

ORIGINALDecision No. 73754

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of City of Sunnyvale,
a Municipal Corporation, and City
of Santa Clara, a Municipal Cor-
poration, to construct widened
crossing over the Southern Pacific
Company's City of Sunnyvale and City
of Santa Clara Line, subject to pro-
visions of Sections 1201-1205 of the
Public Utilities Code of the state of
California.

Application No. 48948
(Filed November 10, 1966)

Gene Fink, for City of Sunnyvale and City of Santa
Clara, applicant.

Larry W. Telford, for Southern Pacific Company,
protestant.

Robert E. Bouchet, for the Commission staff.

O P I N I O N

This is an application by the Cities of Sunnyvale and Santa Clara (hereinafter referred to as the Cities) which sought authority to reconstruct two crossings at grade of Kifer Road and the tracks of Southern Pacific Company (hereinafter referred to as Southern Pacific).

The application indicated that the Cities and Southern Pacific had agreed upon the nature of the protection at the two crossings and the procedure for installation thereof. The application also indicated that the Cities and Southern Pacific were unable to agree upon the sharing of cost for the improved protection at the crossings and requested the Commission to enter an order apportioning these costs. On January 24, 1967, the Commission entered an interim order (Decision No. 71931) authorizing the reconstruction and widening of the two crossings. The interim order prescribed the type of protection to be installed at each crossing. It also

indicated that the costs of these improvements would be apportioned by further order of the Commission.

A duly noticed public hearing was held in this matter before Examiner Jarvis at San Francisco on July 27, 1967. The matter was submitted subject to the filing of proposed findings by the parties which were received by September 7, 1967.

Before dealing with the issues in this proceeding it is necessary to first consider one point raised by the Cities. At the hearing the Cities contended that there presently is no necessity for automatic gates at the two crossings here involved, and they propose findings to this effect. The Commission holds that the Cities are precluded from asserting this contention for the reasons which follow. A well settled rule of law is that: "It is elemental that a party is bound by the admissions of his own pleadings (Razzano v. Kent, 78 Cal.App.2d 254, 259 (177 P.2d 612), and may not make a contention based on a statement of fact contrary thereto (Bloss v. Rahilly, 16 Cal.2d 70, 77 (104 P.2d 1049); Gates v. Bank of America, 120 Cal.App.2d 571, 575 (261 P.2d 545))." (Peyton v. Cly, 184 Cal. App.2d 193, 195-96; Engelbertson v. Loan & Bldg. Assn., 6 Cal.2d 477, 480; Hayden v. Security Homes Estate, 175 Cal.App.2d 223, 229; Johnston v. Johnston, 106 Cal.App.2d 775, 778.) Paragraph 7 of the application filed by the Cities in part states:

- "7. The widening of the two drill track crossings is a joint project between Applicants and Southern Pacific Company. An agreement has been entered into by all the parties wherein it is agreed that the Southern Pacific Company shall furnish all labor, materials, tools and equipment to install, and shall install, two (2) flashing light grade crossing signals equipped with automatic gate arms and appurtenances, together with additional materials, actuating and operating circuits and adequate instrument housing at said crossings."

Paragraph 8 of the application states:

"8. Applicants and the Southern Pacific Company have not been able to reach an agreement concerning the pro rata cost sharing for the widening project and, therefore, seek to have the Public Utilities Commission render its decision apportioning the cost of installing said flashing light signals with automatic gate arms and appurtenances between the parties pursuant to its authority under Sections 1202 and 1202.1 of the California Public Utilities Code."

In the light of the foregoing, the Cities cannot now claim that there is no necessity for automatic gates at the two crossings. Furthermore, the Commission, in the interim order, in part ordered that: "Protection at each crossing shall be by two existing Standard No. 8 crossing signals (General Order No. 75-B) augmented with automatic gate arms." The interim order was entered on January 24, 1967, and has become final. The Cities cannot now challenge the order. (Petitions of Desert Express, etc., 56 Cal. P.U.C.1.) Of course, on the question of apportioning costs, the Cities are not precluded from litigating the question of the relative benefits among the parties because of the installation of gates or any other matters pertinent to the allocation of costs.

Figure 1 following this page is a diagrammatic representation of the two crossings and surrounding area. It shows the relative locations of the various railroad tracks, roads and property hereinafter discussed.

Kifer Road runs through each of the Cities and in the area here under consideration is close to the city limits of the city through which it does not, at the points involved, run. The Cities had planned for many years to widen Kifer Road. In 1964 they caused to be formed an assessment district for the purpose of widening the road. Prior thereto the Cities had already acquired

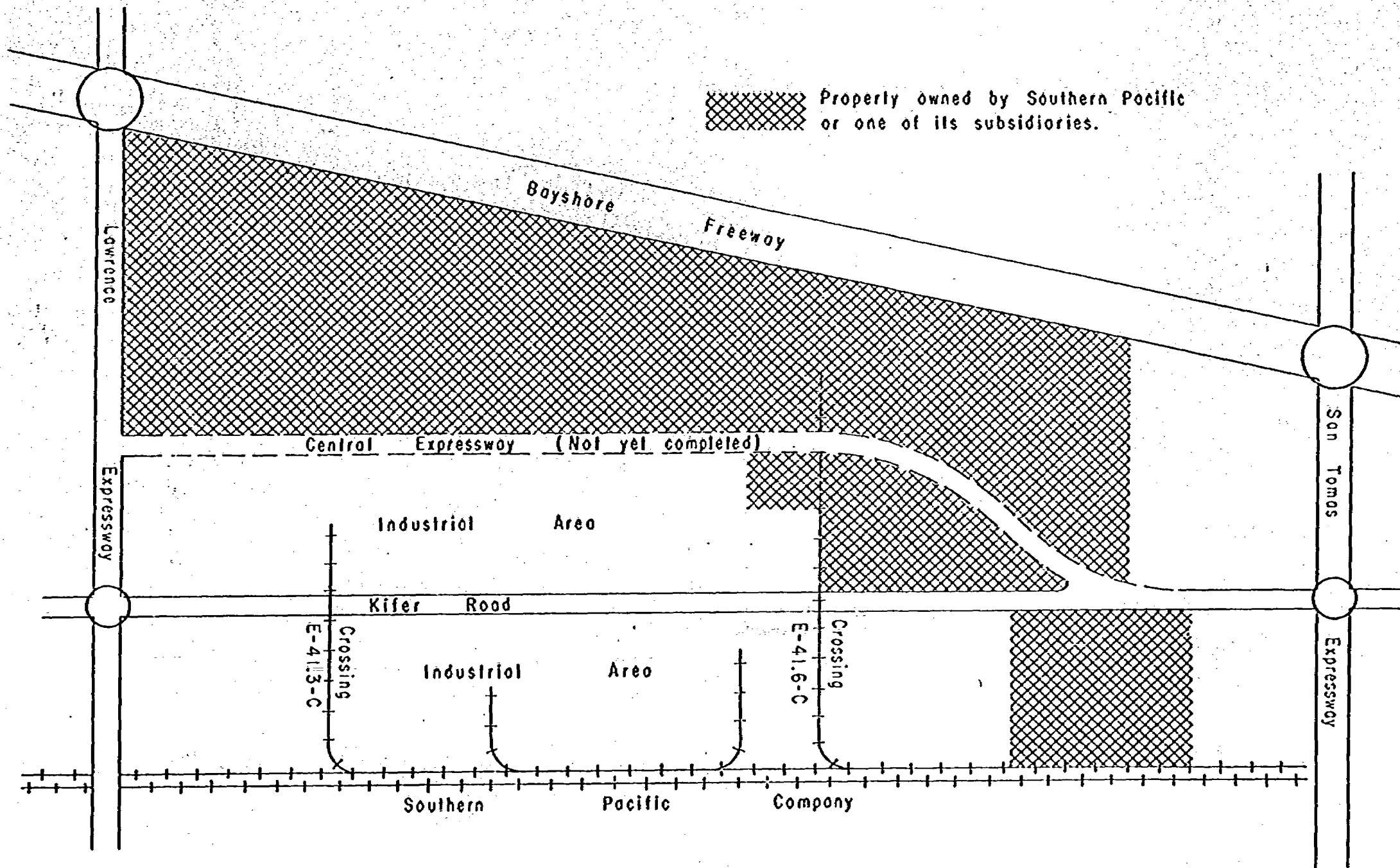


FIGURE 1
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most of the required right of way. The assessment district acquired the rights of way in the areas surrounding the two crossings involved. At the time of hearing in this matter Kifer Road had been widened but the improvements had not been installed at either crossing.

Prior to being widened, Kifer Road had an 86 foot right of way with a pavement width of 24 feet. It had no curbs or gutters. Kifer Road now has an 86 foot right of way with 64 feet of paving between faces of curb. It has four traffic lanes and two parking lanes, but there is no median or divider strip. Prior to the widening, each crossing was protected by two Standard No. 8 flashing light signals. It is conceded that the existing signals had to be replaced because they could not always be observed by traffic in the inner lanes. The Cities and Southern Pacific entered into an agreement in connection with the crossings which in part provided for the installation of flashing lights augmented with automatic gate arms.

The record indicates that an average of 7,482 cars travel across the stretch of Kifer Road in which the crossings are located on each weekday. The Sunnyvale traffic engineer estimated that in the future 14,000 to 18,000 cars will traverse the crossings each weekday. Since December, 1965, Southern Pacific has transported eight inbound and no outbound freight cars over crossing E-41.3 and no freight cars inbound or outbound over crossing E-41.6. When a train goes over one of the crossings it usually stops prior thereto and proceeds over the crossing at a speed not in excess of seven miles per hour.

The Cities contend that the crossing protection to be provided at the crossings is the highest form of protection short of a grade separation; that Southern Pacific is the primary beneficiary

of this type of protection because it owns a large amount of undeveloped land north of Kifer Road; that industrial development will take place on this land; that when this land is developed there will be increased train traffic over the two crossings; that Southern Pacific will benefit from the crossing protection by unimpeded and protected train traffic over the crossings and that Southern Pacific will also benefit as a landowner because of the rail transportation to its property. The Cities argue that if it were not for the anticipated future industrial development of the Southern Pacific land and the anticipated additional train traffic it will generate over the crossings less costly cantilevered flashing lights could have been installed at the crossings. The Cities contend that the Commission should apportion the cost of installing the additional Standard No. 8 flashing light signals 50 percent to the Cities and 50 percent to Southern Pacific Company, with automatic gate arms to be borne 100 percent by Southern Pacific Company.

Southern Pacific contends that the need for increased protection at the two crossings is primarily caused by the widening of Kifer Road; that the widening of Kifer Road "will be of practically no benefit to Southern Pacific Company"; that an increased level of crossing protection results in protecting the motoring public and is justified by anticipated growth in the area. Southern Pacific acknowledges that if it were not for the anticipated increase in rail traffic over the crossing, cantilevered flashing lights would have been sufficient protection. Southern Pacific contends that it should only be required to pay one-half the cost of the difference between the cost of cantilevered flashing lights and the flashing lights with automatic gates required at the crossings.

The Commission staff appeared in the proceeding. It presented no evidence. However, the staff representative made a statement that it was the staff's opinion that when protection of a grade crossing is improved to provide for automatic protection the costs should be apportioned 50 percent to the public agency involved and 50 percent to the railroad involved regardless of the benefit to the respective parties or the facts involved.

There cannot be a rule that a railroad must pay a fixed percentage of the costs of crossing protection and maintenance without regard to the facts of a given case. (Nashville C. & St. L. R. Co. v. Waters, 294 U.S. 405, 79 L.Ed. 949.) The proper test to be applied is that an allocation of 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 Utilities Com., 346 U.S. 346, 352-53, 98 L.Ed. 51, 60.) Benefits, however, need not be the sole test in making an allocation. (Atchison, Topeka & S. F. R. Co. v. Public Utilities Com., supra.) We now consider the facts of the present proceeding in the light of the rules just set forth.

The primary reason for the change in protection at the two crossings is the widening of Kifer Road. The increase in traffic lanes caused the existing protection to be unsafe. The Sunnyvale traffic engineer testified that the role of Kifer Road was to serve the industrial area adjacent to the crossings and "to provide circulation to and from the expressway areas adjacent to this point." To the extent that any change in protection is required at the two crossings, the primary benefit as to the minimum additional protection required is to the Cities because the change was necessitated by the widening of the road in order to facilitate motor vehicle traffic. However, the upgrading of protection to a minimum level

also benefits Southern Pacific. The Commission takes official notice of the fact that there are numerous motor vehicle-train accidents at grade crossings. This fact has caused the Legislature to enact statutes governing the conduct of railroads and operators of motor vehicles with respect to their conduct at grade crossings. (E.g., Public Utilities Code §§ 7604, 7678; Vehicle Code §§ 22451, 22452.) To the extent protection devices prevent accidents at grade crossings, a railroad is benefited because the devices reduce the railroad's potential liability for accidents and, in litigation where the railroad is eventually absolved from liability, the expenses involved in litigation. Thus, even had the crossings required cantilevered flashing lights only there would have been benefit to Southern Pacific under the facts of this proceeding. It is possible that except for the anticipated increase in rail traffic, because of Southern Pacific's projected industrial development of its property near the crossings, automatic gates might never be required at the crossings, and thus benefit from the automatic gates will inure to Southern Pacific. However, to the extent automatic gates are a higher form of protection than cantilevered flashing lights there is benefit to motor vehicle traffic which would not otherwise have been present. This benefit is attributable to the Cities.

In addition to the various benefits to the parties, heretofore discussed, it is also true that a railroad has "a continual obligation to participate in the matter of constructing reasonable and adequate crossings over its tracks, both at grade or 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, etc., 37 C.R.C. 695, 697.)

In the light of the rule just cited and the benefits to the parties previously considered, the Commission applying its expertise and judgment in this matter finds that the Cities should

pay 50 percent and Southern Pacific 50 percent of the cost and maintenance of the protection at the crossings here under consideration. No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Kifer Road in the Cities of Sunnyvale and Santa Clara crosses two industrial spur tracks of Southern Pacific at grade, said crossings being designated as E-41.3-C and E-41.6-C.
2. The Cities of Sunnyvale and Santa Clara formed an assessment district to finance the widening of Kifer Road.
3. Prior to its widening, Kifer Road was 24 feet wide, with no curbs or gutters, at the two crossings here involved.
4. Kifer Road was widened by said assessment district, including the portion at the two crossings, to a width of 64 feet from curb face to curb face. The widened roadway permits four moving traffic lanes and two parking lanes. There is no divider median strip in the center of Kifer Road.
5. Prior to the widening of Kifer Road the two crossings were adequately protected by Standard No. 8 flashing lights.
6. The widening of Kifer Road required that additional crossing protection be installed to protect the two inside lanes of traffic, because visibility of the existing automatic protection could be impaired for motorists travelling in the inside lanes.
7. The property in the vicinity of the two crossings in the City of Sunnyvale is zone M-1, limited industrial and in the City of Santa Clara is shown on the Santa Clara General Plan as industrial.
8. Crossing No. E-41.3-C extends northerly across Kifer Road approximately 250 feet. It presently serves Virden Lighting Company.

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There have been eight inbound and no outbound railroad freight cars transported over the crossing from December, 1965 to June, 1967. These train movements occurred between the hours of 9:00 a.m. and noon. These train movements across the crossing were at a speed of 6 to 7 miles per hour after the train had stopped prior to the crossing.

9. Crossing No. E-41.6-C extends northerly across Kifer Road for approximately 1400 feet. It crosses the future Central Expressway to serve the property north of the Expressway. There is presently one spur track to serve a building contractor, but there have been no inbound or outbound railroad cars transported to or from the contractor over the crossing since December of 1965.

10. Most of the undeveloped property north of Kifer Road which will in the future be served by Crossings Nos. E-41.3-C and E-41.6-C is owned by Southern Pacific or its subsidiaries. Southern Pacific plans industrial development for said property, and such industrial development will generate additional rail traffic over one or both of said crossings.

11. During a five-day workweek a daily average of 7,482 cars travel over Kifer Road in the vicinity of the two crossings. It is estimated that in the future 14,000 to 18,000 cars will traverse said portion of Kifer Road each workday.

12. The total cost of installing cantilevered flashing No. 8 signals at both of the crossings is approximately \$12,600.

13. The total cost of installing automatic gate arms and Standard No. 8 flashing lights at both of the crossings is approximately \$18,740.

14. The funds to pay for the crossing protection will be contributed by the Cities to the aforesaid assessment district.

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15. Automatic gates are required at the two crossings because of the anticipated increase in rail traffic when Southern Pacific develops its property in the area north of Kifer Road.

16. If automatic gates had not been required at the crossings, cantilevered Standard No. 8 flashing lights would have been adequate. Said cantilevered lights would have benefited the Cities as well as the Southern Pacific.

17. In the light of the mutual benefits to the parties and the legal obligation of Southern Pacific to participate in providing adequate crossings over its tracks, the Cities should pay 50 percent and Southern Pacific should pay 50 percent of the cost and maintenance of the automatic protection at the crossings.

Conclusion of Law

The Cities should be ordered to pay 50 percent and Southern Pacific should be ordered to pay 50 percent of the cost and maintenance of the automatic crossing protection at the two crossings.

O R D E R

IT IS ORDERED that the cost of installing and maintaining the protection ordered in Decision No. 71931 at Crossings Nos. E-41.3-C and E-41.6-C shall be borne as follows: The Cities of Sunnyvale

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and Santa Clara shall pay 50 percent of said cost and Southern Pacific Company shall pay 50 percent of said cost.

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

Dated at San Francisco, California, this 20th day of FEBRUARY, 1968.

Peter E. Mitchell
President

A. W. GATOV

William Symons, Jr.

Fred P. Morrissey
Commissioners

PETER E. MITCHELL
President

A. W. GATOV
WILLIAM SYMONS, JR.
FRED P. MORRISSEY
Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.