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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Honorable Carmen T. Mullen, Circuit Court Judge

Case No.: 2013-002266

JASPER COUNTY BOARD OF EDUCATION.....Appellant

v.

JASPER COUNTY COUNCIL AND JASPER COUNTYAUDITOR.....Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

Appellant's stated Issue on Appeal:

Which political subdivision has the authority to determine the school operating tax levy and millage rate for the School District of Jasper County – the Jasper County Board of Education or the Jasper County Council?

Respondents' Additional Sustaining Grounds:

1. Did the court below properly decline to consider the Appellant's S.C. Constitution Article X issue because it was not pled?
2. Did the court below properly decline to consider the Appellant's S.C. Constitution Article VIII, Article X and Article XI issues because they were abandoned at the hearing?
3. Did the court below properly decline to rule on the Appellants' Article X and Article XI issues because they were not preserved by Appellants' Motion to Alter or Amend?

STATEMENT OF THE CASE

The Summons and Complaint in this action were served upon the Defendants on July 15 and 16, 2013, respectively. Brought under the Declaratory Judgments Act, S.C. Code Ann. §15-53-10, et. seq. (1977), the action sought declaratory and injunctive relief predicated upon the proposition that the Appellant, Jasper County Board of Education, was entitled to set the tax millage in Jasper County for school operating purposes. The Respondents filed and served their Answer and Counterclaim dated August 30, 2013, setting up a general denial, various affirmative defenses and a counterclaim the substance of which was to assert that the Jasper County Board of Education does not have the authority to set its own millage because the Jasper County Council has that authority. The Board of Education filed and served its Reply dated September 4, 2013, setting up a general denial to the Counterclaim.

The matter came to be heard before the Honorable Carmen T. Mullen, Circuit Court Judge on September 19, 2013. Judge Mullen issued her Order on September 26, 2013, in which she found and concluded that the Jasper County Council had the authority to set the operating budget millage for the Jasper County School District and the School Board did not have that authority. On or about September 30, 2013, the Appellant's Notice of Motion and Motion to Alter or Amend Judgment was filed with the Court. That Motion was denied by Order of the Court on October 3, 2013. A Notice of Appeal was filed by the Plaintiff on October 22, 2013.

FACTS

On March 13, 1968, the General Assembly adopted Act No. 982, 1968 S.C. Acts 2370, which created a County Council in Jasper County. Section 6 enumerated the powers and duties of the County Council and Subsection 5 empowered Council "[t]o make appropriations to levy taxes therefore for corporate purposes and for educational purposes. . ." 1968 S.C. Acts at 2371-2372. Since that time, the Jasper County Council has been considering and approving the revenue side of the Jasper County Board of Education operating budget and setting the appropriate millage. See Affidavit of Judith M. Frank dated August 28, 2013, R. p. 90-91.

On July 7, 1971, there was adopted Act No. 601, 1971 S.C. Acts 1114 (1971). Section 2 of that Act gave to the Jasper County Board of Education numerous powers to administer the County's School System. 1971 S.C. Acts at 1114. However, nowhere in that Statute was the Jasper County Board of Education given the authority to make appropriations, to set millage, or to levy taxes.[1]

Following the adoption of the Home Rule Act in 1975, Act No. 283, 1975 S.C. Acts 692, Jasper County did not call for a referendum, but instead accepted the legislatively assigned Council – Administrator form of government provided for in S.C. Code Ann. § 4-9-10(b) (1986). See Resolution of Jasper County Council dated 25 June 1976 and Resolution to provide for the Office of County Administrator of Jasper County Council dated 4 October 1976.[2]

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[1] Act No. 601 was amended by Act No. 288, 1989 S.C. Acts 1685 primarily to change the name of the chief administrative officer of the Jasper County Board of Education to superintendent of education. The Amendment made no changes of significance to this case.

[2] Attached to the Affidavit of Judith M. Frank, dated August 28, 2013, Exhibits 1 and 2, R. p. 92-94.

When the General Assembly adopted the Home Rule Act, it included what has become S.C. Code Ann. § 4-9-70 (1986). That section clarified that the Home Rule Act should not be construed to devolve any additional powers upon county councils regarding public school education. However, that Section contained important provisos to address appropriations and tax levies for school districts. Although there are a number of provisos that are irrelevant to this case, the one that is relevant to Jasper County states as follows:

> [P]rovided, however, that except as otherwise provided for in this section the county council shall determine by ordinance the method of establishing the school tax millage except in those cases where boards of trustees of the districts or the county board of education established such millage at the time one of the alternate forms of government provided for in this chapter becomes effective.

At the time of adoption of the Council – Administrator form of government, Jasper County Council had already been including the school district operating budget in the County's Budget Ordinance and setting the millage for many years. See e.g., Fiscal Year Budget Ordinances for 1975 – 76, 1976 – 77, and 1977 – 78.[3] The Appellant has neither asserted nor offered proof that it was establishing school operating millage at the time that the Council – Administrator form of government was adopted in Jasper County.

For forty-five (45) years since the adoption of Act No. 982, supra, the Jasper County School District has submitted budget requests to the Jasper County Council for their consideration. In turn, for that time Jasper County Council has made appropriations and levied taxes for the Jasper County School District operating budget.

[3] Attached to the Affidavit of Judith M. Frank, dated August 28, 2013, Exhibit 4, R. p. 96 at pp. 97 and 98, Exhibit 5, R. p. 106 at pp. 106 and 108, and Exhibit 6, R. p.115 at pp. 117 and 118.

ARGUMENT

I. STANDARD OF REVIEW.

In this part of the Argument, we set forth the standard of review for both motions for judgment on the pleadings and motions for summary judgment.

> 'In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined. The motion, however, is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. The motion cannot be sustained except where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless under the admitted facts, the moving party is entitled judgment, without regard to what the findings might be on the facts upon which issue is joined.'
>
> Wooten v. Standard Life and Cas. Ins. Co., 239 S.C. 243, 248,122 S.E.2d 637, 639 (1961), citing 41 Am. Jur., *Pleading*, § 336.

When reviewing the grant of a summary judgment motion, an appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Sims v. Amisub of S.C., Inc., et.al., Op. No. 5197 (S.C. Ct. App. February 12, 2014); Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003), "Once the moving party carries its initial burden, the

opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Slides v. Greeneville Hosp. Sys., 362 S.C. 250, 255, 607 S.E. 2d 362, 364 (Ct. App. 2004).

II. THE GENERAL ASSEMBLY HAS DELEGATED TO THE JASPER COUNTY COUNCIL THE POWER TO LEVY TAXES FOR SCHOOL PURPOSES; NO SUCH POWER HAS BEEN GIVEN TO THE JASPER COUNTY SCHOOL BOARD.

Although expressed in a variety of ways, the underlying question before the Court in this case asks as a matter of statutory interpretation which entity, the Jasper County Council or the Jasper County School Board, has been given the power to make appropriations and to levy taxes for the operating budget of the Jasper County School District? This part of the argument is divided into two subdivisions. In the first, we shall show that the General Assembly has extended the authority to make appropriations and to impose taxes to fund the Jasper County School District operating budget to the Jasper County Council. The second subdivision will show that as a matter of statutory interpretation no such authority has been extended to the Jasper County School Board.

A. As a matter of statutory interpretation, the General Assembly has extended to Jasper County Council the authority to make appropriations and to levy taxes for the Jasper County School District operating budget.

The original source of Jasper County Council's authority is derived from Act No. 982 § 6(5), supra, which gave County Council the authority "[t]o make appropriations and to levy taxes therefore . . . for educational purposes . . ." . In relevant part, Section 8 of Act No. 982 requires the Jasper County Board of Education to "make a full and

detailed report of its financial status, activities and expenditures for the past fiscal year, showing all balances in all accounts controlled by such [Board], together with its budget and recommendations for the coming year, to the county council." 1968 S.C. Acts at 2573. In Wright v. Colleton County School Dist., 301 S.C. 282, 391 S.E.2d 564 (1990) it was held that the Court need not go beyond the words of a statute to ascertain the intent of the legislature when it appears on the face of that statute. The power to set the school operating budget millage was clearly given to Jasper County Council in 1968 and exercised continuously and without interruption thereafter. Indeed, the Plaintiff does not contest that the power to tax for educational purposes was extended to Jasper County Council since 1968.[4]

In 1975, when the General Assembly adopted Home Rule, Act No. 283, supra, it adopted what became S.C. Code Ann. § 4-9-70 (1986) in an effort to insure that there be no confusion regarding the authority of School Boards over the educational responsibilities of the local school districts. That Section begins by stating that the Chapter is not intended "to devolve any *additional* powers upon county councils with regard to public school education. . ." (Emphasis supplied.) However, that declaration standing alone could potentially work mischief on a system of managing school revenue authorizations which had been developed by the General Assembly county by county on an ad hoc basis. Consequently, there followed a series of caveats, the essence of which was to insure that the school revenue process for each county would continue unchanged. Thus, if a particular school district had fiscal autonomy it would continue to have fiscal autonomy. If the school district revenue was provided by county ordinance, it would continue to be provided by county ordinance. Whatever the plan devised by the General

[4] See Complaint para. 12a, R. p. 16.

Assembly for an individual county, it would continue. The proviso relevant to Jasper County is as follows:

> "[P]rovided, however, that except as otherwise provided for in this section the county council shall determine by ordinance the method of establishing the school tax millage except in those cases where boards of trustees of the districts or the county board of education established such millage at the time one of the alternate forms of government provided for in this chapter becomes effective."
>
> S.C. Code Ann. § 4-9-70 (1986)

No case illustrates the interaction between the Home Rule Act and the taxing authority for school operating budgets better than Stone v. Traynham, 278 S.C. 407, 297 S.E.2d, 420(S.C. 1982). That case was heard in the original jurisdiction of the Supreme Court and deals with the circumstance which arose in connection with Orangeburg County School District Number 5, whose Board contained appointed members. At the time of the adoption of a home rule form of government, apparently the Orangeburg County School District had been setting its own millage. However, in 1981, the Supreme Court decided Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (S.C. 1981) in which the Court held that participation by an appointed board of education in the taxing process of the school district constituted taxation without representation. As such, it became necessary for the Stone Court to consider the application of S.C. Code Ann. § 4-9-70 (1986), particularly the language "[C]ounty council shall determine by ordinance the method of establishing the school tax millage except in those cases where board of trustees of the districts or the county board of education establish such millage at the time one of the alternate forms of government provided for in this chapter became effective." The Supreme Court understood that notwithstanding the provisions of that statute, it

could not, consistent with Crow v. McAlpine, permit the Orangeburg 5 School Board to set the tax millage. The Stone Court responded as follows:

> By enacting § 4-9-70, the General Assembly attempted to ensure that the taxing power for all school districts would be properly vested in some authority. *The clear intent is to vest the power to determine the school tax levy in county council in all cases where it is not vested elsewhere.* It is inconceivable the Legislature would not provide for the levy merely because it could not constitutionally vest control of that power in appointed boards of education.

278 S.C. at 410, 297 S.E.2d at 422 (*Emphasis supplied*)

The Court concluded that S.C. Code Ann. § 4-9-70 (1986) was invalid as applied to appointive bodies. As such, the "legislative intent will be preserved by allowing Orangeburg County Council to prescribe the method of establishing the school tax millage." 278 S.C. at 410, 297 S.E.2d at 422. It is simply impossible to conceive that the South Carolina Supreme Court would extend to the Orangeburg County Council authority to set taxes for the school district, if the Court had any doubt about the permissability of county councils setting school millage. Applied to this case, since Jasper County School Board did not establish the school operating budget at the time of adoption of the Council – Administrator form of government, then Jasper County Council has the authority to set the School District operating budget millage arising from S.C. Code Ann. § 4-9-70 (1986), independent of Act No. 982, supra.

B. As a matter of statutory interpretation the General Assembly has not extended to the Jasper County School Board the authority to make appropriations and to levy taxes for the Jasper County School District operating budget.

The Appellant asserts that Act No. 288, 1989 S.C. Acts 1685 gives to the School Board the authority to tax real property in Jasper County in order to generate funds for the operating budget of the School District. First, the Appellant is in error in it's

assertion that the powers of the School District date to 1989 and were a Legislative response to the adoption of Article XI of the Constitution. Act No. 288 is an amendment to Act No. 601, 1971 S.C. Acts 1114, which created the Jasper County Board of Education. The title to Act No. 288 describes it as an Act "AMONG OTHER THINGS, [TO] CHANGE THE DESIGNATION OF THE CHIEF ADMINISTRATIVE OFFICER TO SUPERINTENDENT OF EDUCATION." A comparison of Act No. 288 of 1989 with Act No. 601 of 1971, clarifies that it has done just that. It has changed the name of the chief administrative officer of the district from Administrator to Superintendent of Education and little else. A comparison of Section 1 of Act No. 288 of 1989, with Section 2 of Act No. 601 of 1971, reveals that there are no substantive changes between the original "Powers and Duties" section adopted in 1971 and the amendment of 1989. Indeed, with regard to the subsections of Section 2 of Act 288 cited by the Appellant in its Brief, pp. 2-3, being Subsections (5), (7), (8), (12)[5]; (16); (17); and (18), there has been no change whatsoever from the original enactment in Act No. 601.[6] As such, the delegations of authority to the Board upon which the Appellant relies are precisely the delegations of the authority given to the Board in 1971, and therefore date to 1971 and predate the ratification of Article XI of the Constitution.[7]

The cardinal rule of statutory construction is for a Court to ascertain the intent of the legislature and to give it effect. Charleston County School District vs. State Budget and Control Board, 313 S.C. 1, 437 S.E.2d 6 (1993). In ascertaining the intention of the legislature, the court need not look beyond words of the statute to ascertain that intent,

[5] The Appellant cites to a fragment of this Subsection.
[6] Paragraph 11 of the Appellant's Complaint lists five subsections from Act No. 288 of 1989, Subsection (5), Subsection (7), Subsection (8), and Subsection (18). Once again, Act No. 288 made no change in any of those Subsections from as originally adopted in Act No. 601. Complaint, R. p. 14 at p. 16.
[7] Ratified in Act No. 42, 1973 S.C. Acts 44

when it appears on the face of the statute. Wright vs. Colleton County School Dist., supra. School districts have no inherit right of local self-government – all powers are derived from the General Assembly. Moseley v. Welch, 209 S.C.19, 39 S.E.2d 133 (1946). Tax Statutes like other laws should be construed with the view towards ascertaining and giving effect to the intention of the legislature. Meredith vs. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966). Statutes imposing taxes cannot be extended by implication beyond the clear import of the language used. Id.; Adams vs. Burts, 245 S.C. 339, 140 S.E.2d 586 (1965); Greenville Baptist Ass'n. v. Greenville County Treasurer, 281 S.C. 325, 315 S.E.2d 163 (Ct. App. 1984).

The Complaint of the Plaintiff makes no reference to any general law which would extend to the Jasper County School Board the authority to impose a tax. In paragraph 11 of their Complaint, the Plaintiff claims and we acknowledge that they have been delegated the authority to "determine and evaluate educational programs", Complaint para. 11a, R. p. 3, to "adopt a system of budgetary controls",[8] Complaint para. 11b, R. p. 3, "to provide for disbursement of . . . funds . . .", Complaint para 11c, R. p. 3, and to perform "other duties and responsibilities . . .", Complaint para. 11d, R. p. 3. However, none of these delegations of authority can be construed, individually or as a group, to give the Jasper County School Board the power to tax the people of Jasper County. That conclusion can be reached easily from the four corners of the Act.

Nor is the Appellant's claim to fiscal autonomy supported when compared to other delegations of fiscal autonomy extended by the General Assembly. Just as the

[8] A "system of budgetary controls" does not imply the power to tax. A budget is a balance sheet or statement of estimated receipts and expenditures, Appalachian Electric Power Co. v. City of Huntington, 115 W. Va. 588, 177 S.E. 431, 433, (1934) or a plan or method whereby expenditures are controlled. Kistler v. Carbon County, 154 Pa. Super. 299, 35 A.2d 733, 735, (1944).

nature of individual school district governance differs greatly from district to district, so too does the determination of how school district operating budget revenue is generated differ. According to the South Carolina School Boards Association, of eighty-four school districts in the State of South Carolina, the boards of twenty-five districts, including Jasper, have no authority over the revenue side of their budget. The county council approves the millage rate in twenty-one of those districts, with the legislative delegation or town/citizen meetings approving the other four. Twenty-six district boards have complete fiscal autonomy of the sort that is sought by the Appellant in this case. In thirty districts the school board has the authority over their budgets subject to external approval authority in the event of certain specific increases. This external authority is exercised in numerous ways including referendum, county council approval, legislative delegation approval and county board approval.[9] Thus, seventy (70%) percent of school districts in South Carolina have the revenue side of their budget controlled wholly or in part by a process external to the districts' governing boards.

It is useful to compare the language used in statutes which give school districts fiscal autonomy.[10] Perhaps the most common method selected by the General Assembly is to direct the board of education or trustees to adopt the millage and the board or it's chair to notify the county auditor and treasurer of that millage. See, e.g., Act No. 299, § 2, 2012 S.C. Acts, http://www.scstatehouse.gov/sess119_2011-2012/bills12actsp1.php (Florence County School District No. 3); Act No. 518 § 5, 1982 S.C. Acts 3435, 3437

[9] See South Carolina School Boards Association, Fiscal Authority, March 2013 (copy of which is attached to Defendant's Second Request for Admissions, R. p. 84).

[10] The Statutes to which we make reference in this paragraph may or may not reflect the current status of the fiscal autonomy of the Districts to which they refer. Nevertheless, they are useful because they illustrate language used by the General Assembly to extend fiscal autonomy to the named school districts at a particular point and time. That language may then be compared with the Jasper County School District's Statute, Act No. 601, 1971 S.C. Acts 1114 (1971).

(Berkeley County); Act No. 831 § 3, 1976 S.C. Acts 2402, 2402 (Georgetown County). To illustrate this approach, in 1963, the General Assembly adopted Act No. 389, 1963 S.C. Acts 624 dealing with fiscal autonomy for the Marlboro County Board of Education. The language is as follows:

> Not later than August first of each year, the board of education shall direct the county auditor to levy and the county treasurer to collect all the millage necessary to meet that portion of the budget to be raised through direct ad valorem taxation, and such direction shall include any special levies which the board may approve under the provisions of Section 21-3514. The county auditor is hereby authorized and directed to levy, and the county treasurer is hereby authorized and directed to collect all such millage as may be directed in writing by the Marlboro Board of Education, pursuant to appropriate resolution by the board.
>
> Act No. 389 § 7, 1963 S.C. Acts at 627

More abbreviated delegation language was used for the Board of Trustees of the Edgefield County School District. In Act No. 1019, 1963 S.C. Acts 2436, the Board of Trustees was given the authority to "[A]nnually, determine the necessary millage to be levied by the auditor and collected by the treasurer of the county to provide for the school budget which the board has prepared and approved." In Act No. 340 § 10, 1967 S.C. Acts 470, 475 pertaining to Charleston County, the General Assembly instructed that "[I]n order to obtain funds for school purposes the board is authorized to impose an annual tax levy. . ." The language for Aiken County is somewhat similar. There, "the district may increase the millage above the millage levied in the preceding year as the governing board of the district determines is reasonable and necessary for the operations of the school district." Act No. 173 Section 1, 1995 Act S.C. Acts 1431. Despite the variety in approaches, where the General Assembly has sought to extend to the governing body of a school district the power to tax, it has generally articulated that intent in

express terms related to the setting of millage or a tax levy. Each of the cited statutes is significantly different from the powers vested in the Jasper County Board of Education, which contains no such language.

Within the last two years two bills have been introduced in the General Assembly to give fiscal autonomy to the Jasper County School Board. Neither of these bills has been adopted. S.1556 introduced in the South Carolina Senate May 29, 2012, S. Journal, 119th Sess. (2011-12), http://www.scstatehouse.gov/sess119_2011-2012/bills/1556.htm and S.358 introduced in the South Carolina Senate February 7, 2013, S. Journal, 120th Sess. (2013-14), http://www.scstatehouse.gov/sess120_2013-2014/bills/358.htm. Admittedly, the fact that neither S.1556 nor S.358 was adopted by the General Assembly is of limited value for the Court in interpreting the meaning of Act No. 288, 1989 S.C. Acts 1685, amending Act No 601, 1971 S.C. Acts 1114. But what is instructive in these Bills is that they are unique examples that illustrate the kind of language that might be used by the General Assembly to give the Jasper County Board of Education fiscal autonomy.[11] For example, in relevant part, Section 1 of S.358 provides as follows:

> Beginning with the year 2013, the county auditor of Jasper County, when directed and ordered by an appropriate resolution of the Jasper County Board of Education as the governing body of the Jasper County School District, shall impose for school purposes a county wide annual tax millage levy on all of taxable property in the county subject to either a school operating millage levy or a school debt service levy, or both. The millage levy for the year 2013 must be the same levy as that levied for 2012 by the Jasper County Council for K-12 educational purposes increased no more than eight mills unless approval for a higher increase is granted by the Jasper County Legislative Delegation. After 2013, the tax levy for school purposes each year may not be increased more than eight mills above the millage levy for school purposes for the previous fiscal year unless

[11] The real irony of S.1556 of 2012 and S358 of 2013 is that if enacted, either of these bills would have imposed substantial limitations on the discretion of the Jasper County School Board. Nevertheless, in this case the Board seeks from the Court unfettered taxing authority with far more discretion than they would have received from the General Assembly.

> approved by a majority of the Jasper County Legislative Delegation. The annual levy must be designated as the county education fund tax. The district superintendent of education and the county treasurer shall open and enter in their books and records an account to be designated as the 'County Education Fund'. The county treasurer shall credit to the fund or account all the proceeds of the tax and any other money received for the county education fund or account and charge against the fund or account all proper vouchers drawn against it.

We have seen that since 1968, Jasper County Council has had the authority to make appropriations and to levy taxes for educational purposes. Act No. 982, 1968 S.C. Acts at 2372. Based upon the record below, the Circuit Court found that at the time of the adoption of the Council – Administrator form of government, Jasper County Council was appropriating funds and setting the millage rate for the Jasper County school operating budget in the County's budget ordinance. That finding is consistent with the Affidavit of the Jasper County Clerk to Council, Judith M. Frank, dated August 28, 2013, R. p. 90. The Court below had before it proof that as a matter of fact it was establishing "such millage at the time one of the alternative forms of government provided . . . becomes effective." S.C. Code Ann. § 4-9-70 (1986). The School Board has directed the attention of the Court to no statute that extends to it the power to impose a tax on the people of Jasper County. It has not been given the power to set millage or impose a tax in the language that has been customarily used by the General Assembly. Bills filed in the General Assembly to give that power to the Board have not been enacted. Moreover, the School Board has offered no evidence that as a matter of fact it was establishing such millage at the time of adoption of the Council – Administrator form of Government. Thus, whether one concludes that Jasper County has the authority to make appropriations and levy taxes for the Jasper County School District by virtue of the express authorization contained in Section 6, Subsection 5 of Act No. 982, 1968 S.C. Acts at 2372, or finds and

concludes that the Jasper County Council has that authority by qualifying in fact and in law under the provisions of S.C. Code Ann. § 4-9-70 (1976), in either event, it seems clear that the authority to make appropriations for and to establish the millage for the operating budget of the Jasper County School District lies with the Jasper County Council, and the Jasper County Board of Education has no such power.

III. THE CONSTITUTIONAL ARGUMENTS WHICH ARE ADVANCED BY APPELLENT HAVE NOT BEEN PLED, ARE ABANDONED AND ARE NOT PRESERVED FOR APPEAL.

Prior to reaching the Appellant's three Constitution based Arguments, identified as "D," "E," and "F," in it's Brief, pp. 16 - 18, it is appropriate to address the Respondent's additional sustaining grounds which all relate to whether these issues were asserted and pursued in this litigation and preserved for appeal. Each of the three Constitutional arguments is predicated on the assertion that by operation of the South Carolina Constitution either the County's power to make appropriations and levy taxes for educational purposes by way of Act No. 982 of 1968, supra,, and/or the authority of the County pursuant to § 4-9-70 (1986) has been forfeit or that fiscal autonomy for the Appellant, as well as presumably all other South Carolina school districts, has become self-effectuating. Whatever the merits of those arguments, they are not properly before this Court because they have not been properly pled or asserted before the Court below, have been abandoned or have not been the subject of a motion to alter or amend judgment.

A. The Appellant Did Not Plead any issues related to Article X of the Constitution.

First, when the Complaint was served, it included in Paragraph 12, subsections b, d and f, each of which raised Constitutional questions with regard to the authority of Jasper County Council to make appropriations and to levy taxes for educational purposes. See Complaint, p. 4, R. p. 17. Subparagraph 12f, involved a claim of unconstitutional special legislation which has now been abandoned by the Appellants.[12] Subparagraph 12b of the Complaint appears to assert the same Article VIII claim argued in the Appellant's Brief, Argument subdivision E, p. 8. Subparagraph 12d of the Complaint asserts an Article XI claim similar to that argued in subdivision D of the Argument portion of Appellant's Brief, p. 6. However, the Article X argument made in subdivision F of the Argument portion of Appellant's Brief, p. 10, is nowhere pled in the Complaint and prior to Appeal has not been a feature of this case. The court below properly declined to enter judgment on the basis of Article X because the judgment must be in accordance with the pleadings of the party in whose favor it is rendered or it is fatally defective. Blackburn and Co., Inc. v. Dudley, 289 S.C. 415, 338 S.E.2d 151 (1985); Yarborough v. People's Nat., 162 S.C. 332, 160 S.E.844 (1931). This is because a primary purpose of a complaint is to apprise the opposite party of the nature of the action against it. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); see also, Blackburn and Co., Inc. v. Dudley, supra. Thus, this Court should decline to consider any theory of appeal on the basis of Article X of the Constitution.

B. At the hearing of this case the Appellant abandoned any constitutional argument.

[12] See Brief of Appellant p. 8, n. 2,

None of these three Constitutional provisions was argued before the court below. Indeed, Counsel for the Appellant began his argument before the Circuit Court as follows:

> We think that this is a case of statutory construction. It's narrow. It's not broad. It's based on pleadings. And there is a real controversy that is ripe for declaratory judgment on who has authority to decide what the amount and the tax rate for the school district's operational budget.[13]
>
> * * *
>
> "The other day - - a couple of days ago, we filed a supplemental memorandum that really zeroed in on what we thought was the most narrow statutory construction that was the best result in this case. We thought that it gave effect to all of the statutes, the both special laws that are just for Jasper County. It recognized the importance of the constitutional division between schools under Article 11, counties under Article 8, the Home Rule statutes, and how they would apply, so that nothing was really necessary for you to apply. You could apply the express language of each bill, give them all effect. They're all constitutional, and it's a narrow decision only affecting Jasper County.
>
> So, I would like to just go through very briefly those statutes and how they fit together." [14]

In South Carolina, it is the law that an issue conceded in the court below may not be argued on appeal. CFRE, LLC, v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011); TNS Mills, Inc., v. S.C. Dept. Rev., 331 S.C. 611, 503 S.E.2d 471 (1998). Here, at argument, the Appellants conceded that this was a case of statutory interpretation and abandoned any issue as to the alleged unconstitutionality of Act No. 982 of 1968, supra, or S.C. Code Ann. § 4-9-70 (1986).

Moreover, the Respondent's Answer and Counterclaim in Paragraph 18[15] specifically recognized that the Appellant had asserted the Constitutional claims found in

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[13] Tr. p. 6, lines 1-6, R. p. 56 lines 1-6.
[14] Tr. p.6 line 21 through p. 7 line 10, R. p. 56 line 21 through p. 57 line 10.
[15] See Answer and Counterclaim p. 4, R. p. 24.

the Complaint, the effect of which would have been to find unconstitutional one or more statutes or portions of statutes and could only be heard on declaratory judgment by service upon the Attorney General with a copy of the proceedings and providing him the right to be heard. S.C. Code Ann. § 15-53-80 (1977). At the hearing, following the completion of the argument of the Appellant, counsel for the Respondent addressed the Court as follows:

> My colleague, Mr. Halligan, has told the Court that he views this now as a case of statutory interpretation. And as such, I read that to mean that the constitutional issues are off the table. And for that reason, I'm not raising the issue with regard to the Attorney General and his notice.[16]

Neither at that moment, nor at any other time during the hearing did Counsel for the Appellant state anything to the contrary. It has been held that a party may not complain on appeal of an error which his own conduct has induced. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 629 S.E. 2d 653 (2006); Shearer v. DeShon, 240 S.C.472, 126 S.E.2d 514 (1962); Floyd v. Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951). The court below recognized the narrow question before her, stating twice that this was a case of statutory interpretation.[17] For these reasons, the Appellant has abandoned its claims under Article VIII, Article X and Article XI of the Constitution.

C. The Appellants motion to alter or amend judgment does not specifically address Article X or Article XI of the Constitution; therefore they are not preserved for appeal.

The Courts in South Carolina have reiterated on numerous occasions the proposition that if the losing party has raised an issue in the trial court, and if the court fails to rule upon it, the party must file a motion to alter or amend judgment in order to

[16] Tr. p. 18, lines 15-20, R. p. 68 lines 15-20.
[17] See Order pp. 2 and 4, R. p. 4 & p. 6.

preserve the issue for appellate review. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); Rodriduez v. Gutierrez, 391 S.C. 323, 705 S.E.2d 94 (Ct. App. 2011); Shirley's Ironworks, Inc. v. City of Union, 397 S.C. 584, 726 S.E.2d 208 (Ct. App. 2010). The ruling of the court below must be explicitly stated. Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008); Doe v. Roe, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006). When the appellant fails to comply with this procedure in any respect, appellate review is waived. BMW of North America, LLC v. Complete Auto Recon Services, Inc., 399 S.C. 444, 731 S.E.2d 902 (Ct. App. 2012). Constitutional arguments are no exception to the preservation rules. Caldwell v. Wiquist, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013).

In the Appellant's notice of motion and motion to alter or amend judgment, paragraph 2 asks the Court to rule in its favor on the Article VIII claim that Act No. 982, 1968 S.C. Acts 2370 was rendered unconstitutional by adoption of the Home Rule Act. However, by the time of this motion, the Appellant had abandoned this argument in open court during the hearing which took place on September 19, 2013. No specific request related to Article X or XI of the Constitution was included in the Motion to Alter or Amend Judgment.

In a case similar to the Article X and Article XI issues, Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 547, 544, 524 S.E.2d 115, 119 (Ct. App. 1999), the Court explained, "To the extent Duncan relies on an implied warranty of workmanship theory, his contentions are not preserved for appeal because Duncan failed to plead the issue, failed to raise the issue to the Circuit Court, the Circuit Court failed to rule on the issue,

and Duncan failed to file a Rule 59(e), SCRP Motion." For these reasons the Court should decline to consider the Article X or Article XI issues.

For all of these reasons the Court should decline to consider the Constitutional objections asserted under Article VIII, X or XI by the Appellants to application of Act No. 982 of 1968, supra, or to S.C. Code Ann. § 4-9-70 (1986). Nevertheless, out of an abundance of caution we will now move to discuss each of the Appellant's Constitutional objections.

IV. THE AUTHORITY OF JASPER COUNTY COUNCIL TO MAKE APPROPRIATIONS AND LEVY TAXES FOR THE JASPER COUNTY SCHOOL DISTRICT OPERATING BUDGET DOES NOT VIOLATE ARTICLES VIII, X, OR XI OF THE CONSTITUTION.

The objections of the Appellant to the authority of Jasper County Council to make appropriations and levy taxes for educational purposes on the basis of Article VIII, X, and XI are without merit. When evaluating an act of the General Assembly it is important to remember that the Legislature, under its plenary powers, may enact any law not specifically, or by implication, prohibited. Duncan v. County of York, supra. In addition, all statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Horry County School District v. Horry County, 346 S.C. 621, 552 S.E.2d 737 (S.C. 2001). The Legislature has wide discretion in determining how to go about accomplishing its duty to provide for the maintenance and support of a system of free public schools. Burriss v. Anderson County Board of Education, 369 S.C. 443, 633 S.E.2d 482 (S.C. 2006); Horry County School District v. Horry County, supra. In

interpreting such legislation, the separation and the independence of each branch of government requires that the Courts go no further than absolutely necessary in declaring unconstitutional an action of the General Assembly. Stone v. Traynham, supra. The party challenging the validity of a statute bears the burden of proving that it is unconstitutional. State v. Dykes, 398 S.C. 351, 728 S.E.2d 455 (2012). This Brief addresses each of the Appellant's assertions with regard to each Article and for clarity sake we will deal with them in the order selected by the Appellant.

A. Jasper County Council's authority to make appropriations and to levy taxes for the Jasper County School District Operating Budget does not violate Article XI of the Constitution.

Appellant appears to make an argument that the delegation to a county council of the authority to make appropriations and levy taxes for educational purposes somehow violates Article XI of the Constitution. However, a review of the four brief sections within that Article reveals that only Section 3 has any relevance to school finance and only the first phrase of the first sentence relates to the statewide system of free public schools. That language is as follows:

> "The General Assembly shall provide for the maintenance and support of a system of free public schools. . ."
>
> S.C. Const. art. XI § 3.

Stated another way, the question before the Court is: Does S.C. Const. art. XI § 3 have sufficient flexibility to allow the General Assembly, if it so chooses, to provide for the maintenance and support of public schools by requiring a county council to set the necessary millage and impose the tax? The answer lies in the breadth of the discretion of the General Assembly under Article XI of the Constitution. A few cases are instructive.

In Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988) the Court had before it the question of whether or not the General Assembly could require local contributions to defray the cost of essentially statewide programs such as the Educational Finance Act and the Education Improvement Act. The Court began by drawing a parallel to an earlier Constitutional provision that required the General Assembly "to provide for a liberal system of free public schools . . ." S.C. Const. art. XI § 5 (1946). After noting the similarities between the two provisions, the Court quoted with approval from Hilderbrand, et. al. v. High School District No. 32, et. al., 138 S.C. 445, 136 S.E. 757 (1927): "[T]he Constitution . . . places very few restrictions on the powers of the General Assembly in the general field of public education. It is required to 'provide for a system of free public schools,' but the details are left to its discretion." The Richland Court also cited with approval language from Moseley v. Welch, 209 S.C. 19, 33-34, 39 S.E.2d 133, 140 (1946) as follows: "The development of our school system in South Carolina has demonstrated the wisdom of the founders of the Constitution in leaving the General Assembly freedom to change conditions." The Richland Court reasoned, "Similarly, 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 needs . . . An additional ground for sustaining trial court's ruling is that when the validity of a legislative fact is questioned, it is a cardinal principal that courts will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity by the courts" 94 S.C. at 349, 364 S.E.2d at 472.

The case of Horry County School District v. Horry County, supra, is also related to the discretion of the General Assembly on school finance issues. There the Supreme

Court considered the school district's objections to S.C. Code Ann.§ 4-1-170 (1986) which allowed counties to create multi-county business parks which could potentially have the effect of exempting property within the County from all ad valorem taxation, including that of school districts. The Horry County School District asserted objections to County Council taking action which had the impact of reducing their tax revenues. The Supreme Court explained that "[t]he legislature has wide discretion in determining how to go about accomplishing its duty to 'provide for maintenance and support of a system of free public schools . . .'" 346 S.C. at 632, 552 S.E.2d at 743. While it is clear from the opinion that the Court was troubled by the language of the MCEP statute, it concluded that it was within the discretion of the Legislature.

Most recently the Supreme Court considered Burris v. Anderson County Board of Education, supra. The case involved a challenge to a two-tier governance system devised by the General Assembly for the Anderson County School District. It is not directly applicable to this case, but it does represent the Court's continued and most recent commitment to the proposition that the General Assembly, charged with providing for the maintenance and support of public education in South Carolina, has wide discretion in determining how to go about accomplishing this duty. 369 S.C. at 451, 633 S.E.2d at 486.

The cases clearly demonstrate that since the adoption of Article XI § 3 of the Constitution, the Supreme Court has been consistent in its recognition that the General Assembly must have broad discretion in determining how it chooses to finance public education in this State. On numerous occasions since the ratification of Article XI in 1973, the General Assembly has adopted statutes which have given county councils

authority over school budgets.[18] Indeed, the determination of how public education is to be funded for the State's school districts is subject to a number of policy considerations. Choices made on a county by county basis lead to different results based upon local circumstances. For example, the General Assembly could determine that it is important for the public body that is providing the service, for example a school board, to also have the responsibility for imposing the tax burden to support it's revenue needs. On the other hand, the General Assembly is entitled to also make the policy decision that a single body ought to have ultimate responsibility over the entire local tax burden imposed upon the people of a county. These competing policies are precisely the kinds of issues which should be and are placed with the General Assembly.

B. Article VIII Section 7 of the Constitution does not repeal Act No. 982 of 1968.

Forty years ago, the South Carolina Supreme Court declared that legislation, such as Act No. 982 of 1968, supra, was not violative of S.C. Const. art. VIII § 7. In Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973), the Court had before it a challenge to a revenue statute, which in that case extended to Newberry County Council the authority to issue certain hospital bonds. The Supreme Court ruled that Article VIII §7 of the Constitution and particularly the third sentence of that provision was prospective and did not invalidate all prior existing statutes which were "special legislation." As the Court said, "it is impossible to interpret this language as intended to apply to any time prior to the ratification date of new Article VIII." 261 S.C. at 274, 199 S.E.2d at 546 (1973). The Court stated that any other construction would be "against all reason and flies in the face of all logic." Id.; see also Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978) and

[18] See, e.g., Act No. 493, 1998 S.C. Acts 3386 (Saluda County School District 1); Act No. 593, 1992 S.C. Acts 3616 (Dorchester County); and Act No. 755, 1988 S.C. Acts 6386 (Abbeville District 60).

Infinger v. Stuckey, 268 S.C. S.C. 375, 234 S.E.2d 214, N. 6 (1977). In this case, Act No. 982 of 1968, supra, well preceded the adoption of Article VIII Section 7 which was not ratified until five years later.

C. Jasper County Council's authority to make appropriations and to levy taxes for the Jasper County School District operating budget does not violate Article X of the Constitution.

In this subdivision of our argument, we will show that the authority of Jasper County Council to make appropriations and to levy taxes for the Jasper County School District Operating Budget is consistent with Article X of the Constitution for at least two reasons. First, there is no provision of Article X which is violated by the General Assembly extending to Jasper County Council the power to make appropriations for school purposes. Second, applying ordinary rules of interpretation, the provisions of Article X which might be relevant to the power of Jasper County Council to make appropriations and to levy taxes for educational purposes are prospective and not retroactive.

A review of the sixteen sections found in Article X reveals that most of the sections in the article are related to state finance issues and bonded indebtedness of the State and it's subdivisions. Indeed, when we look a bit closer it is clear that the framers desired to remove much of the detail that had characterized earlier versions. Perhaps nowhere is that better illustrated than in the first sentence of Section 1, "The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property." The drafters who wrote this provision created such a model of simplicity and clarity that the Respondents have only found it referenced in six decisions of the Supreme Court and in none of them was the Court called upon to interpret this

language. Clarendon County Ex Rel., Clarendon County Assessor v. TYKAT, Inc., 394 S.C. 21, 714 S.E.2d 305 (2011); Beaufort County v. State, 353 S.C. 240, 577 S.E.2d 457 (2003); Riverwoods, LLC v. Charleston County, 349 S.C. 378, 563 S.E.2d 651 (2002); Wesvaco Corp. v. S.C. Dep. of Rev., 321 S.C. 59, 467 S.E.2d 739 (1995); S.C. Tax Com'n v. S.C. Tax Bd. of Rev., 305 S.C. 183, 407 S.E.2d 627 (1991); and Owen Steel Co., Inc. v. S.C. Tax Com'n, 287 S.C. 274, 337 S.E.2d 880 (1985). It goes without saying that this language imposes no impediment upon the General Assembly to authorize Jasper County Council to make appropriations and levy taxes for educational purposes.

The only Section of the current Article X to which the Appellant refers in connection with this case is Article X § 6.[19] Article X Section 6 deals not with the imposition of tax, but with the process of assessing property for ad valorem taxation and the collection of taxes. In fact, there is a similarity between the language of the first sentence of Article X Section 1 and the first sentence of Article X Section 6, but Article X Section 1 deals with the imposition of tax and Article X Section 6 deals with assessment and collection of taxes. In short, the Section referred to by the Appellant has no application whatsoever to this case.

Second, the current version of Article X was ratified by the General Assembly in Act No. 71, 1977 S.C. Acts 90 on May 4th, 1977. Section 3 of the statute, 1977 S.C. Acts at 103, postponed the effective date of the ratification to November 30th, 1977. The General Assembly explained the postponement in Section 2 of Act 70, id., as follows: "In as much as much proposed bonded indebtedness is now planned both by the State itself and

[19] The Appellant does refer to Article X § 5 in connection with its discussion of Stone v. Traynham, supra; however, that is in reference to an issue in Orangeburg County where certain members of the County Board of Education were appointed rather than elected. There is no parallel in this case.

many of its agencies, institutions and political subdivisions, it has been decided that the postponement for the effective date of the ratification of this amendment by the provisions of Section 3 hereof is a matter of essential inducement to the action herewith taken by the General Assembly." This action by the General Assembly reflects the view of the General Assembly that Article X as amended was prospective only. The procedure of postponing the effective date of the ratification was approved by the Supreme Court in Hyder v. Edwards, 269 S.C. 138, 236 S.E.2d 561 (1977). The Supreme Court has effectively ruled that Article X is prospective only. Celanese Corp. v. Strange, 272 S.C. 399, 400, 252 S.E.2d 137, 139, N. 1 (1979). A constitution, like a statute, operates prospectively only, unless the words employed, or the object in view clearly shows that it was intended to have a retrospective effect. Bouknight v. Epting, 11 S.C. 71, 1878 W.L. 5388 (1878). Retroactive effect of a constitutional provision depends on the legislative intent. Covington v. McInnis, 144 S.C. 391, 142 S.E. 650 (1928); Robinson v. Askew, 129 S.C. 188, 123 S.E. 822 (1924). Thus the prospective character of Article X resolves any existent question concerning the application of that provision to the statutes in question.

CONCLUSION

In this Brief we have shown that as a matter of statutory construction Jasper County Council has been extended the authority to make appropriations and levy taxes to fund the operating budget of the Jasper County School District. Subdivision II of the Brief reviewed how authority was initially granted in 1968, when the General Assembly adopted Act No. 982, of 1968, supra. It was confirmed by application of S.C. Ann. § 4-9-

70 because at the time that Jasper County adopted the Council – Administrative form of Government, the County Council and not the School Board was making the appropriations and levying the tax for the operating budget of the School District. We have also demonstrated that while the Jasper County School Board has broad powers to administer the work of the District, the General Assembly has never extended to it the power to tax. The Jasper County School Board is not unique in this respect. About thirty percent of the school districts in South Carolina are funded by ordinance of their county councils. In subdivision III of our Brief we have sought to show that the Court should decline to consider any of the three Constitutional arguments advanced by the Appellants. Although the reasoning is slightly different for each, suffice it to say that the Appellants abandoned those arguments and have not properly preserved them for review. Finally, we have shown in subdivision IV that the Constitutional arguments advanced by the Appellants in an effort to strike down the authority given by the General Assembly to Jasper County Council to make appropriations and to impose the tax necessary to fund the Jasper County School District operating budget are without merit.

For all of the reasons set forth herein the decision of the Court below should be affirmed.

Respectfully submitted,

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May 1, 2014
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

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SC Court of Appeals

Honorable Carmen T. Mullen, Circuit Court Judge

Case No.: 2013-002266

JASPER COUNTY BOARD OF EDUCATION.....Appellant

v.

JASPER COUNTY COUNCIL AND JASPER COUNTY AUDITOR.....Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents and Certificate of Counsel by depositing a copy of each in the United States Mail, postage prepaid, on May 1, 2014, addressed to Childs & Halligan, P.A., Kenneth L. Childs, S.C. Bar No. 1217, William F. Halligan, S.C. Bar No. 2607, Keith R. Powell, S.C. Bar No. 69292, Post Office Box 11367, Columbia, South Carolina 29211, Attorneys for the Appellant.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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