SUPREME COURT
FILED

OCT 22 2012

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Deputy

CASE NO. S202828

IN THE SUPREME COURT
STATE OF CALIFORNIA

NEIGHBORS FOR SMART RAIL,
A Non-Profit California Corporation,
Petitioner and Appellant,

vs.

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.

Second District of the Court of Appeal, Division 8 (No. B232655)
Certified for Partial Publication

Affirming a Judgment and Order by the Superior Court of the State of California for the County of Los Angeles (No. BS125233)
Honorable Thomas I. McKnew, Jr.

OPPOSITION OF EXPOSITION METRO LINE CONSTRUCTION AUTHORITY AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY TO MOTION FOR STAY

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I. INTRODUCTION.

The Exposition Metro Line Construction Authority and the Los Angeles County Metropolitan Transportation Authority ("Respondents") file this joint opposition to the Motion for Stay filed by Petitioner Neighbors for Smart Rail ("NFSR").

NFSR seeks to stay and enjoin ***all construction activities*** on the ***$ 1.5 billion*** Exposition Corridor light rail transit project ("Project") under construction between Culver City and Santa Monica in west Los Angeles County. The Project is part of the regional rail transit system that is the linchpin of the region's strategy to improve Los Angeles' infamous traffic congestion and poor air quality; a strategy essential to the environmental and economic health of the region. A one-year stay will cause damages to the public of $90 million or more, have enormous adverse effects on the residents of Los Angeles, and will cause the loss of several thousands of jobs in disadvantaged communities devastated by the recent great recession.

The timing of NFSR's motion, when it would cause the most harm to the public should not be rewarded by the Court. As the Court of Appeal has noted, "[d]elay is the deadliest form of denial." (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 557.)

The Court should deny the motion for the following reasons:

1. The motion is procedurally defective. NFSR failed to file a verified petition for writ of supersedeas or a verified motion as required by California Rules of Court, rule 8.112(a)(5).

2. A stay of the Project is not required to preserve the Court's jurisdiction pending a decision on the merits. The issues on the merits are narrow, and are limited to issues concerning the ***operation of the Project after construction is complete***: (a) the Exposition Metro Line Construction Authority's ("Authority") evaluation of traffic impacts

based on the ***operation*** of the Project and (b) a single parking mitigation measure. ***None*** of the issues in the case concern ***construction*** impacts. Indeed, NFSR has ***never claimed*** that the Authority's evaluation of construction impacts violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA").

3. Construction of the Project is not scheduled to be complete until 2015 at the earliest. Even in the unlikely event that construction is completed before the Court decides the merits, and in the event the Court reverses the Court of Appeal, the Court retains the ability to enjoin operation of the Project pending the Authority's compliance with the Court's decision.

4. NFSR failed to present any evidence demonstrating irreparable harm to its members or to the public. Most of the Project is within a rail corridor right-of-way that has been in existence for many decades. (Declaration of Richard Thorpe ("Thorpe Decl.") ¶ 8.) The remainder of the Project is on ***existing*** public streets in a highly urbanized area. (Thorpe Decl., ¶ 8.) There are no undeveloped areas, sensitive habitat or any other "greenfield" areas along the project alignment. Ironically, NFSR seeks to stop construction of bridges for grade-separated crossings of public streets even though throughout the case it has argued that the Project should have ***more*** grade-separated crossings.

5. The only "evidence" proffered by NFSR is through a Request for Judicial Notice ("RJN"). The staff reports, newsletters and press releases subject to the RJN at most demonstrate that construction has commenced. They do not constitute self-evident evidence of irreparable harm or evidence that the case will be moot if a stay motion is denied. Even if NFSR had provided evidence of irreparable harm, any such harm could be remedied by modifying the Project prior to opening day of Project service.

6. The balance of the equities here overwhelmingly favors denial of the motion. A stay of the Project for as little as one year will result in delay and other costs of over $90 million. (Thorpe Decl., ¶ 16.) A stay will result in the loss of thousands of jobs in a community still reeling from the recent great recession. (Thorpe Decl., ¶ 28.) Weighed against the severe economic impacts of a stay are the concerns of a few residents of Cheviot Hills represented by NFSR who object to the operation of the Project in a ***railroad corridor*** that has existed for many decades. A stay will prevent the timely construction of a transit project that addresses the preeminent public interest in cleaner air and improved mobility for the residents of Los Angeles County.

7. NFSR delayed its motion to cause maximum economic and social impacts. Despite personal notice of the start of construction over 17 months ago, NFSR failed previously to seek injunctive relief at any time either in the Court of Appeal or this Court. (Thorpe Decl., ¶ 7.)

8. NFSR's motion is grossly overbroad and inconsistent with the legislative direction that CEQA remedies should be narrow and limited. (Pub. Resources Code, § 21168.9.) NFSR seeks to stay ***all*** construction activities including those that have nothing whatsoever to do with NFSR's CEQA claims.

II. STATEMENT OF FACTS.

A. Project History and the Administrative Process.

Los Angeles suffers from the worst traffic congestion and air quality in the nation. For that reason, over three decades ago, the citizens of Los Angeles County overwhelmingly endorsed a program to finance and build a comprehensive rail transit system. (30 AR 00888.)

The establishment of a modern transit system connecting downtown Los Angeles and the west side has been studied in several

environmental reports extending over a decade. (165 AR 18694; 168 AR 18840-867.)

On February 19, 2007, the Authority issued a notice of preparation ("NOP") of the draft environmental impact report ("Draft EIR") for the Project. (196 AR 20837-849; 32 AR 00902.) The Authority conducted four public meetings with over 700 people in attendance to solicit input on the Project's scope. (*Id.* at 00902.) The Authority received and evaluated 1,800 written comments on proposed alternatives. (*Id.* at 00905.) On January 28, 2009, the Authority circulated the Draft EIR for the Project. (78-85 AR 12416-14887; 521 AR 33407.)[1]

After circulation of the Draft EIR, the Authority conducted over 100 meetings with various cities, public agencies and stakeholders, including three formal public hearings, business outreach meetings, and group presentations and alignment tours. (32 AR 00916-925, 928.) Agencies, individuals and interest groups submitted over 8,979 oral and written comments on the Draft EIR. (7 AR 00171.) The comments overwhelmingly supported extension of the light rail line to Santa Monica. (*Id.* at 00175.)

On December 21, 2009, the Authority made the Final EIR available for additional public review and comment. (707 AR 45927.) On February 4, 2010, the Authority held a public hearing to consider certification of the EIR and approved the Project. (2 AR 00006.) Dozens of individuals and organizations submitted written comments and appeared and testified at the hearing. (See, e.g., 727 AR 46941-990.) After consideration of all public comments, the Authority certified the EIR. (2 AR 00005-007.) The Authority also adopted alternative LRT2 (using the existing Exposition Rail Corridor right-of-way to

[1] See Attachments 1 through 4, attached, for maps of the approved Project alternative and Project stations within each segment.

Colorado Avenue to the terminus in Santa Monica), and adopted detailed findings supporting the Authority's decision, a Statement of Overriding Considerations and a Mitigation Monitoring and Reporting Program ("MMRP"). (3 AR 00008-131.)

B. Prior Proceedings Below and in the Supreme Court.

1. Trial Court Proceedings.

NFSR filed a petition for writ of mandate against the Authority and the Federal Transit Administration ("FTA"), challenging the agencies' compliance with CEQA and the National Environmental Policy Act ("NEPA"). (1 JA 000001-21.) FTA removed the action to federal court and the federal claim was subsequently dismissed. (*Id.* at 000112-115,000196-210, 000251-253; Declaration of Robert Thornton ("Thornton Decl."), ¶¶ 3-4.) Following briefing and oral argument, the trial court denied NFSR's petition on all grounds. (3 JA 000716-725.) The trial court entered final judgment on March 4, 2011 (*id.* at 000745-746), and NFSR filed a notice of appeal on April 25, 2011 (*id.* at 000806-809).

2. Court of Appeal Proceedings.

On April 17, 2012, the Court of Appeal filed its opinion affirming the trial court's judgment. The Court of Appeal rejected all of NFSR's numerous CEQA claims. NFSR never argued, either before the trial court or the Court of Appeal, that the Project EIR's evaluation of construction impacts violated CEQA or that construction of the Project would cause any irreparable harm.

3. Petition for Review.

On May 29, 2012, NFSR filed its Petition for Review and limited the petition to two narrow issues: (1) whether the baseline methodology selected by the Authority to determine the significance of traffic and air quality impacts related to ***operation of the Project*** violated CEQA; and

(2) whether a measure adopted by the Authority to mitigate potential "spillover" parking impacts violated CEQA. Although NFSR knew construction had begun when it filed its Petition for Review in May, it failed to include a request for temporary stay, as provided in California Rules of Court, rules 8.116(a) and 8.112(c)(1). (Thorpe Decl., ¶ 7.)

III. DISCUSSION.

A. The Motion Should Be Denied Because NFSR Failed to Verify the Motion.

The proper procedure for the relief NFSR seeks is to file a verified petition for a writ of supersedeas and temporary stay order under California Rules of Court, rules 8.112 and 8.116. NFSR ignored these procedures and this Court should therefore deny its motion. (See Cal. Rules of Court, rule 8.116(c).)

NFSR had ample opportunity to follow required procedures when it filed its petition for Review. It did not do so. Instead, NFSR filed its self-styled, unverified Motion for Stay of all construction activities at a time when it would be most prejudicial to Respondents and the public. Code of Civil Procedure section 923, on which NFSR relies as the authority for its motion, recognizes the power of appellate courts to issue orders to preserve their jurisdiction, but it does not provide procedures governing motions for any such orders. Instead, California Rules of Court, rules 8.112 and 8.116 lay out clear, detailed requirements applicable to writs of supersedeas.

Even if the Court chooses not to enforce the requirements of the writ procedure in this case, NFSR should not be permitted to ignore its substantive requirements. (See *People ex rel. San Francisco Bay Conservation & Development Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 538 [both a stay order and a writ of supersedeas should be controlled by the same principles].) Any petitioner seeking a writ of

supersedeas is required to file a verified petition. (Cal. Rules of Court, rule 8.112(a)(5).) The purpose of requiring a verified petition is to ensure that the party filing it does so in good faith. (*H.G. Brittleston Law & Collection Agency v. Howard* (1916) 172 Cal. 357, 360.) In addition, this requirement provides additional procedural safeguards for a situation where the usual safeguards, such as the opportunity to be heard at oral argument, are absent. In a proceeding for a writ of supersedeas, due process is satisfied by providing a "hearing" through the verified pleadings. (See *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861 ["the writ may issue without oral argument once the matter has been ***fully heard on the verified pleadings***"] emphasis added.)

No such assurances are present here, where NFSR has filed an unverified Motion for Stay. The Court should therefore deny NFSR's motion.

B. Staying Construction of the Project is Not Required to Preserve This Court's Jurisdiction or Prevent Irreparable Harm to NFSR, and Therefore, It Must Be Denied.

Code of Civil Procedure section 923 provides that an appellate court may "make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently entered, or otherwise ***in aid of its jurisdiction***." (*People ex rel. San Francisco Bay Conservation & Development Com. v. Town of Emeryville, supra,* 69 Cal.2d at pp. 538-539, emphasis added; see also *id.* at p. 537.) This inherent power of an appellate court to grant stays or other orders in aid of its jurisdiction is used "where to deny a stay would deprive the appellant of the benefit of the reversal of the judgment against him." (*Id.* at p. 537, internal quotation marks omitted.) The power to issue a stay order to preserve an appellate court's jurisdiction should be "sparingly employed and reserved for the exceptional situation." (*Ibid.*)

NFSR asserts that a stay is required to prevent its claims from becoming moot. (NFSR's Motion for Stay at 4 ["Mot."].) This simply is not true. An action is not moot where ***no irreversible*** physical or legal change has occurred during the pendency of the action and the petitioner can still be awarded the relief it seeks. (See *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 127 [appeal not mooted where city approved a final EIR for a project during pendency of an appeal regarding approval of agreements because, if appellant was successful, city could still be ordered to set those approvals aside]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203-1204 [appeal not mooted even where projects were partially constructed and in operation because, if ordered to conduct additional environmental study, city could still compel additional mitigation measures or require modification, reconfiguration or reduction of the project].)

Construction of a project during pendency of an appeal in a CEQA action does not moot the case. In *Bakersfield Citizens for Local Control v. City of Bakersfield, supra*, 124 Cal.App.4th at p. 1193, a citizens group challenged the city's approval of two retail developments, each of which contained a retail "supercenter." The trial court found that the EIR for each retail center was deficient, but it only enjoined the construction of the supercenters while the deficiencies in the EIRs relating to those supercenters were remedied, leaving the approvals for the remainder of the two retail developments in place. (*Id.* at p. 1195.) During the pendency of the appeal, the developers proceeded to construct virtually everything but the supercenters. (*Id.* at p. 1196.) The Court of Appeal rejected an argument that the appeal was moot in light of the fact that these retail centers were largely completed and stores were open for business. (*Id.* at pp. 1203-1204 ["[E]ven at this late juncture, full CEQA

compliance would not be a meaningless exercise of form over substance."].)

The court reasoned that it could still order effective relief by ordering the superior court to issue writs of mandate requiring the city to vacate its prior approvals, remedy the CEQA violations, and reconsider the project in light of the fully compliant CEQA analysis. (*Ibid.*) It noted that, "[a]s conditions of reapproval, the City may compel additional mitigation measures or require the projects to be modified, reconfigured or reduced." (*Ibid.* at 1204.)

NFSR cites language in *Bakersfield Citizens for Local Control* for the proposition that an agency should not be permitted to build out a portion of a project during litigation as a means of defeating a CEQA suit. (Mot. at 4.) NFSR fails to point out, however, that the court used this possibility as a basis for finding that construction of the majority of an approved project did ***not*** render the appeal moot. (See *Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at pp. 1203-1204; see also *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 882 ["To the City of Fresno and the corporation we say: It is never too late."].) *Woodward Park* held that its ruling could have a practical impact and provide the petitioner effective relief because "a decision upholding the [trial] court's order directing the preparation of an EIR could result in modification of the project to mitigate adverse impacts or even removal of the project altogether." (*Id.* at p. 888.)

NFSR cites *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 742, in support of its argument that the Project will become a *fait accompli* if construction is allowed to continue pending appeal. However, in *Bakersfield Citizens Center for Local Control v. City of Bakersfield, supra*, 124 Cal.App.4th at p. 1184, the Fifth District rejected that argument, calling it "cynical" because construction projects are not irreversible, or their impacts may be

mitigated upon remand and reconsideration by the lead agency, and therefore the courts are not powerless to order effective relief, even if construction is completed prior to a resolution of the appeal on the merits. (*Id.* at p. 1204.)

Finally, NFSR's citation to *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, is also misplaced. While *Wilson* held that completion of a project mooted a request to set aside authorizations of the project, its basis for doing so with respect to the EIR at issue was its reliance on *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, 378-379. In *Hixon*, the court held that cutting down trees for the first phase of a project rendered moot a request for writ of mandate to compel preparation of an EIR for that phase of the project. (*Ibid.*) But, as explained in *Woodward Park Homeowners Assn. v. Garrerks, Inc.*, *supra*, 77 Cal.App.4th at p. 889, *Hixon* is distinguishable from a situation where a project is constructed during the pendency of appeal.

> The distinction between *Hixon* and this case is obvious. In *Hixon*, the trees were *already cut down*; thus the original trees could not be returned. They could only be replaced, which is what the county had already done. [Citation.] Here, in contrast, the project can be modified, torn down, or eliminated to restore the property to its original condition.

(*Ibid.*, italics original.) The court therefore held that the case was not moot because its ruling could award the petitioner effective relief. (*Id.* at p. 888.)

Construction of the Project here does not deprive NFSR of effective relief in the event it is successful on this appeal. Construction of the Project is not scheduled for completion until 2015. (Thorpe Decl., ¶¶ 4; 10.) NFSR's Motion for Stay alleges that the 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." (Mot. at 3.) Even if NFSR's claim was true, that would not divest this court of jurisdiction in the matter. Rather, if the Court were to rule against the authority, none of the planned construction would preclude the Authority from considering modifications to the Project to address the impacts of concern to NFSR. (See *Woodward Park Homeowners Assn. v. Garreks, Inc.*, *supra*, 77 Cal.App.4th at p. 888.)

In addition, none of NFSR's claims are related to any of the current construction activities. NFSR's legal claims in the lawsuit all relate to potential impacts that would occur ***after*** the completion of construction and the beginning of transit service, namely ***operational*** impacts on local traffic on streets that the Project will cross at-grade, operational air quality impacts associated with traffic, and near station impacts on public, on-street parking. (Thorpe Decl., ¶¶ 10; 12.)

The focus of NFSR's motion for a stay is the construction of bridges in the existing Exposition Rail Corridor right of way that will provide ***grade-separated*** street crossings. Because the bridges carry the guideway over streets, they cannot possibly have any operational traffic or associated air quality impacts. NFSR has never challenged the construction of grade-separated crossings. Indeed, the gravamen of NFSR's objection to the Project is that it should include ***more*** grade separations.

Construction of the bridges certainly does not preclude the Authority from considering modifications to the Project to address alleged impacts from ***at-grade crossings*** should the Court rule against the Authority on the merits. (Thorpe Decl., ¶ 12.) Thus, the construction work NFSR seeks to enjoin will not moot their appeal.

NFSR's traffic complaints are limited to 7 out of 90 intersections in the Project area. NFSR alleges that ***at-grade*** street crossings in the area of the seven intersections could delay traffic at these locations.

(Appellant's Opening Brief on the Merits at p.6.) But the bridges under construction are for ***grade-separated*** street crossings. Thus, the construction of the bridges has ***absolutely no operational traffic or associated air quality impacts*** and no other impacts that are relevant to NFSR's challenge to the Project. (Thorpe Decl.,¶ 10.) None of the ongoing construction activities preclude the Authority from considering additional design options and mitigation measures that could lessen the impacts of concern in NFSR's petition, if it were to become necessary following a decision on the merits. (Thorpe Decl., ¶ 12.)

Not only will construction not be complete by the time a resolution is reached in this matter, but any construction that does commence will not have any irreversible impact on NFSR or the public. The majority of the Project's alignment follows an established railroad corridor that has existed for many decades. (Thorpe Decl., ¶ 8.) Maps depicting the location of the bridges under construction – indicated by green squares – show that Project construction is currently taking place entirely within the existing right of way, except for some utility relocation on Colorado Avenue. (Freund Decl., Exhibits 7-9.) Because most of the Project (and all of the current bridge construction that is the focus of the stay motion) is in a long-established railroad right-of-way, there can be no irreparable harm to the NFSR's members or to the public. (Freund Decl., ¶¶ 8-9, Exhibits 10-12; Thorpe Decl., ¶ 8, Exhibit 4; Declaration of Katrina Diaz, ¶ 2, Exhibits 20-21.)

NFSR failed to make the required showing that this is an "exceptional situation" necessitating the Court's grant of a stay pending its appeal. (*People ex rel. San Francisco Bay Conservation & Development Com., supra,* 69 Cal.2d at p. 537.) At most, NFSR has demonstrated that construction of the Project has commenced; it has demonstrated nothing more.

C. NFSR Has Provided No Evidence of Irreparable Harm.

A proper showing for the grant of a stay requires proof that the appellant will suffer irreparable injury absent a stay. (*In re Marriage of Dover* (1971) 15 Cal.App.3d 675, 679 [citing *People ex rel. San Francisco Bay Conservation & Development Com.*, *supra*, 69 Cal.2d at p. 537].) The appellant must show that the harm from not granting a stay is such that appellant would lose the benefits of the appeal should it prevail. (*In re Marriage of Dover, supra,* 15 Cal.App.3d at p. 679.)

The only evidence NFSR presented, via its Request for Judicial Notice ("RJN"), does not establish that NFSR or any of its members will suffer any harm from the construction let alone irreparable harm. Rather, the documents identified in the RJN at most demonstrate only that construction of the Project has started. NFSR presents no evidence, through a declaration of harm or otherwise, that this construction will cause it or the public any irreparable harm whatsoever.

Judicially noticed documents do not constitute evidence of the truth of factual matters that may be deduced from those documents. (*People v. Mangini* (1994) 7 Cal.4th 1057, 1063-1064; see Opposition to Request for Judicial Notice.) The RJN documents do not constitute competent evidence of irreparable harm.

NFSR asserts only that construction of a portion of the Project would proceed during this Court's review of the Court of Appeal's decision. ***NFSR does not – and cannot – claim that construction will be completed before the Court decides this case.*** Indeed, NFSR has acknowledged that construction of the Project will not be complete until 2015 at the earliest. The gravamen of the harm of which NFSR complains pertains to the ***operation*** of the Project, ***not*** the construction of bridges, utility relocation, rough grading, or rail removal that is currently underway. Thus, the alleged environmental impacts on traffic,

air quality, and parking would not be realized until well after this case has been decided.

D. The Motion for Stay Must Be Denied Because Issuance Would Severely Prejudice the Authority, Metro, and the Public Interest.

NFSR's motion is also fatally defective because it fails to even mention the substantial harm to the Authority, Metro, and the public that would result from enjoining all construction activities. (*Nuckolls v. Bank of Cal. Nat. Assn.* (1936) 7 Cal.2d 574, 578; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 7:281 (rev. #1, 2011).)

In seeking a stay, NFSR must demonstrate that the Respondents would not be irreparably harmed by grant of a stay. Because the Respondents will undeniably suffer some harm, NFSR must show that the prejudice to NFSR from not granting the stay would outweigh the harm to the Authority from granting it. NFSR must make this showing because, in determining whether such a stay is warranted, "***[a]ffirmances must be contemplated as well as reversals***." (*Nuckolls v. Bank of Cal. Nat. Assn.*, *supra*, 7 Cal.2d at p. 578; *Deepwell Homeowners' Protective Assn. v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67.)

NFSR's Motion for Stay is defective because it fails to acknowledge the enormous harm to the Authority, Metro, and the public if construction of the Project is enjoined. A delay in construction of the Project will substantially increase the Authority's construction costs. An injunction lasting as short as one year will result in increased construction and other related costs of approximately $90 million. (Thorpe Decl., ¶ 20.) The increased costs of a one year stay of construction are broken down as follows:

- $34,300,000 in annual delay costs, including labor cost escalation at five percent and material cost escalation at six percent.
- $12,800,000 for demobilization, including the cost of four staff for six months to shut down the Phase 2 Project and buyout the subcontractor's contracts; actual subcontractor buyouts per the term of the contract; termination of leases entered into by the contractor; severance pay to employees; equipment move out; and restoration of traffic lanes taken by construction.
- $44,600,000 in remobilization costs.

(Thorpe Decl., ¶¶ 20-21.)

A stay of construction will cause other significant damages including the following:

- Increased cost of construction of the Maintenance and Storage Facility for light rail vehicles. (Declaration of Brian Boudreau ("Boudreau Decl."), ¶¶ 6, 9.)
- Increased cost to store light rail vehicles and power station equipment ordered for the Project. (Boudreau Decl., ¶¶ 7, 9.)

Construction of a billion dollar transit project is a complex undertaking. If construction activities do not occur in the correct sequence, the entire construction schedule will be disrupted. (Thorpe Decl., ¶ 11.)

The massive increase in the cost of the Project does not encompass the entirety of the harm that would result from a stay. The harm to the public must be considered as well. Again assuming a stay lasting one year, delay of construction activities would result in a loss of at least 817 jobs. (Thorpe Decl., ¶ 25.) These jobs include: (1) 222 subcontractor positions, including service providers, consultants, subcontractors, suppliers, vendors, and trucking companies; (2) 400 craft employees; (3) 60 management employees; and (4) 135 subcontractor employees. (Thorpe Decl., ¶ 25.)

The actual job-loss likely will be much higher. (Thorpe Decl., ¶ 26.) Utilizing the President's Council of Economic Advisors formula that one job is created for every $92,000 of government spending, a stay of construction pending appeal will result in a loss of 4,161 jobs for the year 2013. (Thorpe Decl., ¶ 26.)

This loss of jobs is substantial in its own right, but it is particularly significant because of the effect it would have on the local economy of central and west Los Angeles. A substantial amount of these job losses will be felt by those local communities that have been hit hardest by the recent great recession. (Thorpe Decl., ¶ 27.) Thirty percent of the work conducted on the Project must be performed by community area and local residents. (Thorpe Decl., ¶ 27.) At least ten percent of that work must be performed by disadvantaged workers, i.e., individuals whose primary place of residence is within the Los Angeles County and either had an income less than fifty percent of the annual median income or faced some barrier to employment. (Thorpe Decl., ¶ 27.) These struggling local residents would be deprived of the substantial benefit that the Project would provide them. (Declaration of Kevin Ramsey, ¶¶ 2; 4-5.)

Unemployment in Los Angeles County was 11 percent in August 2012—well above the national average. (Thorpe Decl., ¶ 27.) Thus, a one-year Project stay will have a devastating adverse impact on some of the most vulnerable members of the community. Weighed against these severe economic impacts are the alleged operational traffic and on-street parking concerns of a few residents of Cheviot Hills represented by NFSR.

In addition to job losses and the economic impacts of an indefinite stay of all construction, a delay in construction will delay the realization of environmental and other benefits expected to result from the Project. (Thorpe Decl., ¶ 28.) Los Angeles suffers from the worst traffic

congestion and air quality in the nation. Population and employment growth in the Project study area will only exacerbate these problems. Environmental benefits from the Project include reductions in vehicle miles traveled, vehicle hours traveled, improved levels of service on local streets, and reductions in greenhouse gas emissions. (8 AR 00218-234; 11 AR 00353-354; 375-377; 34 AR 01058; 13 AR 00506; 72 AR 10738-739.) The Project will extend rail transit service to west Los Angeles and Santa Monica thus providing an alternative to bus service on congested streets for the transit dependent communities in those areas. (Thorpe Decl., ¶ 28.)

Even if NFSR made the required showing of harm (which it has not), NFSR has failed to show that its alleged harm from construction during pendency of the appeal ***outweighs*** the substantial interest to the public and the Authority in the construction of the Project. Where such a determination cannot be made because of NFSR's failure to provide competent evidence, the Court should not attempt to do so. (*Building Code Action v. Energy Resources Conservation & Development Com.* (1979) 88 Cal.App.3d 913, 922.) Having failed to carry its burden, NFSR's Motion for Stay should be denied.

E. NFSR's Motion for Stay Is Untimely Under the Doctrine of Laches.

"The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1267-1268 [laches applied against plaintiff in CEQA action] [citing *Conti v. Board of Civil Service Com.* (1969) 1 Cal.3d 351, 359]; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61.) When such factors are present, it becomes inequitable to afford the relief requested. (*Ibid.*)

In this case, both acquiescence of NFSR and prejudice to the Authority and Metro are present, as are the other elements of laches. The Authority issued notices that certain pre-construction activities would begin along the Project alignment in May 2011 (for underground pipeline removal) and June 2011 (for work including "potholing" to locate/confirm utility locations). (Thorpe Decl., ¶ 6; Exhibit 2.) The Authority began briefing NFSR's members, their homeowner groups and/or neighborhood councils regarding the Project on May 11, 2011. (Thorpe Decl., ¶ 7.) These briefings included discussion of the construction schedule as early as May 16, 2011. (Thorpe Decl., Exhibit 3.) Because the Authority kept NFSR abreast of the construction activities beginning on April 18, 2011 (Thorpe Decl., ¶ 6), NFSR had ample opportunity to petition the Court of Appeal for a writ of supersedeas pending its final order, which was not issued until April 17, 2012.

Indeed, at no time during the pendency of the litigation before either the Superior Court or the Court of Appeal did NFSR request any form of preliminary injunctive relief. This Court should not reward NFSR's request to enjoin the Project ***more than 17 months after the Authority notified NFSR*** of the start of construction.

NFSR failed to seek a temporary stay when it filed its Petition for Review. (Cal. Rules of Court, rules 8.112(c)(1) and 8.116(a).) In addition, NFSR again failed to request a stay when the Court granted its review on August 8, 2012, despite having direct knowledge that construction activities had commenced as early as May of 2011. (Thorpe Decl., ¶ 7.)

NFSR's delay strategy is a standard tactic utilized by project opponents in CEQA cases. NFSR unnecessarily delayed the adjudication of the lawsuit when it included in the Petition (1) frivolous federal claims in the Petition requiring removal and dismissal of the

claims in federal court, and a frivolous state law claim several years after the expiration of the statute of limitations. (Thornton Decl., ¶¶ 3-6;1 JA at 000001-021, 000112-115, 000196-210, 000251-253.) The frivolous claims were ultimately dismissed, but only after removal of the case to federal court and demurrers in federal court and state court.

F. NFSR's Requested Stay of All Construction Is Not Narrowly Tailored.

NFSR makes absolutely no attempt to demonstrate that the scope of its requested stay is narrowly tailored to preserve any potential remedy it may have or to preserve the Court's jurisdiction. Public Resources Code section 21168.9, on which NFSR relies, requires that a mandate be directed to a "***specific*** project activity" or "***specific*** project activities." (Pub. Resources Code, § 211689.9, subds. (a)(2) and (b), emphasis added; see *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 280 [Permitted ongoing construction of portions of the project].) (*Ibid.*)

NFSR has made no effort to tailor the requested relief. Instead, NFSR broadly requests the cessation of ***all*** "further construction and construction-related activities" that would "alter the status quo of existing environmental conditions." (Mot. at 7.) If the Court were to issue a stay, it may permit some activities to proceed. (*San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of S. Cal.* (2001) 89 Cal.App.4th 1097, 1105.) The Court would need to evaluate each aspect of the Project to determine what, if anything, would deprive it of jurisdiction or preclude NFSR from receiving effective relief. Even assuming NFSR's motion satisfies the elements for a stay, which it does not, it does not provide adequate information to permit the Court to make such a specific determination.

G. If the Court Were to Issue a Stay Order, NFSR Should Be Required to Post a Bond.

Issuance of a stay order will impose enormous economic and environmental costs on the Respondents and the public. Thus, if the Court grants a stay order, it should require NFSR to post a substantial bond.

While the Court has authority to stay a proceeding in order to preserve its jurisdiction, this authority is inextricably tied with the Court's "inherent and equitable power to achieve justice" in the case before it. (*Venice Canals Resident Home Owners Assn. v. Superior Court* (1977) 72 Cal.App.3d 675, 679.) Equity cuts both ways. (*Nuckolls v. Bank of Cal.*, *supra*, 7 Cal.2d at p. 578 ["This court must consider the rights of respondents as well as those of appellants."].) Accordingly, the Court may impose any conditions it deems just upon the stay order to protect the respondent's interest. (*Venice Canals Resident Home Owners Assn. v. Superior Court*, *supra*, 72 Cal.App.3d at p. 679; see also Cal. Rules of Court, rule 8.112(d)(1).)

Twice the courts of this state have determined that the Authority complied with CEQA in the Authority's approval of the Project. The risk of an adverse ruling on the merits should be borne by the one requesting the stay order. (See *Estate of Murphy* (1971) 16 Cal.App.3d 564, 568 ["Equity demands that, as between respondent and appellant, the appellant who seeks the stay should assume the risk"].)

Consistent with this principle, courts have conditioned the grant of a stay order upon the posting of a bond by the petitioner where justice so requires. (See, e.g., *Venice Canals Resident Home Owners Assn. v. Superior Court*, *supra*, 72 Cal.App.3d at p. 682.) Justice requires posting of a bond here.

As documented in the Declarations of Richard Thorpe, Brian Boudreau and Kevin Ramsey, the harm to the public will be enormous if

the Court stays construction of the Project. The bond should generally be sufficient to compensate the wrongfully enjoined party for all harm necessarily and proximately caused by the imposed delay. (*Robinson v. Fidelity & Deposit Co.* (1935) 5 Cal.App.2d 241, 245; see also Code of Civ. Proc., § 529 [amount of bond should be sufficient to cover damages sustained by reason of injunction]; Code of Civ. Proc., § 529.1 [authorizing bonds of $500,000 for enjoined construction projects].) In light of the unique facts of this case, a substantial bond should be required to begin to cover the costs of any imposed delay.

The California courts regularly require bonds where a party seeks to enjoin a project while litigation is pending. (See *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10 [a bond is an "indispensable prerequisite to the issuance of a preliminary injunction" and the duty to order a bond is "mandatory, not discretionary"]; *In re Marriage of Van Hook* (1983) 147 Cal.App.3d 970, 989 [injunction is void without an undertaking]; *Miller v. Santa Margarita Land etc. Co.* (1963) 217 Cal.App.2d 764, 766 [preliminary injunction reversed because no bond ordered]; *Federal Automotive Services v. Lane Buick Co.* (1962) 204 Cal.App.2d 689, 695 [injunction held inoperative and of no effect because the order did not require a bond].)

While the federal courts have held that only a nominal bond should be imposed where the plaintiffs are seeking to protect the environment, California courts have not universally followed the federal courts. (See *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219-220 [noting that the question is as yet unresolved].) But even under the rationale of those federal decisions, a nominal bond is not proper in this case. The federal rule is based upon the idea that the "public interest in preserving the environment pending a hearing on the merits is more significant that the defendant's economic interests." (*Id.* at p. 218.) Under this reasoning, nominal bonds are

imposed upon plaintiffs seeking to protect the environment where the plaintiff is likely to succeed on the merits, and there is a concern that a substantial bond will in effect "close the courthouse door" to meritorious litigation in the public interest. (See *id.* at p. 218.) Here, those concerns are not present.

NFSR is not seeking to protect a public interest in the environment. They are seeking to prevent the construction of the Project on a long-established railroad right of way in their neighborhood. NFSR cannot contend that they are likely to prevail on the merits – they have lost twice before on the merits.

Thus, if the Court were to issue a stay of all or part of the construction, it should require NFSR to post a substantial bond.

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IV. CONCLUSION

For the above-stated reasons, NFSR's Motion for Stay should be denied.

Dated: October 19, 2012

Nossaman LLP

By: _____
Robert D. Thornton
Attorneys for Respondents
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY
and
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD

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INDEX OF ATTACHMENTS

ATTACHMENT NO.	DESCRIPTION
1	Exhibit A to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Approved Project, 9 AR 00253
2	Exhibit B to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 1 Expo ROW, 9 AR 00255
3	Exhibit C to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 2, 9 AR 00264
4	Exhibit D to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 3a, 9 AR 00273

ATTACHMENT 1

Exhibit A to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Approved Project

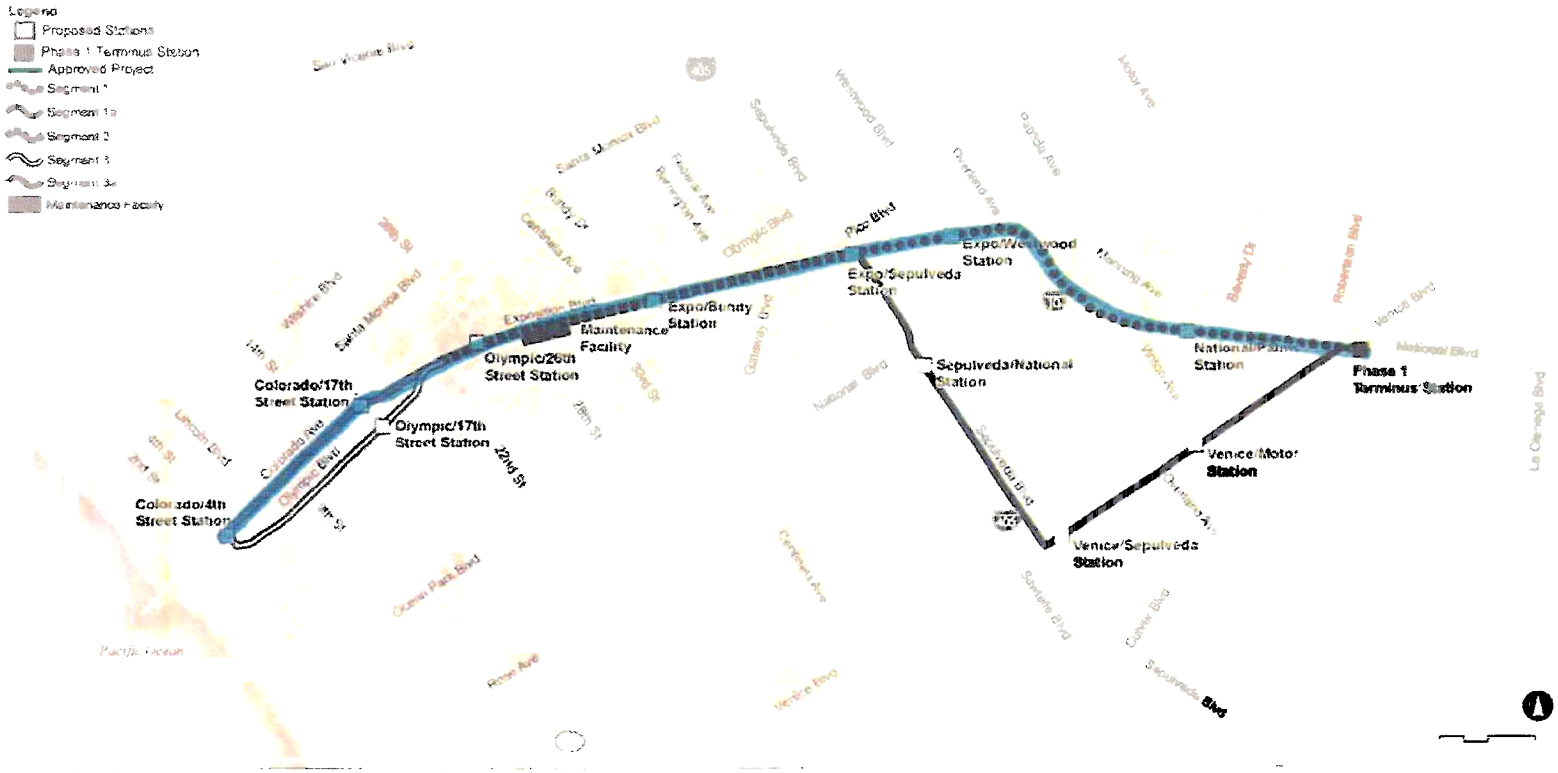
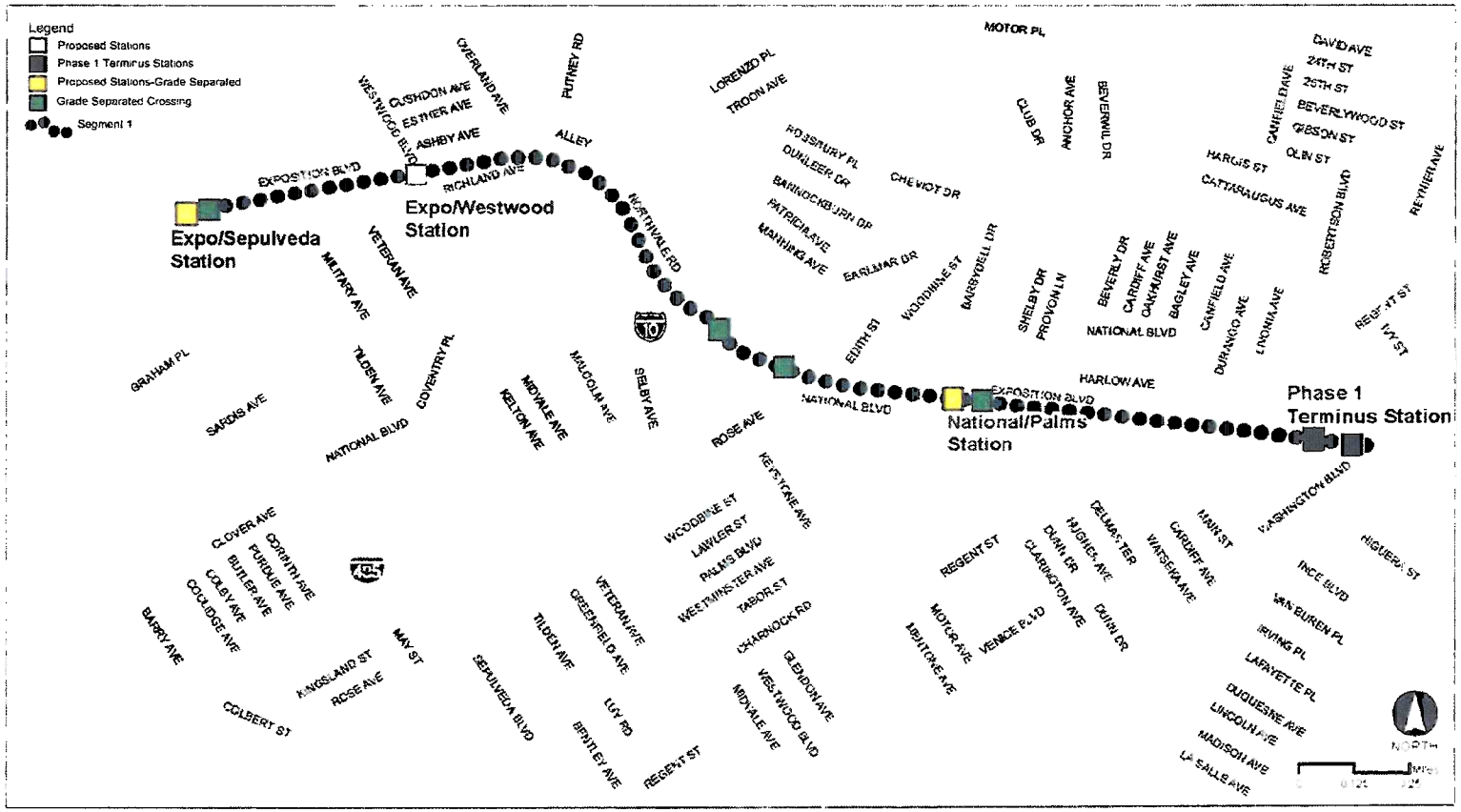


Figure 2.4-1 Project Map—By Segment

Sources: 3 AR 00018-19; 9 AR 00252-74.

ATTACHMENT 2

Exhibit B to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 1 Expo ROW



Source: Metro, 2008; DMJM Harris, 2008

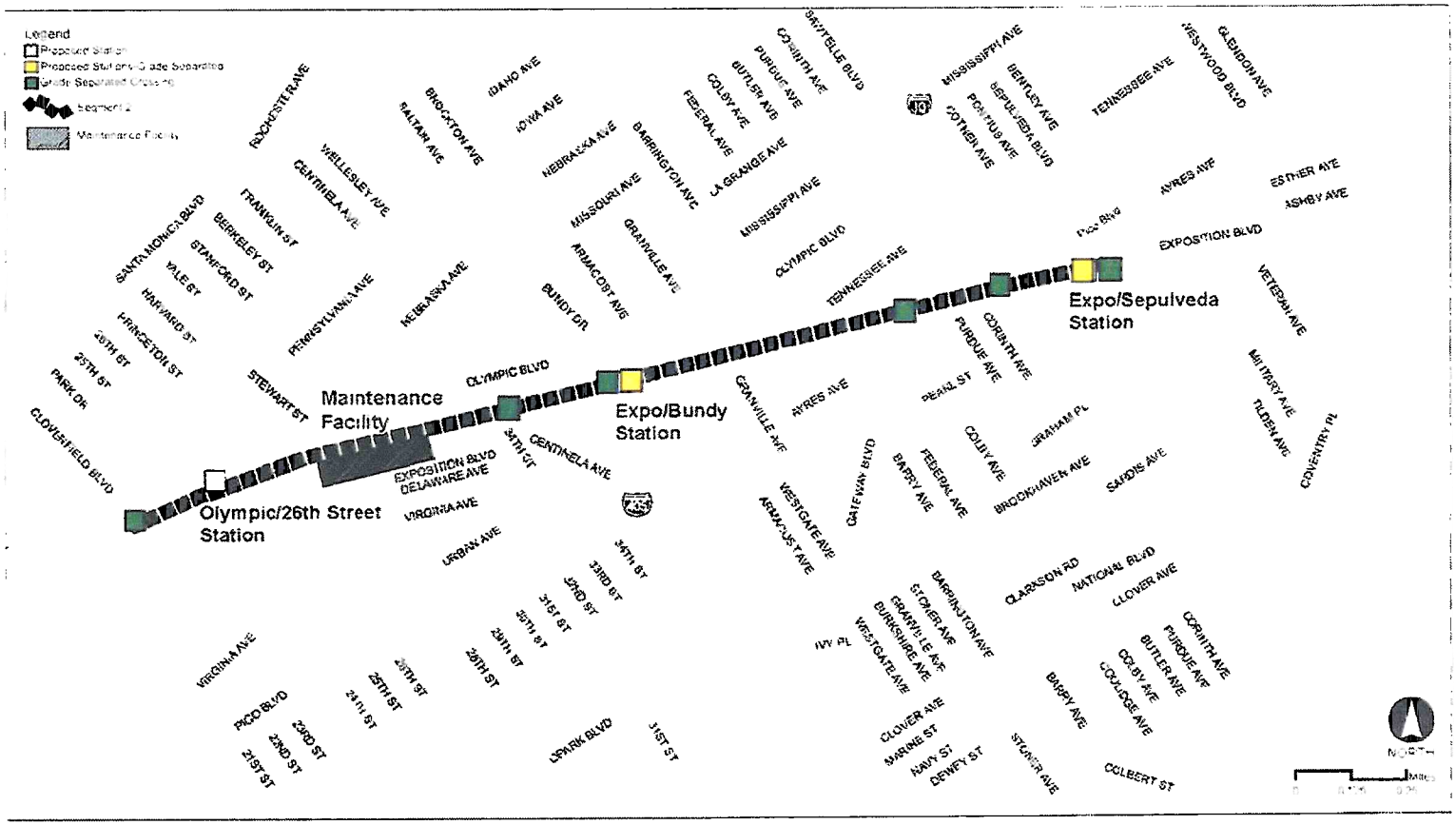
Figure 2.4-2 Segment 1: Expo ROW

Sources: 9 AR 00252-59; 3 AR 00022; 118 AR 15030,15032

ATTACHMENT 2

ATTACHMENT 3

Exhibit C to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 2



Source: Metro, 2008; DMJM Harris, 2008

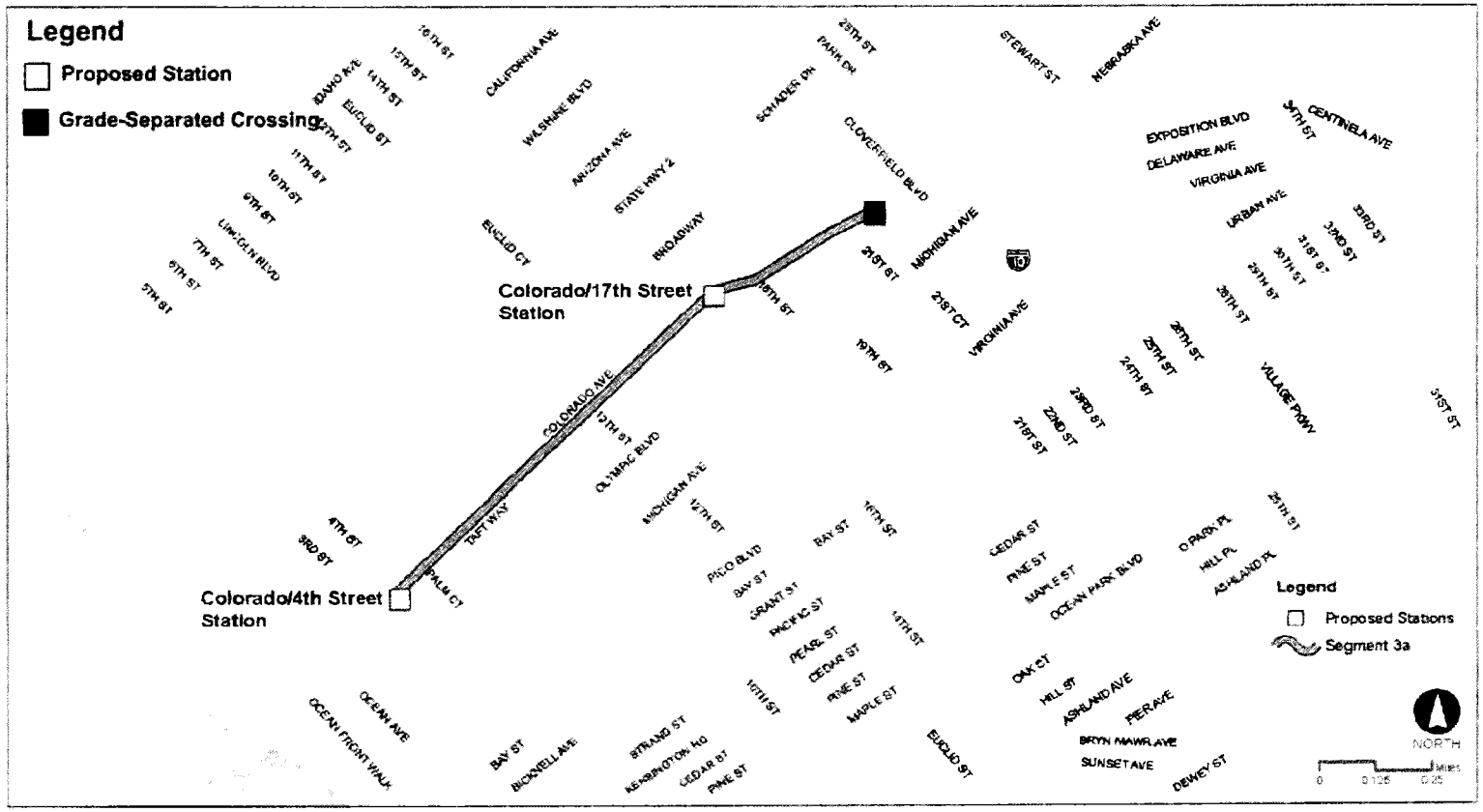
Figure 2.4-4 Segment 2: Sepulveda to Cloverfield

Sources: 9 AR 00258, 00263-68, 00271-74; 3 AR 00022; 118 AR 15030,15032

ATTACHMENT 3

ATTACHMENT 4

Exhibit D to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 3a



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-6 Segment 3a: Colorado

ATTACHMENT 4

Source: 9AR 00271-74

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is Nossaman LLP, 18101 Von Karman Avenue, Suite 1800, Irvine, CA 94612.

On October 19, 2012, I served the foregoing **OPPOSITION OF EXPOSITION METRO LINE CONSTRUCTION AUTHORITY AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY TO MOTION FOR STAY** on parties to the within action as follows:

☐ (By U.S. Mail) On the same date, at my said place of business, an original enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.

☒ **(By Overnight Service)** I served a true and correct copy by common carrier promising overnight delivery as shown on the carrier's receipt for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the common carrier; deposited in a facility regularly maintained by the common carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

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

Executed on October 19, 2012.

Leanne Boucher

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