

Decision 10-11-004 November 19, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of American Canyon for Approval to Construct a Public At Grade Crossing of the California Northern Railroad Track, located in Napa County, State of California.

Application 01-09-021
(Filed September 13, 2001)

Application of the City of American Canyon for or approval to construct a public at-grade crossing of the California Northern Railroad track at South Napa Junction Road located in the County of Napa, State of California.

Application 05-05-014
(Filed May 6, 2005)

**DECISION GRANTING TWO-YEAR EXTENSION WITHIN WHICH
TO EXERCISE AUTHORITY TO CONSTRUCT NEW CROSSING**

Introduction

We grant the unopposed petition of the City of American Canyon (City) to modify Decision 06-09-016. City will now have two more years, measured from the effective date of today's decision, within which to replace an existing private crossing over the California Northern Railroad Company track at South Napa Junction Road with a new public at-grade crossing at the same location. If City needs any further extension beyond the new deadline, City must file a new application with appropriately updated supporting information. These proceedings are closed.

Background

The City of American Canyon (City) filed these consolidated applications to request authority to construct public at-grade railroad crossings that were included in City's General Plan as part of an extensive redevelopment following City's recent (1992) incorporation. The earlier of the two applications concerned the proposed Donaldson Way crossing, which the Commission authorized in Decision (D.) 02-06-059. That authority lapsed under the terms of the Commission's order. City then petitioned for that authority to be renewed, and also filed a new application for authority to construct another crossing at South Napa Junction Road.

The California Northern Railroad, which is the affected operating railroad, protested each application, as did the Union Pacific Railroad Company.¹ Following a prehearing conference, the applications were set for hearing, but the parties settled their dispute before the hearing began. They jointly moved the Commission to adopt the settlement, thereby authorizing construction of the South Napa Junction Road crossing and extending the authorization to construct the Donaldson Way crossing.

The Commission determined that the settlement (1) met the criteria for approving a new at-grade public crossing at South Napa Junction Road, and (2) demonstrated that the circumstances supporting the prior approval of the Donaldson Way crossing were materially unchanged. Consequently, in D.06-09-016, the Commission approved the settlement. In so doing, the Commission imposed certain conditions on completion of the construction. Of

¹ Union Pacific is the owner of the track, which it leases to California Northern.

these conditions, the following ordering paragraphs are pertinent to today's decision:

13. The authority granted in this order shall expire if not exercised within two years of the effective date, unless the time is extended by the Commission.

14. The authority granted in this order may be suspended or revoked in the event that the parties, or any of them, fail to comply with the foregoing conditions of approval. The Commission, upon a showing of good cause, may at any time revoke or modify the authority if public convenience, necessity, or safety so require.²

The Donaldson Way crossing, as further noted below, was constructed within the two-year extension granted by D.06-09-016, but the South Napa Junction Road crossing was delayed. On July 28, 2008, City sent a timely letter to our Executive Director to request, pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure, a four-year extension of the authority to build the latter crossing. On August 11, 2008, the Executive Director granted a two-year extension. As he explained,

Commission Rule of Practice and Procedure (Rule) 16.6, which allows a party to request an extension of the time to comply with a Commission decision by letter or e-mail, is designed to enable a party to obtain a minor extension of the time to comply with requirements imposed by a Commission order without having to file a formal pleading. It is generally not well suited to significantly extending the time to exercise authority such as the grant of a certificate of public convenience and necessity that is the principal subject of the order. For that reason we generally require that an

² D.06-09-016 at 18, Ordering Paragraphs 13 and 14.

extension of such authority be sought by filing a Petition for Modification of the underlying order, pursuant to Rule 16.4.

Your letter suggests that there is little probability that there will be a change of the circumstances relied upon by the Commission in granting the authority in this proceeding for least the next two years. However, your letter also indicates that at some point many contingencies will arise, which could alter the plans for building the Town Center, including the plans for construction of the public crossing. Not the least significant of these contingencies is the completion of environmental review of the Town Center, which could affect the plans for traffic circulation. Consequently, although extension of the current authority for two years appears reasonable because there will not be any change in the underlying public need, the Commission will need a fresh record to reflect any changes in circumstances after that.

Therefore, the Executive Director indicated that if City needed any time beyond September 7, 2010 (the end of the two-year extension), City would have to file a petition for modification sufficiently in advance of the expiration date to allow the Commission to determine whether to further extend the authority on the basis of the current record.

The Executive Director's two-year extension proved inadequate, and on July 23, 2010, City petitioned the Commission to modify D.06-09-016 to provide a further two-year extension beyond that allowed by the Executive Director. City represented that there had been no material changes in the interim, and that there was little probability of any material change affecting the location and design of the crossing through the date of the requested further extension of the authority to construct.

Regarding the circumstances causing the delay in construction, City explained that the declining housing market in 2008 caused the proposed development application for the 100-acre Town Center project to be withdrawn.³ This withdrawal prompted City to consider whether the Town Center project area should be increased in order to enhance development feasibility. As a result of that consideration, City has gone through the many legal steps required to enlarge the “Town Center” to 250 acres.⁴

City candidly acknowledges that this expansion of the area available for potential development does not guarantee a developer will decide to seek entitlements for the Town Center property; such a decision would depend in large part on prevailing economic conditions. Given the continuing economic uncertainty, City cannot assure the Commission that a specific Town Center development plan will be filed which would allow the Town Center project (including construction of the South Napa Junction Road crossing) to move forward.

This uncertainty, according to City, should not bar its requested extension:

The subject at-grade crossing is a necessary and essential component of the Circulation Element of the City’s adopted General Plan and is required for the health and safety of the public. All of the modifications to rail operations necessary to accommodate the South Napa Junction at-grade crossing, which were provided by the City

³ It is the planned development of the Town Center that has prompted both of the crossing projects that are the subject of these consolidated proceedings.

⁴ These steps include, among others, zoning changes, revisions to City’s Urban Limit Line and amendment of the General Plan, approvals from the Napa County Local Agency Formation Commission for City to expand its Sphere of Influence, and annexation of the Town Center area.

in exchange for [the railroad's] support for the proposed crossing, have been completed.

Assuming, as anticipated, that there will be no material change in circumstances pertinent to the design and location of the South Napa Junction at-grade crossing, there are no public interest reasons for denying the requested extension and requiring the City to file a new application to construct the same at-grade crossing previously approved by the Commission. There is no pending or anticipated future environmental review associated with expansion of the Town Center development area from 100 acres to 250 acres. There is no proposed project, pending or otherwise, that requires consideration of potential impacts upon the South Napa Junction crossing as approved by the Commission D.06-09-016. . . . The City has every intention of exercising the authority granted by D.06-09-016 and simply requests that the Commission afford it the opportunity to do so by granting the requested two-year extension.⁵

Reviewing the petition for modification, the assigned Administrative Law Judge (ALJ) noted that the petition made no mention of the Donaldson Way crossing; thus, the Commission lacked information about the status of this crossing, which was the subject of the earlier of these two consolidated applications. The ALJ also considered further explanation appropriate about why a more-than-doubling of the Town Center project area should not be considered a material change for purposes of the South Napa Junction Road crossing as previously approved. The ALJ therefore requested further information on these points from City's counsel, who responded by letter filed and served on September 10, 2010.

As to the status of the Donaldson Way crossing, counsel represented that construction was undertaken and completed, and the crossing opened to traffic,

⁵ Petition for Modification at 8-9.

over two years ago. Costs associated with crossing design and construction (about \$1.3 million) were paid by Standard Pacific Homes. The American Canyon City Council was expected to vote at its September 21, 2010 meeting on acceptance of the crossing for purposes of assuming the maintenance responsibility.

As to the impact of the increased Town Center project area, counsel further details the steps taken, and their legal ramifications, to effect the increase. After noting that the approvals so far obtained do not necessarily determine what development will occur, counsel states:

As noted, there is no current development approved in the land expanded for potential development in the City's Town Center, but even if there were, there is no certainty that such development will occur, as a property owner has no vested right in existing or anticipated zoning. Although this rule is subject to exemptions, *e.g.*, by a building permit, by a Vesting Tentative Tract Map (Gov. Code § 66474.1), by a development agreement, or if preliminary public permits are sufficiently definitive and manifest all final discretionary approvals required for completion of specific buildings, given the current economic situation in the State, many developers are not proceeding with development with even such vested development rights. Consequently any assumption regarding future development within the Town Center that arguably could constitute a material "change in circumstances" would be and is, in and of itself, purely speculative.

Thus, while expansion of the area included within City's Town Center has the *potential* to require additional infrastructure, including streets and thoroughfares, it has no material impact upon either the design or location of the South Napa Junction at-grade crossing. The proposed South Napa Junction at-grade crossing is a necessary and essential component of the Circulation Element of the City's adopted General Plan and is required for the health and safety of the public. The proposed at-grade crossing, as designed and authorized by the Commission in D.06-09-016, remains an integral

element of the City Town Center project, irrespective of the fact that the potential project development area has now been expanded from 100 acres to 250 acres. Consequently, the expansion of the Town Center project area does not affect, much less require any change, in either the location or design of the previously approved South Napa Junction at-grade crossing that is now an approved part of the City's General Plan Circulation Element.⁶

Discussion

We grant City's petition for another extension, based on the unusual circumstances presented.⁷ In general, however, when we authorize a construction project, we require that the construction begin soon (for example, within 12 months), and we are reluctant to grant extensions. Today's decision does not change our general practice.

There are two fundamental concerns for our reluctance to grant extensions, particularly where a project has already experienced long delays. First, the anticipated public benefit from the project may be deferred or lost altogether. Second, our analysis and assumptions underlying the original authorization may become stale and need to be reconsidered.

Regarding the first concern, when we authorize a construction project, we do so in part on the basis of a finding of need. That finding may be time-

⁶ Letter from James D. Squeri to ALJ Steven Kotz, September 10, 2010, at 2-3 (emphasis in original).

⁷ California Northern, in its response to the petition, indicates it has no objection to the petition. We note that City's petition was filed on July 23, 2010, reasonably in advance of the September 7, 2010 deadline for exercise of the authority to construct the South Napa Junction Road crossing. We consider the petition timely for purposes of today's decision.

sensitive; in any case, realization of the public benefit is at least postponed if the project is delayed.

Regarding the second concern, many changes may occur with the passing of years that could materially affect the original authorization. Most obviously, the environmental review or conditions imposed on the project may become out-dated due to development in the vicinity or changes to the project itself.

City's petition reasonably addresses the first concern, and at least lessens the second concern. As clarified by City, it has completed part of its crossing replacement program; namely, the Donaldson Way public at-grade crossing (subject of the earlier of the two consolidated applications) is finished. Furthermore, anticipated development in the area has not occurred due to the deterioration of economic conditions, so the time-sensitivity of the planned South Napa Junction Road crossing has diminished.

Regarding our second concern (over whether circumstances have materially changed since project approval), the petition is less convincing. The gist of City's showing is that City is actively engaged in expanding the Town Center project area (from 100 acres to 250 acres) in order to enhance development feasibility. By addressing one consideration that may have prompted withdrawal of an earlier development application, City's showing provides information from which we may infer that the South Napa Junction Road crossing is still needed. However, the same information also suggests that the development project could prove to be much larger than that assumed when we approved the settlement of City's 2005 application. The possibility that such a change in the development project could affect the associated transportation infrastructure seems clear.

We agree with City that the impact (if any) of future development within the “Town Center” on the South Napa Junction Road crossing is speculative at this point. However, we do know that the development anticipated in City’s 2005 application has not occurred; thus, it would also require speculation on our part to continue to assume indefinitely that no significant changes have occurred since we approved that application in D.06-09-016.

On balance, we grant City’s petition for a two-year extension to complete the South Napa Junction Road crossing, but we decline to grant any further extensions on this record. If City does not complete the crossing within the additional time provided in today’s decision, but considers the crossing still to be needed, City must then file a new application supported by completely updated information.

Comments on the Proposed Decision

The proposed decision of ALJ Kotz 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. No comments were received.

Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Steven Kotz is the assigned ALJ in this proceeding.

Findings of Fact

1. City has completed the Donaldson Way crossing project, which was the subject of the earlier of City’s two consolidated applications.
2. Anticipated development in the area of the two crossing projects has not occurred due to the deterioration of economic conditions. Thus, the

time-sensitivity of completing the South Napa Junction Road crossing project has diminished.

3. City is actively engaged in expanding the Town Center area in order to enhance development feasibility.

4. The enhancement of development feasibility suggests that the proposed South Napa Junction Road crossing is still needed, but that the development project could prove to be much larger than that assumed when the Commission approved the settlement of City's 2005 application.

5. When a construction project is delayed, the conditions assumed in the project approval may change significantly. The likelihood of such changes increases in proportion to the length of the delay.

6. The petition for modification is unopposed.

Conclusions of Law

1. The Commission should grant the two-year extension requested by City to complete the South Napa Junction Road crossing project.

2. If City does not complete the South Napa Junction Road crossing project within the additional time provided in today's decision, City should be required to file a new application supported by completely updated information.

3. Today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The authority previously conferred by Decision 06-09-016 on the City of American Canyon to construct a public at-grade crossing of California Northern Railroad track at South Napa Junction Road is extended for two years, measured from the effective date of this order.

2. If the City of American Canyon does not complete the crossing within the additional time provided in Ordering Paragraph 1 but considers the crossing still needed, the City of American Canyon must file a new application for authority to construct the crossing. The new application must include updated information to support the crossing project.

3. Application 01-09-021 and Application 05-05-014 are closed.

This order is effective today.

Dated November 19, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners