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OPINION	:	No. 82-501
of	:	<u>DECEMBER 31, 1982</u>
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The ADVISORY HEALTH COUNCIL has requested our opinion on the following question:

Does the Office of Statewide Health Planning and Development have the authority to require, as a condition for its approving a certificate of need application, that a health facility agree to provide a "negotiated quota" of Medi-Cal beneficiaries with services?

CONCLUSION

The Office of Statewide Health Planning and Development has authority to condition a certificate of need upon the agreement of the applicant health facility to provide services to a "negotiated quota" of Medi-Cal beneficiaries in appropriate cases.

## ANALYSIS

The California Health Planning Act (Stats. 1967, ch. 1597, p. 3826, § 1; Health & Saf. Code, div. 1, pt. 1.5, § 437 et seq.)<sup>1</sup> is a labyrinthine enactment setting forth a comprehensive state health planning program that was designed, inter alia, to "stop or retard the increasing cost of medical care in California and [the] proliferation of superfluous health facilities, beds and services by setting forth in a state plan the projected needs for hospital beds and thereafter enforcing compliance with the plan." (*Bakersfield Community Hosp. v. Department of Health* (1977) 77 Cal.App.3d 193, 198.) Basically it requires that a health facility obtain a certificate of need issued by the Office of Statewide Health Planning and Development (hereinafter, "OSHPD") before undertaking any of a lengthy list of "projects." (§ 437.10.) These include constructing a new health facility (*id.*, subd. (a)); increasing a facility's bed capacity or reclassifying its beds (*ibid.*); converting an existing facility from one license category to another (*ibid.*); establishing a new specialty clinic or converting a primary care clinic to one (*id.*, subd. (b)); establishing a new special service or certain emergency centers (*id.*, subd. (c)); initially purchasing diagnostic or therapeutic equipment with a value in excess of a certain amount (*id.*, subd. (d)); or, with certain exceptions, any "modernizing" involving a capital expenditure greater than a "threshold" amount (*id.*, subd. (e)).

Under the mechanism of the law, an application for a certificate of need for a covered project is submitted to OSHPD (§§ 438, 438.1) 60 days after giving notice of an intent of applying for one. (§ 438.3.) OSHPD transmits a copy of the application to the appropriate local area health planning agency which reviews it and makes comments and recommendations to OSHPD concerning, inter alia, the need and desirability of the project. (§ 437, subds. (d)(e); § 438.4.) OSHPD itself approves the application outright or orders a hearing if it has substantial questions about the project or if a hearing is requested by the area agency. (§ 438.5(a)(1), (2).) Following a hearing OSHPD must issue a decision either approving the application, approving it with modifications, rejecting it, or *approving it "with conditions mutually agreed upon by the applicant and the office."* (§ 438.5, subd. (e).)<sup>2</sup> Either the applicant or the appropriate area health planning agency may appeal OSHPD's decision granting or denying the certificate to the Advisory Health Council (§ 438.8-438.11) or directly to superior court. (§ 438.13.)

Area agencies and OSHPD have apparently been requiring health facilities to accept a "negotiated quota" of Medi-Cal patients as a condition to their receiving

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<sup>1</sup> Statutory references herein are to the Health and Safety Code unless otherwise stated.

<sup>2</sup> Subdivision (a)(1) of section 438.5 also provides that OSHPD may, without a hearing, approve an application with modifications or *conditions* but only where the applicant agrees to them in writing.

approval for their certificate of need applications. This has taken the form of an agreed upon number of actual patients to be accepted or an agreed upon percentage of the facility's admissions.<sup>3</sup> We are asked by the council whether OSHPD has the authority to condition approval of an application for a certificate of need on an applicant's agreeing to provide services to such an agreed upon amount of Medi-Cal patients. We conclude that whether the type of condition would be within the province of OSHPD to seek would depend on the facts and circumstances surrounding the application for the certificate of need in the particular case.

Any discussion of OSHPD's powers in this regard starts from the premise that administrative agencies are creatures of statute and are empowered to do only those acts as are within the express or implied scope of the statutes from which they derive their powers. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 105; *Blatz Brewing Co. v. Collins* (1945) 69 Cal.App.2d 639, 645-646; cf. Gov. Code, § 11342.1; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419-420.) Here then it cannot be questioned that OSHPD has expressly been given the power to condition its approval of certificate of need applications on an applicant's agreeing to certain matters. (§ 438.5, subds. (a)(1), (e).) But the power to seek and impose conditions is not without limit. Any such condition certainly must be lawful and it must not be arbitrary and capricious (§ 438.9 (a ground for appeal to the council from OSHPD action))<sup>4</sup> or constitute an abuse of discretion (Code of Civ. Proc., § 1094.5, subd. (b) (a ground for appeal to superior court from OSHPD action))<sup>5</sup>. Further, although OSHPD has been granted the power to condition its action any condition it might seek to impose must still be within its statutory authority to make. (*Liberty v. California*

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<sup>3</sup> We do not imply that the agreed upon "negotiated quotas" are limited to these forms for their determination. Rather, they can be based on a wide variety of formulae for calculation.

<sup>4</sup> Section 438.9 provides:

"Grounds for appeal pursuant to Section 438.8 shall be limited to the following:

"(a) The state department or the hearing officer violated the review procedures prescribed by this part.

"(b) The decision of the state department is not supported by substantial evidence.

"(c) The state department or hearing officer has otherwise acted in an arbitrary and capricious manner."

<sup>5</sup> Subdivision (b) of section 1094.5 of the Code of Civil Procedure provides:

"(b) The inquiry in [administrative mandamus] . . . shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the [weight of the] evidence."

*Coastal Com.* (1980) 113 Cal.App.3d 491, 498-499, 501-502; 44 Ops.Cal.Atty.Gen. 65, 66, 67 (1964).) We must therefore examine OSHPD's enabling statutes to determine whether their empowering OSHPD to rule on certificate of need applications authorizes it to require as a condition of approval that a facility agree to provide its services to a negotiated number of Medi-Cal patients.

Section 437.9, subdivision (a), sets forth two sets of criteria upon which applications for certificates of need are to be reviewed thus:

"(a) The basis for decisions by the Office of Statewide Health Planning and Development on applications for certificates of need filed pursuant to this part shall be:

"(1) The Statewide Health Facilities and Services Plan specified in subdivision (b) of Section 437.7.

"(2) The statewide policies developed pursuant to Section 437.8."

The two bases overlap since they cross-reference each other. Thus, *section 437.7, subdivision (b)* describes the Statewide Plan as an integration made by the Advisory Council of all local area plans for community needs and desirability of projects that have been developed by area health planning agencies, consistent and in conformance with the regulations adopted by OSHPD pursuant to section 437.8, while *section 437.8* mandates OSHPD to "promulgate regulations setting forth statewide policies for area health planning agencies in performance of their responsibilities under section 437.7."<sup>6</sup> It is to section 437.8 that we turn, for there the Legislature has actually set forth the factors to be considered by OSHPD in formulating the "statewide policies" to which the Statewide Plan must adhere. It provides as follows:

"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:

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<sup>6</sup> The regulations so adopted appear at title 22, California Administrative Code, sections 90901-90931.

"(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.

"(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 life-care 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.

"....."

None of the factors listed expressly grants the authority to OSHPD to include, as a *condition* for its approving of a certificate of need application, that a facility agree to provide services to a "negotiated quota" of Medi-Cal patients. Such authority however may reasonably be implied from, or at least would not be inconsistent with, the statutory charge found in subdivisions (a), (b) and (f) for OSHPD in developing criteria to govern approval of certificates of need to give consideration to: the requirements of the population to be served, to the needs of special populations, and to the existing availability of health care services in the area. (See also 22 Cal. Admin. Code, § 20901, subd. (b).<sup>7</sup>) Indeed the federal law which sets forth the requirements and standards that a state certificate of need program must meet in order for the state to qualify for financial assistance under federal health programs (cf. *State of N.C. ex rel. Morrow v. Califano* (E.D.N.C. 1977) 445 F.Supp. 532, 534) makes implication of such authority all the more reasonable as it makes consideration of the needs of the medically indigent a factor in determining a certificate of need.

Section 1523(a)(4)(B) of the Public Health Service Act as amended, upon which California's certificate of need program is now established (cf. *Placentia-Linda Community Hospital v. Zaretsky* (1980) 107 Cal.App.3d 850, 853), requires that each state agency designated as its health planning and development agency, such as OSHPD, must "administer a state certificate of need program which applies to the obligation of capital expenditures within the state and the offering within the state of new institutional health services and the acquisition of major medical equipment and which is consistent with standards established by the Secretary [of Health and Human Services] by regulation." (42 U.S.C.A. § 300 m-z (a)(4)(B).)<sup>8</sup>

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<sup>7</sup> OSHPD's regulations provide that "[n]o project shall be found to be desirable [and therefore eligible for a certificate of need] unless the applicant makes a substantial showing that . . . (11) [t]he project will . . . *enhance accessibility* of health services to the population to be served . . . [and] (15) [t]he project *will not adversely affect* the indigent population of the area." (22 Cal. Admin. Code, § 20901, subd. (b)(11, 15).)

<sup>8</sup> The Secretary is directed to, by regulation, issue guidelines concerning national health planning policies (42 U.S.C.A. § 300K-1). By congressional directive they must include "standards respecting the appropriate supply, distribution, and organization of health resources . . . [that in turn] reflect the unique circumstances *and needs of medically underserved populations* . . ." (*Id.*, subsection (b)(1).)

The regulations setting forth the requirements and standards that a state certificate of need program must meet are found in title 42, Code of Federal Regulations, part 123, subpart E (§ 123.401 et seq.). (42 C.F.R. § 123.402.) Section 123.412 thereof deals with the criteria for review of certificate of need applications, providing in part as follows:

"(a) The State Agency shall adopt, and use as applicable, specific criteria for conducting the reviews covered by this subpart. The criteria must be based only on the following general considerations, except that the State Agency may include any additional criteria which it prescribes by regulation in accordance with an authorization under State law. . . .

"(1) The relationship of the health services being reviewed to the applicable health systems plan, annual implementation plan, and State health plan.

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"(5)(i) *The need that the population served or to be served has for the services proposed to be offered or expanded, and the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups, and the elderly, are likely to have access to those services.*

"(ii) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on *the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups, and the elderly, to obtain needed health care.*

"(G) The contribution of the proposed service in meeting the health related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services (for example, low income persons, racial and ethnic minorities, women, and handicapped persons), particularly those needs identified in the applicable health systems plan, annual implementation plan, and State health plan as deserving of priority. For the purpose of determining the extent to

which the proposed service will be accessible, the State Agency shall consider:

"(i) *The extent to which medically underserved populations currently use the applicant's services in comparison to the percentage of the population in the applicant's service area which is medically underserved, and the extent to which medically underserved populations are expected to use the proposed services if approved;*

"(ii) The performance of the applicant in meeting its obligation, if any, under any applicable Federal regulations requiring provision of uncompensated care, community service, or access by minorities and handicapped persons to programs receiving Federal financial assistance (including the existence of any civil rights access complaints against the applicant);

"(iii) *The extent to which Medicare, Medicaid and medically indigent patients are served by the applicant;* and

"(iv) The extent to which the applicant offers a range of means by which a person will have access to its services (e.g., outpatient services, admission by house staff, admission by personal physician).

"NOTE: Where appropriate, the State Agency may also consider other access issues, such as: (1) the extent to which the applicant grants medical staff privileges to physicians who serve the medically underserved; and (2) *the extent to which the applicant takes action necessary to remove barriers that limit access to the health services of the applicant. These barriers may include unavailability of public transportation; absence of translation services where a substantial portion of the population of the health service area does not speak English as its primary language; building designs that substantially hinder use of the facility; and financial barriers (e.g., pre-admission deposits).*" (Emphases added.)

Clearly there will be times when the availability of an applicant's services to Medi-Cal patients will be an important factor in determining whether its certificate of need application should be approved, that is, whether the proposed undertaking by the facility will actually fill the professed need of the community as alleged in the application. In those situations, a condition in the certificate of need to formalize the understandings between the applicant and OSHPD regarding that availability and to ensure it would be appropriate and maybe even necessary. For example, where an application is for the purpose of adding



beds to serve an underserved Medi-Cal population, conditioning approval of the certificate of need upon the applicant's actually serving that population would be eminently reasonable.

On the other hand, we can envision scenarios in which such a condition would be unreasonable and its imposition arbitrary. Chapter 328, Statutes of 1982, has established a new system for providing hospital services to Medi-Cal patients. Under this new law a special negotiator for the state is to contract with the optimum number of inpatient hospital service providers to provide service to the Medi-Cal patients in the area and this is to be the exclusive means of providing services to such patients. (Welf. & Inst. Code, § 14081.) After such contracts are negotiated for an area it would be unreasonable and arbitrary to condition a certificate of need for a health facility which has not contracted with the state to serve Medi-Cal patients upon an agreement that such health facility serve Medi-Cal patients. Furthermore any such agreement made by a health facility which has not contracted to provide Medi-Cal services, as a condition to a certificate of need issued prior to the time the new law became effective, would be nullified since the new law will make its performance impossible.

Thus, conditioning an approval of a certificate of need on an applicant's agreeing to provide services to a "negotiated quota" of Medi-Cal patients depends upon the facts and circumstances of each particular application and an unqualified answer to the question presented cannot be given. Resolution of the matter must be made on a case by case basis where its determination would rest initially with the area agency and OSHPD as part of their view of the application for the certificate of need itself. Their decision on the matter of whether a "quota" should be sought and imposed as a condition of approving the application would then be subject to review by the Advisory Health Council (§§ 438.8-438.11) and superior court (§ 438.13; Code of Civ. Proc., § 1094.5) where a determination would be made as to its propriety, i.e., whether imposition of a "quota" condition was warranted or was unsupported in the premises and/or constituted an abuse of discretion. Where it would be appropriate considering the circumstances of a particular case, OSHPD would have authority to require that a health facility agree to provide a "negotiated quota" of Medi-Cal recipients with services as a condition for its approving a certificate of need application.

We are not unmindful of the fact that, generally speaking, a health facility is under no obligation to participate in the Medi-Cal program, which is a strictly voluntary contractual arrangement.<sup>9</sup> (*Roberts v. Brown* (1971) 6 Cal.3d 1, 6-7; *California*

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<sup>9</sup> Concomitantly a health facility has no right to participate in the Medi-Cal program either. (*Paramount Convalescent Center, Inc. v. Dept. of Health Care Services* (1975) 15 Cal.3d 489, 497, 500-501; cf. *Zimmerman v. Brian* (1974) 41 Cal.App.3d 563, 568 (pharmacist); *Green v.*

*Association of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 800, 817; cf. Welf. & Inst. Code, div. 9, pt. 3, ch. 7, arts. 2.6-2.91, §§ 14081-14089, added by Stats 1982, ch. 328, pp. 2298-2305, §§ 17-21.) Since they, unlike public utilities, are under no legal compulsion to serve all customers, such an obligation would raise constitutional questions. (*California Association of Nursing Homes v. Williams, supra.*) Nevertheless, a health facility is not free to build or expand its services willynilly either, and in fact both our federal and state health planning laws were enacted for the very purpose of monitoring that activity and controlling it through the certificate of need process. (*State of N.C. ex rel. Morrow v. Califano, supra*, 445 F.Supp. at p. 534; 1974 U.S. Code Cong. & Admin. News, pp. 7878-7879, 7891, 7892, 7985-7986; *Bakersfield Community Hosp. v. Dept. of Health, supra*, 77 Cal.App.3d at p. 198.) And there both the federal and state health planning laws have made the accessibility of health care delivery systems to the indigent a factor to be considered in determining whether a new facility or expanded services are needed. (42 C.F.R., *supra*, § 123.412; § 437.8; 22 Cal. Admin. Code, § 90901, subd. (b) (11, 15), *supra.*) Other laws dealing with health facilities have imposed an obligation upon them to be accessible to Medi-Cal patients as well. (§ 436.8, subd. (j), 436.81-436.85 (California Health Facility Construction Loan Insurance Law; Stats. 1969, ch. 970, p. 1920, § 1, as amended); Gov. Code, § 15459 (California Health Facilities Authority Act; Stats. 1979, ch. 1033, p. 3558, § 1); see generally 65 Ops.Cal.Atty.Gen. 165 (1982).) Requiring such accessibility and insuring it through a condition for approval of a certificate of need application, as appropriate, is consistent with the purposes for which the health planning laws were designed, and indeed may be the only means in certain cases to insure that such purposes will be effected. So conceived they provide the flexibility necessary to make the law viable, for clearly neither the statute itself nor the Department's regulations setting forth the Statewide Policies could anticipate the detailed peculiarities inherent in each individual case.

We therefore conclude that where it would be appropriate in a particular case considering the facts and circumstances surrounding an application for a certificate of need, the Office of Statewide Health Planning and Development may condition its approval of the application by accordingly requiring that the health facility agree to provide a "negotiated quota" of Medi-Cal beneficiaries with services.

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*Cashman* (6th Cir. 1979) 605 F.2d 945, 946 (Medicare); *Case v. Weinberger* (1st Cir. 1955) 523 F.2d 602, 607 (Medicare.)