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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEKALB COUNTY, GEORGIA, a political subdivision of the State of Georgia,

Plaintiff,

v.

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, BART L. GRAHAM, in his official capacity as the Commissioner of the Georgia Department of Revenue, and the STATE OF GEORGIA,

Defendants.

CIVIL ACTION FILE
NO. 2008CV153403

FILED IN OFFICE
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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

FINAL ORDER

Plaintiff DeKalb County seeks a declaratory judgment that House Bill 264 passed by the legislature during the 2007 session is "unconstitutional, null and void and of no legal effect," and an injunction barring the Defendants "from administering or enforcing [its] provisions." Verified Petition For Declaratory And Injunctive Relief ("Petition"), p. 14. On February 10, 2009, this case was tried to the Court. Based on the evidence received at that time, the briefs submitted by the parties, and all other pertinent material of record, the Court makes the following findings of fact and conclusions of law.

A. Findings of Fact

In an election held March 18, 1997, DeKalb County voters approved the imposition of a one-percent homestead option sales and use tax ("HOST") in the special tax district whose boundaries correspond to those of DeKalb County, with the revenues to go toward "funding capital outlay projects and . . . replac[ing] revenue lost to an additional homestead exemption of up to 100 percent." At the same time, the voters also approved a local act providing for the

additional HOST-funded homestead exemption in DeKalb County. DeKalb and the Cities of Atlanta, Avondale Estates, Chamblee, Clarkston, Decatur, Doraville, Lithonia, Pine Lake, and Stone Mountain thereafter entered into a 49-year intergovernmental agreement, under which DeKalb agreed to make disbursements annually to the cities from the capital outlay portion of the HOST revenues. A dispute later arose over how to calculate the payments required by that agreement, resulting in ongoing litigation between DeKalb and certain of those cities that also concerns whether the agreement is void.

House Bill 264 was passed during the General Assembly's 2007 session to amend the HOST Act, which is codified as Article 2A of Chapter 8 of Title 48, by providing that the State Revenue Commissioner will distribute HOST proceeds both to the county and to any "qualified municipality," which the statute defines as "a municipality created on or after January 1, 2007, lying wholly within or partially within a county." When H.B. 264 passed and became effective as law, only DeKalb and Rockdale Counties levied a HOST, and neither county contained such a "qualified municipality." DeKalb and Rockdale Counties are still the only counties that impose a HOST.

During the legislature's 2008 session, the General Assembly passed Senate Bill 82, which provided for the incorporation of the City of Dunwoody. Voters who would reside in the new city approved Dunwoody's incorporation in a general election held on July 15, 2008. Under the HOST Act as amended by H.B. 264, the City of Dunwoody stands to begin receiving HOST distributions after June of this year for capital outlay projects. Based on the testimony of Dr. Michael Bell, DeKalb County's director of finance, the Court finds that implementing H.B. 264 in the DeKalb special tax district will not result in any revenue loss to DeKalb County, except for whatever HOST proceeds are distributed under the statute to the City of Dunwoody and possibly

other cities for capital outlay projects. The Court further finds that House Bill 264 will not cause any increase in the ad valorem tax millage rate that DeKalb County levies in the unincorporated area of the county to provide district services.

B. Conclusions of Law

DeKalb County has abandoned Count VII of its petition asserting that H.B. 264 violated the fiscal note requirements of O.C.G.A. § 28-5-49. DeKalb's remaining legal arguments are addressed below.

1. H.B. 264 did not have to be approved by voters in the DeKalb special tax district in order to take effect there

Count I of DeKalb's petition alleges that the provisions of H.B. 264 "are void and can have no legal force or effect in DeKalb County unless and until they are submitted and approved by a majority of the voters [in that county]." Petition, ¶ 27. The "doctrine of legislative equivalency" cited by DeKalb from certain other jurisdictions does not support that claim. See, e.g., Moran v. La Guardia, 1 N.E.2d 961 (N.Y. 1936) ("To repeal or modify a statute requires a legislative act of equal dignity and import.") The Georgia General Assembly amended the HOST Act during its 2007 session in the same way those provisions were first enacted in 1995 and later changed in 1997 – i.e., by statute – so that even if such a "doctrine of legislative equivalency" applied its requirements would be satisfied here.

The HOST Act itself does not purport to require a referendum before the General Assembly can make changes to the HOST levied in the DeKalb special tax district. In addition, the legislature retains "the power to make all laws not inconsistent with [other provisions of the] Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state." Ga. Const. of 1983, Art. III, Sec. VI, Para. I. See generally State Bd. of Educ. v. County Bd. of Educ. of Richmond County, 190 Ga. 588, 589-

90 (1940) ("Comprehended in this broad power to 'make all laws' is of course the power to change or modify existing laws. A law enacted by one General Assembly is subject to repeal or modification by the same or a subsequent General Assembly."). Georgia's Constitution conditions the General Assembly's authority to enact, amend, or repeal laws on the receipt of voter approval in some situations, see, e.g., 1983 Ga. Const., Art. III, Sec. VI, Para. V(e); Art. VII, Sec. II, Para. II(a)(1); Art. VII, Sec. II, Para. IV; Art. VIII, Sec. V, Para. I; Art. IX, Sec. 1, Para. II(c); Art. IX, Sec. II, Para. VII(b); Art. IX, Sec. III, Para. II(a); Art. XI, Sec. I, Para. IV(b), but nothing in the Constitution requires a voter referendum before the changes made by H.B. 264 to the HOST statute can take effect in the DeKalb special tax district.

The Supreme Court also has held that Art. IX, Sec. II, Para. VI of the Constitution gives the legislature specific authority to enact measures like H.B. 264 governing the expenditure of tax revenues collected in special tax districts. Fulton County v. Perdue, 280 Ga. 807 (2006). Thus, DeKalb County's assertion that the HOST Act – as it existed in March 1997 when DeKalb voters approved the one percent sales tax to fund capital outlay projects and property tax relief – has been frozen in place forever as the law in DeKalb County, except as a majority of voters there might otherwise agree, is without statutory support and cannot be squared with Georgia's Constitution. See also Ga. Const. of 1983, Art. VII, Sec. I, Para. I ("[e]xcept as otherwise provided in [the constitution], the right of taxation shall always be under the complete control of the state.").

2. H.B. 264 does not violate Art. IX, Sec. II, Par. VI of the Georgia Constitution

The HOST Act was promulgated by the General Assembly pursuant to the authority of Art. IX, Sec. II, Par. VI of the 1983 Georgia Constitution. City of Decatur v. DeKalb County, 277 Ga. 292, 294 (2003). DeKalb claims in Count II that H.B. 264 violates this provision by

dividing funds "unequally and [non-uniformly] between the county and the City of Dunwoody to the detriment of the [citizens in the unincorporated area of the county]." DeKalb's Memorandum In Advance Of The Hearing By The Court On Declaratory Judgment ("DeKalb's Brief"), p. 8. As previously noted, the Supreme Court has held that this portion of the Constitution gives the legislature specific authority to enact measures like H.B. 264. Fulton County v. Perdue, 280 Ga. 807 (2006). Furthermore, "[i]t is well-established that a taxpayer has no valid equal protection or due process claim merely because he does not receive benefits of tax monies to the same extent as other citizens similarly taxed," Copeland v. State, 268 Ga. 375, 378 (1997), and Art. IX, Sec. II, Para. VI cannot be read to give any greater rights in that regard. The county also maintains that HOST funds may be used only "for services jointly agreed upon by the county and the city of Dunwoody" or for "joint construction projects," DeKalb's Brief, p. 8, but nothing in Art. IX, Sec. II, Par. VI imposes such a requirement.

3. H.B. 264 does not violate the intergovernmental contracts clause of the Georgia Constitution

The Georgia Supreme Court stated in City of Decatur v. DeKalb County, 277 Ga. 292, 294 (2003), that "[i]ntergovernmental agreements are provided for in this State's Constitution. Ga. Const. of 1983, Art. IX, Sec. III, Par. I. That power cannot be limited by HOST or any other *statutory* pronouncement." DeKalb contends that H.B. 264 violates that constitutional provision "because [the legislation] is intended to interfere with and restrict the ability of DeKalb County to enter into and enforce existing and future intergovernmental contracts with municipalities located in the County." Petition, ¶ 35.

As amended by H.B. 264, O.C.G.A. § 48-8-104(d)(3) does not affect HOST distributions to existing cities other than Dunwoody unless DeKalb's intergovernmental agreement with them "has become or does become null and void for any reason." House Bill 264 also does not

unconstitutionally restrict DeKalb's ability to enter into future agreements for distributing and expending HOST proceeds. Even in the case of a "qualified municipality," like the City of Dunwoody, that otherwise is statutorily-entitled to receive a portion of HOST funds collected in the special tax district for capital outlay projects, the county and the city "shall be authorized by intergovernmental agreement to . . . provide for a different distribution amount." O.C.G.A. § 48-8-104(c)(2). Count III of DeKalb's petition therefore is without merit.

4. H.B. 264 does not create non-uniform tax classifications in DeKalb

As a general rule, "all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Ga. Const. of 1983, Art. VII, Sec. I, Para. III. Count IV of DeKalb's petition asserts that H.B. 264 will cause non-uniform taxation within the DeKalb special tax district that violates this constitutional provision. Petition, ¶ 37. Such non-uniformity results, according to DeKalb, because H.B. 264's capital outlay provisions will require an increase in property taxes levied in the unincorporated area of DeKalb and give Dunwoody more HOST proceeds than other cities in the county. DeKalb's Brief at 6-7.

Dr. Bell's testimony actually established that implementing H.B. 264 in the DeKalb special tax district will not result in any revenue loss to DeKalb County – except for whatever HOST proceeds are distributed under the statute to the City of Dunwoody and possibly other cities for capital outlay projects – and will not cause any increase in the millage rate that DeKalb County levies in the unincorporated area of the county for district services. And there is no uniformity problem here in any event. DeKalb County imposes "district services ad valorem taxes" in "special service tax districts" corresponding to the county's unincorporated area and each of the cities lying wholly within DeKalb, in order to fund "district services" provided by DeKalb County. See 1982 Ga. Laws 4396 (enacting the "DeKalb County Special Services Tax

Districts Act"). Within each such "special services tax district" DeKalb imposes a uniform "district services ad valorem tax," although the millage rate may be different from one such district to another. The HOST also is imposed uniformly at the rate of one-percent on all taxable transactions occurring within the special tax district whose boundaries correspond with those of DeKalb County. That is all the Constitution's uniformity provisions require in this situation. See Board of Comm'rs of Taylor County, 245 Ga. 251, 257 (1980) ("[T]here is no lack of uniformity [here]: the special district sales tax will be uniform throughout the special tax district, the county ad valorem taxes will be uniform throughout the county, and each municipality's ad valorem taxes will be uniform throughout that municipality.")

5. H.B. 264 does not provide for the payment of an illegal gratuity

Count V of DeKalb's petition argues that House Bill 264 is unconstitutional because it requires "DeKalb County to give a gratuity to municipalities within DeKalb County." DeKalb has claimed that "the implementation of House Bill 264 will require the county to raise taxes [in the unincorporated area of DeKalb for district services]. As such, this is taking funds from county citizens [in the unincorporated area] and giving it to citizens in the [City of] Dunwoody for which the County is not receiving present consideration." DeKalb's Brief, pp. 7-8. However, as previously noted, Dr. Bell's testimony in fact showed that H.B. 264 will not cause any increase in the millage rate levied by DeKalb County for "district service ad valorem taxes" in the unincorporated area of the county.

In addition, because the HOST is a special district tax – not a county tax – the State Revenue Commissioner's distribution to Dunwoody of HOST proceeds will not alone amount to an illegal gratuity made by DeKalb County to Dunwoody. The City of Dunwoody (just like DeKalb County) will act as an agent for the DeKalb special tax district in expending HOST

revenues for capital outlay projects that benefit the special tax district. See City of Decatur v. DeKalb County, 277 Ga. 292, 294 n.1 (2003). See also Youngblood v. State, 259 Ga. 864, 865 (1990) ("[T]he hotel/motel tax] is not a county tax . . . because the county only levies the tax as an agent for the special district which has no separate governing authority.") The amended statutory scheme therefore presents no "gratuity" problem. Compare City Council of Augusta v. Mangelly, 243 Ga. 358, 366 (1979) ("In my opinion [the 1975 LOST Act] is unconstitutional because giving cities a portion of funds raised by a county levy violates the 'gratuity' provision of [the Georgia Constitution].") (Jordan, J., concurring specially) with Board of Comm'rs of Taylor County, 245 Ga. 251 (1980) (holding that the General Assembly had the constitutional power to pass a statute that divides special district sales and use taxes between a county and a city).

6. H.B. 264 was not local legislation subject to the requirements of Code Section 28-1-14

Count VI of DeKalb's petition alleges that H.B. 264 is unconstitutional because no notice of intention to introduce the legislation was published in the county as required by Art III, § V, ¶ IX of the Georgia Constitution and O.C.G.A. § 28-1-14. DeKalb says that H.B. 264 is a "local bill" within the meaning of those provisions because it "applies only to one county, DeKalb, . . . the only County which has implemented a HOST with a 'qualified municipality.'" DeKalb's Brief, p. 10. However, the status of H.B. 264 as a "general" law rather than as a "local" law does not depend on whether only certain counties might be subject to the legislation's provisions at the time of enactment or later. The important point is that H.B. 264 will apply in every county that might have a HOST and a "qualified municipality" in the future. See Sturm, Ruger & Co. v. City of Atlanta, 253 Ga. App. 713, 721 (2002) ("[W]hether there is only one case pending at the time is not the test [for deciding if a statute precluding certain types of lawsuits is a general law.]

The test is whether the law operates uniformly throughout the State upon the entire class of subjects with which it deals."). Count VI of DeKalb's petition has no merit.

7. DeKalb's policy arguments are legally irrelevant and not supported by the facts

DeKalb asserts that "[t]his case presents not only a legal question but also a policy one." DeKalb's Supplemental Brief, p. 6. See also id. at 6-7 ("May voters rely on their bargain evidenced in a referendum when the voters impose upon themselves additional taxes or is their vote of no import to later politicians?"). DeKalb's feeling that its citizens somehow have been treated unfairly is not a legal matter that this Court can address.

But the facts also do not support DeKalb's view of what H.B. 264 does. DeKalb complains that the HOST as amended by H.B. 264 will benefit the City of Dunwoody instead of "homeowners in DeKalb County." However, Dunwoody – just like DeKalb County itself – will act as an agent for the DeKalb special tax district in spending HOST revenues for capital outlay projects benefiting the special tax district, which includes homeowners in both the incorporated and unincorporated areas of the county. DeKalb also is wrong when it says that giving HOST proceeds to Dunwoody for that purpose "would violate the original referendum question." The HOST Act, as amended by H.B. 264, falls well within the language of the referendum that DeKalb voters approved in 1997. Also, to the extent that fairness is a relevant consideration, the formula set forth in H.B. 264 for computing what HOST proceeds will be distributed to a city like Dunwoody is designed to see "that the residents of [such] a new incorporated municipality will continue to receive a benefit from [the HOST] substantially equal to the benefit they would have received if the area covered by the municipality had not incorporated." O.C.G.A. § 48-8-101.1. Moreover, if the General Assembly has changed the HOST statute in a way that a

majority of the residents of DeKalb do not like, they can vote to discontinue the tax. See O.C.G.A. § 48-8-106.

8. The relief sought against Defendant State of Georgia is barred by sovereign immunity

The State of Georgia cannot be sued except as its sovereign immunity has been specifically waived in the Constitution or by an act of the General Assembly that expressly provides for such a waiver and its extent. Woodard v. Laurens County, 265 Ga. 404, 405 (1995). There is no constitutional or statutory provision that waives the State of Georgia's sovereign immunity from the relief sought against it in the instant lawsuit, even if any of DeKalb's claims had merit.

Conclusion

Based on the above findings of fact and conclusions of law, it is hereby ordered, decreed, and adjudged that Defendant State of Georgia be and is hereby dismissed as a party, and that judgment be and the same is hereby entered in favor of Defendants Sonny Perdue and Bart L. Graham, in their respective official capacities, and against Plaintiff DeKalb County.

This 12 day of March, 2009.

The Honorable Jerry W. Baxter
Judge, Superior Court of Fulton County

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