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Local Government "Home Rule": A Place to Stop?

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I. INTRODUCTION

In November 1977, the Supreme Court of Georgia rendered a decision in *City of Atlanta v. Myers*[1] which invalidated a municipal ordinance requiring that police officers and firefighters be residents of the municipality. The public media, in its discussion of the decision, primarily pointed out the residency requirement, the policy behind it, and its advantages and disadvantages to the cause of good government—all important matters. As frequently happens, however, even more crucial considerations in the case may have gone unheralded. From the legal perspective, that is, the importance of the decision and its implications may considerably transcend the factual context which generated the case.

Less abstractly, the *Myers* litigation confronted the court with the most historic, basic, and consuming issue in local government law: the state's relationship to its local governments, and the most famous offspring (some say illegitimate) of that relationship, the "home rule" concept. What the *Myers* court said, what it did, and what it indicated may contribute significantly to prior knowledge on that issue. The purpose here is briefly to call attention to this aspect of the decision, but first a summary setting of the stage is necessary.

II. THE CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

Historically, both in general and in Georgia, the characterization commonly employed to describe the relationship between a state and its local governments is one of "state supremacy."[2] This characterization typically translated into a judicial approach which required state authorization for local government actions and which strictly construed the available authorizations.[3] Although the Georgia courts manifested this approach many times, treatment of two constitutional prohibitions was especially prominent in the development of this approach. First, the courts forcefully applied the provi-

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[1] 240 Ga. 261, 240 S.E.2d 60 (1977).

[2] *See* Sentell, *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974).

[3] *Id.*

sion—standard in state constitutions—prohibiting the delegation of state legislative powers.[4] In several contexts, the courts held that this provision precluded local government actions allegedly authorized by state statutes.[5] Second, the courts experienced no qualms in extending to measures enacted by local government legislatures the prohibition against "special laws" in cases provided for by existing general statutes.[6] The result of both these judicial endeavors was a rather massive body of case law which squelched any pretense of autonomy for local governments and further confirmed their subservient existence as mere "creatures of the state."

A response to this state of affairs, both in general and in Georgia, was the plea for "home rule"—express constitutional recognition of a degree of local self-government power. Some states received this plea more hospitably than others, accounting for a wide diversity in local government systems throughout the country.

In Georgia, the earliest distinctive acknowledgement of the plea came in a provision of the Constitution of 1945 which commanded the General Assembly to provide for optional "uniform systems of county and municipal government."[7] Following an unsuccessful effort at implementation,[8] the 1954 amendment which replaced the provision authorized the legislature to delegate its powers in order to provide "for the self-government of municipalities."[9] The municipalities' exercise of the powers so delegated is "subject only to statutes of general application."[10] Pursuant to this authorization, the General Assembly enacted the "Municipal Home Rule Act of 1965"[11] and at the same time proposed an amendment to the constitution providing a similar system for counties.[12]

With the ratification of that amendment in 1966, Georgia illustrated employment of "legislative home rule" for municipalities and "constitutional home rule" for counties. Although differing in details, the two systems contain highly similar provisions. They vest both local governments with specified powers, and they enumerate

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[4] GA. CONST. art. III, § 1, para. 1 (1976), GA. CODE ANN. § 2-701 (1977).

[5] *See, e.g.*, DuPre v. City of Marietta, 213 Ga. 403, 99 S.E.2d 156 (1957).

[6] GA. CONST. art. I, § 2, para. 7 (1976), GA. CODE ANN. § 2-207 (1977). *See* Sentell, *When is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167 (1976).

[7] GA. CONST. art. XV, § 1, para. 1 (1945). *See* Sentell, *Home Rule Benefits or Homemade Problems for Georgia Local Government?*, 4 GA. ST. B.J. 317, 318 (1968).

[8] Sentell, *supra* note 7, at 318-21.

[9] GA. CONST. art. IX, § 3, para. 1 (1976), GA. CODE ANN. § 2-6001 (1977).

[10] *Id.*

[11] 1965 Ga. Laws 298.

[12] *Id.* at 752.

subjects reserved for the General Assembly's control. They empower local governing authorities to adopt "clearly reasonable" measures relating to "property, affairs and local government" if general statutes do not treat these matters. Finally, they provide for the local governments' amendment of local statutes without further action by the General Assembly.[13]

The most recent addition to Georgia's home rule arsenal came in a 1972 amendment to the constitution—popularly known as Amendment 19.[14] This provision authorizes local governments to "exercise powers" and "provide services" in fifteen areas ranging from "police and fire protection" to "libraries" to "air pollution control."[15] When the legislative committee transferred this provision to the "editorially revised" Constitution of 1976, it declared that the General Assembly can—except in respect to planning and zoning—enact general statutes "regulating, restricting or limiting the exercise" of the powers conferred but cannot "withdraw any such powers."[16]

Simply sketched, therefore, this has been the legislative and constitutional response to the plea for local government home rule in Georgia. Its total appropriately indicates the dual thrusts of the home rule concept: the recognition of local power and the restriction of state power. Although no bright line delineates these thrusts, a few general tendencies are detectable. The 1954 constitutional authorization makes it clear that any powers delegated to municipalities under it are subject to general statutes. This would be true, therefore, of any delegations contained in the municipal home rule statute of 1965. The county home rule amendment of 1966 is less absolute. Although its general authorization for the adoption of clearly reasonable measures is similarly expressly qualified, its grants of several specific powers are not. Finally, the 1972 amendment—Amendment 19—originally failed to accord any deference to general statutes in its delegations to local governments. As it was placed in the Constitution of 1976, however, this appears to remain true only of planning and zoning. The General Assembly by general statute can regulate, restrict, or limit, but not withdraw, all other delegations.

To this sketch must be attached brief reference to a few illustrative judicial reactions.

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[13] *See* Sentell, *supra* note 7, at 322-24.

[14] 1972 Ga. Laws 1552.

[15] *Id.*

[16] GA. CONST. art. IX, § 4, para. 2 (1976), GA. CODE ANN. § 2-6102 (1977).

III. THE JUDICIAL BACKGROUND

The Georgia Supreme Court rendered one of the earliest striking home rule decisions in *Johnston v. Hicks,*[17] an action involving a county's zoning power. Viewing the case as presenting a conflict between county action and a local zoning statute of the General Assembly, the court emphasized that the home rule amendment of 1966 expressly delegated to counties the power to plan and zone. Accordingly, it held that "[t]he sole authority to amend or repeal existing planning and zoning laws or to enact new planning and zoning laws with respect to unincorporated areas, was granted to the county authorities."[18] At the least, therefore, the county's power to zone these areas prevailed over the General Assembly's local zoning statutes.

Forbes v. Lovett[19] illustrates another positive, albeit confused, application of the 1966 amendment. There the court held the amendment to support a county ordinance which expressly repealed a local statute dealing with the civil service system. "Therefore," the court concluded, "[t]he 1969 local Act . . . was expressly repealed by the 1971 ordinance under the power granted . . . [to the county] by the Home Rule Amendment."[20]

In *Richmond County v. Pierce,*[21] the court considered the validity of a local statute dealing with retirement and pensions for county employees. Because the 1966 home rule amendment expressly empowers local governing authorities to fix compensation, retirement, and pension systems for their employees, the court viewed its prior holding in *Johnston* as invalidating the local statute here. What it had said in *Johnston* with respect to zoning applied to the pensions in this case: The 1966 amendment "vested sole authority over compensation, retirement, etc., . . . in the county governing authorities," and "divested the General Assembly of authority to enact a retirement Act for . . . [the county]."[22] Again, therefore, power derived by the county from the 1966 amendment superceded the General Assembly's local legislation.

The court rendered its most extreme decision thus far in

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[17] 225 Ga. 576, 170 S.E.2d 410 (1969).

[18] *Id.* at 581, 170 S.E.2d at 413.

[19] 227 Ga. 772, 183 S.E.2d 371 (1971).

[20] *Id.* at 775, 183 S.E.2d at 373. For a discussion of both *Johnston* and *Forbes* in context, see Sentell, *"Home Rule": Its Impact on Georgia Local Government Law,* 8 GA. ST. B.J. 277 (1972).

[21] 234 Ga. 274, 215 S.E.2d 665 (1975).

[22] *Id.* at 280-81, 215 S.E.2d at 670.

Thompson v. Hornsby,[23] a case decided under Amendment 19 rather than the 1966 home rule amendment. One of the issues which that case presented was the county's power, in light of an applicable population statute expressly eliminating such authority, to establish a police department. The court quoted from Amendment 19, emphasized that it expressly covered "police and fire protection," and conceded that the population prohibition was a general statute. In any event, the court said, "[t]he 1972 constitutional amendment clearly intends to give each county the power to provide police protection '[i]n addition to and supplementary of' any power now possessed by the county, and contravenes the part of the . . . [population statute] which prohibits . . . [the county] from operating a police department."[24] Under the 1972 amendment, therefore—and in the face of a general statute expressly contra—the court sustained the county's power to operate a police department.

With these decisions, the supreme court confirmed the dual thrusts of the home rule theory noted above. In *Forbes v. Lovett,* the court sustained the county's home rule power expressly to repeal a local statute. In *Johnston v. Hicks* and *Richmond County v. Pierce,* the court viewed specific authorizations in the 1966 amendment to supercede conflicting local legislation and, more importantly, to vest in the county sole authority over these matters. Although neither of these cases involved a general statute, *Thompson v. Hornsby* did. Under the original version of Amendment 19, the court in *Thompson* upheld a county power which a general population statute expressly prohibited.

By this point, conjecture in local government law circles had become rampant. How far was the court prepared to go with the exclusion rationale? Instead of merely sharing state powers with local governments, had the Georgia system ironically worked a devolution? Did the expansive language of *Johnston* and *Pierce* and the holding of *Thompson* mean that for any specific delegation of the 1966 amendment and for all subjects enumerated in the 1972 amendment local governments were free from both local and general statutory control?

The suspense was unbearable.

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[23] 235 Ga. 561, 221 S.E.2d 192 (1975).

[24] *Id.* at 563, 221 S.E.2d at 195.

IV. CITY OF ATLANTA v. MYERS

In 1975, the General Assembly enacted the following statute: "No municipal or county government in this State shall require as a condition of employment by such government that applicants for employment as officers or employees, or such officers or employees now or hereafter employed must reside within the boundaries of the municipality or county."[25] In 1976, the City of Atlanta adopted an ordinance which required that all persons thereafter employed "in the Bureaus of Police & Fire Services shall be residents of the city or become residents within six months of their employment and remain residents during their employment."[26]

The result of these legislative pronouncements was *City of Atlanta v. Myers*. The plaintiff, a nonresident of the municipality, sought employment as a municipal police officer and challenged the validity of the residency ordinance. The ordinance, he urged, was "a special law in contravention of . . . a general law, in violation of the Constitution of 1945."[27] In response, the municipality relied squarely upon Amendment 19. This amendment, it noted, authorized local governments to provide police and fire protection.[28] With this, the municipality forthrightly advanced its final proposition: "It is [our] contention . . . that there is no limitation upon the authority of a municipality to adopt ordinances pursuant to this constitutional power to provide police and fire protection, and that the general law . . . would not prevent the city from adopting an ordinance requiring policemen and firemen to be residents of the city."[29] Finally, therefore, a case tendered this conundrum of conjecture.

The court's unanimous opinion wasted little effort in reaching the substance of the issue. First, it noted the municipality's reliance on *Thompson v. Hornsby* and conceded that the court had held in that case that "the constitutional amendment prevailed over the general law."[30] Then, however, it drew the following distinction: "The *Thompson* case was dealing with the specific power granted by the constitutional amendment, the right to furnish police service, and not with an ordinance limiting the persons eligible for employment

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[25] 1975 Ga. Laws 1576.
[26] City of Atlanta v. Myers, 240 Ga. 261, 262, 240 S.E.2d 60, 61 (1977).
[27] *Id.* at 262, 240 S.E.2d at 62.
[28] *Id.* at 263, 240 S.E.2d at 62.
[29] *Id.*
[30] *Id.* at 264, 240 S.E.2d at 62.

in the police department."[31] *Thompson* thus treated, the court moved on to *Johnston v. Hicks* and *Richmond County v. Pierce.* The court explained that in those cases it had held that "the Home Rule amendment vested authority in the counties exclusively to deal with the specific subjects dealt with therein."[32] But "[t]hese cases interpreted particular home rule constitutional provisions, and do not decide the question made in the present case."[33]

With the hurdle of prior authority cleared, the court proffered its analysis of the problem presented:

> There is no indication in the 1972 amendment to the 1945 Constitution . . . that the grant of power to counties and municipalities to provide certain services, and to enact ordinances to effectuate the powers given, was intended to preclude the General Assembly from enacting general laws affecting the manner in which the powers would be exercised.[34]

Accordingly, the challenged ordinance was declared "unconstitutional and void" as a "special law" enacted in a case "for which provision has been made by an existing general law."[35]

Thus, the supreme court's unanimous performance in *City of Atlanta v. Myers* was abundantly clear, to a point: the municipal ordinance was invalid as an unconstitutional "special law," and Amendment 19 could not rescue the ordinance from this plight. Moreover, none of the court's prior decisions precluded this result. Beyond that point, the footing was less sure.

Thompson, the court said, was different: it dealt with a "specific power" which the amendment granted, and this case apparently did not. Why eligibility for employment as a police officer did not cut to the heart of the right to furnish police service, the court did not say. Perhaps, although it rendered the decision under the original version of Amendment 19, the court was peeking ahead to that provision's present posture in the 1976 constitution. That is, did the court view the general statute as only a "limitation, restriction, or qualification," and not a "withdrawal," of the power to provide police protection?

Johnston and *Pierce* were also distinguishable: the court had de-

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[31] *Id.*

[32] *Id.* at 264, 240 S.E.2d at 62-63.

[33] *Id.* at 264, 240 S.E.2d at 63.

[34] *Id.*

[35] GA. CONST. art. I, § 2, para. 7 (1976), GA. CODE ANN. § 2-207 (1977).

cided those cases under the 1966 home rule amendment. The conspicuous point about this distinction is its failure to employ the obvious additional point that those cases involved only local statutes. Does this omission imply that the court can now direct the expansive language in those opinions concerning exclusive county power against general statutes as well? If this is the implication, the home rule amendment's few specific delegations to counties now emerge as considerably more potent than the delegations to all local governments—except the power to plan and zone—in Amendment 19.

Finally, dealing directly with Amendment 19 itself, the court explained that its grant of power to enact ordinances implementing the authorizations conferred does not preclude general statutes "affecting the manner in which the powers would be exercised." Again, the indicated distinction between power and exercise of power is intriguing, and one might ponder prodigiously on what it holds for the future.

V. Conclusion

For several years, conjecture has been building over the eventual destination of Georgia local government autonomy. The courts have recently subjected the material legislative and constitutional provisions to remarkably expansive discussions, thereby triggering a mixture of reactions. Some viewed developments as indicating almost complete local freedom from state control in a number of respects and applauded a healthy new day. Others began to fear somewhat for state sovereignty itself.

At the least, *City of Atlanta v. Myers* demonstrates that a stopping point does exist, and this Article has raised a number of the possible ramifications of the decision. The basic issue promises continued excitement in local government law circles for the foreseeable future.

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