Florida Dept. of Revenue v. City of Gainesville

THE NEXT CASE ON THIS MORNING'S CALENDAR IS FLORIDA DEPARTMENT OF REVENUE VERSUS THE CITY OF GAINESVILLE. {_ xD

CHIEF JUSTICE: IS KOUNTION COUNSEL READY? BEFORE YOU START , I WOULDLIKE TO MENTION THIS TO BOTH COUNSEL , BEFORE YOU START, WE WOULD LIKE YOU TO FOCUSON WHAT THE DEFINITION OF PUBLIC PURPOSE IS , AND SECONDLY IF YOU WILL FOCUS ON THIS }i }i ENTERPRISE BEING A COMPETITIVE ENTERPRISE, THAT IS THAT THEY DON'T HAVE AN EXCLUSIVE MONOPOLY BUT ARE ENTERING INTO A COMPETITIVE MARKETPLACE.

THOSE ARE BASICALLY -

CHIEF JUSTICE: I KNOW YOUWILL TOUCH ON THEM , BUT I WANT TO MAKE SURE THAT BOTH SIDES EMPHASIZE THAT.

WELL , JUST AS A BRIEFINTRODUCTION, IN THE 1990s , THE TELECOMMUNICATION BUSINESS WAS DEREGULATED FROM OPEN COMPETITION , INCLUDING COMPETITION FROM MUNICIPALITIES, AND THE CITY OF GAINESVILLE NOW PROVIDES CERTAIN TELECOMMUNICATIONS SERVICES TO INDIVIDUALS AND BUSINESSES.

ARE THEY REGULATED BY THE PUBLIC SERVICE COMMISSION?

YES, SUBJECT TO A CHAPTER 364 CERTIFICATE. AND IT I S UNDISPUTED THAT THE CITY IS ENGAGED IN A FOR-PROFIT, PROPRIETARY BUSINESS VENTURE.

IS THAT CRITICAL TO THEFACTS IN THIS CASE?IN OTHER WORDS , THAT I F WHAT A MUNICIPALITY DOES , HAS THE POTENTIAL TO MAKE A PROFIT , THAT THAT PER SE EXCLUDES IT FROM BEING ABLE TO PERFORMING A MUNICIPAL OR PUBLIC PURPOSE?

I THINK THAT IS VERY IMPORTANT , BUT --

BUT I THOUGHT YOU WERE ARGUING FOR A MUCH STRICTER DEFINITION OF MUNICIPA PUBLIC PURPOSE , THAT YOU}i WERE ARGUING THAT THE GOVERNMENTAL TEST --

WE ARE.

BUT UNDER THAT TEST VIRTUALLY THINGS LIKE PARKS MARINAS , ALL OF THAT WOULD BE EXCLUDED, BECAUSE THOSE }i ARE NOT EXCLUSIVE LY , THOSE ARE NOT}i GOVeR,MENTAL FUNCTIONS.

WELL , I THINK, AND THAT, THE PROFIT CONSIDERATION IS IMPORTANT , BECAUSE --

BUT,000 HOW IS THAT , BUT WE ARE GOING AHEAD HERE ANDWE ARE INTERPRETING A TERM THAT WAS IN A CONSTITUTION xD FROM 1968 , AND THEREFORE , WHERE DO WE GET, IF WE SAY, WELL , IF IT IS FOR PROFIT, THEN THAT WILL EXCLUDE I T FROM BEING A MUNICIPAL OR PUBLIC PURPOSE, BECAUSE THE MUNICIPALITY DOESN'T MAKE A PROFIT IN THE TRADITIONAL SENSE. I MEAN , MAYBE THEY ARE SAYING WE ARE GOING TO MAKE A LITTLE PROFIT , BUT WHAT WE REALLY WANT TO DO IS MAKE SURE THAT EVERY POOR PERSON IN GAINESVILLE HAS ACCESS TO

APPROPRIATE TELECOMMUNICATIONS .

I THINK , AND IT IS NOT IN THE RECORD , AND THERE HASBEEN NO EXPLORATION O F IT , BUT I THINK IT IS SAFE TO SAY THAT THINGS LIKE PARKS AND OPERATIONS OF THAT NATURE , THEY DON'T MAKE A PROFIT ON THOSE.

SO IS THAT , TELL ME, THEN , WHAT YOUR DEFINITION WOULD BE OF A MUNICIPAL OR PUBLIC PURPOSE , WITHIN THE 1968 CONSTITUTION. IT IS , IF YOU ARE WRITING THIS OPINION, WHAT IS IT THAT YOU SAY?

WELL , I THINK WHAT IT I S , IS THAT THE , WHEN THE MUNICIPALITY ENGAGES IN A PROPRIETARY FOR -PROFIT FUNCTION, THAT THAT IS NOT A PUBLIC SERVICE.

HOW ABOUT ORLANDO UTILITIES?

YOU MEAN , ANY UTILITY ?

RIGHT. I MEAN SPECIFICALLY , THE CASE THAT THIS COURT HAS , INVOLVING THE FIFTH DISTRICT HAD .

I THINK THERE , THE DISTINCTION IS THE ONE THAT HAS BEEN , WAS OFFERED IN THE DISSENTING OPINION BY JUSTICE ERVIN , JUDGE ERVIN , AND THERE HE POINTED OUT THAT A THE PROVISION OF SOMETHING LIKE ELECTRICITY , IS A CRITICAL SERVICE . IT IS NOT A COMPETITION.

I THOUGHT THE DIFFERENCE THAT HE WAS REACHING FOR, WAS THE FACT THAT THE TELECOMMUNICATIONS HAS BECOME A DEREGULATED INDUSTRY.

RIGHT. RIGHT. AND IT IS NOT --

VERSUS THE MONOPOLY OF THE ELECTRIC UTILITY.

RIGHT. IT IS NOT OPEN. IT IS NOT OPEN TO COMPETITION.

BUT THAT DOESN'T MAKE IT A GOVERNMENTAL PURPOSE. I MEAN , IN FORD VERSUS ORLANDO UTILITY , THIS COURTHELD THAT IT WAS PROPERTY USED FOR THE GENERATION OF ELECTRICITY. WE SPECIFICALLY HELD IT WAS A VALID MUNICIPAL PURPOSE THAT DIDN'T RELATE TO ANY ASPECT OF THE ADMINISTRATION OF GOVERNMENT, BUT IT WAS PROPRIETARY , IN THE SENSETHAT IT PROMOTED THE CONVENIENCE OR HAPPINESS OF CITIZENS . NOW , HOW IS THAT OVERRULING FORD OR SORT OF SAYING WE DON'T LIKE THIS ONE , BECAUSE IT LOOKS LIKE THEY ARE IN COMPETITION WITH THE TELECOMMUNICATIONS INDUSTRY.WE ARE JUST GOING TO FIND ON A CASE-BY-CASE BASIS THAT , WHAT THE PEOPLE THOUGHT IN 1968, WHEN THEY ADOPTED THIS COMPETITION , WAS THEY WOULDN'T HAVE INTENDED THIS TYPE OF SERVICE TO BE EXEMPT FROM AD VALOREM TAXATION, AND THAT IS WHAT I AM HAVING INTELLECTUAL, MAYBE , VISCERALLY I GO , YEAH , THAT IS NOT THE SAME AS AN ELECTRIC UTILITY , BECAUSE I T DOESN'T HAVE A MONOPOLY , BUTTHAT DOESN'T SATISFY ME FROM THE POINT OF VIEW OF HOW YOU DEVELOPED THE CONSISTENT PRINCIPLE }i OF LAW.

I SEE YOUR PROBLEM. I ~r THINK HISTORICALLY , MUNICIPALITIES , UTILITIES I HAVE BEEN SORT O F A SUA GENEROUS OPERATION. THEY GO BACK FOR DECADES, AND YOU HAVE MUNICIPALITIES THAT BEGAN ENGAGING IN THIS , WELL BEFORE THE --

DOES THAT MAKE THEM A GOVERNMENT, IT IS NOT GOVERNMENT, ISN'T I T PROPRIETARY? IT IS NOT GOVERNMENTAL.

I~r THINK IT IS A LITTLE OF BOTH AND ACTUALLY , I THINK IT SOME MORE LIKE A

GOVERNMENTAL OPERATION , AND FOR {_ THIS }i REASON . THEY ARE FURNISH ING SOMETHING THAT IS ABSOLUTELY INDISPENSIBLE TO THE PUBLIC HEALTH, SAFETY AND WELFARE.

DO YOU THINK THAT, IN THIS DAY AND AGE IN THE 21st CENTURY , THAT PEOPLE WOULD HAVE HAD THE EXPENSE OF THE HURRICANES, WOULD FEEL THAT NOT HAVING TELEPHONE SERVICE IS ABOUT AS INDISPENSIBLE AS ELECTRICITY ?

NO. I WOULD PART COMPANY THERE. I DON'T THINK TELEPHONE SERVICE IS INDISPENSIBLE TO THE PUBLIC HEALTH , SAFETY AND WELFARE .

YOU WOULD WANT US T O SAYTHAT IN AN OPINION ?

IN THE WAY THAT THEPROVISION OF UTILITIES ARE. I THINK --

LET ME ASK YOU THIS , LET'S SAY, LET'S TAKE A RURAL COMMUNITY , AND THEREIS A SMALL TOWN IN THAT COMMUNITY , AND FOR PROFIT REASONS, NO TELEPHONE, NO PRIVATE TELEPHONE COMPANY HAS BEEN LEAD IT PROFITABLE TO PUT ANY TELEPHONE SERVICE IN THAT SMALL COMMUNITY , AND PUT UP ALL }i THE TELEPHONE LINES REQUIRED FOR SUCH A SMALL TOWN, AND SO THE TOWN , ITSELF, SAYS, LOOK, WE ARE GOING TO NEED TO PROVIDE SOME TELEPHONE SERVICE FOR OUR RESIDENTS, S O THEY DO SO. IS THAT A PUBLIC PURPOSE AT THAT POINT?

I THINK THAT MIGHT WELL BE A PUBLIC PURPOSE. YEAH. I THINK YOU HAVE TO BaOOK AT THE FACTS OF EACH CASE .

WELL , PERHAPS --

SHOULDN'T WE HAVE SOME BROADER UNDERLYING POLICY RULES, YOU KNOW, THAT AFFECT OR CONTROL THIS , ALSO , AND HERE I AM SPEAKING OF , SHOULDN'T WE HAVE SORT OF A DEFERENCE TO LOCALGOVERNMENT OR MUNICIPALITY , IN TERMS WHAT HAVE THEY DETERMINE TO BE A PUBLIC PURPOSE ? YOU KNOW , WE HAVE HAD ALL O F THIS MOVEMENT LATE IN THE 20th CENTURY , WITH REFERENCE TO HOME RULE , AND , REALLY, AUTHORIZING MUNICIPALITIES AND COUNTIES TO DO ANYTHING THAT THEY WEREN'T PROHIBITED TO DO , AND S O SHOULDN'T THERE BE A BROADER RULE THAT , TO A GREAT EXTENT , THAT WE WOULD ALLOW MUNICIPALITIES , THEMSELVES , TO DETERMINE WHAT IS IN THEIR PUBLIC'S INTEREST, IN TERMS OF TAKING ON ISSUES LIKE THIS , AND BECAUSE ONCE WE START CATAGORIZING, YOU KNOW , OUR LIBRARIES , IS THAT A PUBLIC PURPOSE ? BUT THIS IS WHAT WE DO. WE GET UP WITH THIS LAUNDRY LIST. I THINK WE ALL ARE AWARE OF THE FACT THAT CITIES DO HAVE LIBRARIES , AND WITHIN EVERY LIBRARY , NOW , THERE IS A COMMUNICATION SYSTEM , ACCESSIBLE TO THE PUBLIC , THAT THEY USUALLY CHARGE A FEE FOR. THAT IS THAT THEY, AND SO YOU COULD SAY, WELL , MAYBE THEY MAKE A PROFIT , WITH REFERENCE TO USING THE INTERNET SERVICES THAT ARE AVAILABLE, YOU KNOW, WITHIN THE PUBLIC LIBRARIES , BUT WHAT I AM CONCERNED ABOUT , IS THAT APPROACHING THIS ISSUE FROM THE STANDPOINT OF WE ARE GOING TO HAVE A LAUNDRY LIST OVER HERE , AND A LAUNDRY LIST OVER HERE , AND I AM HAVING A LOT OF DIFFICULTY DOING THAT , UNLESS WE HAVE SOME BROADER PRINCIPLES, SUCH AS WHETHER OR NOT WE SHOULD SHOW SOME DEFERENCE TO THE MUNICIPALITY , ITSELF, FORDECIDING THAT THIS IS A PUBLIC PURPOSE.

WELL , I UNDERSTAND THAT , BUT I THINK THAT TENDS TO MIX UP ARTICLE VIII SECTION 2-B WITH ARTICLE VII , ANDTHERE IS NO QUESTION THAT MUNICIPALITIES HAVE BROAD POWERS. AND --

BUT DOESN'T THAT BRING US BACK TO THE REAL QUESTION THAT JUSTICE PARIENTE ASKED AT THE VERY BEGINNING OF THIS, IS , WHAT IS, THEN , GOING TO BE A PUBLIC PURPOSE? WHAT WOULD BE YOUR DEFINITION, AND IT SEEMS TO ME THAT , AND I HAVE LOOKED AT A NUMBER OF THINGS , TRYING TO FIND A DEFINITION FOR PUBLIC PURPOSE , AND THE BLACK'S LAW DICTIONARY BASICALLY SAYS IT IS AN ACTION BY THE GOVERNMENT,FOR THE BENEFIT OF

THECOMMUNITY. NOW , THAT SEEMS PRETTY BROAD TO ME , AND CERTAINLY TELECOMMUNICATIONS ARE FOR THE BENEFIT OF THE COMMUNITY , SO WHAT WOULD B E YOUR LIMITING DEFINITION FOR PUBLIC PURPOSE?

MY LIMITING DEFINITION WOULD BE THIS , SINCE WE ARE TALKING ABOUT WHETHER PROPERTY, THE REAL ISSUE IS WHETHER CERTAIN PROPERTY IS EXEMPT FROM TAXATION OR NOT, NOT WHAT THE MUNICIPALITY CAN DO , AND MY LIMITING DEFINITION UNDER ARTICLE VII WOULD BE THAT A PUBLIC PURPOSE IS SERVED , WHEN THE CITY IS PROVIDING SOMETHING THAT IS ESSENTIAL O R INDISPENSIBLE , TO THE PUBLIC HEALTH, SAFETY AND WELFARE.

SO A PARK WOULD NOT BE, A MARINA WOULD NOT BE IN THERE. THAT CERTAINLY IS NOT --

NO. IT WOULDN'T BE IN THERE, BUT --

IT WOULD B E , THEN --

BUT, AGAIN, I HAVE THE QUALIFIER THAT , IF THEY ARE UNDERTAKING A PROPRIETARY BUSINESS VENTURE TO MAKE A PROFIT --

YOU CAN. GO AHEAD.

THE DEFINITION, THEN , WOULD ONLY BE APPLICABLE T O AD VALOREM TAX CASES , AS OPPOSED TO ANY OTHER KINDS OF CASE WHERE WE ARE DEALING WITH PUBLIC PURPOSE?

YES. YES.

LET ME TELL YOU WHAT MY PROBLEM IS ABOUT ALL OF THIS. WE HAVE A SERIES OF CASES THAT TALKS ABOUT GOVERNMENTAL, GOVERNMENTAL , AND WE MOST RECENTLY DID THAT IN THE ZB RINGO -IN THEIS HE BRING CASE. NOW , THAT HAD -- WE MOST RECENTLY DID THAT IN THE SEE BRING CASE . NOW ,-KNOW THE SEBRING CASE. NOW , UNLESS THE PROPERTY IS SPECIFICALLY USED, IT IS NOTEXEMPT FROM TAXATION , SO ALLOF THOSE CASES THAT TALK ABOUT GOVERNMENTAL GOVERNMENTAL, REALLY , COULDN'T THEY BE DECIDED ON THE BASIS THAT THE CONSTITUTION EXEMPTED, DID NOT EXEMPT ANY PROPERTY THAT WAS LEASED TO PRIVATE ENTITIES?

WELL , I DON'T THINK THEY WERE ACTUALLY QUITE DECIDEDON THAT BASIS , BECAUSE THE COURT WAS LOOKING AT THE LANGUAGE OF THE STATUTE THAT , ALSO , DEFINES PUBLIC MUNICIPAL PURPOSE, AND EFFECTIVELY, I THINK , CONSTITUTIONALIZED THAT LANGUAGE, AND I THINK IF --

I AM NOT SURE I UNDERSTAND. WHAT , WHEN IT COMES TO LEASED PROPERTY , LEASED PROPERTY IS UNDER THE CONSTITUTION , PROPERTY THAT IS LEASED BY A MUNICIPALITY TO A PRIVATE ENTERPRISE, IT EXEMPT FROM AD VALOREM TAXATION?

NO.

IT IS NOT , BECAUSE IT IS NOT EXCLUSIVE , AND YOU JUST CAN LOOK AT THE PLAINLANGUAGE OF THE CONSTITUTION , WHICH SAYS IT MUST B E EXCLUSIVELY USED BY THE MUNICIPALITY.

THAT IS TRUE FWHAURX IS NOT THE BASIS ON WHICH -- THAT IS TRUE , BUT THAT IS NOT THE BASIS ON WHICH YOU MADE THOSE DECISIONS .

WE HAVE THE TEST NOW. WHAT DO WE DO WITH THAT TEST? DO WE SAY THAT IS THE TEST THAT APPLIES TO LEASED PROPERTY. ARE WE GOING TO HAVE A DIFFERENT TEST THAT APPLIESTO PROPERTY THAT IS OWNED, AND WHERE DO WE GET THAT FROM THE CONSTITUTIONAL

AMENDMENT?

I THINK THE SAME TEST SHOULD APPLY TO BOTH. NOW, IF YOU GO BACK IN THE HISTORY OF THIS, AND IT ISSET FORTH IN THE SEBRINGFOUR DECISION AND ALSO IN JUDGE ERVIN'S DISSENT , ITSEEMS TO ME THAT THE EMPHASIS FOR THE CONSTITUTIONAL CHANGE , WAS THAT ALL PROPERTY PUT TO A PROPRIETARY USE , SHOULD BEAR ITS SHARE OF THE TAX BURDEN. THAT WAS THE UNDERLYING REASON, THAT ALL PROPERTY THAT IS NOT USED FOR A GOVERNMENTAL GOVERNMENTAL PURPOSE --

WE UNDERSTAND. THEN WE JUST HAVE TO DECIDE WHAT IT MEANS, TO BE USED FOR A GOVERNMENTAL PURPOSE. IS IT THE WAY WE DEFINED IT IN THE CASES INVOLVING LEASED PROPERTY , I F IT HAS TO DO WITH SOME ASPECT OF THE ADMINISTRATION OF GOVERNMENT , VERY NARROW TEST , NOT THE TEST THAT THE CITY OF GAINESVILLE IS ASKING FOR , WHICH I S THAT IT PROMOTE THE HEALTH, SAFETY , PROTECTION OR WELFARE OF THE CITIZENS,WHICH IS WHAT WOULD BE A MORE EXPANSIVE TEST .

EL WHAT -- WELL , I THINK THEY GO BEYOND.THAT WHAT THE DECISION BELOW SAID WAS THAT THE PUBLIC PURPOSE LANGUAGE IN ARTICLE VIII , REALLY MEANS ANYTHING THAT SERVES THE CONVENIENCE , COMFORT OR HAPPINESS OF THE MUNICIPALITY. WHICH GOES WAY BEYOND YOUR BASIC POLICE POWER FUNCTIONS, BUT I WOULD CONTEND THAT TELECOMMUNICATION SERVICES DO , AS THE COURT SAID , SERVE THE COMFORT AND CONVENIENCE AND HAPPINESS OF THE CITIZENS , BUT THAT SHOULD NOT BE THE TEST , BECAUSE THAT EFFECTIVE LY EXEMPTS ANYTHING A MUNICIPALITY MIGHT DO FROM AD VALOREM TAXATION.

IF I UNDERSTAND YOUR ARGUMENT, TO WHAT YOU ARE BASICALLY TELLING US , I S THAT THIS, REALLY, HAS TO BE DONE ON A CASE-BY-CASE ANALYSIS. ISN'T THAT CORRECT? I MEAN , TO DIFFERENTIATE BETWEEN THE OPERATION AFTER AIRPORT AND THE OPERATION AFTER TELECOMMUNICATIONS SYSTEM, IS THAT WHERE THE STATE IS?

WELL , I DO THINK THAT IT IS DIFFICULT T O LAY DOWN A GENERAL PRINCIPLE THAT YOU CAN APPLY WITHOUT ANY CONVERSATION OF THE FACTS, BUT THE ONE I WOULD OFFERTHE COURT IS THAT SOMETHING , THAT IT MUST BE , IF YOU GO BEYOND ADMINISTRATION OF GOVERNMENT, IT MUST BE SOMETHING THAT IS INDISPENSIBLE TO THE PUBLIC HEALTH, SAFETY AND WELFARE , LIKE FIRE PROTECTION OR POLICE PROTECTION. YOU DON'T TAX THE POLICE DEPARTMENT 'S PROPERTY OR THE FIRE DEPARTMENT 'S PROPERTY.

ALL RIGHT. BUT THEN, AGAIN , BECAUSE WE ARE LOOKING TO SAY WHETHER , WHEN WE DISRUPT THE WHOLELAW OF THE STATE OF FLORIDA, YOU KNOW, WE HAVE GOT PROPERTY APPRAISERS ALL OVER , MY ASSUMPTION IS , FROM YOUR BRIEF AND THEIRS , THAT THEY HAVEN'T BEEN TAXING PARKS AND MARINA S THAT AREN'T DOING ANYTHING OUT OF THE ORDINARY. IS THAT BECAUSE ARE UNDERSTANDING, THAT FOR THE LAST 40 YEARS THAT , THOSEHAVE NOT BEEN SUBJECT TO AD VALOREM TAXATION ?

YES. THAT WOULD BE M Y UNDERSTANDING.

SO IF WE WERE TO JUST ADOPT YOUR DEFINITION, THAT IT HAS TO BE ESSENTIAL TO THE HEALTH , SAFETY AND WELFARE , WE WOULD BE UNDOING ALL OF THESE OTHER EXEMPTIONTHAT IS EVERYONE , NO ONE SEEMS TO HAVE HAD MUCH PROBLEM WITH.

IF IT IS A PROPRIETARY BUSINESS THAT IS - -

PROPRIETARY , PROPRIETARY ONLY MEANS WHAT?

IT MEANS THEY ARE OUT , TRYING TO MAKE A PROFIT WITH IT.

YOU USE PROPRIETARY WITH PROFIT. IS THAT WHAT YOU ARE --

YES.

BECAUSE I DIDN'T THINK THAT THAT WAS SYNONYMOUS , PROPRIETARY AND PROFIT.

WELL , I GUESS PROPRIETARY , IN ITS MOST NARROW SENSE,MAYBE , JUST OWNERSHIP , BUT I THINK IT GOES BEYOND THAT. IT CON NOTES BUSINESS .

DON'T WE NEED, THEN , IF THAT IS THE CASE THEN , AND IT IS A CASE-BY-CASE BASIS , THEN DOESN'T THIS RECORDHAVE TO BE FURTHER DEVELOPEDFOR THE CITY OF GAINESVILLE , TO SHOW WHY THEY FELT IT WAS ESSENTIAL FOR THE PUBLIC HEALTH, SAFETY AND WELFARE , FOR ITS CITIZENS TO HAVE THIS?

I WOULD THINK SO, BECAUSETHIS CASE WAS DECIDED ON SUMMARY JUDGMENT , AND THERE HAS BEEN NO FACTS SHOWN.

SO IF THEY HAVE A NONPROFIT TELECOMMUNICATION SYSTEM, IT WOULD BE ALL RIGHT. THAT IS IF THEY JUST BALANCE THE COST OF PROVIDING IT , YOU KNOW , WITH THE FEES THAT THEY TAKE IN , BUT IF IT GOES OVER THE LINE ONE YEAR, AND THEY MAKE A PROFIT , THE N IS GOING T O FALL INTO , NOW, ARE WE GOING TO END UP, NOW, WITH A MASSIVE REEVALUATION OF ALL MUNICIPAL PROPERTY , IF THEY CHARGE A FEE FOR GOING TO THE CITY, THEY ARE GOING TO HAVE FOR REEXAMINE THE NEW PROPERTY, IF THEY CHARGE A FEE , A MARINA --

I THINK THEY CAN CHARGE FEES, LIKE USER FEES OR MACHINES FEES, T O COVER THE COST OF THE OPERATION.

YOU ARE SAYING IF IT GOES OVER THE LINE AND MAKES A PROFIT ONE YEAR.

IF IT I S A BUSINESS VENTURE.

BUT NOW YOU ARE THROWING OUT , SEE , WORDS THAT MAYBE IN THE PARTICULAR CONTEXT , EVERYBODY UNDERSTANDS WHAT YOU MEAN , BUT DON'T WE, TODAY, AND FOR INSTANCE YOU WERE TALKING ABOUT POLICE AND FIRE SERVICES OR WHATEVER , W E NOW HAVE PRIVATE INDUSTRY OPERATING OUR PRISONS N IRAQ WE HAVE PRIVATE -- PRISONS . IN IRAQ , WE HAVE PRIVATE SECURITY SERVICES PROVIDING POLICE SERVICE. THESE THINGS, AS I SAID BEFORE, YOU END UP WITH REALLY , A VERY , VERY DIFFICULT TIME.

OF COURSE YOU HAVE ESTABLISHED THAT ANY TIME PROPERTY IS FLEESD A PROPRIETARY PURPOSE --

BUT UNDER YOUR DEFINITION , AREN'T WE GOING TO REALLY HAVE EVERY MUNICIPALITY IN FLORIDA, WOULD HAVE TO HAVE THEIR PROPERTY AUDITED NOWAND THEY WOULD BE AT-RISK THAT LARGE QUANTITIES OF THEIR PROPERTY WOULD , NOW , HAVE TO GO ON THE TAX ROLL , AND DOESN'T THAT JUST STANDTHIS IDEA OF MUNICIPAL-OWNED PROPERTY, THAT IS ARGUABLY BEING USED TO SERVE THE PUBLIC, IS TAX-EXEMPT , SO NOW WE ARE SORT OF TAXING EACH OTHER, IN TERMS OF THE GOVERNMENT.

I AGREE THAT YOU DON'T WANT TO DO THAT , BUT I THINK THAT THERE NEEDS TO BE A LITTLE PLAY IN THE JOINTS, SO TO SPEAK, AND AS LONG AS THE FEES ARE JUST BASICALLY INTENDED TO COVER THE MACHINES AND OPERATION OF THE PARK OR -- THE MAINTENANCE AND OPERATION OF THE PARK OR WHATEVER , I DON'T THINK YOU NEED TO WORRY ABOUT --

YOU MIGHT NOT WORRY ABOUT IT, BUT IT GOES CONTRARY TO THE DEFINITION THAT YOU URGED US TO APPLY , AND IT ALSO GOES CONTRARY TO THE DEFINITION THAT WE USE FOR

LEASED PROPERTY .

NO. I DON'T THINK SO .

I THOUGHT THAT DEFINITION WAS RESTRICTED TO ADMINISTRATION .

WELL , YOU HAVE NEVER REALLY DECIDED A CASE ON THAT . THAT HAS BEEN THROWN OUT , AND I SEE I AM INTO MY --

USING YOUR DEFINITION, FOR EXAMPLE , IN TALLAHASSEE , WOULD MAKE A PROFIT AND WOULD UTILIZE SOME OF THE REVENUES THAT WERE GENERATED FROM THE OPERATION PROVIDING ELECTRICAL SERVICES , TO THE CITIZENS OF THE AREA , AND WOULD USE THAT TO OFFSET THE OPERATION OF THE LOCALPOLICE FORCE OR WHATEVER, THE CITY GOVERNMENT , UNDER YOUR DEFINITION , THE PROPERTY WITH REGARD TO PROVIDING ELECTRICAL SERVICE WOULD, THEN , BE SUBJECT TO AD VALOREM TAXATION, WOULD BE THE VIEW?

NO , BECAUSE MY DEFINITION IS THAT IF IT IS CRITICAL , INDISPENSIBLE TO THE PUBLIC HEALTH, SAFETY AND WELFARE , AS UTILITIES ARE, THAT THAT SERVES A PUBLIC PURPOSE UNDER ARTICLE VII SECTION 3-B. THANK YOU .

CHIEF JUSTICE: WE WILL GIVE YOU A FEW MINUTES FORREBUTTAL.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS ROBERT PASS , AND WITH ME IS MY PARTNER KELLY BITTICK .

CAN YOU EXPLAIN WHAT EVIDENCE IS PRESENTED, IF ANY , ABOUT WHAT OTHER KIND OF TELECOMMUNICATION SERVICES HAVE BEEN PROVIDED IN THE GAINESVILLE AREA , BEFORE THE CITY DECIDED TO PROVIDE SERVICES , AND THE REASONS WHY THE CITY DECIDED TO GET INVOLVED IN THATAREA.

IN TERMS OF EVIDENCE , JUSTICE CANTERO , I BELIEVETHAT THE EVIDENCE IN THE RECORD COMES FROM THE AFFIDAVIT THAT MR . HOFFMANN , REMEMBER THIS CASE WAS NOT DECIDED ON THE SPECIFIC FACTS OF THE CITY OF GAINESVILLE. THIS IS A FACIAL CHALLENGETO A STATUTE. I BELIEVE THE EVIDENCE IS THAT PRIOR TO THE AUTHORIZATION BY THE LEGISLATURE , FOR CITIES TO BECOME TELECOMMUNICATION PROVIDERS UNDER 364 , THATTHERE REALLY WAS NO BROAD PROVISION OF TELECOMMUNICATION SERVICES , OTHER THAN THE OLD INCUMBENT PROVIDERS OF THE BELL COMPANIES. CHAPTER 364 WAS THAT WHICHCREATED A ASSOCIATION WITH THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

WAS THERE AN INCUMBENT PROVIDER , PROVIDING TELECOMMUNICATION SERVICESIN THE CITY OF GAINESVILLE AREA?

I DO NOT BELIEVE THAT THE RECORD REFLECTS ANYTHING SPECIFIC ABOUT WHAT WAS PROVIDED BEFORE. I DO THINK THAT THE RECORD REFLECTS, AT LEAST BY STRONG IMPLICATION , BY DESCRIBING THE SERVICES THAT THE CITY OF GAINESVILLE WAS, THEN , ABLE TO PROVIDE AND THE ENTITIES TO WHOM IT WAS ABLE TO PROVIDE IT , THAT THEREMAY HAVE BEEN NOTHING SIGNIFICANT AND COMPREHENSIVE , BECAUSE , FOR EXAMPLE , ONE OF THE ENTITIES TO WHOM THE CITY OF GAINESVILLE PROVIDES TELECOMMUNICATION SERVICES , IS THE CITY O F GAINESVILLEMEDICAL CENTER.

LET ME ASK YOU THIS , BECAUSE THE BROAD OVERRIDING PRINCIPLES, AND ONE OF THE BROAD OVERRIDING PRINCIPLES THAT HAS COME OUT OF THE HISTORY OF THIS COURT'SCASES , ESPECIALLY WILLIAMS VERSUS JONES AND REITERATED IN THE PORT CANAVERAL CASE, THAT THE GOVERNMENT ON THE NOT TO B E GIVEN AN ADVANTAGE IN DOING WHAT IS ESSENTIALLY A PRIVATE ENTERPRISE OPERATION , IN COMPETITION WITH PRIVATE ENTERPRISE BIRX USEFUL TAX

EXEMPTIONS. ISN'T THAT A BROAD OVERRIDING PRINCE NATURALLYTHIS COURT HAS COME DOWN WITH?

NO , YOUR HONOR , I DON'T THINK SO AND I DON'T THINK THAT IS EMBEDDED A T ALL IN THE CONSTITUTIONAL PROVISION.

WHAT IS , I AM READING FROM WILLIAMS , THAT IF SUCH A COMMERCIAL ESTABLISHMENT OPERATED FOR PROFIT IN PANAMA CITY , MIAMI BEACH IS NOT EXEMPT FROM TAX , THEN WHY SHOULD AN ESTABLISHMENT OPERATED FOR PROFIT ON SANTROSA ISLAND BEACH , BE EXEMPT? NO RATIONAL BASIS EXISTS FOR SUCH DISTINCTION.

THE ANSWER TO THAT IS SIMPLE , YOUR HONOR. WHAT THE COURT IN WILLIAMS , WAS TALKING ABOUT , AND WHAT THIS COURT HAS SPOKEN ABOUTIN ALL OF ITS CASES ADDRESSING THIS PROPRIETARY GOVERNMENTAL DISTINCTION , I S THAT PRIVATE ENTITIES USING , TYPICALLY BY LEASE , MUNIESBLY-OWNED PROPERTY, SHOULD NOT GAIN A COMPETITIVE - - MUNIESBLY - OWNED PROPERTY, SHOULD NOT GAIN A COMPETITIVE ADVANTAGETHROUGH THEIR OWN LEASE.

IS IT OKAY FOR THEGOVERNMENT TO HAVE A COMPETITIVE ADVANTAGE , INVOLVED IN THE VERY SAME OPERATION OF SELLING GAS AT THE AIRPORT?

MATTER OF FACT , IF I COULD SPEAK ABOUT TELECOM. LET ME ANSWER THAT IN THIS WAY . THE SHORT ANSWER IS , YES , BECAUSE THAT IS WHAT THE CONSTITUTION PROVIDES. THE CONSTITUTION PROVIDES THAT MUNICIPAL GOVERNMENT SHALL HAVE , THIS IS ARTICLE VIII , GOVERNMENTAL AND PROPRIETARY POWERS , EXPRESS GRANTS. IT REFERS SPECIFICALLY TO BOTH OF THEM . THEN , IN ARTICLE VII , EVEN THOUGH ARTICLE VII I CLEARLY ARTICULATED THE RIGHT TO BE ENGAGED INAPPROPRIATE AREA ACTIVITIES, THE -- IN PROPRIETARY ACTIVITIES , THE CONSTITUTION , HAD THE FRAMERS WISHED TO DO SO , COULD HAVE SPECIFICALLY SAID YOU SHALL NOT HAVE THIS EXEMPTION AS TO THE PROPRIETARY POWER.

SO I F WE ACCEPT YOUR DEFINITION, THEN THE LAST SENTENCE ON ARTICLE VII SECTION 3-A, IS BASICALLY MEANINGLESS , WHICH GIVES THE , SUCH PORTIONS OF PROPERTY ARE USED FOR EDUCATION , LIBRARY , ET CETERA , MAY BE EXEMPT. ISN'T THAT IRRELEVANT , B Y YOUR DEFINITION , BECAUSE IT IS A MANDATORY DEFINITION THAT YOU ARE ARGUING , CORRECT?

IT IS A MANDATORY EXEMPTION , INSOFAR AS THE EXEMPTION FOR PROPERTY USED BY THE MUNICIPALITY FOR THE MUNICIPAL OR PUBLIC PURPOSE , NOT THE EXEMPTIONS AS TO SCIENTIFIC , LITERARY AND SO FORTH.

WHAT ABOUT LIBRARY , EDUCATIONAL OR LITERARY ?

THOSE ARE ALLOW T O PROVIDE FOR PRIVATE ENTITIES PROVIDING THAT.

DOES IT SAY FOR PRIVATE?

I AM SORRY .

IS THAT WHAT IT SAYS, FOR PRIVATE?

NO. THAT IS THE WAY IT HAS BEEN INTERPRETED.

WELL , ARE YOU ARGUING FOR A CO-EXTENSIVE DEFINITION BETWEEN ARTICLE VIII AND ARTICLE VII ? THAT IS IT IS SORT OF WHAT JUSTICE ANSTEAD WAS SAYING, WHICH IS THAT IF IT I S LEGITIMATE FOR THEM TO DO IT , THEN IT IS EXEMPT FROM AD VALOREM TAXATION.

YES. I THINK THAT IS THE WAY IT HAS TO BE

WELL }i, ~r B)lY}i ISN'T THE PROBLEM, THEN , AGAIN, I N SAYING WHAT THEY COULD OR SHOULD HAVE SAID , WHEN THEYWERE, KK! 99Uz~r }i WERE ~r}i ~r AMENDING ~r "D8THE ~r CO TITUTION IN {_ {_}i 1968 , IS THAT WHY WOULD THEY HAVE }i NEEDED, IF THEY SAID MUNICIPAL PROPERTY EX-CLUSIVELY USED BY THE MUNICIPALITY , WHY DID THEY HAVE TO ADD FOR A MUNICIPAL OR PUBLIC PURPOSE? WE ACCEPT THAT IT CAN BE ANY GOVERNMENTAL OR PROPRIETARY USE, AS LONG AS THE GOVERNMENT USES, AS LONG AS THE }i MUNICIPALITY }i USES, IT THEY WOULDN'T HAVE NEEDED TO ADD THOSE xD ADDITIONAL }K_ {_ xD}i LIMITATIONS .

THAT IS A GOOD QUESTION,YOUR HONOR,}i }i AND I THINK THEANSWER TO IT IS THINK ABOUT IT THIS WAY. WHAT IF THEY HADN'T ADDED IT , HOW CLEAR WOULD THE --XXC%NSTITUTION, THEN{_, `B^? I THINK IT IS ONE }i O F ~r THESE SITUATIONS --

IT WOULD HAVE BEEN VERY CLEAR , WOULDN'T IT , WHICHWOULD HAVE BEEN THAT IT WOULD }i HAVE }i BEEN WHERE YOUWANT}i IT TO BE, WHICH IS THAT AS LONG AS YOU DON'T LEASEIT OUT, IF YOU OWN IT AND }i}i ~r, IF YOU OPERATE A CASINO , WHICH I S SOMETHING THAT , MAYBE THAT WOULD BE OKAY,TOO , BUT BASICALLY AS LONG AS YOU ARE USING IT FOR A VALID, YOU KNOW , SOMETHING THAT IS A BENEFIT TO ALL THE CITIZENS, THEN IT IS EXEMPT FROM TAXATION , AND YOU WOULDN'T NEED TO ADD "MUNICIPAL OR PUBLIC PURPOSE ."

IF I T HAD STOPPED WHEREYOUR HONOR POSTED , IF IT STOPPED BY USE BY THE MUNICIPALITY, PERIOD.

EXCLUSIVE USE.

EXCLUSIVE USE BY THE MUNICIPALITY, PERIOD , THEN I WOULD SUGGEST TO YOU THAT , THROUGH THE YEARS THE USE OF IT , THAT IT WAS THE INTENT OF ARTICLE VII NOT T O LIMIT ARTICLE VIII PURPOSES BUT TO SPECIFICALLY GRANT A BLANKET EXEMPTION TO ANYTHING THAT A MUNICIPALITY DID. I WOULD SUGGEST , YOUR HONOR , THAT WHAT THE FRAMERS WERE TRYING TO ACHIEVE INCLUDINGTHAT, WAS TO MAKE A CLEAR LINKAGE BETWEEN THE TWO , SOTHAT IT WAS CLEAR THAT THE GRANT OF THE EXEMPTION , SELF-EXECUTING EXEMPTION IN ARTICLE VII , SECTION 3-A, WAS LINKED TO THE POWERS IN ARTICLE VIII , SECTION --

SO YOU ARE SAYING PROPRIETARY. SO WHAT BUSINESS WOULD BE ABLE TO BE FAXED -- WOULD BE ABLE TO BE TAXED? COULD THE CITY OPERATE A GROCERY STORE AND SELL AUTOMOBILES TO HELP THE POOR FOLKS?I MEAN , EVERY BUSINESS IS PROVIDING , EVERY SERVICE I S PROVIDING SOMETHING THAT PROVIDES A BENEFIT, SO BY YOUR DEFINITION , WHAT COULD THE CITY NOT DO?

THAT IS A GOOD QUESTION.HERE IS THE BEST ANSWER I KNOW OF YOU CAN GIVE. FIRST OF ALL , TO DECIDE THIS CASE , YOU DO NOT HAVE TO PROBE THOSE LIMITS. YOU DO NOT HAVE TO DECIDE CONSTITUTIONAL ISSUES NOT BEFORE YOU. THIS CASE, THIS CASE IS WELL WITHIN THAT LINE. THIS CASE INVOLVES SOMETHING THAT IS IN THE NATURE OF A UTILITY OF CLASSIC INFRASTRUCTURE.

IT IS NOT A MONOPOLY . THE UTILITY , WHAT OTHER CASE DO WE HAVE WHERE THE UTILITY IS NOT, BECAUSE IT IS A QUASI-PUBLIC UTILITY , WHERE THERE IS A MONOPOLY GRANTED?

I AM NOT SURE I UNDERSTOOD THE QUESTION. I APOLOGIZE.

BECAUSE OF REDEREGULATION,THERE IS NO LONGER A MONOPOLY GRANTED TO ONE UTILITY TO BE THE SINGLE PROVIDER FOR SERVICE IN THE AREA.

NOTHING IN THE CONSTITUTION, JUSTICE BELL , SUGGESTS THAT THE MONOPOLY OR NOT MONOPOLY OR REGULATED , DEREGULATED , HAS ANYTHING TODO WITH DETERMINATION OF WHAT I S EXEMPT.

WHAT ABOUT COMPETITIVE , NONCOMPETITIVE, SO YOU , THE PROBLEM IS YOU WANT US T O DECIDE JUST ON THIS CASE , AND , BUT ARE YOU, WOULD THE RULE, WOULD THE RULE BE THAT , DECLARING THIS STATUTE UNCONSTITUTIONAL, THEN ITWOULD NOT MATTER UNDER WHAT CIRCUMSTANCES THE MUNICIPALITY ENTERED INTO THE TELECOMMUNICATION S FIELD ? IT DOESN'T , IT DOESN'T MATTER WHETHER YOU ARE NOTGOING TO OFFER YOUR SERVICES TO, AS YOU , YOUR BUSINESS PLAN SAYS THAT YOU ARE DOWN THE ROAD , TO RESIDENTIAL PEOPLE AND TO PEOPLE THAT REALLY MIGHT NOT BE ABLE TO AFFORD THIS SERVICE OTHERWISE, THAT YOU COULD KEEP IT , AND USE THESE POWERS, AND ACTUALLY LEAST POWERS OUT AT THAT POINT , BUT YOU COULDN'T , AT THAT POINT , YOU WOULD BE UNDER A DIFFERENT SITUATION , BUT IF YOU DIDN'T LEASE I T OUT , BUT YOU JUST DECIDEDED THAT YOU ARE GOING TO OFFER IT AT A HIGHER RATE AND YOU ARE GOING TO OFFER IT TO THE BIG , YOU KNOW, UNIVERSITY OF FLORIDA BUT NOT TO THE RESIDENTIAL USERS , WHAT WOULD THE SITUATION BE THEN?

WELL , YOUR HONOR, KEEP IN MIND THAT THIS STATUTEINVOLVES, THIS CASE INVOLVES A CHALLENGE T O A SPECIFIC STATUTE, CHAPTER 364. CHAPTER 364 IMPOSES CERTAIN OBLIGATIONS ON THOSE WHO HAVE CERTIFICATES UNDER IT , INCLUDING THE CITY OF GAINESVILLE, AND INCLUDED AMONG THOSE , ARE THE OBLIGATIONS NOT TO DISCRIMINATE IN FAVOR OF CLASSES OF CUSTOMERS OR TO SUGGEST ANY CUSTOM -- OR NOT TO SUBJECT ANY CUSTOMER OR ANY LOCALITY TO DISCRIMINATION. WE HAVE TO ASSUME , IN LOOKING AT THE CONSTITUTIONALITY OF THIS STATUTE , THAT ANY COMPANY OPERATING UNDER IT, ANY MUNICIPAL COMPANY OPERATINGUNDER IT, IS ABIDING BY THAT , AND SO TO START DISCRIMINATING AGAINST CUSTOMERS, TO START GRANTING REFERENCES, WOULD BE OUTSIDE THAT WHICH CHAPTER 364 PERMITS. IT WOULD BE IN VIOLATION.

THE LEGISLATURE , THROUGH THAT SAME CHAPTER , GRANTED MUNICIPALITIES THE ABILITY TO APPLY FOR THESE CERTIFICATE , CORRECT?

CORRECT.

COULD THEY HAVE CONSTITUTIONALLY EXCLUDED MUNICIPALITIES FROM BEING WITHIN THE MARKETPLACE OF THOSE THAT COULD OBTAIN CERTIFICATE?

YES. ARTICLE VIII SECTION 2 , GIVES THE LEGISLATURE PLENARY AUTHORITY, OVER WHAT ACTIVITIES , MUNICIPALITIES CAN ENGAGE IN AND EVEN AUTHORIZES THE ABOLITION OF MUNICIPALITIES AND PROVISIONS.

IF WE SAY YOU ARE EXEMPT BECAUSE OF ARTICLE VII , THATENDS UP TAKING, SAYING THAT YOU REALLY THEN SHOULD NOT NORTHBOUND THE COMPETITIVE MARKETPLACE, BECAUSE WE DIDN'T INTEND , WITH DEREGULATION, TO HAVE SOMEBODY THAT WOULD HAVE AN UNFAIR ADVANTAGE OVER THE OTHER PRIVATE PROVIDERS.

YES. THAT COULD BE DONE . BUT I DIDN'T GET TO FINISH MY ANSWER T O JUSTICE BELL'S QUESTION, NOT TRYING TO AVOID THE ISSUE OF WHERE IS THE OUTER BOUNDARY, BUT STARTING WITH THE POINT OF YOU DON'T HAVE TO REACH THAT IN THIS CASE , BECAUSE THIS SORT OF OPERATION IS WELL WITHIN IT IS A CLASSIC INFRASTRUCTURE SORT OF UTILITY SORT OF PROVISION , OF THE OUTER LIMITS ARE GOING TO HAVE TO BE DEFINED , I THINK, O N A CASE-BY-CASE BASIS , BECAUSE THERE IS NO WAY BY USING WORDS, WHETHERTHEY BE HEALTH , WEALTH WELL FAIR, COMFORT , HAPPINESS AND WHATNOT THAT, YOU ARE GOINGTO BE ABLE TO PREDICT WHAT THAT OUTER LIMIT IS , BUT I DID WANT TO LEAVE YOU WITH THE IMPRESSION THAT THINGS LIKE RESTAURANTS OR GROCERY STORES , ARE SO CLEARLY AND AUTOMATICALLY NOT GOING TO QUALIFY , EVEN THOUGH THEY MAY TEST THOSE LIMITS.

OR MOTELS.

PARDON ME?

OR HOTELS. LIKE THE HYATT HOTEL .

POSSIBLY.LET ME GIVE YOU A REASON WHY. IT GIVES FINE DISTINCTIONS WHETHER YOU ARE OUT THERE ON THE FRINGES , WHICH WE ARE NOT, O F DISTINGUISHING , FOREXAMPLE , EVERYONE WHO COMES TO A PUBLIC PARK , TO HAVE BARBECUE, ENJOY THEMSELVES , IT IS AN EXEMPT THING. WHAT IS THE DIFFERENCE NECESSARILY , BETWEEN THECITY , IS IT CHOSE TO DO SO DOING THAT, SERVING FISH A T A FISH FRY , AND OPENING A RESTAURANT AVAILABLE TO THE PUBLIC. THAT IS NOT OUR CASE. WE ARE NOT CLOSE TO THAT.

BUT WE ARE ASKED HERE , A CERTIFIED QUESTION , AND THE CERTIFIED QUESTION IS, SHOULD WE HAVE THE SAME TEST FOR MUNIESBLY-OPERATED -- MUNIESBLY-OPERATED HOTELS , AS WE WOULD SO FOR A MUNICIPAL LY-LEASED HOTEL? HOW DO YOU VIEW THIS FIRST QUESTION?

WE ARE HERE ON AUTOMATIC APPEAL, TOO.

DIDN'T THEY CERTIFY THEQUESTION TO US?

I BELIEVE THAT JUSTICE ERVIN DID COMMUNICATE THAT HE WOULD CERTIFY A QUESTION. YES, SIR.

I STAND CORRECTED. YES, SIR. THAT'S RIGHT.

DISTINCTION BETWEEN THE TWO PROPRIETARY AND GOVERNMENTAL , I S THE , I S NOT DIFFICULT , BUT THIS COURT HAS DEFINED , I N ITS SEBRING TWO CASE, WHAT PROPRIETARY MEANS. PROPRIETARY FUNCTIONS ARE THOSE WHICH PROMOTE THE COMFORT , CONVENIENCE , AND HAPPINESS O F CITIZENS . THAT IS WHAT IT COURT --

WE HAVE SAID THAT IF IT IS LEASED PROPERTY , PROPRIETARY DOES NOT DEFINE AS MAKING A PROFIT, CORRECT?

AS TO LEASED CASES, MAKING A PROFIT OR NOT IS NOT DETERMINATIVE.

WHAT IS DETERMINATIVE .

FOR LEASED CASES , ALL , THE SOLE DETERMINATIVE THING IS UNDER THIS COURT'S HOLDINGS, IF IT IS LEASED AND IT IS PROPRIETARY , THIS DEFINITION, THEN , IT IS TAXABLE. THIS COURT HAS NEVER APPLIED , EVER APPLIED , THE GOVERNMENTAL PROPRIETARY TEST TO PROPERTY THAT IS OWNED AND USED BY -- TELL ME IN READING, IF I GO BACK, IT IS 1968 AND I READ THIS CONSTITUTIONAL PROVISION , HOW DO I COME UP WITH TWO DIFFERENT TESTS , ONE FOR LEASED PROPERTY AND ONE FOR PROPERTY THAT IS NOT LEASED?

THE CONSTITUTION , EMBEDDED IN THE CONSTITUTION , IS A CLEAR DISTINCTION, AS YOUR HONOR HAS ALREADY INDICATED . THE 68 - - THE '68 CONSTITUTION, IF I CAN TAKE ONE MINUTE AND EXPLAIN THE DIFFERENCE BETWEEN THE TWO CONSTITUTIONS , I THINK I CAN PERHAPS GIVE A FURTHER UNDERSTANDING OF THIS. IN THE '85 CONSTITUTION, THE CONSTITUTION IN ARTICLE 16 , ACTUALLY ALLOWED PRIVATELY USED PROPERTY , PROPERTY OWNED AND USED BY PRIVATE ENTITIES, AS WELL A S THOSE LEASED, TO BE EXEMPT IF THEY SERVED A MUNICIPAL PURPOSE. THAT WAS ARTICLE 16 SECTION 16. THIS COURT , IN ITS FIRSTDAYTONA BEACH OR SECOND DAYTONA BEACH CASE, THE SPEEDWAY CASE, HELD THAT THE PRIVATE COMPANY OPERATING THE DAYTONA BEACH RACEWAY WAS EXEMPT UNDER THAT SECTION OF THE CONSTITUTION. THAT LED T O FEELINGS OF UNHAPPINESS AND UNFAIRNESS . WHEN THE CONSTITUTIONAL FRAMERS IN '68 LOOKED AT THESITUATION , THEY DID NOT CONTINUE THAT PROVISION. INSTEAD, THEY CHANGED IT ENTIRELY AND SAID PROPERTY USED EXCLUSIVELY B Y THE MUNICIPALITY.

NO LONGER CAN THE PRIVATE ENTITY, LIKE IT COULD UNDER THE OLD CONSTITUTION , ENJOY THAT EXEMPTION.

SO, THEN , WHY WOULD THERE NEED TO BE, ALL THESE CASESWHERE WE DEFINE THE GOVERNMENTAL GOVERNMENTAL TEST , WHY , IF THE PLAINLANGUAGE OF THE CONSTITUTION SAYS EX-EXCLUSIVELY USED BY A MUNICIPALITY , WOULDN'T THE EASY ANSWER BE THAT NO PROPERTY THAT IS LEASED , THAT IS BY DEFINITION IS NOT EXCLUSIVELY USED.

YES, YOUR HONOR, IT COULD HAVE , AND I THINK THE ANSWER TO THAT IS A MATTER OF HISTORICAL FACT , RATHER THAN NECESSARILY ANALYTICAL FACT. WHERE THE GOVERNMENTAL PROPRIETARY DISTINCTION WASCREATED BY THIS COURT, WASIN THE WILLIAMS V STRONG CASE.

WAS THAT INTERPRETING THIS CONSTITUTION --

THAT IS EXACTLY POINT I WAS COMING TO.

IT WAS NOT.

IF YOU READ WILLIAMS V STRONG, THE '68 CONSTITUTION IS WHAT WAS ENFORCED , BUT WHAT JUSTICE SUNDBERG WASWRITING ABOUT, WHEN H E FIRST TALKED ABOUT GOVERNMENTAL PROPRIETARY , WAS THE TAXING STATUTE AT ISSUE AT THE TIME. WHAT THE COURT SAID WAS THE TAXING STATUTE , WHEN IT TALKS ABOUT THAT WHICH I S , WHAT LEASED PROPERTY IS SUBJECT TO TAX, IT IS TALKING ABOUT GOVERNMENTAL PROPRIETARY, AND THAT IS CONSISTENT WITH THE CONSTITUTION OF THE -- WITH THE CONSTITUTIONAL DISTINCTION WITH THAT WHICH IS OWNED AND USED BY THE MUNICIPALITY AND THAT WHICH IS NOT. WHAT, THEN, HAPPENED WAS THAT THAT GOVERNMENTAL PROPRIETARY DISTINCTION , BECAME EMBEDDED IN THE CASE LAW AND WAS, THEN , CARRIED FORWARD IN FURTHER CASES , COMPLETELY APPROPRIATELY, BECAUSE IT WAS STILL CONSISTENT WITH THE CONSTITUTION, BUT , AGAIN , BE PERCEIVED AS I F IT WAS A NECESSARY CONSTITUTIONAL TEST, WHEN IT ORIGINALLY WAS--

SO THE ANSWER TO JUDGE ERVIN'S QUESTION , THE ONE THAT HE WANTED TO HAVE CERTIFIED RATHER THAN WAS CERTIFIED , IS THAT THERE SHOULD BE A DIFFERENT TEST FOR PROPERTY THAT IS LEASED BY MUNICIPALITY AND AN OPERATION THAT IS ACTUALLY OPERATED BY MUNICIPALITY , IS THAT CORRECT?

THERE SHOULD BE, BECAUSETHERE IS A DIFFERENCE IN THE CONSTITUTIONAL LANGUAGE, ITSELF.

AND IT WILL JUST HAVE TO BE THAT IF IT IS LEASED , IT IS NOT EXEMPT.

THAT IS CORRECT.

AND YOU WOULDN'T HAVE TO GO THROUGH WHAT WE ARETRYING IT TO GO THROUGH HERE, CORRECT?

THAT IS CORRECT. IF IT IS LEASED, IT SIMPLY DOESN'T MEET THE CONSTITUTIONAL PLAIN LANGUAGE AS BEING OWNED AND USED BY THE MUNICIPALITY . IT IS USED BY A PRIVATE ENTITY.

AND IT IS NOT LEASED. WHAT D O WE DO? ARE THERE ANY LIMITS?

IF IT IS NOT LEASED , IT IS EXEMPT UNDER 3-A , UNLESS THE CITY GOES BEYOND ITSAUTHORITY , UNDER ARTICLE VIII . MY SUGGESTION , IN RESPONSE , BECAUSE I NEVER GOT TO A RESPONSE TO JUSTICE ANSTEAD'S QUESTION OF HOW DO WE FIGURE OUT A STANDARD , IS THAT THE SIMPLE STANDARD , THERE IS NO PERFECT ONE , BECAUSE THESE ARE ALL WORDS. THIS ISN'T MATHEMATICAL DEFINITIONS. THE SIMPLE STANDARD WHICH IS CONSISTENT WITH WHAT THE CONSTITUTION SUGGESTS, I THINK , IS THAT ARTICLE VIII POWERS WERE MEANT TO BE

COEXTENSIVE WITH ARTICLE VII . THERE IS NO REASON WHY A CITY SHOULD BE EXERCISING POWERS THAT AREN'T WITHIN ITS POWERS , UNDER ARTICLE VIII. THAT IS A, QUOTE , SIMPLE TEST, AND THOSE ARE THE LIMITS. KEEPING IN MIND THAT THE CONSTITUTION BUILDS IN A CHECK AND BALANCE , PART OF YOUR CONCERN, JUSTICE BELL.

IS THERE ANYTHING --

THAT BRINGS YOU BACK,THEN, FULL CIRCLE , TO THE CITY CANNOT ENGAGE IN ANY KIND O F BUSINESS, AND THAT WOULD BE TAX EXEMPT.

WELL , JUST , THE CITY COULD NOT ENGAGE IN ANY KIND OF BUSINESS, IF THE KIND OF BUSINESS IT WANTED TO ENGAGE IN , WAS EITHER NOT A POWER UNDER ARTICLE VIII , OR --

BUT ANY PROPRIETARY BUSINESS A CITY COULD ENGAGE IN , AND WOULD BE TAX EXEMPT. I MEAN , IS THAT WHAT YOU ARE SAYING, WHEN YOU SAY THAT IT IS COEXTENSIVE , AND YOU SAY IN ARTICLE VIII , THAT THE CITY CAN ENGAGE INAPPROPRIATE AREA ENTERPRISES , YOU COME RIGHT BACK TO WHERE IS THAT LIMIT?

IT STILL HAS TO B E , JUSTICE QUINCE, IT STILL HAS TO BE A PROPRIETARY ACTIVITY THAT SERVES A PUBLIC PURPOSE. FOR EXAMPLE , THIS COURT, IN THE MILLIGAN CASE , INVOLVING ORLANDO UTILITIES COMMISSION , CONCLUDED THAT THAT , IN THAT CIRCUMSTANCE , A PUBLIC PURPOSE WAS NOT BEING USED , BECAUSE WHAT HAD HAPPENED WAS --

SO WHAT IS YOUR FINAL DEFINITION, THEN, OF A PUBLIC PURPOSE? THAT IS WHERE WE STARTED AT.

A PUBLIC PURPOSE IS ANY PURPOSE THAT PROMOTES THE LANGUAGE COMFORT , SAFETY AND HAPPINESS OF THE CITIZENS AND THE PUBLIC . KEEPING IN MIND THAT IT HAS TO AND POWER THAT ARTICLE VIII GRANTS THIS COURT , INTERPRETS ARTICLE VIII , BUT ALSO KEEP IN MIND THAT THE FRAMERS OF THE CONSTITUTION UNDERSTOOD THAT THESE ARE POTENTIALLY FUZZY CONCEPTS , AND THE CHECK AND BALANCE THAT IS BUILT INTO THAT WAS TWOFOLD.NUMBER ONE, THI S COURT HAS ALWAYS SAT IN JUDGMENT OF WHAT ARE ARTICLE VIII POWERS. THAT IS THE COURT'SFUNCTION. AND NUMBER TWO , IT GRANTEDTO THE LEGISLATURE , THE AUTHORITY TO SAY , EVEN THOUGH ARTICLE VIII GIVESYOU , AS AN INITIAL MATTER, THE POWER TO DO WHATEVER IT IS , THE LEGISLATURE , IF IT IS DISSATISFIED , DOESN'T THINK THAT OUGHT TO BE SOMETHING YOU ARE DOING , MAY WITHDRAW IT. THAT HASN'T BEEN DONE IN A N APPROPRIATE WAY HERE. IF THIS COURT STRIKES DOWN THIS STATUTE, THE LEGISLATURE , LIKE IT CAN CONSIDER ANYTHING, WILL HAVE TO CONSIDER WHETHER IT WAS JUST TO DO THAT , BUT THAT IS THE WAY THE CONSTITUTION DEALT WITH T.

JUSTICE CANTERO .

WE HAVE NEVER SAID THAT OPERATE AGO RACETRACK IS NOT A PUBLIC FUNCTION UNDERARTICLE VIII HAVE W E ?

NOT TO MY KNOWLEDGE.

OKAY.BUT WE HAVE SAID THAT IT IS NOT TAX EXEMPT , UNDERARTICLE VII .

BECAUSE IT WAS BEING USED BY A PRIVATE COMPRATION . -- CORPORATION.

ALL RIGHT. WELL, IS THERE ANYTHING IN ARTICLE VII OR ARTICLE VIII THAT SAYS THAT MUNICIPALITIES ARE GOING TO BE ALLOWED TO HAVE A COMPETITIVE ADVANTAGE ANDENTER INTO ANY KIND O F BUSINESS IT WANTS TO , AGAINST PRIVATE CORPORATIONS , AND RETAIN A TAX EXEMPTION . DID IT IMPLY THAT?

THAT IS THE FIRST QUESTION. NO , THAT DOESN'T ADDRESS THAT SPECIFICALLY, BUT THESECOND ONE IS , JUST YES , UNDERSTAND THIS. THIS IS , I THINK , VERY FUNDAMENTAL ANSWER TO YOURQUESTION , JUSTICE BE CANTERO. THE CONSTITUTION HAS , WE DON'T KNOW ALL THE HISTORIC DETAILS BECAUSE THE '68 REVISION HAS VERY, VERY LITTLE NOTES THAT WERE KEPT , DIRECTING US TO THE PLAIN LANGUAGE, FOR THE MOST PART , BUT THE CONSTITUTIONAL FRAMERS IN '68 , CLEARLY INTENDED TO GIVE MUNICIPALITIES , PROPRIETARY POWERS, WHICH IMPLIES THE ABILITY TO COMPETE WITH OTHER BUSINESSES ENGAGED IN SIMILAR THINGS, AND GAVE IT A CONSTITUTIONAL EXEMPTIONFOR.ALL WE KNOW , AND IT IS REASONABLE TO INFER THAT THE FRAMERS THOUGHT THIS , THEY THOUGHT THIS IS SORT OF MUNICIPALITIES , MUNICIPALITIES ARE SMALL , MUNICIPALITIES ARE SUBJECT TO ALL KINDS OF DISADVANTAGES , COMPETITIVELY , THAT OTHER COMPANIES ARE NOT.THEY HAVE TO DEAL WITH THE PUBLIC RECORDS ACT, THE SUNSHINE LAW AND ALL KINDSOF OTHER THINGS , AND MAYBE, ALSO, I T SON OF THE VERY PURPOSES THAT THAT THEY INTENDED TO GET AT , TO MAKE THE PROVISION OF MUNIESBLY-PROVIDED SERVICES LESS EXPENSIVE , RATHER THAN MORE EXPENSIVE . THE PURPOSE OF THIS LAW , AND THE ONLY PURPOSE OF THIS LAW , IS TO MAKE THE COST T O CONSUMERS HIGHER , FOR THE BENEFIT OF PRIVATE BUSINESS. THAT IS NOT SOMETHING THAT ONE SHOULD READILY ASSUME THE CONSTITUTIONAL FRAMERS DID NOT INTEND TO PREVENT.

CHIEF JUSTICE: THANK YOU VERY MUCH, AND WITH THAT , M R . HUBENER , WE WILL GIVE YOU A COUPLE OF MINUTES.

I DON'T HAVE ANY SILVER BULLET THAT WILL RESOLVE ALL OF THE DIFFERENCES HERE. I DON'T REALLY THINK THAT THERE IS ANYTHING IN THE CONSTITUTIONAL HISTORY, THAT SUPPORTS THE ARGUMENT THAT THE FRAMERS MEANT THE SAME THING, WHEN THEY USED PUBLIC PURPOSE , IN ARTICLE VII ANDARTICLE VIII , AND --

DID THEY USE PROPRIETARY USE IN ARTICLE VIII ?

PROPRIETARY POWERS. YES.

SO THERE IS NO , S O THELANGUAGE IS NOT IDENTICAL , AND THEY WERE , THEY CAME INTO EFFECT AT THE SAME TIME , AND THEY INTENDED ONE TO BE THE SAME AS THE OTHER , ALL THEY HAD TO D O IS SAY , AS DEFINED IN ARTICLE VIII .

AND I THINK THE , WHAT YOU HAVE BEEN LEFT, WITH REALLY,WITH ALL DUE RESPECT , IS THE ARGUMENT THAT ANYTHING A MUNICIPALITY DOES , I S SUBJECT TO TAXATION . IT WOULD BE , I THINK THERE IS ALSO THIS BASIC PREMISE THAT UNDER LIES THESE CHANGES , IS THAT PROPERTY DEVOTED T O PRIVATE USES ,, WHICH I THINK , ARE PROFIT MAKING VENTURES BY A MUNICIPALITY , SHOULD BEAR ITS SHARE OF THE TAX BURDEN . ALL PROPERTY SHOULD, IS NOT ABSOLUTELY --

S O, THEN AGAIN , YOUR TEST WOULD STILL HAVE TO HAVE THAT IT IS NOT JUST, IT WOULD HAVE TO BE THAT, IF THEY ARE MAKING A PROFIT , THAT IS WHAT MAKES IT SUBJECT TO AD VALOREM TAXES , BUT IF THEY ARE NOT MAKING A PROFIT , WHICH , AGAIN , A PROFIT HAS A DIFFERENT MEANING FOR A MUNICIPALITY THAN IT DOES FOR A BUSINESS , THEN IT COULD BE , AGAIN , JUSTICE CANTERO 'S EXAMPLE, WHERE NOBODY IS PROVIDED ANY TELECOMMUNICATIONS SERVICES AND THE MUNICIPALITY STEPSUP TO THE PLATE, THEN WEWOULD HAVE TWO DIFFERENT TESTS OR DEPENDING ON THE FACTS OF THE CASE, AND YOU WOULD BE PUTTING US IN A FACT BY FACT SITUATION.

AND THAT CIRCUMSTANCE , YES , BUT --

BUT IF YOU CONCEDE THAT , THEN DOESN'T THAT MAKE THE STATUTE UNCONSTITUTIONAL , BECAUSE THAT STATUTE DOESN'T ALLOW FOR THE CIRCUMSTANCE OF THE POOR MUNICIPALITIES

AND THE POOR PEOPLE THAT HAVE NO INTERNET ACCESS AND NO TELECOMMUNICATIONS .

I DON'T THINK THAT SITUATION EXISTS, AND IDON'T THINK THE LEGISLATURE THOUGHT IT DID, SO UNTIL IT IS SHOWN THAT THERE IS A MUNICIPALITY THAT HAS NO TELECOMMUNICATION SERVICES AT ALL, AND I DON'T THINKTHAT CAN BE SHOWN, THEN THE STATUTE , IT WOULD BE CONSTITUTIONAL .

CHIEF JUSTICE: OKAY. THANK YOU VERY MUCH. THANK BOTH OF YOU FOR ANSWERING OUR QUESTIONS IN A VERY DIFFICULT SUBJECT. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.