Case No. S202828

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

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

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

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

OPENING BRIEF ON THE MERITS

JOHN M. BOWMAN, SBN 137383
C.J. LAFFER, SBN 260546
ELKINS KALT WEINTRAUB
REUBEN GARTSIDE LLP
2049 Century Park East, Suite 2700
Los Angeles, CA 90067
Telephone: (310) 746-4400
Facsimile: (310) 746-4499
Attorneys for Petitioner and Appellant
NEIGHBORS FOR SMART RAIL

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REUBEN GARTSIDE LLP
2049 Century Park East, Suite 2700
Los Angeles, CA 90067
Telephone: (310) 746-4400
Facsimile: (310) 746-4499
Attorneys for Petitioner and Appellant
NEIGHBORS FOR SMART RAIL

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1. Under the California Environmental Quality Act ("CEQA"), Pub. Resources Code, §§ 21000 *et seq.*, is a public agency required to evaluate a project's potential traffic and other impacts using a baseline consisting of the existing physical conditions in the affected area during the period of environmental review, or may an agency instead elect to evaluate the impacts of a project only against projected future conditions?

2. Under CEQA, is a mitigation measure that merely identifies several possible remedial actions, all of which lie outside the lead agency's jurisdiction and control, adequate to support a finding that a significant impact of a project will be mitigated or avoided, where there is no assurance that any of the actions will be incorporated into the project or otherwise actually implemented?

INTRODUCTION

This case involves a challenge to the legal adequacy of the environmental impact report ("EIR") for the controversial light rail transit line along the Exposition Corridor from Culver City to Santa Monica ("Project"). The Project is expected to commence operations in 2015, at which point over 280 trains per day will travel primarily through residential neighborhoods on the Project's 6.6 miles of dual light rail track. The trains will cross several major north/south streets at grade level (every 2 ½ minutes during peak periods), thereby impeding the flow of automobile traffic on some of Los Angeles' most congested thoroughfares. As approved by Respondent Exposition Metro Line Construction Authority Board ("Expo Board"), the Project will result in long-term, adverse consequences for hundreds of thousands of Southern California residents, including increased traffic congestion and pedestrian safety hazards at

surface rail crossings, severe parking shortages near transit stations, and increased vibration and noise within residential neighborhoods.

As required by CEQA, Respondent Exposition Metro Line Construction Authority ("Expo Authority") prepared the EIR for the Project, which was subsequently certified by the Expo Board. However, the EIR utilizes an improper environmental baseline to evaluate the Project's impacts on traffic and air quality, and purports to mitigate parking impacts with unenforceable and legally inadequate mitigation measures.

In order to determine whether a potential environmental impact of a project is significant, a lead agency must measure that impact against the existing environmental conditions in the absence of the project, which is commonly referred to as the "baseline" for environmental analysis. The use of a proper baseline is critically important because an environmental impact may not appear to be significant when measured against one baseline, but may actually be significant when measured against another. See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 ("*CBE*") (use of an improper baseline results in "'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts'" of the project).

CEQA requires that lead agencies evaluate a project's potential impacts using an environmental baseline consisting of the existing physical conditions "on the ground" in the area affected by project. In contravention of this statutory mandate, Expo Authority "elected" to evaluate some of the Project's potential impacts using *only* projected future conditions as the environmental baseline. Specifically, the EIR measures and analyzes the Project's potential impacts on traffic and air quality against a long-range forecast of future conditions in the year 2030 (two decades after the Expo Board approved the Project and 15 years after the expected commencement

of Project operations), but fails to also evaluate these potential impacts against the existing physical conditions during the period of environmental review. As a result, the EIR fails to adequately inform agency decisionmakers and the public regarding the nature and extent of the Project's adverse impacts on traffic and air quality during its first 15 years of operation.

The EIR also fails to adequately mitigate the Project's impacts. It is an established principle of California law that public agencies have a duty to mitigate, to the extent feasible, the potential impacts of those projects they propose to approve or carry out, in order to ensure the avoidance of environmental harm. However, a mitigation measure that merely identifies several possible remedial actions, all of which lie outside the agency's jurisdiction and control, with no assurance that any of the actions will be incorporated into the project or otherwise actually implemented, is legally inadequate and does not support a finding that a project's significant impacts will be mitigated or avoided.

Here, the EIR acknowledges that without mitigation, the Project will have a significant adverse parking impact on the neighborhoods surrounding transit stations. Expo Authority nevertheless relies upon an unenforceable mitigation measure that consists solely of remedial actions that are beyond its legal authority to implement. Specifically, mitigation measure MM TR-4 requires Respondent and Real Party in Interest Los Angeles County Metropolitan Transportation Authority ("Metro") to merely "work with" the local jurisdictions and affected communities "to assess the need for and specific elements of a permit parking program for the impacted neighborhoods," and identifies several other "mitigation options" for those locations where spillover parking impacts cannot be addressed through a permit parking program, including "time-restricted, metered, or shared parking arrangements."

Despite the inherent unenforceability and uncertainty as to whether any of the remedial actions identified in this amorphous mitigation measure will ever be implemented, and although the implementation of these actions is squarely outside the jurisdiction and control of Expo Authority and Metro, the EIR nevertheless concludes that MM TR-4 would reduce the Project's spillover parking impacts to a less than significant level. However, under well-established legal principles, MM TR-4 constitutes improper deferral of mitigation and does not support the EIR's conclusion as a matter of law.

Petitioner Neighbors For Smart Rail ("NFSR") is a non-profit corporation founded by a coalition of homeowners' associations, community groups and residents who support the development of intelligent transportation solutions for Los Angeles that are safe, well-planned, and environmentally beneficial. NFSR is not categorically opposed to the Project, but instead seeks to ensure that all decisions concerning the Project are based on a legally adequate environmental study, which properly evaluates, discloses and mitigates the Project's environmental impacts. NFSR brought this action on behalf of itself and the public to compel the Expo Board to set aside its decisions concerning the Project and to prepare and circulate a complete and adequate EIR before taking any further action on the Project.

The trial court denied NFSR's petition for writ of mandate, and the Second District Court of Appeal ("Court of Appeal") affirmed. The Court of Appeal held, among other things, that a public agency's use of projected future conditions as the sole baseline for evaluating a project's environmental impacts is proper, so long as the agency's predictions regarding such future conditions are supported by substantial evidence. In reaching this conclusion, the Court of Appeal expressly disagreed with the Sixth District's decision in *Sunnyvale West Neighborhood Ass'n v. City of*

Sunnyvale (2010) 190 Cal.App.4th 1351 and with the Fifth District's decision in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, each of which expressly held that an EIR must include an evaluation of a project's potential effects on the environment using a baseline consisting of the existing conditions during the period of environmental review (*i.e.*, from the time environmental analysis is commenced through the date of project approval). Furthermore, in a stark departure from established law, the Court of Appeal ruled that MM TR-4 was legally adequate and was sufficient to support the EIR's conclusion that the Project's impact on parking would be reduced to a level of insignificance, despite the fact that the EIR provides no reasonable assurance that any of the identified mitigation "options" would ever be implemented.

Respectfully, the Court of Appeal's decision was incorrect on both counts. For the reasons discussed below, this Court should reverse the Court of Appeal's decision and remand with instructions to issue the writ of mandate sought by NFSR.

FACTUAL AND PROCEDURAL BACKGROUND

The Project, which is officially known as the Exposition Corridor Transit Project Phase 2 ("Expo Phase 2"), is proposed to operate within the Exposition Transit Corridor, which generally follows the Exposition right-of-way ("ROW") from downtown Los Angeles to Santa Monica. (6 AR[1] 00155; 8 AR 00214-215.) Expo Phase 2 would traverse approximately seven miles of the Westside of Los Angeles from the terminus of the

[1] "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.

existing Expo rail line at the Venice/Robertson Station in Culver City to downtown Santa Monica. (*Ibid.*)

On February 12, 2007, Expo Authority issued a Notice of Preparation ("NOP") announcing its intent to prepare the EIR for the Project. (6 AR 00156; 196 AR 20839-44.) During the ensuing public "scoping" period, Expo Authority received over 1,800 comments from public agencies, individuals, homeowners' associations, and businesses regarding the proper scope of the EIR. (6 AR 00156; 222-223 AR 21259-23626.) Many of these public comments expressed strong concern regarding the impacts of the Project's at-grade rail crossings of major north-south streets, including Overland Avenue, which represents the primary access point for entering and exiting Interstate 10 in West Los Angeles. (See, *e.g.*, 222 AR 22161-67, 21273, 21298-99, 23192-93, 22986-95, 23150, 23407-25.)

On January 28, 2009, Expo Authority released a draft EIR for the Project, which described and evaluated six project alternatives, including four light rail alternatives with slightly different alignments, each beginning in Culver City and ending in downtown Santa Monica. (520 AR 33405-6.) The Project, which was identified in the EIR as Light Rail Transit ("LRT") Alternative 2, included four consecutive at-grade (*i.e.*, surface) crossings of major north/south thoroughfares, from and including Overland Avenue, Westwood Boulevard, Military Avenue, and Sepulveda Boulevard. Light rail trains would pass through the at-grade crossings of these major north/south streets 280 times per day (one train every 2 ½ minutes during peak periods), thereby severely impeding the flow of automobile traffic on already congested streets. (3 AR 00021; 11 AR 00368, 00382; 687 AR 38388.)

During the public comment period, the Expo Authority received thousands of additional comments from public agencies, individuals,

homeowners' associations, and businesses regarding the potential traffic and other impacts of the Project. (3 AR 00156; 33 AR 00950-01045; 34 AR 01055-84.) Many of these comments were highly critical of the methodology used by the EIR to evaluate the Project's potential impacts. (7 AR 00171-73; 34 AR 01055; 38 AR 04638-45.) Others commented on the EIR's failure to identify adequate mitigation measures. (34 AR 01060, 01079, 01368-96; 38 AR 04087-89, 04104-05.)

Expo Authority released a final EIR for the Project on December 18, 2009, which identified the Project as the "recommended preferred alternative." (5 AR 00141 through 76 AR 12414; 7 AR 00174-75; 3 AR 00016.) As described in the final EIR, the Project included significant material changes from the description of the Project in the draft EIR, such as "redistribution" (*i.e.*, elimination) of parking from the Colorado/4th Street Station. (7 AR 00173.) The final EIR also included several new "design options," such as the "Expo/Westwood Station No Parking" option (*i.e.*, eliminating the 170 surface parking spaces proposed for reservation for transit patrons). (9 AR 00259.)

On February 4, 2010, the Expo Board certified the final EIR and approved the Project. (2 AR 00005-7.) Although the EIR described the physical conditions in the vicinity of the Project as they existed at the time of environmental review, the EIR did not use the existing conditions as the baseline for evaluating the Project's potential traffic and air quality impacts. Rather, the EIR measured 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.) As stated by the Expo Board in its findings:

> For most of the environmental topics in the FEIR and in these Findings, the Authority finds that existing environmental conditions are the appropriate baseline condition for the purpose of determining whether an impact is significant.

> However, the Authority ... is ***electing*** to utilize the ***future baseline conditions*** for the purposes of determining the significance of impacts to traffic and air quality.
>
> (3 AR 00017; emphasis added.)

The Project was expected to be completed in the fall of 2015, and "opening day ridership" was estimated to be approximately 77 percent of the 2030 forecasts. (101 AR 14956; 34 AR 01063.) Moreover, regardless of opening day ridership, Metro was required to run 3-car trains with 6-minute headways upon commencement of Project operations in order to properly "interline" with trains running on Metro's existing Blue Line. (406 AR 28926.) Thus, at the time the EIR was certified, the Project was expected to be completed and fully operational by late 2015.

NFSR timely filed a petition for writ of mandate challenging the adequacy of the EIR under CEQA. (1 Joint Appendix ("JA") 0001-0021.) Judgment was entered denying the petition on March 4, 2011. (3 JA 0745-746.) NFSR subsequently appealed the judgment to the Court of Appeal. (3 JA 0806-809.) On April 17, 2012, the Court of Appeal filed its opinion affirming the trial court's decision ("Opinion" or "Op.").

STANDARD OF REVIEW

This Court reviews Expo Authority's actions under the abuse of discretion standard. Pub. Resources Code, § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Ibid.* "[A] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.

Although an agency's factual determinations are subject to deferential review, questions of statutory interpretation or application of the requirements of CEQA are matters of law that are reviewed de novo. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (Where a claim is "predominantly one of improper procedure" rather than a dispute over facts, courts review the agency's action de novo.). See also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88 (an agency's "use of an erroneous legal standard constitutes a failure to proceed in the manner required by law."); *CBE, supra*, 48 Cal.4th at 319 (an agency that uses an improper baseline has not proceeded in the manner required by law and has thus abused its discretion.)

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus actions, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decisions; in that sense appellate judicial review under CEQA is de novo." *Vineyard, supra*, 40 Cal.4th at 427. This Court must "therefore resolve the substantive CEQA issues ... by independently determining whether the administrative record demonstrates any legal error by the [Expo Authority] and whether it contains substantial evidence to support the [Expo Authority's] factual determinations." *Ibid.*

While the Court may not substitute its judgment for that of the agency, it must "scrupulously enforce all legislatively mandated CEQA requirements." *Id.* at 435. See also *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259 (CEQA must be interpreted "in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.")

DISCUSSION

I. PUBLIC AGENCIES ARE REQUIRED TO EVALUATE A PROJECT'S POTENTIAL TRAFFIC AND OTHER IMPACTS USING A BASELINE CONSISTING OF THE EXISTING PHYSICAL CONDITIONS IN THE AFFECTED AREA DURING THE PERIOD OF ENVIRONMENTAL REVIEW

CEQA generally requires preparation and certification of an EIR on any proposed project that may have a significant effect on the environment before the project is approved. Pub. Resources Code §§ 21080, subd. (d); 21082.2, subd. (d); 21100, subd. (a); 21151. The EIR must include, among other things, a detailed statement setting forth "[a]ll significant effects on the environment of the proposed project." Pub. Resources Code §§ 21061; 21100, subd. (b).

"To decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis." *CBE*, *supra*, 48 Cal.4th at 315. See also Remy, Thomas, Moose and Manley, Guide to the California Environmental Quality Act (11th ed., 2006) p. 198 (although CEQA does not define the term "baseline," "as a conceptual matter, the determination of whether impacts are 'significant' requires a 'baseline' set of environmental conditions against which to compare a project's anticipated impacts."). In the absence of an accurate baseline, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred. See *Save Our Peninsula Committee v. Monterey County* (2001) 87 Cal.App.4th 99, 128. See also *Citizens for East Shore Parks v. California State Lands Comm.* (2011) 202 Cal.App.4th 549, 557 ("[A]n inappropriate baseline may skew the environmental analysis flowing from it, resulting in an EIR that fails to comply with CEQA.").

According to the CEQA Guidelines,[2] "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, *as they exist* at the time the notice of preparation is published, or, if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective." Guidelines, § 15125, subd. (a). (emphasis added.) These existing conditions "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." *Ibid.* See also Guidelines, § 15126.2, subd. (a).

A. *Communities for a Better Environment*

In *CBE*, *supra*, 48 Cal.4th at 316, this Court held that the South Coast Air Quality Management District ("District") abused its discretion by using an improper baseline in evaluating the air quality impacts of a proposed petroleum refinery project. Specifically, this Court found that the District had erroneously compared the increased air emissions from the project to maximum capacity limits allowed under previously issued permits, rather than to existing conditions. *Ibid.* "By comparing the proposed project to what *could* happen, rather than to what was actually happening, the District set the baseline not according to 'established levels of a particular use,' but by 'merely hypothetical conditions allowable' under the permits." *Id.* at 322. (emphasis in original.) As aptly stated by this Court: "An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public at to the reality of the impacts and subvert full consideration of the actual

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[2] The CEQA Guidelines (hereinafter "Guidelines") are codified in title 14, sections 15000 *et seq.* of the California Code of Regulations, and 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.

environmental impacts,' a result at direct odds with CEQA's intent [citation]." *Ibid.*

In *CBE*, this Court recognized that "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the *existing physical conditions* without the project can most realistically be measured...." *Id.* at 328 (emphasis added). Specifically, this Court described the limited circumstances under which an agency may deviate from the "normal" practice of utilizing existing environmental conditions "at the time the notice of preparation [of an EIR] is published" as the baseline pursuant to Guidelines section 15125, subd. (a), stating as follows:

> In some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions. Where environmental conditions are expected to change quickly *during the period of environmental review* for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the *expected date of approval*, rather than to conditions at the time analysis is begun. [citation omitted.] A temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline; overreliance on short-term activity averages might encourage companies to temporarily increase operations artificially, simply in order to establish a higher baseline.
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> *CBE*, *supra*, 48 Cal.4th at 328 (emphasis added).

Thus, while recognizing that lead agencies have some discretion to determine the baseline, this Court indicated that the baseline must be the "existing physical conditions" during the "period of environmental review" (*i.e.*, no later than the date of project approval).

B. Published Court of Appeal Decisions After *CBE*

The Court of Appeal for the Sixth District recently rejected the use of projected future conditions as the sole baseline for evaluating the potential traffic impacts of a transportation infrastructure improvement project in *Sunnyvale, supra,* 190 Cal.App.4th 1351. In *Sunnyvale*, an EIR was prepared for the project using only projected traffic conditions in the year 2020 as the environmental baseline, rather than the existing conditions during the period of environmental review. *Id.* at 1358. The city selected the projected 2020 baseline based on the assumption that the proposed street extension would "not be complete and in use" until that date, and also because the city believe that this methodology offered "the most accurate and informative portrayal" of the impacts of the project. *Id.* at 1358-59. After thoroughly analyzing the relevant authorities, including this Court's decision in *CBE*, the *Sunnyvale* Court held that the agency's use of a future baseline was improper, even if supported by substantial evidence, because "nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval." *Id.* at 1380. The *Sunnyvale* Court reasoned that "[w]e do not construe the word 'normally,' as used in CEQA Guidelines section 15125, subdivision (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." *Id.* at 1379.

Building on *CBE* and *Sunnyvale*, the Fifth District Court of Appeal recently held in *Madera Oversight Coalition, supra,* 199 Cal.App.4th at 95 that an EIR for a real estate development project did not comply with CEQA because the Court was unable to determine with certainty that the EIR had used existing (as opposed to future predicted) conditions as the baseline for determining the significance of the project's potential traffic impacts. In reaching this conclusion, the *Madera* Court held as follows:

> We adopt the following legal conclusions based on the precedent established by *Sunnyvale*: (a) A baseline used in an EIR must reflect existing physical conditions; (b) 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; and (c) lead agencies do have the discretion to select a period or point in time for determining existing physical conditions other than the two points specified in subdivision (a) of Guidelines section 15125, so long as the period or point selected predates the certification of the EIR.
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> *Id.* at 89-90.

The *Madera* Court rejected the lead agency's argument that the *Sunnyvale* decision went too far in limiting a lead agency's discretion, finding "the extensive analysis undertaken by the *Sunnyvale* court to be persuasive." *Id.* at 89. The *Madera* Court also made the following important observation:

> The proper interpretation of Guidelines section 15125, subdivision (a) requires an examination of what is implied by the use of the term "normally" as well as consideration of the meaning of the term "exist." *The term "exist" is especially important because it was used by the Legislature in CEQA itself.* (E.g., §§ 21060.5 ["environment" defined as the physical conditions that *exist* within the affected area], 21151, subd. (b) [when preparing an EIR, "any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions which *exist* within the area"], italics added.) A regulation must be "consistent and not in conflict with the statute" to be valid. (Gov't Code, § 11342.2.).
>
> *Id.* at 89. (emphasis in original.)

In *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, the Sixth District once again addressed the baseline question, this time upholding an EIR for the proposed expansion of a medical campus. *Id.* at 1569-73. The *Pfeiffer* Court 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 ...'"). As stated by the Court, "appellants overlook the fact that the EIR [in *Pfeiffer*] included existing conditions, based on actual traffic counts, in its analysis of traffic impacts." *Id.* at 1572. 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.

C. The Court of Appeal's Decision in this Case

The Court of Appeal in this case upheld the EIR's use of projected future (2030) conditions as the sole baseline for evaluating the Project's impact on traffic and air quality. (Op. at 4, 15-16.) The Court of Appeal explained its reasoning as follows:

> We agree with the Expo Authority and amici curiae that, in a proper case, and when supported by substantial evidence, use of projected conditions may be an appropriate way to measure the environmental impacts that a project will have on traffic, air quality and greenhouse gas emissions. As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public. An analysis of the environmental impact or the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. Many people who live in neighborhoods near the proposed light rail line may wish things would stay

> the same, but no one can stop change. The traffic and air quality conditions of 2009 will no longer exist (with or without the project) when the project is expected to come on line in 2015 or over the course of the 20-year planning horizon for the project. An analysis of the project's impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later.
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> (Op. at 14-15; emphasis in original.)

In reaching this conclusion, the Court of Appeal expressly disagreed with the holdings of the Sixth District in *Sunnyvale* and the Fifth District in *Madera* on the baseline issue. (Op. at 4, 15-16.)

D. CEQA Requires that a Project's Impacts be Evaluated Against Existing Physical Conditions

Under CEQA, an EIR must provide governmental agencies and members of the public with detailed information about the effects that a proposed project may have on the *environment*. Pub. Resources Code, § 21061. See also Pub. Resources Code, § 21068 ("'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment.") CEQA 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 (emphasis added). Moreover, CEQA expressly requires that an EIR discuss the project's "substantial, or potentially substantial, adverse changes in *physical conditions which exist within the area* as defined in Section 21060.5." Pub. Resources Code, § 21151, subd. (a) and (b).

Although CEQA does not define the term "exist," it is commonly understood to mean something having "real being." See Merriam-Webster's Collegiate Dictionary (10th ed., 1998). A "future" event or condition, on the other hand, is commonly understood to mean something

that may occur or come into being at some later point in time. Thus, by assessing 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 defined by Public Resources Code section 21060.5, and did not discuss the potential adverse changes in the physical conditions which "exist" in the area, as required by Pub. Resources Code section 21151. Rather, the EIR's analysis of the Project's traffic and air quality impacts considered only changes to physical conditions that are *predicted* to be present two decades in the future. By relying solely on a comparison of two future, hypothetical scenarios (*i.e.*, predicted conditions in 2030 with and without the Project), the EIR in this case fails to provide decisionmakers and the public with any information concerning real conditions on the ground when the Project commences operations in 2015. See *Citizens for East Shore Parks, supra,* 202 Cal.App.4th at 558 ("[T]o afford meaningful environmental review of a proposed project's impact, a CEQA baseline must reflect 'the "existing physical conditions in the affected area" [citation], that is the "'real conditions on the ground'" [citation]..."). See also *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 658 (the baseline for a proposed expansion of a mining operation must be the "realized physical conditions on the ground ...").

In this case, the Court of Appeal attempted to distinguish this Court's decision in *CBE*, stating that "present-day 'hypothetical allowable conditions' are quite different from projected future conditions." (Op. at 16.) Setting aside the fact that projections of future conditions inherently rely upon various hypotheses regarding myriad variables (*e.g.*, rates of population growth, economic influences, demographic changes, future development, technological advances), there is nothing in *CBE* to support such a distinction. On the contrary, in *CBE*, this Court makes repeated

references to the "existing physical conditions" in the affected area, and instructs that EIRs and other environmental documents "must focus on impacts to the existing environment, not to hypothetical situations". *Id.* at 322. In fact, *CBE* concludes with the following:

> Whatever method the District uses, however, the comparison must be between *existing physical conditions* without the Diesel project and the conditions expected to be produced by the project. Without such a comparison, the EIR will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates.
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> *Id.* at 328 (emphasis added).

Nowhere in *CBE* does this Court even hint that its conclusion might have been different had the record included substantial evidence to support a conclusion that the subject boilers would be operated at their full permitted capacity at some point in the distant future.[3]

Neither "hypothetical allowable conditions" nor "projected future conditions" (even if supported by substantial evidence) can reasonably be interpreted to constitute "existing" conditions. Absent the statutory duty to evaluate a project's impacts on the physical conditions which "exist" within the area affected by a proposed project (Pub. Resources Code, § 21060.5), many agencies would elect to evaluate a project's potential impacts entirely within the abstract confines of long range forecasts, which are prepared using opaque mathematical models that are subject to potential manipulation by "experts" to support a pre-determined conclusion. Although projections of future conditions may provide a useful analytical

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[3] If this was the case, the project proponent in *CBE* could have easily evaded the Court's holding by simply introducing evidence into the administrative record of the project proponent's intent to increase the usage of the boilers up to their permitted capacity at some point in the future if the project was not approved, along with a plausible plan for doing so. In fact, such "gamesmanship" would be encouraged under the rationale of the Court of Appeal's decision in this case.

tool in some cases, they are inherently less reliable than existing conditions, which can be directly observed and measured during the period of environmental review. For example, while existing traffic conditions at street intersections can be observed and independently verified with traffic counts, projected future traffic conditions—which cannot be observed or verified—provide fodder for the inevitable "battle of the experts."

Furthermore, unless the required baseline is tethered to existing conditions, the concept of a "baseline" becomes a moving target. In this case, the Project was approved in 2010 and was expected to commence operations in 2015. So why should 2030 be used as the baseline year? Is it because the Project is a "long-term infrastructure project" that is expected to operate for many decades? If so, then why not use 2050 as the baseline year? Or 2070? And if 2030 is a proper baseline year for a public infrastructure project, wouldn't 2030 (or 2050 or 2070) also be an acceptable baseline year for a proposed new office building or housing development? Note that neither CEQA nor the Guidelines provides any guidance whatsoever regarding the criteria that an agency would use to select a "post-approval" baseline year.[4]

In summary, CEQA requires that an EIR evaluate the potential impacts of a project based on the conditions that "exist" in the area affected by the project. Like all provisions of CEQA, the term "exist" must be interpreted in such a manner "as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth, supra,* 8 Cal.3d at 259. Expo Authority's decision to certify an EIR for the Project that fails to include an analysis of potential

[4] The absence of any such guidance in CEQA or the Guidelines provides further support for a conclusion that use of projected future (post-project approval) conditions as the sole baseline for evaluating a project's potential impacts contravenes CEQA.

adverse changes to the physical conditions as they actually "exist" in the area during the period of environmental review constitutes an abuse of discretion. See *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 ("[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public with the information about the project that is required by CEQA.").

E. The Word "Normally" in Guidelines Section 15125 Does Not Confer Discretion Upon Agencies to Use a Baseline that Does Not Reflect "Existing" Conditions

Section 15125, subd. (a), of the Guidelines provides, in relevant part, as follows:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. *This* environmental setting will *normally* constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.
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> (emphasis added.)

In this case, the Court of Appeal construed the word "normally" in section 15125 to permit analysis of the Project's environmental impacts using predicted conditions *two decades* after the expected date of Project approval. (Op. at 18.) In the words of the Court of Appeal, "[t]o state the norm is to recognize the possibility of departure from the norm." (*Ibid.*)

The Court of Appeal's reasoning is flawed for several reasons. First, the sentence structure of section 15125, subd. (a), indicates that the word "normally" refers to the phrase "[t]his environmental setting," which in turn refers to the "environmental setting" as described in the preceding sentence, *i.e.*, "the physical conditions that exist in the vicinity of the project, *as they*

exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced." Thus, in abnormal cases, Guidelines section 15125 allows an agency to select a baseline other than the physical conditions that exist on the exact date the notice of preparation is published. However, nothing in section 15125 authorizes an agency to deviate from the statutory requirement that the impacts of a project be measured against the *existing* physical conditions in the area.[5]

Second, a regulation must be "consistent and not in conflict with the statute" to be valid. Gov't Code, § 11342.2. See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 105 (upholding the invalidation of certain CEQA Guidelines that were found to be in conflict with CEQA). In this case, the Court of Appeal's interpretation of the word "normally" in Guidelines section 15125 contravenes the express provisions of CEQA, which require that an EIR determine whether a project would significantly affect the *existing* environment. See Pub. Resources Code, §§ 21061; 21100, subd. (b); 21060.5; 21002.1, subd. (e).

The Guidelines' use of the word "normally" can and must be construed in a manner that is consistent with CEQA. For example, in *Sunnyvale*, the court stated as follows:

> The word "normally" as used in the regulation is most reasonably understood as recognizing, with respect to individual projects not previously analyzed under CEQA, that the physical conditions existing exactly at the time the notice

[5] The word "normally" was added to section 15125 in 1998. As explained in a leading CEQA treatise, the Resources Agency was likely attempting to codify various reported court decisions and "chose to freeze 'existing conditions' at the time of NOP for an EIR is issued" in the interest of avoiding a "moving target." Remy, et al., Guide to the California Environmental Quality Act (11th ed., 2006), pp. 199-200.

> of preparation is published or at the time the environmental analysis begins (if a notice of preparation is not published) *may not be representative of the generally existing conditions* and, therefore, an agency may exercise its discretion to apply appropriate methodology to determine the "baseline" existing conditions. Thus, for example, if traffic congestion and vehicular travel has temporarily decreased due to an unusually poor economy so that traffic conditions at the time specified by CEQA Guidelines section 15125 are inconsistent with the usual historical conditions, a lead agency might use appropriate methodology, perhaps historical data and traffic modeling, to determine the existing conditions. Similarly, where evidence shows traffic levels are expected to increase significantly during the environmental review process due to other development actually occurring in the area, the project traffic levels as of the expected date of project approval may be the appropriate baseline.
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> *Sunnyvale*, *supra*, 190 Cal.App.4th at 1380 (emphasis added).

As this Court correctly observed in *CBE*, the date for establishing the baseline need not be a rigid one. *CBE*, *supra*, 48 Cal.4th at 327. Thus, "[w]here environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun." *Id.* at 328. Here, the period of environmental review began with the issuance of the NOP on February 12, 2007, and ended with project approval on February 4, 2010. Expo Authority had the discretion to select a baseline date that falls within that time period, so long as the baseline fairly represents existing conditions and was supported by substantial evidence. However, because the selected 2030 baseline year does not reflect existing conditions during the period of environmental review (and Expo Authority does not contend otherwise), the EIR fails to comply with CEQA.

Third, even if an agency has the discretion to select a baseline date beyond the date of Project approval (*e.g.*, the expected date of project completion), neither the Court of Appeal nor Expo Authority has advanced any valid reason why the "normal" approach should not be used here. See *Sunnyvale*, *supra*, 190 Cal.App.4th at 1383 ("Even if we were to assume that the decision to use projected 2020 conditions as a 'baseline' did not constitute a failure to proceed in a manner required by law ... the administrative record does not support the decision to deviate from the norm."). The Court of Appeal suggested that the Project in this case should be treated differently from other projects because it is a "long-term infrastructure project, the very purpose of which is to improve traffic and air quality conditions over time." (Op. at 18.) However, many projects, including most real estate development projects, will continue to exist (and cause environmental effects) for many decades after they have been completed, and in that respect are no different than the "long-term" Project in this case. Furthermore, for most projects (and particularly for those that are proposed to be carried out by a public agency), an argument could be made that the project will advance some important or beneficial public purpose. Expo Authority cannot, however, point to anything in CEQA, the Guidelines, or case law that permits such projects to be evaluated differently than other projects.

In short, while agencies have some discretion under the Guidelines to decide how the "existing" conditions without the project can most realistically be measured, nothing in CEQA or the Guidelines authorizes an agency to evaluate a project's environmental impacts only against predicted future conditions decades after EIR certification and project approval.

F. The EIR's Evaluation of the Project's Potential Traffic and Air Quality Impacts Using Only Predicted Future Conditions as the Baseline Precluded Relevant Information From Being Presented to the Decisionmakers and the Public

As explained below, by using only projected future (2030) conditions as the baseline for evaluating key aspects of the Project's potential impacts on traffic and air quality, the EIR failed to provide relevant and required information to the decision-makers and the public, and may have skewed the analysis in a manner that understates the true impacts of the Project.

1. Traffic

The EIR found that the Project has the potential to adversely affect approximately ninety street intersections in the region as a result of frequent train crossings and traffic generated by the Project near proposed stations. (11 AR 00336.) The EIR's evaluation of these potential traffic impacts began by conducting traffic counts and rating the current operating conditions at each intersection. (11 AR 00336-340.) The ratings (which are referred to as the intersection's level of service, or LOS), ranged from LOS A (free flowing conditions) to LOS F (extreme congestion with very substantial delay). (11 AR 00336.) Intersections rated LOS A through D are considered to be operating satisfactorily, and intersections operating at LOS E and F are considered to be unsatisfactory. (11 AR 00336-337.)

Although the existing traffic conditions and levels of service at the ninety study intersections were observed and documented, these existing conditions were not used as the baseline for analyzing the Project's potential impacts on these intersections. Rather, the EIR only used projected future conditions in the year 2030 (which are referred to in the EIR as the "No Build" conditions) as the baseline for measuring the

Project's traffic impacts. (34 AR 01057; 11 AR 00346-347, 00351, 00382-407; 72 AR 10722, 10737.) Expo Authority's predictions regarding the conditions that may exist in 2030 were based, in part, on forecasts of traffic volumes that were developed using Metro's regional travel demand model. This model "predicts future travel demand" based on various data and hypotheses, including the Southern California Association of Government's forecasts of regional population and employment growth and "socio-demographic" surveys of travelers. (11 AR 00346-349.)

Under the "threshold of significance" used in the EIR to determine whether the Project would have any adverse impacts on street intersections, an intersection was considered to be impacted if the Project would cause an intersection's *predicted* level of service in 2030 to fall from a satisfactory LOS (A through D) to an unsatisfactory LOS (E or F). (3 AR 00350, 00375-376.) An intersection was also considered to be significantly impacted if the intersection was projected to operate at an unsatisfactory LOS (E or F) under 2030 No-Build conditions and the Project would result in an increase in the average vehicle delay of 4 seconds or more at that intersection in 2030 as "compared to the No-Build condition." (11 AR 00350-352, 00382-386.)

Although the EIR's analysis may provide useful information regarding the potential *future* traffic impacts of the Project in the year 2030, it provides no information whatsoever regarding the potential traffic impacts of the Project upon its anticipated completion date of 2015.[6] For example, at least five intersections that are currently operating at a satisfactory LOS of A through D are projected to operate at an

[6] As mentioned above, the Project is expected to be operating at or near full capacity shortly after its completion.

unsatisfactory LOS of E or F under 2030 No Build conditions.[7] (11 AR 00337-00340, 00397-00400.) Because these intersections were presumed to have *already* deteriorated to a LOS E or F by 2030 for reasons unrelated to the Project, the EIR was able to conclude that the Project would not cause the LOS at these intersections to fall to an unsatisfactory level of service (as compared to 2030 No Build conditions). The EIR does not, however, address the question of whether the Project could potentially cause the LOS at these intersections (or any other intersection) to fall to an unsatisfactory LOS E or F upon completion of the Project in 2015 or at any other point during the first 15 years of its operation. See Guidelines, § 15126.2, subd. (a) ("Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects.").

Similarly, the EIR indicates that there are at least four intersections that are currently operating at an unsatisfactory LOS of E or F, and that the predicted delay at these intersections under the predicted 2030 "with Project" conditions will exceed the existing level of delay at these intersections by well over 4 seconds.[8] (11 AR 00337-340, 00383-405.)

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[7] These intersections include Intersection No. 28 (Bundy Drive and Pico Boulevard), AM Peak Hour (11 AR 00397); Intersection No. 26 (Bundy Drive and Olympic Boulevard), PM Peak Hour (11 AR 00399); Intersection No. 29 (Barrington Avenue and Olympic Boulevard), PM Peak Hour (11 AR 00400); Intersection No. 34 (Sawtelle Boulevard and Pico Boulevard, PM Peak Hour (11 AR 0040); Intersection No. 15. (20th Street and Olympic Boulevard), AM Peak Hour (11 AR 00400).

[8] These intersections include Intersection No. 3 (4th Street/I-10 eastbound and Olympic Boulevard), a.m. peak hour (11 AR 337, 405); Intersection No. 26 (Bundy Drive and Olympic Boulevard), a.m. and p.m. peak hours (11 AR 338, 397, 399), Intersection No. 34 (Sawtelle Boulevard and Pico Boulevard), a.m. and p.m. peak hours (11 AR 338, 398, 400); and Intersection 69 (Manning Avenue/I-10 Westbound and National Boulevard), a.m. peak (11 AR 339, 383.)

The EIR concluded that, as compared to the projected 2030 "No Build" conditions, the Project would not cause more than 4 seconds of delay at these intersections (11 AR 00383-405.) However, because the 2030 No Build conditions include two decades of growth and development in the region, it is impossible to determine from the EIR whether the Project would add more than 4 seconds of delay to these intersections as compared to the conditions that will exist at the time the Project beings operating.

Although the EIR did not evaluate or discuss the Project's potential traffic impacts as compared to the existing conditions at any street intersections, Expo Authority attempted to argue below that the Project would not have any significant traffic impacts, even as compared to the existing conditions. (2 JA 466-469.) Such arguments are unavailing. As this Court observed in *Vineyard, supra,* 40 Cal.4th at 443, the "audience to whom an EIR must communicate is not the reviewing Court but the public and the government officials deciding on the project."

2. Air Quality

In its evaluation of the potential air quality impacts caused by Project operations, the EIR compared the Project's air pollutant emissions to emission estimates for the "No Build" alternative, which incorporates assumed increases in emissions due to increased regional population growth and traffic congestion through the year 2030. (13 AR 00504-510; 9 AR 00242.) The use of this misleadingly elevated pollutant emissions baseline allowed the EIR to conclude that the Project would result in reduced air emissions as compared to the predicted 2030 No Build conditions. (13 AR 00505, 00508-510.)

Although the EIR purports to apply the thresholds of significance recommended by the South Coast Air Quality Management District, these thresholds were not applied to the Project in comparison to the existing

conditions. Thus, like the EIR's assessment of the Project's traffic impacts, the analytical method employed by the EIR to evaluate the Project's potential impacts on air quality fails to address the potential impacts of the Project during the first 15 years of its operational life, and skews the analysis in a way that understates the ecological implications of the Project. See *Laurel Heights Improvement Ass'n of San Francisco v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*) (The EIR is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its actions").

3. The Omission of Relevant Information From the EIR Precluded Informed Decisionmaking and Informed Public Participation

As indicated above, by relying on a comparison of two *future* scenarios (*i.e.*, predicted conditions in the year 2030 with and without the project) to evaluate the Project's potential traffic and air quality impacts, the EIR fails to provide relevant information to the decision makers and the public. See *Kings County*, *supra*, 221 Cal.App.3d at 712 ("A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.").

In this case, the Court of Appeal stated that "[a]s a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public." (Op. at 15; emphasis in original.) On the contrary, common sense suggests that the traffic and air quality conditions in 2010 (the date of Project approval) would be a much better indicator of the "opening day" (2015) conditions than the long range forecast of traffic and air quality

conditions in the year 2030 used by the EIR in this case. Furthermore, if Expo Authority believed that the conditions in existence during the period of environmental review (2007 to 2010) would not reasonably reflect "opening day" conditions (and there is nothing in the EIR or the record to support such a conclusion), the EIR could have included an analysis of the Project's traffic and air quality impacts using a projection of conditions to the year 2015 as a baseline for evaluation (in addition to the required analysis using existing conditions as the baseline). For reasons that are not explained, Expo Authority did not include such an analysis in the EIR, but instead elected to base its significance conclusions solely on predicted conditions 15 years after the Project was expected to commence operations.[9]

Expo Authority argued below that the EIR's evaluation of the Project's traffic and air quality impacts using only the 2030 "baseline" resulted in a more conservative analysis than would the omitted assessment using existing conditions. However, this contention is not self-evident and is not supported by any analysis in the EIR. Moreover, even if the methodology employed by the EIR in this case overestimated the potential impacts of the Project (and there is no indication that it did), the EIR's analysis would still be deficient. Specifically, by evaluating the Project only under the predicted worsened traffic and air quality conditions of the future, the EIR obscures the existence and severity of adverse impacts solely attributable to the Project, and "does not provide the decision-

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[9] Because the EIR did not evaluate the Project's potential traffic and air quality impacts using the date of Project completion as the baseline, this Court need not address the issue of whether, and if so under what circumstances, the physical conditions in the area that are projected to exist at the time a project is expected to be completed or become "operational" may constitute a proper environmental baseline. See *Sunnyvale*, *supra*, 190 Cal.App.4th at 1383-1384.

makers, and the public with the information about the project that is required by CEQA." *Santiago, supra*, 118 Cal.App.3d at 829.

Furthermore, "the conventional 'harmless error' standard has no application when an agency has failed to proceed as required by the CEQA." *Resources Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 897-898. Thus, even if a complete analysis of the Project's traffic and air quality impacts on the existing environment would have produced no findings of different or greater significant environmental effects than the EIR found based on the predicted 2030 conditions, and even if such analysis would not have altered Expo Authority's decision, such circumstances would not establish a lack of prejudice for purposes of CEQA review. See Pub. Resources Code, § 21005, subd. (a).[10] See also *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 487. ("[C]ourts are generally not in a position to assess the importance of the omitted information to determine whether it would have altered the agency's decision, nor may they accept the post hoc declarations of those agencies themselves.") Indeed, a "determination of whether omitted information would have affected an agency's decision" is "highly speculative, an inquiry that takes the court beyond the realm of its competence". *Id.* at 488.

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[10] Pub. Resources Code § 21005, subd. (a), provides as follows: "The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion ... regardless of whether a different outcome would have resulted if the public agency had complied with those provisions."

G. While CEQA Requires the Use of Existing Conditions as the Baseline for Environmental Review, Nothing in CEQA Precludes an EIR from Also Evaluating a Project's Potential Impact on Projected Future Conditions

As noted in the Opinion, various transportation agencies and other amici urged the Court of Appeal to reject *Sunnyvale*, arguing that use of a "future conditions baseline is essential for long-range transportation and water supply projects." (Op. at 17, fn. 8.) This argument presents a false choice. Although CEQA requires an EIR to include an evaluation a project's potential environmental impacts on existing conditions, nothing in CEQA would preclude an agency from *also* including an examination of a project's impacts over time. See *Sunnyvale*, *supra*, 190 Cal.App.4th at 1382 ("We see no problem with evaluating the project and each alternative under existing conditions and reasonably foreseeable conditions where helpful to an intelligent understanding of the project's environmental impacts.") See also Guidelines, § 15125, subd. (e) ("Where a proposed project is compared with an adopted plan, the analysis shall examine the existing physical conditions ... as well as the potential future conditions discussed in the plan."). Indeed, it is not uncommon (or particularly difficult) for an EIR to evaluate certain impacts of a project using both existing conditions and projected future conditions as a baseline. See, *e.g.*, *Pfeiffer, supra,* 200 Cal.App.4th at 1571-1572 (upholding an EIR that used multiple baselines, including both existing conditions and future conditions, in its analysis of the project's traffic impacts).

For some projects, an evaluation of the project's potential impacts on predicted future conditions may be helpful (and perhaps even necessary) in order to better understand the project's potential long-term environmental effects. However, this does not excuse the EIR's omission of any analysis of the potential traffic and air quality impacts of the Project on existing physical conditions in the area. As the court observed in *Sunnyvale*:

> There is no doubt that comprehensive regional transportation planning must look at the big picture and take the long view. But we emphasize that the methodologies for forecasting traffic conditions and planning sound transportation systems and projects are not being challenged here. Once a specific roadway project is proposed and becomes the subject of an EIR under CEQA, however, a straightforward assessment of the impacts produced by the project alone on the existing environment is the foundational information of an EIR even where secondary analyses are included. Nothing prevents an EIR from also examining a project's beneficial impacts over time, if reasonably foreseeable, but it must be remembered that the purpose of an EIR is to avoid or lessen each significant environmental effect of a proposed project whenever feasible.
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> *Sunnyvale*, *supra*, 190 Cal.App.4th at 1382-83.

Furthermore, just because an EIR must include an evaluation of the impacts of the project using existing conditions as the baseline does not mean "that discussions of the foreseeable changes and expected future conditions have no place in an EIR." *Id.* at 1381. Specifically, in addition to evaluating "project specific" impacts, an EIR must separately discuss the potential cumulative impacts of a project "when the project's incremental effect is cumulatively considerable," which "means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Guidelines, §§ 15130, subd. (a) and 15065, subd. (a)(3). This discussion, which must include either a list of past, present, and "probable future projects" producing related or cumulative impacts, or a "summary of projections contained in an adopted general plan or related planning document...," must necessarily consider future conditions. Guidelines, § 15130, subd. (b)(1).[11]

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[11] Petitioner does not contend that the EIR in this case should have used existing conditions to evaluate the Project's potential *cumulative* impacts

Similarly, in evaluating the required "no project" alternative, an EIR must discuss the existing conditions "as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." Guidelines, § 15126.6, subd. (e)(3)(C).[12]

Thus, requiring an EIR to evaluate the impacts of a project using existing conditions as the baseline does not mean that future conditions will be overlooked. On the other hand, omitting an evaluation of the impacts of a project as compared to existing conditions during the period of environmental review would effectively conflate CEQA's requirement for separate analyses of project-specific impacts, cumulative impacts, and the "no project" alternative into one – which is precisely what occurred in this case.[13]

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on traffic or air quality. Rather, Petitioner's arguments regarding the baseline issue apply only to the EIR's treatment of Project-specific traffic and air quality impacts.

[12] The Guidelines make clear, however, that the "no project alternative analysis is not the baseline for determining whether the proposed project's environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline (see Section 15125)." Guidelines, § 15126.6, subd. (e)(1).

[13] For example, the EIR's discussion of the Project's potential cumulative impacts on traffic (which is exactly two sentences long) simply refers the reader back to the section of the EIR that ostensibly evaluates the Project-specific traffic impacts. (29 AR 00866.)

II. A MITIGATION MEASURE THAT MERELY IDENTIFIES ACTIONS THAT COULD BE TAKEN BY OTHER PUBLIC AGENCIES TO AVOID A SIGNIFICANT ENVIRONMENTAL IMPACT, WITHOUT ACTUALLY REQUIRING THE IMPLEMENTATION OF ANY OF THE IDENTIFIED ACTIONS, CONSTITUTES IMPROPER DEFERRAL AND DOES NOT, STANDING ALONE, SUPPORT A FINDING THAT THE IMPACT WILL BE REDUCED TO A LESS THAN SIGNIFICANT LEVEL

CEQA requires that public agencies, through the preparation of an EIR, identify the adverse environmental effects of the projects they approve and mitigate such adverse effects through the imposition of feasible mitigation or alternatives. See *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233. See also *Laurel Heights I, supra,* 47 Cal. 3d. at 392. (The EIR is the "heart of CEQA.") Avoiding environmental harm is CEQA's fundamental purpose and is therefore "the core of an EIR". *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564. See also *City of Marina v. Bd. of Trustees of the California State Univ.* (2006) 39 Cal.4th 341, 348. CEQA's statutory language clearly shows that the Legislature intended to obligate lead agencies to affirmatively minimize or prevent the significant adverse environmental effects caused by the projects that such agencies approve. Accordingly, CEQA mandates that "[e]ach public agency *shall mitigate or avoid the significant effects on the environment* of projects that it carries out or approves whenever it is feasible to do so." (emphasis added.) Pub. Resources Code, § 21002.1, subd. (b).[14]

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[14] Pursuant to Guidelines section 15370, "'[m]itigation' includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action[;] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation[;] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment[;] (d) Reducing or eliminating the impact over time by preservation and maintenance

In addition, "CEQA contains a '*substantive mandate*' that public agencies not approve projects with significant environmental effects 'if there are feasible alternatives or feasible mitigation measures' that can substantially lessen or avoid those effects." Remy, et al., Guide to the California Environmental Quality Act (11th ed., 2006), p. 14., quoting *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134. (emphasis in original.) See also Pub. Resources Code, §§ 21081, subd. (a)(1); 21002; Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2012) § 1.17 ("In Pub Res C §21002, the legislature indicated its intention that public agencies may not approve projects as proposed if "feasible" alternatives or mitigation measures would substantially lessen the significant environmental effects.") "[This] requirement ensures there is evidence of the public agency's actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical process by which the public agency arrived at its decision." *Mountain Lion Foundation, supra,* 16 Cal.4th at 134.

A. None of the Mitigation Options Identified in MM TR-4 is Fully Enforceable, Required By, or Incorporated Into the Project

In order to achieve the fullest possible protection of the environment, under CEQA, a lead agency must be accountable for ensuring that its proposed mitigation measures will effectively address a project's acknowledged significant environmental impact. Thus, lead agencies "shall provide the measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures" to ensure that the mitigation measures are implemented.

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operations during the life of the action [; or] (e) Compensating for the impact by replacing or providing substitute resources or environments."

Pub. Resources Code, § 21081.6, subd. (b). See also Guidelines, § 15126.4, subd. (a)(2) ("Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.") "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." *Federation of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261. In contrast, illusory mitigation measures, that exceed the scope of a lead agency's legal authority and which no agency has a legal obligation to enforce, are inconsistent with the objective of ensuring the avoidance of environmental harm.

The interpretation of the statutory provisions and Guidelines sections specifying the rules and requirements for impact mitigation "presents a question of law subject to independent review." *Madera Oversight Coalition*, *supra*, 199 Cal.App.4th at 85. Regarding the Project's parking and other impacts, Expo Authority found, pursuant to Pub. Resources Code section 21081, subd. (a)(1) and Guidelines, § 15091, subd. (a)(1), "that potentially significant impacts would be reduced to less than significant with implementation of the corresponding Mitigation Measures of the [Project]." (3 AR 00054-55.) Therefore, in the present case, this Court must determine whether, as a matter of law, a mitigation measure that merely identifies remedial actions that could potentially be taken by other public agencies to avoid a significant environmental impact, without actually requiring the implementation of any of the identified actions, complies with the requirements of Pub. Resources Code sections 21081, subd. (a)(1) and 21081.6, subd. (b); and Guidelines sections 15091, subd. (a)(1) and 15126.4, subd. (a)(2).

Furthermore, "[a] clearly inadequate or unsupported study is entitled to no judicial deference." *Laurel Heights I*, *supra*, 47 Cal.3d at 409 fn. 12.

For example, in *Federation, supra,* 83 Cal.App.4th at 1261-1263, the City of Los Angeles prepared an EIR for a general plan amendment and adopted mitigation measures to address significant traffic impacts. However, the City "acknowledged in the [Transportation Improvement Mitigation Plan] that there was *great uncertainty* as to whether the mitigation measures would ever be funded or implemented." *Id.* at 1261. (emphases added.) On that basis, the *Federation* Court concluded that there was no substantial evidence in the record to support a finding that the mitigation measures complied with Pub. Resources Code sections 21081, subd. (a)(1) and 21081.6, subd. (b), respectively, because the measures were not "incorporated into the project or required as a condition of project approval in a manner that [would] ensure their implementation" and the City "made no provision to ensure that [the measures would] actually be implemented or 'fully enforceable'. *Id.* at 1261-1262.

Like *Federation,* in the present case, the administrative record provides no support for an affirmative conclusion that certain mitigation measures were required or incorporated into the Project in a manner that ensures their implementation, or that such mitigation is fully enforceable. Thus, there is great uncertainty as to whether such measures will even be implemented and will effectively address the Project's adverse impacts.

Here, the EIR expressly acknowledges that unless it is mitigated, the Project will have a significant adverse parking impact on the adjacent communities because the demand for parking generated by operation of the Project will exceed the supply of parking at several proposed stations. (Op. at 31.) For example, the proposed Expo/Westwood station is expected to have over 5,000 daily boardings, yet no off-street parking spaces will be provided at the station. (11 AR 00412, 00414.) As a result, neighborhood residents will be forced to compete with transit riders for scarce on-street parking spaces.

To address this impact, the EIR contains an illusory and wholly inadequate mitigation measure (MM TR-4) that only requires Metro to "work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods," and identifies several other "mitigation options" for those locations where spillover parking impacts cannot be addressed through a permit parking program, including "time-restricted, metered, or shared parking arrangements." (Op. at 32.)[15] In reliance on MM TR-4, the EIR concludes, and Expo Authority found, that the station-area spillover parking impacts would be "less than significant." (3 AR 00054; 11 AR 00413-414.)

Expo Authority abused its discretion in making such a finding because MM TR-4 is inadequate as a matter of law. Specifically, MM TR-4 only requires Metro to "work with" wholly independent local governments to "assess" the need for a permit parking program, thereby providing absolutely no assurance that any such program will ever be

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[15] MM TR-4, provides, in relevant part, as follows: "In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service .... If a parking shortage is determined to have occurred ... due to the parking activity of the LRT patrons, *Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods.* ... Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs .... Metro will not be responsible for the costs of permits for residents desiring to park on the streets in the permit districts. *For those locations where station spillover parking cannot be addressed through the implementation of a permit parking program, alternative mitigation options include time-restricted, metered, or shared parking arrangements. Metro will work with the local jurisdictions to determine which option(s) to implement."* (11 AR 00413-414, emphasis added.)

formed or that the Project's impacts will ever be mitigated.[16] Thus, MM TR-4 violates the mandates set forth in Pub. Resources Code sections 21081, subd. (a)(1) and 21081.6, subd. (b), which require that mitigation measures be incorporated into the project or required as a condition of project approval in a manner that ensures that they will actually be implemented and are fully enforceable.[17]

The Court of Appeal held that MM TR-4 was legally adequate on the grounds that when the Project eventually causes a severe parking shortage (*i.e.*, 100 percent on-street parking utilization), Metro will "undertake[] to work with local jurisdictions, to follow their guidelines for permit parking programs, and to reimburse their costs." (Op. at 34.) By doing so, the Court of Appeal misapplied, and significantly broadened, the concept of a performance standard, which (as discussed below) is relevant to whether mitigation may be deferred, but is unrelated to determining the enforceability of a mitigation measure.[18]

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[16] Indeed, in the City of Los Angeles, such programs not only require the approval the City Council, but also an affirmative vote of the majority of residents in the affected area.

[17] The deficiencies in MM TR-4 are also present in mitigation measure MM SAF-1, which was adopted to mitigate the Project's potential impacts on public safety. Specifically, the EIR acknowledges that the Project could impede emergency responder's access to residential neighborhoods, but asserts that these impacts would be reduced to level of insignificance by implementing MM SAF-1, which requires that Metro "coordinate" with the affected cities, "inform" them of Metro's emergency response procedures, "provide a detailed description" of its emergency response procedures so as to provide such agencies with "knowledge" of Metro's response plan, and "encourage" the cities to update their procedures to address implementation of an LRT Alternative. (24 AR 00726-727.) Of course, neither Metro nor Expo Authority has any power to compel the affected cities to update their response procedures (*e.g.*, Fire Department response times), and there is no actual requirement that cities' response procedures be updated.

[18] In addition, as explained *infra*, MM TR-4's program to "monitor the on-street parking activity" is not a performance standard.

In upholding the adequacy of MM TR-4, the Court of Appeal cited *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275, for the proposition that "deferral of specifics is permissible where the local entity commits *itself* to mitigation and lists the alternatives to be considered." (emphasis added.) However, it does not logically follow that a mitigation measure is legally adequate where, as here, the lead agency has not committed itself to mitigation, but instead, has simply identified a "wish list" of actions to be taken by other jurisdictions over which the lead agency has no absolutely control.[19]

"Working with" another governmental entity, as specified in MM TR-4, is fundamentally different than Expo Authority actually "doing something" to effectively mitigate the Project's impacts. CEQA does not expand a public agency's authority to mitigate environmental impacts. Instead, "a public agency may exercise only those express or implied powers provided by law other than [CEQA]." Pub. Resources Code, § 21004. Expo Authority has no legal authority to compel the relevant municipalities to implement any aspect of MM TR-4. (Op. at 34.) All of

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[19] Without elaboration, the Opinion also refers to Pub. Resources Code section 21081, subd. (a)(2), which provides that an agency may find that changes that will avoid or lessen a significant environmental effect "are within the responsibility and jurisdiction of another public agency" and "can and should be adopted by such other agency." (Op. at 30, 34.) However, in this case, Expo Authority did not make this finding. Rather, Expo Authority made the finding specified in Pub. Resources Code section 21081, subd. (a)(1). ("Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.") (3 AR at 00054-55.) See also Guidelines section 15091, subd. (a)(1). Moreover, even if Expo Authority had made the finding set forth in Pub. Resources Code § 21081, subd. (a)(2), such a finding would not support the EIR's conclusion that MM TR-4 will mitigate the Project's potential spillover parking impacts to a less than significant level, because there is no assurance that other agencies would in fact implement any of the identified measures.

the actions identified in MM TR-4, including the specified "back up" options (*i.e.*, time-restricted, metered, or shared parking), are outside of Metro's jurisdiction and control and must be approved and/or implemented by other public agencies. In addition, there is no requirement that any of these options actually be implemented once on-street parking utilization reaches one hundred (100) percent. Although implementation of these actions is squarely outside the jurisdiction and control of both Expo Authority and Metro, and despite the obvious uncertainty as to whether any of the proposed remedial actions identified in this amorphous mitigation measure will ever be implemented, the EIR nevertheless concluded that MM TR-4 would reduce the spillover parking impacts of the Project to a less than significant level.

The Court of Appeal reasoned that it would not "assume...that simply because Expo Authority cannot *require* a local jurisdiction to adopt a permit program, the mitigation measure is inadequate." (Op. at 34.) However, by expressly acknowledging that the specific mitigation actions contained within MM TR-4 exceeded Expo Authority's legal authority, the Court of Appeal took the extraordinary measure of simply assuming the adequacy of MM TR-4, without even attempting to explain how MM TR-4 complied with Pub. Resources Code sections 21081, subd. (a)(1) and 21081.6, subd. (b); and Guidelines sections 15091, subd. (a)(1) and 15126.4, subd. (a)(2).

There are no reported cases upholding a lead agency's finding, under Public Resources Code section 21081, subd. (a)(1), that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment," where the lead agency is entirely powerless to actually implement the mitigation measure that supposedly mitigate or avoid such significant effects. Holding that MM TR-4 is adequate would significantly erode established principles

of law regarding an agency's duty under CEQA to mitigate, to the extent feasible, the potential impacts of those projects they propose to approve or carry out. A mitigation measure that merely identifies a laundry list of actions that ***other*** agencies could or should take, but does not actually require that any of the actions be incorporated into the project or otherwise required as conditions of approval, cannot support a finding that the impact will be reduced to a level of insignificance.

B. The EIR Impermissibly Deferred Mitigation

CEQA generally prohibits deferral of the formulation of mitigation measures "until some future time," unless they "specify performance standards which would mitigate the significant effect of the project..." Guidelines, § 15126.4, subd. (a)(1)(B). See also *San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at 668-71; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-794 (measure to mitigate noise impacts was inadequate because it solely required the preparation of acoustical reports, without any established evaluative criteria). When a project may have environmental impacts "for which mitigation is known to be feasible, the EIR may give a lead agency a choice of which measures to adopt, so long as the measures are coupled with *specific and mandatory performance standards* to ensure that the measures, as implemented, will be effective." *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th (2010) 184 Cal.App.4th 70, 94. (emphasis added.) In the absence of a performance standard, the improper deferral of mitigation would simply allow lead agencies to subvert the requirements that mitigation measures must be enforceable and effective. See *Rialto Citizens for Responsible Growth v. City of Rialto* (July 31, 2012, E052253) [2012 WL 3739944]. ("Deferred mitigation measures must ensure that the applicant will be required to find some way

to reduce impacts to less than significant levels. If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation during project implementation, it would be unreasonable to conclude that implementing the measures will reduce impacts to less than significant levels.")

Numerous reported decisions hold that a mitigation measure that merely states a "generalized goal" of mitigating a significant environmental effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable measures. See, *e.g.*, *San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at 670, *Communities for a Better Environment v. City of Richmond, supra,* 184 Cal.App.4th at 93 (mitigation plan that merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration is deficient). Moreover, a lead agency's commitment to a "specific mitigation goal" is not a sufficient performance standard. *See Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119.

The Court of Appeal cites *Sacramento Old City Ass'n. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-1029, which held that "for [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." In *Sacramento Old City,* the Court upheld an EIR that set forth a range of potential mitigation measures proposed to address a project's significant traffic impacts when certain performance standards were met, even though the EIR did not specify which specific measure had to be adopted by the city. *Id.* at 1029-1030.

However, the present case is easily distinguished from *Sacramento Old City*. In *Sacramento Old City*, the lead agency, the City of Sacramento, had "committed *itself* to mitigating the impacts of parking and traffic," had already "approved funds for a major study of downtown transportation" and each of the measures identified in the EIR were squarely within the City's authority to implement. *Ibid.* Here, in contrast, the actions identified in MM TR-4 are all wholly outside both Expo Authority's and Metro's jurisdiction and control, and there is no actual requirement or commitment that any of the elements of MM TR-4 will be implemented by the other local jurisdictions.

In addition, MM TR-4 does not contain a performance standard. As described above, MM TR-4 contains a parking impact monitoring program, which requires certain limited actions by Metro when one hundred (100) percent of the available on-street parking spaces within a quarter mile area surrounding a station are utilized. However, under MM TR-4, Metro is not committed to achieving less than one hundred (100) percent parking utilization. Therefore, this is not a "performance standard." Instead, the one hundred (100) percent on-street parking utilization is akin to a significance threshold, indicating when a significant parking impact has occurred, at which point it would be impossible to avoid a significant adverse impact.

Moreover, even if a program to "monitor the on-street parking activity" could somehow be construed as a "performance standard," MM TR-4 is fundamentally flawed because even when parking utilization reaches one hundred (100) percent (*i.e.*, <u>all</u> available on-street parking spaces are occupied), Expo Authority has absolutely no legal authority to implement a parking permit program or any of the other actions identified in MM TR-4, and there is no evidence in the record to support a conclusion that the other local jurisdictions could and would implement such measures.

In sum, to the extent feasible, lead agencies must mitigate the significant impacts of those projects that they decide to carry out. This requires the adoption of enforceable measures whose implementation will actually result in the mitigation of impacts, rather than solely relying on the mere possibility that a different agency may mitigate the identified impact. Thus, under CEQA, lead agencies must do more than simply shift their obligations by establishing a "wish list" for other agencies, thereby evading their mitigation duties under CEQA.

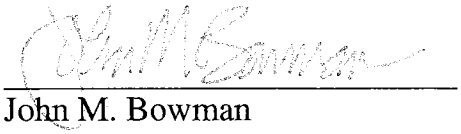
Although the EIR concludes that MM TR-4 would reduce the Project's station-area spillover parking impacts to "less than significant," the record does not contain substantial evidence supporting the effectiveness of MM TR-4, or that the measures described in MM TR-4 were "required in," or "incorporated into" the Project and are "fully enforceable." (11 AR 00413-414.) In fact, MM TR-4 concedes that it may not be possible to address spillover parking in some locations through a permit system, and there is no evidence or analysis to support a conclusion that any of the identified "back up" options would ever be implemented by the applicable local jurisdictions, let alone effective. Furthermore, all of the measures described in MM-TR 4 require approval and/or implementation by local agencies beyond Expo Authority's control. Thus, there is great uncertainty as to whether the mitigation measures would ever be implemented and no policy would prevent development of the Project without mitigation. *See Federation, supra,* 83 Cal.App.4th at 1261. Accordingly, the EIR failed to adequately describe and/or analyze feasible and adequate mitigation measures, improperly deferred the formulation of mitigation measures until after Project approval, and is inadequate as a matter of law.

CONCLUSION

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

DATED: September 7, 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 8.520, subd. (c)(1))

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DATED: September 7, 2012

ELKINS KALT WEINTRAUB
REUBEN GARTSIDE LLP

By: _____
JOHN M. BOWMAN
Attorneys for Neighbors For
Smart Rail, Petitioner and
Appellant

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 7, 2012, I served true copies of the following document described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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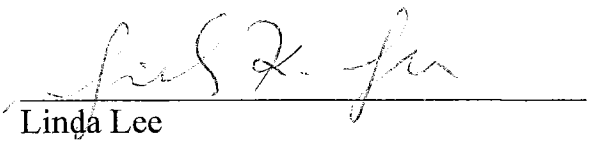
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 7, 2012, at Los Angeles, California.



Linda Lee

SERVICE LIST

Robert D. Thornton, Esq.
John J. Flynn, III, Esq.
Robert C. Horton, Esq.
Nossaman LLP
18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
Attorneys for Respondents
Exposition Metro Line Construction Authority and Exposition Metro Line Construction Authority Board

Michael H. Zischke, Esq.
Andrew B. Sabey, Esq.
Rachel R. Jones, Esq.
Cox, Castle & Nicholson
555 California Street, 10th Floor
San Francisco, CA 94104
Attorneys for Amicus Curiae
League of California Cities
California State Association of Counties

Ronald W. Stamm
Principal Deputy
Office of County Counsel
1 Gateway Plaza
Los Angeles, CA 90012
Attorney for Real Parties-in-Interest and Respondents
Los Angeles County Metropolitan Transportation Authority and
Los Angeles County Metropolitan Transportation Authority Board

Tiffany K. Wright, Esq.
Remy Moose Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814

Bradley R. Hogin, Esq.
Woodruff, Spradlin & Smart
555 Anton Boulevard, Suite 1200
Costa Mesa, CA 92626
Attorneys for Amicus Curiae
Southern California Association of Governments; et al.

Hon. Thomas I. McKnew, Jr.
Department SE H
c/o Clerk of Court
Los Angeles Superior Court
12720 Norwalk Blvd.
Norwalk, CA 90650

Office of the City Attorney,
City of Los Angeles
Carmen A. Trutanich, City Attorney
Andrew J. Nocas, Supervising Attorney
Timothy McWilliams, Dep. City Attorney
Siegmund Shyu, Dep. City Attorney
200 North Main Street
701 City Hall East
Los Angeles, CA 90012
Attorneys for Amicus Curiae
City of Los Angeles

California Court of Appeal
Second Appellate District
Division Eight
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013