LIU, J.

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

LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BS125233
HONORABLE THOMAS I. MCKNEW, JR.

# REPLY TO ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

PAGE

# TABLE OF AUTHORITIES

# I. INTRODUCTION

Petitioner and Appellant Neighbors For Smart Rail ("NFSR" or "Petitioner") respectfully submits the following reply to the Answer to Petition for Review ("Answer") filed jointly by Respondent Exposition Metro Line Construction Authority ("Expo Authority"), Respondent Exposition Metro Line Construction Authority Board, Real Party in Interest Los Angeles County Metropolitan Transportation Authority ("Metro") and Real Party in Interest Los Angeles Metropolitan Transportation Authority Board Metro (collectively "Respondents").

Respondents contend that Supreme Court review of the published opinion in this case (the "Opinion") is not warranted because the Courts of Appeal are "not divided" on the baseline issue and because the questions of law presented in the Petition for Review are not "important." As explained below, Respondents are flat wrong on both counts.

# II. REVIEW OF THE "BASELINE" ISSUE IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND SETTLE AN IMPORTANT QUESTION OF LAW

## A. The Courts of Appeal are Split on the Baseline Issue

In upholding the Expo Authority's use of projected future (2030) conditions as the sole baseline for evaluating the potential traffic and air quality impacts of the Project in this case, the Second District Court of Appeal clearly recognized that its decision was in direct conflict with the Sixth District's decision in *Sunnyvale West Neighborhood Ass'n. v. City of Sunnyvale* (2010) 190 Cal.App.4th

1351 and the Fifth District's decision in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48. (Op. at 4, 15-16.) In fact, the Second District expressly states that the Opinion was published "[b]ecause we disagree with *Sunnyvale* and *Madera*" on the baseline issue. (Op. at 4.)

Nonetheless, Respondents contend that there is no split of authority on the baseline question. Specifically, Respondents assert that, within one year of deciding *Sunnyvale*, the Sixth District "reversed itself" on the baseline question in *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552. (Answer at 9.) However, even a cursory reading of the *Pfeiffer* decision reveals that the Sixth District did no such thing.

In *Pfeiffer*, the Court upheld an EIR for the proposed expansion of a medical campus against a challenge that the EIR had improperly used hypothetical background conditions instead of existing conditions as the traffic baseline. *Id.* at 1569. However, nothing in *Pfeiffer* remotely suggests that the Sixth District "reversed" itself on any issue decided in *Sunnyvale*, as erroneously asserted by Respondents. Rather, the *Pfeiffer* court merely distinguished *Sunnyvale* on the ground that the EIR in *Sunnyvale* 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 ("The study intersections were evaluated 'for the four scenarios, including existing conditions, background conditions, project conditions, and cumulative conditions ...'") and 1572 ([A]ppellants overlook the fact that the EIR included existing conditions, based on

actual traffic counts, in its analysis of traffic impacts"). Specifically, the *Pfeiffer* court concluded that *Sunnyvale* is "distinguishable from the present case, where the traffic baselines included in the EIR were not limited to project traffic conditions in the year 2020, but also included existing conditions and the traffic growth anticipated from approved but not yet constructed developments." *Id.* at 1573. The Sixth District did not "back away" from *Sunnyvale*, as suggested by Respondents, because *Pfeiffer* does not permit a lead agency to solely rely on a future baseline. Rather, *Pfeiffer* stands only for the unremarkable proposition that an EIR is not limited to evaluating the impacts of a project only against existing conditions, but may also evaluate the impacts against other baselines, including baselines that include traffic growth from approved by not yet constructed developments. *Id.* at 1572-73.

Significantly, the Second District's Opinion in this case correctly notes that in *Pfeiffer*, "the EIR used multiple traffic baselines to analyze traffic impacts," and that "*Pfeiffer* distinguished *Sunnyvale* because in *Sunnyvale*, the traffic baselines included only project traffic conditions in 2020 ...." (Op. at 12.) Thus, Respondents' argument that *Pfeiffer* is somehow at odds with *Sunnyvale* is actually undermined by the Opinion itself.

Respondents do not dispute – and therefore impliedly concede – that the Opinion's holding on the baseline question is in direct conflict with the Sixth District's decision in *Sunnyvale*. Because *Sunnyvale* stands as controlling law in the Sixth District, there is clearly a split of authority between the Sixth District and the Second District on the critically-important baseline question.

Respondents' contention that the Opinion does not conflict with the Fifth District's decision in *Madera* is equally devoid of merit. Respondents argue that in *Madera*, the Court did not hold that the EIR under review used an improper baseline, but only that the EIR failed to "identify the baseline" that was used to assess the project's traffic impacts. (Answer at 13.) This argument grossly mischaracterizes the holding in *Madera*.

In *Madera*, the petitioner claimed that an EIR for a proposed development project violated CEQA because it failed to use the existing physical environment as its baseline for analyzing traffic impacts. *Id.* at 92. The respondents, on the other hand, argued that the challenged EIR complied with CEQA by using two different baselines to analyze the traffic impacts of the project, including existing conditions. *Ibid.* After discussing the relevant legal authorities, the *Madera* court first expressly adopted the following rules: (1) a baseline used in an EIR must reflect existing physical conditions; and (2) lead 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. *Id.* at 92. The Court then proceeded to apply these rules to the facts of the case. After reviewing the relevant sections of the EIR, the court concluded that it "was unable to state with certainty that existing conditions were used as the baseline for determining the significance of the project's potential impacts on traffic," and that "at best, the EIR lacked clarity regarding which baseline or baselines were used." *Id.* at 95. In other words, the Court rejected the respondents' defense that the EIR had used the existing environment in its analysis of the project's traffic impacts because it

was unclear from the EIR that this was the case. On these grounds, the Court the held that the EIR violated CEQA.

In light of the *Madera* court's express conclusions of law, there can be no doubt that if the EIR in that case had clearly indicated (as in this case) that the existing environment was not used to evaluate the project's traffic impacts, the court would have held that the EIR was inadequate because it had used an improper baseline. Respondent's facile argument that, in *Madera,* the EIR was found inadequate only because it did not clearly indicate which baseline was used to evaluate traffic impacts blatantly ignores the legal context of the court's conclusion and is patently incorrect.

Respondents also attempt to marginalize *Madera* by suggesting that the *Madera* court blindly followed *Sunnyvale*, and brazenly predict that the Fifth District will now abandon *Sunnyvale* in favor of the Second District's reasoning in this case. Respondents' contention is not only disrespectful to the Fifth District, it is also completely baseless. As discussed in the Petition for Review, *Madera* expanded upon the *Sunnyvale* court's analysis by, among other things, explaining that CEQA itself requires that impacts be measured against the physical conditions that "exist" in the affected area. *Madera, supra*, 199 Cal.App.4th at 89. The *Madera* court also noted that its decision to follow *Sunnyvale* was consistent with the holdings of three previous Fifth District decisions that also addressed the baseline concept, including *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, and *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th

683. *Id.* at 90. Thus, the Fifth District has clearly staked out a position on the baseline issue that is well supported and, as relevant to the Petition for Review, directly conflicts with the Second District's Opinion in this case.

The split of authority on the baseline question between the Fifth and Sixth Districts, on the one hand, and the Second District, on the other, is manifest and cannot be reasonably disputed. Review by this Court is urgently needed to secure uniformity of decision on this important issue and to provide much needed guidance to public agencies, project sponsors, community stakeholders, and CEQA practitioners throughout California.

### B. The Issue of Whether a Lead Agency May "Elect" to Analyze the Potential Impacts of a Project Using Only Projected Future Conditions as the Environmental Baseline Is an Important Question of Law That Must Be Settled.

Respondents assert that the issue of whether a public agency may evaluate the potential impacts of a project using only projected future conditions is not an important question of law, but do not offer any supporting explanation. Instead, Respondents merely attempt to defend the Opinion's holding on the baseline question, and argue that this case is not a good "candidate" for review because Petitioner did not challenge the sufficiency of the evidence in the administrative record that allegedly supports the EIR's prediction regarding future conditions. (Answer at 4.)

Respondents' contention that Petitioner failed to argue that Expo Authority's use of a future baseline is not supported by substantial evidence (Answer at 19) is completely irrelevant because,

among other things, Petitioner contends that Expo Authority's evaluation of the Project's traffic and air quality impacts solely on the basis of predicted conditions 20 years after Project approval and 15 years after commencement of Project operations was erroneous as a matter of law. As the court held in *Sunnyvale*, use of such a future baseline "contravenes CEQA regardless whether the agency's choice of methodology for projecting those future conditions is supported by substantial evidence." *Sunnyvale*, *supra*, 190 Cal.App.4th at 1380-81. The question of whether exclusive use of a future baseline is a failure to proceed in the manner required by law (and therefore not subject to the substantial evidence test), as held by *Sunnyvale* and *Madera*, or allowed where the projected future conditions are supported by substantial evidence, as held by the Second District in this case, is squarely presented in this case.[1]

Respondents' attempt to defend the Opinion's holding on the baseline question merely serves to illustrate why review is necessary in this case. For example, in the Petition for Review, Petitioner

[1] Respondents also argue that "Petitioner cannot be heard to complain for the first time in this Court that the Expo Authority's use of a future baseline for traffic, air quality and greenhouse gas emissions constitutes an abuse of discretion because, in its view, the Expo Authority should have used a 2015 baseline." (Answer at 20.) However, the "issue" raised by this argument is a red herring. Petitioner does not contend that Expo Authority should have used a 2015 baseline. Rather, Petitioner has consistently argued that by using a post-EIR-certification and post-Project-approval baseline in this case, the EIR improperly ignored the potential traffic and air quality impacts of the Project during its first 15 years of operations, *i.e.*, from the expected date of Project commencement (2015) to the year selected by Expo Authority as the "baseline" year for environmental evaluation (2030).

explained that CEQA itself defines the term "environment" to mean "the physical conditions which exist within the area which will be affected by a proposed project" (Pub. Resources Code, § 21060.5), and that by measuring and analyzing the impacts of the Project only against projected future conditions, Expo Authority did not evaluate the Project's traffic and air quality impacts on the "environment" as required by CEQA. See Pub. Resources Code § 21151, subd. (b). In response, Respondents argue that CEQA does not answer the question "exists or will be affected when?" (Answer at 16.) However, this response is pure sophistry. As explained in the Petition for Review, the word "exist" cannot be reasonably construed to mean something that does not currently exist but may exist at some future date if various assumptions come to fruition. Predictions regarding conditions that may exist in the future are inherently hypothetical. See *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 ("*CBE*") (holding that use of a hypothetical baseline that did not represent existing conditions caused an illusory measurement of project impacts and violated CEQA).

Respondents' strained argument underscores that fact that the relevant statutory language has been construed in very different ways by different parties and by different courts. Moreover, despite this Court's previous decision in *CBE,* many important questions remain unanswered. For example, this Court observed in *CBE* that an agency might only have the discretion to deviate from the "normal" baseline (*i.e.*, conditions that exist at the time environmental review commences) in cases where environmental conditions "are expected

to change quickly during the period of environmental review for reasons other than the proposed project," in which case "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." *Id.* at 328. In *Sunnyvale* and *Madera*, the Sixth and Fifth Districts, respectively, reasonably interpreted this language to mean that the selected baseline must fall sometime within the "period of environmental review," *i.e.*, from issuance of the Notice of Preparation through Project approval.[2] The Second District, on the other hand, construed *CBE* to mean that an agency has the discretion to select a future (post-approval) baseline for environmental review, so long as the predicted future conditions are supported by substantial evidence. (Opinion at 14-15.) This Court should end the debate by granting the Petition for Review and, if warranted, clarifying whether its decision in *CBE* permits the use of a future (post-approval) baseline.

Respondents also cite *CBE* in support of its argument that "flexibility" to use "predicted conditions" as the baseline for environmental review is "built explicitly" into Section 15125 of the CEQA Guidelines, which states that the baseline will "normally" consist of conditions existing as of the time environmental review of

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[2] Respondents argue that the court in *Sunnyvale* "simply assumed" that the word "exist" as used in CEQA "must mean 'exists between the time CEQA review begins and the date of project approval,' *i.e.*, during environmental review." (Answer at 16.) Not so. *Sunnyvale's* conclusion that the selected baseline must fall within the period of environmental review was based on, among other things, the language and holding of *CBE*. See *Sunnyvale*, *supra*, 190 Cal.App.4th at 1373-1381.

the project is commenced.[3] (Answer at 17.) Specifically, citing this Court's statement in *CBE* that "project effects might reasonably be compared to predicted conditions at the expected date of project approval," Respondents argue that this Court has "acknowledged that predicted future conditions will in some cases serve as the baseline for assessment of environmental impacts." (Answer at 18.) Respondents then attempt to buttress this contention by dismissing the phrase "at the expected date of project approval" as merely "illustrative of the Court's broader ruling on the discretion belonging to public agencies in selecting an environmental baseline, so long as the baseline in realistic, and not hypothetical." (Answer at 18.) Respondents also cite the following statement from the Opinion, which according to Respondents sums up *CBE*'s interpretation of Guidelines section 15125: "To state the norm is to recognize the possibility of departure from the norm." (Answer at 18.)

Of course, one of the many problems with this line of argument—and with the holding of the Opinion in this case—is that it renders the word "normally" (as used in section 15125 of the Guidelines) meaningless. Specifically, if the baseline is no longer tethered to "existing" physical conditions, then who is to say what is "normal"? Indeed, the Opinion does not even address the question of whether there is anything unique about the Project in this case that

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[3] "Guidelines" refers to the regulations codified in title 14, sections 15000 *et seq.* of the California Code of Regulations, which have been "prescribed by the Secretary of Resources to be followed by all State and local agencies in California in the implementation of [CEQA]." Guidelines, § 15000.

would justify Expo Authority's "election" to deviate from the "normal" baseline by over two decades.[4]

In *Sunnyvale*, the Sixth District prudently declined to construe the word "normally," as used in CEQA Guidelines section 15125, subd. (a), to mean "that a lead agency has carte blanche to select the conditions on some future, post-approval date as the 'baseline' so long as it acts reasonably as shown by substantial evidence." *Sunnyvale*, *supra*, 190 Cal.App.4th at 1379. In this case, the Second District went in the exact opposite direction, and further compounded the problem by failing to provide any guidance whatsoever as to the circumstances in which a lead agency may deviate from the norm.

If the Opinion is allowed to stand, other public agencies in California will undoubtedly follow Expo Authority's lead, and will begin to omit any analysis of the impacts of proposed projects as compared to existing physical conditions from their environmental documents. For reasons summarized in the Petition for Review, review by this Court is needed to ensure that CEQA's important goals of informed public participation and informed decision making are achieved.

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[4] Indeed, the EIR in this case used predicted future conditions in the year 2030 as the baseline for assessing traffic and air quality impacts, but under the logic of the Opinion, the EIR could just as easily have used predicted future conditions in the year 2060 or 2090 as the baseline.

## III. THE QUESTION OF WHETHER A MITIGATION MEASURE THAT MERELY IDENTIFIES ACTIONS THAT COULD BE TAKEN BY OTHER AGENCIES IS LEGALLY ADEQUATE MERITS SUPREME COURT REVIEW

In its Request for Publication, Metro argues that part 6 of the Discussion section of the Opinion ("The Adequacy of Mitigation Measures") provides "important guidance" regarding the formulation of mitigation measures and the "amount of detail necessary to include in a mitigation measures in order to support a conclusion that the mitigation measure would reduce impacts to less than significant." (Petition for Review, Exhibit "B" at 2-3.) By granting Metro's request, the Court of Appeal apparently agreed that this part of the Opinion met one or more of the standards for certification set forth in California Rules of Court, Rule 8.1105, subd. (c). Nonetheless, in an effort to avoid review by this Court, Respondents now seek to downplay the significance of the Second District's holding regarding the adequacy of mitigation measure MM TR-4 and similar measures identified in the EIR in this case.

Respondents argue that the second question presented in the Petition for Review does not merit review by this Court because, according to Respondents, MM TR-4 is "fully enforceable" and therefore "comports with established law." (Answer at 22-23.). On the contrary, by accepting Respondents' novel definition of what constitutes a "fully enforceable" mitigation measure, the Opinion represents a significant retreat from longstanding legal principles concerning the legal adequacy of mitigation measures.

CEQA requires that all measures to mitigate or avoid significant effects on the environment be "fully enforceable through permit conditions, agreements, or other measures." Pub. Resources Code § 21091.6, subd. (d). See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-62 (holding that a finding that traffic mitigation measures had been "required in, or incorporated into" the project was not supported by substantial evidence because there was "great uncertainty as to whether the mitigation measures would ever be funded or implemented" and no policy would prevent development of the project without mitigation). Here, Respondents argue that MM TR-4 is "fully enforceable" because it requires monitoring of on-street parking activity of transit patrons and, if utilization of existing on-street parking reaches 100 percent, Metro "*will* work with the appropriate local jurisdiction and affected communities to implement a parking permit program ...." (Answer at 21-22; emphasis in original.) In other words, even though Respondents have no ability or legal authority to actually implement such a program, Respondents contend that MM TR-4 is "fully enforceable" within the meaning Public Resources Code section 21091.6, subd. (d) because, pursuant to the terms of the measure, Metro is required to "work" with the appropriate agencies in the development of such a program.

The problem, of course, is that MM TR-4 is "enforceable" only to the extent of its terms, and its terms do not actually require that any program or any alternative be implemented, but instead rely on discretionary actions by third party agencies. If, despite Metro's efforts, a parking permit program or alternative option is not

implemented (*e.g.*, because the applicable city or affected residents vote against it), the parking utilization would remain at 100 percent and no mitigation would occur. Yet somehow, in Respondents' view, this measure supports a conclusion that the spillover parking impacts of the Project "will" be mitigated to a level of significance.

Therefore, this case clearly presents an important question of law regarding the proper interpretation of Public Resources Code section 21091.6, subd. (d). Furthermore, review is needed to clarify whether, in a case where the efficacy of a mitigation measure adopted by a lead agency depends upon the actions of other public agencies, the petitioner has the burden of proving that the other agencies will refuse to take the specified action, as erroneously asserted by Respondents in their Answer. (Answer at 23.)

As noted in the Petition for Review, there are parallels between the mitigation issue presented in this case and the issues presented in *City of San Diego v. Trustees of the California State University*, Case No. S199557 (D057446; 201 Cal. App.4th 1134), which is currently pending before this Court. One of the primary issues presented in *City of San Diego* is whether a state agency (California State University) that is obligated to make "fair share" payments for the mitigation of a project's off-site traffic impacts satisfies its mitigation duty under CEQA by stating that it has sought funding from the Legislature to pay for such mitigation and, if the requested funds are not appropriated, may proceed with the project on the ground that mitigation is infeasible. Ironically, the Opinion in this case, if applied to the facts in *City of San Diego*, suggests that the California State University would not even have been required to seek funding from

the Legislature, but instead could have satisfied its duty by simply identifying the necessary traffic improvements and committing itself to "working" with the affected local agencies and, based on this commitment, could have reasonably concluded that the impacts would be mitigated to a level of insignificance.

Clearly, the Opinion's holding that MM TR-4 supports a conclusion that the spillover parking impacts of the Project will be mitigated to a level of insignificance presents an important question of law that merits review by this Court. Among other things, allowing the Opinion to stand would significantly weaken CEQA's mandate that public agencies mitigate or avoid the significant effects on the environment caused by projects that they carry out or approve whenever feasible. See Pub. Resources Code § 21002.1, subd. (b).

## IV. CONCLUSION

For the reasons stated above and in the Petition for Review, the important questions of law presented in this case clearly merit review by this Court.

DATED: June 28, 2012

ELKINS KALT WEINTRAUB REUBEN GARTSIDE LLP

By: _____

John M. Bowman
Attorney for Neighbors for Smart Rail, Plaintiff and Appellants

## CERTIFICATE OF WORD COUNT
## (Cal. Rules of Court, Rule 8.504(d)(1))

This Petition for Review contains 3,879 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

DATED: June 28, 2012

ELKINS KALT WEINTRAUB
REUBEN GARTSIDE LLP

By: _____
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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 June 28, 2012, I served true copies of the following document described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

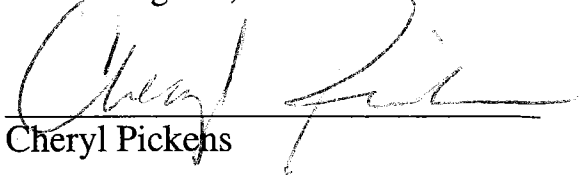
**SEE ATTACHED SERVICE LIST**

_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.

___ **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on June 28, 2012, at Los Angeles, California.



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