

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marín Area Rail Transit (SMART) Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

Application No. 15-05-014
(Filed May 14, 2015)

**OPENING BRIEF OF
THE SAFETY AND ENFORCEMENT DIVISION**

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I. INTRODUCTION

Pursuant to the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Title 20, California Code of Regulations, Article 1, Rules 1.1 through 1.17, and the December 11, 2015 Scoping Memo and Ruling of Assigned Commissioner (“Scoping Memo”), the Safety and Enforcement Division (“SED”) respectfully submits its opening brief in this proceeding.

II. APPLICANT AND INTERVENORS FAIL TO DEMONSTRATE THAT A GRADE SEPARATION IS “NOT PRACTICABLE” TO CONSTRUCT

The City of Santa Rosa has applied for approval to build an at-grade railroad crossing for pedestrians and bicycles. Not only is this proposal at odds with legal requirements, it invites a threat of pedestrian death and injury on the tracks. The risk is heightened by the fact that the line in question is shared by both heavy freight and commuter rail service scheduled to increase in the future (Nutt, Tr. Vol. 2, at page 96, lines 16-18).

Commission precedent for determining the “impracticability” of constructing a grade separation rests on:

Railroad Crossings:

- *San Mateo v. Railroad Com. of California*, 9 Cal. 2d 1 (1937) (heavy rail freight and commuter service);
- *City of San Mateo v. SoPac Transp. Co.*, D. 82-04-033, 1982 Cal. PUC LEXIS 1317 (April 6, 1982), (heavy rail freight and commuter service); and

Rail Transit Crossings:

- *In the Matter of the Application of the Los Angeles to Pasadena Metro Blue Line Construction Authority for an order authorizing the construction of two light rail transit tracks at-grade crossing West Avenue 45 in the City and County of Los Angeles, California. And Related Matters (“Blue Line”)*, D.02-05-047, 2002 Cal. PUC LEXIS 301 (May 16, 2002) (light-rail transit).

III. AT-GRADE RAIL CROSSINGS (GENERALLY)

Public Utilities (“P.U.”) Code § 1202 provides the Commission with the “exclusive power ... to require, where in its judgment it would be practicable, a separation of grades at any crossing established and to prescribe the terms upon which the separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of crossings or the separation of grades shall be divided between the railroad or street railroad corporations affected or between these corporations and the state, county, city, or other political subdivision affected.” As discussed *infra*, all Applicants seeking an at-grade rail crossing must demonstrate that the construction of a grade separation is *not practicable*.

IV. AT-GRADE HIGHWAY-RAILROAD CROSSINGS (HEAVY RAIL)

Freight and commuter railroad operations present greater threats to the traveling public in comparison to light-rail transit operations. The heavier trains and higher speeds of systems regulated by the Federal Railroad Administration (“FRA”) require greater protections than light-rail transit systems regulated by the Federal Transit Administration (“FTA”).¹ The *City of San Mateo supra*, clearly announced the Commission’s position against at-grade crossings for regularly operating freight railroad carrier lines.²

As long ago as 1971, the National Transportation Safety Board declared that "Grade crossings are not compatible with rail rapid transit operations", and in 1978 the Railroad-

¹ “And most importantly, considering the involvement of high-speed trains, there would be inadequate distance to clear the tracks while waiting for traffic signal changes.” (*City of San Mateo supra*, at p. *20.) See also: *City of San Mateo supra* at p. *22, “Accident incidence is related to increases in the number of crossings; therefore, grade crossings should be avoided whenever it is possible to do so (Kern County Bd. of Supervisors (1951) 51 CPUC 317).”

² For purposes of accounting and reporting carriers are grouped into the following three classes:

Class I: Carriers having annual carrier operating revenue of \$ 250 million or more after applying the railroad revenue deflator formula shown in Note A.

Class II: Carriers having annual carrier operating revenues of less than \$ 250 million but in excess of \$ 20 million after applying the railroad revenue deflator formula shown in Note A.

Class III: Carriers having annual carrier operating revenues of \$ 20 million or less after applying the railroad revenue deflator formula shown in Note A.

(49 C.F.R. § 1201 1-1.)

Highway Grade Crossing Handbook issued by the Federal Highway Administration, stated unequivocally, "Lines for high speed railroad passenger service should have no grade crossings."^[3] Since 1930 this Commission, working with local agencies and the railroad, has closed over 50 public at-grade crossings on the 50-mile stretch of the S.P. commuter tracks between San Francisco and San Jose. Since the Fund was established with the 1958-59 fiscal year, the State of California has expended over \$ 20 million on this line alone to finance 17 grade separation projects. This Commission in over 25 years has not authorized a grade crossing on this line.

(*City of San Mateo supra*, 1982 Cal. PUC LEXIS 1317 at p. 22.)

Further,

Today in this State a proponent who desires to construct a new at-grade crossing over mainline railroad trackage carrying any appreciable volume of passenger traffic has a very heavy burden to carry. Against the aforesaid formidable backdrop of fundamental statutory and professional opprobrium, he must convincingly show both that a separation is impracticable and that the public convenience and necessity absolutely require a crossing at grade.

Id. at pp. 22-23.

The Commission made clear that impracticable meant more than impractical. "‘Practicable’ means being possible physically of performance, a capability of being used, a feasibility of construction. On the other hand ‘practical’ connotes the means to build, the possibility of financing. For example: ‘a plan might be practicable in that it could be put into practice, though not practical because . . . too costly . . .’ (*Webster's New Dictionary of Synonyms* (1973) p. 625.)" (*Id.* at p. *24, n. 8.) It is true that the at-grade crossing proposed in the *City of San Mateo* was a highway-railroad crossing yet the reasoning applies in large part to all at-grade crossings. "The Commission's principal

^[3] The Railroad-Highway Grade Crossing Handbook of 1978 pre-dates high-speed railroads operating at speeds in excess of 100 miles per hour ("mph"). Railroads regulated by the FRA operating at speed up to 79 mph were considered high-speed railroads. Sonoma-Marín Area Rail Transit is regulated by the FRA and travels at speeds up to 79 mph.

concern in railroad-highway crossing regulatory matters must be the adequate safeguarding, as far as it can be done practicably, of human life and limb. Safety is an issue of overriding importance.” (*Id.* at p. 28.)

The threat posed by highway-rail crossings was made equally clear by the California Supreme Court in *San Mateo v. Railroad Com. of California*, 9 Cal. 2d 1 (1937), .

In these days of heavy automobile traffic the hazards to life and limb by reason of the numerous railroad crossings at grade is a matter of great public concern. To eliminate unnecessary grade crossings and to minimize the hazards created thereby has become a definite governmental state policy.

(*San Mateo v. Railroad Com. of California*, *supra* 1937 Cal. LEXIS 350 at pp. *9-*10.)

The California Supreme Court in *San Mateo v. Railroad Com. of California*, *supra*, recognized the Commission’s exclusive authority to effect the elimination of unnecessary grade crossings and minimize their hazards:

To effectuate the desired results it is necessary that some public authority be vested with power to compel compliance with regulatory orders. The Constitution and statutes have vested that power in the Railroad Commission. The power so vested has been recognized and approved as to the separation of grades at railroad crossings even in cities organized under a freeholders' charter which had appropriately assumed control of their municipal affairs, prior to the adoption of the constitutional proviso. (*Civic Center Assn. v. Railroad Com.*, *supra.*)

(*Ibid.*)

V. HEAVY FREIGHT RAILROAD DISTINGUISHED FROM LIGHT-RAIL TRANSIT SYSTEMS

The City of Santa Rosa (“City”) and the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of SMART, and Stephen C. Birdlebough (collectively “SCTLC”) repeatedly confuse the standards for heavy rail crossings with those for light-

rail transit crossings. The City contends that *City of San Mateo v. SoPac Transp. Co.*, *supra*, “does not reflect a blanket prohibition against new at-grade crossings” (Nutt, Ex. SR-2 at p. 4). As evidence of this the City cites the six-factor test for an at-grade crossing set forth in the *Blue Line* decision (see page 6 *infra*). “The City believes it has made the required convincing showing, certainly with respect to five of the six criteria referenced by the Commission as relevant to its consideration of the proposed at-grade bicycle and pedestrian crossing.” (*Id.* at p. 6.) Both the argument and the citation are inapposite to this proceeding.

As noted in the *Blue Line* decision, “light rail transit differs from rail rapid transit, such as BART in that it is composed of trains of up to three cars, generally has closer-spaced stations, usually operates at lower speeds, has shorter stopping distances...”. Unlike the facts in the *Blue Line* decision where the Commission was concerned only with light-rail vehicles operating on city streets, the Sonoma-Marín Area Rail Transit (“SMART”) line carries both heavy freight railroad trains and heavy rail commuter⁴ trains at speeds up to 79 miles per hour (“mph”). “The need to address practicability does not disappear with the reduction of heavy rail movements.”⁵

While an Applicant for a light-rail crossing is not relieved of its responsibility to show that a grade separation is not practicable to build, the level of proof required for impracticability is reduced for light-rail transit systems because, as the *Blue Line* decision noted, these systems generally have lesser distances between stations, operate at lower speeds⁶, and have significantly shorter stopping distances requiring reduced operating safety protections because of these distinctions (as noted in G.O. 143-B) in comparison to

⁴ See: 49 C.F.R. § 209 APPENDIX A and 49 U.S.C. § 21402 for the definition of “commuter” railroad.

⁵ The presence of heavy rail operations over the proposed light rail crossing is not required to impose the practicability test for the light-rail crossing. “Certainly the safety of the proposed crossing is influenced by the characteristics of heavy versus light rail, as noted by Commission’s approval for separate general orders for each type system. General Order (GO) 143 specifically [applies to] light rail operations.” (*Blue Line* decision, 2002 Cal. PUC LEXIS 301 *supra*, at pp. *12-*13.)

⁶ See: G.O. 143-B, Title 8.04, p. 25, TABLE 1. MAXIMUM PERMITTED SPEEDS FOR LIGHT-RAIL TRANSIT SYSTEMS. Compare the maximum speed limits and stopping distances for freight and commuter railroads such as the NWP and SMART, 49 C.F.R. §§ 213.9 and 393.52.

the operating systems of railroads at 49 C.F.R. §§ 209 – 272 (required by the FRA). Because SMART trains and the freight trains of the NWP are heavy railroad operations, they are both regulated by the FRA rather than the FTA. While the FRA has predominant authority over heavy rail operations, the Commission has predominant jurisdiction over the safety of light-rail transit systems under 49 C.F.R. § 659. The Commission is the State Safety Oversight Agency for light-rail transit systems and has nearly exclusive safety jurisdiction for light-rail under P.U. Code § 99152 in addition to exclusive railroad and light-rail crossing jurisdiction under P.U. Code § 1201 et seq.

VI. THE TEST OF “IMPRACTICABILITY” FOR LIGHT-RAIL TRANSIT AT-GRADE CROSSINGS

Recognizing the “practicability” requirement within P.U. Code § 1202, the Commission’s exclusive power to enforce the requirement, and the long-history of opposing at-grade crossings under *City of San Mateo supra*, 1982 Cal. PUC LEXIS 1317, *San Mateo v. Railroad Com. of California*, 9 Cal. 2d 1 *supra*, and *Application of the City of Oceanside to construct a street crossing at grade at Third Street across the tracks of the Atchison, Topeka, and Santa Fe Railway Company* [“*Oceanside*”], D. 92-01-017, 1992 Cal. PUC LEXIS 16 (Jan. 10, 1992)⁷, the Commission has established rules for the determination of practicability for light-rail transit systems in the *Blue Line* decision, *supra* at 2002 Cal. PUC LEXIS 301, pages *15-*16.

1. A convincing showing by applicant to eliminate all potential safety hazards.
2. The concurrence of the local community authorities.
3. The concurrence of local emergency authorities.
4. The opinions of the general public, and specifically those who may be affected by an at-grade crossing.

⁷ See: *City of Oceanside, supra* at D. 92-01-017, 1992 Cal. PUC LEXIS 16 (Jan. 10, 1992), at pp. *8-*9, “[R]ailroad grade separations constitute ultimate protection, since all grade crossing accidents and delays then are eliminated.... The advantages which might accrue by way of added convenience and financial benefit are outweighed by the dangers and hazards attendant upon a crossing at grade. Accident incidents are related to the number of crossings; therefore, grade crossings should be avoided whenever it is possible to do so (*Kern County Bd. of Supervisors* (1951) 51 CPUC 317) [emphasis added].”

5. Also relevant, though much less persuasive than safety considerations, should be the comparative costs of an at-grade crossing in comparison with as grade separation.
6. A recommendation by staff indicating that it concurs in the safety of the proposed at-grade crossing, though there may be conditions recommended.⁸

When a hearing is deemed necessary we expect the evidence to include these issues. The weight to be accorded each issue will vary, depending on our evaluation of the overall presentation made. *Applicant bears the heavy burden of proving safety, rather than protestants proving unsafe conditions.* Where there is a request for an at-grade separation a mere preponderance of evidence will not suffice [emphasis added].

(*Blue Line supra*, 2002 Cal. PUC LEXIS 301 at pp. *15-*16.)

While the weight to be accorded the evidence for an at-grade crossing may vary for light-rail transit systems as suggested in *Blue Line*, it must be emphasized that the Jennings Avenue crossing is not a light-rail at-grade crossing. The subject of this proceeding is a shared railroad line for heavy freight and a commuter railroad subject to the Commission’s rail crossing jurisdiction and precedents for railroad mainlines under the *City of San Mateo v. SoPac Transp. Co., D. 82-04-033, supra*.

In the public at-grade pedestrian-bicycle-equestrian-rail crossing over the SMART⁹ tracks in *Application of the UNITED STATES FISH AND WILDLIFE SERVICE, SAN PABLO BAY NATIONAL WILDLIFE REFUGE (USFWS) for an Order authorizing a change in existing use at Reclamation in Sonoma County from a private*

⁸ A seventh requirement was added in *In the Matter of the Application of the Los Angeles County Metropolitan Transportation Authority for an order authorizing the construction of two-track at-grade crossings for the Crenshaw/LAX Transit Corridor Project Light Rail Line across West 59th Street, Slauson Avenue, West 57th Street, West 54th Street, West 52nd Street, West 50th Street and across West 48th Street in the City of Los Angeles*, D.14-08-045, 2014 Cal. PUC LEXIS 418 (Aug. 28, 2014). The Applicant must now also show a “public need” for the crossing. (2014 Cal. PUC LEXIS 418, *supra* at p. *16.) This seventh factor of public need is much like the earlier requirement of a “certificate of public convenience and necessity” for transportation companies. (See: *Southern Pac. Co. v. Public Utilities Com.* (1953) 41 Cal.2d 354, 1953 Cal. LEXIS 281; see also: *Blue Line, supra* at p. *11.)

⁹ The term “transit” in SMART’s acronym is a misnomer. SMART is not a transit system but a heavy rail commuter railroad system.

vehicle crossing to a public at grade pedestrian-bicycle-equestrian crossing of the Sonoma Marin Area Rail Transit District (SMART), milepost MP 5H 30.85, Brazos Junction Branch, D. 15-12-014, 2015 Cal. PUC LEXIS 755 (Dec. 3, 2015), Staff recommended approval of the at-grade crossing Application. It was subsequently approved by the Commission. However, this SMART crossing is not applicable to the instant proceeding.

D.15-12-014 is significantly different from this proceeding in that it crosses a single set of tracks at a 90 degree angle, is a 12-foot wide asphalt pathway on wide-open flat ground, and its location, geometry, and description were deemed safe because, as SED was informed, SMART had no current plans to operate over the crossing. Most importantly, the Northwestern Pacific Railroad Company (“NWP”) agreed to limit its speed at the crossing to 25 mph. (D. 15-12-014, 2015 Cal. PUC LEXIS 755, *supra* at p. *2.)

VII. THE “PRACTICABILITY” TEST APPLIES TO PEDESTRIAN/ BICYCLE CROSSINGS

Applicants seeking authority to construct a pedestrian crossing over mainline railroad tracks almost invariably propose grade separation.¹⁰ Further, not all at-grade crossings over railroad mainlines are opposed by staff.¹¹ In some instances, staff has agreed with a finding that a grade separation is not practicable due to physical limitations

¹⁰ See: *Application of the City of Martinez for an Order Authorizing Construction of a Grade-Separated Pedestrian Crossing (CPUC No.001A-31.50-AD/CC-1406, DOT No.440865T) over Tracks of the Union Pacific Railroad Company (MP 31.5-Martinez Subdivision) near Ferry Street in the City of Martinez, County of Contra Costa County*, D. 15-05-042, 2015 Cal. PUC LEXIS 282 (May 21, 2015); *Application of the City of Tulare for an order authorizing the construction of the Santa Fe Trail Grade Separation Project over the Union Pacific Railroad (UP) in the City of Tulare*, D. 14-11-006, 2014 Cal. PUC LEXIS 679 (Nov. 6, 2014); and *Application of the Town of Truckee to construct a new pedestrian and bicycle underpass at MP 204.64, Roseville Subdivision, Union Pacific Railroad, adjacent to and within the right-of-way of SR-89, Town of Truckee, Nevada County, State of California*, D.14-05-010, 2014 Cal. PUC LEXIS 194, May 1, 2014.

¹¹ *In the Matter of the Application of the City of Petaluma, a Municipal Corporation, for an Order Authorizing the Relocation of One At-Grade Crossing of the Tracks of the Sonoma Marin Area Rail Transit District in the City of Petaluma, County of Sonoma*, D. 06-10-030, 2006 Cal. PUC LEXIS 420 (Oct. 19, 2006); and *Application of the City of Gridley to remove the Laurel Street crossing of the Union Pacific Railroad Company tracks and construct a new crossing in the City of Gridley, County of Butte*, D.06-06-032, 2006 Cal. PUC LEXIS 211 (June 15, 2006).

such as the proximity of a flood control channel.¹² However, when an Applicant seeks an at-grade crossing over a railroad mainline railroad it is commonly denied for lack of a showing of “impracticability.”¹³

Union Pacific notes that new public at-grade rail-pedestrian crossings over its tracks are rare. During the past 10 years, only one at-grade pedestrian crossing open to public use has been authorized on a mainline route of the Union Pacific system in California. That one, at Morgan Hill, serves rail passengers crossing the tracks from a parking lot and downtown businesses. One other pedestrian crossing was authorized in 2005 in the City of Mendota, but the crossing there is over a branch line that serves only three trains per week, all operated at a maximum speed of 10 miles per hour.

*(Application of the San Luis Obispo County Public Works Department for an order authorizing construction of an at-grade pedestrian crossing in San Miguel, California, crossing Union Pacific Railroad in the vicinity of 16th Street, County of San Luis Obispo, D. 07-07-003, 2007 Cal. PUC LEXIS 322 (July 12, 2007) at pp. *6-*7.)*

VIII. APPLICANT AND INTERVENORS’ EVIDENCE FAILS TO PROVIDE AN ADEQUATE BASIS FOR CIRCUMVENTING THE RULE REQUIRING A SHOWING OF IMPRACTICABILITY IN CONSTRUCTING A GRADE SEPARATION AT JENNINGS AVENUE

The Commission’s precedents demand that Applicants seeking an at-grade pedestrian crossing must demonstrate that a grade separation is impracticable to construct. The City misleads the Commission when it argues that it does not have to show that it is not practicable to construct a grade separation at Jennings Avenue.¹⁴ The

¹² *Application of the City of Fremont to construct a new public pedestrian/bicycle path and service vehicle at-grade crossing at the Central Park at-grade pedestrian crossing (DOT # 440642C) at railroad Mile Post 1.76 on the Warm Springs Subdivision in City of Fremont, Alameda County, State of California*, D. 13-12-044, 2013 Cal. PUC LEXIS 726 (Dec. 19, 2013).

¹³ *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*, D. 13-02-003, 2013 Cal. PUC LEXIS 68 (Feb. 13, 2013).

¹⁴ Ex. SR-2 at p. 5, lines 1 – 6.

fact that it is practicable to build a grade separation here is clear from the grant of funds for its construction and the admission of Mr. Nutt that “it is more than likely” that a grade separated structure could be built at Jennings Avenue. (Tr. Vol. 3 at p. 245.)

The City does not dispute receiving a grant of federal funds for its construction. (Nutt, Ex. SR-1 at p. 15.) Nor does the City allege that it is not capable of paying its share of the cost of the proposed grade separation. SCTLC likewise skirts the issue of funding the overpass by concluding, without a financial basis, that while the cost of a tunnel would be “prohibitive” (SCTLC Response at page 3) an overpass would simply constitute a “barrier” to people seeking to cross the tracks. (*Ibid.*)

Instead of confronting head-on the NIMBY predilections of some or providing expert testimony concerning the geometry and risks of an at-grade pedestrian crossing near an elementary school¹⁵, retirement facilities, and commercial property, SCTLC and the City offer only anecdotal, unscientific, and unfounded attacks on SED’s evidence that railroad overpasses save thousands of lives every year. (See: *City of San Mateo v. SoPac Transp. Co.*, D. 82-04-033, *supra*; *San Mateo v. Railroad Com. of California*, 9 Cal. 2d 1, *supra*; and *Oceanside, supra* at p. *9¹⁶.)¹⁷ Commission precedent requires a careful analysis of the risks posed by every proposed at-grade crossing on railroad mainlines whether the grade crossing is a pedestrian crossing or a motor vehicle crossing.

¹⁵ The City testified that 518 students attend the nearby elementary school at Jennings Avenue and 62 of those students walk or ride their bikes to school (Nutt, Tr. Vol. 2 at p. 100). The City further testified that the number of students attending the school is likely to increase including those walking or riding to school. (*Ibid.*)

¹⁶ “The advantages which might accrue by way of added convenience and financial benefit [of an at-grade crossing] are outweighed by the dangers and hazards attendant upon a crossing at grade. Accident incidents are related to the number of crossings; therefore, grade crossings should be avoided whenever it is possible to do so (footnote omitted).”

¹⁷ See also: “Operation Lifesaver notes increase in 2014 crossing and trespass fatalities” at <http://oli.org/news/view/operation-lifesaver-notes-increase-in-2014-crossing-and-trespass-fatalities> .

A. The City Has Condoned Trespassing at Jennings Avenue And Fails to Understand the Need to Reduce the Number of At-Grade Crossings

The City admits that trespassing has long existed at Jennings Avenue but has looked the other way rather than attempt to eliminate or limit the trespass even though NWP freight trains operate over the line. (Nutt, Tr. Vol. 2 at p. 95.) The freight train traffic is expected to increase to four per day. (*Id.* at p. 96.) The City's admitted that there were two nearby pedestrian crossings: the Guerneville Road one-quarter mile to the north and College Avenue one-half mile to the south (Application at p. 3). The City notes that development is expanding in the vicinity of Jennings Avenue increasing population density to between 25 and 40 dwellings per acre. (Nutt, Tr. Vol. 2 at p. 98.) When asked about "redundant" crossings and the need to reduce the number of at-grade crossings, the City was unaware of the purpose for such reduction (Nutt, Tr. Vol. 2 at p. 97) and simply argues that gates and fencing channelization would suffice for purposes of safety. (Birdlebough, Tr. Vol. 3 at p. 236.)

B. The City Fails to Understand the Ultimate Benefit of Grade Separations Over At-Grade Crossings

The City refuses to see the value of a grade separation over an at-grade crossing. "I don't believe that an at-grade crossing is inherently more dangerous than [an] overhead crossing." (*Id.* at p. 234.) The fact is that if the pedestrian uses the grade separation he or she cannot be struck by a train which is the Commission's point in *Oceanside, supra* at pages *8-*9, "grade separations constitute [the] ultimate protection, since all grade crossing accidents and delays then are eliminated." While the protections required at-grade protections are better than no protections, the pedestrian using an at-grade crossing remains in the hazardous position of being struck by a train either because he or she is not aware of an approaching train or because he or she has miscalculated the speed or distance of the approaching train.

C. The City Places Too High a Value on Convenience and Aesthetics at the Expense of Public Safety

The fundamental consideration in the protection of any at-grade crossing is safety. The fact that individuals may find those protections less convenient or less than aesthetically pleasing, should be of secondary importance. Yet the City’s witness, Mr. Nutt, admitted that two of the City’s considerations at Jennings were convenience and aesthetics. (Tr. Vol. 3 at p. 234.)

D. The City Raises Safety Concerns Regarding the Grade Separation Structure That Have Little or No Merit

The City contends that the grade separated structure “creates places where elicit activity occurs”, presents dangers for skateboards and bicycles, and creates problems for disabled pedestrians even though the structure is ADA-compliant¹⁸. (Nutt, Tr. Vol. 3 at p. 235.) Public structures, by their very existence, can conceal the actions of individuals. Nevertheless, the beneficial purposes those structures serve outweigh issues of privacy or concealment. Local police forces are trained to deal with such issues and keep watch over those structures.¹⁹ Skateboarders should not be skating on the ramps of such structures because of the dangers to themselves and others using the structure. The ramps exist for the benefit of the disabled who use wheelchairs. All of the City’s so-called safety concerns for the grade separated structure pale in comparison to the safety concerns it is designed to avert, namely, being struck by a freight or commuter train.

E. SCTLC’s Evidence Lacks Probative Value

SED particularly questions the accuracy and expertise of SCTLC’s offered evidence.

¹⁸ “Americans with Disabilities Act of 1990,” (42 U.S.C. §§ 12111 et seq.).

¹⁹ Perhaps the City’s most disingenuous contention is that the ramps on the structure will act as “a challenge for emergency responders to be able climb the stairs or get up the ramps in order to provide the type of care that may be needed.” (Nutt, Tr. Vol. 3 at p. 239.) In fact, Mr. Nutt later agreed that the potential for crime at “an overcrossing outweighs the personal safety of pedestrians on the tracks.” (*Id.* at p. 242.)

1. SCTLC’s Alleged Dangers of Concealment on the Grade Separated Structure (Ms. Fisher’s Testimony)

Ms. Fisher testified exclusively on the subject of zoning, the safety and health of communities, and the fear of crime resulting from hiding places on overpasses. (SCTLC-9 at pp. 2-3.) Ms. Fisher is an owner of a community design firm and asserts that “[t]here would be no neighboring eyes overlooking a pedestrian bridge at Jennings Avenue. (*Id.* at p. 2.) In fact, the zoning height limitations for the Jennings Avenue area is 45 feet, well above the uppermost portion of the proposed grade separation structure.²⁰ (Fisher, Tr. Vol. 2 at p. 112.) Further, the only significant obstruction to views of the proposed design with ramps (Exh. D to the City’s App.) are the trees on the right-of-way that could be removed by SMART.

2. SCTLC’s Alleged Dangers of Concealment on the Grade Separated Structure (Mr. Alden’s Testimony)

SCTLC’s witness, Mr. Alden, admitted that his concern of local resident’s fearing that children could be bullied by older children and restricted sight lines, is true for any grade separated structure. (Alden, Tr. Vol. 3 at p. 251.) Further, he had no information or comparisons regarding parental concerns raised by grade separation structures located at retail, commercial, or industrial areas where there are few, if any, residences and neighbors. (*Id.* at p. 252.)

3. SCTLC’s Evidence of Japan’s Long History of School Children Safely Crossing At At-Grade Crossings (Mr. Alden’s Testimony)

When SED inquired about the surprising testimony that Japan had a long history of school children safely using at-grade crossings, Mr. Alden admitted he did not know the number of persons killed or injured in Japan at at-grade pedestrian crossings. (*Ibid.*) Mr. Alden did not know the percentage of railroad lines in Japan that had exclusive

²⁰ See Exhibit D, RENDERING OF SIZE/VISUAL IMPACT ASSOCIATED WITH AN OVERCROSSING OF JENNINGS AVENUE, in the Application.

rights-of-ways (railroad lines without crossings)²¹ in Japan. (*Id.* at pp. 252-253.) When asked if passenger transport in Japan is conducted over exclusive rights-of-way and if there is very little freight transport over railroads in Japan, Mr. Alden was unaware.²² When asked if he was aware that Operation Lifesaver asserts that about every three hours a person or vehicle is hit by a train in the U.S.²³, he admitted he was not aware of the asserted facts.

4. SCTLIC’s Assertion That An At-Grade Crossing at Jennings Avenue Would Be Approved by SED If One or Two Other Crossings Were Closed Is Not True (Mr. Alden’s Testimony)

Finally, when asked about his assertion that SED had “confirmed” that “an at-grade crossing at Jennings Avenue would be approved if one or two other crossings were closed, Mr. Alden testified that he “did not recall how he came to state that.” (Tr. Vol. 3 at p. 259.)

5. SCTLIC’s Assertion That The At-Grade Crossings in San Clemente, California, Establish a Precedent For An At-Grade Crossing at Jennings Avenue Lacks Merit (Mr. Alden’s Testimony)

When asked if it was determined that grade separated pedestrian crossings at San Clemente, California²⁴, were “impracticable” to build, Mr. Alden admitted that he did not

²¹ Railroad transport in Japan is mainly passenger transport and to a large extent, high-speed passenger transport (See: Wikipedia at https://en.wikipedia.org/wiki/Rail_transport_in_Japan , “Rail transport in Japan is a major means of passenger transport, especially for mass and high-speed travel between major cities and for commuter transport in metropolitan areas.”) carried over exclusive rights-of-way without at-grade crossings (“High-speed trains normally operate on standard gauge tracks of continuously welded rail on grade-separated right-of-way that incorporates a large turning radius in its design.” See: Wikipedia at https://en.wikipedia.org/wiki/High-speed_rail .)

²² Railroads in Japan are used relatively little for freight transport, accounting for just 0.84% of goods movement. (See: Wikipedia at https://en.wikipedia.org/wiki/Rail_transport_in_Japan .)

²³ See: <http://oli.org/> .

²⁴ *In the Matter of the Application of the City of San Clemente for an order authorizing the construction of five, permanent one-track at-grade crossings and three permanent one-track grade separated crossings and improvement of three existing crossings for the San Clemente Pedestrian Trail, known as the San Clemente Beach Safety Enhancement Project located on the Southern California Regional Rail Authority Orange Subdivision between railroad mile post 204.0 and 206.0 in the City of San Clemente, County of Orange, California*, D.04-05-053, 2004 Cal. PUC LEXIS 270 (May 27, 2004).

know. (Tr. Vol. 3 at p. 260.)

In fact, SED entered into a Settlement Agreement with the City of San Clemente, the BNSF Railroad Company, the Orange County Transportation Authority, the Southern California Regional Rail Authority, and the California Department of Transportation authorizing San Clemente's seven new and three existing Beach Trail at-grade pedestrian crossings. There were exceptional circumstances surrounding these crossings as they were necessary for entrance and exit from the beaches in San Clemente. Furthermore, the crossings were located near cliffs, a city pier, and immediately adjacent to beaches, beach access stairways, and wetlands, making grade separated structures difficult or impossible to build. Also, the crossings were related to special environmental and historical concerns regarding the Coastal Trail and certain access restrictions imposed by the California Coastal Commission. For these reasons, SED recommended approval of the Applications to the Commission.

SCTLC fails to explain the relevance and application of the San Clemente Decision to this proceeding given these San Clemente crossings' special circumstances.

IX. CONCLUSION

The City and SCTLC have failed to demonstrate that it is impracticable to construct a grade separate crossing at Jennings Avenue. Both parties have failed to demonstrate that all potential safety hazards at the proposed site of the at-grade crossing at Jennings Avenue (on a heavy commuter rail and freight line in the vicinity of family residences, a nearby elementary school, retirement residences), have been satisfactorily addressed since, among other reasons, the grade separated structure was rejected by the City. For these reasons and those mentioned above, the Application for an at-grade crossing at Jennings Avenue should be denied.

Respectfully submitted,

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