What is the purpose of the Public Benefit Hospital Sales and Conveyance Act?

Tennessee law directs the attorney general and reporter to review any proposed public benefit hospital conveyance transaction to determine whether to object to the proposed transaction on behalf of the public interest or to take no action. The manner in which sale proceeds are used is among the factors set forth in statute that must be considered.

Tennessee case law supports this review of the permitted uses of proceeds from the sale of hospitals owned and operated by cities, counties or private act hospital authorities. In the case of Lafollette Medical Center v. The City of LaFollette, the Court of Appeals reconfirmed the Trial Court’s order that the proceeds from the sale of a city-owned hospital should be held in a constructive trust for use for “general healthcare of the community.”

In 2006, the Tennessee General Assembly passed the Public Benefit Hospital Sales and Conveyance Act to formalize the process and assist the attorney general and reporter gather sufficient information and data during the proposed sale or lease of a public benefit hospital entity to adequately evaluate the proposed transaction or the effects of the transaction on the public.

According to the Act, “The attorney general and reporter may demand that the public benefit hospital entity giving notice under § 48-68-203 provide such information as the attorney general and reporter reasonably deems necessary to complete the review of any proposed public benefit hospital conveyance transaction described in §§ 48-68-206 and 48-68-207. A failure by the public benefit hospital entity giving notice under § 48-68-203 to provide timely information as required by the attorney general and reporter shall be a sufficient ground for the attorney general and reporter to object to the proposed public benefit hospital conveyance transaction.”

What kind of financial, operational or transactional information is requested by the attorney general?

In addition to the customary legal and transactional information required to evaluate the proposed conveyance, the Act also lists the information that must be provided to assist the attorney general in determining whether the transaction will have effect on availability or accessibility to health care services, including:

(1) Whether sufficient safeguards are included to assure the affected community continued access to affordable care;

(2) Whether the proposed public benefit hospital conveyance transaction creates or has the
likelihood of creating an adverse effect on the access to or availability or cost of health care services to the community;

(3) Whether the acquiring entities have made a commitment, at least comparable to the public benefit hospital entity, to provide health 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 public benefit hospital entity or its successor public benefit hospital entity or foundation to provide such health care or to provide support or medical education and teaching programs or medical research programs shall be considered in evaluating compliance with this commitment;

(4) Whether the public benefit hospital conveyance transaction will result in the revocation of hospital privileges;

(5) Whether sufficient safeguards are included to maintain appropriate capacity for health science research and health care provider education; and

(6) Whether the proposed public benefit hospital conveyance transaction demonstrates that the public interest will be served considering the essential medical services needed to provide safe and adequate treatment, appropriate access and balanced health care delivery to the residents.

Why is this proposed legislation needed?

The intent of SB2912/HB3275, sponsored by Sen. Doug Overbey (R-Maryville) and Rep. Mike Harrison (R-Rogersville), is to simply add some additional language for the attorney general, who has the sole authority and legal standing to review the transaction and act in the community’s interest, to consider in making a decision about the proposed transaction. This currently includes:

(1) Whether the public benefit hospital entity will receive full and fair market value for its charitable or social welfare assets;

(2) Whether the fair market value of the public benefit hospital entity's assets to be transferred has been manipulated by the actions of the parties in a manner that causes the fair market value of the assets to decrease;

(3) Whether the proceeds of the proposed public benefit hospital conveyance transaction will be used consistent with the trust under which the assets are held by the public benefit hospital entity and whether the proceeds will be controlled as funds independently of the acquiring or related entities;

(4) Whether the proposed public benefit hospital conveyance transaction will result in a breach of fiduciary duty, as determined by the attorney general and reporter, including conflicts of interest related to payments or benefits to officers, directors, board members, executives and experts employed or retained by the parties;

(5) Whether the governing body of the public benefit hospital entity exercised due diligence in deciding to dispose of the public benefit hospital entity's assets, selecting the acquiring entity, and negotiating the terms and conditions of the disposition;
(6) Whether the public benefit hospital conveyance transaction will result in private inurement to any person;

(7) Whether health care providers will be offered the opportunity to invest or own an interest in the acquiring entity or a related party, and whether procedures or safeguards are in place to avoid conflict of interest in patient referrals;

(8) Whether the terms of any management or services contract negotiated in conjunction with the proposed public benefit hospital conveyance transaction are reasonable;

(9) Whether any foundation established to hold the proceeds of the public benefit hospital conveyance transaction will be broadly based in the community and be representative of the affected community, taking into consideration the structure and governance of the foundation;

(10) Whether the attorney general and reporter has been provided with sufficient information and data by the public benefit hospital entity to adequately evaluate the proposed public benefit hospital conveyance transaction or the effects of the transaction on the public; provided, that the attorney general and reporter has notified the public benefit hospital entity or the acquiring entity of any inadequacy of the information or data and has provided a reasonable opportunity to remedy the inadequacy; and

(11) Any other criteria the attorney general and reporter considers necessary to determine whether the public benefit hospital entity will receive full and fair market value for its assets to be transferred, as required in rules adopted by the attorney general and reporter under § 48-68-208.

**How does the proposed amendment change current law?**

The amendment rewrites (3) above as follows:

(3) Whether the proceeds of the proposed public benefit hospital conveyance transaction will be used consistent with the trust under which the assets are held by the public benefit hospital entity;

The amendment also adds the following new subdivisions (4) and (5) and redesignates the remaining subdivisions accordingly:

(4) Whether the proceeds are used by a county or municipality for general or special revenue obligations not expressly provided for when the hospital was established;

(5) Whether the proceeds will be controlled as funds independently of the acquiring or related entities; provided however, no proceeds shall be returned to any county or municipal government except to the extent necessary to pay lawful obligations to such county or municipal government;

As amended, this legislation further clarifies that these net proceeds can provide compensation for debts owed by the public hospital to the local government, as appropriate.
Why can’t the proceeds from the sale or lease of a public benefit hospital be used for whatever purposed deemed necessary by the local government?

The following statement issued recently by Sharon Curtis-Flair, spokesperson for the Tennessee Attorney General’s office in response to a media inquiry, reconfirms that agency’s longstanding role in protecting public assets to ensure access to health care and other health-related activities.

“Current law directs this Office to review any proposed public benefit hospital conveyance transaction and to determine whether to object to the proposed transaction on behalf of the public interest or to take no action. In reviewing a proposed transaction, there are factors that are set forth in statute that must be considered, including the manner in which sale proceeds are used. Our review of a transaction is very fact specific and typically involves detailed discussions with parties to the transaction.

The legislation seeks to clarify how the proceeds from the sale of the publicly owned hospital may be used in the public interest. While this Office has not been involved in drafting the bill, HAT provided us a copy of the proposed legislation, and, as drafted, it is consistent with the historic position of this Office with respect to the appropriate use by a county or municipality of funds generated from the sale of a public benefit hospital.”