HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/CS/HB 711 (CS/CS/CS/SB 1568)	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Health & Human Services Committee; Community & Military Affairs Subcommittee; Health & Human Services Quality Subcommittee; Hooper and others (Budget Subcommittee on General Government Appropriations; Community Affairs; Health Regulation; Gaetz and Garcia)	108 **Y's**	9 **N's**
COMPANION BILLS:	CS/CS/CS/SB 1568	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

House Bill 711 passed the House on March 2, 2012. The bill was amended by the Senate on March 7, 2012, and subsequently passed the House on March 7, 2012. The bill amends laws related to the sale or lease of public hospitals.

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

The 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 the secretary of the Agency for Health Care Administration (AHCA), 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 AHCA;
- Requires certain findings by AHCA;
- Allows for appeal;
- Mandates distribution of sale or lease proceeds;
- Mandates distribution of ad valorem tax revenue for property that is not exempt after sale or lease;
- Sunsets hospital taxing authority upon sale; and
- Authorizes exemptions from the provisions of the bill for specified circumstances.

The bill amends hospital licensure provisions by expanding the definition of "accrediting organization."

The bill has an indeterminate fiscal impact on AHCA and public hospitals in the state.

The bill was approved by the Governor on April 6, 2012, ch. 2012-66, Laws of Florida. The effective date of the bill is upon becoming a law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Public Hospitals

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

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

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;

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[1] *See*, http://ahca.myflorida.com/mchq/FCTFH/fctfh.shtml (site last visited February 2, 2012).
[2] *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 defining a "hospital district" – for example, AHCA included Hamilton County and the Miami-Dade County Public Health Trust, whereas DEO did not.
[3] 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.
[4] S. 155.40(1), F.S.
[5] *Id.*
[6] In accordance with s. 286.0105, F.S.
[7] In accordance with s. 255.0525, F.S.
[8] 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.

- 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.[9]

The Office of the Attorney General (OAG) reviews the proposed transaction with regard to any anti-competitive issues.[10] The OAG has charitable trust authority to review transactions that would implicate trusts where the public hospital entity was the beneficiary.[11] AHCA has no role in the sale or lease of public hospitals.

Hospital Commission

In March 2011, the Governor issued Executive Order 11-63, creating the Commission on Review of Taxpayer Funded Hospital Districts (Commission).[12] This Commission was tasked with assessing and making recommendations as to the role of hospital districts, including what is in the public interest as to hospital operation and an effective access model for the economically disadvantaged.[13] Specifically, the Governor ordered the following areas to 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.[14]

From May 23 through December 29, 2011, the Commission met 14 times and heard from 20 different individuals and organizations.[15] In a final report issued 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.[16]

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[9] S. 155.40(8)(a), F.S.

[10] 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 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. However, s. 542.235, F.S., provides additional limitations on lawsuits 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.

[11] 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.

[12] Fla. Exec. Order No. 11-63 (Mar. 23, 2011), *available at* http://www.flgov.com/2011-executive-orders/ (last accessed Jan. 9, 2012).

[13] *Id.*

[14] *Report on the Commission of Review of Taxpayer Funded Hospitals*, (December 30, 2011), *available at* http://ahca.myflorida.com/mchq/FCTFH/fctfh.shtml (last accessed Jan. 5, 2012).

[15] *Id.*

Hospital Accreditation

Currently, Florida law allows AHCA to consider and use hospital accreditation by certain accrediting organizations for various purposes, including accepting accreditation surveys in lieu of AHCA surveys, requiring accreditation for designation as certain specialty hospitals, and setting standards for quality improvement programs. Section 395.002, F.S., defines "accrediting organizations" as the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, and the Accreditation Association for Ambulatory Health Care, Inc.

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 requires all public hospitals and health care systems[17] by December 31, 2012, to commence a one-time evaluation (2012 evaluation) of the benefits of selling or leasing the hospital. The 2012 evaluation must include:

- A valuation, prepared by either a certified public accountant, or a 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 must make all documents considered by it in the 2012 evaluation publically available. The board must publish its findings within 160 days of the commencement of the 2012 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 2012 evaluation will have an indeterminate fiscal impact on every public hospital.

Governing boards that issued public requests for proposals on or before February 1, 2012, are exempt from the evaluation requirement.

Sale or Lease Transaction

The bill requires a governing board, which determines through the 2012 evaluation, that operating the hospital is no longer in the public's interest, to ascertain whether there are any interested and qualified purchasers or lessees.

The board must publically advertise an offer to accept proposals for sale or lease, and publically notice meetings in which the sale or lease is discussed. 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,[18] or determined by a certified public accounting firm, or a 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.

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[16] *Id.*

[17] The term "healthcare system" is used throughout the bill, and is not defined by current law or the bill.

[18] 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 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:

- The proposal represents fair market value, or, if not, why it is in the best interests of the public;
- There will be a reduction or elimination of ad valorem or other taxes used to support the hospital;
- The quality of care will not be affected, especially in relation to the indigent, uninsured and underinsured;
- Disclosure has been made of all conflicts of interest, for both the board members and any retained experts; and
- 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.

The bill provides that disclosure of conflicts of interest must include whether the sale or lease will result in a "special private gain or loss" to members of the governing board, or "key employees." Neither "special private gain or loss," nor "key employee" is defined by the bill.

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 location of all facilities and names and addresses of all parties to the transaction;
- A description of the terms of all proposed agreements;
- The fair market value analysis of the assets associated with the proposed agreement that was completed during the 2012 evaluation, and all 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 that the fair market value analysis that the board discloses, be the analysis completed pursuant to the 2012 evaluation.

The bill requires the hospital board to publish this information not later than 120 days before the anticipated closing for the proposed transaction 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 immediately upon completion of the sale.

It is unclear whether these process requirements apply only to transactions that arise from the 2012 evaluation or to all future transactions as well. The bill's process requirements in s. 155.40(6), F.S., apply to transactions arising from a board determination that ownership is no longer in the best interest of the affected community, which is made "upon completion" of the 2012 evaluation. Similarly, the bill requires, in s. 155.40(6), F.S.; that the board's findings include the fair-market analysis conducted as a part of the 2012 evaluation. The bill does not expressly address future transactions, for which the 2012 fair-market value analysis may not be useful.

AHCA Review

The bill requires the board to file a petition for approval of the transaction by the secretary of AHCA. The board must publish a notice of sale or lease, and the petition must be filed no sooner than 30 days after the publication of notice. The bill requires that the chair of the governing board certify, under penalty of perjury, the accuracy of the petition submitted to AHCA. There is no provision in the bill for an interested party to challenge the transaction, or to move in opposition to the transaction, as a part of the AHCA review.

AHCA is granted the authority to order the governing board to approve or deny the proposed sale or lease of a county, district or municipal hospital. The bill directs AHCA to render a judgment as to compliance with the process set forth in law within 30 days of receiving the petition. Specifically, the secretary shall determine whether 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 is silent as to whether AHCA's determination is subject to the provisions of the Administrative Procedures Act (ch. 120, F.S.) (the Act), and its rules. In general, an agency action that affects substantial interests is subject to the Act.[19] The bill requires AHCA to issue a final order within 30 days of receiving the petition from the governing board, which appears to compress procedural timelines in both the Act and its rules.[20]

The bill authorizes an "interested party" to seek judicial review of the AHCA final order by appealing to either the appellate district where the hospital is located, or the First District Court of Appeal, pursuant to s. 120.68., F.S. [21]

The bill provides that appeal 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 whether the decision by the agency is clearly erroneous.[22] When reviewing agency action, courts in Florida use the standard of arbitrary or capricious, to either affirm or overturn an agency decision.[23]

The bill provides that if the 2012 evaluation, determination of qualified purchasers or lessees, or documentation requirements are not followed, then the contract is voidable by any party to the transaction. The bill does not provide a limit as to when an interested party could bring such an action. Existing statutes of limitations for contracts provide a five year time frame within which an action must

[19] S. 120.569(1), F.S.
[20] *See generally,* s. 120.525, F.S.; s. 120.54, F.S.; s. 120.56, F.S.; s. 120.569, F.S.; s. 120.57, F.S., and rule 28-106, F.A.C.
[21] The bill defines "interested party" as a person submitting a proposal for sale or lease, and the governing board. The bill appears to limit the right of judicial review to these two types of entities. However, s. 120.68, F.S., provides that a "party" who is adversely affected by a final order is entitled to judicial review. Section 120.52, F.S., defines "party" more broadly than the bill's definition of "interested party," such that fewer persons may be entitled to appeal than are entitled to participate in the AHCA proceedings (assuming that the Act applies to proceedings).
[22] "Clearly erroneous" is a standard used by appellate courts when reviewing a lower court decision. The U.S. Supreme Court has held that a decision is clearly erroneous when, the lower court has made a mistake, which would occur when the findings are not supported by substantial evidence, contrary to the clear weight of the evidence, or based on an erroneous view of the law. *See e.g., Concrete and Pipe Products of California v. Construction Labourer's Pension Trust for Southern California,* 508 U.S. 564 (1993); *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). This standard is similar to that found in the rules of Federal Procedure. *See* FED. R. CIV. P. 52(a). In Florida law, clearly erroneous, as a standard of review for agency action is seldom used. For example, the standard is used in a way that relates to the review of questions of law. s. 120.57(e)3., F.S. The standard is also used in relation to RFP review (s. 430.203(9)(a), F.S.) and a de novo review of procurement when facts are in dispute (s. 120.57(3)(f), F.S.), however, in this context the statute also provides the administrative law judge with the option to use arbitrary or capricious, or contrary to competition.
[23] *See e.g.* ss. 120.54, and 120.57, F.S.

be brought.[24] Further, if any member of the governing board negligently or willfully violates this section, then the member could be subject to penalty by the Commission on Ethics. Due to the nature of such transactions, a sale or lease could take a number of years to complete – and the members of the board could change over time.

If the hospital district's charter requires a referendum to approve a sale or lease, the board does not have to seek AHCA approval for the transaction. However, regardless of the terms of the charter, the transaction must be approved by a majority of the registered voters in the special hospital district.

Distribution of Funds

The bill mandates that the proceeds from the sale or lease be distributed in a certain way by a governing board. Fifty percent must be deposited into a healthcare economic development trust fund, controlled by the county commission, or municipality in which the hospital is located. The bill requires that the Department of Economic Opportunity be consulted as to the distribution. The remaining fifty percent must be appropriated for indigent care. The bill is silent as to which entity is in charge of this distribution.

Further, the bill mandates that proceeds from property that was previously exempt from ad valorem taxation, and is subject to ad valorem taxation after sale or lease, be distributed in the same 50/50 split as previously described. For hospitals that are leased, it is not likely that the property will be subject to ad valorem taxation, because the underlying ownership of the property is not changed.

The bill creates s. 155.401, F.S., to specifically grant authority to special districts to appropriate funds from the proceeds of a sale or lease to promote and support economic growth and to further the purposes of the district.

Exemptions

The bill provides an exemption from the requirements to: evaluate ownership; 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 AHCA; and distribute funds; and from the bill's contract voidability provisions. This exemption applies to:

- 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.

However, a hospital under lease as of the effective date will be subject to the provisions of the act if:

- 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: determine qualified purchasers or lessees; 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 AHCA; and distribute funds; and the bill's contract voidability provisions. This exemption applies when the governing board is selling or leasing property that generates less than 20 percent 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.

[24] *See* ch. 95, F.S.

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.

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

Hospital Accreditation

The bill allows AHCA to approve additional accreditation organizations for hospital licensure purposes, pursuant to s. 395.002,(1), F.S. The bill also republishes a conforming section of law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate fiscal impact on AHCA to review a proposed hospital transaction. The bill has an indeterminate fiscal impact on the Division for Administrative Hearings for review of AHCA decisions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires special taxing districts to distribute the proceeds of a sale or lease of a public hospital according to a statutorily prescribed formula. Further to this, the bill requires that counties or municipalities follow a statutorily prescribed formula for the distribution of ad valorem tax revenues for property that was previously exempt from such exemptions.

The bill also requires that every public hospital commence an ownership evaluation, by December 31, 2012. The cost of a fair market value analysis is indeterminate, as is the cost of the operating comparison with similarly situated hospitals.

Fees and costs for the AHCA approval process are borne by the hospital board.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.