

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 1448
 INTRODUCER: Senator Garcia
 SUBJECT: Sale or Lease of a Public Hospital
 DATE: March 17, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Favorable
2.	_____	_____	CA	_____
3.	_____	_____	JU	_____
4.	_____	_____	BC	_____
5.	_____	_____	RC	_____
6.	_____	_____	_____	_____

I. Summary:

This bill amends s. 155.40, F.S., to require any sale or lease of a public hospital (owned by a county, district, or municipality) to be approved by the Attorney General (AG) prior to the sale or lease. Also, 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, and the board's decision must be in writing and clearly state certain facts and findings that support its decision to sell or lease the hospital.

After the AG receives a request for approval of the sale or lease of a public hospital, the AG must publish notice of the request and allow time for public comment about the proposed sale or lease. The bill delineates specific information that the request must include and gives the AG authority to demand additional information and testimony regarding the proposed sale or lease through the authority of a subpoena and to contract with experts or consultants in order to review the proposed sale or lease.

The AG must issue a report of his or her findings by making certain determinations and must report his or her decision to approve, with or without modification, or deny the sale or lease of the public hospital. The AG's decision must be published in the Florida Administrative Weekly.

This bill 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 authority's 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.
- 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.

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 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 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.

Within the OAG, there exists an Antitrust Division (division), which 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 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

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).

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).

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 years past 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 the trial and appellate level. The AG has common law authority to protect the public's interest, which the Legislature declared 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) recommends 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: for the Florida Elections Commission, \$1,398,762; for the Office of Attorney General, \$183,502,762; and for the Office of Statewide Prosecution, \$6,281,871.⁹

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 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

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).

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).

III. Effect of Proposed Changes:

This bill amends s. 155.40, F.S., to require any sale or lease of a public hospital (owned by a county, district, or municipality) to be approved by the AG prior to the sale or lease. Also, 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 bill 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 bill as the most likely price that the assets would bring in a sale or lease in a competitive and open market under all conditions requisite to a fair sale or lease, with the buyer or lessee, and seller or lessor, each acting prudently, knowledgeably, and in their own best interest, and with a reasonable time being allowed for exposure in the open market.

The board’s decision to accept a proposal to purchase or lease the hospital must be in writing and clearly state facts and findings that support its decision to sell or lease the hospital. The facts and findings must state whether the proposal:

- Represents the fair market value of the hospital;
- Constitutes the best use of the hospital and its attendant facilities;
- Will have a positive effect on the reduction or elimination of certain tax revenues to support the hospital; and
- 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.

In order for the governing board of the public hospital to receive approval from the AG to sell or lease the hospital, it must file a request for approval with the AG not less than 120 days before the anticipated closing date of the sale or lease. The request for approval must contain the following information:

- The name and address 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;
- An analysis of the financial or economic status of the hospital and a 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; and
- Any other information requested by the AG.

Within 30 days after the AG receives this request along with the information required above, the AG must publish notice of the proposed sale or lease in one or more newspapers of general circulation in the county where the main campus of the hospital is located and must also publish such notice in the Florida Administrative Weekly. The notice must provide the names of the parties in the transaction and provide the means by which persons may submit written comments about the proposed transaction. A person must submit written comments in support or in opposition of the sale or lease of the hospital within 20 days after the public notice of such sale or lease is published by the AG in the Florida Administrative Weekly. The governing board, the proposed purchaser or lessee, or any other interested person may submit a written response to such comments no later than 10 days after the general comment period to the public notice ends.

The bill gives the AG authority to demand additional information and testimony regarding the proposed sale or lease through the authority of a subpoena.

The bill authorizes the AG to contract with experts or consultants in order to review the proposed sale or lease and determine the fair market value of the proposed transaction and such contracts must be paid for by the acquiring entity. The acquiring entity, when billed for the contract services, has 30 days to pay the bill.

Sixty days after the date the public notice of sale or lease is published, the AG must issue a report of his or her findings and must report his or her decision to approve, with or without modification, or deny the sale or lease of the public hospital. In making his or her decision, the AG must determine whether:

- The proposed sale or lease is permitted by law;
- The proposed sale or lease would result in the best use of the hospital facilities and assets;
- The proposed sale or lease discriminates among potential purchasers or lessees depending on whether the entity is 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;
- The procedures used by the governing board of the hospital in making its decision to dispose of its assets were fair and reasonable;
- Any conflict of interest was disclosed;
- The seller or lessor will receive fair market value of the assets;
- Charitable assets are placed at an unreasonable risk if the transaction is financed in part by the seller or lessor;
- The terms of any management or services contract negotiated in conjunction with the transaction are fair and reasonable;
- 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.

The AG's decision must be published in the Florida Administrative Weekly.

The bill provides an effective date of July 1, 2011.

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 hospital to make available to the public its facts and findings that support its decision to sell or lease the hospital and requiring publication of a notice of the sale or lease by the AG. Additionally, the bill ensures more oversight over the sale or lease process by requiring the AG 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 AG's approval of 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There would be an indeterminate negative fiscal impact on those entities seeking to purchase or lease a public hospital because of the requirements in the bill. For example, the acquiring entity must pay a bill for contract services obtained by the AG to review the proposed sale or lease agreement, including contract services to determine the fair market value of the proposed transaction.

C. Government Sector Impact:

The OAG has estimated that it will have to expend approximately \$250,129 to comply with the requirements of the bill.¹²

VI. Technical Deficiencies:

On line 218 of the bill, the word “whether” should be deleted as it is redundant.

VII. Related Issues:

Because this bill requires the AG to take an “agency action” by requiring the AG to approve or deny the sale or lease of a public hospital, a person would have recourse to challenge the AG’s decision under ch. 120, F.S.

Many of the terms or standards provided for in the bill may be subject to judicial interpretation. For example see, “reasonable time being allowed for exposure in the open market,”¹³ “fairness evaluation,”¹⁴ “best use of the hospital facilities and assets,”¹⁵ the procedures used by the board “were fair and reasonable.”¹⁶

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹² OAG, *FY 2011-2012 Fiscal Impact of HB 619* (companion bill to SB 1448), on file with the Senate Health Regulation Committee.

¹³ Line 110, SB 1448.

¹⁴ Line 152, SB 1448.

¹⁵ Lines 118-119, SB 1448.

¹⁶ Lines 225-227, SB 1448.