

SENATE BILL NO. 2348

Introduced by

Senators J. Lee, Flakoll, Nething

Representatives DeKrey, Hawken, Mueller

1 A BILL for an Act to create and enact sections 10-33-148, 10-33-149, 10-33-150, 10-33-151,
2 and 10-33-152 of the North Dakota Century Code, relating to transactions by nonprofit
3 corporations that operate or control hospitals, nursing homes, or other health care facilities; to
4 amend and reenact sections 10-33-144, 10-33-145, 10-33-146, and 10-33-147 of the North
5 Dakota Century Code, relating to nonprofit corporations that operate or control hospitals,
6 nursing homes, or other health care facilities; and to provide a continuing appropriation.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1. AMENDMENT.** Section 10-33-144 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **10-33-144. Transaction by a nonprofit corporation doing business as operating**
11 **or controlling a hospital or nursing home - Notice to attorney general ~~-Waiting period.~~**

12 1. ~~A corporation doing business as a hospital shall notify the attorney general in~~
13 ~~writing before closing an agreement or a transaction that will~~ A nonprofit
14 corporation that operates or controls a hospital, nursing home, or other health care
15 facility shall provide written notice to, and obtain the written consent of, the attorney
16 general before entering into an agreement or transaction that will do any of the
17 following:

18 a. ~~Sell, lease, transfer, exchange, option, convey, mortgage, create a security~~
19 ~~interest in, or otherwise dispose of to a for-profit organization fifty percent or~~
20 ~~more of the assets or operations of the corporation doing business as a~~
21 ~~hospital or fifty percent or more of the assets or operations of a related~~
22 organization Sell, lease, transfer, exchange, option, convey, mortgage, create
23 a security interest in, or otherwise dispose of its assets to a for-profit
24 corporation or entity or a nonprofit corporation or entity when fifty percent or

- 1 more of the assets of the selling corporation are involved in the agreement or
2 transaction;
- 3 b. ~~Sell, lease, transfer, exchange, option, convey, mortgage, create a security~~
4 ~~interest in, or otherwise dispose of any of the assets or operations of the~~
5 ~~corporation doing business as a hospital or any of the assets or operations of~~
6 ~~a related organization if the transaction or agreement will result in any~~
7 ~~for-profit organization owning or controlling fifty percent or more of the assets~~
8 ~~or operations of the corporation doing business as a hospital or fifty percent or~~
9 ~~more of the assets or operations of a related organization~~ Transfer control,
10 responsibility, or governance of fifty percent or more of the assets or
11 operations of the nonprofit corporation to a for-profit corporation or entity or
12 another nonprofit corporation or entity; or
- 13 c. Result in any for-profit organization having control of, governance of, or the
14 power to direct management and policies of the corporation doing business as
15 a hospital or a related organization.
- 16 2. ~~The notice must include:~~
- 17 a. ~~The names and addresses of the corporation doing business as a hospital,~~
18 ~~the for-profit organization, and all other parties to the proposed agreement or~~
19 ~~transaction;~~
- 20 b. ~~The terms of the proposed agreement or transaction, including the proposed~~
21 ~~sale price;~~
- 22 e. ~~A copy of the proposed agreement or transaction; and~~
- 23 d. ~~Information regarding whether a financial or economic analysis by an~~
24 ~~independent consultant has been prepared concerning the degree to which~~
25 ~~the proposed agreement or transaction will serve the public interest, or~~
26 ~~concerning the fair market value of the corporation doing business as a~~
27 ~~hospital~~ The substitution of a new corporate member or members that
28 transfers the control of, responsibility for, or governance of the nonprofit
29 corporation, the substitution of one or more members of the governing body,
30 or any arrangement, written or oral, that would transfer voting control of the
31 entity, is a transfer for purposes of this section.

- 1 3. ~~A corporation doing business as a hospital may neither transfer nor convey any~~
2 ~~assets or control through an agreement or transaction described in this section~~
3 ~~until ninety days after the corporation gives the attorney general notice required~~
4 ~~under this section, unless the attorney general waives all or part of the waiting~~
5 ~~period. Before the end of the waiting period, the attorney general may extend the~~
6 ~~period up to sixty additional days by providing written notice of the extension to the~~
7 ~~corporation. The waiting period may be extended for one or more additional~~
8 ~~sixty-day periods upon agreement between the corporation and the attorney~~
9 ~~general, or pursuant to a court order. The notice must include:~~
10 ~~a. The names and addresses of all parties to the proposed agreement or~~
11 ~~transaction;~~
12 ~~b. The terms of the proposed agreement or transaction, including the proposed~~
13 ~~sale price;~~
14 ~~c. A copy of the proposed agreement or transaction;~~
15 ~~d. Information regarding whether a financial or economic analysis by an~~
16 ~~independent consultant has been prepared concerning the degree to which~~
17 ~~the proposed agreement or transaction will serve the public interest, or~~
18 ~~concerning the fair market value of the corporation doing business as a~~
19 ~~hospital; and~~
20 ~~e. Any other information the attorney general deems necessary.~~
21 4. ~~The notice requirements of this section do not apply to a proposed agreement or~~
22 ~~transaction between related organizations serving the same or similar charitable~~
23 ~~purposes and are in addition to any notice requirements that may apply under~~
24 ~~section 10-33-122. This section does not apply to a nonprofit corporation if the~~
25 ~~agreement or transaction is in the usual and regular course of its activities.~~
26 5. ~~This section applies to a foreign nonprofit corporation that operates or controls a~~
27 ~~hospital, nursing home, or other health care facility.~~

28 **SECTION 2. AMENDMENT.** Section 10-33-145 of the North Dakota Century Code is
29 amended and reenacted as follows:

1 **10-33-145. ~~Transaction by a corporation doing business as a hospital—Attorney~~**
2 **Notice of attorney general's powers and duties decision - Experts Extension - Court**
3 **order - Costs.**

- 4 1. ~~Upon receipt of a notice under section 10-33-144, the attorney general may review~~
5 ~~and investigate the proposed agreement or transaction and may require the~~
6 ~~corporation doing business as a hospital and the for-profit organization to provide~~
7 ~~to the attorney general any additional information relevant to the review or~~
8 ~~investigation of the proposed agreement or transaction.~~
- 9 2. ~~Upon receipt of a notice under section 10-33-144, the attorney general may review~~
10 ~~the proposed agreement or transaction to determine whether consummation of the~~
11 ~~proposed agreement or transaction by the corporation doing business as a hospital~~
12 ~~is consistent with the fiduciary obligations of the corporation doing business as a~~
13 ~~hospital and the obligations of the officers and directors of the corporation doing~~
14 ~~business as a hospital and is in accordance with law. The attorney general shall~~
15 ~~consider the following factors in reviewing and evaluating a proposed agreement or~~
16 ~~transaction:~~
- 17 a. ~~Whether appropriate steps were taken by the corporation doing business as a~~
18 ~~hospital to safeguard restricted assets transferred to the for-profit~~
19 ~~organization;~~
- 20 b. ~~Whether appropriate steps were taken by the corporation doing business as a~~
21 ~~hospital to ensure that any proceeds of the proposed agreement or~~
22 ~~transaction are used for charitable purposes consistent with restrictions~~
23 ~~placed on assets of and with the charitable purposes of the corporation doing~~
24 ~~business as a hospital;~~
- 25 c. ~~Whether the terms and conditions of the proposed agreement or transaction~~
26 ~~are fair and reasonable to the corporation doing business as a hospital,~~
27 ~~including whether the corporation doing business as a hospital will receive fair~~
28 ~~market value for the assets of the corporation;~~
- 29 d. ~~Whether any conflict of interest or breach of fiduciary duty, as determined by~~
30 ~~the attorney general, exists and was disclosed, including any conflict of~~
31 ~~interest or breach of fiduciary duty related to directors and officers of,~~

- 1 ~~executives of, and experts retained by the corporation doing business as a~~
2 ~~hospital, the for profit organization, and any other party to the agreement or~~
3 ~~transaction; and~~
- 4 e. ~~Whether the agreement or transaction will result in inurement, pecuniary gain,~~
5 ~~or excess benefit to any person associated with the corporation doing~~
6 ~~business as a hospital.~~
- 7 3. ~~For the purpose of reviewing and evaluating the factors identified in subsection 2,~~
8 ~~the attorney general may retain experts if necessary and reasonable and shall~~
9 ~~obtain public comment regarding the proposed agreement or transaction. If the~~
10 ~~attorney general intends to seek payment from the corporation doing business as a~~
11 ~~hospital for the cost of any expert retained under this subsection, at least five days~~
12 ~~before retaining that expert, the attorney general shall notify the corporation doing~~
13 ~~business as a hospital of the expert cost projected to be incurred. A corporation~~
14 ~~doing business as a hospital which receives notice under this subsection shall pay~~
15 ~~the reasonable cost of any retained expert. If the corporation doing business as a~~
16 ~~hospital objects to paying the costs of an expert, the corporation may seek a~~
17 ~~district court order limiting the corporation's liability for the costs. In determining~~
18 ~~whether to issue an order, the court shall consider whether the expert is necessary~~
19 ~~and reasonable and the cost of the expert relative to the value of the proposed~~
20 ~~agreement or transaction.~~
- 21 4. ~~Section 44-04-18.4 applies to any information provided to the attorney general~~
22 ~~under sections 10-33-144 through 10-33-147. Within ninety days of receipt of the~~
23 ~~written notice required under section 10-33-144, the attorney general shall notify~~
24 ~~the selling nonprofit corporation in writing of the decision to consent to, give~~
25 ~~conditional consent to, or not consent to the agreement or transaction. Before the~~
26 ~~end of the ninety-day period, the attorney general may extend this period for up to~~
27 ~~sixty additional days by providing written notice of the extension to the selling~~
28 ~~nonprofit corporation. The decision period may be extended for one or more~~
29 ~~additional periods upon agreement between the selling nonprofit corporation and~~
30 ~~the attorney general, or pursuant to court order. If the attorney general does not~~
31 ~~give consent to the proposed agreement or transaction, the nonprofit corporation~~

1 may not enter into the agreement or transaction without a court order obtained in
2 district court in an action under chapter 32-23. Upon request for a court order the
3 court shall determine if the proposed agreement or transaction is in the public
4 interest. In a proceeding for a court order under this section, the attorney general
5 must be served with notice and is entitled to be heard. In a proceeding for a court
6 order under this section, the attorney general is entitled to an award of reasonable
7 attorney's fees and costs and expenses incurred in the proceeding. An agreement
8 or transaction without the consent of the attorney general is void unless approved
9 by court order.

10 **SECTION 3. AMENDMENT.** Section 10-33-146 of the North Dakota Century Code is
11 amended and reenacted as follows:

12 **10-33-146. Transaction by a corporation doing business as a hospital - Notice of**
13 **decision - Public meeting - Meeting notice.** Before issuing a written decision referred to in
14 section 10-33-145, the attorney general ~~approves, denies, or takes any other action on a~~
15 ~~proposed agreement or transaction under section 10-33-144 or 10-33-145, the attorney general~~
16 ~~shall notify, in writing, the corporation doing business as a hospital of the attorney general's~~
17 ~~decision. Before issuing a written decision under this section, the attorney general shall may~~
18 ~~conduct at least one or more public hearing hearings, one of which must be held in the county~~
19 ~~where the corporation doing business as a hospital in which the facility is located. At a public~~
20 hearing under this section, the attorney general shall request and receive comments from any
21 interested person regarding the proposed agreement or transaction. At least fourteen days
22 before a public hearing under this section, the attorney general shall provide notice of the
23 meeting by publication in the official newspaper of the city in which the ~~corporation doing~~
24 ~~business as a hospital, nursing home, or health care facility is located. The attorney general~~
25 shall also provide notice of the meeting to the governing body of the county in which the
26 ~~corporation doing business as a hospital, nursing home, or health care facility is located, if~~
27 applicable, and to the governing body of the city in which the ~~corporation doing business as a~~
28 ~~hospital, nursing home, or health care facility is located, if applicable. If a substantive change in~~
29 ~~the proposed agreement or transaction is submitted to the attorney general after the initial~~
30 ~~public hearing, the attorney general may conduct an additional public hearing to hear comments~~
31 from interested parties with respect to that change.

1 **SECTION 4. AMENDMENT.** Section 10-33-147 of the North Dakota Century Code is
2 amended and reenacted as follows:

3 **10-33-147. ~~Transaction by a corporation doing business as a hospital~~ Attorney**
4 **general general's decision.** ~~The attorney general may bring proceedings to secure~~
5 ~~compliance with section 10-33-144. If the attorney general determines consummation of the~~
6 ~~proposed transaction or agreement is not consistent with the fiduciary obligations of the~~
7 ~~corporation doing business as a hospital and the corporation's officers and directors or is not in~~
8 ~~accordance with law, the attorney general may bring proceedings to enjoin the consummation~~
9 ~~of the proposed transaction or agreement or to secure any other relief available under the law.~~
10 ~~Failure of the attorney general to take action on a proposed agreement or transaction described~~
11 ~~in section 10-33-144 does not constitute approval of the transaction and does not prevent the~~
12 ~~attorney general from taking other action. The attorney general shall decide whether to consent~~
13 ~~to, give conditional consent to, or not consent to an agreement or transaction described in~~
14 ~~section 10-33-144. In making the determination, the attorney general shall consider any factors~~
15 ~~that the attorney general deems relevant, including the following:~~

- 16 1. Whether the terms and conditions of the agreement or transaction are fair and
17 reasonable to the nonprofit corporations, including whether the exchange of assets
18 or consideration between the seller nonprofit corporation and the acquiring
19 for-profit corporation is at fair market value.
- 20 2. Whether the agreement or transaction will result in any inurement, pecuniary gain,
21 or excess benefit to any person associated with the selling corporation or acquiring
22 corporation.
- 23 3. Whether the governing body of the selling corporation exercised due diligence in
24 deciding to dispose of the selling corporation's assets, selecting the acquiring
25 entity, and negotiating the terms and conditions of the disposition.
- 26 4. Whether any conflict of interest or breach of fiduciary duty, as determined by the
27 attorney general, exists and was disclosed, including any conflict of interest or
28 breach of fiduciary duty related to directors, officers, and executives of the
29 nonprofit corporations, as well as experts retained.
- 30 5. Whether the proceeds from the agreement or transaction will be used for
31 appropriate charitable health care purposes consistent with the selling

1 corporation's original purpose and past operations or for the support and promotion
2 of health care in the affected community or area.

3 **SECTION 5.** Section 10-33-148 of the North Dakota Century Code is created and
4 enacted as follows:

5 **10-33-148. Contracts - Consultants and experts - Contract costs.** Within the time
6 periods designated in section 10-33-145 and relating to those factors specified in section
7 10-33-147, the attorney general may contract with, consult, and receive advice from any state
8 agency on terms and conditions that the attorney general deems appropriate. After
9 consultation with or notice to the selling corporation, the attorney general may contract with
10 experts or consultants to assist in reviewing the proposed agreement or transaction. Contract
11 costs may not exceed an amount that is reasonable and necessary to conduct the review and
12 evaluation. A contract entered into under this section does not require a bid and is exempt from
13 chapters 44-08 and 54-44.4. The selling corporation, upon request, shall pay the attorney
14 general promptly for all contract costs. The attorney general is entitled to reimbursement from
15 the selling corporation for all actual reasonable direct costs incurred in reviewing, evaluating,
16 and making the determination referred to in section 10-33-145, including administrative costs.
17 The selling corporation shall promptly pay the attorney general, upon request, for all of the
18 costs.

19 **SECTION 6.** Section 10-33-149 of the North Dakota Century Code is created and
20 enacted as follows:

21 **10-33-149. Costs and fees - Continuing appropriation.** All costs, fees, and other
22 moneys received pursuant to sections 10-33-144 through 10-33-152 must be deposited into the
23 attorney general's operating fund. The moneys in the fund are appropriated to pay the costs
24 incurred in the attorney general's performance of responsibilities pursuant to sections
25 10-33-144 through 10-33-152.

26 **SECTION 7.** Section 10-33-150 of the North Dakota Century Code is created and
27 enacted as follows:

28 **10-33-150. Compliance - District court.** The attorney general may ensure
29 compliance with any and all notices, certifications, obligations, and commitments which are
30 required to be made in connection with an agreement or transaction under sections 10-33-144
31 through 10-33-152, and the attorney general may institute proceedings to enforce such

1 compliance in action in the district court of the county in which the health care facility is located.
2 This provision does not preclude any other person with standing from bringing an action in
3 district court regarding the proposed disposition.

4 **SECTION 8.** Section 10-33-151 of the North Dakota Century Code is created and
5 enacted as follows:

6 **10-33-151. Investigation - Subpoena - Hearing - Powers of the attorney general -**
7 **Rules.** In discharging the attorney general's responsibilities under sections 10-33-144 through
8 10-33-152, and in connection with the public hearing required by section 10-33-146, the
9 attorney general may conduct investigations, issue subpoenas to any person, agent, trustee,
10 fiduciary, consultant, institution, association, or corporation directly related to the proposed
11 agreement or transaction and may conduct hearings in aid of an investigation or inquiry. The
12 attorney general has the powers under section 10-33-123. The attorney general may adopt
13 rules the attorney general deems necessary and appropriate to fully implement the provisions of
14 sections 10-33-144 through 10-33-152.

15 **SECTION 9.** Section 10-33-152 of the North Dakota Century Code is created and
16 enacted as follows:

17 **10-33-152. Attorney general's or court's authority not impaired.** The provisions of
18 sections 10-33-144 through 10-33-152 are in addition to, and do not supersede, any other
19 authority of the attorney general with regard to charitable trusts and nonprofit corporations.