

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 711 Sale or Lease of a County, District, or Municipal Hospital

SPONSOR(S): Community & Military Affairs Subcommittee; Health & Human Services Quality Subcommittee; Hooper

TIED BILLS: None **IDEN./SIM. BILLS:** SB 464

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	15 Y, 0 N, As CS	Mathieson	Calamas
2) Community & Military Affairs Subcommittee	15 Y, 0 N, As CS	Duncan	Hoagland
3) Civil Justice Subcommittee	14 Y, 1 N	Caridad	Bond
4) Health & Human Services Committee			

SUMMARY ANALYSIS

County, district and municipal hospitals are created pursuant to a special enabling act, rather than a general act. The special act sets out the hospital authority's power to levy taxes to support the maintenance of the hospital, the framework for the governing board and defines the ability to issue bonds.

The process for the sale or lease of a county, district or municipal hospital is established in Florida statute. Currently, the authority to make this decision and to negotiate such a transaction is given to the governing board that is selling the hospital. A hospital can be sold or leased to a for-profit or a not-for-profit Florida corporation, if the transaction is in the best interest of the public.

This bill requires that the governing board of a county, district or municipal hospital, prior to completing a proposed sale or lease of the hospital, receive approval from a circuit court, or, if provided for in the hospital charter, by a referendum. The bill:

- Requires certain findings by the hospital governing board;
- Requires public notice by the hospital governing board;
- Provides for certain content for petitions to the court;
- Allows interested parties to participate in the court approval process;
- Requires certain findings by the court; and
- Allows for appeal.

A county, district, or municipal hospital that has not received tax support within the last five years is exempt from the circuit court process requirements established in the bill.

The bill has an indeterminate fiscal impact on the courts. Costs associated with the petition are borne by the hospital board, unless a party contests.

The bill provides an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

County, district¹ and municipal hospitals are created pursuant to a special enabling act, rather than a general act.² The special act sets out the hospital authority's power to levy taxes to support the maintenance of the hospital, the framework for the governing board and defines the ability to issue bonds.

The process for the sale or lease of a county, district or municipal hospital is established by s. 155.40, F.S. Currently, the authority to make this decision and to negotiate such a transaction is given to the governing board that is selling the hospital.³ A hospital can be sold or leased to a for-profit or a not-for-profit Florida corporation, and must be in the best interest of the public.⁴ The board must publically advertise both the meeting at which the proposed sale or lease will be discussed,⁵ and the offer to accept proposals from all interested and qualified purchasers.⁶ Any lease, contract or agreement must contain the following terms:

- Articles of incorporation of the corporation are subject to approval of the board.
- Qualification under s. 501(c)(3) of the U.S. Internal Revenue Code for a not-for-profit corporation.
- Orderly transition of the operation and management of the facilities must be provided for.
- On termination of the contract, lease or agreement, that the facility returns to the county, district or municipality.
- Continued treatment of indigent patients pursuant to law.⁷

For the sale or lease to be considered a complete sale of the public agency's interest in the hospital, 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 thereof, regardless of the underlying ownership of the real property;
- Not receive public funding, other than by contract for the payment of medical services provided to patients for which the public agency has responsibility to pay;
- Take control of decision-making or policy-making for the hospital from the public agency seller;
- Not receive substantial investment or loans from the seller;
- Not be created by the public agency seller; and
- Primarily operate for its interests and not those of the public agency seller.⁸

¹ Hospital districts are created under the statutory authority provided in s. 189.404, F.S., and a special act. As of January 13, 2012, there are 30 hospital districts: 26 are independent and 6 are dependent. Sixteen districts have the authority to levy ad valorem property taxes. Department of Economic Opportunity, Division of Community Development, Special District Information Program, *available at* <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListde/> (last visited Jan. 12, 2012.)

² Section 155.04, F.S., allows a county, upon receipt of a petition signed by at least 5 per cent 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.

³ Section 155.40(1), F.S.

⁴ *Id.*

⁵ In accordance with s. 286.0105, F.S.

⁶ In accordance with s. 255.0525, F.S.

⁷ Specifically, the Florida Health Care Responsibility Act, ss. 154.301-154.316, F.S., and ch. 87-92, L.O.F. S. 155.40(2), F.S.

⁸ S. 155.40(8)(a), F.S.

The State courts currently do not have a role in the sale or lease process of a county, district or municipal hospital, unless the transaction is challenged in litigation. The Office of the Attorney General (OAG) reviews the proposed transaction with regard to any anti-competitive issues.⁹ The OAG has charitable trust authority to review transactions that would implicate trusts where the public hospital entity was the beneficiary.¹⁰

In March 2011, the Governor issued Executive Order 11-63, creating the Commission on Review of Taxpayer Funded Hospital Districts (Commission).¹¹ This Commission was tasked with assessing and making recommendations as to the role of hospital districts, including what was in the public interest as to hospital operation and an effective access model for the economically disadvantaged.¹² Specifically, the Governor requested the following areas be examined:

- Quality of care;
- Cost of care;
- Access to care for the poor;
- Oversight and accountability;
- Physician employment; and
- Changes in ownership and governance.¹³

From May 23 through December 29, 2011, the Commission met 14 times and heard from 20 different individuals and organizations.¹⁴ In a final report delivered on December 30, 2011, the Commission made the following general recommendations:

- Appointees to hospital boards should be qualified and not have conflicts of interest.
- Board members should include health care stakeholders and community members with financial expertise and experience in operating successful, larger enterprises.
- The boards of the district and the hospital should be separate, and both should be subject to appropriate oversight.
- Hospital board members should not be a part of the hospital administrative or management team.
- There should be a transition from hospital districts to indigent health care districts, which would include decoupling district owned hospitals from the district.
- Hospital boards should have flexibility with ad valorem millage rates, within their maximum allowable rate.¹⁵

Effect of the Proposed Changes

The bill amends s. 155.40, F.S., detailing the process to determine the approval of a sale or lease. The bill requires the governing board of a county, district or municipal hospital to submit a petition for approval of sale or lease to the circuit court, to be approved, prior to the completion of the proposed

⁹ The OAG is responsible for enforcing state and federal antitrust laws, and the anti-trust division works to stop violations that harm competition and adversely impact the citizens of Florida. Chapter 542, F.S., provides the OAG with 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. *See* ch. 542, F.S. However, s. 542.235, F.S., provides additional limitations to suit against local governments, including a limitation on criminal action, and civil and injunctive relief against both the governmental entity and agents when they are acting within the scope of their authority.

¹⁰ The OAG may assert the rights of qualified beneficiaries with respect to charitable trusts pursuant to s. 736.0110(3), F.S., and with respect to the dissolution of not-for-profit corporations pursuant to ss. 617.1420, 617.1430, and 617.2003, F.S. The OAG notes that the review under this authority varies considerably from transaction to transaction and can be very labor intensive. This is especially the case in transactions that involve mergers of competitors within the same market. Email from the OAG on file with House Health & Human Services Quality Subcommittee staff. March 18, 2011.

¹¹ Fla. Exec. Order No. 11-63 (Mar. 23, 2011). The Executive Order is *available at* <http://www.flgov.com/2011-executive-orders/> (last accessed Jan. 9, 2012).

¹² *Id.*

¹³ The Commission's report is *available at* <http://ahca.myflorida.com/mchq/FCTFH/fctfh.shtml> (last accessed Jan. 5, 2012).

¹⁴ *Id.*

¹⁵ *Id.*

sale or lease of a hospital. However, if a hospital's charter provides that a referendum is required to change ownership, the governing board shall hold such a referendum instead of seeking approval from the circuit court.

The bill amends s. 155.40(4), F.S., requiring the hospital governing board to determine that operating the hospital is no longer in the public's interest and to ascertain whether there are any interested and qualified purchasers or lessees. The bill adds that the sale or lease must be for "fair market value," which is defined 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."¹⁶ If the board determines that a sale or lease is for less than fair market value, it must provide a written explanation as to why this is in the public interest.

The governing board is required to determine, in writing, the basis for choosing a particular proposal. The factors to be considered must include:

- A determination that the proposed transaction represents fair market value, or if not why the transaction is in the best interests of the public;
- A determination of whether there will be a reduction or elimination of ad valorem or other taxes used to support the hospital; and
- A determination that the quality of care will not be affected, especially in relation to the indigent, uninsured and underinsured.

In addition, information and documentation relevant to the board's determination must accompany the findings. Such information includes, but is not limited to the following:

- The details of the facilities and all parties to the transaction;
- A description of the terms of all proposed agreements;
- An estimate of the total value associated with the proposed agreement, including available valuations from the last three years of the hospital's assets;
- Any available financial or economic analysis prepared by experts that the board retained; and
- Copies of all other proposals and bids received.

The bill requires the hospital board to file this information with the court not later than 120 days before the anticipated closing for the proposed transaction. Notice must be published in one or more newspapers of general circulation in the county where the majority of the hospital's assets are located. The notice must provide a mechanism for public comment about the proposed transaction to the board, for up to 20 days after the date of publication. If a statement of opposition is received, the governing board or proposed purchaser or lessee has 10 days to respond in writing.

The bill provides that no sooner than 30 days after the publication of notice, a petition for approval must be filed in the circuit court in which the majority of the hospital's assets are located. The bill directs the court to issue an order that would require all interested parties to appear at a specified date and time and show why the petition should not be granted. The order is to be published at least once a week for two consecutive weeks in one or more major newspapers, not less than 20 days prior to the hearing. Unless the petition is contested, the hospital board bears the expense.

The bill provides that any interested party may become a party to the action. An interested party is defined as a bidder, any taxpayer from the county, district, or municipality in which the majority of the hospital's physical assets are located; or the governing board of the hospital. The circuit court must hold a hearing to determine all questions of law and fact, rendering a final judgment that either approves or denies a proposed transaction.

¹⁶ An arm's length transaction is negotiated by unrelated parties, each acting in his or her self interest; the basis for a fair market value determination. It is a transaction in good faith in the ordinary course of business by parties with independent interests. This is the standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction. Black's Law Dictionary (8th Ed. 2006).

The bill provides that the court must determine that the transaction:

- Is permitted by law;
- Does not discriminate against a potential purchaser or lessee on the basis of being a for-profit or not-for-profit Florida corporation;
- Complied with the public notice provisions;
- Was made with the exercise of due diligence by the board;
- Disclosed conflicts of interest relating to the members of the governing board and the experts retained by the parties to the transaction;
- Reflects that the seller or lessor will receive fair market value for the assets, including an explanation of why the public interest is served by the proposed transaction;
- Makes an enforceable commitment to the continuation of quality care for all residents, and especially, the indigent, uninsured and underinsured; and
- Will result in a reduction or elimination of ad valorem or other taxes used to support the hospital.

The bill provides that any party to the action has the right to seek judicial review in the appellate district where it was filed, and will be governed by the Florida Rules of Appellate Procedure. Any interested party seeking review must file an appeal within 30 days of the final judgment. The standard of review for the appellate court is that the decision is not arbitrary, capricious, or not in compliance with s. 155.40, F.S.

The bill provides that any sale or lease completed before June 30, 2012, is not subject to the requirements of these provisions. Additionally, any lease that contained, on June 30, 2012, an option to renew or extend that lease upon its expiration date is not subject to these provisions upon any renewal or extension on or after June 30, 2012.

Additionally, a county, district, or municipal hospital that has not received tax support within the last five years is exempt from the circuit court process approval requirements. Tax support is defined as receiving ad valorem or other tax revenues directly from a county, district, or municipal taxing authority to a hospital without a corresponding exchange of goods or services five years prior to the effective date of a proposed lease or sale. However, exempt hospitals are required to comply with the public notice provisions of the bill by publishing the details of the transaction prior to closing and receiving public comment. The following public hospitals are identified by the Agency for Health Care Administration (AHCA) as hospitals that have not received tax support in the last five years:

- Lee Memorial Hospital (Lee County).
- Bay Medical Center (Bay County).
- Parrish Medical Center (Brevard County).
- Health Central (Orange County).
- Ed Fraser Memorial Hospital (Baker County).
- Jackson County Hospital (Jackson County).
- Doctors Memorial Hospital (Holmes County).
- Munroe Regional (Marion County).¹⁷

The bill does not alter the OAG's duty in relation to charitable trusts, and the transaction must still be reviewed for anti-competitive issues pursuant to ch. 542, F.S., and s. 736.0110(3), F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 155.40, F.S., relating to sale or lease of county, district or municipal hospitals; effect of sale.

Section 2 amends s. 395.3036, F.S., relating to confidentiality of records of meetings of corporations that lease public hospitals or other public health care facilities.

¹⁷ Agency for Health Care Administration, email to House Community & Military Affairs Subcommittee staff, April 4, 2011, on file with Health and Human Services Quality Subcommittee staff.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill has an indeterminate fiscal impact on state courts to review proposed transactions for the sale or lease of a county, municipal or district hospital. However, the bill provides for the ability to assess costs to either the hospital board or a contesting party.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has an indeterminate fiscal impact on the private sector. Prospective purchasers or lessees may be required to pay costs if they oppose the proposed transaction. The sale or lease of a hospital could be delayed by this oversight process. However, more interested parties should be able to participate in the process of selling or leasing a public hospital creating more competition.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article 5, s. 2 of the Florida Constitution provides that:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review. . .

On Lines 235-238, the bill provides that:

All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the date of final judgment.

While this provision in the bill reflects the current rule of appellate procedure, in the future, the court could change the time in which to file a notice of appeal. As a result, this provision of the bill is superfluous but, in the future, could be found unconstitutional.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Several terms and standards in the bill could subject the statute to judicial interpretation. These include: a "fairness evaluation," and non-discriminatory decision making.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 12, 2012, the Health and Human Services Quality Subcommittee adopted a strike-all amendment to HB 711. The amendment:

- Requires a circuit court review of the transaction or a referendum if the hospital charter requires a referendum for such a transaction.
- Requires the circuit court to determine whether the transaction complies with the law.
- Defines and provides an exemption for non-tax supported public hospitals from the circuit court process, but not from the notice provisions of the bill.
- Requires public benefit be considered by the hospital board in a determination of fair market value.
- Allows taxpayers to petition the court as an interested party.

This bill was reported favorably as a Committee Substitute.

On January 18, 2012, the Community & Military Affairs Subcommittee adopted 2 amendments to CS/HB 711:

- The CS/HB 711 required a fairness evaluation by an independent expert. Amendment 1 deletes this requirement.
- The CS/HB 711 required the court to determine that the transaction reflects that the seller or lessor will receive fair market value for the assets, including an explanation of how the public interest will be served by the proposed transaction. Amendment 2 amends this provision to provide that the court must determine that the transaction reflects that the seller or lessor *documented receipt* of fair market value for the assets, including an explanation of *why* the public interest is served by the proposed transaction.

The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute as passed by the Community & Military Affairs Subcommittee.