

#36.65

7/29/70

Memorandum 70-87

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--  
Code of Civil Procedure Section 1238.3)

Section 1238.3 was added to the Code of Civil Procedure in 1951 to provide a very limited authorization to condemn for nonprofit hospitals engaged in scientific research or educational activities. The section is discussed in the attached staff background study.

The substance of Section 1238.3 should be retained in the Health and Safety Code. While the extent of the delegation of condemnation power to nonprofit hospitals under Section 1238.3 is not entirely clear and may be too narrowly drawn, the staff believes that it would not be desirable to attempt to expand the condemnation authority in our comprehensive statute. If nonprofit hospitals need broader condemnation authority, they can present the necessary legislation for legislative consideration. At the same time, Section 1238.3 must be disposed of in preparing the comprehensive statute, and the staff recommends that we merely recodify it in the Health and Safety Code without substantive change.

We recommend the addition of a new Section 1427 to the Health and Safety Code (see Exhibit I attached). The policy question that needs to be resolved in connection with this section is whether the certificate of the Director of the Department of Public Health as to necessity for the acquisition should be conclusive on the issue of necessity, establish a presumption affecting the burden of proof, establish a presumption affecting the burden of producing evidence, or have no effect at all (hospital would have to prove necessity

even if property owner did not contest issue). The staff believes that the certificate should establish a presumption affecting the burden of proof, and we have drafted Section 1427 accordingly.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238.3

Staff recommendation

Code of Civil Procedure Section 1238.3 (repealed)

Sec. . Section 1238.3 of the Code of Civil Procedure is repealed.

~~1238.3.--Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:~~

~~1.--Property immediately adjacent to and necessary for the operation or expansion of a nonprofit hospital then in existence and engaged in scientific research or an educational activity and the acquisition of which has been certified as necessary by the Director of the State Department of Public Health, except that property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans shall not be taken under this section.~~

~~2.--As used in this section, "nonprofit hospital" means any health center or general, tuberculosis, mental, chronic disease, or other type of hospital holding a license in good standing issued under the provisions of Chapter 2 of Division 2 of the Health and Safety Code and owned and operated by a fund, foundation or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.~~

Comment. Section 1238.3 is superseded by Section 1427 of the Health and Safety Code.

HEALTH AND SAFETY CODE § 1427

Staff recommendation

NONPROFIT HOSPITALS

§ 1427. Eminent domain power of nonprofit hospital

Sec. . Section 1427 is added to the Health and Safety Code, to read:

1427. (a) As used in this section, "nonprofit hospital" means any health center or general, tuberculosis, mental, chronic disease, or other type of hospital holding a license in good standing issued under this chapter and owned and operated by a fund, foundation, or corporation, no part of the new earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(b) Any nonprofit hospital then in existence and engaged in scientific research or an educational activity may exercise the right of eminent domain to acquire property immediately adjacent to and necessary for the operation or expansion of the hospital if the director has certified that the acquisition of the property sought to be acquired is necessary for the operation or expansion of the hospital.

(c) The certificate of the director that the acquisition of the property sought to be acquired is necessary for the operation or expansion of the hospital establishes a presumption that:

(1) The proposed project is a necessary project;

(2) The proposed project is planned or located in the manner which will be most compatible with the greatest public good and least private injury; and

HEALTH AND SAFETY CODE § 1427

Staff recommendation

(3) The property sought to be acquired is necessary for the proposed project.

(d) The presumption established by subdivision (c) is a presumption affecting the burden of proof.

(e) Property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans may not be taken under this section.

Comment. Subdivisions (a), (b), and (e) of Section 1427 continue without substantive change the provisions of former Code of Civil Procedure Section 1238.3. Subdivisions (c) and (d), which establish a presumption of necessity for the purposes of Section 302 of the Comprehensive Statute, are new. The certificate of the Director of the State Department of Public Health is a prerequisite before an action to condemn property may be commenced. In this connection, it should be noted that the Department of Public Health makes and enforces detailed regulations for construction or alteration of hospital buildings. Health & Saf. Code § 1411; 17 Cal. Admin. Code §§ 265, 400-499. See West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 322 P.2d 13 (1956). Accordingly, it is appropriate that the certificate of the director be given a presumptive effect that the taking is necessary.

## THE DECLARED PUBLIC USES

### Nonprofit Hospitals

Section 1238.3 was added to the Code of Civil Procedure in 1951<sup>1</sup> to provide a very limited authorization to condemn for nonprofit hospitals engaged in scientific research or educational activities.<sup>2</sup> The authorization is limited to property adjacent to existing hospitals and the acquisition must be "certified as necessary" by the Director of the Department of Public Health. Moreover, the Department of Public Health makes and enforces detailed regulations for construction or alteration of hospital buildings.<sup>3</sup>

It is not clear whether Section 1238.3 was added to accommodate a very few nonprofit hospitals or was calculated to meet a more general need in connection with the operation of the facilities of such hospitals. No invocation of the section has as yet reached the appellate courts. It seems clear, however, that the section presents no substantial problem under the constitutional public use doctrine.<sup>4</sup> It would, therefore, seem to be appropriate to codify the substance of the section in Chapter 2 (commencing with Section 1400) of Division 2 of the Health and Safety Code.

THE DECLARED PUBLIC USES  
NONPROFIT HOSPITALS  
FOOTNOTES

1. Cal. Stats. 1951, Ch. 791, § 1, p. 2280.
2. The section authorizes condemnation of:

Property immediately adjacent to and necessary for the operation or expansion of a nonprofit hospital then in existence and engaged in scientific research or an educational activity and the acquisition of which has been certified as necessary by the Director of the State Department of Public Health . . . . .

For purpose of the section "nonprofit hospital" is defined as one:

owned and operated by a fund, foundation or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

3. Health & Saf. Code § 1411; 17 Cal. Adm. Code §§ 265, 400-499.  
See West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 322 P.2d 13 (1956).
4. See University of Southern California v. Robbins, 1 Cal. App.2d, 523, 37 P.2d 163 (1934); cert. den. 295 U.S. 738 (sustaining condemnation by private universities).