CASE NO. S202828

IN THE SUPREME COURT
STATE OF CALIFORNIA

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

vs.

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

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

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

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

ANSWER BRIEF ON THE MERITS OF RESPONDENT EXPOSITION METRO LINE CONSTRUCTION AUTHORITY

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ACRONYM LIST

Acronym/Abbreviation	Definition
AR	Partially Certified Administrative Record of Proceedings
Authority	Exposition Metro Line Construction Authority
CEQA	California Environmental Quality Act, Public Resources Code §§ 21000-21777
EIR	Environmental Impact Report
Expo Phase 1 Project	Exposition Corridor Transit Project Phase 1 from Downtown Los Angeles to Culver City
FTA	Federal Transit Administration
Guidelines	CEQA Guidelines, Cal. Code Regs., tit. 14, §§ 15000-15387
HCM	Highway Capacity Manual
JA.	Joint Appendix filed in the Court of Appeal below
LOS	Level of Service
LRT	Light Rail Transit Alternative
LRT 2	Light Rail Transit Alternative 2, approved by resolution adopted Feb. 4, 2010 (see RPA, below)
Metro	Los Angeles County Metropolitan Transportation Authority
MMRP	Mitigation Monitoring and Reporting Program
MMTR-4	Mitigation Measure Transportation/Traffic – 4 (see 3 AR 00054-055)
NEPA	National Environmental Policy Act
NFSR	Neighbors for Smart Rail, Petitioner and Appellant

ACRONYM LIST

Acronym/Abbreviation	Definition
NOP	Notice of Preparation
Op	Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Eight, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority et al.*, B232655, filed April 17, 2012.
Op. Br.	Opening Brief on the Merits of Petitioner and Appellant Neighbors for Smart Rail
Project	The Exposition Corridor Transit Project Phase 2 from Culver City to Santa Monica
RPA	Recommended Preferred Alternative, LRT 2 (see Attachments 1-4)
RTP	Regional Transportation Plan
SCAG	Southern California Association of Governments
SCAQMD	South Coast Air Quality Management District
VHT	Vehicle Hours Traveled
VMT	Vehicle Miles Traveled

I. QUESTIONS PRESENTED.

1. Under the California Environmental Quality Act ("CEQA"),[1] does a lead transit agency have discretion to select a baseline methodology other than conditions existing at the time of CEQA review, so long as the baseline is supported by substantial evidence?

2. Does a lead CEQA agency have discretion to adopt a parking mitigation measure where (a) the measure imposes requirements on the public agency operator of the transit project if parking utilization reaches a designated threshold, and (b) the public agency owner has committed to implement the mitigation measure?

II. INTRODUCTION.

A. Project History and Need.

Los Angeles suffers from the worst traffic congestion and air quality in the nation. The very severe traffic congestion and the resulting acute air quality problems in Los Angeles are largely attributable to Los Angeles' historic and continuing population and employment growth combined with the region's historic reliance on the automobile as the primary mode of transportation. (See, e.g., 438 AR 29823-825, 29878-886; 126 AR 15937, 15940.)

For that reason, over three decades ago, the citizens of Los Angeles County overwhelmingly approved a program to finance and build a comprehensive rail transit system. (30 AR 00888.) The rail transit system is the linchpin of the region's strategy to improve air quality through transit mobility, a strategy essential to the region's continued economic vitality and environmental health. Traffic

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[1] Pub. Resources Code, §§ 21000-21777. All further statutory references are to the Public Resources Code unless otherwise indicated.

congestion on the west side of Los Angeles is particularly acute and will get even worse unless something is done.

Phase 2 of the Exposition Corridor Transit Project ("Project") challenged in this lawsuit implements the regional and local transportation plans that address the projected population growth and increase in employment. The Project is a component of the Southern California Regional Transportation Plan ("RTP") (439 AR 30061, 30069), the regional Air Quality Management Plan (3 AR 00022-223; 59 AR 044993; 475 AR 31669) and the County-wide 30-year Long-Range Transportation Plan (3 AR 00022, 509 AR 33232).

Despite over a decade of environmental analysis of transit alternatives connecting downtown Los Angeles with Santa Monica, appellant Neighbors for Smart Rail ("NFSR") demands further delay in a project that will employ thousands of Californians, provide much-needed traffic relief, and reduce air pollution.

B. The Issue: Does the Substantial Evidence Standard of Review Apply to Selection of a Baseline?

NFSR disagrees with the policy decision made by numerous agencies to establish light rail transit in the ***existing*** Exposition Rail Corridor right-of-way. Instead, NFSR wants the alignment changed to avoid its members' neighborhood. Since NFSR knows that it cannot succeed in challenging this policy directly, it seeks to kill the project by criticizing the analytical methodology selected to define the significance of traffic and air quality impacts. Ironically, this criticism is contrary to the position taken by NFSR itself in commenting on the Project's draft EIR.

The change in NFSR's position is an effort to capitalize on the case of *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 ("*Sunnyvale*"), which was decided five days before the trial court hearing in this action. *Sunnyvale's*

assertion that the substantial evidence standard of review does not apply to the selection of the baseline is in conflict with this Court's holding in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 ("*CBE*") and several Court of Appeal decisions. The Sixth District itself implicitly disagreed with *Sunnyvale* less than a year later in *Pfeiffer v. City of Sunnyvale* (2011) 200 Cal.App.4th 1552 ("*Pfeiffer*") where the Sixth District applied the substantial evidence standard of review and upheld use of a future conditions baseline.

NFSR's argument that the substantial evidence standard of review does not apply to an agency's selection of a baseline is inconsistent with long-standing CEQA precedent that the courts review such factual determinations under the substantial evidence standard. As the Second District concluded below:

> 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.

(Opinion ("Op.") 14-15, italics original.) This holding is consistent with this Court's recognition in *CBE* that an agency's selection of a baseline is a fact-specific methodological determination subject to the substantial evidence standard of review. (*CBE, supra*, 48 Cal.4th at p. 328.)

Nothing in CEQA could reasonably support the contention that, regardless of the nature and operational realities of the project at hand, a

transportation agency must, as a matter of law, measure project impacts against a baseline established at the time of the notice of preparation of the draft Environmental Impact Report ("EIR"), or even at the time of project approval. Indeed, to arbitrarily insist upon such a rule thwarts the CEQA objective of informed decision making. It is also contrary to this Court's recognition that the substantial evidence standard of review is founded on "the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers. [Citations.]" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 ["*WSPA*"].) Nevertheless, that is the conclusion reached by the court in *Sunnyvale*.

The Second District below rejected the baseline holding in *Sunnyvale*, citing common sense, and an utter lack of support for the *Sunnyvale* conclusion in CEQA, the Guidelines, or relevant cases. The Second District affirmed the discretion of transportation agencies to select a date for determining the significance of project impacts on traffic and air quality, so long as it is supported by substantial evidence. It also upheld the mitigation measure for near-station spillover parking impacts because it is supported by substantial evidence.

III. STATEMENT OF FACTS.

A. The Administrative Process and Preparation of Environmental Impact Reports.

The establishment of a modern transit system connecting downtown Los Angeles and the west side has been studied in several environmental reports extending over a decade. In June 2001, the Los Angeles County Metropolitan Transportation Authority ("Metro") began the preparation of an EIR evaluating transit alternatives in the corridor between downtown Los Angeles and Santa Monica. (736 AR 48075.) In 2005, Metro approved a light rail transit ("LRT") alternative ("Expo

Phase 1 Project") from downtown Los Angeles to Culver City. (165 AR 18694; 168 AR 18840-867.) Metro postponed a decision on the extension of the LRT line to Santa Monica pending additional CEQA review of alternatives between Culver City and Santa Monica. (168 AR 18846.)

On February 19, 2007, the Exposition Metro Line Construction Authority ("Authority") issued a notice of preparation ("NOP") of an EIR for the Expo Phase 2 Project.[2] (196 AR 20837-849; 32 AR 00902.) The Authority conducted four public meetings (attended by over 700 people) to solicit public input on the Project prior to preparation of the EIR. (33 AR 00902.) The Authority received and evaluated 1,800 written comments on proposed alternatives. (*Id.* 00905.) On January 28, 2009, the Authority circulated the Draft EIR for the Expo Phase 2 Project. (78-85 AR 12416-14887; 521 AR 33407.) The Draft EIR evaluated six alternatives, including a "No-Build" alternative, transportation system management alternative (bus and other transportation improvements without major new capital investment), and four different LRT alignments. (9 AR 00241, 00246-247, 00250-251.)[3]

After circulation of the Draft EIR, the Authority conducted over 100 meetings with various cities, public agencies and stakeholders, including three formal public hearings, business outreach meetings, and

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[2] The Authority was formed in 2003 pursuant to state law. (8 AR 00213; Pub. Utilities Code, §§ 132600-132650.) The Authority's Board of Directors is composed of one representative each appointed by the city councils of Santa Monica and Culver City, two representatives each appointed by the City of Los Angeles and the County of Los Angeles, one representative appointed by Metro, and the CEO of Metro is an ex officio, nonvoting member. (*Id.*, § 132615.) Once construction is complete, the Authority is dissolved, and Metro assumes all responsibility for operating the Project upon completion of each phase. (*Id.*, § 132650.)

[3] See Attachments 1 through 4 for maps of the approved Project

group presentations. (32 AR 00916-925, 00928.) Agencies, individuals and interest groups submitted over 8,979 oral and written comments on the Draft EIR. (7 AR 00171.) The comments overwhelmingly supported extension of the light rail line to Santa Monica. (*Id.* 00175.) The Authority prepared a written response to every comment on the Draft EIR. (33-43 AR 00943-8016.)

The Authority conducted additional environmental analysis on issues raised by the public. (3 AR 00022; 101 AR 14952.) At NFSR's request, the Authority analyzed two grade-separated design options for Overland Avenue and Westwood Boulevard. (9 AR 00303-306; 715 AR 45995-46008; 718 AR 46033-093.) Based on that additional analysis, the Authority concluded that these grade-separated design options did not merit additional evaluation because neither would reduce any significant environmental impacts, and each would cause more severe significant environmental impacts. (9 AR 00306; 715 AR 46008; 3 AR 00091.)

On December 21, 2009, the Authority made the Final EIR available for additional public review and comment. (707 AR 45927.) On February 4, 2010, the Authority held a public hearing to consider certification of the EIR and approved the Expo Phase 2 Project. (2 AR 00006.) Dozens of individuals and organizations submitted written comments and testified at the hearing. (See, e.g., 727 AR 46941-990.) After consideration of all public comments, the Authority certified the EIR. (2 AR 00005-007.) The Authority adopted alternative LRT 2 (using the existing Exposition Rail Corridor right-of-way to Colorado Avenue, and continuing along Colorado Avenue to the terminus at 4th Street in Santa Monica), and adopted detailed findings supporting the Authority's decision, a Statement of Overriding Considerations and a

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alternative and Project stations within each segment.

Mitigation Monitoring and Reporting Program ("MMRP"). (3 AR 00008-131.)

At no time during the lengthy administrative process did NFSR suggest that the CEQA baseline for identifying the significance of traffic and air quality impacts be at the time of the preparation of the EIR (2007), the time of the project approval (2010), or at the time of the projected opening of the Project (2015). Rather, NFSR commented that the Authority should use future conditions with and without the Project in ***2035*** to evaluate the potential significance of traffic and air quality impacts. (727 AR 46961.)

B. EIR Disclosure of 2007 Conditions and Projected Changes to 2007 Conditions.

This case is ***not*** about whether the EIR disclosed existing conditions in the Project area or the changes to those conditions over time. Contrary to NFSR's representations, the EIR describes the existing conditions in the Project area in 2007 (the date of the Notice of Preparation of the EIR). The EIR disclosed traffic and air quality conditions existing at the start of and during the environmental review process. (11 AR 00336-340, 353-354 [traffic in 2005, 2007-2008], 13 AR 00498-499 [ambient air quality 2006-2008].) The EIR also disclosed the predicted changes in the traffic and air quality conditions at the project's planning horizon of 2030 ***with and without*** the Project. (11 AR 383-410 [traffic], 13 AR 00506-519 [air quality], 14 AR 00527-529 [greenhouse gas emissions].) The trial court found that the EIR "did discuss *both* the existing and future conditions when analyzing traffic impacts. AR 350, 1055." (3 Joint Appendix ("JA") 000719, italics original.) Thus, the EIR disclosed to the public the existing conditions in the Project area in 2007 and disclosed to the public how those conditions were expected to change if the Project was built and if the Project was not built.

C. The Operational Traffic Impact Analysis.

The EIR comprehensively studied the impacts to transportation and traffic by analyzing impacts to vehicle miles traveled ("VMT"), vehicle hours traveled ("VHT"), transit usage, traffic operation (local circulation, station access traffic, and grade crossing delays), traffic circulation (e.g. diversion onto parallel streets and into adjacent neighborhoods), localized impacts on level of service ("LOS") at 90 study area intersections, parking, and pedestrian and/or bicycle routes or facilities. (3 AR 000025-026; 11 AR 00331-438.) The Project will improve VMT and VHT, have a beneficial impact on transit trips and shift to transit from cars and buses on highly congested streets. (3 AR 00025.) The Project includes an array of project design features such as additional through lanes, storage lanes, dedicated turn lanes, and signal phasing to avoid any significant traffic impacts. (11 AR 00365-367.) The Authority found there would be no significant impact to LOS at any of the 90 area intersections. (3 AR 00025; 34 AR 01058.)

NFSR's focus throughout the litigation has been on only 6 or 7 intersections of the 90 studied. The Authority evaluated the LOS at area intersections using Metro's state-of-the-art regional travel demand forecasting model. The model takes into account existing traffic conditions, as well as approved population and employment growth projections, and resulting changes in traffic. (11 AR 00346-348.)

The model uses the official population and employment projections, as well as forecast changes in the socio-demographic characteristics of travelers for the 2030 planning horizon in the Regional Transportation Plan ("RTP"), adopted by the Southern California Association of Governments ("SCAG"), the designated Metropolitan Planning Organization for Southern California. (*Ibid.*) Transportation planning agencies, including Metro, use the RTP planning horizon to evaluate operational impacts such as traffic and air quality because

projects take years to plan and build, and it takes years before they are fully operational and project use reaches expected levels. Because the public's investment in the rail transit strategy is very large ($300 billion to implement the 2009 LRTP), the agencies must consider whether the investment in any project provides long run benefits.

The traffic study evaluated ninety intersections on the west side. (11 AR 00336-340.) The study area included all of the intersections adjacent to at-grade crossings and nearby intersections that could potentially be affected by a queue extending back from the at-grade crossings at the light rail tracks. (72 AR 10704-709.)

The EIR also calculated the average vehicular delay at the proposed crossings to evaluate the extent of additional traffic delay due to the at-grade crossings on the Project's alternative alignments. (11 AR 00368-369; 72 AR 10735-737.) The EIR evaluated the impact of the Project using the Highway Capacity Manual ("HCM") developed by the Transportation Research Board of the National Academy of Sciences and approved by the Federal Transit Administration ("FTA"). (72 AR 10716-718.) The HCM is used widely to evaluate light rail projects where congested or oversaturated intersection conditions exist. (*Id.* 10716-718.)

Relying on the advice of the traffic engineers, the Authority selected several thresholds of significance for evaluating traffic impacts. (11 AR 00351, 355, 371, 377.) With regard to localized traffic impacts, the EIR used the HCM methodology to define a significant intersection impact:

> [I]f the project traffic is projected to cause deterioration in the level of service ["LOS"] to LOS E or worse . . . [or] if the intersection is already operating at LOS E or F and the project results in an increase in the average vehicle delay of 4 seconds or more at the

> intersection compared to the No-Build condition.

(11 AR 00350, 375.)

The EIR discloses that, due to population and employment growth, traffic congestion and resulting air emissions will increase in the Project study area over the next twenty years. (8 AR 00218-234.) The EIR documents that traffic at intersections in the Project study area will worsen over time if the Project is not built. (11 AR 00375-377.)

Conversely, the Project will contribute to a reduction in automobile emissions by ***reducing*** vehicle miles traveled and vehicle hours traveled.[4] (11 AR 00353-354.) While the Project alone cannot be expected to eliminate all congestion in the area, it is one element of an integrated regional transit system that will reduce reliance on the automobile and buses.

D. The Operational Air Quality Impact Analysis.

The EIR evaluates the nature and magnitude of the change in the air quality environment due to implementation of the Project and each alternative resulting from Project operations and project-related effects on traffic volumes. (13 AR 00495-520; 59 AR 08278-09487 [air quality technical background report].) Existing ambient concentrations of 6 criteria pollutants was disclosed (13 AR 00495-499), and sensitive receptors were identified within one-half mile of the Project and project alternatives (*id.* 00501-503). "The net increase in project emissions generated by project operation activities and other secondary sources have been quantitatively estimated and compared to thresholds of significance recommended by the SCAQMD [South Coast Air Quality Management District]." (13 AR 00504; see 122 AR 15310-312, 15352-354.) Because the Project will contribute to a reduction in VMT, it will

[4] The EIR also evaluated short-term air quality impacts from

result in net reductions in emissions of criteria pollutants. (11 AR 00506.) All other operational air quality impacts will be less than significant. (11 AR 00510-520.)

E. Selection of the Baseline for Identifying the Significance of Potential Traffic and Air Quality Impacts.

Continued population and employment growth in Los Angeles is not hypothetical. It is a cold, hard reality borne out by experience over several decades and the official demographic projections for Los Angeles. (8 AR 00217-235.) As the Second District stated: "Population growth, with its concomitant effects on traffic and air quality, is not hypothetical in Los Angeles County; it is inevitable." (Op. 19-20.)

From 2010 to 2030, the population of the Los Angeles Westside is projected to grow from 1.5 to 1.8 million persons. (736 AR 48078.) The number of jobs is projected to increase by over 200,000. (*Ibid.*) In the study area alone, population is expected to increase by 13.9%, and employment by 23.7% from 2000 to 2030. (8 AR 00218.) Between 2005 and 2030, vehicle miles traveled within the study area is projected to increase by 27% (31-32% during peak hours), and vehicle hours traveled will increase by 74% (93-105% peak). (8 AR 00227.)

The Authority used the conditions existing in the Project area during CEQA review (2007) to determine the significance of all potential impacts, except traffic and operational air quality impacts. (3 AR 000017.) The Authority also used 2007 conditions to evaluate the significance of potential short-term temporary traffic and air quality impacts during construction of the Project. (28 AR 00821; 3 AR 00091.)

However, based on the projected growth in population and traffic that will occur whether or not the Project is built, and because the Project is a major infrastructure project designed to alleviate congestion and improve air quality over time, the Authority exercised its discretion to

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construction of the Project. (59 AR 08303.)

use traffic and air quality conditions projected to occur at the planning horizon of 2030 as the environmental baseline for analyzing the potential significance of the Project's operational impact on traffic, air quality, and greenhouse gas emissions. (3 AR 00017 [Attachment 5 (finding regarding same)].)

F. Spillover Parking Mitigation.

The Authority determined that some station areas do not have residential permit parking districts or time-restricted on-street parking, and "could be" impacted by spillover parking into adjacent residential neighborhood. (11 AR 00411-414.) The Authority, in consultation with Metro and local cities, adopted mitigation measure "MMTR-4" to address this potential impact. (3 AR 00054-055 [Attachment 6], 113.) MMTR-4 requires implementation of well-established measures (such as a neighborhood parking permit program, time-restricted, metered or shared parking arrangements) if parking demand exceeds supply. Metro has committed to pay the cost of implementing the measure.

As authorized by CEQA, the Authority found that MMTR-4 reduced potential parking spillover impacts to "a less-than-significant level," ("Finding 1") and it found that MMTR-4 is within the responsibility and jurisdiction of one or more other public agencies, and such changes have been, or can and should be adopted by such agency or agencies ("Finding 2"). (3 AR 00015, 054.)

G. Procedural Background.

1. Trial Court Proceedings.

NFSR filed a petition for writ of mandate against the Authority and FTA, challenging the agencies' compliance with CEQA and the National Environmental Policy Act ("NEPA"). (1 JA 000001-021.) FTA removed the action to federal court and the federal claims were subsequently dismissed. (*Id.* 000112-115, 000196-210, 000251-253.)

Following briefing and oral argument, the trial court denied NFSR's writ of mandate on all grounds. (3 JA 000716-725.) The trial court entered final judgment on March 4, 2011 (*Id.* 000745-746), and NFSR filed a notice of appeal on April 25, 2011 (*Id.* 000806-809).

2. Court of Appeal Proceedings.

On April 17, 2012, the Court of Appeal filed its opinion affirming the trial court's judgment.

At no time in this lawsuit did NFSR challenge the validity of the data or models used to evaluate traffic and air quality impacts. Nor did NFSR claim that the Authority's findings regarding traffic and air quality are not supported by substantial evidence. Instead NFSR argued at trial and in the Court of Appeal that agencies have ***no discretion*** to select a date that is after the date of the approval of the project to determine the significance of the impacts on traffic and air quality. NFSR's position is that the substantial evidence standard of review does not apply beyond the date of project approval. The Court of Appeal rejected NFSR's argument:

> An analysis of the environmental impact of 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*. . . . 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.

(Op. 15, italics original.)

IV. STANDARD OF REVIEW.

Judicial review is limited to the question whether the lead agency has committed a prejudicial abuse of discretion. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) The petitioner bears the burden of demonstrating either that the lead agency failed to proceed in the manner required by law, or that one or more findings or factual determinations lacks the support of substantial evidence in the administrative record. (*Ibid.*; § 21168.5.) The adequacy of an EIR is presumed; the appellant has the burden of proving otherwise. (Evid. Code, § 664; *State of California v. Superior Court* (1990) 222 Cal.App.3d 1416, 1419.)

"Substantial evidence" is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, ***even though other conclusions might also be reached.***" (Guidelines,[5] § 15384, subd. (a), emphasis added.) A court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*WSPA, supra*, 9 Cal.4th at pp. 573-574.) The question under the substantial evidence test is ***not*** whether there is substantial evidence to support the conclusions of the opponents of a project; the question is ***only*** whether there is substantial evidence to support the decision of the agency in approving the project. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 407 ["*Laurel Heights I*"].) Under the standard, a reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.)

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[5] All references to "Guidelines" are to the State CEQA Guidelines, Cal. Code Regs., tit. 14, §§ 15000-15387.

This Court has specifically held that a lead agency's selection of a baseline is a factual question, subject to the substantial evidence standard of review:

> Neither 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, subject to review, ***as with all CEQA factual determinations***, for support by substantial evidence. [Citation.]

(*CBE, supra*, 48 Cal.4th at p. 328, emphasis added [citing *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th at p. 435].)

Finally, this Court recently reminded that "[c]ommon sense . . . is an important consideration at all levels of CEQA review." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175.)

V. ARGUMENT.

A. NFSR Failed to Exhaust Its Administrative Remedies Regarding Its "Baseline" Arguments.

Exhaustion of administrative remedies during the public comment period is a jurisdictional requirement. (§ 21177, subd. (a); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.) The petitioner bears the burden of proving that the issue was timely raised before the lead agency. (*Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) The purpose of issue exhaustion is to afford the agency the opportunity to correct any errors or show why it has not erred before the courts intervene. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249,

282.) "To advance the exhaustion doctrine's purpose '[t]he "exact issue" must have been presented to the administrative agency . . . [Citation].'" (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) "'[G]eneralized environmental comments at public hearings,' 'relatively . . . bland and general references to environmental matters' [citation], or 'isolated and unelaborated comment[s]' [citation] will not suffice [to preserve an issue for appeal under CEQA]." (*Id.* at p. 536.) "If a party wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings." (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686-687.)

NFSR did not exhaust the issue of whether the Authority improperly analyzed impacts to traffic, air quality or greenhouse gas emissions against a 2030 baseline. In a comment letter, NFSR raised what it characterized as a "baseline" issue (727 AR 46952), and reiterated the same in its Petition (1 JA 000011). But the "baseline" issue NFSR raised in the administrative process and the Petition had nothing to do with the use of 2030 No-Build traffic and air quality conditions to measure the significance of traffic and air quality impacts. Instead, NFSR complained that the Authority designed the Project to include improvements to area intersections to avoid any potentially significant impacts to traffic at intersections near three specific at-grade crossings (727 AR 46952-955, 46959; 1 JA 000011), a responsible practice that CEQA actually encourages. (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 10; *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185.)

Not only did NFSR fail to exhaust its administrative remedies on the use of a 2030 baseline, but where it did address the use of a 2030 baseline, ***it criticized the Authority for not using a 2035 baseline.***

NFSR ***agreed*** with the Authority that "[t]he traffic study and corresponding air quality analysis ***should be*** based upon a 20-year planning horizon for environmental analysis." (727 AR 46961, emphasis added.) NFSR also argued that, "[t]he Expo Phase II project should also use the year 2035 to evaluate the cumulative impacts of the proposed project and planned projects." (*Id.* 46962.)

Although the Second District determined that one commenter sufficiently raised the issue of use of an existing conditions baseline to assess traffic impacts on LOS, the record is clear that no one raised the issue in terms of "short-term vs. long-term impacts," or in terms of using a "dual baseline," or an opening day (2015) baseline as NFSR now does.

At the trial court hearing, NFSR argued for the first time that the Authority should have used 2015 as the baseline for measuring traffic and air quality impacts. The year 2015 is, of course, in the future, so this argument contradicts NFSR's position that agencies have no discretion to use a future conditions baseline. The trial court correctly concluded that during the administrative process no one argued that the EIR should have addressed traffic impacts "upon the commencement of rail operations in 2015." (2 JA 000512.)

Once again, NFSR's position has changed. It now asserts that the Authority was required to use ***three*** baselines – 2007, ***and*** 2015 ***and*** 2030 – to analyze the significance of operational traffic and air quality impacts to disclose short-term and long-term operational impacts. There is no evidence in the administrative record that these issues were raised during the lengthy administrative process. Thus, they are not properly before this Court.

B. The Authority's Use of Projected 2030 Conditions to Determine the Significance of Operational Traffic and Air Quality Impacts Was Proper Because It Allowed for Informed Decision Making.

"The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions." (*In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) Thus, the touchstone for determining an EIR's compliance with CEQA is whether the EIR includes the information to allow an informed decision regarding the project's environmental impacts. The baseline must serve this larger purpose by disclosing any significant project-specific impacts on physical conditions in the project area. (§ 21151, subd. (b); Guidelines, § 15125, subd. (a).)

The EIR evaluated the effects of the Project over time. It disclosed existing traffic and air quality conditions in the Project area and disclosed how those conditions were expected to change between 2007 and 2030. (Sections III.B.-D., above.)

NFSR concedes that in order to evaluate cumulative effects (such as traffic and air quality), the EIR necessarily must consider the anticipated growth in population and the traffic generated by that growth. (NFSR's Opening Brief ("Op. Br.") at 32-33.) But while conceding that the EIR is required to evaluate impacts in light of projected future conditions, NFSR argues that the Authority has no discretion to use that analysis to determine whether the effects of the Project are significant.

The trial court rejected NFSR's argument: "[The Authority] apparently believed, as does this court, that the comparison of future conditions in this situation provides more meaningful information to the public and to the decisionmakers." (3 JA 000719.) "To analyze the project's effects on transportation assuming that the project's operation

is the only change that will occur, is absurd." (*Id.* 000718.) The Second District concurred:

> An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010 [when the project was approved]), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. . . . 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.

(Op. 15-16, original italics, footnote omitted.)

The Second District rejected the contrary holding in *Sunnyvale*. The *Sunnyvale* court reasoned that CEQA requires use of an existing conditions baseline because such a comparison "is the ***only*** way to identify the environmental effects specific to the project alone." (*Sunnyvale*, *supra*, 11 Cal.3d at p. 1380, emphasis added.) As the Second District explained, *Sunnyvale* cited no authority for this assertion and it is false. (Op. 18.)

Where, as here, substantial evidence indicates that traffic and air quality conditions in the project area are changing due to population and economic growth, one obvious reasonable way to identify the traffic and air quality effects ***specific to the Project*** is to compare projected future conditions ***with and without the Project***. To compare traffic and air quality conditions with the Project once it is fully operational, or on opening day, to conditions as they once existed in 2007 (notice of preparation), would falsely attribute congestion and air quality impacts to the Project that would occur even if the Project is not constructed. In addition, as the Second District correctly held, to compare conditions in 2009 (the year the Final EIR was circulated) with and without the Project

"would rest on the false hypothesis that everything will be the same 20 years later." (Op. 15.) CEQA should not be construed to require such misleading or purely hypothetical comparisons to determine whether a project will have a significant environmental impact.

The Second District also rejected NFSR's false assumption that all future physical conditions, even those actually projected to occur, are "hypothetical" because, as NFSR now phrases it, they have no "real being" until they actually occur. The same could obviously be said about ***all*** forecasting authorized or required by CEQA. Again, the only question where such forecasting is concerned is whether it is supported by substantial evidence. The Court need not venture into metaphysics to resolve the issue. As the Second District observed, "'hypothetical allowable' conditions are quite different from projected future conditions." (Op. 16.)

> It is illusory to assume something is happening (and use it for a baseline) when it is not happening and never has, such as with the NOx emissions in *CBE*. But there is nothing illusory about population growth and its inevitable impacts on traffic and air quality: population is growing, and population increases do affect traffic and air quality, with or without the project. A decision to measure environmental effects of a long-term project by looking at those effects in the long term is neither hypothetical nor illusory. It is a realistic and rational decision.

(Op. 16.)

NFSR's argument is based on a fundamental misperception of the law and the nature of regional traffic and air quality impacts. CEQA requires agencies to consider the potential impacts of a project over time. CEQA recognizes that fact-based determinations (such as the identification of a meaningful significance threshold and the selection of

a methodology to evaluate whether the significance threshold is exceeded) are within the agency's discretion, subject to review by the courts under the substantial evidence standard of review. (See Guidelines, § 15064; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373 [lead agency has discretion to choose its methodology].)

NFSR relies on *Sunnyvale, supra*, 190 Cal.App.4th 1351, and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 ("*Madera Oversight Coalition*") to support its construction of CEQA. But the cases cited by *Sunnyvale* and *Madera Oversight Coalition* in support of their construction of CEQA all dealt with situations where the lead agency compared the project's impacts with ***hypothetical*** conditions, not projected future conditions.

"Existing conditions," as a baseline for evaluating the significance of environmental effects, was a concept first developed in the case of *Environmental Planning & Information Council v. County of El Dorado* ("*EPIC*") (1982) 131 Cal.App.3d 350, to address a very specific problem that does ***not*** exist in this case: From time to time, public agencies attempt to compare the effects of a project to the level of development that had been ***planned*** or ***authorized*** (but not yet built) according to a previous general plan or permit.

EPIC and its progeny characterize the level of development in the approved (but ***not*** built) land use plans as "hypothetical conditions" because the plan that the applicant, in those cases, sought to amend did not exist ***and would never exist*** if the applicant's plan was approved. Instead, in this circumstance, EIRs should "compare what will happen if the project is built with what will happen if the site is left alone." (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 [rejecting impact analysis that "emphasized the

marginally increased impacts of the proposed project over buildout under existing zoning"].)

Indeed, within a year of *Sunnyvale,* the same court of appeal implicitly acknowledged the flaws in *Sunnyvale's* analysis in *Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1572. In *Pfeiffer*, the Sixth District upheld the use of a future baseline to analyze traffic impacts, multiplied existing traffic volume by a growth factor, and considered inevitable additional traffic that would result from approved but not yet constructed developments in the project area. In upholding the city's use of a future baseline in *Pfeiffer*, the Sixth District relied on the discretion afforded to agencies under *CBE*. The traffic analysis used to determine baseline conditions here is similar to that upheld in *Pfeiffer*.

In *Pfeiffer*, the city used as its baseline raw peak one-hour traffic data for morning and evening commute periods collected in 2007, multiplied by a growth factor, and combined the added traffic expected from approved but not-yet-constructed development projects in the area surrounding the proposed medical offices. (*Id.* at p. 1571.) As the court summarized, "[u]sing this raw data for existing conditions ***and the predictions for traffic conditions generated by factors other than the . . . project, including already-approved developments***, the draft EIR's traffic analysis concluded that the . . . project would not result in 'significant near-term impacts'" to freeways, roadways, or intersections. (*Id.* at p. 1572, emphasis added.)

The court concluded that the city's predicted future conditions baseline for traffic was supported by "substantial evidence, undisputed by appellants, that ***traffic conditions in the vicinity of the . . . project could vary from existing conditions due to a forecast for traffic growth and the construction of already-approved developments.***" (*Ibid.*, emphasis added.) Accordingly, the court held that "appellants have not met their burden to show that the EIR is legally inadequate with respect

to ***the*** baseline used to measure traffic impacts. [Citation.]" (*Ibid.*, emphasis added.)

Thus, contrary to NFSR's mischaracterization, *Pfeiffer* upheld the use of a future conditions baseline to determine whether the project would have a significant impact on traffic, but noted that the future conditions baseline ***included*** existing conditions. The traffic methodology used by the Authority here is indistinguishable from the methodology approved in *Pfeiffer*. The Authority's projected future conditions baseline was verified using traffic counts collected at 90 study area intersections in 2007-2009. (11 AR 00337-340, 34 AR 01576; see also Section III.C., above.) Growth factors were applied to existing traffic counts in six Project subareas to take into consideration localized population and employment growth to determine future traffic conditions. (11 AR 00348.)

C. *CBE*, not *Sunnyvale*, Controls the Standard of Review Applicable to the Selection of a Baseline.

Pfeiffer followed this Court's holding in *CBE* that the selection of a baseline to determine the significance of a project impact is a factual determination subject to the substantial evidence standard of review. In *CBE*, this Court applied the substantial evidence standard of review to a lead agency's selection of a baseline: "an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can more realistically be measured, subject to review, ***as with all CEQA factual determinations***, for support by substantial evidence. [Citation.]" (*CBE*, *supra*, 48 Cal.4th at p. 328, emphasis added [citing *Vineyard Area Citizens for Responsible Growth*, *supra*, 40 Cal.4th at p. 435]; see also *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120 [holding that "the agency has the discretion to resolve factual issues and to make policy decisions. If the determination of a baseline condition requires

choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence"].)

In *Vineyard Area Citizens for Responsible Growth*, this Court held that the standard of review is of decisive significance:

> Judicial review of these two types of error differs significantly: . . . In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." [Citation.]

(*Vineyard Area Citizens for Responsible Growth*, *supra*, 40 Cal.4th at p. 435.)[6]

The standard of review applicable to an administrative agency's factual determinations is grounded in the constitutional separation of powers. (*WSPA*, *supra*, 9 Cal.4th at p. 572.) "The propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary." (*Ibid.*)

An agency's use of discretion in selecting a baseline has been explicitly reserved in the CEQA Guidelines. Guidelines section 15125, subdivision (a), states that the baseline will "normally" consist of conditions existing as of the time of the notice of preparation or at the

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[6] The leading authorities on CEQA recognize that "a lead agency has considerable flexibility in defining the baseline." (1 California Environmental Law & Land Use Practice (2010) Environmental Impact Reports, § 22.04[5][a], p. 22-67; *see* 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. 2011) Project Description, Setting, and Baseline, § 12.20, p. 599.)

time environmental review is commenced. In *CBE*, this Court acknowledged the flexibility built explicitly into the Guidelines, stating:

> 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.

(48 Cal.4th at p. 328, emphasis added.)

This Court has therefore acknowledged that ***predicted*** future conditions may in some cases serve as the baseline for assessment of environmental impacts. The Court's reference to the expected date of project approval, as the context reveals, is merely illustrative of the Court's broader ruling on the discretion enjoyed by public agencies in selecting an environmental baseline. There is nothing in the Court's description of the example employed, or in any other portion of its holding, that could arguably be read to create a restriction that limits future predicted conditions as a matter of law to only those that will exist at or before the time of project approval.

D. The Second District's Holding Below Comports With the Language and Fundamental Purpose of CEQA.

The Second District's holding is based on standard canons of construction. "In construing a statute, this court must ascertain the intent of the Legislature with a view to effectuating the legislative purpose." (*Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.) To determine the intent of the legislature, the Court must begin with the plain language of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) In addition, CEQA must be construed "as a whole, as the rules of statutory construction require." (*WSPA*, *supra*, 9 Cal.4th at p. 571.)

However, "[i]f the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "In such circumstances, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. [Citation.]" (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.)

"The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is ***likely*** to have on the environment . . . ." (§ 21061, emphasis added; see also *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, *supra*, 43 Cal.4th at p. 1162; *Laurel Heights I*, *supra*, 47 Cal.3d at p. 402 [informed decision making is CEQA's "fundamental goal"].)

CEQA itself provides:

> It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, ***shall not interpret*** this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements ***beyond those explicitly stated in this division or in the state guidelines***.

(§ 21083.1, emphasis added.)

The Second District's holding comports with the language and purpose of CEQA. A fundamental purpose of an EIR is to provide the public and decision makers with detailed information about "the effect which a proposed project is likely to have on the environment . . . ." (§ 21061.) Indeed, the Legislature emphasized that it is state policy to

"[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions." (§ 21001, subd. (d).)

As the Court of Appeal correctly observed, nothing in the statute mandates that lead agencies determine whether there will be an impact on the physical conditions "within the area which will be affected by a proposed project" by ***always*** comparing conditions as they exist ***during CEQA review*** with and without the project. (Op. 15-16, emphasis added.)

A careful reading of the statute indicates that the term "exist" does not modify or define a particular time frame for the analysis, but is used to refer to the geographic scope of the analysis, i.e., "the area which ***will be affected*** by the proposed project . . . ." (§ 21060.5, emphasis added; accord § 21100 ["For purposes of this section, any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions ***which exist within the area as defined in Section 21060.5***"], emphasis added.) Indeed, the text of the statute expressly refers to the area which ***will be*** affected by the project.

Thus, the plain language of the statute requires that lead agencies disclose in the EIRs they prepare what, if any, significant impacts a project ***will have*** on the physical conditions that exist in the project area that "***will be affected*** by a proposed project." The statute does not specify exactly ***when***, in time, the project ***will affect*** the physical conditions in the project area. Thus, as the Second District held, the language of the statute does not restrict a lead agency's discretion to select as a baseline physical conditions in the project area as they are projected to exist after the date of project approval. Indeed, NFSR seems to agree with the Second District since NFSR now argues for a 2015 baseline date – a future date that is five years after the Authority's approval of the Project.

But even if the Court determines that the statute is ambiguous, the Second District's construction comports with the fundamental purpose of CEQA. In many instances, the physical conditions in the project area (such as scenic views) are expected to remain stable. The impacts of the project on the visual environment at the time of the NOP provides useful information regarding the aesthetic impact of the project. Here the Authority used an existing conditions baseline to evaluate all but three of the Project's impacts.

But not all conditions in the Project area here will remain stable. It is undisputed that the population, employment and concomitant traffic congestion will continue to increase through 2030 on the west side. (Section III.E., above.) It is absurd to suggest that the Authority use 2007 population, employment and traffic to determine the Project's operational impacts when the 2007 conditions will no longer exist when the Project is fully operational. As the Second District summarized:

> The traffic and air quality conditions of 2009 [the date the Final EIR was circulated] 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.

(Op. 15.) "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." (*Ibid.*, italics original.)

Under the plain language of the statute, lead agencies have the discretion to select a projected future conditions baseline. But even if there is ambiguity in section 21060.5, the Second District has identified a construction that comports with the purpose of CEQA. (*Day v. City of*

Fontana, *supra*, 25 Cal.4th at p. 272 ["In such circumstances, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. (Citations.)"].)

E. NFSR's "Real Being" Construction of CEQA Adds Words to the Statute and Conflicts With CEQA Purposes.

NFSR acknowledges that CEQA does not define the term "exist." So NFSR resorts to one of several dictionary definitions to claim that the term is "commonly understood" to mean "something having 'real being.'" (Op. Br., 16-17.) NFSR then goes on to insert into the statutory definition of "environment" the phrase "***during CEQA review***," between the word "exist" and the phrase "within the area which will be affected by a proposed project." NFSR's invitation to the Court to re-write the definition of "environment" violates the Legislature's express rule prohibiting courts from adding "procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." (§ 21083.1.) There is nothing in the text of section 21060.5 that prohibits lead agencies from selecting a date for determining the significance of a project's impacts that is after the date of the approval of the Project. Indeed, NFSR effectively concedes this point by now arguing that 2015 is an appropriate baseline date.

If, as NFSR suggests, the meaning of "environment" is restricted to "the physical conditions having real being during CEQA review," then ***any*** comparison to future conditions would be to something other than the "environment." This interpretation is patently absurd. CEQA is replete with references to future conditions. The very first legislative finding in CEQA is:

> The maintenance of a quality environment for the people of the state now and ***in the future*** . . . .

(§ 21000, subd. (a); see also § 21001, subd. (d) ["Ensure that the ***long term*** protection of the environment . . . shall be the guiding criterion in public decisions."]; § 21001, subd. (e) ["Create and maintain conditions . . . to fulfill the social and economic requirements of present and ***future*** generations."], emphasis added.)

Consistent with the purposes of CEQA, the Guidelines provide that significant impacts include "reasonably foreseeable indirect" impacts and the "effects of probable future projects." (CEQA Guidelines, § 15064, subd. (d)(1), (h)(1).)

The determination of whether a project will have cumulatively significant effects necessarily involves the consideration of predicted future conditions set forth in pertinent planning documents. If CEQA limits agencies to considering environmental conditions that have "real being" during the CEQA review, it would be incongruous for the Guidelines to require consideration of projects that do not exist when analyzing cumulative impacts on the environment.

NFSR assumes that a comparison of the Project's traffic and air quality impacts with existing conditions is the only way to identify the environmental effects specific to the project alone. But the Second District has demonstrated that such a cramped reading of CEQA is not supported by the plain language or purpose of CEQA, the Guidelines, this Court's holding in *CBE*, or common sense. (Op. 17-21.) The assumption that only an existing conditions baseline can reveal project-specific impacts "is erroneous when applied to traffic and air quality impacts of a long-term infrastructure project, the very purpose of which is to improve traffic and air quality conditions over time." (*Id.* at p. 18.) Here, by comparing traffic and air quality conditions in 2030 with and

without the Project, the Authority isolated and identified the traffic and air quality impacts of the Project.

"The important point . . . is the reliability of the projections and the inevitability of the changes on which those projections are based. The objective is to provide information that is relevant and permits informed decisionmaking." (Op. 18-19.)

> In a major infrastructure project such as Expo Phase 2, assessment of the significance of environmental effects based on 2009 conditions (or conditions at any point from 2007 to 2010 [i.e., the period of CEQA review]) *yields no practical information, and does nothing to promote CEQA's purpose of informed decisionmaking on a project designed to serve a future population.*

(*Id.* at p. 20, emphasis added.)

Finally, NFSR argues that unless CEQA is interpreted to "tether" the baseline analysis to conditions existing during CEQA review, the Authority could have arbitrarily chosen 2050 or 2070 as the projected future conditions baseline. (Op. Br. 19.) This ignores the record evidence, the reality of transportation planning, and the "tether" provided by the requirement that lead agencies rely on substantial evidence to select a baseline.

The Authority chose 2030 because when it issued the NOP in 2007, 2030 was the planning horizon for transportation projects in the adopted Regional Transportation Plan. (8 AR 00218-221; 34 AR 01055.) Under federal law, SCAG must prepare the RTP to demonstrate how the region will meet federal mandates, including air quality requirements, and must be approved by federal agencies in order for the region to continue receiving federal transportation funds. (72 AR 10715.) The Metro Travel Demand Model receives its demographic inputs from SCAG's Regional Travel Demand Model, which was the

best available demographic projection for the year 2030. (34 AR 01055.)

Thus, the Authority's selection of 2030 is supported by substantial evidence, and demonstrates how the substantial evidence requirement in CEQA and the Guidelines "tethers" a lead agency's selection of a baseline to reality.

F. The Alleged Threat of "Gamesmanship" Provides No Basis for Construing CEQA to Limit Agency Discretion to Use a Projected Future Conditions Baseline.

NFSR engages in pure speculation to assert that if lead agencies are permitted to use projected future conditions, lead agencies would hire sham "experts" to game CEQA by using "opaque mathematical models" and "myriad hypotheses" to support the lead agencies' foregone conclusions. (Op. Br., 18-19.) There is no evidence of "gamesmanship," nor is there any evidence that the Second District's holding would encourage it.

First, NFSR's assertions are unsupported by any evidence in the record. The population and employment projections used in the EIR are the official demographic projections developed by Metro and the Southern California Association of Governments in accordance with state and federal law. (8 AR 00218; 11 AR 00347, 13 AR 00500, 00504). The EIR disclosed traffic and air quality conditions in 2007, and the changes in traffic and air quality with and without the Project in 2030. (Sections III.B.-D., above.)

Second, if scientific forecasting is mere gamesmanship, disallowed by CEQA, it would be impossible for federal, state, or local transportation agencies to plan and implement effective transit, transportation, and goods movement improvements. Every major infrastructure project in the State of California is based on population and employment projections. It would be irresponsible for any agency to

not use forecasting in light of approved population projections when deciding whether to invest a billion dollars in a transportation improvement.

Indeed, traffic and air quality models are essential to determine ***any*** transit project's impacts on traffic and air quality, even where an existing conditions baseline is used in the analysis. The models have been refined over many decades of use by federal, state, and local transportation agencies. They are essential to both wise project planning and long-range regional transportation planning. Their use is well understood by transportation planners, and they provide the bedrock for informed decision making in this context.

NFSR's illusory "threat" of gamesmanship is no reason to rob agencies of the discretion they need to analyze traffic and air quality impacts.

G. Substantial Evidence Supports the Methodology the Authority Used to Determine the Significance of Traffic and Air Quality Effects.

1. NFSR Has Waived the Right to Contest the Sufficiency of the Evidence Supporting the Authority's Selection of the Baseline.

NFSR has waived any right to challenge the sufficiency of the evidence supporting the Authority's discretionary election to use a 2030 baseline. As the Second District stated:

> [P]etitioner does not suggest that the methodologies, forecasts, models, and other data are insufficient to support the projections the Expo Authority has used – but rather only that the Expo Authority should not be permitted to use them. NFSR has made no effort to demonstrate how the use of projected traffic and air quality conditions as a baseline to measure the impact of this project has precluded or could preclude informed decisionmaking (or,

> conversely, how the use of current conditions to measure those impacts would or could contribute to informed decisionmaking).

(Op. 20.)

Nevertheless, NFSR argues that it would have been ***better*** if the Authority had used an existing conditions baseline, an opening-day 2015 baseline, or both. It does so under the guise of establishing that use of a future projected conditions baseline constitutes a ***prejudicial*** abuse of discretion. Having failed to raise the issue below, it is waived. (*People v. Peevy* (1998) 17 Cal.4th 1194, 1205.)

Even if NFSR had not waived or failed to exhaust administrative remedies, these arguments are unpersuasive. At most, they only serve to illustrate that the selection of a baseline is a factual question subject to public notice and comment, the scrutiny of trustee and responsible agencies, and, if challenged in litigation, the substantial evidence standard of review.

2. The Projected Traffic and Air Quality Conditions Under the No-Build Baseline Are Supported by Substantial Evidence, and Are Neither Hypothetical Nor Assumed.

Southern Californians know all too well that traffic congestion on the west side is severe, and that traffic congestion is projected to get worse. The EIR discloses that, due to population and employment growth, traffic congestion and resulting air emissions will increase in the Project study area over the next twenty years. (8 AR 00218-234.) As demonstrated in detail in Section III.C., above, these increases are not hypothetical, "assumed," or speculative.

3. NFSR's Argument That a 2015 Baseline or Multiple Baseline Would Be "Better" Undermines Its Position and Is Unavailing.

NFSR cites a few intersections out ***of the ninety*** intersections analyzed in the EIR to criticize the Authority's methodology in determining traffic effects.[7] (Op. Br. 25-27, fns. 7-8.)

Specifically, NFSR argues that with respect to Intersections 15, 26, 28, 29 and 34, the EIR "does not . . . address the question whether the Project could potentially cause the LOS at these intersections . . . 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 operation." (*Id.* 26, emphasis added.)

NFSR's argument stands the substantial evidence standard on its head. The question is not whether there is substantial evidence that a different baseline may have been better,[8] but whether substantial

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[7] On appeal below, NFSR singled out six intersections. The Authority addressed each intersection in detail in its brief below and NFSR failed to respond. (Expo Authority's Opening Brief below at pp. 25-27; Attachments 1-4, 7-8; see also Attachment 8.) For the first time in its Opening Merits Brief it adds another (Intersection No. 3 (4th Street/I-10 eastbound and Olympic Boulevard), a.m. peak hour (11 AR 337, 405). Any arguments regarding Intersection No. 3 are also waived.

[8] NFSR insinuates that the Project will be fully operational on its anticipated opening day in 2015. (Op. Br. 8.) However, this is yet another substantial evidence argument. Even if the Project would be running near a full schedule on opening day, *ridership* is anticipated to be 77% of year 2030 forecasts. (34 AR 01063.) It was reasonable for the Authority to use the planning horizon as representative of operational conditions since people switch from cars and other motor vehicles to light rail over time. NFSR notably fails to mention that on opening day, when traffic congestion will be lower than projected for 2030, the at-grade crossings will already incorporate design changes that avoid any significant impact to LOS, including new north- and southbound through lanes, elimination of or time-restrictions on on-street parking, exclusive turn lanes, and some turning restrictions. (11 AR 00365-367.) This is further evidence that use of a 2030 baseline supports a conclusion that

evidence supports the Authority's selected baseline. (*Laurel Heights I, supra*, 47 Cal.3d at p. 407.)

With respect to Intersections 3, 26, 34, and 69, NFSR asserts that "the predicted 2030 'with Project' conditions will exceed the existing level of delay . . . by well over 4 seconds[,]" and concludes on that basis that "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 begins operating [in 2015]." (Op. Br. 26.) This argument suffers from all the same fatal flaws as its Level of Service argument above.

But it suffers an additional fatal flaw: Under NFSR's methodology for determining that LOS will exceed the existing delay at four intersections by "well over 4 seconds," future traffic congestion and air emissions attributable to population and employment growth that are projected to occur by all relevant planning agencies, whether or not the Project is built, would falsely be attributed to the Project. The trial court rejected this argument, stating that "[t]o analyze the project's effects on transportation assuming that the project's operation is the ***only*** change that will occur, is absurd." (3 JA 000718, emphasis added.)

The trial court is correct. First, the Project could not possibly be responsible for any increases in traffic that occur before the Project opens (projected to be 2015). If traffic and air emissions increase between 2007 and 2015, something other than the Project ***must*** be the cause of the increase. Second, the Project cannot be responsible for additional traffic that will be generated as a result of increases in population and employment. Third, as a light rail transit project, the Project will not generate additional automobile trips after the Project opens in 2015; rather, it will help ***reduce*** automobile trips. (72 AR 10738.)

LOS impacts on opening day will be less than significant.

NFSR also argues that "the EIR did not evaluate or discuss the Project's potential traffic impacts as compared to the existing conditions at any street intersections . . . [,]" and argues that the Authority cannot rebut this claim because the EIR did not disclose the anticipated changes in traffic relative to existing conditions. (Op. Br. 27.) But the EIR ***did*** disclose how traffic and air quality conditions are anticipated to change over time by clearly disclosing both existing and future traffic and air quality conditions. (See Sections III.B.-D. above.)

Thus, even if these arguments were properly before the Court, they fail to demonstrate that comparison of traffic and air quality conditions projected at the planning horizon of 2030 with and without the Project failed to foster public participation and informed decision making.

4. The Air Quality Analysis Is Supported By Substantial Evidence.

The EIR evaluates "the nature and magnitude of the change in the air quality environment due to implementation of the proposed project" using methods and significance thresholds consistent with those recommended by SCAQMD. (13 AR 00504; see 122 AR 15310-312, 15352-354.)

Agency use of adopted regulatory standards to define significance thresholds is a common practice that complies with CEQA. (See *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933-934 [upholding determination that energy impact of project that meet state energy efficiency standards complied with CEQA]; *Cadiz Land Co. v. Rail Cycle L.P.* (2000) 83 Cal.App.4th 74, 106 [upholding agency use of the federal air quality standards to conclude that air quality impacts on agriculture were not significant]; 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. 2011), § 13.14, pp. 621.1-627.)

NFSR argues that these thresholds were not applied to the Project in comparison to the existing conditions; therefore the EIR "fails to address potential impacts of the Project during the first 15 years of its operational life [2015-2030], and skews the analysis in a way that understates the ecological implications of the Project." (Op. Br. 28.) Again, the argument that the Authority should have studied the impacts from 2015-2030 was never raised in the administrative proceedings, and NFSR has waived any substantial evidence attack on the air quality analysis.

Even if the argument could be asserted at this point, NFSR simply assumes that the Authority's methodology used a "misleadingly elevated pollutant emissions baseline" and understates the air quality impacts of the Project. But NFSR cites ***no evidence*** that the projected levels of air emissions in the Project area in 2030 are misleading or skewed. (§ 15064, subd. (f)(5) ["Argument, speculation, unsubstantiated opinion or narrative . . . shall not constitute substantial evidence"].) Finally, even if NFSR's characterization of the baseline as "skewed" were supported by substantial evidence in the record, which it is not, it would be irrelevant because the ***Authority's*** air quality analysis, including its selection of a 2030 baseline, ***is*** supported by substantial evidence, and NFSR has never argued otherwise. (See Section III.D., above.)

H. NFSR Has Failed to Demonstrate That the Authority's Traffic or Air Quality Analyses Precluded Informed Decision Making. Therefore, It Has Failed to Show Prejudice.

NFSR argues that use of a projected future conditions baseline must be a prejudicial abuse of discretion because it fails to disclose the "short-term" operational impacts of the Project from 2015 to 2030. (Op. Br. 25-26, 28-30.) This issue was not raised in the administrative proceedings, and is therefore waived. In addition, NFSR fails to carry its

burden of proof because its "evidence" consists of pure speculation and finds no support in the law.

First, NFSR argues that "common sense suggests that the traffic and air quality conditions in [February] 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." This is sheer speculation, unsupported by any evidence in the record. Even if the issue had been exhausted, NFSR's assertion fails because under the substantial evidence standard of review. The question is not whether substantial evidence supports the opponent's position, but whether substantial evidence supports the lead agency's decision.

NFSR cites Guidelines section 15126.2, subdivision (a), which advises agencies to describe a project's direct and indirect significant effects, "giving due consideration to both the short-term and long-term effects." First, substantial evidence in the EIR supports the Authority's discretionary selection of the 2030 planning horizon baseline, and its determination that Project operations will not have any significant traffic or air quality impacts. This provision does not apply where there are no significant impacts. Second, the analysis provided the public and decision makers with relevant information and did not preclude public participation or informed decision making. NFSR has not demonstrated bad faith, or an utter failure to provide the information required for informed decision making. Third, the EIR disclosed the short-term project effects on traffic and air quality from construction. (10 AR 00321; 28 AR 00822-842.) Due consideration ***was*** given to short-term and long-term Project impacts on traffic and air quality. Fourth, CEQA provides that it is the policy of the State to "[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions." (§ 21001, subd. (d).) Thus, the Authority gave

"due consideration" to short-term and long-term impacts in accordance with the law.

Next, NFSR argues that "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)." (Op. Br. 29.) Again, the issue of whether the Authority should have used ***multiple*** baselines was never raised during the administrative proceedings, and NFSR never briefed it below, so it is beyond the scope of review. Even if it were properly before the Court, it is pure speculation that a 2015 analysis would yield any more useful information than a 2007, or a 2010 analysis.

In addition, NFSR's preferred strategy to use multiple baselines is contrary to well-established law. Where an EIR has evaluated an impact by reference to more than one baseline, the courts of appeal have consistently held that it is an abuse of discretion to fail to identify which individual baseline the agency actually relied on to determine whether an impact is significant. (*Madera Oversight Coalition*, *supra*, 199 Cal.App.4th at p. 96 [remanding with instructions to identify which baseline was used to analyze significance of impact]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 673 [same]; see also *Save Our Peninsula Committee*, *supra*, 87 Cal.App.4th at p. 120 [agency's selection of one among several possible baselines without meaningful analysis is an abuse of discretion].)

NFSR also asserts, without any citation to the record, that "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-makers, and the public with the information about the project that is required by CEQA.' [Citation.]" (Op. Br. 29-

31.) This unsupported assertion is false. By comparing traffic and air quality conditions at the planning horizon of 2030 with and without the Project, the Authority's analysis ***did*** disclose the impacts solely attributable to the ***Project***.

NFSR asserts that by not disclosing the traffic and air quality impacts of the Project on existing 2009 and/or 2015 projected future conditions baseline, the EIR has precluded relevant information from being presented to the public, and therefore represents a prejudicial abuse of discretion. (Op. Br. 30.) This is not the case. As demonstrated in Sections III.C.-D., above, the EIR presented ample "relevant information" to the public regarding the Project-specific impacts on traffic and air quality using baselines methodologies that are supported by substantial evidence in the record.

Finally, NFSR argues that omitting an existing conditions baseline analysis "would effectively conflate CEQA's requirements for separate analysis of project-specific impacts, cumulative impacts, and the "no project" alternative into one . . . ." (Op. Br. 33.) But the Guidelines do not require that these three analyses be distinct in all circumstances.

Traffic congestion and air quality are quintessential cumulative impacts. They occur not solely because of the Project, but because of population and employment growth, and the combined effects of past, present and reasonably foreseeable future projects. (See Guidelines, § 15130, subd. (b)(2).) Moreover, "[w]here a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." (Guidelines, § 15130, subd. (a).) The same evidence demonstrating that a project will not have an individually significant impact can serve as evidence that a project will not have a

"cumulatively considerable" incremental effect on a cumulative impact. Thus, the EIR did not, in fact, conflate the two analyses, but relied on the evidence of no significant individual impacts to support the finding that the Project would not have a cumulatively considerable incremental effect on cumulative air quality and traffic impacts.

The EIR did not unlawfully conflate the "no project" analysis with the analysis of the Project's traffic and air quality impacts, either. The Guidelines specifically acknowledge that where, as here, the no project alternative is the same as the baseline selected pursuant to Guidelines 15125, ***the no project alternate may serve as the environmental baseline.*** (Guidelines, § 15126.6, subd. (e)(1).)

I. The Mitigation for Potential "Spillover" Parking Is Fully Enforceable and Supported by Substantial Evidence.

The record supports the finding that MMTR-4 is enforceable and feasible, and will significantly lessen any significant environmental impacts that may result from near-station spillover parking demand exceeding on-street public parking supply.[9]

1. The Substantial Evidence Standard of Review Applies.

Where a potentially significant impact can be feasibly mitigated, CEQA requires an agency to find, based on substantial evidence, that the mitigation has been required in, or incorporated into, the project, ***or*** that the mitigation measure is the responsibility of another agency and has been, or can and should be, adopted by the other agency, or ***both***. (§ 21081, subd (a)(1); Guidelines, § 15091, subd. (a)(1).) If substantial evidence supports ***either*** of these findings for MMTR-4, the EIR

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[9] The parking deficit is not an environmental impact; only the secondary effects on traffic and air quality are environmental impacts. (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco*, 102 Cal.App.4th at 697.)

complies with applicable CEQA requirements. (Guidelines, § 15091, subd. (b); *Laurel Heights I, supra*, 47 Cal.3d at pp. 393, 407.) Here, the Authority made both findings with respect to MMTR-4. (3 AR 00015 (defining "Finding 1" [corresponding to the finding in § 21081, subd. (a)(1)] and "Finding 2" [*id.*, subd. (a)(2)]); 3 AR 00054 [adopting both findings for MMTR-4].)

NFSR argues that a de novo standard of review applies, citing *Madera Oversight Coalition, supra*, 199 Cal.App.4th at p. 85. The court there held that ***construction of the Guidelines*** is a question of law. The question presented here is not how to construe the Guidelines, but whether the record evidence supports the finding that a mitigation measure complies with CEQA.

2. MMTR-4 Is Enforceable.

The EIR evaluated the effect of spillover parking near project stations assuming a fully mature transit system in 2030. (11 AR 00411-414; 34 AR 01186.) Based on the conservative assumption that there would be no parking turnover during peak hours, it concluded that demand may exceed supply of on-street public parking at five Project stations. (*Id.* 00411-412.) It did not conclude that available parking spaces at each station will be at capacity on opening day. (34 AR 01186; 72 AR 10793-795.)

To substantially lessen the potential shortfall in near-station parking, the Authority, in consultation with the applicable cities that may be affected, developed mitigation measure MMTR-4, and adopted it as part of the MMRP for the Project. (3 AR 00014, 00054-055, 00113; 11 AR 00413-414.) The Authority considered the addition of more dedicated station parking, but as the Authority explained, that approach "could also have the effect of increasing traffic around each station by encouraging auto access," purchasing property for surface parking could

have adverse land use impacts, and parking structures are both costly and potentially create adverse impacts to adjacent land uses. (34 AR 01186.)

To strike a balance between mitigating potential spillover parking impacts without creating the potential for adverse traffic or land use impacts, MMTR-4 establishes a program to monitor on-street parking activity of transit patrons. (3 AR 00054-055; 11 AR 00413-414.) If parking availability exceeds an established performance standard (100% utilization of available parking spaces), Metro is ***required*** to work with any affected local jurisdiction and affected residents and businesses to develop a parking permit program. (*Ibid.*; see also 34 AR 01063-064.) Metro is also ***required*** to fund implementation of any adopted parking program (excluding resident permits). At the request of the local agencies, MMTR-4 was revised to include alternatives to a permit program in case such a program cannot be implemented, including time-restricted metered parking, or shared parking arrangements. (3 AR 00054-055.)

This is no mere "to do" list. As stated, these are enforceable requirements that have been incorporated into the MMRP for the Project, and Metro has committed to monitor, develop, and fund a parking permit or other locally preferred program in consultation with any affected local agency and community. Thus, MMTR-4 satisfies the requirements of section 21086.6, subdivision (b).

Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal.App.4th 1252 is inapposite. There, the measures were inadequate because the City relied on a document that mentioned the possibility of mitigation measures, but did not require their implementation. (*Id.* at pp. 1255-1256.) MMTR-4 defines the requirement that Metro perform monitoring and develop and fund a parking management program in cooperation with local agencies and affected communities.

In addition, the Authority made "Finding 2" for MMTR-4 that "those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be adopted by that other agency." (3 AR 00015, 00054 [Finding 2]; § 21081, subd. (a)(2).) This finding is supported by substantial evidence. There is no requirement in CEQA or the case law NFSR relies upon that renders this finding inadequate as a matter of law because the Authority cannot require local jurisdictions to adopt a parking program. NFSR's interpretation would nullify section 21081, subd. (a)(2), and should be rejected.

3. There Is Substantial Evidence That MMTR-4 Will Mitigate Spillover Parking.

In the alternative, NFSR argues that there is no substantial evidence to support "Finding 1" that MMTR-4 will reduce spillover parking impacts to less than significance because there is no ***guarantee*** that the local jurisdictions will adopt a fully funded parking program Metro has tailored to satisfy local guidelines and community preferences. But there ***is*** substantial evidence: the local agencies participated in developing MMTR-4, and they have already implemented parking permit programs and metered parking in the Project area. (11 AR 00413.) Indeed, representatives from each local agency sit on the Authority's Board. In addition, a similar mitigation measure was adopted for the Expo Phase 1 Project. (739 AR 48431.) Thus, substantial evidence supports the finding that Metro will conduct the surveys, work with any affected local agency and community, and any affected local agency will adopt a parking program if spillover parking causes peak hour usage to exceed the 100% performance standard.

The Second District correctly refused to assume "that simply because the Expo Authority cannot *require* a local jurisdiction to adopt a permit program, the mitigation measure is inadequate." (Op. 34, original

italics.) NFSR bears the burden of demonstrating a lack of substantial evidence. Speculation that local agencies will refuse to work with Metro cannot meet that burden or overcome the presumption that public agencies will carry out their duties. (Evid. Code, § 664; *El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1351 [the courts must presume a public agency will carry out its obligations; sheer speculation cannot carry a party's burden of proving otherwise].)

4. The Use of a Parking Performance Standard Is Proper.

CEQA authorizes the use of performance standards in establishing mitigation measures based on future studies. (Guidelines, § 15126.4; *Laurel Heights I, supra*, 47 Cal.3d at p.412; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027, 1029 ["*SOCA*"].) Such an approach is especially appropriate when monitoring is required to determine whether an impact will occur (*Laurel Heights I, supra*, 47 Cal.3d at p. 412), or when the results of later field studies are used to tailor a mitigation measure to fit actual environmental conditions (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.)

Here, monitoring parking capacity against a performance standard makes sense because it is currently unknown ***if*** significant spillover parking impacts will occur, and, if so, ***where*** the impacts will occur. Each parking program must be tailored to the local agency's guidelines; and it is currently unknowable which program any affected local community will prefer. (11 AR 00413-414; see *Laurel Heights I, supra*, 47 Cal.3d at p. 412 ["We think it unreasonable to demand a commitment to take specific action based on unknown and as yet unknowable test results"].)

In *SOCA, supra*, the court upheld the use of a performance standard of 90% parking usage based on the City's commitment to

employ one or more mitigation measures it found to be effective at reducing parking impacts. (229 Cal.App.3d at pp. 1021, 1035.) Here, the effectiveness of the parking programs is known: if they did not work, they would not be in wide use on the west side and in urban settings everywhere. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach, supra*, 52 Cal.4th at p. 175 ["common sense . . . "is an important consideration at all levels of CEQA review"].)

NFSR suggests that a 100% usage standard is unlawful because it would not avoid any impact. But CEQA does not require a mitigation measure to avoid every impact; it requires it to avoid ***or*** mitigate (i.e., substantially lessen) ***significant*** impacts. (§ 21081, subd. (a)(1); Guidelines, § 15091, subd. (a)(1).)

Neither a parking permit program, nor any of the other alternatives is "vague" or "amorphous." In *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95, cited by NFSR, the city deferred formulation of vaguely defined and untested mitigation measures to reduce a refinery's GHG emissions by nearly 900,000 metric tons per year. Anyone who lives in Los Angeles knows exactly what is meant by a parking permit program, time-restricted metered parking, and shared parking arrangements with other sources of parking, and their effectiveness is known. (See *Laurel Heights I, supra*, 47 Cal.3d at p. 418 [holding that a promise to promote transit, carpooling, vanpooling and related activities was adequate mitigation for a deficit of on-site parking spaces].)

5. There Is No Prejudicial Abuse of Discretion Because Finding 2 Is Adequate, and the EIR Did Not Preclude Public Participation or Informed Decision Making.

Section 21081 does not require both Finding 1 and Finding 2 with respect to spillover parking, but one or the other. (§ 21081.) Even if there was no substantial evidence to support Finding 1, Finding 2 is

supported by substantial evidence. Metro has exclusive jurisdiction over the Project once construction is complete. (Pub. Utilities Code, § 132650.) Each local agency has ultimate responsibility and authority to adopt a parking program.

Because Metro and the appropriate local agency have exclusive jurisdiction to implement MMTR-4, and that jurisdiction is clearly stated in MMTR-4, the "problem of agencies deferring to each other, with the result that no agency deals with the problem," is not an issue here. (*City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 342, 366.) Thus, there has been no prejudicial abuse of discretion.

NFSR has not even attempted to demonstrate that the discussion of spillover parking and MMTR-4 deprived the public or decision makers of any relevant information required for informed public participation and decision making. (See *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1044 [where there is no evidence that "the public in any way [has] been misled or defrauded," and there is no evidence that the "decision-makers [have] been deprived of any relevant information . . ." a court should not require revision and recirculation of an EIR].)

VI. CONCLUSION.

For the reasons above, the Second District's holdings should be affirmed.

Dated: October 9, 2012

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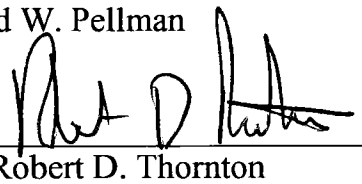
By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

I certify that the text of this brief consists of 13,912 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief.

Dated: October 9, 2012

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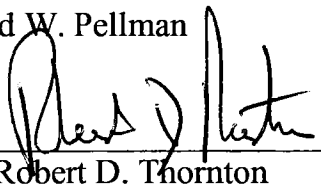
By: 
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INDEX OF ATTACHMENTS

ATTACHMENT NO.	DESCRIPTION
1	Exhibit A to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Approved Project, 9 AR 00253
2	Exhibit B to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 1 Expo ROW, 9 AR 00255
3	Exhibit C to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 2, 9 AR 00264
4	Exhibit D to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Map of Segment 3a, 9 AR 00273
5	Redacted copy of Tab 3, pages AR 00016-17 of the Partially Certified Record of Proceedings lodged in the Superior Court for the County of Los Angeles and on file herein reproducing, in relevant part, Subsection 1.4 of Exposition Corridor Transit Project Phase 2 Findings of Fact
6	Redacted copy of Tab 3, pages AR 00054-55 of the Partially Certified Record of Proceedings reproducing, in relevant part, the findings made, and text regarding mitigation measure MMTR-4 in Section 4.1 of Exposition Corridor Transit Project Phase 2 Findings of Fact
7	Exhibit E to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Image of Expo Blvd. National-Palms Crossing, 58 AR 08210
8	Exhibit F to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Comparison of Project Intersections that Worsen to E of F in 2030, 3 JA 000713

ATTACHMENT 1

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

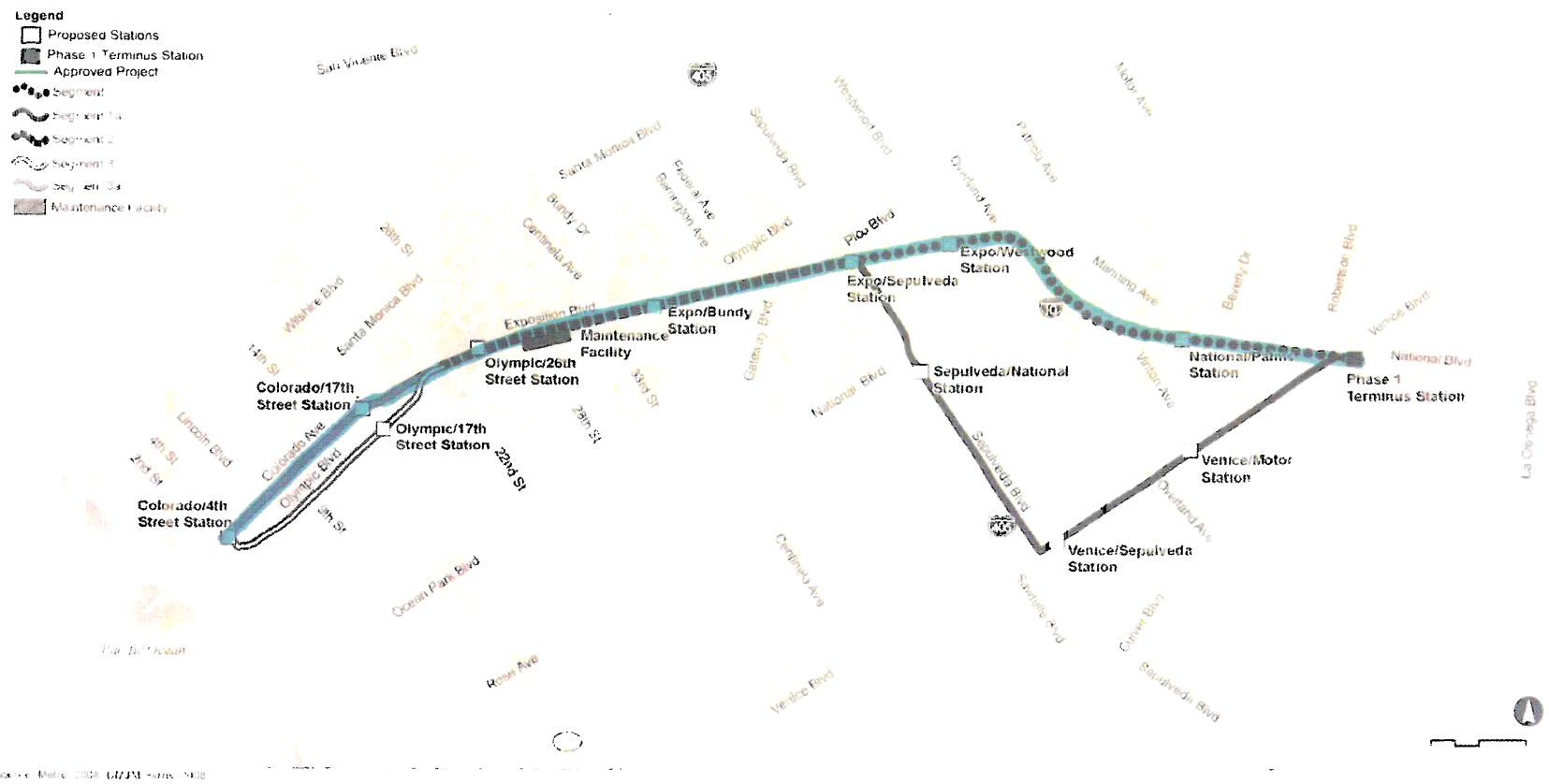


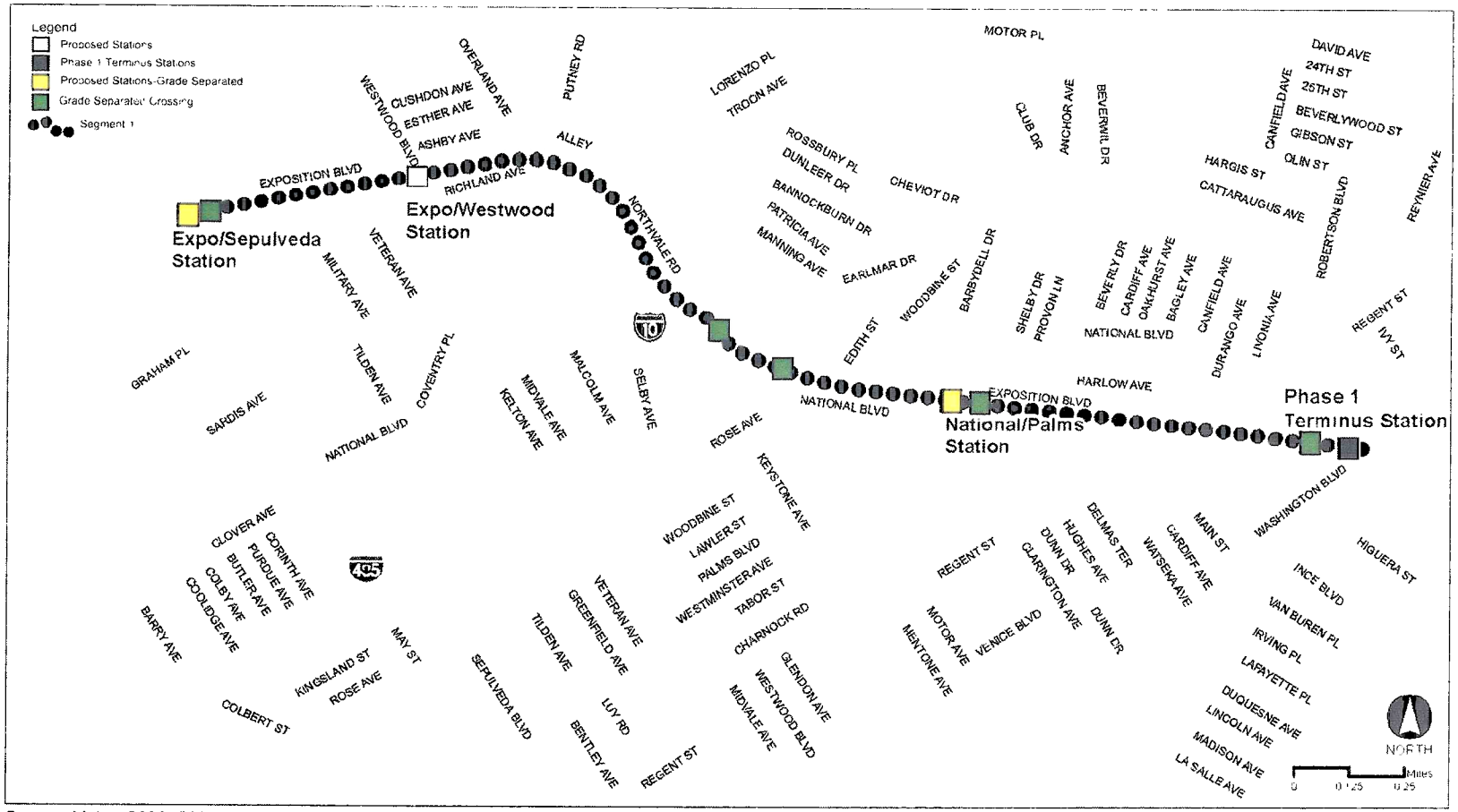
Figure 2.4-1 Project Map—By Segment

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

ATTACHMENT 1

ATTACHMENT 2

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



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-2 Segment 1 Expo ROW

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

ATTACHMENT 2

ATTACHMENT 3

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

Source: Metro, 2008; DMJM Harris, 2008

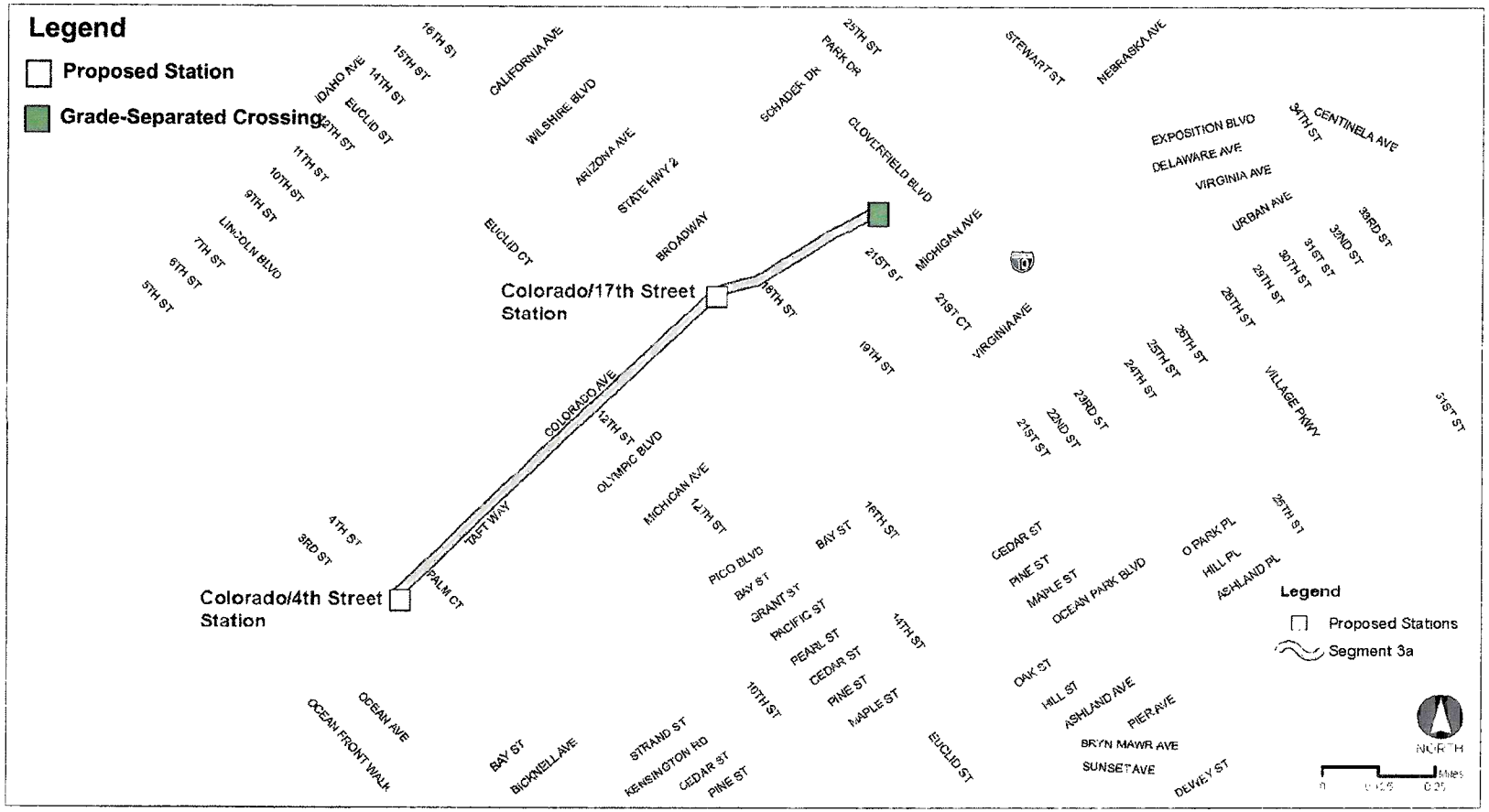
Figure 2.4-4 Segment 2: Sepulveda to Cloverfield

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

ATTACHMENT 3

ATTACHMENT 4

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



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-6 Segment 3a: Colorado

Source: 9AR 00271-74

ATTACHMENT 4

ATTACHMENT 5

Redacted copy of Tab 3, pages AR 00016-17 of the Partially Certified Record of Proceedings lodged in the Superior Court for the County of Los Angeles and on file herein reproducing, in relevant part, Subsection 1.4 of Exposition Corridor Transit Project Phase 2 Findings of Fact

REDACTED

1.4 Identification of Environmental Setting for Use in Determining Significance of Effects of the Project

The CEQA Guidelines require environmental impact reports to include a description of the physical environmental conditions in the vicinity of the project and that "[t]his environmental setting will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. (CEQA Guidelines, Section 15125, subd. (a), emphasis added). The CEQA Guidelines also provide that an "EIR shall discuss any inconsistencies between the proposed project and applicable general plans" and "[w]here 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." (CEQA

Guidelines, Section 15125 subd.(d) and (e)). The Guideline quoted above does not mandate that a frozen snapshot of existing conditions be used.

As the Court of Appeal stated, "[t]he agency has the discretion to resolve factual issues and to make policy decisions. If the determination of a baseline condition requires choosing between conflicting opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence. (*Save Our Peninsula Open Space Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120).

Consistent with the CEQA Guidelines, the No-Build Alternative is defined to consist of the existing transit services as well as improvements explicitly committed to be constructed by the year 2030 as defined in the Southern California Association of Governments (SCAG) Regional Transportation Plan (RTP).[3] Accordingly, this No-Build Alternative includes only transit service and roadway construction projects that are programmed and funded and would be expected to occur, independent of and regardless of whether one of the proposed Transportation Systems Management (TSM) or LRT Alternatives is approved. Of the various programmed construction improvements contained in the SCAG RTP, only the I-405 Widening (I-405 from the I-10 to US 101) and the Overland Avenue Bridge Widening (over I-10) involve potential changes to the physical environment of the Expo Phase 2 project study area.

In accordance with the CEQA Guidelines, the EIR evaluates the impacts of the project alternatives against existing conditions. The EIR also evaluates projected future traffic and air quality conditions with and without the project. This is necessary so that the public and the decision makers may understand the future impacts on traffic and air quality of approving and not approving the project. In this manner, the EIR evaluates both the impact of the project alternatives against current environmental conditions, as well as comparing the impacts of the project against projected future traffic and air quality conditions.

The evaluation of future traffic and air quality conditions utilizes adopted official demographic and projections for the project area and region. Past experience with the adopted demographic projections indicate that it is reasonable to assume that the population of the project area and the region will continue to increase over the life of the project. The projected population increases will, in turn, result in increased traffic congestion and increased air emissions from mobile sources in the project area and in the region.

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 finds that the existing physical environmental conditions (current population and traffic levels) do not provide a reasonable baseline for the purpose of determining whether traffic and air quality impacts of the Project are significant. 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] 2008 Regional Transportation Plan: Making the Connections, adopted May 2008.

ATTACHMENT 6

Redacted copy of Tab 3, pages AR 00054-55 of the Partially Certified Record of Proceedings reproducing, in relevant part, the findings made, and text regarding mitigation measure MMTR-4 in Section 4.1 of Exposition Corridor Transit Project Phase 2 Findings of Fact

4. LESS-THAN-SIGNIFICANT ENVIRONMENTAL EFFECTS; MITIGATION INCORPORATED

The Authority finds that as discussed below, the following potentially significant impacts would be reduced to less than significant with implementation of the corresponding Mitigation Measures of the Expo Phase 2 Project. Explanations below apply to the RPA and consider all design options.

4.1 Transportation/Traffic

4.1.1 Spillover Parking

Based on the ridership and mode of transit access forecasts at the proposed RPA stations, the demand for parking would exceed the proposed supply at several stations, potentially resulting in some parking demand spilling over into adjacent neighborhoods. Spillover parking in the neighborhoods around the stations can be expected around all of the stations except the Sepulveda/National Station. If a parking shortage is determined to occur due to parking activity of LRT patrons, the Authority has adopted measures (described below and in the FEIR) committing the Authority to coordinate with Metro to reduce the effect on impacted neighborhoods. For those locations where station spillover parking cannot be addressed through implementation of a neighborhood permit program, alternative mitigation requirements include time-restricted, metered, and shared parking arrangements. Effects would be mitigated to a less-than-significant level.

4.1.2 On-Street Parking Capacity

In Segment 3a (Colorado), reconstruction of Colorado Avenue to accommodate the RPA would eliminate on-street parking on the south side of the street between 14th Street and Lincoln Avenue and on-street parking on either the north or south side of the street between Lincoln Avenue and 4th Street. Field surveys determined moderate to intensive use of these spaces, and little excess capacity on adjacent side streets. As a result, replacement parking would have to be accommodated with various options along Colorado Avenue. Mitigation has been proposed to address this impact.

4.1.3 Findings

The Authority adopts Finding 1 and Finding 2. The Authority adopts the following mitigation measures to reduce potentially significant impacts related to station spillover parking and loss of on-street parking to less-than-significant levels.

- **Mitigation Measure MM TR-4** In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service and shall monitor the availability of parking monthly for six months following the opening of service. If a parking shortage is determined to have occurred (i.e., existing parking space utilization increases to 100 percent) due to the parking activity of the light-rail transit (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. The guidelines established by each local jurisdiction for the assessment of permit parking programs and the development of community consensus on the details of the permit program shall be followed. Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs within one-quarter mile of the stations and for the costs of the signs posted in the neighborhoods. 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 implementation of a permit 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.

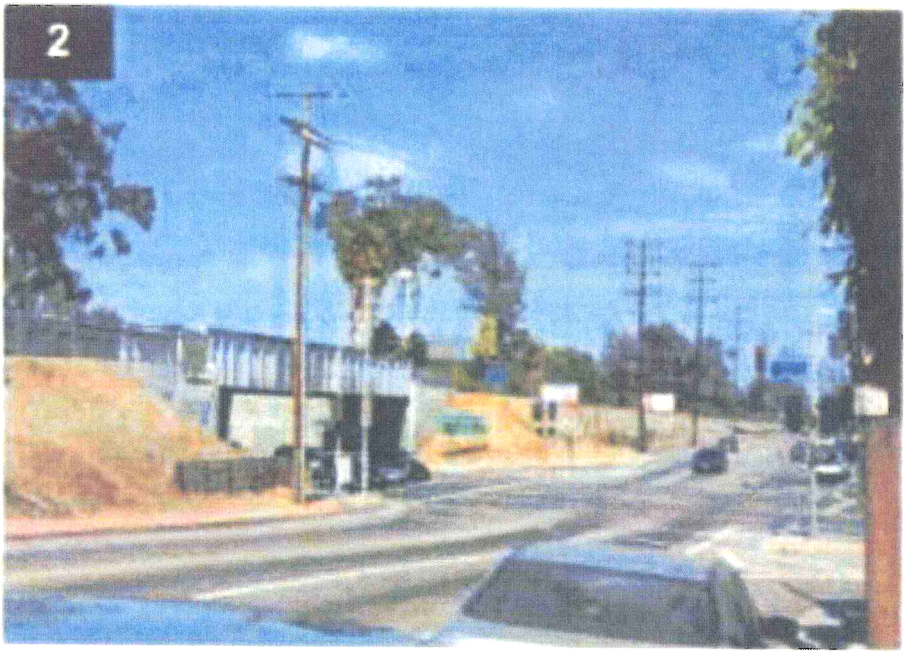
REDACTED

ATTACHMENT 7

Exhibit E to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Image of Expo Blvd. National-Palms Crossing

EXHIBIT E

PHOTOGRAPH OF LRT CROSSING AT
EXPO BOULEVARD AND NATIONAL/PALMS



Exposition Blvd., West of National/Palms, South of I-10, Looking East

SOURCE: 58 AR 08210

ATTACHMENT 8

Exhibit F to Respondents' Opposition Brief filed in the Court of Appeal, Second Appellate District, B232655 – Comparison of Project Intersections that Worsen to E of F in 2030

COMPARISON OF LEVEL OF SERVICE FOR PROJECT INTERSECTIONS THAT WORSEN FROM CURRENT LOS D OR BETTER TO LOS E OR F IN YEAR 2030 NO-BUILD CONDITIONS*

Segment No.	Intersection No.	Intersection	AM/PM	Current LOS	No Build LOS 2030	LRT LOS 2030	Change in Delay (sec.)
3a	15	20th Street/Olympic Blvd.	AM	D	E	E	0.8
2	28	Bundy Drive/Pico Blvd.	AM	C	E	E	-2.2
2	29	Barrington Ave./Pico Blvd.	PM	D	E	E	-3.0
1	52	Westwood Blvd./ Exposition Blvd. (s)	AM	C	E	B	-30.1
1	69	Manning Ave./I-10 WB/ National Blvd.	PM	D	E	E	-1.1

*Source: 72 AR 10706-08 [FEIR Table 2-1, Existing Study Area Intersection Conditions], 10757 [FEIR Table 5-10, Segment 1 Study Area Intersections—Year 2030 LOS (AM Peak Hour)], 10759-60 [FEIR Table 5-11, Segment 1 Study Area Intersections—Year 2030 LOS (PM Peak Hour)], 10770 [FEIR Table 5-16, Segment 2 Study Area Intersections—Year 2030 LOS (AM Peak Hour)], 10778 [FEIR Table 5-22, Segment 3a Study Area Intersections—Year 2030 LOS (AM Peak Hour)].

EXHIBIT 1

304006_2.DOC

PROOF OF SERVICE

The undersigned declares:

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

On October 9, 2012, I served the foregoing **ANSWER BRIEF ON THE MERITS OF RESPONDENT EXPOSITION METRO LINE CONSTRUCTION AUTHORITY** on parties to the within action as follows:

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

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

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

Executed on October 9, 2012.

Leanne Boucher

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