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OPINION	:	No. 80-218
	:	
of	:	<u>May 8, 1980</u>
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SUBJECT: CONSTRUCTION OF FREEWAY SOUND BARRIER—The state does not have authority to contract with the city to reimburse that city for the construction of a freeway sound barrier unless the Legislature has first appropriated the money for such reimbursement and the California Transportation Commission has allocated that appropriation to that specific project during the fiscal year in which the contract is formed.

The Honorable Jack R. Fenton, Assemblyman, Fifty-Ninth District, has requested an opinion on the following question:

Does the state have the authority to contract with a city to reimburse that city for the construction of a freeway sound barrier which contract specifies a particular year for reimbursement?

CONCLUSION

The state does not have authority to contract with the city to reimburse that city for the construction of a freeway sound barrier which contract specifies a particular year for reimbursement unless the Legislature has first appropriated the money for such

reimbursement and the California Transportation Commission has allocated that appropriation to that specific project during the fiscal year in which the contract is formed.

ANALYSIS

The Legislature, through Streets and Highways Code section 215.5,¹ has directed the California Department of Transportation (hereinafter “department”) to develop and implement a priority system for the construction of sound barriers (called “noise attenuation barriers”) along freeways. When the priorities are established, the department is to recommend funding for construction beginning with the projects with the highest priority. A city or county may construct such a sound barrier along freeways prior to the priority for that barrier being reached, and, if the requirements of Streets and Highways Code section 215.5 (c) are met, when the funding priority is reached, the department is to reimburse the city or county, without interest, for the cost of such construction.

We are informed that the department has set the requisite sound barrier priorities based on three overall categories:

1. Noise sensitive areas existing before route adoption;
2. Noise sensitive areas developed after route adoption but before freeway construction;

¹ Streets and Highways Code section 215.5 provides:

“(a) The department shall develop and implement a system of priorities for ranking the need for installation of noise attenuation barriers along freeways in the California freeway and expressway system. The priority system shall include as criteria the existing and future intensity of sound generated by the freeway.

“(b) When all freeways have been ranked in priority order, the department shall, consistent with available funding, recommend in the 6-year plan, and in succeeding 6-year plans, a program of construction of noise attenuation barriers beginning with the highest priority.

“(c) Should any city or county construct a sound attenuation barrier along a freeway using public funds prior to the time that such barrier reaches a high enough priority for state funding, then, when the funding priority is reached, the department shall reimburse the city or county without interest for the cost of such construction when constructed, but the reimbursement may not exceed the cost of the department to construct such barriers. Reimbursements shall be made only if the city or county constructs the sound attenuation barrier to the standards approved by the department, follows bidding contracting procedures approved by the department, and the project is approved by the California Transportation Commission.”

3. Noise sensitive areas developed after freeway construction.

The department's general policy is to recommend and schedule sound barriers in category one before category two and barriers in category two before category three.

A Southern California city which is bisected by a freeway desires to enter into an agreement with the department whereby the city will advance the funds to construct sound barriers within the city limits under a contract let by the department. In turn, the department would reimburse the city for the actual cost of construction when and if the priority for that wall is reached, provided the Legislature appropriates the money and the California Transportation Commission (hereinafter "commission") allocates the money to the project.

The city desires to insert in the agreement with the department a particular year during which the reimbursement would be made.² Thus, the question presented is whether the department may, pursuant to the constitution and statutes, agree to a specific year for reimbursement. We conclude that it may not, since reimbursement is dependent on appropriations by the Legislature and allocation of funds by the commission, neither of which events has occurred and neither of which can be agreed to in advance.³

A brief review of the system for funding and budgeting freeway projects will help analyze this question. Commencing with the budget for fiscal year 1978–1979, the department has been directed to prepare and submit to the governor a proposed budget which includes the portion to be funded from the State Highway Account in the State Transportation Fund. (Sts. & Hy. Code, § 165.) The budget relating to such funds is to be organized on a program, rather than on a project basis. (Sts. & Hy. Code, § 167.) The highway program portion is, in turn, to be made up of eight specified program elements, one of which is "operational improvements." The Governor's budget contains a subcategory or component of this program entitled "(Id.)⁴ Compatibility Improvements,"

² We understand that part of the sound barrier in question is in category one and the remainder in category two. The category one portion of the particular project involved, we are informed, is listed in the 1979 State Transportation Improvements Program at project no. 97K-60, and is there scheduled for reimbursement payments in fiscal year 1982–1983. As will be developed below, this scheduling is subject to change by the commission and is subject to appropriation by the Legislature. The category two portion of the sound barriers in question is not established in the department's program.

³ The opinion request also asks whether, if the question above is answered in the affirmative, there is any law or regulation which would deter the California Department of Transportation from entering into such a contract. In the light of our conclusion as to the primary question, we need not address this second question.

⁴ Streets and Highways Code section 167 provides:

which includes sound barriers. (1979–1980 Governor’s Budget p. 342.) The commission is to review and comment upon the department’s budget. (Sts. & Hy. Code, § 165; Gov. Code, § 14523.)

The Governor submits his budget, which contains the department’s budget with whatever revision the Governor desires, to the Legislature. In turn, the Budget Act contains the appropriations as made by the Legislature including the Highway Transportation Program.⁵ After the Legislature appropriates money in the Budget Act, the commission allocates funds for specific transportation projects. The two statutory requirements for such allocation are (1) that the allocations be consistent with the Budget Act for that fiscal year, and (2) the projects must be included in the state transportation improvements program. (Gov. Code, § 14533.)⁶

“With respect to the funds in the State Highway Account in the State Transportation Fund, the proposed budget shall be organized on a program basis. The proposed budget shall list the proposed expenditures for the highway program under the following programs:

“(a) Administration.

“(b) Program development.

“(c) Maintenance.

“(d) Operation.

“(e) Rehabilitation.

“(f) Operational improvements.

“(g) New facilities.

“(h) Local assistance.

“The basis for defining major and minor capital outlay projects shall be established by the commission.”

⁵ For example, in the 1979–1980 Budget Act, the Legislature appropriated from the State Highway Account, State Transportation Fund under the program element “operational improvements” \$45,823,000 for support (“state operations”) and \$118,450,000 for capital outlay. (Stats. 1979, ch. 259: items 164 and 453.) The Governor’s budget as submitted had contained \$47,533,000 and \$118,050,000 respectively for these items. The Legislature’s Budget Act does not contain the components of the elements as are detailed in the Governor’s budget.

⁶ Government Code section 14533 provides:

“The commission shall allocate funds for transportation projects consistent with the Budget Act for that fiscal year. After July 1, 1979, the commission shall not allocate funds for projects that are not included in its adopted state transportation improvements program.”

The state transportation improvements program (STIP) is adopted annually by the commission. This process is initiated by the department submitting each year an estimate of federal and state funds that will become available on an annual and a five-year basis (Gov. Code, §§ 14524, 14525), and a proposed STIP. (Gov. Code, § 14526.) Regional transportation planning agencies and county commissions also submit proposed programs and may comment on the department's proposed STIP. (Gov. Code, §§ 14527, 14528.) From all this, the commission adopts and submits to the Legislature and Governor by July 1 of each year a final STIP, which is essentially a five-year state transportation program with expected revenues. (Gov. Code, §14529.)⁷

From the above, it is readily apparent that before a freeway sound barrier may be constructed at state expense, the particular project must be listed in the department's priority system, must be listed in the current STIP and money must have been appropriated

⁷ Government Code section 14529:

"After taking into consideration the proposed state transportation improvement program submitted by the department pursuant to Section 14526, the regional transportation improvement programs, submitted pursuant to Section 14527, and comments submitted pursuant to Section 14528, through the use of public hearings, the commission shall adopt and submit to the Legislature and Governor by July 1, 1979, and not later than adopt and submit to the Legislature and Governor by July 1, 1979, and not later than July 1 of each year thereafter, a five-year state transportation improvement program including all funds to be allocated by the commission consisting of:

"(a) The estimate of available funds from state and federal sources and associated constraints for transportation improvement in the state.

"(b) All major projects, as determined by the commission, to be funded from state transportation funds allocated by the commission during the succeeding five fiscal years.

"(c) A summary of expenditures for minor projects, as determined by the commission, to be funded from state transportation funds allocated by the commission during the succeeding five fiscal years.

"(d) Recommended annual expenditures from the State Highway Account in the State Transportation Fund by program category, as set forth in the Budget Act, for the succeeding five fiscal years.

"(e) Any additional action and information determined by the commission to be relevant to the successful implementation of the adopted state transportation improvement program.

"The state transportation improvement program shall be consistent with the estimate of available revenues."

by the Legislature.⁸ Thus, if during the current fiscal year, as to a highest priority sound barrier item, there is an appropriation for the highway program, and the project is listed in the STIP and the commission allocates appropriated funds for the project, the department may proceed with it. Pursuant to Streets and Highways Code section 215.5, if the city has met the prerequisites and has previously constructed the wall, the department would, under these circumstances, then be allowed to reimburse the city.

What the department may not do, however, is agree that such reimbursement will take place in a future fiscal year, lacking current appropriations and allocations. First, there may be no money expended from the state treasury in the absence of an appropriation by the Legislature. (Cal. Const., art. XVI, § 7; *Myers v. English* (1858) 9 Cal. 342, 349; *California State Employees' Assn. v. State of California* (1973) 32 Cal. App. 3d 103, 107–108; *California State Employees' Assn. v. Flournoy* (1973) 32 Cal. App. 3d 219, 234–235.)

Secondly, the Legislature may not authorize the incurring of any indebtedness in excess of \$300,000 without a vote of the people. (Cal. Const., art. XVI, § 1.) To agree now to pay a sum in excess of \$300,000 (which would include the sound barriers in question) without a current appropriation would violate this constitutional provision. Moreover, this Legislature may not bind future Legislatures to act in a particular way (*In re Collie* (1952) 38 Cal. 2d 396, 398 and cases cited therein), and thus, the Legislature could not promise now to appropriate a sum of money several years hence.

Finally, an executive branch agency may not bind its successors to a particular course of action in the future. (*Id.*) Thus, the present commissions inclusion of the project in question in this year's STIP cannot prevent a future commission from removing that project from future STIPs. Such removal would, under Government Code section 14533, then prohibit the allocation of appropriated moneys to that project.

We conclude, therefore, that unless the Legislature appropriates money currently and the commission currently allocates money to the particular sound barrier project, the department has no authority to agree, pursuant to Streets and Highways Code section 215.5, to reimburse a city for construction of such a project in a particular year. Such reimbursement will always be dependent on legislative appropriations and commission allocation in the year of reimbursement.

⁸ Although the appropriation should be in the element of the highway program designated "operational improvements," Streets and Highways Code section 168 allows the department, with the approval of the commission, to transfer funds between programs provided the transfers do not decrease the amount to be expended for any such program by more than 10 percent of the total amount appropriated.