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OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

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| OPINION | : | No. 80-711 |
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| of | : | <u>JANUARY 14, 1981</u> |
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| GEORGE DEUKMEJIAN | : | |
| Attorney General | : | |
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| Paul H. Dobson | : | |
| Deputy Attorney General | : | |
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The Honorable Henry W. Zaretsky, Director, Office of Statewide Health Planning and Development, has requested an opinion on the following question:

Does Health and Safety Code section 438.5 preclude the adoption of a regulation which would authorize dispensing with the hearing required by that section when all the parties have waived an oral hearing and no one has requested the hearing within a specified time period after public notice has been given calling for such requests?

CONCLUSION

Health and Safety Code section 438.5 precludes the adoption of a regulation which would authorize dispensing with the hearing required by that section when all parties have waived an oral hearing and no one has requested the hearing within a specified time period after public notice calling for such requests.

ANALYSIS

The Health Planning Law (Health & Saf. Code, § 437 *et seq.*) as revised by Statutes 1976, chapter 854, requires, among other provisions, that a health facility must obtain a certificate of need issued by the Office of Statewide Planning and Development in order to commence certain projects relating to the increase of health care services. (Health & Saf. Code,¹ § 437.10; 62 Ops. Cal. Atty. Gen. 270, 272 (1979).)

A health facility which desires to commence a project listed in section 437.10 must apply for a certificate of need. (§§ 438, 438.6.) At least 60 days prior to the filing of an application, the applicant health facility is required to notify the state Department of Health Services and the appropriate area health planning agency of its intent to apply. (§ 438.3.) Within 30 days after receiving a copy of an application, the area health planning agency is required to hold one or more public meetings for review and comment upon the application; within 45 days after receiving the application the area health planning agency shall submit to the state Department of Health Services any recommendations or comments concerning the application. (§ 438.5.) Thereafter, a hearing on the application is held pursuant to section 438.5 which provides in pertinent part:

“(a) Within 90 calendar days of the receipt of the complete application, or an application otherwise deemed complete pursuant to Section 438.2, the Office of Statewide Health Planning and Development *shall hold a hearing on the application in the geographical area served by the area health planning agency* reviewing the project. At the hearing, the area health planning agency shall present its recommendations and comments on the application except as otherwise provide in this part, the hearing shall be conducted in accordance with Chapter 5 (*commencing with Section 11500*) of Part I of Division 3 of Title 2 of the Government Code, except that the office may use its own hearing officer.

“.....”

“(c) The office shall make a final decision on an application within 15 calendar days after the conclusion of The public hearing at which the application was considered and shall make its findings public. The decision shall either approve the application, approve it with modifications, reject it, or approve it with conditions mutually agreed upon by the applicant and the office. Failure of the office to render a decision within such time shall be deemed approval of the application and the office shall issue a certificate of

¹ All section references are to the Health and Safety Code unless otherwise specified.

need for the project described in the application. The failure of any applicant to fulfill the conditions under which the certificate of need was granted shall constitute grounds for revocation of such certificate of need.

“” (Emphases added.)

The hearing specified in section 438.5 is clearly a public hearing. Subdivision (c) of that section refers to it as such. The reference in subdivision (a) (see ch. 5 of part 1, div. 3 of tit. 2) of the Government Code—the Administrative Procedures Act—demonstrates the Legislature intended the hearing to involve oral testimony and/or argument. (See Gov. Code, §§ 11512, 11513; *cf.* Gov. Code, § 11517.)

The statutory requirement that the hearing be in the geographic area served by the health planning agency demonstrates the hearing is to be at a location where interested members of the public may attend. Thus, the hearing contemplated by the statute involves a meeting conducted at a definite time and place and attended by a representative or representatives of the area health planning agency and by the interested parties and members of the public. Thus, it is to be an “oral hearing”—to use the words of the question.

We note in this regard that regulations promulgated by the Director of the Office of Statewide Health Planning and Development (§ 437.6) implementing section 438.5 presently provide for public “oral hearing.” (Tit. 22, Cal. Admin. Code, § 90501 *et seq.*) The parties to the hearing are a representative of the Office of Statewide Health Planning and Development, the area agency, and the applicant health facility. (Tit. 22, Cal. Admin. Code, § 90507.) Title 22, California Administrative Code section 90513 provides that, in addition to the parties, members of the public shall have a chance to be heard at the hearing. We are asked whether section 438.5 precludes the Director of the Office of Statewide Health Planning and Development from adopting a regulation which would dispense with the hearing required by that section in cases where the parties have waived an oral hearing and no member of the public has requested a hearing after public notice calling for such requests within a certain period of days prior to the hearing.

It is our conclusion, for the reasons set forth below, that the director has no authority to promulgate such a regulation in view of the language of section 438.5. Government Code section 11342.2 provides:

“Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”

Section 438.5 provides that in every case to which it is applicable, a hearing “shall” be conducted. Thus, the requirement for a hearing is mandatory. (§ 16.) The statute does not distinguish between “uncontested” and “contested” matters. It does not authorize the dispensing of the hearing in cases where no one requests it.

The proposed regulation would eliminate a hearing in “uncontested” applications contrary to the terms of the statute. For that reason, we conclude that the regulation would thus be inconsistent with the statutory requirement and thus would be invalid.

It has been suggested that the requirement of a prior request for public hearing is merely a way of effectuating a “waiver” by the public at large to its right to a public hearing under section 438.5. “Waiver is the intentional relinquishment of a known right after knowledge of the facts.” (*Roesch v. Demota* (1944) 24 Cal. 2d 563, 572.) In certain cases an individual member of the public can waive a right granted to him or her pursuant to a statute. (See, e.g., 57 Ops. Cal. Atty. Gen. 70, 72 (1974).) Each and every member of the public may waive his or her individual right to attend a public hearing under section 438.5 by simply not attending. The fault which would render the regulation suggested by the instant request invalid, is not that it purports to permit a waiver by each and every member of the public of his or her right to attend the public hearing. Rather, it is that the regulation would establish an additional requirement of a written request for the conduct of the public hearing. That requirement is not mentioned in the statute; it is not reasonably necessary to effectuate the purpose of the statute, nor is it reasonably designed to aid the statutory objective which is to have a public hearing in every case. Where a regulation imposes an additional requirement not mentioned in the statute, the regulation is valid only if the additional requirement is reasonably necessary to effectuate the purpose of the statute or reasonably designed to aid the statutory objective. (*Ross General Hospital, Inc. v. Lackner* (1978) 83 Cal. App. 3d 346, 354.)

It is our conclusion, therefore, that Health and Safety Code section 438.5 precludes the adoption of a regulation which would authorize dispensing with the hearing required by that section on uncontested certificate of need applications where all parties have waived an oral hearing and no one has requested the hearing within a specified number of days after public notice calling for such requests.
