#36.24 8/24/70

Memorandum 70-79

Subject: Study 36.24 - Condemnation (The Right to Take--"More Necessary" Public Use)

At the July 1970 meeting, the Commission directed the staff to revise certain of the sections to be added to the tentative statute relating to the "more necessary" public use problem and to resubmit all the sections for Commission consideration. We have accordingly reworked these sections making substantial changes in both organization and content. (See Exhibit II - yellow).

Section 450 is substantively the same as the section the Commission approved at the July meeting. The Comment to the section has, however, been revised to indicate more completely the authority for the definition.

Section 451 is also substantively the same as the section the Commission approved at the July meeting. Again, however, the Comment to the section has been revised to provide greater assistance.

Former Section 453 is renumbered to 452. Both the statute and Comment are the same as approved in July.

Former Section 452 is renumbered to 453. We felt that this section should be stated in direct conjunction with new Section 454. Section 453 is the same as approved in July; however, the Comment has been revised to help make clear the relation of this section to Section 454.

Former Section 455 is renumbered Section 454. In July the Commission directed the staff to reexamine this section to determine whether it reenacts existing law. We believe that it does. Section 454 is based on the last sentences in subdivisions (3) of Sections 1240 and 1241 of the Code of Civil Procedure. These respective sentences read as follows:

1240. The private property which may be taken under this title includes:

* * * * *

(3) Property appropriated to a public use; . . . . But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

1241. Before property can be taken, it must appear:

* * * * *

(3) If already appropriated to some public use, that the public use of which it is to be applied is a more necessary public use . . . .

But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, or irrigation district, or transit district, or rapid transit district or public utility district, or water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated. [Emphasis added.]

To the best of our knowledge, Section 454 is substantively identical to the former law. Obviously, Sections 1240 and 1241 were not themselves consistent. For example, Section 1241 lists five kinds of public entities whose property is protected from their counterparts that are not included in Section 1240. (We have underscored these additional entities.) The discrepancy between Sections 1240 and 1241 seems to be unintentional and merely the result of careless statutory drafting. Moreover, the sections have been treated as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758, 349 P.2d

526 (1960). We have conformed the list in Section 454 to the longer list set forth in Section 1241.

Both Sections 1240 and 1241 refer to takings of private property appropriated to the use of certain public entities. In drafting Section 454, we eliminated the modifying word "private" because we believe it is meaningless here. Again, we do not know what, if anything, was originally intended in the use of the word "private." It is clear, however, that these sections are not limited in application to property privately owned but appropriated to public use. See City of Beaumont v. Beaumont Irr. Dist., supra (property owned by irrigation district may not be condemned by city); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district).

In the City of Beaumont case, the property the city sought to condemn was public property owned by an irrigation district. The city contended that Section 1241 referred only to "private property," and, hence, did not apply to or protect the district's property from condemnation. The California Supreme Court rejected this contention and clearly held that the term "private property" in both Sections 1240 and 1241 refers to property owned by public agencies as well as by private persons or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra 63 Cal.2d at 295-296.

Finally, both sections prohibit takings "while such property is so appropriated and used for the public purposes for which it has been so appropriated." The implication is that the property must not only be appropriated to but also in actual use for the proper purposes. However, such is not apparently the rule applied. The Court of Appeal has stated that:

§ 1240. Property subject to be taken

The private property which may be taken under this title includes:

1. Private property.

1. All real property belonging to any person;

2. State lands; exclusion.

2. Lands belonging to this state, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; provided, that all * * * 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and hereby are withheld from the operation of this title and shall not be condemned as against the state or the United States;

3. Property appropriated to public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a state highway or a public street or highway of the state, or a county, city and county, or incorporated city or town, joint highway district, or the use thereof by the state or a county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by the state, a county, city and county, incorporated city or town, joint highway district, irrigation or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by the state, such county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

4. Irrigation district property.

4. Property appropriated to any public use by any irrigation district, may be taken by another irrigation district for another public use and purpose, which is consistent with the use of such property for such existing purposes to the same extent as such property is then used; provided, that the right to such limited use in common shall include the right to enlarge, change or improve the property so taken; provided further, that such enlargement, change or improvement shall not interfere with the original use or any necessary extension or enlargement of such use.

5. Public utility franchises and property.

5. Franchises for any public utility, and all kinds of property of any nature whatsoever used, either during the existence of or at the termination of said franchise, to supply and furnish the service of such public utility, but such franchise or property shall not be taken except for a more necessary public use.

6. Rights of way.

6. All rights-of-way for any and all the purposes mentioned in Section 1238, and any and all structures and improvements on, over, across or along such rights-of-way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right-of-way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

7. Private property not enumerated.

7. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

8. Condemnation of State property.

8. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the Governor, Attorney General, and * * * the State Lands Commission of this state.

§ 1241. Prerequisites

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;

2. That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of property located outside of the territorial limits thereof.

3. If already appropriated to some public use, that the public use of which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of the State, a county, city and county, or any incorporated city or town, or joint highway district, or the use thereof by the State, a county, city and county, or any incorporated city or town, or joint highway district, or a municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district for the same purposes to which it has been appropriated or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a

county, city and county, or any incorporated city or town or by a municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof, or for the purpose of supplying any other public utility, or for any other public use. And such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use; to furnish such a supply or provide for any such other public utility or other public use in conjunction with any other supply or with any other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such county, city and county, incorporated city or town or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district. Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this State to counties, cities and counties, incorporated cities or towns or municipal water districts or irrigation districts, transit districts, rapid transit districts, public utility districts, or water districts.

But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

Memorandum 70-79

EXHIBIT II

COMPREHENSIVE STATUTE § 450

Tentatively approved July 1970

Division 4 - The Right to Take

CHAPTER 8. MORE NECESSARY PUBLIC USE

§ 450. "Property appropriated to a public use"

450. As used in this chapter, "property appropriated to a public use" means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Comment. Section 450 defines "property appropriated to a public use" in accordance with prior California decisions. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750-758, 8 P.2d 532, (1932). The general concept of "public use" is discussed in connection with Section 300. See Section 300 and Comment thereto. It should be noted that appropriation to a public use does not require actual physical use, but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time. See e.g., Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959)(property formally dedicated but not yet used by corporation for cemetery purposes); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(property assembled by electric railway for planned subway).

Moreover, property may be appropriated to a public use even though it is owned by a private individual or corporation. E.g., Woodland School Dist. v. Woodland Cemetery Ass'n, supra; City of Los Angeles v. Los Angeles Pac. Co., supra. Conversely, property may be owned by a public entity but not be so appropriated, and, hence, be subject to condemnation without a showing that it will be appropriated to a "more necessary" use. Deseret Water, Oil & Irr. Co. v. State, 167 Cal. 147, 138 P. 981 (1914), rev'd on other grounds, 243 U.S. 415, and 176 Cal. 745, 171 P. 287 (1917).

§ 451. Property appropriated to a public use may be taken only for more necessary use

451. Except as provided in Section 471, property appropriated to a public use may be taken by eminent domain only for a more necessary public use.

Comment. Section 451 retains the general rule formerly set forth in Code of Civil Procedure Section 1240(3) and repeated elsewhere. This rule prevails over the general authority granted elsewhere to a number of condemnors to condemn property "whether the property is already devoted to the same use or otherwise." See, e.g., Harb. & Nav. Code § 6296. The rule is given much greater specificity in the succeeding sections in this chapter as well as numerous provisions in other codes. See, e.g., Health & Saf. Code § 8560 (no railroad, street, or utility line may be laid across dedicated cemetery without consent of cemetery authority). The introductory clause of Section 451 recognizes the exception for takings for a use that will be wholly consistent with the existing use. See Section 471 and Comment thereto.

§ 452. Use by state more necessary than other uses

452. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than the state, the use thereof by the state for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by the state, the use thereof by the state is a more necessary use than any use to which such property might be put by any other person.

Comment. Section 452 broadens somewhat the general rule stated under former Code of Civil Procedure Section 1240 and Government Code Section 15856 (Property Acquisition Law). Section 1240 formerly provided a state priority over private ownership and Section 15856 provides an absolute priority for all acquisitions under that statute. Section 452 embraces state acquisitions under other authority, most notably by the Department of Water Resources and the Department of Public Works. The exception clause recognizes that specific exemptions may be stated elsewhere. E.g., Health and Safety Code Section 8560 (no street may be laid across existing cemetery without consent of cemetery authority or plot owners).

COMPREHENSIVE STATUTE § 453

Tentatively approved July 1970

§ 453. Use by public entity more necessary than use by other persons

453. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity.

Comment. Section 453 is similar in substance to former Code of Civil Procedure Section 1240(3), except that Section 453 embraces all public entities. Thus, for example, Section 453 includes school districts which formerly were not included.

The preference under Section 453 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. The introductory clause recognizes that specific exceptions may be legislatively declared

elsewhere. Cf. Govt. Code §§ 26301, 37353 (county and city, respectively, may not provide public course by condemning existing privately owned golf course). Perhaps the most notable of these exceptions are contained in Section 454. Under the latter section, property appropriated by any person to the use of certain public entities is protected from subsequent appropriation by certain other public entities. See Section 454 and Comment thereto. See also Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city precluded by former Code of Civil Procedure Sections 1240(3) and 1241(3)--now Section 454--from condemning property appropriated to use of other governmental entities by private corporation).

Memorandum 70-79

COMPREHENSIVE STATUTE § 454

Staff recommendation

§ 454. Property appropriated to a public use by cities, counties, or certain special districts

454. Notwithstanding Sections 451 and 453, property appropriated to the public use of any city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district may not be taken by eminent domain by any other city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district while such property is so appropriated to such use.

Comment. Section 454 codifies prior law under former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 454, like its predecessors, protects property appropriated to a public use by or to the use of one of a group of public entities from condemnation by any other entity in the group. The list of entities in Section 454 conforms to that contained in former Section 1241(3). Former Section 1241(3) listed a greater number of entities than former Section 1240(3); however, the discrepancy appears to have been unintentional, and the sections were apparently regarded as interchangeable. See City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965); County of Marin v. Superior Court, 53 Cal.2d 633, 2 Cal. Rptr. 758, 349 P.2d 526 (1960). The term "appropriated to a public use" is defined by Section 450. See Section 450 and Comment thereto. Former Sections 1240(3) and 1241(3) prohibited takings

"while such property is so appropriated and used for the public purposes for which it has been appropriated." (Emphasis added.) This language implied that the property must not only be appropriated, but also actually used for a public purpose. However, the cases did not so construe the section. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 750, 8 P.2d 532, (1932)("'used' does not mean actual physical use . . . but . . . property reasonably necessary for use" which will be used within a reasonable time). The term "used" has accordingly been eliminated from Section 454 to conform with the actual construction. Similarly, both sections referred to takings of "private" property appropriated to the use of the respective entities. It was clear, however, that the sections were not limited to private property devoted to public use but included property owned by public entities as well as by private individuals or corporations. See City of Beaumont v. Beaumont Irr. Dist., supra (city may not condemn property appropriated to use by irrigation district); County of Marin v. Superior Court, supra (county road may not be condemned by municipal water district); Mono Power Co. v. City of Los Angeles, 284 Fed. 784 (9th Cir. 1922)(city may not condemn property appropriated to use of other governmental entities by private corporation). The modifying word "private" has, therefore, been deleted as meaningless.

COMPREHENSIVE STATUTE § 454

Staff recommendation

Section 454, like its predecessors, protects property appropriated to a public use by the specific condemnees listed from only the condemnors listed. Thus, for example, a city may not take from a rapid transit district, but a school district which is not listed may both take from those listed and their property may be taken by those listed without regard to these provisions (although the general rule stated in Section 451 would still apply).

COMPREHENSIVE STATUTE § 455

Staff recommendation

§ 455. Procedure for raising and resolving more necessary public use issue

455. If property already appropriated to a public use is sought to be condemned and the condemnee desires to contest the taking as not being for a more necessary public use, he shall raise the issue in the manner provided by Section 902. Upon the hearing of such issue, the condemnee has the burden of proving that the property is already appropriated to a public use; and if it is established by proof or otherwise that the property sought to be condemned is already appropriated to a public use, the condemnor has the burden or proving that its use is a more necessary public use than that to which the property has already been appropriated.

Comment. Section 455 makes clear certain procedural aspects of raising and resolving the issues involved in a taking for a "more necessary" public use.

Section 455 requires a condemnee desiring to contest the taking on the ground that the proposed use is not a more necessary public use than that to which the property is already appropriated to raise this defense by preliminary objection. See Section 902 and Comment thereto. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use and the condemnee bears the burden of proof on this issue. See City of Los Angeles v. Los Angeles Pac. Co., 31

Cal. App. 100, 159 P. 992 (1916). Where this fact is proved or otherwise established, the condemnor must then prove that its use is a more necessary public use than the existing use.

Prior law apparently required a condemnor seeking to condemn property already appropriated to a public use to allege facts showing that its proposed use was a more necessary public use than that to which the property was already appropriated. See Woodland School Dist. v. Woodland Cemetery Ass'n, 174 Cal. App.2d 243, 344 P.2d 326 (1959). Section 455 eliminates this pleading requirement but continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

COMPREHENSIVE STATUTE § 470

Staff recommendation

Division 4 - The Right to Take

CHAPTER 9. CONDEMNATION FOR CONSISTENT USE

§ 470. "Property appropriated to a public use"

470. As used in this chapter, "property appropriated to a public use" has the meaning given that phrase by Section 450.

Comment. Section 470 incorporates by reference the definition of "property appropriated to a public use" in Section 450. For discussion of the phrase, see Section 450 and the Comment thereto.

Memorandum 70-79

COMPREHENSIVE STATUTE § 471

Staff recommendation

Division 4 - The Right to Take

§ 471. Taking for consistent use

471. (a) The authority to acquire property by eminent domain for a public use includes authority to exercise the power of eminent domain to acquire property already appropriated to a public use for a use which is consistent with the use to which the property is already appropriated.

(b) The resolution of necessity authorizing the taking of property under this section and the petition for condemnation filed pursuant to such authority shall specifically refer to this section.

(c) If the condemnee desires to contest the taking under this section, he shall raise the issue in the manner provided by Section 902. Upon the hearing of this issue, the condemnee shall have the burden of proving that his property is already appropriated to a public use. The condemnor shall have the burden of proving that its use will be consistent with the public use to which the property is already appropriated. Except as otherwise provided by statute, if the court's determination is in favor of the condemnor, the court shall fix the terms and conditions upon which the propety may be taken and the manner and extent of its use for each of the uses.

COMPREHENSIVE STATUTE § 471

Staff recommendation

Comment. Section 471 makes clear that the authority to condemn for a public use includes the authority to condemn property already appropriated to a public use for a use which is compatible with the preexisting one. Under prior law, the principle was stated in connection with provisions dealing with the "more necessary use" issue. See former Code of Civil Procedure Section 1240(3). The provision was not, however, a "more necessary" public use provision and did not involve that issue. On the contrary, the authority provided here does not contemplate displacement but rather joint use without undue interference with the preexisting use. Accordingly, the authority to condemn for a consistent use is not limited in any way by the rules set forth in Chapter 8. To help make this distinction clear, Section 471 has been set forth in a separate chapter.

Subdivision (a) of Section 471 authorizes a condemnor to acquire property already appropriated to a public use for uses "consistent" with the use to which the property is already appropriated. For definition and discussion of the term "appropriated to a public use," see Sections 450 and 470 and Comments thereto. The requirement that the proposed use be "consistent" with the existing use continues prior law. See former Code of Civil Procedure Section 1240(3), (6). The term is necessarily imprecise because of the variety of circumstances it must embrace. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), cert. denied 282 U.S. 863 (19)(abundant water for use of both parties)(alternate holding); Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263,

90 P. 545 (1907)(railroad right-of-way sought on top of reclamation district levee); City of Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604 (1891)(sewer line in highway right-of-way); City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (railway company's electric transmission lines and subway on property taken for city park). However, the basic principle requires that the proposed use not unduly or unreasonably interfere with or impair the continuance of either the existing physical use or such future use as may be reasonably necessary for the purpose for which the property is already appropriated. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969). Any interference or detriment must be immaterial or trivial. See Reclamation Dist. No. 551 v. Superior Court, supra. See generally 1 Nichols, Eminent Domain § 2.2[8], at pages 235-238 (3d ed. 1964). Section 471 does not grant authority to displace or to interfere substantially with a prior use. The power to displace a condemnee is dealt with in Chapter 8 (commencing with Section 450).

Section 471 authorizes any condemnor able to satisfy its requirement that the proposed use will be consistent with the preexisting one to condemn the property of any condemnee. Under former law, this point was unclear. See San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 523-524, n.10, 75 Cal. Rptr. 24, (1969). Subdivision (3) of

former Code of Civil Procedure Section 1240 referred only to property "appropriated to a public use or purpose, by any person, firm or private corporation," thereby implying that property appropriated to a public use by a public entity could not be subjected to imposition of a consistent use. However, subdivision (6) of that section authorized the imposition of "rights-of-way" with no such limitation. In view of the very limited nature of the authority granted and the desirability of encouraging common use, Section 471 adopts the latter approach and is applicable to all condemnors and all condemnees.

Subdivision (b) requires the condemnor to refer specifically to this section in its resolution of necessity and petition for condemnation where it seeks to exercise the authority granted here. It might be noted that, in certain situations, a condemnor may be unsure of its authority to condemn under Chapter 8 and may therefore proceed under both that chapter and Section 471. Such inconsitent allegations are proper.

Subdivision (c) requires a condemnee desiring to contest the taking on the ground that the proposed use will be inconsistent with the public use to which he has already appropriated the property to raise this defense by preliminary objection. See Section 902 and Comment thereto. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use and the condemnee bears the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles