THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W Dickson, Circuit Court Judge

Case No 2009-CP-18-2674

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc — Appellants,

v

School District No 2 of Dorchester County and
the Board of Trustees for Dorchester School District No 2 — Respondents

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BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This action commenced on March 29, 2009 with the filing of a Complaint, by Home Builders Association of South Carolina and the Trident Home Builders Association (collectively, "HBA") seeking a declaratory judgment and injunctive relief preventing School District 2 of Dorchester County and the Board of Trustees for Dorchester School District No 2 (collectively, "School District") from imposing and collecting impact fees on new residential construction pursuant to 2009 S C Acts 99 ("Act 99") and its attendant Resolution (R p 34-45)

School District timely answered alleging the validity of Act 99 (R pp 31-33) Subsequently, School District moved for judgment on the pleadings, pursuant to Rule 12(c), SCRCP (ROA, 46-54) On September 9, 2010, a hearing was held before the Hon Edgar W Dickson On March 11, 2011 School District's motion was granted (R pp 2-10) HBA timely filed a Motion to Amend or Reconsider Judgment, pursuant to Rule 59(e), SCRCP, (R pp 75-78) which was denied on June 22, 2011 (R pp 11-12) On July 11, 2011 HBA timely filed a Notice of Appeal

FACTS

On or about February 11, 2009, the General Assembly of the State of South Carolina passed and enrolled Senate Bill 235 which became law on February 26, 2009 as 2009 S C Acts 99 ("Act 99") summarized as

SYNOPSIS AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES

On June 22, 2009, School District adopted the Resolution imposing the impact fee (R pp 34-35)

Appellants ("HBA") are associations whose members include builders engaged in home construction and residential development, doing business in School District, who are now obligated to pay the impact fee before receiving a certificate of occupancy Applicable fees were charged to members of both Associations who paid under protest, reserving rights to contest the validity of Act 99 and the authority of School District to impose an impact fee (R p 29)

STANDARD OF REVIEW

The standards controlling a judgment on the pleadings are set forth in Russell v Columbia, 305 S C 86, 89, 406 S E 2d 338, 339 (1991), as follows

> A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment A judgment on the pleadings is in the nature of a demurrer All properly pleaded factual allegations are

> deemed admitted for purposes of the consideration of a demurrer When a fact is well pleaded, any inferences of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever

(internal citations omitted)

Additionally, judgment on the pleadings against the plaintiff is "a drastic procedure," Falk v Sadler, 341 S C 281, 287, 533 S E 2d 350, 353 (Ct App 2000), to be applied only "where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment " Sapp v Ford, 386 S C 143, 146, 687 S E 2d 47, 49 (2009) Thus, the procedural issue before the court at this point is not whether Act 99 is ultimately unconstitutional but only whether the HBA's Complaint raises any legally viable claims

In reviewing the propriety of granting judgment on the pleadings, pursuant to Rule 12(c), SCRCP, the appellate court applies the same *de novo* standard of review employed by the circuit court Hambrick v GMAC Mortg Corp , 370 S C 118, 634 S E 2d 5 (Ct App 2006)

ARGUMENT

I ACT 99 AUTHORIZING AN EDUCATION IMPACT FEE SOLELY FOR SCHOOL DISTRICT IS UNCONSTITUTIONAL SPECIAL LEGISLATION

A The Constitution Specifically Prohibits Special Laws Where a General Law Can Be Enacted

South Carolina's Constitution expressly prohibits special legislation in Article III, §34 which provides in pertinent part

Special laws prohibited

> The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit (none of the specified subjects are applicable to this case)
>
> ***
>
> IX In all other cases, where a general law can be made applicable, no special law shall be enacted

(R pp 58-59) "The purpose of the prohibition is to make uniform where possible the statutory laws of this State in order to avoid duplicative or conflicting laws on the same subject. Med Soc'y of S C v Med Univ of S C , 334 S C 270, 279, 513 S E 2d 352, 357 (1999)

Not all local or special legislation is prohibited Valid special or local legislation, however, requires a showing that the law in question contains a substantial distinction between the persons or subject matter to which it applies and the persons and subject matter to which it does not apply In other words, the legislation demonstrates one or more unique classifications that justify it As stated in Shillito v City of Spartanburg, 214 S C 11, 20, 51 S E 2d 95, 98 (1948)

> The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act ***will best meet the exigencies of a particular case,*** and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation There must, however, be a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation

(emphasis added)

For the prohibition not to apply a special exigency or unique circumstance must exist rendering general legislation inapplicable Med Soc'y, 334 S C 270, 279

The Supreme Court has recently reaffirmed its prior decisions and set forth a clear statement of the standards to be applied in determining the constitutionality of special or local legislation in Charleston County School District v Harrell, 393 S C 552, 558, 713 S E 2d 604, 608 (2011)

> We outlined the framework to determine whether special legislation exists in *Kizer v Clark 360 S C 86, 600 S E 2d 529 (2004)* "A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class " *Id at 92 600 S E 2d at 532* If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification *Id at 93 600 S E 2d at 532* However, the mere fact that a law creates a classification does not render it unlawful *Id* Instead, the constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits unreasonable and arbitrary classifications *Id at 93 600 S E 2d at 533* "A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it " *Id* Accordingly, special legislation is not unconstitutional where there is "a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded " *Horry County 306 S C at 419 412 S E 2d at 423* Thus, where a special law will best meet the exigencies of a particular situation, it is not unconstitutional *Med Soc of S C v Med Univ of S C 334 S C 270 279 513 S E 2d 352 357 (1999)* "In other words, the General Assembly must have a logical basis and sound reason for resorting to special legislation " *Horry County 306 S C at 419 412 S E 2d at 423* (citation omitted)

Act 99 is special legislation which does not distinguish between School District and other school districts in the state and shows no unique exigency justifying special authority unavailable to school districts generally

B Special Laws Involving Education Are Not Exempt From the Constitutional Prohibition Against Special Laws Where a General Law Can Be Enacted

Prior to Harrell, some had argued that special laws involving educational matters were exempt from the constitutional prohibition of Art III, §34(IX) This argument was soundly rejected in Harrell which held that, while the legislative power may be broader in dealing with school matters than with other matters, it is not outside the limitation imposed by the South Carolina Constitution that no special law shall be enacted where a general law can be made applicable 393 S C at 559-560 See also Horry Cnty v Horry Cnty Higher Educ Comm'n, 306 S C 416, 412 S E 2d 421 (1991)

Act 99's application to a single school district, without any peculiar or unique conditions, results in special treatment and violates the constitutional limitation that no special law shall be enacted where a general law can be made applicable

Applying the principles for testing special legislation embodied in Harrell to Act 99 mandates a finding of unconstitutionality

i Act 99 is a Special Law

Act 99's application to a single school district makes it a special law in that it applies only to one member of the class of school districts within the state

ii School District is Not Unique

Act 99 neither embodies a substantial distinction among school districts, between those embraced within it those excluded, nor is reasonably necessary to best meet the exigencies of the School District's situation The Complaint alleges that the financial needs of the School District are not limited to the School District but are the same as those of other school districts faced with a growing population requiring the additional

facilities (R pp 29-30) There is no reason to single the school District granting it a funding vehicle unavailable to other districts

The requisites for finding a special law sufficiently unique to survive a constitutional challenge are established in Medical Society, 334 S C 270 To resolve the constitutionality of the act before it the court reviewed two prior cases which established the standards for uniqueness The court cited S C Public Service Authority v Citizens & Southern National Bank, 300 S C 142, 386 S E 2d 775 (1989), which upheld

> special legislation relating only to the Santee Cooper electric utility allowing it to change its fiscal year to the calendar year We noted that Santee Cooper was unique since it was the only State agency involved in the production, sale, and distribution of electricity, and that the Act in question was enacted to address a special condition facing this unique agency Accordingly, we concluded the Act before us was not prohibited special legislation

Med Soc'y, 334 S C at 280 (internal citations omitted)

In the second case, Duke Power Co v S C Public Service Commission, 284 S C 81, 90, 326 S E 2d 395, 400-401 (1985), special legislation had been upheld

> allowing voters to approve a referendum granting the Greenwood County Power Commission approval to sell its electric utility to Duke Duke challenged the Act on the ground of special legislation We noted the Greenwood County Power Commission had no power to sell its facility without legislative authorization, and the proposed transaction was unique Accordingly, the challenged Act was not prohibited special legislation

Med Soc'y, 334 S C at 280 (internal citations omitted)

Using the standards set out above, the Court found the act at issue constitutional due to the unique position of MUSC

> In this case, MUSC is a unique State agency because it is the only one that owns and operates an acute-care teaching hospital Further, the proposed

> transaction regarding hospital services is one unique to MUSC Moreover, the fact that MUSC has no authority to enter the proposed transaction without legislative approval indicates such legislation is necessary Since the legislature had a "logical reason and sound basis" for enacting a special law authorizing the proposed transaction, Act No 390 is not unconstitutional special legislation

Id

Unlike Santee Cooper, the only state run electric provider, the Greenwood Power Commission, where a transaction required legislative approval, or MUSC, a provider of unique hospital services, the School District has no rational need for special treatment distinguishing it from other school districts The School District is not the only district in the State, it is not involved in a transaction requiring legislative approval, and it is not the only provider of educational services in the State

iii A General Law Can Be Made Applicable

As many school districts are faced with growing populations requiring additional facilities, the Legislature could easily craft a law applicable to all school districts in the State providing an additional funding stream extracted from new residential construction In fact, such a law already exists covering impact fees South Carolina Development Impact Fee Act, S C Code Ann §§ 6-1-910, et seq (1999) ("Impact Fee Act") grants counties, municipalities and certain other governmental service providers the option of imposing development impact fees on new development requiring additional or expanded facilities The Impact Fee Act does not apply to school districts The Legislature, if it were so inclined, could enact a law similar to the Impact Fee Act for school districts or it could expand the entities covered by the Impact Fee Act to include school districts Either approach would result in a general law which would afford not only School

District, but all school districts, the powers provided to School District under Act 99 That it has not done so further underscores the special nature of Act 99

Because the Complaint alleges that a general law could be made applicable, HBA has established a *prima facie* case that Act 99 violates the constitutional prohibition against special legislation

II BRADLEY IS NOT CONTROLLING

The court below relied primarily on the Supreme Court's decision in Bradley v Cherokee School District No One of Cherokee County, 322 S C 181, 470 S E 2d 570 (1996), finding that a sales tax for the benefit of a single Spartanburg County school district did not violate Art III, §34(IX) The Act in Bradley, is distinguishable from Act 99 in several aspects, not the least of which is that Act 588 was not appropriate for general legislation

The Cherokee School District was faced with repaying bonds issued pursuant to the School Bond Act, S C Code §§ 59-71-10, et seq, an act of general legislation applicable to all school districts In order to afford the district some relief, the Legislature enacted Act 588, Acts and Joint Resolutions, 1994, aptly entitled the "Cherokee School District No One School Bond-Property Tax Relief Act," ("Act 588") which specifically authorized the imposition of a sales tax for a limited purpose and time

> Subject to the requirements of this act, the governing body of Cherokee County School District 1 may by resolution impose a one percent sales and use tax within Cherokee County for a specific purpose and for a specified period of time to collect funds to be used to pay debt service on general obligation bonds issued pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code (School Bond Act)

(R p 79)

Act 588 also imposed other requirements, including that the tax only be imposed after an approving referendum, based upon a resolution specifying "the improvements to be financed through the issuance of" of the bond, "the maximum time for which the tax may be imposed," and "the maximum principal amount of [the] bonds to be issued and repaid with the proceeds of the tax " (R p 79)

Based on and in compliance with the terms of Act 588 the Cherokee School District passed the appropriate resolution and the residents of the County approved the tax by referendum Thereafter, the Bradley plaintiffs challenged the tax on several grounds, including that it violated Article III, §34(IX) of the S C Constitution

In addressing the application of Article III, §34(IX) to Act 588 the Supreme Court held that while education is not immune to the constitutional strictures of Article III, §34(IX) "[a] law which is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, §34(IX) " 322 S C at 186 (citation omitted) However, Act 99 differs from Act 588 to such a degree that it is constitutionally defective

First, the sales tax under Act 588 was authorized for the purpose of assisting the Cherokee School District in repaying specific revenue bonds authorized by the School Bond Act, which grants the power to issue bonds to all districts The bonds issued by the Cherokee School District are unique to that district and provisions for their repayment would not lend themselves to statewide legislation

Second, in Act 99, unlike Act 588, there is no limitation on the use of the funds and they may be used not only for the payment of principal and interest on past and

future bonds, but also for un-bonded construction (R pp 83-84) There is no requirement that the fees be limited to any particular project or that they be limited in time

Third, in Bradley the Supreme Court found it critical that the tax must be "applied uniformly to all persons and property within the area affected" 322 S C at 186 The impact fee authorized by Act 99 fails on both sides of this equation It fails to treat all property within the district equally as it only applies to property subject to new residential construction and it does not apply to all persons within the district, but only to a "developer" constructing "residential dwelling unit[s]" (R p 83) Alternatively, if the impact fee is viewed as a tax on new home buyers it fails to be applied uniformly to all persons within the district as it is only exacted from those moving into new construction

Fourth, the sales tax permitted by Act 588 is a form of taxation common throughout the State In contrast, the school impact fee authorized by Act 99 is limited to a single school district Other school districts may not benefit from this source of revenue

Fifth, Act 588 allowed imposition of the tax only after a referendum which afforded all those most likely to be subjected to the tax an opportunity to vote Act 99, on the other hand, allowed for implementation solely by a resolution of the Trustees, (R p 83) effectively barring any consideration by those most likely to be burdened with the impact fee, those persons moving into new residential construction

The present facts before the court are sufficiently different such that they cannot be construed as falling within the purview of Bradley

III THE COURT ERRED IN GRANTING SCHOOL DISTRICT JUDGMENT PURSUANT TO RULE 12(c) SCRCP

A HBA Has Stated a Sufficient Cause of Action Challenging the Constitutionality of Act 99 to Preclude Dismissal at this Stage

Taking the allegations of the HBA's Complaint as true, as required under Russell, 305 S C 86, for a proper analysis under SCRCP Rule 12(c), HBA has sufficiently stated a cause of action to survive a motion to dismiss pursuant to SCRCP Rule 12(c) The Complaint alleges that the funding needs of School District are not unique, equally applying to many, if not all, other school districts within the State of South Carolina (R pp 29-30) Other school districts within the State are similarly situated in that they are required to construct or expand facilities in order to meet the demands of a growing population The Complaint further alleges that the purposes of Act 99 can be equally fulfilled by general legislation applicable to all school districts within the State of South Carolina (R p 30) As argued *supra*, these two elements form the lynchpins of determining the constitutionality of the Act 99

The standards for reviewing a judgment on the pleadings established in Russell, 305 S C 86, are that

> A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment [A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever

(internal citations omitted) School District has been improperly granted judgment on the pleadings pursuant to SCRCP Rule 12(c)

B HBA Has Alleged That School District's Situation Is Not Sufficiently Unique To Justify Special Legislation

The Office of the South Carolina Attorney General in considering the constitutional validity of Act 99 opined

> In order to determine whether a general law may be made applicable, we must gain an understanding of the Legislature's reasoning for specifically allowing Dorchester County School District No 2 to impose an impact fee when to our knowledge, the Legislature has not granted such authority to any other school district in the State **The legislation itself is devoid of any findings as to why Dorchester School District No 2 in particular should be granted such authority** Thus, we would have to gain knowledge of facts surrounding the passage of the legislation to make this determination This Office, unlike a court, does not have the authority to investigate and make factual determinations Op S C Atty Gen , August 13, 2008 Therefore, we are not in a position to determine whether a special circumstance exists with regard to Dorchester School District No 2 to make it impossible to create a general law and require the Legislature to enact special legislation This determination must ultimately be made by a court

S C A G Op , dated July 7, 2009, Requested by Rep Tracy R Edge (emphasis added)

The Attorney General's Opinion concludes with respect to the constitutionality of Act 99 pursuant to provisions of Article III, §34(IX)

> However, after making factual determinations as to whether a general law can be made applicable to the imposition of impact fees by school districts, we believe a court could find that the legislation violates the prohibition on special legislation pursuant to article III, section 34

Id

HBA has pled sufficient facts to establish that Act 99 lacks the requisite level of uniqueness justifying special legislation, thus rendering the Act unconstitutional HBA has presented a *prima facie* case sufficient to defeat a Rule

12(c) challenge and should be permitted to develop the factual basis to prove its case at trial

C The Lower Court Imposes an Improper Pleading Standard

The lower court held, "[t]hose attacking the validity of the legislation have the burden to negate every conceivable basis which might support it" (R p 5, internal citation omitted) In contrast, Russell holds that, "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever" 305 S C at 89

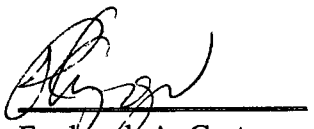
CONCLUSION

Taking the allegations alleged in the Complaint as true, HBA has made a *prima facie* case that Act 99 is constitutionally defective in that it is a special law without a unique basis where a general law could have been enacted HBA has demonstrated that the Complaint alleged sufficient issues of fact which, if resolved in their favor, would entitle them to a prevailing judgment thereby precluding judgment on the pleadings pursuant to Rule 12(c) of the South

Carolina Rules of Civil Procedure requiring a reversal of the lower court

November 18, 2011
Columbia, SC

Respectfully Submitted,



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