

# **Disposal of State Owned Land**

Are Heritage Trust Sites and other “public” properties at risk?

William Graham

May 5, 2006

Professor Connolly

Environmental Law of South Carolina

## **Disposal of State Owned Land**

Are Heritage Trust Sites and other “public” properties at risk?

### **Introduction**

As a result of a recent South Carolina State Budget proviso, state-owned lands (including parks, heritage trust sites, wilderness areas, etc.) are supposed to be transferred to the South Carolina State Budget and Control Board and will now be administered by the five-member panel that makes up the governing directors of the Budget and Control Board. This paper investigates the legal issues this arrangement raises. Including whether three votes is all that is required to enable a state park to be sold for private development. The paper also investigates the history and structure of some of the State’s largest land holding entities, and the process employed by the Budget and Control Board to dispose of “surplus” property.

Two legal doctrines based in principles of common law trusts also provide some relief to those seeking to stop or curb property alienation by State government, but it may be public outcry and the General Assembly that hold the keys to protecting these cherished public spaces.

### **A Time of State Budget Deficits**

Much of the current movement to shift more property management power to the Budget and Control Board spawns from a 1999 Legislative Audit Council report<sup>1</sup> undertaken during the final year of Governor David Beasley’s administration. At the time the study was published, state government owned nearly one million acres of land and 8,415 buildings. Although the 1997

---

<sup>1</sup>A Review of South Carolina's Management of State-Owned Land, April 1999, South Carolina General Assembly Legislative Audit Council available at <http://www.state.sc.us/sclac/Reports/1999/land.htm>

version of South Carolina Code §1-11-58 required individual state agencies to make their own determination of what property could be considered “surplus,” and report surplus properties to the Budget and Control Board, only 5 of the State’s 34 agencies had reported any surplus property by January 1999.<sup>2</sup>

General Services Division gives considerable deference to agency determination of which of the real properties under its control could be considered “surplus.” Although the specific definition that is currently used is not readily available, the 1999 Audit report recommended a list of criteria that it believed should be used to determine whether a property is surplus, and it is likely that the list offers the basis for the current criteria. The report suggested an analysis of:<sup>3</sup>

- Whether the property was vacant or unimproved.
- Whether the agency was using the property.
- Whether the property was essential to the agency mission.
- Whether the property was being put to its highest and best use (i.e., the most profitable and likely use).
- Whether the property had previously been determined surplus by the agency.

Among the large land owning state agencies whose holding were reviewed by the Audit report were State Budget and Control Board, the Department of Mental Health, the South Carolina Forestry Commission, and the Department of Natural Resources. The report identified 53 pieces of property as vacant, unused, or under-used thereby potentially surplus. Using existing

---

<sup>2</sup> A Review of South Carolina's Management of State-Owned Land, April 1999, South Carolina General Assembly Legislative Audit Council available at <http://www.state.sc.us/sclac/Reports/1999/land.htm>

<sup>3</sup> Id. at 92

appraisals and information from county tax assessors' offices, the report found the aggregate value of 40 parcels totaling over \$13 million.<sup>4</sup>

Relying on the analysis of property management systems in neighboring states, the Audit report concluded that South Carolina needed but did not have “a master land plan to guide the acquisition and use of state property.” Nor did it have a necessary “comprehensive system to identify, evaluate, and dispose of unused or unneeded land.” The report urged the creation of a centralized system to manage real property as a way to increase the value of the state's resources.

### **Moving the Proposal Forward**

For all practical purposes, the 1999 audit report lay dormant until Governor Mark Sanford took office. Sanford's administration entered into state governance at a time of nationwide economic downturn. South Carolina, like many other states across the union, was running a sizeable budget deficit with no apparent end in sight.<sup>5</sup> The Sanford administration considered selling off some surplus property as a way to lower annual operating expenses and provide extra revenue to “cover the \$155 million deficit left over from the 2002 fiscal year.”<sup>6</sup>

An editorial in *The State* offered an analysis of the underlying problem noting the inherent disincentive for agencies to sell surplus property under their control because the

---

<sup>4</sup> *State Must Better Manage Its Vast Land Holdings*, Editorial, *The State* (Columbia, SC), published on August 13, 2003, Page A10.

<sup>5</sup> *The Fiscal Crunch Confronting the South*, Sujit M. CanagaRetna, The Council of State Governments, Southern Legislative Conference, Kentucky General Assembly: Joint Hearing of the Appropriations and Revenue Committees, Frankfort, Kentucky January 14, 2003 available at <http://www.slcatlanta.org/Publications/FAGO/Ky-Power.ppt#1>.

<sup>6</sup> *Board to Consider List of State Property to be Sold*, Jennifer Holland, *The State* (Columbia, SC), published on August 12, 2004, Page B6.

proceeds were typically not allocated to the agency.<sup>7</sup> As a result, there was a rational tendency to hold onto the property for the possibility of its future use by the particular agency, however slight. The editorial criticized the old system of holding onto surplus property calling it a cost borne by “by the local community, in lost economic development and lost property taxes.”<sup>8</sup> It also criticized certain agencies for their unwillingness to share or transfer unused properties to agencies in need of extra space.<sup>9</sup>

In 2004, the legislature responded to the call for a change to the way the state managed its vast property holdings. Through a proviso in that year’s budget, the general assembly moved to grant more authority to the Budget and Control Board and adopted many of the recommendations from the Audit Council’s 1999 report. Included was the transfer of all applicable state agency properties to the Budget and Control Board. The budget text provides as follows:<sup>10</sup>

(A) It is the intent of the General Assembly to establish a comprehensive central property and office facility management 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 properties. The Budget and Control Board is directed to identify all state owned properties whether titled in the name of the state or an agency or department, and all agencies and departments of state government are upon request to provide the Board all documents related to the title and acquisition of the real properties that are occupied or used by the agency or titled in the name of the agency. **Except for any properties where the Board determines title should not transfer because the properties are subject to reverter clauses or other restraints upon transfer of title to the State, or where the Board determines the state would be best served by not receiving**

---

<sup>7</sup> *State Must Better Manage Its Vast Land Holdings*, Editorial, The State (Columbia, SC), published on August 13, 2003, Page A10.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> 2004 Act No. 248, Part IB, § 73.18, subsection (A)

**title, and with the exception of properties,** highways and roadways owned by the Department of Transportation, **title of any property held in a state agency or department name is effectively transferred to the state under the control of the Budget and Control Board upon the effective date of this Act.** (emphasis added)

The proviso also mandated the Budget and Control Board's creation of an overall state property management system and plan.<sup>11</sup>

Further, the Budget and Control Board is directed to approve a long-term plan no later than November 1, 2004, for the real property and space needs of all state agencies. **Based on the plan, state owned buildings and properties that the Board determines are not needed shall be sold with the approval of the Board.** Upon determination by the Board that a property should be sold, the agency is required to sell the property and remit the proceeds as directed herein. In addition existing debt on facilities and buildings may be refinanced with Board approval. (emphasis added)

Unless the specific property to be sold required satisfaction of an existing lien hold, the proviso directed that the net proceeds from all property sales be directed in the following manner:<sup>12</sup>

“The proceeds...shall be used to reduce the Fiscal Year 2001-02 accumulated budgetary general fund operating deficit as provided in this section”

The proceeds section of the proviso essentially temporarily usurped S.C. Code Ann. § 1-11-115 (2005) which dictates that:<sup>13</sup>

All proceeds from the sale of real property titled to or subject to the care and control of the State Budget and Control Board must be deposited to the credit of the Sinking Fund and used by the board for the acquisition and maintenance of facilities owned by it for the use and occupancy of state departments and agencies.

---

<sup>11</sup> 2004 Act No. 248, Part IB, § 73.18, subsection (A).

<sup>12</sup> Id.

<sup>13</sup> § 1-11-115, “Use of proceeds of sale of State real property;” enacted by 1999 Act No. 100, Part II, § 39

Although the budget proviso did not limit to Budget and Control Board's ability to consider all state owned properties as potentially "surplus," it put emphasis on a handful of key properties by specifically listing them as having a high priority for disposal:<sup>14</sup>

Department of Mental Health--Bull Street Complex; Budget and Control Board--300 Gervais Street; Budget and Control Board--Brickyard Road, 6.5 acres; Department of Disabilities and Special Needs--Margaret Street House; Department of Motor Vehicles--Office at old Myrtle Beach Air Force Base; and Educational Television Commission--Closed ETV Building.

The proviso also specifically excluded those properties held by "institutions of higher learning; the Public Service Authority; the Ports Authority; the MUSC Hospital Authority; the Myrtle Beach Air Force Redevelopment Authority; the Department of Transportation; and the Charleston Naval Complex Redevelopment Authority."<sup>15</sup>

### **The Budget Proviso's Preemption Clause**

Perhaps the most powerful element of the provision, and the most controversial, is the proviso's preemption clause. It indicates that "this provision is comprehensive and supersedes any conflicting provisions **concerning title and acquisition and disposition of state owned real property whether in permanent law, temporary law** or by provision elsewhere in this Act."<sup>16</sup> (emphasis added)

---

<sup>14</sup> Id.

<sup>15</sup> § 1-11-115, "Use of proceeds of sale of State real property;" enacted by 1999 Act No. 100, Part II, § 39

<sup>16</sup> Id.

In construing a legislative act by the General Assembly, the courts will work to ascertain legislative intent.<sup>17</sup> If the language used in the statute is “clear and unambiguous,” courts will interpret such legislation literally.<sup>18</sup> Thus, it is likely that the preemption clause contained within the aforementioned budget proviso would be interpreted literally, giving additional powers to the Budget and Control Board over state owned property.

Because the powers of the General Assembly are plenary and not enumerated like those of Congress, the South Carolina Supreme Court has held that any “act of the General Assembly must be presumed valid and constitutional.”<sup>19</sup> For legislation to be considered unconstitutionally void by the courts, its unconstitutionality must be “clear beyond any reasonable doubt.”<sup>20</sup>

## **A Changing Economy**

Of course, moods and political winds shifted just two years later as the economy improved and financial pressures on the State’s coffers eased. A budget surplus inspired the editorial staff of *The State* to caution state government against the “risk of getting rushed into selling property for less than it’s worth or for uses that aren’t in the best interest of the state and community.”<sup>21</sup> This is not to say that the pressure to dispose of state owned property was

---

<sup>17</sup> Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980); Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 415 S.E.2d 634 (1992); see also Opinion of the Attorney General of the State of South Carolina, February 27, 1990, 1990 S.C. AG Lexis 35

<sup>18</sup> State v. Goolsby, 278 S.C. 52, 292 S.E.2d 180 (1982), see also Opinion of the Attorney General of the State of South Carolina, August 29, 2002, 2002 S.C. AG Lexis 136

<sup>19</sup> State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956)

<sup>20</sup> Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939)

<sup>21</sup> *Budget Surplus Should Ensure Best Land Sale Decisions*, Editorial, *The State* (Columbia, SC), published on August 14, 2004, Page A8.

completely removed by the budget surplus. South Carolina's changing demographics is also playing an ever-increasing role.

### **Demand from the Private Sector**

Over the last few decades, the states in the Sunbelt have experienced an influx of new residents relocating from other parts of the country.<sup>22</sup> The sudden growth in the demand for housing and related services has added more pressure on finding a balance between development and conservation. The South Carolina Conservation Bank expects this phenomenon to persist as people continue to move into the state at an ever increasing rate. According to Bank estimates, South Carolina's population "will rise 25 percent, or 1 million people, between 2000 and 2015. As a result, the state will need 525,000 new housing units and 50 percent more paved roads."<sup>23</sup>

Analysts indicate that older couples from the North will continue to move to the South to take advantage of the region's quality of life as well as lower home prices.<sup>24</sup> Empty nesters who sell their homes in the country's Northeast will find that a comparable house in the Carolinas costs significantly less. They will also discover that despite a likely pay cut to relocate, their money goes a lot further in comparison. It appears that the economists are correct in their analysis. Homebuilding in the State has been booming through the first half of 2005. Permit issuance in the last year is up nearly one-quarter.<sup>25</sup>

---

<sup>22</sup> *Economic Boom Redefines the Population Equation*, USA Today, December 29, 1999

<sup>23</sup> *State lags behind in protecting vital land*, Saturday, December 18, 2004, Paul Alongi, The Greenville News

<sup>24</sup> *Take this house and shove it*, CNNMoney, 12/6/2005

<sup>25</sup> *South Carolina state profile - Fall 2005*, FDIC, 11/1/2005

The numbers along the State's coast are astonishing. According to the Environmental Systems Research Institute, a GIS based development tracking company, in the last 10 years, the area of Berkeley, Charleston, and Dorchester counties, has experienced tremendous residential expansion, making up 95 percent of South Carolina overall change in population.<sup>26</sup> Even more surprising is that "the urban (developed) area is outpacing the population growth at a rate of 6 to 1."<sup>27</sup>

### **Columbia and Richland County**

The Columbia metropolitan area specifically is also experiencing unprecedented growth. At least, 2,229 new condominiums, townhomes, apartments and single family homes are planned or under construction in the downtown area,<sup>28</sup> with a total of 5,200 residences within the city limits.<sup>29</sup>

Columbia has some of the biggest daytime population increases among U.S. cities with 50,000 residents or more.<sup>30</sup> The population jumps 59 percent to over 184,000 residents. A large portion of the influx can be attributed to drivers who live outside the city limits in neighboring suburbs. Fortunately, as these numbers increase and commutes lengthen, the push to move downtown to avoid traffic and be closer to amenities will strengthen further.<sup>31</sup> Rising gas prices

---

<sup>26</sup> Environmental Systems Research Institute, ARC News Online, "Urban Growth Along South Carolina's Coast;" available at <http://www.esri.com/news/arcnews/winter9900/articles/38-urbangrowth.html>

<sup>27</sup> Id.

<sup>28</sup> *Building our City- How six projects and 20 people...*, The State, 10/23/2005

<sup>29</sup> *Full Speed Ahead*, The State, 11/10/2005

<sup>30</sup> *It's Official: Columbia swells during the day*, The State, 10/22/2005

<sup>31</sup> *Trying to make amends*, The State, 11/20/2005

may also have similar effects.<sup>32</sup> These emerging phenomenons will limit the expansion of unbridled sprawl to some degree, but pressure for large tracts of undeveloped land will continue.

### **History of Agencies Charged to Protect Parks, Heritage trust sites, and Wilderness Areas**

Of the state agencies charged with maintaining large portfolios of state owned land, the three most prominent entities are the South Carolina Forestry Commission, the Department of Parks, Recreation, and Tourism, and the Department of Natural Resources. Each has a long history of administering thousands of acres of parks and preserves, as well as having an active role in shepherding South Carolina's environmental protection policies.

#### South Carolina Forestry Commission

Established by law in 1927 as a response to a growing environmental crisis caused by clear cutting and poor farming practices, the South Carolina Forestry Commission (SCFC) was charged with protecting the forest, promoting the benefits of forest management, and monitoring the forests' condition.<sup>33</sup> Today's mission is largely unchanged. SCFC strives to "protect, promote, enhance, and nurture the forest lands of South Carolina in a manner consistent with achieving the greatest good for its citizens."<sup>34</sup> Its responsibilities are extensive and encompass "all forest lands, both rural and urban, and to all associated forest values and amenities including,

---

<sup>32</sup> ARTICLE: Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?, 26 Colum. J. Envtl. L. 399 (2001)

<sup>33</sup> South Carolina Forestry Commission, "History of the Forestry Commission," available at <http://www.state.sc.us/forest/scmiss.htm>

<sup>34</sup> South Carolina Forestry Commission, "Mission Statement," available at <http://www.state.sc.us/forest/scmiss.htm>

but not limited to, timber, wildlife, water quality, air quality, soil protection, recreation, and aesthetics.”<sup>35</sup>

Although the agency manages tens of millions of acres of forests in South Carolina, SCFC directly maintains 171 properties across the state. The total acreage of these holdings exceeds 95,000, and includes three state forests.<sup>36</sup>

#### Department of Parks, Recreation, and Tourism

The creation of state parks in South Carolina began as a national movement of conservation and park development in 1933. As part of the Roosevelt administration’s response to the depression, ten of thousands found employment through the Civilian Conservation Corps creating a national park system that included sites in South Carolina. “Sixteen state parks were acquired during the 1930s and Myrtle Beach was the first to open on July 1, 1936.” At that time, the parks were under the supervision of South Carolina’s Forestry Commission.

The General Assembly created South Carolina’s Department of Parks, Recreation & Tourism in 1967. Like DNR, DPRT authority originates from S.C. Code Ann. § 1-30-10. Its power also comes from S.C. Code Ann. § 51-1-10 et seq.<sup>37</sup> In addition to developing the State’s emerging tourism industry, the Department was called upon “to protect and promote South Carolina state parks.”<sup>38</sup>

---

<sup>35</sup> Id.

<sup>36</sup> Available at <http://www.gs.sc.gov/sb-ps/appraisal/parcels/SB-appraisal-parcels.phtm>

<sup>37</sup> S.C. Code Ann. § 51-1-10 (2005) “Department of Parks, Recreation and Tourism created; governing commission; members; terms; vacancies.”

<sup>38</sup> “Our Mission,” South Carolina Department of Parks, Recreation, and Tourism, available at <http://www.scprt.com/about-scprt/missionmessage.aspx>

Today DPRT has more than 67,000 acres under its purview, with the state parks making up the bulk of the 143 properties. There are “46 operational parks and six historic properties.”<sup>39</sup> The Park Service division of DPRT manages and protects these diverse areas, “which range from deep mountain wilderness and old-growth forests, to plantation homes, battlefields, waterfronts and wetlands.”

### Department of Natural Resources

The South Carolina Department of Natural Resources (DNR), began with the 1905 passage of Act 489 and the 1906 passage of Act 60 which provided for the appointment of county game wardens and the creation of the State Board of Fisheries, respectively.<sup>40</sup> Approval of the Restructuring Act of 1993 authorized the merger of the former SC Department of Wildlife and Marine Resources, SC Water Resources Commission, SC Land Resources Conservation Commission, SC Geological Survey, and SC Migratory Waterfowl Committee under the roof of one state department, DNR.<sup>41</sup> DNR is part of the State’s executive branch. The enabling legislation and general structure originates from S.C. Code Ann. §1-30-10.

The DNR maintains 417 properties across the state. The total acreage of these holdings exceeds 190,000, and includes Wildlife Management Areas and 19 lakes.<sup>42</sup> Included in the acreage are 70 Heritage Preserve sites under the supervision of the Heritage Trust Program.<sup>43</sup>

---

<sup>39</sup> Available at <http://www.gs.sc.gov/sb-ps/appraisal/parcels/SB-appraisal-parcels.phtm> accessed on February 27, 2006.

<sup>40</sup> Department of Natural Resources, Centennial Celebration for SCDNR: History Timeline, available at <http://www.dnr.sc.gov/history/index.html>

<sup>41</sup> Department of Natural Resources, Timeline of years 1992 – 2000, available at <http://www.dnr.sc.gov/history/year1992.html>; see also S.C. Code Ann. § 1-30-75 (2005)

<sup>42</sup> <http://www.gs.sc.gov/sb-ps/appraisal/parcels/SB-appraisal-parcels.phtm>; see also <http://www.dnr.sc.gov/managed/index.html>

<sup>43</sup> S.C. Code Ann. § 51-17-10 et seq.

## Heritage Trust Property

The South Carolina Heritage Trust Program was created in 1976,<sup>44</sup> as a way to preserve the state's natural and cultural amenities remains against encroachment from the state's growing population. The enabling legislation designates certain areas as "heritage preserves" that are to be "protected for the benefit of present and future generations, for once disturbed they cannot be wholly restored."<sup>45</sup>

To further strengthen the protections for included sites, the final paragraph of the enabling "Declaration" strives to make the intent of the legislation perfectly clear:<sup>46</sup>

It is therefore the public policy of this State to secure for the people, both present and future generations, the benefits of an enduring resource of natural and cultural areas and features by establishing a system of Heritage Preserves and Sites.

The statute designates DNR as the trustee and the "present and future generations of citizens of the State" as beneficiaries.<sup>47</sup> The trust is managed by a seventeen member advisory board consisting of representatives from the general public and seven state agencies including DPRT, the Department of Archives and History, and the Department of Commerce.<sup>48</sup>

The Heritage Trust Program is funded through direct appropriations from the General Assembly, the Endangered Wildlife Fund, the Endangered Species License Plate and by a portion of revenue collected from a tax on real estate document stamps. Since 1996,

---

<sup>44</sup> Id.

<sup>45</sup> S.C. Code Ann. § 51-17-20 (2005) "Declaration of legislative findings"

<sup>46</sup> Id.

<sup>47</sup> S.C. Code Ann. § 51-17-90 (2005) "South Carolina Heritage Trust created"

<sup>48</sup> S.C. Code Ann. § 51-17-50, "Heritage Trust Advisory Board created; composition"

approximately 47,000 acres have been protected by inclusion into the Heritage Trust Program, at a total cost of \$19.4 million.<sup>49</sup>

S.C. Code Ann. § 51-17-80 (2005) dictates how Heritage Preserve areas are to be established and §51-17-90 outlines how those preserves become part of the Heritage Trust. Although the dedication of a Heritage preserve protects the area against private use in perpetuity,<sup>50</sup> the land can be redirected to some other public use. S.C. Code Ann. § 51-17-80 (2005) indicates:

No Heritage Preserve shall be taken for any other public purpose unless the approval of both the board of the department and the Governor has been obtained. In no case shall any Heritage Preserve be taken for any private use.

However, Heritage Preserves included in the corpus of the Heritage Trust are afforded “a greater degree of preservation than that provided by dedication.”<sup>51</sup>

## **History and Structure of the State Budget and Control Board**

Today’s South Carolina State Budget and Control Board began through a budget proviso in 1933.<sup>52</sup> The State Budget Commission, as it was originally known, was comprised of the Governor, the Chairman of House Ways and Means Committee, and the Chairman of the Senate Finance Committee. More than twelve years later, as the nation returned from war, the South

---

<sup>49</sup> National Marine Protected Areas Center, State / Territory - Marine Managed Areas (MMAs): South Carolina, Highlighted MMAs: Heritage Trust Program Areas; available at [http://www.mpa.gov/mpa\\_programs/states/south\\_carolina.html](http://www.mpa.gov/mpa_programs/states/south_carolina.html)

<sup>50</sup> S.C. Code Ann. § 51-17-80 (2005)

<sup>51</sup> S.C. Code Ann. § 51-17-90 (2005)

<sup>52</sup> “An Historical Timeline of the Budget & Control Board,” South Carolina Budget and Control Board, available at <http://www.bcb.sc.gov/BCB/boardtimeline.pdf>

Carolina Preparedness for Peace Commission issued a report suggesting a complete overhaul of the state government structure. The study outlined the framework of what would become the Budget and Control Board. In 1950, based in part on the 1945 Peace report, Governor Strom Thurmond championed Reorganization Plan No. 2 before the General Assembly. Plan No. 2, which called for the creation of the State Budget and Control Board, was adopted shortly thereafter.<sup>53</sup>

The statutory authority of today's Budget and Control Board's comes from Title 1, Chapter 11 of the South Carolina Code of Laws.<sup>54</sup> The chapter, aptly titled "State Budget and Control Board," outlines in generalities the structure and power of the State's most influential governmental agency. The composition of the Board is mandated by state law.<sup>55</sup> It includes the Governor, who serves as chairman, the State Treasurer, the Comptroller General, the chairman of the Senate Finance Committee, and the chairman of the Ways and Means Committee of the House of Representatives.<sup>56</sup> The Governor, State Treasurer, and Comptroller General are elected to their state executive positions in state-wide general elections. The representatives from the House and Senate are elected by their local districts, and are part of the Board as a result of their chairmanships. The current membership of the Budget and Control Board is a diverse group of public service veterans from all points of the political spectrum.<sup>57</sup>

---

<sup>53</sup> "A History of the South Carolina Budget and Control Board," South Carolina Budget and Control Board, available at <http://www.bcb.sc.gov/BCB/BCB-history.phtm>

<sup>54</sup> S.C. Code Ann. § 1-11-10 et seq

<sup>55</sup> S.C. Code Ann. § 1-11-10 (2005)

<sup>56</sup> State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (S.C. 1977)

<sup>57</sup> "Budget and Control Board Members," South Carolina Budget and Control Board, available at <http://www.bcb.sc.gov/BCB/BCB-members.phtm>

The Budget and Control Board meets about 10 times annually, more frequently if required. Each statutorily defined member is accorded one vote. Also generally attending the meetings are a number of nonvoting participants. The list includes: Board Secretary, Budget and Control Board Chief of Staff, eight Division Directors, Budget and Control Board General Counsel, Governor's Chief of Staff, Deputy State Treasurer, Comptroller General's Chief of Staff, Governor's Deputy Chief of Staff for Administration, Senate Finance Committee Chief of Staff, House Ways and Means Committee Chief of Staff, other Budget and Control Board staff, and the Budget and Control Board Executive Director.<sup>58</sup> The Executive Director is the chief administrative officer for the Board and serves at the pleasure of the five members of the Budget and Control Board.<sup>59</sup> His office is responsible for administration, operation of the Board divisions, and legal matters.

### **How the Budget and Control Board Manages Property**

In addition to budget proviso § 73.18,<sup>60</sup> the Budget and Control Board receives its general authority to manage real property through a series of codes, primarily found at S.C. Code Ann. §1-11-55 through 116 (2005). Pertinent statutes include §1-11-58 which reads:

Every state agency, as defined by Section 1-19-40, shall annually perform an inventory and prepare a report of all residential and **surplus real property owned** by it. The report shall be submitted to the State Budget and Control Board, Office of General Services...and shall indicate current use, current value, and projected use of the property. Property not

---

<sup>58</sup> Minutes from 2005 meetings of the Budget and Control Board: December 13, 2005, November 1, 2005, September 27, 2005, August 29, 2005, August 9, 2005, June 14, 2005, May 17, 2005, April 13, 2005; available at <http://www.bcb.sc.gov/BCB/BCB-minutes.phtm>

<sup>59</sup> S.C. Code Ann. § 1-11-23 (2005)

<sup>60</sup> 2004 Act No. 248, Part IB, § 73.18, subsection (A)

currently being utilized for necessary agency operations shall be made available for sale and funds received from the sale of the property shall revert to the general fund; (emphasis added)

S.C. Code Ann. § 1-11-65 (2005) is also relevant to the state's land holdings. The provision gives the Budget and Control Board sweeping authority to review the purchase and/or sale of all state owned property. It says in part:

(A) All transactions involving real property, made for or by any governmental bodies, excluding political subdivisions of the State, **must be approved by and recorded with the State Budget and Control Board.** Upon approval of the transaction by the Budget and Control Board, there must be recorded simultaneously with the deed, a certificate of acceptance, which acknowledges the board's approval of the transaction. The county recording authority cannot accept for recording any deed not accompanied by a certificate of acceptance; (emphasis added)

Finally, § 1-11-70 entitled "lands subject to Board's control" which reads:

All vacant lands and lands purchased by the former land commissioners of the State shall be subject to the directions of the State Budget and Control Board.

The General Services Division, one of the Budget and Control Board's eight divisions, is charged with carrying out the day-to-day administration of property management.

### **General Services Division**

The Division of General Services was created by budget proviso on July 1, 1964. Originally known as the Office of General Services, the General Services Division was renamed and structurally modified as part of a major Budget and Control Board reorganization in 2001. In addition to administering the state government's mail, printing, and vehicle services, the General Services Division manages all state owned property including leasing, purchasing, and selling

via its Real Property Services office.<sup>61</sup> The division also maintains 82 state owned buildings, including the Governor's Mansion and State House.

### **Typical Procedures Employed for the Disposal of State-owned Real Property**

Aforementioned §1-11-58 charges General Services with review of the annual real property reports and determination of which parcels should be deemed “surplus” to the State.<sup>62</sup>

General Services makes this information available to the public through its Real Property Services Division's interactive web interface database that lists the State's for sale property.<sup>63</sup> The web page is aptly entitled “Surplus Real Property for Sale.” The database includes parcel specific information such as property type (rural or urban), a general description that includes the parcel's location and tax map number, acreage, county, date the property was first listed, and the contact information of the general services staff member managing the property's disposition.

In addition to the surplus property database website, the General Services Division maintains a publicly accessible version of the entire list properties held by state agencies.<sup>64</sup>

Parcels are referenced by agency name and/or county and include the following information: name to whom the property is deeded, parcel address, county, acreage, and tax map number.<sup>65</sup>

---

<sup>61</sup> <http://www.gs.sc.gov/OGS/GS-index.phtm> accessed on 3/15/2006.

<sup>62</sup> S.C. Code Ann. § 1-11-58 (2005)

<sup>63</sup> <http://www.gs.sc.gov/sb-ps/RPS-surplus.phtm> accessed on 3/15/2006

<sup>64</sup> S.C. Code Ann. § 1-11-58 (2005) (“A central listing of such property will be maintained for reference in reviewing subsequent property acquisition needs of agencies.”)

<sup>65</sup> <http://www.gs.sc.gov/sb-ps/appraisal/parcels/SB-appraisal-parcels.phtm>

South Carolina Code dictates that the Budget and Control Board can authorize General Services to “sell any unassigned surplus real property.”<sup>66</sup> The Office of General Services in turn has the discretion to determine the most prudent method of disposal. The statute does suggest a few possible avenues such as auction, sealed bids, or listing the property with a private broker. However, the final clause of the statute grants General Services the flexibility to call on “any other method determined...to be commercially reasonable considering the type and location of property involved.”<sup>67</sup>

The General Services Division is constantly reviewing and marketing the sale of state owned properties. There are 28 properties currently listed on the General Services surplus index listed as “for sale.” The properties have an approximate aggregate acreage of 334 acres.<sup>68</sup> The disposition of many if not all of them are benign and unlikely to generate much controversy.

## **Recent Concerns**

Some more notable recent disposals could be considered “high profile,” but the reputation is likely the result of the properties new uses rather than their previous employment. For example, the former home of South Carolina Television, located on Millwood Avenue was sold to a company associated with long time developer urban developer Ben Arnold. The

---

<sup>66</sup> S.C. Code Ann. § 1-11-58 (2005): “Property not currently being utilized for necessary agency operations shall be made available for sale and funds received from the sale of the property shall revert to the general fund.”

<sup>67</sup> S.C. Code Ann. § 1-11-58 (2005)

<sup>68</sup> <http://www.gs.sc.gov/sb-ps/RPS-surplus.phtm> accessed on February 27, 2006. Note that the web list does not include parcels whose sale is under consideration.

development project, known as Shandon Square<sup>69</sup> will a mixed-use area with 22 private single-family residences.

On August 12, 2004, the Budget and Control Board announced its intention to sell the 86,000-plus square-foot Middleton Building at 300 Gervais Street directly across from the State Museum.<sup>70</sup> The private development, known as City Club,<sup>71</sup> will include high end town homes. In both of the aforementioned cases, the land exited the public realm for the purpose of private development with little outcry from the public. However, it is important to note that although both of the facilities were owned by “the public” neither was open to the general public.

Perhaps a more controversial issue is the sale of the State Hospital property in Columbia. In July 2003, government officials announced their desire to sell 178 acres of the Department of Mental Health’s central facility in downtown Columbia.<sup>72</sup> The property, affectionately know as Bull Street, has been part of the public realm since funding for its creation was approved by the legislature in 1821.<sup>73</sup> The S.C. Lunatic Asylum, as it was called, was only the second publicly funded institution dedicated to the treatment mental illness in the country. The idea was to provide an atmosphere that mimicked the design and layout of a small town.

The site has seen a number of changes over the years, and has even served as the temporary home to as a prison camp for Union officers from 1864 to 1865. The Bull Street complex reached its population heyday in the early 1900s with over 1000 patients. As attitudes

---

<sup>69</sup> *Full speed ahead*, The State, November 10, 2005

<sup>70</sup> *Board to sell some property*, The State (Columbia, SC), 8/13/2004, Jennifer Holland, Page D41

<sup>71</sup> *Current Vista Development*, Columbia Development Corporation, available at [http://www.columbiadevelopment.org/majordev\\_cdc.asp](http://www.columbiadevelopment.org/majordev_cdc.asp), accessed on May 2, 2006

<sup>72</sup> *State Must Better Manage Its Vast Land Holdings*, Editorial, The State (Columbia, SC), published on August 13, 2003, Page A10.

<sup>73</sup> *History of the South Carolina Department of Mental Health, Changing Minds, Opening Doors: A South Carolina Perspective on Mental Health Care*, Susan Craft, May 1996, available at <http://www.state.sc.us/dmh/history.htm>

towards the care for the mentally ill changed, so too changed the need for a large centralized mental health campus. The 1920s and 30s saw a gradual push to provide decentralized care in other South Carolina cities in the form of outpatient clinics. This movement resurged in the late 1960s and 1980s as community based mental health services gained additional support. Slowly patients were transferred away from the Bull Street campus and geographically closer to their families. Today, the S.C. Department of Mental Health serves over 90,000 clients in 17 community health centers. Nonetheless, less than 80 are housed at Bull Street.<sup>74</sup> According to DMH officials, “entire floors, wards, and cottages on the Columbia campus are closed or are used for administrative offices.”<sup>75</sup> Both DMH and General Services agree that the Bull Street property is surplus.

## **What is keeping South Carolina from selling off its state owned land?**

### Tourism

One of the State’s leading industries is tourism. The State touts itself as a haven for those who appreciate the outdoors. South Carolina’s state park web-based portal for park information and central reservation system opens with the following observations:<sup>76</sup>

Stunning forested mountains and towering waterfalls, blackwater rivers and scenic inland lakes, white sand beaches and ancient island shores, treasured American historic sites and priceless cultural treasures ...with more than 80,000 acres of protected lands from the Blue Ridge Mountains to the sand dunes of the Atlantic, South Carolina State Parks protect some

---

<sup>74</sup> *Mental Health May Get Millions*, Roddie Burris, The State (Columbia, SC), published on June 12, 2005, Page B1.

<sup>75</sup> *History of the South Carolina Department of Mental Health*, Changing Minds, Opening Doors: A South Carolina Perspective on Mental Health Care, Susan Craft, May 1996, available at <http://www.state.sc.us/dmh/history.htm>

<sup>76</sup> Introductory paragraphs on <http://www.southcarolinaparks.com> accessed on May 27, 2006.

of the most inviting natural, cultural and recreational destinations in the US.

According to DPRT statistics, South Carolina's state parks attract almost 10 million visitors annually.<sup>77</sup>

In general, state government officials are keenly aware of the tourism industry's impact on the South Carolina economy.<sup>78</sup> Alienation of certain state owned properties would have negative repercussions on that industry.

### Legal Doctrines

Both the Charitable Trust Doctrine and the Public Trust Doctrine have been used in other states, and to some degree in South Carolina to stop or limit the alienation of state owned property. In some circumstances, concerned citizens have the prerogative to bring legal action to prevent the sale of state property. In other situations, only the Attorney General may raise the issue before the courts. The primary argument under both theories is that although the legal title of certain state owned property vests in the State of South Carolina, the equitable title remains with those of the public who receive benefit the land. Although legal doctrines provide some relief, judicial determination is likely to hinge on the court's analysis of the extent of deference that the General Assembly should be afforded. However, because of the nature of real estate development finance, a lengthy judicial process could have the effect of rendering a potential purchase economically unviable.

---

<sup>77</sup> *Our Mission*, South Carolina Department of Parks, Recreation, and Tourism, available at <http://www.scprt.com/about-scprt/missionmessage.aspx>

<sup>78</sup> *South Carolina Tourism: The Economic Development that Won't Go Offshore!*, International Tourism Research Institute, University of South Carolina, 2006, (“\$9.6 Billion impact on gross state product; \$1 Billion impact in state and local tax revenues; 188,250 employment impact”)

### *Charitable Trust*

A trust is defined as a legal relationship between a person or persons having an equitable ownership in property or assets and another person or persons owning the legal title to those resources, where the equitable owner is entitled to certain benefits created by the performance of duties and the exercise of certain powers by the title holder.<sup>79</sup> Likewise, a charitable trust, is one created “for the benefit of an indefinite class of persons constituting some portion or class of the public or, more broadly defined, a trust limiting property to some public use.”<sup>80</sup> According to the South Carolina Supreme Court in *Porcher v. Cappellmann*, 187 S.C. 491, 198 S.E. 8 (1938):

A “private trust” is distinguished from a “charitable trust” in that in the former there must be a certain trustee who holds legal title, and a certain specified cestui que trust, clearly identified, or made capable of identification by the terms of the instrument creating the trust, while in a charitable trust the beneficiaries are uncertain, being 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, being the time of duration allowed for existence of a trust and the degree of definiteness required.

Charitable trusts are typically created through a process whereby a gift is bestowed by a benefactor to be managed by a trustee. The gift is dedicated to a charitable purpose such as reducing poverty, improving education, addressing health concerns, or some other public benefit.<sup>81</sup> There is not a technical legal formula that must be employed to create a charitable trust.<sup>82</sup> Instead, if in question, the court will examine the reasons behind the trust’s creation. In

---

<sup>79</sup> 54 Am J1st Trust § 4

<sup>80</sup> 15 Am J2d Char § 5; State ex rel. Emmert v Union Trust Co. 227 Ind 571, 86 NE2d 450, 12 ALR2d 836.

<sup>81</sup> Modern Dictionary for the Legal Profession, Third Edition, 2001. William S. Hein & Co., Inc.

<sup>82</sup> Harter v. Johnson, 122 S.C. 96, 115 S.E. 217, 220 (1922)

*Harter v. Johnson*, 122 S.C. 96, 115 S.E. 217, (S.C. 1922), the South Carolina Supreme Court held that:

...no 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... the omission from a bequest of the words 'in trust' is not material.

Local and state legislative entities are also able to create charitable trusts by grant or by legislative act.<sup>83</sup> Furthermore, the funds used to do so are not required to come strictly from private donations; they may also originate from general tax revenue.<sup>84</sup> In *Thompson v. Hale*, an Act by the Georgia General Assembly, supported primarily by appropriations of the Legislature rather than private gifts, created a charitable trust.

A charitable trust may also be created through the transfer of property even if valuable consideration is exchanged. In *Cohen et al. v. City of Lynn*, 33 Mass. App. Ct. 271, 598 N.E.2d 682 (1992), the Court upheld the lower court's decision concluding that the trust was inalienable despite the fact that the grantors received consideration from the city. The Court concluded that the municipality had accepted the property subject to language in the deed that created a charitable trust for "park purposes."

In a similar Massachusetts situation, land owner's offered the city a piece of vacant property at a "reasonable price" if the property would be "dedicated to public use."<sup>85</sup> Noting that

---

<sup>83</sup> *Thompson v. Hale*, 123 Ga. 305, 51 S.E. 383 (1905)

<sup>84</sup> "... 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.

<sup>85</sup> *Nickols v. Commissioners of Middlesex County*, 341 Mass. at 19, 166 N.E.2d 911

the owner's could subdivide and sell the lots in the future to private persons, thereby excluding the public, the local park commissioner urged that the property be purchased and "secured for public enjoyment forever." Years later, when the city attempted to sell the property, members of the community brought suit. The Court concluded that a "public charitable trust" had been created through the conveyances and that the agreement must be enforced.<sup>86</sup> After-acquired property that extends the boundaries of a charitable trust is also generally considered part of the trust property.<sup>87</sup>

Unlike public trusts, "charitable trusts cannot be enforced by ordinary citizens."<sup>88</sup> State Attorney Generals are considered the proper party to enforce the interest of the general public in this regard.<sup>89</sup>

South Carolina courts have long upheld the importance of charitable trusts, and they have continuously echoed the need to protect them.<sup>90</sup> The South Carolina's Supreme Court has recognized that "charitable 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."<sup>91</sup> They have also been lenient in interpreting enabling documents, consistently construing indefinite language as sufficient to create a charitable trust.<sup>92</sup>

---

<sup>86</sup> Salem v. Attorney Gen., 344 Mass. at 631, 183 N.E.2d 859.

<sup>87</sup> State ex rel. Goddard v. Coerver, 100 Ariz. 135, 412 P.2d 259 (Ariz. 1966)

<sup>88</sup> 10 S.C. Env'tl. L.J. 23

<sup>89</sup> *Id.*

<sup>90</sup> Porcher v Cappleman, 187 S.C. 491, 198 S.E. 8, 10 (1938). ("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.")

<sup>91</sup> Colin McK Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986) (citing Porcher v. Cappleman).

<sup>92</sup> Watson v. Wall, 229 S.C. 500, 93 S.E.2d 918 (1956); Dye v. Beaver Creek Church, 48 S.C. 444, 26 S.E. 717 (1897).

Furthermore, in *Grady et al. v. City of Grville*, 129 S.C. 89, 123 S.E. 495 (1924) the South Carolina Supreme Court recognized that state agencies and local municipalities are permitted under state law to serve as trustees for charitable trusts. The *Grady* Court held that the City of Greenville, as an extension of its traditional police powers, could serve as trustee for the establishment of a trust to recognize and honor fallen Confederate soldiers.

Although a charitable trust has the ability to protect property to a certain extent, this does not indicate that the property can never be sold. Courts of Equity have approved sales through their power of equitable deviation. The doctrine of equitable deviation allows divergence:<sup>93</sup>

...from a specified term of the trust if, owing to circumstances not known to the [benefactor] 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...

South Carolina courts have long recognized the power of a Court of Equity to deviate from the technical requirements of the trust when such requirements cannot be carried out or when the charitable end would be better served in another way. Nonetheless, although courts of equity are entrusted with the judicial power to alter or modify a trust, there predisposition is to preserve, not destroy. The power to modify charitable trusts is justified only by some exigent circumstance “which makes the action of the court in a sense indispensable to the preservation of the trust.”<sup>94</sup>

As such, the burden to identify those circumstances that substantiate a deviation from the original trust falls to the trustee.<sup>95</sup>

---

<sup>93</sup> Colin McK. Grant Home, 292 S.C. at 473, 349 S.E.2d at 659

<sup>94</sup> Chiles v. Chiles, 270 S.C. 379. 242 S.E..2d 426 (1978)

<sup>95</sup> *Epworth Children's Home v. Beasley*, 616 S.E.2d, *supra*, at 717

In *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 349 S.E.2d 655 (S.C. Ct. App. 1986) the court again faced the issue of alienation of trust property. Although the heirs to the trust argued that a deviation would make the trust fail thus reverting the proceeds to them, the Court of Appeals affirmed the Circuit Court's determination that selling the property and creating a fund devoted to furthering the trust's underlying purposes was judicially prudent. The Court opined that:<sup>96</sup>

...the doctrine of *cy pres*, 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 . . . 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...

The question then becomes, how much power would a charitable trust argument have against the State's attempt to dispose of certain state owed property. Although it is unlikely that a court would strictly follow the holding of *Colin McK. Grant Home v Medlock* in its application regarding the sale of an entire park or protected areas, a proposed deviation from a portion of a park could have similar effect as the aforementioned case. If circumstances permitted, the State could argue that the tax burden on the public is too great to justify annual upkeep of all state owned land. The public could be better served by using the proceeds from the sale of a portion of a property to create a trust that would provide future maintenance and improvements to the remaining portion of the property. Rebuttals would likely focus on the slippery slope effects of creating new trusts from the remains of dismantled ones.

### *The Power of the General Assembly over Charitable Trusts*

---

<sup>96</sup> Colin McK. Grant Home v. Medlock, 292 S.C. 466, 349 S.E.2d 655 (S.C. Ct. App. 1986)

It seems strange to think that a simple proviso in a state budget could have the effect of undoing decades of preservation and environmental protection. As discussed earlier in the article, a budget proviso is similar to any other legislation passed by the General Assembly. The more important question is the degree of power the General Assembly holds over charitable trusts.

The powers of the General Assembly are plenary, except as restricted by the Constitution.<sup>97</sup> Yet, courts have viewed the authority of the legislature with respect to altering charitable trusts somewhat differently than the normal exercise of traditional legislative powers. The rule of thumb is that their power is limited, and legislatures cannot undo or alter a charitable trust without exigent circumstances.<sup>98</sup>

Some jurisdictions have held that such action would create a violation of the separation of powers.<sup>99</sup> In *Opinion of the Justices*, 374 Mass. 843, 371 N.E.2d 1349 (1978), the Massachusetts Supreme Court opined that it “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.”

Jurisdictions closer to home have taken a different stance. The North Carolina Supreme Court, for example, has held that either the state legislature or a court of equity could authorize the sale of charitable trust property.<sup>100</sup> The United States Supreme Court has also weighed in on the issue, tending to agree with North Carolina. In *Stanley v. Colt*, the US Supreme Court held that the Legislature could authorize alienation of trust property even though such alienation was

---

<sup>97</sup> *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), *State ex rel. Richards v. Moorner*, 152 S.C. 455, 150 S.E. 269 (1929)

<sup>98</sup> *Opinion of the Attorney General of the State of South Carolina*, December 9, 2005, 2005 S.C. AG Lexis 138

<sup>99</sup> *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); *Cohen v. City of Lynn*, supra; *Opinion of the Justices*, 101 N.H. 531, 133 A.2d 792 (1957)

<sup>100</sup> *Shields v. Harris*, 190 N.C. 520, 130 S.E. 189, 192-193 (1925)

strictly prohibited in the documents creating the trust. The Court noted that “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.”<sup>101</sup>

ALR annotation *40 A.L.R.2d 556: Constitutionality, Construction, and Effect of Legislation Authorizing Sale of Charitable Trust Property* offers similar insight, although it notes that the jurisdictional treatment has been limited:<sup>102</sup>

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...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.

However, the annotation also notes that the legislation must be specifically directed to a particular trust, perhaps indicating that general verbiage may not suffice.

In respect to parks, heritage properties, and wildlife preserves, the question then becomes whether the General Assembly has the power to dissolve or alienate charitable trust property that itself created. South Carolina courts have not directly faced this question. Although the General Assembly and most legislative bodies have the power to alter or repeal previously enacted legislation, “such is not necessarily the case with regard to charitable trusts.”<sup>103</sup> It is highly probable that the common law governing charitable trusts likely distinguishes the General Assembly’s power in this instance from its traditional role. In a declaratory judgment action, a

---

<sup>101</sup> 72 U.S. 119, 5 Wall. 119, 18 L. Ed. 502 (1867)

<sup>102</sup> *Constitutionality, Construction, and Effect of Legislation Authorizing Sale of Charitable Trust Property*, C. T. Foster, 40 A.L.R.2d 556

<sup>103</sup> *Opinion of the Attorney General of the State of South Carolina*, December 9, 2005, 2005 S.C. AG Lexis 138 referencing *Jones, Atty. Gen. v. Vermont Asbestos Corp.*, 108 Vt. 79, 183 A. 291 (1936),

court would first determine whether the General Assembly actually created a charitable trust. If it did decide that a trust was created, the issue would then turn on whether the subsequent action taken by the legislature, was a benefit or detriment to the trust.<sup>104</sup> If the action was in detriment, then the court would likely rule against the State.

### *Public Trust Doctrine*

Recently, a handful of legal scholars have argued that the Public Trust Doctrine could be interpreted to include a far greater array of publicly held properties.<sup>105</sup> They argue that public spaces, such as parks, recreation areas, and wilderness preserves should be protected “because of their availability for general use by the public for numerous public purposes and consequently, because of their importance in enhancing the quality of life...”<sup>106</sup> through the Public Trust Doctrine.

The Public Trust Doctrine is a legal theory originating from common law property that indicates that certain lands are held indefinitely in trust for the public and can be used only for the public good.<sup>107</sup> Under the Public Trust Doctrine, “certain environmental resources are treated as property entitled to maintenance and protection for the public by the government. The state holds the resource in trust for the public and must apply a public trust concept to the management of the resource, fulfilling its duty to promote and maintain a healthy environment

---

<sup>104</sup> Id.

<sup>105</sup> ARTICLE: Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine?, 10 S.C. Envtl. L.J. 23 (2002)

<sup>106</sup> Id.

<sup>107</sup> Id.

on behalf of its citizens.”<sup>108</sup> In essence, there is a “duty of loyalty to the trust beneficiaries (the public) and a duty of care over the trust assets (the park).”<sup>109</sup>

The historical roots of this doctrine arise from Roman and English tradition and are most commonly associated with protection of navigable waters and tidal plains. South Carolina’s treatment of the doctrine in case law is limited.<sup>110</sup> It was first discussed in 1884 in *State v. Pacific Guano Co.*, 22 S.C. 50, (S.C. 1884).<sup>111</sup> In *Sierra Club v. Kiawah Resort Associates*, the South Carolina Supreme Court further outlined doctrine’s applicability in South Carolina.<sup>112</sup>

The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

There are a handful of ways in which states can create properties that become subject to the Public Trust Doctrine.<sup>113</sup> These methods share many similarities with the Charitable Trust Doctrine. State governments can purchase land using public funds and then dedicate that land for a public purpose such as a park or a reserve.<sup>114</sup> It can also be created through eminent domain.<sup>115</sup> Finally, public spaces can be created from property donated to municipalities or state agencies

---

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> ARTICLE: The Public Trust Doctrine in South Carolina, 7 S.C. Envtl. L.J. 31 (1998)

<sup>111</sup> NOTE: McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis, 53 S.C. L. Rev. 509 (2002)

<sup>112</sup> *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397, 1995 S.C. LEXIS 52 (S.C. 1995)

<sup>113</sup> ARTICLE: Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine?, 10 S.C. Envtl. L.J. 23 (2002)

<sup>114</sup> Id.

<sup>115</sup> Id.

for the purpose of creating and maintaining public spaces much like establishing a charitable trust. Unlike the Charitable Trust Doctrine, the Public Trust Doctrine allows standing to be conferred on plaintiffs as residents or taxpayers.<sup>116</sup> Citizens who seek to preserve these spaces “could assert that the state and its municipalities have a duty under the Public Trust Doctrine to protect and preserve parks as a natural resource held in trust for the public.”<sup>117</sup> Because the Public Trust Doctrine has recently resurfaced in the South Carolina Courts as a background principle of state property law it may qualify as a defensive tool to limit a state property’s alienation.

The line separating general state owned property and state owned property susceptible to the Public Trust Doctrine is thin. Public trust properties would only be protected if they are purchased and dedicated for a specific public use. Lands acquired for general state or municipal purposes, without deed or other restrictions, are not placed into a trust for communal purposes. Similar to the enabling circumstances found in the Charitable Trust Doctrine, although some jurisdiction have required that the dedication to the public be found in a legislative enactment or in a written instrument,<sup>118</sup> other jurisdictions have looked at actions surrounding the acquisition of the property to determine the purpose for which the land was acquired.<sup>119</sup> According to Professor Serena M. Williams:<sup>120</sup>

---

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id. referencing Paepcke v. Public Bldg. Com., 46 Ill. 2d 330, 263 N.E.2d 11, 2 Env't Rep. Cas. (BNA) 1291, 1 Env'tl. L. Rep. 20172 (1970)

<sup>119</sup> Id. referencing Gewirtz v. City of Long Beach, 69 N.Y. Misc. 2d 763 (Sup. Ct., Naussau Co. 1972), aff'd, 358 N.Y.S.2d 957 (N.Y. App. Div. 1974).

<sup>120</sup> ARTICLE: Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine?, 10 S.C Env'tl. L.J. 23 (2002)

If the actions indicate that the land was acquired for the purpose of creating a park and a park is then created, the public trust applies even in the absence of specific language in the instruments conveying the property.

Despite a myriad of protections, the Public Trust Doctrine has not evolved into an unlimited barrier against all property development. Even if the land has been dedicated as a public space and or has been used as such by the public under the guise of a public trust, legislative authority can essentially undo the public trust protection making the land susceptible to diversion or alienation. The *Kiawah* court noted that:<sup>121</sup>

The control of South Carolina for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Two tests have evolved in analyzing whether government action violates the Public Trust Doctrine.<sup>122</sup>

- (1) Land held in public trust can be alienated or diverted only when based on specific and direct authorization by a state legislature;
- (2) Land held in public trust can be alienated or diverted only when it meets a substantive test as established by courts

In essence, state and local governments have been able to overcome the Public Trust Doctrine by simply redirecting the protected property to some other public use. As opposed to an outright sale to a private developer, these public spaces “are more often threatened by the diversion of the land to other public projects since the state or local government may view public parks as land available for a change in public use that is less costly politically and financially

---

<sup>121</sup> *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (S.C. 1995)

<sup>122</sup> *Id.*

than land acquired by eminent domain.”<sup>123</sup> New or redirected roadways, golf courses, and conference facilities are just a handful of the of type public projects that have encroached upon parks and preserves. Thus, although the Public Trust Doctrine can prevent public officials from seeing public spaces as land ripe for commercial development; it is not a panacea against all change.

### The Power of Public Opinion

Public opinion is, perhaps, the most easily available tool for protecting certain state properties from alienation or deviation from public use. Should the state attempt to sell state owned property or a significant portion thereof that is perceived by the public as a space within the realm of protected properties, public outcry is highly likely and highly effective. Nonetheless, although organized conservationists groups should be part of the process, the response will be more powerful if it comes directly from the general public.

For example, since the announcement of the State Hospital’s Property’s sale, countless letters to the editor and columns from concerned citizens appeared in The State Newspaper.<sup>124</sup> During that same period, the State’s editorial board spoke to the issue numerous times on the paper’s editorial pages. As noted above, the comments from the authors regarding the state hospital have focused on who will be the beneficiary of the proceeds rather than alarm over the transfer of the property from state to private ownership.

---

<sup>123</sup> Id.

<sup>124</sup> March 21, 2006, Page A10, March 19, 2006, Page D8; March 15, 2006, Page A12; March 10, 2006 , Page A10; January 2, 2006, Page A8; November 19, 2005 (4 letters) , Page A10; October 23, 2005, Page D6; September 4, 2005, Page D2; July 14, 2005, Page A10; July 9, 2005, Page A12; July 9, 2005, Page A12 ; June 25, 2005 (2 letters), Page A8 ; June 18, 2005, Page A8 ; June 18, 2005, Page A8 ; May 16, 2005, Page A8 ; March 11, 2005, Page A12; February 9, 2005, Page A12 ; January 28, 2005, Page A14 ; January 28, 2005, Page A14; January 28, 2005, Page A14; July 6, 2004, Page A8; June 25, 2004, Page A14; June 12, 2004, Page A14 ; May 29, 2004, Page A9; January 24, 2004, Page A12; January 14, 2004, Page A14

A similar situation also provoked a public outcry. In 2004, Governor Sanford's 2004-05 budget proposal contained provisions to privatize some state park operations and services. Although, the movement pertained only to managing the parks, and not to their sale or diversion, Governor Sanford's proposal was met with stiff public opposition. The measure was eventually defeated by the legislature. Although the administration made no mention of transferring property rights to private companies or developers,<sup>125</sup> citizens were outraged that the government was taking even small steps toward the privatization of "public" state-owned land.

The key component to protecting properties is monitoring the actions taken by the Budget and Control Board and the General Assembly regarding those holdings. Activist groups should focus their energies on reviewing agendas and minutes from the various bodies, which are readily available via the internet, and keep the public and media informed should a questionable issue arise.

#### The Budget and Control Board and the General Assembly

The Budget and Control Board and the General Assembly are the two most important reasons why South Carolina has not witnessed a massive sell-off of state owned property. Much of this can be ascribed to the nature and makeup of the two government bodies. First, both are typically deliberate organizations that operate outside a vacuum. They are aware of the importance of the State's natural resources, and the need to protect them against private encroachment.

Second, they are highly cognizant of the repercussions that would result from a sale of a state owned property that citizens considered "public." Like any other elected body, the General

---

<sup>125</sup> *State Parks – Public or Private: Watchdog Alert*, State Environmental Resource Center, July 12, 2004, available at <http://www.serconline.org/watchdog/watchdog2004/watchdog19.html>

Assembly is susceptible to public pressure. Especially near the end of an election cycle.

Although arguably less influenced by public opinion, the members of the Board do face election cycles as well.

Finally, if the legislature was truly unhappy with an upcoming Budget and Control Board action regarding state owned real property, whether in respect to general or specific sites, the General Assembly could move to give guidance to the Budget and Control Board by altering the property management enabling legislation or by creating a new budget proviso. They could also create legislation to specifically address the parcel in question.<sup>126</sup>

## **Conclusion**

The 2004 Budget Proviso § 73.18 has significantly increased the property management power of the South Carolina State Budget and Control Board, legally shifting much of the property transferability control previously held by other state agencies under the purview of the five member board. Although a concern to watch, the rush to sell state owned property has not occurred. Nonetheless, the pressure on state government to make property available to the private sector will only increase as the State's population grows. The impetus would be further exacerbated should South Carolina be faced with another economic downturn.

On the other hand, properties such as parks, heritage trust sites, and wilderness areas, are protected to some degree by legal theories such as the Charitable Trust Doctrine and the Public

---

<sup>126</sup> Senate Bill 1110, House Bill H 4882, Session 116 (2005-2006) (“A bill to amend the code of laws of South Carolina, 1976, by adding section 44-9-130 so as to provide that South Carolina State Hospital property owned or held by the Department of Mental Health that is not in use may be sold or leased, to create a special trust fund for the deposit of proceeds from the sale or lease of such property, to provide that these funds must be used to replace adult long-term hospitalization services and forensic services, and to prohibit the department from using these funds to supplant its current level of appropriated funding.”)

Trusts Doctrine that can add extra protection should government officials move to alienate what the public considers protected property. Furthermore, public opinion carries an extraordinary amount of weight in guiding the General Assembly to allow or restrict the property disposal powers of the Budget and Control Board.