLENGE, AND THE COURT CAN LOOK JUST AT THE LANGUAGE OF THE STATUTE, TO DETERMINE THAT IT IS CONSTITUTIONAL.

WHY, I GUESS THE QUESTION STILL BECOMES WHY SHOULD THIS COURT DO THAT, WHEN, IF IN FACT, WE DECIDE THAT THE THIRD DISTRICT EXCEEDED ITS SECOND TIER REVIEW AUTHORITY, YOU ARE BACK AT SQUARE ONE WITH THE ORDINANCE BEING IN PLACE AND SOME FUTURE LITIGANT CAN, IN FACT, BRING A DECLARATORY JUDGMENT ACTION, IF THEY FEEL THAT THIS ORDINANCE IS UNCONSTITUTIONAL?

YOU ARE RIGHT, YOUR HONORS, AND THE PROBLEM IS THIS HAS CREATED ALREADY, TREMENDOUS ECONOMIC BURDENS IN OUR COUNTY, HAS HALTED THE CONSTRUCTION OF, FOR INSTANCE, CHURCHES THROUGHOUT THE COUNTY. HAS HALTED THE CONSTRUCTION OF PRIVATE SCHOOLS THROUGHOUT THE COUNTY, WHERE WE HAVE --

DIDN'T THOSE PARTIES HAVE THE OPPORTUNITY TO HAVE BROUGHT THIS ISSUE BEFORE THE TRIAL COURT, IF THERE WAS A PROBLEM?

WELL, THOSE PARTIES WOULD NOT WANT THE ORDINANCE TO BE UNCONSTITUTIONAL. OF COURSE THEY WOULD WANT THE ORDINANCE TO BE CONSTITUTIONAL. BUT THE PROBLEM IS THE THIRD DISTRICT COURT HAS MADE ITS FEELINGS KNOWN ON THIS ISSUE SO STRONGLY THAT IN TWO SEPARATE CASES THEY HAVE RULED OUR ORDINANCE AS UNCONSTITUTIONAL, WHERE NO ONE RAISED THE ISSUE OR BRIEFED THE ISSUE BUT THE THIRD DISTRICT FELT THIS IS THE LAW. YOU CAN'T PUT THE TOOTHPASTE BACK IN THE TUBE HERE. WHAT WE HAVE IS A DE FACTO -- DECISION BY THE JUDGES ON THIS COURT WITH STRONG FEELINGS AND HAVE NOT REQUIRED ANY BRIEFING ON THE MERITS.

BUT IF WE AGREE WITH YOU, WE DO PUT THE TOOTHPASTE BACK IN THE TUBE, DO WE NOT? AREN'T WE GETTING BACK TO STRAR SQUARE ONE? -- TO SQUARE ONE? I AM CONCERNED WITH THE PRECEDENT HERE THAT, IF WE GO AHEAD AND ADDRESS THIS ISSUE, WHERE YOU ARE SAYING IT WAS IMPROPER FOR THEM TO ADDRESS THIS ISSUE AND FIRST OF ALL, YOU WANT US TO RULE THAT IT WAS IMPROPER FOR THEM TO ADDRESS THE ISSUE AND THEREFORE TO QUASH THAT DECISION, BUT THEN, ALL RIGHT, YOU ARE SAYING, BUT NEVERTHELESS THE EVEN THOUGH IT WAS IMPROPER FOR THEM TO ADDRESS THE ISSUE, WE WANT YOU TO NOW GO AHEAD AND ADDRESS THE ISSUE, AND SO THAT IS A VERY DANGEROUS PRECEDENT FOR THIS COURT TO SET, IS IT NOT, WITH OTHER ISSUES AND CASES COMING UP YOU KNOW, LATER. WE HAVE TO DECIDE THIS CASE NOT JUST FOR THIS PARTICULAR CASE, SO WHY ISN'T THAT ADEQUATE RELIEF, BECAUSE IF YOU PREVAIL, AND THEY DID EXCEED THEIR JURISDICTION, AND THEIR REVIEW, DOESN'T THAT PUT THE TOOTHPASTE BACK IN THE TUBE, AND THAT DECISION HAS BEEN QUASHED, NOW LEAVES THE PARTIES AT SOME TRIAL COURT LEVEL, TO FARRELLY DEBATE AND HASH OUT -- TO FAIRLY DEBATE AND HASH OUT THESE ISSUES.

I DON'T THINK IT PUTS IT BACK IN THE TUBE, YOUR HONOR. FIRST OF ALL, IN THE IVEY CASE ITSELF, SETTING A PRECEDENT, A VERY RECENT CASE OF THIS COURT, THIS COURT FOUND IN A VERY WELL WRITTEN OPINION THAT, THE THIRD DISTRICT EXCEEDED ITS JURISDICTION AND HAD NO BASIS FOR RULE OTH CERTIORARI ISSUE AND YET THE COURT IN INTEREST OF JUDICIAL ECONOMY WHICH RESOLVED AN ONGOING ISSUE, RULED THAT THE THIRD DISTRICT SHOULDN'T HAVE RULED ON AN ISSUE TO BEGIN IT -- TO BEGIN WITH AND RULED ON THE ISSUE. IN 1981, A SUPREME COURT CASE, THIS COURT DISCUSSED AT THAT TIME AN OPINION OF A CIRCUIT COURT, WHICH AT, I BELIEVE BACK IN THOSE TIMES CAME TO COURT IF THERE WAS AN ISSUE OF UNCONSTITUTIONALITY, DIRECTLY STATED THAT IN ITS ORDER IN THIS CAUSE, THE CIRCUIT COURT OPINED THAT THE COURT MAY NOT VIOLATE THE UNITED STATES CONSTITUTIONAL, WHILE THIS COURT UP HOADES THE CONSTITUTIONALITY. IN OTHER WORDS IT WASN'T SUPPOSED TO BE AT THE COURT BECAUSE IT WAS UPHOLDING A CONSTITUTIONALITY IN THE CIRCUIT COURT'S OPINION. WE, IN ORDER TO AVOID WE, IN ORDER FOR JUDDISH ECONOMY, HAVE FOUND THAT THE SPECULATION TO THE CONTRARY NOTWITHSTANDING, FIND IN FAVOR OF THE COURT. THERE WOULD BE A JUDICIAL ECONOMY AND A GREAT BENEFIT TO THE ECONOMY OF DADE COUNTY. THERE IS A CURRENT CASE RIGHT NOW, BASED ON THE THIRD DISTRICT COURT'S REASONING AS EXPRESSED, TRYING TO MAKE A 1989 ZONING RESOLUTION INVALIDATED, BASED ON THIS ALLEGED UNCONSTITUTIONALITY STANDARDS. LEAVING ZONING, LEAVING LAW FIRMS -- LEADING LAW FIRMS WITHIN THE COUNTY HAVE OPINED THAT THERE IS A PROBLEM, GIVEN THIS RATIONALE OUT THERE, WITH LENDING AND ZONING APPROVALS, THAT THEY MAY BE SUBJECT TO OTHER ATTACKS, BESIDES JUST IN THE TRADITIONAL APPROVAL FOR CERTIORARI AFTER APPROVAL.

LET ME JUST GO, ASSUMING WE EITHER RULE, WE DO NOT DECIDE THE CONSTITUTIONALITY BUT QUASH THE THIRD DISTRICT'S DECISION FINDING IT UNCONSTITUTIONAL. THE COUNT COUNTY INITIALLY WAS -- THE COUNTY INITIALLY WAS THE PETITIONER TO THE THIRD DISTRICT ON THE CIRCUIT COURT'S ORDER.

THAT'S CORRECT.

MY UNDERSTANDING OF THE COUNTY'S POSITION AT THE PRESENT TIME, IS YOU WOULD JUST BE AS HAPPY AS COULD BE, IF THE CIRCUIT COURT ORDER, WHICH REMANDED THE CASE BACK TO THE ZONING BOARD FOR CONSIDERATION, BASED ON ITS ORDER, WAS PUT INTO EFFECT. OR ARE YOU ARGUING THAT, WE, WE SHOULD GO FURTHER AND SAY THE CIRCUIT COURT ERRED IN SOME WAY?

YES. WE ARE STRONGLY ARGUING THAT THE CIRCUIT COURT ERRED IN MANY WAYS. THEY ALSO ABUSED OR MISAPPLIED, I DON'T WANT TO SAY AND -- I DON'T WANT TO SAY ABUSED BUT MISAPPLIED THE CERTIORARI STANDARDS OF THIS COURT, AND THOSE MISS ANDATION -- THOSE MISAPPLICATIONS OF THE CERTIORARI STANDARD ARE EVIDENT FROM THE FACE OF THE CIRCUIT COURT OPINION ITSELF, SO IT IS NOT NECESSARY TO GO INTO THE RECORD FOR THE CIRCUIT COURT TO DETERMINE THE ERRORS OF THE CIRCUIT COURT, AND JUST AS THIS COURT DID IN DEUSEAU AND FPL, WE WOULD ASK THAT YOU REMAND THE CASE BACK TO THE CIRCUIT COURT FOR THEM TO PROPERLY APPLY THE THREE-PRONGED STANDARD OF FIRST HERE CERTIORARI REVIEW.

WHAT DID THEY DO WRONG? AND I ASSUME THIS IS WHAT YOU WOULD INITIALLY ARGUE TO THE THIRD DISTRICT, THAT THEY DIDN'T EVER --

YES. FIRST OF ALL, IN VIOLATION OF THE STANDARDS SET FORTH IN THE DEUSEUA CASE, A RECENT CASE SET BY THIS COURT, THE CIRCUIT COURT IGNORED COMPETENT EVIDENCE BEFORE IT WHICH WOULD HAVE SUPPORTED THE DECISION OF THE ZONING BOARD. THERE WERE PLANS, PHOTOGRAPHS AND SIMULATIONS THAT SHOWED THE HYATT, THE SCALE AND THE INDUSTRIAL -- THE HEIGHT, THE SCALE AND THE INDUSTRIAL APPEARANCE OF THE 148-FOOT FOR YOUER THAT

IS AT ISSUE HERE, SHOWS A RESIDENTIAL NEIGHBORHOOD DIRECTLY TO THE NORTH AND TO THE SOUTH OF THIS RESIDENTIAL AREA, AND THAT THERE WAS FACT-BASED TESTIMONY FROM THE NEIGHBORS THAT THERE WOULD BE NOTHING TO HIDE THIS 148-FOOT INDUSTRIAL TOWER FROM THE RESIDENTIAL NEIGHBORHOODS, BUT THE COURT REVAID -- REWEIGHED THE EVIDENCE AND FOUND THAT BECAUSE THERE WAS ANOTHER ROUGHLY SIMILAR-HEIGHT TOWER SOME DISTANCE TO THE EAST OF THE APPLIED-FOR TOWER, WHICH THE NEIGHBORS TESTIFIED COULD BARELYLY BE SEEN FROM THEIR NEIGHBORHOOD, THE CIRCUIT COURT THEN SAID IT CANNOT BE ARGUED THAT THIS NEW TOWER WOULD BE INCOMPATIBLE WITH THE AREA, SO THEY HAVE CLEARLY RIGHT THERE, SUBSTITUTED THEIR JUDGMENT OF WHAT CAN BE ARGUED OR WHAT CAN BE DETERMINED.

WASN'T THE MAJOR CONCERN OF THAT OPINION WAS THAT THE ZONING BOARD JUST BASICALLY STATED THE STANDARD, WITHOUT REALLY LAYING FORT FINDINGS OF FACT?

THAT'S CORRECT, WHICH IS, UNDER THIS COURT'S CASE IN SNYDER, ALL THAT THE ZONING BOARD WAS REQUIRED TO DO.

SO YOU DON'T THINK THE ZONING BOARD AT ANY POINT, NEEDS TO BASICALLY JUST ISSUE A SUMMARY DECISION, WITHOUT APPLYING THE STANDARDS TO THE FACTS BEFORE IT, AND ARTICULATING IT SO THAT, ON CERTIORARI REVIEW, THE CIRCUIT COURT HAS SOMETHING TO LOOK AT?

WELL, THE BOARD --

OTHER THAN GOING BACK AND REVIEWING THE RECORD ITSELF?

THE BOARD CLEARLY NEEDS TO OBVIOUSLY APPLY THE STANDARDS TO THE RECORD ON REVIEW, AND OF COURSE I SEE JUSTICE PARIENTE WITH A SMILE ON HER FACE, BECAUSE SHE HAS LONG BEEN ON RECORD OF FEELING THAT THERE IS A NEED FOR FINDINGS OF FACT IN THIS INSTANCE, AND OTHER JUSTICES HAVE NOT QUITE AGREED WITH HER. THAT IS REALLY NOT AN ISSUE THAT IS BEFORE THE COURT TODAY. OF COURSE WE WOULD BE HAPPY TO ADDRESS IT, IF THE COURT WOULD LIKE US TO, AND I DO HAVE, YOU KNOW, SOME ARGUMENTS I COULD MAKE TODAY ON THAT ISSUE, BUT IT IS NOT REALLY AN ISSUE BEFORE US TODAY.

SHOULDN'T WE, THEN, THOUGH, IF THE THIRD DISTRICT DID NOT ACTUALLY ADDRESS THE ISSUES THAT WERE RAISED, WOULDN'T THE MOST APPROPRIATE THING BE FOR US TO REMAND IT TO THE THIRD DISTRICT FOR THEM TO CONSIDER THESE ISSUES, THE SUBSTANTIVE ISSUES THAT WERE RAISED BY THE COUNTY, RATHER THAN OURSELF, DECIDING WHETHER THE CIRCUIT COURT EXCEEDED ITS JURISDICTION UNDER FIRST TIER CERTIORARI REVIEW?

THAT WOULD BE ACCEPTABLE TO THE COUNTY, TO DIRECT THE DISTRICT COURT. WHAT WE WERE DOING WAS FOLLOWING THIS COURT'S PRECEDENCE IN DEUSEAU, AND TWO OTHERS, WHERE THE COURT REMANDED DIRECTLY BACK TO THE CIRCUIT COURT. IN FACT, IT IS INTERESTING IN THE DEA SEAU CASE, WHEN YOU REMANDED IT BACK FOR THE THREE-PRONG FIRST HERE CERTIORARI REVIEW, THE OMNIPOINT DECISION HAD COME OUT IN THE INTERIM, AND THE CIRCUIT COURT EXPRESSLY DECLINED TO FOLLOW THIS COURT'S MANDATE OF REVIEW AND, INSTEAD, SAID THIS ORDINANCE IS UNCONSTITUTIONAL AND THEREFORE WE ARE ABOUT GOING TO DENY THE APPLICATION. THE THIRD DISTRICT COURT DID REVIEW THAT, ON YET ANOTHER PETITION FOR CERTIORARI, TO THE THIRD DISTRICT COURT, BUT IT IS INTERESTING THAT IS JUST ONE EXAMPLE OF HOW THE TOOTHPASTE BEING OUT OF THE TUBE HAS CAUSED PROBLEMS.

IS IT YOUR POSITION THAT THE HEIGHT RESTRICTION THAT, THAT, ITSELF, THE FACT THAT THIS IS A TALL POLE, THAT THAT IS A BASIS THAT THE ZONING BOARD, UNDER THE STATUTE, THE ORDINANCE AS WRITTEN, CAN DENY AN UNUSUAL USE EXCEPTION?

NOT SPECIFICALLY JUST ON HEIGHT. FOR INSTANCE, IF WE LOOK AT THE COMPREHENSIVE DEVELOPMENT MASTER PLAN STANDARDS THAT WE CITED TO THE COURT, AND OF COURSE WHICH WE ARE REQUIRED TO TAKE INTO ACCOUNT UNDER SNYDER AND ITS PROGENY, WHEN CONSIDERING THE COMPATIBILITY, ONE OF THE THINGS YOU LOOK AT IS HEIGHT, IN RELATION TO WHAT IS IN THE SURROUNDING AREA, SO IN OTHER WORDS IF THERE WERE IN THE MIDDLE OF A VERY LARGE COMMERCIAL AREA OR A VERY LARGE INDUSTRIAL AREA, WHERE THERE WEREN'T SINGLE-FAMILY RESIDENCES CLOSE BY THAT WOULD BE IMPACTED BY THE VISION OF THIS INDUSTRIAL-LOOKING VERY TALL POLE, WHEN THEY WAKE UP IN THE MORNING TO GET THEIR MORNING PAPER, THEN THE HEIGHT IN AND OF ITSELF, WOULD PROBABLY NOT DISQUALIFY OR BE SUFFICIENT BASIS, I SHOULD SAY, FOR THE BOARD TO EXERCISE ITS DISCRETION AND DENY THE APPLICATION, BUT UNDER THE FACTS OF THIS CASE, WHERE IT IS CLEAR THAT IT WOULD BE VISIBLE TO THESE RESIDENTS, EXCUSE ME, AND THAT NOTHING ELSE OF THIS HEIGHT WITH THIS SORT OF APPEARANCE, JUST A STARK TOWER WITH ANTENNA RIGGED ON IT, IS IN THE AREA THAT IS VISIBLE TO THE MR. CHIEF JUSTICE

YOU WANTED TO BE REMINDED OF YOUR REBUTTAL TIME AND THE MARSHAL TURNED ON THE LIGHT TO REMIND YOU.

YOU HAVE TO CONSIDER THE SURROUNDING AREA AND WHAT THE CAPABILITY IS. I WILL TRY TO ADDRESS YOUR FURTHER QUESTIONS ON REBUTTAL. THANK YOU.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. JUSTICE ANSTEAD. MY NAME IS DEBORAH MARTOHUE. I AM WITH THE LAW FIRM OF HAZE AND MARTOHUE. I REPRESENT OMNIPOINT HOLDINGS, IN THIS CASE THE APPELLEE.

I WANT TO UNDERSTAND THE THINGS THAT YOU DO AGREE WITH THE COUNTY BECAUSE APPARENTLY YOU AGREE WITH SOME THINGS. DO YOU AGREE THAT THE THIRD DCA EXCEEDED ITS SCOPE OF SECOND TIER REVIEW?

I AM NOT ABSOLUTELY CONVINCED THAT THE COURT DID NOT HAVE SOME FUNDAMENTAL POWER, SOME INHERENT POWER TO REVIEW, IN THEIR OPINION, A ORDINANCE THAT MIGHT NOT CONSTITUTE VALID LAW, BUT I DO AGREE WITH THE COUNTY THAT THE ORDINANCE IS NOT FACIALLY UNCONSTITUTIONAL. IF READ PROPERLY AND NOT INTERPRETED AS THE WAY THE COUNTY JUST ARGUED TO YOU TODAY, IT WOULD BE FACIALLY CONSTITUTIONAL.

AND YOU ARE ASKING US TO, THEN, GO FURTHER THAN EVEN THE THIRD DCA DID, AND HOLD THAT IT IS UNCONSTITUTIONAL AS APPLIED.

YOUR HONOR BECAUSE THE COUNTY HAS INTERPRETED THE ARGUMENTS IN DEFENSE OF THE ZONING BOARD DECISION, IMPORTING VARIOUS PROVISIONS THROUGHOUT THE COMPREHENSIVE PLAN, TO DEFEND THE ZONING BOARD, I BELIEVE THAT WE, UNFORTUNATE LAT ANY ARE IN A POSITION BEFORE -- UNFORTUNATELY ARE IN A POSITION OF HAVING TO ARGUE BEFORE THIS COURT THAT THAT IS UNCONSTITUTIONALLY APPLIED.

ISN'T THAT PRECISELY THE KIND OF ISSUE FOR WHICH EVIDENCE MUST BE PRESENTED BELOW? THERE NEEDS TO BE SOME KINDS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, BECAUSE IT IS NOT JUST CONSIDERING A FACIAL CHALLENGE. IT IS CONSIDERING THE SPECIFIC CIRCUMSTANCES OF THE CASE. HOW ARE WE GOING TO, THEN, ADDRESS THAT, WITHOUT EVIDENCE HAVING BEEN PRESENTED ON THE ISSUE?

I DON'T DISAGREE WITH YOU IN THE TRADITIONAL SENSE, THE WAY THESE TYPES OF ACTIONS ARE BROTS BEFORE THE COURT. HOWEVER, WE ARE IN AN AWKWARD CIRCUMSTANCE, WHERE THE THIRD DISTRICT DECIDED ADD CONSTITUTIONAL ISSUE THAT WE KIND OF SAW COMING

BECAUSE OF THE BRANNON DECISION IN LATE NOVEMBER, RIGHT BEFORE ORAL ARGUMENT. HOWEVER, IN THE DEFENSE, AGAIN, LIKE I SAID, THIS ISSUE IS NOT AS VIRGIN AS IS THE COUNTY MAY LEAD THE COURT TO BELIEVE. IT CERTAINLY WAS DISCUSSED AD NAUSEAM IN ORAL ARGUMENT BEFORE THE THIRD DISTRICT, AND WE DIDN'T HAVE A CHANCE TO BELIEVE IT, BUT I AM BEFORE THIS -- TO BRIEF IT, BUT I AM BEFORE THIS COURT UNFORTUNATELY HAVING TO DEFEND AN INTERPRETATION THAT IS APPLIED, BECAUSE YOU PUT TELECOMMUNICATION FACILITIES IN A POSITION WHERE THEY HAVE TO DEAL WITH A STANDARD THAT IS ABSOLUTELY IMPOSSIBLE TO SATISFY, AND I CALL IT IS A CATCH-22. AS JUSTICE PARIENTE JUST SAID, YOU ARE DENYING A TELECOMMUNICATIONS FACILITY BECAUSE IT IS TALL? NOWHERE IN THE STANDARDS, IS THERE A VISIBILITY REQUIREMENT OR AN AESTHETICS REQUIREMENT, EVEN, NO REQUIREMENT REGARDING TALL. THE COUNTY IS ARGUING THAT THERE ARE THINGS LIKE HEIGHT AND SCALE AND BULK IN THE COMPREHENSIVE PLAN, AND I DO AGREE THAT SNYDER DICTATES THAT THE LAND DEVELOPMENT REGULATIONS BE CONSISTENT WITH A COMPREHENSIVE PLAN, AND THEY ARE, BUT AT THE END OF THE DAY, IF THE COUNTY IS GOING TO APPLY CRITERIA TO A SPECIFIC SPECIAL EXCEPTION OR UNUSUAL USE APPLICATION, THOSE CRITERIA MUST BE IMPLEMENTED IN THE LDR'S. OTHERWISE, HOW CAN YOU SAY A PERSON IS ON REASONABLE NOTICE AS TO WHAT CRITERIA THEY ARE TO SATISFY, WHEN YOU KNOW, THERE ARE HUNDREDS OF POLICIES, OBJECTIVES AND GOALS IN A COMPREHENSIVE PLAN, AND I MUST TELL YOU QUITE FRANKLY ON ANY GIVEN DAY, YOU CAN PARS THROUGH THAT COMPREHENSIVE PLAN AND FIND A POSITION TO SUPPORT YOUR PARTICULAR ARGUMENT DU JOUR.

ISN'T THAT TRUE, REALLY, ABOUT MOST SPECIAL EXCEPTIONS? THAT IS WHAT THERE IS A CERTAIN AMOUNT OF DISCRETION THAT IS VESTED, WHEN SOMEONE IS SEEKING AN EXCEPTION, AS OPPOSED TO THERE ARE PLACES THAT YOUR TOWER COULD BE BUILT, WITHOUT HAVING TO, THAT WOULD BE WITHIN THE ZONING CLASSIFICATIONS THAT, AND THIS WASN'T ONE OF THEM. CORRECT?

RESPECTFULLY, YOUR HONOR THAT, IS INCORRECT. THIS SPECIAL EXCEPTION, UNUSUAL USE, IS PERMITTED IN THE LAND USE DESIGNATION, WHICH IS BUSINESS AND OFFICE. IT IS A PERMITTED USE. IN THE BU-1-A, A COMMERCIAL DESIGNATION. IT JUST MUST GO THROUGH PUBLIC HEARING AND MEET THE SPECIFIC CRITERIA, AND IF I COULD READ TO YOU, I MEAN RIGHT ON THE FACE OF THIS CRITERIA, THE CODE SAYS "WOULD NOT GENERATOR RESULT IN EXCESSIVE NOISE OR TRAFFIC, CAUSE UNDUE OR EXCESSIVE BURDEN ON PUBLIC FACILITIES," THEY LISTED ALL OF THE PUBLIC FACILITIES. "WOULD NOT TEND TO CREATE FIRE OR OTHER EQUALLY DANGEROUS HAZARDS, WOULD NOT PROVOKE EXCESSIVE OVERCROWDING OR HAVE THE ABILITY", COMMA, WHEN "CONSIDERING THE NECESSARY REASONABLENESS REQUIRED FOR THE AREA OF CONCERN AND APPLIED-FOR COMPATIBILITY EXCEPTION."

WHY DIDN'T YOU COMPLY WITH THE CIRCUIT COURT'S ORDER?

I AM PLEASED WITH THE CIRCUIT COURT'S ORDER.

BUT THAT AVOIDS HAVING TO REACH THE CONSTITUTIONALITY OF THIS STATUTE, CORRECT?

YES, YOUR HONOR.

AND THE OTHER QUESTION I HAVE, IS THIS ORDINANCE DIFFERENT FROM ANY OF THE ORDINANCES THROUGHOUT THE STATE OF FLORIDA, IN OTHER WORDS, DO ANY OF THE ORDINANCES DEAL WITH CELLULAR TOWERS SEPARATELY FROM THEIR GENERAL ZONING CODE?

ABSOLUTELY, YOUR HONOR, AND I PARTICIPATED IN DRAFTING MANY OF THOSE ORDINANCES AROUND THE STATE AND MANY LOCALITIES, INCREASINGLY, HAVE DEALT WITH TELECOMMUNICATIONS IN A DIFFERENT MANNER, UNDERSTANDING THAT COMPATIBILITY CANNOT BE ADDRESSED IN THE SAME MANNER THAT YOU MAY ADDRESS OTHER TYPES OF USES, BECAUSE THE INHERENT FUNCTION OF THAT TYPE OF FACILITY REQUIRES THEM TO BE HIGHER

THAN ANYTHING ELSE IN THE AREA. OTHERWISE THEY DON'T WORK. AND UNDER THE COUNTY'S THEORY OF COMPATIBILITY, IF YOU ARE THE FIRST ONE ON THE BLOCK, YOU CAN'T BE COMPATIBLE, BECAUSE THERE IS NO SIMILAR USES IN THE AREA, SO BY DEFINITION, YOU ARE INCOMPATIBLE, AND IF YOU ARE THE SECOND OR THIRD ONE ON THE BLOCK, YOU ARE NOT COMPATIBLE, BECAUSE NOW YOU HAVE A CUMULATIVE ADVERSE IMPACT, AND WHEN YOU HAVE CRITERIA THAT SAYS COMPATIBLE, NECESSARY AND REASONABLE, AND YOU ARE USING THAT TYPE OF CRITERIA TO ANALYZE IT, YOU NEGATE THE NECESSITY AND REASONABLENESS PRONG OF THAT, BECAUSE IF YOU ARE TALL ENOUGH, AND YOU ARE THE ONLY ONE ON THE BLOCK, YOU ARE PROBABLY NOT, THERE IS NO SIMILAR USES, BUT YOUR NECESSARY AND REASONABLENESS.

WHEN YOU WANT WENDT TO THE CIRCUIT COURT, YOU PETITIONED FOR A WRIT OF CERT. YOU DIDN'T RAISE THIS ISSUE BEFORE THE CIRCUIT COURT, DID YOU?

I ABSOLUTELY ARGUED IT, BUT IN TERMS OF CATCH-22, BECAUSE THE WE PETITIONED, THE COUNTY RESPONDED INTERPRETING, IN DEFENDING THEIR ZONING CODE, INTERPRETING THIS TYPE OF COMPATIBILITY ARGUMENT, PUTTING US IN A POSITION NOT TO SAT I PHI. -- TO SATISFY. WE WERE NOT ON NOTICE THAT THAT WOULD BE THE OFFENSE. OTHERWISE WE CLEARLY DO NOT BURDEN ANY OF THE ENUMERATED CRITERIA THAT IS IN THE CODE, AND IN FACT --

ISN'T THAT ARGUMENT KIND OF, IT IS NOT A REALLY GOOD ARGUMENT, WHEN YOU LOOK AT THE FACT THAT THERE IS ANOTHER TOWER, ISN'T THERE, THAT WAS IN A SIMILAR AREA.

IT WAS ADJACENT.

HOWEVER THAT, TOWER ENDED UP BEING COMPATIBLE WITH THE AREA BECAUSE THE PEOPLE WHO LIVED IN THESE TOWNHOUSES OR HOMES OR WHATEVER IT WAS DIDN'T HAVE THE SAME VISIBILITY PROBLEM THAT YOUR TOWER HAS.

RESPECTFULLY, YOUR HONOR, THAT IS THE COUNTY'S INTERPRETATION OF THAT, AND WE UNDERSTAND THAT YOU KNOW, SOME OF THE CITIZENS SAID THAT THIS --

ISN'T THAT WHAT THE EVIDENCE THAT WAS PRESENTED WHEN THIS, WHEN THE HEARING TOOK PLACE, ISN'T THAT WHAT THE CITIZENS CAME IN AND BASICALLY SAID ABOUT YOUR TOWER VERSUS THE OTHER TOWER THAT WAS PRESENTED?

YOUR HONOR, THAT THAT WOULD BE, THEIR OPINION TESTIMONY, BECAUSE OUR PHOTO SIMULATIONS DID NOT SHOW THAT, AND IN FACT THIS 50, 150-FOOT TOWER, WHICH IS TWO FEET TALLER THAN THE TOWER WE PROPOSED, WE WOULD HAVE COLOCATED ON IT BUT IT WASN'T STRUCTURALLY POSSIBLE, IS ON THE PROPERTY IMMEDIATELY ADJACENT TO US. WE HAVE THE SAME 200-FOOT CORRIDOR, THE SAME 4-TO-SIX-LANE ROAD DIVIDING THE RESIDENTIAL AREA, THE SAME RESIDENTIAL AREA, YOU COULD ASK FOR MORE IDENTICAL FACTS UNLESS THE TOWER WAS RIGHT ON TOP OF OUR TOWER, BUT REGARDLESS OF THAT, UNDER YOUR STANDARD FOR CERTIORARI REVIEW, IF IT IS ENTIRELY WITHIN THE FIRST TIER REVIEW OF THE CIRCUIT COURT, AS A MATTER OF LAW, TO DETERMINE WHETHER OR NOT THE EVIDENCE IS LEGALLY SUFFICIENT AND THEY DETERMINED THAT IT WASN'T, AND IF THE STANDARD OF REVIEW IS THAT THE CIRCUIT COURT IS JUST SUPPOSED TO RUBBER STAMP WHATEVER ZONING DECISIONS ARE, ISN'T DOESN'T THAT STAND SNYDER SQUARELY ON ITS HEAD?

BUT WHAT YOU ARE LOOKING AT AS I UNDERSTAND IT IN THIS REVIEW, IS WHETHER OR NOT WHAT THE BOARD DID IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, SO IN THAT YOU LOOK AT THE EVIDENCE, WHETHER THERE MAYBE EVIDENCE PRO AND EVIDENCE CON, BUT IF YOU LOOK AT THE EVIDENCE AND THERE IS EVIDENCE THAT WILL SUPPORT WHAT THE BOARD DID, THEN DOESN'T, ON THAT FIRST TIER REVIEW, THAT YOU HAVE TO SAY THAT THIS WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE?

NOT IN THIS CASE, BECAUSE THE COURT HELD THAT THE OPINION TESTIMONY OF CITIZENS WHO HAD GENIZED AESTHETIC CONCERNS -- TO -- CITIZENS WHO HAD GENERALIZED AESTHETIC CONCERNS, WHICH THIS COURT DEEMED NOT SUFFICIENT IN EVIDENCE OF THIS TYPE, WHEREAS OTHERWISE SOMEBODY'S OPINION CANNOT BE FACT-BASED. IT IS AN OPINION. BEAUTY IS IN THE EYE OF THE BEHOLDERS, THE SAME AS THE SECTION 11 CASE IN MIAMI WHERE THEY SAID THE INDUSTRIAL BUILDING WAS AN EYESORE. WHY DO WE HAVE STRICT SCRUTINY, AND I THINK THAT DOES LEAD INTO JUSTICE PARIENTE'S DISSENT IN BROWARD COUNTY, THE ANALYSIS OF WHY THERE NEEDS TO BE WRITTEN FINDINGS, AND THAT LEADS TO JUSTICE BELL'S QUESTION OF IT IS NOT JUST SNIDER THAT CONTROLS IN THIS CASE FORM THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES WRITTEN FINDINGS.

LET'S GET BACK TO THE SECOND TIER REVIEW. LET'S START FROM THE BEGINNING HERE. WE HAVEN'T REALLY ADDRESSED THAT VERY MUCH YET. HOW DO YOU JUSTIFY THE FIRRED DCA REACHING THE CONSTITUTIONAL ISSUE, WHEN IT WASN'T PART OF SECOND TIER REVIEW, WASN'T RAISED BEFORE THE ZONING BOARD, WASN'T RAISED BEFORE THE CIRCUIT COURT, WASN'T RAISED IN THE THIRD DCA, AND THEY JUST PULLED IT OUT AND DECIDED THE ISSUE? HOW DO YOU JUSTIFY THAT?

I DON'T JUSTIFY IT, EXCEPT THAT THERE MIGHT BE SOME REASON SOMEONE SAYS THAT, TANTAMOUNT TO A FAILURE TO ABIDE BY CONSTITUTIONAL PROTECTIONS IS TANTAMOUNT TO A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW, BUT QUITE FRANKLY, IF THAT WAS THE ONLY ISSUE BEFORE THIS COURT TODAY, I AM NOT SURE IF I WOULD BE HERE, BUT THE PROBLEM IS THAT THE COUNTY IS NOW ATTACKING THE UNDERLYING DECISION, AND I DON'T BUY OFF ON THE PREMISE.

YOU THINK WE CAN SIMPLY QUASH THE THIRD DCA'S DECISION BECAUSE THEY SHOULDN'T HAVE REACHED THE CONSTITUTIONAL ISSUE AND PUT A PERIOD?

I WOULD LIKE TO CLARIFY AND SAY THAT I THINK THAT WE CAN QUASH THE THIRD DISTRICT COURT OF APPEALS DECISION ON THE FACE OF THE CONSTITUTIONALITY ISSUE, BUT REMEMBER THEY AFFIRMED THE CIRCUIT COURT AND DID NOT ASSIGN ANY ERROR, AND SECOND TIER CERTIORARI REVIEW FINDS THAT IT CAN'T BE MERE LEGAL ERROR. IT MUST BE AN ERROR SO SERIOUS AS TO VIOLATE A CLEARLY-ESTABLISHED PRINCIPLE OF LAW THAT RESULTS IN A MISCARRIAGE OF JUSTICE.

DOESN'T THAT FOLLOW-UP TO JUSTICE CANTERO'S QUESTION, ISN'T THAT WHAT WE OUGHT TO DIRECT OUR ATTENTION TO FIRST? I MEAN HOW WE ARE HERE TO BEGIN WITH. I MEAN, IS IT YOUR POSITION THAT WE SHOULDN'T BE HERE TO BEGIN WITH, BECAUSE THE THIRD DISTRICT SHOULDN'T HAVE BEEN THERE TO BEGIN WITH? IS THAT WHERE WE ARE?

I THINK I AGREE. I THINK THAT I AM STANDING HERE TO TELL YOU THAT THE CIRCUIT COURT WAS NOT ASSIGNED ANY ERROR AND THAT THE THIRD DISTRICT AFFIRMED THAT RESULT AND IT SHOULD BE CONFIRMED SEPARATE AND DEAL WITH AS THIS COURT SEES FIT. IF THEY FIND THAT THEY EXCEEDED THEIR JURISDICTION ON SECOND TIER REVIEW AND WOULD REICH TO QUASH THAT DECISION, I WOULD AND TONE AGREE WITH THE -- I WOULD HAPPEN TO AGREE WITH THE COUNTY BECAUSE OF ECONOMIC REALM FIXES, AND I WOULD LET THE COUNTY PRESS THAT POINT. WE BELIEVE THAT THE CERTIORARI REVIEW STANDARDS SET FORTH IN THE RECENT TRILOGY BY THIS COURT IS PRETTY CLEAR THAT CIRCUIT COURT DECISION SHOULD STAND, AND IT IS IS NOT JUST ABOUT SUBSTANTIAL COMPETENT EVIDENCE, IF I COULD HAVE ONE MOMENT. IT IS ABOUT THE VIOLATION OF THE TELECOMMUNICATIONS ACT ON TWO PRONGS, THE FAILURE TO HAVE WRITTEN DECISION TIED TO EVIDENCE IN THE RECORD, AND THEY VIOLATED THE DISCRIMINATION CLAUSE OF THE TELECOMMUNICATIONS ACT.

NOW, WHAT IS IT, YOU SAID THAT, THE, IF, IN ANSWER TO JUSTICE CANTERO'S QUESTION, THAT

WE SHOULDN'T JUST GO AHEAD AND QUASH THE THIRD DISTRICT BECAUSE THEY APPROVED THE CIRCUIT COURT'S OPINION. HOWEVER, FOOTNOTE ONE SAYS WE DO NOT REACH THE VARIOUS QUESTIONS AS TO SUBSTANTIAL COMPETENT EVIDENCE, SO CLEARLY THAT WAS YOUR, THAT WAS THE MAIN ARGUMENT, IS THAT THEY, THAT THE CIRCUIT COURT ERRONEOUSLY APPLIED SUBSTANTIAL COMPETENT EVIDENCE BY NOT LOOKING AT THE OPINION TESTIMONY OF THE NEIGHBORS, SO HOW, AGAIN, I GUESS, UNLESS WE REACH THAT SUBSTANTIVE ISSUE, I DON'T SEE HOW WE COULD SAY THAT THE THIRD DISTRICT OPINION APPROVED THE CIRCUIT COURT ORDER BUT THEN WENT FARTHER THAN IT NEEDED TO DO, WHEN IT SPECIFICALLY SAID THAT IT DIDN'T REACH THE SUBSTANTIAL COMPETENT EVIDENCE ISSUE.

FIRST, IT IS THE COUNTY'S POSITION THAT THE CIRCUIT COURT SUBSTANTIALLY REACHED THE EVIDENCE ISSUE, BUT I BELIEVE THAT THE FOOTNOTE IN THE THIRD DCA AND WITH AN ABUNDANCE OF CAUTION IN ADMONISHMENT AND RECOMMEND TO THIS COURT THAT THEY WEREN'T GOING TO TOUCH IT AND THE PREVALENT ISSUE AND THEY WERE NOT GOING TO USURP THE FIRST DISTRICT'S JURISDICTION ON THAT ISSUE AND LET ME ASK THAT THE COURT, IN QUASHING, TO CONSIDER, THAT JUST BECAUSE THE COURT DOESN'T REACH AN ISSUE UNDER J-TEXAS REALTY -- UNDER THE JTEX ISSUE, THE GREEN, AND BECAUSE THEY DIDN'T REACH THAT ISSUE, IT MEANS THAT THEY PROPERLY CONDUCTED THEIR SECOND TIER CERTIORARI REVIEW, DOESN'T MAKE SENSE TO ME, AND THAT WOULD MEAN EVERY PCA DECISION THAT HAS NO OPINION AND DECIDES NOT TO REACH ANY OF THOSE ISSUES, WOULD BE ERRONEOUS!

LET ME ASK YOU A QUESTION. WHAT IS YOUR READING OF THE CIRCUIT COURT'S ORDER AS TO WHEN IT REMANDED IT BACK TO THE ZONING BOARD? IT SAYS "CONSISTS WENT THIS OPINION." DO YOU READ THAT AS THE SAME AS WITH THE THIRD DCA, BECAUSE THE THIRD DCA SPECIFICALLY SAYS "TO GRANT APPROVAL."

NO, I DON'T READ IT THE SAME AND UNFORTUNATELY I BELIEVE THAT THE THIRD DCA NORMALLY WOULD NOT SAY THAT, BUT UNDER THESE CIRCUMSTANCES BECAUSE THEY HAD INVALIDATED THE CODE, IN FACT THERE, IS DEBATE, YOU KNOW, WHETHER OR NOT IT WOULD HAVE EVEN GONE BACK TO PUBLIC HEARING WITH NO STANDARDS TO EVALUATE IT, SO I THINK THEY WERE IN A POSITION TO HAVE TO SAY GRANT. NORMALLY, I MEAN, IT IS UNNORTH NATIONAL IN THIS AREA OF LAW. WE REALLY DON'T HAVE A REMEDY, BUT I THINK THE CIRCUIT COURT PHRASED IT PROPERLY. THE THIRD DCA WAS IN A DIFFICULT SITUATION, RECOGNIZING THEY HAD JUST INVALIDATE ADD CODE. SO -- INVALIDATED A CODE. TYPICALLY THEY SEND THEM, BECAUSE AS THE PRECEDENT, AND I DON'T NECESSARILY AGREE WITH THE PRESS TENTENT IN THIS AREA BECAUSE -- WITH THE PRECEDENT IN THIS AREA BECAUSE THERE IS REALLY NO REMEDY FOR CLIENTS LIKE MINE, BUT FOR PURPOSES OF, YOU KNOW, PRIOR PRECEDENT, THE CIRCUIT COURT WAS CORRECT. THEY USUALLY SEND IT BACK TO THE ZONING BOARD FOR RECONSIDERATION.

FOR RECONSIDERATION.

RECONSIDERATION CONSISTENT WITH THE OPINION AND IT GIVES THEM THE OPPORTUNITY TO PUT ON OTHER CONDITIONS, AS LONG AS THE CONDITIONS DO NOT SWALLOW THE APPLICATION. YOU COULDN'T PUT A CONDITION SAYING SURE, YOU COULD PUT A 100-FOOT TOWER. THAT WOULD DEFEAT THE PURPOSE OF WHY THEY NEED A 148-FOOT TOWER. JUST IF THE COURT IS CONSIDERING THE CONSTITUTIONAL ISSUE, WE RESPECTFULLY REQUEST IF YOU SOMEHOW AGREE WITH THE THIRD DCA AND UPHOLD THEIR CONDITION REGARDING PROHIBITION. THERE IS A CONDITION OF FEDERAL COURTS HAVING ANALYZED THIS MORE. IT IS USUALLY NOT A STATE COURT ISSUE, BUT UNDER DIFFERENT TYPES OF TESTS AND ANALYSIS, GAP ANALYSIS, PROHIBITION IN EFFECT, ARE FURTHER EFFORTS REASONABLE OR WOULD THEY BE FRUIT LESS, A MAJORITY OF THE COURTS HAVE HELD THAT THERE ARE NO GENERAL RULES ON WHAT IS A PROHIBITION, BUT A SIGNIFICANT GAP IN COVERAGE OR REASONABLE EFFORTS TO OBTAIN A PERMIT ARE FRUIT LESS, AND IF YOU HAVE NO CODE, THERE IS NO REASONABLE OSTS THAT YOU

COULD -- THERE IS NO REASONABLE EFFORTS THAT YOU COULD UNDERTAKE TO OBTAIN A PERMIT. THE MAJORITY DECISIONS IN 1998 AFTER THE ACT, WERE GENERALLY SAYING BLANKET BANS. YOU NEED BLANKET BANS, BUT AS THE CASE LAW HAVE EVOLVED, SAY A MAJORITY OF THE CASES NOW REALIZE THAT THE INTENT OF THE TELECOMMUNICATIONS ACT IS PRO COMPETITIVE, AND JUST HAVING SOME SERVICE IN A CERTAIN AREA OR CONTROLLED BY ONE OTHER TWO CARRIERS, FRUSTRATES THE PURPOSE OF THE TELECOMMUNICATIONS ACT, SO THIS WOULD, YOU KNOW, HAVING NO CODE, WOULD BE A PROHIBITION, AND WE NEED TO AT LEAST ALLOW THESE FACILITIES TO AT LEAST GO IN AND APPLY FOR A BUILDING PERMIT. LET'S SEE. I MUST GO BACK TO THE WRITTEN DECISION REQUIREMENT ISSUE, BECAUSE THIS IS A REALLY, IS A VERY SIGNIFICANT ISSUE TO THE TELECOMMUNICATIONS INDUSTRY, AND WITH ALL DUE RESPECT TO SNYDER, AND I UNDERSTAND IT IS THE, THE REASONING HAS BEEN CALLED INTO QUESTION A LITTLE BIT ON THIS ISSUE, BECAUSE I THINK IT DOES UNDERMINE THE STRICT SCRUTINY STANDARD. THE TELECOMMUNICATIONS ACT, AND THE INTENT OF THE CONGRESS RECOGNIZE THAT, IF YOU DON'T HAVE AT LEAST SOME EXPLANATION THAT IS NOT GENERIC THAT DOESN'T JUST ADOPT CONCLUSORY LANGUAGE FROM THE CODE OR THE STAFF RECOMMENDATION, IF THERE ISN'T AN EXPLANATION TIED TO EVIDENCE IN THE RECORD, HOW CAN THERE BE MEANINGFUL JUDICIAL REVIEW? YOU ALL, ALL THE WAY UP AND DOWN THE LINE, ARE GOING TO BE GOING BACK AND SECOND-GUESSING, AND I THINK THAT IT IS ILLUSION TO THINK THAT EVEN ON CERTIORARI REVIEW, THAT THE COURTS AREN'T GOING BACK AND REINVESTIGATEING THE RECORD TO A CERTAIN EXTENT, AND IT IS A DISTINCTION WITHOUT A DIFFERENCE. OKAY.

THANK YOU VERY MUCH.

CHIEF JUSTICE: HOW MUCH TIME DOES COUNSEL HAVE ON READULTS BULTHS? -- ON REBUTTAL? ALL RIGHT. COUNSEL.

QUICKLY YOUR HONORS JUST TO ADDRESS BRIEFLY SOME OF THE POINTS MADE BY MY OPPONENT, FIRST OF ALL SHE SAID THAT THE COUNTY STANDARDS AS TO CELL PHONES AS APPLIED TO CELLULAR TOWERS ARE ACTUALLY IMPOSSIBLE TO COMPLY WITH. WE HAVE SUGGESTED THIS IS A NEW ISSUE ONCE AGAIN. WE HAVE HAD PLENTY OF NEW ISSUES ARISE IN THIS CASE SO WE WOULD OBJECT TO A NEW ISSUE AS BEING APPLIED BY THE COURT.

WASN'T IT RAISED IN RESPONSE TO, IN THE CIRCUIT COURT, AFTER THE COUNTY FILED ITS ANSWER?

RAISED IN THE COURT, BY CONSTRUCTIONAL STATUTORY TYPE OF TERM, THAT YOU COULDN'T CONSIDER COMPATIBILITY, UNLESS ONE OF THE EARLIER SEVEN ENUMERATED CRITERIA WERE IMPACTED.

WHAT ABOUT THE ARGUMENT IF I UNDERSTAND IT CORRECTLY, THAT KIND OF ARGUMENT WAS MADE IN THE TRIAL COURT?

THAT'S CORRECT, BUT IS NOT A CATCH-22, BECAUSE FIRST OF ALL, IF IT WAS A CATCH-22, THE EFFECT COULD BE SHOWN AND THEY AS WE WILL HAVE APPLIED AN ARGUMENT, BUT THAT WOULD DEPEND ON THE PARTICULAR LOCATION AND HOW THE CATCH-22 APPLIED TO THAT LOCATION, AND WE DON'T HAVE A RECORD HERE IN ORDER TO MAKE THAT FACTUAL ANALYSIS AND DETERMINATION, BUT AGAIN, ON A FACIAL CONTEXT, HEIGHT AND COMPATIBILITY WITH ANOTHER TOWER IN THE SAME AREA ARE NOT CONSIDERED IN A VACUUM AND NOT A HARD AND FAST RULE. AS COUNSEL IS TRYING TO MAKE OUT THEM TO BE. AGAIN, THE APPROPRIATE CONSIDERATION FOR THE BOARD AND THE ONE IN WHICH THEY ARE ALLOWED TO EXERCISE THEIR DISCRETION AS JUSTICE QUINCE SAID, IS THE CONSIDERATION OF WHAT IS AROUND THERE AND HOW IS THIS PARTICULAR FACT CIRCUMSTANCE AND THE PARTICULAR AREA AND A PARTICULAR SIGHT OF -- SITE OF THIS PROPOSED USE HAVE ON THE SURROUNDING AREA, AND AS WE ALL KNOW, EACH PARCEL, EACH AREA HAS GOT ITS OWN PARTICULAR CHARACTERISTICS AND

DO REQUIRE AN INDIVIDUAL ANALYSIS.

SO ANYTHING WOULD HAVE BEEN A HEIGHT AT WHICH THE NEARBY RESIDENCES COULD SEE THAT, THE STRUCTURE, WHETHER IT WAS A BUILDING,, A TOWER, A McDONALD'S SIGN, AN AMERICAN FLAG WOULD HAVE BEEN DENIED AS BEING, AS AN UNUSUAL USE EXCEPTION?

I DON'T KNOW THAT IT WOULD HAVE BEEN DENIED.

TRYING TO UNDERSTAND WHAT OTHER CRITERIA WOULD HAVE BEEN APPLIED. THERE IS NO PUBLIC HEALTH OR SAFETY ISSUE THAT IS BEING RAISED WITH THE CELLULAR TO YOUNER THE RECORD, WAS THERE?

NO.

SO OTHER THAN AESTHETICS, WHAT IS THE, HOW WOULD THAT --

JUST SOME OF THE CRITERIA FROM THE MASTER PLAN. WHEN COMPATIBILITY AMONG APPROXIMATE LAND USES, YOU CAN CONSIDER HEIGHT ELEMENTS AND PARTICULAR COMPATIBILITY, AND AS THE CASE LAW HAS DISCUSSED, AESTHETICS IS A PORTION OF COMPATIBILITY. WHAT WE HAVE HERE IS A VERY TALL STRUCTURE, NOT JUST marginally taller, BUT BASED ON THE FACT OF WHETHER IT CAN BE SEEN OR NOT IT IS NOT AN OPINION, IT IS A FACT, AND THE FINDER OF FACT PRESUMABLY CAN JUDGE THE CREDIBILITY OF THE NEIGHBORS TO BELIEVE THAT THEY COULD BARELY SEE THE OTHER TOWER BUT THIS ONE WOULD BE PLAINLY VISIBLE.

THIS CODE THAT WAS PUT INTO EFFECT 30 YEARS AGO, AS YOU POINT OUT, HAS THE COUNTY EVER CONSIDERED THAT, YOU KNOW, AGAIN YOU HAVE GOT CELLULAR TOWERS ARE A WHOLE DIFFERENT BALLGAME ABOUT, THAT THE CODE OUGHT TO BE TAILORED TO SPECIAL CRITERIA, AND WAS THAT, AGAIN, WAS THAT ISSUE RAISED DURING THE LITIGATION?

WELL, I DON'T THINK THAT IS REALLY AN ISSUE FOR THE COURT, BECAUSE THE ISSUE IS WHETHER OUR ORDINANCE IS CONSTITUTIONAL OR NOT NOT WHAT IS OPTIMAL, BUT HAVING SAID THAT, WE HAVE BEEN WORKING FOR SOME PERIOD OF TIME, ON ADOPTING A NEW TOWER ORDINANCE, WORKING FOR OVER A YEAR WITH THE INPUT, OF AMONG OTHERS, MISS MARTOHUE AND THE INDUSTRY, AND THAT POINTS OUT THE PROBLEM WITH VALIDATING, TAKING OVER A YEAR FOR THE INDUSTRY TO TRY TO ADOPT A NEW CODE FOR THE USES, THERE ARE SPECIAL EXCEPTIONS AND I DON'T KNOW HOW MANY AVAILABLE USES, SO YOU CAN IMAGINE HOW NAPOLEON OUR CODE WOULD BE IF WE TRIED TO ADOPT AN ORDINANCE FOR EACH USE AND 1.2 MILLION PEOPLE AND LITERALLY THOUSANDS OF ACRES. QUICKLY, TO DISCUSS THE CONCERN, MY TIME IS UP.

CHIEF JUSTICE: HE HIM AFRAID WE ARE GOING TO -- I AM AFRAID WE ARE GOING TO HAVE TO TAKE THE REST OF IT ON THE BRIEFS THAT YOU ALL PREPARED. THANK YOU VERY MUCH. IN A MINUTE, THE COURT IS GOING TO TAKE ITS REGULAR 15-MINUTE MORNING RECESS, BUT BEFORE I DO THAT, I WANT TO WELCOME THE PRE-LAW STUDENTS THAT ARE AT FLORIDA STATE UNIVERSITY THIS SUMMER. WELCOME TO THE FLORIDA SUPREME COURT. IN A FEW MINUTES, WHEN WE TAKE OUR BREAK, SEVERAL OF THE JUSTICES ARE GOING TO JOIN YOU IN THE COURTROOM, AND I WOULD ASK THAT YOU JUST STAY IN YOUR SEATS AFTER THE BREAK AND NOT LEAVE. I DON'T WANT THE JUSTICES TO COME BACK IN HERE AND FIND AN EMPTY COURTROOM, SO WITH THAT, THE COURT WILL BE IN RECESS FOR 15 MINUTES.

MARSHAL: PLEASE RISE.