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ORIGINAL

Decision No. 83645

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the CITY OF SACRAMENTO for an Order authorizing construction of four crossings at grade between I, J, K and L Streets and the track of the Southern Pacific Transportation Company (Walnut Grove Branch) in the Old Sacramento Historical Area.	Application No. 53619 (Filed October 4, 1972)

David W. McMurtry, Attorney at Law, for the City of Sacramento, applicant.
Harold S. Lentz, Attorney at Law, for Southern Pacific Transportation Company, respondent.
O. J. Solander, Attorney at Law, for the State of California, Department of Transportation, interested party.
Robert T. Baer and Ira R. Alderson, Jr., Attorneys at Law, for the Commission staff.

O P I N I O N

The city of Sacramento seeks authority to construct grade crossings at I, J, K, and L Streets within its corporate limits, across the track of Southern Pacific Transportation Company (SP). The proposed construction concerns a project in which the city, in cooperation with other government agencies, plans to develop a recreational and historical park along the east bank of the Sacramento River, extending from I Street to Capitol Avenue. The Walnut Grove branch of the railroad will continue to traverse this park within a 20-foot wide fenced easement.

The proposed crossings will be used almost exclusively for the purpose of providing pedestrian access to this river park. The application states (paragraph 8): "The proposed crossings will serve public pedestrian traffic in the Old Capitol Sacramento Historic Area and State Park, plus occasional park service vehicles. Public vehicular traffic over the proposed crossings will be prohibited."

At the hearing it developed that the only vehicles which would be permitted to use the crossings would be those performing emergency and maintenance functions. Later, it was indicated that there might be special sight-seeing vehicles which would permit touring of the park. The surface of the crossings will be constructed to the necessary standard to handle such maintenance, emergency, and sight-seeing vehicles.

The crossings themselves will be of a type unique for California, and apparently unique for the United States. The protection for each crossing will consist of four wire mesh gates, two on one side of the track and two on the other. Each of these gates will be supported on a single post and will be equipped with an actuating mechanism for rotation through an arc of 90 degrees. They are intended to function so that at all times when trains are not using the tracks, they will block pedestrians from walking on the tracks other than at the crossing locations, and when a train is approaching, the gates will swing so as to block the pedestrian crossings completely until the train passes. Audible warning signals including a bilingual (English-Spanish) public address warning were proposed. No standard warning signals were planned. The functioning of the train indicators and the crossing gates will be coordinated so that a train will receive a green signal to pass through the area of the crossings only after the gates are closed.1/

1/ A more complete and technical description of the proposed crossing protection, complete with diagrams, appears in the appendix to the application.

The Commission originally issued an ex parte order (Decision No. 81090 dated February 23, 1973) approving this installation. SP petitioned for a rehearing on the ground that it had not consented to an ex parte Commission order not providing for the entire cost of construction and maintenance to be borne by the applicant in accordance with an agreement entered into between the parties. Rehearing was granted (Decision No. 81470). The staff originally opposed the inclusion of such an order but then on brief, agreed that this was appropriate.

A hearing was held in Sacramento before Examiner Meaney on September 25, 1973. The State of California Department of Transportation (DOT) appeared as an intervenor at the hearing and took the position that no gas tax funds could be expended for the construction of these particular crossings. The staff appeared and participated primarily for the purpose of presenting testimony regarding the method of determining maintenance cost. The staff concurred with DOT regarding the use of gas tax funds.

After this hearing was adjourned and the case was submitted, the examiner determined that he wished to take additional evidence on (1) the necessity for an EIR, (2) whether some visual warning devices should be included with the audible devices, and (3) whether any modification to the agreement between the parties for installation of protective devices was necessary in order to insure the integrity of the signal circuitry. This reopening was accomplished by a letter to the parties defining the issues, dated June 12, 1974, which was ordered copied into the transcript at the subsequent hearing on August 6, 1974.

At the August 6 hearing, SP objected to consideration of such issues without a formal order reopening the record. This objection was based upon the contention that ex parte Decision No. 81090 in this proceeding was dated February 23, 1973, that the effective date of this decision was March 15, 1973 (20 days after the order); that SP's petition for rehearing, filed on March 14, 1973, did not stay the Commission order, and that, therefore, issues other than those raised in the petition for rehearing (which related to apportionment of costs) cannot be raised at this time without a Commission order reopening the proceeding.

We disagree with this view of the examiner's responsibilities in this application, at least when, as in this case, the order granting rehearing does not by its own language restrict the rehearing to certain issues. It is our opinion that after the hearing was conducted on September 25, 1973, the examiner could set a further hearing on issues clearly relevant to reaching a proper result herein.

Commission Rule 84 does not by its own language purport to be the exclusive method for reopening proceedings. If it were so interpreted it would mean the Commission could never, no matter what formalities are involved, reopen a matter without receiving a petition from a party to set aside the submission. Such an interpretation has never been followed and is unthinkable, since it would mean that the Commission would lose control of the record of a case after th. date of submission.

The last sentence of Rule 63, defining the authority and responsibility of the presiding officer,[2/] states:

> "He [the presiding officer] may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."

2/ "Presiding officer" is defined in Rule 62 to include an examiner.

This is the rule that applies to this situation. The examiner has fairly applied this rule here, since (1) his letter reopening the record did nothing to interfere with or attempt to stay any order of the Commission, or reach a final determination of any issue, and (2) all three issues presented are of vital importance in reaching a final decision in this matter. Two of them involve serious considerations of public safety. Since this installation is the first of its kind in the state, it is especially important to consider safety factors carefully.

Public Utilities Code Section 1701, which provides that no informality in any proceeding or manner of taking testimony shall invalidate any order, decision, or rule made, approved, or confirmed by the Commission, properly applies here. The letter, sent well in advance of the supplemental hearing, preserved the substantial rights of the parties by providing them with adequate notice of a forthcoming hearing and by clearly defining the issues.

We further note in this connection that on page 7 of Exhibit A to the application (paragraph III, 2) it is indicated that "visual warning lights" would be provided. The plans did not detail how this is to be done, and Decision No. 81090 failed to mention how such lights were to be installed. Certainly, under the circumstances, it is reasonable to take testimony on this subject.

Use of Gas Tax Funds for a Grade Crossing Not Open to Public Vehicular Traffic

DOT urges that the Commission may not order apportionment of costs as to a grade crossing not intended for public vehicular use, when to do so would cause expenditure of gas tax funds to construct it.

Public Utilities Code Sections 1231 and 1231.1 concern the use of State Highway Fund money for the construction and maintenance (respectively) of crossings at grade. Pursuant to these sections, cities and counties are reimbursed for certain expenditures in connection with such construction and maintenance from the State Highway Fund, pursuant to order of this Commission.

DOT points out that, historically, such Commission orders have concerned crossings open to public vehicular travel[3/] and that Article XXVI of the California Constitution restricts the use of taxes on motor vehicle fuel, inter alia, to "public streets and highways".

The city counters by offering definitions of these terms which would include these proposed crossings, and invites our attention to a 1973 Attorney General's Opinion (56 Ops. Atty. Genl. 243) which concludes that motor vehicle fuel revenues may be spent on pedestrian lanes when they are "adjacent to or approximately paralleling existing or proposed highways and would directly increase the traffic capacity or safety of the highway".

SP argues that, regardless of Article XXVI, highway funds may be expended on crossings which are not "public streets" or "public highways" because the statutory provisions dealing with apportionment of costs for railroad grade crossings (Division 1, Part 1, Chapter 6 of the Public Utilities Code) are enactments within the

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3/ SP cites Commission Decision No. 79722 dated February 15, 1972 (Application No. 52728) as authority for highway fund use at a pedestrian crossing. This decision was an ex parte order, and the issues presented here were neither raised nor discussed.

purview of Article XII, Sections 22 and 23 of the California Constitution,[4/] and by the language of such sections, are endowed with a special status with respect to other provisions of the Constitution in that it has long been established that provisions of the Public Utilities Code are considered as the Constitution itself and prevail over any constitutional provision in conflict therewith. (SP's closing brief, p. 13, citing Pacific Tel. &Tel. Co. Eshelman (1913) 166 Cal 640.)

4/ Article XII, Section 22 reads, in pertinent part:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, Section 23 reads, in pertinent part:

> "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

The staff agrees with DOT in its analysis of Article XXVI, and disagrees with the city that the aforementioned Attorney General's Opinion may be applied to these crossings.

The issues raised by this facet of the application are: (1) Are the crossings "public streets" or "public highways" within the meanings of Article XXVI?[5/] (2) If they are not, may the Commission still issue an order which will result in an expenditure of funds derived from motor vehicle fuel taxes?

We are of the opinion that the answer to question (1) is in the negative and that, as to the crossings in this application, the answer to question (2) is also in the negative.

Before proceeding with our analysis, we note that the briefs in this matter discuss the effect of Article XXVI as it was adopted in 1938. Proposition 5 on the June 4, 1974 statewide ballot rewrote Article XXVI. This revision became effective June 5, 1974. The Commission must obviously base its order on the constitutional provisions in effect on the date of the order, rather than on those which are obsolete. Therefore, our analysis will be directed to Article XXVI as it now stands.

(a) Powers of the Commission in Application of Public Utilities Code Sections 1231 and 1231.1. This question will be considered first, since if SP were correct in its analysis of the Constitution, it would not be necessary to determine the exact meaning of the terms "public street" or "public highway" and their application to this proceeding.

First, while it has long been settled that control over railroad crossings is cognate and germane to the subject of railroad regulation and therefore the legislature may, under the above constitutional provisions, invest the Commission with the power to determine issues concerning apportionment of costs of crossings

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5/ There is no dispute over our jurisdiction to authorize construction of the grade crossings involved in this application.

(City of San Jose v Railroad Commission (1917) 175 Cal 284; City of San Bernardino v Railroad Commission (1923) 190 Cal 562), the field of public highway finance and construction is obviously not within such a category. When two legislative fields overlap, this Commission cannot assume that it has exclusive jurisdiction (cf. Orange County Air Pollution Control District v PUC (1971) 4 C 3d 370, 93 Cal Rptr 752).

Second, we must remember that we deal here with an amendment to the Constitution (Article XXVI, adopted in 1938 and amended in 1974) and not simply a statute. While we are well aware of the interpretation placed upon the constitutional provisions granting the Commission its powers (Pacific Tel. & Tel. Co. v Eshelman (1913) 166 Cal 640), we cannot on such basis assume that the people, as distinguished from the legislature, cannot abridge or modify such powers. While Article XII, Section 23 says that the legislature's right to confer additional (cognate and germane) powers upon the Commission is "plenary and unlimited by any provision of this Constitution", such language can hardly be taken to mean that the scope of the powers of the legislature or of the Commission's jurisdiction is immutable.

For example, if the people were to expressly enact a constitutional amendment which removed certain powers from the Commission, it could not be seriously argued that such amendment is ineffective because a previously enacted provision, also enacted by the people and part of the same Constitution, must govern. To rely upon such a proposition is to hold that a certain part of the Constitution is absolutely unamenable.

If it is unthinkable that the people cannot expressly modify by amendment any portion of the Constitution, may not the people accomplish the same end by implication? The only answer, in logic, is that an amendment, the import of which is to modify the powers of the Commission, must be given effect, but that in view of the provisions of Article XII, Sections 22 and 23, there must be a clear and convincing showing that this effect was intended.

We turn now to determining whether such a clear and convincing intent is evident. We think both because of the language of the amendment and its historical background, such intent is present. Although the 1974 amendment rewrote Article XXVI, we believe we must examine it in light of its entire history to determine its effect on the Commission's responsibilities.

Article XXVI was originally adopted November 8, 1938.6/ In the 15 preceding years, there was a steady increase in the revenues produced by gasoline taxes, registration fees, and weight fees. By 1938 conflicts had arisen on whether these revenues should be used to improve the state highway system or should go into the general fund. Article XXVI was adopted to resolve this problem. The ballot arguments may be considered as a guide to the purposes of the article.

6/ The pertinent part of this amendment in its 1938 form read:

> "Section 1.(a) From and after the effective date of this article, all moneys collected from any tax now or hereafter imposed by the State upon the manufacture, sale, distribution, or use of motor vehicle fuel, for use in motor vehicles upon the public streets and highways over and above the costs of collection, and any refunds authorized by law shall be used exclusively and directly for highway purposes, as follows:
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> "(1) The construction, improvement, repair, and maintenance of public streets and highways, whether incorporated or unincorporated territory, for the payment of property, including but not restricted to rights of way, taken or damaged for such purposes and for administrative costs necessarily incurred in connection with the foregoing." (Emphasis added.)

The argument in favor of passage read, in part:

> "This proposed constitutional amendment, when adopted by the voters, will effectively and permanently prevent diversion of gasoline tax funds to purposes other than those now provided by law.
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> "California motorists have been threatened many times with the misuse or diversion of moneys paid by them for the maintenance and development of routes for motor travel and for the support of the Department of Motor Vehicles. The purpose of this amendment is forever to end such threats." (Emphasis added.)

Thus, the intent to end the use of such revenues for other than highway purposes "for motor travel" was readily apparent, and it is not reasonable to assume any implied exception in favor of the Public Utilities Commission which could have been the basis for later legislative action under Article XII.

We believe that the 1974 amendment does not alter the situation. Over the last few years, sentiment increased for allowing (subject to certain restrictions) motor vehicle tax funds to be applied to development of public mass transit systems. Proposition 5 was placed on the June 4, 1974 ballot in response to this view. The first sentence of Section 1, and subsection 1(a), which correspond to the former sections quoted in Footnote 6, above, read:

> "Section 1. Revenues from taxes imposed by the state on motor vehicle fuels for use in motor vehicles upon public streets and highways, over and above the costs of collection and any refunds authorized by law, shall be used for the following purposes:
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> "(a) The research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their

> environmental effects, the payment for property taken or damaged for such purposes, and the administrative costs necessarily incurred in the foregoing purposes." (Emphasis added.)

All of the ballot arguments concern, exclusively, the advisability of adopting the provisions elsewhere in the Article, concerning expenditure of highway funds for mass transit. The legislative analysis appearing in the voters pamphlet as a preface to the proposition does not discuss the differences between the old Sections 1(a) and 1(a)(1) (see Footnote 4), and the new Sections 1 and 1(a), above. We must therefore assume that, other than allowing the use of some highway funds under certain conditions for mass transit development, the voters intended to continue the same basic policy of restricting use of the funds to "public streets and highways", and we may not find a general exception in favor of legislative enactments in the Public Utilities Code, where none existed before.

We therefore must now analyze, first, whether a pedestrian grade crossing falls generally within the meaning of "public street" or "public highway", and (if the answer is "no") whether the particular crossings in this application are eligible for highway fund expenditures on any other basis.

(b) Pedestrian crossings generally as public highways. May the terms "public street" and "public highway" be generally applied to pedestrian railroad grade crossings? As indicated, the crossings in question will be built within a park area although they will be on street rights-of-way. There are no plans to carry vehicular traffic other than maintenance and emergency vehicles, and possibly in the future, sight-seeing buses.

DOT attempts to furnish the Commission with a short answer to the problem by arguing that the streets at the location of the crossings are actually "pedestrian malls". This particular argument is without merit. It can be easily seen from Streets and Highways Code Sections 11100 et seq. that pedestrian malls are structures intended primarily, if not exclusively, to separate pedestrian travel from vehicular travel, where such traffic, mixed, already exists on city streets. This is particularly clear from Section 11200, especially subsection (e), as well as Section 11100.

We thus must analyze the problem by determining whether the crossings are part of a "public street" or "public highway".

The parties suggest various approaches to decide this issue. We have reviewed the various contentions and are satisfied that the controlling definitions are presented in Vehicle Code Sections 360 and 590. These sections read respectively as follows:

> "360. 'Highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street. (Stats. 1959, c. 3, p. 1534, Section 360.)"
>
> "590. 'Street' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Street includes highway. (Stats. 1959, c. 3, p. 1538, Section 590.)"

We have reviewed various definitions of "street" and "highway" elsewhere and have determined that such definitions either are nongeneric,[7] or exist for the specific purposes of the chapter in which they appear.

7/ For example, Streets and Highways Code Section 23 defines a highway in terms of what it "includes", that is bridges, culverts, curbs, etc., but does not say what a highway, much less a public highway, is, from a point of view of function or use.

Thus, a public street or highway, for the purpose of this proceeding, consists of a thoroughfare upon which public vehicular traffic is permitted. It is clear from the undisputed evidence here that none of the crossings under consideration meet this definition. The use of the crossings by maintenance, emergency, and (possible) sight-seeing vehicles does not fill the bill.

The argument advanced by the city that there may be future general traffic is pure speculation, and furthermore, it is obvious that, as presently designed, the protection proposed is totally unsuitable for general vehicular traffic.8/ A complete redesign of the protective devices would be essential before general, or even limited public vehicular, use could be allowed.

The city argues that a street is a street irrespective of vehicular use, basing this argument on Vehicle Code Section 21101. This section merely concerns the right of local authorities to adopt rules and regulations by ordinance or resolution concerning closing of highways to vehicular traffic under certain conditions. This section does not define a "public highway" or "public street", and therefore has no bearing on this matter. Neither does the opinion in City of Long Beach v Payne (1935) 3 Cal 2d 185. The holding in that case (that the term "highways" is so broad that it includes "canals") antedates the passage of Article XXVI of the Constitution, which was adopted in 1938. Further, the "public highway" definition then contained in the California Motor Vehicle Act was not concerned with

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8/ For this reason, we do not agree with the staff or the city that this question is more appropriately resolved later, at the time that the first billing for maintenance cost is submitted pursuant to paragraph 5 of Decision No. 72225, as amended by Decision No. 75264. The use of the crossings is clearly established by the evidence already in the record. It is desirable to inform the various parties now as to their rights, rather than to leave the question open.

whether a street or highway was "open to the use of the public for purposes of vehicular travel".9/

(c) Exceptions to "public street" requirement. The present Article XXVI, Section 1(a) allows the use of motor vehicle fuel revenues, inter alia, for "related public facilities for nonmotorized traffic" (that is, such facilities related to public streets). We find that in this particular case the pedestrian crossings applied for do not fall within this category.

9/ At the time of the Payne case, Section 21 of the Motor Vehicle Act read:

> "Sec. 21. 'Highway' or 'public highway'. Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term 'highway' or 'public highway' shall apply to and include driveways and paths upon the grounds of universities, colleges, and institutions when and during such time or times as such driveways and paths are open to public traffic by permission of the governing board or officer charged with the control and direction of any such university, college,or institution. The term 'highway' or 'public highway' shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public."

The legislature adopted the Vehicle Code in 1935 (Stats. 1935, c. 27 pp. 93-98) and at that time set forth the definition of a street or highway as "a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel". This 1935 legislation occurred after the operative facts upon which the Payne case was decided. In 1937 the definition was amended to its present form. It is obvious that the legislature had in mind to limit the definition of what constitutes a public highway; otherwise the language relating to vehicular use added in 1935 and altered in 1937 would not have been used.

While there are yet no cases interpreting the phrase "related public facilities for nonmotorized traffic", a 1973 Attorney General's Opinion (56 Ops. Atty. Genl. 243) considered, under the 1938 version of Article XXVI, the following question: "Does article XXVI of the Constitution permit the appropriation of motor vehicle fuel taxes for use on pedestrian, equestrian, or bicycle lanes or trails?" Conclusion No. 2 of the opinion answered this question as follows:

> "Article XXVI of the Constitution permits the use of motor vehicle fuel taxes for the construction and maintenance of pedestrian, equestrian, and bicycle lanes and trails separated from but adjacent to or approximately paralleling existing or proposed highways if such separation increases the traffic capacity or safety of the highway."

The opinion analyzes the history of the passage of this amendment, including the ballot arguments, and explains the conclusion, in part, as follows:

> "In view of the historical context in which article XXVI was bred and subsequent reaffirmation of those basic concepts, one is forced to the conclusion that motor vehicle fuel taxes were meant for use in connection with activities directly related to motorized vehicular traffic.
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> "However, it is apparent, for instance, that the construction and maintenance of pedestrian facilities, such as sidewalks and pedestrian overcrossings and undercrossings, which serve to separate pedestrian traffic from motor vehicle traffic on the highway, serve a "highway purpose," in that pedestrians who use or might use the streets and highways for transportation are removed from the highway thereby increasing the traffic capacity and safety of such street or highway.

* * *

> "Thus, it is our opinion that article XXVI of the Constitution permits the use of motor vehicle fuel taxes for the construction and maintenance of pedestrian, equestrian, and bicycle lanes and trails separated from but adjacent to or approximately paralleling existing or proposed highways only where such separation directly increases the traffic capacity or safety of highway.
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> "We conclude, therefore, that the use of motor vehicle fuel taxes on pedestrian, equestrian, and bicycle lanes and trails is permitted if such lanes or trails are adjacent to or approximately paralleling existing or proposed highways and would directly increase the traffic capacity or safety of the highway. On the other hand, the use of motor vehicle fuel taxes on such lanes or trails other than as outlined above and which are not adjacent to or do not approximately parallel a highway, and which do not increase the traffic capacity or safety of the highway, is precluded by article XXVI of the Constitution since it would not promote the movement of motor vehicle traffic." (Emphasis added.)

We observe that the phrase "related public facilities for nonmotorized traffic" is susceptible of a somewhat broader interpretation than that which the Attorney General's Opinion placed upon the 1938 version of Article XXVI. We believe, however, in view of the above discussed history of Article XXVI, and because the reason for adoption of the 1974 revision was to allow use of motor vehicle fuels, under certain conditions, for development of public mass transit, that the people intended no radical departure from the logic expressed in the Attorney General's Opinion, and that in order to be a "related" public facility for nonmotorized traffic, there must be shown at least some beneficial effect on (motor vehicle) traffic safety, traffic capacity, or traffic patterns in the immediate vicinity. Argument that in an age of pollution problems, when efforts are being made to find alternatives to automobiles, the more desirable result is to allow highway funds to be categorically available for nonvehicular railroad grade crossings, must be addressed to the people and not to this Commission.

We have analyzed the city's evidence and find that the city failed to meet the burden of showing that these crossings may be the subject of the "related public facilities" clause.

No evidence was introduced during the hearings relating directly to this issue.[10/] The city argued in its closing brief that without construction of these crossings (and assuming the tracks were fenced off within the park) all pedestrian traffic in the park would have to use the nearest existing crossing at Capitol Mall, to get from one side of the track to the other, that there are visibility problems for drivers watching for pedestrians at this point, and that, therefore, the alleged diversion of pedestrians from this crossing will increase the capacity and safety of "that busily traveled highway." (City's closing brief, p. 3.)

Such assumptions are not supported by the record. No evidence was presented as to any visibility problem. How busily the highway is traveled is not the subject of any evidence. We will note in this connection that this is no longer the main route through Sacramento although it is still an artery serving the Capitol Mall area. None of the exhibits illustrate any condition which indicates a danger to Old Sacramento Historical Area pedestrians, or to motorists, if such pedestrians were in fact to use the Capitol Avenue crossing to cross the track. It would not be necessary for such pedestrians to cross Capitol Avenue to get from one side of the track to the other.

It is speculative to assume that the city would open to the public the narrow stretch of land between the track and the river without first opening at least one of the crossings proposed in this application. It is also speculative to assume that much use of the land between the track and the river would be made if all pedestrians

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10/ As noted, the briefs herein are directed toward analyzing this issue on the basis of the 1938 version of Article XXVI, and the Attorney General's Opinion interpreting it. Obviously, however, if the evidence met the stricter test under the 1938 language, it would fulfill the requirements of the 1974 language.

had to walk to the Capitol Avenue end of the area and then double back. Pursuant to agreement of the parties, the examiner viewed the area. Although future river-oriented attractions may be installed (at least some such attractions are pictured on Exhibit 5) at present there is nothing in the area beyond the track except a wall which prevents access to the river.

We have made an independent analysis of the record to determine whether, in any other manner, these crossings could be deemed to have some beneficial effect on motor vehicle traffic in the immediate vicinity and find that this cannot be established from the evidence. The stub-ends of I, J, K, and L Streets between Front Street (also called the Embarcadero) and the river are not in their existing form suitable for any general vehicular traffic. The walkway area west of the track will carry pedestrian traffic in an approximate north-south direction. Front Street, immediately to the other side of the track, will carry vehicular and nonvehicular traffic; thus, the crossings are not planned for the purpose of separating north-south vehicular from nonvehicular traffic. As for east-west movement, it does not appear from the record that general vehicular traffic will be permitted any access to the riverbank area in this vicinity by any other entrance; therefore, no intent appears to separate east-west vehicular from nonvehicular traffic by use of these specially designed crossings.

The Old Sacramento Historical Area must be regarded as a whole to reach a common-sense answer to this question. It is obvious that the crossings are not intended to achieve any beneficial effect on motor vehicle movements, but are rather simply for the purpose of providing pedestrian access to the riverfront area (and, as previously discussed, as access for emergency, maintenance, and possibly sight-seeing vehicles).

We emphasize that we decide only that the crossings in this application do not meet the requisites of the "related public facilities" clause of Article XXVI, and that we are not generally holding that no nonvehicular crossings can be considered within its purview.

As pointed out in SP's petition for rehearing, the parties executed an agreement which, among other things, provides that the city shall construct the crossings at no expense to SP, and that the city will reimburse SP for all maintenance costs. Our order will provide for costs to be borne by the applicant in accordance with the agreement. Because of our views on the use of highway funds, this means that for the subject crossings the city cannot be reimbursed for construction expenditures under allocations made pursuant to Public Utilities Code Section 1231, nor is the city eligible for maintenance funds under Section 1231.1.

Method of Determining Costs of Maintenance

SP and the staff disagree as to the method of determining maintenance costs, and also as to when this should be done.

Preliminarily, we agree with SP that the determination should be made upon the present record in this proceeding. Complete testimony was taken on this issue. Whether the devices to be used at these four crossings will be of use elsewhere in California is uncertain. If future events prove that they have general applicability, the order herein is not a bar to modifying the maintenance value assigned herein in some future proceeding.

Regarding the method of arriving at the costs for the gate mechanisms, SP offers the following alternatives: (1) revise the table of relative unit values in Case No. 8249 to include values for these devices; (2) assign relative unit values for this proceeding only, which would not be considered a precedent in future general proceedings investigating maintenance costs, or (3) assign no relative unit values, but, rather, fixed dollar amounts and provide a method for updating such figures.

The staff observes that as to alternative (3) the Commission has never paid sums from the Crossing Protection Maintenance Fund or any other basis but by assignment of relative unit values. For this reason and because continual updating of dollar amounts would be burdensome, we consider (3) to be the least desirable alternative.

The staff recommends that the filing of a petition for modification in Case No. 8249 (the most recent general investigation of maintenance costs) is the proper procedural method to dispose of this issue.[11/] We consider this to be duplication of effort. The record herein is complete, the devices are, at least at present, unique to this location, and, as stated, the order herein is not a bar to modification in some future proceeding, if necessary.

We therefore choose alternative (2) above.

Charles Darrough, Public Projects Engineer for SP, who has over 30 years experience in SP's signal department, testified he made an investigation regarding the maintenance of the gate mechanisms and that in his opinion two relative unit values should be assigned for each gate (that is, since there are four gates at each crossing, there would be eight units assigned at each crossing).

11/ All devices other than the gates have relative unit values assigned (Case No. 8249, Decision No. 72225).

This assumes a 15-year life for the mechanism. The staff feels that the assumption of such life is an attempt to recover the entire capital cost. This is not the case; it is merely an assumption necessary to assure that sufficient units are assigned to allow for necessary replacement of worn out parts, or total replacement of a worn out mechanism.

Counsel for SP pointed out (Tr. 39) that SP is not seeking herein a revision of dollar amounts assigned to unit values. Thus, the dollar amounts produced by the units herein assigned may or may not reflect 1974 costs, in dollars.[12/] Case No. 9710, now pending, will resolve the problem of any necessary upward revision of dollars assigned to units.

In the agreement covering the construction of the crossings, it was stipulated that a total of 88 units should be assigned to the protection. At the hearing (Tr. 43-44) it was shown that this was excessive and that based upon what is now known about the function of the mechanisms, the Commission should order a total of only 52 units to be assigned. Based upon the uncontroverted evidence, this modification to the agreement is reasonable. To this figure of 52 will have to be added six additional units per crossing for the two Standard No. 10 lights which we shall order as part of the crossing protection, as a result of the evidence taken at the August 6 hearing, covered in greater detail hereinafter.

Adequacy of Crossing Protection

As indicated above, because of the Commission's concern as to this facet of this application, testimony was taken on this problem at the August 6 hearing.

12/ The testimony of witness Darrough indicated that he made a projection of 1974 costs, and that based upon his analysis, a unit value, for these crossings, should be worth $55 rather than $30.

The staff recommended installation of two Standard No. 10 flashers, one on each side of the track, at each crossing, installed in accordance with General Order No. 75-C. The staff witness stated that while an ordinary pedestrian crossing is about 10 feet wide and these crossings will be 30 feet, that his recommendation would be adequate with the addition of two more light heads at approximately right angles to the regular No. 10 lights, these additional lights thus facing across the crossing opening.

The city explained that it favored some visual warning but that it preferred protection which it felt would be adequate but less obtrusive in the historical area, for aesthetic reasons. The city's suggestion consisted of lights with a bell system, the lights to be those used on crossing arms, attached to the top of the gates.

SP reiterated its procedural objection mentioned above but stated that it also favored the addition of some lighting arrangement, and preferred the staff recommendation. Mr. Darrough of SP explained that it would be relatively easy for children to tamper with the crossing-arm type of light and the associated wiring, which, on a standard installation, is out of reach except when the gate is down. He also stressed the increased visibility of the No. 10 signal, the fact that it is a standard installation, and the problem of having red flashing lights on gates across the tracks themselves, which might be mistaken by an engineer unfamiliar with the area as an emergency stop signal.

Both the staff and railroad witnesses felt that appearance of the No. 10's could be improved, without affecting safety, by the Commission allowing the posts to be painted solid black, rather than with striping.

The city said it planned to paint the gates dull black, which is the color selected for all metal objects in the vicinity, such as the gas lampposts. The area will be lighted, at least at present, entirely by gas lamps to be consistent with the historical appearance.

The city agreed it would pay the increased costs (subject to any apportionment order made by the Commission as to highway funds) associated with installation and maintenance of any additional protection ordered by the Commission.

The city, the staff, and SP all agreed that if Standard No. 10's, which have bells, are to be installed, a public address warning system would be unnecessary.

The Commission is impressed with the diligent efforts of the parties to design satisfactory protection for this area, and believes that visual protection should be included. To allow the opening of any crossing of any kind without some visual warning activated in advance of the motion of the gates would be a departure from established practice, and would provide inadequate warning for hard-of-hearing or deaf persons, and perhaps for children, at least some of whom need a combination of visual and audible stimuli to adequately attract their attention in a park or recreational area. Since the park may at times attract large crowds, the noise level may occasionally be such that everyone's safety will be better safeguarded by having visual as well as audible warnings. Also, although No. 10 flashers are not intended as devices to warn motor vehicle drivers of approaching trains, they will at least serve as some visual train warning to drivers of emergency, maintenance, and sight-seeing vehicles.

The Commission, considering these factors, chooses the staff's recommendation. Standard No. 10's are relatively secure from tampering, and they have lights which are more conspicuous than those which could be placed on the top of the pedestrian gates. The Commission will permit the posts of the No. 10's to be painted black to improve aesthetics.

Because the nighttime illumination will be entirely by gas light (the city's witnesses indicating there would be less light than on a regular street corner), the Commission believes that either the gates must be painted a more conspicuous color than black, or that painted boards or reflectorized strips must be attached thereto to increase their nighttime visibility. We realize that this may not be harmonious with the "19th Century" appearance the city is trying to achieve; for this reason we will not prescribe a specific method or color scheme for achieving adequate visibility, but will allow the parties a chance to develop a design or color scheme which will afford reasonable night visibility while detracting from aesthetics as little as possible. We reserve the right to modify the protection at a later date if actual experience proves it to be insufficient.

Integrity of the Signal Circuitry

The agreement for installation of the crossing contains some language which suggested to the examiner that different parts of the crossing protection equipment were to be maintained physically by different parties. At the hearing on August 6 it was explained that this language referred only to maintenance of the gates themselves, and not to any of the electrical connections and devices, all of which will be physically maintained by the railroad.

Any question as to who is to maintain the public address system is obviated by the fact that its installation will not now be necessary, due to the inclusion of the No. 10 signals.

No modification of the agreement is necessary.

Applicability of California Environmental Quality Act

Preliminarily, it is clear from a review of the history of the Old Sacramento Historical Area presented herein, that the development of the entire project area, and not just the installation of the crossing protection, must be regarded as the "project" within the meaning of Public Resources Code Section 21065, especially since this is a redevelopment project and Section 21090 provides that for the purposes of the Environmental Quality Act, all undertakings in furtherance of a redevelopment plan shall be deemed a single project.

The city introduced a copy of the redevelopment plan for the Capitol Mall Riverfront Project, which included the development of these special crossings as an integral part thereof. The project was adopted by the Sacramento City Council on August 25, 1966. The uncontroverted evidence presented at the August 6, 1974 hearing was to the effect that a substantial portion of the total funds allocated to the project had already been spent and that substantial physical alteration of the project area had been accomplished on or before November 23, 1970.

Section 15070 of the Guidelines for Implementation of the California Environmental Quality Act requires an EIR for a project approved prior to November 23, 1970 and having a significant effect on the environment only if (1) a substantial amount of public funds allocated to it have not been spent and it is still feasible to modify the project or choose feasible alternatives, or (2) a public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment. In this case, no such modification is proposed. Substantial sums (approximately $15.8 million of the $21 million allocated) were spent as of November 23, 1970, and substantial physical alteration of the area was achieved by that date. Thus an EIR is not necessary.

Other alternate grounds for determining this project's exemption from EIR requirements need not be discussed.

Findings

1. The crossings applied for herein are intended for use as pedestrian crossings, with occasional use by emergency, maintenance, and possibly sight-seeing vehicles. Public vehicular traffic will not be permitted.

2. As presently designed, the crossings are not suitable for public vehicular traffic.

3. The proposed protection should be modified to include both visual and audible warning devices.

4. Cost of maintenance should be determined by assigning relative unit values to the protective devices, as more particularly set out in the order herein.

5. No modification of the agreement for installation of the crossings is necessary, except as to the total relative unit values to be assigned to the crossing protection, as indicated in Ordering Paragraph 7.

6. The Capitol Mall Riverfront Project was approved by the city of Sacramento on August 25, 1966 and has not, since that date, been the subject of a modification which would result in a new significant effect on the environment. Substantial sums were spent on the project on or before November 23, 1970.

Conclusions

1. The crossings are not "public streets" or "public highways" within the meaning of Vehicle Code Sections 360 and 590.

2. The crossings are not "related public facilities for nonmotorized traffic" within the meaning of that phrase as used in California Constitution, Article XXVI, Section 1(a).

3. The city of Sacramento is not eligible, as to these crossings, for reimbursement of construction or maintenance costs under Division 1, Part 1, Chapter 6 of the Public Utilities Code.

4. No EIR is required.

O R D E R

IT IS ORDERED that:

1. The order in Decision No. 81090 is vacated.

2. The city of Sacramento is hereby authorized to construct four pedestrian crossings at grade across the tracks of the Southern Pacific Transportation Company in Sacramento at the locations and substantially as shown by plans attached to the application to be identified as follows:

Crossing No.	Street Name
AH-88.95-D	"I" Street
AH-89.0-D	"J" Street
AH-89.1-D	"K" Street
AH-89.2-D	"L" Street

3. Width of crossings shall be 32 feet and grades of approach shall be as shown on plans attached to the application. Construction shall be equal or superior to Standard No. 2 of General Order No. 72-B.

4. Clearances, including any curbs, shall conform to General Order No. 26-D. Walkways shall conform to General Order No. 118.

5. Protection at each crossing shall consist of four electrically operated wire mesh gates installed substantially as indicated in the exhibits to the application and two Standard No. 10 pedestrian signals, each with two additional lights facing pedestrians approaching the crossing parallel to the track (General Order No. 75-C). The gates shall be constructed so that when they are open to allow passage across the tracks, they shall positively block pedestrians from walking parallel with or along the track. The gates will also be constructed in a manner that when a train approaches a crossing, they will positively block the crossing passage until the train has safely passed. The Standard No. 10 signals shall be so installed

that obstructions will not impair view of the signal. The posts of the No. 10 signals may be painted black. The gates shall be so painted or otherwise marked that they will be adequately visible at night.

6, Costs of construction and maintenance of the crossing and crossing protection shall be borne by applicant in accordance with an agreement entered into between the parties, without eligibility for reimbursement for such costs under Division 1, Part 1, Chapter 6 of the Public Utilities Code.

7. The relative unit values for maintenance cost shall be the following:

Unit No.	Description	Relative Unit Value
20(e)	Crossing signal flashing light type (two flashing lights), with or without bell or reflectorized signs, per mast	2.0
20(f)	Additional flashing light, each	0.5
20(g)	Wire mesh gate and automatic mechanism, per unit	4.0

8. Within thirty days after completion pursuant to this order, applicant shall so advise the Commission in writing. This authorization shall expire if not exercised within two years unless the time be extended or if conditions are not complied with. Authorization may be revoked or modified if public convenience, necessity, or safety so require.

9. The crossings shall not be opened to public vehicular traffic without first obtaining a further order of this Commission.

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

Dated at San Francisco, California, this 29th day of OCTOBER, 1974.

Vernon L. Sturgeon
President
William Symons Jr.
Robert E. McClure
Commissioners