

## ACT 257

S.B. NO. 2460

A Bill for an Act Relating to Acquisition of Hospitals.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Chapter 323D, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**“PART . HOSPITAL ACQUISITION**

**§323D-A Definitions.** For the purpose of this part, unless the context requires otherwise:

“Acquisition” means any acquisition by a person or persons of an ownership or controlling interest in a hospital, whether by purchase, merger, lease, gift, or otherwise, that results in a change of ownership or control of twenty per cent or greater or which results in the acquiring person or persons holding a fifty per cent or greater interest in the ownership or control of that hospital, but does not include the acquisition of an ownership or controlling interest in a private nonprofit hospital by a transferee that:

- (1) Is a nonprofit corporation having a substantially similar charitable health care purpose as the transferor or is a governmental entity;
- (2) Is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or as a governmental entity; and
- (3) Maintains representation from the affected community on the local board.

“Agency” means the state health planning and development agency.

“Hospital” means an institution with an organized medical staff, regulated under section 321-11(10) which admits patients for inpatient care, diagnosis, observation, and treatment, but does not include a public health facility under chapter 323F.

“Person” has the meaning found in section 323D-2.

**§323D-B Acquisition of hospital.** (a) No person shall engage in the acquisition of a hospital without first:

- (1) Applying for and receiving the approval of the agency; and
- (2) Notifying the attorney general and, if applicable, receiving approval from the attorney general pursuant to this part;

unless the acquiring person is a nonprofit corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or is a governmental entity.

(b) Any person not required to obtain the approval of the agency under this part shall give the attorney general at least ninety days’ prior notice of an impending acquisition, during which time the attorney general may take any necessary and appropriate action consistent with general duties of oversight with regard to the conduct of charities, if applicable. The notice shall briefly describe the impending acquisition, including any change in ownership of tangible or intangible assets.

(c) The application shall be submitted to the agency and the attorney general on forms provided by the agency and shall include:

- (1) The name of the seller, the name of the purchaser, and the names of other parties to an acquisition;
- (2) The terms of the proposed agreement;
- (3) The sale price;

- (4) A copy of the acquisition agreement;
- (5) A financial and economic analysis and report from an independent expert or consultant of the effect of the acquisition under the criteria set forth in section 323D-F; and
- (6) All other related documents.

A copy of the application and copies of all additional related materials shall be submitted to the agency and to the attorney general at the same time. The applications and all related documents shall be considered government records.

**§323D-C Notice; procedures.** (a) Within five working days after receipt of a complete application under section 323D-B, the agency shall give public notice of the application in the affected county or counties where the hospital is located and shall notify by first-class mail any person who has requested notice of the filing of such applications. The public notice shall state that a completed application has been received, state the names of the parties to the agreement, describe the contents of the application, and state the date by which a person may submit written comments about the application to the agency.

(b) Within ninety days after receiving a complete application, the agency shall review the application in accordance with the standards set forth in this part and approve or disapprove the acquisition.

Within twenty days after receiving a complete application, the attorney general shall determine whether a review of the application in accordance with section 323D-F is appropriate and notify the applicant if a review is warranted. If the attorney general determines that a review is unnecessary or not appropriate, then none of the other provisions of this part applicable to review by the attorney general shall apply.

(c) For acquisitions which require approval from the agency under this part and a certificate of need, the applicant shall submit a single application for both purposes and the application shall be reviewed under a single unified review process by the agency. Following the single unified review process, the agency shall simultaneously issue its decision regarding the certificate of need and its decision for purposes of the sale of a hospital under this part.

**§323D-D Hearings.** (a) The agency, after consultation with the attorney general, shall, if appropriate, hold a public hearing during the course of review, which hearing may be held jointly with the certificate of need review panel or the statewide health coordinating council, and in which any person may file written comments and exhibits or appear and make a statement. The agency or the attorney general may subpoena additional information or witnesses, require and administer oaths, require sworn statements, take depositions, and use related discovery procedures for purposes of the hearing and at any time prior to making a decision on the application.

(b) The hearing shall be held no later than sixty days after receipt of a complete application. The hearing shall be held upon ten working days' notice, not including days the application is deemed to be incomplete.

**§323D-E Review; decision; rules.** (a) The attorney general shall conduct its review of the application in accordance with the standards enumerated in section 323D-F. Within ninety days after receipt of an application, the attorney general shall review and approve or disapprove the acquisition.

(b) If the attorney general does not act within ninety days after receipt of an application, the application shall be deemed approved. If the attorney general approves or disapproves the acquisition, the applicant, or any person who has submitted comments and has a legal interest in the hospital being acquired or in

another hospital that has contracted with the acquired hospital for the provision of essential health services, may bring an action for declaratory judgment for a determination that the acquisition is or is not in the public interest under the criteria set forth in section 323D-F.

(c) The agency shall review the completed application in accordance with the standards enumerated in section 323D-G. Within ninety days after receipt of a completed application, the agency shall:

- (1) Approve the acquisition, with or without any specific modifications; or
- (2) Disapprove the acquisition.

The agency shall not make its decision subject to any condition not directly related to criteria enumerated in section 323D-G, and any condition or modification shall bear a direct and rational relationship to the application under review.

(d) Any affected person may appeal a final decision by the agency to the reconsideration committee created under section 323D-47 under procedures substantially similar to those for appeals of health care certificate of need decisions. The reconsideration committee shall have the same powers and duties with respect to appeals under this part as exist for appeals to the reconsideration committee regarding issuance of certificates of need. The findings, conclusions, and decisions of the reconsideration committee shall constitute the determination of the agency. The agency, the applicant, or any affected person who has intervened in the matter before the reconsideration committee may seek judicial review of any agency determination.

(e) If both the agency and the attorney general review the application, it shall not be granted unless it is approved by both.

#### **§323D-F Acquisition in the public interest; decision of attorney general.**

If the attorney general determines that a review of the application is appropriate, the attorney general shall approve the application unless the attorney general finds that the acquisition is not in the public interest. An acquisition of a private nonprofit hospital is not in the public interest unless appropriate steps have been taken to safeguard the value of charitable assets and ensure that any proceeds of the transaction are used for appropriate charitable health care purposes as provided in paragraph (8). In determining whether the acquisition meets such criteria, the attorney general shall consider, as applicable:

- (1) Whether the acquisition is permitted under chapter 415B governing nonprofit entities, trusts, or charities;
- (2) Whether the hospital acted in a duly diligent manner in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale;
- (3) The procedures used by the seller in making its decision, including whether appropriate expert assistance was used;
- (4) Whether all conflicts of interest were disclosed, including, but not limited to, conflicts of interest related to board members of, executives of, and experts retained by the seller, purchaser, or parties to the acquisition;
- (5) Whether the seller will receive reasonably fair value for its assets. The attorney general may employ, at the seller's expense, reasonably necessary expert assistance in making this determination;
- (6) Whether charitable funds are placed at unreasonable risk, if the acquisition is financed in part by the seller;
- (7) Whether any management contract under the acquisition is for reasonably fair value;
- (8) Whether the sale proceeds will be used for appropriate charitable health care purposes consistent with the seller's original purpose or for the

support and promotion of health care in the affected community, and will be controlled as charitable funds independent of the purchaser or parties to the acquisition; and

- (9) Whether a right of first refusal to repurchase the assets by a successor nonprofit corporation or foundation has been retained, if the hospital is subsequently sold to, acquired by, or merged with another entity.

**§323D-G Acquisition; decision by agency.** In making a decision whether to approve or disapprove an application, the agency shall consider:

- (1) Whether sufficient safeguards are included to ensure that the affected community has continued access to affordable care;
- (2) Whether the purchaser and parties to the acquisition have made a commitment to provide health care to the disadvantaged, uninsured, and underinsured, and to provide benefits to the affected community to promote improved health care. Current and prior health care activities and funding for those activities by the seller or its successor nonprofit corporation or foundation may be considered in evaluating compliance with this commitment;
- (3) If health care providers will be offered the opportunity to invest or own an interest in the purchaser or a related entity to the purchaser; and
- (4) Whether procedures or safeguards are in place to avoid conflict of interest in patient referral and the nature of those procedures or safeguards.

This section does not apply higher standards to hospitals covered by this part than those applicable to hospitals not covered by this part.

**§323D-H Revocation; hearing.** If the agency receives information indicating that the acquiring person is not fulfilling the commitment to the affected community under section 323D-G, the agency shall hold a hearing upon ten days' notice to the affected parties. If after the hearing the agency determines that the information is true, the department may institute proceedings to revoke the license issued to the purchaser.

**§323D-I Public interest.** The attorney general shall have the authority to ensure compliance with commitments made pursuant to section 323D-G.

**§323D-J License renewal.** No license to operate a hospital may be issued or renewed by the department of health pursuant to this chapter, and a license which has been issued shall be subject to revocation or suspension, if:

- (1) There is an acquisition of a hospital without first having received the approval of the agency under this part;
- (2) There is an acquisition of a hospital without the approval of the attorney general, if the attorney general determines that a review of the application is appropriate under this part;
- (3) There is an acquisition of a hospital and the attorney general disapproves the acquisition and there is a judicial determination that the acquisition is not in the public interest; or
- (4) The hospital is not fulfilling its commitment under section 323D-G or is not following procedures or safeguards required under section 323D-G(4).

This section does not limit the right to a hearing or the right of appeal for a hospital from such decision.

**§323D-K Prior acquisitions.** Any acquisition of a hospital before the effective date of this part and any acquisition in which an application for a certificate of need has been granted by the agency before the effective date of this part is not subject to this part.

**§323D-L Maintenance of services.** (a)<sup>1</sup> A person who has acquired or is engaged in the acquisition of a hospital shall not substantially reduce or eliminate direct patient care services at the hospital below the levels at which those services were available at the time of the acquisition, without first giving written notice of the planned reduction or elimination to the agency and receiving the agency's approval, prior to implementing the reduction or elimination of services.

**§323D-M Statutory authority.** No provision of this part shall derogate from the common law or statutory authority of the attorney general.''

SECTION 2. In codifying the new sections added by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 3. This Act shall take effect upon its approval.

(Approved July 20, 1998.)

**Note**

1. No subsection (b) designation.