

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
)	
Charleston County School District,)	C/A No. 2009-CP-10-1348
)	
Petitioner,)	
)	
v.)	MEMORANDUM IN SUPPORT OF
)	MOTION TO DISMISS
)	
Robert W. Harrell, in his official capacity)	
as Speaker of the S. C. House of)	
Representatives, Andre Bauer in his)	
official capacity as President of the S. C.)	
Senate, and Mark Sanford in his)	
official capacity as Governor of the State of)	
South Carolina,)	
)	
Defendants.)	
_____)	

The Defendants submit this Memorandum in support of their Motion to Dismiss and respectfully request that this Court dismiss this action for the reasons discussed below.

BACKGROUND

This suit alleges that Act No. 189, 2005 S.C. Acts 1923, violates special legislation prohibitions of S.C. Const. art. III §34 and Home Rule prohibitions on laws for a specific county under S.C. Const. art. VIII §7. The Act provides in part, as follows:

“Section 5A. (A) The Charleston County School District may not deny a charter school, charter school teacher, or charter school student anything that is otherwise available to a public school, public school teacher, or public school student including, but not limited to, the provisions in subsection (B).
(B)(1) The local school district of a charter school in Charleston County may not charge rent to a charter school that was converted from an existing public school .

A prior Opinion of the Attorney General found the Act constitutional. *Ops. Atty Gen.* (October 19, 2007)(copy attached). This suit fails for the reasons set forth in that Opinion and also because the

Complaint fails to allege any basis for relief against the Defendants or authority of the Governor as to this matter.

I

THE COMPLAINT FAILS TO ALLEGE ANY CLAIM AGAINST THE DEFENDANTS AND FAILS TO ALLEGE A SHORT AND PLAIN STATEMENT OF THE FACTS SHOWING THAT THE PLEADER IS ENTITLED TO RELIEF AGAINST THEM.

The Complaint fails to state facts sufficient to constitute a cause of action of any kind against the Governor, the President of the Senate and the Speaker. Rule 8 (a), SCRPC states that a pleading must contain a short and plain statement of the facts showing that the pleader is entitled to relief. The instant complaint contains no such statement as to these defendants. They are named only in brief statements identifying them and the offices they hold. Complaint, ¶¶ 2 - 4. All of the alleged causes of action complain about the provisions of Act 189, but never mention the Defendants.

“In this state, Rule 8, SCRPC, mandates that a pleading contain “ultimate facts” rather than “evidentiary facts” to state a cause of action. [footnote omitted]. *Watts v. Metro Security Agency* 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001). “‘Ultimate facts fall somewhere between the verbosity of ‘evidentiary facts’ and the sparsity of ‘legal conclusions.’” [footnote omitted]. *Watts*; see also, Flanagan, *South Carolina Civil Procedure* (2d Ed.), p. 59, cited in *Watts*. The instant Complaint contains no facts whatsoever alleging any cause of action against any defendant. See also, *infra*, Argument II. Therefore, this action must be dismissed.

II

THE GOVERNOR HAS NO AUTHORITY UNDER THE ACT AT ISSUE AND NO AUTHORITY TO PROVIDE RELIEF AS TO THE SUBJECT OF THIS ACTION

Act 187 gives the Governor no duty or authority to act as to the matters set forth in that statute. Therefore, he has no authority to provide relief as to the subject of this legislation, and this suit must be dismissed. Of course, in their legislative capacities, neither the Speaker nor President of the Senate have authority to implement Act 187.

Plaintiffs are not seeking the passage of legislation, but even if, *arguendo*, they were, neither the Governor, of course, nor the other Defendants can pass legislation individually. None of them can be enjoined to pass legislation nor can the General Assembly be enjoined to pass legislation. *See Foster v. Taylor*, 210 S.C. 324, 42 S.E. 2d 531 (1947); *see also, Gregory v. Rollins*, 23 S.C. 269, 95 S.E. 2d 487 (1956).

III

ACT NO. 189, 2005 S.C. ACTS 1923, IS CONSTITUTIONAL UNDER S.C. CONST. ART. III, §34 AND ART. VIII § 7¹.

The attached Opinion of the Office of the Attorney General properly addressed these constitutional issues. It is incorporated by reference as fully as if set forth herein.

Act 189 is essentially a special provision in the General Law. Although Plaintiff argues that Act 189 addresses a topic already covered by general charter school legislation (*see*, S.C. Code Ann. §59-40-10, *et seq.*(Supp. 2008), Act 189 is essentially a special provision in the General Law. The Supreme Court has sustained laws on that basis including one case involving the Act consolidating

¹ Plaintiff has miscited this provision as article XIII rather than article VIII.

the Charleston County School Districts. *Smythe v. Stroman*, 251 S.C. 277, 162 S.E.2d 168 (1968); *see also, Moseley v. Welch*, 209 S.C. 19, 39 S.E.2d 133 (1946); art III, §34(X).

IV

OPS. ATTY. GEN. (OCTOBER 19, 2007) PROPERLY INTERPRETED ACT 189

The Complaint alleges, “[a]s an aside, while the Act expressly mentions conversion schools, [*Ops. Atty Gen* (October 19, 2007)] . . . asserts that its terms apply to both conversion and star-up charter schools. While it is [Plaintiff’s] assertion that this Opinion is flawed, enforcement of this interpretation would magnify the negative impact of the Act.”

The above allegation fails to state a cause of action. By its own terms, it mentions the issue only “[a]s an aside” and does not ask the Court to construe the provision or provide relief as to the Opinion’s interpretation. Therefore, this “aside” fails to meet standards for a cause of action, and Plaintiff is not entitled to any relief as to this argument. If, *arguendo*, this Court reaches this issue, the attached Opinion properly addressed it.

CONCLUSION

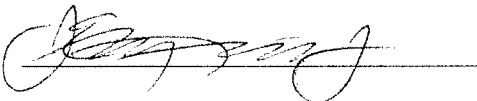
For the foregoing reasons, the Plaintiff has failed to state facts sufficient to constitute a cause of action, and this Court lacks jurisdiction over the subject matter of this action.

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Respectfully submitted,

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Office of the Attorney General
State of South Carolina

*1 October 19, 2007

The Honorable Chip Campsen
Senator

Dear Senator Campsen:

You have requested an opinion “on two questions regarding the constitutionality and application of Act 189 of 2005.” As you note in your letter, Act No. 189 amended Act 340 of 1967 and Act 128 of 2003. Act 189 provides as follows:

Section 5A. (A) The **Charleston** County School District may not deny a **charter** school, **charter** school teacher, or **charter** school student anything that is otherwise available to a public school, public school teacher, or public school student including, but not limited to, the provisions in subsection (B).

(B)(1) The local school district of a **charter** school in **Charleston** County may not charge rent to a **charter** school that was converted from an existing public school.

(2) A **charter** school in **Charleston** County may apply for a grant on its own.

(3) A teacher in a **charter** school in **Charleston** County may be nominated and considered as a candidate for Teacher of the Year.

(4) A student at a **charter** school in **Charleston** County may receive a Laura Brown Fund Grant if the student otherwise qualifies for the grant.

You further state that “our Supreme Court has recognized on several occasions that the General Assembly has broad discretion concerning matters of public education pursuant to Section 3, Article XI of the South Carolina Constitution that requires the General Assembly ‘to provide for the maintenance and support of a system of free public schools.’” Thus, you ask whether “in light of the cases interpreting this provision and the presumption of all acts of the General Assembly, would you consider Act 189 to be a violation of the prohibitions against **special legislation** contained in Article III § 34 and Article VIII § 7?”

Your second question relates to the interpretation of Act No. 189 of 2005. You ask whether it is “permissible for the **Charleston** County School District to charge a nonconverted **charter** school rent for the use of existing district buildings.”

Law / Analysis

Any statute enacted by the General Assembly carries a heavy presumption of constitutionality. As we have often stated, a legislative act is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has repeatedly recognized that the powers of the General Assembly are plenary, unless in conflict with the Constitution. This contrasts with the powers of the federal Congress which are expressly enumerated. *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94S.E.2d 231, 233 (1956). Accordingly, an act will not be considered

void unless its unconstitutionality is clear beyond any reasonable doubt. *Thomas v. Mucklen*, 186 S.C. 290, 195 S.E. 539 (1937); *Townsend v. Richland Co.*, 190 S.C. 270, 2 S.E.2d 779 (1939).

Moreover, only a court may strike down an act of the General Assembly as unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare any Act void. Therefore, a duly enacted statute "must continue to be followed until a court declares otherwise." *Op. S.C. Atty. Gen.*, June 11, 1997.

*2 Article III, § 34 (IX) of the South Carolina Constitution provides that no special law shall be enacted where a general law can be made applicable. Moreover, Section 7 of Article VIII further states the following:

[t]he General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to thenature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. *No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.*

(emphasis added). On the other hand, Article XI, § 3 of the Constitution states that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable."

Our Supreme Court has attempted to reconcile these various provisions of the State Constitution in *Moye v. Caughman*, 265 S.C. 140, 217 S.E.2d 36 (1975) and subsequent decisions. In *Moye*, the Court upheld a statute which changed the method of electing the boards of trustees of school boards for Lexington County against a challenge based upon Art. VIII, § 7's prohibition against laws for a specific county. The Court concluded as follows:

[t]he contrast between Article XI and Article VIII should be obvious. In Article XI the General Assembly is charged with the duty to provide for a system of public education, whereas in Article VIII the General Assembly is required to confer powers upon the counties so that they may carry out local functions. Moreover a reading of Article XI, which deals specifically with public education as a whole, ... in light of the historical background of public education in this State, and attempting to harmonize the entire Article and extract the impact of each section, it is clear that the provisions of Article VIII, which deal with local government, have no application to the matter currently before us.

265 S.C. at 143-144, 217 S.E.2d 36, 38.

And, in *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), the Supreme Court reaffirmed this reasoning in the context of a challenge made pursuant to Article III, § 34's prohibition against the enactment of **special legislation**. The *Bradley* Court distinguished *Horry County v. Horry County Higher Ed. Comm.*, 306 S.C. 416, 412 S.E.2d 421(1991) as follows:

... Appellant contends *Horry County v. Horry County Higher Ed. Comm.* ... has implicitly overruled this court's holding that the legislature may pass separate legislation regarding public education without violating constitutional limitations We disagree *Horry County* did not overrule *Moye* and the line of cases upholding legislation relating to school districts. In *Horry County*, the County was authorized to levy a tax sufficient to pay the interest and principal onbonds issued to finance the activities of the Horry County Higher Education Commission. The Horry act was found to be **special legislation** because while the tax imposed on all taxable property within Horry County, the funds were not used for the benefit of all persons residing within the area. Additionally, the funds in *Horry* were used solely for the benefit of one institution of higher learning. Although the court in *Horry* concluded that legislation regarding education is not exempt

from the requirements of Article III, § 34 (IX), it also found that it does not prohibit all **special legislation**.

*3 A law that is special only in the sense that it imposes a lawful tax limited in application or incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34 (IX). *Hay v. Leonard*, 212 S.C. 81, 46 S.E.2d 653 (1948). Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). Statutes upheld as constitutional were not only applied uniformly to all persons and property within the area affected, but the specific taxes were used for the benefit of all persons residing in the area. *Id.* The funds in this case are not confined to the sole use and benefit of any particular class but would benefit the entire county of Cherokee. ... Accordingly, the trial court did not err in concluding that Act 588 imposes a lawful tax limited in application and incidence to persons or property in Cherokee County and as such is not a special law in violation of Article III, § 34 (IX). *Hay v. Leonard, supra*. 322 S.C. at 185-86, 470 S.C. at 572-3.

We must consider these authorities in the context of legislation dealing with **charter** schools. The South Carolina **Charter** School Act of 1996, as amended, codified at S.C. Code Ann. Section 59-40-10 *et seq.*, expresses the Legislature's purpose in creating **charter** schools as to

- (1) improve student learning;
- (2) increase learning opportunities for students;
- (3) encourage the use of a variety of productive teaching methods;
- (4) establish new forms of accountability for schools;
- (5) create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site; and
- (6) assist South Carolina in reaching academic excellence.

Section 59-40-20. Moreover, § 59-40-30(A) further comments upon the intent of the General Assembly, by noting that “[i]n authorizing **charter** schools, it is the intent ... to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating *all children within the public school system.*” (emphasis added). Further, § 59-40-40(2) expressly provides that a **charter** school “is a public school” and “is accountable to the school board of trustees of that district which grants its **charter.**” Section 59-40-40(1).

Against this background, we thus turn to Act No. 189 specifically. On its face, this Act is applicable to all **charter** schools in the **Charleston** County School District - encompassing all of **Charleston** County. Indeed, subsection (A) of the Act is all inclusive, providing that the “**Charleston** County School District may not deny a **charter** school, **charter** school teacher, or **charter** school student anything that is otherwise available to a public school, public school teacher, or public school student including, but not limited to the provisions in subsection (B).” Thus, based upon the reasoning of the *Bradley* case, discussed above, it is evident that the purpose of Act No. 189, when considered with the express goals of the **Charter** School Act of 1996, as amended, is “to benefit the entire county” of **Charleston**. *Bradley, Id.* Inasmuch as the South Carolina **Charter** School Act designates **charter** schools as part of the public school system, there is little doubt that the enactment of Act No. 189 sought to provide for “the maintenance and support” of the public schools of **Charleston** County, consistent with Art. XI, § 3. Thus, it is our opinion that Act No. 189 of 2005 violates neither Art. III, § 34 (IX) nor Article VIII, § 7. Accordingly, we believe a court would uphold the Act as constitutional.

*4 Your second question involves our interpretation of Act No. 189. Specifically, the issue is whether it is permissible “for the **Charleston** County School District to charge a noncovered **charter** school rent for the use of existing district buildings?” As explained more fully below, it is our opinion that Act No. 189 does not permit a

rental charge.

In our construction of Act No. 189 of 2005, several principles of statutory construction guide us. First and foremost, is the cardinal rule of statutory interpretation which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), citing *State v. Bancroft*, 340 S.C. 339, 531 S.E.2d 922 (2000). All other rules of statutory construction are subservient to the rule that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

In addition, in construing statutory language, a statute must be read as a whole. Provisions thereof should not be read in isolation. All sections must be construed together with one another and each section given effect. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992). As our Supreme Court has recognized, “[i]n ascertaining the intent of the Legislature, a court should not focus on a single section or provision but should consider the language of the statute as a whole.” *Croft v. Old Republic Ins., Co.*, 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005).

Also, full effect must be given each part of a statute and in the absence of ambiguity, words must not be added to or taken therefrom. *Home Bldg. and Loan Assn. v. City of Sptg.*, 185 S.C. 313, 194 S.E.2d 139 (1939). In addition, as our Supreme Court stated in *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942),

it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.

Finally, we note that in the enactment of the **Charter** School Act, the Legislature made clear that a liberal construction is warranted “to advance a renewed commitment by the State of South Carolina to the mission goals, and diversity of public education.” Section 59-40-30(A). In view of the fact that Act No. 189 addresses those **charter** schools in **Charleston** County, we believe the same liberal construction is to be afforded.

*5 Applying these principles of statutory construction, it is evident that the General Assembly intended in the passage of Act No. 189 of 2005 that the **Charleston** County School District may not “charge rent to a **charter** school” in the District. While true that subsection (B)(1) of the Act specifically states that such prohibition relates to “a **charter** school that was converted from an existing public school,” we do not read that provision to mean that rent may be charged nonconverted charterschools in the District. As noted, we do not construe the provisions of Act No. 189 in isolation, but as part of a coherent whole. Subsection 5A provides the following:

[t]he **Charleston** County School District may not deny a **charter** school, **charter** school teacher, or **charter** school student anything that is otherwise available to a public school, public school teacher or public school student including, but not limited to the provisions in subsection (B).

The term “including, but not limited to” generally indicates that items which were not specifically enumerated, are equally included within the terms of an act. *Op. S.C. Atty. Gen.*, Op. No. 84-132 (November 14, 1984). As one court has emphasized, the phrase “including, but not limited to” is “meant as a term of expansion” not as a limitation. *State v. Jones*, 721 A.2d 903, 907 (Conn. App. 1998). Thus, subsection (B)(1), specifically addressing the prohibition upon charging of rent to **charter** schools converted from public school, cannot be read so nar-

rowly as to imply that the Act intended that nonconverted **charter** schools may be charged rent. In our view, subsection (B)(1) is not a limitation but a specific example of the general prohibition contained in Subsection 5(A), which provides that the District may not deny a **charter** school "anything otherwise available to a public school" This construction is insured by subsection 5(A)'s use of the phrase "including, but not limited to, the provisions in subsection (B)."

In short, we believe the Legislature, in enacting Act No. 189 of 2005, intended to prohibit the School District's charging of rent to *all* **charter** schools in the District, including those **charter** schools not "converted from an existing public school," for the use of existing district buildings. Such interpretation is entirely consistent with the Act's requirement that the District must give **charter** schools in the District "anything that is otherwise available to a public school." Thus, the fact that the **charter** school was not converted from a public school is not controlling.

Conclusion

It is our opinion that Act No. 189 of 2005 is constitutional and would be upheld by a court. It is our further opinion that Act No. 189 prohibits the **Charleston** County School District from charging rent to a nonconverted **charter** school, as well as one converted from a public school, for the use of existing district buildings.

Very Truly Yours,
Henry McMaster
*6 Attorney General

By: Robert D. Cook
Assistant Deputy Attorney General

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