THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0138

Steven Rand, et al.

v.

State of New Hampshire

STATE'S RESPONSE IN SUPPORT OF MOTION TO STAY PENDING APPEAL

The State of New Hampshire, by and through counsel, the New Hampshire Attorney General's Office, hereby files this response in support of the Coalition Communities' (the "Coalition") motion to stay. In support thereof, the State provides the following:

1. The Statewide Education Property Tax ("SWEPT") is the primary mechanism the State uses to raise the money that it subsequently spends to fund adequate education grants to municipalities.

2. RSA 76:3 establishes the SWEPT and requires the DRA to "set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 [Taxation of Railroads] and RSA 83-F [Utility Property Tax]."

3. RSA 76:8, I requires the SWEPT to be calculated in a proportionate and reasonable way so it is equal in valuation and uniform in rate.

4. Under RSA 76:8, II, the DRA commissioner must then issue a warrant to the "selectmen or assessors of each municipality by December 15" directing them to assess the amount of SWEPT computed and to "pay it to the municipality for the use of the school district or districts."

5. RSA 76:3 and RSA 76:8 do not authorize the State, or any state agency, to retain any of the money the SWEPT raises; rather, RSA 76:8, II expressly appropriates all of the revenue the SWEPT raises by paying those funds to the municipalities whose

taxpayers raised them and requires those municipalities to use those funds for a single public purpose, *i.e.*, to support their school district or districts.

6. The plaintiffs challenged the SWEPT as unconstitutional under Part II, Article 5 of the New Hampshire Constitution because they contend it results in certain communities getting to keep so-called "excess SWEPT" and because the DRA has developed a practice of allowing unincorporated places to generate a negative local education tax rate to avoid stranding taxpayer dollars in those places. The plaintiffs asserted that this alleged defect and DRA practice made the SWEPT disproportionate and non-uniform in rate in violation of Part II, Article 5. *See Appeal of Bethlehem (N.H. Dep't of Envtl. Servs.)*, 154 N.H. 314, 322 (2006) ("Part II, Article 5 . . . requires that all taxes be proportionate and reasonable, equal in valuation and uniform in rate, and just.").

7. The State opposed the challenge.

8. The State argued that the SWEPT is not structured like previous education taxes that this Court has found unconstitutional because it requires the DRA to set a property tax rate across the State that is proportionate and reasonable, equal in valuation and uniform in rate, and just. *See* RSA 76:8, I. A taxpayer's SWEPT rate is not abated, phased-in, or reduced in any way on the front end, like previous education taxes, and therefore the SWEPT meets the requirements of Part II, Article 5.

9. The State further asserted that the plaintiffs were really challenging the legislature's decision regarding how to spend SWEPT dollars once they have been raised. The State explained that the legislature's power to spend money is plenary and is controlled by Part I, Article 12 and Part II, Article 6 of the New Hampshire Constitution. Under those constitutional provisions, so long as the money spent is earmarked for a "public purpose," a legislative spending decision is constitutional, even if the benefits are distributed unequally. *See Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n*, 105 N.H. 17, 21 (1963). As this Court explained in a case dealing with the distribution of tax money for schools to school-districts in the town, "[t]axes must be proportionally assessed on persons and property; but there is no constitutional provision that money raised by taxation must be appropriated in such a manner that the several tax-payers, or

districts of tax-payers, will be directly benefited in proportion to the amount of their taxes. Such a provision, if it existed, could not be executed." *School-District No. 1 in Walpole v. Prentiss*, 66 N.H. 145, 146 (1889).

10. RSA 76:8, II constitutionally appropriates the SWEPT by paying it to the municipality "for the use of the school district or districts," which is manifestly a public purpose. *See, e.g.*, N.H. Const. Part II, Art. 83; *Opinion of the Justices*, 99 N.H. 536, 538 (1955) ("The furtherance of education is universally regarded as a public purpose . . . ."). Even though this spending is unequal among municipalities, this inequality in the benefit received does not render the SWEPT unconstitutional. *See Manchester Fed. Sav. & Loan Ass'n*, 105 N.H. at 21 ("Neither the plaintiffs nor any taxpayer can complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use.").

11. The State also argued that the SWEPT statutes constitutionally classify the property subject to it. Specifically, the State asserted that the SWEPT applies solely to property in municipalities. *See* RSA 76:3 (explaining that the SWEPT is imposed only on "all persons and property taxable pursuant to RSA 76:8, . . .); RSA 76:8 (referring only to "municipalities," the "municipality's tax base," and issuing a warrant "to the selectmen or assessors of each municipality").

12. The State explained that an unincorporated place is not a municipality because unincorporated places lack the defining features a municipality possesses: they are not incorporated, they do not have a regular local government, they contain a *de minimis* population, they do not provide infrastructure for the general public protection, health, and welfare, and they do not support many regular municipal functions. *See Hillsborough v. Deering*, 4 N.H. 86 (1827) (explaining the limited privileges of unincorporated places and stating that, "They cannot vote to raise money to make highways . . . . Nor can they vote to raise money to repair highways . . ." and "that

unincorporated places have no authority to raise money for the support of paupers. Nor can any action be maintained by or against them.").[1]

13. Property in municipalities therefore differs in kind and use from property in unincorporated places.

14. Accordingly, the State asserted that "just reasons" within the meaning of the case law supported applying the SWEPT to property in municipalities and not applying the SWEPT to property in unincorporated places. *See, e.g.*, *Smith v. N.H. Dep't of Rev. Admin.*, 141 N.H. 681, 686 (1997) (explaining that "part II, article 6 authorizes the legislature to 'classify' property for purposes of taxation" based on "the property's kind or use" and that "the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made") (internal quotations omitted).

15. The trial court disagreed with both arguments.

16. It found that this Court's decision in *Claremont Sch. Dist. v. Governor*, 142 N.H. 462 (1997) ("*Claremont II*") made the SWEPT a unique form of property tax that may only be used to generate dollars to meet the State's constitutional adequacy obligations under Part II, Article 83. (Coalition's NOA, Order on Cross-Motions for Partial Summary Judgment at 13-16.)

17. The trial court further ignored the plain language of RSA 76:3 and RSA 76:8 and found that the State cannot classify the property subject to the SWEPT in the literal manner it had because all property owners benefit from the public education of students, the SWEPT's purpose is to support funding the State's constitutional adequacy obligation, and exemption from the SWEPT for property in unincorporated places would not be "just" as a result. (Coalition's NOA, Order on Cross-Motions for Partial Summary Judgment at 17-18.) The trial court even suggested in a footnote that many other property tax exemptions from the SWEPT may be unconstitutional as well. (*Id.* at 18 n.

[1] The county performs many of these functions for the unincorporated places, including the provision of education to any children when they happen to reside there, RSA 28:7-d; RSA 198:16.

5.) If that is true, then State property, municipally-owned property, the property of charitable organizations, and property used for religious purposes may also have to be subject to the SWEPT for the SWEPT to be constitutional.[2]

18. In the State's view, the trial court's order is wrong.

19. This Court's *Claremont* decisions did not rewrite the state constitutional provisions governing the legislature's taxing and spending powers. The SWEPT meets Part II, Article 5's uniformity and proportionality requirements, and the statutory provisions implementing the SWEPT constitute a constitutional exercise of the legislative spending power. The SWEPT also permissibly classifies the property to which it applies as property in municipalities and does not encompass property in unincorporated places for just reasons.

20. An education property tax like the SWEPT does not occupy a special place in the constitutional pantheon that exempts it from the normal rules of legislative taxation and spending, and the judiciary does not have the power to enshrine its preferred tax policy in the State Constitution.

21. Nonetheless, the State might have refrained from filing in support of the Coalition's motion to stay if the trial court had simply declared the SWEPT unconstitutional and had not taken the extraordinary additional step of rewriting the SWEPT statutes by enjoining "the State" from "permitting communities to retain excess SWEPT funds," requiring communities that generate "excess SWEPT" (none of whom are actual parties to this case) to remit those funds to the New Hampshire Department of Revenue ("DRA"), and requiring those remitted funds, which are subject to no legislative

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[2] The following statutory provisions appear to exempt various kinds of real property from the SWEPT: RSA 72:23, I-II (exempting certain real property owned by the State, counties, municipalities, school districts, and village districts from taxation); RSA 72:23, III (exempting real property held by religious entities for religious purposes); RSA 72:23, IV (exempting buildings and structures of all schools, including the land thereto appertaining); RSA 72:23, V (exempting "[t]he buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established").

appropriation other than the direction of the SWEPT statute, RSA 76:8, II, to be "used for the exclusive purpose of satisfying the State's adequacy obligations." (Coalition's NOA, Order on Cross-Motions for Partial Summary Judgment at 20-21.)

22. The judiciary declares what the law is and may properly enjoin unlawful or unconstitutional activity. The judiciary does not, however, have the power to rewrite taxing and spending statutes it has deemed unconstitutional to force a legislative funding system to operate in a preferred way. It is the legislature's role to remedy an unconstitutional law, not the trial court's role to rewrite it, which is why a stay of an order declaring a critical taxing and funding mechanism like the SWEPT unconstitutional is prudent and appropriately deferential to the other co-equal branches of government pending appeal.

23. The ultimate problem with the trial court's remedy, however, is evident in the results it will produce.

24. While the DRA can notify communities by letter that they cannot retain so-called "excess SWEPT" and should remit it to the DRA in accordance with the trial court's order, the DRA has no statutory authority that would permit it to enforce that remittance. Those communities are also not parties to this action and therefore cannot be held in contempt for non-compliance.

25. In denying the State's motion to stay pending appeal, the trial court speculated in a footnote that the State must have the authority to enforce remittance. (Coalition's NOA, Order on Pending Motions at 8.) The trial court further speculated that "common sense suggests that the DRA has mechanisms in place to enforce the tax scheme, perhaps by offsetting uncollected or improperly retained amounts via a reduction in States grants or aid."[3] (*Id.* at 8 n. 1.)

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[3] The trial court invited the State to file a motion to reconsider on this issue if it believed the trial court's speculation was wrong, and the trial court would hold an evidentiary hearing on it. The State did not move for reconsideration because: (1) the issue it raised, and that the trial court chose not to resolve, is purely a legal issue that was presented in the State's motion to stay; and (2) any further delay in the resolution of this important tax matter would not serve the public interest.

26. What the trial court's order does not appreciate is that the trial court cannot rewrite the SWEPT statutes and then make various other statutory mechanisms in the RSAs, assuming they even exist, applicable to its statutory rewrite when the legislature clearly did not intend that result.

27. The legislative directive with respect to revenue the SWEPT raises is very clear; the money gets raised and is then appropriated and paid to the municipality for its school district or districts. RSA 76:8, II. There is no authority in statute for the DRA to force the so-called "excess SWEPT" to be remitted to the DRA, and there is no authority in statute for the DRA, which does not provide grants or aid to municipalities, to reduce grants or aid that other state agencies might provide to municipalities because the municipality has not remitted its "excess SWEPT" to the DRA. But even if such other statutes did exist, the legislature clearly did not intend those other statutes to apply to so-called "excess SWEPT" payments. The trial court simply has no authority in fashioning a remedy to rewrite the tax and spending law of the State to create a new education funding regime.

28. Finally, the trial court's remedy requires that any "excess SWEPT" remitted to the DRA "must be used for the exclusive purpose of satisfying the State's adequacy aid obligations." (Coalition's NOA, Order on Cross-Motions for Partial Summary Judgment at 21.) The DRA has no legislative authority to utilize "excess SWEPT" funds remitted to it for any purpose. As a result, if the DRA receives such funds, the DRA will provide those funds to the state treasury to hold in an escrow account until the litigation ends and the legislature directs what should be done with them. *See In re Strandell*, 132 N.H. 110, 115 (1989) ("It is well established that the executive branch may expend public funds only to the extent, and for such purposes, as those funds may have been appropriated by the legislature.").

29. The branch of government tasked with how to use and spend properly raised tax funds is the legislative branch, not the judicial or executive branches. The legislative branch required the DRA to direct by warrant that all revenues raised by the SWEPT be appropriated to the municipality for school district purposes. RSA 76:8, II.

The trial court's merits order rewrites that legislative regime by directing that properly raised revenue now be diverted from its intended legislative public purpose to a different, exclusive purpose chosen by the trial court. This direction usurps the legislature's core constitutional power to appropriate money, in violation of Part I, Article 37 of the New Hampshire Constitution, and the DRA does not intend on furthering that usurpation.

30. Thus, for all of the above reasons, the State respectfully supports the Coalition's motion to stay pending appeal.

WHEREFORE, the State respectfully requests that this Court issue an order:

A. Granting the Coalition's Motion To Stay Pending Appeal; and

B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: March 18, 2024

By: /s/*Anthony J. Galdieri*
Anthony J. Galdieri, Bar # 18594
Solicitor General
Samuel R.V. Garland, Bar # 266273
Senior Assistant Attorney General
New Hampshire Dept. of Justice
1 Granite Place South
Concord, NH 03301
(603) 271-3650
anthony.j.galdieri@doj.nh.gov
samuel.r.v.garland@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record.

Date: March 18, 2024 /s/*Anthony J. Galdieri*