

STORAGE NAME: h1133.ca

DATE: April 1, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1133

RELATING TO: Community Organizations

SPONSOR(S): Representatives Hafner and Crist

STATUTE(S) AFFECTED: None

COMPANION BILL(S): SB 1048 (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS
- (2) BUSINESS DEVELOPMENT & INTERNATIONAL TRADE
- (3) CIVIL JUSTICE & CLAIMS
- (4)
- (5)

I. SUMMARY:

This bill creates "The Community Asset Protection Act," the intent of which is to make public all proposed transfers of community organizations to outside interests so that the public may evaluate the fairness and effects of such transfers. The act contains provisions similar to those in general law relating to public notice of transactions and public inspection of records.

The intent section indicates that the records should be available for public inspection and copying as if the community organization was a state agency subject to general law provisions relating to public records.

The act does not create any state regulation of these transactions or vest any state agency with the authority to regulate sales of community organizations.

The fiscal impacts of this bill may accelerate the need for additional funding for state attorney's offices throughout the state. This bill will increase the cost associated with the transfer of assets or management authority of a community organization to outside interests.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

In the late 1970s, public hospitals were facing or about to face a financial crisis. Many counties, municipalities, and hospital districts began searching for ways to sell or lease their facilities. For hospitals created pursuant to a general law and local ordinance, the sale or lease of their facilities was a local problem. However, for public hospitals created by special act, permission to sell or lease had to be obtained from the Legislature because special districts possess only those powers and authority which have been expressly granted by law or necessarily implied therefrom in order to carry out an expressly granted power. [See AGO 80-18 and 82-44 concluding that the charters of the Halifax Hospital Medical Center and the Board of Trustees of Holmes County Hospital Corporation do not authorize the governing board to lease their facilities to a corporation which would operate and manage the facility.]

As a consequence, in 1982, the Legislature enacted chapter 82-147, Laws of Florida, codified at section 155.40, Florida Statutes, authorizing, by general law, counties, districts, and municipalities to reorganize their public hospitals as not-for-profit corporations. In addition, they were authorized to enter into contracts and/or leases with not-for-profit corporations to operate and manage their hospitals. The purpose of the statute was to assist public hospitals in competing with the private sector by allowing, presumably more efficient, outside management and corporate structure to operate the facilities.

Since the enactment of section 155.40, Florida Statutes, the statute has been criticized as providing minimal guidance as to the role of the government entity with regards to its public property, or the accountability of the not-for-profit corporation for the public assets it is responsible for managing. As enacted, the statute simply required the following of any agreements entered into under section 155.40, Florida Statutes:

- Articles of incorporation be subject to the approval of the hospital's board of directors;
- Provide for the orderly transition of the facilities to the not-for profit corporations;
- Provide for the return of the facility upon termination of the agreement or dissolution of the corporation;
- Provide for the continued treatment of indigent patients under the Florida Health Care Responsibility Act; and
- Permit the abolishment of the existing board and the establishment of a new board.

Some criticism has come from Florida courts concerning the agreements the community organizations entered into under the provisions of section 155.40, Florida Statutes. See *Jess Parrish Memorial Hospital, Inc. v. City of Titusville*, 506 So.2d 22 (Fla. 5th DCA 1987) (voiding a contract in which the district improperly conveyed the hospital facility to the Jess Parrish Memorial Hospital, Inc., a not-for-profit corporation formed by the directors of the hospital district pursuant to section 155.40, Florida Statutes); and *Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc.*, 658 S0.2d 577 (Fla. 4th DCA 1995) (invalidating a 1986 lease agreement between the former Northwestern Palm Beach County Hospital Board and the Everglades Memorial Hospital, Inc., a not-for-profit corporation formed to operate and manage the district hospital.)

In 1996, in response to court decisions and other criticism, the Legislature enacted chapter 96-304, Laws of Florida, which amended section 155.40, Florida statutes, **to permit the sale as well as lease of publicly owned hospitals to both for-profit and not-for-profit corporations.** The statute now requires that, in the event of a sale, the governing body of the public entity must do the following:

- Publicly advertise the sale of the hospital;
- Ensure the sale to be for fair market value; and
- Provide a finding that the sale is in the public's best interest; however
- Hospitals which receive more than \$100,000 in public tax revenues must either have their funds appropriated on an annual basis, or permit the public governing body to modify the amount of the tax revenues given in a 12-month notice.

Most Florida public hospitals have now converted to not-for-profit facilities. In recent years Florida not-for-profit hospitals, as well as other non-profit facilities with strong ties to the community, have experienced financial difficulties and have become vulnerable to buyouts by large private corporations. Section 155.40, Florida Statutes, does not apply to sales of non-profit corporations; therefore, no public notice or other community involvement is required for those sales. Most of these transactions occur in private and the community is not aware of the sale until after the sale is completed. Some of these transactions have received great publicity as residents discover a proposed sale and responded with outrage. See *Sell the Local Hospital? The Very Idea Splits A Usually Placid Town*, *The Wall Street Journal* (Tuesday, March 18, 1997).

Limited oversight is available through the responsibility of the Attorney General to represent the public interest in the sale and conversion of not-for-profit institutions. The Attorney General is authorized to enforce the common law rule of *cy pres*, which, in the case of selling a not-for-profit entity, requires that the proceeds be transferred to another charitable organization. The legal doctrine exists to assure that the money donated to charities stays in the charitable stream and is not diverted to personal use or profit. To a certain extent, these common law principles have been codified in Florida Law. See

chapter 737, part V, Florida Statutes, and chapter 617, Florida Statutes. The Attorney General, at the request of the public, may intervene in such transactions and impose a process of review. However, such legal action is necessarily adversarial in nature; in addition to being costly and often lengthy, legal action does not foster an open, cooperative process between the community not-for-profit organization and the community residents.

B. EFFECT OF PROPOSED CHANGES:

The bill creates "The Community Asset Protection Act," the intent of which is to make public all proposed transfers of community organizations to outside interests so that the public may evaluate the fairness and effects of such transfers. The act contains provisions similar to those in section 155.40, Florida Statutes, relating to public notice of transactions and public inspection of records. The intent section indicates that such records should be available for public inspection and copying as if the community organization was a state agency subject to chapter 119, Florida Statutes. **This act does not create state regulation of these transactions or vest any state agency with the authority to regulate sales of community organizations.**

"Community organization" is defined as:

- A nonprofit corporation, trust, foundation, society, league, order, association, organization, or other entity recognized under 26 U.S.C. s. 501(c) *that has current gross assets with a fair market value of \$3 million or more* and is organized under the laws of the state, or authorized to transact business in this state, to provide health, medical, or hospital care, or charitable, social welfare, educations, scientific, literary, fraternal, financial, insurance, or similar services that benefit the community. As defined, the act applies to a broader range of transactions than the sale of non-profit hospitals. The act specifically excludes from this definition a member-owned organization that makes available to its members all records relating to a proposed transaction for the purpose of inspecting, copying, and evaluating such records reasonably in advance of the transaction.

"Transaction" under the act means:

- The sale, lease, exchange, conveyance, merger, or otherwise transference of control of 20 percent or more of its current gross assets in a single transaction, or a 30 percent or more of such vote in a series of transactions over a period of three years, to outside interests; or
- The grant of 20 percent or more of the vote on its governing board in a single transaction, or 30 percent or more of such vote in a series of transactions over a period of three years, to outside interests; or

- The entering into a joint venture, joint operating agreement, management agreement, partnership or other business agreement that transfers 20 percent or more of the community organization's management authority in a single transaction, or 30 percent or more of its management authority in a series of transactions occurring over a period of three years, to outside interest.

Therefore, transfers of less than 20 percent of gross assets, governing board vote, or management authority, will not be subject to the provisions of the act. In addition, transfers of between 20 and 30 percent of gross assets, governing board vote, or management authority, may be divided into a series of transactions and not be subject to the provisions of the act.

Other key terms defined in the act are as follows:

- **"Affected community,"** means the citizens and political entities served by, or receive the benefit of services provided by, a community organization;
- **"Outside interests,"** means an individual, partnership, corporation, trust, foundation, joint business venture, or other entity, *whether for-profit or not-for-profit*, that conducts business or provides services and whose assets are not entirely controlled by a community organization; and
- **"Public inspection period,"** means the 60 days immediately following the date of publication by a community organization of the first advertisement notifying the public of a proposed transaction, during which time public hearings are held, all records relating to the proposed transfer are made available for public inspection and copying, *and the proposed transaction may not be consummated.*

The definition of **"outside interests"** applies the provisions of the act to a broader class of transactions - the sales of non-profits to for-profit entities.

The requirements of the act for community organizations proposing a transaction can be discussed in three stages: pre-notice, notice, and post-notice (or the public inspection period).

Pre-notice:

When a community organization proposes to enter into a transaction, as defined in the act, it must do the following:

- Obtain at least one written report by an independent expert assessing certain aspects of the proposed transaction;
- Obtain signed affidavits regarding conflicts of interest from each member of its governing board; and

- State in writing whether there are any contractual or other agreements with outside interest regarding future use of the assets or future exercise of the management authority involved in the proposed transfer; and, if so, what penalties are available if the outside interests do not comply with those agreements.

The expert's report must address, whether, the following will occur under the proposed transaction:

- The community organization will receive fair market value for its assets or management authority;
- The proposed use of the proceeds is consistent with the charitable services and benefits provided by the community organization; and
- Was the negotiation of the proposed transaction was conducted at "arms' length" and is fair to the affected community.

The signed affidavits from the board must disclose the following:

- Whether the affiant has been offered or accepted any personal or familial benefit from any outside interests; and
- Whether he or she has been offered or accepted any position with an entity which will direct the use of the proceeds of the proposed transaction or otherwise function as a successor to the community organization.

Notice:

After compliance with pre-notice procedures, the community organization must provide notice of the proposed transaction to the affect community and state attorney where the community organization maintains its principal place of business and to the Attorney General.

The Notice must include the following:

- Describe the nature of the proposed action;
- The parties to the proposed action;
- The geographical area of the affected community;
- The date, time, and location of public hearings; and
- The location of all records related to the proposed transaction.

Notice to the state attorney: Must be made prior to the commencement of the public inspection.

Notice to the affect community: Must be made by placing two advertisements in a newspaper of general circulation in the affected community, no less than three weeks apart. The first advertisement must be published before the public inspection period begins. The second two advertisements must be published at least 30 days before the public inspection period ends.

The advertisements must be at least two columns wide by ten inches long. The headline must be in at least 18 pont type. The advertisements must not appear in the legal section of the newspaper. The act provides a form which the advertisement must substantially follow. [The act's advertising requirements follow general notice provision currently found in the Florida Statutes, and appear to be modeled thereon. See subsections 126.66 and 166.041, Florida Statutes.]

Post-Notice:

During the public inspection period, the community organization must permit public inspection, at no cost, and copying at the rate set by the Florida Public Records Act, of all records related to the proposed transaction, which must be available at a single location during regular business hours. The community organization must hold at least two public hearings in the affected community at times and locations convenient to the affected community. A knowledgeable community organization representative must be available to answer questions at those meetings.

This act specifically authorizes the Attorney General or the state attorney to challenge a proposed transaction, on behalf of the affected community, by bringing a declaratory judgment action in circuit court. The bases for challenging such proposed transaction include the following:

- The community organization failed to fully comply with the provisions of the act; or
- The community organization will not receive fair market value for its assets or management authority; or
- The proposed transaction permits assets held by a charitable organization to be used or transferred for non-charitable purposes; or
- The proposed transaction is not a product of an arm's length negotiation, there exists a material conflict of interest, there has been material breach of fiduciary duty, or other aspects of the negotiation process call into question its fairness; or
- The proposed transaction is fundamentally unfair and not in the best interests of the community; or

- The proceeds of the transaction will not be applied in a manner consistent with current services and benefits provided to the affected community.

Upon a finding of any of the above, a court may do any of the following:

- Declare the proposed transaction, or any part thereof, invalid and prohibit its consummation;
- Establish a mechanism to monitor future compliance by the outside interests with the terms of the transaction; or
- Order other equitable or legal relief necessary to ensure that the transaction is fair to the affected community.

This bill provides an effective date of July 1, 1997.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

Yes. This bill increases the authority of the courts to adjudicate disputes over the sale, lease, exchange, conveyance, merger, or other transfer of assets or management authority of a community organization to outside interests.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes.

The Community organization proposing to enter into any transaction governed by this bill must do the following:

Obtain written report or reports by independent experts assessing specific aspects of the proposed transaction;

Obtain signed affidavits from each member of its board of directors or board of trustees and each officer and executive employee disclosing specific information required by this act;

State in writing whether there are any contractual or other agreements with outside interests regarding the future use of the community organization's assets or future exercise of the management authority involved, along with specifying what penalties are available if the outside interests do not comply with the agreements; and

Provide notice, as specified in the act;

Conduct public hearings, as specified in the act; and

Make public records available for review and copying, as specified in the act.

The Attorney General or the state attorney may challenge a proposed transaction by bringing an action for declaratory judgment under chapter 86, Florida Statutes.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

Not applicable (N/A).

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

(2) what is the cost of such responsibility at the new level/agency?

(3) how is the new agency accountable to the people governed?

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

N/A.

(1) Who evaluates the family's needs?

(2) Who makes the decisions?

(3) Are private alternatives permitted?

(4) Are families required to participate in a program?

(5) Are families penalized for not participating in a program?

b. Does the bill directly affect the legal rights and obligations between family members?

N/A.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

N/A.

(1) parents and guardians?

(2) service providers?

(3) government employees/agencies

D. SECTION-BY-SECTION ANALYSIS:

Section 1 does the following:

- Establishes the Community Asset Protection Act;
- States the legislative intent;
- Defines the terms;

- Establishes the procedures and notice requirements the community organization must follow when it proposes to transfer facilities or management authority to outside interests;
- Establishes public records inspections procedures;
- Establishes public hearings requirements;
- Establishes notice requirements to Attorney General and local state attorney's offices; and
- Establishes authority for Attorney General or local state attorney to challenge proposed transaction through an action for declaratory judgement and court's authority;

Section 2 establishes an effective date of July 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

May increase case loads of Attorney General and state attorney's offices and require the following:

- Hiring of additional personnel to handle cases; and
- Increase funding to cover pre-litigation and litigation costs.

3. Long Run Effects Other Than Normal Growth:

May accelerate the need for higher than previously anticipated funding needs of state attorney's offices throughout the state.

Department of Legal Affairs (Attorney General's office), supports the act, and expects to fulfill its duties therein within current resources.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Community Organizations: This bill will increase the costs associated with the transfer of assets or management authority of a community organization (hiring of experts, obtaining of affidavits, notice and public hearing requirements), to outside interests. The organization may be financially impacted by being prohibited from closing a proposed transaction until the public inspection period has run, and, costs associated with any law suits filed as a result of that opportunity.

Outside Interests: This bill will increase the costs associated with closing a proposed transaction until the public inspection period has run, and, of course, costs associated with any lawsuits filed as a result of the transaction.

2. Direct Private Sector Benefits:

Compliance with the requirements of the bill strengthens the outside interest's defenses to affected community or other challenges.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

The Attorney General's office supports the act and, expects to fulfill its duties therein within current resources.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the expenditure of funds by counties or municipalities.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue-raising authority of counties and municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

There have been several administrative law cases construing the application of the general notice provisions in the existing Florida Statutes. Many of those cases concern whether the local government adequately complied with the requirement to advertise in a "newspaper of general circulation within" the county or municipal jurisdiction. The act authorizes the community organization to define "the geographical area of the affect community," and then requires the organization to publish notice of the proposed transaction "in a newspaper of general circulation within the affected community." These seem to be inherently conflicting provision as it is probably in the organization's interest to advertise on a limited scale. The act may be easier to implement if it relied on current statutes and cases and simply required advertisement in a "newspaper of general circulation within the county and/or municipal jurisdictions of the affected community."

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

A "strike everything after the enacting clause" amendment will be offered by the sponsor. A summary of the amendment is as follows:

Section 1:

Clarifies that the intent of the act is to open to public scrutiny proposed transfers of a community organization's assets or management authority from those involving 20 percent interest in the community organization's assets or management authority to those involving 50 percent interest in the community organization's assets or controlling interest or management authority.

Deletes requirement that community organizations involved in proposed transfers comply to the provisions of chapter 119, Florida Statutes.

Revises the definition of "affected community."

Further clarifies the definition of "community organization."

Defines the term "consummated" and clarifies that application of the act to occur when there is a "legally enforceable right to a specific performance of the transaction."

Clarifies the term "public inspection period."

Revises definition of "transaction" removing the three year limitation and conforms the remainder of the definition to the intent clause. Creates specific exclusions from the term "transaction" for "wholly owned subsidiaries of the community organization or . . . wholly owned subsidiary of the community organization and the community organization."

Removes the requirement that an independent expert must conduct a review to determine if the use of the proceeds from the transfer is consistent with the original charitable intent of the donors and allows the review to be conducted by the community organization.

Clarifies notice requirements and removes from requirement of disclosure due diligence records, relevant financial records of outside interests, and collateral agreements not disclosed in any affidavit required by this section.

Limits challenges of proposed transactions to Attorney General or state attorney of the affected community, to bring a declaratory judgment as provided under chapter 86, Florida Statutes.

This amendment eliminates concerns raised in the COMMENTS section of this analysis which raised the concern of a community organization not adequately advertising the proposed transaction or transfer.

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VII. SIGNATURES:

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