

66454

ORIGINAL

Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
 the CITY OF CONCORD, State of
 California, for a crossing at grade
 of the tracks of SACRAMENTO NORTHERN
 RAILWAY COMPANY'S right of way by
 the extension of Olivera Road in the
 City of Concord, Contra Costa County,
 California.

Application No. 43559

Thomas F. McBride, for the City of Concord, applicant.

Walter G. Treanor, for Sacramento Northern Railway;
Randolph Karr, for Southern Pacific Company;
Marshall W. Vorkink, for Union Pacific Railroad
 Company; Mirko A. Milicevich, for The Atchison,
 Topeka and Santa Fe Railway Co.; Gordon B. Turner
 and Maurice E. Hubuet, Jr., for Hofmann Co.;
Thomas M. O'Connor and Orville I. Wright, for the
 City and County of San Francisco; Edward A. Goggin,
 for Hilton J. Melby; George W. McClure, for the
 County of Contra Costa; George D. Moe, for the
 State of California, Department of Public Works;
Adrian Thiel, for Associated Home Builders of
 Greater Eastbay; Richard Carpenter, for League
 of California Cities; Robert T. Anderson, for
 City of Berkeley; and Daniel J. Curtin, Jr., for
 City of Richmond; interested parties.

J. K. Gibson and M. J. Lewis, for the Commission staff.

O P I N I O N

The current phase of this proceeding deals with the question of allocating the costs of maintaining the automatic crossing protection devices at Olivera Road and the tracks of the Sacramento Northern Railway in the City of Concord.

This application was filed on June 29, 1961. The City of Concord sought authority to construct a crossing at grade by extending Olivera Road across the main line of the Sacramento

Northern Railway in order to provide access to a then recently annexed new subdivision known as "Sun Terrace East". On August 22, 1961 the Commission, in Decision No. 62464, issued an ex parte interim order which, in part, authorized construction of the requested grade crossing and required that the crossing be protected by two Standard No. 3 crossing signals. There was, however, a dispute as to who should pay for the cost of maintaining that portion of the crossing delineated by lines two feet outside the rails and the cost of maintaining the automatic protection devices. The interim order provided that "Maintenance cost between such lines and maintenance cost of crossing protection hereinafter ordered shall be by further order of this Commission". A duly noticed public hearing was held in this matter, on the issue of allocating maintenance costs, before Examiner Jarvis in San Francisco on January 30 and 31, 1962. The matter was submitted subject to the filing of briefs which were filed on or before June 4, 1962.

The record discloses that the Olivera Road crossing had been constructed and was in use at the time of the public hearing. The evidence indicates that although the City of Concord is the nominal applicant, interested party Hofmann Company is the immediate real party in interest. While the interim order provided that "Applicant City of Concord shall bear entire construction expense....", the city required the Hofmann Company to pay

the required amount as a condition to prosecuting the application. The Hofmann Company paid Sacramento Northern Railway the sum of \$10,460, which was the estimated cost of installing the flashing lights, preparing the track for the crossing and installing planks. Pending the determination of the issue here under consideration, and prior to construction of the crossing, Sacramento Northern Railway demanded that, assuming its position herein were sustained and the City planned to pass on the costs of crossing maintenance to Hofmann Company, said Company should be required to place in escrow an amount which would yield in yearly interest a sufficient sum to pay for the yearly maintenance costs. On October 23, 1961, the Concord City Council passed Resolution No. 1721 which, in part, provided that unless Hofmann Company deposited the requisite amount in escrow, the City Attorney would be directed to request that this application be dismissed and the City Engineer would be ordered to stop development of Sun Terrace East until adequate means of ingress and egress were provided. On November 1, 1961, Hofmann Company deposited \$7,500 with an approved escrow holder. The crossing was subsequently constructed and put in use.

The physical facts of the crossing and surrounding area are illustrated in the following representational diagram set forth as Figure 1.

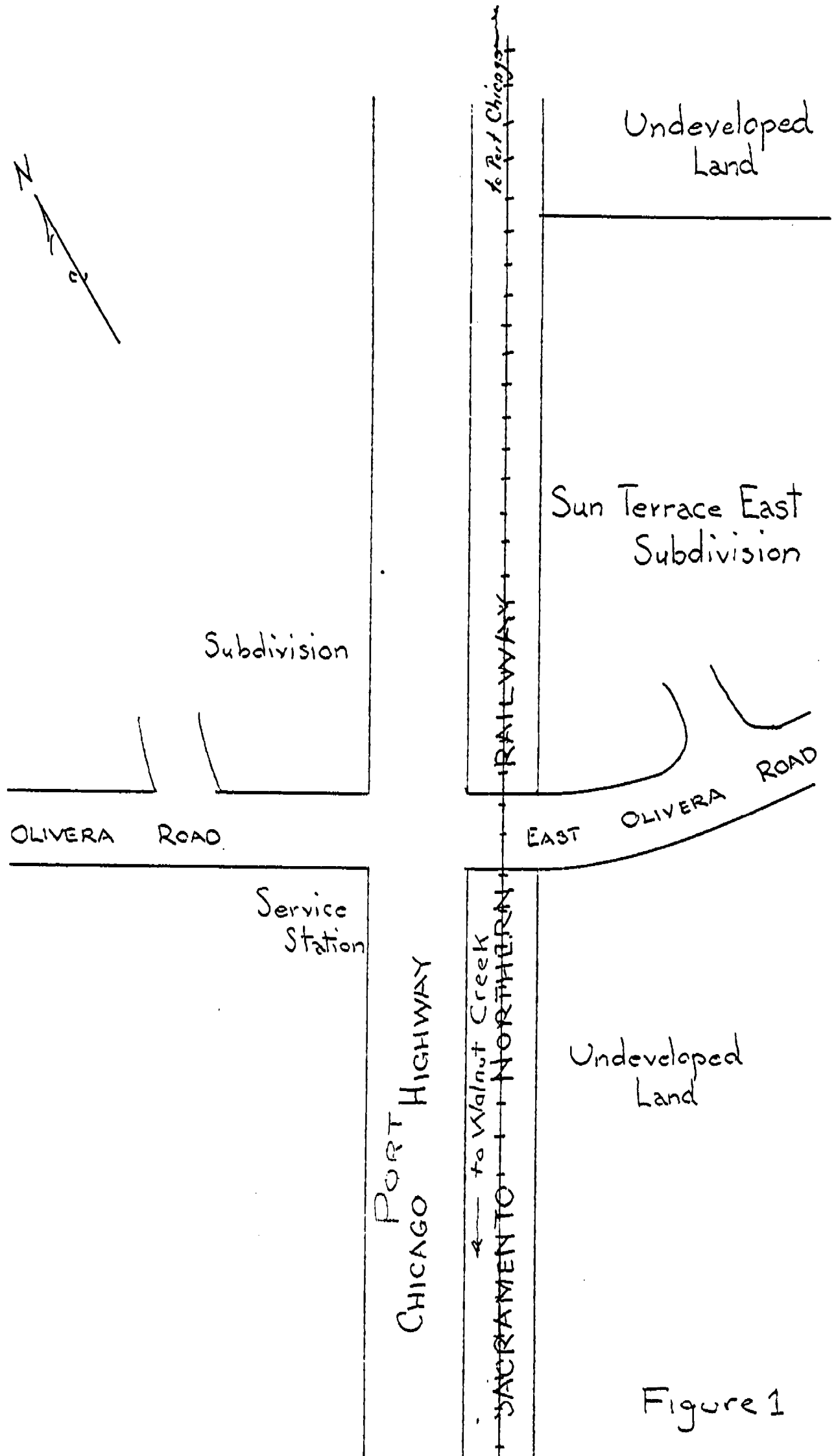


Figure 1

At the hearing Sacramento Northern Railway indicated that it was willing to assume the cost of maintaining the area delineated by lines two feet outside the rails. The yearly cost of such maintenance is approximately \$48. Therefore, the sole remaining issue in this proceeding is who should pay the maintenance costs for the automatic signal protection at the crossing.

Sacramento Northern Railway requests that the Commission change its long-standing practice of requiring the railroad to bear the entire cost of maintaining signal protection at newly established grade crossings and to allocate costs of maintenance on a case-by-case basis. Sacramento Northern Railway's position is indicated by the following quotations found at various portions in its brief and consolidated herein in narrative form: "It cannot be denied that it is the fervent wish of the railroads that they be relieved of all signal maintenance costs in much the same manner as the motor vehicle operators are relieved of traffic signal maintenance costs. It is recognized, however, that this may well be a Utopian objective, perhaps unreasonable in our lifetimes. In the meantime, relief, where fully justified under present conditions, should not be withheld because of the more ambitious ultimate and complete desire." (S. N. Brief, p. 2.) "Until recently, it has obviously been common practice to assess full signal maintenance costs for a newly opened crossing against the railroads. There were undoubtedly good, sound and sufficient reasons for that policy in the early days when inter alia at practically every crossing there were numerous and frequent trains, and relatively few motor vehicle crossings.In recent years

there has come about a pronounced change in the railroad picture, and there is active competition; reduced revenues; increased costs; and, among other things, a reduction or contraction of railroad service. At the same time motor vehicle traffic (both private and common carrier) over many of these crossings has multiplied several hundredfold. Crossings are now frequently requested to advance private rather than public interests. The time has now come when, at certain crossings, the benefit of signal protection is wholly for parties other than the railroad, and we believe that in such cases the equities demand that those parties themselves pay the full costs of such benefits." (S. N. Brief, pp. 3-4.)

Sacramento Northern Railway also contends that it runs only two trains per day over the crossing; that these trains have on the average of 2.92 cars and operate at a maximum speed of 25 miles per hour; that the motor vehicle traffic over the crossing is heavier than the train traffic; that the visibility of the train crew as it approaches the crossing is virtually unobstructed for a considerable distance, while the visibility of a driver approaching the crossing is severely restricted; that motor vehicles leaving Sun Terrace East are forced to stop directly astride the Sacramento Northern Railway tracks if a posted stop sign for Port Chicago Highway which closely parallels the tracks is obeyed; and that the Olivera Road crossing protection is solely for the benefit of motor vehicles going to and from the subdivision.

Interested party Southern Pacific Company filed a brief supporting the position of Sacramento Northern Railway.

The City of Concord and Hofmann Company contend that the Commission should not change its long-standing practice of

allocating to the railroads the costs of maintaining signal protection at grade crossings. They argue that this proceeding is the opening gambit in an attempt to shift the costs of grade crossing maintenance from the railroads to the various municipalities throughout the State. The city and Hofmann Company also contend that the California cases hold that where a railroad has installed a crossing protection device, failure to exercise due care in maintaining the device constitutes negligence on the part of the railroad (citing Startup v. Pacific Electric Railway Company, 29 Cal. 2d 866; Will v. Southern Pacific Company, 13 Cal. 2d 468; and Mallett v. Southern Pacific Company, 20 Cal. App. 2d 500) and that if the costs of maintenance for crossing protection were shifted to various public bodies, private individuals and corporations, they would be subjected to numerous lawsuits where negligent maintenance is alleged.

The city and Hofmann Company also contend that the crossing protection benefits Sacramento Northern Railway because it permits its trains to pass through the crossing having the right of way over motor vehicle traffic, that the protection reduces potential lawsuits against the railroad, and that Sacramento Northern Railway should pay for the maintenance of the protection devices.

The city and Hofmann Company also assert that when Sacramento Northern Railway's predecessor (Oakland and Antioch Railway) acquired the easement for its right of way it agreed with Hofmann Company's predecessor in title to construct and maintain as many as three crossings across the land now owned by

Hofmann, and that under these agreements Sacramento Northern Railway is legally and equitably bound to pay for maintaining the signals at the crossing.

Interested party League of California Cities took the position that the Commission should require Sacramento Northern Railway to pay for maintaining the signals at the crossing. It was argued that railroads have a continuing obligation to provide safe crossings; that the speed of trains, railroad operating requirements, responsibility for the safety of passengers and employees and possible liability in case of accident require railroads to maintain safe crossings; that cities and counties must now bear the entire expense of erecting and maintaining railroad warning approach signs and enforcing the many Vehicle Code sections relating to the duties of motor vehicle operators approaching a railroad crossing (including investigating accidents involving trains and vehicles and at times assigning police officers to protect school children using a crossing); that municipal costs are rising; and that it would be unfair to municipalities, under the circumstances, to require them to pay the costs of maintaining protective devices.

Interested party Department of Public Works took the position that the State of California is already doing its share to relieve the alleged financial burden of the railroads and that the railroads should not be relieved of their obligation to maintain crossing protection devices. In support of this position, it was indicated that each year the California Legislature appropriates between \$250,000 to \$300,000 to assist municipalities to meet their share of the costs of installing protective devices (Public Utilities Code, Sections 1231, 1232) and it also appropriates five

million dollars a year which is used in aid of constructing grade separations or improving existing separations (Streets and Highways Code, Sections 189, 190).

Interested party City and County of San Francisco took the position that municipalities contribute toward the costs of installing crossing protection, but the maintenance of such protection is properly chargeable to the railroad; that a change in the existing policy would adversely affect the Commission's program of attempting to upgrade crossing protection throughout the State; and that crossing protection benefits the railroads because it permits the railroads to operate trains without the necessity of interrupting their course of travel.

An allocation of crossing maintenance costs must not result from an arbitrary exercise of power and it must be fair and reasonable. (Atchison, Topeka & S. F. R. Co. v. Public Util. Com., 346, U.S. 346, 352-53.) The long-established policy of this Commission has been to require the railroads to pay the costs of maintaining protective devices. (Application of Joint Highway District No. 2, 32 C.R.C. 907, 908.)^{1/} The Commission finds no

^{1/} The record herein discloses that on August 20, 1950, the four major railroads operating in California; the Department of Public Works, Division of Highways; and representatives of the Commission's Transportation Engineering section entered into an informal agreement partially entitled "Suggested Plan Of Apportioning The Expense Incident to Constructing, Altering, or Improving Grade Crossings Between State Highways And Railroads, As Well As Installing Protective Devices, Together With The Maintenance of Such Improvements." This informal agreement only applied to grade crossings with state highways. It provided that in the normal case the railroads would pay the cost of maintaining protective devices. The railroads claim that this informal agreement has been abrogated and is no longer in effect. In any event, the Commission is not bound by the agreement and it is not controlling of any issue in this proceeding. (San Bernardino v. Railroad Commission, 190 Cal. 562.)

reason to change this policy under the facts of this case. "It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease." (Application of County of Los Angeles, 37 C.R.C. 695, 697.) The growth of a community is a normal occurrence which a railroad must be prepared to meet in the discharge of its lawful duty. The Olivera Road Crossing is a product of the normal growth of the City of Concord. Crossing protection benefits the railroad as well as the general public.

To require the railroad corporation, here concerned, to assume the expense of maintaining protective devices at the crossing, here involved, is doing nothing more than requiring it to discharge a fundamental, elementary and existing public obligation imposed upon it as a result of its own chosen activity in operating as a railroad. (Erie Railroad Company v. Board of Public Utility Commissioners, 254 U.S. 394; Lehigh Valley R.R. Co. v. Board of Public Utility Commissioners, 278 U.S. 24; Chicago, Milwaukee and St. Paul Railway Co. v. Minneapolis, 232 U.S. 430; and Missouri Pacific Railway Co. v. Omaha, 235 U.S. 121.)

It is not necessary, in the light of the views heretofore set forth, to discuss any of the other contentions raised by the parties.

Based upon the evidence of record in this matter the Commission makes the following findings and conclusions:

Findings of Fact

1. The crossing at grade of Olivera Road and the tracks of the Sacramento Northern Railway in the City of Concord (Crossing No. 8-35.1) is a result of the normal growth of the City of Concord.

2. The estimated average annual cost of maintaining the signal protective devices at the Olivera Road Crossing is Three Hundred Seventy-Five Dollars (\$375).

3. The estimated average annual cost of maintaining the crossing within the area delineated by lines two feet outside the rails is Forty-Eight Dollars (\$48). Sacramento Northern Railway has stipulated that it will pay said cost.

4. The assessment of maintenance costs, herein, against the Sacramento Northern Railway is just, fair and equitable and constitutes a public obligation which said railroad should bear.

Conclusions of Law

1. Sacramento Northern Railway should be ordered to pay for the cost of maintaining the portion of the crossing within the area delineated by lines two feet outside the rails.

2. Sacramento Northern Railway should be ordered to pay for the cost of maintaining the protective signal devices at the crossing.

O R D E R

IT IS ORDERED that Sacramento Northern Railway Company shall pay the cost of maintaining the protective signals at

Crossing No. 8-35.1 and the cost of maintaining that area of said crossing delineated by lines two feet outside the rails.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 10th day of December, 1963.

William B. Bennett
President
George F. Trover
Everett A. Rege

Commissioners

I dissent and concur in the views expressed by Commissioner Holoboff. George F. Trover

I dissent. The majority decision is a good example of how adherence to policy can smother facts which compel a contrary result. That the decision is the result of policy is acknowledged on sheet 8 of the opinion where it states: "The long-established policy of this Commission has been to require the railroads to pay the costs of maintaining protective devices". (Citation) The majority then states that it finds no reason to change this policy under the facts of this case but nowhere does the opinion discuss why no change is required by the facts.

It is important to note that this is a new crossing which benefits the public in the subdivision known as "Sun Terrace East" by providing access to the area. It also benefits the subdivider because without such access there would have been no "Sun Terrace East". (See sheet 3.)

In light of the foregoing, it is pointless to contend that the signal protection benefits the railroad because it "permits its trains to pass through the crossing having the right of way over motor vehicle traffic", and "that the protection reduces potential lawsuits against the railroad". (See sheet 6) But for the City's insistence that this subdivision required this crossing, the railroad would not have to worry ^{either} ~~and~~ ^{about} its trains having the right of way ^{as stated} and potential lawsuits.

The majority emphasizes the fact that this development is part of the normal growth of Concord and that the railroad must be prepared to meet such growth in the discharge of its lawful duty (sheet 9). The effect of this decision, however, requires the railroad to bear the entire burden of such growth. Not even the City of Concord was prepared to do that because it extracted \$7500 from the subdivider to produce the revenue from which to pay for maintenance costs. assessed to the City.

In short, the effect of this decision ultimately requires that part of the public which patronizes the railroad to pay for costs which benefit another part of the public, namely, the subdivider and the residents of Concord.

The facts in this case fully justify requiring the City to bear all of the maintenance costs.

San Francisco, California
December 10, 1963


Frederick B. Holoboff
Commissioner