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IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
CIVIL DIVISION

JMS ENTERPRISES, INC., on behalf of
itself and all other taxpayers similarly situated **PLAINTIFF**

v. **CASE NO. 65CV-18-43**

OZARK MOUNTAIN SOLID WASTE DISTRICT and
SEARCY COUNTY TAX COLLECTOR, Joey Pruitt **DEFENDANTS**

ATTORNEY GENERAL OF ARKANSAS
Leslie Rutledge **INTERVENOR**

ORDER

On this 18th day of December, 2019, came on before the Court the above referenced matter on Plaintiff's Motion for Summary Judgment, Defendant Ozark Mountain Solid Waste District's Cross-Motion for Summary Judgment and Motion to Dismiss Plaintiff's Amended Complaint, and Intervenor's Motion to Dismiss. The Plaintiff was represented by counsel, Matt Bishop and Wendy R. Howerton, the Defendant Ozark Mountain Solid Waste District was represented by Mary-Tipton Thalheimer, counsel for its Receiver, Geoffrey Treece, and the Searcy County Tax Collector was represented by counsel Ronald P. Kincade. Intervenor was represented by her attorney, Olan Reeves. The Court, upon reviewing the pleadings, hearing the arguments of counsel, and consideration of all other things properly before it, finds as follows:

FINDINGS OF FACT

1. Defendant Ozark Mountain Solid Waste District ("OMSWD") is a regional solid waste management district organized pursuant to Ark. Code Ann. § 8-6-701 *et seq.* The district is comprised of the geographical areas encompassed by Baxter, Boone, Carroll, Marion, Newton and Searcy counties.

2. Plaintiff is an owner of improved real property within Searcy County.

3. In 2005, OMSWD entered into a contract to purchase a landfill in Baxter County, Arkansas known as Nabors Landfill. In addition to the landfill, OMSWD purchased certain personal property which was used in the hauling of solid waste by the seller.

4. In order to finance the purchase of Nabors landfill and the waste hauling company, OMSWD issued tax-exempt revenue bonds in the total approximate amount of $12,340,000. OMSWD executed a "Trust Indenture" that designated Bank of the Ozarks as trustee for all bondholders.

5. By 2012, OMSWD had ceased operating Nabors landfill and the waste hauling company and had defaulted on the bonds.

6. In 2014, the Arkansas Department of Environmental Quality ("ADEQ") took possession of Nabors Landfill and certain funds of OMSWD.

7. On January 6, 2014, OMSWD filed a voluntary petition for Chapter 9 bankruptcy.

8. On December 2, 2014, Bank of the Ozarks as Trustee for the bondholders filed a petition in Pulaski County, Case No. 60CV-14-4479, requesting a receiver be appointed for OMSWD. ADEQ intervened in the receivership case, but no other parties were provided notice. Geoffrey Treece was appointed receiver.

9. On November 15, 2016, Geoffrey Treece filed a Receiver's Report recommending the sale of various personal property of OMSWD, including the waste hauling equipment and the sale of real property of OMSWD, with the proceeds to be delivered to Bank of the Ozarks as Trustee for the bondholders.

10. The Receiver's Report stated the District owed a debt of approximately $16,000,000.00 to ADEQ and a principal debt in the amount of $11,090,000.00 to the bondholders. The Receiver recommended this debt be paid via an annual $18.00 service charge on all parcels of improved real

property within the counties comprising OMSWD. This charge is to continue for in excess of twenty (20) years. The Receiver relied upon Ark. Code Ann. § 8-6-714(d) as the statutory basis for the $18.00 service charge.

11. The board of directors of OMSWD, consisting of the county judges and mayors of cities of the first class within the six counties, did not vote to authorize entry of the order or vote to impose a fee.

12. The Receiver then contacted the tax collectors in each county comprising OMSWD, and the $18.00 service charge was placed upon the ad valorem tax invoices beginning in 2018 for the 2017 tax year. A taxpayer cannot pay their ad valorem taxes without paying the $18.00, as the tax payment will be refused and lien placed on the taxpayers' property. That lien may ultimately result in foreclosure by the Commissioner of State Lands if the $18.00 is not paid.

13. For the collections in 2018, the Receiver has directed and the tax collectors have delivered the funds to Bank of the Ozarks, as Trustee for the bondholders. All collected funds remain in the possession of Bank of the Ozarks.

14. That the Receiver's Report earmarks all collections from the $18.00 to be paid to the bondholders and ADEQ up to the amount of $1,200,000.00 per year with the remainder, if any, to go to OMSWD.

15. That OMSWD does not currently operate a landfill, and has not since 2012. It provides no solid waste disposal services.

16. That OMSWD represented to the bankruptcy court that Ark. Code Ann. § 8-6-714(d) only applied if it were providing waste hauling or disposal services. OMSWD stated it did not provide waste hauling services, as those services were actually provided by governmental entities within the OMSWD's confines, such as the City of Harrison. OMSWD further stated it could not

levy fees pursuant to Ark. Code Ann. § 8-6-714(d) to pay down old debt such as that of the bondholders and ADEQ, as it would not be for the purposes of providing services.

17. That OMSWD remains in existence, and over the past five years has, through the collection of tipping fees and grants, ended each fiscal year since 2014 with a surplus in excess of $100,000.00.

18. That OMSWD representatives and the Receiver have detailed certain services presently performed by OMSWD. Those services do not include the hauling of solid waste or the collection of solid waste by OMSWD. Those services have been fully paid for with existing revenues of OMSWD other than the $18.00.

19. That the basis for the portion of the $18.00 which the Receiver desires to pay to ADEQ derives from Section 45 of the 2014 Arkansas Department of Environmental Quality Appropriation Act, and the 2015, 2016, 2017, 2018 and 2019 ADEQ Appropriation Acts (collectively "Section 45"), all of which contain identical language. Said language purports to modify Ark. Code Ann. § 19-5-979 which limits expenditures from the Landfill Post-Closure Trust Fund to "landfill post-closure corrective action." The term "closure" is a term of art in the industry meaning that ADEQ has certified a landfill as "closed." Nabors Landfill has not been certified as "closed." Section 45 of the ADEQ Appropriation Acts modifies Ark. Code Ann. § 19-5-979 to allow expenditures from the Landfill Post-Closure Trust Fund for pre-closing action.

20. Section 45's amendment of Ark. Code Ann. § 19-5-979 is limited to expenditures only for those landfills that are owned by a regional solid waste district that has filed for bankruptcy protection under federal law, or is unable to meet its debt obligations, or is otherwise insolvent.

21. Section 45 further created a cause of action for ADEQ to recover expenditures from the Landfill Post-Closure Trust Fund by the institution of a civil action against the regional solid waste districts *and* the cities and counties which comprised the districts.

22. That Plaintiff brings this suit pursuant to Article 16, Section 13 of the Arkansas Constitution on behalf of itself and all similarly situated taxpayers to have the $18.00 declared an illegal exaction.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes:

23. That Ark. Code Ann. § 8-6-714(d) permits a regional solid waste district board to "levy a service fee on each residence or business for which the board makes solid waste collection or disposal services available." OMSWD does not presently, and has not since at least 2012, provided solid waste collection or disposal services to the citizens of the district. OMSWD has represented that it does not provide waste hauling services in its 2014 bankruptcy pleadings, and OMSWD has not operated Nabors landfill since 2012. Utilizing the plain meaning of the statute, which authorizes a fee when a solid waste district "makes" services available, OMSWD has been unable to charge a service fee since 2012 at the latest, when it stopped operating a landfill or solid waste hauling company. Ark. Code Ann. § 8-6-710(b) prohibits OMSWD from collecting any charges or fees for waste collection or disposal when the cities or municipalities are actually providing the services. The authority to levy and collect such fees and charges lies with the entity actually performing the services, such as a city.

The services claimed by OMSWD are services that OMSWD must provide in order to collect the "tipping fee" authorized by Ark. Code Ann. § 8-6-714(a) or waste tire services which OMSWD cannot charge a fee for pursuant to Ark. Code Ann. § 8-6-714(b). The services

contemplated by Ark. Code Ann. § 8-6-714(d) are distinct services from Ark. Code Ann. § 8-6-714(d) and cannot be used to support a fee pursuant to subsection (d).

As a result, the Court concludes that OMSWD is not offering the type of services contemplated by Ark. Code Ann. § 8-6-714(d) and OMSWD is not authorized to impose a "service fee" pursuant to Ark. Code Ann. § 8-6-714(d) when it is not performing solid waste collection or disposal services. Therefore, the imposition and collection of the $18.00 pursuant to this statute is an illegal exaction.

24. The Court also concludes the $18.00 is a tax upon the Plaintiffs. In *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), the Arkansas Supreme Court held, ". . . this court in determining whether a governmental charge, assessment or fee is a tax is not bound by how the enactment or levy labels it." *Id.* at 423. As such, this Court is not bound by OMSWD's characterization of the $18.00 as a "fee."

In *City of North Little Rock v. Graham,* 278 Ark. 547, 647 S.W.2d 452 (1983) the Arkansas Supreme Court explained the difference between a tax and a fee, stating:

> . . . taxes are those imposed on persons or property within the corporate limits, to support the local government and pay its debts and liabilities, and they are usually its principal source of revenue. 16 E. McQuillin, *Municipal Corporations* § 44.02 (3rd Ed. 1979)
>
> There is a distinction between a tax imposed for general revenue purposes and a fee charged in the exercise of police power. . . .
>
> Here, it is undisputed that the people never voted on the $3.00 charge and that the charge is to pay for a salary increase for policemen and firemen. Therefore, it is a payment exacted by the municipality as a contribution toward the cost of maintaining the traditional government functions of police and fire protection. [Citations omitted]

Id. at 548-549.

In *Barnhart v. City of Fayetteville,* 321 Ark. 197, 900 S.W.2d 539 (1995), the Arkansas Supreme Court considered a similar question regarding an alleged fee for the payment of bonds. The City of Fayetteville passed an ordinance obligating it to pay the debt of a separate government entity via what Fayetteville termed a fee. The Supreme Court rejected this characterization, noting that Fayetteville citizens were already assessed a fee for services actually provided, and finding the additional charge to be a tax. The reasoning is applicable here:

> The surcharge is not related to providing sanitation services in Fayetteville, but instead is a fee imposed to pay the debt of the Authority. Since the surcharge is not related to services provided by Fayetteville, it is not a 'fee,' but rather is a 'tax.' A governmental levy of a fee, in order not to be denominated a tax by the courts, must be fair and reasonable and must bear a reasonable relationship to the benefits conferred on those receiving the services.

Id. at 205.

25. In this case, the $18.00 is a tax as it is not imposed for the purpose of the police powers of OMSWD, but as the Receiver's Report states, is dedicated almost solely to the payment of old debt of OMSWD. Any attempt to levy a "service fee" pursuant to Ark. Code Ann. § 8-6-714(d) would not be for solid waste collection and disposal services, but to quote OMSWD, "it would be levying fees to pay down old debt." The purpose of a tax, as stated in *North Little Rock v. Graham*, *supra*, is for the payment of a government's debts and liabilities. As a result, with the $18.00 in this matter being almost solely dedicated to the payment of old debt, it must be a tax.

26. The $18.00 is also a tax because it bears no relationship to the services provided by OMSWD, and is thus not a valid exercise of OMSWD's police powers. In *Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), the Arkansas Supreme Court addressed this issue. It held that a charge imposed upon residential builders for tapping into the City of Marion's water and sewer system was in fact a fee, and not a tax. The Court reasoned:

> The chancellor held, and appellees argue on appeal, that because the fees imposed by the city exceed the services provided, the fees are in actuality taxes. Such a conclusion ignores the fact that the tapping and access fees established by Marion are for the raising of funds to pay for the extension of existing water and sewer systems to developments where new users reside. Raising such expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if the use of the money is limited to meeting the cost of that extension.* [Emphasis in original]

Id. at 427.

Even if this Court were to conclude that OMSWD was presently offering solid waste hauling and disposal services, the $18.00 is not being applied to the services offered. Instead, it is going to pay old debt. OMSWD, according to its primary operating officer Melinda Caldwell, has been providing the same services since 2014 and each fiscal year has ended with an over $100,000 net cash position. The $18.00 is simply unnecessary for OMSWD to provide those services.

27. The $18.00 is a tax, and OMSWD lacks any authority to tax. The bases for a regional solid waste district to impose any charge upon the public are set forth in Ark. Code Ann. § 8-6-714. OMSWD has no ability to tax the residents within its geographical confines, and as such the $18.00 is an illegal exaction.

28. The imposition of the $18.00 is also a violation of the due process rights of the members of the Plaintiff class. In order to have a valid due process claim, a party must show four elements: 1) an action under color of state law, 2) the subject must involve a right, privilege or immunity secured by the constitution such as property, 3) a loss of property amounting to a deprivation, and 4) no adequate remedy under state law. *Pulaski County v. Commercial Nat'l Bank,* 210 Ark. 124, 194 S.W.2d 883 (1946). OMSWD's stated basis for the $18.00 is pursuant to Ark. Code Ann. § 8-6-714(d), which is an action under color of state law. The $18.00 is the property of Plaintiffs, and OMSWD would deprive the Plaintiffs of that sum and ultimately their

land if it is unpaid. As the $18.00 was not imposed by vote of OMSWD's directors, and the Plaintiffs were not parties to the receivership action in Pulaski County, Plaintiffs have no adequate remedy under state law. As a result, all four elements of a valid due process claim are met. Plaintiffs' due process rights have been violated, and therefore the imposition of the $18.00 constitutes an illegal exaction.

29. The portion of the $18.00 dedicated to the payments to the bondholders is also a violation of Amendment 65 to the Arkansas Constitution. Amendment 65 provides in pertinent part:

> Any governmental unit, pursuant to laws heretofore or hereafter adopted by the General Assembly, may issue revenue bonds for the purpose of financing all or a portion of the costs of capital improvements of a public nature, facilities for the securing and developing of industry or agriculture, and for such other public purposes as may be authorized by the General Assembly.

Section 3(a) of Amendment 65 defines the term "revenue bonds" as:

> All bonds, notes, certificates or other instruments or evidences of indebtedness the repayment of which is secured by rents, user fees, charges, or other revenues (other than assessments for local improvements and taxes) derived from the project or improvements financed in whole or in part by such bonds, notes, certificates or other instruments or evidences of indebtedness, from the operations of any governmental unit, or from any other special fund or source other than assessments for local improvements and taxes.

Amendment 65 specifically provides that funds for repayment of the bonds may come from the project financed or any other source other than assessments for local improvements and taxes. As the $18.00 is a tax, it cannot be dedicated to the bondholders for the repayment of these revenue bonds. The application of any of these proceeds to the payment of the bonds is a violation of Amendment 65 and an illegal exaction upon Plaintiffs.

30. That Section 45 violates Article 5 § 30 of the Arkansas Constitution. Article 5 § 30 requires that "appropriations shall be made by separate bills, each embracing but one subject."

The purpose of an ADEQ Appropriation Act is the funding for personal services and operating expenses of ADEQ. Section 45 goes beyond r, in creating a cause of action and civil liability against the regional solid waste districts and the cities and counties which comprise the district. As such, Section 45 is unconstitutional.

31. That Section 45 also violates Ark. Code Ann. § 1-2-116(a), which provides "if the subject matter of any law is already generally embodied in one of the titles of this Code or can be appropriately classified therein, that new law shall be enacted as an amended to that title of the Code." Section 45's modification of the authorized expenditures of the Landfill Post-Closure Trust Fund as set forth in Ark. Code Ann. § 19-5-979 are in violation of Ark. Code Ann. §1-2-116(a).

32. That Section 45 violates Article 5, § 23 of the Arkansas Constitution. It amends Ark. Code Ann. § 19-5-979 despite Article 5 § 23's requirement that an amendment to a law be "reenacted and published at length." Section 45 not only does not incorporate or reenact Ark. Code Ann. § 19-5-979, it makes no reference at all to the statute.

33. That Section 45 violates Amendment 14 to the Arkansas Constitution. The purpose of Amendment 14 is to prohibit "special or local" legislation. It is clearly narrowly drawn to apply only to OMSWD. It is the only regional solid waste district in Arkansas any of the parties were aware of that owned a landfill, had filed bankruptcy, was unable to pay its creditors which included bondholders, and was otherwise insolvent. Additionally, it is the only solid waste district the parties were aware of that ADEQ sought to expend funds from the Landfill Post-Closure Trust Fund to support.

Owen v. Dalton, 296 Ark. 351, 757 S.W.2d 921 (1988) stands for the proposition that there need only be a "rational basis" for a law to not be considered special or local legislation. Section

45's basis, according to Intervenor, is to allow ADEQ to collect money from landfill owners to provide funds for the next landfill that needs repair. Section 45, however, does not apply to all landfills, merely ones owned by regional solid waste districts. Neither Defendants nor Intervenors offer a rational basis for only allowing expenditures to prevent environmental degradation by a landfill owned by one particular type of entity.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that:

1. Plaintiffs' Motion for Summary Judgment is Granted for the foregoing reasons.
2. Defendant Ozark Mountain Solid Waste District's Cross Motion for Summary Judgment is denied.
3. Intervenor Leslie Rutledge, as Attorney General of Arkansas' Motion to Dismiss is denied.
4. Defendant Ozark Mountain Solid Waste District and Defendant Tax Collector are ordered to cease collection of the $18.00.
5. Defendant Ozark Mountain Solid Waste District is ordered to deliver all sums collected from the $18.00 charge upon Searcy County Residents to the Registry of the Circuit Clerk of Searcy County, Arkansas pending further orders of this Court.
6. Any payments of the $18.00 collected by the Tax Collector of Searcy County prior to or subsequent to this Order should be paid into the Registry of the Searcy County Circuit Clerk.

IT IS SO ORDERED.

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Hon. Susan K. Weaver, Circuit Judge

Arkansas Judiciary

Case Title: JMS ENTERPRISES V OZARK MOUNTAIN SOLID WASTE DIST.

Case Number: 65CV-18-43

Type: ORDER OTHER

So Ordered

JUDGE SUSAN K. WEAVER