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SFA**BILL ANALYSIS**

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Senate Bill 158 (as introduced 2-11-97)
Sponsor: Senator Dale L. Shugars
Committee: Health Policy and Senior Citizens

Date Completed: 3-10-97

CONTENT

The bill would create the “Nonprofit Hospital Sale Act” to prohibit a “person” (an individual, partnership, corporation, limited liability company, or other legal entity) from acquiring a hospital owned by a nonprofit corporation without first applying for and receiving the approval of the Department of Community Health (DCH) and the Attorney General pursuant to the provisions of the bill; prohibit a person from acquiring a hospital owned by an entity other than a nonprofit corporation without first applying for and receiving the approval of the DCH, as well as a certificate of need under the Public Health Code; provide that an acquisition application form and all related documents would be public records for purposes of the Freedom of Information Act; prescribe the procedures for filing an application and specify time limits for review of an application by the DCH and Attorney General; prescribe specific criteria to be considered by the DCH and/or Attorney General in deciding to approve or disapprove an application; and allow the DCH to subpoena certain information and hold hearings under certain circumstances. The bill would apply only to the acquisition of a hospital that took place after the bill’s effective date. Following is a detailed description of the bill.

Application for Acquisition

An application for the “acquisition” of a hospital would have to be submitted to the DCH, and to the Attorney General if necessary (in the case of a hospital owned by a nonprofit corporation), on forms provided by the DCH. “Acquisition” would mean acquisition by a person of an ownership or controlling interest in a hospital, by purchase, lease, gift, or otherwise, that resulted in a change of ownership or control of 20% or more, or that resulted in the person holding a 50% or greater interest in the ownership or control.

The DCH would have to include in the application the name of the transferring nonprofit corporation hospital, the name of the purchaser and other parties to an acquisition, the terms of the proposed sale or acquisition agreement, the sale or acquisition price, and a copy of the sale or acquisition agreement and all other related documents. A copy of the application and all additional related materials would have to be submitted to the DCH and Attorney General at the same time. The application form and all related documents would be public records for purposes of the Freedom of Information Act.

Within five working days after receipt of an application, the DCH would have to publish notice of the application through means reasonably calculated to give notice to the public, and notify by first-class mail each person who had requested advance notice of the filing of such applications. The notice would have to state that an application had been received; state the names of the parties to the proposed agreement; describe the contents of the application; and state the date by which a person could submit written comments about the application to the DCH.

Review of Application

The DCH, and the Attorney General if required, within 15 days after receiving an application would have to determine if the application was complete for purposes of review. The DCH or Attorney General could find that an application was incomplete if a question on the application form had not been answered in whole or in part, or had been answered in a manner that did not fairly meet the question addressed, or if the application did not include attachments of supporting documents necessary to complete the answer. If the DCH or the Attorney General determined that an application was incomplete, it would have to notify the applicant within 15 days after the application was received, stating the reasons for its determination of incompleteness with reference to the particular questions for which a deficiency was noted. Within 90 days after receiving a completed application, the Department, and the Attorney General if required, would have to review the application in accordance with the standards set forth in the bill and approve or disapprove the acquisition.

For an acquisition that required both approval from the DCH and a certificate of need under the Public Health Code, the applicant would have to submit a single application for both purposes and the DCH could review the application under a single unified review process. Following the single process, the DCH would have to issue a decision for purposes of the certificate of need application (in the manner prescribed under the Public Health Code) and for purposes of an application filed under the bill.

Public Hearing

The DCH, or the Attorney General if required, during the course of its review of an application would have to hold a public hearing on the acquisition. The DCH or the Attorney General could conduct the public hearing in the manner provided for a public hearing before the promulgation of rules under the Administrative Procedures Act.

A person could intervene in a review if he or she could show an interest in the matter distinct from that of the general public. The DCH and the Attorney General could promulgate rules for intervention pursuant to the Administrative Procedures Act.

The DCH or the Attorney General could subpoena additional information or witnesses, require and administer oaths, require sworn statements, take depositions, and use related discovery procedures for purposes of a public hearing, and at any time before making a decision on the application. The required hearing would have to be held within 30 days after the publication of a notice of the application. The DCH would have to give 10 working days' notice before holding the hearing, not including days the application was considered to be incomplete.

Attorney General: Application Approval and Criteria

The Attorney General would have to review a completed application for the acquisition of a hospital owned by a nonprofit corporation in accordance with the standards prescribed in the bill. Within 90 days after receipt of a completed application, the Attorney General would have to disapprove the acquisition, or approve the acquisition with or without specific conditions or modifications. The Attorney General could not make his or her decision subject to a condition that was not directly related to the criteria specified in the bill and a condition or modification would have to bear a direct and rational relationship to the application. If the Attorney General did not act within the 90-day period, the application would be considered approved. An applicant, or an intervenor, could seek judicial review of the decision of the Attorney General in a court of competent jurisdiction.

In making a decision to approve or disapprove an application, the Attorney General would have to consider the following criteria:

- Whether the sale and purchase were permitted under the Nonprofit Corporation Act and other laws of the State governing nonprofit entities, trusts, or charities.
- Whether due care was exercised by the nonprofit corporation hospital in deciding to sell or otherwise transfer, selecting the buyer or other acquirer, and negotiating the sale or acquisition.
- The procedures used by the nonprofit corporation hospital in making its decision, including whether appropriate expert assistance was used.
- Whether conflict of interest was avoided, including, but not limited to, conflicts of interest related to board members of, key executives of, legal counsel for, and experts retained by the nonprofit corporation hospital or the acquiring entity.
- Whether the nonprofit corporation hospital would receive fair market value for its assets. The Attorney General could employ, at the nonprofit corporation's expense, one or more necessary expert assistants in making this determination if the application incompletely addressed the standards of due care or procedure.
- Whether charitable funds were placed at risk, if the acquisition were financed in part by the nonprofit corporation hospital.
- Whether the nonprofit corporation hospital retained a realistic option to sell or otherwise transfer any remaining interest in the hospital to the acquiring entity for a fair price.
- Whether a management contract under the acquisition was for fair market value.
- Whether the sale or other transfer proceeds would be used for appropriate charitable purposes consistent with the transferring nonprofit corporation hospital's original purpose, or for the promotion of health in the affected community, and whether the proceeds would be controlled as charitable funds independently of the acquirer.
- Whether a nonprofit, charitable corporation established to hold the proceeds of the sale or other transfer would be broadly based in the community and be a representative of the affected community, including the structure and governance of the nonprofit corporation.

DCH: Application Approval and Criteria

Within 90 days after receipt of a completed application, the DCH would have to disapprove an acquisition, or approve an acquisition with or without specific conditions or modifications. The DCH could not make its decision subject to a condition not directly related to the criteria prescribed in the bill, and a condition or modification would have to bear a direct and rational relationship to the application. An applicant or intervenor could seek judicial review of the DCH decision in a court of competent jurisdiction.

In making a decision to approve or disapprove an application the DCH would have to consider whether sufficient procedures and safeguards were included to assure the affected community continued access to affordable health care. A right of first refusal to repurchase or reacquire the assets by a successor nonprofit corporation or foundation would have to be considered evidence of a procedure or safeguard to assure access to continued health care, if the nonprofit corporation owning the hospital were subsequently sold to, or merged with another entity, including an assurance that financing necessary to accomplish the repurchase or retransfer was reasonably available.

The DCH also would have to consider whether the acquiring entity had made a commitment to provide care to the disadvantaged, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care. Activities and funding provided by the transferring nonprofit corporation owning the hospital, or its successor nonprofit corporation or foundation, to provide such care could be considered in evaluating compliance with the commitment.

In addition, if health care providers would be offered the opportunity to invest or own an interest in the acquiring entity or in an entity related to the acquiring entity, the DCH would have to consider whether procedures or safeguards were in place to avoid conflict of interest in patient referral by investing health care providers, and the nature of those procedures or safeguards.

Rescinding Approval/License Renewal

The DCH would have to require periodic reports from the acquiring entity and from the transferring nonprofit corporation hospital or its successor nonprofit corporation or foundation to ensure compliance with commitments made to the disadvantaged, uninsured, and underinsured. The DCH could subpoena information and documents and conduct on-site compliance audits at the acquiring entity's expense.

If the DCH received information indicating that the acquiring entity was not fulfilling its commitment to the affected community, or that the patient referral patterns of a health care provider having an ownership interest in the acquiring entity or a related entity were inconsistent with the procedures or safeguards, the DCH would have to hold a hearing after 10 days' notice to the affected parties. If after the hearing the DCH determined that the information was true, the DCH could institute proceedings to rescind its approval of the acquisition.

If a person acquired a hospital without first having received the approval of the DCH and, if necessary, the approval of the Attorney General, or if a hospital acquired under the bill were not fulfilling its commitment to the affected community, or were not following required conflict of interest procedures or safeguards, the DCH could not renew the hospital's license to operate.

A hospital that was acquired under the Act would have to apply for a new license under the Public Health Code.

Legislative Analyst: G. Towne

FISCAL IMPACT

The bill would have an indeterminate impact on the State and local units of government. The bill would result in additional workload for the Department of Attorney General and Department of Community Health. The extent would depend upon the number of acquisitions and the complexity of the transactions.

Fiscal Analyst: B. Bowerman
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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.