

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 Community Affairs Committee

BILL: CS/SB 1448

INTRODUCER: Community Affairs Committee, Senator Garcia and Senator Lynn

SUBJECT: Sale or Lease of a Public Hospital

DATE: March 25, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Favorable
2.	Gizzi	Yeatman	CA	Fav/CS
3.			JU	
4.			BC	
5.			RC	
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This Committee Substitute (CS) amends s. 155.40, F.S., to require 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 CS 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 CS, and the board's decision must be in writing and state the findings and basis that support its decision to sell or lease the hospital. The CS 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.

The CS directs the governing board to file a petition with the circuit court where a majority of the physical assets of the hospital are located requesting the approval of the sale or lease of a public hospital. The CS provides jurisdiction to the circuit court to approve the sale or lease of a county, district, or municipal hospital. The circuit court must issue and publish an order requiring

all interested parties to attend a hearing on the proposed sale or lease and shall issue a final judgment after such hearing making certain determinations prescribed in the CS.

This CS substantially amends the following sections of the Florida Statutes: 155.40 and 395.3036.

II. Present Situation:

Sale or Lease of Public Hospitals

County, district, and municipal hospitals are created by special enabling acts, rather than by general acts under Florida law.¹ The special act sets out the hospital ability or inability to 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 31 hospital districts in Florida under which public hospitals operate.²

The process for the sale 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 Act³ 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 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.

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.

² Information provided by the Agency for Health Care Administration via email on March 17, 2011.

³ Sections 154.301-154.316, F.S.

- 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 interests and not those of the public agency seller.

A complete sale of the public agency's interest 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. 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.

Office of the Attorney General (Department of Legal Affairs)

The Attorney General (AG) is the statewide elected official directed by the Florida Constitution⁴ to serve as the chief legal officer for the State of Florida. The AG is the agency head of the Office of the Attorney General (OAG), within the Department of Legal Affairs, and is responsible for protecting Florida consumers from various types of fraud and enforcing the state's antitrust laws. Additionally, the AG protects constituents in cases of Medicaid fraud, defends the state in civil litigation cases, and represents the people of Florida when criminals appeal their convictions in state and federal courts.⁵ Within the OAG, there is an Office of Statewide Prosecution that investigates and prosecutes criminal offenses that extend across multiple jurisdictions.

The Antitrust Division (division) located within the OAG, is responsible for enforcing state and federal antitrust laws. The division works to stop violations that harm competition and adversely impact the citizens of Florida. Under ch. 542, F.S., the AG has the authority to bring actions

⁴ See FLA. CONST. art. IV., s. 4.

⁵ Office of the Attorney General of Florida, *The Role and Function of the Attorney General*, available at: <http://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F> (Last visited on March 18, 2011).

against individuals or entities that commit state or federal antitrust violations, including bid-rigging, price-fixing, market or contract allocation, and monopoly-related actions.⁶

Several recent trends have emphasized the importance of this division in the OAG. In the antitrust area, there has been a dramatic increase over the last five years in the number of proposed mergers, acquisitions, and joint ventures. Along with the increase in these types of transactions, the economy has become unstable and consequently, companies and individuals may be more likely to collude with competitors to fix prices, rig bids on public entity procurement contracts, unlawfully fix prices, or illegally monopolize or attempt to monopolize a particular market or industry. In addition, the federal antitrust enforcement agencies have not been as aggressive in the past years in enforcing the federal antitrust laws and therefore, the division has had to compensate for such lack of enforcement.⁷

The General Civil Litigation Division (litigation division) also exists within the OAG. The litigation division discharges the AG's responsibilities under s. 16.01, F.S., by providing statewide representation on behalf of the state, its agencies, officers, employees, and agents at both the trial and appellate level. The AG has common law authority to protect the public's interest, which the Legislature declares to be in force pursuant to s. 2.01, F.S., and under which the litigation division serves to protect the public's interest. The Ethics Bureau within the litigation division prosecutes complaints before the Florida Commission on Ethics. Once the Commission on Ethics has received and investigated a sworn complaint alleging that a public officer or employee has breached the public trust, the commission's prosecutor (Advocate) provides recommendation as to whether the case should go forward. If the case goes forward the prosecutor conducts the prosecution under ch. 120, F.S., Administrative Procedure Act.⁸

The Department of Legal Affairs budget for Fiscal Year 2010-11 includes the following: \$1,398,762 for the Florida Elections Commission; \$183,502,762 for the Office of Attorney General; and \$6,281,871 for the Office of Statewide Prosecution.⁹

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 laws under s. 286.011, F.S.¹⁰

Other recent 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

⁶ Department of Legal Affairs, Office of the Attorney General, *Long Range Program Plan FY 2011-12 through FY 2015-16*, available at: <http://floridafiscalportal.state.fl.us/PDFDoc.aspx?ID=3463> (Last visited on March 18, 2011).

⁷ *Id.*

⁸ *Id.*

⁹ The Florida Legislature's Office of Program Policy Analysis & Government Accountability, *Office of the Attorney General (Department of Legal Affairs)*, available at: <http://www.oppaga.state.fl.us/profiles/1026/> (Last visited on March 18, 2011).

¹⁰ Linda Shrieves, Orlando Sentinel, *Judge rules Bert Fish must cut ties with Florida Hospital*, 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 on March 19, 2011).

Hospital was merged with Adventist Health in 2010 and currently there are proposals that would turn public hospital systems in Miami and Broward County into private hospitals.¹¹

III. Effect of Proposed Changes:

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

Amends subsection (1): The CS requires 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): Prior to the sale or lease, the governing board of the public hospital must determine 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 advertise the offer to accept proposals. However, the CS amends s. 155.40, F.S., to no longer allow the board to make such a determination by negotiation of 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 a “fair market value,” which is defined in the CS as “the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s length transaction.”

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

- Represents the fair market value of the hospital.
- Affects whether there will be a reduction or elimination of ad valorem or other tax revenues to support the hospital.
- Ensures that the quality of health care will continue to be provided to residents of the affected community, especially the indigent, the uninsured, and the underinsured.
- Is otherwise in compliance with paragraph (9)(a).

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 3 years immediately preceding the proposed transaction date;

¹¹ Anne Geggis, Daytona Beach News-Journal, *Bills reflect problems at Bert Fish*, 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 on March 19, 2011).

- 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; and
- Copies of all other proposals and bids the governing board may have received or considered in compliance with subsection (4).

Creates subsection (6): Within 120 days before the anticipated closing date of the proposed transaction, the governing board shall 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 private 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): Any interested person may 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): A governing board of a county, district, or municipal hospital may not sell or lease a public hospital facility without first receiving approval by a majority vote of the registered voters in the county, district, or municipality or, in alternative, approval by a circuit court. 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 requirements of this section.

Creates subsection (9): Once the petition is filed, the circuit court shall issue an order requiring all interested parties to appear at the designated time and place and show why the petition should not be granted. Before setting the hearing date, the clerk shall 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. Such publication shall make all interested parties as parties defendant to the action. Any interested party 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): After the hearing, the court shall render a final judgment approving or denying the proposed transaction. 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 potential purchasers or lessees 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;
- The seller or lessor will receive fair market value for the assets;
- The acquiring entity made an enforceable commitment to provide health care to the indigent, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care; and
- The proposed transaction will result in a reduction or elimination of ad valorem or other taxes used to support the hospital.

Creates subsection (11): Any party to the action has the right 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 this section.

Creates subsection (12): The governing board shall pay all costs associated herein. In instances where an interested party contests the action, the court may assign costs to the parties.

Creates subsection (13): This section does not apply to any sale or lease of a public hospital that is completed before March 9, 2011, nor does it apply to the renewal or extension of any lease that, on March 9, 2011, contained an option to renew or extend that lease upon its expiration.

Section 2 amends s. 395.3036, F.S., to fix a cross-reference to reflect changes made by this CS.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This CS will provide more disclosure of the sale or lease process of a public hospital by requiring 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 CS ensures more oversight over 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:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This CS 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 CS 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.

C. Government Sector Impact.

This CS 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 CS will require a governing board to make and publish certain findings that support a board's decision to accept a proposal for the sale or lease of a public hospital. The CS will also require the circuit court 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 CS 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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on April 4, 2011:

The CS provides that the sale or lease of a public hospital shall be subject to approval by a majority vote of the registered voters within that county, district, or municipality or by the circuit court (instead of the Attorney General's Office), and makes conforming and technical changes therein.

- B. **Amendments:**

None.