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STATE OF CALIFORNIA—THE RESOURCES AGENCY

PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION

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Request Filed: 9/12/97
Staff: DL-SC/MB-V
Staff Report: 12/19/97
Hearing Date: 1/12/98
Commission Action: Posponed 11/5/97



STAFF REPORT: REQUEST FOR RECONSIDERATION

APPLICATIONS NO.: A-4-96-318R and A-4-97-131R

APPLICANT: Department of Transportation

PROJECT LOCATION: One to two miles inland from the intersection of Highway 150 and U.S. Highway 101, Ventura County.

PROJECT DESCRIPTION: Replace two substandard bridges and realignment of a portion of Highway 150 along Rincon Creek, Ventura and Santa Barbara Counties.

COMMISSION ACTION AND DATE: Commission denied permits (on appeal from decisions of Ventura and Santa Barbara Counties approving permit with conditions) on August 14, 1997.

STAFF NOTE

Consideration of this item was postponed until the January 12 - 16, 1998 meeting by the Commission at their November 5, 1997 meeting. The staff report (as corrected in the addendum) remains the same.

PROCEDURAL NOTE:

The Commission's regulations provide that at any time within thirty (30) days following a final vote upon an application for a coastal development permit, the applicant of record may request that the Commission grant a reconsideration of the denial of an application, or of any term or condition of a coastal development permit which has been granted. Cal. Code of Regs., Title 14, Section 13109.2.

The regulations provide that the grounds for reconsideration of a permit action shall be as stated in Coastal Act Section 30627.

"The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the Commission's initial decision." (Emphasis added)

Section 30627(b)(4) of the Coastal Act also states that the Commission "shall have the discretion to grant or deny requests for reconsideration."

On September 12, 1997 the California State Department of Transportation submitted a request for reconsideration of the Commission's decision to deny the reconstruction of two bridges. This request was made within the 30 day period following the final vote as required by Section 13109 of the California Administrative Code (Exhibit 1). As summarized below, the applicant contends the Commission made an error of law and that new information is available that could not have been obtained prior to the hearing which would result in a different decision. If a majority of the Commission votes to grant reconsideration, the permit application will be scheduled for the January, 1998 meeting at which the Commission will consider it as a new application, Cal. Code of Regs., Title 14, Section 13109.5(d). If the Commission does not grant reconsideration, the August 14 decision to deny the project stands and revised finding reflecting the Commission's action will be prepared.

SUMMARY OF APPLICANT'S CONTENTION:

The request for reconsideration is based on two assertions consistent with the grounds stated in Section 30627 (b) (3) of the Coastal Act: (1) there is new evidence relative to traffic accident rates and improvements to the State Route 1 corridor, and (2) that an error of law had occurred relative to consistency with the provisions of the Coastal Zone Management Act (CZMA).

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission deny the request for reconsideration.

STAFF RECOMMENDATION:

Motion I

"I move that the Commission reconsider Appeal No. A-4-96-318"

Staff Recommendation

Staff recommends a NO vote which will result in the adoption of the following resolution and findings to deny reconsideration and uphold the Commission's initial action on the project. A majority of the Commissioners present is required to pass the motion.

Resolution for Denial of A-4-96-318

"The Commission hereby denies the request for reconsideration of the proposed project on the grounds that no new relevant information has been presented which, in the exercise of reasonable diligence, could not have been presented at the hearing on A-4-VNT-96-318-R and that no error of fact or law has occurred which has the potential for altering the Commissions' initial decision."

Motion II

"I move that the Commission reconsider Appeal No. A-4-97-131"

Staff Recommendation

Staff recommends a NO vote which will result the adoption of the following resolution and findings to deny reconsideration and uphold the Commission's initial action on the project. A majority of the Commissioners present is required to pass the motion.

Resolution for Denial of A-4-97-131

"The Commission hereby denies the request for reconsideration of the proposed project on the grounds that no new relevant information has been presented which, in the exercise of reasonable diligence, could not have been presented at the hearing on A-4-97-131-R and that no error of fact or law has occurred which has the potential for altering the Commissions' initial decision."

II. Findings and Declarations

The Commission hereby finds and declares as follows:

A. Project Description and History

The State Department of Transportation (CalTrans') requests reconsideration of the Commission's decision to deny two permits (on appeal from decision of Ventura and Santa Barbara Counties approving permits with conditions) for replacement of two substandard bridges and realignment of a portion of Highway 150 along Rincon Creek, Ventura and Santa Barbara Counties. The project straddles the County line and is located along the creek, one to two miles inland from the intersection of Highway 150 and U.S. Highway 101. Most of the roadway realignment will take place in Ventura County while the bridge replacements are divided between the two Counties.

The Ventura County approval with conditions was appealed to the Coastal Commission. This appeal was filed on December 5, 1996. The County of Santa Barbara approval with conditions was also appealed to the Coastal Commission and the appeal was filed on June 12, 1997. In each case, the appellant contended that the project was inconsistent with the respective County Local Coastal Program. The Commission subsequently found that that each appeal raised a substantial issue relative to consistency with the respective certified LCP for each county.

When the Commission finds that a Substantial Issue exists relative to conformity with the certified LCP, a full public hearing (de novo) on the merits of the project will be held at the same meeting or at a subsequent meeting. The applicable standard of review for the Commission to consider at the de novo hearing is whether the proposed development conforms with the certified LCP pursuant to Section 30604(b) of the Coastal Act. The Commission held a combined de novo public hearing on both appeals on August 14, 1997 and denied the proposed development. A review of the hearing tape and the transcript indicate that while traffic safety was considered, the project's impacts on agricultural land, riparian/wetland habitat and on the nesting areas for the yellow warbler, a species of special concern, were so significant that the bridge replacements and road re-alignment were inconsistent with the relevant resource protection policies of the respective Santa Barbara and Ventura County LCP. The Commission also found that the

scenic qualities of this portion of Highway 150 would be impermissibly degraded by the proposed design and thus inconsistent with relevant LCP policies designed to protect visual resources. Finally, the Commission found that the enhancement of coastal access and recreation, which the road and bridge realignment would facilitate, was insufficient to override the LCP policies protecting natural and visual resources. The Commission has not yet adopted findings to support its action to deny the project. If the Commission denies CalTrans' request for reconsideration, written findings supporting the Commission's decision to deny the proposed development will be scheduled for adoption at a subsequent meeting.

B. Grounds for Reconsideration

Pursuant to Section 30627(b)(4) of the Coastal Act, the Commission has the discretion to grant or deny requests for reconsideration. Section 30627(a)(1) states that the Commission shall decide whether to grant reconsideration of any decision to deny an application for a coastal development permit. The applicant requests that the Commission's denial of the permit be reconsidered. (Please see Exhibit 1)

Section 30627 (b)(3) states in relevant part that a basis for a request for reconsideration shall be that an error of fact or law has occurred which has the potential of altering the initial decision or that new information has come to light that could not have been produced at the hearing. If the Commission votes to grant reconsideration, it will consider the permit application as a new application at a subsequent hearing.

C. Issues Raised By Department of Transportation

CalTrans' request for reconsideration is based on the following two assertions (1) there is new evidence relative to traffic accident rates and improvements to the State Route 1 corridor, and (2) that an error of law had occurred relative to consistency with the provisions of the Coastal Zone Management Act (CZMA). These assertions are analyzed in the following sections of these findings.

D. New Evidence of Accident Rates

CalTrans' contends that accident rate information offered by California Highway Patrol officers at the hearing misled the Commission into determining that there were more accidents on other, improved sections of Highway 150 than in the .7 mile project area and that this misunderstanding caused the Commission to deny the project. CalTrans' then supplied accident rate statistics which show that the accident rate in the project area is 2.6 times higher than would be expected for the volume of traffic on this type of road. Accident rates on Highway 150 outside the project area are also offered and show that the rate is neither higher nor lower than would be normally expected. CalTrans' asserts that had the Commission been given the respective accident rates, the project would not have been denied.

A review of the transcript indicates that traffic safety was one of the issues discussed by the Commission. Information offered by Officer Kissinger of the California Highway Patrol indicated that in his opinion there was a serious traffic safety issue with the bridges proposed for reconstruction (Transcript pg. 12, lines 11-15). He then went on to discuss accident rates on all of Highway 150. Officer Finale, also with the California Highway Patrol, stated that the bridges, particularly the second one, presented

serious traffic safety concerns (Transcript pg. 13, 14 lines 21-25, 1-7). In response to Commission questions, both officers offered additional information on the safety problems of the bridges and their approaches as well as some discussion of general problems with the entirety of Highway 150. (Transcript pgs. 14-16, 23). Officer Kissinger, on page 24, lines 6-9, opined that the proposed project would significantly reduce accidents. Finally, in response to a question from Chairman Areias, Mr. Cesena, the CalTrans' representative, stated that the accident rate in the project area was currently twice the statewide average and had, in the past, been fifteen times higher. (Transcript pg. 56, lines 14-25, pg. 57, lines 1-6). He reiterated (pg. 58, line 4) that the accidents were occurring at the bridges.

The accident rate statistics were also given in the staff reports prepared for this project (pg. 6, para. 4, A-4-VNT-96-318) as well as in an exhibit graphically depicting the rates within the project area in comparison to those which would normally be expected on this type of road (Exhibit 9, A-4-STB-97-131)

It thus is clear that the Commission had accurate information on traffic safety and accident rates before it at the time of the August hearing. The information supplied in the September 12, 1997 letter from CalTrans' states that the accident rate within the project limits is 2.6 times higher than average, but the rate elsewhere on Highway 150 is what would be expected on this type of road. This is not new information, but is essentially the same as that found in the staff reports and offered as testimony by the CalTrans' representative at the hearing. It is not, therefore, new information that could not have been presented at the hearing and thus does not satisfy the statutory requirement to grant a reconsideration.

The arguably "new" information offered by CalTrans' in their September 12 letter is the specific accident rate for Highway 150 outside the project limits. This is not entirely "new" because there was discussion during the hearing regarding the entirety of Highway 150 with both the California Highway Patrol and CalTrans' representatives clearly stating that the area within the project limits was the most problematic from a safety standpoint. It would be inferred then that the accident rates elsewhere on Highway 150 were not as bad, although a specific statistic was not given. Even if the specific figure could be considered new information, it is not a fact that could not have been presented at the hearing as CalTrans' makes no claim that these statistics have only been available for the last month.

A review of the record indicates that the Commissioners understood that there was a traffic safety issue associated with the project however they concluded that other alternatives existed to alleviate the conditions.

E. Commission action to approve a Federal Consistency Determination for the project in 1995 precludes subsequent denial of a Coastal Permit for the same project.

CalTrans' asserts that the Commissions' approval of a Federal Consistency determination for this project in 1995 precludes denial of a coastal permit for the same project. This is essentially an estoppel argument and is cited by CalTrans' as an error in law - one of the grounds for reconsideration.

Aside from the difference in the Federal Consistency and Coastal Permit processes, which will be discussed in following paragraphs, this argument fails because, if indeed it exists, it was waived when CalTrans' failed to

raise it earlier in the Commission's proceedings. If, as is now asserted, CalTrans' believes the Commission is estopped from further action on this project because of the 1995 consistency determination, then the appropriate time to notify the Commission was during the substantial issue portion of the deliberations. Failure to assert the Commission was bound by its CZMA decision thus allowing the Commission to hear the de novo item, constitutes a waiver on the part of CalTrans' and bars the claim at this point.

The premise that because an earlier Consistency Determination was made in favor of the project the Commission is now bound to approve a coastal permit is, however, faulty in and of itself. This is because the two procedures - consistency determinations and coastal permit deliberations are quite different.

In the federal consistency process, the Commission is not deciding the fate of a project. It may agree or object to the project, but it has no authority to deny or condition a particular item. The Commission is more in the position of a commentor to the decision-making body which is the preparing agency and the Federal Secretary of Commerce. Moreover, objections do not have the same effect as a denial because they can be administratively overturned by the Secretary of Commerce. It is also important to remember that federal consistency review often occurs at a much earlier stage of a project. This particular consistency review was made two and one half years before the project came before the Commission as an appeal. As noted in the Commission findings, the project at that time did not contain all detailed, site-specific information, so that the consistency review focused on the preferred alternative location and major design features of the project, and, to the extent then anticipated, the project's impacts on coastal zone resources. A choice among basic project alternatives had to be made early as required by the federal funding agency prior to the final acceptance of the Environmental Impact Statement (EIS) and award of funds. This preliminary conceptual review of the project is not a substitute for the more specific analysis that occurs during the coastal permit process.

Finally, the standard of review for federal consistency actions and coastal permits on appeal is different. For a consistency certification the standard of review is Chapter 3 of the Coastal Act. The Commission found that this project was consistent with Coastal Act wetland policies (Section 30233) as an allowable use as an incidental public service consistent with the Commission's wetland guidelines.

On the other hand, the test applicable under an appeal from the local decision under the certified Local Coastal Programs for Ventura and Santa Barbara Counties was conformity with their certified LCPs. The Commission has found that the project was not in conformity with these LCPs and CalTrans has presented no new information to the contrary. The project has evolved and changed over time and become more specific as it moved through local review. Such local review through the LCP process is also recognized as part of California's Coastal Management Program as approved under the CZMA. This de novo LCP local government review and appeal process is not precluded by the CZMA.

F. Summary

Where an applicant for reconsideration meets the threshold requirement of alleging potential errors of fact or law that have the potential for altering the Commission's decision, the Commission has discretion to grant

reconsideration. The issues presented in CalTrans' request for reconsideration concerning new evidence relative to traffic accident rates and improvements to the State Route 1 corridor, and consistency with the provisions of the Coastal Zone Management Act (CZMA) were generally addressed in the staff reports to the Commission and during the course of the August hearing on this project. Further, in neither case are the issues presented relative to conformity with the certified Local Coastal Programs for Ventura and Santa Barbara Counties. In this situation, the requirements for reconsideration have not been met and there is no need for a second hearing on CalTrans' application to allow the Commission to more fully consider the project.

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September 12, 1997

File: SF-0107-EN

VIA FAX AND MAIL

Mr. Steve Scholl
Deputy Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Appeal Nos. A-4-96-131, A-4-96-318

Dear Mr. Scholl:

By this letter the Department of Transportation is requesting that the California Coastal Commission reconsider its decision to deny the issuance of a coastal development permit for the Rincon Creek Bridge Replacement Project. This matter came before the Commission on August 14, 1997, in the context of the two above-referenced appeals from two separate county actions. The project straddles the Ventura/Santa Barbara county line. Both counties had issued coastal development permits for the project. The issuance of these permits was subsequently appealed to the Commission by Geoffrey Latham. The Commission found that both appeals presented a substantial issue. Upon considering the project de novo, the Commission voted 8-2-1 to deny the issuance of a coastal development permit for the project.

This request for reconsideration is being made pursuant to the provisions of California Public Resources Code section 30627 and is based upon the following grounds (this statement of grounds includes references to the official Reporter's Transcript of the August 14, 1997, hearing and this Reporter's Transcript will hereinafter be referred to as "RT"):

EXHIBIT NO. I
APPLICATION NO. P 1 of 3
A-4-VNT-96-318R A-4-STB-97-131R
Caltrans Reconsideration Request

EXHIBIT NO. I
APPLICATION NO. P 2 of 3
A. + VNT-96-311R
A. + STB-97-131R
Caltrans Reconsideration Request

1. The Department wishes to present new evidence relating to traffic accident rates and improvements in the State Route 150 corridor. At the hearing on August 14, 1997, two officers from the California Highway Patrol appeared to testify in support of the project. One officer, Captain Dave Kissinger stated that 101 traffic accidents had occurred "on the Ventura side" of State Route 150 (east of the project limits) in the past 3 years, and also noted that the "Ventura side" had an "improved" roadway (RT at page 12, lines 11-22). This discussion was subsequently taken by several Commissioners to mean that the accident rate was high on an improved section of roadway and therefore that if State Route 150 was also improved within the project limits, accident rates would actually increase and the roadway would actually become more dangerous. This point was critical to the decision made by several Commissioners to vote to deny the issuance of a permit, as evidenced by the discussion in the transcript (RT at page 24, line 23 to page 25, line 19; page 42, line 14 to page 43 line 25; page 44, lines 15 to 19; page 45, lines 8-10; page 59, line 23 to page 60, line 10).

The Department did not anticipate a discussion of accident rates or improvements on the eastern portion of State Route 150 outside of the project limits and was therefore unprepared to respond specifically to the stated concerns of the Commissioners. In fact, accident rates over the past 10 years on State Route 150 east of the project limits are occurring at the expected rate. From 1987 through 1997, 235 accidents have occurred on this 14.5 mile stretch of road. Given the average traffic on this stretch of road, this equates to an accident rate of 1.86 accidents per million vehicle miles traveled. The expected accident rate over this period was 1.86 accidents per million vehicle miles traveled.

However, accident rates within the project limits over the past 10 years have been occurring at a rate that is 2.6 times (or 260% higher than) the expected rate. From 1987 to 1997, 28 accidents have occurred on this .9 mile stretch of roadway. Given the average traffic on this stretch of road, this equates to an accident rate of 4.14 accidents per million vehicle miles traveled. The expected accident rate over this period was 1.57 accidents per million vehicle miles traveled.

Accident rates on the portion of State Route 150 east of the project limits (the "improved" road) do not establish that improving a road makes it more dangerous, and no other evidence was presented to the Commission to establish such a point. State Route 150 east of the project limits is in fact a safe road as demonstrated by accident records. However, there is clearly a safety problem within the project limits which must be addressed. The proposed project will in fact address this problem and will improve safety within the project limits.

2. The decision to deny a permit for the project constituted an error of law in that it is inconsistent with the provisions of the Coastal Zone Management Act. The California Coastal Commission has been delegated the responsibility for administration of the federal Coastal Zone Management Act (CZMA) within the State of California which includes certain oversight activities relating to federally funded projects.

Consistency certification is one of the oversight activities required by the CZMA. 16 United States Code section 1456; 15 Code of Federal Regulations section 930.1 et seq. Consistency certification is supposed to be obtained as early as possible in the development of a project to insure that federal funds are not expended (and wasted) on the development of a project which cannot be found consistent with the CZMA and the coastal management plan for the area affected (which would mean that the project could not be permitted and implemented).

The Commission issued a coastal consistency certification for the project, which is federally funded, on March 8, 1995. The Commission did not object to the safety need or the scope of the project. Significant funds and resources have been expended by the Department and the Federal Highway Administration since March 8, 1995, in reliance on the consistency certification, including development of final plans, specifications and estimates for the project. By raising objections which were not raised in the consistency certification process, the Commission has acted contrary to the provisions of the CZMA.

There is a critical need for improvements on State Route 150 within the project limits. There are simply no responsible options available short of the proposed project to address this safety problem. The Department respectfully requests that, based on the foregoing, the Commission reconsider the issuance of a coastal development permit for the project.

Very truly yours,



TONY ANZIANO
Deputy Attorney

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EXHIBIT NO. I
APPLICATION NO. p 3 of 3
A-4-VNT-96-318 R
A-4-STB-97-131 R
Caltrans Reconsideration Request