#36.24 11/22/71

Memorandum 71-92

Subject: Study 36.24 - Condemnation (Taking for More Necessary and Joint Use)

In accordance with the Commission's decisions at the October 1971 meeting, the staff presents herewith a redrafted version of provisions relating to condemnation of property appropriated to public use. The basic thrust of this draft is that any property appropriated to public use may be taken for joint use so long as the proposed use is compatible with the existing use or can be made compatible without significant alteration of the existing use. On the other hand, property may not be taken for the exclusive use of a condemnor unless (1) use by the condemnor is more necessary than the existing use and (2) the existing use is not compatible with the more necessary use, nor could it be made compatible absent significant alteration of the more necessary use. This scheme is codified in Exhibit I.

In connection with the redrafting of the more necessary use provisions, the staff notes an anomaly created by an enactment of the 1971 Legislature. Code of Civil Procedure Section 1241.7 states that public park and recreation areas, historic sites, state wildlife and waterfowl management areas, and state ecological preserves are rebuttably presumed to be the best and most necessary uses for property so appropriated. Section 1241.7 also provides, however, that, in case of a state highway taking of such property, the rebuttable presumption applies only in a declaratory judgment proceeding properly brought prior to commencement of the condemnation proceeding. This presumption and the state highway exception are codified in Eminent Domain Code Section 467 and Streets and Highways Code Section 103.5 (Exhibit I).

The 1971 Legislature added another exception to these provisions: Where this park, and the like, property is sought for public utility route or structure purposes, the presumption applies only in a declaratory judgment proceeding. This provision, evidently intended to protect privately-owned public utilities, is anomalous in that property appropriated to public use by a public entity is always for a more necessary use than use by a private person. See Section 464. The presumption for parks adds nothing to the protection already afforded parks against nonpublic entities.

Consequently, the staff recommends that, when Code of Civil Procedure Section 1241.7 is repealed, nothing be done with the provision relating to public utilities. A public utility can, in any case, always condemn park land if its project is compatible with the park purposes.

Respectfully submitted,

Nathaniel Stebling
Legal Counsel

Memorandum 71-92

EXHIBIT I

## CHAPTER 8. CONDEMNATION OF PROPERTY APPROPRIATED TO PUBLIC USE

Comment. Property appropriated to public use (defined in Section 113) may be taken by eminent domain only for (1) a compatible use under Article 1 (commencing with Section 450) of this chapter or (2) a more necessary public use under Article 2 (commencing with Section 460) of this chapter. The grounds of compatible and more necessary public use are independent grounds of condemnation authority, and a plaintiff may proceed against property appropriated to public use under either one or both of these grounds, even though the two grounds are inconsistent grants of condemnation authority. See, e.g., Section 2040 (content of complaint). Unless the plaintiff qualifies to take the property under the test of compatibility or under the test of more necessary public use, the plaintiff may not take by eminent domain property appropriated to public use.

Even if the plaintiff would otherwise qualify to take property appropriated to public use on the ground of compatibility or on the ground of more necessary public use, certain property appropriated to public use may be exempt from condemnation by certain plaintiffs for certain purposes. E.g., Govt. Code § 26301 (county may not take privately owned golf course for use as golf course); Govt. Code § 37353 (city may not take privately owned golf course for use as golf course); Health & Saf. Code §§ 8134, 8560, 8560.5 (cemetery land may not be taken for rights of way); Pub. Res. Code § 7994 (certain land in the public domain may not be taken at all); Pub. Util. Code § 21632 (Department of Aeronautics may not take an existing airport owned by local entity).

EMINENT DOMAIN CODE § 450

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## Article 1. Condemnation for Compatible Use

### § 450. Property appropriated to public use may be taken for compatible public use

450. Except at otherwise provided by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be taken under this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Comment. Section 450 makes clear that the authority to condemn property includes the general authority to condemn for compatible joint use property already devoted to a public use. See Section 113 ("property appropriated to public use" defined). Section 450 does not contemplate displacement of the existing use by the second use; rather it authorizes common enjoyment of the property where the second use does not unreasonably interfere with the existing use.

The authority granted by Section 450 is independent of the authority contained in Article 2 ("more necessary public use") and is not limited in any way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Article 2 independent of

any authority stated in Article 1. It should be noted, however, that, where property is taken under more necessary use authority, the defendant may be entitled to continue joint use of the property. See Section 462.

The requirement that the proposed use be compatible with the existing use continues prior law that permitted condemnation for consistent uses. See former Code Civ. Proc. § 1240(3), (4), (6). The term "consistent" was necessarily imprecise because of the variety of circumstances it embraced. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930), cert. denied 282 U.S. 863 (1930)(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).

Section 450 continues the basic principle of consistency by requiring that the proposed use not unreasonably interfere with or impair the continuance of the existing use or such future use as may reasonably be anticipated 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); Reclamation Dist. No. 551 v. Superior Court, supra. See generally 1 P. Nichols, Eminent Domain § 2.2[8], at 235-238 (3d ed. 1964).

EMINENT DOMAIN CODE § 450

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Section 450 does not grant authority to displace or interfere substantially with a prior use; the power to displace an existing use is dealt with in Article 2 (commencing with Section 460).

Section 450 authorizes any condemnor able to satisfy the requirement that its proposed use will be compatible with the existing one to condemn the property of any person. Under former law, this point was not clear. 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. Subdivision (4) of former Section 1240 also dealt with joint use but the subdivision was limited to property appropriated to public use by an irrigation district. However, subdivision (6) of former Section 1240 authorized the imposition of "rights of way" on property appropriated to public use with no limitation as to the person who had appropriated the property to public use. In view of the very limited nature of the authority granted and the desirability of encouraging common use, Section 450 adopts the latter approach and is applicable to all condemnors and all condemnees.

It should be noted that Section 450 has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority granted by this section. Such a situation may call for intervention by the owners or a separate inverse action. Cf. Section 2023 (owner as party to condemnation proceeding) and People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954)(possibility of subsequent action).

Section 450 requires the plaintiff to refer specifically to this section in its complaint where it seeks to exercise the authority granted here. If the plaintiff is a public entity, it must refer to this section in its resolution of necessity also.

In certain situations, a plaintiff may be uncertain of its authority to condemn under Article 2 and may, therefore, proceed under both that article and Section 450. Such inconsistent allegations are proper. See Section 2040 and Comment thereto.

§ 451. Objections to taking for compatible use; burden of proof

451. The defendant may object to a taking under Section 450 in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8. At the hearing of the objection, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its proposed use satisfies the requirements of this article.

Comment. Section 451 makes clear that a defendant desiring to contest the taking on the ground that the proposed use will be incompatible with the public use to which the property is appropriated must raise this defense by objection to the right to take. See Section 2100 et seq. If the taking is contested, the court must first determine whether the property is in fact already appropriated to a public use, and the defendant bears the burden of proof on this issue. Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the plaintiff must then show that the taking is authorized under this article.

§ 452. Fixing terms and conditions of joint use

452. Except as otherwise provided by statute:

(a) When property is taken under Section 450, the court shall fix the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties.

(b) If the court determines that the use in the manner proposed by the plaintiff would not satisfy the requirements of Section 450, the court shall further determine whether the requirements of Section 450 could be satisfied by fixing terms and conditions upon which the property may be taken. If the court determines that the requirements of Section 450 could be so satisfied, the court shall permit the plaintiff to take the property upon such terms and conditions and shall prescribe the manner and extent of its use by each of the parties.

(c) Where property is taken under this article, the court may order any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the use to which the property is appropriated.

Comment. Subdivision (a) of Section 452 requires that, in granting the plaintiff the right to use property appropriated to public use, the court regulate the manner in which the proposed and prior uses will be enjoyed. This continues the substance of portions of former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a.

Subdivision (b) requires that, before a court refuses to allow a taking for joint use because the taking does not satisfy the requirements of Section 450, the court must determine whether terms and conditions could be imposed on the proposed taking so that it would satisfy the requirements of Section 450. If the court refuses to approve the joint use as proposed because of a particular feature of the joint use, the court must specify in what respect the joint use as proposed fails to satisfy the requirements of Section 450 and, where possible, specify the modifications in the use as proposed that are necessary in order to satisfy the requirements of Section 450. Under prior law, decisions could be found which implied that the court could not review in the proposed joint use and indicate what changes would be required in the proposed joint use so that the taking would be permitted. E.g., San Bernardino County Flood Control Dist. v. Superior Court, 269 Cal. App.2d 514, 75 Cal. Rptr. 24 (1969).

Subdivision (c) makes clear that the court may require any necessary removal or relocation of structures or improvements if such removal or relocation would not require any significant alteration of the existing use. A similar provision was found in former Code of Civil Procedure Sections 1240(3) and 1247a. See Marin County v. Superior Court, 53 Cal.2d 633, 349 P.2d 526, 2 Cal. Rptr. 758 (1960). Subdivision (c) does not deal with which party bears the cost of relocation. Although the plaintiff will normally bear the cost of such relocation, in some cases statutory provisions deal with which

of the parties is to bear the cost of relocation. For a listing and discussion of statutes dealing with cost for relocation of facilities of franchise holders, see 5 Cal. L. Revision Comm'n Reports 186-190 (1963); 10 Cal. L. Revision Comm'n Reports 353-358 (1971).

The introductory clause of Section 452 recognizes that exceptions to the provisions of the section may be found in other statutes. The most significant of these exceptions are the statutes dealing with relocation of facilities of franchise holders, discussed above. Also, for example, the Public Utilities Commission has exclusive jurisdiction to determine and regulate crossings involving railroads (Pub. Util. Code §§ 1201 and 1202) and issues involving street and highway crossings may be nonjusticiable (Cf. Eminent Domain Code § 313; Sts. & Hwys. Code § 100.2).

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## Article 2. Condemnation for More Necessary Public Use

### § 460. Property appropriated to public use may be taken for more necessary public use

460. Except as otherwise provided by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be taken under this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Comment. Section 460 permits a plaintiff to exercise the power of eminent domain to displace an existing public use. For the definition of "property appropriated to public use," see Section 113. The plaintiff may do so only if the proposed use is "more necessary" than the existing use. It should be noted, however, that the defendant may be permitted to continue joint use of the property under authority granted in Section 462.

The authority to take property appropriated to a public use for a more necessary use continues the prior law. See former Code of Civil Procedure Sections 1240(3) and 1241(3) and numerous repetitions of the rule in other provisions. The authority to take property for a "more necessary" public use makes unnecessary the authority formerly granted to a number of condemnors to take property "whether the property is already devoted to the same use or

otherwise." See, e.g., Harb. & Nav. Code § 6296; Pub. Res. Code § 5542; Pub. Util. Code § 16404; Sts. & Hwys. Code § 27166; Water Code § 71693. The meaning of "more necessary public use" is given greater specificity in the succeeding sections in this article as well as numerous provisions in other codes. See, e.g., Sts. & Hwys. Code § 30402 (use by Toll Bridge Authority a more necessary use than any other use except railroad uses); Sts. & Hwys. Code § 31001 (use by Folsom Lake Bridge Authority a more necessary use than any other use); Sts. & Hwys. Code § 31201 (use by El Dorado County Toll Tunnel Authority a more necessary use than any other use).

Prior law apparently required a plaintiff 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 460 eliminates this pleading requirement, but Section 461 continues the rule that the condemnor has the burden of proving that the proposed use is a more necessary public use.

EMINENT DOMAIN CODE § 461

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§ 461. Procedure for raising and resolving more necessary use issue

461. The defendant may object to a taking under Section 460 in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8. At the hearing of the objection, the defendant has the burden of proof that his property is appropriated to public use. If it is established that the property is appropriated to public use, the plaintiff has the burden of proof that its use satisfies the requirements of Section 460.

Comment. Section 461 makes clear that a defendant desiring to contest the taking on the ground that the proposed use is not more necessary than the public use to which the property is appropriated must raise this defense by objection to the right to take. See Section 2100 et seq. If the taking is contested, the court must first determine whether the property is in fact already appropriated to public use, the defendant bearing the burden of proof on this issue. Cf. 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 plaintiff must then show that its use is a more necessary public use than the existing use.

§ 462. Right of prior user to joint use of property

462. (a) Where property is sought to be taken under Section 460, the defendant is entitled to continue the public use to which the property is appropriated if the continuance of such use will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary public use as it is then planned or exists or may reasonably be expected to exist in the future.

(b) Upon motion of the defendant, made within the time permitted to object to a taking under Section 2100, the court shall determine whether the defendant is entitled under subdivision (a) to continue the use to which the property is appropriated; and, if the court determines that the defendant is so entitled, the court shall fix the terms and conditions upon which the defendant may continue the public use to which the property is appropriated, the terms and conditions upon which the property taken by the plaintiff is acquired, and the manner and extent of the use of the property by each of the parties.

Comment. Section 462 provides a right new to California law that, where property appropriated to public use is taken for a more necessary public use, the prior user may continue his use jointly with the more necessary use if the continuance will not unreasonably interfere with or impair, or require a significant alteration of, the more necessary use.

Subdivision (a). The test for whether the defendant may continue to jointly use the property is comparable to that defining compatible uses. Cf. Sections 450 and 452.

Subdivision (b). In order to have a determination of the right to joint use under subdivision (a), the defendant must raise the issue by timely motion. The motion may be made alone within the time specified in the provisions for challenging the right to take (Section 2100 et seq.), or may be made in connection with an objection to the right to take.

If the defendant makes the proper motion, the court must determine whether he is entitled to continue use of the property and must consider possible alterations that would enable joint use and, at the same time, not require significant alteration of the more necessary use or unreasonably impair or interfere with it.

EMINENT DOMAIN CODE § 463

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§ 463. Use by state more necessary than other uses

463. Except as otherwise provided by statute:

(a) Where property has been appropriated to 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 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 463 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. See, e.g., State v. City of Los Angeles, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967). Section 462 embraces state acquisitions under other authority, most notably by the Department of Water Resources and the Department of Public Works. See also Water Code § 252 (authority of Department of Water Resources to take park lands). The exception clause recognizes that specific exemptions or qualifications may be stated elsewhere. E.g., Section 467 (park use presumed "more necessary" than highway use); Health & Saf. Code § 8560 (no street may be laid across existing cemetery

without consent of cemetery authority or plot owners); Sts. & Hwys. Code § 155 (Department of Public Works may not take for memorials without county consent); Sts. & Hwys. Code §§ 103.5, 210.1 (Department of Public Works may condemn parks but shall avoid doing so wherever possible). And, of course, property appropriated to public use by the state may always be taken for common use where compatible pursuant to Section 450 et seq. and the prior user may, under appropriate circumstances, be permitted under Section 462 to continue his use jointly with the more necessary state use.

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

464. Except as otherwise provided by statute:

(a) Where property has been appropriated to 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 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 464 is similar in substance to former Code of Civil Procedure Section 1240(3), except that Section 464 embraces all public entities. Thus, for example, Section 464 includes school districts which formerly were not included.

The preference under Section 464 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 465. 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 465 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 465--from condemning property appropriated to use of other governmental entities by private corporation).

It should be noted, however, that property appropriated to public use by a public entity may always be taken for common use by any other person where compatible pursuant to Section 450 et seq.

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

465. Notwithstanding Section 460, 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 under this article 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 465 codifies prior law under former Sections 1240(3) and 1241(3) of the Code of Civil Procedure. Section 465, like its predecessors, protects property appropriated to a public use by or to the use of one of a group of public entities from displacement by any other entity in the group. The list of entities in Section 465 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 113. See Section 113 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 465 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.

EMINENT DOMAIN CODE § 465

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Section 465, like its predecessors, protects property appropriated to a public use by the specific defendants listed from displacement only by the plaintiffs listed. Thus, for example, a city may not take from a rapid transit district, but a school district, because it is not listed, may both take from those listed and have its property taken by those listed without regard to these provisions (although the general rule stated in Section 460 would still apply).

It should be noted that Section 465 places a limitation only on displacement of one user by another. Any entity listed in Section 465 may take property of any other entity listed for common uses where compatible under Section 450. See, e.g., City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496 (1930) and Turlock Irr. Dist. v. Sierra Etc. P. Co., 69 Cal. App. 150, 230 P. 671 (1924).

Note: The Commission solicits comments on whether the provisions of existing law reflected in Section 465 are presently causing difficulty, whether Section 465 is needed, and whether it should be retained, repealed, or modified.

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§ 466. Preservation of certain property in its natural condition; presumption as to best public use

466. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively for the preservation of native plants, or native animals, including but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 466 continues without substantive change the provisions of subdivision (a) of former Section 1241.9 of the Code of Civil Procedure. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

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§ 467. Park property; presumption as to best public use

467. Except as provided in Section 103.5 of the Streets and Highways Code, notwithstanding any other provision of law, the fact that property is appropriated to public use as a state, regional, county, or city park or recreation area, or historic site included in the National Register of Historic Places or state-registered landmarks, or state wildlife or waterfowl management area, or state ecological preserve, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 467 continues without substantive change the provisions of subdivision (a) of former Section 1241.7 of the Code of Civil Procedure. The term "wildlife or waterfowl management area" refers to an area as provided for in Article 2 (commencing with Section 1525) of Chapter 5 of Division 2 of the Fish and Game Code. The term "ecological preserve" refers to an area as provided for in Article 4 (commencing with Section 1580) of that same chapter of the Fish and Game Code. For special procedural limitations where the property described is sought to be taken for state highway purposes, see Section 103.5 of the Streets and Highways Code.

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Streets & Highways Code § 103.5 (amended)

Sec. . Section 103.5 of the Streets and Highways Code is amended to read:

103.5. (a) The real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by ~~such~~ resolution that such property is necessary for state highway purposes.

(b) When property described in Section 466 or Section 467 of the Eminent Domain Code is sought to be acquired for state highway purposes, and such property was dedicated or devoted to the uses described in those sections prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by the public agency or nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after publication by the commission in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivery of a written notice to the public agency or nonprofit organization owning such property by the commission that a proposed route or an adopted route includes such property; provided that such written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state. In such declaratory relief action, the resolution

of the commission shall not be conclusive evidence of the matters set forth in Section 103. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of Sections 466 and 467 of the Eminent Domain Code shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this section, the provisions of Sections 466 and 467 of the Eminent Domain Code do not apply.

Comment. Subdivision (b) of Section 103.5 continues without substantive change the provisions of subdivision (b) of former Sections 1241.7 and 1241.9 of the Code of Civil Procedure relating to highways. These provisions set forth significant procedural limitations on the rights granted under Sections 466 and 467 of the Eminent Domain Code.

EXHIBIT II

SECTION 1. Section 1241.7 of the Code of Civil Procedure is amended to read:

1241.7. (a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property appropriated for a public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, is sought to be acquired for state highway purposes, or for public utility route or structure purposes, and such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve was dedicated to or established for park or recreational purposes, or as a wildlife or waterfowl management area, or as a historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, prior to the initiation of highway route location studies, or public utility route or structure location studies, an action for declaratory relief may be brought only by the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve by the California Highway Commission or public utility that a proposed route or site or an adopted route or site includes park land or recreational area, or a wildlife or waterfowl management area, or an historic site, or an ecological reserve owned by that agency. In such declaratory relief action, the resolution of the California Highway Commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, or for public utility route or structure purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.