

ORIGINAL

Decision No. 84978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of SOUTHERN PACIFIC TRANSPORTATION
COMPANY for an order authorizing
the construction at grade of an
industrial drill track in, upon and
across Railroad Avenue in the County
of Alameda, State of California.

Application No. 55012
(Filed July 3, 1974;
amended October 4, 1974)

Harold S. Lentz, Attorney at Law, for applicant.
Glen L. Moss, Attorney at Law, for San Lorenzo
Traffic Action Committee (STAC); Steven A.
McAdam, for Save San Francisco Bay Area;
Mrs. Janice B. Delfino, for Ohlone Audubon
Society; Mrs. John Partridge, for Bay School
PTA; and Ms. Christine Quiles, for East Bay
Subcommittee, San Francisco Bay Chapter, Sierra
Club; protestants.
Fitzgerald, Abbott & Beardsley, by Philip M. Jelley,
Attorney at Law, for Crow-Spieker #9 and #10;
Ben H. Zuppan, Attorney at Law, Herbert G. Crowle,
and Ms. Jessie G. Cambra, for County of Alameda;
and Glenn A. Forbes, City Attorney, for City of
San Leandro; interested parties.
Ira R. Alderson, Jr., and Patrick J. Power, Attorneys
at Law, and Tack Joe, for the Commission staff.

O P I N I O N

Statement of Facts

Southern Pacific Transportation Company seeks an order
of the Commission to authorize the construction, at grade, of an
industrial drill track across Railroad Avenue in Alameda County. This
crossing project will serve to connect to the local portion of the
main line of applicant's railroad the approximate 1,600 feet of drill

track from which a spur track of approximately 670 feet will service existing warehouse facilities. This trackage and the warehouse facilities are on a 21-acre parcel of industrially zoned land developed by Crow-Spieker, and border on the unincorporated township of San Lorenzo. The parcel and its facilities can be reached only by Grant Avenue, a road which approaches through San Lorenzo.

Preparatory to undertaking development of the parcel, Crow-Spieker approached the city of San Leandro. Under provisions of the California Environmental Quality Act of 1970 the city of San Leandro became the "Lead Agency"^{1/} for construction of the industrial park. On November 9, 1972 San Leandro issued its Environmental Impact Report,^{2/} and followed this with full approval of the industrial park project on November 28, 1972.

1/ Public Resources Code, Section 21067. Lead Agency:

"'Lead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment."

2/ Public Resources Code, Section 21061. Environmental impact report (insofar as relevant here):

"An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which any adverse effects of such a project might be minimized; and to suggest alternatives to such a project."

The vice-president of Crow-Spieker, who had prepared and processed the approvals on the development project, testified that at all times it was contemplated that the facilities would be rail served. In 1973 construction started and two large warehouse buildings^{3/} were completed, along with a rail spur which will connect with applicant's main line if this application is granted. The Master Plan was altered and accepted by the city on June 29, 1974. Under this amended plan the western half of the development was sold to the county and development of the remaining area was completed by erection of two additional structures. The tenants of the warehouse facilities leased their buildings with the understanding that rail service would be provided.

The general manager of the tenant of the warehouse building next to the rail spur testified that all merchandise comes in by truck at present - via Grant Avenue - to its warehouse. From July 1 to November 1, 1974 an estimated 125 incoming and 25 outgoing trips by truck were made. If the rail spur becomes operative, truck service will substantially decrease as most loads would move by rail.

A staff engineer briefly testified recommending that two Standard No. 1-R crossing signs be installed. An engineer from the county road department testified that Railroad Avenue in the area under consideration bears northerly from Grant Avenue, alongside and between the Crow-Spieker development and the applicant's main line, and leads to a gate and fence which parallels San Lorenzo Creek. The creek is the responsibility of the Alameda County Flood Control District. A road runs along the creek on the opposite side of the fence. A certified record from the county assessor was placed into evidence and indicates that Railroad Avenue is "neither assessed nor taxed on the current assessment roll". The county engineer testified

^{3/} One warehouse facility of 110,750 sq.ft. and the second of 98,000 sq.ft.

that members of the public occasionally drive over Railroad Avenue. Railroad Avenue in the vicinity of the proposed crossing is a 12-foot wide dirt lane. He testified further that the road has apparently been used as a public thoroughfare since offered for dedication in 1914. The record indicates that the development by Crow-Spieker (called San Leandro Business Park) is within the city limits of San Leandro. Railroad Avenue is not.

A signal engineer of applicant testified that a switch and block signal will control all train movement on the main line at this point, and on the spur. When the switch is open to permit a train to enter or leave the spur, block signals on each side of the spur will turn red, and stop all trains on the main line until the switch is closed and the track is safe.

A number of public witnesses testified or entered statements, primarily to urge that the Commission designate itself the "Lead Agency" on the rail spur crossing project, and prepare an Environmental Impact Report. Among these witnesses were San Lorenzo residents. One testified as to potential vibration and noise from a crossing with their possible effect on local wildlife; another as to future alternative transportation corridors under consideration elsewhere; and another as to the possible impact on birds, mice, and other small animals.

An Examiner's Ruling issued August 15, 1974 (before public hearings) had denied the need for an Environmental Impact Report, finding the environmental impact of the proposed rail crossing to be insignificant. Subsequently, public hearings were held on September 27, October 31, November 1, 7, and 8, 1974 in San Leandro, and on December 9, 1974 in San Francisco, before Examiner Fraser, after which the matter was submitted. The Commission on March 4, 1975 issued Decision No. 84168 authorizing the construction.

Immediately upon issuance of Decision No. 84168, the county of Alameda and the San Lorenzo Traffic Action Committee filed petitions for rehearing. In accordance with Section 1733 these petitions suspended the order. On reconsideration, the Commission granted rehearing. While expressing no opinion as to the validity of the San Leandro Environmental Impact Report of 1972 for the industrial park project, but reflecting serious questions as to the adequacy of consideration in 1972 with respect to the crossing project portion of the overall industrial park complex,^{4/} and also aware of its primary responsibility for approval of grade crossings in California, the Commission in accordance with Section 17.1 of its Rules of Practice and Procedure entitled "Special Procedures for Implementation of the California Environmental Quality Act of 1970", determined itself to be the "Lead Agency" with respect solely to the crossing project.

The applicant subsequently submitted a revised Environmental Impact Statement to the Commission. In addition, the applicant, together with the protestants, the interested parties, and the staff, working together under the good offices of Commissioner Batinovich, worked out a compromise intended to reduce the environmental impact of the project under the special circumstances of this case. This compromise would limit switching on the requested drill track servicing the warehouse adjacent to the existing spur track to the hours between 6:30 a.m. and 8:00 p.m. daily, including Saturdays, Sundays, and holidays. This compromise was reduced to stipulation form and subsequently, after revision, submitted to the examiner. The staff

^{4/} Although the supporting Environmental Impact Statement upon which the 1972 City of San Leandro Environmental Impact Report was based mentions "rail line", and infers rail service, it is regretful that there was no consultation whatsoever with the Public Utilities Commission (which has jurisdiction over rail crossings in California).

thereupon considered the record of prior public hearings, the applicant's revised Environmental Impact Statement, and the proposed stipulation, and consulted with all the known responsible public agencies involved before producing its own independent study which, together with a recommendation for a Negative Declaration, it submitted to the examiner.^{5/}

Both a prehearing conference and a final public hearing were held on August 15, 1975 in San Francisco before Commissioner Robert Batinovich and Examiner John B. Weiss. The case was submitted subject to issuance of an Examiner's Ruling on applicant's motion that a Negative Declaration be issued. On August 26, 1975 Examiner Weiss issued a Negative Declaration,^{6/} concluding that the crossing project in Application No. 55012 would have no significant effect on the environment. No exceptions were received.

Discussion

The threshold issue before us, particularly in view of the decision of the Court of Appeal, First Appellate District, Division Three, on August 11, 1975 in San Lorenzo Traffic Action Committee, et al. v The City Council of the City of San Leandro, et al. (unpublished decision 1 Civil 35468 (Sup Ct No. 43991)), is whether or not this Commission can in fact or law be the "Lead Agency" for the

^{5/} Entered into the hearing record as Exhibits 21 and 22.

^{6/} The examiner filed this Negative Declaration with the State Clearinghouse, Office of Planning and Research where it was assigned State Clearinghouse No. (SCH) 75090201.

crossing project under the California Environmental Quality Act of 1970. In that decision, the Appeals Court determined that Section 21169^{7/} of the California Public Resources Code and the defense of laches, serve to validate the Environmental Impact Report issued by the city of San Leandro in 1972 to cover the overall industrial park development, and therefore the Environmental Impact Report cannot be challenged.

The description of the overall industrial park development by Crow-Spieker contained in the San Leandro 1972 Environmental Impact Report makes it clear that industrial rail service was contemplated.^{8/} Unfortunately, however, it is equally clear that there was no consultation whatsoever with the Public Utilities Commission on any aspect of the rail crossing necessary to effectuate rail service, despite the fact that this Commission has jurisdiction over rail crossings in

^{7/} Public Resources Code, Section 21169. Validation; issuance of lease, permit, etc., or project undertaken, etc.:

"Any project defined in subdivision (c) of Section 21065 undertaken, carried out or approved on or before the effective date of this section and the issuance by any public agency of any lease, permit, license, certificate or other entitlement for use executed or issued on or before the effective date of this section notwithstanding a failure to comply with this division, if otherwise legal and valid, is hereby confirmed, validated and declared legally effective. Any project undertaken by a person which was supported in whole or in part through contracts with one or more public agencies on or before the effective date of this section, notwithstanding a failure to comply with this division, if otherwise legal and valid, is hereby confirmed, validated and declared legally effective." (Effective date: December 5, 1972)

^{8/} "C. Description of Proposal. (Including reference to other application forms, drawings, etc., where appropriate.): Development of 42 acres of currently unimproved industrially zoned (I-2) property. Proposed project consists of construction of streets, rail line, utilities and storm and sewer drainage systems with ultimate construction of a group of rail-served warehouse and service buildings in general accordance with the proposed master plan for the project."

California.^{9/} We are well aware that such large industrial park developments, as the one involved here, involve activities under the jurisdiction of many agencies, and if separate Environmental Impact Reports were required, a development would be unreasonably delayed, if not economically eliminated. But one of the fundamental and critically essential elements in the entire approval process contemplated by the California Environmental Quality Act of 1970 is the requirement of thorough and widespread consultation with all responsible agencies before completing a draft Environmental Impact Report or Negative Declaration. ". . . This early consultation is

9/ Public Utilities Code, Section 1201:

"No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

and Public Utilities Code, Section 1202 (insofar as here applicable):

"The commission has the exclusive power:

- "(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa."

designed to insure that the Environmental Impact Report or Negative Declaration will reflect the concerns of all responsible agencies which will issue approvals for the project. After completing the draft Environmental Impact Report or Negative Declaration, the Lead Agency shall also consult with and seek to obtain comments from other public agencies having jurisdiction by law..."^{10/} None of these was done in this application insofar as any consideration of the grade crossing project was concerned.

We have no quarrel with the city of San Leandro over its status as "Lead Agency" for the overall industrial park development, nor do we dispute the validity of the 1972 Environmental Impact Report the city issued for the overall industrial park development. Therefore, we do not consider the issue before us as one coming within the

10/ Guidelines for Implementation of the California Environmental Quality Act of 1970, Section 15066. Consultation:

"When more than one public agency will be involved in undertaking or approving a project, the Lead Agency shall consult with all responsible agencies (i.e., all the other public agencies involved in carrying out or approving the project) before completing a draft Environmental Impact Report or Negative Declaration. This early consultation is designed to insure that the Environmental Impact Report or Negative Declaration will reflect the concerns of all responsible agencies which will issue approvals for the project. After completing the draft Environmental Impact Report or Negative Declaration, the Lead Agency shall also consult with and seek to obtain comments from other public agencies having jurisdiction by law and should consult with persons having special expertise as described in Sections 15083 and 15085."

provisions of Section 21165 of the Public Resources Code.^{11/} By our actions and determinations in this case we merely assert that when, as here, a grade crossing project associated with a large industrial park development previously environmentally approved by another agency, received no specific or general consideration apparent on the record, this Commission may exercise its residual obligation and responsibility under Section 21151 of the Public Resources Code,^{12/} and Section 15067(a) of the Guidelines for Implementation of the California

11/ Public Resources Code, Section 21165. Lead agency; preparation of impact report:

"When a project is to be carried out or approved by two or more public agencies, the determination of whether the project may have a significant effect on the environment shall be made by the lead agency and such agency shall prepare, or cause to be prepared by contract, the environmental impact report for the project, if such a report is required by this division. In the event that a dispute arises as to which is the lead agency, any public agency may submit the question to the Office of Planning and Research, and the Office of Planning and Research shall designate the lead agency, giving due consideration to the capacity of such agency to adequately fulfill the requirements of this division."

12/ Public Resources Code, Section 21151. Local agencies; preparation and completion of impact report; submission as part of general plan report:

"All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they intend to carry out or approve which may have a significant effect on the environment. When a report is required by Section 65402 of the Government Code, the environmental impact report may be submitted as a part of that report."

Environmental Quality Act of 1970,^{13/} to assume jurisdiction and consider, act upon, and remedy that defect or omission before we proceed on the merits to approve a subsequently submitted application for an order authorizing construction of a rail crossing. Perhaps we act in an excess of caution, but Decision No. 84394, by which we assumed "Lead Agency" status for the grade crossing project only, was issued in recognition of this Commission's basic obligation as a responsible state agency to fully balance public objectives, including economic, social, and environmental factors, with private needs in determining whether and how a crossing project admittedly within its jurisdiction should be approved.^{14/}

13/ Guidelines for Implementation of the California Environmental Quality Act of 1970, Section 15067. Subsequent EIR:

"Where an EIR has been prepared, no additional EIR need be prepared unless:

- "(a) Substantial changes are proposed in the project which will require major revisions of the EIR, due to the involvement of new environmental impacts not considered in a previous EIR on the project;
- "(b) There are substantial changes with respect to the circumstances under which the project is to be undertaken, such as a change in the proposed location of the project, which will require major revisions in the EIR due to the involvement of new environmental impacts not covered in a previous EIR."

14/ The examiner, noting the January 28, 1914 dedication of Railroad Avenue (predating Section 65402 of the Government Code and Section 11611 of the Business and Professions Code, dealing with formal acceptance of dedications) as a public thoroughfare, and testimony that no taxes thereafter have been paid, as well as the apparent continuous use since 1914 by both public agencies and private persons, concluded that Railroad Avenue is a "public road, highway or street", and that jurisdiction attached to the Commission under Section 1201 of the Public Utilities Code (See Footnote 3 of the Negative Declaration). The Commission agrees with the examiner's determination, and adopts it as its own.

Turning to the merits of the application itself, we recognize that completion of the rail crossing would economically benefit warehouse operations in the San Leandro Business Park, make for more efficient usage of the existing facilities, and provide expanded employment opportunities. The continued presence and vigorous participation by Crow-Spieker and tenants in this protracted case are alone ample evidence of their interest in and desire for rail service. They need it and benefits would result from completion of this crossing. Witnesses for both testified that rail service was contemplated all along as integral to this development. Rail service will enable one of the principal tenants to discontinue its present uneconomical practice of having to have rail shipments off-loaded at Union City and trucked to its warehouse in the industrial park for further distribution. It appears reasonably certain that even with enhanced business volume rail service would serve to materially reduce truck traffic on Grant Avenue, a major source of irritation to local residents, and would thus also serve to reduce air pollution generated by those trucks. The tenant also testified that limitation of hours of rail operation (as proposed by the stipulation offered into evidence by the parties) over the crossing to essentially the daylight hours would not materially affect its business. This limitation would also substantially reduce noise and vibrations, irritations induced by the diesel engines, and boxcars using the crossing. There is nothing irreversible about the construction of this crossing - if need be, or, if future viable alternatives develop, the trackage could be removed within days, leaving the crossing site in substantially the same condition as now. Inspection of photographs of the site reveals nondescript weeds, several small bushes, and a small tree. Partial or total elimination of this vegetation would have no significant impact on the environment. There are no known

historical or archaeological sites in the area. Alternative routes would involve exorbitant cost. In summary, we conclude that the limitations of the stipulation submitted by the parties serve to put this rail crossing project in a posture wherein it will have no significant effect upon the environment.

The Negative Declaration filed by the examiner on August 27, 1975 with the Office of Planning and Research, State Clearinghouse,^{15/} was reviewed by this Commission, and our findings are based upon the information set forth therein.

Findings

1. The construction of an industrial drill track across Railroad Avenue in Alameda County to connect a spur track to applicant's main line is reasonably desired to provide economic operation of the San Leandro Business Park.

2. The Environmental Impact Report issued in 1972 by the city of San Leandro for the San Leandro Business Park development, inadvertently or otherwise, did not include any specific consideration of the environmental impact of the at grade rail crossing project under consideration here.

3. There were no consultations by the city of San Leandro with this Commission prior to issuance of its 1972 Environmental Impact Report for the San Leandro Business Park.

4. To meet this deficiency or omission, the California Public Utilities Commission determined itself to be the "Lead Agency" for the grade crossing project only.

5. The Negative Declaration, prepared and filed by Examiner John B. Weiss, is hereby incorporated by reference and we certify that it was completed in compliance with the requirements of the California Environmental Quality Act of 1970, as amended, and the Guidelines for Implementation of that Act.

^{15/} The Office of Planning and Research, State Clearinghouse, acknowledged receipt of the Negative Declaration filed by the examiner and assigned State Clearinghouse No. (SCH) 75090201 to project. The reviewing period ended October 1, 1975. On October 6, 1975 the Office of Planning and Research, stating no comments were received, verified Commission environmental compliance.

6. The Commission has reviewed and considered the information contained in the Negative Declaration.

7. Our findings on the environmental factors are as follows:

- a. Noise, vibration, and disruption resulting from rail service will be minimized because of the limitation of switching to specific hours.
- b. Rail service to the existing warehouse facilities has the potential to overall decrease the existing levels of heavy truck traffic making delivery into the affected area.
- c. The proposed rail service will serve only existing warehouse facilities, and while the economic enhancement of these facilities provided by rail service may contribute indirectly to growth, such growth-inducing impact should not be significant.
- d. The alternatives to the proposed project (except that of non-approval) will not have a lesser environmental impact and will be economically disadvantageous in comparison to the proposed project. If not constructed, truck traffic, with resultant additional noise and exhaust pollution, would substantially increase.
- e. The only irreversible environmental effects of the proposed project are the irretrievable consumption of labor and energy required for construction.
- f. The effect upon vegetation and wildlife will be minimal.
- g. No historic, archaeological, or anthropological sites will be affected by the project.

8. Railroad Avenue is a "public road, highway, or street", and our jurisdiction accordingly attaches.

9. Applicant should be authorized to construct the industrial drill track across Railroad Avenue.

10. The crossing protection should be two Standard No. 1-R crossing signs (General Order No. 75-C).

11. Dimensions, configurations, clearances, and walkways should be substantially in accordance with the plan set forth in the application and comply with applicable rules and general orders of the Commission.

12. Costs of constructing the crossing shall be borne by the applicant and its subrogation shall be in conformity with applicant's practice.

Conclusions

1. This Commission is the "Lead Agency" for this grade crossing project.

2. The Negative Declaration has been completed in compliance with the California Environmental Quality Act and the Guidelines for Implementation of this Act.

3. This Commission has reviewed and considered the information contained in the Negative Declaration, and the findings relating to the environmental factors set forth in Finding 7 are reasonable.

4. Applicant's motion that a Negative Declaration be issued was granted by the ruling filed August 26, 1975 by Examiner Weiss.

5. The application should be granted.

O R D E R

IT IS ORDERED that:

1. Southern Pacific Transportation Company is authorized to construct an industrial drill track across Railroad Avenue in the county of Alameda at the location and substantially as shown in the plan attached to and part of the application.

2. The crossing, to be identified as Crossing No. L-18.38-C, shall be protected by two Standard No. 1-R signs (General Order No. 75-C).

3. Costs of construction shall be borne by applicant and subrogated in conformity with applicant's practice.

4. Construction of the crossing shall be equal or superior to Standard No. 1 (General Order No. 72-B). Crossing widths shall conform to the existing roadway with tops of rails flush with the pavement surface.

5. Clearances shall conform to General Order No. 26-D. Walkways shall conform to General Order No. 118.

6. Maintenance of the crossing shall be in conformity with General Order No. 72-B.

7. Within thirty days after completion pursuant to this order applicant shall so advise the Commission in writing.

8. This authorization shall expire if not exercised within two years unless time be extended or if the above conditions are not complied with.


9. This authorization may be revoked or modified if public convenience, necessity, or safety so require.

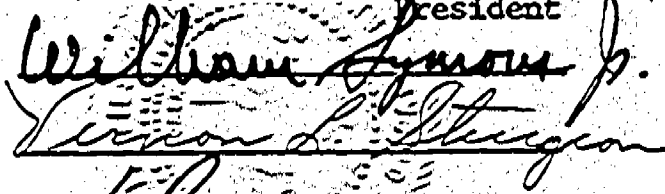
10. This decision is issued in view of the many unique aspects of this particular proceeding and none of the provisions hereof or the special conditions or restrictions set forth herein, specifically including the restriction prohibiting the railroad from providing

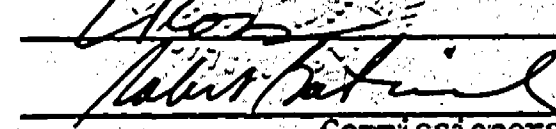
rail service to anyone who may request rail service on other portions of the track involved herein or extensions thereof, even though any such extensions may not cross any highway, street, byway, or path, is to be considered a precedent of general applicability.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 7th
day of OCTOBER, 1975.



President


Vernon L. Sturgeon


Robert F. Finkel
Commissioners