February 11, 2021

HOUSE BILL No. 1407

DIGEST OF HB 1407 (Updated February 10, 2021 12:44 pm - DI 137)

Citations Affected: IC 36-1.

Synopsis: Proceeds from the sale of a capital asset. Authorizes a nonprofit foundation (foundation) established by a county to hold proceeds from the sale of capital assets to include in the foundation's investment policy statement a formal spending policy for: (1) a spending rate of up to 5% multiplied by a five year moving average of quarterly market values with the distributable amount for each year determined on a specified date; or (2) in the case of a foundation that was established less than 10 years ago, an interim spending rate of up to 5% multiplied by a moving average consisting of all available quarterly market values since the date the foundation was established. Amends provisions that apply to a foundation that is established to hold proceeds from the sale of a county hospital as follows: (1) Specifies that the county may transfer excess money it receives from the foundation's annual spend rate back into the foundation. (2) Provides that if the annual investment income earned on the principal of the foundation exceeds 5% in a calendar year, that amount is added to and considered a part of the principal of the foundation. (3) Requires the board of the foundation to establish one or more separate accounts in which the principal and income of the foundation shall be held and that are subject to the same requirements in current law for accessing the principal and income.

Effective: Upon passage.

Engleman, Clere

January 14, 2021, read first time and referred to Committee on Local Government.
February 11, 2021, amended, reported — Do Pass.

February 11, 2021

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

HOUSE BILL No. 1407

A BILL FOR AN ACT to amend the Indiana Code concerning local government.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 36-1-14-3, AS ADDED BY P.L.139-2015, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) This section applies to a county in which the total amount received by the county (either before July 1, 2015, or after June 30, 2015) or that will be received by the county from the sale of a capital asset exceeds fifty million dollars ($50,000,000).

(b) As used in this section, "foundation" means a charitable nonprofit foundation established under subsection (c).

(c) The county legislative body and the county fiscal body may, by adopting substantially similar ordinances, establish a charitable nonprofit foundation to hold some or all of the proceeds of the sale of the capital asset in trust for the benefit of the county. A county legislative body and a county fiscal body may adopt ordinances under this subsection before, after, or at the time of the sale of the capital asset. The members of the county legislative body and the members of the county fiscal body shall serve as the board of trustees of a foundation established under this section. A member's term on the board of trustees expires when the member's term on the county legislative body or the county fiscal body expires.

(d) The board of trustees of a foundation established under this section shall contract with investment managers, investment advisors, investment counsel, trust companies, banks, or other finance professionals to assist the board in its investment program. Money held by the foundation must be invested in accordance with the terms of an investment policy statement developed by the board of trustees with an investment advisor that:

(1) is approved by the board of trustees; and

(2) complies with the diversification, risk management, and other fiduciary requirements common to the management of charitable foundations, including that the funds of the foundation must be invested according to the prudent investor rule. However, the investment policy statement may not allow the foundation to invest in any investments in which the political subdivision that established the foundation is not permitted to invest under the Constitution of the State of Indiana.

The investment policy statement must include the limitation on the investment in equities specified in subsection (f) **and may include a formal spending policy as authorized in subsection (g).**

(e) Money held by the foundation:

(1) may be invested in any legal, marketable securities; and

(2) is not subject to any other investment limitations in the law, other than the limitations under this section and the limitations in the investment policy statement.

(f) The total amount of the funds invested by a foundation in equity securities under this section may not exceed fifty-five percent (55%) of the total value of the portfolio of funds invested by the foundation under this section. However:

(1) an investment that complies with this subsection when the investment is made remains legal even if a subsequent change in the value of the investment or a change in the value of the total portfolio of funds invested by the foundation causes the percentage of investments in equity securities to exceed the fifty-five percent (55%) limit on equity securities; and

(2) if the total amount of the funds invested by a foundation in equity securities exceeds the fifty-five percent (55%) limit on equity securities because of a change described in subdivision (1), the investments by the foundation must be rebalanced to comply with the fifty-five percent (55%) limit on equity investments not

later than one hundred twenty (120) days after the equity investments first exceed that limit.

(g) The investment policy statement approved by the board of trustees under subsection (d) may include a formal spending policy for:

(1) a spending rate of up to five percent (5%) multiplied by a five (5) year moving average of quarterly market values with the distributable amount for each year determined on a specified date; or

(2) in the case of a foundation that was established less than ten (10) years ago, an interim spending rate of up to five percent (5%) multiplied by a moving average consisting of all available quarterly market values since the date the foundation was established;

to the extent consistent with Section 4942 of the Internal Revenue Code.

~~(g)~~ **(h)** The following apply if a foundation is established under this section:

(1) The county legislative body shall determine the amount of the proceeds from the sale of the capital asset that shall be transferred by the county fiscal officer to the foundation.

(2) The principal amount of the donation to the foundation consists of the following:

(A) The amount transferred to the foundation under subdivision (1).

(B) Any donations, gifts, or other money received from any private source.

(C) Any investment income that is:

(i) earned on the principal of the donation; and

(ii) added to the principal of the donation as provided in subdivision (3).

(3) To the extent that investment income earned on the principal amount of the donation during a calendar year exceeds five percent (5%) of the amount of the principal at the beginning of the calendar year, that excess investment income shall, for purposes of this section, be added to and be considered a part of the principal amount of the donation.

(4) An expenditure or transfer of any money that is part of the principal amount of the donation may be made only upon unanimous approval of the board of trustees.

(5) The foundation must be audited annually by an independent third party auditor.

(6) The board of trustees must meet at least quarterly to receive a quarterly compliance and performance update from the investment advisor. Three (3) nonvoting advisors who are officers of different county designated depositories shall attend the quarterly meetings in an advisory capacity to assist the board of trustees:

(A) in reviewing the compliance and performance report from the investment advisor; and

(B) in reviewing the annual audit required by subdivision (5).

The three (3) nonvoting advisors may not vote on any action of the board of trustees. The board of trustees shall by majority vote select the three (3) depositories from which the three (3) nonvoting advisors will be chosen. Each of the three (3) depositories selected under this subdivision shall select an officer of the depository to serve as one (1) of the three (3) nonvoting advisors. Each nonvoting advisor shall serve a term of three (3) years, and the nonvoting advisor shall continue to serve until a successor is selected. However, to provide for staggered terms, the board of trustees shall provide that the initial term of one (1) nonvoting advisor is one (1) year, the initial term of one (1) nonvoting advisor is two (2) years, and the initial term of one (1) nonvoting advisor is three (3) years. For purposes of avoiding a conflict of interest, a financial institution for which a nonvoting advisor is an officer (and any affiliate of such a financial institution) may not receive a commission or other compensation for investments made by the foundation under this section.

SECTION 2. IC 36-1-14-5, AS ADDED BY P.L.183-2018, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. (a) This section applies only to a county that meets the following:

(1) The county sells a county hospital before January 1, 2017.

(2) The county council and county executive of the county adopt ordinances under this section to establish a charitable nonprofit foundation after June 30, 2018.

(b) As used in this section, "board" means the board of trustees of a foundation established under subsection (f).

(c) As used in this section, "foundation" means a charitable nonprofit foundation established under subsection (d).

(d) A county council and a county executive may, by adopting substantially similar ordinances, establish a charitable nonprofit foundation to hold some or all of the proceeds of the sale of a county hospital in trust for the benefit of the county.

(e) Nothing in subsection (d) shall be construed as superseding, replacing, or modifying any previously adopted ordinance or agreement that effectuates:

(1) monetary disbursements from the previously executed asset purchase agreement; and

(2) distributions from the previously executed asset purchase agreement;

to an Indiana nonprofit corporation.

(f) If a foundation is established under this section, the board of trustees of the foundation consists of the following five (5) members:

(1) One (1) member of the county council, appointed by the president of the county council.

(2) One (1) member of the county executive, appointed by the president of the county executive.

(3) One (1) individual who has at least five (5) years of experience as a certified public accountant, a financial adviser, a banker, or an investment manager, appointed by the president of the county council.

(4) One (1) individual who has at least five (5) years of experience as a certified public accountant, a financial adviser, a banker, or an investment manager, appointed by the president of the county executive.

(5) The county treasurer.

A member who serves on the board under this subsection is not entitled to compensation for service as a board member. Subject to the approval of the policy by the county council and the county executive, the board may establish a policy to reimburse a member of the board for the member's travel expenses and other expenses actually incurred in connection with the member's duties.

(g) The county treasurer shall serve as the chairperson of the board.

(h) The board of a foundation established under this section shall contract with a financial institution eligible to receive public funds of a political subdivision under IC 5-13-8-1 to assist the board in its investment program.

(i) The county council and the county executive shall do the following:

(1) Formulate an investment policy that ensures that money held by the foundation is invested in accordance with IC 30-2-12.

(2) Establish a policy concerning distributions of income and principal from the foundation.

A policy concerning distributions of income and principal that is established under subdivision (2) must specify that, except as provided in subsection ~~(j)(5),~~ **(j)(6),** the board may not expend or transfer money from the principal amount of the donation to the foundation.

(j) The following apply if a foundation is established under this section:

(1) The county council and the county executive shall determine:

(A) the amount of the proceeds from the sale of the county hospital that shall be transferred by the county fiscal officer to the foundation; **and**

(B) the amount of excess money received by the county from the annual rate of spending distributed by the foundation that shall be transferred by the county fiscal officer to the foundation, if any.

(2) The principal amount of the donation to the foundation consists of the following:

(A) The ~~amount~~ **amounts** transferred to the foundation under subdivision (1).

(B) Any donations, gifts, or other money received from any private source.

(C) Any investment income that is:

(i) earned on the principal of the donation; and

(ii) added to the principal of the donation as provided in subdivision (3).

(3) To the extent that investment income earned on the principal amount of the donation during a calendar year exceeds five percent (5%) of the amount of the principal at the beginning of the calendar year, that excess investment income shall, for purposes of this section, be added to and be considered a part of the principal amount of the donation.

~~(3)~~ **(4)** The county council and county executive shall establish a policy to set the annual rate of spending from the foundation. The rate of spending established by the county council and county executive may not exceed five percent (5%) of the principal amount of the donation calculated on January 1 of each year. The county council and county executive may change the annual rate of spending by a majority vote of the members of the county council and a majority vote of the members of the county executive. Any principal that is disbursed from the foundation to the county is not subject to the procedures to access the principal amount of the donation described in subdivision ~~(5).~~ **(6).**

~~(4)~~ **(5)** The county council and county executive may not access the principal amount of the donation in the first five (5) years from the date the foundation is established under this section.

Beginning after the fifth year from the date the foundation is established under this section, the county council and county executive may access the principal amount of the donation in accordance with subdivision ~~(5).~~ **(6).**

~~(5)~~ **(6)** This subdivision does not apply to an expenditure or transfer of money that is part of the principal amount of the donation that is used to meet the annual rate of spending and does not exceed the annual rate of spending established under subdivision ~~(3).~~ **(4).** The county council and county executive may approve an expenditure or transfer of any money that is part of the principal amount of the donation in accordance with the following:

(A) The county council and county executive may access the lesser of ten percent (10%) of the three (3) year average balance or two million dollars ($2,000,000) from the principal amount of the donation as follows:

(i) A vote of five (5) of the seven (7) members of the county council and a majority vote of the county executive at a joint meeting of the county council and the county executive must vote in favor of accessing the principal amount of the donation.

(ii) A vote under item (i) to access the principal amount of the donation may occur not more than one (1) time per year.

(iii) The three (3) year average balance is based on the opening balance of the principal amount of the donation on the first day of the month of each of the thirty-six (36) months immediately preceding the joint meeting of the county council and the county executive described in item (i).

(B) If the county council and county executive wish to access an amount from the principal amount of the donation that is more than the amount available under clause (A) but not more than fifty percent (50%) of the principal amount of the donation, the board shall proceed as follows:

(i) Five (5) of the seven (7) members of the county council and a majority vote of the county executive at a joint meeting of the county council and the county executive must vote in favor of accessing the principal amount of the donation. The votes of the county council and the county executive at the joint meeting must occur on two (2) occasions as provided in item (ii).

(ii) The votes described in item (i) must occur on two (2) occasions that are at least one (1) year apart but not more than two (2) years apart.

(iii) The votes described in item (i) must be based on identical language in an ordinance that sets forth the approved use of the funds accessed from the principal amount of the donation.

If the language in an ordinance under this clause is different from the language used in the first vote, the process to vote on accessing the principal amount of the donation must start over. The process to access the principal amount of the donation described in this clause may be used only once in any five (5) year period after the expiration of the five (5) year period in which the principal amount may not be accessed under subdivision ~~(4).~~ **(5).**

(C) To compute the five (5) year period described in clause (B), the period begins from the date on which the second vote to access the principal amount of the donation occurs.

~~(6)~~ **(7)** The foundation must be audited annually by an independent third party auditor.

~~(7)~~ **(8)** The board must meet at least quarterly to receive a quarterly compliance and performance update from the investment adviser.

(k) A unit located in a county to which this section applies may enter into an interlocal agreement under IC 36-1-7 with the county council, the county executive, and the board to invest funds obtained by the unit from the sale of a capital asset into the foundation established under this section. An interlocal agreement entered into under this subsection must contain the following:

(1) Funds transferred to the foundation from the sale of a capital asset under this subsection must be held in a separate account within the foundation and are not subject to the requirements of accessing principal and income established in this section.

(2) A policy concerning distributions of income and principal from the unit's account within the foundation.

The department of local government finance may not reduce the actual or maximum permissible property tax levy under IC 6-1.1-18.5 or any other law of a unit that enters into an interlocal agreement under this subsection on account of money transferred into or expended from a foundation established under this section.

(l) Notwithstanding any provision to the contrary, in order to fulfill the purposes for which it was created and exists, the board shall establish one (1) or more separate accounts within the

foundation in which funds under subsection (j)(2) shall be held, all upon request and direction of the county council and county executive. All of the provisions and requirements for accessing principal and income under this section shall also apply to any such separate accounts established within the foundation under this subsection.

~~(l)~~ **(m)** Subject to subsection ~~(j)(4),~~ **(j)(5),** money from the principal amount of the donation may be used for any legal or corporate purpose of the county, including the pledge of money to pay bonds, leases, or other obligations under IC 5-1-14-4. Money from the principal amount of the donation that is expended or transferred under subsection ~~(j)(5)~~ **(j)(6)** may be used to pay bonds issued by the county. The county council and the county executive may vote once under subsection ~~(j)(5)~~ **(j)(6)** to expend or transfer money from the principal amount of the donation to pay interest on bonds issued by the county.

~~(m)~~ **(n)** The department of local government finance may not reduce the county's actual or maximum permissible property tax levy under IC 6-1.1-18.5 or any other law on account of money deposited into or expended from a foundation established under this section.

SECTION 3. **An emergency is declared for this act.**

COMMITTEE REPORT

Mr. Speaker: Your Committee on Local Government, to which was referred House Bill 1407, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 36-1-14-3, AS ADDED BY P.L.139-2015, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) This section applies to a county in which the total amount received by the county (either before July 1, 2015, or after June 30, 2015) or that will be received by the county from the sale of a capital asset exceeds fifty million dollars ($50,000,000).

(b) As used in this section, "foundation" means a charitable nonprofit foundation established under subsection (c).

(c) The county legislative body and the county fiscal body may, by adopting substantially similar ordinances, establish a charitable nonprofit foundation to hold some or all of the proceeds of the sale of the capital asset in trust for the benefit of the county. A county legislative body and a county fiscal body may adopt ordinances under this subsection before, after, or at the time of the sale of the capital asset. The members of the county legislative body and the members of the county fiscal body shall serve as the board of trustees of a foundation established under this section. A member's term on the board of trustees expires when the member's term on the county legislative body or the county fiscal body expires.

(d) The board of trustees of a foundation established under this section shall contract with investment managers, investment advisors, investment counsel, trust companies, banks, or other finance professionals to assist the board in its investment program. Money held by the foundation must be invested in accordance with the terms of an investment policy statement developed by the board of trustees with an investment advisor that:

(1) is approved by the board of trustees; and

(2) complies with the diversification, risk management, and other fiduciary requirements common to the management of charitable foundations, including that the funds of the foundation must be invested according to the prudent investor rule. However, the investment policy statement may not allow the foundation to invest in any investments in which the political subdivision that

established the foundation is not permitted to invest under the Constitution of the State of Indiana.

The investment policy statement must include the limitation on the investment in equities specified in subsection (f) **and may include a formal spending policy as authorized in subsection (g).**

(e) Money held by the foundation:

(1) may be invested in any legal, marketable securities; and

(2) is not subject to any other investment limitations in the law, other than the limitations under this section and the limitations in the investment policy statement.

(f) The total amount of the funds invested by a foundation in equity securities under this section may not exceed fifty-five percent (55%) of the total value of the portfolio of funds invested by the foundation under this section. However:

(1) an investment that complies with this subsection when the investment is made remains legal even if a subsequent change in the value of the investment or a change in the value of the total portfolio of funds invested by the foundation causes the percentage of investments in equity securities to exceed the fifty-five percent (55%) limit on equity securities; and

(2) if the total amount of the funds invested by a foundation in equity securities exceeds the fifty-five percent (55%) limit on equity securities because of a change described in subdivision (1), the investments by the foundation must be rebalanced to comply with the fifty-five percent (55%) limit on equity investments not later than one hundred twenty (120) days after the equity investments first exceed that limit.

(g) The investment policy statement approved by the board of trustees under subsection (d) may include a formal spending policy for:

(1) a spending rate of up to five percent (5%) multiplied by a five (5) year moving average of quarterly market values with the distributable amount for each year determined on a specified date; or

(2) in the case of a foundation that was established less than ten (10) years ago, an interim spending rate of up to five percent (5%) multiplied by a moving average consisting of all available quarterly market values since the date the foundation was established;

to the extent consistent with Section 4942 of the Internal Revenue Code.

~~(g)~~ **(h)** The following apply if a foundation is established under this section:

(1) The county legislative body shall determine the amount of the proceeds from the sale of the capital asset that shall be transferred by the county fiscal officer to the foundation.

(2) The principal amount of the donation to the foundation consists of the following:

(A) The amount transferred to the foundation under subdivision (1).

(B) Any donations, gifts, or other money received from any private source.

(C) Any investment income that is:

(i) earned on the principal of the donation; and

(ii) added to the principal of the donation as provided in subdivision (3).

(3) To the extent that investment income earned on the principal amount of the donation during a calendar year exceeds five percent (5%) of the amount of the principal at the beginning of the calendar year, that excess investment income shall, for purposes of this section, be added to and be considered a part of the principal amount of the donation.

(4) An expenditure or transfer of any money that is part of the principal amount of the donation may be made only upon unanimous approval of the board of trustees.

(5) The foundation must be audited annually by an independent third party auditor.

(6) The board of trustees must meet at least quarterly to receive a quarterly compliance and performance update from the investment advisor. Three (3) nonvoting advisors who are officers of different county designated depositories shall attend the quarterly meetings in an advisory capacity to assist the board of trustees:

(A) in reviewing the compliance and performance report from the investment advisor; and

(B) in reviewing the annual audit required by subdivision (5).

The three (3) nonvoting advisors may not vote on any action of the board of trustees. The board of trustees shall by majority vote select the three (3) depositories from which the three (3) nonvoting advisors will be chosen. Each of the three (3) depositories selected under this subdivision shall select an officer of the depository to serve as one (1) of the three (3) nonvoting advisors. Each nonvoting advisor shall serve a term of three (3) years, and the nonvoting advisor shall continue to serve until a successor is selected. However, to provide for staggered terms, the board of trustees shall provide that the initial term of one (1) nonvoting advisor is one (1) year, the initial term of one (1) nonvoting advisor is two (2) years, and the initial term of one (1) nonvoting advisor is three (3) years. For purposes of avoiding a conflict of interest, a financial institution for which a nonvoting advisor is an officer (and any affiliate of such a financial institution) may not receive a commission or other compensation for investments made by the foundation under this section.".

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to HB 1407 as introduced.)

ZENT

Committee Vote: yeas 12, nays 0.