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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

December 9, 2005

Frank W. Fusco, Executive Director
State Budget and Control Board
Post Office Box 12444
Columbia, South Carolina 29211

Dear Mr. Fusco:

You seek a legal opinion regarding the potential sale of a portion of the Bull Street property which has, for almost two hundred years, been the home of facilities of the Department of Mental Health. In your letter, you state that "[t]he thinking is that the Bull Street tract is not specifically needed to house mental health facilities and that it would be more efficient and economical for the State and Department of Mental Health to sell this property, relocate facilities, and reinvest the proceeds that would be derived." You note that the original four acres of the Bull Street property "upon which the Mills Building is situate" is not included in any plans by the State to sell the property and "will remain in State ownership." In addition, you state that a few of the subsequent deeds conveying additional lands to the Department (or to the Board of Regents of the Lunatic Asylum or State Hospital for the Insane) contain "the grantee's intended use," but that "the majority of the deeds contain no such language." Furthermore, you note that the property "appears to have been purchased for substantial consideration, and the deeds are devoid of any expression of intent by grantors to create a trust." It is your opinion that "the General Assembly's authority over this property does not differ from its authority over other state property" and thus, "we would wish to proceed with the sale of the property as expeditiously as possible."

In requesting our opinion, you, therefore, state the following:

[n]onetheless, my agency defers to your Office in these matters, both as the State's lawyer and as the proper party to enforce application of funds given or donated to public charities pursuant to S.C. Code Ann. § 1-7-130. Accordingly, after reviewing this letter, if you feel that there is any prohibition upon the State's conveying its interest in these properties to third parties, I respectfully request that you provide the Governor and members of the Budget and Control Board your opinion to that effect as soon as possible. On the other hand, should you believe that litigation is required to resolve this question, we trust you will take appropriate action. Should you determine that there is no prohibition upon the State's selling these properties, please provide your opinion to that effect to the members of the

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Mr. Fusco
Page 2
December 9, 2005

Budget and Control Board as soon as possible. We are concerned that the uncertainty raised by your August 3, 2005, letter, without further clarification, could undermine the value and timely sale of this property.

It is our opinion that a court would most likely conclude that the Department of Mental Health, as successor to the State Lunatic Asylum and South Carolina State Hospital for the Insane, is a "public charity" and that the Bull Street property is thus impressed with a charitable trust. Accordingly, we recommend that prior to any sale, the Department of Mental Health seek court approval of such sale, consistent with the basic principle that a court of equity must approve, by way of equitable deviation, any such transfer. Typically, any sale approved by the court requires that the proceeds derived from the sale be used in support of the trust. *See, Colin McK Grant Home*, 292 S.C. 466, 349 S.E.2d 655 (Ct. App. 1986) [equitable deviation permitted sale of trust property and use of proceeds to support the trust]. In the alternative, consistent with certain authorities, referenced herein, we suggest at the very least that the General Assembly allocate the proceeds of any sale to the Department of Mental Health for its use in the treatment of the mentally ill. Such allocation would be consistent with the General Assembly's longstanding practice of benefitting this public charity by devoting the proceeds of any sale of land or other property of the Department of Mental Health to the treatment of the mentally ill. However, the most prudent course of action and the one consistent with general principles of charitable trust, is that the Mental Health Board (trustees) and the Budget and Control Board (authorized to sell the property for the State) seek judicial approval of any sale before such sale occurs.

Law / Analysis

Historical Background

Before discussing the legal issues which are pertinent to your inquiry, it is important first to present a detailed factual background. The underlying history of the Bull Street property, and the perception of that property throughout the 19th and 20th Centuries will be of vital importance in determining whether the Asylum/State Hospital/Department of Mental Health is a "public charity" or whether the Bull Street property is impressed with a charitable trust. Thus, we present the following historical review, noting herein that we have not had the opportunity to examine every conceivable historical record which might shed light on this issue. From our review of existing sources, however, the following information is both pertinent and persuasive.

Efforts to establish an asylum for the insane in South Carolina began in the early nineteenth century. As has been stated by one authority,

[t]he South Carolina Asylum followed the earliest establishment of such a facility at Williamsburg, [Virginia] [T]he conceptualization of such an institution for the care of the insane in South Carolina actually predated 1813, the time when a Colonel [Samuel] Farrow, a congressman, attempted to rally support for the establishment of

Mr. Fusco
Page 3
December 9, 2005

such a facility. Efforts to secure financial support for this venture were thwarted by the nation's ensuing embroilment with the British

Hellams, "A History of South Carolina State Hospital (1821 to 1900)," Ph.D. dissertation, 1985, p. 7 (hereinafter cited as Hellams).

Undaunted, Farrow continued his efforts to establish an Asylum in South Carolina. In his history of the State Hospital, Superintendent J. H. Babcock writes that Farrow

... declined re-election to Congress in 1816 and declared himself a candidate for the House of Representatives of the General Assembly for the avowed purpose of establishing a lunatic asylum and a school for the deaf and dumb.

Babcock, *State Hospital for the Insane*, 587.

Despite the failure of this State's earlier efforts to create an Asylum, leaders persevered, and such an institution was ultimately established by legislative enactment in 1821. The Institution was named the State Lunatic Asylum. Daniel Trezevant, who later served as the Asylum's long-time physician, recalled the efforts of William Crafts – a Bostonian who immigrated to Charleston – in the movement to establish an Asylum in South Carolina:

[i]n a propitious moment, ... Crafts caught up the feeling, and by a bold and masterly *ad capitandum* speech, such as only he could make, arrested the public attention, gained the sympathy of the State, and carried captive to his eloquence the hearts and minds of the legislators. With zeal and earnestness they addressed themselves to the work of love and money, and our Asylum arose.

Trezevant, *Letters To His Excellency Governor Manning on the Lunatic Asylum*, (reprint Arno Press, 1973), p.4. Thus, the General Assembly enacted Act No. 2269 of 1821 and, pursuant to that Act, the Asylum was authorized as the second such institution for the treatment of the mentally ill established in the United States.

The General Assembly's purpose in creating the Asylum was clear from the Act's preamble: that "... *the benevolent purposes of society require, on the part of the State, a public institution for the reception and cure of lunatics*" (emphasis added). Commissioners of the Asylum were to be appointed "with authority to select, contract for and purchase a suitable site or sites, at or near Columbia, for the establishment of a lunatic asylum" The Act further authorized these Commissioners "... to draw out of the treasury of this State the sum of thirty thousand dollars, if so much be necessary, *to be appropriated to the purpose of purchasing such site or sites ... for the purposes of a lunatic asylum*" (emphasis added).

Shortly thereafter, in 1822, the Legislature enacted Act No. 2285 as part of the continuing implementation of the Asylum's creation. This statute ratified the selection of the site of the Institution and defined its purpose, requiring that

... the lot, upon which the Lunatic Asylum stands, containing four acres, butting and bounding on Upper, Boundary, Bull, Pickens and Sumter streets, be and the same is hereby vested in the Trustees and Visitors of said Asylum, *and their successors in office, for the uses and purposes expressed in an Act of the General Assembly* of the said State passed on twentieth day of December, in the year of our Lord one thousand eight hundred and twenty-one

(emphasis added).

The same year – 1822 – William Crafts, as noted above, one of the Asylum's founding fathers, delivered an eloquent oration on the occasion of the laying of the cornerstone of the Institution. Crafts spoke with great rhetorical flourish, yet left no doubt as to the Institution's charitable purpose in caring for and treating the mentally ill. His oration was in complete accord with the Legislature's earlier statement in the authorizing legislation that the Asylum was being created for "benevolent purposes.". Crafts began his address by proclaiming that

God made us for each other. Benevolence is the basis of his throne, and the foundations of the earth he laid in charity. What could it add to his power – the creation and government of perishable matter. What could it add to his dignity – the submission of weak and humble mortals. What could it add to his happiness – the brief career of imperfect beings, victims here of folly, there of misfortune, and every where of death.

Continuing his oration, Crafts observed that:

life was given us to do good, and he whose deeds have been charitable, sleeps not without a pillow of roses in his grave

The honor of States is to disseminate knowledge if these, I repeat be dear objects to the Philanthropist, does not as strong an inducement exist to aid by public care and exertion, the *recovery* of reason, when it is lost, as to cultivate it where it exists.

William Crafts, "Oration on the Occasion of Laying the Cornerstone of the S.C. Lunatic Asylum," 23 July, 1822, Caroliniana Library, University of South Carolina, Columbia, South Carolina pp. 5, 12-13. Thus, from the very beginning of the Asylum's existence, those who were responsible for its founding, including the General Assembly, deemed the Institution's purpose as one of benevolence, or charity.

The Asylum accepted its first patient in 1828. See, *Crouch v. Benet*, 198 S.C. 185, 17 S.E.2d 320 (1941). Although the original site for the Asylum consisted of only four acres, and its early evolution proceeded in fits and starts, over time, the growth of the Institution necessitated a number of purchases of adjacent properties by the Regents. Many of the deeds involving such purchases are still extant. A majority of these deeds contain no restriction upon the property's use, and are conveyed to the Asylum (or as it was later known, the State Hospital for the Insane), in fee simple. A few deeds do contain restrictive language such as "for the use and purposes of the State Hospital for the Insane." In no instance, however, is there a reverter clause in these deeds.

Typically, the Asylum's Regents paid a purchase price for the properties subsequently obtained, just as had been the case with respect to the original four acre tract. In other words, many of the deeds of purchase appear to be little different from the conveyance of property to any other state agency or governmental body. Thus, at first blush, this would appear to be evidence that these subsequent conveyances were not impressed with a charitable trust.

However, there is considerable documentation to the contrary. Indeed, just as those who founded the Asylum deemed its purpose to be one of benevolence or charity, it is equally evident that, in later years, both Asylum officials, as well as the Legislature and our Supreme Court, have considered the sole purpose of the Asylum to be a charitable one – the care and custody of the mentally ill in South Carolina. There is little doubt, as will be seen from the historical evidence, that those who administered the Asylum, and later the State Hospital, viewed it necessary to purchase additional surrounding properties to carry out the Institution's purpose of caring for and treating the mentally ill. These officials considered the after-acquired properties just as important to, if not more so, to the Hospital's purpose than even the original four acre site upon which the Asylum was founded. As will be demonstrated below, such charitable purpose is consistent with the general law in other jurisdictions recognizing that care for the mentally ill is indeed a charitable purpose. More particularly, the operation of an asylum by the government at public expense, is typically considered to be for a charitable purpose and to be a public charity. In short, we consider the documentary evidence to be overwhelming that the Asylum – later known as the State Hospital – and then, the Department of Mental Health – has always been considered to be a "public charity" and a "charitable institution."

Indeed, in its very first *Annual Report* of the General Assembly in 1829, the Asylum's Regents reported that "[t]he Asylum is now in successful operation, and promises to realize the benevolent intentions of its founders." *Annual Report of the Board of Regents to General Assembly*, 1829. Strikingly, in 1847, a joint legislative committee on the Lunatic Asylum issued a report which recognized the function of the Asylum as a charitable trust and which stated the following:

[t]he Committee, however, are of the opinion that the Regents [of the Asylum] have already ample powers to *adopt any measures of reform and improvement connected with the Institution and the great purposes of philanthropy which it intended to promote, which their wisdom and practical knowledge may approve, and that they*

Mr. Fusco
Page 6
December 9, 2005

have full control of the funds of the Institution in the discharge of their responsible and benevolent trust.

Reports and Resolutions of the General Assembly of South Carolina, Passed at the Annual Sessions of 1847, p. 117. (emphasis added). Moreover, in 1848, the General Assembly enacted legislation authorizing the Board of Regents of the Asylum to “close up, and use, *for the purpose of said Asylum*, that portion of Pickens Street “as lies between Lumber and Upper Streets” (emphasis added). *South Carolina Statutes*, Vol. XI, p. 520 (1848).

In 1851, the Regents reported to the Legislature that

[i]t is now about thirty years since, by their [the Legislature’s] benevolence it [the Asylum] was founded, and we think that the hopes of the State and those philanthropic gentlemen who persevered through evil and good report in its erection, have not been disappointed.

Reports and Resolutions, 1851, p.85.

Governor Means, in 1852, addressed the General Assembly in his annual message. He presented the view that the needs of the Asylum demanded immediate relief. In the Governor’s view,

[t]he Lunatic Asylum, *that charitable Institution* so creditable to the humanity of the State, demands your special care and attention.

If the Legislature will grant a further appropriation, it is proposed to enclose, with a wall, four acres of the lands belonging to the Asylum on the east side of it, and erect suitable buildings to accommodate the female patients. For this purpose, the Regents Physician and Superintendent ask an appropriation of \$30,000.

House Journal, 1852, p. 20.

Indeed, in December of 1852, a legislative committee recommended, and the General Assembly adopted, a concurrent resolution authorizing the appropriation of \$30,000 for additional improvements and “for the enlargement of the grounds [of the Asylum].” The Asylum’s Regents were empowered to purchase a tract “[a]djoining the lands of the Asylum” Such purchase was deemed by the Committee as desirable to “enhance the value of the lands of the institution” *Reports and Resolutions of the General Assembly*, 1852, p.176.

The “charitable” status of the Asylum was incorporated into the Constitution of the State in 1868. Art. XI, § 1 of that Constitution is entitled “Charitable and Penal Institutions.” Such provision stated that

[i]nstitutions for the benefit of the insane, blind, deaf and dumb and the poor shall always be fostered and supported by this State and shall be subject to such regulations as the General Assembly may enact.

Thus, the framers of the 1868 Constitution clearly concluded that any “institution[] for the insane,” such as the Lunatic Asylum, constituted a “charitable” institution. This is further demonstrated by the fact that Art. X, § 5 of the same Constitution states as follows:

[i]t shall be the duty of the General Assembly to enact laws for the exception from taxation of all public schools, colleges and institutions of learning, all charitable institutions in the nature of *asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons*, all public libraries, churches and burying grounds Provided that this exception shall be extended beyond the buildings and premises actually occupied by such schools, colleges, institutions of learning, *asylums*, libraries, churches and burial grounds, although connected with charitable objects.

(emphasis added). The 1895 Constitution likewise provided in Art. XII, § 1 under the heading “Charitable and Penal Institutions” that “[i]nstitutions for the care of the insane and the poor shall always be fostered and supported by this State, and shall be subject to such regulations as the General Assembly may enact.”¹ Again, the framers of the Constitution considered institutions such as the Asylum, to be “charitable” in nature.

In his Message of January 14, 1872, Governor Moses reiterated the thinking that the Asylum was a charitable institution. He recommended a number of items to the Legislature. Among his suggestions was the imposition of a tax for the support of the insane in South Carolina. The Governor implored the Legislature to enact

... an ample tax [to] be speedily and at once levied for the support of the Asylum, on the most liberal basis consistent with our surroundings, and to increase and improve its present accommodations, as far as is now expedient, in accordance with the recommendations of the Superintendent, as set forth in his report. The proceeds of this tax, if levied should be sacredly sequestered and faithfully applied to the *charitable object for which it will be designed*.

1872 *Senate Journal*, pp. 222-223. (emphasis added). Likewise, in 1874, the Governor again requested “[t]he levy of a specific tax for the maintenance of the charitable institutions” in order to meet the distressed financial needs of the Asylum. He advised that what was needed was “the strict sequestration of the proceeds to the object of the levy” of such a tax “as directed by the

¹ This provision of the Constitution has now been removed.

Constitution” This approach would “... be an efficient remedy of the diseased finances” of the Asylum “and would reflect credit upon our humanity and civilization.” 1874 *House Journal*, p. 91.

In 1878, the General Assembly appropriated funds for “Penal and Charitable Institutions” in the Annual Appropriations Act. See Act No. 496 of 1878. Clearly, the “penal” institution referenced was the Penitentiary; the “charitable” institutions enumerated were the State Orphan Asylum, the Deaf, Dumb and the Blind Asylum, the Palmetto Orphan Asylum, the Catawba Indians and the South Carolina Lunatic Asylum. The Legislature continued to view the Asylum as a “charitable institution” throughout this period. See, e.g., Act No. 413 of 1883 (Appropriations Act) [categorizing Lunatic Asylum for purposes of appropriations under the heading “Penal and Charitable Institutions”].

In 1886, Governor Sheppard, expressing the charitable nature of the Asylum, termed it as a “grand and beautiful monument to the benevolence of the people of the State” *Senate Journal*, 1886, p. 50. Governor Richardson, in his Annual Message in 1887, likewise emphasized the importance of the Asylum to the State from the standpoint of providing a public charity:

[t]his institution it seems to me is entitled as much, or perhaps more than any other, to the liberal support and fostering care of the representatives of the people, for there is scarcely a hamlet or township neighborhood in South Carolina to which its humane charity does not extend, lightening the crowding cares of many a household, and often restoring to usefulness in all the relations of life those who, without its gentle and skillful ministrations, would otherwise be lost to society, family or friends.

I am sure there is not a citizen of South Carolina who would demur at any reasonable taxation to sustain, in a manner consistent with the progress of the age, *the highest and most obligatory of all State charities*, so as to render it more effective for the accomplishment of the noble Christian and to which it is consecrated

Senate Journal 1887, p. 21.

And, in 1889, the General Assembly adopted Joint Resolution No. 193 to authorize the Board of Regents of the Asylum “To Enquire Into and Report Upon Suitable Localities For The Establishment of An Asylum For The Colored Insane....” Such Joint Resolution required notices in all the counties “to the effect that the policy of establishing a separate State Asylum for the colored insane has been under consideration by the General Assembly, and that said Board of Regents has been empowered to receive from Counties, communities or persons in this State bids or proposals to donate as least three hundred acres of land, with or without suitable buildings, or money to be used in the purchase of the same, one or more, or all, for the purpose of establishing such institution within the County....” The Regents were also authorized to inquire as to the possibility of the purchase of land in at least two counties of the State for such purpose. This requested donation again stresses the charitable nature of the Asylum.

In 1892, Governor Tillman, again emphasizing the Institution's charitable nature, called the Legislature's "attention to the fact that there are changes needed in the laws governing the admission of [Asylum] patients, so as to prevent *the State's charity* being abused." *Senate Journal*, 1892, p.10. (emphasis added). The Governor, in his 1894 message to the General Assembly, categorized the Asylum and the Penitentiary as the two institutions which fell under the heading "Penal and Charitable Institutions," obviously classifying the Penitentiary as "penal" and the Asylum as "charitable." *Senate Journal*, 1894, p.45. Likewise, in 1896, Governor Evans made the same classification (adding the Deaf and Blind Asylum to his list), recommending also to the Legislature the purchase of the "Wallace property" as "absolutely necessary to the needs of the institution in the future" *Senate Journal*, 1896, p.25.

Pursuant to Act No. 561 of 1894, the Legislature enacted legislation "To Further Regulate and Provide for the Admission and Discharge of Patients To the Lunatic Asylum, and Promote the Management of the Same." Such Act provided that "... the Lunatic Asylum of South Carolina shall be maintained *solely* for the support, custody and treatment of insane persons." (emphasis added).

And, in Joint Resolution No. 229 of 1896, the General Assembly authorized the Asylum's Regents to purchase additional lands. In that Joint Resolution, the Regents were empowered to "purchase the property known as the Wallace property, containing one hundred and eight (108) acres, more or less, with the buildings thereon, *for the use of the State Hospital for the Insane*, provided the price to be paid for said property shall not exceed twenty seven thousand dollars." (emphasis added).

By 1897, with the Asylum's purchase of the "Wallace property," Governor Evans noted in his message to the Legislature that the State Hospital's property "compares favorably with any institution of like character anywhere." *Senate Journal*, 1897, p.38. Then, in 1903, the "Seegers" property was authorized to be purchased by the Regents by Joint Resolution No. 180. Such Joint Resolution expressly stated that the "Seegers" tract was "for the use of the State Hospital for the Insane." The Board was authorized to spend no more than \$5500 for this 4 acres, and was also empowered to obtain a loan and give a mortgage for such purchase with the obligation to be repaid "from the fund realized from pay patients in the State Hospital for the Insane."

The purchase of the "Jones" property, consisting of 3¼ acres, was likewise authorized by Joint Resolution No. 672 of 1902. Again, the Legislature required that the property be "for the use of the State Hospital for the Insane." As before, the General Assembly authorized a loan to be taken out and a mortgage given.

Governor Ellerbe, in his Annual Message of 1899, once more addressed the pressing needs of the State Hospital for the Insane and recognized the Institution's charitable puprose. He recommended to the Legislature the following with respect to the Hospital:

[t]he proper support of *this helpful public charity*, which looks to the amelioration of one of the saddest of human afflictions, has always appealed successfully to the sympathies of the State's representatives, and should continue to do so.

Reports and Resolutions, 1899, Vol. 1, p. 182. (emphasis added).

In 1909, the Legislative Committee on Penal and Charitable Institutions of the State issued its Report to the General Assembly. The Committee reported that "they have made a complete examination of the books at the various institutions which they were required to investigate." A portion of the Committee's Report dealt with the "already crowded" condition at the State Hospital for the Insane and the need for "a more liberal appropriation." It is clear from the Report that the Committee deemed the South Carolina State Hospital to be one of "charitable institutions" under its auspices. *Senate Journal*, 1909, p. 404-405.

In 1915, by Act. No. 100, the Legislature created the "State Board of Charities and Corrections," which was primarily a board of an advisory nature. It is significant to note that, while the Board was to inspect certain institutions of "eleemosynary, charitable, correctional or reformatory character" at least once a year, the General Assembly required that "hospitals for the insane" along with the penitentiary and "the reformatories" must be inspected every six months. Moreover, the "superintendents of the state institutions" were mandated to submit to the Board of Charities and Corrections "such information as they may obtain concerning the financial condition of any inmate or of relatives liable for his or her support." Yet again, it is evident that the Legislature thus deemed the State Hospital for the Insane as a "charitable" institution.

Other similar evidence abounds. For example, in his 1909 Message No. 1 to the General Assembly, Governor Martin Ansel reported with respect to conditions at the State Hospital that "[t]his charitable institution is one that appeals to all of us and it must be sustained and maintained as its necessities require." *Senate Journal*, 1909, p. 37.

Likewise, there are numerous documented instances throughout the nineteenth century in which officials of the Asylum recognized the purpose of the Institution to be "charitable" in nature and that the Asylum constituted a "charitable institution." For example, an 1859 Report of the Committee of the Board of Regents to the General Assembly complained:

[w]e suppose the Legislature of South Carolina in establishing a *great and noble charity like this*, intended to support it; and it is therefore, only necessary to satisfy that honorable body that they have failed to do so, to secure the remedy promptly at their hands."

Annual Report of the Board of Regents of the Lunatic Asylum, 1859, p. 140. (hereinafter *Annual Report*). Daniel Trezevant, Asylum Physician, wrote in 1848 of the trustee relationship of the Board of Regents to the mentally ill, stating that "[t]he Regents of the Asylum are the only friends which

the Insane have, and it is to their influence that they look for protection and redress.” *Reports and Resolutions*, 1848, p. 7. And, in 1849, the Asylum’s Physician again counseled with respect to the duty of the Legislature to adequately fund the Institution:

[i]n the present state of civilization, when in every country the lunatic is looked after with the most scrupulous care, and every possible comfort given – a simple state of their wants should be sufficient to induce *the benevolent* to step forward with their aid.

Reports and Resolutions, 1849, p. 229. (emphasis added).

The Board of Regents likewise reported to the Legislature in 1851 that additional space at the Asylum was sorely needed in order to adequately treated the patients. Concluded the Board,

[i]n treating the future prospects of *this noble charity*, so honorable to the character of the State, the Committee (of the Board) are compelled to say, that unless the grounds are greatly enlarged, as well as the buildings, the prospect of future benefits to this unhappy class of unfortunates is at an end.

Reports and Resolutions, 1851, p. 4. (emphasis added).

In 1869, J. W. Parker, Asylum Superintendent, commented that “South Carolina could institute no nobler charity than an asylum for this unfortunate class....” *Reports and Resolutions*, 1869, p.260. And in 1874, Superintendent Ensor quoted from a Report of the Board of Public Charity of Illinois, which stated that “[t]he true view of these charitable institutions [such as for the insane] is, that they are of the nature of an insurance against disaster.” *Reports and Resolutions*, 1874, p.42. Ensor’s 1875 Report to the Legislature attached a petition to the General Assembly from Columbia businessmen pleading for payment of past due debts incurred by the Asylum. These individuals noted that the State could not “support an institution which had for the better part of a century excited admiration for its charity as well as its efficiency.” *Reports and Resolution*, 1875, p.58.

Subsequently, the Annual Report of the Board of Regents elaborated upon the Asylum’s purpose as follows:

[t]he members of the Board assume nothing beyond what is proved by actual results, in saying they have administered this *benignant charity of the State* as judiciously and effectively as, under the circumstances could have been done, and they urgently commend to the representatives of the people of South Carolina the liberal and continued care of and consideration of this institution, as appealing to their patriotism, their philanthropy and their Christianity, with the full assurance that the

recommendations of this Report are necessary to meet and fulfill the purposes of these sacred obligations.

Reports and Resolutions, 1883, p.821. (emphasis added). The Report of the Superintendent further reflected his perception of his duties in administering a public charity:

[t]hose who are charged with the administration of this *great charity* feel the full measure of their responsibility to the State, and have earnestly studied every method of economy.

Reports and Resolutions, 1886, Vol. 1, p.574.

Frequently, during this period, the Board's and Superintendent's *Annual Reports* referred to the Asylum as a "benignant charity," "noble charity," "great charity" or "noble State charity." See, e.g., *Reports and Resolutions*, 1994, Vol 11, p. 741 ["benignant charity"]; *Reports and Resolutions*, 1885, Vol. 1, pp. 625-625 [benignant charity]; *Reports and Resolutions*, 1890, Vol. 1, p.106 ["State's noblest charity"], p.116 ["great charity"]; *Reports and Resolutions*, 1980, Vol. 1, p.206 [requests care for the insane which becomes so noble a charity]; *Reports and Resolutions*, 1892, Vol.2, p. 331 ["noble charity"].

J. W. Babcock, who served as Superintendent of the Asylum for many years in the latter part of the nineteenth century and well into the twentieth, and who wrote a comprehensive history of the Asylum and State Hospital in 1915, noted that, in 1864, an effort was made by Confederate officers to obtain "the new asylum building east of Pickens Street as a prison for Northern officers." However, in Babcock's words, "... the regents *declined to yield their trust for other than its original purpose*" Babcock, *State Hospital for the Insane*, p. 598.

Moreover, in this period, the Board espoused the well-recognized view that, as a charity, the Asylum must conduct its affairs with the utmost economy and efficiency. In its Rules and Regulations for the Government of the Asylum, the Board stated:

[t]he same principles of economy, order, and efficiency which regulate a well-managed private enterprise should prevail in a *charitable institution supported by the taxes of the people*; and a disposition towards extravagance or wastefulness in any form will disqualify any person from employment here.

Reports and Resolutions, 1891, Vol.1, p.281. Continuing, the Board added:

[i]n one word, let it be the determined purpose of all persons in any way connected *with this noble charity* so to order their lives and establish their characters that the people of the State, by whose liberty the Asylum is maintained, may feel a reasonable

assurance that its benevolent functions and purposes are faithfully and efficiently performed.

Reports and Resolutions, Id.

Even more importantly, it appears that the Board of Regents perceived that the Asylum's property was impressed with a charitable trust. The 1891 Rules and Regulations recognized that

[t]he South Carolina Lunatic Asylum was established and is maintained by the State for the benefit of the insane alone.... *The institution and all of its resources belong to the patients as beneficiaries of the State's charity....*

Id. at 280-281.

As will be discussed more fully below, the need for expansion of the Asylum's grounds was also a continuing problem for the Board of Regents over the years. Superintendent Babcock described the continuing effort by the Board of Regents to acquire more land in order that the Asylum could fulfill its purpose more effectively. He wrote that

... [t]he appeals for more land which for nearly 40 years had been reiterated in vain in successive [annual] reports [to the Legislature] were finally heard when presented by Dr. Griffin [superintendent] and the regents. Thus we find the Wigg Farm bought in 1877, the Parker Farm in 1878 and the Black Farm in 1881.

Babcock, *State Hospital for the Insane, supra*, at 602.

In his history, Babcock also noted the difficulty the Asylum faced in the actual purchase of needed properties as part of its expansion in the treatment of the mentally ill. Babcock recognized the fact that the Asylum was located in the City posed a considerable obstacle in acquiring additional properties. Prospective sellers were, of course, anxious to turn a large profit. Superintendent Babcock observed that "[t]he regents have from time to time been forced to purchase such tracts of adjacent land as were offered for sale at seemingly high prices, and the patients have not been able to enjoy the amount of liberty they might have had were the institution located a few miles in the country." *Id.* at 595.

In addition, the methodology of financing the care for the patients over the course of the Asylum's history is instructive. In a brief history of the Asylum, prepared for the Legislature by the Regents at the turn of the century, in 1900, the President of the Board chronicled:

[f]or many years only the more violent insane were committed to its [the Asylum's] care. Although during that time many patients were received from adjacent States,

nearly thirty years passed before one thousand patients had been admitted. These patients were supported by their friends or their Counties, and it was not till about 1871 that the institution became a direct expense on the State treasury and "State care" of the insane became a part of the more humane public policy.

Reports and Resolutions, 1901, Vol. 2, p. 1427.

In the early 20th century, Superintendent Babcock prepared a detailed study of the history of public charities in South Carolina. His study, parts of which were evidently encompassed in his book, *State Hospital for the Insane*, see, *ante*, was attached as an appendix to the 1905 Report of the Board of Regents and was entitled "The Growth of Public Charity In South Carolina." As part of this valuable study, Babcock documented the trials and travails of the Asylum's growth and development. For example, the Superintendent quoted the Asylum's long-time physician, Daniel H. Trezevant, regarding the failure of the Legislature to properly fund the Asylum in the decades following the founding of the Institution. Trezevant bemoaned the fact that even though at the outset "... I thought our little State was far in advance of our sisters, ... it was painful in '45 and '50 to see how inferior were our accommodations, when compared to other institutions." He further stated that "I confess I do not look to the purse of the Legislature, when I am acting for the insane. My thoughts are first and principally to what is most for their benefit" *Reports and Resolutions*, 1905, p. 943.

Superintendent Babcock concluded this study of public charities in South Carolina – a study which, as seen below, considered the State Hospital as the State's foremost public charity – by summarizing the highs and lows of the Institution over a century. Despite hard times, Babcock noted that "[t]he [Asylum's] Regents have always endeavored to administer their charge upon principles of the broadest charity." *Id.* at 941. Though discouraged by a lack of public resources, Babcock never wavered in his faith in the public at large:

[f]inally, it may be confessed that one of the purposes of this long, though imperfect, review of an important subject has been to demonstrate that there has been present here in South Carolina for over 200 years a well defined idea as to the needs of public charity properly bestowed. Once kindled, the idea has never been extinguished. It has had its advocates from generation to generation. It has not been solved by legislative indifference, by the ingratitude of its beneficiaries, nor by war itself.

It is nearly a century since Samuel Farrow conceived the idea of an asylum For years he failed to secure attention. Then, at length, the General Assembly of 1821 (be it remembered with honor!) in advance of its time listened and said: "Let there be an asylum." Forthwith it was begun, but ere it was completed Farrow and Crafts, his coadjutor, had each gone to his reward. Then Davis, the pioneer, directed the young institution through a most hazardous and discouraging experimental stage, when even the Regents were disheartened. Trezevant followed, sagacious and

intrepid, who raised his prophetic voice against a city location in vain for thirty years. For over forty-five years Parker steadfastly kept the faith and remained at his post, even amidst the ravages of war and the humiliations of Reconstruction. Besides these, from the beginning, Board of Regents – men of fair renown, selected for their wisdom and foresight, as well as physicians superintendents yet living – have battled right manfully for the claims of the insane before Governors and honorable Committees of the General Assembly and results have slowly followed.

But through it all there does not run in our minds a reasonable doubt whether the State – that is the people: farmers, businessmen, doctors, lawyers, ministers, legislators, Governors, Christian men and women, if you please – whether these have even given *the most worthy public charity in their midst* the full measure of its deserts? Would not more prompt response to some of the repeated appeals in the past – the abolition of wooden buildings for patients, for instance – have followed a more generous and active charity? Have not important problems connected with the development of the Asylum received less consideration than they merited? Have County officials always protected the institution with the same fidelity they have given to local interests?

Id. At 957-958.

The characterization of the State Hospital as a “charitable” institution has continued well into the twentieth century. For example, in 1935, Governor Olin D. Johnston, in his Inaugural Address, presented his views concerning the “Penal and Charitable Institutions” of the State. He first discussed the Penitentiary as a “penal” institution. The Governor then presented his recommendations concerning the State Hospital (the “charitable” institution), proposing that “a committee be named to ascertain the needs of the State Hospital, which is badly over-crowded with a view to eliminating the congestion as early as possible” *House Journal*, 1935, p. 73. In 1952, the Committee to Study Public and Private Facilities for Mental Health and Mental Health Laws made its Report, which resulted in an overhaul of the State’s mental health laws that same year. *See*, Act No. 836 of 1952 [establishing the Mental Health Commission, etc.] . In its *Report*, the Committee, chaired by Representative Werber Bryan, decried the free treatment being provided by the State Hospital for those patients able to pay, noting that “... the idea seems to be prevalent that our State Hospital and State Training School are purely charitable institutions.” *House Journal*, 1952, p. 40.

Donations to the Asylum

It is important also to note that the Asylum has been the beneficiary of numerous donations and contributions over the years. Not only were gifts of a charitable nature contributed, but funds were donated which helped the Institution purchase property which enabled the Asylum to better

carry out its purpose. We cannot enumerate all those donations, but set forth the following as examples of public benevolence to this Institution.

For example, newspaper editors donated papers for the patient's use and enjoyment. *Reports and Resolutions*, 1852, p. 86. In addition, friends of the Asylum donated books for the Institution's library. *Id.* Postmasters contributed unclaimed newspapers and periodicals.

In addition, when the Asylum experienced its greatest crisis, during the Civil War and its aftermath Reconstruction period, donations and contributions helped keep the doors of the Institution open. Superintendent Babcock, in his work, *State Hospital for the Insane* recounts these various acts of benevolence in some detail. For example, he writes:

[a]t one time, when the State (Republican) government refused to provide the means of maintaining the institution, and when its officers could no longer obtain credit for necessary supplies of food and clothing in Columbia or Charleston, Dr. Ensor (Superintendent) obtained from benevolent Quakers in Philadelphia the sum of \$10,000 upon his personal note. In this way the institution was tided over a grave emergency. After the restoration of state government to the Democrats, Dr. Ensor's note was taken up by order of the General Assembly and paid from the state treasury.

Babcock, *State Hospital for the Insane*, *supra* at 600.

Similarly, Babcock quoted Superintendent Ensor's comments from his 1875-1876 *Annual Report* as follows:

"[i]f the institution is kept open at all it must be done on credit and credit is an expensive article and often hard to procure at any price. After exhausting the credit of the institution, I have been obliged to use my own means and credit and the credit of my friends for its maintenance or close its doors. Every year I have been compelled to beg and borrow and to submit to all sorts of impositions and humiliations, to give my personal obligations and those of my friends, in order to keep the institution open. Even within the past two months of this reformation and good government I have been obliged to give my private notes in order to obtain the necessary subsistence and clothing for our inmates."

Babcock, *supra* at 600-601.

Anticipating donations to the Hospital, the General Assembly later codified the Department of Mental Health's authority to accept gifts and donations, again demonstrating the charitable nature of the State's treatment of the mentally ill. Section 44-9-110 provides that

[t]he Mental Health Commission may accept on behalf of the Department of Mental Health or any of its facilities or services, gifts, bequests, devises, grants, donations of money or real and personal property of whatever kind, but no such gift or grant shall be accepted upon the condition that it shall diminish an obligation to the Department.... Any gift or grant giver to a specific facility or service shall be used for that facility or service only, or to its successor.

Land purchases were also facilitated by the generosity and benevolence of charitable gifts. In his history of public charities in South Carolina, Superintendent Babcock paid tribute to the work of Dorothea Dix, the great humanitarian, in coming to the aid and assistance of the Asylum. He recounted the following:

[i]n the 70's Miss Dorothea L. Dix, the life-long friend of the insane in this and other states and countries, collected by private subscription in Charleston and elsewhere \$3300. This sum was invested in 4 percent bonds of the City of Charleston, which were placed in the hands of a Trustee, with instructions that the income be spent under the direction of Dr. Parker for the pleasure and comfort of the patients. After several years, upon the death of the distinguished Trustee, the bonds disappeared, and were only recovered in 1894 through the efforts of the late A. H. Hayden of Charleston, a former Regent, and of Mayor J. F. Ficken and Corporation Counsel Charles Inglesby. This fund secured under authority of the General Assembly to make part of the first payment on the Wallace purchase, and, next to the approval given the proposed purchase by Governor Evans, was one of the most important aids in securing that valuable property. In recognition of the aid thus rendered the institution by Miss Dix even after her death, the largest building on the Wallace land was devoted to convalescent white women and has largely added to their "pleasure and comfort." This building is appropriately called the Dix Cottage.

Reports and Resolutions, 1905, p. 955. Indeed, the General Assembly, in authorizing the purchase of the "Wallace property" in 1896, recognized the "Dix Fund" donation, providing in Joint Resolution No. 229 of that year, that

...the said Regents are authorized and empowered to borrow a sum of money not exceeding the difference between the sum realized from the sale of the bonds (known as the Dix Fund) and the amount paid for the property....

As well, Superintendent Babcock, in his *State Hospital for the Insane*, also mentioned another possible donation of property to the Asylum at very nearly the beginning of the Institution's existence. Babcock chronicled that

[a]s already indicated an acrimonious controversy regarding a change in the location of the asylum was waged from 1848 to 1856. One faction, led by

Dr. Trezevant, wished to abandon the original site in the City of Columbia, and rebuild several miles out in the country. The other side of the question was advocated by Dr. Parker, who preferred to retain the original Mills structure, and erect additions *upon adjoining property, some of which had probably been obtained by gift from the Taylor family.*

Babcock, *State Hospital for the Insane, supra* at 606. While there is no proof of the connection, we note that one of the Hospital's buildings was subsequently named the "Taylor Building."

Legislative Regulation of The Asylum/Hospital/DMH

There is no question that, from the very outset, the General Assembly has been intimately involved in the development of the Asylum/State Hospital/DMH over the nearly two hundred years of its existence. Indeed, it was legislative action which authorized the Lunatic Asylum's creation. As has been demonstrated in some detail above, the General Assembly authorized a number of land acquisitions, amendments to the law regarding the commitment of the mentally ill to the Institution, the closings of streets around the campus, and virtually every other change in the structure of the Institution over the years.

Previously, the Legislature has debated possible moves of the Asylum campus to other locations on a number of occasions. As indicated, a move to the "countryside" was contemplated in the late 1840s and 1850s for the well-being of the Asylum's patients. As Superintendent Babcock has described the rancorous debate regarding the contemplated move,

[m]eanwhile, about forty acres of land lying east of the Asylum, had been secured for gardening and farm purposes. The location of the institution practically within the city has always proved a serious drawback. By 1848, demands for the admission of new patients forced the question of the advisability of erecting new buildings near the old site in Columbia, or selling the buildings and land and moving into the country. Upon this question there was difference of opinion among the Regents, the physicians and the General Assembly. At one time the controversy was so bitter it almost led to a duel. Finally, the General Assembly, in 1856, took the matter in hand, and directed that new wards be constructed upon lands lying east of Pickens Street.

Reports and Resolutions, 1905, p. 941.

Those who favored moving the Asylum to a more suitable location advocated using the proceeds from the sale for the new facilities. For example, Dr. Trezevant, the Asylum's Physician, argued to the General Assembly in 1855 that

I need only now say, that there is not sufficient land, nor can ... [there be an amount] of a proper land be obtained, to add to its extent, and what can be obtained

does not lie well for our use. A street intervenes between the homestead and the main body, and there is barely sufficient [land] for pleasure grounds; and if the new building is erected on the spot prepared for it, it will be within the corporate limits of the city. That it is valuable, and will sell for far more than a better site, with the proper portion of land, can be obtained. One hundred acres is the minimum called for by the Superintendent The same quantity of land [recommended for the proper treatment of the insane to be 250-300 acres] should be purchased for an institution such as the State ought to endow, and the quantity cannot be purchased adjoining us. Less than 250 ought not to be bought, for the patients require space; occupation is necessary; they should have diversified employments. Exercise is absolutely essential, and it should be within their own limits; but these cannot be effected in the present location, and it creates the necessity for our removal.

Reports and Resolutions, 1855, p. 146.

Once the issue of the Asylum's continuing location on the Bull Street property was settled in 1856, and the trauma of the intervening War and Reconstruction was finally at an end, the Institution began to expand rapidly in population during the latter part of the nineteenth century. As noted above, the General Assembly continued to authorize the purchase and acquisition of adjoining properties for the treatment of the mentally ill. Yet, the problems of overcrowding and the presence of the City of Columbia in near proximity continued. In 1903, the Legislature found it necessary to authorize the State Hospital Regents to

close up and use so much of the extension of Gregg Street to Elmwood Avenue and the extension of Elmwood Avenue to Laurens Street in the City of Columbia, as adjoining the Seegar's property so as to better secure the privacy of the Institution: Provided, that before the closing up of said parts of streets, the Regents of the State Hospital for the Insane shall open up and extend Lumber Street for its full width, for the use of the public in an easterly direction to Harden Street.

Joint Resolution No. 111 of 1903.

In 1909, the issue of overcrowding and methods of treatment at the State Hospital reached a boiling point and the General Assembly ordered an investigation. The majority report of the legislative investigating committee recommended the sale of the Bull Street property, noting in its Report that "since the Hospital land is worth at least \$400,000 if sold for building purposes, and a new hospital to care for 1,000 patients will cost less than \$700,000, we recommend that new hospitals be built and the present buildings then sold." "Report of the Legislative Committee to Investigate the State Hospital," *Reports and Resolutions*, 1909, p. 532.

Superintendent Babcock described the impact of the legislative investigation as follows:

[t]he investigation served to direct public attention to the overcrowded conditions and inadequate accommodations of the patients in a way probably not to be secured by less drastic measures.

Babcock, *State Hospital for the Insane, supra*, at 607. He noted that, as a result, he was appointed as chairman of a commission to "purchase lands for the use of the hospital and to have plans and specifications prepared for the buildings to relieve the congested conditions." According to Babcock,

[a]fter thorough study of the whole situation, the commission, after visiting several locations where land was offered, finally unanimously decided to purchase the site for the hospital the location in the neighborhood of Dent, ... seven miles north of Columbia or six miles from the original asylum. This decision was reached because the site presented the features of healthfulness, accessibility and water. During the year, feeling that they were planning perhaps for all future needs of State, the commission purchased 1935 acres of land at a cost of \$53,000 besides securing options on adjacent tracts. The commission reported to the Legislature that they had only authority (under the act creating them) to plan for the enlargement of the hospital and that it was not practicable to remove the entire hospital from Columbia, but that they had planned to remove first the colored insane. They furthermore suggested that at the same time in the future the General Assembly might deem it wise to dispose of all the property in Columbia, and remove into the country, the white insane as well as the colored, for all of which purposes ample land had been provided.

Id. Babcock added that the new commission purchased additional property in the area – 226 acres at a cost of \$7,737.

In 1912, the General Assembly, by Joint Resolution No. 578, provided that "it is desirable and necessary for reasons of economy and sanitation gradually, but as rapidly as convenient, to remove the entire plant of the State Hospital for the Insane from its present site in the City of Columbia to the lands recently purchased by the State Hospital Commission, known as 'State Park. ...'" Further, the Joint Resolution recognized that proceeds from the sale of the Bull Street lands would be used in the payment for new facilities declaring that

[w]hereas, by the ultimate sale of the property of the State Hospital for the Insane in and at the said City of Columbia, the State of South Carolina will, in a large measure, be able to provide a sufficient fund for the payment of any obligations incurred in the construction and equipment of a new plant....

The Joint Resolution further provided for a bond referendum of one million dollars for the new plant and for a sale "under the direction and supervision of the State Sinking Fund Commission, of the

property now owned by the State in the City of Columbia, and used and occupied by the said State Hospital for the Insane.”

Section 3 of the Joint Resolution stated that

[i]n case the sale of the property herein referred to should raise an insufficient fund to pay the said bonds at maturity, then the General Assembly shall annually levy a sufficient tax upon all the property in this State subject to taxation to make up said deficiency and provide a sum sufficient to pay all of said bonds at maturity.

The public did not approve the proposed constitutional amendments for the bond issuance and the sale of the Bull Street property to assist in the repayment of such bonds. Thus, Babcock’s Hospital Commission reported in 1913 that “[i]t will be necessary for the present General Assembly to make some provision for carrying on the work of State Park.” *Reports and Resolutions*, 1913, Vol. 3, p. 491.

Additional legislative investigation of the operation of the State Hospital, both in 1914, and 1915, followed. In the 1914 Report of the Special Legislative Committee, the Committee found that State Park

is ideal and admirable adopted to and for the uses for which it was purchased, and ought to be developed as the State can afford to do so to the end that the great congestion now existing at the State Hospital for the Insane may be gradually and completely relieved.

Reports and Resolutions, 1914, Vol. 4, p. 641. As part of that investigation, Babcock expressed his opposition to the sale of the Bull Street property, noting that “ I think it is necessary for the State to have a psychopathic hospital near the city to receive acute cases of nervous diseases....” *Id.* at 680. Likewise, Governor Blease stated therein that he had opposed the legislation (in 1912 authorizing the bond referendum and Bull Street sale), stating that “nor do I propose to have anything to do with the sale of it.” *Id.* at 698.

Governor Richard I. Manning, upon assuming office in 1915, led the effort to overhaul the Hospital. He “first directed the attention of the General Assembly to the pathetic conditions” at the Institution. As part of the focus of public attention,

[a]n investigation showed that approximately 1700 imbeciles, idiots, tuberculosis patients and mental cases were crowded in dilapidated, unsanitary firetraps. The food was poor, the patients were not satisfactorily classified or treated, and the hospital had only two full-time and two part-time doctors. The legislature approved a complete reorganization under the direction of Dr. C. Fred Williams.

Lander, *A History of South Carolina*, 1865-1960, p.54. A one half mill tax upon all taxable property was imposed by the General Assembly "to provide for the payment for the development and repairs of the State Hospital for the Insane in the City of Columbia and at State Park." *Reports and Resolutions*, 1916 Vol. 3, p. 349. Thus, as in 1856, the decision and commitment was made to maintain the Bull Street Campus in Columbia for the continuing care and treatment of the mentally ill in South Carolina.

Sales of State Hospital property were, in fact, authorized by the General Assembly over the years. For example, in 1951, Sections 19 of Act No. 380 of 1951 authorized the Board of Regents "to sell the property located at the southeast corner of Wheat and Harden Streets in Columbia, and to deposit the proceeds of such sale to the credit of appropriations heretofore made for permanent improvements at the State Hospital." In 1949, the State Hospital was authorized to transfer all dairy cattle and equipment to the Board of Directors of the Penitentiary and, in exchange therefor, "milk will be delivered free of charge to the State Hospital." Act No. 352 of 1949. By Act No. 910 of 1960, the Mental Health Commission was directed to convey a tract of land in Richland County to the State Education Finance Commission and to sell timber on such lands. Proceeds from the sale of timber were to be credited to the South Carolina State Hospital Maintenance Account. Act No. 910 of 1960.

Act No. 422 of 1963 authorized the Hospital to sell land to the Ebenezer Baptist Church. Proceeds from the sale were to be credited to the South Carolina State Hospital Chapel Fund. Pursuant to Act No. 616 of 1971, the State Mental Health Department was directed to grant certain rights of way and to sell certain property to the State Highway Department and South Carolina Electric and Gas Co. The proceeds derived from such transactions were to be used for permanent capital improvements of the Mental Health Department.

In 1974, Act No. 1309 required the Department of Mental Health to transfer to the Budget and Control Board property for the construction of a building for the South Carolina Employment Security Commission. And, in Act No. 644 of 1978, a proviso required "[t]hat funds received by the Department [of Mental Health] from the sale of timber be retained by the Department and expended for permanent improvements with the approval of the Budget and Control Board." Act No. 201 of 1985 contained a Proviso authorizing the Department of Mental Health to "apply funds from the sale of surplus land in Richland County less expenses of the sale to the purchase of lands under option in Anderson County" with any remaining funds going to the General Fund.

Beginning in 1991, a Proviso was inserted in the Appropriations Act which authorized the Department of Mental Health to "retain revenues associated with the sale of property and may expend these funds on capital improvements approved by the Joint Board Review Committee and the Budget and Control Board." This Proviso remained unchanged through the 1997 Appropriations Act. In 1998, pursuant to Act No. 419, the Proviso was changed slightly to read as follows:

[a]fter receiving approval from the Budget and Control Board for the sale of property, the Department may retain revenues associated with the sale of property titled to or utilized by the Department and may expend these funds on capital improvements approved by the Joint Bond Review Committee and the Budget and Control Board.

This identical Proviso was contained in the 1999 Appropriations Act.

Interestingly, in the 2000 Act, Act No. 387 of 2000 repeated the previous Proviso, with one additional sentence added thereto: "Property titled to the Department or to the Board of Regents in the Central Columbia Campus may not be transferred to another entity without the approval of the Commission on Mental Health. However, as before, if such sale or any sale occurred, the funds from such sale were required to be retained by the Mental Health Commission for expenditure upon capital improvements. This modified Proviso, requiring the approval of the Mental Health Commission for the sale of any Bull Street property, was also contained in the 2001, 2002, and 2003 Appropriations Acts.

The Proviso, however, was deleted from the 2004 Appropriations Act, replacing it with Proviso 73.18 which provided for a "comprehensive central property and office management facility process to plan for the needs of state government agencies and to achieve maximum efficiency and economy in the use of state owned or state leased real property." As part of such process, the General Assembly expressed its approval of the sale of the Bull Street property by stating that "[t]he property that the Board should consider for sale includes but is not limited to: Department of Mental Health – Bull Street Complex."

In the 2005 Appropriations Act, the General Assembly enacted Proviso 63.40, which was vetoed by the Governor, but overridden by the Legislature. Such Proviso provides in pertinent part:

[u]p to 50% of the proceeds, net of selling expenses, from the sale of surplus real properties shall be retained by the Budget and Control Board and used for the deferred maintenance of state-owned buildings. The remaining 50% of the net proceeds shall be returned to the agency that the property is owned by, under the control of, or assigned to and shall be used by that agency for non-recurring purposes....

Additions to Bull Street Property Over the Years

We have alluded previously to the fact that the majority of deeds relating to properties subsequently acquired by the Asylum/State Hospital do not expressly state that the property is held in "trust" or that it was dedicated to Asylum use. However, extant historical evidence clearly indicated that Asylum officials thought of the subsequent additions to the Bull Street tract as part of the integrated whole and as a means to better assist the Hospital in the treatment of the mentally ill. A few examples of this perception are set forth below.

In 1852, Asylum Physician, Daniel Trezevant who favored removing the Asylum to the countryside, recommended to the Regents (and Legislature) as an alternative:

[a] building can be erected in the garden lot, and the land which we own around will enable us to give considerable space for the exercise, etc. so essential to their well doing. This will effect a very great improvement; and though it will not rid us of the annoyances of the town, one can have at least ten acres, or more, for their use, with fine water of easy access, and if you would purchase a small tract of land adjoining us and now for sale, we would have abundance of water at a very slight expense. Taylor's lots and spring are now in the market, and I would most earnestly advise you to become the purchaser. To erect such buildings as our exigencies demand will cost about \$30,000. With that sum, sufficient accommodations can be supplied for our immediate wants....

Reports and Resolutions, 1852, p.78. By 1854, the Regents reported:

[h]ere we have fifty five acres of land – a large portion of it suitable for gardening and farming purposes – and we understand that a few more acres may be added to it at a reasonable price, so situated that we cannot be crowded by the town on the east or on the north, near to market, and to on active and intelligent population that have always taken an interest in its success and management, healthy and with an abundance of good well and hydrant water, gas, lights and ain any other advantages not to be had remote from all neighborhood.

Reports and Resolutions, 1854, p. 118. And, in 1868, the Board of Regents summarized the Asylum grounds thusly:

[o]ur farming for want of more land is confined to 60 acres; we could have cultivated double the quantity....

It is to be regretted the Asylum does not own a good farm. The most of the land cultivated is private property.

Reports and Resolutions, 1868, p. 133.

Following the ordeal of Reconstruction, and the return of the Asylum to a sounder financial footing, the Regents sought additional land in order to assist in the custody and the care of the mentally ill. The Regents reported in 1880 that

[u]nder this head may appropriately be mentioned a recent addition to the farm. Appreciating the advantages, both sanitary and economic, of outdoor employment of the patients, your Board has long felt the need for more land for the Asylum. When,

therefore, a month ago, an opportunity occurred of purchasing the adjacent Parker farm, the Board felt fortunate in having managed to save enough from the annual appropriations to secure so important an addition to our lands.

Reports and Resolutions, 1880 p. 241. In that same Report, the Board noted that “[i]t gives me pleasure to report that we have at last been able to purchase a half acre lot in Elmwood Cemetery, where our dead may be buried in a manner more acceptable to our friends.” *Id.* And, in its 1900 Report, the Regents, presenting a history of the Asylum to the Legislature, summarized land acquisitions in the latter part of the nineteenth century as follows:

... from time to time, have been added to the original possessions by purchase for farming and dairy purposes the Wigg place, the Black place and the Parker farm. In 1895, the Wallace property, containing 110 acres was bought and devoted to the purposes of the patients and the farm.

Reports and Resolutions, 1901, Vol. 2, Part 2, p.1428. Finally, Governor McSweeney chronicled the Asylum’s growth and expansion in 1903:

[b]egun in a small way as an experiment before the care of the insane had been adopted by other states, except Virginia, the asylum has grown far beyond the expectations of its founders and early managers. Through the foresight of the regents the original property has been gradually enlarged by the purchases of adjoining tracts of land till the institution now owns almost 300 acres. Of this about 50 acres are occupied by the various building assigned to hospital, administrative, residential and mechanical purposes and for exercise grounds of the patients, the remainder used for farming and gardening and thus largely reducing the *per capita* expenses.

Reports and Resolutions, 1903, p. 300. Concerning the Asylum grounds, the Governor added:

[t]he State, therefore, has carefully located and practically within Columbia, *for the charitable maintenance of its defective classes, a large plant now approximating in value a half million dollars.*

Id. (emphasis added).

Supreme Court Decisions

Our Supreme Court has also recognized that the Asylum (which later became the “State Hospital for the Insane,” otherwise known as the “State Hospital” and even later, “the Department of Mental Health”) has always served a purpose charitable in nature and is, in fact, a public charity. In *Crawford v. Johnston*, 177 S.C. 399, 181 S.E. 476 (1935), for example, the Court reviewed the constitutionality of a bond statute which authorized the issuance of bonds for a number of state

institutions, including the State Hospital for Insane, the State Training School for the Feeble Minded, the School for the Deaf and Blind and the South Carolina Sanatorium. The Act was attacked on the basis of, among other things, that it constituted "special legislation" for purposes of Art. III, § 34 of the Constitution. Our Supreme Court rejected such argument, concluding as follows:

[i]t is also argued that the act in question violates section 34 of article 3 of the Constitution, which forbids the enactment of a special law where a general one can be made applicable. The contention is that the statute does not affect *the state-supported charitable institutions* equally, some of them not being benefited at all, and for that reason the act is invalid.

The objection is without merit. None of the inhibitions named in section 34 of article 3 appears to be applicable here. Furthermore, it is doubtful if a general law would meet the situation presented, as the institutions named in the act have their own peculiar requirements.

181 S.E. at 479. (emphasis added). It is thus significant that in *Crawford*, the Court referred to the State Hospital as a "charitable institution."

Even more telling is the Supreme Court's decision in *Crouch v. Benet, supra*. This decision is highly instructive with respect to the charitable status of the State Hospital. There, a taxpayer brought suit to enjoin the Board of Regents from issuing certificates of indebtedness, the proceeds of which were to provide additional buildings at the South Carolina State Hospital and the State Training School. The constitutional challenge to the legislation authorizing such certificates of indebtedness was based upon the argument that the provision contained in the Appropriation Act constituted "special legislation." Rejecting this argument, our Supreme Court took the opportunity to discuss at length the purpose of the State Hospital and its status under the law. The Court reviewed the history of the State Hospital and concluded as follows:

[w]e may digress here to say that in no sense of the word is legislation in behalf of the State Hospital for the Insane logrolling in its nature, for the purpose of securing the passage of measures in its favor could not succeed otherwise upon its own merits. Historically, we are told by Judge John Belton Oneal, the State Hospital for the Insane originated with Captain Samuel Farrow, of Spartanburg District, upon seeing by the roadside oftentimes on his way to Columbia, a poor woman from Greenville, who at the sessions of the Legislature visited Columbia for many years. With the cooperation of the cultured lawyer, William Craft, Esq. of Charleston, the Legislature was prevailed upon by these gentlemen to pass a creative act in December, 1821, authorizing the erection of a suitable building for an asylum for the unfortunate mental patients and sufferers in the State and a school for the deaf and dumb. The first building which was designed by the State Architect and Engineer, the renowned Robert Mills, was erected in 1822, and is still in use in the City of Columbia as

probably the oldest building now standing in the United States built by a State for the insane.

On December 12, 1828, while the Legislature was then in session, a young white woman was received as the first patient of the State Hospital for the Insane (then known as the State Lunatic Asylum), and her mother was appointed matron to care for her. South Carolina was, therefore, the pioneer of the southern states in the care of the insane. The State Hospital for the Insane has been supported, maintained, and at times greatly improved by the addition of other modern buildings pursuant to Acts of the Legislature and by means of appropriations for this most worthy, humane and beneficent purpose as a State Institution. It is the long established and settled policy of the State to adequately provide funds each year to carry on *this benevolent public charity*

It is not only a wise provision of the law, but it is the long established public policy of the State to own, operate, foster and support the State Hospital for the Insane by legislative enactment from time to time and from year to year. All of the demands of society and a humane regard for the welfare of the helpless members of society who because of mental infirmities cannot care for themselves, as well as the mandate of the Constitution of the State, require that legislative appropriation shall be made often as may be necessary *to carry out this purpose*.²

17 S.E.2d at 323-324 (emphasis added). Thus, the Court reached the same conclusion as had the Legislature and officials of the Hospital (Asylum) repeatedly over the years – that the Hospital and its entire operation constitutes a “public charity.” Moreover, it is clear that the Court did not distinguish between particular tracts of the Bull Street property and considered the entire State Hospital Institution to be a “benevolent public charity.” *See also, Minter v. State*, 258 S.C. 186, 187 S.E.2d 890 (1972); *S.C. Mental Health Comm. v. May*, 226 S.C. 108, 83 S.E.2d 713 (1954) [the maintenance and care by the State of the mentally ill is not “an unconditional charity” but is based upon expectation of future reimbursement if circumstances thereafter permit].

Governing Law Concerning Charitable Trusts

Having reviewed the history of the State Hospital in some detail, we turn now to the applicable law. Our Supreme Court has recognized that “[t]he requisites of a valid private trust and one for a charitable use are materially different.” *Porcher v Cappleman*, 187 S.C. 491, 198 S.E. 8, 10 (1938). A private trust requires that “there must be not only a certain trustee who holds the legal

² It should be remembered that at the time the Court decided *Crouch v. Benet*, Art. XII, § 1 of the Constitution required that “[i]nstitutions for the care of the insane and poor shall always be fostered and supported by this State, and shall be subject to such regulations as the General Assembly may enact.” The Constitution referred to “Charitable and Penal Institutions.”

title, but a certain specified cestui que trust, clearly identified, or made capable of identification, by the terms of the instrument creating that trust” *Id.* On the other hand, what distinguishes a charitable trust is the fact that

“... the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi-public character. The most important distinction, however, between charities and other trusts is that in the time of duration allowed and the degree of definiteness required. Trusts for public charitable purposes, being for objects of permanent interest and benefit to the public, and perhaps being perpetual in their duration, are upheld under circumstances under which private trusts would fail.”

In *Cappelman*, the Court also noted “[a] trust for the prevention, cure or treatment of disease, or otherwise for the promotion of health is charitable.” 198 S.E. at 10.

The Supreme Court of South Carolina has also repeatedly recognized that “[c]haritable trusts are entitled to peculiar favor; the courts will construe them to give them effect, if possible, and to carry out the intention of the donor.” *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005), quoting *Colin McK Grant Home v. Medlock*, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986) (citing *Porcher v. Cappelman, supra*). Our Court consistently has construed language which was challenged as too indefinite and non-specific as, nevertheless, sufficient to create a charitable trust. *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956); *Shields v. Jolly*, 1 Rich. Eq. 99, 18 S.C. Eq. 99 (1844); *Dye v. Beaver Creek Church*, 48 S.C. 444, 26 S.E. 717 (1897). And, in *Jolly*, the Court held that a charitable trust will never fail for want of a trustee, noting that [o]ur courts have, I believe, gone further than most courts of chancery elsewhere, in changing trustees as the exigency of cases may require.”

Special, technical words are not required to create a charitable trust, but a court must look to the substance of a charitable purpose rather than the form of the instrument. 14 C.J.S. *Charities* § 4. As our Supreme Court noted in *Harter v. Johnson*, 122 S.C. 96, 115 S.E. 217, 220 (1922),

“[n]o formality in the use of language is necessary in order to create a public charitable trust. The court look[s] to the purpose for which the gift was made, rather than to the particular words used to designate that purpose. And while a gift cannot be made a charity unless made upon a trust, either express or implied, that it shall be devoted to uses which the law recognizes as charitable, the omission from a bequest of the words “in trust” is not material, where the intention is clearly manifested that the whole property shall be applied by the legatee for the benefit of other persons than himself.”

115 S.E. at 221, quoting 5 R.C.L. 296. In an effort to ascertain whether the intent of the settlor is charitable or not, a court may look beyond the deed itself, to contemporaneous circumstances. *In re Estates of Scholler*, 403 Pa. 97, 169 A.2d 554 (1961).

It is also well recognized that the use of the term "benevolent" or "benevolence" is generally interpreted as the equivalent of "charitable" in terms of ascertaining the intent of the donor. *See, St. Louis Union Trust Co. v. Burnet*, 59 F.2d 922 (8th Cir, 1932); *Jones v. Haberstam*, 107 U.S. 174 (1883). As the leading authority on charitable trusts has written, "[t]here are ... a number of holdings in the United States which treat 'benevolent' as synonymous with 'charitable' and enforce a perpetual trust for benevolent objects or institutions." Bogert on *Trusts and Trustees*, § 370. Bogert summarizes the law as follows:

[a]t the present time it would seem that the intent of a donor who leaves property to be distributed for "benevolent" or "philanthropic" purposes is in most cases charitable Common usage has made these terms synonyms for charity.

Id. *See also, Maine AFL-CIO Housing Devel. Corp. v. Town of Madawska*, 523 A.2d 581 (Me. 1987) [term "benevolent" is synonymous with "charitable" within the meaning of property tax exception].

Moreover, courts have recognized that, based upon longstanding interpretations, the phrase "for the use of" may be deemed as intending to convey a trust, or as being meant "in trust for." *See, Davis v. United States*, 495 U.S. 472 (1990) [phrase employed by Congress, "for the use of," may be reasonably interpreted as creating charitable trust.]; *Chapman v. Commr. of Revenue*, 651 N.W.2d 825 (Minn. 2002) [phrase "for the use of" means "in trust for"].

The type of purpose which constitutes a "public charity" was extensively elaborated upon by our Supreme Court in the *Harter* case. There, the Court stated:

[i]n 5 R.C.L. a public charity is defined as follows: A gift is a 'public' charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specified classes as decrepit seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity. It is this indefinite, unrestricted quality that gives it a public character. Without undertaking to be technically accurate, a 'purely public charity' may be defined as one which discharges, in whole or in part, *a duty which the commonwealth owes to its indigent and helpless citizens*. Undoubtedly it is the duty of the state to educate its poor children, and thus fit them for discharging the duties of citizenship; *to care for the indigent insane*, its helpless orphans, and its poor who are sick and afflicted; and therefore an institution, which, serving no selfish interest, discharges, in whole or in part, any such duty, is a purely public charity. Thus, if an institution is one the benefits of which the public generally are entitled to

enjoy, it is then a purely public charity – public, because although not owned by the public, its uses and objects are wholly public, and for the benefit of the public generally, and in no sense private as being limited to particular individuals.”

115 S.E. at 220. (emphasis added). Thus, our own Supreme Court has recognized that the “care for indigent insane” constitutes a charitable purpose. *See also, Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 195 S.E. 65 (1937) [hospital, while a private corporation, is a “public charity.”].

The principal and distinctive features of “charitable institutions” are that “they have no capital stock and no provision for making dividends or profits, but derive their funds mainly from public and private charity and hold them in trust for the objects of the institutions.” 14 C.J.S. *Charities* § 3. Moreover, the terms “public charity” and “charitable trust” are viewed by the courts as virtually synonymous. As one court has stated, a charitable trust is as follows:

[t]he definition of a “charitable trust” or a “public charity” as given in *Jackson v. Phillips* [14 Allen, Mass, 539] *supra*, has been adopted and applied in this state. *Bills v. Pease* [116 Me. 98, 100 A. 146 ‘A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts, under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government.

Bates v. Schillinger, 145 A. 395, 397 (1929). *See also, In the Matter of the Estate of Eggan v. Huff*, 86 Idaho 328, 386 P.2d 563 (1963) [“Although it is true that the indefiniteness of the ultimate beneficiary is one of the characteristics of a public charity, or a charitable trust, there must be certainty in defining the class of individuals to be benefited.”] *Johnson v. South Blue Hill Cemetery Association*, 221 A.2d 280, 287 (Me. 1966) [“A charitable trust or public charity “in its legal sense embraces four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community]; *In re Owen’s Estate*, 244 Iowa 533, 57 N.W.2d 193 (1953) [“(w)here, however, a will makes provision for a public charity or charitable trust, the decisions are in general accord as to the right of the attorney general to represent the public”]; *Porcher v. Cappelman, supra* [A trust to provide medical and surgical attention for crippled children was for a public charity and was a “charitable trust.”]; § 1-7-130 [“The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law.”]; *Furman Univ. v. McLeod*, 238 S.C. 475, 120 S.E.2d 865 (1961) [in the matter of administering or enforcing charitable trusts, the Attorney General is the proper party to protect the interest of the members of the public at large].

Additionally, the fact that an institution may charge for its services does not detract from its charitable trust status. *Harter v. Johnson, supra*. As the Court recognized in *Lindler v. Columbia Hospital*, 98 S.C. 25, 30, 81 S.E. 513 (1914) "... a hospital supported mainly by charity does not lose its character as a charitable institution by the fact that it accepts compensation and make a charge for the use of the rooms to those who are able to pay for them."

In South Carolina, the English statute of uses (43 Elizabeth, Chap. 4) is not in force and "the *cypres* doctrine cannot be applied by the courts of our state." However, in exercising its jurisdiction "courts of equity in the exercise of their ordinary jurisdiction can establish the charity" *Harter v. Johnson*, 115 S.E. *supra*, at 223. In the performance of its duties,

[a] court of equity takes a sympathetic view of attempts to create a charitable trust, and will go to great lengths to try to sustain such an attempt. *Medical Society of South Carolina v. S. C. Natl. Bank of Charleston*, 197 S.C. 96, 14 S.E.2d 577 (1941); *Porcher v. Appleman* [*supra*] No general rule can be laid down as to what benefits constitute a public charity, and each case must be judged on its own facts. *Medical Society, supra*.

It is also well established that a governmental agency may serve as a trustee of a charitable trust. Often, it has been held that a municipal corporation may act as trustee. See, e.g. *Ramsey v. City of Brookfield*, 361 Mo. 857, 237 S.W.2d 143 (1951), citing 14 C.J.S., *Charities* § 33; *Restatement, Trusts*, § 378. Moreover, a state agency or board may act as trustee upon receiving legislative authority to act in such capacity. *State v. Arizona ex rel. Goddard v. Coerver*, 100 Ariz. 135, 412 P.2d 259 (1969).

And, in *Harrison v. Barton*, 358 P.2d 211 (1960), the Supreme Court of Oklahoma held that a charitable trust – there, the Oklahoma City Municipal Improvement Authority – was legally created and constituted a valid trust by statute with Oklahoma City the beneficiary. In *Barton*, the Court cited in support of that principle a number of cases, including its earlier decision in *Bd. of Co. Commrs. of Okla. Co. v. Warram*, 285 P.2d 1034 (Okla. 1955). In *Bd. of Co. Commrs.*, the trust was formed pursuant to Oklahoma statutory law to provide and supply water to the unincorporated areas of Oklahoma County. Responding to the argument that the statutorily created trust was invalid, the Court stated the following:

[w]e conclude that none of the suggestions interfere with Oklahoma County as the sole beneficiary under the trust instrument involved, which has been accepted by the Board of County Commissioners of Oklahoma County.

In addition, the Court quoted *Bogert on Trusts and Trustees* (1953) Vol. 2A, § 378 for the proposition that

'The governmental trust may forward social interest by requiring the trustees themselves to perform certain governmental functions, instead by aiding existing governmental agencies in carrying on their activities. ... [p. 170].

And at page 163 of the same section, it is said:

... It would seem, therefore, that a trust to furnish money to a government for its governmental services would always be charitable, since all the objects of the particular government must be of widespread social interest.'

285 P.2d at 1042.

Our own Supreme Court has also recognized that a governmental agency may serve as a trustee of a charitable trust and may carry out a governmental purpose in so doing. In *Grady et al. v. City of Greenville*, 129 S.C. 89, 123 S.E. 495 (1924), for example, a case particularly instructive here, the Court recognized that the City of Greenville could serve as trustee for the establishment of a trust to recognize and honor the Confederate dead in Greenville County. There, the Court commented upon the capacity of the City to serve in the unique role of trustee, while, at the same time, exercising the City's police powers:

[t]hat a municipal corporation may become the trustee of a charitable trust is well settled [citations omitted]. That the purpose of the erection and maintenance of this monument is one for which a municipality in this jurisdiction is entirely competent to accept and administer a trust is not open to question [citations omitted]. In that view it is apparent that, upon the City Council's obligation, under its practically unlimited police power, to devote this city street to the appropriate uses best calculated to subserve the public safety and the common good, *is here superimposed the duty of discharging this trust, in relation to the monument, by so preserving, caring for, and disposing of the memorial property as faithfully and effectually to promote the laudable and beneficent purpose for which the monument was erected*. Specifically, therefore, our only legitimate inquiry here takes the form of whether it has been made to appear that the proposed action of the City Council [in moving the Confederate Monument] would constitute such a breach of this trust as entitles the plaintiff to injunctive relief.

129 S.C. at 105. (emphasis added).

It should be noted that in *Grady*, the City began "the work of taking down the monument" [and moving it elsewhere] when a suit was brought in equity to restrain such removal. The Circuit Court concluded that removal could not be accomplished, consistent with the trust, and thus issued a permanent injunction against removal.

The Supreme Court, however, reversed the Order of the Circuit Court, concluding that the City's removal of the monument to another location was consistent with the trust and in accordance with the City's police power. The Court noted that "[i]f the contemplated action of council involved the demolition of this monument, and the consignment of its memorial stones to a junk heap or the city rock pile, the validity of Plaintiffs' claim of injury [in removal] would, we apprehend, be conceded by all right – thinking persons." 129 S.C. at 106. However, Council only proposed removal to "a site in front of the County Courthouse." *Id.* Such was, in the Court's view, entirely consistent with the purpose of the trust:

[t]he obvious and avowed object of ... [the monument's] erection ... was, not only to serve as a record of the tender reverence in which the memory of the gallant dead was held by the builders, but to recall to the children and kinsmen of these men, who glorified a fallen cause That the effectuation of that high object might be better subserved by removing this monument from the center of a congested city street, surrounded by the din and clamor of raucous automobile traffic, where neither kinsman nor stranger could pause to read the inscription without incurring jeopardy of life or limb, to another spot where the real significance of this sermon in stone would be more likely to arrest the reverent attention of the wayfarer, and to sink into the hearts and minds of rising generations, would seem to be too apparent to warrant argument. ... *Certainly, in the state of the facts disclosed by the record, we cannot say that the contemplated removal of re-erection of the monument constitutes such a breach of the council's fiduciary duty, as trustees of this memorial property, as entitles the plaintiffs to enjoin their action.*

Id. at 105-106 (emphasis added). Thus, *Grady*, requires a legislative body to balance its interest in promoting the police power with its duty to protect and promote a charitable trust.

The better view also rejects any argument based upon the fact that the funds supportive of the charitable purpose are raised in whole or in part by taxation and thus the institution supported is non-charitable. As Bogert has stated,

[t]here are a number of cases where funds have been established under compulsion of statute for the purpose of accomplishing allegedly charitable objects. For example, the legislature may have provided for the collection of taxes for the purpose of erecting harbor defenses against the encroachments of the sea, or to extend a water system, or to erect a poorhouse But if such funds are to be vested in special commissioners or other agencies are they held under a charitable trust? Does the fact that the monies going into the fund are raised by taxation, and not by voluntary gift, prevent the creation of a charitable trust, if there is a holding in trust and not ownership by the municipal corporation itself? Is it essential that the act of creating a charitable trust be an act of donation, brought about on the initiative of the settlor himself and of his own free will?

... It would seem that the *source* of the fund should be immaterial. The vital question should be the *effect* of the trust. If it will result, in the opinion of the court, in a sufficiently widespread distribution of public benefits, the trust should be supported as charitable.

Bogert, *Trusts and Trustees* (2d ed. revised 1991) § 367.

Additionally, courts in other jurisdictions have also recognized that the care of the mentally ill is a charitable purpose, notwithstanding the fact that the particular facility for the treatment of the mentally ill is government owned and is operated at taxpayers' expense. For example, the very nature of an "asylum" signifies "a refuge; sanctuary; a charitable institution." *Cromie's heirs v. The Institution of Mercy*, 66 Ky. 365 (1867). And, in *Directors of Insane Asylum of New Mexico v. Boyd*, 37 N.M. 36, 17 P.2d 358 (1933), the Court concluded that the applicable statute of limitations did not run against the directors of the state insane asylum. The Court noted that

"[a]ccording to the weight of authority the statute of limitations cannot be pleaded against action by a state hospital for the insane, a body politic and corporate created by the state to carry out a public charity, and supported by the public revenues and controlled by the state's officers, to recover for board and medical attention furnished to an inmate."

17 P.2d at 359. In *Commonwealth v. City of Phil.*, 19 Pa.D&C 2nd 690, 1960 WL 6102 (1959), it was held that "Henry R. Landis State Hospital is an institution of purely public charity within the meaning of regulation no. 3, that the hospital is entitled to pay for its water supplied by the city at the rates established for institutions of purely public charity and that the hospital is entitled to be reimbursed for all payments made for its water consumption in excess of such charitable roles."

Further, in *State Bd. of Trustees of Delaware State Hospital at Farnhurst v. Boyer*, 52 Del. 458, 159 A.2d 793 (1960), the Court elaborated upon the underlying basis for the rule that a State Hospital for the Insane is deemed a "charity" for purposes of the statute of limitations being inapplicable to such institutions:

[t]he reason for the rule in the case of state hospitals for the mentally ill is well stated in *Central Hospital for Insane v. Adams*, 134 Tenn. 429, 183 S.W. 1032, 1034, L.R.A. 1916E, 94:

'The recovery in this a case will go directly to assist the state in caring for the inmates who are the dependent words of the state's bounty.

'These hospitals for the insane do not serve a mere local purpose.'

Moreover, in *Trustees of State Hospital for the Insane at Danville v. Voris*, 41 Pa. C.C. 532, 1913 WL 3949 (Pa. Com. Pl. 1913), the Court concluded that the State Hospital for the Insane at Danville, Pennsylvania "is a state institution and a public charity." Thus, the property of the Hospital was deemed exempt from taxation. *See also, Zoeller v. State Bd. of Agriculture*, 173 S.W. 1143, 1144 (Ky. 1915) [asylum for insane one of "charitable institutions of the state."]

Finally, in *Moore v. Neely*, 212 Tenn. 496, 370 S.W.2d 537 (1966), the Tennessee Supreme Court addressed the question of whether a gift to the State Hospital was a charitable gift. The Court concluded that indeed it was. In the view of the Court,

[w]e cannot agree that this is a bequest and a devise to the Western State Hospital as trustee; instead, it is a direct gift to the institution itself: 'at their death to be given as charity to the Western State Hospital' (Item III); 'the rest of my funds of the estate to be paid over to the Western State Hospital, * * * for the use of said institution in taking care of some other persons not able to do so' (Item IV). The Chancellor, we think correctly, held this to be a direct gift to the Hospital itself for its use in caring for its patients unable to care for themselves.

The Western State Hospital, by our statutes, is a 'body politic and corporate.' It has a common seal; and, in its corporate name and capacity, may acquire property, real and personal, by gift or otherwise, and hold, sell and convey the same for the uses and purposes of its creation, and sue and be sued in the same manner as a natural person. Its primary corporate purpose is the care and treatment of the poor insane. T.C.A. §§ 33-601, 33-603, 33-612 to 33-616, 33-621 to 33-623.

This Court held in *Central Hospital v. Adams*, 134 Tenn. 429, 183 S.W. 1032, L.R.A.1916E, 94, that a state hospital created under the above mentioned code sections is a public charity owned and operated for the benefit of all the people of the state. So, the Western State Hospital has legal capacity to take as a devisee, legatee or donee; and all funds and property which it receives it holds and administers for the charitable purposes and trusts set out in its charter and in the statutes.

The fundamental principles of the law of charitable trusts in Tennessee were laid down in the great case of *Green v. Allen* (1844) (opinion by Judge Turley), 24 Tenn. 170, and further explained and approved in *Dickson v. Montgomery* (1851) (opinion by Judge Nathan Green), 31 Tenn. 348, 360, and *Franklin v. Armfield* (1854) (opinion by Special Justice John Marshall of Franklin), 34 Tenn. 305, 327, and later cases too numerous to be cited. The rule there settled is that:

'If the charity be created either by devise or deed, it must be in favor of a person having sufficient capacity to take as devisee or donee, or if it be not to such person, it must be definite in its object, and lawful

in its creation, and to be executed and regulated by trustees, before the court of chancery can, by virtue of its extraordinary jurisdiction, interfere in its execution' (24 Tenn. 204; 31 Tenn. 361, 362; *Ewell v. Sneed* (1917) (opinion by Mr. (later Chief) Justice Grafton Green), 136 Tenn. 602, 609, 191 S.W. 131, 5 ALR 303.

The charitable gift in the case before us meets this test. As aforesaid, the Hospital is a corporation, a legal entity, with sufficient capacity to acquire property (real and personal) by gifts or otherwise—'capacity to take as devisee or donee'; and it is also a public charity, definite in its objects and lawful in its creation, which objects are set out in its charter and the aforementioned statutes. In our opinion, it is well settled in this State that a charitable gift to such a corporation is in all respects valid and enforceable by the Chancery Court.

Moreover, as was stated by our Supreme Court in *Harter v. Johnson, supra*, "[t]he founding and maintenance of hospitals and asylums of various kinds, and homes for destitute and friendless children, and the aged and infirm, constitute charitable uses or trusts, and bequests, devices, or other gifts for such purposes will be upheld in equity with a strong hand." 115 S.E. at 222.

As noted above, consistent with this general authority, our Supreme Court has similarly concluded that the South Carolina State Hospital (now the Department of Mental Health) is a "public charity." Following a discussion of the history of the state Lunatic Asylum and the State Hospital, the Court, in *Crouch v. Benet, supra*, found:

[t]his State Hospital for the Insane has been supported, maintained, and at times greatly improved by the addition of other modern buildings pursuant to Acts of the Legislature and by means of appropriations for this most worthy, humane and beneficent purpose as a State Institution. It is the long established and settled policy of the State to adequately provide funds each year to carry on this *benevolent public charity*.

17 S.E.2d at 323 (emphasis added). Thus, the fact that an institution or asylum may be operated by the government and receive appropriations of public monies does not in any way preclude its "charitable" status. What is significant is that the institution or agency is performing a charitable purpose – here, care for those such as the mentally ill who are suffering from mental disease or illness.

It is also important to note that property conveyed unconditionally to a charitable corporation is typically deemed to be likewise impressed with a trust for the accomplishment of the corporate purposes. See, *Wellesley College v. Attorney General*, 313 Mass. 722, 49 N.E.2d 220 (1943). As one court has stated, "... we hold, in line with many courts, that a devise on bequest, although in the form of an outright gift, yet when made to an institution *whose sole reason for existence and whose*

entire activity is charitable, is in purpose and practical effect a charitable trust.” *In Re Peterson’s Estate*, 277 N.W. 529, 532 (Minn. 1938). (emphasis added).

In accord with this reasoning is *Pacific Home v. Los Angeles County*, 41 Cal.2d 844, 264 P.2d 539 (1953), wherein it was stated as follows:

[s]imilarly, all the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation’s purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes. It follows that neither plaintiff nor its successor could legally divert its assets to any purpose other than charitable purposes, and said property was therefore ‘irrevocably dedicated’ to exempt purposes within the welfare exception.

264 P.2d at 543. A wealth of authorities are in accord. See, *Lynch v. Spilman*, 67 Cal.2d 251, 62 Cal. Repr. 12, 431 P.2d 636 (1967); *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. Ct. App. 1986) [“The property deeded by Hammond to HCM without any express or contrary limitation, was nevertheless subject to the implicit limitation of use for educational purposes within the meaning of paragraph (3) by reference to the stated corporate purposes.”]; *In Re Los Angeles County Pioneer Society*, 40 Cal.2d 852, 257 P.2d 1, 9 (1953) [“In cases where ... property is conveyed without restriction to a charitable corporation ... the charitable intent of the donor is ascertained by reference to the charitable purposes of the donee.”]; *In re Harrington’s Estate*, 151 Neb. 81, 36 N.W.2d 577, 582 (1949) “a gift, donation, or bequest by name, without further restriction or limitation as to use, to a corporation organized and conducted solely for charitable purposes, will be deemed to have been made for the objects and purposes for which the corporation was organized”]; *Brown v. St. Luke’s Hosp. Assn.*, 85 Colo. 167, 274 P.2d 740 (1929) [“It is clearly apparent that St. Luke’s Hospital came into being as, and has continued to remain, a charitable institution; that all property held or acquired by it is impressed with a trust for the charitable uses and purposes above mentioned.”].

Moreover, the fact that valuable consideration might have been paid by the charitable institution or trust to purchase additional property to carry out the trust’s purpose does not defeat the conclusion that such acquired property is impressed with a charitable trust. For example, in *Cohen et al. v. City of Lynn*, 33 Mass. App. Ct. 271, 598 N.E.2d 682 (1992), taxpayers sued the *City of Lynn* and a real estate developer to obtain a ruling that a conveyance of property from the municipality to the developer was invalid and to rescind such conveyance. The Court of Appeals affirmed the lower court’s ruling, concluding that the city received the land in question subject to the charitable trust

requirement that the property be used for "park purposes even though the grantors received consideration. The Appeals Court explained as follows:

[t]he city and Gilberg suggest that since the grantors received substantial payment for the land in 1893, the conveyance was not a gift and, therefore, no trust was established. The record indicates that the city council appropriated \$12,000 toward the \$20,000 purchase price on the condition that the remaining \$8,000 be raised by public subscription. The latter amount was obtained from "property owners near the beach, and by a few public spirited citizens" and included \$1,500 donated by the grantors. *We have found no authority, nor is any cited to us, ... to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust.* Generally, the creation of a trust may be supported by consideration "in the sense that the beneficiary confers a benefit on the settlor in order to obtain from him the creation of the trust." Bogert, *Trusts and Trustees*, § 202, at 8-9 n. 8 (2d ed. rev. 1992). Moreover, the grantors' monetary contribution in effect establishes that the conveyance, in part was a gift. In any event, the record does not indicate that the payment to the grantors represented a fair market value. This case must be distinguished from decisions denying trust status to conveyances made for substantial consideration "in fee simple forever" and which recited "no specific purpose ... in the deeds" *Jacobson v. Parks & Recreation Comm. of Boston*, 345 Mass. 641, 643, 189 N.E.2d 199 (1963). See *Brooks v. Boston*, 334 Mass. 285, 286, 135 N.E.2d 13 (1956).

The circumstances attending the conveyances to the city evidence a general plan to dedicate the land permanently to public park purposes. During much of the time it was privately owned, the land had been vacant and open to the public. In 1891, the city's park commissioners wrote in their annual report that owners "are willing to sell this land to the city at [a] reasonable price, if dedicated to public use." They describe a less desirable alternative for the city: "It is evident that the time is not far distant when the owners will seek to recover the sum annually paid in taxes for many years, and will sell the land in small lots or make such improvements as may exclude the public." In their 1892 annual report, the commissioners stated the land was to be "secured for public enjoyment forever." The "general plan" and expression of a "consistent and harmonious purpose" are evident. See *Nickols v. Commissioners of Middlesex County*, 341 Mass. at 19, 166 N.E.2d 911. The judge correctly concluded that a public charitable trust arose from those conveyances and that the acceptance of deeds by the city, "constituted a contract between the donor and the donee which must be observed and enforced." *Salem v. Attorney Gen.*, 344 Mass. at 631, 183 N.E.2d 859. Accord *Dunphy v. Commonwealth*, 368 Mass. at 383, 331 N.E.2d 883; *Opinion of the Justices*, 369 Mass. at 982-983, 988, 338 N.E.2d

806; *Newburyport Redev. Authy. v. Commonwealth*, 9 Mass. App. Ct. at 230, 401 N.E.2d 118.

598 N.E.2d at 685. (emphasis added).

Arizona Supreme Court Decision of State v. Coerver

With these underlying legal principles in mind, we now discuss herein a particularly instructive case concluding that a State Hospital's property is impressed with a charitable trust, and emphasizing the necessity of court approval for the sale of property of such facility, designed to treat the mentally ill. That decision is one from the Supreme Court of Arizona, *State v. Coerver, supra*. There, the Court, sitting *en banc* in its original jurisdiction, in a case brought upon relation of the governor, held that property conveyed in 1885 by the county board of supervisors to the directors of the insane asylum constituted a charitable trust. The Court noted that the Asylum was created by statute in 1885 and that, acting pursuant to this statute, the Board of Supervisors purchased the tract of land and then conveyed such property to the Board of Directors of the Insane Asylum of Arizona. In addition, the Court concluded that the unused portion of these lands could, consistent with the principles of equitable deviation, and as a supplement to the trust purposes, be approved by the court for reconveyance by the Hospital's board of directors to the county for construction of a general hospital. Key facts of the case, as enunciated by the Court, were as follows:

[t]he land involved in this case constitutes slightly more than sixty-two acres of the land conveyed to the asylum board in 1885. The remaining portion of the original 160 acres is presently occupied and used by the Arizona State Hospital as the site of its physical plant and operation. During much of the time from its acquisition in 1885 until 1964, the land in question was used for agricultural purposes, in connection with the operation of the hospital.

On June 24, 1965, at a regular monthly meeting, the respondent Board unanimously adopted a resolution expressing its intention to convey to Maricopa County so much of the sixty-two plus acres as is needed for a new Maricopa County General Hospital. The present action was brought to test the power and authority of the State Hospital Board to convey the land and the power and authority of Maricopa County to accept the grant.

Both respondents [Board of State Hospital and Maricopa County] contend the deed from the Board of Supervisors of Maricopa County to the Directors of the Insane Asylum created a charitable trust. The respondent Maricopa County contends the trust has failed, in part, and, therefore, the respondent Arizona State Hospital Board now holds the land as a resulting trustee for the benefit of Maricopa County. The respondent Arizona State Hospital Board claims it may substitute the *res* of the charitable trust. Applicant [Governor] urges that the county holds no interest in the

property, but that the state owns the land in fee simple absolute. Thus, the nature of the right, title or interest conveyed by the deed of the land in question by the Board of Supervisors of Maricopa County on October 8, 1885, is the first question to be answered in resolving this case.

412 P.2d at 262.

The Court's analysis in the *Coerver* case is striking because the facts in that case are remarkably similar to the situation involved here. As part of its analysis, the *Coerver* Court noted that it must place "itself in the position of the settlor at the time of the creation of the trust and interpret ... what he has said or done in light of his environment at that time." *Id.* at 263. In this regard, the decision examined the surrounding circumstances establishing the Asylum. To this end, the following was referenced:

[t]he phrase 'for the use and benefit of the territory of Arizona and for said asylum' was twice used in the deed. Moreover in Act 58 (Laws of 1885) which established the Insane Asylum, the Legislature provided, inter alia, that if not less than eighty acres of land were conveyed to the Board of Directors, 'for the use and benefit of the Territory and for said asylum ...' then the Directors and their successors may receive and hold such property 'for the benefit of the Territory of Arizona and the use of said Asylum.' *Certainly, these phrases suggest an intention to create a charitable trust with the Board of Directors of the Insane Asylum of trustees and the beneficiaries being the mentally ill of the State.*

Id. at 263-264. (emphasis added). Even though, as was noted, "[t]here is also language in the deed which might indicate that the intent of the County was to convey the land to the Board of Directors in fee simple absolute ...," the Court recognized that "[t]he law then [1885] as now, has treated the charitable trust with considerable favor, by applying liberal rules of construction in an effort to support such a trust." Thus, based upon the language used, [for the "use of said Asylum"] and the liberal rules of construction favoring the support of a charitable trust, the *Coerver* Court concluded "that the County had intended that the conveyance to the Board of Directors to be in the form of a charitable trust" *Id.* at 264.

We note here that the available facts regarding the creation and development of the South Carolina Lunatic Asylum appear stronger in favor of a charitable trust than even the situation in *Coerver*. Not only did the Acts creating the South Carolina Asylum possess language similar to that of Arizona's deed in *Coerver* ["uses and purposes" of an Asylum], but such enabling Act spoke of the "benevolent purposes" in such creation. Then too, is what we believe is the overwhelming historical evidence subsequent to such creation which consistently referred to the Asylum and State Hospital as a "charity" or "charitable institution" and viewed the duties and responsibilities as "charitable" in nature. Included in this evidence over the course of many years is the important statement in the 1891 Rules and Regulation of the Asylum which declared that "[t]he institution and

all of its resources belong to the patients as beneficiaries of the State's charity." Also crucial is the statement in 1847 by the joint legislative committee that the Board of Regents "have full control of the funds of the Institution in the discharge of their responsible and benevolent trust." Finally, is the conclusion in 1941 of our own Supreme Court in *Crouch v. Benet, supra* – that the State Hospital is a "benevolent public charity."

Following *Coerver's* conclusion that the property of the Arizona State Hospital was impressed with a charitable trust, the next question before that Court was whether the Hospital's Board of Directors could dispose of the property in question by conveying it to the County for use as a general hospital. The applicable legal standard was articulated by the Court as follows:

... the court will permit a trustee to deviate from the express terms of the trust if, owing to circumstances not known to the settlor or not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

Id. A court of equity, according to the Court, possesses the jurisdiction to "sell property held for charitable purposes, where on account of changed conditions, the charity would fail, or its usefulness would be materially impaired without a sale." Tellingly, the Arizona Supreme Court relied upon charitable trust case law from South Carolina, as it noted that a court of equity's power to permit sale

... does not rest on the *cy pres* doctrine but rather on the inherent jurisdiction of the Equity Court.... (citations omitted). The South Carolina Supreme Court in *Furman University v. McLeod*, 238 S.C. 475, 491--492, 120 S.E.2d 865, 873 (1961) applied the appropriate rule:

'The equities of the situation demand that this deviation from the technical terms of the trust, if it be a deviation, should be authorized by the Court.

'The defendant has raised the point that no deviation is possible since the *Cy pres* doctrine is not recognized in South Carolina. If is the opinion of this Court, however, that the *Cy pres* doctrine has no application in the instant case in any event as there is here no diversion of the trust and no transfer of assets to a different charity or to a different purpose.

'If anything, there is only a deviation from the strict or technical terms of the trust to enable the same charitable institution to better fulfill the purposes for which it was organized and to carry out to the fullest extent possible, the intent and purposes of the grantors of the property in question.'

Id. at 264-265. The *Coerver* Court concluded that “[c]ertainly the County and the Legislature had intended that agriculture be an essential element of the trust if they provided that sufficient irrigation be provided for the tract conveyed to the Board of Directors.” Furthermore, “... agriculture for a long period of time has supplied needed funds for the maintenance of the mental hospital, providing a method of treatment for the patients. However, in recent years, the remaining land has been found to be useless for the farming purposes for which it was originally intended.” 412 P.2d at 265.

In the Court’s view, “[r]ehabilitative theories no longer support such [farming] activities as the most effective treatment of the mentally ill.” According to the Court, “... the economics of the situation do not support the future use of the land for agricultural purposes.” *Id.*, at 144. Accordingly, in the Court’s opinion,

... a conveyance to the County for the construction of a General Hospital would greatly enhance the benefits to the beneficiaries of the charitable trust because the establishment of a modern well-equipped medical complex in the immediate vicinity of the Arizona State Hospital would beneficially consolidate community resources for diagnosis, care, and treatment of the mentally ill.

Therefore if the sale by the State Hospital Board is conditioned upon the use of the land for County Hospital purposes, it is obviously appropriate for supplementing the carrying out of the purposes of the original trust. If the sale were not so conditioned, so that the use of the land might be diverted to a purpose unconnected with hospital or medical care and treatment, it would be inconsistent at this time with the trust purposes, and therefore beyond the approved authority of the State Hospital Board.

It should be made clear that this Court does not have before it the question of the disposition of the lands, upon which the facilities or buildings are now being administered by the hospital board. Thus this decision does not purport to be future authority for the sale, transfer, or disposition in any manner of such hospital properties, as that question is not presently before the Court.

Id. at 145.

Additionally, the *Coerver* Court rejected the Governor’s arguments “that the lands so conveyed to the Board of Directors of the Hospital vested in the State, and therefore only the State Land Department could be authorized to convey such lands. In so doing, the Court reasoned that the property was conveyed in a different capacity than was typical because “it appears evident that the Legislature intended that the Board act as trustee of the property so conveyed.” In the Court’s view,

[i]t is generally held that a State Board may act in two entirely distinct and separate capacities and thus may hold title as trustee of a charitable trust.... Though the legal

title had vested in the Board of Directors, the equitable title remained with those of the public to be benefited by the Mental Hospital.

Id. at 266. In short, without court approval of the sale, although the State Land Department may have held the legal title to the property, the land was held in trust for the benefit of the mentally ill.

The Court in *Coerver* attached little significance to the fact that "the Legislature has seen fit to sell a portion of the State Hospital land on two occasions...." *Id.* at 266. According to the Court,

[t]he sales to the City of Phoenix for a fire station ... and roadway ... were a benefit to the charitable trust. Such power or authority of the Legislature is in no way inconsistent with the conclusions expressed in this case. Such legislative power or authority is not exclusive of a broader power and authority of the court to administer the trust and to direct the conveyance. Bogert, *Trust and Trustees* § 395; Scott on Trusts §§ 381, 399.5. Also see *Trustees of New Castle v. Gordy*, 33 Del. Ch. 334, 93 A.2d 509 (1952); Annot. 40 A.L. R.2d 544. But see, *Bridgeport Public Library and Reading Room v. Burroughs Home*, 85 Conn. 309, 82 A. 582 (1912).

Thus, based upon the foregoing authorities, it is our opinion that a court would likely conclude that the Bull Street property is impressed with a charitable trust. Not only did the Legislature provide in the enabling legislation enacted in 1821 and 1822 that the original property was for "benevolent" or charitable purposes and was dedicated to the "use" of the Asylum by its Directors and "successors in office," but the General Assembly likewise provided that the original four acre tract upon which the Asylum was founded was so dedicated. Similar language in *Coerver* was held to create a charitable trust. In addition, as demonstrated herein, the Legislature as well as the Board of Regents, have consistently referred to the Asylum or to the State Hospital as serving a "charitable" purpose or as a "charity" or "charitable institution." Moreover, a number of other properties at the Bull Street site subsequently acquired by the Board of Regents over the span of a century were dedicated by the General Assembly to the "use" of the Asylum. Finally, based upon the history of the Asylum, clearly, those administering the Asylum or Hospital viewed the expansion of the Institution (by purchase from adjoining landowners) as necessary for the custody and care of the mentally ill; they thus saw these after-acquired properties as one, an integral part of the Bull Street tract. Finally, based upon the history of the Asylum, our own Supreme Court in *Crouch v. Benet*, *supra*, concluded that "[i]t is long established and settled policy of the State to adequately provide funds each year to carry on the benevolent public charity."

The fact that the Board of Regents may have paid full consideration for subsequently acquired properties at the Bull Street site or the fact that the actual deeds of conveyance to these properties may not contain language dedicating such property exclusively to the Asylum's use is, in our view, not controlling or determinative of the question of charitable trust. In addition to the compelling historical evidence referenced herein, it is the law that property subsequently acquired by a charitable trust is likewise impressed with the same trust purpose.

As stated, it is evident from the historical context of these subsequent acquisitions that the Board of Regents was in considerable need at that time to expand the Asylum's grounds to carry out the overall purpose of the treatment of the mentally ill. Indeed, Superintendent Babcock chronicled the many efforts of the Board to acquire additional property and the "high prices" being charged by owners of such lands. The acquisition of surrounding properties was clearly, for those who administered the Hospital, the only viable alternative to moving the Asylum (and later the Hospital) altogether, to a more spacious environment, the countryside. The Legislature often tried to set limits upon the price for which the Board was authorized to offer for such properties, apparently, recognizing the high asking price for land in this area – in the city limits of Columbia. In other words, the Asylum was required to purchase additional land to carry out its purpose of treating the mentally ill even if it meant paying a fair market price to do so.

Finally, the fact that the State Hospital was created by an Act of the General Assembly and is a state agency, supported primarily by appropriations of the Legislature rather than private gifts does not make it any less a charitable trust. Of course, a charitable trust may be created by grant or by legislative act. *Thompson v. Hale*, 123 Ga. 305, 51 S.E. 383 (1905). As one court has stated:

[t]he fact that the beneficiary [of the charitable trust] is a governmental entity or unit makes the trust no less charitable since a governmental trust may forward social interest by requiring the trustees to perform certain governmental functions, instead of aiding existing governmental agencies in carrying on their activities. Hence, a trust to furnish money to a government for its general governmental purposes is charitable, since all the objects of the particular government must be of widespread social interest and the ultimate beneficiaries – the public – are anonymous and indefinite.

Louisiana Public Facilities Authority v. Foster, 795 So.2d 288, 294 (La. 2001).

Moreover, in *State ex rel. City of St. Louis v. Seibert, State Auditor*, 123 Mo. 424, 24 S.W. 750 (1893), the Supreme Court of Missouri concluded as follows:

[t]he insane of the state being proper objects of charity, some of the insane outside the city of St. Louis being supported by the St. Louis Insane Asylum, the Constitution authorizing an appropriation for their support, unless prohibited expressly or by reasonable implication, the question is whether there is such prohibition We can see no reason why the insane of the state not belonging to the city of St. Louis, who are found in the city, may not be cared for and supported in its insane asylum at the public expense, if it can be as well as economically done.

And, in *Jasper Co. Farm Bureau v. Jasper Co.*, 315 Mo. 560, 286 S.W. 381 (1926), it was said by the Court:

[i]t is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations provided for the care of the indigent, destitute, and insane, either in institutions exclusively under state control or those maintained by corporations for purely charitable purpose.

In short, the charitable purpose underlying such land acquisition must be examined from the standpoint of the conveyee (State Hospital), rather than the conveyor. Certainly, such was implicitly recognized by the Supreme Court in *Crouch v. Benet, supra*, wherein the Court noted that

[t]his State Hospital for the Insane has been supported, maintained, and at times greatly improved by the addition of other modern buildings pursuant to Acts of the Legislature and by means of appropriations for this most worthy, humane and beneficent purpose as a State Institution.

It is the underlying charitable purpose – care and treatment of the mentally ill – which we deem controlling. Accordingly, in our opinion, the Bull Street property is impressed with a charitable trust.

This does not mean, however, that the property cannot be sold. The *Coerver* case is fully illustrative of the principle that a court of equity may well approve such a sale pursuant to its powers of equitable deviation. Our courts recognize that a Court of Equity possesses broad discretion to deviate from the literal requirements of a charitable trust when such requirements cannot be carried out. See, *Furman Univ. v. McLeod, supra*; *Mars v. Gibert*, 93 S.C. 455, 77 S.E. 131 (1913). Of course, while a court of equity has the power to alter or modify a trust to effectuate the intent of the settlor it is the duty of the courts to preserve, not destroy, trusts. Such power can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the preservation of the trust. *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978). The trustee must identify “changed conditions or circumstances which would justify deviation....” *Epworth Children’s Home v. Beasley*, 616 S.E.2d, *supra*, at 717. While a court of equity may not control the discretion vested in the trustee, the court would have jurisdiction of the trustee ... as it has over all trustees to see that he does not depart from the terms of his trust or to apply the funds in good or bad faith to purposes foreign to the charity.” *Porcher v. Cappleman*, 198 S.E., *supra* at 12.

An instructive case involving the doctrine of “equitable deviation” is that of *Colin McK Grant Home v. Medlock, supra*, wherein a charitable corporation brought an action seeking approval to sell the corporation’s real property and to use the proceeds thereof to establish a housing subsidy fund for trust beneficiaries. As created, the trust was racially and religiously discriminatory, providing that the Home must be for “white persons in reduced circumstances,” as well as other discriminatory provisions. The heirs contended that the trust had failed, and thus its proceeds should be distributed to them, because the trust’s purpose violated “the public policy and laws of this State and of the United States.” 292 S.C. at 469. On the other hand, the trustee requested that the Court

order the Home sold and the proceeds to establish a fund to provide housing to persons described in the trust's criteria.

The Court of Appeals affirmed the Circuit Court's determination to sell the property and create a fund devoted to the trust's purposes. In the opinion of the Court of Appeals, such a sale was authorized by the principle of equitable deviation, inasmuch as "the primary intent of the settlors was to provide housing for elderly Charlestonian Presbyterians of reduced circumstances." *Id.* at 472. The Court thus stated the following:

[t]he doctrine of *cypres*, which permits a court to apply the funds of a charitable trust to a general charitable purpose, has been consistently rejected by the courts of this State.... (citations omitted). This State has, however, long recognized the doctrine of equitable deviation, which permits the strict terms of a trust to be altered when changed circumstances so require to effectuate the trust's purpose....

Although a court has considerable discretion to adapt a trust to changed circumstances, this flexibility is not unlimited. The distribution of trust property must always be in accord with the settlor's intent....

Equitable deviation permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust.... In this case, the record shows that the purposes of the trust can no longer be accomplished by operation of the Home at Meeting and Huger Streets. Accordingly, the court committed no error in authorizing sale of the property and the creation of a trust fund.

Id. at 471-272.

As you have noted in your previous letter, the General Assembly has enacted legislation which impacts the potential sale of the Bull Street property. In the 2004 Appropriations Act, the Legislature adopted Proviso 73.18, which provided for a "comprehensive central property and office management facility process to plan for the needs of state government agencies and to achieve maximum efficiency and economy in the use of state owned or state leased real property." As part of such process, the General Assembly expressed its approval of the sale of the Bull Street property by stating that "[t]he property that the Board should consider for sale includes but is not limited to: Department of Mental Health – Bull Street Complex."

Moreover, in the 2005 Appropriation Act, the General Assembly enacted Proviso 63.40, which was vetoed by the Governor, but the veto was overridden. Such Proviso provides in pertinent part as follows:

[u]p to 50% of the proceeds, net of selling expenses, from the sale of surplus real properties shall be retained by the Board and used for the deferred maintenance of state owned buildings. The remaining 50% of the net proceeds shall be returned to the agency that the property is over control of, or assigned to and shall be used by that agency for non-recurring purposes

This provision is comprehensive and supersedes any conflicting provision concerning disposition of state owned real property whether in permanent law, temporary law or by provision elsewhere in this Act.

Any unused portion of these funds may be carried forward into succeeding fiscal years and used for the same purposes.

Thus, assuming that this Proviso is applicable to the Bull Street property (and there is no reason of which we are aware that it is not), then the question becomes what impact this Proviso has upon the public charity which our Supreme Court has recognized was created and endured throughout the Asylum's/State Hospital's/Department of Mental Health's existence. This raises the question of the power of the General Assembly over a public charity or charitable trust.

There is no doubt that the power of the General Assembly is plenary, absent conflict with the Constitution. *Unisys Corp. v. South Carolina Budget and Control Bd., et al.*, 346 S.C. 158, 551 S.E.2d 263 (2001); *State ex rel. v. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002) [Legislature's power of appropriation is plenary]. One Legislature generally does not bind another. *State v. Mancke*, 18 S.C. 81 (1992). Yet, courts have viewed the authority of the Legislature or a legislative body with respect to the administration of charitable trust somewhat differently than the exercise of legislative powers only. The general rule is that legislative authority in this area is limited. As has been stated,

[w]hile the legislature possesses some authority to alter charitable trusts, such authority is narrowly limited, ... so the legislature cannot without the consent of the donor, materially change the execution of a charitable trust ..., unless there exists an exigency for such change.

Some courts have analyzed legislative attempts to diminish a charitable trust or to order a sale of its property in terms of a separation of powers violation. For example, in *Opinion of the Justices*, 374 Mass. 843, 371 N.E.2d 1349 (1978), the Court recognized that the Legislature could determine who administered the trust and how such persons could be selected. However, in the Court's view, "(i)t is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of *cypres*." 371 N.E.2d at 1355. According to the Court, any such legislative deviation would violate the separation of powers provision of the Constitution. *Id.* at 1356. *Accord., In re Opinion of the Justices*, 237 Mass. 613, 131 N.E.2d 31 (1921); *Bridgeport Public Library and Reading Room*, 85

Conn. 309, 82 A.582 (1912) [charitable trust is “peculiarly the subject of a court of equity’s care and solicitude These are peculiarly judicial functions It is certain, whatever that dividing line may be, or however indefinite it may be at points, that jurisdiction over this charitable trust to see that it is properly and beneficially administered, that the purpose of the donor does not fail, and that the interest of the beneficiaries, under changing conditions and with the lapse of time, belongs to the judicial department.”]; *Dunphy v. Commonwealth*, 368 Mass. 376, 331 N.E.2d 883 (1975) [“The acceptance of the grant by the city constituted a contract between the donor and the donee which must be observed and enforced.”]; *Cohen v. City of Lynn, supra* [“The special legislation authorizing the city to sell and convey could therefore neither impair the trust obligation, nor ratify the purported conveyance.”]; *Opinion of the Justices*, 101 N.H. 531, 133 A.2d 792 (1957) [legislation which places conditions upon the use of funds of a burial lot fund “may not constitutionally be done by the Legislature. Such a course would seem to be an invasion of established equitable powers of the courts, and hence in violation of the Constitution.”].

On the other hand, some courts conclude that either the Legislature or a court of equity may authorize the sale of charitable trust property. As was stated by the North Carolina Supreme Court in *Shields v. Harris*, 190 N.C. 520, 130 S.E. 189, 192-193 (1925),

[t]he Legislature, or a court of equity, may authorize a sale of charitable trust property under the needs arising from the exercise of police power by that division having jurisdiction of the locus in quo. *Stanley v. Colt* [5 Wall. 119, 18 L.Ed. 502 (1866)] ...; *Old South Society v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299. Certainly a court of equity would not now disapprove what it would have authorized in the first instance.

In *Stanley, supra*, the United States Supreme Court held that the Legislature could authorize alienation of trust property even though the settlor expressly forbade such alienation. The Court stated:

[i]n England, and in this country where a court of chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of that court, and in cases of abuse, or misuse of the charity by the trustees or agents in charge of it, this court will interpose to correct such abuses, and enforce the execution of the charitable purposes of the founder

This power, in the State of Connecticut, it appears is exercised by its legislature, as in the present instance. Many acts of the kind have been referred to in the argument, extending through a long series of years down to the present time.

We cannot doubt that the power exists in the Legislature, and it is not for this Court to revise the facts upon which it has seen fit to exercise it.

72 U.S. at 169-170.

Then too, is the general rule expressed in an extensive Annotation, found at 40 A.L.R.2d 556, entitled "Constitutionality, Construction, and Effect of Legislation Authorizing Sale of Charitable Trust Property." This general principle is as follows:

[t]he consensus of opinion is most of the limited number of jurisdictions in which the question has been considered is that the legislature has constitutional power to authorize the sale of charitable trust property held under a trust which expressly or impliedly forbids the sale or alienation of such property, where there is a practical necessity for selling the property and the proceeds of the sale are to be devoted to carrying on the purposes of the trust; that such authority may be granted by special act relative to a particular charitable trust and without requiring the trustee to submit the matter to a court for its approval; and that, while a court of equity can grant equivalent relief, the power is not exclusively a judicial power or function but exists also as a legislative power. Such power has been considered to rest in the legislature under the doctrine of "parens patriae," or as an attribute of the State's visitorial rights in connection with charitable trusts."

Two cases attempt to reconcile these apparently conflicting views with respect to the Legislature's power to enact legislation authorizing the sale of charitable trust property. In *Trustees of New Castle Common v. Gordy*, 33 Del. Ch. 334, 93 A.2d 509, 40 A.L.R. 544 (1952), the Delaware Supreme Court upheld as constitutional an act which conferred upon trustees of a trust for the benefit of inhabitants of the Town of New Castle the power to sell realty and which expressly required the proceeds of the sale to be used for trust purposes. There, the Court stated:

[i]n this country ..., the power of the legislature over charitable trusts is not co-extensive with the prerogatives of the Crown. It is limited by principles of American constitutional law. Scott on Trusts, Vol. 3, Sec. 399.5. For example, the legislature may not exercise the power of a Chancellor under the doctrine of *cy pres* and thus divert the corpus of the trust to uses other than those specified. Bogert, *Trusts and Trustees*, Vol. 2, Sec. 434; Scott on Trusts, Vol. 3, Sec. 399.1 Nor may it terminate a charitable trust or change its administration. See Bogert, *Trusts and Trustees*, Vol. 2, Sec. 398

We think the foregoing correctly states the general principles of law on this subject as approved by the great weight of authority. *Legislation respecting a charitable trust is valid if in aid of its purpose and not in destruction or impairment of the interest arising under it.*

93 A.2d at 515. (emphasis added).

Of course, the question arises regarding the Legislature's power with respect to the property of a public charity or charitable trust which the General Assembly itself created. While it may certainly be reasonable to hold the view that the Legislature may amend or even repeal any act which it has enacted, such is not necessarily the case with regard to charitable trusts. In *Jones, Atty. Gen. v. Vermont Asbestos Corp.*, 108 Vt. 79, 183 A. 291 (1936), the Supreme Court of Vermont addressed the question of the validity of a legislative act authorizing the town of Belvidere to sell and convey to Vermont Asbestos Corporation by deed in fee simple all or any part of the lands reserved for gospel and town school rights. A certain portion of the Town's property was set aside for the exercise of these rights including the Legislature's creation of the University of Vermont, an eleemosynary corporation. Subsequent legislation formed a public corporation creating the Vermont Agricultural College which, together with the University of Vermont, unified under the name of the University of Vermont and State Agricultural College. Such institution became vested with the University of Vermont trust lands.

The Court thus faced the issue of a charitable trust created in part or in toto by the Vermont Legislature. In its view, such distinction made little or no difference. Observed the Court,

[t]he inherent jurisdiction of the court of chancery to administer charitable trusts is ancient and well settled, antedating the statute of 43 Eliz. c. 4(1601), as clearly appears from the exhaustive and scholarly opinion of Williams, C.J. in *Exrs. of Burr v. Smith*. 7 Vt. 241, 291-311, 29 Am. Dec. 154 This jurisdiction applies whether the trust *res* is derived from private donation or gift from the Legislature It has been held to extend to the authorization of a sale of the property where although the object of the trust is still existent, the possession of the particular estate has become no longer suitable for the purposes to which it was originally devoted, and its alienation is essential to the beneficial administration of the charity, the avails of the sale to remain subject to the charitable intention of the donor.

182 A. at 297. In the case before it, however, concluded the Court, the question was "the power of the Legislature to authorize a sale in the manner prescribed by the statute that is in issue." *Id.* The Court reviewed many of the cases referenced above including those upholding the power of the Legislature to authorize the sale of charitable trust property. Moreover, the Court noted that

[w]here the Legislature authorizes a sale of the property of infants or other person not *sui juris*, it does so in its capacity as *parens patriae* The same principle applies in the case of a public charity As to those persons who may hereafter become entitled to the benefits of the trust, there is a want of capacity to manage and preserve the property, and hence the necessity of devolving this duty upon the sovereign represented by the Legislature.

The Court concluded that the legislation in question, which produced a price to the university and the Town of Belvidere far greater than the rent being paid by the asbestos corporation, did not change or alter the trust, and thus was valid.

[w]e are of the opinion that the two statutes of 1935 were within the competency of the General Assembly to enact; that they were in effect the act of the donor of the trust removing a restriction from the grant, and giving power and authority to the trustees, in one case the University, in the other the town acting through its selection, to deal with the property in a manner hither to prohibited, if in their discretion they should decide that it would be for the advantage of those entitled to its benefits to do so. There is no destruction or modification of the purposes and objects of the trust

As for the claim that the Legislature has failed properly to provide for the safe investment of the funds received from the sales so that they may be kept from depreciation or loss, all that need be said is that this was a matter for the General Assembly to decide. "If the legislature possesses the power, it also has the power to determine whether the case presented is one proper for its exercise, and its determination is conclusive, as also of the mode and safeguards under which it shall be exercise." *Brevoort v. Grace*, 53 N.Y. 245, 251. It is enough if the General Assembly, acting according to its judgment, in view of the existing facts, comes fairly to the conclusion that the conversion will be for the benefit of those entitled. *Petition of Post*, 13 R.I. 495, 499; *Stanley v. Colt*, 5 Wall. 119, 18 L.Ed. 502, 510. That this will be so in the instant case is reasonably apparent, for the annual income to be expected, even in this days of low return, from the investment of the respective sums of \$50,000 and \$25,000 will far exceed the annual rents of \$35 and \$25 which can never, so long as the present conveyances are in force, be increased. The wisdom of the Legislature in abolishing this species of mortmain is not open to question.

182 A. at 302. Thus, the *Jones* Court was of the view that the legislative action authorizing the sale of charitable trust property was valid *because* it was deemed to be supportive of, not in derogation of the trust purposes. It is clear from the Court's words that if the legislation had destroyed or modified the trust, such enactments might not have been sustained.

South Carolina cases appear to have employed the same analysis. *Mars v. Gibert*, *supra*, dealt with the power of the General Assembly to divert a bequest for establishing a school on testator's land, wherein boys and girls were to be taught in the beginning of their school life to the purpose of founding scholarships in colleges. The case involved the will of John de la Howe. Mr. de la Howe in his will requested the Legislature to "graciously ... keep the institution under their fatherly protection." 77 S.E. at 134. In response to the fact that the public schools were, by 1912, providing the same purpose as that expressed in the will, the General Assembly adopted a concurrent resolution in that year which authorized "using the funds for the foundation of scholarships in Clemson College for the boys and in Winthrop College for the girls." *Id.* Specifically, the resolution

provided that the trustees of the charitable trust institute legal proceedings "for the purpose of determining whether or not the trustees can be authorized by the General Assembly to establish and maintain from the revenue of said estate such number of scholarships for boys and girls in Clemson Agricultural College and Winthrop Normal and Industrial College as the said trustees may deem proper and the revenue of said estate justify." Thus, the Legislature simply authorized the deviation "if the court should decide that the trust fund could be used for that purpose."

Subsequently, the trustees did in fact decide to make such a change and adopted a resolution to that effect. A suit seeking to enjoin the Board from taking such action was brought by other trustees. The circuit court upheld the deviation.

However, the Supreme Court reversed. The Court noted that the doctrine of *cy pres* – recognizing that when trustees of any charity find that such charity cannot be administered for the purpose set out in the instrument, they may apply the funds to a cognate purpose – is not recognized in South Carolina. According to the Court,

[t]he only particular in which the trust of the will and the trust proposed by the trustees and the General Assembly coincide is that both contemplate the development into good citizens of 12 poor boys and an equal number of poor girls of Abbeville county by industrial training. In all other particulars the trust proposed will be essentially different from the trust of the will.

Id. Accordingly, the Court concluded:

[a]ll of these objects [of the will] would be defeated by the change. There would be no local institution, and only boys and girls fit for college would receive the benefit. It follows that, under the laws of this state, the court is obliged to refuse to sanction the proposed change of the trust fund.

Id. Thus, the *Gibert* Court, like a number of decisions referenced above, refused to follow the Legislature's imposition of the doctrine of *cy pres* upon the Court. The Court reserved and preserved its right to make its own *judicial determination* as to whether the trust purposes were being fulfilled.

And, in *Grady*, the Court likewise stressed the dual role of the municipal council in acting as both a legislative body and a protector of the charitable trust. The Supreme Court of South Carolina, in other words, recognized that with respect to charitable trusts, a legislative body possesses additional responsibilities:

[i]n that view it is apparent that, upon the city council's obligation, under its practically unlimited police power, to devote this city street to the appropriate uses best calculated to subserve the public safety and the common good, is here superimposed the duty of discharging this trust, in relation to the monument, by so

preserving, caring for, and disposing of the memorial property as faithfully and effectually to promote the laudable and beneficent purpose for which the monument was erected.

123 S.E. at 500.

Finally, in the context of the sale of State Hospital property, the Arizona Supreme Court in *Coerver* engaged in a similar form of balancing analysis between the Legislature's legislative power and its duties as *parens patriae* protector of the trust. In response to the argument that the Arizona Legislature had previously sold land of the State Hospital on two occasions, the Court emphasized:

[t]he sales to the City of Phoenix for a fire stations ... were *of benefit to the charitable trust*. Such power or authority of the Legislature is in no way inconsistent with the conclusions expressed in this case. Such legislative power or authority is not exclusive of a broader power and authority of the court to administer the trust and to direct to the conveyance.

412 P.2d at 266. (emphasis added).

Conclusion

The question as to whether or not longstanding and well recognized charitable trust law applies to the Bull Street property and its proposed sale is indeed novel in this State. Our courts have not directly faced this question. While it is fundamental that the Legislature possesses plenary legislative power and thus may alter or amend its previous legislation – the law governing charitable trusts likely distinguishes the General Assembly's power in this instance from its traditional role. Only a court may determine with finality the question of whether the Bull Street property's status is that of the typical state property (as the Budget and Control Board attorneys argue) or is instead, as we believe, based upon its history, that of property holding the special status of being impressed with a charitable trust.

We are guided in this instance by several legal authorities – particularly, the decision of the Arizona Supreme Court in *Coerver*. In a closely analogous case, the *Coerver* Court found that State Hospital property was impressed with a charitable trust and required approval of the Court prior to sale. The Arizona Legislature had enacted legislation creating the Asylum, and yet, charitable trust principles still were applicable. In addition, our Supreme Court in *Crouch v. Benet, supra* examined the history of the South Carolina Lunatic Asylum/State Hospital and concluded that the Institution is a "benevolent public charity." Subsequent decisions of our Supreme Court have reiterated that the care and treatment of the mentally ill in South Carolina is a charitable purpose even though some patients may have to pay. The fact that some patients may be required to pay because they are financially able to do so, does not, however, defeat the overall charitable purpose of the Institution.

See, Lindler v. Columbia Hospital, supra. As our Supreme Court has recognized, care for the indigent mentally ill in South Carolina is a clear charitable purpose.

Finally, our own historical research unquestionably supports the Supreme Court's conclusion in *Benet*; since the very beginning of its existence in 1821, and even before that time, the Asylum/State Hospital has been referred to and considered as the foremost State "charitable institution." Without exception, the Institution has been perceived as a public charity or charitable trust by the Legislature and by the Board of Regents and officials of the Hospital. As the Regents recognized in 1891, in the Asylum's Rules and Regulations, "[t]he institution and all of its resources belong to the patients as beneficiaries of the State's charity." As the joint legislative committee expressed in 1847, the Asylum's Regents "have full control of the funds of the Institution in the discharge of their responsible and benevolent trust." And, as the Asylum's Physician wrote in 1848, "[t]he Regents of the Asylum are the only friends which the Insane have, and it is to their influence that they look for protection and redress."

Accordingly, we are of the opinion that a court would most likely conclude that the Bull Street property is impressed with a charitable trust. The Bull Street property, even though acquired at different times over the years, and even though the deeds to such properties do not mention a charitable trust, has consistently been viewed as one tract used for the overall purpose of the treatment of the mentally ill. Moreover, after-acquired property of a charitable trust is generally considered as part of the trust property.

This conclusion only partially answers your question, however. That the Bull Street property is impressed with a charitable trust does not mean it may not be sold. Indeed, our Court concluded in *Colin McK Grant Home, supra* that a court of equity will often exercise its powers of equitable deviation with respect to charitable trust property. If the court finds that compliance with the trust terms would defeat or substantially impair accomplishment of the purposes of the trust, it may permit the trustees to deviate from such terms in order to accomplish the overall trust purposes. Such deviation – as the Arizona Supreme Court held – may include a sale of State Hospital property when no longer used for its original purposes (such as farming as therapy for patients), as well as a devotion of the proceeds from such sale to the overall trust purposes.

The court's function in such a sale, according to most authorities, is, by no means, exclusive. The General Assembly's role is critically important as well. Courts have concluded that the Legislature in such instance exercises its power not only in its legislative capacity, but also in its role of *parens patriae*, or as protector of the beneficiaries of the charitable trust – in this instance, the mentally ill of South Carolina. Thus, the Legislature is required to act, as it has throughout much the history of the Asylum/State Hospital, in favor of the charitable trust, not in derogation thereof. In other words, while it is the Legislature which authorized the creation of the Asylum so many years ago, and it has been the Legislature which has funded the lion's share of the Institution as it has seen fit throughout its history, it is clear that the General Assembly does not enact legislation regarding this agency and its beneficiaries in the same capacity as it does with respect to other state agencies.

For almost 200 years, the Legislature has assumed the role of protector of the mentally ill in South Carolina.

Traditionally, over the years, the General Assembly has recognized and honored the charitable trust purposes of the Asylum/State Hospital as far as any sale of Hospital property is concerned. Generally speaking, the Legislature has always been careful to insure that the proceeds of any sale are devoted to the Hospital/DMH purposes. Even more striking is the fact that between 1991-2003, the General Assembly inserted a Proviso in the Appropriations Act in one form or another which guaranteed that proceeds from the sale of DMH property would be devoted exclusively to the agency. Indeed, from 2001-2003, the applicable Proviso spoke specifically to the proposed sale of Bull Street property, requiring not only that any such sale be approved by the DMH Board, but that proceeds from that sale be returned *in toto* to the Agency.

Such policy changed, however, in 2004. The then-existing Proviso, devoting proceeds from the sale of DMH property to the Agency, appears to have been deleted in that year, and replaced by Proviso 73.18, discussed above, which simply authorized the Budget and Control Board to consider the Bull Street property for sale. This year, the Legislature enacted the general Proviso – 63.40 – applicable to all state agencies – which devoted one-half the proceeds from any sale of the Agency's property to that Agency's budget. Such an approach, however, appears inconsistent with the General Assembly's longstanding protection of the charitable trust placed upon the Asylum/State Hospital/DMH/property. In other words, a portion of the proceeds from any sale would, according to the current Proviso, be devoted to a purpose unrelated to DMH's charitable purpose.

Thus, assuming that a court would find that there exists here a charitable trust – and the evidence is strongly supportive of this conclusion – such charitable trust must be recognized and protected. This could be done in one of two ways. First, as record title holder, and the agency in possession of the property, as well as the longstanding trustees for the protection of the mentally ill, the Mental Health Commission (and possibly the Budget and Control Board – the agency by Proviso 73.18 authorized to sell the property) could bring an action for a declaratory judgment to determine whether or not there exists a charitable trust and, if so, for approval of the proposed sale. This was the approach taken in the *Coerver* case in Arizona. Such approach would leave no doubt as to the legal status of the property. Moreover, any sale and the reasons therefor would possess the imprimatur of the court.

The alternative would be for the Legislature to protect the charitable trust, as it has in the past, by requiring the proceeds from any sale to be devoted exclusively to the Department of Mental Health. Such would be consistent with the Legislature's plenary legislative power and would avoid protracted litigation. However, such an approach would have the distinct disadvantage of always being subject to a court challenge. *See, Coerver, supra.*

Of course, we recognize that it will be argued that even if the Legislature were to devote in full to the Department of Mental Health the proceeds of the sale of the Bull Street property, the

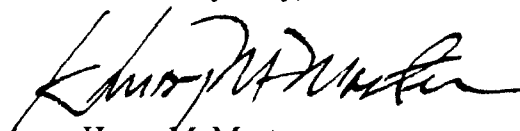
Mr. Fusco
Page 56
December 9, 2005

General Assembly could, in accordance with its own procedures and judgments, attempt to offset those proceeds with a corresponding reduction in the Department's appropriated budget. As we have said, there is no question that the General Assembly possesses plenary legislative power and a plenary authority to appropriate revenue, all in the name of the people of the State. And, as we have seen, at times during the history of the State Hospital, legislative appropriations to the Institution were reduced so drastically, that the officers were required to use their own personal credit to keep the Asylum doors open.

Still, a court would, in our opinion, analyze the question as one concerning whether legislative action is a benefit to or is in derogation of the charitable trust. In the *Coerver* case in Arizona – a remarkably similar decision, because, as here, the Arizona Legislature had created the Asylum by legislative act – the Court applied the legal standard of whether legislation concerning the State Hospital benefitted or undermined the charitable trust. Moreover, our own Supreme Court in *Crouch v. Benet, supra* suggested the same standard as *Coerver*, noting that “[a]ll of the demands of society and a humane regard for the welfare of society who because of mental infirmities cannot care for themselves, as well as the mandate of the Constitution of the State [no longer applicable] require that legislative appropriations shall be made as often as may be necessary to carry out this purpose.” Thus, the Court implies at least that it will examine any legislative action regarding the State Hospital/DMH with an eye toward whether or not the legislation is a benefit to the “benevolent public charity.”

In our view, court approval would represent the preferable alternative. We note again that the South Carolina case, *Mars v. Gibert, supra*, refused to abide by the Legislature's determination regarding a change in the John de la Howe will. Moreover, as the *Coerver* case held, if a charitable trust is involved, while legal title may reside in the state, the equitable title is held in trust for the beneficiaries, in this instance, the mentally ill of South Carolina. Court approval thus would bring this matter to closure and would fully protect the charitable purpose of care and treatment of the mentally ill in this State.

Yours very truly,



Henry McMaster

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