

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Charleston County School District,

Petitioner,

v.

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, Mark Sanford in his Official capacity as Governor of the State of South Carolina, and the State of South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-10-1348

ORDER

BY _____
JULIE J. ARMSTRONG
CLERK OF COURT
2010 JAN 27 PM 2:21

FILED

This case has come before this Court pursuant to a Motion to Dismiss of the Defendants. The Motion was argued on December 1, 2009. After carefully considering the arguments and memoranda of counsel, this Court grants the Motion to Dismiss for the reasons discussed below.

BACKGROUND

This suit alleges that Act No. 189, 2005 S.C. Acts 1923, violates the 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 .

At the Motion hearing, this Court ordered that the State be added as a defendant to this suit. Since then, Plaintiff has amended its complaint to name the State, and also to add a claim that Act 189 is inconsistent with the 2006 amendment Act No. 274, 2006 S.C. Acts 2227) to the Charter School Act. *see*, S.C. Code Ann. §59-40-10, *et seq.* (Supp. 2008). The issue of the 2006 amendment was argued at the December hearing, but it was not in the original complaint. The Defendants have moved to dismiss the Amended Complaint, but a hearing does not need to be held as to this new Motion because the issues were sufficiently addressed at the December hearing.

I

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

Act 189 is entitled to the heavy presumption of constitutionality extended to State legislation by our Courts. As stated recently in *State v. Neumann*, 384 S.C. 395, 683 S.E.2d 268, 271 (2009):

This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.' " *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 134-35, 568 S.E.2d 338, 344 (2002)

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

(quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis*, 345 S.C. at 569-70, 549 S.E.2d at 597.

Plaintiff has given this Court no reason to overcome this presumption.

At the hearing, Plaintiff conceded that Act 189 does not violate the Home Rule provisions barring legislation for individual counties under S.C. Const. art. VIII, §7. Therefore, that issue does not need to be addressed further. Act 189 is also constitutional under art. III, §34 (IX). That section prohibits special legislation where a general law can be made applicable.

This statute must be construed in light of the legislature's authority to provide for public education under art. XI §3² *McElveen v. Stokes*, 240 S.C. 1, 124 S.E.2d 592, 596 (1962), in which the statute at issue was not school related stated that "[i]n determining whether a statute pertaining to school matters is obnoxious to subsection IX of Section 34, Article III, it is well settled that this subsection must be construed in connection with the applicable provisions of Article XI, which deal with education and various school matters." The legislature's authority under this provision was emphasized in *Abbeville v. State*, 335 S.C. 58, 515 S.E.2d 535 (2009), in which the Supreme Court stated that it did "not intend by this opinion to suggest to any party that [the Court would] usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards."

² This section of the Constitutions 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."

Rarely has the Supreme Court declared a local school statute unconstitutional under art. III, §34. *Moye v. Caughman* 265 S.C. 140, 217 S.E.2d 36 38 (1975), recognized this different treatment, as follows, in considering an act changing the method of electing the boards of trustees in Lexington County:

The appellant in his brief did not raise the question of whether the act violates Article III, Section 34; therefore, the applicability of Section 34 is not before us. At oral argument the appellant suggested that the act is violative of Section 34. Without deciding the issue, the Court calls to the attention of the appellant the following cases. *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932); *McElveen v. Stokes*, 240 S.C. 1, 124 S.E.2d 592, 596 (1962); *Thorne v. Seabrook*, S.C., 216 S.E.2d 177 (1975). They indicate that Section 34 does not deal with matters specifically covered by Article XI.

Horry County v. Horry County Higher Ed. Comm., 306 S.C. 416, 412 S.E.2d 421(1991), was one of those rare exceptions in which the Court declared a local education related statute unconstitutional, but it involved a law quite different from the present statute. In *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), the Supreme Court upheld a school tax statute for Cherokee County against a special legislation challenge, and in the process, distinguished *Horry County*:

Horry County did not overrule *Moye* [*v. Caughman*, 265 S.C. 140, 217 S.E.2d 36 (1975)] 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 on bonds 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.

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.

A prior Opinion of the Attorney General found Act 189 to be constitutional. *Ops. Atty Gen.* (October 19, 2007). That Opinion related the Act to the purposes of the Charter School legislation and the *Bradley* decision. While that Opinion is not binding upon this Court, the reasoning of that Opinion, as follows, is consistent with the determination of this Court.

The South Carolina Charter School Act of 1996, as amended, . . . 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).

On its face, [Act 189] 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 [which found the statute at issue applicable to all of Cherokee County] 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.

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). The District focuses on §59-40-170,³ which provides in part that vacant school buildings are to be

³ This statute provides, as follows:

The Department of Education shall make available, upon request, a list of vacant and unused buildings and vacant and unused portions of buildings that are owned by school districts in this State and that may be suitable for the operation of a charter school. The department shall make the list available to applicants for charter schools and to existing charter schools. The list must include the address of each building, a short description of the building, and the name of the owner of the building. Nothing in this section requires the owner of a building on the list to sell or lease the building or a portion of the building to a charter school or to any other school or to any other prospective buyer or tenant. However, if a school district declares a building surplus and chooses to sell or lease the building, a charter school's board of directors or a charter committee operating or applying within the district must be given the first refusal to purchase or lease the building under the same or better terms and conditions as it would be offered to the public. (emphasis added)

offered to charter schools for sale or lease “under the same or better terms and conditions as it would be offered to the public.” (emphasis added). Act 189 is consistent with §59-40-170 and merely goes a step further in stating that rent may not be charged (“[t]he 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”). Not charging any rent under Act 189 is a “better term” than would be offered to the general public for purposes of §59-40-170. This provision of Act 189, therefore, is a special provision in the general law, which is expressly permitted by art. III, §34(X) (“nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws”). Act 189 is also consistent with the goals of the general legislation to “create, new, innovative, and more flexible ways of educating all children” and the direction that the legislation “be interpreted liberally to support the findings and goals of this chapter” §59-40-30(A).

The Supreme Court has sustained laws as special provisions in the general law including in one case involving the Act consolidating 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). Local legislation for the Charleston County School District is appropriate because it has a unique structure of a consolidated school board and constituent districts with their own school boards. Act 340, 1967 S.C. Acts 340. Charleston County, itself, has a “rather unique geography” with nearly 100 miles of Atlantic coastline and various parts of the County divided by rivers and linked by bridges. *U.S. v. Charleston Co. School District*, 738 F. Supp. 1513 (DCSC, 1990), *aff’d* in part and vacated and remanded in part, 960 F. 2d 1227, *supra*, note 4.

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The General Assembly has passed numerous local laws in relation to public education. *Moseley v. Welch, supra*, recognized this fact and concluded that the local legislation at issue in that case was a special provision in the general law and sustainable under art. III, 34:

The general school law of the State is contained in Chapter 122, Sections 5272 through 5512, of the 1942 Code, as amended. Many of these sections contain special provisions relating to various counties. This chapter is immediately followed by Chapter 122-A, Sections 5513 through 5675, which contains special legislation relating mainly to the fiscal school affairs, of each of the forty-six counties of the State. As stated by the Special Referee, 'this is at least indicative of a consistent legislative opinion that conditions in the various counties are such as to preclude uniformity of treatment in relation to the administration of school affairs.' This conclusion of the General Assembly is entitled to much respect and in doubtful cases should be followed. *Spartanburg County v. Miller, County Treasurer, et al.*, 135 S.C. 348, 132 S.E. 673; *Evans et al. v. Beattie, Comptroller General, et al.*, 137 S.C. 496, 135 S.E. 538; *Craig v. Pickens County*, 189 S.C. 164, 200 S.E. 825.

* * *

The Act in question provides: 'All duties of the existing County Board of Education shall devolve upon the Board of Education herein created when the same is not in conflict with the general law or the provisions of this Act.' The general school law is, therefore, in force in Williamsburg County except to the extent that it is modified under the terms of the Act in question. We think the validity of this legislation may be fairly sustained as a special provision in the general law, permitted by the quoted portion of Section 34, Article 3, of the Constitution. *Walker et al. v. Bennett et al.*, 125 S.C. 389, 118 S.E. 779; *Arnette et al. v. Ford et al.*, 129 S.C. 526, 125 S.E. 138; *State et al. v. Meares, Supt. of Education, et al.*, 148 S.C. 118, 145 S.E. 695; *Powell et al. v. Hargrove et al.*, 136 S.C. 345, 134 S.E. 380; *Walpole v. Wall, County Supt. of Education*, 153 S.C. 106, 149 S.E. 760.

As noted above, the prior Opinion of the Office of the Attorney General stated that "[i]nasmuch 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." The legislature has historically provided for such

support on a local level by local statute as indicated by §4-9-70 (1986)⁴ and a perusal of the supplements to the index to local legislation of the Code. *See also, Moseley, supra.* In fact, the General Assembly has provided for the raising of local school revenue in Charleston County by local legislation passed prior to the Property Tax Reform Act in 2006, §12-37-220(B)(47)(a) (Supp, 2008). *See, eg., Act No. 1602, 1972 S.C. Acts 3134.*⁵ Clearly, Act 189 is sustainable as a special provision in the general law.

Plaintiff contends that a more recent Opinion of the Attorney General (*Ops. Atty. Gen.*, July 7, 2009) found that a special law regarding an educational matter would be likely to be found unconstitutional. That opinion addressed a bill proposing to allow impact fees for Dorchester County District 2. It found the bill questionable special legislation because a general law could be made applicable to impact fees for school districts because a general law addressed the subject for other local governments. This 2009 Opinion does not apply to the Act 189 Charter school law for Charleston County because that legislation is not inconsistent with the general law and because the Charleston County School District possesses unique characteristics of geography, organization and authority. The statutes are different and the conclusions about them are not required to be the same.

As recognized by *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470, 472 (1988), "under Article XI, Section 3, the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern

⁴ One of the methods of establishing school tax millage for districts under 4-9-70 was retention of such authority by the General Assembly where it had retained such authority in 1974.

⁵ This Court expresses no opinion on local finance issues in Charleston County other than upholding the validity of Act 189.

needs.” The legislature has properly passed Act 189 as a means of providing for the schools of Charleston County. Under all of the above authority, Act 189 is clearly constitutional under art. III, §34.

II

ACT 189 IS NOT OVERRULED BY AMENDMENTS TO THE CHARTER SCHOOL LEGISLATION

Plaintiff contends that Act 189 is superseded by the 2006 amendments to the charter school law, but those amendments did not change §59-40-170, which contains provisions for the use of vacant buildings. That provision was the same in both the 2006 legislation and the earlier legislation. The history of the provision in the Code noted that “[t]he 2006 amendment reprinted this section with no apparent change.” Therefore, not only was Act 189 not superseded by the 2006 amendment, the legislature indicated its satisfaction with Act 189 by not amending or repealing it when it passed the charter school amendments one year later in 2006.

“On numerous occasions, our courts recognized that the Legislature has the authority to enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions. *Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services*, 346 S.C. 158, 169, 551 S.E.2d 263, 269 (2001). Moreover, the Legislature has the plenary power to amend statutes. *Simmons v. Greenville Hosp. System*, 355 S.C. 581, 586, 586 S.E.2d 569, 571 (2003). Thus, if the legislation in question does not violate the Constitution, the Legislature has the authority to adopt it despite the fact that it may conflict with or amend existing law.” Clearly, the General Assembly considers Act 189 a special provision in the general law that is consistent with the purposes of the 2006 legislation.

III

THE GOVERNOR MUST BE DISMISSED

Although the Defendants have raised issues of failure to state a cause of action against the State, the Governor, the President of the Senate and the Speaker, this Court need not reach this defense because of its conclusion that the challenged legislation is constitutional;⁶ however, this Court does conclude that the Governor should be dismissed because Act 187 does not give him any duty or authority to act as to the matters set forth in that statute.⁷ Therefore, he has no authority to provide relief as to the subject of this legislation, and this suit must be dismissed as to this action.⁸

⁶ Rule 8 (a), SCRCF, states that a pleading must contain a short and plain statement of the facts showing that the pleader is entitled to relief. Defendants contend that the instant complaint contains no such statement as to them. The officers are named only in brief statements identifying them and the offices they hold, and the State is only identified as an entity. Complaint, ¶¶ 2 - 4. All of the alleged causes of action complain about the provisions of Act 189, but never mention the Defendants.

⁷ Plaintiff cites cases in which the Governor has been a named Defendant, but fails to show whether they relate to the instant matter. Those cases are readily distinguishable. For example, the Governor was named in *Drummond v. Beasley*, 331 S.C. 559, 503 S.E. 2d 455 (1998), but that case involved the exercise of the Governor's veto power. *Condon v. Hodges*, 349 S.C. 2323, 562 S.E. 2d 623 (2002) addressed other actions of the Governor. In the instant case, Plaintiff has pointed to no acts of the Governor other than his holding supreme executive authority, and his signing the legislation at issue. This authority is insufficient to warrant the Governor's being made a party to this case.

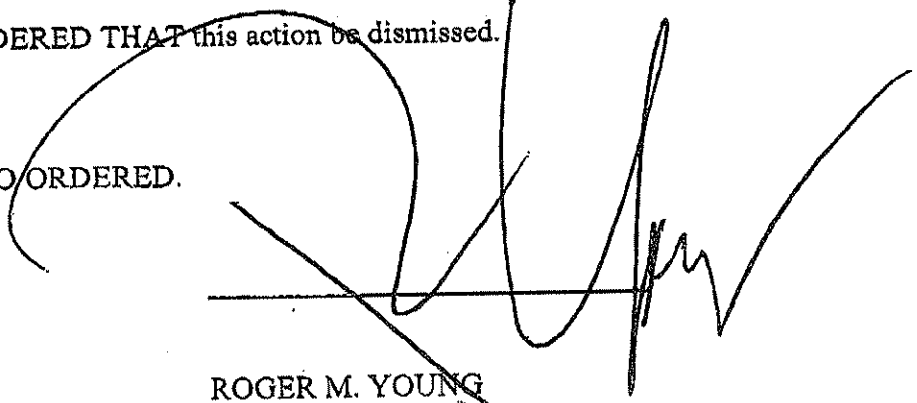
⁸ This Court need not reach the issue of whether the other Defendants are subject to suit but does note that in their legislative capacities, neither the Speaker nor President of the Senate have authority to implement Act 187. None of the Defendants can pass legislation individually, nor can they or 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).

CONCLUSION

For the foregoing reasons, this Court grants the Defendants' Motion to Dismiss.

Therefore, IT IS ORDERED THAT this action be dismissed.

AND IT IS SO ORDERED.



ROGER M. YOUNG
Judge, Ninth Judicial Circuit

1/24, 2010