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City of Gainesville v. State of Florida

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. I APPRECIATE YOU ALL BEING READY TO GO, AND I LOOKOUT INTO THE AUDIENCE, AND IT LOOKS LIKE YOU HAVE DRAWN AN AUDIENCE HERE. YESTERDAY AFTERNOON, WE INDUCTED A WHOLE GROUP OF NEW FLORIDA LAWYERS. IT IS A LITTLE MORE CROWDED THAN THIS. SO WE WILL BE LOOKING FOR A STELLAR PERFORMANCE THIS MORNING. THE FIRST CASE ON THE DOCKET IS CITY OF GAINESVILLE, FLORIDA, VERSUS THE STATE OF FLORIDA. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS LIZ WAURTOUK, AND I REPRESENT THE CITY OF GAINESVILLE AND ALSO THE CITY ATTORNEY FOR THE CITY OF GAINESVILLE IS WITH ME THIS MORNING. THE CITY OF GAINESVILLE IS TAKING THIS ON APPEAL FROM A TRIAL COURT RULING THAT REFUSED TO VALIDATE CERTAIN REVENUE BONDS BEFORE THE COURT. THE COURT DENIED VALIDATION ON THE GROUNDS THAT THE REVENUE STREAM, WHICH WAS GOING TO BE USED TO REPAY THE BONDS, WAS INVALID. IN OTHER WORDS, IT FOUND THE CITY'S STORM WATER UTILITY FEE TO BE AN INVALID FEE.

WAS IT DECLARED INVALID BECAUSE THEY CONSIDER IT TO BE A TAX OR WHAT WAS THE UNDERLYING CAUSE HERE?

IT WASN'T CLEAR, FROM THE RULING, YOUR HONOR, AND THE STATE OF FLORIDA HAD ARGUED THAT IT WAS, IN FACT, A SPECIAL ASSESSMENT. IN FACT, WHAT THEY ARGUED IS STORM WATER CHARGES, BY THEIR VERY NATURE, ARE SPECIAL ASSESSMENTS, AND THERE IS NO WAY THAT YOU CAN MAKE IT INTO USER FEES, BUT IT WAS THE CITY'S POSITION DOWN BELOW AND IT IS THE CITY'S POSITION BEFORE THIS COURT, THAT THE CITY'S STORM WATER UTILITY FEE HAS MET ALL OF THE CRITERIA THAT THIS COURT HAS ESTABLISHED THROUGHOUT TIME, AND INDEED, ALL THE CRITERIA THAT OTHER COURTS HAVE LOOKED AT, IN DETERMINING WHETHER FEES ARE VALID FEES OR WHETHER THEY ARE SPECIAL ASSESSMENTS. THE CITY'S CHARGE IS BASED ON USE. IT IS BASED ON THE PROPERTY'S RELATIVE CONTRIBUTION TO THE STORM WATER SYSTEM. ALL REVENUES ARE, IN FACT, USED TO FUND THE STORM WATER UTILITIES, AND IF THERE IS NO USE OF THE SYSTEM, THERE IS IN FACT, NO USE, NO CHARGE FOR THE FEE.

LET ME ASK SOMETHING ABOUT HOW YOU DETERMINE RELATIVE CONTRIBUTION. YOU TOOK AN AVERAGE OF ALL THE RESIDENTIAL PROPERTIES, AND YOU DETERMINED THAT 2300 SQUARE FEET WAS THE AVERAGE IMPERVIOUS AREA -- IMPERVIOUS AREA FOR EACH SINGLE PROPERTY, CORRECT?

FOR EACH RESIDENTIAL PROPERTY, THAT IS CORRECT. THERE WAS DETERMINED THAT THERE ARE CERTAIN TYPES OF RESIDENTIAL PROPERTIES THAT HAVE SIGNIFICANTLY STATISTICALLY LESS AREA, AND THAT WOULD BE THE APARTMENTS AND MOBILE HOMES ASSIGNED LOWER VALUE. THERE WERE CERTAIN RESIDENTIAL PROPERTIES THAT HAD MORE IMPERVIOUS AREA, AND THEY WERE LOOKED AT SIGNIFICANTLY. THAT IS CONSISTENT WITH WHAT FLORIDA CASES AND COURTS

ACROSS THE NATION HAVE DONE, IN REGARD TO RESIDENTIAL AND MULTIFAMILY PROPERTIES, BECAUSE STATISTICALLY, THERE ISN'T ENOUGH DIFFERENCE SIGNIFICANTLY, BETWEEN THE IMPERVIOUS AREA, TO JUSTIFY GOING OUT AND PHYSICALLY MEASUREING 20,000 INDIVIDUAL HOMES, TO DETERMINE WHETHER ONE MIGHT HAVE 19,000 OR ONE MIGHT HAVE 25,000. YOU WOULD BE ADDING SO MUCH MORE TO THE COST OF THE FEE, THAT THE COURT HAS NEVER HELD THAT THAT IS NECESSARY IN ORDER TO HOLD A VALID FEE, WHEN YOU ARE LOOKING AT SOMETHING THAT CAN'T BE PHYSICALLY MEASURED, LIKE ELECTRICITY COMING INTO A HOME THROUGH A METER OR WATER THAT COMES IN THROUGH THE HOME WITH A METER, YOUR HONOR. IT IS CONSISTENT WITH WHAT THIS COURT HAS DONE, BOTH IN THE CASE WITH GARBAGE, SEWER, THE RECLAIMED WATER THAT THIS COURT JUST RECENTLY ADDRESSED IT IN THE PINELLAS COUNTY CASE, AND IT IS CONSISTENT WITH LOWER FLORIDA COURTS, WITH WHAT THEY HAVE DONE, AND ALSO COURTS ACROSS THE NATION, WITH STORM WATER FEES.

DOES THIS COVER THE ENTIRE CITY OF GAINESVILLE, OR ARE WE TALKING ABOUT A SPECIFIC AREA THAT IS GOING TO BE COVERED BY THE STORM WATER?

WE ARE TALKING ONLY ABOUT THOSE AREAS WITHIN THE CITY OF GAINESVILLE, THAT ACTUALLY DISCHARGE INTO THE CITY SYSTEM THERE. IS A SIGNIFICANT PORTION, IN THE MIDDLE OF THE CITY, THAT IS THE MAIN CAMPUS FOR THE UNIVERSITY OF FLORIDA, BECAUSE THE PARTICULAR LAY OUT OF THE LAND, IT ACTUALLY DRAINS INTERNALLY INTO THEIR OWN SYSTEM FOR WHICH THEY PROVIDE STORM WATER MANAGEMENT SYSTEMS. WE DON'T CHARGE. THERE ARE PROPERTIES THAT ARE ON THE PERIMETER OF THE CITY THAT, BECAUSE OF THE WAY THEY DRAIN, THEY DRAIN OUTSIDE THE CITY, DON'T USE THE CITY SYSTEM. WE ADOPT CHARGE. ANY PROPERTY THAT RETAINS 100 PERCENT OF ITS STORM WATER ATTRIBUTABLE TO THE DEVELOPMENT ON SITE, BECAUSE IT DOESN'T USE THE CITY SYSTEM, WE DON'T CHARGE.

HOW DOES YOUR FEE DIFFER OR THE FEE STRUCTURE, FROM SOME OF THE OTHER MUNICIPALITIES? I KNOW THERE WAS SOME COMPARISON WITH, I THINK WAS IT PORT ST. LUCIE OR ONE OF THE OTHER IN FLORIDA.

YES. YOUR HONOR, I THINK THAT WHAT THE TESTIMONY SHOWED AND WHAT YOU WOULD FIND FROM THE AMICUS BRIEFS, IS THAT THE CITY HAS BEEN THE MOST CONSERVATIVE IN ASSESSING THE CHARGE. WE GIVE CREDITS RANGING FROM 100 PERCENT DOWN TO 2 PERCENT, FOR ANYTHING THAT THEY RETAIN ON SITE. AS THE EXPERT TESTIFIED AT TRIAL WHO HAD SET UP STORM WATER UTILITIES, NOT ONLY IN THE STATE OF FLORIDA BUT ACROSS THE NATION, WE ARE THE MOST CONSERVATIVE IN GIVING THAT KIND OF CREDIT, BECAUSE WE HAVE ATTEMPTED TO MAKE IT AS CLOSE TO A USER FEE AS WE CAN MAKE IT, MAKING THE USE AS VOLUNTARY AS WE CAN MAKE IT.

WHAT IS YOUR GENERAL CLASSIFICATION SCHEME OF THE PROPERTIES THAT ARE WITHIN THE CITY THAT ARE CHARGED THIS FEE?

OKAY. WE HAVE, ACTUALLY, THREE CLASSIFICATIONS OF RESIDENTIAL PROPERTIES. THERE IS THE MULTIFAMILY RESIDENTIAL, WHICH BASED, WHETHER IT IS AN APARTMENT OR A MOBILE HOME, BECAUSE THEY ARE THE SMALLER, THEY ARE THE .6 ERU. SINGLE FAMILY RESIDENCES OF A CERTAIN SIZE, CONDOMINIUMS ARE ONE ERU, AND THEN ONCE YOU GET TO A CERTAIN SIZE RESIDENTIAL, IT THEY ARE EVALUATED AS ARE ALL OTHER NONRESIDENTIAL PROPERTY, WHICH MEANS THAT WE GO OUT. WE LOOK AT THE AMOUNT OF IMPERVIOUS AREA ON THE PROPERTY, MEASURE THAT DOWN TO A TENTH AFTER PERCENT. WE THEN LOOK TO -- TO A TENTH OF A PERCENT. WE THEN LOOK TO THE AMOUNT OF STORM WATER THAT THEY RETAIN ON SIGHT AND NOT ALL STORM WATER BUT IMPERVIOUS, BUT GIVE CREDFOYT THE AMOUNT THAT THEY RETAIN ON SITE, DOWN TO AN AMOUNT OF A TENTH OF A PERCENT AGAIN.

IS THERE SOME QUESTION AS TO WHETHER THE OCCUPANTS ARE ACTUALLY CHARGED THIS FEE

OR THE OWNERS OF THE PREMISES? EXPLAIN THAT TO US.

I WOULD, YOUR HONOR. IT IS THE TENANTS OF THE BUILDING WHO ARE CHARGED THE FEE, BECAUSE THE CITY COMMISSION, IN ITS LEGISLATIVE DISCRETION DETERMINED THAT THEY WERE THE USERS OF THE SYSTEM AS OPPOSED TO BEING THE OWNERS OF THE PROPERTY. IT IS THEIR POSSESSIONS THAT WOULD BE DAMAGED IN A FLOOD. THEY DRINK THE CLEAN WATER THAT RESULTS AS A RESULT OF HAVING STORM WATER MANAGEMENT. IT IS THEIR VEHICLES PARKED IN THE PARKING LOT THAT LEAVE BEHIND THE GREASE AND OIL THAT HAVE TO BE DEALT WITH. THE WASTE THAT THEY LEAVE BEHIND GOES TO THE STORM WATER MANAGEMENT SYSTEM. I THINK, YOUR HONORS, IT WOULD BE FOUND THAT THERE WOULD BE A STRONGER ARGUMENT IF THIS WERE CHARGED AS AN ASSESSMENT AS ADDITIONAL OWNERSHIP OF THE PROPERTY, AS THAT CASE THAT I CITED IN MY BRIEF, WHICH WAS THE OREGON CASE.

TELL ME HOW THIS IS, ONE, HOW IT IS BILLED, AND SECONDLY, IS, ARE ALL OF THESE MONIES THAT ARE COLLECTED, USED FOR THE CONSTRUCTION AND MAINTENANCE OF THE STORM WATER DRAINAGE, OR ARE SOME OF THEM USED FOR OTHER NEEDS OF THE CITY?

YES, YOUR HONOR. THE CHARGE GOES OUT ON THE ELECTRIC UTILITY BILL, ALONG WITH OTHER CHARGES FOR GAS, WASTEWATER AND WATER. IN THAT CASE, IT IS DIFFERENT THAN THE ATLANTIC GULF CASE, WHICH GOES OUT ON -- WHICH GOES OUT ON THE ADVALOREM TAX BILL. WE BILL OURS OUT ON A MONTHLY BASIS, JUST AS ON ANY UTILITY, AND AS TO THE SECOND QUESTION THE COURT ASKED, IT SLIPPED MY MIND. I AM SORRY.

THE SEC QUESTION IS THE REVENUES THAT WERE -- THE SECOND QUESTION IS THE REVENUES THAT WERE GENERATED, HOW ARE THEY FUND?

IT GOES INTO A UTILITY TRUST FUND, WHICH ONLY EXPENDITURES RELATING TO STORM WATER MANAGEMENT ARE TAKEN FROM THAT TRUST FUND, AND I DON'T THINK THAT THERE WAS ANY DISPUTE DOWN BELOW THAT WE ONLY USE THOSE SOURCES TO FUND STORM WATER MANAGEMENT SERVICES.

WHAT IS THE SIGNIFICANCE OF THE FACT THAT STORM WATER UTILITY FEES ARE EXPRESSLY AUTHORIZED BY FLORIDA STATUTE, AS FAR AS PORT ORANGE SPECIFICALLY REFERS TO THAT, AND, AGAIN, TRYING TO UNDERSTAND WHAT THE CONSTRUCT FOR THIS CASE SHOULD BE, AND THE ANALYSIS AS TO WHETHER THIS IS VALID OR INVALID.

I DON'T KNOW HOW MUCH SIGNIFICANCE THERE IS TO THAT, YOUR HONOR, BECAUSE I THINK THAT THE FEES CAN CERTAINLY BE JUSTIFIED UNDER CHAPTER 180, AND I KNOW THAT THE AMICUS HAVE ARGUED THAT IT CERTAINLY IS AUTHORIZED UNDER HOME RULE. I THINK THE SIGNIFICANCE OF THE AUTHORIZATION, UNDER 403, IS THAT THE LEGISLATURE RECOGNIZING THE SIGNIFICANT PROBLEMS OF STORM WATER RUNOFF, I MEAN, IT ACCOUNTS FOR OVER HALF OF THE POLLUTANTS ENTERING FLORIDA SURFACE WATERS, WHICH IS WHY IT IS IN THE CHAPTER ON ENVIRONMENTAL CONTROL. I THINK THAT THE SIGNIFICANCE OF THAT IS THAT THE LEGISLATURE HAS MANDATED THAT WE PROVIDE THESE SERVICES. WE DON'T HAVE ANY CHOICE. THE LEGISLATURE MANDATES THAT WE PROVIDED THE SERVICE. THEY HAVE CERTAINLY RECOGNIZED THAT THERE ARE GOING TO BE A LOT OF CHARGES ASSOCIATED WITH THE SERVICE, BECAUSE AS THIS COURT HAS RECOGNIZED BEFORE IN PINELLAS COUNTY, THE ENVIRONMENTAL ASPECTS OF ANY KIND OF WATER PROGRAM ARE AMONG THE MOST SIGNIFICANT AND AMONG THE MOST EXPENSIVE COMPONENTS, AND I THINK THAT WE WOULD HAVE AUTHORIZATION, UNDER CHAPTER 180, I THINK WE WOULD HAVE AUTHORIZATION UNDER HOME RULE, BUT I THINK THAT WHAT 403 MAKES ABSOLUTELY CLEAR IS YOU HAVE TO DO THIS.

ONCE WE DETERMINE THAT, IF IT IS A FEE, AND IT IS NOT GOING TO BE A TAX, COULD YOU, MAYBE THIS REALLY IS GOING TO GO TOWARDS THE DEPARTMENT OF TRANSPORTATION, THEIR VIEW. I AM JUST TRYING, WHETHER YOU SEE WE HAVE ANY DISCRETION OR ANY REVIEW POWER,

REALLY, TO DECIDE THERE IS A BETTER WAY TO DO IT, AS FAR AS THE COLLECTION, I MEAN, WHERE IS THE SCOPE OF OUR REVIEW, ONCE WE DECIDE THAT, YES, THIS IS A UTILITY FEE, BUT MAYBE YOU COULD DO IT BETTER.

WELL, I DO THINK THAT ONE THING THAT THIS COURT AND ALL COURTS ALL ALONG HAVE RECOGNIZED IS THE LEGISLATIVE DISCRETION IN SETTING THE AMOUNT OF FEES, AND UNLESS COURTS WANT TO SET AS SUPER CITY COMMISSIONS, TO DETERMINE HOW YOU ARE GOING TO SET THE FEE AND WHETHER YOU ARE GOING TO CHARGE THE TESTIMONY TENANT, I THINK IT -- THE TENANT, I THINK IT HAS GOT TO BE THE CITY HAS TO HAVE THE LEGISLATIVE DISCRETION TO HOLD HEARINGS, TO HEAR ARGUMENTS AS TO WHY IT IS THE TENANTS THAT ARE MORE PREVALENTLY CHARGED THAN THE PROPERTY OWNERS, AND I THINK THIS COURT ALONG WITH OTHER COURTS, HAVE RECOGNIZED ALL ALONG THAT YOU ARE NOT GOING TO MICROMANAGE UTILITIES, BECAUSE THAT IS NOT YOUR ROLE AND NOT YOUR SPECIALTY. AS LONG AS THE FEE IS REASONABLE AND NONDISCRIMINATORY, THIS COURT AND MANY OTHER COURTS HAVE HELD THAT IT IS WITHIN THE LEGISLATIVE DISCRETION OF THE LEGISLATIVE BODY, TO DETERMINE HOW BEST TO BE FUNDED, AND A PRIMARY EXAMPLE IS THAT CITY OF RIVIERA BEACH CASE, WHERE IT WAS IN FACT A LOWER FLORIDA CASE, BUT THEY SAID, HEY, THE DECISION ON WHETHER YOU CHARGE THE INDIVIDUAL TENANTS AFTER APARTMENT BUILDING OR WHETHER YOU CHARGE THE PROPERTY OWNER OF THE PROPERTY BUILDING BY HOW MANY DUMPSTERS YOU HAVE OUT THERE, THAT IS A LEGISLATIVE DECISION THAT IS BEST LEFT TO THE CITY COMMISSION. SO AS LONG AS IT IS NOT DISCRIMINATORY, AS LONG AS IT IS REASONABLE, I MEAN, THAT IS WHAT THE COURT IS LOOKING AT. I WOULD SUBMIT TO YOU THAT, SHORT OF PROVIDING THE SERVICES, WHICH WERE MANDATED TO DO -- WHICH WE ARE MANDATED TO DO AND SAY, IT IS UP TO YOU GUYS TO PAY OR NOT AS YOU SEE FIT, THERE IS NOTHING MORE THAT COULD HAVE BEEN DONE TO MAKE THIS FEE MORE VOLUNTARY AND MORE EQUITYBLY BASED ON USE.

ARE COMMERCIAL TENANTS TREATED THE SAME AS RESIDENTIAL TENANTS?

NO. ALL NONRESIDENTIAL TENANTS, WHICH WOULD INCLUDE COMMERCIAL, INDUSTRIAL, GOVERNMENT BUILDINGS, CITY OF GAINESVILLE BUILDINGS, WE PAY THE FEE, THEIR INDIVIDUAL PROPERTIES ARE INDIVIDUALLY EXAMINED, TO DETERMINE THE AMOUNT OF IMPERVIOUS AREA ON THE PROPERTY, AND THEN THEY ARE FURTHER EXAMINED TO DETERMINE HOW MUCH THEY RETAIN ON SITE.

MY QUESTION IS IF YOU HAVE A STRIP MALL WITH TWELVE TENANTS, SUBLESSEE OR LESSEES IN A STRIP MALL, YOU CHARGE THE LANDOWNER OR THOSE LESSEES?

IT GOES TO THE TENANT, YOUR HONOR.

TO THE TENANT ON A COMMERCIAL PROPERTY?

SO THAT THE PUBLIC -- SO THE PUBLIC WOULD RECEIVE ITS BILL FOR ITS SHARE AND THE DOLLAR GENERAL STORE PERHAPS, NEXT TO IT, WOULD RECEIVE ITS BILL FOR ITS SHARE. IT GOES TO THE AT THEANT. LIKE I SAID, THE CITY -- IT GOES TO THE TENANT. LIKE I SAID, THE CITY COMMISSION DETERMINED IT WAS THE TENANT THAT MAKES USEFUL THE SERVICE.

YOU DETERMINED THAT IN FACT, HAVING OTHER CITIES, PORT ST. LUCIE, AS JUSTICE PARIENTE JUST SAID, AND IN DURHAM, NORTH CAROLINA, HAVEN'T THEY FOUND A MORE ACCURATE WAY TO DO IT, BECAUSE HAVEN'T THEY MEASURED AT LEAST THE SQUARE FOOTAGE OF EACH INDIVIDUAL PROPERTIES, DO THAT DO THAT?

I WOULD -- DO THEY DO THAT?

I THINK, IN READING BOTH OF THOSE CASES, IT WAS NOT AN ISSUE AS WHO HOW MUCH OF AN ISSUE THAT THEY WERE MAKING, AS TO WHETHER THE FEE WAS A VALID FEE. IN THE ATLANTA

GULF CASE, IT WAS COULD THEY BILL THE CHARGE ON THE ADVALOREM TAX BILL, AND IN THE OTHER OUT-OF-STATE CASE, IT WAS WHETHER THEY HAD AUTHORIZATION TO DO IT. THE ATLANTIC GULF CASE ONLY HAD TWO RESIDENTIAL CLASSES OF USERS. WE HAVE THREE. DOT HAS NOT POINTED TO A SINGLE CASE WHERE IT IS CLEAR FROM THE RULING THAT, WHAT THE GOVERNMENT ENTITY HAS DONE IS TO GO IN AND MEASURE EACH RESIDENTIAL PROPERTY IN THE CITY, TO SEE HOW MUCH IMPERVIOUS AREA THERE IS AND HOW MUCH CREDIT THEY GET FOR ANYTHING RUNNING OFF. I WOULD SUBMIT TO THE COURT THAT NONE OF THE CASES THAT THE D.O.T. CITES FOR THE PROPOSITION IN ITS BRIEF, REALLY STANDS FOR THAT.

WHAT ABOUT THE ISSUE OF VOLUNTARINESS, AS IT RELATES TO TENANTS? THE D.O.T. ARGUES THAT IT IS NOT VOLUNTARY AS TO TENANTS, BECAUSE THEY ARE IN THAT BUILDING.

WELL, I THINK THAT THE COURT HAS ALSO UPHELD, OVER TIME, MANY TIMES, ESPECIALLY WITH THE USE OF MANDATORY CONNECTION TO SEWER SYSTEMS THAT, SOMETIMES WHENEVER PUBLIC WELFARE, HEALTH AND SAFETY ARE INVOLVED, YOU CAN MANDATE MANDATORY CONNECTIONS. AS FAR AS I INDICATED EARLIER, THAT THE CITY MADE THE LEGISLATIVE DECISION THAT, SINCE THEY WERE THE USERS OF THE SYSTEM, THAT THEY WERE THE ONES APPROPRIATELY INVOLVED. THEY CAN CHOOSE TO LIVE IN AN APARTMENT COMPLEX THAT RETAINS ALL STORM WATER ON SIGHT. THERE BY, NOT HAVING THAT AS AN ADDITIONAL PART IN EVALUATING THAT IN THE RENT THAT THEY DETERMINED. AGAIN, YOUR HONOR, THE FACT THAT TENANTS DON'T HAVE A CHOICE, EITHER, AS TO HAULING THEIR OWN GARBAGE TO THE DUMP. THEY HAVE TO PAY THE SOLID WASTE DISPOSAL FEE, WHETHER THEY HAVE ONE BAG OF GARBAGE OR TWO BAGS OF GARBAGE OR EVEN IN ANOTHER CASE THAT THIS COURT HAS ADDRESSED, THEY SAY I DON'T USE IT BECAUSE I CARRY MY OWN GARBAGE TO THE DUMP. MANDATORY FEES HAVE ALWAYS BEEN UPHELD BY THIS COURT, WHEN YOU HAVE GOT TRADITIONAL UTILITY SERVICES INVOLVED.

CHIEF JUSTICE: THE HE MARSHAL HAS RE-- THE MARSHAL HAS REMINDED US OF YOUR REBUTTAL TIME. YOU CAN RESPOND TO JUSTICE QUINCE'S QUESTION.

ONE OF THE ISSUES HERE SEEMS TO BE WHETHER YOU HAVE THE RIGHT TO CHARGE THE D.O.T. FOR THIS SERVICE. I AM WONDERING HOW IS THE D.O.T. CHARGED? WHAT IMPERVIOUS AREAS ARE WE TALKING ABOUT, IN REGARDS TO THE D.O.T.? ARE WE TALKING ABOUT ALL OF THE ROADS IN GAINESVILLE OR WHAT?

NO, YOUR HONOR. WE HAD ARGUED, OF COURSE, BELOW, THAT THAT WAS COLLATERAL, BUT IN ADDRESSING THE MERITS OF THAT, THE D.O.T. IS NOT CHARGED FOR ITS ROAD SYSTEM. THE COUNTY IS NOT CHARGED FOR ITS ROAD SYSTEM. THE FEDERAL GOVERNMENT IS NOT CHARGED NOR IS THE CITY. WHAT WE ARE TALKING ABOUT AND THE ISSUE THAT THE DOT HAS IN THIS CASE IS ONE SINGLE PIECE OF PROPERTY THAT IT MAINTAINS AN OFFICE AND A WAREHOUSE ON. THAT IS THE PIECE OF PROPERTY THAT IT IS CHARGED FOR, JUST AS THE STATE OF FLORIDA DEPARTMENT OF CORRECTIONS CENTER DOWN THE ROAD, JUST AS CITY HALL IS CHARGED, IT IS A PIECE OF PROPERTY THAT ADMITTEDLY USES THE CITY SYSTEM. IT IS NOT, WE DON'T CHARGE THE ROADS, EVEN THOUGH EVENTUALLY THE RUNOFF FOR THE ROADS END UP IN OUR SYSTEM. THEY MAY MOVE IT AWAY FROM THE ROADS BUT WE DON'T CHARGE THE ISSUE, AND THAT IS THE ONLY ISSUE, AS FAR AS THE D.O.T. BEING PAID IN THIS CASE.

CHIEF JUSTICE: SAF SAVE THE BALANCE OF TIME. COUNSEL.

GOOD MORNING. MAY IT PLEASE THE COURT. MARY ANN TRESSELL ON AND THE STATE OF FLORIDA RETRIED APPLIED THAT THEY DID NOT WANT TO DO ANYTHING BUT RELY ON ITS BRIEF. THE COURT GRANTED THAT PROPOSAL. SO THE TIME IS ALL MINE.

WOULD YOU BRING US BACK TO SQUARE ONE, A BOND VALIDATION PROCEEDING, AS FAR AS WHAT THE NARROW ISSUES ARE THAT WERE BEFORE THE TRIAL COURT AND THEN HOW THAT GETS TRANSFERRED HERE, NOW THAT WE HAVE HAD A DENIAL OF THE VALIDATION OF THE

BONDS. WHAT ARE THE APPROPRIATE ISSUES TO BE CONSIDERED BY A TRIAL COURT, IN A BOND VALIDATION PROCEEDING.

I BELIEVE THAT THE CASE LAW IS FAIRLY CLEAR FROM THIS COURT THAT THE THREE ISSUES ARE THE LEGALITY OF THE OBLIGATION, WHETHER IT WAS USED FOR THE PURPOSE THAT IT WAS SET OUT FOR, AND THE LEGALITY OF THE DEBT, BUT I BELIEVE THAT THE CASES ALSO HAVE A STRING RUNNING THROUGH THEM, WHICH I KNOW THAT JUSTICE LEWIS DOESN'T ALWAYS AGREE, WITH ABOUT COLLATERAL ISSUES. I BELIEVE, AND THIS COURT HAS SO FAR SAID IT IN THESE CASES, THAT YOU NEED TO LOOK AT THE UNDERLYING OBLIGATION, ALSO. THREE CASES COME TO MIND. THE GRW CASE, THE KEY CITIZENS FOR RESPONSIBLE GOVERNMENT, AND THE RESPONSIBLE CITIZENS FOR TAX REVENUE MANAGEMENT OR SOMETHING, HERE IN LEON COUNTY THAT, THIS COURT LOOKED TO THE UNDERLYING OBLIGATION TO ENSURE ITS LEGALITY, BECAUSE LET'S SAY, AND IN OUR CASE IT IS THE ORDINANCE. THE ORDINANCE IS GOING TO PRODUCE THE FEES, \$4 MILLION A YEAR THEY COLLECT, TO PAY BACK THE BOND HOLDERS, SO IF THE VALIDITY OF THE ORDINANCE CANNOT BE ADDRESSED IN THE BOND VALIDATION CASE, I BELIEVE THAT THE BOND HOLDERS ARE GOING TO BE PUT AT JEOPARDY, BECAUSE THE BOND HOLDERS ARE GOING TO RELY ON THE CITY OF GAINESVILLE HAVING THIS MONEY COMING TO THEM TO REPAY THE DEBT WHEN THE BONDS COME DUE, SO IF THAT IS NOT PART OF THIS PROCEEDING, AND THE PROCEEDING BELOW, THEN SOMEBODY CAN LATER COME AND CHALLENGE THE ORDINANCE, AS BEING UNCONSTITUTIONAL OR INVALID, AND LET'S SAY IT --

IS THERE A PROVISION FOR SOME KIND OF, MAYBE, DECLARATORY ACTION THAT CAN BE FILED, TO DETERMINE THE VALIDITY OF THE ORDINANCE?

THAT IS A VERY GOOD QUESTION, JUSTICE QUINCE, AND IN FACT, THE CITY OF GAINESVILLE DID THAT. DOT HAS REFUSED TO PAY THIS FEE FOR SOMETHING LIKE TWELVE YEARS. WE HAVE CONTINUALLY SAID THIS IS A SPECIAL ASSESSMENT, WHERE THE GOVERNMENT, YOU CAN'T IMPOSE A SPECIAL ASSESSMENT ON US, AND BE SHIDZ, WE ARE YOUR PARTNER -- AND BESIDES, WE ARE YOUR PARTNER IN STORM WATER MANAGEMENT. WE ARE OUT THERE. WE HAVE STORM WATER MANAGEMENT FACILITIES ALL OVER THE CITY. BELOW, WE INTRODUCED EVIDENCE OF HOW MUCH OF THE CITY'S STORM WATER, THE STORM WATER GOES FROM DOT'S DRAINS TO THE CITY'S DRAINS, BACK TO DOT DRAINS, BACK TO DOT RETENTION PONDS, BACK TO THE CITIES AND EVENTUALLY IN PAINS PRAIRIE OR SOMEWHERE -- AND PAYNES PRAIRIE OR SOMEWHERE, AND EVENTUALLY THE D.O.T. DOES --

DO YOU PAY STORM WATER UTILITIES?

THEY DO.

TO WHOM DOES THAT GO?

TO WHATEVER THE LOCAL UTILITY COMPANY IS. THAT, I BELIEVE, ILL COME BACK TO YOUR QUESTION, JUSTICE QUINCE, IN JUST A SECOND. THANK THAT DISTINGUISHES WHY THIS ISN'T A UTILITY FEE. WE DON'T PAY OUR ELECTRIC BILL. SOMEWHERE WE APPLIED FOR UTILITY. WE WANT YOU TO TURN ON, FLORIDA POWER & LIGHT OR WHOEVER YOU ARE, TURN ON ELECTRICITY AT SUCH-AND-SUCH AN ADDRESS, AND WE HAVE TWO PROPERTIES IN THE CITY OF GAINESVILLE. IF WE DON'T PAY OUR BILL, THEY TURN OFF THE LIGHTS. HERE THAT CAN'T HAPPEN. THIS ISN'T A TYPICAL UTILITY, ALTHOUGH THE STATUTE SAYS YOU CAN BILL IT AS A TYPICAL UTILITY, THIS ISN'T A TYPICAL UTILITY, BECAUSE YOU CAN'T TURN IT OFF. YOU CAN'T STOP IT WHEN PEOPLE DON'T PAY, SO IF DOT DIDN'T PAY FOR TWELVE YEARS OR SO, BACK TO YOUR QUESTION, JUSTICE QUINCE, SO THE CITY SUED DOT HERE IN LEON COUNTY, FOR A DECLARATORY JUDGMENT ON ITS ORDINANCE, TO PROVE THAT IT DID HAVE TO PAY AND TO COLLECT THE AMOUNTS THAT IT WAS DUE. THE TRIAL COURT FOUND THAT IT WAS NOT A VALID USER FEE. THEY TOOK THE CASE TO THE FIRST DISTRICT COURT OF APPEAL. JUDGE BENTON WROTE THE OPINION AND SAID, IF THE

ORDINANCE WORKS AS IT IS ALLEGED, IF IT OPERATES AS IT IS ALLEGED, THEN IT WOULD BE A VALID USER FEE, BUT I THINK THE CITY NEEDS TO HAVE A CHANCE TO PROVE THAT, BECAUSE THIS WAS ON A MOTION TO DISMISS. SO HE REVERSED IT AND SAID TAKE IT BACK TO THE TRIAL COURT. THEY DID AND LET THEM AMEND. BEFORE THEY, THE TIME RAN OUT TO AMEND THEIR ORDINANCE, THEY TOOK A VOLUNTARY DISMISSAL. AND SO THE NEXT THING WE GET IS NOTICE THAT THEY FILED THIS BOND VALIDATION, SO RATHER THAN HAVE A DETERMINATION THAT THEIR ORDINANCE IS VALID THAT, THE MONIES THAT THE D.O.T. SHOULD BE PAYING, SHOULD BE PAID IN ESSENCE, THEY DECIDED TO GO FOR A BOND VALIDATION HEARING, AND THAT IS WHEN THE DEPARTMENT AND THE STATE ATTORNEYS OFFICE STEPPED IN.

SO COULD THE DEPARTMENT HAVE, ON ITS OWN, FILED A DECLARATORY JUDGMENT ACTION?

I THINK WE COULD HAVE.

BUT ISN'T THIS, AND, AGAIN, LET'S GO WITH JUSTICE ANSTEAD'S QUESTION. THE ISSUE ABOUT THE PROCEDURAL POSTURE OF THIS CASE, HOW IS IT DIFFERENT THAN THE CITY OF PORT ORANGE OR THE PINELLAS COUNTY CASE? IN BOTH THOSE CASES, DIDN'T WE DIRECTLY LOOK AT THE QUESTION OF THE USER FEES VERSUS WHETHER IT WAS A SPECIAL ASSESSMENT, IN DECIDING WHETHER THE BOND VALIDATION --

YES. IN ALL OF THE CASES HAVE, I MEAN, ALL OF THOSE THAT THIF I HAVE CITED -- THAT I HAVE CITED, GRW WAS, ALSO. ON THE PURCHASE AGREEMENT, YOU LOOKED AT THAT, TOO.

I AM ASKING WHETHER THE ISSUE WAS A DEPARTMENT OF TRANSPORTATION ISSUE, BECAUSE YOU HAVE ASPECTS WITH SPECIAL PARTNERS OF THE CITY SHOULD BE EXEMPTED, WHY ISN'T THAT -- EXEMPTED, WHY ISN'T THAT PECULIARLY A FINANCIAL MATTER THAT DOESN'T GO TO THE VALIDATION OF THE BONDS?

I THINK IT AFFECTS THE OVERALL SCHEME THAT THE CITY IS USING. THE CITY IS USING A SCHEME. FIRST OF ALL THEY ARGUE THAT IT IS OKAY TO HAVE A MANDATORY FEE. THIS ISN'T A MANDATORY FEE. ALL OF THE CASES THAT THEY CITE ARE UNDER CHAPTER 180, AND UNDER CHAPTER 180.02 SUB-3, IT SAYS YOU CAN MAKE PEOPLE CONNECT, WHETHER THEY USE IT OR NOT. THAT LANGUAGE ISN'T IN 403. I BELIEVE THAT IS A BIG DISTINCTION. THE LEGISLATURE CREATED BOTH STATUTES. THEY COULD HAVE EITHER INCLUDED THIS IN 180 OR THEY COULD HAVE INCLUDED THE SAME LANGUAGE IN 403, AND I THINK WE WOULD HAVE TOTALLY DIFFERENT ARGUMENT HERE BUT THEY DIDN'T, SO SINCE IT IS NOT MANDATORY, THEY HAD TO COME UP WITH A SCHEME IN ORDER TO CHARGE PROPERTIES. THEY CAME UP WITH THE ERU. NOW, THE ERU, AS I READ THE CASES, HAS NEVER BEEN APPROVED FOR, ON A USER FEE CASES. ATLANTIC GULF PROPERTIES, ATLANTIC GULF COMMUNITIES THAT, IS THE PORT ST. LUCIE CASE, JUSTICE PARIENTE THAT, YOU ARE THINKING OF. THAT WAS A NONADVALOREM ASSESSMENT. IT WASN'T A UTILITY FEE. IT WASN'T A USER FEE. THEY USED THE ERU. YES. THE ERU ISN'T THE PROBLEM HERE. I THINK THE WAY THEY HAVE GONE ABOUT UTILIZING IT, NOT THE SIMPLE FACT THAT ANYTHING THAT IS AN ER U IS GOING TO BE INVALID, AND I THINK THAT BOTH THE NORTH CAROLINA CASE AND ATLANTIC GULF PROPERTIES CASE, TALK ABOUT THE ERU, AND IT IS A FLAT RATE HERE. THIS ISN'T, THIS ISN'T SOMETHING THAT HAS BEEN THOUGHT ABOUT. IT DOES NOT, THEIR FEE DOES NOT IMPOSE A FEE, BASED ON THE RELATIVE CONTRIBUTION OF THE BENEFICIARIES TO THE PROGRAM. THAT IS WHAT THE STATUTE SAYS, THAT THIS FEE THAT THE COST OF THE PROGRAM, SHOULD BE ASSESSED TO THE BENEFICIARIES OF THE PROGRAM, BASED UPON THEIR RELATIVE CONTRIBUTION TO ITS NEEDS.

WHAT IS WRONG WITH THE SCHEME THAT THEY ARE USING, WHICH IS TRYING TO DETERMINE THE AMOUNT OF SQUARE FOOTAGE OF IMPERVIOUS SPACE THAT EACH OF THESE HOMES OR APARTMENTS OR WHATEVER THE KIND OF BUILDING IT IS, USES, AND WHY ISN'T THAT A RELATIVE CONTRIBUTION SCHEME?

JUSTICE PARIENTE, THEY DIDN'T TRY TO DO THAT. THEY SAID THEY TOOK THE AMOUNT OF IMPERVIOUS AREA IN THE ENTIRE CITY, I AM NOT SURE HOW THEY DETERMINED THAT, AND DIVIDED IT BY THE NUMBER OF RESIDENTIAL UNITS, AND CAME OUT WITH AN AVERAGE OF 2300 SQUARE FEET, AND YOU WILL FIND IN THE RECORD, WHERE I BELIEVE THEIR PUBLIC WORKS DIRECTOR WAS ASKED, WELL, HOW MUCH DOES A ONE-HALF ACRE PIECE OF PROPERTY WITH A 1500 SQUARE FOOT IMPERVIOUS AREA ON IT PAY? \$6. HOW MUCH DOES A TWO-ACRE PIECE OF PROPERTY WITH A 20,000 SQUARE FOOT IMPERVIOUS AREA? \$6.

WHEN YOU KEEP USING THIS TERM "IMPERVIOUS AREA", WE ARE TALKING ABOUT GROUND THAT IS COVERED OVER?

THE HOUSE, THE DRIVEWAY, THE SWIMMING POOL, THE TENNIS COURT, IF YOU ARE SO LUCKY. I KEEP WANTING TO SAY THE RESIDENT BUT IT IS THE HOUSE AND ANYTHING ELSE THAT IS PAVED OVER, THE IN-GROUND SWIMMING POOL. THAT IS IMPERVIOUS AREA. SO I DON'T BELIEVE THAT THAT, AND THEY SAY THEY DON'T WANT TO GO OUT AND FIND OUT HOW MUCH EACH PROPERTY ACTUALLY CONTRADICTS, BECAUSE THEY SAY THAT THE COST OF THEM DOING THAT IS GOING TO COST MORE THAN THEY ARE GOING TO GET BACK IN THE FEES.

BUT ISN'T THAT, REALLY, IN THE REALM OF WHAT OUR CASES HAVE COME DOWN AND SAID IS WITH IN THE DISCRETION OF THE LEGISLATIVE BODY, TO MAKE THAT TYPE OF DECISION? WHERE, WHAT IS, WHAT HAVE WE SAID ARE THE ELEMENTS THAT DIFFERENTIATE A USER FEE FROM A SPECIAL ASSESSMENT?

WELL, I BELIEVE THAT YOU SAID IT VERY WELL, IN PORT ORANGE. AND IT SAYS THAT YOU HAVE GOT TO RECEIVE A SPECIAL BENEFIT. THE PERSONS WHO USE IT GET A SPECIAL BENEFIT. NOW, THAT KIND OF ALSO LOOKS LIKE A SPECIAL ASSESSMENT. ALL OF THE CASES SAY THAT THAT IS THE ONE POINT THAT LOOSE A LITTLE BIT ALIKE, BUT THEN YOU GO ON TO SAY THAT IT HAS GOT TO BE VOLUNTARY. YOU HAVE GOT THE OPTION --

IS THERE, HOW, IS THERE, DID THE TRIAL JUDGE MAKE A DETERMINATION HERE, THAT THIS WAS NOT VOLUNTARY?

I THINK INDIRECTLY HE DID.

BUT HE DIDN'T DIRECTLY.

WELL --

THAT --

EVEN WHEN YOU READ ALL OF HIS ORAL PRONOUNCEMENT, IT IS KIND OF LOST IN THERE, BUT I THINK THAT THAT WAS PART OF HIS CONCLUSION OF WHY THE ORDINANCE WASN'T VALID.

WHAT, IN THIS TYPE OF CONTEXT, WOULD MAKE A FEE VOLUNTARY OR INVOLUNTARY? WHAT IS THE STANDARD THAT WE WOULD MAKE THAT DETERMINATION IN THIS CASE?

WELL, I THINK, AS YOU SAID IN PORT ORANGE, THE PERSON WHO IS RECEIVING THE BENEFIT CAN CHOOSE TO ACCEPT IT OR NOT, AND IN THIS CASE, YOU CAN'T CHOOSE TO ACCEPT THE RAIN OR NOT.

HOW DOES THAT DIFFER, TELL ME AGAIN, THEN, WHY, WHAT ABOUT THE RECLAIMED WATER CASE, THE PINELLAS COUNTY?

THAT RECLAIMED WATER CASE, AS I READ IT, THE, INTERPRET WAG THIS COURT SAID, I THINK THIS COURT MADE THAT DECISION, BECAUSE THE RECLAIMED WATER FEE WAS ATTACHED TO

THE WATER CHARGE, AND THE WATER WAS CHARGED PER HOW MUCH YOU USE, HOW MUCH COMES OUT OF YOUR TAP. THAT IS HOW MUCH YOU WERE BILLED FOR THE WATER, AND THIS COURT SAID THAT IT WAS SO, I DON'T KNOW WHETHER THEY SAID INTERTWINED OR AN INTEGRAL PART OF THAT WHOLE SYSTEM, THAT IT WAS OKAY TO SORT OF LIKE PUT IT TOGETHER WITH THE WATER CHARGE, AND I THINK THE LANGUAGE LATER ON, SAYS SOMETHING ABOUT IF A GOVERNMENTAL ENTITY CHOOSES TO MAKE A AVAILABLE, A TRADITION -- MAKE AVAILABLE, A TRADITIONAL UTILITY SERVICE, THEN YOU WANT ON TO SAY THIS COURT HAS NOT HESITATED TO APPROVE MANDATORY CHARGES, SO I THINK THAT THE UTILITY THAT WAS MADE AVAILABLE WAS THE WATER. THEY ARE BILLED. YOU DON'T PAY YOUR WATER BILL. YOU EITHER DON'T GET ANY WATER OR IT IS ONE OF THE MANDATORY ONES UNDER 180, SO YOU HAVE GOT TO DO IT.

UNDER THAT YOU WOULD SAY THERE WOULD BE NO WAY, EVEN IF THEY WENT OUT AND MEASURED THE PROPERTY, THAT IT WOULD BE TRULY VOLUNTARY. I MEAN --

IT IS A SPECIAL ASSESSMENT. PLAIN AND SIMPLE, IT IS A SPECIAL ASSESSMENT, JUST LIKE IN SARASOTA COUNTY. BOTH OF THE SARASOTA COUNTY CASES IT WAS A SPECIAL ASSESSMENT.

WHAT DOES THAT MEAN? IN OTHER WORDS ARE YOU SAYING THAT, NO MATTER HOW A MUNICIPALITY SETS IT UP, IT IS GOING TO BE A SPECIAL ASSESSMENT AND THEREFORE WHAT?

THERE FOR YOU CHARGE IT AS A SPECIAL ASSESSMENT, AND AS A SPECIAL ASSESSMENT, YOU DON'T, YOU CANNOT CHARGE GOVERNMENTAL ENTITIES. I BELIEVE THAT IS WHY THEY WANT TO DO IT AS A UTILITY FEE, AS A VALID USER FEE. YOU CANNOT TAX --

SO YOU WOULDN'T BE CHARGED, A CITY THAT, THEY COULDN'T CHARGE THEMSELVES. THEY COULDN'T CHARGE THE FEDERAL GOVERNMENT.

THAT'S CORRECT.

AS FAR AS THE HOMEOWNERS, THE COMMERCIAL OWNERS, IT WOULD NOT BE, IT WOULD BE IRRELEVANT AS TO THEM.

EVERYTHING IS STILL THE SAME. THAT WAS THE ISSUE IN THE SARASOTA COUNTY CASES. IN THE FIRST ONE, A GROUP OF CHURCHES CHALLENGED IT AND SAID IT IS NOT A SPECIAL ASSESSMENT BECAUSE THE CHURCHES HAD TO PAY SPECIAL ASSESSMENTS AND NOT TAXES, SO THE CHURCHES CHALLENGED IT AND SAID, NO, I BELIEVE IT IS A SPECIAL ASSESSMENT, AND YOU, JUSTICE WELLS, SAID, NO, I THINK IT IS A TAX, AND THEN WHEN THEY RENEWED THE ORDINANCE AND EXPANDED HOW MANY PROPERTIES WERE COVERED, THE CASE CAME UP AGAIN AND ONCE AGAIN, SARASOTA COUNTY SAID IT IS STILL A SPECIAL ASSESSMENT, EVEN THOUGH THERE ARE ALMOST NO PROPERTIES ASSESSED, ONCE AGAIN JUSTICE WELLS, I THINK YOU SAID I STILL THINK IT IS A TAX!

WHAT FEES ARE ATTRIBUTABLE TO GOVERNMENTAL ENT SNITS.

NOT OF GOVERNMENTAL ENTITIES, BUT I BELIEVE -- GOVERNMENTAL ENTITIES?

NOT GOVERNMENTAL ENTITIES, BUT I BELIEVE THAT ABOUT 20 PERCENT OF THE CITY'S \$4 MILLION COME FROM PROPERTIES THAT AND OUT STATE ROADS.

HOW MUCH DOES THE THE CHARGE -- HOW MUCH DOES IT CHARGE THE D.O.T. ON AN ANNUAL BASIS?

THE TWO PROPERTIES THERE, ABOUT \$23,000 A YEAR.

I DON'T UNDERSTAND YOUR ARGUMENT. ARE YOU SAYING THAT THE CITY DID THIS AS A CITY

UTILITY FEE AND NOT A SPECIAL ASSESSMENT, SO THAT IT CAN ASSESS ANOTHER \$23,000 TO DOT, AT \$4 MILLION A YEAR?

THEY RISKED THEIR ORDINANCE FOR \$23,000 A YEAR, AND, YES, IT WAS \$23,000, AND ALL WE HAVE ASKED FOR, UNDER OUR POSITION, IS ALL WE ASK FOR IS A CREDIT. WE BELIEVE THAT CONTRIBUTION MEANS CONTRIBUTION BOTH WAYS. WE CONTRIBUTE TO YOUR SYSTEM CITY AND YOU CHARGE EVERYBODY, WHETHER THEY USE YOUR SYSTEM OR DOT'S SYSTEM, THEY BRING THE MONEY IN AND THE CONTRIBUTION WORKS BOTH WAYS.

WHAT PREVENTS YOU FROM FILING A DECLARATORY JUDGMENT ACTION SAYING WE DESERVE A CREDIT, APART FROM A BOND VALIDATION PROCEEDING?

WE COULD HAVE.

AND YOU CAN TOMORROW, RIGHT?

I GUESS WE COULD TOMORROW.

WHETHER OR NOT THIS BOND IS VALID.

YES, I BELIEVE WE COULD.

IS THE LEGISLATION, IS, THE CITY IS REQUIRED TO PROVIDE STORM WATER MANAGEMENT, CORRECT?

AS IS THE D.O.T..

BY WHAT MECHANISM? LEGISLATION BY THE STATE OF FLORIDA, RIGHT?

YES, SIR.

THE CITY HAS NO CHOICE BUT TO MANAGE ITS STORM WATER, CORRECT?

ABSOLUTELY. WE DON'T DISPUTE THAT AT ALL.

AND IN ORDER TO DO THAT, THE CITY HAS TO RAISE FUNDING TO DO THAT.

CORRECT.

AND THE MODEL SAID, IN THE LEGISLATION, 403.891, MANDATES THE DEPARTMENT OF ENVIRONMENTAL PROTECTION TO DEVELOP A MODEL STORM WATER MANAGEMENT PROGRAM. IS THAT CORRECT?

IT DOES, BUT I DO NOT BELIEVE THAT THE CITY HAS EVER SAID THAT THAT IS WHAT THEIR PROGRAM WAS MODELED ON. THERE WAS NO EVIDENCE BELOW THAT DEP AND THE DCA GOT TOGETHER AND CREATED A MODEL PROGRAM AND THEN IT WAS ADOPTED BY THE CITY, AND SO THEREFORE IT FALLS UNDER THAT PROVISION.

BUT WHAT IS THE COST MECHANISM TO RECOVER THE KS THES FOR THE PROGRAM -- THE COSTS FOR THE PROGRAM IN THE MODAL ACT. IS IT NOT AN EQUITABLE UNIT COST APPROACH?

THAT'S CORRECT.

HOW IS THE CITY'S APPROACH DIFFERENT FROM THE MODEL APPROACH IN THE STATUTE?

I THINK IT ISN'T A MODEL APPROACH. I THINK EQUITABLE WOULD REQUIRE MORE THAN THEY

HAVE DONE. IF YOUR IMPERVIOUS AREA ON YOUR TWO ACRES COVERS 20 TIMES MORE THAN MINE ON MY LITTLE HALF ACRE OF PROPERTY, I DON'T THINK THAT THAT IS EQUITABLE AT ALL.

SO YOU DON'T THINK, YOUR POSITION HAS TO BE PROPORTIONATE APPROACH AND NOT A CATEGORICAL, THAT THE CITY CANNOT SET UP CLASSES 6 OF PROPERTY THAT HAS -- CLASSES OF PROPERTY THAT HAS TO BE CONCEIVABLE TO EACH INDIVIDUAL PROPERTY.

I HAVEN'T SEEN WHAT THEIR TESTIMONY WOULD BE, IF THEY REALLY DID SAY THAT THAT WAS UNDER THEIR EQUITABLE PEROT UNIT COST. I DON'T KNOW WHAT THEIR TESTIMONY WOULD BE IF THEY ESTABLISHED THAT OR WHETHER DCP, IN CREATING SUCH A MODEL PROGRAM, WOULD PROVIDE SOME SORT OF GUIDANCE FOR THEM. I AM AFRAID I CAN'T ANSWER.

YOUR OPPONENT ARGUES THAT, GOING BACK TO THIS VOLUNTARY BUSINESS, THAT YOU CAN, THAT YOU CAN AVOID THIS FEE BY RETENTION. DO YOU DISAGREE WITH THAT?

THAT IS WHAT THE STATUTE SAYS BUT THAT IS NOT WHAT THE RECORD SHOWS. ONE RESIDENTIAL GOVERNMENT DEVELOPMENT IN THE ENTIRE CITY HAS QUALIFIED FOR THEIR RETENTION CREDIT.

BUT THEORETICALLY UNDER THE STATUTE, YOU CAN DO THAT.

THEORETICALLY BUT NOT REALITY.

DOES THAT MAKE IT VOLUNTARY?

DOES THAT MAKE IT VOLUNTARY? NO, I DON'T THINK IT DOES AT ALL. IS IT VOLUNTARY FOR ME, THEN, TO TAKE WHATEVER WOULD QUALIFY, IF I HAVE GOT A PIECE OF PROPERTY BIG ENOUGH THAT I COULD QUALIFY TO DIG A HOLE? THAT IS WHAT IT IS RETENTION. I WOULD HAVE TO DIG A RETENTION POND? I DON'T THINK THAT MAKES IT VOLUNTARY AT ALL. I THINK IT COMES RIGHT BACK TO PORT ORANGE, THAT THIS IS A FEE THAT IS A MANDATORY CHARGE THAT IS IMPOSED UPON THOSE WHOSE ONLY OPTION IS OWNING A PIECE OF DEVELOPED PROPERTY WITHIN THE MUNICIPALITY.

BUT NOW AGAIN, WE ARE GOING BACK TO THE QUESTION OF WHO IS MAKING WHAT ARGUMENT, AND THE PROBLEM I HAVE IS THAT, IF THIS IS A UNIQUE ISSUE AS FAR AS VALID FEE VERSUS SPECIAL ASSESSMENT, AS OPPOSED TO AN INVALID TAX, WHICH SOME OF THE CASES HAVE GONE OFF ON, THEN WHY SHOULDN'T WE VALIDATE THE BONDS, BECAUSE THE ONLY ISSUE WE CARE ABOUT, FOR THE DIRECT ISSUE, IS WHETHER THERE IS A SUFFICIENT FUNDING STREAM, AND LEAVE THE ISSUE AS TO WHETHER THE D.O.T. IS IN SOME SPECIAL CIRCUMSTANCE, TO A SEPARATE LAWSUIT. WHY ISN'T THAT A BETTER, YOU KNOW, POLICY TO, FOR THIS COURT?

I THINK THAT THIS COURT CAN COME TO THE SAME CONCLUSION AND SAY THAT THE WAY IT OPERATES IS A SPECIAL ASSESSMENT, NOTWITHSTANDING THE D.O.T.'s CONTRIBUTION ARGUMENT AND WE ARE PARTNERS IN STORM WATER. THE WAY IT OPERATES, IT OPERATES AS A SPECIAL ASSESSMENT, NOT AS A UTILITY.

BUT, AGAIN, IF I UNDERSTOOD YOU CORRECTLY, THAT WOULD NOT AFFECT THE VAST MAJORITY OF THE FUNDING SOURCE, BECAUSE THE COMMERCIAL AND RESIDENTIAL USERS WOULD STILL BE, PAY, WHETHER YOU CALLED IT A USER FEE OR A SPECIAL ASSESSMENT. IS THAT CORRECT?

YES. THAT'S CORRECT. SO THIS COURT COULD SAY IT IS A SPECIAL ASSESSMENT. WE DISAGREE.

AND VALIDATE THE BONDS.

AND VALIDATE THE BONDS, AND THE RESULT IS THE SAME. THEY HAVE THEIR INCOME STREAM.

THEY DON'T HAVE 23,000 A YEAR FROM DOT BUT THEY HAVE THE REST OF THEIR \$4 MILLION-PLUS.

HOW DOES THE D.O.T. HAVE STANDING TO CHALLENGE ANY OF THIS, IF THE D.O.T. CLAIMS THAT THEY ARE IMMUNE FROM THE PAYMENT OF ANY OF THIS, AND IN FACT, THEY HAVE REFUSED TO PAY ANY OF THIS? HOW DO YOU HAVE STANDING, NOW, TO CHALLENGE ALL THE OTHER PROVISIONS THAT YOU ARE DOING HERE, IF YOU HAVE PUT UP A WALL AND SAID WE ARE IMMUNE FROM ANY OF THIS ASSESSMENT?

I THINK THE REASON THAT WE HAVE, I DIDN'T THINK ABOUT IT UNDER THE TERMS OF STANDING, BUT THAT WE SHOULD BE HERE AND RIGHTFULLY SO, IS THE FACT THAT THE BOND HOLDERS DON'T KNOW THAT. THE BOND HOLDERS BELIEVE THAT ALL OF THE REVENUE STREAM THAT THE CITY IS COLLECTING IS GOING TO GO BACK TO PAY THEIR BONDS.

HOW DO YOU GET TO STAND FOR THE BOND HOLDERS, WHEN YOUR ONLY POSITION IN THIS, IF I UNDERSTAND IT, IS THAT YOU HAVE A FACILITY THERE THAT OBVIOUSLY DOES CAUSE RUN OFF OR WHATEVER, AND HAS SOME SUBSTANTIAL IMPERVIOUS SURFACE, BUT THAT YOU HAVE REFUSED TO ACKNOWLEDGE THE LEGITIMACY OF THIS AND SO YOU HAVEN'T PAID IT, AND I AM HAVING DIFFICULTY UNDERSTANDING HOW YOU HAVE ANY STANDING TO CHALLENGE THIS, WHEN YOU HAVE IGNORED THIS ORDINANCE, REFUSED TO PAY IT, WHEN, TELL ME HOW YOU ARE A PROXY FOR EVERYBODY ELSE THAT AND APPARENTLY IS PAYING THIS.

WELL, I DON'T THINK WE ARE STANDING AS A PROXY FOR EVERYBODY ELSE. THE STATE ADOPTED OUR ARGUMENTS AS TO THE REST OF IT, ABOUT IT NOT BEING VOLUNTARY, THAT IT IS NOT A VALID USER FEE, SO EVEN THOUGH WE MADE MOST OF THE ARGUMENTS, IT WAS THE STATE'S ARGUMENTS, TO, THE STATE ATTORNEY STANDS IN FOR EVERYBODY ELSE IN BOND VALIDATION CASES.

I UNDER THAT, BUT I AM HAVING TROUBLE SEEING HOW THE D.O.T., WHO HAS NEVER PAID THIS, HAS ANY RIGHT TO CHALLENGE THE LEGALITY OF THIS ORDINANCE.

WELL, I BELIEVE THAT IT IS BECAUSE THE CITY OF GAINESVILLE STILL IMPOSES THIS UPON US. THAT JUST BECAUSE WE REFUSE TO ABIDE BY IT DOESN'T MEAN THAT THE CITY DOESN'T STILL HOLD THIS OVER OUR HEADS AND EXPECT US TO PAY, SO I BELIEVE THEREFORE, THAT IS WHY WE NEEDED TO BE HERE AND WE ARE.

CHIEF JUSTICE: THANK YOU VERY MUCH.

THANK YOU VERY MUCH.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME IS LEFT?

JUST VERY BRIEFLY, I WOULD LIKE TO ADDRESS A COUPLE OF POINTS. FIRST OF ALL, IF THE COURT FINDS THIS IS A SPECIAL ASSESSMENT, IT IS NOT JUST DOT AND THEIR 23,000 DOLLARS. IT IS EVERY ENTITY THAT IS IMMUNE FROM PAYING SPECIAL ASSESSMENTS, UNLESS IT IS SPECIFICALLY AUTHORIZED BY STATUTE, SO THAT INCLUDES ALL OF THE GOVERNMENT PROPERTY INSIDE THE CITY OF GAINESVILLE. WE ARE NOT JUST TALKING ABOUT THE D.O.T.'S \$23,000. I WOULD ALSO LIKE TO POINT OUT, IN RESPONSE TO AN ANSWER THAT THE D.O.T. GAVE TO JUSTICE WELLS'S QUESTIONS, THE D.O.T. HAS REFUSED TO ACKNOWLEDGE, THROUGHOUT THIS PROCEEDING AND THROUGHOUT ITS BRIEF, THAT AS TO EVERY SINGLE NONRESIDENTIAL PROPERTY IN THE CITY, IF THEY RETAIN ON SITE, THEY DON'T PAY. IF THEY RETAIN ANY PORTION ON SITE, THEY DON'T PAY. THE SIMPLE FACT OF THE MATTER AS TO MOST SINGLE FAMILY RESIDENCES, AND THIS WAS TESTIFIED TO AT TRIAL, THE PRACTICAL ITS OF THE SITUATION ARE SUCH THAT THEIR LOT SIZE IS NOT SUFFICIENT TO DO ANY KIND OF RETENTION ON SIGHT. -- ON SITE.

LET ME JUST GO BACK TO THE QUESTION ABOUT THE SCOPE OF WHAT WE NEED TO REACH. DOES THE CITY OF GAINESVILLE AGREE THAT WE NEED TO DECIDE WHETHER THIS IS A VALID FEE OR A SPECIAL ASSESSMENT, AS PART OF THIS PARTICULAR BOND VALIDATION PROCEEDING?

YES, I DO.

AND THAT IS, THEREFORE, BUT WE COULD STILL, THE ISSUE IS THE BONDS ARE STILL VALID. IT IS JUST UP TO, THEN, HAVE THE BONDS BEEN ISSUED ALREADY?

NEW YORK CITY YOUR HONOR.

AND WHAT IS THE AMOUNT OF THE BONDS IN RELATIONSHIP TO THE FEES THAT COME IN?

WELL, QUITE FRANKLY, YOUR HONOR, GAINESVILLE IS ONE OF THOSE PLACES, AS IS THE CITY OF TALLAHASSEE, WHERE HALF OF THE PROPERTY INSIDE THE CITY OF GAINESVILLE AND CONSEQUENTIALLY HALF OF THE USERS, HAPPEN TO BE GOVERNMENT PROPERTIES THAT WOULD NOT BE CHARGED UNDER THIS SPECIAL ASSESSMENT. SO WE WOULD PROBABLY LOSE APPROXIMATELY HALF OUR REVENUE FOR THE FUNDING OF A SERVICE TAKE WE HAVE TO PROVIDE -- THAT WE HAVE TO PROVIDE FOR EVERYONE, WHETHER IT IS A SCHOOL BOARD BUILDING, WHETHER IT IS A UNIVERSITY OF FLORIDA BUILDING.

BUT THAT ISSUE, IT IS THE LEGISLATURE THAT SAYS THAT THE GOVERNMENTAL ENTITIES DON'T PAY SPECIAL ASSESSMENTS, CORRECT? IT IS NOT THIS COURT'S OBLIGATION TO FIGURE OUT, TO MAKE SOMETHING FIT INTO SOMETHING, IF IT DOESN'T ACTUALLY FIT INTO IT, IS IT?

I WOULD AGREE, YOUR HONOR, 100 PERCENT WITH. THAT I WOULD ALSO POINT OUT TO THE COURT THAT THE LEGISLATURE SPECIFICALLY PROVIDED THAT WE COULD SET IT UP AS A USER FEE IN ADDITION TO A SPECIAL ASSESSMENT. THEY RECOGNIZED THAT A SPECIAL ASSESSMENT WAS ONE OPTION, BUT THEY ALSO RECOGNIZED, I THINK, THAT GOVERNMENTS ARE USERS OF THIS SERVICE, JUST AS, SO ARE THE SINGLE-FAMILY RESIDENCES, AND SPECIFICALLY GAVE US THE OPTION TO SET IT UP AS A USER FEE, AS A SPECIAL ASSESSMENT. THE ISSUE BEFORE THE COURT, YOUR HONOR, QUITE FRANKLY, IS HAVE WE ESTABLISHED A VALID USER FEE THROUGH OUR STORM WATER UTILITY SYSTEM? IT IS NOT JUST US, YOUR HONOR. THERE ARE ALMOST HUNDRED STORM WATER UTILITIES ACROSS THE STATE OF FLORIDA, AS YOU CAN RECOGNIZE FROM THE FLORIDA STORM WATER ASSOCIATION BRIEFS. I WOULD SUBMIT TO YOU THAT, IF YOU LOOKED AT THE CHARACTERISTICS DESCRIBED IN THOSE, IF OURS IS NOT VALID, NONE OF THOSE OTHER UTILITIES ARE GOING TO BE DECLARED VALID, EITHER. NOR ARE, IS THIS COURT'S DECISION GOING TO BE CONSISTENT WITH HOW SUPREME COURTS ACROSS THE NATION HAVE LOOKED AT STORM WATER UTILITIES AND FEES.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE AND TAKE THE REST OF IT ON OUR BRIEFS. THANK YOU ALL VERY MUCH.

THANK YOU, YOUR HONOR.