

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 711 Sale or Lease of a County, District, or Municipal Hospital  
**SPONSOR(S):** Community & Military Affairs Subcommittee; Health & Human Services Committee; 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	17 Y, 1 N, As CS	Mathieson	Gormley

### 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.

The bill requires every county, district or municipal hospital, by December 31, 2012, to evaluate continued ownership of such a hospital. This is to occur regardless of whether the governing board intends to sell or lease the hospital.

The bill amends s. 155.40, F.S., to require 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;
- Allows for appeal;
- Sunsets hospital taxing authority upon sale, unless a lower rate is ratified by a majority of voters in the district; and
- Authorizes exemptions from the provisions of the bill for specified circumstances.

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**

Hospital districts are created under the statutory authority provided in s. 189.404, F.S., and a special act. The Agency for Health Care Administration (AHCA) reports that there are 30 hospital districts in the state, 24 of which are independent, and 6 dependent. 16 of these districts have the authority to levy ad valorem property tax.<sup>1</sup> The Department for Economic Opportunity (DEO) maintains a searchable database of special districts that is accessible through the department website. From the DEO website it appears there are 31 hospital districts.<sup>2</sup>

County, district and municipal hospitals are created pursuant to a special enabling act, rather than a general act.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> The board must publically advertise both the meeting at which the proposed sale or lease will be discussed,<sup>6</sup> and the offer to accept proposals from all interested and qualified purchasers.<sup>7</sup> 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.<sup>8</sup>

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;

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<sup>1</sup> See, <http://ahca.myflorida.com/mchq/FCTFH/fctfh.shtml> (site last visited February 2, 2012).

<sup>2</sup> See, <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/report.cfm> (site last visited February 2, 2012). The difference in count could be a result of differences in definitions as to what comprises a hospital district between the two agencies – for example, AHCA included Hamilton County and the Miami-Dade County Public Health Trust, whereas DEO did not.

<sup>3</sup> 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.

<sup>4</sup> Section 155.40(1), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> In accordance with s. 286.0105, F.S.

<sup>7</sup> In accordance with s. 255.0525, F.S.

<sup>8</sup> 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.

- Not be created by the public agency seller; and
- Primarily operate for its interests and not those of the public agency seller.<sup>9</sup>

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.<sup>10</sup> The OAG has charitable trust authority to review transactions that would implicate trusts where the public hospital entity was the beneficiary.<sup>11</sup>

In March 2011, the Governor issued Executive Order 11-63, creating the Commission on Review of Taxpayer Funded Hospital Districts (Commission).<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

From May 23 through December 29, 2011, the Commission met 14 times and heard from 20 different individuals and organizations.<sup>15</sup> 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.<sup>16</sup>

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<sup>9</sup> S. 155.40(8)(a), F.S.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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).

<sup>13</sup> *Id.*

<sup>14</sup> The Commission's report is *available at* <http://ahca.myflorida.com/mchq/FCTFH/fctfh.shtml> (last accessed Jan. 5, 2012).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

## **Effect of the Proposed Changes**

House Bill 711 substantially amends s. 155.40, F.S., relating to the sale or lease of county, district or municipal hospitals.

### *Evaluation*

The bill provides that all public hospital boards are, by December 31, 2012, to have commenced an evaluation of the benefits of selling or leasing the hospital. The evaluation is to include:

- A valuation, prepared by either a certified public accountant, or firm with substantial experience in the valuation of hospital assets;
- An operating comparison with similarly situated hospitals, based on data available from AHCA and quality metrics from the Centers for Medicare and Medicaid Services; and
- A public hearing.

The board's findings must be published within 120 days of the commencement of the evaluation, in one or more newspapers of general circulation in the county in which the majority of the hospital assets are located, and in the Florida Administrative Weekly. The evaluation will have an indeterminate fiscal impact on every public hospital, that is not exempted from this process. Hospitals that have letters of intent, requests for proposals, or existing leases are exempted.

### *Sale or Lease Transaction*

The bill provides that if the governing board determines that operating the hospital is no longer in the public's interest, it must ascertain whether there are any interested and qualified purchasers or lessees. Any 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,"<sup>17</sup> or determined by a certified public accounting firm, or firm with experience in the valuation of hospitals. If the lease is not for fair market value, it must be in the best interest of the affected community.

The governing board is required to determine, in writing, the basis for choosing a particular proposal, including a description of how the transaction meets the following requirements:

- That the proposed transaction represents fair market value, or if not why the transaction is in the best interests of the public;
- That there will be a reduction or elimination of ad valorem or other taxes used to support the hospital;
- That the quality of care will not be affected, especially in relation to the indigent, uninsured and underinsured;
- That disclosure has been made of all conflicts of interest, for both the board members and any retained experts; and
- That disclosure has been made of all physician or other health care provider contracts which may be void or voidable at the completion of the sale or lease.

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;
- A fair market value analysis of the assets 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.

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<sup>17</sup> 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 (8<sup>th</sup> Ed. 2006).

The bill requires the hospital board to publish this information not later than 120 days before the anticipated closing for the proposed transaction. This 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. The bill provides that when a county, district or municipal hospital is sold, the taxing authority associated with the hospital sunsets, unless a continuation of the taxing authority and a substantial reduction in the millage rate is ratified by voters.

### *Judicial Review*

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. Circuit courts are granted jurisdiction to review the proposed sale or lease of county, district or municipal hospitals.<sup>18</sup>

The bill requires that the chair of the governing board certify, under penalty of perjury, the accuracy of the petition submitted to the court.

The bill directs the court to render a final judgment as to compliance with the process set forth in law, within 45 days of receiving the petition. Specifically, the court shall determine whether:

- 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 if subsection (6) is not followed, then the contract is voidable by any party to the transaction. Further, if any member of the governing board negligently or willfully violates this section, then this could be subject to penalty by the Commission on Ethics.

### *Exemptions*

The bill exempts hospital districts from the requirements to: determine qualified purchasers or lessees; document bases supporting a decision to sell or lease; make relevant documents publically available; allow comments of opposition; get approval of the transaction from the circuit court; and from the bill's contract voidability provisions, under the following circumstances:

- A hospital that has a letter of intent to sell or lease, as long as such letter was approved by the board before December 31, 2011, and the transaction is completed by December 31, 2012.
- A hospital that has issued a request for proposals, if such a request results in a sale by December 31, 2012.

A hospital that is under lease as of the effective date, however, will be subject to the provisions of the act if:

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<sup>18</sup> Specifically, a circuit court has original jurisdiction not vested in a county court. Art. V s. 5 (b), Fla. Const.

- The lease is terminated or notification is given of termination, unless the termination and new party is agreed to in writing by the existing parties;
- The lessor notifies the lessee of the intention to find new lessees or purchasers;
- The lessor notifies the lessee of the intention to resume operation at the termination of the lease.

The bill also provides an exemption from the requirements to: document the bases supporting a decision to sell or lease; make relevant documents publically available; allow comments of opposition; get approval of the transaction from the circuit court; and the bill's contract voidability provisions, when the governing board is selling or leasing property that generates less than 20 per cent of the net operating revenue in the last fiscal year. However, the sale or lease must still be noticed and a public hearing must be held.

Finally, bill creates an unnumbered section of law, providing that the content of the bill supersedes any conflicting general or special law.

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:** Creates an unnumbered section of law.
- Section 3:** 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.
- Section 4:** Provides an effective date of July 1, 2012.

## 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 requires all public hospitals to have commenced an ownership study by December 31, 2012. The bill directs the governing board to obtain a fair market value analysis from either a certified public accountant or a firm that specializes in the valuation of hospitals. The cost of this analysis is uncertain at this time.

#### 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.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill's requirement to conduct an evaluation of the community benefits of the sale of a public hospital, as applied to the dependent special taxing districts, may implicate the county and municipality mandates provision of Art. VII, Sec. 18, of the Florida Constitution. However, there is no Florida case law on the applicability of Art. VII, Sec. 18, Fla. Const., to special taxing districts.

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:

None.

**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.

On February 23, 2012, the Health and Human Services Committee adopted a strike-all amendment to CS/HB 711. The amendment retains:

- A circuit court review of the transaction or a referendum *if* the charter requires a referendum for such a transaction.
- The process for a governing board to follow when determining if there are qualified purchasers or lessees, and the documentation requirements of an approval.
- A provision for interested parties to contest a sale or lease.
- An appeal process after a final judgment has been made by the court.

The amendment adds:

- Provides each public hospital is to conduct an ownership study, have started by December 31, 2012.
- That only a lease may be for less than fair market value, with an explanation of why the public interest is served by this.
- Redefines qualified purchaser or lessee to require demonstration of capital that is equivalent to 25 per cent of the hospital's net revenue from the previous fiscal year.
- Requires that conflicts of interest be disclosed by board members and board-retained experts, during the approval process.
- That a circuit court shall render a decision within 45 days of receiving a petition from a board.
- That in certain circumstances, a sale or lease could be voidable by any party to the transaction.
- Exemptions for:
  - property that generates less than 20 per cent of the net revenue of the hospital,
  - existing leases,
  - letters of intent to sell or lease, or
  - requests for proposal.
- A provision for taxing authority to sunset in the event of a sale, unless a lower rate is ratified by the electors in the special district.

This bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.