

Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: February 25-26, 2004

Reference No.: 2.4a.
Action Item

From: ROBERT L. GARCIA
Chief Financial Officer

Prepared by: Brice D. Paris
Division Chief
Right of Way

Ref: APPEARANCE

RECOMMENDATION:

The Department of Transportation (Department) recommends the California Transportation Commission (Commission) adopt Resolution of Necessity C-18890, which is the subject of this Appearance. The summary below identifies the location of and designates the nature of the property rights covered by the Resolution of Necessity. In accordance with statutory requirements, the owners have been advised that the Department is requesting a resolution at this time. Adoption of Resolution of Necessity C-18890 will assist the Department in the continuation of the orderly sequence of events required to meet construction schedules.

C-18890 - Flor Balkman

07-LA-405-KP 43.8-Parcels 76871-1,2 - EA: 1178U9 - Certification Date: 06/26/03 - RTL Date: 02/06/04 - (Freeway - widen existing Freeway and construct HOV lanes). Authorizes condemnation of land in fee for a state highway, extinguishment of abutter's rights of access, and a temporary easement for construction purposes. Located in the city of Culver City at 11218/11222 Washington Boulevard.

SUMMARY OF ISSUES

PROPERTY OWNER'S CONCERNS

The property owner Ms. Flor Balkman through her attorney Mr. Gerald Greene has stated they do not contest or question the need for the project, the design of the project, or the need for the parcel. However, they do contend that the Department has not made a valid offer of just compensation as required by Government Code Section 7267.2.

The following is a description of the property owner's primary issues and concerns, followed by the District's response:

Owner:

Loss of parking both during and after construction of the proposed project. The proposed project results in the temporary loss of two employee parking spaces during construction, and the permanent loss of one parking space designated as handicapped. In order to replace the handicapped parking space in the after-condition, it is estimated that two parking spaces will be permanently lost. The property owner believes that this will result in a legal non-conforming status of her property affecting future value. The property owner further states that all these parking spaces are used for company trucks and contends that any project impacts to parking will adversely affect the viability of the current business operations.

Department Response:

The Department has analyzed project impacts to the subject property, in particular the loss of parking as a result of the proposed project. This issue was considered by the Department in its offer of just compensation to the property owner. Given the parking requirements of the City, the subject property is currently considered to be legal nonconforming, and will continue to be in the after-condition. Loss in value of the remaining property after the proposed acquisition and construction in the manner proposed is a compensation issue. Issues as to compensation are outside the purview of the Commission and not relevant to the approval of a resolution of necessity.

It should be noted that the right of way requirements have been down-scoped in response to the owner's concerns to minimize adverse impacts to the subject property. Upon review of several design alternatives, the Department redesigned the proposed retaining wall adjacent to the subject property from a "Type 1" retaining wall with driven piles, to a "Type 5" retaining wall with "Cast in Drilled Hole" (CIDH) piles. The "Type 5" retaining wall has the entire footing within the proposed right of way and negates the need for a former permanent footing easement, which would have required an additional property area acquisition. The redesign has also reduced the size of the temporary construction easement from 527 square feet to 269 square feet because the CIDH method of construction is less intrusive and requires a smaller area for construction purposes.

Owner:

The Department's offer of just compensation does not comply with the requirements of Government Code Section 7267.2, as it did not account for any loss of goodwill the ongoing business will suffer as a result of the proposed project.

Department Response:

The Department has complied with Government Code Section 7267.2 by having a fair market appraisal prepared to determine the just compensation, and has made an offer to the owners of record to acquire the property in the full amount of that appraisal. Government Code 7267.2 pertains to "Real Property" interest and not "Loss of Business Goodwill", and does not require that a condemning agency include compensation for claims of Loss of Business Goodwill in the offer required by Government Code Section 7267.2.

The Department has responded by providing the property owner with a claim form for Loss of Business Goodwill. Any subsequent loss of Business Goodwill claim is a compensation issue. Compensation issues are outside the purview of the Commission and not considered in the process of adopting a Resolution of Necessity.

Owner:

The duration of the Department's temporary construction easement (43 months) is too long. The property owner contends that the entire 43 months is not needed to construct the proposed highway improvements adjacent to the subject property. As such, the owner has requested the Department investigate whether or not the duration of the temporary construction easement can be reduced.

Department Response:

In response to the owner's request, the Department was able to incorporate language in the Construction Contract Specifications to specify that the widening of the adjacent Washington Boulevard bridge structure, and construction of the retaining wall adjacent to the subject property, will be part of the "First Order of Work" for the Highway Contractor. Therefore, the Department was able to reduce the duration of the temporary construction easement to 24 months.

Attachments

Resolution of Necessity Appearance Fact Sheet

PROJECT DATA 07-LA-405-KP 41.2/48.2

Location: On Route 405 in Los Angeles County in the cities of Los Angeles and Culver City

Limits: On Route 405 between Route 90 and Route 10

Contract Limits: KP 41.2 – KP 48.2

Cost: Construction--\$107,000,000.00; R/W--\$40,000,000.00

Funding Source: Federal (88.53%), State (11.47%) - HB5

Number of Lanes:

Existing: 10 mixed flow lanes

Proposed: 10 mixed flow lanes + 2 HOV lanes

Proposed Major Features:

Add one HOV lane in both directions of Route 405 within the project limits, and modify five local street interchanges.

Traffic: Existing (year): 1997 – 308,000 ADT
Proposed (year): 2025 – 387,500 ADT

PARCEL DATA

Property Owner: Flor Balkman

Parcel Location: North of Route 405, East of Washington Boulevard

Present Use: Commercial

Area of Property: Approximately 10,000 Square Feet

<u>Area Required</u> :	Parcel 76871-1	FEE	237 Square Feet
	Parcel 76871-2	TEMPORARY CONSTRUCTION EASEMENT	269 Square Feet

RESOLUTION OF NECESSITY REVIEW PANEL REPORT

The Resolution of Necessity Review Panel met on January 9, 2004 at the Right of Way offices in Los Angeles. The Panel members included Vern Rhinehart and Mark Zgombic, Headquarters Right of Way, Linda Fong, Headquarters Division of Design and Julie Delrivo from the Legal Division. The property owner, Flor Balkman and her attorney, Gerald Greene were in attendance.

This report summarizes the findings of the Review Panel with regard to the four criteria required for a Resolution of Necessity and makes recommendation to the Chief Engineer.

NEED FOR THE PROJECT

Route 405 Freeway is the only north-south freeway west of downtown Los Angeles. Because it passes such highly traveled destinations as Los Angeles International Airport (LAX) and the Ports of Los Angeles and Long Beach, it is considered an essential link in the National Highway System.

The project is part of a statewide effort to quickly increase construction of High Occupancy Vehicle (HOV) lanes in order to relieve congestion. The State has performed studies that demonstrate that these HOV lanes can greatly increase freeway capacity for the least expenditure of public funds. Moreover, the additional HOV lanes help fill a gap between existing HOV lanes south of LAX and a southbound HOV lane north of route 10. The vast majority of Route 405 will have HOV lanes in Los Angeles County upon completion of this project.

Much of the proposed project passes through the city of Culver City which is where the subject property is located. Culver City is approximately 4.94 square miles in area, and has an estimated population of 38,793. Over 60.3 percent of the city's total land area is currently developed as residential, half of which are single family homes. Commercial development in the city accounts for 17.4 percent, movie studio use at 2.3 percent, industrial at 6.6 and public lands at 10.1 percent.

The property owner does not contest the need for the project.

PROJECT DESIGN

The State proposes to construct an HOV Lane in both directions of the Route 405 Freeway between the Route 90 Freeway and Route 10 Freeway. The project has a total length of 5.76 kilometers, with the final section consisting of a 3.7 meter median, a 3.6 meter HOV Lane, a 1.2 meter buffer, five 3.6 meter regular traffic lanes, and a 3.0 meter enforcement area. The project will increase capacity on Route 405, improve traffic flow, reduce energy consumption, and relieve congestion. The addition of a HOV lane would also reduce the number of congestion-related accidents, further improving the flow of traffic. Sound walls ranging from 10 to 14 feet high were identified as requirements to mitigate project noise.

The environmental document was approved on June 30, 2000. The current construction cost is estimated at \$107,000,000. The project is tentatively scheduled for advertisement in February 2004.

The property owner does not contest the project design as planned.

NEED FOR SUBJECT PROPERTY

The subject parcel is located at 11218/11222 Washington Boulevard in the city of Culver City. The larger parcel has an approximate total site area of 10,000 square feet, and is improved with a 3,060 square foot commercial building which is used for an electrical supplies/distribution business, as well as automotive repair business. Irregular in shape, the subject property is directly adjacent to the Route 405 freeway on the northeast side. The freeway at this location is elevated atop a fill. The proposed acquisition does not physically impact any of the primary building improvements on the property. However, miscellaneous site improvements are impacted which include a portion of the asphalt paved parking area, wrought iron fencing, and an irrigated landscaped planter with perimeter concrete curbing. The project results in the temporary loss of two employee parking spaces during construction, and the permanent loss of one handicapped parking space. In order to replace the handicapped parking space in the after-condition, it is estimated that two parking spaces will be permanently lost. The project would result in the permanent acquisition of 237 square feet, from a total property area of 10,000 square feet.

The property owner through counsel has requested to appear before the California Transportation Commission to oppose adoption of the Resolution of Necessity. The following is a description of the property owner's primary issues and concerns, followed by the District's response:

Owner:

Loss of parking both during and after construction of the proposed project. The proposed project results in the temporary loss of two employee parking spaces during construction, and the permanent loss of one parking space designated as handicapped. In order to replace the handicapped parking space in the after-condition, it is estimated that two parking spaces will be permanently lost. The property owner believes that this will result in a legal nonconforming status of her property affecting value. The property owner states that all these parking spaces are used for company trucks and contends that any project impacts to parking will adversely affect the viability of the current business operations.

Department Response:

The Department has analyzed project impacts to the subject property, in particular the loss of parking as a result of the proposed project. This issue was considered by the Department in its offer of just compensation to the property owner. Given the parking requirements of the City, the subject property is currently considered to be legal nonconforming, and will continue to be in the after-condition. Loss in value of the remaining property after the proposed acquisition and construction in the manner proposed is a compensation issue.

Issues as to compensation are outside the purview of the Commission and not relevant to the approval of a resolution of necessity.

It should be noted that the right of way requirements have been down-scoped in response to the owner's concerns to minimize adverse impacts to the subject property. Upon review of several design alternatives, the Department redesigned the proposed retaining wall adjacent to the subject property from a "Type 1" retaining wall with driven piles, to a "Type 5" retaining wall with "Cast in Drilled Hole" (CIDH) piles. The "Type 5" retaining wall has the entire footing within the proposed right of way and negates the need for a former permanent footing easement, which would have required an additional property area acquisition. The redesign has also reduced the size of the temporary construction easement from 572 square feet to 269 square feet because the CIDH method of construction is less intrusive and requires a smaller area for construction purposes.

Owner:

The Department's offer of just compensation does not comply with the requirements of Government Code Section 7267.2, as it did not account for any loss of goodwill the ongoing business will suffer as a result of the proposed project.

Department Response:

The Department has complied with Government Code Section 7267.2 by having a fair market appraisal prepared to determine the just compensation, and has made an offer to the owners of record to acquire the property in the full amount of that appraisal. Government Code 7267.2 pertains to "Real Property" interest and not "Loss of Business Goodwill", and does not require that a condemning agency include compensation for claims of Loss of Business Goodwill in the offer required by Government Code Section 7267.2.

The Department has responded by providing the property owner with a claim form for Loss of Business Goodwill. Any subsequent loss of Business Goodwill claim is a compensation issue. Compensation issues are outside the purview of the Commission and not considered in the process of adopting a Resolution of Necessity.

Owner:

The duration of the Department's temporary construction easement (43 months) is too long. The property owner contends that the entire 43 months is not needed to construct the proposed highway improvements adjacent to the subject property. As such, the owner has requested the Department investigate whether or not the duration of the temporary construction easement can be reduced.

Department Response:

In response to the owner's request, the Department was able to incorporate language in the Construction Contract Specifications to specify that the widening of the adjacent Washington Boulevard bridge structure, and construction of the retaining wall adjacent to the subject property, will be part of the "First Order of Work" for the Highway Contractor. Therefore, the Department was able to reduce the duration of the temporary construction easement to 24 months.

The right of way requirements for the subject parcel are:

- Parcel # 76871-1 – A fee acquisition consisting of 237 square feet required for the construction of a 21-foot high concrete retaining wall to support the widening of the exiting Route 405 bridge structure to facilitate the addition of an HOV lane.
- Parcel # 76871-2 – A temporary construction easement consisting of 269 square feet required to allow adequate working room for the Department's contractor to construct the retaining wall that will support the widening of the bridge structure.

As mentioned above, the need to acquire the subject property is necessitated by the construction of a retaining wall to support the widening of the exiting Route 405 bridge structure to facilitate the addition of an HOV lane. The Department's design has taken into consideration the minimum Highway Design Standards. As such, the project impacts to the subject parcel cannot be avoided.

The property owner does not contest that the property to be condemned is necessary for the project.

STATUTORY OFFER TO PURCHASE

The Department has appraised the subject property and offered the full amount of the appraisal to the owners of record. The owner is not satisfied with the offer and negotiations are continuing. Issues as to compensation are outside the purview of the California Transportation Commission.

PANEL RECOMMENDATION

The Panel concludes that the Department's design complies with Section 1245.230 of the Code of Civil Procedure in that:

- The public interest and necessity require the proposed project.
- The proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury.
- The property to be condemned is necessary for the proposed project.
- An offer to purchase in compliance with Government Code Section 7267.2, has been made to the owners of record.

The Panel recommends submitting a Resolution of Necessity to the CTC.



VERNON V. RHINEHART
Panel Chair

I concur with the Panel's recommendation:



J. MIKE LEONARDO
Acting Chief Engineer

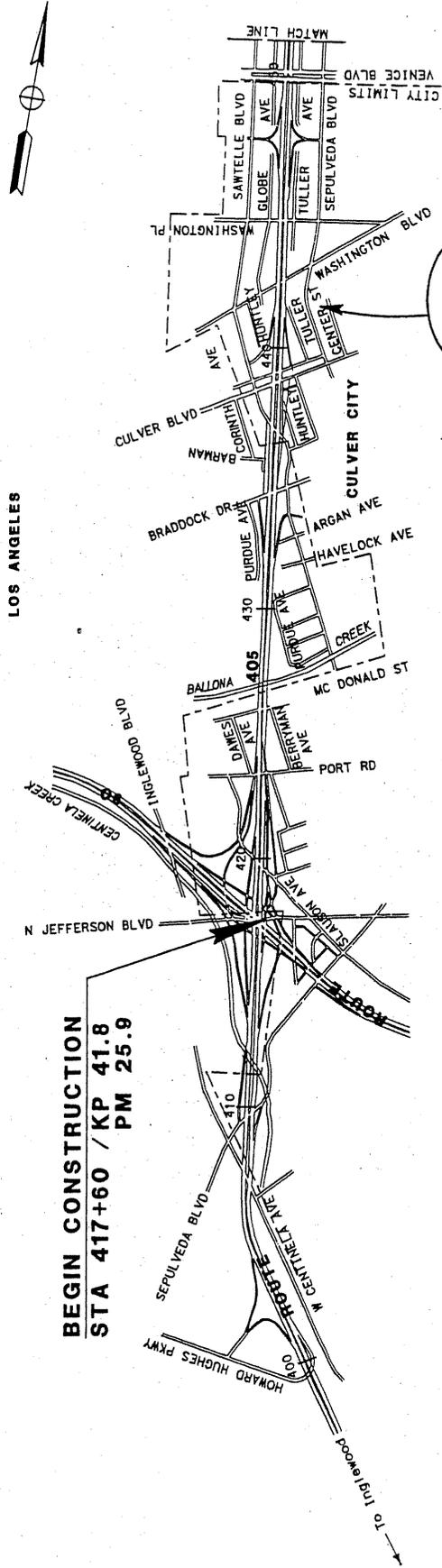
PERSONS ATTENDING SECOND LEVEL REVIEW PANEL HEARING ON
JANUARY 9, 2004

Vern Rhinehart, Panel Member
Mark A. Zgombic, Panel Member
Linda Fong, Panel Member
Julie Delrivo, Panel Member

Flor Balkman, Property Owner
Gerald Greene, Property Owner's Attorney

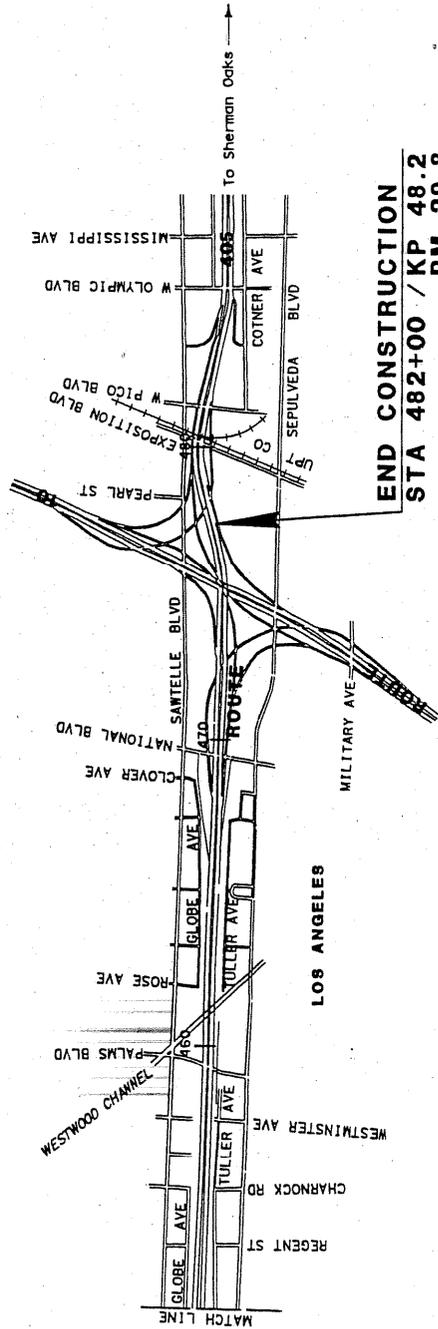
Doug Failing, District Director
Teresa Arias, Southern R/W Regional Manager
Andrew Nierenberg, District 7 Project Delivery Manager
C. Paul LaMond, Chief R/W Acquisition
Bill Reagan, District 7 Deputy Design Engineer
Greg Farr, District 7 Design
Mabel Tran, District 7 Program Project Management
Leon Romero, District 7 Program Project Management
Kelly Lamare, District 7 Program Project Management

COUNTY OF LOS ANGELES



BEGIN CONSTRUCTION
STA 417+60 / KP 41.8
PM 25.9

SUBJECT PARCEL 76871



END CONSTRUCTION
STA 482+00 / KP 48.2
PM 29.8

INTERSTATE

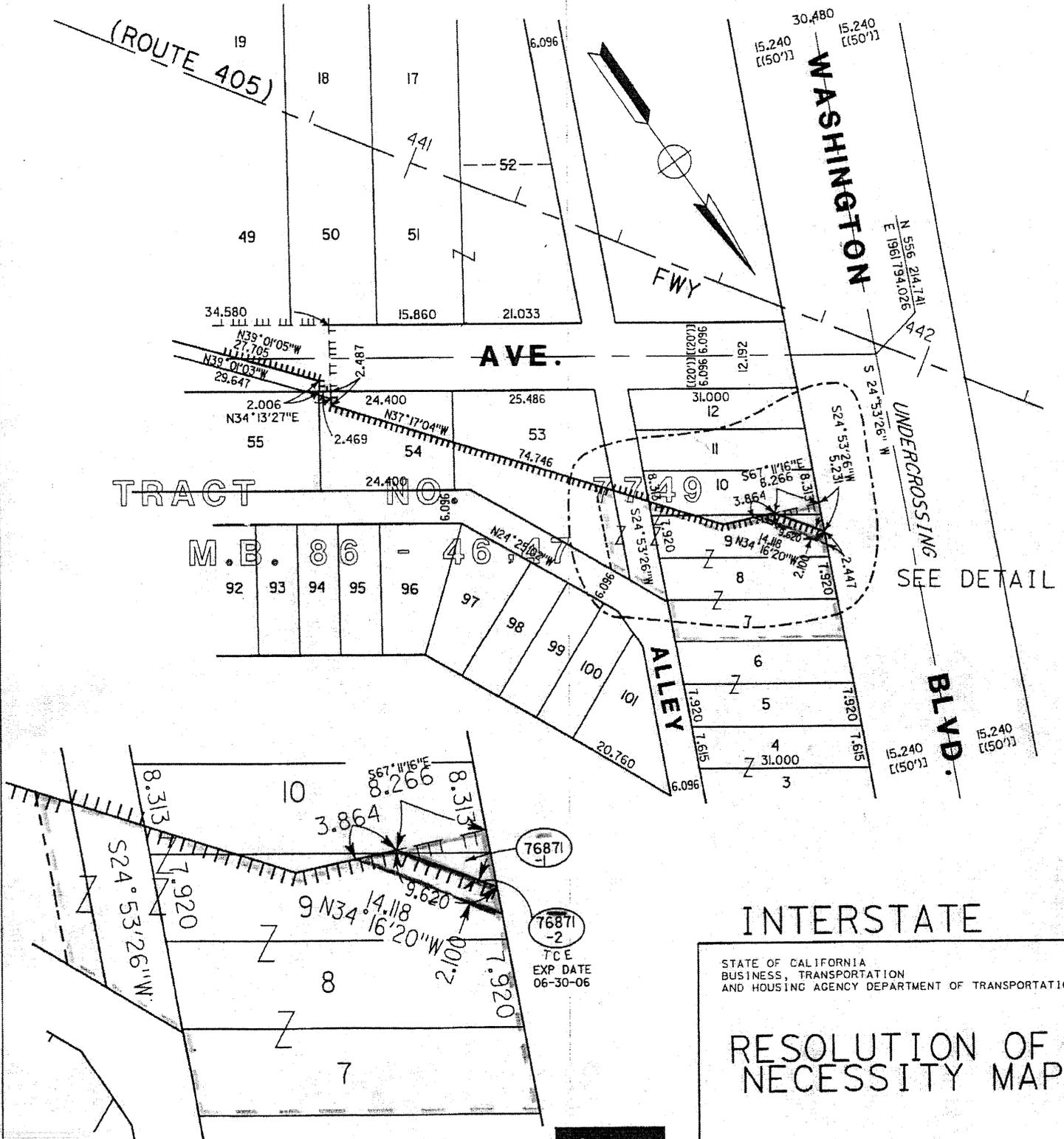
EXHIBIT "A"

07-LA-405-K.P.42.1/42.8



City of Culver City

EXHIBIT " B "



DETAIL
NO SCALE

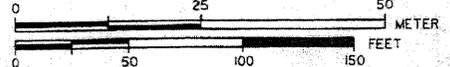


INTERSTATE

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION
AND HOUSING AGENCY DEPARTMENT OF TRANSPORTATION

RESOLUTION OF NECESSITY MAP

07-LA-405-K.P. 43.8



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REC'D BY CTC *Jo Agard*
2/4/04
FEB 04 2004

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EMAIL: gergreene@earthlink.net

February 2, 2004

Executive Director
California Transportation Commission
P.O. Box 942873
Mail Station 52
Sacramento, California 94273-0001

Re: Parcel 76871
Flor Balkman

To Whom It May Concern:

This letter is being written on behalf of Flor Balkman in response to a letter dated January 29, 2004 informing me that another date has been set for the Commission to determine whether a resolution of necessity should be adopted regarding the acquisition of the above referenced property by the California Transportation Commission. I request that this letter be introduced into evidence and given to the Commission before they vote on the resolution of necessity if we are unable to attend the hearing.

This is the third letter I am writing responding to the third notice of acquisition. Although I had indicated before in letters dated July 15, 2003 and November 3, 2003 that we objected to the adoption and that we requested to be heard at the hearing, we were never notified that the second date had been canceled. It was fortunate that we had not relied on the representation and traveled to Sacramento.

Some of the concerns expressed in my prior letters have been addressed at First and Second Level reviews that occurred in Los Angeles that Ms. Balkman and I were able to attend. However, not all the defects that will prevent a legal adoption of a resolution of necessity have been remedied, and therefore, it would be improper for the Commission to adopt a resolution of necessity before the defects were remedied.

First, Ms. Balkman objects to any adoption because the offer required by Government Code section 7267.2 has not been made in good faith. Cal Trans has not provided for the loss of goodwill the business will suffer as a result of the taking. When this issue was discussed at the Second Level Review, counsel for Cal Trans indicated that there was no need to have a goodwill appraisal prepared at this stage of the proceedings. Since there is no law or decision to support this position, it is erroneous. Perhaps counsel was operating under the inapplicable situation that if Cal Trans does not know there will be a claim for goodwill, there is no reason to make an offer. However the facts in this case are different.

The fact that Cal Trans knows and has recognized the validity of Ms. Balkman's claim requires Cal Trans to offer compensation for this loss due to the taking of Ms. Balkman's property.

To resolve the goodwill issue Cal Trans provided us with a questionnaire at the meeting that we were told should be completed so that the Cal Trans appraiser could prepare a goodwill analysis. Since this has not yet been completed and it is anticipated that it will be submitted by the end of this week, it is premature for Cal Trans to proceed with the hearing until a proper offer is made.

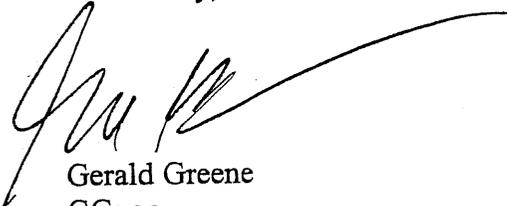
I further object to the hearing on the adoption of the resolution because of basic due process violations. The provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1 Section 7 of the California Constitution must not be violated. Having a hearing in Sacramento for property located in Los Angeles County for a project located in Los Angeles County and a proceeding that will be heard in the courts of Los Angeles County is tantamount to denying Ms. Balkman the opportunity to be heard. To force someone to give up a property interest and to hold a hearing for that purpose at an inconvenient location places so much of a burden on the property owner that it in essence denies him or her the right to be heard. It is clear under the holdings in *Horn v. County of Ventura* (1979) 24 Cal.3d 605 and *Conejo Recreation and Park District v. Armstrong* (1981) 114 Cal.App.3d 1016 that a due process violation must result in the dismissal of an eminent domain proceeding. By holding a hearing more than four hundred miles away from the property's location Ms. Balkman will be deprived of the opportunity to appear and protect her rights that are being taken away. Conducting a hearing at a location that is not only inconvenient, but would result in unnecessary expense to the property owner denies the property owner of due process.

Permitting the property owner to submit objections in writing cannot remedy the constitutional violations. It is obvious that confronting the Commission in person and having the opportunity to be heard and questioned is completely different than writing objections, which may or may not be read by the Commission. It is far too easy to dismiss an objection when it cannot be made in the most effective manner.

For the reasons set forth above, Ms Balkman objects to the adoption of a resolution of necessity. I would also request that if the meeting is canceled again that you notify us.

If you have any questions regarding this matter please contact me.

Yours truly,



Gerald Greene

GG: gc

Cc: Flor Balkman

Paul LaMond