

H.596

An act relating to the conversion of assets of a nonprofit hospital

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 18 V.S.A. § 9420 is amended to read:

§ 9420. CONVERSION OF NONPROFIT HOSPITALS

(a) Policy and purpose. The ~~state~~ State has a responsibility to ~~assure~~ ensure that the assets of nonprofit entities, which are impressed with a charitable trust, are managed prudently and are preserved for their proper charitable purposes.

(b) Definitions. As used in this section:

(1) “Board” means the Green Mountain Care Board.

(2) “Charitable assets” means the fair market value of a nonprofit hospital. When a conversion affects only some of the assets of a nonprofit hospital, “charitable assets” means those assets of the hospital that will be so affected.

~~(2) “Commissioner” is the commissioner of financial regulation.~~

(3) “Conversion” means a transaction or series of transactions described in subdivision (4) of this subsection, except that a conversion does not include a transaction in which the party receiving assets of a nonprofit hospital is a nonprofit corporation.

(4) “Convert” means to sell, transfer, lease, exchange, option, commit, convey, or otherwise dispose of assets or operations of a nonprofit hospital.

The term does not include transactions ~~occurring in the normal and ordinary course of business for the nonprofit hospital,~~ such as management contracts, vendor contracts, physician-hospital contracts, managed care contracts, financing agreements, sales of investment securities, ~~or~~ ventures such as letters of credit, or cooperative or networking agreements with for-profit providers, occurring in the normal and ordinary course of business of the nonprofit hospital.

(5) “Fair market value” means the price that the assets being converted would bring in a competitive and open market under a fair sale with the buyer and seller acting prudently, knowledgeably, at arm’s length, and in their own best interest.

(6) “Hospital system” means a network of hospitals affiliated with a nonprofit hospital.

(7) “Nonprofit hospital” means a nonprofit entity, where no part of the net earnings may lawfully be applied to the benefit of any private shareholder or individual, and which is a hospital as defined in section 1902 of this title, or a hospital member of a hospital system; provided, that the term “hospital” does not include any hospital conducted, maintained, or operated by the ~~United States~~ U.S. government or the ~~state~~ State of Vermont or the duly authorized agency of either.

(8) "Parties" means the nonprofit hospital and any other person who is a party to a conversion ~~described in the application filed pursuant to subsection (e) of this section~~, including, ~~without limitation~~, any person that, pursuant to the plan of conversion, is to receive charitable assets or proceeds as a result of the conversion. When, in this section, reference is made to liabilities or obligations of the parties, such liabilities and obligations shall be joint and several.

~~(9) "Qualifying amount" means an amount that is at least \$1 million and represents at least 40 percent of the value of the assets of the nonprofit hospital, or that vests control of the nonprofit hospital in another person or entity. For purposes of determining whether the threshold requirements of this subdivision have been or will be met, related conversions shall be aggregated.~~

~~(c) Approval required for conversion of qualifying amount of charitable assets. A nonprofit hospital may convert a qualifying amount of charitable assets only with the approval of the commissioner, and either the attorney general or the superior court, pursuant to the procedures and standards set forth in this section~~ Certification. In any case in which a conversion is subject to the certificate of need process under subsection 5, chapter 221 of this title, the nonprofit hospital shall be required to certify that it has satisfied each of the standards described in subdivisions (d)(1)–(7) of this section. If the Board has reason to believe that any such certification is not true and accurate, it shall

refer the matter to the Attorney General, who may investigate and take legal action pursuant to subsection (e) of this section. The Board may request additional information from the nonprofit hospital relating to the certification.

~~(d) Exception for conversions in which assets will be owned and controlled by a nonprofit corporation:~~

~~(1) Other than subsection (c) of this section and subdivision (2) of this subsection, this section shall not apply to conversions in which the party receiving assets of a nonprofit hospital is a nonprofit corporation.~~

~~(2) In any conversion that would have required an application under subsection (e) of this section but for the exception set forth in subdivision (1) of this subsection, notice to or written waiver by the attorney general shall be given or obtained as if required under 11B V.S.A. § 12.02(g). Standards of review. When converting an asset, the nonprofit hospital shall be subject to the following standards:~~

~~(1) The governing body of the nonprofit hospital exercised due diligence in deciding to engage in the conversion, selecting the acquiring party, and ensuring that the terms and conditions of the conversion are fair and reasonable to the nonprofit hospital.~~

~~(2) The nonprofit hospital will receive fair market value for its charitable assets, and the market value of those assets has not been~~

manipulated by the actions of the parties in a manner that causes the value of the assets to decrease.

(3) The conversion will not result in a breach of fiduciary duty, including any undisclosed or material conflicts of interest related to payments or benefits to officers, directors, board members, executives, or experts employed or retained by the parties.

(4) The conversion will not result in private inurement to any person.

(5) The proceeds of the conversion will be used in a manner and place consistent with the public benefit purposes of the nonprofit hospital.

(6) Any foundation established to hold the proceeds of the conversion will be representative of and broadly based in the community served by the nonprofit hospital and will be subject to appropriate public accountability standards.

(7) The conversion plan has made reasonable provisions for reports, upon request, to the Attorney General on the conduct and affairs of any person that, as a result of the conversion, is to receive charitable assets or proceeds from the conversion to carry on any part of the public purposes of the nonprofit hospital.

~~(e) Application. Prior to consummating any conversion of a qualifying amount of charitable assets, the parties shall submit an application to the attorney general and the commissioner, together with any attachments~~

~~complying with subsection (f) of this section. If any material change occurs in the proposal set forth in the filed application, an amendment setting forth such change, together with copies of all documents and other material relevant to such change, shall be filed with the attorney general and the commissioner within two business days, or as soon thereafter as practicable, after any party to the conversion learns of such change. If the conversion involves a hospital system, and one or more of the hospitals in the system desire to convert charitable assets, the attorney general, in consultation with the commissioner, shall determine whether an application shall be required from the hospital system.~~ Action by the Attorney General.

(1)(A) If the Board or the Attorney General has reason to believe that a nonprofit hospital has converted or is about to convert charitable assets in such a manner that would violate one or more of the standards set out in subsection (d) of this section, the Attorney General may investigate the matter pursuant to procedures set forth generally in 9 V.S.A. § 2460 and may bring an action in Washington Superior Court or in the Superior Court of any county where one of the parties has a principal place of business. In any action brought by the Attorney General under this subsection, the Attorney General shall have the burden to establish that the conversion:

(i) violates one or more of the standards listed in subdivision (d)(1), (3), (4), (6), or (7) of this section;

(ii) substantially violates one or more of the standards set forth in subdivisions (d)(2) and (5) of this section.

(B) The Court may order appropriate relief in such circumstances, including avoidance of the conversion or transfer of the converted assets or proceeds or the amount of any private inurement to a person or party for use consistent with the purposes for which the assets were held prior to the conversion, a penalty of up to \$1 million, and the award of costs of investigation and prosecution under this subsection (e), including the reasonable value of legal services.

(2) In determining whether to grant relief under this subsection, and the nature of such relief, the Court shall consider:

(A) whether the violation was willful;

(B) whether any person has derived, or may derive, an economic benefit from the conversion;

(C) whether the purposes for which the assets had been held by the nonprofit hospital have been frustrated by the violation;

(D) whether the interests of the public or the community served by the nonprofit hospital would be jeopardized by voiding the conversion; and

(E) how any monetary penalty imposed would affect the community served by the nonprofit hospital.

~~(f) Completion and contents of application:~~

~~(1) Within 30 days of receipt of the application, or within 10 days of receipt of any amendment thereto, whichever is longer, the attorney general, with the commissioner's agreement, shall determine whether the application is complete. The attorney general shall promptly notify the parties of the date the application is deemed complete, or of the reasons for a determination that the application is incomplete. A complete application shall include the following:~~

~~(A) a detailed summary of the purposes and material terms of the proposed conversion;~~

~~(B) the names and addresses of the parties that have been or will be created as part of the conversion, including a list of all individuals who are or have been chosen as their directors, officers, or board members;~~

~~(C) copies of all organizational documents relating to the parties;~~

~~(D) copies of all contracts and other agreements related to the conversion;~~

~~(E) copies of the most recent audited financial reports of the entities involved;~~

~~(F) a detailed description of all assets of the nonprofit hospital, including the value of the assets and the basis for that valuation. For assets included in or otherwise affected by the conversion, the following information is also to be included:~~

~~(i) the nature of any restrictions on such assets owned or held by the nonprofit hospital and the purpose or purposes for which such assets were received;~~

~~(ii) a statement as to whether the assets will be converted to cash in connection with or as a result of the conversion; and~~

~~(iii) a detailed description of all proposed changes in control or ownership of the assets and an explanation regarding whether and if so, how the charitable assets of the nonprofit hospital will continue to be used in a manner consistent with their intended charitable purpose;~~

~~(G) a description of the process by which the decision to undertake the conversion and to select the acquiring party and the type and amount of consideration to be given or received in the conversion, if applicable, was reached by the nonprofit hospital, and all documents relating to that process and decision, including, but not limited to, minutes, committee or special study reports, correspondence, presentations, audits, and other internal or outside reviews or analyses;~~

~~(H) the amount, source, and nature of any consideration to be paid to the nonprofit hospital, its directors, officers, board members, executives, or experts retained by the nonprofit hospital, including prospective employment or consultation;~~

~~(I) a detailed description of the structure and functions of any charitable foundation that will receive proceeds of the conversion, including a description of its assets, its mission, the purposes of the foundation, the expected charitable uses of the assets, how it will be broadly based in, and represent, the community affected by the conversion, and how proceeds from the conversion will be controlled;~~

~~(J) a certified board resolution or other appropriate document evidencing approval of the conversion by each party involved;~~

~~(K) a certification signed by those members, identified by name and title, of the governing body or other person approving the conversion on behalf of the nonprofit hospital that the standards set forth in subsection (j) of this section have been considered in good faith and are met, together with such explanations and other documentation as may be necessary to demonstrate such compliance;~~

~~(L) a separate certification from each member of the governing board, the chief executive officer, and other officers designated in the governing documents of the nonprofit hospital, executed under oath, stating whether that director or officer is then, or may become within three years of completion of the conversion a member or shareholder in, or officer, employee, agent, or consultant of, or may otherwise derive any compensation or benefits, directly or indirectly, from any party.~~

~~(M) a statement from any party specifying the manner in which it proposes to continue to fulfill the charitable obligations of the nonprofit hospital, if applicable; and~~

~~(N) any additional information the attorney general or commissioner finds necessary or appropriate for the full consideration of the application.~~

~~(2) The parties shall make the contents of the application reasonably available to the public prior to any hearing for public comment described in subsection (g) of this section to the extent that they are not otherwise exempt from disclosure under 1 V.S.A. § 317(b). Other preexisting authority. Nothing in this section shall be construed to limit the authority under existing law of the Board, the Attorney General, the Department of Health, or a court of competent jurisdiction.~~

~~(g) Notice and hearing for public comment on application.~~

~~(1) The attorney general and commissioner shall hold one or more public hearings on the transaction or transactions described in the application. A record shall be made of any hearing. The hearing shall commence within 30 days of the determination by the attorney general that the application is complete. If a hearing is continued or multiple hearings are held, any hearing shall be completed within 60 days of the attorney general's determination that an application is complete. In determining the number, location, and time of hearings, the attorney general, in consultation with the commissioner, shall~~

~~consider the geographic areas and populations served by the nonprofit hospital and most affected by the conversion and the interest of the public in commenting on the application.~~

~~(2) The attorney general shall provide reasonable notice of any hearing to the parties, the commissioner, and the public, and may order that the parties bear the cost of notice to the public. Notice to the public shall be provided in newspapers having general circulation in the region affected and shall identify the applicants and the proposed conversion. A copy of the public notice shall be sent to the state health care and long term care ombudspersons and to the senators and members of the house of representatives representing the county and district and to the clerk, chief municipal officer, and legislative body, of the municipality in which the nonprofit hospital is principally located. Upon receipt, the clerk shall post notice in or near the clerk's office and in at least two other public places in the municipality. Any person may testify at a hearing under this section and, within such reasonable time as the attorney general may prescribe, file written comments with the attorney general and commissioner concerning the proposed conversion.~~

~~(h) Determination by commissioner.~~

~~(1) The commissioner shall consider the application, together with any report and recommendations from the staff of the department requested by the commissioner, and any other information submitted into the record, and~~

~~approve or deny it within 50 days following the last public hearing held pursuant to subsection (g) of this section, unless the commissioner extends such time up to an additional 60 days with notice prior to its expiration to the attorney general and the parties.~~

~~(2) The commissioner shall approve the proposed transaction if the commissioner finds that the application and transaction will satisfy the criteria established in section 9437 of this title. For purposes of applying the criteria established in section 9437, the term "project" shall include a conversion or other transaction subject to the provisions of this subchapter.~~

~~(3) A denial by the commissioner may be appealed to the supreme court pursuant to the procedures and standards set forth in 8 V.S.A. § 16. If no appeal is taken or if the commissioner's order is affirmed by the supreme court, the application shall be terminated. A failure of the commissioner to approve of an application in a timely manner shall be considered a final order in favor of the applicant.~~

~~(i) Determination by attorney general. The attorney general shall make a determination as to whether the conversion described in the application meets the standards provided in subsection (j) of this section.~~

~~(1) If the attorney general determines that the conversion described in the application meets the standards set forth in subsection (j) of this section,~~

~~the attorney general shall approve the conversion and so notify the parties in writing.~~

~~(2) If the attorney general determines that the conversion described in the application does not meet such standards, the attorney general may not approve the conversion and shall so notify the parties of such disapproval and the basis for it in writing, including identification of the standards listed in subsection (j) of this section that the attorney general finds not to have been met by the proposed conversion. Nothing in this subsection shall prevent the parties from amending the application to meet any objections of the attorney general.~~

~~(3) The notice of approval or disapproval by the attorney general under this subsection shall be provided no later than either 60 days following the date of the last hearing held under subsection (g) of this section or ten days following approval of the conversion by the commissioner, whichever is later. The attorney general, for good cause, may extend this period an additional 60 days.~~

~~(j) Standards for attorney general's review. In determining whether to approve a conversion under subsection (i) of this section, the attorney general shall consider whether:~~

~~(1) the governing body of the nonprofit hospital exercised due diligence in deciding to engage in the conversion, selecting the acquiring party, and~~

~~ensuring that the terms and conditions of the conversion are fair and reasonable to the nonprofit hospital;~~

~~(2) the nonprofit hospital will receive fair market value for its charitable assets, and whether the market value of those assets has not been manipulated by the actions of the parties in a manner that causes the value of the assets to decrease;~~

~~(3) the conversion will not result in a breach of fiduciary duty, including any undisclosed or material conflicts of interest related to payments or benefits to officers, directors, board members, executives, or experts employed or retained by the parties;~~

~~(4) the conversion will not result in private inurement to any person;~~

~~(5) the proceeds of the conversion will be used in a manner and place consistent with the public benefit purposes of the nonprofit hospital;~~

~~(6) any foundation established to hold the proceeds of the conversion will be representative of and broadly based in the community served by the nonprofit hospital and will be subject to appropriate public accountability standards;~~

~~(7) the application contains sufficient information and data to permit the attorney general and commissioner to evaluate the conversion and its effects on the public's interests in accordance with this section; and~~

~~(8) the conversion plan has made reasonable provision for reports, upon request, to the attorney general on the conduct and affairs of any person that, as a result of the conversion, is to receive charitable assets or proceeds from the conversion to carry on any part of the public purposes of the nonprofit hospital.~~

~~(k) Investigation by attorney general. The attorney general may conduct an investigation relating to the conversion pursuant to the procedures set forth generally in 9 V.S.A. § 2460. The attorney general may contract with such experts or consultants the attorney general deems appropriate to assist in an investigation of a conversion under this section. The attorney general may order any party to reimburse the attorney general for all reasonable and actual costs incurred by the attorney general in retaining outside professionals to assist with the investigation or review of the conversion.~~

~~(l) Superior court action. If the attorney general does not approve the conversion described in the application and any amendments, the parties may commence an action in the superior court of Washington County, or with the agreement of the attorney general, of any other county, within 60 days of the attorney general's notice of disapproval provided to the parties under subdivision (i)(2) of this section. The parties shall notify the commissioner of the commencement of an action under this subsection. The commissioner shall be permitted to request that the court consider the commissioner's~~

~~determination under subsection (h) of this section in its decision under this subsection.~~

~~(m) Court determination and order.~~

~~(1) Within 45 days of the commencement of an action under subsection (l) of this section, the court shall hold a hearing to determine whether the conversion described in the application and any amendments submitted prior to the attorney general's notice of disapproval satisfy the standards under subsection (j) of this section that the attorney general identified in the notice of disapproval as not having been met by the transaction described in the application. The court shall determine the matter within 45 days of the conclusion of the hearing. The court, for good cause, may extend each of the time periods provided in this subsection for its hearing and determination for an additional 30 days, or for a longer period if agreed to by the parties and the attorney general. The attorney general shall represent the interests of the public at any hearing under this subsection. The parties shall have the burden to establish that the application, with any amendments that were submitted prior to the attorney general's notice of disapproval, meets each of the standards of subsection (j) of this section identified in the attorney general's notice of disapproval as not having been met by the application.~~

~~(2) If the court finds that the parties have shown that the conversion described in the application meets the standards of subsection (j) of this section~~

~~identified in the attorney general's notice of disapproval as not having been met by the application, the court shall set aside the determination of the attorney general, and the parties may proceed under this section as if the attorney general had approved the conversion described in the application.~~

~~(3) If the attorney general substantially prevails in the action, the court may order the parties to reimburse the state for the reasonable value of the attorney general's services and expenses in defending the action, separate and apart from any amounts the parties are required to pay pursuant to subsection (k) of this section.~~

~~(4) Nothing herein shall prevent the attorney general, while an action brought under subsection (l) of this section is pending, from approving the conversion described in the application, as modified by such terms as are agreed between the parties, the attorney general, and the commissioner to bring the conversion into compliance with the standards set forth in subsection (j) of this section.~~

~~(n) Use of converted assets or proceeds of a conversion approved pursuant to this section. If at any time following a conversion, the attorney general has reason to believe that converted assets or the proceeds of a conversion are not being held or used in a manner consistent with information provided to the attorney general, the commissioner, or a court in connection with any application or proceedings under this section, the attorney general may~~

~~investigate the matter pursuant to procedures set forth generally in 9 V.S.A.
§ 2460 and may bring an action in Washington superior court or in the superior
court of any county where one of the parties has a principal place of business.
The court may order appropriate relief in such circumstances, including
avoidance of the conversion or transfer of the converted assets or proceeds or
the amount of any private inurement to a person or party for use consistent
with the purposes for which the assets were held prior to the conversion, and
the award of costs of investigation and prosecution under this subsection,
including the reasonable value of legal services.~~

~~(e) Remedies and penalties for violations:~~

~~(1) The attorney general may bring or maintain a civil action in the
Washington superior court, or any other county in which one of the parties has
its principal place of business, to enjoin, restrain, or prevent the consummation
of any conversion which has not been approved in accordance with this section
or where approval of the conversion was obtained on the basis of materially
inaccurate information furnished by any party to the attorney general or the
commissioner.~~

~~(2) A conversion entered into in violation of any provision of this
section may be voided, upon petition of the attorney general, by the superior
court of Washington County or the county in which any party has its principal
place of business.~~

~~(3) If a person violates a provision of this section or any lawful order of a court acting pursuant to this section, the court, upon petition of the attorney general, may order that person to pay to the state the value of services and expenses incurred by the attorney general in the investigation and prosecution of the violation, and may:~~

~~(A) order that person to cease such activity or other appropriate injunctive relief;~~

~~(B) order the disgorgement of any private inurement; and~~

~~(C) impose a penalty on that person of up to \$1 million.~~

~~(4) In determining whether to grant relief under this subsection, and the nature of such relief, the court shall consider whether:~~

~~(A) the violation was willful;~~

~~(B) any person has derived, or may derive, an economic benefit from the conversion;~~

~~(C) the purposes for which the assets had been held by the nonprofit hospital have been frustrated by the violation; and~~

~~(D) the interests of the public or the community served by the nonprofit hospital would be jeopardized by voiding the contract.~~

~~(p) Conversion of less than a qualifying amount of assets.~~

~~(1) The attorney general may conduct an investigation relating to a conversion pursuant to the procedures set forth generally in 9 V.S.A. § 2460 if~~

~~the attorney general has reason to believe that a nonprofit hospital has converted or is about to convert less than a qualifying amount of its assets in such a manner that would:~~

~~(A) if it met the qualifying amount threshold, require an application under subsection (e) of this section; and~~

~~(B) constitute a conversion that does not meet one or more of the standards set forth in subsection (j) of this section.~~

~~(2) The attorney general, in consultation with the commissioner, may bring an action with respect to any conversion of less than a qualifying amount of assets, according to the procedures set forth in subsection (n) of this section. The attorney general shall notify the commissioner of any action commenced under this subsection. The commissioner shall be permitted to investigate and determine whether the transaction satisfies the criteria established in subdivision (g)(2) of this section, and to request that the court consider the commissioner's recommendation in its decision under this subsection. In such an action, the superior court may enjoin or void any transaction and may award any other relief as provided under subsection (n) of this section.~~

~~(3) In any action brought by the attorney general under this subdivision, the attorney general shall have the burden to establish that the conversion:~~

~~(A) violates one or more of the standards listed in subdivision (j)(1), (3), (4), or (6); or~~

~~(B) substantially violates one or more of the standards set forth in subdivisions (j)(2) and (5) of this section.~~

~~(q) Other preexisting authority.~~

~~(1) Nothing in this section shall be construed to limit the authority of the commissioner, attorney general, department of health, or a court of competent jurisdiction under existing law, or the interpretation or administration of a charitable gift under 14 V.S.A. § 2328.~~

~~(2) This section shall not be construed to limit the regulatory and enforcement authority of the commissioner, or exempt any applicant or other person from requirements for licensure or other approvals required by law.~~

Sec. 2. EFFECTIVE DATE

This act shall take effect on passage.