

Decision No. 85950

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of the City of Oxnard for an Allocation from the Crossing Protection Fund to assist in paying its share of the cost of constructing pedestrian signals at crossing CPUC No. 45-2.14.D Gary Drive, City of Oxnard.

Resolution No. CP-2239
(Filed February 4, 1975)

Investigation on the Commission's own motion to establish a list of grade crossings of railroads and city, county, or city and county highways urgently in need of improved protection, and to determine the nature of needed improved protection at such crossings.

Case No. 5495
(Filed September 15, 1953)

O. J. Solander, Attorney at Law, for State of California, petitioner.
Richard Paul Staley, Attorney at Law, and
Leonard C. Hayes, for City of Oxnard, interested party.
William Jennings, Attorney at Law, for the Commission staff.

OPINION ON REHEARING

Decision No. 80856, issued ex parte, on December 19, 1972, granted Application No. 53595 filed by the city of Oxnard and authorized Oxnard to construct a pedestrian grade crossing over the track of the Ventura County Railway Company at Gary Drive (Crossing No. 45-2.14.D). The order provided crossing protection in the form of two pedestrian railroad crossing signs, crossing bells, and flashing signal units mounted as shown in Appendix A to that order. Pursuant to that order the pedestrian

crossing with the requisite warning devices was constructed. The city of Oxnard notified the Commission by letter dated January 22, 1974 that the crossing had been placed in operation on January 11, 1974.

Decision No. 80856 provided that Oxnard should bear the entire construction expense of the crossing and requisite crossing protection and maintenance expense outside lines two feet outside rails.

Resolution No. CP-2239 issued February 19, 1975 in Case No. 5495^{1/} granted the request by Oxnard for an allocation from the Crossing Protection Fund (Public Utilities Code Sections 1231-1232) in an amount equal to one-fourth of the actual cost of constructing the crossing in issue.^{2/}

1/ Decisions Nos. 49565 and 49754 in Case No. 5495 established a procedure for the handling by resolution of uncontested requests for allocations of crossing funds created by Statutes 1953, Chapter 1739.

2/ Resolution No. CP-2239 stated as follows:

"City of Oxnard has requested an allocation from the Crossing Protection Fund to assist in paying its share of the cost of constructing pedestrian signals at the crossing listed on Attachment A. The appropriation statute permits allocation from the fund of not more than one-half of the public agency's share. It is the judgment of the Commission that allocation be made for up to one-half of the public agency's share of the signal installation costs at the crossing in question, but not to exceed 25 percent of the total cost. We are of the opinion that the pedestrian crossing has a beneficial effect on motor vehicle traffic in the immediate vicinity inasmuch as it will remove pedestrians from nearby vehicular crossings and this meets the requisites of the 'related public facility' clause in Article XXVI of the Constitution. The situation in Sacramento (Decision No. 83645) involved different circumstances in that the project was located in a historical State park complex. Being of the opinion and finding that need has been shown for the installation of the proposed protection and for the allocation of funds hereinafter made...(Order)."

Decision No. 84877 dated September 5, 1975 granted the petition for rehearing of Resolution No. CP-2239 filed July 7, 1975 by State of California, Department of Transportation (hereinafter CalTrans or DOT). Decision No. 85043 reopened Case No. 5495 and consolidated that proceeding with the rehearing of Resolution No. CP-2239.

The rehearing ordered by Decision No. 84877 was held before Examiner Mallory in Oxnard on April 9, 1976 and the matter was submitted.

Evidence was presented by witnesses appearing for the city of Oxnard (City), CalTrans, Ventura County Railway Company (VCRR), and the Commission staff.

The staff witness presented Exhibit A-1, which contains the report of his investigation of the use made of the crossing and the alternate traffic route available in the absence of the crossing. The staff report states that the principal use of the pedestrian crossing is by school children who reside on one side of the railroad track and attend school on the other side. Three schools are involved; Ansgar Larson Grammar School and Charles Blackstock Junior High School, located west of the track, and Channel Island High School, located east of the track.^{3/} School hours are between 8:06 a.m. and 3:30 p.m. During the afternoon of Wednesday, November 5, 1975, traffic counts were made by the staff to determine the extent the crossing is used. The results are as follows:

^{3/} The staff exhibit shows that 153 students attending Ansgar Larsen Grammar School, 65 students attending Charles Blackstock Junior High School, and 350 students attending Channel Island High School live in areas where students make use of the Gary Drive pedestrian crossing. Students are not bused.

	<u>Westbound</u>			<u>Eastbound</u>			<u>Total</u>
	<u>Students</u>	<u>Bikes</u>	<u>Adults</u>	<u>Students</u>	<u>Bikes</u>	<u>Adults</u>	
7:45 a.m.-9:00 a.m.	86	8	1	132	10	-	237
9:00 a.m.-2:00 p.m.	36	11	-	3	3	2	55
2:00 p.m.-4:15 p.m.	<u>185</u>	<u>22</u>	<u>=</u>	<u>77</u>	<u>18</u>	<u>1</u>	<u>303</u>
Total	307	41	1	212	31	3	595

The witness for VCRR testified that the railroad operates two trains in each direction each weekday, on no particular schedule. The first train southbound is after 10:00 a.m. and the return northbound trip is about two hours later. The second outbound and return trips are about 2:00 p.m. and 4:00 p.m. Three of the train movements generally cross Gary Drive during the periods when the crossing is being used by school children.

The parent of five school-age children who reside east of the track testified that three of her children use the Gary Drive crossing to reach school; that the only feasible alternate route, if the Gary Drive crossing did not exist, is via Channel Island Boulevard, located 0.38 miles to the north of the Gary Drive crossing; that Channel Island Boulevard is a heavily traveled street which she feels is not safe for her children to use; and that, if the Gary Drive crossing did not exist, she or her husband would drive the children to school to avoid their using Channel Island Boulevard. Counsel for the City introduced three letters from parents living in the same general area as the foregoing witness, which indicated that the writers believed Channel Island Boulevard is unsafe for school children and that it is desirable that the Gary Drive Crossing be available for their children to use.

The City also introduced evidence concerning the background and history of the crossing, the physical features at the crossing, and those of the adjacent public crossings at Channel Island Boulevard to the north and Bard Road to the south. That evidence shows that there is a 6-foot drainage ditch paralleling the railroad track. In April 1975 Ventura County (Flood Control, Zone II) reconstructed the drainage ditch so that it is a rectangular open reinforced concrete channel having vertical walls topped by a 6-foot high chain link fence. The chain link fence extends from Channel Island Boulevard to Bard Road, except at Gary Drive crossing where a reinforced concrete foot bridge was installed across the channel. There is no access by public street between the Bard Road crossing (Crossing 45-2.52) and Channel Island High School to the northeast.

Traffic counts introduced by the City in Exhibit A-5 indicate the following usage of the Gary Drive crossing between the hours of 7:00 a.m. and 4:00 p.m. on April 6, 1976:

<u>Eastbound</u>		<u>Westbound</u>	
<u>High School</u>	<u>Elementary</u>	<u>High School</u>	<u>Elementary</u>
197	42	80	84

Testimony was presented by a senior engineer appearing for CalTrans to the effect that no funds are available to reimburse cities for their share of construction and maintenance of crossing protection because the Governor had deleted all such funds from the current budget. No appropriation to that fund is included in CalTrans' proposed budget for the next fiscal year.

CalTrans also presented an engineer who testified that an engine whistle was adequate warning to school children that a train is approaching the crossing; therefore, light and sound signals constructed at the crossing are unnecessary. As such protection is unnecessary in the opinion of the witness, highway fuel tax funds should not be used to reimburse the City for construction of the signals and warning lights at the crossing.

The Issues

The sole issue in this proceeding is whether the pedestrian crossing in question qualifies for the use of highway fuel tax funds under the doctrine expressed in City of Sacramento (Decision No. 53619 dated October 29, 1974 in Application No. 83645). The issue concerning whether the signal lights and bells erected at the crossing are necessary to protect the pedestrians using the crossing is moot, having been decided when the Commission issued Decision No. 80856, supra, authorizing the construction of the crossing and specifying the protective devices required as part of that construction. CalTrans' attempt to show that such protective devices are not needed constitutes a collateral attack on an order which long has become final. Similarly, the fact that the grade crossing protection fund is depleted at the present time and that no funds may be appropriated in the next fiscal year is not germane. Sections 1231 and 1231.1 provide that funds appropriate for purposes specified therein shall be available for allocation and expenditure without regard to fiscal years. Until the repeal of Section 1231 of the Public Utilities Code we must proceed on the basis that future funding will be made from which an appropriation to the City can be made if found lawful herein.

The Sacramento Decision

The Sacramento decision states as follows (mimeo. pages 15, 16, and 17):

"The present Article XXVI, Section 1(a) [of the State Constitution] 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...

"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.

'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.

* * *

'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 non-motorized traffic, there must be shown at least some beneficial effect on (motor vehicle) traffic safety, traffic capacity, or traffic patterns in the immediate vicinity."

Discussion

The evidence shows that the pedestrian crossing here in issue is primarily used by children on their way to and from the public schools that they attend. The evidence also shows that if the crossing did not exist some limited portion of the children who now use the crossing would be driven to and from school via adjacent public streets because the parents of these children consider the streets to be unsafe. The record also shows that Channel Island Boulevard, the

adjacent vehicle public crossing, is a heavily traveled highway and that the peak traffic periods occur in the same periods that the school children leave for and return from school. To the extent that such automobile traffic does not take place, it directly increases the traffic capacity and safety of the highway adjacent to the pedestrian crossing. In other words, the evidence adduced herein meets the tests set out in Sacramento in that some motor vehicle traffic is removed from Channel Island Boulevard at peak traffic periods as a result of the pedestrian crossing.^{4/}

The order in Resolution No. CP-2239 will be affirmed.

^{4/} "§ 156.10 Nonmotorized transportation facilities paralleling state highway; construction and maintenance; payment of costs

"(a) The department may construct and maintain * * * non-motorized transportation facilities approximately paralleling any state highway where the separation of * * * nonmotorized traffic from motor vehicle traffic will increase the traffic capacity or safety of the highway.

"(b) Where the separation of * * * nonmotorized traffic from motor vehicle traffic will increase the traffic capacity or safety of the highway, the department shall pay for the construction and maintenance of separate * * * nonmotorized transportation facilities approximately paralleling the highway.

"(c) The Legislature finds and declares that the construction * * * maintenance of such * * * nonmotorized transportation facilities constitute a highway purpose under Article XXVI of the California Constitution, and justify the expenditure of highway funds and the exercise of the power of eminent domain therefor.

"(Formerly § 105.7, added by Stats. 1971, c. 1553, p. 3066, § 4. Renumbered § 156.10 and amended by Stats. 1973, c. 947, p. 1781, § 7.)

"Asterisks * * * indicate deletions by amendment.

"Underline indicates changes or additions by amendment."

Motion for Assessment of Costs

The Commission staff counsel made a motion that the Commission assess court costs, including the cost of conducting the rehearing.^{5/} The basis for the motion is that the party initiating the rehearing is a state agency and that it is inappropriate, in the counsel's view, that one state agency should make a formal attack on the order of another agency when both are supported by public funds. It is counsel's opinion that the two administrative agencies should use other forums, such as the Governor's Council, to resolve disputes between them. Counsel urged that all informal means for meeting and conferring on disputed issues be exhausted before a public hearing is held. Counsel pointed out that not only was the time and effort of CalTrans and Commission staff personnel required in the rehearing, but the time and effort of other outside parties such as VCRR and the City were required. Counsel explained that the Commission had not heretofore acted in the manner proposed by him; moreover, in a recent utility rate proceeding, public interest participants were denied a request that the utility make funds available to them to protest the rate increase. (Pacific Gas and Electric Company, Decision No. 84902 dated September 16, 1975 in Application No. 54279, mimeo. pages 163-167.)

Counsel furnished no citations of authority for his motion (other than Pacific Gas and Electric Company which holds contrary to the motion). A review of the Public Utilities Code and

^{5/} Counsel estimated that the cost of holding the instant public hearing including travel costs of the examiner, counsel, reporter, and staff witness is about \$1,500, based on comments made by the Chief Examiner of the Commission. It may be noted that the amount of the allocation authorized in Resolution No. CP-2239 is \$1,432.79.

the Commission Rules of Procedure reveals no statutory provisions or procedural rules for assessment of the kind of costs requested by staff counsel.^{6/} Moreover, the entire responsibility for rehearing does not lie with CalTrans. As indicated in Footnote 2 (supra) our staff could expect CalTrans' opposition to the allocation based on Sacramento yet recommended that it be granted ex parte, thus inviting a petition for rehearing.

The comments of staff counsel are well taken concerning the fact that two publicly supported state agencies have had to resolve their differences in a formal proceeding. Our Transportation Division staff should determine whether the allocation of highway funds to grade crossings will be in issue at the time an application to construct the crossing is made and should attempt to resolve that issue before authority for the construction of the crossing is approved, as an extension of present informal procedures preceding authorization to construct grade crossings.

The holdings in Sacramento and herein should clearly indicate to the parties the circumstances under which allocations from highway funds are appropriated with respect to pedestrian crossings. Agreement between our staff and CalTrans should not be difficult to reach on an informal basis, except in very unusual circumstances.

^{6/} Costs arising from violation of discovery procedures may be allowable. (See P.U. Code Sections 1793, 1794.)

No basis in law or fact appears for the assessment of costs to CalTrans, and the staff motion should be denied.

Findings

1. Decision No. 80856 dated December 19, 1972 granted Application No. 53595 filed by the city of Oxnard. That decision became final January 8, 1973. It authorized construction of a pedestrian grade crossing over the track of Ventura County Railway Company at Gary Drive (Crossing No. 45-2.14.D) and provided that protection shall be by two pedestrian railroad grade crossing signs, crossing bells, and flashing light signals. Applicant was ordered to bear the entire construction expense of the crossing and requisite crossing protection, also maintenance costs outside lines two feet outside of rails.

2. The crossing was completed and placed in operation January 11, 1974.

3. Decision No. 49565 (1954)(53 CPUC 101), as amended by Decision No. 49754 (1954) (unreported) in Case No. 5495, established procedures for the allocation of state highway funds to cities and counties to assist them in paying their share of the cost of constructing protection at railroad grade crossings. Pursuant to those decisions, Resolution No. CP-2239 was adopted by the Commission on February 19, 1975, which allocated to the City from the Crossing Protection Fund (Sections 1231-2 of the Public Utilities Code) an amount equal to one-fourth of the actual cost of constructing the protection of the pedestrian crossing at Gary Drive.

4. A petition for rehearing was filed by the State Department of Transportation (CalTrans) alleging, inter alia, that the project does not qualify for the expenditure of gas tax funds, as the pedestrian crossing is not adjacent to or approximately paralleling existing or proposed highways and will not directly

increase the capacity or safety of the highway and that the sole purpose of the protection is to benefit pedestrians and not vehicular traffic. Rehearing was granted by Decision No. 84877 dated September 3, 1975 in order to provide administrative due process to petitioner.

5. Rehearing was held in Oxnard.

6. Evidence adduced by the Commission staff, the City, and parents of children using the crossing showed that the predominant use of the pedestrian crossing is by students attending public schools located on either side of the track; that a fenced drainage ditch parallels the railroad track; that without the Gary Drive crossing students would be required to cross the railroad at adjacent public crossings at Channel Island Boulevard (Crossing No. 45-1.76) and Bard Road (Crossing 45-2.52); that there is no access by public street from points west of Bard Road to Channel Island High School located east and north of the Bard Road crossing; that elementary and high school students would be required to use Channel Island Boulevard; that Channel Island Boulevard is a heavily traveled main east-west traffic artery; that some parents believe Channel Island Boulevard to be unsafe for use by school children at the peak auto traffic periods which coincide with the periods of use by school children; and that if Gary Drive crossing did not exist some parents would drive their children to and from school, thus increasing traffic on Channel Island Boulevard.

7. The pedestrian crossing at Gary Drive is adjacent to and paralleling Channel Island Boulevard and Bard Road, and there is no access to the railroad between said streets except at Gary Drive because of the existence of a fenced drainage ditch paralleling the rail track.

8. Maintenance of a pedestrian crossing at Gary Drive directly increases the safety and capacity of Channel Island Boulevard by

diverting potential automobile traffic from that street to the pedestrian crossing at Gary Drive during the peak automobile traffic periods. Thus the sole purpose of the Gary Drive crossing is not to benefit pedestrians.

Conclusions

1. The crossing is a "related public facility for nonmotorized traffic" within the meaning of that phrase as used in California Constitution Article XXVI, Section 1(a).

2. The city of Oxnard is eligible as to the Gary Drive pedestrian crossing (No. 45-2.14.D) for reimbursement of construction and maintenance costs under Division 1, Part 1, Chapter 6 of the Public Utilities Code.

3. The allocation of funds as provided in Resolution No. CP-2239 should be affirmed.

ORDER ON REHEARING

IT IS ORDERED that the order in Resolution No. CP-2239 is affirmed.

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

Dated at San Francisco, California, this 15th day of JUNE, 1976.

William J. L. L. L.
President

Robert Bateman
Commissioners

*I concur, but
wish to NOTE That page 10
states the real problem -
a waste of taxpayer money
Robert Bateman*

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.