

April 10, 2007

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South Carolina Department of Mental Health
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Dear Mr. Binkley:

You have asked “whether the Department of Mental Health (DMH) may spend funds appropriated to it by the General Assembly to market the Bull Street property?” By way of background, you state the following:

[g]iven the size and potential value of the Bull Street property, at some point DMH will likely require the advice and assistance of outside experts to properly and effectively market the property, in order to maximize the proceeds from its eventual sale. Securing such advice and assistance will require DMH to spend money to obtain such expert advice and assistance.

The question posed above arises from the possibility that the holding by the South Carolina Supreme Court in the above-referenced action could be interpreted as, in effect, recognizing the existence of a trust entity separate and apart from DMH. Under this possible interpretation, the Bull Street property, which the Supreme Court held is impressed with a charitable trust, arguably is controlled not by DMH but by the trustees of some separate trust entity. Under such an interpretation, a question could in theory be raised if DMH were to expend its State appropriated funds to market the Bull Street property.

Your opinion is as follows:

However, while the Supreme Court declared that the Bull Street property is impressed with a charitable trust, the decision reaffirms that the property is, and always has been, owned and controlled by one entity—DMH and its predecessors. The Department of Mental Health is a corporate body governed by the South

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Carolina Mental Health Commission. It is the successor to the grantees of the deeds to the Bull Street property, to-wit: The Regents of the Lunatic Asylum of South Carolina and The Regents of the State Hospital for the Insane. No separate “public charity” was recognized by the court. Rather, the court simply recognized that the Department is itself a public charity and must act as the trustee of the Bull Street property.

Although the particular question was not raised or argued before the Supreme Court, the following authority supports an affirmative answer to the question.

The Supreme Court specifically cited and agreed with the portion of the Attorney General’s Opinion of December 9, 2005 which states that the Department of Mental Health “...is a ‘public charity.’” Likewise, the court held that “[f]urther, as noted by the Attorney General, properties conveyed to a public charity are also impressed with a charitable trust.”

The Court never made reference to a second entity, i.e., the Department and an independent public charity or trust. Instead, the court stated that the property is “owned by the Department of Mental Health;” and “institutions for the insane are constitutionally provided for and subject to regulation by the General Assembly.” The constitutional provision referred to clearly authorizes financial support via legislative appropriation to DMH for the agency’s various missions, including its original and primary purpose to provide for the care and treatment of the mentally ill. Couch v. Benet 198 S.C. 185, 17 S.E.2d 320, 323 (1941). In order to carry out its functions, DMH has used its legislatively appropriated funds to, among other things, obtain, maintain, improve and renovate land and buildings.

Strong support for this position can be found in the last paragraph of the section of the Supreme Court’s decision entitled “1. Charitable Trust.” The Court acknowledges, without qualification, that “The General Assembly also deemed fit that title to the property vest in the Board of Regents, and has routinely authorized the appropriation of funds for its charitable purposes.” This holding is consistent with an earlier case which held: “It is the long established and settled policy of the State to adequately provide funds each year to carry on this benevolent public charity.” Crouch v. Benet, Id. at 323.

The conclusion that there is no separate entity apart from DMH is bolstered by the fact that the Department’s statutory duties are consistent if not identical with the purposes of the charitable trust acknowledged by the Court. As stated in your brief:

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“The Regents may act only in their corporate capacity and consistent with their enabling Acts which was to promote this charitable purpose.”

And, even if there arguably was a separate trust entity, the legislature has previously authorized or mandated that state funds be used to support non-profit corporations in the fulfillment of their missions. Similarly, state agencies regularly expend funds which benefit non-profit corporations. If the answer to the question were “no,” it would lead to at least two incongruous and improper results. First, by impairing its ability to properly market the Bull Street property, DMH would be unable to fulfill one of its fundamental duties as trustee of the property, that being to maximize the proceeds from any authorized sale of the property “for the benefit of DMH for the care and treatment of the mentally ill.” The Department is required as a fiduciary, as well as by statute, to act in the best interests of the mentally ill and in the event of the sale of the Bull Street property, that clearly means seeking to maximize the sale proceeds.

Second, the agency has historically used legislatively appropriated funds to maintain its properties, including the Bull Street property. Such maintenance increased the value, and hence the potential sale price, of such property in the event of a properly authorized sale, at least indirectly. If it’s held to be improper to expend appropriated funds during the marketing process to increase the potential sale price of the Bull Street property, that would call into question other expenditures of State funds related to the Bull Street property and other properties impressed by a charitable trust, such as expenditures for maintenance and improvements. For example, the John de la Howe School could arguably not expend any state funds to maintain those of their properties impressed with a charitable trust. The Department is unaware of any prohibition against the use of state funds to support the activities of the John de la Howe School, which the Court cited as an example of a charitable trust.

Finally, I believe issuance of an opinion on this question by your office complements the Attorney General’s statutory obligation to prevent any breach of trust by a public charity.

Law / Analysis

In *South Carolina Department of Mental Health v. McMaster*, ___ S.C. ___, ___ S.E.2d ___, 2006 WL 4069445 (2007), our Supreme Court recently held that the so-called “Bull Street” property – the property upon which the South Carolina State Hospital was built and expanded, and for which the Department of Mental Health has used for the treatment of the mentally ill since the 1820s, – “is held in trust for the DMH.” [Department of Mental Health]. The Court found that the Bull Street

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lands, consisting of some 185.6 acres, are “subject to a charitable trust,” but may now be sold by DMH because such property “is no longer necessary to “house mentally ill patients.” However, the Court further held that “the proceeds from any sale of the property must remain in trust *for the benefit of DMH* for the care and treatment of the mentally ill.” (emphasis added).

In its decision, the Court referenced the Attorney General’s Opinion, dated December 19, 2006, which had concluded 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.” The Supreme Court agreed with the Attorney General’s conclusion, stating as follows:

[w]e agree with the Attorney General’s opinion that the property is subject to a charitable trust. However, given the change in circumstances in the care and treatment of mental health patients, we hold the doctrine of equitable deviation may be employed to allow a sale of the property with disbursement of the proceeds to be placed in trust for the benefit of DMH.

Based upon the Supreme Court’s analysis in *DMH v. McMaster*, we are of the opinion that you are correct in your conclusion that public funds appropriated to the Department of Mental Health by the General Assembly may be used to facilitate the sale of the Bull Street property. The Supreme Court’s holding that “the [Bull Street] property is subject to a charitable trust” and that the proceeds from any sale are “to be placed in trust for the benefit of DMH,” make it clear, we believe, that the Court does not deem the charitable trust found there to be an entity separate and apart from DMH. Referencing its earlier decision of *Crouch v. Benet*, 198 S.C. 185, 17 S.E.2d 320 (1941), the Court concluded that when DMH was created as the old Lunatic Asylum in 1821, such creation was for “benevolent purposes” – the treatment of the mentally ill. Indeed, as the *DMH* Court stated, *Crouch v. Benet* had earlier found that

South Carolina was a pioneer of the southern states in the care of the insane which has been supported, maintained and “pursuant to Acts of the Legislature and by means of appropriations for this most worthy, humane and beneficent purpose as a State Institution.”

___ S.C. ___, ___ S.E.2d ___, quoting *Crouch*, 17 S.E.2d at 323.

Furthermore, the *DMH* decision recognized that the Bull Street property

... was conveyed for the charitable purpose of the State Hospital for the Insane. It was conveyed to the Board of Regents of the Hospital, and the General Assembly enacted enabling legislation specifically for the benevolent purpose of establishing

a hospital for the insane. The General Assembly also deemed fit that title to the property rest in the Board of Regents, and has routinely authorized the appropriation of funds for its charitable purposes. We find that the deeds and the legislative giving rise to the State Hospital clearly evidence the creation of a charitable trust. Accordingly, we find the property is held in trust for the DMH.

It is evident from these various passages in the Court's opinion that the Supreme Court does not view the "charitable trust," which impresses the Bull Street property to be a discrete entity separate from the Department of Mental Health or its operation in treating the mentally ill. Throughout its decision, the Court speaks of the "trust" being for the benefit of DMH's overarching purpose of caring for and treating the mentally ill. As the Attorney General argued to the Court, and as the Court so concluded, DMH was created expressly for such purpose. And, as we stated in our Brief to the Court, the Regents [of DMH] "may act only in their corporate capacity and consistent with their enabling Acts which was to promote this charitable purpose."

Moreover, as the Court emphasized in its opinion, throughout the history of the Asylum, the State Hospital and ultimately DMH the Legislature has appropriated funds to and has enacted legislation on behalf of DMH in furtherance of the charitable trust created by the Legislature in 1821. Likewise, the DMH Board has, throughout the history of the agency, administered this charitable trust, acting in its fiduciary capacity as trustee. Moreover, there can be no doubt that the Court, in its recent decision, concluded that the sale of the Bull Street property is in furtherance of the charitable trust. Indeed, by applying the doctrine of equitable deviation to the trust, the Court recognized that the original use of the Bull Street property no longer is necessary for such purpose, and that the trust purposes could now best be served by selling the property and devoting the proceeds to the trust's purpose of treating the mentally ill.¹

¹ As the Supreme Court in the DMH decision indicated, the Bull Street proposed sale is virtually identical to the Arizona case, *Goddard v. Coerver*, 412 P.2d 259 (Ariz. 1966). In *Coerver*, the Arizona Supreme Court made it clear that a state Department of Mental Health may also serve as trustee of a charitable trust created by the Legislature for treatment of the mentally ill. As the Court in *Coerver* stated, "[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." However, this dual capacity does not mean that the charitable trust administered by DMH is a separate entity or that public funds may not be used in the sale of the charitable trust property. To the contrary, the Board members are simply acting in *two capacities* for the same purpose. Indeed, *Coerver* stands for the principle that a state mental health agency may be created as a charitable trust. The same conclusion was reached in *Moore v. Neely*, 370 S.W.2d 537 (Tenn. 1963) [State Hospital "... is also a public charity ..."]. This creation of the State Hospital (now DMH) as a charitable trust is precisely the holding of the *DMH v. McMaster* decision.

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Conclusion

It is our opinion that the charitable trust found by the Supreme Court in *DMH v. McMaster* is not an entity separate and apart from the Department of Mental Health. The purpose of the trust identified in that case is the same as the statutory and corporate purpose of the Department and its governing board – treatment of the mentally ill. Thus, fully consistent with the longstanding practice of appropriating and expending public funds in furtherance of the charitable trust, created by the Legislature in 1821 when it established the Asylum on the Bull Street property, the Department of Mental Health may expend public funds appropriated to it by the Legislature in preparation for the sale of such property. This use of public funds not only promotes a public purpose,² but is in furtherance of the charitable trust purpose identified by the Supreme Court in *DMH* – the care and treatment of the mentally ill.

Very truly yours,

Henry McMaster
Attorney General

By: Robert D. Cook
Assistant Deputy Attorney General

² Of course, all expenditures of public funds must be for a public, not a private, purpose. See *Op. S.C. Atty. Gen.*, October 8, 2003, citing decisions of the South Carolina Supreme Court in *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967); *Haesloop v. Charleston*, 123 S.C. 272, 115 S.E.2d 596 (1923) A public purpose does not have to benefit all people. Promotion of the public health in the form of a hospital is a public purpose. *Anderson v. Baehr*, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975). A charitable trust providing care and treatment of the mentally ill serves not only a charitable purpose, but a public purpose as well. See, *Harter v. Johnson*, 122 S.C. 96, 115 S.E. 219 (1922).