NEXT CASE ON THE COURT'S CALENDAR IS VOLUSIA COUNTY -V- ABERDEEN AT ORMOND BEACH. MR. GRAHAM, YOU MAY PROCEED.

THANK YOU, URPS. MY NAME IS RICHARD GRAHAM, ALONG WITH CAROL ALLEN OF MY OFFICE AND DAN ECKERT, A VOLUSIA COUNTY ATTORNEY. REREPRESENT THE COUNTY AND THE SCHOOL BOARD OF VOLUSIA COUNTY. THIS IS AN APPEAL FROM THE ORDER OF SUMMARY JUDGMENT IN FAVOR OF ABERDEEN, IN THE LOWER COURT, WHICH IS THE PLAINTIFF BELOW AND THE APPELLEE HERE, DETERMINING THAT THE VOLUSIA COUNTY SCHOOL IMPACT FEE WAS AN ILLEGAL AND UNCONSTITUTIONAL TAX ON ABERDEEN, AS IT APPLIED ONLY TO ABERDEEN, BECAUSE OF ITS STATUS AS A SENIOR-RESTRICTED COMMUNITY. THERE ARE -- THIS CASE WAS, THE APPEAL WAS FILED WITH THE DISTRICT COURT OF APPEAL, THE FIFTH DISTRICT, AND THE SUGGESTION WAS MADE THAT IT BE CERTIFIED TO THIS COURT AS INVOLVING A MATTER OF GREAT PUBLIC IMPORTANCE. IT WAS A CERTIFIED AND ACCEPTED BY THIS COURT ON THAT BASIS. THERE ARE SEVERAL ISSUES INVOLVED IN THE APPEAL. THE FIRST ONE IS THE STATUS OF ABERDEEN AS A -- WHETHER IT TRULY IS AN IRREF CABLY DEED-RESTRICTED SR. CITIZEN AREA. THERE WAS A DISPUTE AS TO THIS BECAUSE OF THE ORIGINAL DECLARATION OF COVENANTS AND RESTRICTIONS WHICH WAS FILED WITH THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITH THE PROSPECTUS AND APPROVED BY THAT DIVISION, HAD A PROVISION IN IT THAT THE DEVELOPER COULD, AT ANY TIME, REVOKE OR MODIFY ANY OF THE RESTRICTED COVENANTS IN THAT DECLARATION OR IN ANY SUPPLEMENTAL DECLARATION OR FUTURE DECLARATION.

NOW, THAT PRIMARY DECLARATION WAS NEVER EXECUTED AND FILED. CORRECT?

THAT'S CORRECT.

NOW, IS IT YOUR CONTENTION THAT, IF IT IS, SAY, FILED TODAY, THAT IT WOULD SUPERSEDE THE SUPPLEMENTAL DECLARATIONS?

IT WOULD. I CONTEND THAT, SINCE IT WAS SENT TO THE DIVISION IN TALLAHASSEE AND APPROVED AS PART OF THE PROSPECTUS AND SDRIBED TO EVERY POTENTIAL -- AND DISTRIBUTED TO EVERY POTENTIAL LESSEE OF THE DEVELOPMENT, THAT IT IS BINDING. IN THEIR OWN AFFIDAVIT THEY SAID THAT THEY DIDN'T KNOW WHY IT WASN'T SIGNED AND RECORDED. IT WAS INADVERTENCE, SO I THINK THAT, ANYBODY, ANY TITLE EXAMINER LOOKING AT THE SUPPLEMENTAL DECLARATIONS WOULD SAY, WELL, WHERE IS THE ORIGINAL? WHERE IS THE ONE IT SUPPLEMENTS?

WHAT IS OUR STANDARD REVIEW, AS TO THAT ISSUE? THE -- IT IS A FACTUAL -- IT WAS A LEGAL DETERMINATION, FACTUAL DETERMINATION. THE APPELLATE COURT HASN'T REVIEWED IT.

WHAT THE LOWER COURT DETERMINED, ON THAT ISSUE, WAS THAT, EVEN IF THE ORIGINAL DECLARATION WAS BINDING, THAT THE DEVELOPER WOULD HAVE A HARD TIME, IF CHALLENGED, TRYING TO RESCIND THESE RESTRICTIONS, THESE AGE RESTRICTIONS, BECAUSE IN THE SUPPLEMENTAL DECLARES, IT -- DECLARATION, IT SAID THEY COULD NOT RESCIND IT, BUT THE QUESTION IN OUR MIND WAS NOT WHETHER WE WOULD BE SUCCESSFUL IN A CHALLENGE OR WHETHER THEY WOULD BE SUCCESSFUL IN A CHALLENGE BUT WHETHER THEY HAVE THE POWER TO REVOKE THEM, WHICH THEY, OBVIOUSLY, DO.

THAT IS VERY SPECIFIC TO THIS CASE, I GUESS. LET'S ASSUME --

THAT'S CORRECT.

LET'S ASSUME THAT IT IS VALID. THEN WHAT IS YOUR ARGUMENT ON WHY IT IS A -- WHY IT IS NOT AN ILLEGAL TAX, AS TO THIS ADULT --

BEFORE, IF I COULD JUST -- BUT THE TRIAL COURT MADE A SPECIFIC FINDING THAT, IN HIS ORDER, IN RESPECT TO THE FACT THAT THERE WERE NOT GOING TO BE CHILDREN OR MINORS LIVING IN THIS DEVELOPMENT, I THINK HE USED THE TERM FOR THE FORESEEABLE FUTURE. IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR. THE RESTRICTIONS, THEMSELVES, ARE FOR 30 YEARS, AND IN THE SUPPLEMENTAL RESTRICTIONS, IT SAYS THEY CANNOT BE REVOKED, AND THE ORIGINAL DECLARATION OF COVENANTS AND RESTRICTIONS, IT SAID THEY CAN REVOKE ANY IN THAT COVENANT OR IN ANY SUPPLEMENTAL. SO THAT WAS THE QUESTION. THE LOWER COURT RULED THAT THEY WEREN'T SIGNED, NUMBER ONE, AND NUMBER TWO, THAT THEY PROBABLY WOULDN'T BE ABLE TO, REALLY, RESCIND THOSE RESTRICTIONS, BECAUSE OF I CAN WITABLE ARGUMENT.

-- BECAUSE OF EQUITABLE ARGUMENT.

SO YOU AGREE THAT IT DOES SET UP THE CONTROVERSY, IN THE QUESTION THAT JUSTICE CARIENT I WOULD GET BY WITH.

THE LEGAL QUESTION HERE IS THE CONSTITUTION, OBVIOUSLY. THERE IS ANOTHER, SECONDARY ISSUE THAT I JUST NEED TO TOUCH ON BEFORE I GET TO THE CONSTITUTIONAL QUESTION. THAT IS THAT WE PRESENTED EVIDENCE AND ARGUMENT TO THE LOWER COURT THAT SR.-RESTRICTED COMMUNITIES DO, IN FACT, IMPACT THE NEED FOR NEW SCHOOLS, AND THEY DO BENEFIT FROM NEW SCHOOLS, AND WE CITED A WHOLE LITANY OF AREAS, SUCH AS THE USE OF THESE FACILITIES AS EMERGENCY EVACUATION SHELTERS, POLLING PLACES, ADULT EDUCATION, AND MORE IMPORTANTLY, THE REQUIREMENT OF THE SCHOOL BOARD TO ABSOLUTELY EDUCATE ANY STUDENT WITH A DISABILITY, UP UNTIL AGE 21, AND THEY COULD HAVE ANY NUMBER OF STUDENTS AGE 18-21 IN THIS COMMUNITY, EVEN IF THE RESTRICTIONS ARE VALID. THE COURT RULED THAT THERE WAS A POTENTIAL BENEFIT, BUT IT WAS INSIGNIFICANT OR NOT SUCH TO SUCH A DEGREE THAT IT WOULD JUSTIFY THE -- IT WOULD SATISFY THE DUAL RATIONAL NEXUS TEST THAT HAS BEEN HANDED DOWN IN MANY, MANY CASES, DEALING WITH IMPACT FEES IN FLORIDA, PRIMARILY WITH WATER, SEWER, AND TRANSPORTATION IMPACT FEES.

WELL, DOES IT HAVE TO BE A SUBSTANTIAL NEXUS OR JUST ANY?

THOSE CASES SAY THAT IT DOES, YOUR HONOR. BECAUSE THEY ARE DEALING WITH OTHER ISSUES, WATER, SEWER, AND TRANSPORTATION ISSUES. THIS COURT, THERE IS ONLY ONE CASE IN FLORIDA THAT MATTERS ON EDUCATIONAL IMPACT FEE CASES, IN MY OPINION, AND THAT IS THIS COURT'S DECISION IN THE ST. JOHNS CASE, WHERE YOU SPECIFICALLY STATED THAT EDUCATIONAL IMPACT FEES ARE AND MUST BE DIFFERENT FROM WATER, ROAD AND SEWER IMPACT FEES, BECAUSE THE FLORIDA CONSTITUTION GUARANTEES A FREE PUBLIC EDUCATION. THEREFORE IT CANNOT BE A USER FEE. YOU CANNOT BASE THE APPLICATION OF THE FEE ON THE SPECIFIC USE BY THAT PROPERTY OF THE PERSON PAYING IT. IF YOU DO, IT VIOLATES ARTICLE IX SECTION I OF THE FLORIDA CONSTITUTION, WHICH MANDATES A FREE PUBLIC EDUCATION. THIS COURT RULED HAD, IN THE ST. JOHNS CASE, THAT EDUCATIONAL IMPACT FEES ARE DIFFERENT FROM THE OTHER IMPACT FEES. IT RULED, IT SEVERED OUT THE PROVISIONS OF THAT ST. JOHNS COUNTY ORDINANCE THAT ALLOWED THE PEOPLE TO OPT OUT OF THE FEE, BY FILING AFFIDAVITS OR OTHERWISE SHOWING AND DEMONSTRATING THAT THEY WOULD NOT PUT CHILDREN IN THE PUBLIC SCHOOLS, AS UNCONSTITUTIONAL, AS VIOLATING THE MANDATE FOR A FREE PUBLIC EDUCATION. THIS COURT WENT ON TO, FURTHER, KNOCK OUT OR DETERMINE THAT THAT ST. JOHNS COUNTY ORDINANCE WAS CONSTITUTIONAL, BUT IT COULD NOT BE APPLIED

UNTIL SUCH TIME AS IT APPLIED COUNTY-WIDE. BECAUSE, UNDER THE WORDING OF THE ORDINANCE, IT DIDN'T APPLY WITHIN MUNICIPALITIES YOU MEAN INTERLOCAL AGREEMENTS HAD BEEN -- MUNICIPALITIES, UNTIL INTERLOCAL AGREEMENTS HAD BEEN REACHED BETWEEN THE COUNTIES AND MUNICIPALITIES. THERE WAS A FOOTNOTE, FOOTNOTE 6 THAT SAID THIS COURT WOULD NOT FIND OBJECTIONAL THE EXEMPTION OF SENIOR-RESTRICTED COMMUNITIES. THE FOOTNOTE GOES AGAINST THE RULING OF THE CASE. I SUBMIT THAT YOU ARE THE ONLY ONES WHO CAN DETERMINE THAT, BUT THE CASE GOES AT GREAT LENGTHS TO SAYING IT CAN'T BE A USER FEE. IT CAN'T BE TIED TO THE USER. IT CANNOT -- IT SAID THAT THERE WILL BE MANY HOUSEHOLDS WHO WILL NEVER HOUSE KIDS, WHO WILL NEVER HAVE ANY CHILDREN IN THE PUBLIC SCHOOLS. BUT YOU MUST, THEY MUST PAY INTO THE COUNTY WIDE NEED THAT IS CREATED PIE NEW HOUSING, IN ORDER FOR IT TO BE CONSTITUTIONAL.

DRAGGING YOU BACK TO JUSTICE PARIENTE'S QUESTION, WHICH I APOLOGIZE FOR INTERRUPTING, BUT ISN'T THE NUTS AND BOLTS OF THAT QUESTION, REALLY, THE DIFFERENCE BETWEEN A TAX AND AN IMPACT FEE, AND ISN'T THAT THE WHOLE CRUX OF WHAT THE DUAL OR RATIONAL NEXUS TEST --

THAT'S CORRECT.

-- AND EVERYTHING THAT WE ARE TRYING TO FIGURE OUT IS WHY WHY THERE SHOULD BE SOMETHING CALLED A FEE, AS OPPOSED TO BEING A TAX. AND I THINK THAT IS WHAT NEEDS TO BE ADDRESSED.

I THINK THAT IS AN ISSUE, YOUR HONOR, AND I THINK THAT IS WHAT WAS ADDRESSED IN ST. JOHNS. THE ST. JOHNS EDUCATIONAL IMPACT FEE WAS UPHELD BY THIS COURT, AFTER SEVERING OUT THE UNCONSTITUTIONAL PARTS. IT WAS SAID, THIS COURT SAID, THAT, WHAT ST. JOHNS COUNTY DEMONSTRATED THAT WAS FOR EVERY 100 NEW HOMES, 44 CHILDREN WERE GOING TO BE IN THE SCHOOLS. A LOT OF THOSE HOMES WERE NEVER GOING TO PUT ANY KIDS IN THE SCHOOLS, BUT FOR EVERY 100, 44 KIDS WILL BE IN THE SCHOOLS. THEREFORE A COUNTY-WIDE IMPACT FEE ON NEW HOUSING THAT APPLIED TO EVERYBODY, THAT TOOK CARE OF THE NEEDS OF ALL 44 OF THOSE KIDS WAS THE ONLY CONSTITUTIONAL WAY TO DO IT, AND THAT IS WHAT WE HAVE. WE HAVE A STUDENT GENERATION RATE THAT IS CALCULATED, COUNTY-QUIET WIDE, AND IT PROJECT -- COUNTY-WIDE, AND IT PROJECTS, .254, AND THAT TAKES INTO CONSIDERATION THAT WE WILL HAVE SENIOR-RESTRICTED HOUSING, AND WE WILL HAVE SUBDIVISIONS WITH MANY, MANY CHILDREN, BUT THAT IS THE COUNTY-WIDE RATE, AND IT HAS TO BE DONE THAT WAY, BECAUSE IT IS A COUNTY-WIDE SCHOOL SYSTEM.

READING, SINCE YOU HAVE BEEN FRANK ENOUGH TO ADMIT THE EDICTA IN ST. JOHNS, COULD YOU PLAY DEVIL'S ADVOCATE AND TELL THE COURT HOW THE DICTA COULD HAVE BEEN PUT IN AND BROAD CONCERN FOR THE HOLDING? WASN'T THERE A DISTINCTION THAT HOUSEHOLDS, AT THAT TIME, NEVER HAD CHILDREN, ABOUT THE POTENTIAL THAT THERE WOULD BE CHILDREN THERE, THAT THEY COULDN'T JUST LOOK AT IT AS A SNAP SHOP IN TIME. THEY HAD TO LOOK AT IT OVER THE LONG-TERM.

WELL, I WOULD HATE TO SAY THAT THE INDICATIVE WASN'T WELL THOUGHT OUT, BECAUSE -- THAT THE DICTIVE WASN'T WELL THOUGHT OUT, BECAUSE THAT WOULD NOT AND SMART THING TO SAY, BUT IT DOES SEEM TO GO AGAINST THE OPINION, AND I WILL SAY THIS, AS IS OFTEN THE CASE IN DICTIVE. THERE WASN'T AN ISSUE IN THE CASE. IT WAS NEVER RAISED. THERE WASN'T AN OPPORTUNITY FOR ST. JOHNS COUNTY TO SAY, HEY, THEY DO IMPACT OUR SCHOOLS. WE HAVE ADULT EDUCATION. WE USE THESE SCHOOLS FOR EMERGENCY SHELTERS. THAT WAS NEVER RAISED, AND THAT WAS NEVER DEMONSTRATED TO THE COURT, I ASSUME, SO I THINK IT WAS JUST A STATEMENT THAT, REALLY, DOES GO AGAINST THE LOGIC OF THE RULING, AND I CAN'T READ IT ANY OTHER WAY THAN TO DO THAT, WHEN THIS COURT SAID IT KNT -- IT CAN'T BE A USER FEE, AND THEN FOR THE LOWER COURT, IN THIS CASE, TO APPLY SUBDIVISION-LEVEL

SCRUTINY TO THIS SUBDIVISION, SAYING THEY ARE NOT USING IT SO THEY DON'T HAVE TO PAY IT, AND THE SUPREME COURT, WHEN THEY CERTIFIED THIS CASE UP HERE, THEY SAID IT WAS OF GREAT PUBLIC IMPORTANCE, AND THE REASON WAS BECAUSE THE LOWER COURT RULED, IN ORDER TO BE CONSTITUTIONAL, AN EDUCATIONAL FEE MUST BE A USER IMPACT FEE, DIRECTLY OPPOSED TO WHAT THIS COURT RULED.

WHY -- EXCUSE ME. GO AHEAD.

DID THEY REALLY SAY THAT IT HAD TO BE A USER FEE? BECAUSE AS I READ ST. JOHNS AND WHAT THE LOWER COURT DID HERE, WHAT WE ARE TALKING ABOUT IS THE POTENTIAL FOR CHILDREN TO COME AND GO. AND THE LOWER COURT ACTUALLY, AS I UNDERSTAND IT, SAID THAT, IN THIS PARTICULAR SUBDIVISION, THERE WAS NOT THAT POTENTIAL.

THAT'S CORRECT. AND WHAT WE CONTEND, YOUR HONOR, IS THAT THE SUM OF THESE HOMES, IF THEY NEVER HOUSE CHILDREN, ARE A PART OF THE COUNTY-WIDE PART OF THE HOMES THAT WILL NEVER HOUSE CHILDREN, AND IT HAS TO BE THAT WAY COUNTY-WIDE, UNDER THE REASONING OF YOUR ST. JOHNS OPINION, TO BE CONSTITUTIONAL. IN FACT NONE OF THESE HOMES MAY EVER HAVE CHILDREN, BUT THEN THEY ARE PART OF -- THEY GO INTO THAT STUDENT GENERATION RATE THAT IS CALCULATED COUNTY-WIDE, AS IT MUST BE, AND THEY BECOME PART OF THE FORMULA. THEY EFFECT THE FORMULA.

SO YOUR ARGUMENT, THEN, IS THAT THE SPECIAL NEEDS, AND WHAT IS THAT TEST, THE SPECIFIC NEED, SPECIAL BENEFIT, IS THAT THERE IS A POTENTIAL FOR THE, THIS SUBDIVISION TO BE USED AS AN EMERGENCY --

ACTUALLY WHAT I THINK, YOUR HONOR, WHAT I AM REALLY ARGUING THAT THE SPECIFIC NEEDS, SPECIAL BENEFIT STANDARD DOESN'T APPLY TO EDUCATION IMPACT FEES, UNDER THE RULINGS OF THIS COURT IN ST. JOHNS. IT CAN'T BE A SUBDIVISION-LEVEL SCRUTINY. IT IS A COUNTY-WIDE SCHOOL SYSTEM, AS THIS COURT SAID, AND AS LONG AS THE NEEDS OF ALL OF THOSE 44 STUDENTS ARE MET BY THE IMPOSITION OF THE FEE ON ALL THOSE 100 HOMES THAT, SOME OF WHICH WILL NEVER HOUSE CHILDREN, THEN IT IS CONSTITUTIONAL. IT IS NOT AN ILLEGAL TAX.

BUT HOW CAN IT, THE TRUTH IN LABELING, AND CALL SOMETHING AN IMPACT FEE, IF IT CANNOT -- IF WHAT THAT SUBDIVISION IS CANNOT HAVE AN IMPACT ON WHATEVER IS BEING FUNDED BY THE FEE? NOW, IT CAN HAVE AN INCIDENTAL IMPACT, AS I UNDERSTAND WHAT THE TRIAL JUDGE RULED, BUT IF THEY DON'T HAVE -- AREN'T GOING TO HAVE ANY SCHOOL CHILDREN, IT WOULD BE AS WHY ISN'T THE SAME AS THEM NOT HAVING ANY BATH TUBS, AS FAR AS THE SEWER GOES?

WELL, YOUR HONOR, BECAUSE OF ARTICLE IX SECTION I OF THE FLORIDA CONSTITUTION, AND BECAUSE OF THIS COURT'S PREVIOUS RULING THAT IT CANNOT BE TIED TO USE, AS FAR AS AN EDUCATIONAL IMPACT FEE, COUNTY WIDE IT CAN BUT NOT SUBDIVISION LEVEL, NOT HOUSING. YOU WOULD NOT LET THE ST. JOHNS COUNTY ORDINANCE MAINTAIN THAT PROVISION THAT ALLOWED YOU TO OPT OUT, BECAUSE YOU WEREN'T GOING TO USE THE SCHOOLS! IT HAS TO BE COUNTY-WIDE. IT HAS TO BE A NONUSER FEE, OR IT FAILS, UNDER ARTICLE IX SECTION I OF THE FLORIDA CONSTITUTION. IF I DON'T HAVE ANY QUESTIONS, I WILL RETAIN MY TIME FOR REBUTTAL.

THANK YOU, MR. GRAHAM. MR. UPCHURCH?

IF IT PLEASE THE COURT, I AM FRANK UPCHURCH. I REPRESENT ABERDEEN. WHAT I BELIEVE THE COURT DID, IN THE ST. JOHNS COUNTY CASE, WAS RECOGNIZE THAT, IN GENERAL, RESIDENTIAL HOUSING HAS AN IMPACT ON THE SCHOOL SYSTEM THAT DOES NOT DEPEND ON THE ACTUAL DEMOGRAPHICS OF ANY PARTICULAR HOME AT ANY PARTICULAR TIME. THE COURT, POINTEDLY, SAID THAT, EVEN THOUGH THE FIRST FAMILY THAT OCCUPANCY THE HOME MAY NOT HAVE

CHILDREN IN SCHOOL, OVER TIME, COLLECTIVELY, CHILDREN WILL COME AND GO FROM THE DEVELOPMENT. SO WHAT THE COURT RECOGNIZED THERE, WHICH IS REALLY TRUE, IS THAT THE IMPACT GROWTH ON THE SCHOOLS IS NOT A FUNCTION OF HOUSE BY HOUSE DEMOGRAPHICS. THERE IS A SUBDIVISION THAT GOES IN, AT SOME PART OF THE COUNTY. IT IS OPEN TO ALL AGES. THEIR EXPERIENCE AND HISTORY TEACHES CHILDREN WILL SHOW UP, SOONER OR LATER. THEY WILL COME AND GO. IN THE COUNTY, THEY HAVE TO TAKE THAT INTO ACCOUNT IN ITS PLANNING, JUST LIKE PARKS AND OTHER FACILITIES, THAT PEOPLE, THAT RESIDENTS MAY NOT ACTUALLY EVER USE, IT STILL HAS TO MAKE THOSE FACILITIES AVAILABLE TO SERVE THE SUBDIVISION, WHEN THE ACTUAL NEED ARISES. THE -- TO ME, THE FOOTNOTE IS PRETTY CLEAR. I THINK IT IS A BROAD HINT. THAT DEED, THAT RESTRICTED, DEED-RESTRICTED SENIOR CITIZEN COMMUNITIES OUGHT TO BE EXEMPTED.

HOW DO YOU ADDRESS THE APPELLATE'S ARGUMENT THAT THE PRIMARY DECLARATION, HERE, INDICATES THAT THE DEVELOPER COULD CHANGE THIS RESTRICTION, AND TOMORROW CHILDREN COULD MOVE INTO THIS SUBDIVISION?

I THINK THE COURT DID A THOROUGH JOB IN RESPONDING TO THAT ARGUMENT, POINT POINT-BY-POINT, EVEN ASSUMING THAT IT WAS EXECUTED AND RECORDED. THE MORE SPECIFIC SUPPLEMENTAL DECLARATION, WHICH DEALT ONLY WITH THE AGE RESTRICTIONS AND SPECIFICALLY STATED, IN TWO PLACES, THAT THE PROHIBITION AGAINST MINORS WAS NOT REVOCABLE, WOULD CONTROL, OVER THE PRIOR, MORE GENERAL, RESERVATION, FOR SEVERAL REASONS. PARTICULAR CONTROLS OVER THE GENERAL. SECONDLY, THE ORIGINAL DECLARATION OR IN THE ORIGINAL DECLARATION, CONTRACTUALLY, THE DEVELOPER RESERVED THE POWER TO MODIFY. NOWHERE IS IT WRITTEN THAT THE DEVELOPER COULD NOT SUBSEQUENTLY RECORD A DECLARATION WHICH RESTRICTED OR MADE EXCEPTIONS TO THE POWER TO MODIFY. WE CITE THE JOHNSON -VS- THREE BASE CASE, IN WHICH, I BELIEVE, IT WAS THE THIRD DISTRICT EXPRESSLY HELD THAT A WAIVER, A DEVELOPER'S WAIVER OF THE RIGHT OF THE BROAD RESERVATION TO MODIFY COVENANTS AND RESTRICTIONS ARE EFFECTIVE. THAT IS WITH THAT SUPPLEMENTAL, WHAT IT DID, AND THAT IS WHAT IT WAS INTENDED TO DO. FINALLY, I WOULD POINT OUT, JUSTICE QUINCE, THAT THE SUPPLEMENTAL -- BOTH THE SUPPLEMENTAL AND THE ORIGINAL DECLARATION STATE THAT, IN ANY CASE ARISING OVER THE MEANING OR THE CONSTRUCTION OF THE COVENANTS AND RESTRICTIONS, THE DEVELOPER'S GOOD FAITH CONSTRUCTION CONTROLS, AND PERHAPS THE SCHOOL BOARD HAS AN ARRESTING UNIT HERE, BUT -- HAS AN ARGUMENT HERE, BUT THOSE PROVISIONS SAY THE DEVELOPER'S SBHERPTATION CONTROLS. THE -- INTERPRETATION CONTROLS FORM THE DEVELOPERS HAVE -- CONTROLS. THE DEVELOPER HAS GONE ON RECORD AND STATED TO EVERYBODY THAT THIS IS WHAT IT MEANS, AND THE COURT PROPERLY FOUND THAT THEY ARE IRREVOCABLE. I WOULD, FURTHER, POINT OUT THAT THERE IS NOTHING, COMING BACK TO FOOTNOTE SIX, THAT SPEAKS TO IRREVOCABLE LAND USE RESTRICTIONS. IT SIMPLY REFERS TO LAND USE RESTRICTIONS.

WELL, SPEAK TO MR. GRAHAM'S ARGUMENT, IF YOU WOULD, THAT, REALLY, AN EDUCATION IMPACT FEE IS DIFFERENT THAN A WATER AND SEWER IMPACT FEE, IN THAT THERE ARE OTHER USES OF SCHOOLS, JUST LIKE IF THERE WAS, AS IN THE ST. JOHNS CASE REFERS TO, I MEAN, THERE COULD BE AN IMPACT FEE FOR PARKS, AND NOT EVERYBODY USES THE PARKS. IN THAT, I MEAN, YOU HAVE PEOPLE THAT COME INTO THESE COMMUNITIES THAT ARE MOVING THERE BECAUSE THEY HAVE GRANDCHILDREN IN THE SCHOOLS. THERE REALLY ISN'T ANY LOGIC TO THE VIEW, EITHER, THAT THESE PEOPLE THAT LIVE IN THIS AREA ARE NOT GOING TO HAVE SOME IMPACT ON THE NEED FOR SCHOOLS.

THE ORDINANCE, ITSELF, DEFINES OR PROVIDES THAT IMPACT FEE LIABILITY IS TRIGGERED BY LAND DEVELOPMENT ACTIVITY. IT DEFINES LAND DEVELOPMENT ACTIVITY AS DEVELOPMENT THAT ADDS TO THE PUBLIC SCHOOL ENROLLMENT. THAT IS THE CRITERION, AND THAT IS WHY VOLUSIA COUNTY NEEDS TO BUILD NEW SCHOOLS, TO EDUCATE KIDS, GRADES K-12. THERE IS NO EVIDENCE IN THIS RECORD THAT ANY OF THAT NEED IS TO PROVIDE ADDITIONAL SHELTER

CAPACITY. CLEARLY THESE ARE INCIDENTAL BENEFITS. ALL CITIZENS CONTRIBUTE TO THE SUPPORT OF THE SCHOOL SYSTEM, THROUGH TAXES AND OTHER ACTIONS. WE ARE TALKING, HERE, ABOUT AN IMPACT FEE, WHICH THIS COURT HAS VERY POINTEDLY SAID, COLLIER COUNTY CASE, GOING BACK TO DUNEDIN, THE PORT ORANGE CASE, THAT THE NEEDS AND BENEFITS OF THE INFRASTRUCTURE, WHICH IS FINANCED BY AN IMPACT FEE, MUST -- AND THEIR RELATIONSHIP TO THE FEE PAYER MUST BE DIFFERENT FROM THE PUBLIC AT LARGE. AND THAT IS THE DIFFERENCE HERE. THESE KINDS OF BENEFITS, IF THE COUNTY IS SEEKING TO JUSTIFY, IS OFFERING UP TO SEEK TO JUSTIFY THE FEE, ARE NO DIFFERENT THAN THE BENEFITS TO THE PUBLIC AT LARGE, WHICH DOES NOT HAVE TO PAY FEES. THAT IS WHY WE PAY TAXES. AND IF MY COME BACK TO THE FOOTNOTE, BECAUSE I THINK THE FOOTNOTE, IN THE ST. JOHNS COUNTY CASE, CAN BE RECONCILED. I THINK WHAT THE COURT WAS SAYING, VERY CLEARLY, IS THAT A SCHOOL IMPACT FEE OR THAT THE EXCLUDING RESTRICTED ADULT COMMUNITIES FROM SCHOOL IMPACT FEES WILL NOT SUBJECT THE FEE TO THE USER FEE CLAIM, OR IT CANNOT BE -- IT IS NOT SUBJECT TO CHALLENGE AS A USER FEE, ON GROUND THAT THESE FACILITIES ARE EXCLUDED. THAT IS CLEARLY WHAT IT SAYS, AND THAT FOOTNOTE IS DESPOSITIVE OF THE USER FEE IN THIS CASE. THIS IS NOT A USER FEE. IT IS NOT ASSESSED ON THE BASIS OF USE. ABERDEEN, THE COURT DID NOT HOLD THAT ABERDEEN WAS EXEMPT OR SHOULD BE EXEMPT BECAUSE IT DOES NOT USE THE SCHOOLS. THE REASON IT HELD IT WAS EXEMPT IS BECAUSE IT DOES NOT HAVE ANY IMPACT, AS IMPACT IS DEFINED IN THE ORDINANCE. THE BOTTOM LINE IS THAT THE VOLUSIA COUNTY DOES NOT HAVE TO BUILD SCHOOLS TO SERVE SENIOR CITIZENS. THEY HAVE TO BUILD SCHOOLS TO SERVE CHILDREN, AND THIS DEVELOPMENT IS CLOSED TO CHILDREN.

WHY SHOULD WE SINGLE OUT A DEVELOPMENT LIKE THIS? YOUR OPPONENT GAVE STATISTICS, BEFORE, I THINK, WHERE HE TALKED ABOUT DEMOGRAPHICS, IN TERMS OF 40% OF THE HOUSEHOLDS OR WHATEVER GOING TO HAVE CHILDREN AND 60% AREN'T, OR SOMETHING SIMILAR TO THAT. MY QUESTION IS, IF WE TAKE THESE SAME OCCUPANTS OF HOUSING IN ABERDEEN, AND WE SPREAD THEM OUT IN THE COMMUNITY, THE SAME PEOPLE THAT AREN'T GOING TO HAVE ANY IMPACT ON THE SCHOOLS IN THE WAY THAT YOU DESCRIBE IT, AND THEY BUILD RESIDENCES THROUGHOUT THE COMMUNITY, THEN THEY ARE GOING TO BE SUBJECT TO THIS IMPACT FEE, BECAUSE OF THE WAY THAT THEY GO ABOUT ESTIMATING THEIR NEEDS FOR THEIR SCHOOLS. THAT IS THAT, ONCE THEY ARE, IT IS THIS NUMBER OF INCREASE IN POPULATION, THEN THEY PROJECT THE NEED FOR THIS MANY, YOU KNOW, MORE STUDENTS ARE GOING TO COME OUT OF THAT, AND THE NEED FOR SCHOOLS. WHY SHOULD WE, THEN, WHEN THOSE PEOPLE THAT, WHEN THEY ARE SPREAD OUT IN THE COMMUNITY, THEY ARE NOT GOING TO HAVE THAT DIRECT IMPACT, ARE GOING TO BE PART OF THIS AND BE ASSESSED, BUT WHEN THEY BUNCH THEMSELVES TOGETHER IN A DEVELOPMENT LIKE THIS, THEY ARE GOING TO BE EXEMPTED FROM THAT RESPONSIBILITY THAT EVERYBODY ELSE HAS. I AM NOT -- MY QUESTION MAY SOUND CONFUSING, BUT THE SAME, LET'S SAY, YOU HAVE 100 FAMILIES LIVING IN ABERDEEN, WHATEVER, BUT THOSE SAME 100 FAMILIES MAKE THE CHOICE TO BUILD NEW HOMES THROUGHOUT THE COMMUNITY, BUT THEY ARE NOT GOING TO HAVE CHILDREN. THEY ARE NOT GOING TO HAVE ANY IMPACT ON THE SCHOOLS, BECAUSE THEY ARE SPREAD OUT, BUT THEY ARE GOING TO BE SUBJECT TO THE IMPACT FEE, BECAUSE, NOW, WE HAVE GOT THIS THING SORT OF, YOU KNOW, IN THE BUREAUCRACY, IT IS A REGULAR PART OF THE THING. YOU BUILD A NEW SINGLE FAMILY RESIDENCE. YOU PAY AN IMPACT FEE, AND PRESUMABLY, IN MOST COUNTIES, NOW, THEY ARE DOING THAT, YOU KNOW, FOR THE SCHOOLS, TOO. WHY DO WE SINGLE OUT, WHEN THEY BUNCH TOGETHER LIKE THIS?

THE -- I THINK GOING BACK TO THE ST. JOHNS COUNTY CASE AND THE COURT'S REASONING IN THAT DECISION, THE IDEA IS THAT THE DEVELOPMENT, THE BOXES, AS DISTINGUISHED FROM THE OCCUPANTS, THE INDIVIDUAL OCCUPANTS WHO ROLL OVER, WHO COME AND GO, IS THE IMPACT. IT IS THOSE HOMES, THAT DEVELOPMENT, THAT THIS INFRASTRUCTURE HAS TO BE PROVIDED TO SERVE, SO AS IT IS DEMOGRAPHICS, AS ACTUAL DEMOGRAPHICS CHANGE, OVER TIME, THE FACILITIES WILL BE AVAILABLE. SO ANY, WITH THE SOLE EXCEPTION, I THINK, OF A COMMUNITY LIKE THIS, WHICH DEAD INDICATES ITSELF, COMMITS ITSELF TO PROVIDING HOUSING FOR THE

OPPOSITE END OF THE DEMOGRAPHIC SPECTRUM THAN THE ONE SERVED BY THE SCHOOLS, ALL OTHER HOUSING THAT IS OPEN TO FAMILIES WITH CHILDREN HAS TO BE TAKEN INTO ACCOUNT, IN THE SCHOOL PLANNING. IF ABERDEEN, IF THE SCHOOL, IF THE ENTIRE DEVELOPMENT IS CLOSED TO CHILDREN, IT DOESN'T COME UP ON THE SCHOOL BOARD'S RADAR, UNTIL AND UNLESS THAT SITUATION CHANGES, AND THERE IS EVIDENCE IN THE RECORD --

COULD YOU ADDRESS THE OTHER BENEFITS TO THIS COMMUNITY FROM HAVING SCHOOLS, SUCH AS THE POTENTIAL THAT THERE COULD BE DISABLED ADULTS, THE USE OF SCHOOL FACILITIES FOR EMERGENCY USAGES, THE USE OF SCHOOLS FOR ADULT EDUCATION, AND RELATED ACTIVITIES. WHAT IS YOUR RESPONSE TO THAT?

THE ORDINANCE, ITSELF, DEFINES, IN SO MANY WORDS, IMPACT OF NEW DEVELOPMENT AS ENROLLMENT GROWTH. THE RECORD IS VERY CLEAR IN THIS CASE THAT VOLUSIA COUNTY NEEDS TO BUILD NEW SCHOOLS TO SERVE A -- ITS INCREASED ENROLLMENT, NOT ONLY FROM GROWTH BUT FROM INTERNAL DEMOGRAPHICS AND OTHER CAUSES. THERE IS NO EVIDENCE IN THIS RECORD THAT THE NEED -- THAT THERE IS ANY NEED FOR ADDITIONAL SHELTER CAPACITY, THAT THERE IS NEED FOR ANY ADDITIONAL INFRASTRUCTURE FACILITIES TO SERVE DISABLED CHILDREN. THESE ARE INCIDENTAL BENEFITS. THEY ARE BENEFITS MUCH WE DO NOT DENY THAT, BUT THOSE ARE THE REQUIREMENT OF, IF THERE IS GOING TO BE A VIABLE DISTINCTION BETWEEN IMPACT FEES, SCHOOL IMPACT FEES OR OTHER IMPACT FEES AND TAXES IN THIS STATE, THE DUAL RATIONAL NEXUS TEST HAS TO BE APPLIED AT THE SUBDIVISION LEVEL. IT CANNOT BE SORT OF, JUST AS IN COLLIER COUNTY, THE COURT REJECTED THE ARGUMENT THAT ALL THAT IS REQUIRED IS A MERE RATIONAL RELATIONSHIP. THAT IS A TAX TEST. NOW, VOLUSIA COUNTY'S ARGUMENTS, HERE, ARE, REALLY DON'T FOCUS ON ANYTHING SPECIFIC ABOUT ABERDEEN, ANY PARTICULAR IMPACT, ANY PARTICULAR NEEDS OF THIS COMMUNITY OR ANY PARTICULAR BENEFITS. WE -- THE COUNTY STRESSES, TIME AND AGAIN, COUNTY-WIDE NEEDS, COUNTY-WIDE OBLIGATION, COUNTY-WIDE BENEFITS. MEMBERS OF THE COURT, THESE ARE CLASSIC TAX ARGUMENTS. THIS ARGUMENT, INDEED THIS FEE, ASAP APPLIED TO ABERDEEN, HAS TAX -- AS APPLIED TO ABERDEEN, HAS TAX WRITTEN ALL OVER IT, AND NO ONE DISPUTES THE PROPOSITION THAT MAINTAINING QUALITY PUBLIC SCHOOLS IS MATTER OF VITAL PUBLIC IMPORTANCE TO ALL OF US, BUT I WOULD POINT OUT THAT MAINTAIN MAINTAINING A CITY-WIDE WATER AND SEWER SYSTEM OR -- IS IMPORTANT. THE ROADS. PORT ORANGE ARE IMPORTANT. THE GOVERNMENTAL SERVICES INVOLVED IN COLLIER COUNTY WERE IMPORTANT. THIS BUSINESS IS, BY DEFINITION, IMPORTANT, BUT THE BOTTOM LINE IS THE POWER OF LOCAL GOVERNMENT IS CONSTRAINED BY THE CONSTITUTIONAL RESTRICTIONS ON ITS TAXING AUTHORITY, AND WHAT VOLUSIA COUNTY IS ASKING, IN SUBSTANCE AND EFFECT, BASED ON A FICTION OR A PRULINGS THAT THIS DEVELOPMENT -- OR A PRESUMPTION THAT THIS DEVELOPMENT HAS SOME SORT OF AN IMPACT ON THE NEED FOR NEW SCHOOLS, IS TO EXPAND ITS TAXING AUTHORITY. AS THIS COURT HAS SAID, REPEATEDLY, SAID IT IN THE COLLIER COUNTY CASE, JUSTICE WELLS SAID IT NUMEROUS OCCASIONS IN DISSENTING OPINIONS AND SPECIAL ASSESSMENT CASES, THESE ARE DECISIONS FOR THE LEGISLATURE NOT FOR THE COURT. THERE IS A BONA FIDE NEED HERE, BUT THESE ARE ARGUMENTS THAT THE COUNTY SHOULD BE ADDRESSING TO THE LEGISLATURE, TO EXPAND ITS SCHOOL TAXING AUTHORITY. THIS IS NOT THE FUNCTION OF THIS COURT. THE -- THIS COUNTRY WAS FOUNDED, WHEN THE COLONIES ROSE UP IN REVOLT, WHEN THE SOVEREIGN ABUSED ITS TAXING AUTHORITY. THE RESTRICTIONS ON POWER TO TAX THAT ARE FOUND IN THE CONSTITUTION OF THE STATE OF FLORIDA ARE IMPORTANT. THEY SERVE A RIGHTLY IMPORTANT PURPOSE -- A VITALLY IMPORTANT PURPOSE. I KNOW THERE ARE TERRIBLE PRECIOUS ON LOCAL GOVERNMENTS AND ON THE COURTS TO PROVIDE CREATIVE METHODS OF FINANCING. THIS COURT HAS REPEATEDLY DRAWN THE LINE. THIS COURT HAS DRAWN THE LINE AND HELD IT. DUNEDIN, IN PORT ORANGE, IN COLLIER COUNTY, AND EVEN IN THE ST. JOHNS COUNTY CASE. IN THIS CASE, VOLUSIA COUNTY SEEKS TO GO OVER THE LINE AND IMPOSE EXACT FEES, WHEN, IN FACT, THERE IS NO RULE AND REAL IMPACT. WHAT THEY ARE TRYING TO DO IS TO TAKE THE IMPACT OUT OF IMPACT FEES. IF YOU TAKE THE IMPACT OUT OF IMPACT FEES, THE ONLY THING THAT IS LEFT IS THE TAX. THANK YOU.

THANK YOU MR. UPCHURCH. MR. GRAHAM, REBUTTAL?

I WOULD LIKE TO POINT OUT TO THE COURT, WHICH I AM SURE YOU ARE ALL AWARE, THAT FOOTNOTE 6 IN THE ST. JOHNS CASE WAS NOT A MANDATE THAT THERE BE AN EXEMPTION FOR SR.-RESTRICTED HOUSING. IT WAS STATED THAT IT WOULD BE UNOBJECTIONABLE TO THIS COURT FORM THE LOWER COURT, IN THIS CASE, TOOK IT AS A MANDATE, I BELIEVE, AND WENT AGAINST THE REASONING OF THE BULK OF THE OPINION IN ST. JOHNS. I WOULD, ALSO, LIKE TO POINT OUT THAT THEORETICALLY OR POTENTIALLY EVERY HOUSEHOLD IN ABERDEEN COULD HOUSE ONE OR MORE EXCEPTIONAL EDUCATION STUDENTS, BETWEEN THE AGE OF 18 AND 21, WHO COULD COST THE SCHOOL DISTRICT HUNDREDS OF THOUSANDS OF DOLLARS, AS THEY SOMETIMES DO, BECAUSE YOU HAVE AN OBLIGATION TO FURNISH NOT ONLY EDUCATION APPROPRIATE TO THE HANDICAPED. YOU HAVE AN OBLIGATION TO FURNISH ANCILLARY SERVICES, SUCH AS MEDICAL AND TRANSPORTATION, WHEN NECESSARY. EVERY HOME THERE COULD POTENTIALLY HOUSE THESE STUDENTS.

WHAT WAS THE POINT BELOW ABOUT THAT BEING ONE OF THE DRIVING NEEDS BEHIND THE EVALUATION OF THIS IMPACT FEE?

THE POTENTIAL THAT IT COULD HAPPEN WAS PRESENTED TO THE LOWER COURT.

BUT THERE WASN'T ANY EVIDENCE AS TO HOW YOU WOULD HAVE ASSESSED THAT IMPACT, IN TERMS OF COMING UP WITH THE AMOUNT OF THE FEE?

WELL, I GUESS WE DIDN'T PRESENT EVIDENCE AS TO WHAT EXISTED AT ABERDEEN. WE -- BECAUSE WE DON'T THINK THAT WAS APPROPRIATE. IN THIS COURT'S RULING IN ST. JOHNS, IT SAID --

NO. NO. I AM TALKING ABOUT INCOMING UP WITH THE ACTUAL FORMULA FOR THE IMPACT FEE. WAS THERE ANY EVIDENCE THAT, IN THAT FORMULA, THERE WAS THOUGHT GIVEN TO HOW MANY DISABLED ADULTS THERE WERE PER NUMBER OF STUDENTS OR ANYTHING THAT WOULD HAVE GIVEN A BASIS, IN THE RECORD BELOW, TO HAVE MADE THAT DETERMINATION.

I AM NOT SURE, IN THE ORDINANCE, ITSELF, THERE IS ANY DISTINCTION MADE BETWEEN ESA STUDENTS AND REGULAR STUDENTS, BECAUSE THEY ALL HAVE TO BE HOUSED.

YOU DIDN'T PRESENT ANY EVIDENCE, THOUGH, LIKE A SURVEY FROM ANOTHER ADULT COMMUNITY IN ANOTHER TOWN OR WHATEVER, WHERE YOU SAID HERE IS ANOTHER COMMUNITY THAT HOUSES 5,000 SENIOR CITIZENS, AND OF THE 5,000, 500 OF THEM GO TO THE COMMUNITY HIGH SCHOOL, AND ANOTHER 500 OF THEM USE THIS SERVICE, PROVIDED BY THE SCHOOLS?

WE DID NOT, YOUR HONORMENT WE JUST PRESENTED THE ARGUMENT THAT THE POTENTIAL WAS THERE, BECAUSE YOU CAN'T PROJECT WHAT WILL HAPPEN, BASED ON SOMEONE ELSE'S EXPERIENCE.

HOW ABOUT COMING BACK, AND ONE LAST TIME REALIZING YOUR TIME IS LIMITED, AND RESPOND, AGAIN, TO THE LAST WORDS, WHICH, I THINK, ASIDE FROM THE FOOTNOTE, THAT UNDERLINE THE FOOTNOTE, IS, REALLY, THE POINT THAT YOUR OPPONENT IS MAKING, AND THE QUESTION THAT JUSTICE WELLS ASKED, AND THAT IS ISN'T THIS SORT OF A FROUD FRAUD IN LABELING -- OF A FRAUD IN LABELING. THAT IS THAT OBVIOUSLY THE FUNDAMENTAL PURPOSE OF THE IMPACT FEE FOR SCHOOLS IS THAT THERE IS GOING TO BE AN IMPACT AND A NEED FOR NEW SCHOOLS, BECAUSE OF THE CHILDREN THAT ARE GOING TO END UP IN THAT COMMUNITY, AND WHY WE HAVE TO JUST ESTIMATOR GENERALLIZE TO SOME DEGREE. CAN'T WE BE PRETTY SAFE THAT A DEVELOPMENT THAT IS DEDICATED JUST TO ADULTS, PER THE FINDING OF A TRIAL COURT, CANNOT HAVE THAT KIND OF IMPACT, WHICH IS THE IMPACT CONTEMPLATED WITH

IMPACT FEES FOR SCHOOLS, WHAT -- YOU KNOW, THAT IS, REALLY, UNDERLYING THE FOOTNOTE, AND IT IS NOT THE EXISTENCE OF A DICTIVE FOOTNOTE OR WHATEVER. IT IS THAT IDEA THAT IS UNDERLYING.

MY RESPONSE TO THAT, YOUR HONOR, IS MR. UPCHURCH SAID THAT WATER, SEWER, PARKS, ARE IMPORTANT, AND I AGREE. BUT THEY ARE NOT CONSTITUTIONALLY MANDATED TO BE PROVIDED FREE. AND ON A COUNTY-WIDE BASIS NOT AN INDIVIDUAL BASIS. IT IS A COUNTY-WIDE SCHOOL SYSTEM.

THAT DOESN'T COME BACK TO THE TAX ISSUE THOUGH.

THIS COURT HAS RULED, IN ST. JOHNS, THAT IT HAS TO BE COUNTY-WIDE, THAT THERE WILL BE HOMES THAT DON'T IMPACT THE SCHOOLS THAT WILL HAVE TO PAY IT, AND FOLLOWING UP ON YOUR PREVIOUS QUESTION MR. UPCHURCH AND THE JUSTICE ASKED, WHY WOULD I NOW BE ABLE TO FILE A DIEDRE RESTRICTION ON MY OWN HOME AND NOT PAY IMPACT FEES? WHY WOULD I HAVE TO BE GROUPED WITH A BUNCH OF PEOPLE? AND THAT IS WHAT THIS COURT SAID COULDN'T BE DONE IN ST. JOHNS, BECAUSE IT CONVERTS IT TO A USER FEE AND MAKES IT UNCONSTITUTIONAL.

HOW BIG IS ABERDEEN, BY THE WAY?

I THINK, WHEN IT IS BUILT OUT, IT WILL HAVE 500 HOMES. IT HAD 84 OR 85, AT THE TIME THAT THIS POSITION WAS CONTEMPLATED.

THANK YOU, MR. UPCHURCH. WE WILL TAKE IT UNDER ADVISEMENT AND WE WILL BE IN RECESS FOR 15 MINUTES.