

Memorandum 71-62

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--
Nonprofit Hospitals)

Summary

The Commission considered Memorandum 71-43 at the July meeting and instructed the staff to reconsider the memorandum and redraft the attached draft statute. (See Minutes.) This memorandum presents the problem of condemnation authority of nonprofit hospitals a second time. A new draft statute is attached.

Analysis

Definition of "nonprofit hospital." The Commission concluded that the definition of "nonprofit hospital" in the statute should include only "true hospitals" and exclude facilities providing only peripheral services, such as nursing homes and convalescent hospitals. The Administrative Code distinguishes such institutions (generally, for purposes of licensing) on the basis of duration and variety of services and professional level of staff. (See 17 Cal. Admin. Code, Ch. 1, §§ 230, 231, 235; 9 Cal. Admin. Code § 515.) A parallel definition is contained in the federal Hill-Burton Act. See 42 U.S.C.A. § 291o(c) and (e).) The new draft statute definition follows the Administrative Code provisions. The state and federal provisions are attached as Exhibit III.

Condemnation authority of new hospitals. The Commission concluded that condemnation authority should be granted newly organized hospitals. The new draft statute authorizes condemnation by any institution licensed as a

hospital within the definition of the draft statute. A license must be secured prior to establishment of any new hospital. (See Health & Saf. Code § 1400.)

Limitation of area in which condemnation permitted. All limitations on the area in which a nonprofit hospital may condemn have been deleted from the draft statute in accord with the Commission's instructions. Whether a choice of sites is a proper or permissible one will depend on whether local planning authorities and the Director of Public Health approve it as such.

Local health planning agency approval. Under recent legislation, construction of new health facilities requires consideration by and approval of local health planning authorities. The Commission determined that provisions of the draft statute specifically making condemnation authority dependent upon compliance with the new planning legislation should be retained. A summary of the new planning legislation--Health & Saf. Code §§ 437.7, 437.8, 437.9, 438, 438.1, 438.2, 438.3, 438.5, 1402.1, and 1402.2; Welf. & Inst. Code §§ 7003.1 and 7003.2--is set out below.

Health & Safety Code

Section 437.7 instructs the Health Planning Council to approve from time to time a "voluntary area health planning agency" for each "designated area of the state." The voluntary area agencies are to be composed of a majority of consumer members with representatives from the health professions. The area agencies shall review area needs and develop standards of community need and desirability, under Council guidelines, to be applied in reviewing proposals for new facilities in the area. Agency hearing procedures parallel judicial procedures, and the area agencies may subdivide their areas into tractable local areas under the jurisdiction of "voluntary local health planning agencies" which meet the same criteria of composition, procedure, and functions as the area agencies.

Section 437.8 instructs the Health Planning Council to develop principles to guide the area and local agencies in their duties under Section 437.7, such principles to comprise: (1) area needs, (2) availability of existing approved facilities, (3) availability of substitutes for approved facilities, (4) economies of joint or shared services, (5) development of comprehensive community services.

Section 437.9 sets forth the general contents of an application for agency approval including: (1) area served, (2) breakdown of population served, (3) demand for proposed service, (4) description of proposed service, (5) availability of local facilities supplying same service, and (6) benefits and impact of proposed service on other local facilities.

Section 438 sets forth the times for agency consideration of applications. Generally, an agency must act within 90 days; failure to act constitutes approval. Local agency decisions are subject to 30-day review by area agencies; failure of the area agency to act within 30 days approves the local agency decision.

Section 438.1 provides that an applicant may appeal the decision of an area agency to an appeals board consisting of the consumer members of another area agency as designated periodically by the Council. An area agency decision may also be appealed by one-third of the members of the board of directors of the area agency, that appeal lying directly to the Council, and one-third of the members of the board of a local agency can appeal to the Council a decision of an area agency in review of a local agency decision.

Section 438.2 provides that an applicant must appeal an area agency decision, if at all, within 30 days and that the appeal shall be decided within 90 days.

Section 438.3 provides that an applicant's appeal from an appeal decision shall be made to the Council within 30 days, as shall an appeal by members of

the board of an area agency. The Council shall hear such appeals upon certification within 60 days that one-third of the voting members of the Council (the Director of the Department of Public Health is the only nonvoting member of the Council) agree to the hearing. A decision on the appeal shall be reached in 90 days by the "full council," following at least one hearing which may be conducted by as few as three voting members, the majority of whom shall be consumers.

Section 438.4. Decisions on applications by an area agency, originally or on review, or by an appeals board or the Council on appeal shall: (1) approve, (2) reject, (3) approve with modifications. A decision is final when appeals are exhausted. Approval terminates at the end of 12 months unless: (1) applicant has begun and diligently pursues his project as determined by the area agency; or (2) the area agency grants an extension (up to 12 months) upon showing of good cause.

Section 438.5 requires that local governmental zoning and planning agencies give due recognition to local health planning agency findings, recommendations, and decisions.

Section 1402.1 prescribes the contents of a verified statement required to be submitted to the state department by any person or entity desiring a license for "a new facility or additional bed capacity or the conversion of existing bed capacity to a different license category, except outpatient and emergency services." Applicant must state: (1) the date of application for approval of the appropriate health planning agency; (2) the date of agency hearings and evidence that applicant participated; (3) the date of final approval and that the time for appeal has passed or that any modifications required have been made; or (4) that the time for agency decision or review has passed without an adverse decision; or (5) that more than 12 months have expired since a decision was reached by the area agency.

Section 1402.2 reads: "The department [of State] may review but shall not approve any construction plans or issue any license under this chapter which shall cover new or additional bed capacity or the conversion of an existing bed capacity to a different license category, except outpatient and emergency services, until the applicant has complied with the provisions of Section 1402.1."

Welfare & Institutions Code

Sections 7003.1 and 7003.2 apply to mental institutions, as distinguished from general health facilities, but are otherwise identical to Health & Safety Code Sections 1402.1 and 1402.2.

The revised draft statute authorizes condemnation only for projects which have been actually approved by local planners or an appropriate appeals board. It appears that under the existing planning provisions a project might be constructed and licensed even though it had never been approved. Under Health & Safety Code Sections 1402.1 and 1402.2 and Welfare & Institutions Code Sections 7003.1 and 7003.2, an unapproved project may be licensed if the applicant certifies that he participated in planning agency hearings which resulted in some decision in the matter not more recently than 12 months ago. Under Section 1402.6, the license must be issued if the applicant has complied with all other licensing requirements. Possibly, the requirement of actual approval is unnecessary since a prospective condemnor would also have to secure a certificate of necessity and convenience from the State Director of Public Health. (See infra.) Nevertheless, the provision is thought advisable if only to avoid the possibility of contests over the issue of public use and necessity where a planning agency specifically disapproves a project and the Director later grants a certificate of necessity and convenience.

Approval of State Director of Public Health

Provisions of the draft statute requiring hospital condemnors to secure project approval by the state Director of Public Health have been retained according to Commission instruction. The draft statute thus contains a dual review-approval requirement. Generally speaking, the local planning authorities will determine whether a proposed project is necessary or desirable considering local alternatives while the Director will determine whether it is appropriate to pursue a locally approved project by condemnation as proposed. In those cases where the authority of local planners and the Director overlap, the Director will have, in effect, a veto power over local projects.

Limitation on Condemnation of Existing Medical Facilities

The Commission objected to the provision in the previous draft statute permitting taking of facilities only partially devoted to medical uses if the Director certified that the result would be a net gain in quality or quantity of community medical services. The attached draft permits the taking of any medical facilities as long as the Director's certificate of convenience and necessity contains a finding that there will be a net gain in community services.

Immediate Possession

The previous draft granted nonprofit hospitals the right to immediate possession on the same terms as the comprehensive statute provides for public entities. The rationale was that hospitals provide services similar to those provided by public entities generally and that, in view of the short duration of planning approval (12 months) and the potentially protracted duration of condemnation proceedings without the right to immediate possession, an immediate possession provision was in order.

The alternative to an immediate possession provision is to amend Health & Safety Code Section 438.4 to provide for extension of approval where condemnation is begun and diligently pursued, as is presently provided where construction is begun and diligently pursued. Whether there has been diligent pursuit, and thus whether approval shall be renewed, is subject to determination by an area planning agency, but--insofar as Health & Safety Code Sections 1402.1, 1402.2, and 1402.6 would permit or require licensing (or renewal of licenses) of projects for which approval has not been renewed (as well as for which approval was never granted)--the risk of immediate damage to hospitals due to expiration of planning approval during condemnation is minimal. There may be a secondary risk in that the local planners may approve a second facility to provide similar or identical services. That risk, however, would also seem to be minimal since the prospect of duplicative facilities is seldom likely to be economically attractive to the planning authorities or prospective operators of the second facility. The major drawback involved in this licensing without renewal of approval procedure would seem to be the inherent loss of flexibility in planning involved; but, if that is a defect, it is one written into the planning legislation as it presently exists.

There may be a considerable advantage in an immediate possession privilege for hospitals, in that it would hasten construction of new facilities where they are urgently needed and, in the case of urgently needed facilities, would permit their construction by hospitals most qualified to do so, or in areas where they are most needed, where the time factor of condemnation would otherwise prevent it. Nevertheless, as the Commission noted, there are

serious problems involved with granting nonprofit hospitals the right to immediate possession, particularly insofar as the Commission has postponed consideration of whether certain nonprofit hospitals should be statutorily reclassified as "public entities."

In the interim, at least, it appears that the proposed amendment to Health and Safety Code Section 438.4 is an adequate response to whatever risks may flow from tying hospital condemnation authority to local agency planning approval.

Conclusions

The attached draft statute has been redrafted according to the instructions of the Commission at the July meeting and is submitted for approval at the September meeting.

Respectfully submitted,

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EXHIBIT I

§ 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 institution, place, **building**, or agency currently licensed under this chapter to provide 24-hour inpatient services for the diagnosis, care, and treatment of various physical or mental illnesses or ailments of humans, in multiple departments having an organized medical or medical-dental staff, and which is 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. "Non-profit hospital" does not include institutions the primary purpose of which is to provide convalescent, rehabilitative, nursing, or resident care.

(b) Any nonprofit hospital may exercise the right of eminent domain to acquire property necessary for the establishment, operation, or expansion of the hospital if:

(1) A voluntary area health planning agency approved pursuant to Section 437.7 of this code, or the consumer members of such a voluntary area health planning agency acting as an appeals body, or the Health Planning Council has made a final and favorable decision concerning the project for which property is sought to be condemned; and

(2) The Director of the State Department of Public Health has certified that the acquisition of the property sought to be acquired is necessary for the establishment, operation, or expansion of the hospital.

(c) The certificate of the Director of the State Department of Public Health that the acquisition of the property sought to be acquired is necessary for the establishment, operation, or expansion of the hospital establishes a presumption that:

- (1) The public interest and necessity require the proposed project;
- (2) The proposed project is planned and located in the manner that will be most compatible with the greatest public good and the least private injury; and
- (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 the scientific care, treatment, or relief of the mental or physical illness or ailment of humans may be taken under this section only if the certificate of the Director of the State Department of Public Health contains a finding that the taking will not result in the loss to the community of an essential care, treatment, or relief service which is not replaced and that the taking will result in a substantial increase in the volume or quality of such services provided the community, or in the addition of a facility essential to the well-being of the community.

Comment. Section 1427 supercedes former Code of Civil Procedure Section 1238.3.

Subdivision (a). The definition of hospital in subdivision (a) has been narrowed to include only those institutions which are licensed to provide

diversified, professional, short-term services, and to exclude institutions which provide only long-term or specialized services. The definition includes newly organized and licensed hospitals. The definition is in keeping with the Administrative Code definitions of "hospital" and "general hospital." See 9 Cal. Admin. Code § 515; 17 Cal. Admin. Code, Ch. 1, § 230. The term "non-profit" has the same meaning under subdivision (a) as under former Code of Civil Procedure Section 1238.3.

Subdivision (b). Subdivision (b) grants a broader authority to take than was provided by Code of Civil Procedure Section 1238.3 in that it permits acquisition of property to establish a newly organized and licensed hospital, dispenses with the former requirement that the property be "immediately adjacent" to existing holdings; and no longer requires that the hospital condemnor be engaged in "scientific research or an educational activity." Instead of imposing the restrictions contained in former Section 1238.3, Section 1427 makes the necessity and desirability of each hospital condemnation project subject to a dual review by local health facilities planning authorities and the State Director of Public Health. The limitation to property "immediately adjacent" was regarded as too narrow and restrictive by attorneys, hospital administrators, and health services planners. The limitation to hospitals engaged in scientific research or education was both narrow and ineffective. The new scheme is intended to aid expansion to meet public needs as determined by authorized agencies.

Paragraph (1). New hospital projects must be submitted for approval to local health services planning boards (voluntary area health planning agencies or voluntary local health planning agencies) before they can be licensed to be operated. The local boards are instructed to determine whether proposed

projects are necessary and convenient to the community, and to approve those projects conducive to comprehensive community medical services. Decisions of the local boards may be appealed, either by the applicant for approval or by members of the local planning boards, the final decision in any case resting with the Health Planning Council. See Health & Saf. Code §§ 437.7, 437.8, 437.9, 438, 438.1, 438.2, 438.3, 438.4, 438.5. Approval, once granted, expires within a year but may be extended if a project has been started and, in the opinion of the local planners, is diligently pursued, or for other good cause shown. Health & Saf. Code § 438.4. Applications for licensure of new projects must indicate that the applicant has submitted the project for local board approval, and has participated in hearings to that end, and that approval was granted or that 12 months have passed since a decision on the project was reached. See Health & Saf. Code §§ 1402.1, 1402.2. In view of the latter provision, it is possible to acquire a license for a new hospital project even though the project has been disapproved by local planning authorities so long as the decision of the local authorities is at least one year old.

Paragraph (1) of subdivision (b) requires that a project be actually approved by local authorities before condemnation will be authorized, regardless of whether the project might later be licensed though it had never been approved. A final decision by the planning authorities disapproving a project would at least rebut the presumption, established by the certificate of the Director of Public Health required by paragraph (2), that the project was required by the public interest and necessity.

Health and Safety Code Section 438.4 has been amended to provide that project approval by local authorities may be extended beyond 12 months where condemnation is begun and diligently pursued, just as where construction is

begun and diligently pursued. It should be made clear, however, that, once approval is acquired, condemnation can begin and, though approval is later allowed to lapse or not extended, the project may be completed and licensed, the requirements of both this section and Section 1402.1 having been met.

Paragraph (2). Paragraph (2) continues the requirement of certification of necessity by the Director of the Department of Public Health. The Department of Public Health makes and enforces detailed regulations for construction or alterations of hospital buildings. Health & Saf. Code § 1411; Admin. Code §§ 265, 400-499. See West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 322 P.2d 13 (1956).

Subdivisions (c) and (d). Subdivisions (c) and (d) establish and classify the presumption of necessity for the purposes of Section 302 of the Comprehensive Statute.

Subdivision (e). Subdivision (1) of former Code of Civil Procedure Section 1238.3 prohibited taking of property "devoted to use for relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans." This limitation was both vague and unrealistic. Subdivision (e) of Section 1427 deletes entirely the reference to "spiritual" properties and amends the limitation to permit the taking of property devoted to medical purposes if the Director of Public Health finds that to do so will improve the overall availability of essential health services in the community.

EXHIBIT II

Health and Safety Code § 438.4 (amended)

Sec. . Section 438.4 of the Health and Safety Code is amended to read:

438.4. The voluntary area health planning agency, acting upon an application originally or reviewing a recommendation of a voluntary local health planning agency or the consumer members of a voluntary area health planning agency acting as an appeals body, and the Health Planning Council shall make one of the following decisions:

- (a) Approve the application in its entirety;
- (b) Deny the application in its entirety;
- (c) Approve the application subject to modification by the applicant, as recommended by the body involved.

A decision shall become final when all rights to appeal have been exhausted. Approval shall terminate 12 months after the date of such approval unless the applicant has commenced construction, or conversion to a different license category, or an action to condemn property pursuant to Section 1427, and is diligently pursuing the same to completion as determined by the voluntary area health planning agency; or unless the approval is extended by the voluntary area health planning agency for an additional period of up to 12 months upon the showing of good cause for the extension.

Comment. Section 1427 requires that health planning agency approval be secured before condemnation for the construction of hospital facilities is commenced. The amendment to Section 438.4 recognizes that condemnation may require more than a year, and provides that approval may be extended at the end of 12 months if condemnation has been commenced and is diligently pursued.

EXHIBIT III

17 Cal. Admin. Code, Ch. 1, §§ 230, 231, 235

230. Hospital. Hospital means any institution, place, building or agency with an organized medical or medical-dental staff which maintains and operates 24-hour inpatient services for the diagnosis, care and treatment of patients.

231. Nursing Home. Nursing home means any institution, place, building or agency which maintains and operates 24-hour skilled nursing services for the care and treatment of chronically ill or convalescent patients, including mental, emotional or behavioral problems, mental retardation or alcoholism.

235. Skilled Nursing Services. Skilled nursing services means those services ordinarily provided to patients by or under the supervision of a registered nurse or licensed vocational nurse.

9 Cal. Admin. Code § 515

515. General Hospital. A general hospital shall mean a hospital in which many different types of patients are cared for on an inpatient basis and shall consist of various departments such as medicine, surgery, and pediatrics. It must conform to applicable state and local laws and regulations.

42 U.S.C.A. § 291c(c), (e)

(c) The term "hospital" includes general, tuberculosis, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' home facilities, extended care facilities, facilities related to programs for home health services, self-care units, and central service facilities, operated in connection with hospitals, and also includes education or training facilities for health professions personnel operated as an integral part of a hospital, but does not include any hospital furnishing primarily domiciliary care.

* * * * *

(e) The term "nonprofit" as applied to any facility means a facility which is owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.