

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 464

INTRODUCER: Senator Garcia

SUBJECT: Sale or Lease of a County, District, or Municipal Hospital

DATE: January 9, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Pre-meeting
2.	_____	_____	BC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill requires any sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease. The bill also provides that prior to the sale or lease, the governing board of the public hospital must publicly notice meetings earlier in the process. If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for a “fair market value,” which is defined in the bill, or otherwise serve the public interest, and the findings and basis that support the board’s decision to sell or lease the hospital must be in writing. The bill delineates additional information that must be included in the governing board’s findings and requires the board to publish all findings and documents to allow time for public comment about the proposed sale or lease.

This bill amends sections 155.40 and 395.3036, Florida Statutes.

II. Present Situation:

Sale or Lease of Public Hospitals

County, district, and municipal hospitals may be created by special enabling acts, rather than by general acts under Florida law.¹ The special act may specify the hospital’s ability or inability to

¹ Section 155.04, F.S., allows a county, upon receipt of a petition signed by at least 5 percent of resident freeholders, to levy an ad valorem tax or issue bonds to pay for the establishment and maintenance of a hospital. Section 155.05, F.S., gives a county the ability to establish a hospital without raising bonds or an ad valorem tax, utilizing available discretionary funds. However, an ad valorem tax can be levied for the ongoing maintenance of the hospital.

levy taxes to support the maintenance of the hospital, the framework for the governing board, and whether or not the governing board has the ability to issue bonds. There are currently 34 hospital districts in Florida under which public hospitals operate,² and the Public Health Trust of Miami-Dade County, which is not a special hospital district but is a part of county government.³

The process for the sale or lease of a public hospital is established by s. 155.40, F.S. Currently, the governing board of a public hospital has the authority to negotiate the sale or lease of the hospital. The hospital can be sold or leased to a for-profit or not-for-profit Florida corporation and such sale or lease must be in the best interest of the public. The board is required to publicly advertise the meeting at which the proposed sale or lease will be discussed in accordance with s. 286.0105, F.S., and the offer to accept proposals from all interested and qualified purchasers in accordance with s. 255.0525, F.S.

Section 155.40(2), F.S., requires any lease, contract, or agreement to:

- Provide that the articles of incorporation of the corporation are subject to approval of the board of directors or board of trustees of the hospital.
- Require that any not-for-profit corporation become qualified under s. 501(c)(3) of the U.S. Internal Revenue Code.
- Provide for the orderly transition of the operation and management of the facilities.
- Provide for the return of the facility to the county, municipality, or district upon the termination of the lease, contract, or agreement.
- Provide for the continued treatment of indigent patients pursuant to the Florida Health Care Responsibility Act⁴ and ch. 87-92, Laws of Florida.

For the sale or lease to be considered “a complete sale of the public agency’s interest in the hospital” under s. 155.40(8)(a), F.S., the purchasing private entity must:

- Acquire 100 percent ownership of the hospital enterprise.
- Purchase the physical plant of the hospital facility and have complete responsibility for the operation and maintenance of the facility, regardless of the underlying ownership of the real property.
- Not allow the public agency to retain control over decision-making or policymaking for the hospital.
- Not receive public funding, other than by contract for services rendered to patients for whom the public agency seller has the responsibility to pay for hospital or medical care.
- Not receive substantial investment or loans from the seller.
- Not be created by the public agency seller.
- Primarily operate for its own financial interests and not those of the public agency seller.

² See Agency for Health Care Administration, Florida Commission on Review of Taxpayer Funded Hospital Districts, *Hospital Tax District Survey Data*, for a list of taxpayer funded hospital districts, available at: <http://ahca.myflorida.com/mchq/FCTFH/hospitalNEW.shtml> (Last visited on January 3, 2012).

³ Commission on Review of Taxpayer Funded Hospital Districts, *Report of the Commission on Review of Taxpayer Funded Hospital Districts*, pg. 8, available at: <http://ahca.myflorida.com/mchq/FCTFH/pdf/122911Meeting/FinalReportRF2.pdf> (Last visited on January 3, 2012).

⁴ Sections 154.301-154.316, F.S.

A complete sale of the public agency's interest under s. 155.40(8)(b), F.S., shall not be construed as:

- A transfer of governmental function from the county, district, or municipality to the private corporation or entity.
- A financial interest of the public agency in the private corporation or other private entity purchaser.
- Making the private corporation or other private entity purchaser an "agency" as that term is used in statute.
- Making the private entity an integral part of the public agency's decision-making process.
- Indicating that the private entity is "acting on behalf of a public agency," as that term is used in statute.

If the corporation that operates a public hospital receives more than \$100,000 in revenues from the county, district, or municipality, it must account for the manner in which the funds are expended.⁵ The funds are to be expended by being subject to annual appropriations by the county, district, or municipality, or if there is a contract for 12 months or longer to provide revenues to the hospital, then the governing board of the county, district, or municipality must be able to modify the contract upon 12 months notice to the hospital.⁶

Recent Leases or Sales of Public Hospitals

The public hospital Bert Fish Medical Center entered into a controversial \$80 million lease agreement with Adventist Health System, which was nullified by Circuit Court Judge Richard Graham because of 21 closed-door meetings that occurred during the negotiation process and violated Florida's Sunshine Law under s. 286.011, F.S.⁷

Other leases or sales or proposed leases or sales of public hospitals have been scrutinized, especially for the effect such sales or leases would have on taxpayers. For example, Helen Ellis Hospital was merged with Adventist Health in 2010, and there have been proposals to turn public hospital systems in Miami-Dade County and Broward County into private hospitals.⁸

Florida Commission on Review of Taxpayer Funded Hospital Districts

On March 23, 2011, Governor Rick Scott issued Executive Order Number 11-63, which created the Florida Commission on Review of Taxpayer Funded Hospital Districts (Commission). The Commission was created to assess and make recommendations on the role of hospital districts, whether it is in the public's best interest to have government entities operating hospitals, and what is the most effective model for enhancing health-care access for the poor.

⁵ Section 155.40(5), F.S.

⁶ *Id.*

⁷ Linda Shrieves, *Judge rules Bert Fish must cut ties with Florida Hospital*, Orlando Sentinel, February 24, 2011, available at: http://articles.orlandosentinel.com/2011-02-24/health/os-bert-fish-decision-20110224_1_sunshine-laws-open-meetings-hospital-board (Last visited January 3, 2012).

⁸ Anne Geggis, *Bills reflect problems at Bert Fish*, Daytona Beach News-Journal, March 8, 2011, available at: <http://www.news-journalonline.com/news/local/southeast-volusia/2011/03/08/bills-reflect-problems-at-bert-fish.html> (Last visited January 3, 2012).

The Commission held 14 public meetings between May 23 and December 29, 2011, at which stakeholders, government officials, and taxpayers gave testimony and made presentations. The Commission also surveyed all Florida hospital districts. Based on the presentations, testimony, and the survey responses, the Commission made several recommendations in the Report of the Commission on Review of Taxpayer Funded Hospital Districts.⁹

The Commission's general recommendations include the following:¹⁰

- The Governor and other appointing authorities should appoint qualified individuals to district and hospital boards who do not have conflicts of interest.
- Board members should include health care stakeholders and members of the local community who have financial expertise and experience operating successful, larger enterprises.
- To ensure appropriate checks and balances, the membership of district and hospital boards should be separate and distinct.
- To ensure appropriate checks and balances the membership of hospital board members and hospital managers should be separate and distinct.
- Special hospital districts should become indigent health care districts, funding indigent health care based on local priorities and not limited to hospitals owned or operated by the districts. As a part of the transition to indigent health care districts, hospital districts that own hospitals should de-couple them from the districts.
- When considering changes to taxation rates, millage rates should be adjustable with a maximum allowable rate, but with the flexibility to lower the rate if circumstances change.
- Boards of directors of hospital districts should be subject to appropriate oversight.

Furthermore, to correspond with the directives in the Governor's executive order, the Commission made several comments and recommendations regarding quality of care, cost of care, access to care for the poor, oversight and accountability, physician employment, and changes of ownership and governance in taxpayer funded hospitals.¹¹ Those comments and recommendations, pertaining to the sale or lease of taxpayer funded hospitals, are as follows:

- Using the available outcome data, the Commission could not establish that there is a pattern of higher or lower quality in Florida hospitals based on ownership. The Governor and Legislature should support the Agency for Health Care Administration (AHCA) in its effort to continue to refine and publish data on outcomes and quality by hospital and health care facility.
- An open, competitive public procurement process or negotiation should be ensured.
- A fair and independent asset valuation process should be ensured during a sale or lease.
- Guidelines should be established to ensure an ongoing community benefit from any proceeds generated by the sale of a hospital.
- Without inhibiting the functioning of a free market, independent oversight of a sale or lease process should be maintained with review by an appropriate authority.
- The maintenance and/or expansion of community health programs should be required if there is a sale or lease, with an emphasis on primary care and emergency room diversion.

⁹ Commission on Review of Taxpayer Funded Hospital Districts, *Report of the Commission on Review of Taxpayer Funded Hospital Districts*, pg. 1, available at: <http://ahca.myflorida.com/mchq/FCTFH/pdf/122911Meeting/FinalReportRF2.pdf> (Last visited on January 3, 2012).

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4-5.

III. Effect of Proposed Changes:

Section 1 amends s. 155.40, F.S., to make the following changes:

Amends subsection (1) to require any sale or lease of a public hospital (owned by a county, district, or municipality) to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease.

Amends subsection (4) to require the governing board of the public hospital to determine, prior to the sale or lease of the hospital, whether there are qualified purchasers or lessees of the hospital by publicly advertising the meeting at which the proposed sale or lease will be considered by the governing board or publicly advertising the offer to accept proposals. However, the bill amends s. 155.40, F.S., to no longer require the board to negotiate the terms of the sale or lease with a for-profit or not-for-profit Florida corporation.

If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for “fair market value,” which is defined in the bill as “the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arms-length transaction.”

Creates subsection (5) to require the governing board’s decision to accept a proposal to purchase or lease the hospital to be in writing and state the findings and basis that support its decision to sell or lease the hospital. The written findings must state whether the proposal:

- Represents the fair market value of the hospital or if the proposal does not represent fair market value, a detailed explanation of why the public interest is served by the acceptance of less than fair market value.
- Will result in a reduction or elimination of ad valorem or other tax revenues to support the hospital.
- Includes an enforceable commitment that existing programs and services and quality of health care will continue to be provided to all residents of the affected community, particularly the indigent, the uninsured, and the underinsured.
- Is otherwise in compliance with paragraphs (6) and (7) as created in the bill, which require the governing board of the hospital to make the proposed transaction publicly available and to publish a notice indicating the means by which a person may submit written comments about the proposed the sale or lease of the public hospital.

The findings must be accompanied by all information and documents relevant to the governing board’s determination, including, but not limited to:

- The name and addresses of all parties to the transaction.
- The location of the hospital and all related facilities.
- A description of the terms of all proposed agreements.
- A copy of the proposed sale or lease agreement and related agreements, including leases, management contracts, service contracts, and memoranda of understanding.
- The estimated total value associated with the proposed agreement, the proposed acquisition price, and other consideration.

- Any valuations of the hospital's assets prepared within three years immediately preceding the proposed transaction date.
- A financial or economic analysis and report from any financial expert or consultant retained by the governing board.
- A fairness evaluation by an independent expert in such transactions.
- Copies of all other proposals and bids the governing board may have received or considered in compliance with subsection (4).

Creates subsection (6) to require within 120 days before the anticipated closing date of the proposed transaction, the governing board to make publicly available all findings and documents required under subsection (5) and publish a notice of the proposed transaction in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital are located. The notice must include the names of the parties involved and the means by which a person may submit written comments about the proposed transaction to the governing board and may obtain copies of the findings and documents required under subsection (5).

Creates subsection (7) to authorize any interested person to submit a written statement in opposition of the sale or lease of the hospital within 20 days after publication of the public notice. If a written statement of opposition is submitted, the governing board or proposed purchaser or lessee may submit a written response no later than 10 days after the due date for the written statement of opposition.

Creates subsection (8) to require a governing board of a county, district, or municipal hospital to obtain approval by a majority vote of the registered voters in the county, district, or municipality or, in alternative, approval by a circuit court, before selling or leasing a public hospital facility. In order for the governing board to receive approval from the circuit court to sell or lease the hospital, it must file a petition in a circuit court in which a majority of the physical assets of the hospital are located at least 30 days after publication of the notice of the proposed transaction. The petition must include all findings and documents required under subsection (5) and include certification by the governing board that it is in compliance with all the requirements under s. 155.40, F.S.

Creates subsection (9) to require the circuit court to issue an order, once the petition for approval of a sale or lease is filed, requiring all interested parties to appear at the designated time and place within the circuit where the petition is filed and show why the petition should not be granted. For purposes of this section, "interested parties" includes any party submitting a proposal for sale or lease of the county, district, or municipal hospital, as well as the governing board.

Before setting the hearing date, the clerk is required to publish a copy of the order in one or more newspapers of general circulation in the county where a majority of the physical assets of the hospital are located, at least once each week for two consecutive weeks. The first publication must be at least 20 days before the date set for the hearing. With publication, all interested parties are made defendants to the action. Any interested person may become a party to the action by moving against or pleading to the petition at or before the hearing date.

At the hearing, the court shall determine all questions of law and fact and make such orders necessary to properly consider and determine the action and render a final judgment.

Creates subsection (10) to require the court to render, after the hearing and upon consideration of all evidence presented, a final judgment approving or denying the proposed transaction. The court must order the governing board to accept or reject the proposal for the sale or lease of the county, district, or municipal hospital. In reaching its decision, the court must determine whether:

- The proposed sale or lease is permitted by law.
- The proposed sale or lease unreasonably excludes a potential purchaser or lessee on the basis of being a for-profit or not-for-profit Florida corporation.
- The governing board of the hospital publicly advertised the meeting at which the proposed transaction was considered by the board in compliance with s. 286.0105, F.S.
- The governing board of the hospital publicly advertised the offer to accept proposals in compliance with s. 255.0525, F.S.
- The governing board of the hospital exercised due diligence in deciding to dispose of hospital assets, selecting the transacting entity, and negotiating the terms and conditions of the disposition.
- Any conflict of interest was disclosed, including conflicts of interest of members of the governing board and experts retained by parties to the transaction.
- The seller or lessor will receive fair market value for the assets, or if the sale or lease represents less than fair market value, why the public interest will be served by accepting less than fair market value.
- The acquiring entity made an enforceable commitment that existing programs and services and quality health care will continue to be provided to all residents of the affected community, particularly to the indigent, the uninsured, and the underinsured.
- The proposed transaction will result in a reduction or elimination of ad valorem or other taxes used to support the hospital.

Creates subsection (11) to authorize any party to the action to appeal the circuit court's decision in the appellate district where the petition for approval was filed, by filing a notice of appeal or petition for review within 30 days after the date of the final judgment. On appeal, the reviewing court shall affirm the circuit court's judgment unless the decision is arbitrary, capricious, or not in compliance with s. 155.40, F.S.

Creates subsection (12) to require the governing board to pay all costs associated with petitioning the court for approval of the sale or lease. In instances where an interested party contests the action, the court may assign costs to the parties.

Creates subsection (13) to exclude from the requirements of s. 155.40, F.S., any sale or lease of a public hospital that is completed before March 9, 2011. Also excluded is the renewal or extension of any lease that, on March 9, 2011, contained an option to renew or extend that lease upon its expiration and is renewed or extended after March 9, 2011.

Section 2 amends s. 395.3036, F.S., to make grammatical and cross-reference corrections.

Section 3 provides that this act shall take effect July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

This bill will provide more disclosure of the sale or lease process of a public hospital by requiring the governing board of the hospital to make available to the public its facts and findings that support its decision to sell or lease the hospital and by requiring publication of a notice of the sale or lease by the governing board. Additionally, the bill ensures more oversight of the sale or lease process by requiring the circuit court to determine whether the public has been put on notice as to any meetings at which the proposed sale or lease is to be considered or as to any offer to accept the proposal for sale or lease prior to the circuit court's final judgment approving the sale.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill grandfathers-in those sales or leases completed before March 9, 2011, and those leases that contained, on March 9, 2011, an option to renew or extend the lease upon its expiration. The bill appears to apply retroactively to all other sales or leases.

In general, courts will refuse to apply a statute retroactively if it affects substantive rights, liabilities, and duties,¹² impairs vested rights, creates new obligations, or imposes new penalties.¹³ However, statutes which do not alter contractual or vested rights, but relate only to remedies or procedure, can be applied retroactively.¹⁴

Florida courts have recognized that a statute may be retroactively applied if:

- There is clear evidence that the Legislature intended to apply the statute retroactively; and
- Retroactive application is constitutionally permissible.¹⁵

In determining whether retroactive application is constitutional, courts have generally held that due process considerations prevent the retroactive abolition of vested rights.¹⁶

¹² *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).

¹³ *Romine v. Florida Birth Related Neurological Injury Compensation Ass'n*, 842 So. 2d 148, 153 (Fla. 5th DCA 2003).

¹⁴ *Menendez*, 979 So. 2d at 330.

¹⁵ *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494 (Fla. 1999); *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA. 2004).

This is not an absolute rule, however, because the courts have identified factors that may be considered in determining whether to allow retroactivity. In one case, the Supreme Court weighed three factors in considering the validity of retroactivity:

- The strength of the public interest served by the statute;
- The extent to which the right affected is abrogated; and
- The nature of the right affected.¹⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will allow interested parties to provide written statements of opposition to a governing board's determination to accept a proposal for the sale or lease of a public hospital and will allow any interested person to become a party to the action by moving against or pleading to a governing board's petition for approval on the sale or lease of a public hospital in circuit court. The bill further allows any party to the hearing on the sale or lease of the public hospital to seek judicial review of the circuit court's final judgment in the appellate district where the petition for approval was filed. The interested parties may incur court costs associated with such actions.

C. Government Sector Impact:

This bill will require the sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court in which a majority of the physical assets of a public hospital are located.

This bill will require a governing board to make publicly available and publish certain findings that support a board's decision to accept a proposal for the sale or lease of a public hospital. The bill will also require the circuit court clerk to publish a copy of the order requiring all parties to appear to the hearing on the governing board's petition to approve the sale or lease of a public hospital.

This bill directs the governing board of the public hospital to pay all costs associated herein. However, in instances where an interested party contests the action, the court may assign costs to the parties.

Therefore, there may be costs associated with the bill's publishing and notice requirements and any action filed in court.

¹⁶ *State Dept. of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

¹⁷ *Id.*

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides that a governing board of a county, district, or municipal hospital may not enter into a sale or lease of a hospital facility without first receiving approval by a majority vote of the registered voters in the county, district, or municipality or, in the alternative, approval from a circuit court. It is unclear whether the requirement to receive the “approval by a majority vote of the registered voters in the county, district, or municipality” is meant to require a majority vote of *all* registered voters in the county, district, or municipality or whether the intent is to require a majority vote of registered voters in the county, district or municipality that participate in the vote. Additionally, the bill does not specify the procedures for making a call for an election for purposes of obtaining the approval or rejection of a proposal for the sale or lease of a public hospital.

The bill provides a mechanism for interested parties to participate in the approval of the sale or lease of a public hospital before a circuit court. The bill requires the circuit court, where the petition for the approval of the sale or lease of the public hospital is filed, to issue an order requiring all “interested parties” to appear to show why the petition should not be granted. Lines 192-194 appear to require interested parties to take an affirmative step (moving against or pleading to the petition) to become a party to the action. The bill states that the term “interested parties” includes “any party submitting a proposal for sale or lease of the county, district, or municipal hospital, as well as the governing board.” The bill makes all interested parties defendants to the action. It is cumbersome that the petitioners, who are seeking approval of the sale or lease and who are, by definition, interested parties, are grouped in with those interested parties who may oppose the sale or lease, as defendants to the action. Also, it is cumbersome that the term “interested parties” is defined to include the petitioners for the sale or lease and yet lines 174-178 require the court to issue an order requiring the “interested parties” to show why the petition *should not* be granted.

The term “interested parties” could be clarified in the bill. For example, s. 75.06, F.S., relating to actions to validate bonds of state agencies, commissions, or departments, provides that “by [a publication of the order for the bond validation hearing] *all property owners, taxpayers, citizens, and others having or claiming any right, title, or interest in the county, municipality or district, or the taxable property therein, are made parties defendant to the action* and the court has jurisdiction of them to the same extent as if named as defendants in the complaint and personally served with process.”

The bill appears to have an internal conflict regarding the requirement that any sale or lease of a public hospital must be for fair market value. On lines 90-92, the bill requires a sale or lease of a public hospital to be for fair market value. However, lines 102-105 and lines 222-225 of the bill seem to suggest that the public interest may be served by a public hospital’s governing board’s acceptance of a proposal for the sale or lease of the hospital that is less than fair market value.

To clarify that a governing board is required to file a petition in a circuit court when it elects to petition the court instead of receiving approval of a sale or lease by a majority vote, line 163 should state, “If the governing board elects to petition the circuit court to seek approval of the proposed transaction, the petition must be filed at least 30 days after publication of the notice of the proposed transaction.” Currently, line 163 requires a petition to be filed, regardless of whether the governing board elects approval by a majority vote.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.