October 19, 2007

The Honorable Chip Campsen
Senator, District No. 43
360 Concord Street, Suite 201
Charleston, South Carolina 29401

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).
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> (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.
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> (2) A charter school in Charleston County may apply for a grant on its own.
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> (3) A teacher in a charter school in Charleston County may be nominated and considered as a candidate for Teacher of the Year.
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> (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, 94 S.E.2d 231, 233 (1956). Accordingly, an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. *Thomas v. Macklen*, 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.

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 the nature 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 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.
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> 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.

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 noncoverted 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. Baucom*, 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.

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 charter schools 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 narrowly 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
Attorney General

By: Robert D. Cook
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