

#36.24

7/12/71

Memorandum 71-51

Subject: Study 36.24 - Condemnation (The Right to Take--"Consistent Uses")

Chapter 9 (Condemnation for Consistent Use) of Division 4 (Exhibit I) of the Comprehensive Statute was presented for Commission approval at the September 1970 meeting. Approval was deferred at that time at the request of the Department of Public Works to enable them to comment on the staff recommendations. No comments have been received to date and this memorandum should serve as a gentle reminder. In the absence of any specific opposition, the staff believes that Chapter 9 is in proper shape for general distribution, and we ask that it be tentatively approved at the September 1971 meeting in order that this may be accomplished.

The following briefly summarizes the Commission's past action with respect to this chapter and should refresh your memories concerning it. In July 1970, the Commission directed the staff to review the problem of consistent uses and redraft these provisions to make clear that they provide a separate grant of authority to condemn property for a consistent use. The term "consistent use" was to be clarified in some manner and further consideration given to the potential range of condemners to be accorded this authority.

To help make clear that Section 471 provides a separate grant of condemnation authority, i.e., authority to condemn property for consistent

uses, we removed the section from the "more necessary" use chapter and placed it in a separate chapter. The principle expressed in no way involves the issues of "more necessary" use and this separate treatment should help to eliminate any confusion.

The staff believes that the diversity of possible fact situations virtually precludes a precise definition of "consistent uses." However, we greatly revised and expanded the discussion in the Comment to Section 471 in an attempt to clarify the term.

With respect to the question of coverage, we believe that the authority provided by this section should be granted to all condemners. There is a question whether property appropriated to a public use by a public entity generally may be taken for common use under present subdivision (3) of Section 1240. The issue has been noted in the past but the courts have not been required to settle the problem. The applicable portion of subdivision (3) refers only to property "appropriated to a public use or purpose, by any person, firm or private corporation." However, subdivision (6), which authorizes limited, common use of "rights-of-way," contains no such limitation. This latter subdivision has been relied upon to permit a railroad seeking to condemn an easement atop a reclamation district levee to show that its railroad right-of-way would be consistent with the prior use. Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263, 90 P. 545 (1907). The authority we would provide is, after all, a very limited one. Moreover, as a policy question, it seems desirable that compatible common use by all condemners be favored. There seems to be no reason to make publicly-owned

property inviolable especially since the usual alternative would be to impose an additional burden on adjacent private property. That is, it seems probable that, in most situations, the condemnor seeking to impose a consistent use will have determined that its project is going to go forward in any event, and it is only a question of choice of alternative locations. If the condemnor is not permitted to condemn suitable property already appropriated to a public use, it will simply turn to private property. Where the project is engineering or site oriented, there will be a limited number of suitable locations, and we suspect that often the decision will be to take additional adjacent private property, thus, at least occasionally imposing a double burden on the owner who gave up property to the first user. We are mindful that, in at least some instances, the matter will be specifically dealt with by other statutes. However, there will always remain circumstances where the general principle could and should be applicable.

At the September meeting, we hope the Commission will be able to consider Chapter 9 and approve it with any necessary revisions for inclusion in the tentative statute.

Respectfully submitted,

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Assistant Executive Secretary

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EXHIBIT I

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.

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 appropriated to a public use for a use which is consistent with the existing physical use or such future use as may be reasonably necessary for the purpose for which the property is already appropriated.

(b) The resolution of necessity authorizing the taking of property under this section and the complaint 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 2401. 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 property may be taken and the manner and extent of its use for each of the uses.

## Staff recommendation

Comment. Section 471 makes clear that the authority to condemn for a public use includes the general authority to condemn property already appropriated to a public use for a use which is compatible with the pre-existing one. Under prior law, the principle was stated partly in connection with provisions dealing with the "more necessary use" issue. See former Code of Civil Procedure Section 1240(3). See also former Code of Civil Procedure Section 1240(4), (6). 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), (4), (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,

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Staff recommendation

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

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Staff recommendation

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) was limited to irrigation districts. 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. It should be noted, however, that Section 471 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.

Subdivision (b) requires the condemnor to refer specifically to this section in its resolution of necessity and complaint in 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 inconsistent 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 2401 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 Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916). Where this fact is established, the condemnor must then show that its use will be consistent with the preexisting one. If the court's determination on this issue is in favor of the condemnor, subdivision (c) continues the power of the court to regulate the manner in which the proposed and prior uses will be enjoyed. See former Code of Civil Procedure Sections 1240(3), 1247(1), 1247a. In this regard, it should be noted again, however, that, while the condemnee may be required to make slight accommodations for the proposed use, the authority granted by this section does not permit displacement of or substantial interference with either the existing use or reasonable foreseeable extensions of such use.