

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-201
	:	
of	:	<u>April 10, 1980</u>
	:	
GEORGE DEUKMEJIAN	:	
Attorney General	:	
	:	
Warren J. Abbott	:	
Assistant Attorney General	:	
	:	

SUBJECT: AREA HEALTH FACILITIES AND SERVICES PLAN—The Advisory Health Council may proceed with its functions of determining whether the area plans are in conformance with the regulations adopted by the Office of the Statewide Health Planning and Development pursuant to section 437.8 and to integrate those plans into the Statewide Plan prior to any amendments being made to those regulations to reflect the legislative intent expressed in the amendment to section 437.8 and chapter 1186.

The Advisory Health Council has requested an opinion on the following question:

May the Advisory Health Council, pursuant to Health and Safety Code section 437.7 (b), determine that an area health facilities and services plan conforms to regulations adopted pursuant to Health and Safety Code section 437.8 and integrate such plan into the Statewide Health Facilities and Services Plan prior to such regulations being revised by the Office of Statewide Health Planning and Development to reflect legislative changes made in section 437.8 by chapter 1186, Statutes of 1979?

CONCLUSION

The Advisory Health Council may, pursuant to Health and Safety Code section 437.7(b), determine that an area health facilities and services plan conforms to regulations adopted pursuant to Health and Safety Code section 437.8 and may integrate such plan into the Statewide Health Facilities and Services Plan prior to those regulations being revised by the Office of the Statewide Health Planning and Development to reflect legislative changes in section 437.8 made by chapter 1186, Statutes of 1979.

ANALYSIS

The Advisory Health Council (hereinafter “Council”), as one of its functions, reviews and determines whether area plans developed by area health planning agencies conform to regulations adopted by the Office of Statewide Health Planning and Development (hereinafter “OSHDP”). (Health & Saf. Code, § 437.7(b).)¹ The Council also integrates all the area plans into a single Statewide Health Facilities and Services Plan (hereinafter “Statewide Plan”). Section 437.8 essentially requires the adoption of regulations setting forth statewide policies for area health planning agencies in performing their responsibilities and lists a series of factors to be considered by OSHDP in adopting its regulations. OSHDP has adopted regulations as required by section 437.8. (Cal. Admin. Code, tit. 22, § 90304, *et seq.*) The Council has for several years been making the requisite determinations as to area plans and their annual revisions conforming to these regulations and annually integrates these plans into the Statewide Plan.

In 1979, the Legislature, as part of chapter 1186, Statutes 1979, amended section 437.8 to add a declaration of legislative intent regarding surgical clinics.² The question presented is whether the Council must now stop making its determinations and its plan integration efforts until OSHDP makes revisions in its regulations to reflect the legislative amendment. Our review of the statutory scheme keyed around the area and Statewide Plans and of the legislative history of chapter 1186 leads us to conclude that the Council need not await any such revisions to the regulations, but that the Council and area health planning agencies should consider the amendment to section 437.8 in performing their

¹ All unidentified code section references are to the Health and Safety Code.

² The paragraph added to section 437.8 reads:

“With respect to the determination of unmet need in the community or the adverse effect of new or expanded surgical clinics on the utilization of operating rooms in hospitals, it is not the intent of the Legislature to limit the expansion of surgical clinics when the hospitals have not made efforts to fully utilize their ambulatory operating capacity and to provide ambulatory surgical services at a reasonable cost to the community.” (Stats. 1979, ch. 1186, § 2.)

statutory functions.

A surgical clinic is defined in section 1204(b) (1) as one type of specialty clinic eligible for licensure pursuant to the chapter on clinic licensing (§ 1200, *et seq.*):

“A ‘surgical clinic’ means a clinic which is not part of a hospital and which provides ambulatory surgical care for patients who remain less than 24 hours. A surgical clinic does not include the office of private physicians or dentists in individual or group practice.”

As with all clinics and other licensed health facilities (§ 1250, *et seq.*), a surgical clinic must obtain a “certificate of need” from OSHPD for any of a series of projects (§ 437.10), such as establishment of a new clinic or conversion to such a clinic (§ 437.10(b)), or the establishment by such a clinic of a new special service as defined in section 1203 (§ 437.10(c)), or the purchase or lease by such a clinic of diagnostic or therapeutic equipment with a value in excess of \$150,000 (§ 437.10(d)), or any project requiring a capital expenditure by such a clinic in excess of \$150,000. (§ 437.10(e).) The basis for the decision of OSHPD as to whether to grant a certificate of need is in part, the Statewide Plan. (§ 437.9.)

The Council, created by section 437, is given several functions, two of which are key here:

“(a) The Advisory Health Council, with the recommendation of the state department [OSHPD], shall approve the statewide health facilities and services plan adopted pursuant to subdivision (b) of Section 437.7.

“

“(d) The Advisory Health Council shall act as the appeals body pursuant to Section 438.8 regarding applications for a certificate of need filed pursuant to this part.” (§ 437.5.)³

Pursuant to section 437.7 the Council is also required to evaluate and designate one area health plan agency for each area of the state designated by the Council “[i]n order to assure availability of objective and impartial review by planning groups (referred to as area health planning agencies) of proposals for health facility projects as set forth in Section

³ The “this part” referred to in section 437.5(d) is part 1.5 (§ 437, *et seq.*) of division 1, entitled “Health Planning” and contains the provisions for area and Statewide Plans (§§ 437.7 and 437.8), and certificates of need (§ 437.10. *et seq.*).

437.10” The functions of area health planning agencies are:

“(a) To review information on utilization of hospitals and related health facilities.

“(b) To develop area plans to be used for the determination of community need and desirability of projects specified in Section 437.10, *consistent with the regulations adopted by the Office of Statewide Health Planning and Development* pursuant to Section 437.8. Each such plan shall become effective *upon a determination by the council that the plan is in conformance with regulations adopted pursuant to Section 437.8*. The council shall integrate all such area plans into a single Statewide Health Facilities and Services Plan, which shall become effective upon formal adoption by the council.

“

“(d) To review applications for certificates of need as required by Section 437.10 and make recommendations to the office as to the need and desirability for the project proposed in the application, based upon the statewide and area plans adopted pursuant to subdivision (b) or, prior to the adoption of such plans, based upon the existing plans specified in Section 437.9.

“(e) To make written findings of fact and recommendations to be delivered to applicant and filed with the office as a public record.” (§ 437.7.) (Emphasis added.)

The Council, then, is charged with the responsibility of reviewing the area plans, determining whether they conform to the regulations adopted by OSHPD pursuant to section 437.8,⁴ and then integrating those plans into the Statewide Plan. As noted, the

⁴ Section 437.8, prior to the amendment by chapter 1186 provided:

“The Office of Statewide Health Planning and Development shall promulgate regulations setting forth statewide policies for area health planning agencies in the performance of their responsibilities under Section 437.7.

“In adopting such regulations, the office shall, with the advice of the Advisory Health Council, consider the following factors, and may consider other factors not inconsistent with the following:

“(a) The need for health care services in the area and the requirements of the population to be served, including evaluation of current utilization patterns;

Statewide Plan is, in part, the basis for determination of applications for certificates of need, and the Statewide Plan, being an amalgam of the area plans, will, in theory, be based on the regulations of OSHPD, and therefore the factors required to be considered by the Legislature in section 437.8. We shall now examine whether chapter 1186 made any significant change in this entire scheme which would require the plan revision and updating process be stopped until OSHPD revises its regulations. We think not.

“(b) The availability and adequacy of health care services in the area’s existing facilities which currently conform to federal and state standards;

“(c) The availability and adequacy of services in the area such as preadmission, ambulatory or home care services which may serve as alternatives or substitutes for care in health facilities;

“(d) The possible economies and improvement in service that may be derived from the following:

“(1) Operation of joint, cooperative, or shared health care resources;

“(2) Maximum utilization of health facilities consistent with the appropriate levels of care, including but not limited to intensive care, acute general care, and skilled nursing care;

“(3) Development of medical group practices, especially those providing services appropriately coordinated or integrated with institutional health service, and development of health maintenance organizations;

“(e) The development of comprehensive services for the community to be served. Such services may be either direct or indirect through formal affiliation with other health programs in the area, and include preventive, diagnostic, treatment and rehabilitation services. Preference shall be given to health facilities which will provide the most comprehensive health services and include outpatient and other integrated services useful and convenient to the operation of the facility and the community;

“(f) The needs or reasonably anticipated needs of special populations, including members of a comprehensive group practice prepayment health care service plan, members of a religious body or denomination who desire to receive care and treatment in accordance with their religious conviction, or persons otherwise contracted or enrolled under extended health care arrangements, including lifecare agreements pursuant to Chapter 10 (commencing with Section 1770). Division 2 of the Health and Safety Code.

“(g) The special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service areas in which the entities are located. Such entities may include medical and other health professional schools, multidisciplinary clinics, and specialty centers.”

The only change made to this section by chapter 1186 was to add the paragraph to the end set forth in footnote 2 above.

Our duty in this regard, of course, is to follow the fundamental rule of statutory construction that the intent of the Legislature must be ascertained so as to effectuate the purposes of the law. (*Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645.) A corollary rule is that every statute should be construed with reference to the whole system of law of which it is a part so that all of it may be harmonized and have effect. (*Stafford v. L.A., etc., Retirement Board* (1954) 42 Cal. 2d 795, 799; 58 Ops. Cal. Atty. Gen. 507, 511 (1975).) We believe that application of these rules to chapter 1186 and the statutory scheme relating to the Statewide Plan outlined above requires the conclusion that the Council should proceed with its work.

First, we note that the amendment to section 437.8 does not by its terms purport to require any amendment or revision of OSHPD's regulations. Indeed, it only purports to be a statement by the Legislature of its intent concerning the expansion of surgical clinics. Moreover, the amendment does not even add a factor to the list to be considered by OSHPD when it adopts its regulations.

Secondly, when the Legislature wants a process to stop or not to start until regulations are adopted or revised, it can say so directly. Indeed, when chapter 854 of Statutes in 1976 was enacted, which statute substantially revised Part 1.5 of Division 1, the law we are concerned with here, it added this provision:

“SEC. 41.7. The changes in Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code and in Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code made by this act shall become operative on the effective date of this act; except that if regulations are not adopted pursuant to Section 437.6 within 90 days after the effective date of this act, Part 1.5 (commencing with Section 437), except Section 437.5, shall not be operative until the date upon which such regulations are filed with the Secretary of State.”

Chapter 1186 contains no provision directing that plan approvals or certificate of need applications should be suspended until the section 437.8 regulations are revised.

Finally, the history of chapter 1186 supports a conclusion that the amendment to section 437.8 was only intended to be a declaration of legislative intent for consideration by OSHPD in adopting or amending its regulations and by the Council and area agencies in the formulation and review of the area and Statewide Plans.

1. As introduced in the Assembly on March 26, 1979, Assembly Bill 1317 provided for an exemption from a certificate of need for an existing licensed community clinic to convert to a chronic dialysis clinic, one of the specialty clinics defined by section 1204(b) (2).

2. As amended in the Assembly on April 26, 1979, Assembly Bill 1317 would also, by an amendment to section 1204, provide an exemption from a certificate of need for any existing, licensed clinic which provided the services of a surgical clinic to convert to a licensed surgical clinic.

3. The June 7, 1979 amendment put the proposed certificate of need exemptions for dialysis clinics and conversion to surgical clinics in section 437.10, the section listing the projects for which a certificate of need is required, but dropped the proposed amendment to section 1204 relating to exemptions for conversion to surgical clinics (although the exemption for chronic dialysis clinics remained in the bill). The June 7 amendment also added a proposed section 1233 which remained in the bill thereafter and is now law:

“A surgical clinic may restrict use of its facilities to members of the medical staff of the surgical clinic and other physicians and surgeons approved by the medical staff to practice at the clinic.”

4. The June 20, 1979 amendment in the Assembly dropped the amendment to section 437.10 providing limited exemptions for certificates of need for chronic dialysis and surgical clinics. We are informed that the reason for this was that Senate Bill 980, which was then in the Assembly, contained a grandfather exemption to the certificate of need requirements through the addition of a new section 1205.⁵

Thus, as of June 20, 1979, AB 1317 had no provision as to certificate of need for surgical clinics.

5. The August 21, 1979 amendment in the Senate dropped the amendment to section 1204 exempting existing clinics which are providing chronic dialysis services from certificates of need on conversion. (This was apparently because Senate Bill 980 took care

⁵ Senate Bill 980 eventually passed and became law as an urgency measure on September 7, 1979. By virtue of a new section 1205.5, existing and qualified clinics providing chronic dialysis or surgical services could convert to these specialty licenses without obtaining a certificate of need under section 437.10. Section 1205.5 also contained a provision that an existing licensed clinic which provided surgical services and met the requirements for licensure as a surgical clinic need not operate on an “open-staff” basis. Thus, the provisions of proposed section 1233 in Assembly Bill 1317 were in effect made applicable to grandfather surgical clinics.

of the problem.) This amendment also added a version of what ultimately became the critical paragraph to section 437.8,⁶ and a proposed new section 1205.7 in essentially the same form of that portion of section 1205.5 as proposed by Senate Bill 980 relating to surgical clinics, that is a grandfather exemption from certificate of need for existing licensed clinics converting to surgical clinics. The proposed new section 1233 remained unchanged.

6. In the Senate on August 29, 1979 a minor change in language was made to the new paragraph to be added to section 437.8. Assembly Bill 1317 passed the Senate in this form. The Assembly rejected the Senate Amendments, and the bill then went to conference. The conference report came out after Senate Bill 980 had become law.

7. The conference committee created in effect a new bill, which was adopted and became chapter 1186. Section 1 added a new article 8 to chapter 4 of Part 1, division 1, creating a mechanism for grants and loans to community and free clinics. Section 2 added the new paragraph (in the form quoted in footnote 2, above) to section 437.8, while section 3 added the new section 1233. Section 4–8 amended and repealed various sections of chapter 1 of division 2, the clinic licensing chapter relating to allocation of grants and loans. Section 9 enacted an appropriation of \$2.1 million for grants and loans to community clinics and free clinics. Section 10 was the urgency clause.

Thus, from a bill initially designed to exempt conversion of existing clinics to chronic dialysis or surgical clinics from a certificate of need, chapter 1186 became essentially a community and free clinic grant and loan program bill. The certificate of need exemption provision for existing clinics was taken care of by chapter 490 (SB 980). As to those clinics which qualified for an exemption for a certificate of need, there would be no concern with an area or Statewide Plan or the regulations adopted pursuant to section 437.8. If a problem existed of a significant number of existing licensed clinics desiring to convert to chronic dialysis or surgical clinics being unable to qualify for such specialty clinics because of limitations in the Statewide Plan, chapter 490 removed that problem. As to potential new surgical clinics or existing clinics which did not qualify for the chapter 490 grandfather exemption, we find nothing in the amendment to section 437.8 or the new section 1233 which in any way compels a conclusion that the entire certificate of need procedure or the development and revision of area plans and the Statewide Plan relating to

⁶ By the August 21 amendment, this paragraph would have read:

“With respect to the adverse effect of new or expanded surgical clinics on the utilization of operating rooms in hospitals, it is not the intent of the Legislature to limit the expansion of surgical clinics when the hospitals have not made efforts to fully utilize their ambulatory operating capacity and provide outpatient services at a reasonable cost to the community.”

all clinics and health facilities should be shut down until OSHPD revised its regulations, if such revision is necessary at all. Rather, we see the amendment to section 437.8 as a declaration by the legislature that in planning for surgical clinics, and in passing on certificates of need for such clinics, the Council and OSHPD should consider that the Legislature did not intend to limit the expansion of such surgical clinics when the hospitals have not made efforts to fully utilize their ambulatory operating capacity and to provide ambulatory surgical services at a reasonable cost to the community.”

It has been suggested that because chapter 1186 was an urgency statute, it demonstrates a legislative intent that the section 437.8 regulation should be amended and the ongoing certificate of need review and plan revision process halted until the new regulations could be considered. The urgency clause of chapter 1186 reads as follows:

“SEC. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

“It is necessary that this act take effect immediately in order to ensure that community clinics and free clinics, which are a primary source of health care for a significant portion of the medically unserved, accounting for more than 1,000,000 patient visits annually, maintain a continuity of care through grants and loans for services and renovations necessary for the health and safety of the patient population.

“Furthermore, unless immediate legislative action is taken, uncertainties resulting from the implementation of Chapter 1147 of the Statutes of 1978 may require surgical clinics providing necessary services to suspend their current services with attendant great medical and financial hardship to patients and the clinics.”⁷

The last paragraph of this urgency clause is similar to the last paragraph of the urgency clause of chapter 490 (SB 980).⁸ The Chapter 1186 urgency clause appears to be more an

⁷ Chapter 1147, Statutes of 1978, referred to in the last paragraph of the urgency clause totally revised the clinic licensing provisions of chapter 1 of division 2, including creating a specialty clinic system of section 1204(b), with conforming changes to other sections, including section 437.10(b) on the requirement for a certificate of need for the establishment of a specialty clinic.

⁸ Section 2 of chapter 490, the urgency clause, reads:

“

“Unless immediate legislative action is taken, uncertainties resulting from the

urging that the Council and OSHPD henceforth consider the legislative intent as expressed in the amendment to section 437.8 in ruling on certificates of need and reviewing plans rather than that the process should stop until the regulations are amended, if necessary at all, by OSHPD.

We conclude, then, that the Council may proceed with its functions of determining whether the area plans are in conformance with the regulations adopted by OSHPD pursuant to section 437.8 and to integrate those plans into the Statewide Plan prior to any amendments being made to those regulations to reflect the legislative intent expressed in the amendment to section 437.8 and chapter 1186. In all of their functions, the Council, area planning agencies and OSHPD should, of course, heed that expression of legislative intent.

implementation of Chapter 1147 of the Statutes of 1978 may require outpatient clinics providing necessary surgical and kidney dialysis services to suspend their current services with attendant great medical and financial hardship to patients and the clinics.”