SENATE DOCKET, NO. 666 FILED ON: 1/20/2011

SENATE . . . . . No. 1169

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act further regulating hospitals..

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Bruce E. Tarr	☐ *[District]* ☐
Michael R. Knapik	☐ *[District]* ☐
Robert L. Hedlund	☐ *[District]* ☐
Richard J. Ross	*Norfolk, Bristol, and Middlesex*
Ann-Margaret Ferrante	*5th Essex*

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SENATE . . . . . No. 1169

By Mr. Tarr, a petition (accompanied by bill, Senate, No. 1169) of Bruce E. Tarr, Michael R. Knapik, Robert L. Hedlund, Richard J. Ross and others for legislation to further regulate hospitals. Public Health.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE
SENATE
, NO. *899* OF 2009-2010.]

The Commonwealth of Massachusetts

An Act further regulating hospitals..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 111 of the General Laws is hereby amended by inserting after section 5R the following section:—

Section 5S. The department of public health shall annually, by the first of October, make a determination of which acute hospitals and hospital services in the commonwealth are needed to protect the health of their communities. The department shall consider the following factors, among others, in making its determination:

(a) the availability of needed emergency and non-emergency inpatient and ambulatory hospital services to the citizens of each community or catchment area, (b) standards of travel time for those citizens, (c) financial accessibility and openness to serving persons vulnerable to deprivation of needed care, (d) acceptability and ease of use, (e) overall need for hospital care in each community, in light of the demonstrated comparative cost, safety, and efficacy of hospital care and its alternatives.

In its determinations, the department shall give particular consideration to the needs of low-income, uninsured, and other residents of the commonwealth who are especially vulnerable to underservice.

16 In annual revisions of the listing of essential acute hospitals and hospital
17 services, the department shall evaluate individual hospitals in the light of any changes in the
18 services or behavior of other nearby hospitals.

19 The department shall also set standards for identifying hospitals in danger of
20 closing, or of changing services in ways that could harm their communities.

21 Then, the department will apply those standards and identify hospitals in
22 danger of closing, or of changing services in ways that could harm their communities, and work
23 pre-emptively to preserve all such hospitals deemed needed by their communities. All acute care
24 hospitals in receivership, considered by informed persons to be at risk of receivership, or
25 otherwise predicted by sound methods of be vulnerable to closing, changing, or reducing
26 services in ways that could harm their communities shall be particularly scrutinized for inclusion
27 on the list of essential acute care hospitals. Such pre-emptive work shall include technical and
28 financial assistance, as described subsequently.

29 SECTION 2. Said chapter 111 is hereby further amended by inserting after
30 section 70F the following seven sections:—

31 Section 70G. The department may bring an action in the superior court
32 department of the trial court requesting the appointment of a receiver to operate a hospital.
33 Before the department brings such an action, a hospital administrator designated by the
34 commissioner shall be informed that the department intends to bring such an action and shall be
35 informed of the reasons for the decision to bring such an action. Said administrator may submit
36 his recommendations concerning the hospital proposed for receivership within two business days
37 after receiving the above information. After said two-day period, the department, in its sole
38 discretion may bring an action in the superior court department described in this section. A
39 patient residing in the hospital's primary service area, or the guardian of such a patient, may
40 petition the department of public health to seek a receivership under this section. If the
41 department denies such petition or fails to commence action within five days, the party bringing
42 the petition may bring suit in the superior court department for the appointment of a receiver or
43 other appropriate relief under this section. Upon filing of this suit, a patient or guardian shall
44 serve a copy of the complaint on the department. Prior to any hearing for the appointment of a
45 receiver, the department shall file, and the court shall consider, an affidavit made under oath
46 describing the results of any investigation conducted by the department, including a statement of
47 any findings with respect to the resident's petition and the reasons for not filing an action
48 pursuant to this section, and shall append thereto the two most recent reports of deficiencies in
49 that hospital. Nothing in this chapter shall be construed as abrogating or superseding any
50 common law or statutory right of any person to bring an action requesting appointment of a
51 receiver to operate a hospital.

52 The court shall issue a short order of notice and, where an emergency is
53 alleged, set the matter for hearing within five days after filing of the action. In all other cases, a
54 hearing shall be set within two weeks. A receiver shall be appointed immediately, on an ex parte
55 basis, if it appears by verified complaint or by affidavit that there are grounds for the
56 appointment of a receiver and that immediate appointment is necessary to prevent harm to the
57 patients.

58 The court will name as receiver the commissioner of public health or his/her
59 designee.

60 Appropriate grounds for establishing a receivership under this section shall be
61 any of the following:

62 (a) to assure the temporary continued operation of the hospital when there is
63 a substantial risk of its closing before adequate arrangements have been made for the transfer of
64 its patients;

65 (b) to maintain any needed health care services for residents within the
66 service area of the hospital when such services are not otherwise available or reasonably
67 convenient to the service area;

68 (c) to maintain any health care services needed by residents within a service
69 area of the hospital who are particularly vulnerable to medical underservice or denial of needed
70 medical services;

71 (d) to secure the continued operation of effective or potentially effective,
72 low-cost facilities;

73 (e) to protect the lives and safety of patients when the hospital is operating
74 without a license or a valid, completed application for licensure on file with and awaiting action
75 by the department of public health, or if the department has denied, revoked, or refused to renew
76 a license, or has initiated license denial, revocation, or non-renewal procedures and the lives,
77 health, safety, or welfare of the patients cannot be adequately assured pending the full hearing
78 and decision on the matter;

79 (f) a declaration by the governor of a public health emergency pursuant to
80 section 2A of chapter 17, if the declaration, by its terms, is applicable.

81 A receiver appointed hereunder shall not take any actions or assume any
82 responsibilities inconsistent with this purpose.

83 No person shall impede the operation of a receivership created under this
84 section. There shall be an automatic stay for a sixty-day period subsequent to the appointment of
85 a receiver, of any action that would interfere with the functioning of the hospital, including but

86 not limited to cancellation of insurance policies executed by the licensee, termination of utility
87 services, attachments or set-offs of resident trust funds and working capital accounts, and
88 repossession of equipment used in the hospital.

89 Section 70H. When a receiver is appointed, the licensee shall be divested of
90 possession and control of the hospital in favor of the receiver. With the approval of the court, the
91 receiver shall have authority to remedy violations of federal and state law and regulations
92 governing the operation of the hospital; to hire, direct, manage and discharge any consultant or
93 employees, including the administrator of the hospital; to receive and expend in a reasonable and
94 prudent manner the revenues of the hospital; to continue the business of the hospital and the care
95 of the patients; to perform those acts necessary or desirable to accomplish the purpose of the
96 receivership; to perform regular accountings and make periodic reports to the court; and to
97 exercise such additional powers and perform such additional duties, as the court may deem
98 appropriate.

99 The receiver shall apply the current revenues of the hospital to current
100 operating expenses and, subject to the following provisions, to debts incurred by the licenses
101 prior to the appointment of the receiver. The receiver shall ask the court for direction in the
102 treatment of debts incurred prior to this appointment where such debts appear extraordinary, of
103 questionable validity, or unrelated to the normal and expected maintenance and operation of the
104 facility, or where payment of debts will interfere with the purposes of the receivership. Priority
105 shall be given by the receiver to expenditures for current, direct patient care.

106 Revenues held by or owing to the receiver in connection with the operation of
107 the hospital shall be exempt from attachment and trustee process. Any retroactive payment that
108 may be due or owing to the hospital as the result of a retroactive rate adjustment shall be
109 disposed of in accordance with the orders of the court, after it considers competing claims to said
110 payments.

111 The receiver shall not close the hospital without leave of court. In ruling on
112 the issue of closure, the court shall consider the best interest of the residents of the
113 commonwealth and the patients and the possibility of transferring them to suitable, alternative
114 placements; the rights, interests and obligations of the licensee, the owner, the mortgagees, and
115 other secured parties and lienholders; the licensure status of the facility; the condition of the real
116 estate with respect to state and federal construction requirements and any other factor which the
117 court deems relevant.

118 If the court has approved closure of the hospital, the receiver shall make major
119 repairs to the real or personal property of the hospital but only to the extent necessary to prevent
120 or remove jeopardy to the health, safety or welfare of the patient. If the court has not directed
121 closure of the hospital, the receiver may make such repairs but only to the extent necessary to
122 prevent or remove jeopardy to the health, safety or welfare of the residents or to minimally

123 qualify the hospital for continuing participation in the medical care and assistance programs,
124 established under chapter one hundred and eighteen E, or in the program of health insurance for
125 the aged and disabled under Title XVIII of the Social Security Act (P.L.-89-97).

126 In the event that a receiver appointed under section seventy G does not have
127 sufficient capital to advanced for major repairs or improvements, the receiver may petition the
128 court for permission to apply to the department for a loan. Notice shall be given to the owner of
129 the real estate, the licensee, the department, and to any mortgagee and other secured parties and
130 lienholders of record. The court shall after hearing, authorize the receiver to apply for such
131 assistance if it determines that the hospital should not be closed, and the commissioner certifies
132 that the repair or improvement is necessary to prevent or remove jeopardy to patients or to
133 minimally qualify the facility for participation in said medical care and assistance program and
134 said program of health insurance for the aged and disabled; or it determines that the hospital
135 should be closed and the commissioner certifies that the repair or improvement is necessary to
136 prevent jeopardy to patients for the limited period of time that they are awaiting transfer. The
137 purposes of this provision shall be to protect patients and to prevent the closure of facilities
138 which, given proper management, are likely to be viable operations. This section shall not be
139 construed as a method of financing major repairs or capital improvements to hospitals which
140 have been abandoned because the licensee has been unable to secure financing by conventional
141 means.

142 Upon court approval, the receiver may apply to the department of medical
143 security, which shall administer financial assistance from the essential hospital preservation trust
144 fund.

145 The licensee or the owner may apply to the court to determine the
146 reasonableness of any expenditure by the receiver.

147 Section 70I. A receiver shall not be required to honor any lease, mortgage, or
148 secured transaction entered into by the licensee of the hospital if the court finds that the
149 agreement was entered into for a fraudulent purpose or to hinder or delay creditors or that the
150 rental, price or rate of interest required to be paid under the agreement is in excess of a
151 reasonable rental, price or rate of interest at the time the agreement was entered into; or the
152 agreement is unrelated to the operation of the hospital.

153 If the receiver is in possession of real or personal property subject to a lease,
154 mortgage or security interest which the receiver is permitted to avoid, and if the possession of
155 said property is necessary for the continued operation of the hospital the receiver shall apply to
156 the court to set a reasonable rental, price or rate of interest to be paid by the receiver to the
157 person entitled thereto during the duration of the receivership. The court shall hold a hearing on
158 the application within fifteen days. The receiver shall send notice of the application to any
159 owners of record and to mortgagees and other secured parties and lienholders of record of the

160 property involved at least ten days prior to the hearing. In no event shall the amount set by the
161 court exceed what is reasonable for the hospital. Payment by the receiver of the amount
162 determined by the court to be reasonable shall be a defense to any action against the receiver for
163 payment or for the possession of said property subject to the lease, mortgages or security interest
164 involved by any person who received such notice.

165 Notwithstanding the foregoing, there shall be no foreclosure or eviction
166 during the receivership period where such foreclosure or eviction would, in the view of the court,
167 serve to defeat the purpose of the receivership.

168 Section 70J. A receivership shall not be terminated if a license to operate the
169 facility would not be in effect upon termination; or the hospital would revert to the licensee
170 during the pendency of proceedings to revoke, deny, or suspend its license; or the hospital revert
171 to it person not approved for licensure by the department.

172 The receivership may be terminated by the court upon the petition of the
173 receiver, the attorney-general, or any other interested party provided that the court finds that the
174 deficiencies or problems that were the cause of the receivership have been remedied or
175 eliminated. This would take place when the threat to the lives, health, or safety of the residents of
176 the area have been eliminated; when access to care has been secured; or when costs of care have
177 been sufficiently contained through other means.

178 A temporary receivership shall not exceed five years.

179 Section 70K. No person shall bring an action against a receiver appointed
180 under section seventy G without first securing leave of court. The receiver shall be liable in his
181 personal capacity for gross negligence or intentional wrongdoing. In all other cases, the receiver
182 shall be liable in his official capacity only, and any judgment rendered shall be satisfied out of
183 the receivership assets.

184 Section 70L. An order appointing a receiver under section seventy G shall
185 have the effect of a license for the duration of the receivership. The receiver shall be responsible
186 to the court for the conduct of the hospital during the receivership, and any violation of
187 regulations governing the conduct of the hospital, if not promptly corrected, shall be reported by
188 the department to the court.

189 Section 70M. The department is hereby authorized and directed to promulgate
190 rules and regulations necessary for the implementation of sections seventy G to seventy L,
191 inclusive.

192 SECTION 3. Said chapter 111 is hereby further amended by inserting after
193 section 72Q the following section:—

194 Section 72Q 1/2. The court shall set a reasonable compensation for the
195 receiver and shall require the receiver to furnish a bond. Such expenses shall be paid from the
196 revenues of the hospital. The licensee shall be liable for any adjustment to the hospital's rate that
197 is necessitated by the provisions of the first paragraph of this section.

198 The commonwealth shall have a lien for any expenditure under section
199 seventy H upon the following property: the building in which the hospital is located; the land on
200 which the hospital is located; any fixtures, equipment or goods used in the operation of the
201 hospital. Such lien shall be prior to any mortgage or lien which the court finds has been executed
202 or obtained for a fraudulent purpose or to hinder or delay creditors. Such lien shall also be prior
203 to a mortgage or lien held by any person with an ownership interest in the hospital; or any person
204 which controls or has the ability to directly or indirectly control to any significant degree the
205 management of policies of the licensee or the hospital; or any person related to the licensee or to
206 the hospital by any significant degree of common ownership or common control. The receiver
207 shall cause notice of any lien created hereunder to be duly filed.

208 As an additional remedy for recouping commonwealth expenditures, the
209 licensee, persons responsible for the affairs of the licensee, or the owner, may be held liable for
210 such expenditures to the extent that any of these persons benefits financially from the
211 expenditure. Recoupment shall also be available against any person who, prior to the
212 appointment of the receiver, breached a legal responsibility to assure appropriate maintenance of
213 the hospital, if such breach necessitated the expenditure by the commonwealth, and against any
214 person who was responsible for an abandonment of the hospital.

215 SECTION 4. Chapter 118F of the General Laws is hereby amended by adding
216 the following two sections:—

217 Section 21. 1. There is hereby established an essential acute hospital
218 stabilization and preservation trust fund which shall be administered and expended by the
219 division of health care, finance and policy (DHCFP).

220 The fund shall consist of all sums collected under an essential hospital
221 preservation assessment levied annually and amounting to 0.25 percent of total annual revenue
222 for each acute hospital operating in the commonwealth.

223 To keep the accumulated trust fund's value from exceeding 1.0 percent of
224 statewide acute hospital revenue, the assessment shall be reduced or eliminated in any year in
225 which the accumulated trust fund is expected to exceed 1.0 percent of state-wide total acute
226 hospital revenue. The assessment shall be reduced as needed in any year in which an assessment
227 smaller than 0.25 percent will bring the trust fund to 1.0 percent of statewide total acute hospital
228 revenue.

229 In the event that a shortfall arises, and the fund is unable to meet all of its
230 obligations, the commissioner of DHCFP will notify the commissioner of public health, and, at
231 the direction of the commissioner of public health, the commissioner of DHCFP will make
232 special binding uniform proportionate assessments on all hospitals to generate funds needed.
233 Such assessments will not exceed 25 percent of total expenses, averaged over the past three
234 years, of the hospitals in receivership.

235 The trust fund shall be used solely for stabilizing and preserving essential
236 hospitals determined to be in danger of closing or reducing needed services. Stabilization and
237 preservation assistance may take either of these two forms:

238 (a) financing for technical and administrative assistance for hospitals
239 needing reorganization, and

240 (b) partial underwriting of capital and operating costs to stabilize needed
241 but financially distressed hospitals.

242 2. The commissioner of DHCFP shall, if necessary, obtain additional funds
243 for the purposes described in the previous subsection through a reallocation, in favor of
244 financially distressed but needed hospitals, of distributions from the hospital free care pool.

245 Section 22. 1. Any hospital which appears on the department of public
246 health's annual listing of essential acute hospitals may petition the DHCFP for funding for
247 technical and administrative assistance, or for grants towards capital or operating costs. The
248 DHCFP will determine whether such assistance or grants are essential or important to the
249 survival of an entire essential hospital or the survival of listed essential services at a particular
250 hospital.

251 At the initiative of the commissioner of DHCFP, of the speaker of the

252 Massachusetts house, of the president of the Massachusetts senate, of the
253 administrator or receiver of the hospital, of the trustees of the hospital, or of a patient residing in
254 a hospital's primary service area or of the guardian of such a patient, the department of public
255 health shall undertake a redetermination of whether a hospital previously excluded from the
256 annual listing of essential acute hospitals deserves to be placed on that list.

257 At the initiative of the commissioner of DHCFP, of the commissioner of public
258 health, or of a patient residing in a hospital's primary service area or of the guardian of such a
259 patient, the DHCFP shall also undertake determination of the need for technical assistance or
260 grants for a particular hospital.

261 3. The DHCFP shall identify accounting firms, law firms, hospital
262 administration consultants and other needed experts with whom it may contract as needed to

263 provide technical and administrative assistance to essential hospitals in danger of closing or to
264 hospitals where essential services are in danger of closing.