

Case No. S202828

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

SUPREME COURT  
**FILED**

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

SEP 25 2012

Frank A. McGuire Clerk  

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Deputy

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.*

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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

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**MOTION FOR STAY AND  
MEMORANDUM OF POINTS AND AUTHORITIES**

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## MOTION FOR STAY

**To the Honorable Chief Justice and the Associate Justices of the Supreme Court of California:**

Pursuant to Rule 8.54 of the California Rules of Court and Code of Civil Procedure section 923, Petitioner and Appellant Neighbors for Smart Rail respectfully requests that this Court issue a stay order enjoining all construction activity by Respondent Exposition Metro Line Construction Authority related to its construction of Phase II of the Exposition Light Rail Line, the approval of which is at issue in this case, pending a decision by this Court on the underlying merits. A stay is necessary for the preservation of this Court's jurisdiction over the substantive issues in this case, and to prevent further alteration of the status quo pending a decision by this Court.

This request is based on this Motion for Stay, the attached Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice and the files and records in this action.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

As discussed in the Appellant's Opening Brief on the Merits, this case involves a challenge under the California Environmental Quality Act ("CEQA") to the legal adequacy of the environmental impact report ("EIR") for a light rail transit project on the Westside of Los Angeles (the "Project"). See Opening Brief on the Merits ("Op. Br."), pp. 1-5. The Project was approved by Respondent Exposition Metro Line Construction Authority ("Exposition Authority") in early 2010 and is expected to be operational in 2015. (2 AR<sup>1</sup> 00005-7; 101 AR 14956.)

Construction activity on the Project began in the summer of 2012 following the filing of the petition for review by Petitioner and Appellant Neighbors for Smart Rail ("NFSR"). See Request for Judicial Notice in Support of Motion for Stay ("RJN") Exhibits ("Exs.") 6, 15. See also RJN Exs. 2-5, 7-11, 17. Development of the Project has recently intensified, with major construction activities underway on a number of Project bridges (RJN Exs. 6-11, 15, 17) and utilities (RJN Exs. 12-14) that are dramatically and irrevocably changing the existing physical conditions on the ground in the area affected by the Project. Many of the major infrastructure improvements currently under construction are expected to be complete within a year, at which time a decision from this Court will likely still be pending. RJN Exs. 6-8, 10-14.

If Exposition Authority is allowed to proceed with such construction activity during the pendency of this case, the questions presented in this

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<sup>1</sup> "AR" means the certified portion of the Record of Proceedings in this matter, which was lodged in electronic form. The numbers preceding "AR" refer to the tab number of the document as shown on the AR index. The numbers following "AR" are the page number(s) from the AR as indicated at the bottom center of each page.

action will likely become moot. Accordingly, this Court should issue a stay enjoining all Project-related construction activity in order to preserve the Court's jurisdiction and prevent further alteration of the status quo pending a decision in this case.

## II. FACTUAL BACKGROUND

On February 4, 2010, Respondent Exposition Metro Line Construction Authority Board certified the EIR and approved the Project. (2 AR 00005-7.) The EIR did not use the existing physical conditions in the area as they existed at the time of environmental review as the baseline for evaluating the Project's potential traffic and air quality impacts. Rather, Exposition Authority "elected" to measure the Project's traffic and air quality impacts only against a long-range forecast of future conditions in the year 2030. (9 AR 00242; 11 AR 00346-347; 13 AR 00504-510; 34 AR 01057; 72 AR 10722, 10737; 3 AR 00017.) At the time the EIR was certified, the Project was expected to be completed and fully operational by late 2015. (101 AR 14956; 34 AR 01063; 406 AR 28926.)

In March 2010, NFSR timely filed a petition for writ of mandate challenging the adequacy of the EIR under CEQA. (1 Joint Appendix ("JA") 0001-0021.) After judgment was entered denying the petition, NFSR appealed the judgment to the Court of Appeal. (3 JA 0745-746; 0806-809.) On April 17, 2012, the Second District Court of Appeal filed its opinion affirming the trial court's decision ("Opinion" or "Op.").

Construction of the Project did not commence until after NFSR filed its Petition for Review with this Court on May 25, 2012. In June and July of 2012, Exposition Authority engaged in certain "pre-construction" activity on the Project, such as clearance and grubbing. See RJN Exs. 1-4, 15. Construction activity on the Project significantly escalated after this Court granted review on August 8, 2012. Specifically, as stated by

Exposition Authority staff, “[c]onstruction of the [Project] reached a significant milestone in August [2012], with the start of major work on several of the bridge structures for the [Project].” RJN Ex. 6. See also RJN Ex. 15. Such “[b]ridge work entails building the footings, abutments and Mechanically Stabilized Earth (MSE) walls for each of the [bridge] structures.” RJN Ex. 6.

The “major work” that is now underway, most of which Exposition Authority expects to be complete within the next year, includes the following:

- Construction of the Centinella Avenue Bridge, which is expected to be complete within twelve months. RJN Ex. 6, 7, 15.
- Construction of the Motor Avenue Bridge, which is expected to be complete within six to twelve months. RJN Exs. 6, 8, 15.
- Construction of the Sepulveda Boulevard Bridge, which is expected to be complete within fifteen months. RJN Exs. 6, 9, 15.
- Construction of the Olympic/Cloverfield Boulevard Bridge, which is expected to be complete within twelve months. RJN Ex. 10.
- Construction of the National/Palms Boulevard Bridge, which is expected to be complete within in twelve months. RJN Exs. 6, 11.
- Construction of the Bundy Drive Bridge, which is expected to be complete within sixteen months. RJN Ex. 17.

As is abundantly clear by the construction activity described above, Exposition Authority intends to complete the basic infrastructure “backbone” for the Project, including six bridges, before this Court is likely to hear and decide this case. Once this major work is complete, even if

NFSR prevails on the merits before this Court, it will be impossible for Exposition Authority to return the Project area to the status quo, and the questions at issue could be rendered moot.

### III. DISCUSSION

Pursuant to Code of Civil Procedure section 923, this Court has the authority to “make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.” See *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 280. See also *No Oil v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 (a stay order issued by this Court where the case “presented issues of public importance, which would be mooted” if oil company was allowed to complete its drilling project pending appeal); *People ex rel. San Francisco Bay Conservation & Dev. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-537 (stay order issued enjoining fill operations in San Francisco Bay “pending final determination of the appeal,” where this Court “deemed the stay basic to the maintenance of this court’s appellate jurisdiction because resumption of fill activities would have imperiled the value of appellant’s right of appeal.”) Moreover, “[a]s a matter of public policy and basic equity, developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project during litigation...”. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203.

A stay is required to prevent NFSR’s claims from becoming moot. *Wilson & Wilson v. City of Redwood City* (2011) 191 Cal.App.4th 1559, 1576 (holding that the completion of a project “moots requests to set aside or rescind resolutions authorizing the project.”). A stay is also required in this case to ensure that the construction and operation of the Project, as



previously designed and approved based on inadequate environmental analyses, does not become a *fait accompli*, regardless of whether the Project causes significant adverse environmental impacts. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 742 (holding that unless a stay was granted, “[i]t is all too likely that if [surveying and construction] activities proceed pending preparation of an adequate EIR, momentum will build and the project will be approved, no matter how severe the environmental consequences identified in the new EIR.”) See also *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135 (expressing concern that “‘bureaucratic and financial momentum’ [may] build irresistibly behind a proposed project, ‘thus providing a strong incentive to ignore environmental concerns.’” quoting *Laurel Heights Improvement Ass’n v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 395)

Here, it is imperative that the Court preserve its power to render a substantive decision in this case that will afford the fullest possible protection of the environment and will preserve NFSR’s remedies under CEQA, lest this case become a mere matter of form over substance. As shown above, Exposition Authority is already, or will soon be, engaged in major construction activity on six separate Project bridges, and with each passing week, Exposition Authority is getting closer to completing the basic infrastructure “backbone” for the Project. Substantial construction of the Project during the pendency of this case will effectively moot NFSR’s claims, and the eventual completion of the Project, as previously approved, will become a *fait accompli*.

As shown in NFSR’s opening brief filed on September 10, 2012, Exposition Authority violated CEQA when it used projected future conditions as the sole baseline for evaluating the Project’s potential traffic and air quality impacts. One of the central issues presented in this case is

whether Exposition Authority is required to use existing conditions as the environmental baseline against which it evaluates the Project's environmental impacts. The selection of a proper environmental baseline is central to determining whether the Project will have significant environmental impacts, which, in turn, dictates whether and how the Project's design may require modification to avoid such impacts. By proceeding with construction of the Project, Exposition Authority is irrevocably altering the existing environmental conditions on the ground, thereby skewing the results of any further environmental analyses that may be required in this case.

Furthermore, if the required environmental review indicates that the Project must be modified in a manner that requires the alteration or demolition of improvements constructed during the pendency of this action, such activity could itself result in additional environmental impacts. A stay is necessary in this case to prevent the adverse and possibly irreparable alterations of the physical environment prior to full and accurate assessment and disclosure of the potential traffic and other impacts of the Project and to ensure adequate consideration of alternatives and mitigation measures that may be identified in the revised environmental analyses.

The requested stay is also necessary for the protection of the Petitioner's right to administrative appeal and judicial review, and is in the public interest. In the absence of a stay, the remedies set forth in CEQA for Exposition Authority's failure to comply with CEQA will likely be ineffective and the important public purposes of CEQA will be subverted. See Pub. Resources Code, § 21168.9, subd. (a) (if a court determines that a public agency's decision was made absent full compliance with CEQA, and a project activity "will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project," respondents and real parties may be enjoined from undertaking any actions that could

result in “an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the ... decision into compliance with [CEQA]”). See also *San Joaquin Raptor/Wildlife Rescue Center, supra*, 27 Cal.App.4th at 741.

In summary, the requested stay should be granted in order to maintain the status quo, avoid environmental harm, and protect this Court’s jurisdiction to decide the important questions presented in this case.

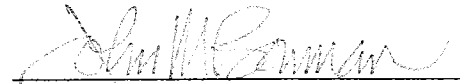
#### IV. CONCLUSION

For the reasons set forth above, this Court should issue a stay enjoining Exposition Authority from engaging in any further construction and construction-related activities on the Project that alter the status quo of existing environmental conditions, pending this Court’s decision on the merits of this case.

DATED: September 24, 2012

ELKINS KALT WEINTRAUB  
REUBEN GARTSIDE LLP

By:



John M. Bowman  
Attorney for Neighbors for  
Smart Rail, Petitioner and  
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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 September 24, 2012, I served true copies of the following document described as **MOTION FOR STAY AND MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

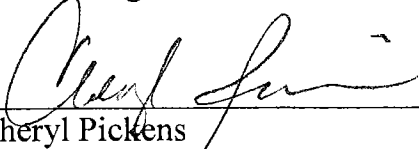
**SEE ATTACHED SERVICE LIST**

  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 September 24, 2012, at Los Angeles, California.

  
Cheryl Pickens

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