April 26, 2010

The Honorable Robert W. Harrell, Jr.
Speaker of the House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Mr. Speaker and Members of the House:

I am hereby vetoing and returning without my approval H. 3395, R. 171.

This bill makes changes to the way our state government plans for, and deals with, bad budget years. I applaud its intent and give credit to the General Assembly for including provisions in this legislation that would indeed make bad economic and budget times more manageable. Unfortunately in weighing the positives and negatives of this bill, we still found the legislation wanting and, for that reason, are compelled to veto H. 3395, R. 171.

We very much support the provisions that raise the amount of revenue required to be accumulated in the General Reserve Fund from three percent of the revenue of the latest completed fiscal year to five percent. We also support the provision that requires General Reserve Fund replenishment within five fiscal years; these requirements are great steps in the right direction. If the bill stopped here, we would have supported it; unfortunately it does not and so we veto for the following reasons:

Section 3 of the bill includes the requirement that if the Budget and Control Board does not take unanimous action within seven days of the Board of Economic Advisors decision to reduce its revenue estimate by two percent or more – then the Director of the Office of State Budget must reduce the general fund appropriations to agencies across-the-board. Over the course of this administration, we have clearly stated our belief that targeted, rather than across-the-board, cuts are more appropriate because not all agencies or activities are of equal importance to the citizens of the state. Across the board cuts also have the unintended consequence of encouraging agencies to spend everything they get because there is no reward for frugality with taxpayer funds. They do not recognize the ways in which some agencies may have been great stewards of taxpayer resources, while others are profligate spenders. We believe that elected officials should
make the tough, although unpleasant, decisions by prioritizing activities when revenues are down. This provision essentially codifies the practice of across-the-board cuts.

This provision also gives an unelected official authority to automatically cut agency budgets. Our concern is not a criticism of the individual who currently holds this position – we simply believe that the addition or decrease of appropriated funds should be decided by elected officials so that there is a consequence for decisions as they are deliberated on by voters and taxpayers.

We also disagree with Section 4 of the bill, which moves from three to four the number of Budget and Control Board members necessary to recognize an agency deficit. Currently, only three members of the Board must agree to recognize a deficit. We believe this provision is constitutionally suspect, based on the case law that is routinely cited when the constitutionality of the Board is challenged on the grounds that it violates separation of powers, as defined by the South Carolina Constitution, since three, not four, members are linked to the executive branch of our state.

The South Carolina Supreme Court, in a series of cases, has determined that the Separation of Powers Clause does not preclude the membership of two legislators on the Board. In State v. Edwards, the Court upheld the constitutionality of the Board against a separation of powers challenge because “the General Assembly has been careful to put the legislative members in a minority position on The Board.”

Similarly, in Tall Tower, Inc. v. South Carolina Procurement Review Panel, the Supreme Court upheld the legislative presence on the Procurement Review Panel against a separation of powers challenge, relying heavily on the majority-minority distinction in Edwards. The Court further held that “[t]he statutory composition of the Panel comports with both these criteria” because the executive branch would always constitute a majority.

Section 4 of H. 3395 fails the Edwards rule because the bill’s four-member threshold runs afoul of South Carolina Supreme Court precedent. Under Section 4, no longer may the Executive Branch majority control the outcome of a Board decision – instead, the Executive Branch must obtain legislative consent before executing or administrating laws passed by the General Assembly.

For these reasons, I am vetoing and returning without my approval H. 3395, R. 171.

Sincerely,

Mark Sanford