

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298**FILED**01-09-13  
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January 9, 2013

**Agenda ID #11844**  
**Ratesetting**

## TO PARTIES OF RECORD IN APPLICATION 11-08-014

This is the proposed decision of Administrative Law Judge (ALJ) Yacknin, previously designated as the presiding officer in this proceeding. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Upon the request of any Commissioner, a Ratesetting Deliberative Meeting (RDM) may be held. If that occurs, the Commission will prepare and publish an agenda for the RDM 10 days beforehand. When the RDM is held, there is a related ex parte communications prohibition period. (See Rule 8.3(c)(4).)

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov). Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Yacknin at [hsy@cpuc.ca.gov](mailto:hsy@cpuc.ca.gov) and assigned Commissioner. The current service list for this proceeding is available on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

/s/ PHILIP WEISMEHL for  
Karen V. Clopton, Chief  
Administrative Law Judge

KVC:avs

Attachment

Decision PROPOSED DECISION OF ALJ YACKNIN (Mailed 1/9/2013)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of the City of Davis to Construct one new at-grade pedestrian and bicycle crossing at the main train station platform access in the vicinity of Mile Post No. 76.0, and an emergency-access only private crossing in the vicinity of Mile Post 76.3 of the Union Pacific Railroad Company in the City of Davis, County of Yolo, State of California.

Application 11-08-014  
(Filed August 11, 2011)

**DECISION DENYING APPLICATION FOR AT-GRADE CROSSING**

**1. Summary**

This decision denies the City of Davis's application to construct an at-grade pedestrian and bicycle crossing across the Union Pacific Railroad Company railroad. This proceeding is closed.

**2. Procedural Background**

Pursuant to Pub. Util. §§ 1201 and 1202,<sup>1</sup> the Commission has the exclusive authority to allow the construction of a public road, highway or street across a railroad, and to determine and prescribe the manner of each such crossing. Section 1202(c) authorizes the Commission to require, where in its judgment it would be practicable, such crossing to be grade-separated and to prescribe the apportionment of the cost of such crossing between the affected railroad

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<sup>1</sup> All references are to the Pub. Util. Code unless otherwise noted.

corporations and affected political subdivisions. In addition, the California Environmental Quality Act (CEQA) requires the City of Davis (City), as lead agency, to prepare an environmental impact report or negative declaration for the project and for the Commission, as a responsible agency,<sup>2</sup> to certify that it has reviewed and considered the environmental impact report or negative declaration prior to acting upon or approving the proposed project. (CEQA Guidelines § 15050(a) and (b).)

By this application, the City seeks authority to construct a new, at-grade pedestrian and bicycle crossing across over the Union Pacific Railroad Company's (Union Pacific) railroad near the main train station in downtown Davis in order to connect the Olive Drive neighborhood to the rest of the City.<sup>3</sup> The City asserts that the crossing is needed, that it is not practicable to separate the grades at the proposed crossing, and that its proposed design is in compliance with the Commission's safety requirements. As part of its application, the City submitted a negative declaration determining that the proposed crossings will not have any adverse environmental impacts pursuant to CEQA.

The Rail Crossings Engineering Section (RCES) of the Commission's Consumer Protection and Safety Division, Union Pacific, and the Capitol Corridor Joint Powers Authority (CCJPA) filed timely protests, and a prehearing conference was conducted on October 25, 2011. The assigned Commissioner issued a scoping memo and ruling on November 15, 2011, scoping memo and

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<sup>2</sup> See CEQA Guideline § 15381.

<sup>3</sup> The City withdrew its request for a new, at-grade emergency crossing. (RT 662:23 - 663:11.)

ruling setting forth a schedule for evidentiary hearings and identifying the issues to be determined in resolving the application as follows:

1. Is a new crossing needed?
2. Is it practicable to require the crossing to be grade-separated?
3. How should the crossing be constructed to ensure safe use?
4. Did the Commission review and consider the information contained in the negative declaration?

By ruling dated April 3, 2012, the assigned Commissioner granted the City's unopposed motion to continue evidentiary hearing and for extension of time, and amended the scoping memo and ruling to re-set the procedural schedule. Evidentiary hearing was held on September 12, 13, 19, and 20, 2012. Parties filed opening briefs on October 25, 2012, and reply briefs on November 1, 2012.<sup>4</sup> Pursuant to the ALJ's November 13, 2012, ruling,<sup>5</sup> Union Pacific filed a surrebuttal brief on November 13, 2012, the City filed a sur-surrebuttal brief on November 20, 2012, and the City filed the Prepared Supplemental Testimony of Mike Adell on November 27, 2012, upon which the record was submitted.

### **3. Location and Historical Use**

The City requests an at-grade pedestrian and bicycle crossing over Union Pacific's railroad tracks at the Davis Station in order to connect the Olive Drive neighborhood to the City's downtown area.

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<sup>4</sup> In its reply brief, the City moves to strike portions of RCES's and CCJPA's opening briefs that include or reference and rely upon extra-record material. We grant that motion and strike Section VIII and Attachment A of RCES's opening brief and Sections B.2 and C.1 of CCJPA's opening brief.

<sup>5</sup> By informal ruling on November 14, 2012, the ALJ extended the time for filing the additional briefs and declaration. We affirm that informal ruling here.

The Olive Drive neighborhood is a community of less than 700 residents, including 50 K-through-8th-grade students. It is bordered on the north by the Union Pacific railroad tracks that run between Sacramento and the Bay Area, on the south by Interstate 80, and on the west by Richards Boulevard. The neighborhood is roughly centered at the Davis Station located in the City's downtown area, and extends approximately 925 feet in either direction to the east and southwest. It is bisected by Olive Drive, which runs from Richards Boulevard to the westbound Interstate 80 off-ramp at the eastern end of the neighborhood, where it connects to a bicycle path that leads to the east.

The Davis Station is located in the middle of a wye that connects three different railroad lines: one headed east toward Sacramento and one headed southwest toward the Bay Area (both of which border the Olive Drive neighborhood), and the third headed north towards Woodland. Three entities operate trains over the railroad lines which border the Olive Drive neighborhood: Union Pacific operates an average of 14 freight trains per day; Amtrak operates two trains per day; and CCJPA, which started with running four trains daily in each direction in 1998, now operates approximately 30 trains per weekday (22 trains per weekend day).

Three gates across from the Davis Station wye (at Slatter's Court, Davis Mobile Estates, and Hickory Lane) lead out of the Olive Drive neighborhood. Olive Drive neighborhood residents historically used these gates and crossed the railroad lines to walk or bike between downtown Davis and the neighborhood. In 2011, Union Pacific erected a fence between the railroad tracks and the Olive Drive neighborhood, closing off use of the gates.

There is a grade-separated pedestrian and bicycle crossing at the west end of the neighborhood at Richards Boulevard (the Richards Boulevard Underpass),

and another one 600 feet further west that provides access to the Davis Bike Loop (the Putah Creek Underpass). In addition, there is a pedestrian and bicycle path at the east end of Olive Drive that connects to the grade-separated crossing at Mace Boulevard near the eastern edge of the City.

#### **4. Need for Crossing**

The threshold issue in this proceeding is whether a new crossing is needed to connect the Olive Drive neighborhood to the rest of the City of Davis. Where the requested crossing is at-grade, the applicant must “convincingly” show that the public convenience and necessity “absolutely” require the new crossing. (*In re City of San Mateo*, 1982 Cal. PUC LEXIS 1317, \*22-23.)

A new crossing from the Olive Drive neighborhood would provide pedestrians and bicyclists with more convenient, direct access to and from areas of Davis than that provided by the existing crossing alternatives at Richards Boulevard, Putah Creek and Mace Boulevard. While there does not appear to be any significant difference in travel distance or time to destinations in the west and northwest of the City (such as the University of California, Davis to the west of Richards Boulevard and the community park and public library in the northwest of the City), the most convenient route from most of the Olive Drive neighborhood to the core of downtown Davis is north over the railroad lines. Based on historical (albeit illegal) usage before the Union Pacific fence was erected, the proposed crossing might be used as much as one hundred times per day or more. In addition, the continued illegal crossings in the vicinity, as evidenced by photographs of a hole under the fence, a break in the fence line, worn paths around the eastern and western ends of the fence, a ladder next to the fence, and a rug over the top of the fence, demonstrate that the Union Pacific fence has not eliminated illegal crossings and safety risks posed by them.

In addition to restoring a direct physical route, the proposed at-grade crossing would restore a symbolic community link between the Olive Drive neighborhood and the City's core. The City points out that the Olive Drive neighborhood is the lowest income neighborhood in the City with 30% of the families living in poverty and 55% of householders with incomes under \$25,000, and contends that a new crossing would improve the community linkage between the Olive Drive neighborhood and the rest of the community by ameliorating the isolating effect of the Union Pacific fence.

A new at-grade crossing would provide additional access to provide service to, and to evacuate from, the Olive Drive neighborhood in emergency situations, and local emergency authorities support it for this reason.

Taken together with the demonstrated community support for a new, safe crossing in the vicinity, these factors demonstrate a reasonable need for a new, safe crossing between the Olive Drive neighborhood and the City's core. However, they do not convincingly demonstrate that an at-grade crossing is *absolutely* needed.

While improved convenience and community connection are desirable, a physical and symbolic connection currently exists at the Richards Boulevard underpass, located just 926 feet from the proposed at-grade crossing. Walking from the proposed at-grade crossing location in the Olive Drive neighborhood to the crossing location on the north side of the railroad tracks via the Richards Boulevard underpass is a distance of approximately 2235 feet, taking approximately 15 minutes for an adult male to walk. Similarly, in *In re City of Fresno*, 1975 Cal. PUC LEXIS 145, the Commission found that there was not a need for a proposed at-grade crossing given the existence of an alternative

crossing less than one-quarter mile away.<sup>6</sup> We are not persuaded that it presents an absolute inconvenience or community division.

Likewise, while a new crossing would provide an additional access and evacuation route in the event of an emergency, there is no evidence that existing evacuation routes to the west at Richards Boulevard and to the east at the bike path connector are inadequate for this purpose.

The City's additional contentions and showing in support of them, either alone or in combination with all other factors, do not persuade us of an absolute need for an at-grade crossing.

The City contends that the proposed at-grade crossing is needed in order to provide a safe route for the Olive Drive neighborhood's children who attend schools north of the railroad lines and are currently obliged to use the bicycle path to the Mace Boulevard Overpass, which City Schools discourages as unsafe, or the Richardson Boulevard Overpass, which has heavy traffic congestion. We are not persuaded on this point. As for elementary school students, as of 2007, the designated Olive Drive neighborhood elementary school is located in south Davis and, as of this time (2012), only two elementary children remain in attendance in north Davis. As for middle school and high school students, these safety concerns would seem to apply equally to the over 900 junior high and high school students (as well as the over 200 elementary school children) residing in

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<sup>6</sup> The City cites to D.07-07-003 (*In re City of San Miguel*) as precedent for the Commission's determination that six to seven blocks of additional pedestrian travel creates a need for an at-grade crossing. (City reply brief at 11.) To the contrary, D.07-07-003 approved the at-grade crossing by adopting a settlement and cannot be used as precedent regarding any principle or issue in that proceeding or in this one. (20 CCR 1, § 12.5 (Rule 12.5).)

south Davis who must also use these routes to reach schools which are located in northern Davis. (See Ex. 1, Att. 3, Answer 5; Prepared Supplemental Testimony of Mike Adell, filed November 27, 2012.) Thus, to the extent that the City has safety concerns related to school children using the Mace Boulevard Overpass or Richard Boulevard Overpass, a new crossing at the Olive Drive neighborhood would be a largely inadequate solution.<sup>7</sup>

The City contends that the proposed at-grade crossing is needed because, as the Union Pacific fence has not eliminated illegal, unsafe crossings discussed previously, its proposed at-grade crossing is therefore needed to provide a safe crossing from the Olive Drive neighborhood. There is no evidence or logic to support the inherent suggestion that illegal crossings would cease in the event that the City's proposed at-grade crossing were constructed. Furthermore, as discussed below, the City's proposed at-grade crossing cannot be constructed in a manner that would prevent illegal crossings at the proposed at-grade crossing.

For all these reasons, we find that there is no absolute need for the proposed at-grade crossing to connect the Olive Drive neighborhood to the City's core.

## **5. Practicability of Grade-Separated Crossing**

An applicant seeking a new at-grade crossing "must convincingly show [...] that a separation is impracticable." (*In re City of San Mateo, ibid.*) The

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<sup>7</sup> The City contends that D.07-07-003 (*In re City of San Miguel*) is precedent for approving an at-grade crossing to alleviate the impact of out-of-direction travel on school children and in acknowledgement of that fact that fencing alone is not likely to deter children from illegally crossing the tracks, even where the applicant did not show that a separated crossing was impractical. To the contrary, D.07-07-003 approved the at-grade crossing by adopting a settlement and cannot be used as precedent regarding any principle or issue in that proceeding or in this one. (20 CCR 1, § 12.5 (Rule 12.5).)

comparative costs of an at-grade crossing in comparison with a grade separation are relevant to this issue, although they are much less persuasive than are safety concerns. (D.02-05-047 (*Pasadena Blue Line*) at 12.)

The City contends that a grade-separated crossing is impracticable both for reasons of cost and for reasons of physical infeasibility due to physical and legal limitations. The City does not make a convincing showing on either of these points.

### **5.1. Cost Comparison**

The City makes no showing with respect to the cost of an at-grade crossing to which to compare the cost of grade-separation. Although the application asserts that it could be constructed for \$1 million to \$2 million (Application, para. 6), the City did not present any testimony or documentary evidence in support of this assertion. The City's Interim Public Works Director Clarke, who testified as to the estimated cost of a grade-separated crossing, testified that he had no idea of the source of that cost estimate and that he had not instructed any of his engineers to prepare such a cost estimate. (City/Clarke, RT 321:20-322:7.) Union Pacific, however, offered the testimony of its Manager of Industry and Public Projects Smith, who conservatively estimated that the cost of constructing the proposed at-grade crossing would exceed \$1 million exclusive of any real estate rights that the City must require. (Ex. 2, Att. A, Ans. 38.)

The City does not make a convincing showing with respect to its estimated cost of a grade-separated crossing. Clarke estimates that it will cost between \$3 million and \$7 million to construct a grade-separated crossing. (Ex. 1, Att. 5, Answer 6.) Clarke bases this estimate on the City's preliminary estimate of the cost of a constructing a pedestrian and bicycle path to connect the east end of Olive Drive to the Pole Line Road overcrossing (which he estimated to be

approximately \$2 million, based in turn on the cost of the Dave Pelz pedestrian and bicycle overpass) inflated to account for unknowns implicated by the need to cross the railroad tracks in a constrained site by reference to the \$4.4 million bid price for constructing the Santa Fe Drive pedestrian underpass in Encinitas, California in October 2011. (City/Clarke, RT 311:10-23.)

However, the Pole Line Road overcrossing and Dave Pelz pedestrian and bicycle overpass are not apparently comparable to a pedestrian and bicycle overpass from the Olive Drive neighborhood to the Davis Depot. Those overcrossings cross over, from north to south, 2<sup>nd</sup> Street, the Union Pacific rail lines, the pedestrian and bicycle path from the east end of Olive Drive, Interstate 80 and, respectively, Research Drive or Chiles Road. (*See, e.g.*, Ex. 10.) In contrast, a crossing from the Olive Drive neighborhood to the Davis Depot would only cross the Union Pacific rail lines. Furthermore, the City makes no showing describing the configuration and circumstances attending the Santa Fe Drive pedestrian underpass to demonstrate that they are comparable to those attending an overcrossing from the Olive Drive neighborhood to the Davis Depot.

The record does, however, contain evidence of the cost of constructing a grade-separated crossing at the site, as well as the cost of constructing a comparable structure. Union Pacific's Director of Public Affairs and Corporate Relations Stark testified that Union Pacific worked closely with the City of San Luis Obispo on the construction of a pedestrian and bicycle overpass at the local train depot, which was constructed in 2000 for approximately \$750,000, and provided photos of the bridge which, to the untrained eye, appears to be more comparable to what would be needed at the Davis Depot than the Pole Line Road overcrossing or the Dave Pelz pedestrian and bicycle overcrossing. (Ex. 2,

Att. C, Ans. 18 and Ex. 2.) Furthermore, the City's former Associate City Engineer Gibbs prepared a "Terminal Report" in May 2009 identifying rudimentary possible design configurations and estimating the cost for a grade-separated crossing at the Davis Depot site to be \$610,000 to \$719,000, exclusive of property rights. (Ex. 2, Att. A, Ex. 6.)

The weight of the evidence suggests that, contrary to the City's unconvincing showing that a grade-separated crossing is prohibitively expensive as compared to an at-grade crossing, the cost of constructing a grade-separated crossing is more likely comparable to the cost of constructing a crossing at-grade.<sup>8</sup>

## **5.2. Physical and Legal Limitations**

The City contends that a grade-separated crossing is impracticable for physical and legal reasons.

The City contends that any physical changes within the wye would trigger review pursuant to Section 106 of the National Historic Preservation Act of 1966 (NHPA) and 36 C.F.R. 800, because the wye has been designated as an area of potential impact for historical resources. That review would occur in the context of environmental review pursuant to CEQA. (See, e.g., City/Hiatt, RT 172:24-173:15.) However, the fact that a grade-separated crossing project requires CEQA review of potential significant impacts on historical resources does not render the project impracticable. There is no evidence that CEQA review is

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<sup>8</sup> The City also contends that it would be better able to compete for grant funds for an at-grade crossing than for a grade-separated crossing due to its more favorable cost/benefit ratio. Because we find that the cost of constructing a grade-separated crossing is likely comparable to the cost of constructing an at-grade crossing, we do not reach this contention.

likely to identify significant adverse impacts. Furthermore, even if it did, neither CEQA nor NHPA prohibit the City from approving a project for having such impacts. (*See, e.g.*, CEQA Guidelines 15093 and 36 C.F.R. 60.2 ("The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property").)

The City contends that it is impracticable to construct a grade-separated overcrossing that meets Americans with Disabilities Act (ADA) standards due to the very limited space on the north side within the wye and the need to acquire property to accommodate the necessary footprint on the south side of the tracks, as well as the high costs of designing and constructing such a structure. This contention goes to the issue of the cost of constructing an at-grade crossing as compared to constructing a grade-separated crossing, which we addressed above.

The City contends that the presence of underground toxics and other subterranean facilities in the wye could potentially render a grade-separated crossing impracticable. However, Clarke, who testified to this evidence and opinion, has not examined these features and raised the issue as "a high risk concern that we would need to look into to see if it ruled out the possibility. I just don't know at this point in time." (City/Clarke, RT 335:11-336:21.)

None of this evidence, separately or taken together, presents a convincing showing that a grade-separated crossing is infeasible.

## **6. Elimination of Safety Hazard**

There is overwhelming evidence that an at-grade crossing cannot be designed to eliminate potential safety hazards.

Union Pacific operates an average of 14 freight trains per day, Amtrak operates two passenger trains per day, and CCJPA operates approximately 30 passenger trains per weekday.

When a passenger train is stopped at the station, freight trains may still run through the station area at speeds up to 30 miles per hour (mph). The stopped passenger train activates warning devices, which could mislead pedestrians into believing that the warning devices were activated for the passenger train and attempting to go around the stopped passenger train, even if a freight train is approaching the station. It takes a freight train travelling at 30 mph one-half mile to stop. (Ex. 5, at 8-11.)

The proposed crossing location is situated on a curve in the tracks that restricts visibility for both pedestrians and train crews. Visibility is reduced much more when a passenger train is stopped in the station. (Ex. 5, at 9.)

The proposed crossing location is an area of freight car switching which would block the crossing. Freight trains may also block the crossing to coordinate movement with a passenger train. These activities would activate the warning devices for long periods of time. Experience has shown that, in such circumstances, pedestrians are prone to bypass the warning devices, cross over unoccupied tracks, and sometimes go under or through stopped trains. The warning devices proposed by the City can be easily bypassed by pedestrians, and the history of illegal crossings in the area suggests that it is very likely that City residents will ignore warning devices. (Ex. 2, Att. A, Ans. 28, 30, and 33-35; Ex. 5, at 10.)

The City points out that residents have been crossing the rail lines in the area since 1938 and that, since 1992, there have been only three fatalities, two of which were alcohol-related. The City contends that this is strong circumstantial evidence that the site is not inherently unsafe. To the contrary, the circumstances have changed substantially, as the unsafe combination of stopped passenger trains in conjunction with moving freight trains has escalated since CCJPA started with running four trains daily in each direction in 1998, and now operates approximately 30 trains per weekday (22 trains per weekend day).

The City contends that its proposed at-grade crossing is, for practical purposes, equivalent to the authorized crossings between the main platform and the middle platform that are safely used by passenger train patrons, and indeed safer due to its additional safeguards. To the contrary, there is a significant difference between the purpose for and related safety concerns regarding a crossing arrangement that serves passenger train patrons and an at-grade crossing that serves pedestrians and bicyclists who seek to travel between the Olive Drive neighborhood and the City core: Passenger train patrons do not have a reason to bypass a stopped train.

For all these reasons, the City has not made a convincing showing that its proposed crossing can be constructed to ensure safe use.

## **7. Crossing Design**

Because we do not approve a new at-grade crossing, we do not reach the issue of how the crossing should be designed.

## **8. Consideration of Negative Declaration**

Because we do not approve a new at-grade crossing, we do not reach consideration of the City's Negative Declaration.

## **9. Comments on Proposed Decision**

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

## **10. Assignment of Proceeding**

Michel P. Florio is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. There is no absolute need for an at-grade crossing to connect the Olive Drive neighborhood to the rest of the City of Davis.
2. It is practicable to construct a grade-separated crossing to connect the Olive Drive neighborhood to the rest of the City of Davis.
3. It is not possible to construct an at-grade crossing to connect the Olive Drive neighborhood to the rest of the City of Davis in a manner that will ensure safe use.

### **Conclusions of Law**

1. The application for authority to construct an at-grade crossing to connect the Olive Drive neighborhood to the rest of the City of Davis should be denied.
2. The ALJ ruling extending time should be affirmed.
3. Section VIII and Attachment A of RCES's opening brief and Sections B.2 and C.1 of CCJPA's opening brief should be stricken.
4. A.11-08-014 should be closed, and this order should be made effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. The City of Davis's application to construct an at-grade pedestrian and bicycle crossing across the Union Pacific Railroad Company railroad is denied.
2. The Administrative Law Judge's November 14, 2012, informal ruling extending time for filing the sur-surrebuttal brief and the declaration presenting further evidence to November 20 and November 28, 2012, respectively, is affirmed.
3. Section VIII and Attachment A of Rail Crossing Engineering Section's opening brief and Sections B.2 and C.1 of Capital Corridor Joint Powers Authority Officials' opening brief are stricken.
4. Application 11-08-014 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.