ORAL ARGUMENT - 4/16/96
95-1041
NOOTSIE V. WILLIAMSON CAD

IKARD: May it please the court. Good morning. Because the court has granted our points of error Nos. 1 and 4 we have divided our argument in accordance with those 2 points of error. The first which relates to the constitutionality of §23.51(1) of the Tax Code will be the subject of my argument, and then Ms. Lilly will address the issues concerning standing of the appraisal district to challenge the constitutionality of the statute in the first place.

This case is about whether the legislature acted within its powers when it defined open space land, which is entitled to special valuation treatment under Art. 8, §1-d-1 of the Texas constitution to include land principally used as an ecological laboratory by public or private colleges or universities. The owner of this land Nootsie Ltd. contends the legislature did act within its powers. The Williamson County App. District contends it did not.

The land in this case is approximately 170 acres located in Williamson county, which is owned by Nootsie, Ltd. but has been maintained as an ecological laboratory since 1967 under the administration of the Texas system of natural laboratories. Just for point of reference an ecological laboratory is an area used for basic ecological teaching and research. The UT, St. Eds, Baylor, U of H have used the property in issue as an ecological laboratory for almost 30 years to study a number of different ecological matters, including the effects of grazing on grasses, to study the pristine canyon vegetation as a reference point, for the measurement of deviations in similar properties, which have been grazed and to study the compatibility of farm and ranching with animals and vegetation which are protected by the various statutes of the federal and state governments.

HECHT: Does it have any productive capacity?

IKARD: The answer to that question is no. And I know that question was pointed out by the appraisal district in its brief. It was argued both to the TC and to the CA. Our response to that is: This is no different from a situation where on this same 170 acres I raised a number of cattle, and have a 50 acre garden, and have 4-5 horses for my family to ride for pleasure all of which are farm or ranch purposes. But I don't sell or border or trade any of those products. I use them for my own consumption or I give them away for charity. That entity has no productive capacity. But it sure would be entitled to receive special valuation treatment under 1-d-1.

SPECTOR: In the years that it was considered open space land, how was it valued?

IKARD: Subchapter D of ch. 23 has a provision by which the chief appraiser can determine the productive capacity by virtue if you will market comparables. What happens is the chief appraiser can establish what the market would be in a comparable property for grazing or for raising crops or so forth and apply market expenses to that revenue and derive net to land productivity capacity.

SPECTOR: And that's how it was done?

IKARD: That's how it was done. It's no different from a situation where there is a below market lease on a commercial building. And the chief appraiser is prohibited from using a below market lease for the purposes of determining the value of that property. He or she goes out and finds out what market rent is and determines what the value of the property is in accordance with that revenue rather than that which is produced by the property.

I just want to say that it's important to remember that this property absolutely and unconditionally qualifies for open space land treatment under 23.51(1), and under 1-d-1 but for the contention that 23.51(1) is unconstitutional. It was stipulated to that effect and in fact it had been granted from 1979 the first date that it would have been possible under 1-d-1 until 1990 when the district made a determination for the first time to deny it based on unconstitutionality. And it's also important to note that the Travis CAD, which also appraises this property for an overlapping school district has granted open space valuation treatment since 1979 and continues to do so as we speak today.

Let me just speak for a minute about the language of the statute and of the constitutional amendment. I have on the easel a blowup and under Tab 5 of the handout we've given you there is a facsimile of 1-d-1. The important language that I would like to focus the court's attention to is in subsection A where it says: To promote the preservation of open space land, the legislature shall provide by general law for taxation of open space land devoted to farm or ranch purposes. Then it goes on to say: The legislature by general law may provide eligibility limitations under this section, and may impose sanctions. And the last clause is crucial here: May impose sanctions in furtherance of the taxation policy of this section. Now what the legislature did when it was given 1-d-1 and it was passed by the people of the State of Texas is it passed a companion statute 71.74a, which is under Tab 5 in your handout, and that was the statute which implemented the open space policy under 1-d-1. And 71.74a was repealed when the property tax code came into existence and effective as of Jan. 1, 1982. But both those statutes 71.74a and 21.53(1) contain the identical language in the definition of what open space property is. And that identical language is that the definition includes land that is used principally as an ecological laboratory by a public or private college or university.

This was of course one of the legislature's eligibility limitations which it was given the right to set by the constitutional amendment. And of course this was in furtherance of the taxation policy of this section. It is clear what the taxation policy of §1-d-1 is. This court has addressed that question. And Justice Hightower has written for this court that the policy of 1-d-1 is to promote the preservation of open space land. That's the taxation policy referred to in §A. And I direct the court's attention of course to the HL Farm case which was determined in 1994.

HECHT: The respondent argues that your argument is so broad that it would allow golf courses, ball parks, and other things to fall into the same category, and that's bad. What's your response to that?

IKARD: I assume that taken to its most ridiculous extreme you could argue that if you were limited exclusively by the introductory clause, that is to promote the preservation of open space land, that that would be the case. But I think you also have to be limited by the farm or ranch purposes provision. These have to be read in conjunction when you are dealing with the question that you've asked me. And certainly golf courses cannot be squeezed within the definition of farm or ranch purposes. We are arguing that this particular function, that is the use of property as an ecological laboratory actually meets the constitutional test by 2 reasons: 1) that it does in fact promote open space land, which is the taxation policy; and 2) it is a former ranch purpose. Certainly one of the purposes would have to be the study and research of crops and vegetables on farm or ranches.

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LILLY: May it please the court. As Mr. Ikard has indicated I will address before the court today the issue of the appraisal district's scheme to challenge the constitutionality of the statute in issue in this case, §23.51 of the Tax Code.

The appraisal district is a political subdivision of the State. It is a creature of the

legislature. And it may operate only under the authority conferred upon it by the legislature. It does not derive any authority elsewhere. The legislature authorizes an appraisal district simply to appraise property within its district for the purposes of ad valorem tax. The legislature has not authorized the appraisal district to serve as a judicial body and to determine legal issues. Nor has the legislature bestowed upon the appraisal district any property rights nor any vested property rights that would enable it to go into district court and ask the court to determine the constitutionality of this statutory mandate.

SPECTOR: Do you think it makes any difference that they were defendants in this lawsuit?

LILLY: No your honor I do not. I do think that, of course the plaintiff had standing in the court and so the court had jurisdiction to consider the plaintiff's appeal of its case, but I do not think that the appraisal district without standing could confer upon the court the subject matter jurisdiction of the matter of looking at the unconstitutionality that was alleged in the statute.

CORNYN: In the Texas Association of Business didn't we say as long as the plaintiff had standing that the court had subject matter jurisdiction and that was the end of the story?

LILLY: Yes your honor. I also though would point the court to the court's decision in Corpus Christi Peoples Baptist Church where the court decided to look at the constitutionality issue, or the court stated that it didn't need to look at standing and to determine the standing issue. And that was a case similar to this one. For the reason that the court did find the statute constitutional. And the court did state that the plaintiff, the church in that case, had standing before the court. It could be inferred by the reader that the court had chose to look at the standing issue or look at the constitutional issue and find that statute constitutional. However, I do think that the court would have gotten to the standing issue first before it could have determined the statute to be unconstitutional.

ENOCH: Why shouldn't an appraisal district virtually represent the taxpayers of its appraised district?

LILLY: I think under certain circumstances the appraisal district could probably represent and I think the property entity would probably be the taxing unit. Because there is some case law out there saying that taxpayers cannot bring a lawsuit to challenge the tax treatment of another taxpayer. If the court decides to follow that line of reasoning. I think that the proper party would probably be the taxing units that arguably may have vested rights in the property taxes. And I think under certain circumstances the appraisal districts could stand in the shoes of the taxing units and bring such a suit. Those would be cases under the Texas Association of Business that they have the authority, specific authority of agency to do that. that's not the case in this situation.

BAKER: The district refers to Jester Development v. Travis County Appraisal District. What's your answer to that authority for standing?

LILLY: In Jester the Austin CA stated that in that case the district has refused to exercise its authority to decide whether that particular section applies; and states that the appraisal district might yet choose to apply it; and also that it might choose or not choose to employ it. But there's no language in that court...

BAKER: I realize the basis for the decision that it was an advisory opinion. But the question is the other statement that the district could apply the statute as it thinks proper. And if the taxpayer appeals to the district court, then the appraisal district makes _____ position. Now we have Nootsie as the plaintiff in this litigation and the appraisal district defending its position that it doesn't think the statute is constitutional, that seems to fit that circumstance.

LILLY: Also in this case the defendant has brought a declaratory judgment action and through that...

BAKER: But that was a counter to your first lawsuit saying y'all didn't do right in the first place.

LILLY: I understand that. However I do think that that is still significant. And regarding Jester, I do not see that the Austin CA in its statement that it can decide how to apply the section is really stepping forward and saying that if the district has the option to decide that it is unconstitutional on its own. It does cite a case that sounds like it stands for that proposition, that's Texas Municipal Retirement System v. Roark. And then looking further at that case it seems to me that that case could be distinguished from the circumstances of this case. In that case the retirement beneficiary who was appealing to the court was...the legislature had changed the law in midstream on that case. That's not the situation in this case. There has been no change in the law by the legislature or the judiciary. Only a change in the law by the appraisal district. And our contention is that the appraisal district does not have the authority. That should be left up to the legislature.

BAKER: But authority is a different question than standing. Do you agree with that?

LILLY: I understand.

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RESPONDENT

GRAHAM: May it please the court. I think there are 3 main issues in this case. And I hate to say that this case is more important than any you've heard today. But I think it is. In the others it was just money at stake. In this case I think our system of government is a stake. And I say that for several reasons because at the heart of this case are the doctrines of the supremacy of law, and under Texas law and that of any other state in this nation in fact the supreme law is the constitution. Another issue at stake is separation of powers. Can one branch of government direct another branch of government to violate the supreme law? And thirdly I think is the power of the people to restrict their legislature and in fact all branches of government in the exercise of their authorities.

What we've got in this case and I think the first key issue is our standing. Obviously, if my client has no standing to challenge the constitutionality of this statute, then the plaintiff/petitioner wins by default. I think that in response to that issue I would make several points. First off the appraisal district is not a mere creature of statute. Article 8, §18, which we cite to you in our brief was passed in 1981 by the legislature and approved by the voters. And what it requires is something exactly like the appraisal district. It requires a single appraisal of the property in the counties. It requires a single appraisal of review board or board of equalization process in each county. The appraisal districts were actually created by a statute passed in 1979. But before they became operational that amendment became law. So the appraisal district is not merely a whim of the legislature, but in fact is a directive that the voters have imposed on the legislature to implement. Secondly, my clients take an oath of office just like the members of this court, just like the members of the legislature to uphold both the constitution and the statutes of this state.

We are aware of the line of cases that say that political subdivisions entities of statute don't have rights arising under the bill of rights in Texas. But there are no due process claims in this case. There is no claim for equal protection. What we are arguing in this case is not that we have rights that you need to enforce, but that we have responsibilities that we must fulfill. And those responsibilities arise under the constitution, particularly in Art. 8, §§1 and 2, which say very clearly that the general rule

of property tax is that all taxation should be equal and uniform and in proportion to value.

HECHT: Is there any difference in your view between the meaning of agricultural use in 1D, and open space land devoted to farm or ranch purposes in 1-d-1?

GRAHAM: The answer to that question is yes. And the reason for that is the original amendment, 1-D, defined agricultural use to also require a clear and detailed look at the owner of the property. There was no real difference in the purposes of 1-d, and 1-d-1. The difference is not in the properties that may qualify for special valuation, but in who may qualify. 1-d had very strict limitations on the ownership not the property. What it said was you had to have agricultural as your primary occupation, as your primary source of income, that you had to be a natural person, therefore a trust, corporations, that sort of entity could not qualify. 1-D-1 I think is clearly if you look at the legislative history is a response to the fact that although certain owners could qualify the vast majority of land actually being legitimately farmed and ranched in Texas could not because of who owned it, not because of how it was being used. So if you look at the definition in both the statute and the constitution under 1-d-1 and 1-d, the nature of the property is identical. The difference is in the nature of the owners allowed to qualify for this special tax treatment.

HECHT: So if the taxpayer had land studying crop, various different kinds of crops, and pesticides and insecticides, and so on, would that qualify under 1-d-1 or not?

GRAHAM: I think it might. And we did stipulate. Among the stipulations is one that the activities being conducted on this property benefit all of human kind and agricultural is part of that group.

HECHT: For example: if A&M has a farm out that is studying various hybrids of crops you think that would qualify?

GRAHAM: Certainly.

HECHT: There's a pretty fine distinction between that and what we have here.

GRAHAM: I think the distinction goes back to what the voters thought they were doing when they approved this amendment. And that was going to be my last point, but I'll make it the second point. What the voters looked at when they saw the ballot in 1978 was the following language:

> The constitutional amendment providing for tax relief for residential homesteads, elderly persons, disabled persons, and agricultural land.

Now we have a long history of case law in this state that says what we look to when we interpret the constitution is what was the intent of the framers. And the framers are both the members of the legislature who offer this amendment and the voters who approve it. If you look at the legislative history and the stipulations in this case tell you this: never once in the 1978 session was the phrase "ecological laboratories" mentioned. And petitioners made a very point of the fact that there was a previous statute in 1977 and a subsequent statute in 1979 that did refer to ecological laboratories. But there is no mention of it in 1978. And I think what you have to recognize is there is a far vaster requirement a more difficult requirement to be imposed in passing a constitutional amendment than there is in passing a statute. And another thing you need to recognize is the legislature in 1978 knew that to exempt something it had to do so with very clear language and a constitutional amendment. The reason for that was John Hill had already ruled the statute they passed in 1977 was unconstitutional because it lacked the constitutional amendment to authorize a different treatment of the property.

HECHT: How many ecological labs are there in the state?

GRAHAM: I'm not sure. Personally I am aware of a very limited number. Williamson county had in fact granted this for some period of years. Williamson county frankly was one of the last to become fully operational. They did a lot of things in the early years. There was a change in staff in 1990 and they went back and reviewed all the exemption applications and they found these. They didn't even know they had them. And they denied this one and several others. And Williamson county is one of the few counties I know that's ever even had an application.

I would point out that Nootsie is not a university. It's a private owner. They can develop this property at any time they want.

BAKER: That's immaterial out of the stipulations isn't it?

GRAHAM: That's correct. Let me make a couple of more points about out standing. I think the constitution has within its bounds, particularly in art. 8, limitations on the ability of the legislature to manipulate the tax system. My client is the one statutorily and I think constitutionally designated to implement the tax system. And I think that we have to recognize that we do have 3 constituents. One of the questions earlier addressed this issue. We have first the constituent of Nootsie. We have to respond to Nootsie's claims, Nootsie's interests. Secondly we have the constituency of the taxing units who rely on the appraisal district to prepare for them an appraisal roll that they would then use for tax purposes. And thirdly, and most importantly we have the constituency of all of the other taxpayers who are entitled to equal and uniform taxation in proportion to value. And they are entitled to know that no other taxpayer is getting a break that they are not entitled to. Because the net impact of that is higher taxes on the remainder taxpayers.

I would just give you an example because I think an extreme example proves the principle: If the legislature passed a statute saying we tax all wood frame houses at 100% of full market value, but we tax all brick houses at 10% of full market value. I don't think there is anybody that would argue that the body responsible for implement the property tax system would have to without recourse obey that statute. It makes no sense and it defies logic and it defies our principle of separation of powers that one branch of government can direct another to do an unconstitutional thing.

SPECTOR: Was opposing counsel correct that if a farm is lying fallow that there is an estimate made of productive capacity? How is that handled?

GRAHAM: No it's not correct. There is in the statutory implementation language allowing normal crop and livestock rotation. But if land is just sitting with no use it will not qualify for agricultural evaluation. And I think that's the key issue in this case.

HECHT: It won't even qualify under 1-d-1?

GRAHAM: No. The land has to be devoted to agricultural to the intensity normal for the area.

HECHT: Isn't that 1-D?

GRAHAM: That's both.

HECHT: I thought 1-D-1 said on the basis of its productive capacity?

GRAHAM: That's correct. But the statutes and I think the constitution devoted to farm and

ranch purposes if you're not using it to raise crops, if you're not using it to raise livestock it's not devoted farm and ranch purposes because that by any definition is what farm and ranch purposes are. I think even petitioner would agree that if somebody is not using their land, simply not using it for anything, the fact that is it open does not entitle it to 1-D, or 1-d-1.

SPECTOR: If they are not planting crops because they want to see if six years from now that would be more productive do they lose their exemption?

GRAHAM: Not if that's a normal agricultural activity. If a typical farmer or rancher would do that sort of thing, no, they wouldn't lose it. But if a typical farm and rancher wouldn't do that sort of thing, yes, they would lose it.

HECHT: This seems to be in some tension with your argument earlier that 1-d is restricted to those kinds of active agricultural uses, and 1-d-1 is not.

GRAHAM: I don't think there is any difference. If you go read the statutes they are almost identical except when you talk about who the owner is and which owners can qualify. Under 1-D agriculture has to be your occupation, your source of income. Under 1-d-1 there is no ownership test. The test is directed towards the use of the land.

SPECTOR: Aren't you making the distinction between owners in this case?

GRAHAM: No your honor I am not. I am making a distinction between uses. I think any definition of farm and ranch purpose means raising crops or livestock. I can't find any case anywhere that says one of those two activities is not a component part of farm and ranching. And if anyone could show me such definition then maybe the voters in 1978 understood when they read agricultural land on the ballot, that we were talking about a place where instead of raising crops and livestock you were going to study the mating habits of crickets, the life cycles of cave and _____; we were going to send somebody out with a pair of scissors to clip grass instead of have cows eat it. I don't think anybody is arguing that this property is being used for beneficial purposes by the universities. The point is if the voters are going to be allowed to make these kind of decisions put it to them in plain terms. If you read that language, if you read what appeared on the ballot, if you will read every bit of the discussion in the legislative history, you will never see anything that indicates we are not talking about land actively being used as a farm or a ranch.

HECHT: So just to be clear if I own the 100 acres in Williamson county that I really didn't raise anything on it except whatever grew naturally, and I just like to go out there and look at nature whenever I got a chance, that would or wouldn't qualify under 1-d-1?

GRAHAM: Wouldn't qualify under either 1-d, or 1-d-1.

GONZALEZ: What if you attempted to raise some hay for 2-3 horses you kept there and it was for your own use of that 2-3 horses?

GRAHAM: 1-d-1 doesn't require you to be in it for a profit. It doesn't require you to be a good farmer or a good rancher. There is case law saying if you're totally in it for recreation, no deal. That's a case this court heard out of Tarrant county. But if you're just trying but not really doing well you still qualify under 1-d-1. You wouldn't under 1-d.

SPECTOR: How about if you're trying to do better and you buy a farm to see if a certain seed is...you know you're going to plant an apple orchard in the midst of a peach orchard. It would qualify wouldn't it?

GRAHAM: Sure, because I think there you are engaging in an activity that everybody would understand to be agricultural in nature. I don't think studying the urbanization of the Edwards Plateau, studying _____ fires, studying crickets is what everybody would consider normally to be farming and ranching. The question came up about golf courses. If we are not talking about property actively devoted to farming and ranching where do we draw the line? If there is some remote benefit to the agricultural industry from studying the ecology I think there is just as much in having recreational activities available to farmers and ranchers. Even the Lord rested on the 7th day. Certainly farmers and ranchers need to have an opportunity to play golf, play baseball, that sort of thing.

HECHT: Surely wherever the line is ecological labs are closer than golf courses?

GRAHAM: Maybe so. But at least on golf courses they are raising something - grass.

CORNYN: And it has to be conducted by a public or private college or university?

GRAHAM: It's not owned by that entity, it's just that the research has to be conducted. If the university owned it we wouldn't be here. That would be exempt under other provisions of the Texas constitution.

Another issue that we haven't touched on really that I think is crucial to this case is whether or not 1-d-1 creates an exemption. I think the answer is pretty obvious. The basic rule is you tax property at full market value, you tax property equally and uniformly. Everything else you find in art. 8 is an exception to that general rule. And it creates a right or privilege that most taxpayers aren't entitled to. And anything that results in taxing property at less than its full market value is an exemption regardless of what you call it. And the reason that is significant to this case is the long history from this court of saying that when we are talking about an exemption we have to construe the statute very strictly and narrowly against the granting of the exemption. Because an exemption by definition is the antithesis of equality and uniformity. If you don't construe them strictly you end up giving tax breaks to one taxpayer that they are not entitled to and that occurs at the expense of other taxpayers.

I think what we really have to come back to is what did the voters think they were voting on in 1978? What was really the issue there? Ecological labs were never discussed. The words never appear. What we were talking about all through that process was a tax break for active farms and ranches. What we were talking about was the impact of urbanization on those properties. The fact that people were being forced to sell and leave the farm and ranching business because increasing market values were driving up their tax. We the voters knowledgeably gave farmers and ranchers a tax break, a very substantial tax break. And we did so by a pretty hefty margin. We knew we were doing that. We didn't know that we were giving a tax break to a developer who owned the place where the universities came out and looked at the spiders. I, for one, would vote for an amendment to allow this treatment for ecological laboratory properties. But I haven't been given that chance, and neither have the rest of the voters of this state, and I think that's what we are here about.

My client is obligated to take care of the taxpayers who aren't in front of this court just as much as they are the ones who are here. And the only way we can do that is to ensure that Nootsie doesn't get a break they are not entitled to. And I think the legislature stepped beyond the limits of what the voters and what they themselves knew was authorized by this amendment. And I say that last part because if you look at the way the statute is written, it says: agricultural use or use as an ecological laboratory.

OWEN: Is this a fact issue, and does it matter what the ecological laboratory is studying? does that make a difference?

GRAHAM: I don't think that it does.

OWEN: What if they study only grasses and livestock?

GRAHAM: I think it still comes down to whether or not they are actively engaging in what would commonly be defined as farming or ranching. And to me in every definition I've seen that entails the raising of crops or livestock.

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REBUTTAL

IKARD: May it please the court. The first thing I would like to address in my closing is the exemption issue. There is only one reported case which has directly dealt with the issue of whether the special valuation treatment under subchapter D of ch. 23 of the Tax Code is an exemption or not, that's the May v. Tarrant Appraisal District, 1990, no writ, Ft. Worth, cited in our brief. That CA held "special valuations under ch. 23 of the Tax Code, including subchapter D open space land valuation are methods of appraisal that take into consideration the use of the property and therefore do not constitute partial exemptions from taxation." That's a quote from the opinion at page 908. Of course this court addressed the primary issue that the May court dealt with in whether or not a taxpayer is entitled to attorney's fees in an open space land case, in a subsequent opinion Seven Investments, and disapproved of the May court's affirmation of the TC granting of attorney's fees, but it did not disapprove of the court's determination that open space land valuation is not an exemption.

OWEN: On the standing issue who would have standing to challenge the constitutionality of this statute?

LAWYER: I have grappled with that issue for some time both in this case and in others. I believe that the law is that a taxing unit is the only entity that has a vested right either granted by statute, or by common law or the constitution in order to challenge an alleged infringement upon that right by the legislature. The taxing units have the right to file a challenge and a subsequent challenge petition under the categories of challengeable issues in the Tax Code at 41.03. And there is a laundry list of things the taxing units can in effect protest in a challenge petition. That's an administrative right that they have. Secondly, I think that to the extent that the taxing units can establish a vested right in taxes which but for an unconstitutional statute they would have the right to collect. They have the right to bring an action under the Declaratory Judgments Act against the State of Texas, and for a determination as to the constitutionality of that statute.

I do not believe that the appraisal district because it is an instrumentality of the state created by the legislature, now Mr. Graham has artfully directed your attention to Art. 8, §18, as being the creative vehicle for appraisal districts, but a close look at the language of §18 shows that the legislature has complete and unfettered control over the development of the way in which appraisal districts are managed and administered. And they have created in the Tax Code the exclusive rights and duties of the appraisal district. The appraisal district has no rights outside the ambit of the tax code anymore than a taxpayer does.

And so I would say that while it may be possible for the appraisal district to operate as agent for taxing units if there is an express agency granted, that in _____ the appraisal district must enforce the statutes as the legislature which created them instructs. The taxing units which have a vested right in taxes which it otherwise be collected can assert those vested rights in a declaratory judgment action. And there would be a justiciable controversy in that event.

Let me just say I think the evolution of the statutes that use the term "ecological

labs" is important. I have given you a handout. Under Tab 7 in that handout there is a chronology of events. And I think it's worth viewing. 71.50K which is the first statute including the language "ecological labs" in the definition of open space language was passed by the legislature in 1977. The companion constitutional amendment that would have allowed that statute was ruled to be unconstitutional. So the legislature had the ecological labs language before it in 1977 when 71.50K was passed. It also included the same language in 71.74A when it was passed after 1-d-1 was passed. So both before, during, and after the passage of 1-d-1, the legislature knew about ecological labs.