#36.65 6/24/71

Memorandum 71-43

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

Summary

In September 1970, the Commission considered a staff recommendation that the substance of Code of Civil Procedure Section 1238.3 (eminent domain--nonprofit hospitals) be recodified in new Health and Safety Code Section 1427. See Comprehensive Statute. The Commission directed that the staff recommendation be distributed with a cover letter (attached Exhibit I) to 25 selected individuals and organizations. This was done, and 14 replies were received. See attached Exhibits II-XV. These letters overwhelmingly support retention of authority of nonprofit hospitals to condemn but also indicate that both existing law and the proposed section are unduly and unrealistically limited.

This memorandum analyzes the letters received and suggests changes in Section 1427 for Commission consideration.

Present Law

Existing Section 1238.3 and proposed Section 1427 provide that, upon certification of the Director of the Department of Public Health that a project is necessary, an existing nonprofit hospital engaged in scientific research or education may condemn property for the purpose of operating or expanding the hospital, as long as the property taken is "immediately adjacent" and not already devoted to "relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans." Under 1969 legislation, hospital expansion projects cannot be licensed unless approval is first secured from local or area health services planning boards authorized to determine community

need and desirability of proposed construction. See Health and Safety Code Sections 437.7-438.5, 1402.1, 1402.2; Welfare and Institutions Code Sections 7003.1, 7003.2.

The Need for Authority to Condemn

The letters which took a position at all agree that nonprofit hospitals need eminent domain authority. (See Exhibits IV, V, VI, VII, IX, X, XII, XIII, XIV, XV.)

Letters from the State Department of Public Health and the Comprehensive Health Planning Association of Central California point to the economic value of condemnation by hospitals. The greater cost of property acquisitions by other means would be reflected in increased costs of medical services. (See Exhibits V, VI.) A less restricted condemnation authority would facilitate extension of existing services to areas without services; presumably, there would be a savings involved over creation of wholly new facilities. (See Exhibit IV.)

In the main, however, correspondents characterized the practical value of the existing and proposed authority as a tool to persuade landowners to come to reasonable terms. See Exhibits V, VII, XII, XIII, XIV, and XV.

"Immediately Adjacent" Property

At present, there is doubt whether, because of the immediate adjacency requirement, a hospital can condemn property separated from existing holdings by a street. See Exhibits VII, XIII, XIV, and XV. In this apparently not infrequent situation, the authority is useful less as a lever than as a means to bluff. See Mr. Roger's account of the early stages of the Alta Bates case, Exhibit XV. Accordingly, most of the writers volunteered objections to limiting the authority to "immediately adjacent" property. See

Exhibits IV, VI, VII, XII, XIII, XIV, XV. The common ground of these objections, expressed most clearly by medical services planners, is that the restriction is unrealistic in view of the increasing need for medical facilities. See, particularly, Exhibits IV (California Committee on Regional Medical Programs), XII (Hospital Council of Northern California), VI (Health Planning Association of Central California). Mr. Cattaneo (Hospital Council of Northern California) cogently points out that (if the function of the statute is to aid expansion to meet developing needs), to the extent there is authoritative review (by the Director of the Department of Public Health and more recently by the local and area planning boards) of the necessity of expanded services, fixed limitations written into the statute are unnecessary and potentially dysfunctional.

The positive proposals for amending the adjacency limitation are all of the same form, suggesting limitation of the authority to a "specified distance." Exhibits VI, VII, XIV. However, in view of the variations in the physical situations of hospitals, and the relative density or dispersion of the populations they serve, a fixed distance limitation would be an arbitrary solution at best. A five-mile limitation might be appropriate in downtown Los Angeles, for instance, but wholly unrealistic in Madera County. It would be more appropriate to the purpose of expanding to meet needs to coordinate the limitation with population areas served. It appears that the state has been plotted out into such areas for purposes of establishing local and area medical services planning boards (see Health and Safety Code Section 437.7), and a realistic limitation might take the form of restricting a hospital to condemnation within the area controlled by the planning board having authority over the hospital. See redrafted Section 1427(b)(1) (attached as Exhibit XVI).

Limitation to Existing Hospitals

The staff believes the limitation of condemnation authority to hospitals in existence should be removed as serving no purpose which cannot be achieved by adequate review of proposed condemnation projects and as unduly limiting response to the need for medical facilities.

The majority of those who responded to inquiry about this limitation commented favorably. (Exhibits V, X, XIII.) The Director of Public Health simply notes, "The existing authority appears to be adequate as regards limiting the authority to expansion of existing hospitals." (Exhibit V.) The viewpoints of Exhibits X and XIII seem to be to some extent proprietary: They complain that permitting condemnation by all nonprofit hospitals "would appear to be unfair to members of the public" and "would be an infringement upon the rights of individuals [hospitals] already established."

Only one letter opposes continuation of the limitation, but it seems to contain the sounder reasoning:

> We suggest that the limitation to existing hospitals be omitted to allow new non-profit hospital corporations to acquire their original building sites. Of major importance to this suggestion . . . is the general safeguard provided by the section that any hospital seeking to use the power of condemnation must first secure the approval of the Director of the Department of Public Health. The proposed Section 1427 outlines the criteria to be considered by the director before he can consent to the use of the power. Also, the certificate of approval only gives rise to a presumption; the property owner still has an opportunity to test these criteria judicially. Thus, in our opinion, with this dual review process, it is not necessary nor is it sound law, to limit the power of condemnation arbitrarily before the fact. [Exhibit XII (Mr. Cattaneo, Hospital Council of Northern California).]

Mr. Cattaneo's observation is strengthened by the additional review now required under the new medical services planning legislation.

Prohibition Against Condemnation of Existing Treatment Facilities

A number of writers misconstrued our question regarding this limitation as a question whether condemnation for medical office buildings should be permitted. Exhibits IV, VI, IX. Two others comment that they are not aware of problems with the limitation. Exhibits VII, XIV. One surmises that there are problems but opposes lifting the limitation. Exhibit X. One letter opposes the limitation on the general ground that, where there is adequate review to determine need, there should be no immutable prohibition on condemnation. Exhibit XII.

Exhibit XIII (Mr. Ludlam) notes a case in which the limitation prevented taking of a doctor's home in which he maintained his office. Mr. Saylor, Director of Public Health (Exhibit V), suggests revising the limitation to prevent takings only of properties which are not used substantially on a full-time basis for medical purposes. What is indicated by these letters is substantially a "higher use" test: The existing limitation ought to be revised to permit condemnation of properties already providing health services where the reviewing authorities determine that the proposed project is required to serve a more pressing need. See redrafted Section 1427(e) (attached Exhibit XVI).

Few of the letters received note the ambiguity inherent in the existing facilities limitation. Mr. Saylor's comments and the case cited by Mr. Ludlam indicate that there is substantial ambiguity in the word "devoted." Further, though the language "relief, care, or treatment of . . . spiritual . . . illness or ailment . . ." may be intended simply to denote the various branches of psychiatry or psychology, it is plainly broad enough to extend the prohibition to the taking of religious or quasi-religious properties.

It is also unclear, since it is difficult to know what "relief of spiritual ailment," and the like, might include. These problems might be cured by deleting the word "spiritual" and inserting such a word as "scientific" before the words "relief, care, or treatment." See redrafted Section 1427(e) (attached Exhibit XVI). The result would be to make the limitation apply to medical properties only.

Limitation to Hospitals Engaged in Scientific Research or Educational Activity

Three letters object to the limitation that the condemnor hospital be engaged in research or education on the common ground that the limitation is unrealistic in view of need (Exhibits VII, XII, XIV), and one of them notes that the limitation is incomprehensibly vague (Exhibit XII).

A major question presented by these letters is what sort of expansion the condemnation authority is designed to promote. Possibly the section was intended only to promote expansion of facilities for research and education. Most of the writers seem to assume otherwise, since they speak of expansion to meet general needs for medical services. Of particular importance in this regard is the interest and experience indicated by the letters from medical services planning organizations, since the authority of such organizations extends, if at all, only peripherally to projects for construction of research or educational facilities. Also, it would appear that the section can be read broadly enough to permit condemnation for projects wholly unrelated to research or education (projects "necessary for the operation . . . of the hospital"). Mr. Ludlam (Exhibit XIII) suggests that it is not infrequently used to condemn for parking lots. Finally, as Mr. Cattaneo points out (Exhibit XII), if the purpose of the present language is to limit expansion

by condemnation to research or education relation projects, it probably does not work: Virtually every hospital can validly claim to be engaged in "scientific research or an educational activity."

The thrust of the comments in this regard commends Mr. Cattaneo's approach of revising the section to permit condemnation for projects as needed, need to be determined by the reviewing authorities.

Conflict With the Recent Planning Legislation

> We would be concerned about any attempt to tie the right to condemnation to planning approval. It is our opinion that the effective implementation of planning is being handled in other ways under AB 1340 and 1341 and that there are different problems involved in condemnation. Since the hospital does not have the right to immediate possession it must commence its property acquisition program two to three years prior to the time it completes its plans for construction. If it must expose its plans or make them definitive this far in advance for purposes of condemnation, it will not only lead to bad planning but also by the very disclosure of the program lead to higher property costs for property which may be acquired without the necessity of condemnation. Also, planning approval under current practice is good for only a year and this is not sufficient lead time. [Exhibit XIII (Mr. Ludlam).]

> It should be stressed that any non-profit hospital desiring to expand must make application for such expansion to the voluntary area health planning agency in its area. This is necessary under the provisions of Chapter 1451, California Statutes, 1969 (AB-1340), copy enclosed. If the expansion proposes exercising the power of eminent domain the voluntary area health planning agency is another check to insure that the proposed expansion is necessary and that the property sought is necessary for the proposed project and that both are most compatible with the greatest public good and the least private injury." [Exhibit IX (Mr. Jacobsen, Executive Director, Comprehensive Health Planning Association of San Diego and Imperial Counties).]

These passages indicate the confusion over the relationship between the condemnation authority granted by Code of Civil Procedure Section 1238.3 and proposed Health and Safety Code Section 1427 and the planning authority conferred by new Health and Safety Code Sections 437.7-438.5, 1402.1, 1402.2,

and new Welfare and Institutions Code Sections 7003.1, 7003.2. While Mr. Jacobsen is not entirely accurate in suggesting that the new planning boards act to determine the criteria contained in proposed Section 1427 (they are directly concerned with necessity for expansion but only indirectly with necessity of particular parcels to projects or efficient construction plans), it appears that he is correct in stating that the new planning boards have authority over projects nonprofit hospitals may pursue by condemnation. Mr. Ludlam's apparent assumption to the contrary appears to be incorrect.

Health and Safety Code Section 1402.1 provides the new planning boards with authority to approve or disapprove any "new facility or additional bed capacity or the conversion of existing bed capacity to a different license category, except outpatient and emergency services." Section 1402.2 states:

> The department [of Public Health] may review but shall not approve any construction plans or issue any license under this chapter which shall cover [any of the above] until the applicant has complied with [secured planning board approval under] the provisions of Section 1402.1. (Welf. & Inst. Code §§ 7003.1, 7003.2 are the same.)

The result of the new planning legislation is that the certificate of necessity of the Director of the Department of Public Health required by existing Code of Civil Procedure Section 1238.3 and proposed Health and Safety Code Section 1427, may be useless for condemnation purposes unless the condemning hospital also has approval of the appropriate planning board. To the extent the planning boards are empowered to determine the general social necessity of expansion and the necessity of expansion by a particular hospital, an adverse determination by the board would, at least arguably, be an answer to the presumptions raised by the director's certificate that the proposed project is necessary and located properly and that the land is needed. Further, even where approval of the planning board is secured, the

hospital is faced with serious problems in view of Mr. Ludlam's comments about lead time: Apparently, in most cases, approval would expire before condemnation was completed. The hospital would have to apply for a new approval (and, probably, for a new license) with no guarantee that it would be forthcoming.

It is possible that the new planning legislation will be interpreted as not having the effect suggested above. The decisions of the planning boards are appealable to the Health Planning Council to make a final determination. The Health Planning Council is an advisory group to the Department of Public Health. See Health and Safety Code Sections 431.2, 437. Thus, it might be that a decision by the Director of the Department obviates a decision by the Council or that the decisions of the Council are superseded by those of the Director. Thus, if the Director's certificate of necessity were secured, condemnation might proceed without submitting the matter to a planning board. It appears, however, that the decision making authority of the Council is independent. The Director is a member only. See Health and Safety Code Section 437.

The problem presented might be solved simply by extending the expiration date of a planning board approval. Thus, Health and Safety Code Section 438.4 provides:

> Approval shall terminate 12 months after the date of such approval unless the applicant has commenced construction or conversion to a different license category and is diligently pursuing the same to completion as determined by the voluntary area health planning agency; . . . .

This provision might be amended to provide extension of the termination date where condemnation approved by the Director has been commenced and is diligently pursued. It is not clear, however, that the provision for termination of

approval within a year unless the planning board approves an extension upon "showing of good cause" is not designed to accomodate the rapidity of changes in need for medical services: It may be that, in some circumstances, a one-year delay time is all that can reasonably be tolerated within the framework of orderly provision of public health facilities. Thus, to require extension of approval for two or three years during condemnation before construction can begin may, in some cases, be unacceptable.

The alternative to the above suggestion would be to grant nonprofit hospitals the right to immediate possession. Presently, nonprofit hospitals do not have that right (see Code of Civil Procedure Sections 1243.4, 1243.5), and the Comprehensive Statute does not give it to them since it affords the right only to public entities and public utilities. See Comprehensive Statute Section 1269.01. Nevertheless, the reasons which support the Commission's decision to extend the right to public entities and public utilities in all eminent domain cases would seem to justify extending the right to nonprofit hospitals.

Nonprofit hospitals may be viewed as providing a public service and maintaining public facilities on the same basis as do public utilities. (See Exhibit XV. A letter from Commissioner Miller is to the same effect.) At the same time, the legislative system in which nonprofit hospitals provide public facilities--initiative, condemnation, and construction by the hospitals, with approval according to planning by the local and area agencies (under the ultimate authority of the state Health Planning Council)--would seem to have the same function and effect as a public entity the Legislature might have created for the purpose, having the common powers of public entities to plan, approve, condemn, and construct.

The staff believes that nonprofit hospitals should be given the same rights to deposit probable just compensation and to apply for an order of possession prior to final judgment as are conferred upon public entities and public utilities by Division 7 of the Comprehensive Statute. This may be done by adding a subdivision to that effect to proposed Health and Safety Code Section 1427 (see Exhibit XVI) or by amendments to Division 7 of the Comprehensive Statute.

Conclusions

The eminent domain authority of nonprofit hospitals should be continued, should be recodified as Health and Safety Code Section 1427, and should be expanded and clarified as follows:

(1) The limitation to condemnation of property "immediately adjacent" should be removed. The hospital should be permitted to condemn within the jurisdiction of its local or area health planning agency.

(2) Section 1427 should expressly provide that, to condemn, the hospital must secure both (a) a certificate of necessity from the Director of the Department of Public Health and (b) approval of the local or area health planning agency.

(3) A hospital should be permitted to deposit probable just compensation and apply for immediate possession on the same terms and in the same cases as public entities.

(4) The limitation of authority to hospitals "engaged in scientific research or an educational activity" should be removed as unnecessary.

(5) The prohibition against taking of properties devoted to relief, care, or treatment of the "spiritual" as well as mental and physical ailments of humans should be amended to prohibit only the taking of properties devoted

to providing medical services on such a substantially full-time basis that the taking for expansion will not produce an increase in the quality or quantity of services provided the community.

(6) The limitation of authority to existing hospitals should be removed.

Respectfully submitted,

E. Craig Smay
Legal Council

Memorandum 71-43

EXHIBIT I

FORM LETTER

Dear _____:

The California Law Revision Commission has been directed by the Legislature to prepare a comprhensive statute governing the condemnation of property for public use. The Commission plans to recommend the repeal of Section 1238.3 of the Code of Civil Procedure (authorizing condemnation of property needed for the expansion of nonprofit hospitals) and the enactment of new provisions to deal with condemnation by nonprofit hospitals.

Attached are provisions drafted by the Commission's staff relating to condemnation by nonprofit hospitals. The Commission seeks your comments on these provisions which are intended to continue without substantive change the limited condemnation authority now given nonprofit hospitals.

In addition, your views on the following questions would be helpful to the Commission in its study of this field of law:

1. Do nonprofit hospitals need any condemnation authority at all?

2. Is the existing grant of condemnation authority--which is limited to property needed for the expansion of existing hospitals only--adequate or is a broader condemnation authority needed for nonprofit hospitals?

3. Does the existing limitation on the condemnation authority of nonprofit hospitals--preventing the condemnation of property used for medical offices--create real problems in expanding the facilities of nonprofit hospitals?

The Commission will appreciate receiving a statement of the views of your organization. We would like to consider this matter at our December 4-5 meeting. Accordingly, we would appreciate receiving your statement not later than November 15 so that it can be reproduced and distributed to the members of the Commission and other interested persons for study prior to the meeting.

Yours truly,

John H. DeMoully
Executive Secretary

Memo 71-43 EXHIBIT II

BLUE CROSS
HOSPITAL SERVICE OF CALIFORNIA / 1919 Webster St., Oakland, Ca 94612 / (415) 834-4900 OFFICES IN SAN FRANCISCO, SAN JOSE, SACRAMENTO AND FRESNO

November 13, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

While we certainly are interested in the orderly development of hospital facilities in our Plan area and will cooperate with any effort on their part for legislative change which will be of assistance, Hospital Service of California has taken no official position on the questions you raise in your letter of September 23, 1970.

Your letter has been referred to our Hospital Relations committee who in turn can canvas the various contracting hospitals for comment and while it is not possible to have these available for your December 4, 1970 meeting they will be forwarded as soon as received.

Hospital Service of California appreciates the inquiry of your commission and desires to assist the work of the commission in any way it can.

Very truly yours,

George C. Lucia
President

GCL:br

Memo 71-43 EXHIBIT III

STATE OF CALIFORNIA—DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS RONALD REAGAN, Governor

BOARD OF MEDICAL EXAMINERS
1020 N STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: 916—445-4584

November 9, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Committion
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

At a recent meeting of the Board of Medical Examiners your letter of September 23, 1970 relating to condemnation of nonprofit hospitals was considered.

The members of the Board did not take any position regarding the subject of your letter, however, they did as individuals express their concern about the protection of the basic rights of citizens.

Very truly yours,

Wallace W. Thompson

WALLACE W. THOMPSON
Executive Secretary

WWT:dr

CALIFORNIA COMMITTEE ON
Memo 71-43

EXHIBIT IV

REGIONAL MEDICAL PROGRAMS

655 Sutter Street, San Francisco, California 94102, Telephone (415) 771-5432

Paul D. Ward
Executive Director

November 6, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear John:

This is a rather late reply to your letter of September 23rd concerning the work being done by the California Law Revision Commission on a statute governing the condemnation of property for public use. I have hesitated replying because I feel that my comments do indicate substantive change.

Without going into the question of whom should have the right of condemnation, that is, whether it be non-profit or proprietary, it would seem to me that the future might indicate a need to acquire properties which are not immediately adjacent to the existing structure. For example, if the present trend continues, apparently larger hospitals are going to be required to provide services in areas distant from their main structure. It is possible, for example, that a hospital like Mount Zion might find it advisable to provide substantial services in places like Hunter's Point and other areas where no services now exist. If they have the right to condemn property immediately adjacent to their present structure, it would seem equally valid for them to be able to acquire property in the same manner at points distant from their existing structure where no services now exist.

I would question the right to condemn property for the construction of medical office buildings, but this same question would have less validity where clinics are being created or other types of outpatient services under hospital management.

Apparently there is a typographical error in the 5th line of proposed Section 1427(a) Health and Safety Code.

Sincerely,

Paul D. Ward
Executive Director

PDW:lms

Memo 71-43 EXHIBIT V

OFFICE OF THE DIRECTOR

STATE OF CALIFORNIA
Department of Public Health
2151 BERKELEY WAY
BERKELEY, CALIFORNIA 94704

November 2, 1970

John H. DeMoully, Executive Director
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This is to acknowledge your letter of September 25, 1970, requesting the Department's comments on the proposed revision of Section 1238.3 of the Code of Civil Procedure.

The staff of the Department who have been responsible for administering the program have reviewed the material attached to your letter and the following comments are submitted:

1. The condemnation authority allowed non-profit hospitals under Section 1238.3 have been invaluable as a procedure for bringing together property owners and the hospital to resolve the financial question raised by the hospital need to expand and acquire additional land. Without this authority, hospitals would have been forced to pay exaggerated prices for property which would have been passed on to the patient.

2. The existing authority appears to be adequate as regards limiting the authority to expansion of existing hospitals.

3. The existing limitation preventing the condemnation of property used for medical offices has created problems in those cases where the use of the existing property is questionable as regards the full time use of the property versus the use on an intermittent basis. The

necessity of showing full time use of the property for a specified period prior to the condemnation might be utilized as a basis for a decision.

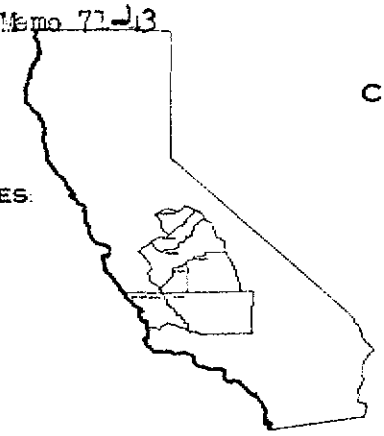
If the Department may be of any further assistance to you and the Commission in this matter, please do not hesitate to contact me.

Sincerely yours,

Louis F. Saylor, M. D.
Director of Public Health

Memo 71-13

EXHIBIT VI



MEMBER COUNTIES:
FRESNO
KERN
KINGS
MADERA
MARIPOSA
SAN LUIS OBISPO
TULARE

COMPREHENSIVE HEALTH PLANNING ASSOCIATION
OF CENTRAL CALIFORNIA

1616 WEST SHAW AVENUE, SUITE B6
FRESNO, CALIFORNIA 93705
TELEPHONE (209) 224-7272

November 2, 1970

John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Your letter of September 30, 1970, requested our comments relative to the need of nonprofit community hospitals to have the power of property condemnation.

We submit the following staff reply to the three questions asked:

1. We feel there is a definite need for nonprofit hospitals to have the right of property condemnation. This is the only means available in some instances to permit hospitals who are land locked to expand at reasonable cost to meet established community health needs. There are alternatives such as high rise construction or relocation which may be considered, however, these alternatives are not always possible or considered to be the best possible solution to a needed hospital expansion program.

2. The present and proposed change to the law limits the authority of a hospital to acquire property immediately adjacent to the facility. It is felt that a broader authority should be established providing a specified distance from the existing facility.

3. We were not aware that this existing limitation has caused a problem of any significance. Physicians offices, unless they are paid staff of the hospital, have traditionally been a matter of free enterprize by the individual physician or group of physicians.

Thank you for giving us the opportunity to comment on this matter. We wish your organization continued success in the work it is accomplishing.

Sincerely,

James T. Adair
Executive Director

JTA:at

Memo 71-43 EXHIBIT VII

September 30, 1970

John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This will acknowledge receipt of your letter of September 23, 1970 soliciting our views concerning the need for the right of existing nonprofit hospitals to have the power of condemnation.

I submit the following answers to the three questions you asked and offer a fourth recommendation.

1. Although nonprofit hospitals rarely file condemnation actions under the authority granted by the C.C.P., this has been a most useful tool in persuading property owners to enter into good-faith negotiations relative to the sale of the property. In view of this fact and the expected need for expansion of existing hospital facilities in the future, in my opinion there is a definite need for this authority.

2. The present law, as well as the proposed change, limits the authority to "property immediately adjacent" to an existing hospital facility. This has created a problem in connection with some institutions in that questions have been raised about property located across the street from the institution or property in the same block as the institution, but not immediately adjacent. I would hope this could be resolved by broadening the authority of the hospital to permit condemnation of property located within a specified distance from the facility as opposed to requiring that the property be immediately adjacent to the facility.

3. I am not aware of any problems concerning the limitation of the authority preventing acquisition of property used for medical offices or other facilities used for the care and treatment of the sick or injured.

4. There is a problem that some institutions are facing with respect to the requirement that the hospital must be engaged in scientific research or an educational activity, which requirement exists under the present law as well as the proposed modification. I personally think that this is an unrealistic requirement if one assumes that health facilities in California are necessary and needed expansion should be facilitated by the exercise of the power of eminent domain. The fact that a facility is engaged in a form of educational activity or scientific research, in my mind adds very little to the merits of facilitating the expansion of the institution. In view of this, I believe that these requirements should be deleted.

The opportunity to offer these comments is appreciated. We sincerely commend the work of the Law Revision Commission.

Respectfully submitted,

William M. Whelan
Executive Director

WMW:sg

Memo 71-43 EXHIBIT VIII

STATE OF CALIFORNIA—HUMAN RELATIONS AGENCY RONALD REAGAN, Governor

DEPARTMENT OF SOCIAL WELFARE

744 P STREET
SACRAMENTO 95814

September 28, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for the invitation in your letter of September 23 to express my views on the question of the exercise of eminent domain.

The subject of non-profit hospitals is not one with which this Department has any official or even practical connection. Any views I might state would represent my private opinions rather than those derived from the experience of this agency.

Under these circumstances, I would prefer not to express any views at all.

Sincerely yours,

Robert Martin
Director

Memo 71-43 EXHIBIT IX

COMPREHENSIVE HEALTH PLANNING ASSOCIATION OF SAN DIEGO AND IMPERIAL COUNTIES

Room 047, County Administration Center
1600 Pacific Highway, San Diego, California 92101 Telephone (714) 233-5351

RICHARD F. JACOBSEN
EXECUTIVE DIRECTOR

October 9, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Reference your letter September 23, 1970, I am in agreement with the tentatively approved Comprehensive Statutes 300, 301 and 302 and concur with your staff recommendation that Section 1427 be added to the Health and Safety Code and that Section 1238.3 be repealed.

In regards to question No. 1, non-profit hospitals need condemnation authority because many are becoming land-locked due to being surrounded by expansion going on in many of our cities. Many hospitals constructed facilities years ago, on the "outskirts of town", and now cannot accomplish necessary expansion because of becoming surrounded by urban sprawl.

Questions No. 2 and No. 3 are related in that it would be ideal to have a medical office building as part of a medical center complex, (contiguous to a hospital) but condemnation of property should not (for obvious reasons) be allowed "for medical offices only".

It should be stressed that any non-profit hospital desiring to expand must make application for such expansion to the voluntary area health planning agency in its area. This is necessary under the provisions of Chapter 1451, California Statutes, 1969 (AB-1340), copy enclosed. If the expansion proposes exercising the power of eminent domain the voluntary area health planning agency is another check to insure that the proposed expansion is necessary and that the property sought is necessary for the proposed project and that both are most compatible with the greatest public good and least private injury.

I trust the above will assist you in your evaluation.

Sincerely,

Richard F. Jacobsen
Executive Director

RFJ/sms
enc.

Memo 71-43 **EXHIBIT X**

BAY AREA COMPREHENSIVE HEALTH PLANNING COUNCIL

October 6, 1970

Mr. JOhn H. De Moully
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. De Moully:

Mr. Chipman has asked that I respond to your letter of September 23, 1970 concerning the condemnation authority of nonprofit hospitals.

The provisions drafted by the Commission Staff are considered adequate and are concurred in by the undersigned.

In respect to the three questions included in your letter, I will respond to them as follows:

1. Do nonprofit hospitals need any condemnation authority at all?
ANSWER: Yes.

2. Is the existing grant of condemnation authority - which is limited to property needed for the expansion of existing hospitals only - - adequate or is a broader condemnation authority needed for nonprofit hospitals?
ANSWER: The existing grant is deemed adequate. It would appear that to extend the grant to include condemnation authority for hospitals in the planning stage of development would be an infringement upon the rights of individuals already established. It would be difficult to contemplate such inflexibility in the planning for hospitals.

3. Does the existing limitation on the condemnation authority of non-profit hospitals - preventing the condemnation of property used for medical offices - create real problems in expanding the facilities of nonprofit hospitals?
ANSWER: This limitation undoubtedly causes problems. However, it would appear that these matters could be better resolved through negotiation than expanding the authority.

Very truly yours,

PML:ng

Paul M. Levesque, Acting Chief
HEALTH FACILITIES PLANNING

CC: Mr. W. B. Chipman

Memo 71-43 EXHIBIT XI

CALIFORNIA
BLUE SHIELD

October 22, 1970

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

On September 23rd, you wrote to our president, Mr. Thomas C. Paton, inviting Blue Shield to make certain comments related to proposed changes in the laws related to nonprofit hospitals.

While we sincerely appreciate the opportunity to comment which you have afforded us, the subject matter is somewhat outside the area of interest and competence of our organization. We therefore have no statement which we wish to have considered by the Commission.

Sincerely,

Willis W. Babb
Vice President

WWB:nm

Memo 71-43

Hospital Council of Northern California

EXHIBIT VII

1400 GEARY BOULEVARD • SAN FRANCISCO, CALIFORNIA 94109 • 922-4100

Grant Cattaneo
Executive Director

Jon A. Ogden
Associate Director

October 29, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Condemnation by Non-Profit Hospitals

Dear Mr. DeMoully:

Thank you for your letter asking for our comments on your study of California law governing the power of non-profit hospitals to acquire property through eminent domain proceedings.

1. In our opinion there is a definite need to continue the power of eminent domain. We believe the existence of this authority has been of considerable assistance to hospitals in securing property through negotiated purchase.

2. The existing granted power should be broadened in several respects. We suggest that the limitation to existing hospitals be omitted to allow new non-profit hospital corporations to acquire their original building sites. Of major importance to this suggestion as well as to the others is the general safeguard provided by the section that any hospital seeking to use the power of condemnation must first secure the approval of the Director of the Department of Health. The proposed Section 1427 outlines the criteria to be considered by the Director before he can consent to the use of the power. Also the certificate of approval only gives rise to a presumption; the property owner still has an opportunity to test these criteria judicially. Thus, in our opinion, with this dual review process it is not necessary nor is it sound law to limit the power of condemnation arbitrarily before the fact.

   Similarly this review process provides sufficient protection in our opinion to omit the limitation of the power to those hospitals engaged in "scientific research or educational activity." Also, this limitation is vague in that it gives no indication as to the extent of research or educational activity that is required before the hospital qualities. Does the hospital have to be affiliated as a teaching hospital with a medical school or is it sufficient

that the hospital has a nursing school or several interns or residents? Also, must the property sought to be condemned be used in whole or part for scientific research or educational activity? Again, there appears to be no compelling reason to so limit the power especially with the protection to the public afforded by the review process before the Director of the Department of Public Health.

A third difficulty with the existing authority is the limitation to property immediately adjacent to the existing hospital site. The authority to condemn granted other entities both public and private is not so limited to immediately adjacent properties; with the added protection of the necessity of prior approval by the Director of the Department of Public Health, there appears to be no sound reason to so limit the power to non-profit hospitals.

3. No hospital has brought to our attention any problem regarding the inability under current law to condemn properties already used for medical offices. However, that is not to say that such problems have never existed nor may occur in the future. Therefore, again, this limitation should also be omitted given the requirement of prior approval of the project by the Director of the Department of Public Health.

We thank you for the opportunity to comment on this matter, and if any additional information is required please advise

Very truly yours,

Grant Cattaneo
Executive Director

Mec

Memo 71-43

EXHIBIT XIII

MUSICK, PEELER & GARRETT
ATTORNEYS AT LAW
ONE WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 629-3322
CABLE "PEELGAR"

October 2, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

We are the Legal Counsel for the California Hospital Association and many different hospitals and hospital organizations. As Legal Counsel for the California Hospital Association we were responsible for the preparation and development of Section 1238.3 of the Code of Civil Procedure to authorize condemnation of property needed for the expansion of nonprofit hospitals.

We have had considerable experience with the Act and have found it to be a most useful device for resolving problems with property owners who have exaggerated ideas as to the value of their property when it is in the path of a hospital expansion. There has been relatively little litigation in comparison with the number of times under which the very existence of this section has brought people to the conference table and caused a satisfactory settlement both ways.

It is our opinion that the section should continue to be limited to expansion of existing hospitals and not made available for new hospital projects. There is still adequate property available for new projects and it would appear to be unfair to members of the public to come in and condemn for this purpose.

We have had at least one incident of a problem involving acquiring property being used as a medical facility. It was a case involving a property owned by a physician in which he had his office in his home. We were unable to make the section stick and an exorbitant price was paid. The

other type of problem which we have had is the requirement that the property be immediately adjacent. This has been interpreted as not including properties across a street when the fee to the street was owned by the city. This has been a particular problem for acquiring parking areas for hospitals.

The section, of course, does not cover space for medical buildings and with the development of the medical center complex, in which medical office buildings owned by the hospital are becoming an essential element, an expansion of the section to include buildings for this purpose would be useful. As a practical matter we have been able to work around the problem by placing the medical buildings on property acquired through other than condemnation.

We would be concerned about any attempt to tie the right to condemnation to planning approval. It is our opinion that the effective implementation of planning is being handled in other ways under AB 1340 and 1341 and that there are different problems involved in condemnation. Since the hospital does not have the right to immediate possession it must commence its property acquisition program two to three years prior to the time it completes its plans for construction. If it must expose its plans or make them definitive this far in advance for purposes of condemnation, it will not only lead to bad planning but also by the very disclosure of the program lead to higher property costs for property which may be acquired without the necessity of condemnation. Also, planning approval under current practice is good for only a year and this is not sufficient lead time.

We hope that these replies have been helpful to you and please consider them to have been made on behalf of the Hospital Council of Southern California and Blue Cross, to whom you previously directed inquiries.

Sincerely yours,

JEL:k

James E. Ludlam
for MUSICK, PEELER & GARRETT

cc: Hospital Council of
Southern California
Blue Cross of Southern California
California Hospital Association

Memo 71-43 EXHIBIT XIV

JOSEPH D. PEELER
JOHN H. ROBINSON
MELVIN D. WILSON
DAVID P. EVANS
JAMES E. LUDLAM
GERALD G. KELLY
JESSE R. O'MALLEY
BRUCE E. CLARK
MURRAY S. MARVIN
STUART T. PEELER
BRUCE A. BEVAN, JR.
RALPH E. ERICKSON
CHARLES F. FORBES
THOMAS J. REILLY
RICHARD T. APEL
GEORGE C. HADLEY
THOMAS M. COLLINS
DONALD J. DREW
RICHARD D. BEAR
LEONARD E. CASTRO
J. PATRICK WHALEY
MICHAEL W. CONLON

MICHAEL P. MURPHY
WILLIAM J. EMANUEL
EDWARD A. LANDRY
JOHN R. BROWNING
DONALD R. GAIL
C. ROBERT FERGUSON
LAUDER W. HODGES
JOSEPH A. SAUNDERS
RONALD G. TRAYNER
JEFFREY R. MATSEN
ROBERT E. THOMSON
FREDERICK T. GUCKENBERGER
ROGER B. BAYMILLER
FRANK H. SMITH, JR.
GALE C. GUTHRIE
LAWRENCE E. STICKNEY
ANTHONY M. VIENNA
GERALD A. COLLIER
ROBERT J. NEIL
CHARLES R. RISH
CHRISTOPHER A. CARR
JAMES B. BEETZ, JR.

ELVON MUSICK
1880-1968

LEROY A. GARRETT
1906-1961

NORTHER A. KLINE
OF COUNSEL

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ONE WILSHIRE BOULEVARD
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TELEPHONE (213) 629-3322
CABLE "PEELGAR"

November 3, 1970

John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear Mr. DeMoully:

Under date of September 23, 1970, you advised me that the Commission plans to recommend the repeal of Section 1238.3 of the Code of Civil Procedure (authorizing condemnation of property needed for the expansion of non-profit hospitals) and asked for my comments on these provisions and my views on the questions in this regard addressed to Mr. William M. Whalen, Executive Director, California Hospital Association.

The answer to question No. 1 is in the affirmative. COMMENT: Although non-profit hospitals rarely file condemnation proceedings under the authority granted by Section 1238.3 of the Code of Civil Procedure which you propose to repeal and reenact under your staff's recommendation as Section 1427 of the Health & Sanitation Code, their right to do so if it becomes necessary most certainly encourages property owners to enter into good faith negotiations for the sale of their property. In view of this fact and the expected need for the expansion of existing hospital facilities in the future, there is in my opinion a definite need for this authority.

In answer to question No. 2, I feel that the present law, as well as the proposed change, too narrowly limits the authority to "property immediately adjacent" to an existing hospital facility. This has created a problem in connection with some institutions in that questions have been raised about property located across the street

from the hospital or property in the same block as the same and not immediately contiguous thereto. I would hope this could be resolved by broadening the authority of the hospital to permit condemnation of property located within a specfied distance from the facility as opposed to requiring that property be immediately adjacent to the facility.

Answering question No. 3, I will state that I am not aware of any problems concerning the limits of the authority preventing acquisition of property used for medical offices or other facilities used for the care or treatment of the sick or injured.

There is the additional problem existing under present statutes as well as the Commission's proposed modification that some hospitals are facing with respect to the requirement that it must be engaged in scientific research or educational activity. I personally think this is an unrealistic requirement if one is to assume that health facilities in California are necessary and that the needed expansion would be facilitated by the exercise of the power of eminent domain. The fact that such a facility is engaged in a form of educational activity or scientific research adds very little, in my opinion, to the merits of facilitating the expansion of the institution and should not be a condition preventing the exercise of eminent domain. In our view, we feel that these requirements should be deleted from Section 1427 of the Health & Sanitation Code as proposed by your staff.

If you desire further expansion of the views I have expressed herein, please advise.

Sincerely,

George C. Hadley
of MUSICK, PEELER & GARRETT

GCH:mm

Memo 71-43

EXHIBIT XV

ROGERS, VIZZARD & TALLETT
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
369 PINE STREET
SAN FRANCISCO, CALIFORNIA 94104

JOHN D. ROGERS
THOMAS F. VIZZARD
JOHN H. TALLETT

YUKON 1-2470

April 30, 1971

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

RE: Alta Bates Hospital vs. Florence I. Mertle, et al.
Superior Court for Alameda County (Case No. 403-636)

Dear Mr. DeMoully:

Enclosed is a copy of our brief filed at trial in the above-referenced matter.

In this matter, Alta Bates owned property within one square block bounded by Regent (east), Webster (north), Kolby (west), and Prince (south). Commencing in 1965, it commenced acquisition of properties within the block northerly to its holdings. Substantial properties were acquired, some under threat of eminent domain in that block. After a number of properties had been acquired, Alta Bates felt it desirable to seek abandonment of Webster Street between Regent and Kolby, to round out its holdings and increase the efficiency and safety of its operation. The City of Berkeley required as a part of the agreement to abandon Webster Street that a small substitute street be constructed immediately adjacent to the Hospital's present ownership between Regent and Kolby just northerly of Prince. In other words, the new "feeder" street would be just past the midway point in said block.

Alta Bates filed a condemnation action to acquire the property for this purpose from defendant Mertle. We took the positions set forth in our brief. The Court, after the hearing of two days' testimony on the issue of "authority to take", granted judgment for defendant Mertle.

Our firm has represented owners where non-profit hospitals seek acquisition of property by condemnation, and also non-profit

hospitals themselves. The narrow limitations of their authority present peculiar problems. While not involved in the instant case, the problem of "immediate adjacency" is uncommonly restrictive. In fact, there is some question as to whether or not property across the street, even assuming an unconnecting underlying fee is "immediately adjacent". The practice of non-profit hospitals is to seek the acquisition of properties without condemnation across the street, and then extend ownerships in the next block to properties immediately adjacent to the "foothold" property.

Another problem facing non-profit hospitals is their inability to proceed under the Joint Exercise of Powers Act, since they are not a "public agency".

While the subject property in our own case was immediately adjacent to the operating hospital, the real problem involved its inability to proceed under a Joint Exercise of Powers Agreement with the City. This then raised the question of acquisition of property "for exchange" which was clearly without its authority.

In my own personal opinion, the condemnation powers of non-profit hospitals should be extended, since in most cases they are indeed "non-profit" and furnish a needed public service. I would suggest, therefore, that some consideration be given to broadening the language of "immediate adjacency", and amending the Joint Exercise of Powers Act to include non-profit hospitals.

I am sorry that additional authorities cannot be supplied in the matter, but I am sure you are aware that Section 1238.3 has not been construed by judicial decision. For obvious reasons, non-profit hospitals do not desire appellate review. No appeal will be taken by Alta Bates in this case.

Incidentally, while your letter does not request information concering this point, we must now struggle with the question of abandonment. In my opinion, present cases which distinguish involuntary abandonment should be reviewed. In principle, attorney's fees and reasonable costs should be paid whether a condemnor voluntarily abandons or a Court orders them to do so. This issue may be appealed in this case, if we face an adverse ruling. However, perhaps some legislative study of the question is in order.

I enjoyed meeting and talking with you in San Jose, and look forward to your text on inverse condemnation.

Very truly yours,

John D. Rogers

JDR/dj
Enclosure - 1

COPY COPY COPY

JOHN D. ROGERS

Rogers, Vizzard & Tallett
A Professional Corporation
Attorneys at Law
369 Pine Street
San Francisco, California 94104
Telephone 981-2470

ATTORNEYS FOR Defendant Florence
I. Mertle

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ALTA BATES HOSPITAL, a nonprofit corporation, Plaintiff, - vs - FLORENCE I. MERTLE, et al., Defendants.	No. 403-636 TRIAL MEMORANDUM

Plaintiff seeks to acquire property owned in fee simple absolute by the defendant, Florence I. Mertle, for the ostensible purpose of operating a non-profit hospital thereon, but for the real purpose of constructing thereon a public street.

The limited right of eminent domain conferred upon private non-profit hospitals is set forth in Section 1238.3 of the Code of Civil Procedure, which in pertinent part reads as follows:

> "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."

The power of condemnation when conferred by the State in derogation of common law and general private rights, must be strictly construed. As stated by the Supreme Court in the early case of San Francisco and Alameda Water Company v. The Alameda Water Company (1869), 36 Cal. 639, at 644:

> "All the authority for the proceeding and the mode of conducting the same, are found in section 28 of the General Act for the incorporation of water companies, passed April 22, 1858. This section (as are all other like statutes) is in derogation of the common law and of general private rights, and must be strictly construed. It authorizes and prescribes a summary proceeding by which a citizen is divested of his property without his consent; the power conferred for such purpose upon the special tribunal should, therefore, never be extended or enlarged by implication, but strictly confined within the statutory limits, as to matters subject to its control, and the mode of its exercise."

While the subject property is concededly immediately adjacent to plaintiff's private hospital, it is and has been for many years used and licensed as a residental care facility, the occupants thereof in large measure being referred by the California Department of Social Welfare. The facility is operated as a "residential care home" pursuant to detailed regulations of the California Department of Social Welfare, which will be developed in the evidence.

More importantly and critically, however, the real purpose for which the subject property is being acquired is to exchange the same with the City of Berkeley in consideration for the proposed abandonment of portions of Webster Street, more than one-half block removed from the subject property. In brief, the real purpose for which the property is being acquired is for a City street.

The power of a municipality to acquire property for City streets, in appropriate circumstances, is conceded. However, the City of Berkeley is not a party to this action, nor could it be a party to an action with the plaintiff Private Hospital under the Joint Exercise of Powers Act (Government Code, Section 6500, et sequitur), since plaintiff Private Hospital is not a "public agency" as defined therein.

We believe there is no contention that plaintiff Private Hospital has the extremely limited power sometimes accorded by the Legislature to public condemnors to acquire properties for "exchange", such as that which is narrowly applied to State Department of Public Works under Section 104.2 of the Streets and Highways Code. Plaintiff Private Hospital simply has no authority to act as the agent for the City of Berkeley, either jointly or, as here, under a theory of implied delegation. As stated in People v. Superior Court, 10 Cal. 2d 288, at Page 295:

> "It is a well established legal principle that although the power of eminent domain is inherent in sovereignty, nevertheless neither the state itself nor any subsidiary thereof may lawfully exercise such right in the absence of precedent legislative authority so to do. And equally established is the rule that the agency to which has been delegated the authority to institute a condemnation action has the exclusive power in the premises. In that regard, in the case of San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 226 [128 Pac. 924], it is said: 'It is conceded by plaintiff that the power of eminent domain is vested in the state, and that no person or corporation can avail himself or itself of that power, even in

> aid of a recognized public use, unless the state has granted to such person or corporation a right to exercise the power for the particular use proposed. There must be a statute conferring the power, either expressly or by necessary implication . . .' To the same effect, see 20 C.J. 885, 887; Nichols on Eminent Domain, volume 1, section 19; also, Ventura County v. Thompson, 51 Cal. 577."

Section 1241 of the Code of Civil Procedure provides before property can be taken it must appear:

> "1. That the use to which it is to be applied is a use authorized by law;"

Plaintiff Private Hospital is limited in its strictly construed power to condemnation of property for hospital purposes, and cannot misuse that power to acquire property for City street purposes. It cannot seek to extend its limited power as a private hospital to a further power of "exchange" without a scintilla of legislative authority. Nor may the City of Berkeley, assuming that it requires the condemnation of property for public street purposes, delegate that power to a Private Hospital. The Honorable Trial Court is without jurisdiction to extend, enlarge, or create powers of eminent domain not conferred by the Legislature.

The present action must, therefore, be dismissed and the presently filed complaint abandoned, with costs.

Respectfully submitted,

ROGERS, VIZZARD & TALLETT

BY John D. Rogers
John D. Rogers
Attorneys for Defendant Florence I. Mertle

Memorandum 71-43

EXHIBIT XVI

§ 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 under this chapter 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.

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

(1) The hospital and the property sought to be condemned are situated within an area under the authority of the same voluntary local health planning agency as defined in Section 437.7 of this code; or, if there is no voluntary local health planning agency approved for the area in which the hospital is situated, the hospital and the property sought to be condemned are situated within an area under the authority of the same voluntary area health planning agency as defined in Section 437.7 of this code; and

(2) The hospital has complied with the provisions of Section 1402.1 of this code, or Welfare and Institutions Code Section 7003.1; and

(3) 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 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 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 or 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 wholly or in substantial part to use for the scientific care, treatment, or relief of the mental or physical illness or ailment of humans may not be taken under this section; except that property which is not wholly devoted to such uses, or not so devoted on a full-time basis, may be taken 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.

(f) A nonprofit hospital authorized to take property by eminent domain under this section shall have the same rights to deposit probable just compensation prior to judgment and to obtain possession prior to final judgment as are conferred upon public entities by Division 7 (commencing with Section 1268.01) of this code.

Comment. Section 1427 supersedes the authority formerly contained in Code of Civil Procedure Section 1238.3.

Subdivision (a). Subdivision (a) makes no change in the definition of "nonprofit hospital" contained in subdivision (2) of former Code of Civil Procedure Section 1238.3.

Subdivision (b). Former Code of Civil Procedure Section 1238.3 provided for condemnation of "immediately adjacent" property upon certification of the Director of the State Department of Public Health that a project was necessary. Subdivision (b) continues the requirement of certification by the Director, but dispenses with the immediate adjacency requirement. Subdivision (b) also discontinues the former limitations of condemnation authority to existing hospitals and to hospitals engaged in scientific research or educational activities.

Limitation to existing hospitals, hospitals engaged in research or education. The limitation of condemnation authority to existing hospitals was unduly restrictive. The need for facilities is sufficiently great that condemnation should be permitted for the construction of new hospitals. Abuse of the authority is guarded against by dual review: Each project must first be approved by a local or area health planning agency as in the public

interest, and condemnation is permitted only upon certification of necessity by the Director of Public Health.

The limitation of authority to hospitals engaged in scientific research or education was both too narrow to fit the scope of public need for medical facilities and too broad to be an effective limitation. Section 1427 permits condemnation by any facility within the definition of "nonprofit hospital."

Paragraph (1). The requirement that property to be taken be immediately adjacent to present holdings was uniformly criticized as unduly restrictive by attorneys, hospital administrators, and health services planners. Paragraph (1) permits a hospital to condemn for expansion anywhere within the jurisdiction of the hospital's local or area health planning agency established pursuant to Section 437.7. The scheme is intended to aid expansion to meet public needs as determined by authorized agencies. In densely populated areas with numerous facilities, the area in which a hospital may condemn to expand is likely to be small. In sparsely populated areas, the area is likely to be large.

Paragraph (2). Health and Safety Code Section 1402.2 and Welfare and Institutions Code Section 7003.2 forbid licensing of new hospital construction which does not have health planning agency approval pursuant to Health and Safety Code Section 1402.1 and Welfare and Institutions Code Section 7003.1. Paragraph (2) forbids condemnation for such construction without planning approval.

Paragraph (3). Paragraph (3) 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 alteration 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 the 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 provide that properties not substantially fully devoted to medical purposes may be taken if the Director of Public Health finds that to do so will improve the overall availability of essential health services in the community.

Subdivision (f). Subdivision (f) gives nonprofit hospitals condemning under Section 1427 the same rights to deposit probable just compensation prior to judgment and to obtain possession prior to final judgment as are conferred upon public entities by Division 7 of the Comprehensive Statute. This subdivision recognizes that nonprofit hospitals, in carrying out the plans of local and area health planning agencies for orderly growth of public health facilities, act in the capacity of a public entity and that immediate possession may be necessary to such hospitals in view of the one-year provision for approval of new hospital projects. See Health and Safety Code Section 438.4.