Case No. S202828

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NEIGHBORS FOR SMART RAIL,
a non-profit California corporation,
Petitioner and Appellant

v.

EXPOSITION METRO LINE CONSTRUCTION AUTHORITY, EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD,
Respondents,

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY BOARD,
Real Parties-in-Interest and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B232655

ON APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BS125233, THE HONORABLE THOMAS I. MCKNEW, JR., PRESIDING

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In the Opening Brief, Petitioner and Appellant Neighbors for Smart Rail ("NFSR") has shown that the Environmental Impact Report (the "EIR") for the Exposition Light Rail Transit Line extension from Culver City to Santa Monica (the "Project"), prepared by Respondent Exposition Metro Line Construction Authority ("Expo Authority") and certified by Respondent Expo Authority Board, is legally inadequate for at least two reasons.

First, the EIR utilized an improper environmental baseline to evaluate the Project's traffic and air quality effects. Specifically, rather than comparing the impacts of the Project to existing environmental conditions, as required under the California Environmental Quality Act, Public Resources Code section 21000, *et seq.* ("CEQA"), Expo Authority improperly evaluated the Project's traffic and air quality impacts solely in comparison to projected future conditions in the year 2030, twenty years beyond the date of Project approval and fifteen years after the Project is expected to be fully operational. In doing so, the EIR fails to properly inform decisionmakers and the public through the full and complete disclosure of the Project's environmental impacts. Although this issue was raised during the administrative approval process, Expo Authority elected not to correct this deficiency.

Second, the EIR does not adequately mitigate the significant environmental impacts resulting from the severe on-street parking shortages expected throughout the Project corridor caused by excess demand from transit riders. Rather than incorporating enforceable conditions to ensure that an adequate supply of on-street parking spaces remains available to existing residents and businesses near the Project's proposed stations, the EIR improperly defers parking mitigation without requiring the

achievement of any performance standard. Moreover, the EIR's proposed parking measure is premised on the unsubstantiated assumption that local governments will fill this mitigation void, despite the absence of any enforceable obligation to do so. Expo Authority abused its discretion when it certified the EIR, which relies on the legally inadequate mitigation measure to conclude that the Project would cause no significant environmental impacts associated with parking shortages.

In their respective Answer Briefs, Expo Authority and Respondents Los Angeles County Metropolitan Transportation Authority and Los Angeles County Metropolitan Transportation Authority Board (collectively, "Respondents") argue that despite established precedent from this Court and various Courts of Appeal, as well as clear statutory language in CEQA and the CEQA Guidelines to the contrary, Expo Authority was nevertheless allowed to exercise its discretion and elect not to evaluate the Project's impacts on existing conditions, but instead to only evaluate the Project's impacts on projected conditions in the year 2030. Respondents also argue that a parking mitigation measure that contains no enforceable commitment by Respondents or any other jurisdiction to reduce impacts to a level of insignificance is nevertheless legally adequate. As shown below, Respondents' arguments reflect a misunderstanding of the applicable standard of review and CEQA's unambiguous requirements.

DISCUSSION

I. THE EIR FAILED TO EVALUATE THE PROJECT'S TRAFFIC AND AIR QUALITY IMPACTS USING A BASELINE CONSISTING OF THE EXISTING PHYSICAL CONDITIONS IN THE AFFECTED AREA AS REQUIRED BY CEQA

Respondents devote a significant portion of their briefs attempting to show that the Expo Authority had the discretion to "elect" to use a future, post-approval baseline in this case, and that this decision should be upheld under the substantial evidence test. However, a lead agency's discretion to select the baseline for environmental analysis is constrained by the language of CEQA itself. Expo Authority's decision to rely solely on projected future conditions in the year 2030 as the baseline for evaluating the Project's traffic and air quality impacts is not subject to the substantial evidence standard of review, but rather constitutes an abuse of discretion because it was not in accordance with the law.

A. Expo Authority's Decision to Evaluate the Project's Potential Traffic and Air Quality Impacts Using Only Projected Future Conditions as the Baseline Constitutes a Failure to Follow Proper Procedure, which is Reviewed De Novo Rather than Under the Substantial Evidence Test

Respondents contend that the substantial evidence standard of review applies to Expo Authority's decision to evaluate the Project's potential impacts on traffic using only predicted conditions in 2030 (20 years after Project approval and 15 years after Project completion). From this flawed premise, Respondents argue that Petitioner waived its right to challenge Expo Authority's sole reliance on this 2030 baseline because it did not challenge the "evidence" that allegedly supports the EIR's predictions regarding 2030 conditions. Expo Br., pp. 33-34. Respondents'

arguments reflect a fundamental misunderstanding of the standard of review that applies to the baseline issue.

An agency abuses its discretion when (1) it fails to proceed in a manner required by law, or (2) the determination or decision is not supported by substantial evidence. Pub. Resources Code, §§ 21168, 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-27. "Judicial review of these two types of error differs significantly: while [courts] determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], [courts] accord greater deference to the agency's substantive factual conclusions." *Id.* at 435. Consequently, in reviewing an EIR for CEQA compliance, courts must adjust their "scrutiny to the nature of the alleged defect, depending on whether the claim is predominately one of improper procedure or a dispute over the facts." *Ibid.* "[A]lthough an agency's factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law." *Save Our Peninsula v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118. See also *Preserve Wild Santee v. City of Santee* (October 19, 2012) _Cal.App.4th_ [2012 DJDAR 14541, 14545] (In a case "where petitioner claims an agency failed to include required information in its environmental analysis, [a Court's] task is to determine whether agency failed to proceed in the manner prescribed by CEQA.")

Here, by omitting any discussion of the Project's potential traffic and air quality impacts on the *existing* environment, the EIR failed to comply with CEQA's requirements. This omission is not a dispute over facts. Rather, by certifying an EIR that omitted information required by CEQA, Expo Authority failed to follow proper procedure, which is a question of law subject to de novo review. See *No Oil, Inc. v. City of Los Angeles*

(1974) 13 Cal.3d 68, 80 ("[A]n agency's 'use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.'"). Thus, Respondents' argument that substantial evidence supports the EIR's methodology and its predictions regarding future 2030 conditions is irrelevant.

Respondents cite various reported decisions for the proposition that an agency has "discretion" to establish the baseline for purposes of analyzing a project's impacts. However, none of these cases, including this Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (*"CBE"*), supports a conclusion that an agency's decision to use a future (post-approval) baseline is subject to the substantial evidence test.

In *CBE*, this Court decided the baseline question de novo, holding that the lead agency failed to follow proper procedure. Specifically, this Court held that the District's "use of the maximum capacity levels set in prior boiler permits" as the baseline for analyzing NOx emissions from the proposed refinery project, rather than the "actually existing" levels of emissions from the boilers, was "inconsistent with CEQA and the CEQA Guidelines." *CBE*, *supra*, 48 Cal.4th at 326-27. Nothing in *CBE* suggests that this Court reached this conclusion under the substantial evidence test (*i.e.*, that the assumed maximum capacity levels were not supported by substantial evidence), as implied by Respondents.

After concluding that the baseline selected by the lead agency was legally improper, this Court considered the parties' arguments regarding "the proper manner of measuring ***actually existing emissions***." *Id.* at 327 (emphasis added). On this point, this Court held that in "cases where environmental conditions are expected to change quickly ***during the period of environmental review*** for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the

expected date of project approval, rather than to conditions at the time analysis is begun." *Id.* at 328 (emphasis added). This Court further noted that "an agency enjoys the discretion to decide, in the first instance, exactly how the ***existing physical conditions*** without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." *Ibid.* (emphasis added). Thus, the statements in *CBE* cited by Respondents indicate, at most, that the lead agency's method of measuring the actual "existing physical conditions" during the "period of environmental review" is subject to the substantial evidence test. These statements do not, however, suggest that an agency's omission of any discussion of the potential impacts of a project on the existing physical conditions is a "factual" question to be reviewed under the substantial evidence test.

Respondents' reliance on *Save Our Peninsula* is similarly misplaced. In *Save Our Peninsula*, an EIR's discussion of the baseline water use for the project site was found inadequate because, among other things, the EIR failed to investigate and present evidence to support the assumption that the pre-project use of water on the site was for irrigation purposes. *Save Our Peninsula*, *supra*, 87 Cal.App.4th at 128. However, the EIR at issue in *Save Our Peninsula* did not employ a future (post-approval) baseline. Moreover, the Court recognized that the significance of a project's impacts must be measured against the "actual physical conditions" on the site during the period of environmental review. *Id.* at 125. Thus, according to the Court, the issue presented was "whether the baseline conditions should be established as of the beginning or the end of the environmental review process." *Id.* at 127.

The Court in *Save Our Peninsula* held that estimating water used for irrigation "where there was no substantial evidence to show that the property was in fact irrigated does not accurately reflect ***existing***

conditions." *Id.* at 121 (emphasis added). As in *CBE*, this conclusion suggests only that the substantial evidence test may apply to determinations regarding the actual physical conditions that exist during the period of environmental review. *Save Our Peninsula* does not support Respondent's contention that the substantial evidence should be applied to an agency's decision to evaluate the potential impacts of a project only against predicted future conditions.

In *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, the Sixth District held that the use of a future, post-approval baseline "cannot be upheld since that approach contravenes CEQA regardless whether the agency's choice of methodology for projecting those future conditions is supported by substantial evidence." *Id.* at 1380-81. Less than one year later, the Sixth District rendered its decision in *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552. According to Expo Authority, *Pfeiffer* supports Respondents' contention that an agency's "selection of a baseline to determine the significance of a project impact is a factual determination subject to the substantial evidence standard of review." Expo Br., p. 23. On the contrary, nothing in *Pfeiffer* suggests that the Sixth District reversed its prior holding on the standard of review question under *Sunnyvale*. Furthermore, the *Pfeiffer* Court distinguished *Sunnyvale* on the ground that the EIR in *Sunnyvale* had evaluated the project's traffic impacts *only* against projected future conditions, whereas the EIR in *Pfeiffer* used four different baselines to evaluate the project's traffic impacts, *including existing conditions*. *Id.* at 1571-73. The question of whether the substantial evidence test applies in cases where, as here, the EIR relies solely on a projected future baseline was simply not presented, discussed or decided in *Pfeiffer*.

According to Metro, *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270 "also confirms that the question of the appropriate baseline is subject to the substantial evidence standard of review." Metro Br., p, 17. Not so. The baseline selected by the lead agency in *Fat* was the existing conditions during the period of environmental review, not a projected future condition. Thus, *Fat* is inapposite. Furthermore, *Fat* contains virtually no discussion of the applicable standard of review. *Id.* at 1278.

Finally, Metro relies heavily on *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 for the proposition that the selection of a particular baseline is a factual question subject to the substantial evidence test. Metro Br., pp. 18-20. This ignores both the context of the baseline issue in that case and the actual language used in the decision. Specifically, in *Cherry Valley*, the Court upheld the city's decision to use 1,484 acre feet of water usage as the baseline for evaluating the potential effects of a residential development project on water supplies. *Id.* at 336-340. In upholding this baseline, the Court noted the project proponent had a fully-adjudicated legal right to use up to 1,484 acre feet of water (*Id.* at 337) and a history of pumping substantially the same amount of water in connection with its previous agricultural use of the site. *Id.* at 340. Indeed, the Court stated that the city's selection of 1,484 acre feet of water usage as the baseline "was quintessentially a discretionary determination of how the ***'existing physical conditions without the project'*** could 'most realistically be measured.'" *Id.* at 337 (quoting *CBE*, *supra*, 48 Cal.4th at 328; emphasis added.) Thus, *Cherry Valley*, like *Save Our Peninsula* and *Fat*, only concerned an agency's factual determination of how the existing physical conditions could be most realistically measured. Here, Respondents do not even pretend that, in utilizing projected conditions in 2030 as the sole baseline for evaluating the

Project's traffic and air quality impacts, Expo Authority was attempting to realistically measure the ***existing*** physical conditions in the Project area.

Thus, the issue presented in this case is not whether substantial evidence supports the EIR's predictions regarding conditions in 2030. Rather, the issue is whether Expo Authority's decision to forego any evaluation of the Project's traffic and air quality impacts on the environment as it "exists," and to instead rely solely on a baseline consisting of hypothetical future conditions, complies with CEQA. Expo Authority's decision to rely on a future (2030) baseline constitutes a failure to follow proper procedure, subject to de novo review by this Court. See *Sunnyvale*, *supra*, 190 Cal.App.4th at 1380 ("[N]othing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval."); *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 90 ("[L]ead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR.").

B. CEQA Requires that an EIR Evaluate a Project's Potential Impacts on the Environment, Which is Defined as the Physical Conditions that "Exist" in the Area.

CEQA expressly requires an EIR to provide decisionmakers and the public with information regarding a proposed project's potential effects on the physical conditions that "exist" within the area affected by the project. See Pub. Resources Code, §§ 21061, 21068, 21060.5, 21100, subd. (d); 21151, subd. (b). Despite this unambiguous statutory language, Respondents argue that a lead agency has the discretion to deviate from this standard and evaluate a project's potential impacts using only a baseline of projected future conditions.

As correctly noted by Expo Authority, this Court "need not venture into metaphysics to resolve the issue." Expo Br., p. 20. The issue can and should be resolved on the basis of well-established rules of statutory construction.

"When construing a statute, a court's goal is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' [Citations.] Generally, the court first examines the statute's words, giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent. [Citations.] [¶] When the statutory language is ambiguous, a court may consider the consequences of each possible construction and will reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity. 'Our decisions have long recognized that a court's "overriding purpose" in construing a statute is "to give the statute a reasonable construction conforming to [the Legislature's] intent [citation] ...."' [Citations] 'The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable.' [Citation.] *Guttuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567.

1. CEQA Clearly and Unambiguously Requires that an EIR Evaluate a Project's Potential Impacts on the Existing Physical Conditions in the Affected Area

CEQA expressly requires that an EIR discuss a project's potential to cause significant adverse impacts on the "environment," which is defined as the "physical conditions" that "exist" within the area that will be affected by the project. Pub. Resources Code §§ 21061, 21060.5, 21151, subd. (a) and (b). NFSR contends that under the ordinary and usual meanings of the

words "physical" and "exist," CEQA requires an EIR to address the potential impacts of a project using the physical conditions that actually exist during the period of environmental review (*i.e.*, while the EIR is being prepared). Respondents, on the other hand, urge this Court to construe the term "exist" to mean predicted *future* conditions two decades after the period of environmental review. Applying common sense to the language at hand, this Court should reject Respondents' proffered construction of CEQA.

Respondents' claim that the word "exist" includes predicted future conditions relies heavily on the phrase "which will be affected" in Public Resources Code section 21060.5 ("'Environment' means the physical conditions which exist in the area **which will be affected** by a proposed project ..."). Specifically, Respondents argue that because the statute does not specify *when* the effect occurs, an agency is not required to use the existing physical conditions as the baseline for evaluating the potential impacts of a project, but may instead evaluate the impacts against conditions that are predicted for the area at some future date when the impacts are expected to occur. Expo Br., p. 27. However, this strained reading of Section 21060.5 does not support the EIR's use of a 2030 baseline in this case. Specifically, the Project is expected to be complete and operational in 2015, and there is nothing in the EIR (or elsewhere in the record) to suggest that the Project's traffic and air quality impacts will not occur *until* 2030. Thus, while Respondents' parsing of Public Resources Code section 21060.5 may support the use of a baseline consisting of the reasonably foreseeable conditions upon project completion, it does not support the EIR's evaluation of the Project's potential traffic and air quality impacts using only predicted conditions in 2030 (15 years after Project completion) as the baseline.

Respondents assert that NFSR "now argues for a 2015 baseline date," and contend that Petitioner has waived such an argument. Expo Br., p. 27; Metro Br., p 9. On the contrary, as just explained, it is Respondents who now seem to argue for a 2015 baseline in this case – a baseline that the EIR did not employ. NFSR, on the other hand, has consistently argued that the EIR should have included an evaluation of the Project's potential traffic and air quality impacts using a baseline consisting of the physical conditions existing during the period of environmental review (*i.e.*, between 2007, when the notice of preparation was issued for the EIR, and 2010 when Expo Authority certified the final EIR and approved the Project). See Opening Brief, pp. 29, fn. 9; Opinion at 4. See also *CBE*, *supra*, 48 Cal.4th at 328 ("Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun.") However, even if CEQA permits an agency to use projected conditions as of the expected date of project completion as the environmental baseline, the EIR here still violates CEQA because the Project was expected to be completed and operational by 2015.

For these reasons, Respondents' "waiver" argument is a red herring.

2. Respondents' Proffered Interpretation of CEQA Would Undermine the Legislature's Intent

If the relevant statutory language was ambiguous (which it is not), the Court would need to "consider the consequences of each possible construction," and "reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity." *Guttuso*, *supra*, 42 Cal.4th at 567. Furthermore, because the statute at issue in this case is CEQA, the Court must interpret the statute "in such a manner as to afford the fullest

possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259.

The interpretation proffered by Respondents would not afford the fullest possible protection to the environment. Among other things, CEQA requires that a project's direct and indirect impacts be identified and described, "giving due consideration to both the short-term and long-term effects." Guidelines, § 15126.2, subd. (a). See also *Sunnyvale, supra,* 190 Cal.App.4th at 1373. Yet, an interpretation of CEQA that allows lead agencies to evaluate the potential impacts of a project using only projected future conditions as the baseline would deprive the decision makers and the public of information concerning the potential short-term effects of a project. Indeed, by relying solely on a projected 2030 baseline to evaluate the Project's potential traffic and air quality impacts, the EIR in this case omitted essential information concerning the Project's traffic and air quality impacts during the first 15 years of its operational life, thereby precluding informed decisionmaking and informed public participation. See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.

Expo Authority states that the EIR evaluated the effects of the Project "over time." Expo Br., p. 18. On the contrary, the EIR evaluated the Project's potential traffic and air quality effects only at one particular point in time – the year 2030 – based on predicted future conditions. Apparently, Expo Authority expects the decisionmakers and the public to figure out on their own what the Project's impacts would be during the 20 year gap between Project approval and the selected baseline year.

If the construction of CEQA advanced by Respondents is accepted by this Court, lead agencies would have unbridled discretion to simply "elect" to evaluate some or all of a project's potential impacts against the hypothetical conditions that are predicted to exist only at some future date,

which would presumably be selected by each agency on a case-by-case basis. As a result, the methodology used to evaluate a project's impacts on the environment would differ widely from agency to agency, from project to project, and even impact category to impact category within the same EIR, which would inevitably lead to confusion among decisionmakers and members of the public. See *CBE*, *supra*, 48 Cal.4th at 322 ("An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts ..."). On the other hand, if the Court construes CEQA as requiring an EIR to evaluate a project's potential impacts on the existing physical conditions in the area during the period of environmental review, all EIR's would be subject to a uniform standard, which would promote the Legislature's intent that documents prepared pursuant to CEQA "be organized and written in a manner that will be meaningful and useful to decisionmakers and to the public." Pub. Resources Code § 21003, subd. (b). Such a construction would also conform to the CEQA Guidelines, which provide that an EIR should normally use the physical conditions that exist in the area during the period of environmental review as the "baseline" for determining whether a project's potential impacts are significant.[1] Guidelines, § 15125, subd. (a).

As explained in the Opening Brief, an interpretation of CEQA that allows an agency to omit any evaluation of the impacts of a project as compared to existing conditions during the period of environmental review would effectively allow agencies to combine the analyses of project-specific impacts, cumulative impacts, and the "no project" alternative into one "all purpose" discussion, which is exactly what occurred in this case.

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[1] Webster's defines the term "baseline" as "a line serving as a basis; *especially*: one of **known measure or position** used ... to calculate or locate something." See www.merriam-webster.com (bold added).

Indeed, Expo Authority concedes this point, arguing that "[t]raffic congestion and air quality are quintessential cumulative impacts." Expo Br., p. 41. By combining the analysis of Project-specific impacts, cumulative impacts, and the "no project" alternative in this manner, the Project-specific effects on the existing physical conditions in the area are obscured. See Pub. Resources Code § 21065.3 ("'Project-specific effect' means all the direct or indirect environmental effects of a project other than cumulative effects and growth-inducing effects.").

In short, interpreting CEQA to require an EIR to evaluate a project's impacts on the existing physical conditions is consistent with the statutory language and comports with the Legislature's intent. The alternative construction proposed by Respondents, on the other hand, would lead to a fundamental change in the manner in which environmental reviews have been conducted by lead agencies for decades. Specifically, instead of evaluating the impacts of a project on the existing environment, agencies could simply "elect" to evaluate some impacts of some project on some imagined future version of the environment. This construction would produce unworkable results given the absence of any guidance in CEQA or the CEQA Guidelines as to how to conduct an environmental review that is not tied to existing conditions.

3. The Justifications Offered by Respondents For Using Projected Future Conditions as the Sole Baseline for Environmental Review Are Unavailing

Metro claims that "future conditions provide the most useful information to agency decisionmakers and the public about the ultimate effects of a proposed transit project." Metro Br., pp. 13-14. Similarly, Expo argues where "substantial evidence indicates that traffic and air quality conditions in the project area are changing due to population and economic growth, one obvious reasonable way to identify the traffic and air

quality effects specific to the Project is to compare projected future conditions with and without the project." Expo Br., p. 19 (emphasis removed). These arguments are specious and must be rejected. CEQA's requirement that an EIR evaluate the potential impacts of a project using the existing physical conditions does not preclude an EIR from also evaluating impacts against a presumed future baseline where such analysis would be helpful to an intelligent understanding of the project's environmental impacts.[2] Opening Brief, p. 31-33.

Metro also argues that the EIR was not required to evaluate the Project's potential impacts on the environment as it exists during the period of environmental review because transit projects "take years to plan, fund, and build," and therefore "will never operate under the present day conditions." Metro Br., p. 1. While it is true that some projects may take years to plan, fund and build, it is undisputed that, in this case, the Project is expected to be completed and operational by 2015 – just four years after approval.[3] It is also undisputed that the EIR did not evaluate the Project under either "present day" (2010) conditions or "opening day" (2015)

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[2] Expo Authority claims that the position taken by NFSR on the baseline issue in this case is contrary to NFSR's stance during the administrative proceedings below. Expo Br. at 2. In support of this allegation, Expo cites a statement made by NFSR's representative that the EIR should have included an evaluation of the Project's impacts using the year 2035 as the planning horizon for transportation planning in the region. Expo Br. at 2, 7; 727 AR 46961-62. However, the mere fact that NFSR's representative noted that the EIR's forecast of 2030 conditions was based on stale data does not contradict the position taken by NFSR in this action. Specifically, at no time did NFSR's representative state or suggest that an EIR may rely *solely* on such an analysis in evaluating the potential impacts of a project.

[3] The Project will be "fully-operational" upon commencement of operations because the proposed trains must interlink with service on the fully-operational Expo Line Phase I and the existing Blue Line. (101 AR 14956; 34 AR 01063; 406 AR 28926.)

conditions. Thus, while Metro's argument may support an argument for a 2015 baseline, it does not support the EIR's sole reliance on a projected 2030 baseline for evaluating the Project's traffic and air quality impacts in this case.

The suggestion made by Respondents that the Project's impacts will not come to fruition for many years after commencement of operations is unsupported by any evidence in the record, and is belied by the measure identified by the EIR to mitigate the Project's "spillover "parking impacts (discussed infra). Specifically, Transportation /Traffic Mitigation Measure No. 4 ("MM TR-4") requires Expo Authority to monitor the availability of on-street parking for six months following the opening of service. (11 AR 00413-414.) Yet, requiring monitoring for only six months after commencement of operations only makes sense if the Project is expected to be fully operational within that time period.

Finally, Metro contends that NFSR's construction of CEQA would add "unnecessary procedural obligations." Metro Br., p. 13. This and similar arguments made by Expo Authority are nonsensical. EIR's have evaluated the impacts of projects on existing physical conditions for decades, and Respondents have yet to explain why such an analysis could not have been included in the EIR in this case. Furthermore, to the extent that it may be necessary or useful to evaluate the potential impacts of certain projects using multiple baselines, Respondents have not (and cannot) demonstrate why it would be unworkable or impractical to do so. See *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707-711 (holding that an EIR for a proposed General Plan amendment must evaluate the potential impacts of the amendment using both the existing conditions and potential future conditions discussed in the plan as the baseline for analysis).

C. NFSR's Claims Regarding the Legal Inadequacy of the EIR's Future Baseline Were Properly Raised During The Administrative Process

Expo asserts that NFSR is barred from challenging the EIR's improper use of a future environmental baseline to analyze the Project's traffic and air quality impacts, on the grounds that this issue was not properly exhausted during the administrative review and approval process for the Project. As shown below, this assertion is easily refuted by the record. Accordingly, the Court of Appeal rejected this argument and held that the inadequacy of the EIR's baseline was brought to Expo's attention in a manner sufficient to preserve the claim for the subsequent mandamus action. (Op. at 15, fn. 7.)

Under the "exhaustion of administrative remedies doctrine," in order for a writ petitioner to prosecute a particular CEQA claim, that issue must have been raised during the relevant administrative process. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 162-163; see also Pub. Res. Code § 21177, subd. (a). "'[G]eneralized environmental comments at public hearings,' 'relatively ... bland and general references to environmental matters' [citation omitted]" and "'[g]eneral objections to project approval....'[citation omitted]" are not sufficient to satisfy the administrative exhaustion of an issue. *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36. However, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1051. See also *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750 (holding that petitioners need not identify an EIR's "precise legal inadequacy", as long as objections "fairly apprise" the agency of the concern). Furthermore, a petitioner may

"litigate issues that were timely raised by others." *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1263 ("*Federation*"). See also Pub. Res. Code § 21177, subd. (a)

Expo Authority mistakenly asserts that the EIR's improper use of a projected future environmental baseline to analyze the Project's impacts on traffic and air quality was not properly raised and exhausted during the Project's environmental review and administrative approval process. (Expo. Br. at 15-17.) However, contrary to this assertion, a number of public comments questioned Expo's reliance on speculative future conditions, rather than existing conditions, to determine the Project's impacts.

For example, as noted by the Court of Appeal, one commenter stated that the EIR "understates the impact of the Project's traffic...by comparing the change in intersection performance between the No-Build alternative and LRT alternative in 2030....Nowhere in the in Draft EIR does it evaluate the impact between the Project-added traffic to existing conditions..." (38 AR 04639.) The same individual commented that "[t]he traffic impact analysis is incomplete since it does no[t] provide an analysis of the traffic impacts between the Project alternatives and existing conditions...The correct analysis of significant impacts is to compare the Project-generated traffic to the existing baseline." (38 AR 04640.) Thus, the exact deficiency claimed by NFSR here was clearly raised during the administrative proceedings. Indeed, the EIR responds to this comment by admitting that the Project's traffic impacts are only evaluated against a future baseline. (38 AR 04639.)

In addition, one member of the public expressly stated that the EIR was deficient because "[i]t doesn't look at traffic reductions from traffic right now, but it compares it to the no-build option." (43 AR 07644, emphasis added; See also 37 AR 04018.) Furthermore, another public

comment questioned the speculative nature of using forecasted 2030 conditions, rather than existing conditions, as a baseline. (35 AR 02612.)

These comments specifically identified the EIR's flawed baseline and are not merely "generalized environmental comments," "bland and general reference to environmental matters," or "general objections to project approval." *Sierra Club v. City of Orange*, *supra,* 163 Cal.App.4th at 535-36. Moreover, these comments sufficiently alerted Expo Authority that its "method of analysis was faulty" and gave Expo Authority an opportunity to render this litigation unnecessary by revising the EIR and evaluating the Project's traffic and air quality impacts against existing conditions. *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176. However, Expo Authority elected not to do so.

II. PARKING MITIGATION MEASURE MM TR-4 IS LEGALLY INADEQUATE AND DOES NOT SUPPORT A FINDING THAT IMPACTS RELATED TO SEVERE PARKING SHORTAGES CAUSED BY THE PROJECT WILL BE REDUCED TO A LESS THAN SIGNIFICANT LEVEL

CEQA requires public agencies to identify the significant environmental effects of the projects they approve and to mitigate such effects by imposing feasible and enforceable mitigation or alternatives. Pub Resources Code, § 21081.6, subd. (b). The obligation to mitigate significant impacts serves CEQA's fundamental purpose of avoiding environmental harm. Pub. Resources Code, § 21002. Illusory mitigation measures, including those beyond a lead agency's legal authority and that no agency is legally obligated to implement, or that impermissibly defer mitigation without reliance on a performance standard, are inconsistent with the intent and requirements of CEQA.

In this case, the EIR acknowledged that the Project would cause a significant parking impact, but concluded that such impact would be

reduced to a level of insignificance by MM TR-4. Expo Authority's decision to certify the EIR constitutes an abuse of discretion because MM TR-4 is legally inadequate.

First, MM TR-4 does not contain an enforceable obligation to mitigate the Project's spillover parking impacts, and contains no performance standard with which to ensure compliance. Second, MM TR-4 simply assumes that three independent local governments – the Cities of Los Angeles, Santa Monica and Culver City (collectively, the "Cities") – will choose, absent any legal obligation, to implement remedial actions. Yet, there is no evidence in the record to support this assumption. Thus, the EIR's conclusion that MM TR-4 will mitigate the Project's parking impacts is not supported by substantial evidence.

A. Standard of Review Regarding Mitigation

Metro acknowledges that a reviewing court may be required to interpret the applicable CEQA Guidelines to determine whether a lead agency has complied with CEQA in its formulation of mitigation measures. Metro Br., p. 41. In the present case, this Court's interpretation of Public Resources Code section 21081.6, subd. (b) and Guidelines sections 15126.4, subd. (a)(2) "presents a question of law subject to independent review." *Madera, supra*, 199 Cal.App.4th at 85. Here, the EIR concluded that "[i]mplementation of [MM TR-4] would reduce the impacts associated with station spillover parking to ***less than significant***." (11 AR 00414.) Accordingly, this Court must determine whether, as a matter of law, a mitigation measure that merely identifies remedial actions that could be taken by other agencies to avoid a significant environmental impact, without actually requiring the implementation of any of the identified actions or adherence to an established performance standard, constitutes legally adequate mitigation under Public Resources Code section 21081.6, subd. (b); and Guidelines section 15126.4, subd. (a)(2).

B. MM TR-4 Does Not Contain An Enforceable Obligation to Mitigate Spillover Parking Impacts

Here, the EIR utilized the following criterion to determine whether the Project would cause a significant environmental impact:

> "Would the project cause intrusion into adjacent neighborhoods or commercial areas where the demand for parking at a station exceeds the proposed parking lot capacity?"
>
> (11 AR 00411.)

Based on this criterion, the EIR expressly acknowledged that without mitigation, the Project would cause a significant adverse impact resulting from parking shortages at five of the Project's stations, because the Project does not include sufficient off-street parking facilities to accommodate its projected ridership, transit riders are expected to utilize on-street parking spaces in the neighborhoods surrounding transit stations and neighborhood residents will be forced to compete for scarce on-street parking spaces, thereby causing a "spillover" parking effect.[4] (11 AR 00411.)

To mitigate this significant environmental effect, the EIR proposed MM TR-4, which provides, in relevant part, as follows:

> "In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service and shall monitor the availability of parking monthly for six months following the opening of service. If a parking shortage is determined to have occurred (i.e. existing parking space utilization increases

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[4] Respondents suggest that the Project's spillover parking impacts are not "environmental impacts" within the scope of CEQA. Metro Br., p. 38; Expo. Br., p. 42. This is inconsistent with the EIR's analysis of spillover parking impacts (11 AR 00342, 344-345, 411-413) and characterization of the resultant shortfall as a potentially significant environmental impact requiring mitigation (3 AR 00054; 7 AR 00178-179).

> to 100 percent) due to the parking activity of the LRT patrons, ***Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods***. ... Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs .... Metro will not be responsible for the costs of permits for residents desiring to park on the streets in the permit districts. ***For those locations where station spillover parking cannot be addressed through the implementation of a permit parking program, alternative mitigation options include time-restricted, metered, or shared parking arrangements. Metro will work with the local jurisdictions to determine which option(s) to implement."***
>
> (11 AR 00413-414, emphasis added.)

Relying on MM TR-4, the EIR concludes that the station-area spillover parking impacts would be "less than significant." (3 AR 00054; 11 AR 00413-414.) Expo Authority abused its discretion in certifying the EIR because MM TR-4 is inadequate as a matter of law and violates the mandate established under Public Resources Code section 21081.6, subd. (b), requiring that mitigation measures that adequately address significant impacts are incorporated into the project, or required as fully enforceable conditions of approval, in a manner that ensures the measures will actually be implemented.

Here, the issue is not whether MM TR-4 itself is enforceable or is incorporated into the Project. MM TR-4 is inadequate because it does ***not*** require the implementation by Expo Authority, Metro, or any other agency, of any of the measures identified in MM TR-4 to actually mitigate the spillover parking impacts. Simply put, there is nothing in MM TR-4 requiring ***any*** reduction in on-street parking utilization, even when such utilization reaches 100 percent. Instead, MM TR-4 only requires Metro to monitor parking availability and, after all on-street parking is being used,

"work with" local governments to assess the need for parking permit programs, time-restricted metering, or other possible remedial actions. Similarly, while MM TR-4 provides that Metro shall reimburse the costs associated with implementing parking permit programs, no such implementation is required. In fact, Metro even concedes that it "cannot ultimately force [the] affected jurisdictions to implement the parking measures" contained in MM TR-4. Metro Br., p. 50.

CEQA generally prohibits deferral of the formulation of mitigation measures "until some future time," unless they "specify performance standards which would mitigate the significant effect of the project..." Guidelines, § 15126.4, subd. (a)(1)(B). In a recent case, *Preserve Wild Santee v. City of Santee* , *supra* _Cal.App.4th_ [2012 DJDAR at 14547], an EIR included a mitigation measure for impacts on an endangered butterfly species that required the future adoption of a habitat plan and the active management of the species within a designated preserve. *Ibid.* The Court rejected this measure, holding that a mitigation measure that only provided for "the postapproval formulation of [a] habitat plan's provisions for active management of [an endangered species] within [a required] preserve violates CEQA's proscription against deferred mitigation measures." *Ibid.* The *Preserve Wild Santee* court expressly identified the EIR's failure to "specify performance standards or provide other guidelines for the active management requirement" as grounds for finding the butterfly mitigation measure inadequate, stating the "timing and specific details for implementing other Quino management activities discussed in the draft habitat plan are subject to the discretion of the preserve manager based on prevailing environmental conditions." *Ibid.* "Consequently, these activities are ***not guaranteed to occur at any particular time or in any particular manner***." *Ibid.* (emphasis added.)

Respondents do not dispute that MM TR-4 defers formulation of mitigation, but contend that it is adequate because it contains a performance standard, pursuant to Guidelines, § 15126.4, subd. (a)(1)(B). In doing so, Metro mischaracterizes MM TR-4, which contains no commitment to achieve any "standard."

Two cases illustrate adequate performance standards. In *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 943, a mitigation measure to a protect special status plant species required the successful transplant and establishment of at least 80 percent of individual plants on an open space. In *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1021, a parking mitigation measure contained a performance standard requiring that no more than 90 percent of parking spaces be utilized.

In contrast, MM TR-4, by its terms, provides no assurance that parking utilization will be below 100 percent in the neighborhoods surrounding the Project. Thus, MM TR-4's 100 percent threshold is not a performance standard ensuring that no significant impact will occur.[5] Instead, to the extent that MM TR-4 imposes any enforceable obligations, it only requires Metro to perform short-term, six-month monitoring of parking conditions and to assess the need for a parking permit program. However, it imposes no enforceable obligation to ***implement*** a program to maintain parking utilization below 100 percent. Therefore, MM TR-4 is a legally inadequate mitigation measure and cannot support a conclusion that the Project will not cause significant spillover parking impacts.

C. The Record Does Not Contain Substantial Evidence That MM TR-4 Will Reduce The Project's Spillover Parking Impacts to a Level of Insignificance.

Even if the substantial evidence test is utilized to assess the legal adequacy of MM TR-4, Respondents have not identified substantial evidence supporting the EIR's conclusion that MM TR-4 mitigates the significant impacts associated with Project-caused parking shortages. The reason is simple: there is nothing in the record evidencing any commitment by the Cities to implement MM TR-4's proposed mitigation programs, and Respondents cannot compel these independent municipalities to implement the programs.

Federation, supra, 83 Cal.App.4th at 1261-1263 applies here. In *Federation*, mitigation measures adopted by the City of Los Angeles to address significant traffic impacts caused by a general plan amendment were found inadequate because there was uncertainty regarding funding and implementation of the measures. *Ibid.* Because of this uncertainty, the *Federation* Court held that the measures were not adequately "incorporated into the project or required as a condition of project approval in a manner that [would] ensure their implementation" and the City "made no provision to ensure that [the measures would] actually be implemented or 'fully enforceable'". *Id.* at 1261-1262. On that basis, the *Federation Court* held that substantial evidence did not support the mitigation measure's satisfaction of Public Resources Code section 21081.6, subd. (b).

Neither the EIR nor the administrative record here supports a conclusion that measures to actually mitigate the Project's spillover parking were required or incorporated into the Project in a manner that ensures their implementation. As in *Federation,* there is great uncertainty here whether any measures can or will be implemented to mitigate the Project's adverse

spillover parking impacts. Accordingly, the EIR does not comply with CEQA.

Respondents erroneously assert that substantial evidence supports the EIR's conclusion that MM TR-4 will mitigate the Project's spillover parking impacts. "In the CEQA context, substantial evidence 'means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' [citing] Guidelines, § 15384, subd. (a).)" *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1183. However, "[a]rgument, speculation, unsubstantiated opinion or narrative [and] evidence which is clearly erroneous or inaccurate" does ***not*** constitute substantial evidence. Guidelines, § 15384.

Here, the limited evidence which Respondents cite is not substantial evidence that MM TR-4 will be implemented to mitigate the Project's spillover parking impacts to a level of insignificance. In fact, nothing in the record shows a commitment by any of the Cities to implement the remedial actions included in MM TR-4. Any inference to the contrary is entirely speculative.

For example, Respondents argue that the existence of a residential parking permit district near one proposed station and parking meters in the vicinity of two other station areas (11 AR 00413) are evidence that implementation of MM TR-4 will mitigate the Project's spillover parking impacts. However, the mere existence of parking districts and meters elsewhere in the Project area is not substantial evidence that the measures identified in MM TR-4 will be implemented by the Cities in the future, and, if implemented, would adequately address the Project's spillover parking impacts.

Respondents also contend that because the EIR states that MM TR-4 had "been revised in consultation with the local agencies" (11 AR 00413) or that a so-called "working relationship" exists between the various agencies, the Cities will implement MM TR-4 and spillover parking impacts will be mitigated. Metro Br., pp. 50. However, it is a major leap in logic to conclude, based on Expo Authority's "consultation" with local governments and the Cities' representation on the Expo Authority Board, that such governments will independently or concertedly take sufficient remedial action where they have no such duty.[6]

Moreover, assuming, arguendo, that the Cities were willing to initiate the establishment of residential parking permit programs in the affected areas, it is not a foregone conclusion that such programs would be successfully implemented. In the City of Los Angeles, for example, such programs require the approval the City Council and the majority of residents in the affected area. Thus, there are additional procedural hurdles to implementation that are not contemplated in the EIR and fall outside the control of Expo Authority, Metro or even the local jurisdictions.

As noted by Respondents, Expo Authority made the finding specified in Guidelines section 15091, subd. (a)(1), (*i.e.*, that "[c]hanges or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR), as well as the finding specified in Guidelines section 15091, subd. (a)(2) (*i.e.*, that "[s]uch changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such

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[6] Respondents cite *El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1351 for the proposition that "courts must presume a public agency will carry out is obligations." However, because MM TR-4 establishes no obligations for the Cities, there are no grounds for such a presumption here.

other agency or can and should be adopted by such other agency.") Expo Authority erroneously argues that even if there is not substantial evidence to support its finding under Guidelines section 15091, subd. (a)(1), such a defect can somehow be cured by its finding under Guidelines section 15091, subd. (a)(2). See e.g. *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212 (holding that a statement of overriding considerations was defective because three of twelve possible benefits of the proposed project that were purported to outweigh its significant environmental impacts were not supported by substantial evidence.); disapproved on other grounds in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499. Furthermore, making a finding under Guidelines section 15091, subd. (a)(2) lends no support whatsoever for the EIR's conclusion that MM TR-4 will mitigate the Project's potential spillover parking impacts to a level of insignificance, because there is no assurance that other, independent jurisdictions would implement any of the identified measures.

CONCLUSION

For the reasons set forth above and in the Opening Brief, the EIR in this case does not comply with the substantive requirements of CEQA and fails as an informational document. The Court of Appeal's decision should be reversed, with instructions to the trial court to issue a writ of mandate setting aside the Expo Authority Board's decisions to certify the EIR and approve the Project.

DATED: October 30, 2012

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.520, subd. (c)(1))

This Reply Brief on the Merits contains 8,400 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 2049 Century Park East, Suite 2700, Los Angeles, California 90067.

On October 30, 2012, I served true copies of the following document described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

_X_ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Elkins Kalt Weintraub Reuben Gartside LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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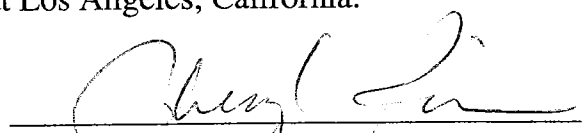
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 30, 2012, at Los Angeles, California.



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