Case No. S202828

IN THE SUPREME COURT
STATE OF CALIFORNIA

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

v.

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

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

Second District Court of Appeal, Division 8 (Case 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 (Case No. BS125233)
Honorable Thomas J. McKnew, Jr.

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Expo Phase 2 Project ("Expo Line") is a much-needed light rail transit line that will serve the Westside of Los Angeles. The Expo Line was approved by the Exposition Metro Line Construction Authority ("Expo Authority") after many years of careful planning in coordination with the Los Angeles County Metropolitan Transportation Authority ("Metro") and the cities through which the line will traverse (Los Angeles, Santa Monica, Culver City).

The Expo Line is part of Metro's Long Range Transportation Plan (AR 00234). Metro is the planner, coordinator, designer, builder, and operator of much of the transportation and transit network in Los Angeles County. Metro therefore has vast experience in planning and analyzing transit projects. Because of the nature and scale of the types of projects that Metro plans, builds, and operates, Metro must necessarily look to the future when planning and analyzing projects. Because these projects take years to plan, fund, and build, they will never operate under the present-day conditions, or the conditions existing at the time environmental review under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.) commences. Furthermore, the types of large-scale transit and transportation projects developed by Metro are not meant to address present-day transit needs. Instead, Metro must look to the future and plan a transit and transportation network that serves the

population and employment growth that is certain to come. For these reasons, it is logical and appropriate that agencies like Metro and Expo Authority would compare a project's operational impacts against the conditions that will exist when the project is expected to be fully operational. In this case, there is substantial evidence supporting Expo Authority's use of conditions in 2030 as the baseline to measure the Project's traffic, air quality, and climate change impacts.

Furthermore, having worked with Metro and the cities of Los Angeles, Culver City, and Santa Monica, to develop parking mitigation, there is substantial evidence that the proposed mitigation for spillover parking impacts will reduce any potential impacts to less-than-significant levels. For these reasons, Expo Authority's Environmental Impact Report ("EIR") for the Expo Line should be upheld.

STATEMENT OF ISSUES

This case presents the following two questions:

1. When a project is not expected to be completed and operational for many years, does CEQA prohibit an agency from measuring operational impacts against the conditions that will exist when the project is in operation? Stated another way, does an agency abuse its discretion by comparing a project's operational impacts against the conditions that will exist when the project is operational?

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2. If there is substantial evidence that a mitigation measure will be implemented by another agency, and that the mitigation measure will be effective to mitigate the particular impact for which it is designed, does an agency abuse its discretion in finding that the impact will be mitigated to a less-than-significant level?

In regard to the first question, what is *not* at issue in this litigation is whether the year 2015 would be a better baseline than 2030 for analyzing impacts. Prior to project approval and the in the Court of Appeal, Petitioner did not argue that 2015 was an appropriate baseline. In fact, in the Court of Appeal, Petitioner argued only that, *as a matter of law*, the Expo Authority was prohibited from using *any* future baseline. Thus, Petitioner has waived any argument that a 2015 baseline – a future baseline – should have been employed in this case. Furthermore, Petitioner has waived any argument that use of a 2030 baseline is not supported by substantial evidence.

STANDARD OF REVIEW

In a CEQA case such as this one, the reviewing court determines whether the respondent public agency prejudicially abused its discretion either by failing to proceed in the manner required by law or because its decision is not supported by substantial evidence. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 392 (*Laurel Heights I*); Pub. Resources Code, §§ 21168, 21168.5.) In determining whether an agency abused its discretion, the "court must adjust its scrutiny to the nature of the alleged defect, depending on whether the

claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*).) If the dispute is predominately one of facts, the Court must uphold the agency's actions if they are supported by substantial evidence. (*Ibid.*) "Substantial evidence" means "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." (CEQA Guidelines, § 15384, subd. (a); see also Pub. Resources Code, §§ 21080, subd. (e)(2), 21082.2, subd. (c).) Unsubstantiated opinion or narrative is not substantial evidence under CEQA. (*Save Our Peninsula Committee. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 122; CEQA Guidelines, § 15384, subd. (a).) Challenges to the scope of the analysis, the methodology for studying an impact, and the reliability or accuracy of the data present factual issues, so such challenges must be rejected if substantial evidence supports the agency's decision as to those matters and the EIR is not clearly inadequate or unsupported." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259 (*Federation*).)

Although Petitioner has tried to couch its arguments as questions of law, subject to de novo review, both issues raised in this litigation are clearly subject to the substantial evidence standard. As set forth below,

numerous cases have held that the agency has discretion to establish the "baseline" for purposes of analysis of impacts. Similarly, Petitioner's challenge to the parking mitigation measure boils down to a question of whether the Expo Authority's determination that impacts will be reduced to a less-than-significant level is supported by substantial evidence.

The Court must presume that the agency complied with the law. (Evid. Code, § 664; *Al Larson Boat Shop, Inc. v. Bd. of Harbor Coms.* (1993) 18 Cal.App.4th 729, 740 (*Al Larson Boat Shop*).) An EIR is presumed adequate (Pub. Resources Code, § 21167.3) and "the party challenging the EIR has the burden of showing otherwise." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158.) Petitioner must show the record contains *no* substantial evidence supporting the disputed conclusions. Petitioner neither carries that burden by pointing only to excerpts of the record favoring its position nor by "[p]ointing to evidence of a disagreement with other agencies." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 (*CNPS v. Rancho Cordova*).) This approach "is not enough to carry the burden of showing a lack of substantial evidence to support the City's finding." (*Ibid.*) A petitioner challenging an EIR "must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal." (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934.)

Even so, the Court does not "'pass upon the correctness' of the EIR's environmental conclusions, but only its sufficiency as an informative document." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564 (*Goleta II*).) A court must uphold the EIR "'if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA." (*El Morro Community Assn. v. California Dept. of Parks and Recreation* (2004) 122 Cal.App.4th 1341, 1349 (*El Morro*).) The Court looks "not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 712.) The Court must uphold a decision supported by substantial evidence even if there is substantial evidence to the contrary. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393.)

As such, in applying the substantial evidence standard, "'the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.'" (*Laurel Heights I, supra,* 47 Cal.3d at p. 393 (quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514 (*Topanga I*)).) The findings of a public agency must "be liberally construed to support rather than defeat the decision under review." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356 (*Topanga II*).) All reasonable doubts must be resolved in favor of the decision. (*Topanga I,*

supra, 11 Cal.3d at p. 514.) A court may not interfere with the agency's discretion regarding the choice of the action to be taken. (See CEQA Guidelines, § 15121, subd. (b) ["the information in the EIR does not control the agency's ultimate discretion on the project"]; *Goleta II, supra,* 52 Cal.3d at p. 576 [the wisdom of approving a project is "a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of local officials and their constituents"].) Accordingly, a court must defer to the agency's determination when supported by substantial evidence. (*Laurel Heights I, supra,* 47 Cal.3d at p. 409.)

ARGUMENT

A. The use of projected future conditions as a baseline can yield the most useful information regarding a project's impacts and is appropriate when supported by substantial evidence.

In enacting and interpreting CEQA, both the Legislature and the Supreme Court have emphasized that resources expended in the environmental review process should be directed towards mitigating adverse environmental impacts, rather than producing uninformative studies. For example, Public Resources Code section 21003 declares that:

> All persons and public agencies involved in the environmental review process [are] responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.

(Pub. Resources Code, § 21003, subd. (f).)

While highlighting a concern for procedural efficiency, this statutory language explicitly emphasizes the importance of mitigating significant environmental effects. The statute thus suggests that, in the Legislature's view, money directed towards actually preventing or reducing significant environmental damage may be better spent than money spent solely on what this Court has called "generat[ing] paper." (*Goleta II*, *supra*, 52 Cal.3d 553, 564 ["[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind" (quoting *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283)]; see also *Laurel Heights I, supra,* 47 Cal.3d at p. 393.)

The Legislature has also emphasized CEQA's practical side:

> 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.

(Pub. Resources Code, § 21083.1; see also *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 689 (*San Franciscans*).) Accordingly, the courts have repeatedly rejected interpretations of CEQA that create more unnecessary work for the agency but do nothing to protect the environment. (See, e.g., *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1469

["courts are statutorily prohibited from interpreting CEQA 'in a manner which imposes procedural or substantive requirements beyond those explicitly stated in' CEQA or its implementing guidelines"]; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145 [rejecting an expansive interpretation of CEQA "in light of the legislative admonition that the courts should not interpret CEQA to impose 'procedural or substantive requirements'" not explicitly stated in the statutes or Guidelines]; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 36 [same].)

In the trial court and Court of Appeal, Petitioner argued that the Expo Authority violated CEQA by comparing the impacts of the project against a future baseline. Citing the cases of *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 (*Sunnyvale West*) and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 (*Madera Oversight*), Petitioner argued that, as a matter of law, Expo Authority was prohibited from using any baseline that would exist after the project approval.[1] But as discussed

[1] / Now, in its Opening Brief on the Merits, Petitioner argues that a future baseline would be acceptable, as long as that baseline is the opening day of the project. Petitioner never exhausted its administrative remedies as to this argument and has waived this argument by failing to raise it in the courts below.

below, such a bright-line rule is inappropriate for analyzing the operational impacts of long-term projects such as the transit line at issue here.

In this case, using the "existing conditions" as a CEQA baseline would not generate any information of practical value. Insisting on using the conditions that exist at the time environmental review is commenced would result in an analysis of impacts based on conditions that will not actually exist at the time the project is in operation. At the time of environmental review for the Expo Line, the project was still years away from being fully funded and built, and many years away from being fully operational. Thus, analyzing such a project's theoretical operational impacts on present environmental conditions, as the holding in *Sunnyvale West* would require, would not provide the public or decision-makers with any information about the Expo Line's impacts on the environment in which it will actually operate. (See Pub. Resources Code, § 21060.5 ["Environment" means "the physical conditions that exist within the area *which will be affected by a proposed project*"] (italics added).)

Sunnyvale West and *Madera Oversight* represent a departure from a long line of cases emphasizing *real* environmental analysis over meaningless environmental review. As applied to major infrastructure projects, designed to serve the future population, the requirement to compare operational impacts to existing conditions yields no practical information. It therefore does not serve CEQA's purposes of informed

decision-making and mitigation of environmental impacts. Furthermore, although the *Sunnyvale West* court cited this Court's opinion in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (*Communities for a Better Environment)*, as the basis for its prohibition on the use of a future baseline, *Communities for a Better Environment* does not support such a rule.

1. The CEQA Guidelines and California Supreme Court precedent establish that an agency's selection of a baseline is an exercise of the agency's discretion and will be upheld if supported by substantial evidence.

This Court's decision should be guided fundamentally by the question of which approach best serves CEQA's informational purpose. A rigid insistence on a bright-line rule requiring agencies to use existing conditions, or time of approval, or even commencement of the project under all circumstances for all projects would frequently fail to serve that purpose. Such a bright-line rule would force the environmental review for many projects to ignore reality and instead construct a hypothetical scenario in which a project that will not be built or be fully operational for many years is compared to existing conditions. There is no such absolute rule in CEQA or the cases interpreting CEQA. Rather, CEQA and the decisions interpreting CEQA have emphasized the practicality of the statute, and have rejected attempts to impose requirements that do not provide meaningful

information regarding environmental impacts. As this Court has recently explained:

> The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 391-392.) For the EIR to serve these goals *it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed*, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made.

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450 [emphasis added].)

In the case of CEQA review for a major transit project like the Expo Line, comparing the operational impacts of the project against the conditions as they exist at the time a notice of preparation ("NOP") is released, or the EIR is published, or even when the project is approved, would provide no practical information. Such projects will not operate under the conditions existing at the time an NOP or EIR is issued or even soon after the project is approved; nor are they designed to. These projects take many years to construct, and are designed to accommodate future population, employment, and travel demand. When evaluating such a project's operational impacts, it is therefore logical to compare those impacts against the conditions under which the project will be operating.

As discussed below, the holding in *Sunnyvale West* so heavily relied upon by Petitioner adds unnecessary procedural obligations to the CEQA review for such projects. As further discussed below, it also departs from a long line of cases establishing that agencies have flexibility in establishing the baseline and that such determinations are subject to the substantial evidence standard of review. It may be no surprise then, that the Sixth District Court of Appeal rather quickly departed from the rigid rule it pronounced in *Sunnyvale West* and returned a short time later, in *Pfeiffer v. City of Sunnyvale* (2011) 200 Cal.App.4th 1552, to the long-held understanding that such determinations are indeed flexible and should be afforded substantial deference as long as they are supported by substantial evidence.

Particularly for long-range transit and transportation planning, it is usually necessary to rely on future conditions, supported by substantial evidence demonstrating the reasonable certainty of those conditions, to provide the most useful information to agency decisionmakers and the public about the ultimate effects of a proposed transit project such as the one in this case. Far from Petitioner's dismissive characterization of these conditions as merely "hypothetical" or "illusory", the record in this case demonstrates that population growth and concomitant increases in vehicle traffic and air pollution are *certain* to occur, and therefore that the project would be operating in significantly more congested conditions at the

transportation agencies' planning horizon in 2030. Furthermore, the record shows that all of the future traffic infrastructure improvements assumed in the analysis are planned and approved, in place, or under construction. (AR 72:10718-19; AR 476:32006, 32079; AR 509:33216, 33233-33234.) As recognized by the Court of Appeal below, there can be no legitimate contention that conditions would remain *unchanged* over the next 20 years from the time of initiation of project analysis, through project approval and commencement of construction, to full operation of the project. (See, e.g., AR 8:00218-234.) Therefore, using the 2030 baseline was entirely appropriate for this EIR, as it provided the agencies and the public with a conservative estimate of potential project impacts as measured against that baseline.

a. An agency's choice of baseline is inherently a factual question, subject to the substantial evidence standard of review.

Petitioner's ever-evolving arguments now paint the selection of a baseline as a procedural question of law, to which the Court should afford no deference. While it is not surprising that Petitioner would try to avail itself of a potentially more favorable review posture, such position is not supported by long-standing case law, including this Court's recent decision in *Communities for a Better Environment*. This Court should uphold the reasoning of the Court of Appeal below in this case and the recent decision of the Sixth District in *Pfeiffer*, *supra*, 200 Cal.App.4th 1552, both of which

faithfully applied this Court's holding in *Communities for a Better Environment*, stating the obvious point that an agency's choice of the proper point in time at which to set the baseline for comparison of a project's potential impacts is a factual determination subject to the substantial evidence standard of review. [2] (See *Pfeiffer, supra,* 200 Cal.App.4th at pp. 1572-1573, relying in large part on *Communities for a Better Environment, supra,* 48 Cal.4th at pp. 327-328.)

Until *Sunnyvale West* was published, there was general agreement amongst CEQA practitioners based upon the precedent discussed herein that agencies had discretion to establish the proper baseline so long as that determination was supported by substantial evidence that the baseline conditions were realistic, and so long as using something other than the existing physical conditions did not serve to minimize the impacts of the project. (See Brief of Amici Curiae Twelve Transportation, Transit, and Water Agencies In Support of Respondents Exposition Metro Line Construction Authority et al., Second District Court of Appeal Case No. B232655, p. 38.) As explained in one treatise often cited by the courts "[n]otably, though, by using the word 'normally,' the Resources Agency

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[2] / Although *Pfeiffer* is extremely relevant here, discussion of that case is noticeably scant in Petitioner's opening brief. Instead, Petitioner mentions it only in passing and then tellingly fails to acknowledge that court's affirmation that the substantial evidence standard of review applies to the agency's selection of a baseline. (Petitioner's Opening Brief ("OB"), pp. 14-15.)

has implicitly recognized that, at least in some circumstances, a "past" or "future" baseline might be appropriate." (Remy, et. al., Guide to CEQA (11th ed. 2006) at p. 199.)

A long line of decisions establishes that determining the baseline is an inherently factual conclusion. As explained by the court in *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99 (*Save Our Peninsula*):

> [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 expert opinions or differing methodologies, it is the function of the agency to make those choices based on all the evidence.

(*Id.* at p. 120.) The issue in *Save Our Peninsula* was whether it was proper for the Draft EIR and Final EIR to present various levels of groundwater pumping as the potential baseline but to leave the determination of which baseline to use until the end of the environmental review process. The court also dealt with what was an obvious attempt to manipulate the baseline to minimize the project's impacts. In language cited by this Court in *Communities for a Better Environment*, the court in *Save Our Peninsula* explained that:

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> [T]he date for establishing the baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. In some cases, conditions closer to the date the project is approved are more relevant to a determination whether the project's impacts will be significant. [Citation.] For instance, where the issue involved an impact on traffic levels, the EIR might necessarily take into account the normal increase in traffic over time. Since the environmental review process can take a number of years, traffic levels as of the time the project is approved may be a more accurate presentation of the existing baseline against which to measure the impact of the project.

(*Save Our Peninsula*, *supra*, 87 Cal.App.4th at pp. 125-126.)

The *Save Our Peninsula* decision thus established the flexibility agencies have in determining the proper baseline. Nothing in *Save Our Peninsula* suggests that this analysis would change if the agency had substantial evidence that a baseline set in the future was the most appropriate basis for comparing operational impacts.

Fat v. County of Sacramento (2002) 97 Cal.App.4th 1270 (*Fat*) also confirms that the question of the appropriate baseline is subject to the substantial evidence standard of review. (*Id.* at p. 1278 ["[t]he central issue remains whether there is substantial evidence to support County's decision *not* to deviate from the norm in selecting [existing conditions] as the baseline"].) In *Fat*, the issue was whether to set the baseline prior to the time of the initial study. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 (*San Joaquin Raptor*), also

confirms that the determination of the proper baseline is subject to the substantial evidence standard of review.

These cases all preceded the Supreme Court's decision in *Communities for a Better Environment*, discussed in greater detail below. If there was any question as to whether the baseline is subject to the substantial evidence standard, this Court had the opportunity to address it in the *Communities for a Better Environment* decision. But, the Court upheld these cases on the issue of the standard of review. (*Communities for a Better Environment, supra,* 48 Cal.4th at pp. 320-323, 327-328.) And because the Court was not addressing the issue of a projected future baseline, there is no basis for applying the language in *Communities for a Better Environment* to preclude, as a matter of law, the use of such a baseline where it is supported by substantial evidence.

The factual nature of baseline selection was confirmed even more recently in *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 (*Cherry Valley*). In that decision, the court emphasized that establishing the proper baseline for a comparison of impacts is inherently a factual question, subject to the substantial evidence standard of review. (*Id.* at p. 337.) The EIR at issue in *Cherry Valley* analyzed the impacts of a specific plan. The owners of the property had an adjudicated right to pump 1,484 acre-feet of water per year, and there was evidence that they had pumped close to this amount over the years

(although there was no evidence they had ever pumped the full amount). In recent years, agricultural activities had ceased, and in the year prior to EIR preparation, the owners had pumped only 50 acre-feet. The project opponents argued the baseline for water supply impacts, which used the 1,484 acre-feet entitlement rather than the conditions during CEQA review, was improper.

In rejecting the opponent's baseline argument, the *Cherry Valley* court cited *Communities for a Better Environment* and *Save Our Peninsula* to once again reiterate that the determination of the baseline is an inherently factual determination, and therefore, the agency has discretion, subject to review under the substantial evidence standard, to establish the baseline. In doing so, the court distinguished cases like *Communities for a Better Environment*, *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, and *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350 (*EPIC*) in which the courts had struck down the use of "hypothetical allowable conditions" as the baseline. The problem in those cases was that the use of such "hypothetical allowable conditions" was erroneous because it "distorts a project's true environmental impacts and may also lead to the failure to consider feasible alternatives and mitigation measures." (*Cherry Valley*, *supra*, 190 Cal.App.4th at pp. 339-340.) In each of the cases, there was no evidence that the baseline used presented a realistic scenario in which the

project's impacts would occur, and the use of such a hypothetical baseline minimized the impacts of the project.

But that rationale would not apply to a long-term transportation or transit project such as the Expo Line because the use of a projected future baseline, when supported by substantial evidence, *does* present a realistic scenario in which the project will actually operate. Here it presents a more realistic scenario for assessing the significance of the Expo Line's operational impacts on traffic and air quality than a comparison to conditions existing at the time of preparation of the EIR, or even commencement of the project, as lately argued by Petitioner, because despite its projected 2015 opening date, the Expo Line will take several years to develop its full ridership capacity and usage, and meanwhile, population and traffic congestion are certain to grow, changing the conditions in which the project will operate for the worse. (AR 8:00218-34; AR 34:01063; see also AR 72:10738-39.) This is not a situation where the use of a projected future baseline is merely hypothetical or illusory; nor would it serve to minimize impacts.

2. *Communities for a Better Environment* did not reject the use of a future baseline; the Court should reject the rigid rule propounded in *Sunnyvale West* and *Madera Oversight* as it conflicts with the Court's guidance in *Communities for a Better Environment*.

The Court's opinion in *Communities for a Better Environment* did not directly address the question of whether it is ever appropriate to use a

projected future baseline. At issue in *Communities for a Better Environment* was a permit approved by the South Coast Air Quality Management District (District) for a ConocoPhillips refinery project. The project involved replacing or modifying components of an existing refinery, installing new components, and substantially increasing operations of an existing cogeneration plan and four boilers. In approving a negative declaration for the project, the District had used the maximum permitted operations at the existing refinery as the baseline, *despite evidence that the refinery never operated at such levels*. Thus, the District determined that even under a "worst-case" scenario, the emissions from the project would not create a significant impact because those emissions would be within levels previously permitted. (*Communities for a Better Environment*, *supra*, 48 Cal.4th at pp. 317-318.) The Court held:

> We conclude neither the statute of limitations, nor principles of vested rights, nor the CEQA case law on which ConocoPhillips and the District rely justifies employing as an analytical baseline for a new project the maximum capacity allowed under prior equipment permits, rather than the physical conditions actually existing at the time of analysis.

(*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 316.)

The Court was not addressing a situation where the lead agency had used a projected future baseline that was based on projected changes in the environment that are well-supported by substantial evidence, and therefore did not reject such an approach. Rather, the Court rejected the use of

maximum permitted (but never achieved) operations of the existing plant as the baseline:

> [W]e conclude the District's choice of a baseline for NOx emissions was inconsistent with CEQA and the CEQA Guidelines; the District should have looked to the existing physical conditions, rather than to the maximum permitted operation of the boilers.

(*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 319.)

In reaching its determination, the Court, after citing CEQA Guidelines, § 15125, subdivision (a), explained that a "long line of Court of Appeal decisions holds, in similar terms, that the impacts of a proposed project are ordinarily compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework." (*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 321.) The Court went on to discuss cases in which an agency had used the hypothetical build-out of an existing plan as the baseline to compare the impacts of a new plan. (*Id.* at p. 321, fn. 6.) Doing so minimized the impacts of the new plan. The Court also cited cases in which petitioners had argued that the agency should use a baseline *prior* to existing conditions to account for existing, but potentially illegal or unpermitted, development. (*Id.* at p. 321, fn. 7.)

In the cases cited by the Court (and relied upon by Petitioner here), the lead agency was either using a hypothetical baseline to minimize the impacts of the project, or project opponents were advocating for use of a

prior baseline to maximize the impact. In each of those cases, the courts rejected the manipulation of the baseline to achieve a purpose inconsistent with CEQA. The *Communities for a Better Environment* decision is not fairly read as rejecting, under all circumstances, the use of a projected future baseline, particularly when the use of such a baseline yields the most accurate assessment of impacts and best fulfills the informational purposes of CEQA.

The Court explained, "[s]imultaneous maximum operation, then, is not a realistic description of the existing conditions without the [project]." (*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 322.) This is the basis for the Court's statement that:

> An approach using hypothetical allowable conditions as the baseline results in "illusory" comparisons that "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts," a result at direct odds with CEQA's intent.

(*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 322.)

In other words, the problem was that the maximum permitted operations were not a realistic scenario for comparison of environmental impacts, and the use of that illusory scenario resulted in the minimization of impacts.[3] The Court further explained:

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[3] / In contrast to the circumstances in *Communities for a Better Environment*, there is nothing illusory about increases in population and employment growth that transportation and transit agencies are required to

> 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 more realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, *supra*, 40 Cal.4th at p. 435.)

(*Communities for a Better Environment*, *supra*, 48 Cal.App.4th at p. 328.)

Petitioner repeatedly cites this passage of *Communities for a Better Environment* to highlight the language regarding "existing physical conditions," arguing that the Court therein *expressly* limited agency discretion to use a projected future baseline. (OB, at pp. 12, 18.) But as shown above, this is simply incorrect. The Court was *not* deciding whether it is ever appropriate to use a projected future baseline. The highlighted language does, however, clearly establish that determination of the proper baseline is a factual determination, which the agency has the discretion to decide, and is therefore reviewable under the substantial evidence standard.

a. The use of a 2030 baseline is not the sort of "illusory" or "hypothetical" baseline this Court rejected in *Communities for a Better Environment.*

The circumstances here are entirely distinguishable from those in this Court's decision in *Communities for a Better Environment, supra,* 48 Cal.4th 310, where this Court recognized the obvious risk of downplaying

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use in their evaluation of transit improvements, and that form the basis for projections of future environmental conditions.

or hiding the proposed action's impacts through the use of the *truly* hypothetical permitted maximum pollutant emissions as the analytical baseline. There is nothing hypothetical or illusory about Metro's Travel Demand Model, which formed the bases for the EIR's 2030 baseline condition and the analysis of the Expo Line's impacts to those conditions. (11 AR 346.) The Metro Travel Demand Model was updated and refined specifically for use in the study of the Expo Line. (*Ibid.*)

As explained, in the EIR travel forecasting models, such as the Metro Travel Demand Model, are mathematical models that "describe the relationships between land use and demographics, causes of personal travel, and the resultant amount and location of that travel." (11 AR 347.) "These models are statistically derived from observations of individual travel choices obtained through extensive surveys of a region's trip-making characteristics of travelers and their households." (*Ibid.*) The Metro Travel Demand Model receives its demographic inputs from the Southern California Association of Government's Regional Travel Demand Model.[4]

[4] / SCAG is the federally designated Metropolitan Transportation Planning Organization ("MPO") for the six-county region that includes the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, and Ventura. As an MPO, SCAG is required to adopt and periodically update a long-range transportation plan and a regional transportation plan. (329 AR 27402.) Thus, SCAG is an expert agency in developing population and transportation demographics.

The Metro Travel Demand Model predicts future travel demand based upon several input data items that include:

- SCAG forecasts of regional growth in population and employment in the region;
- SCAG forecast changes in the socio-demographic characteristics of travelers; and,
- Future characteristics of the roadway and transit systems including travel times, costs, and system capacity reflective of the planned system (2030 conditions). (*Ibid.*)

To estimate the more localized traffic impacts associated with the Expo Line, intersection travel volume projections were developed using the following process:

- Development of future base traffic volumes reflecting 2005-2030 background traffic growth, and changes due to auto trip reduction and other shifts in traffic as a direct result of the Expo Line;
- Development of additional peak hour auto access trips to stations related to station parking trips and drop-off trips; and,
- Estimation of trip diversions due to cross-street and/or left-turn closures and their potential impact on the study area intersection turning movement volumes. (*Ibid.*)

There is nothing "hypothetical" or "illusory" about the projected 2030 baseline. It was developed based on the travel demand model of an expert agency (Metro), which included demographic inputs from another expert agency (SCAG), and that was specifically tailored to address the impacts of this project. Thus, unlike the "hypothetical" maximum permit levels used as the baseline in the *Communities for a Better Environment* case, the baseline for the Expo Line EIR is based on substantial evidence.

3. CEQA does not prohibit the use of a projected future baseline, nor does the previous case law interpreting CEQA.

The bright-line rule regarding the use of a projected future baseline for CEQA review used by the court in *Sunnyvale West* prohibits the most practical method of identifying and isolating the significant environmental effects of complex, long-term planning projects. The CEQA Guidelines acknowledge that there is flexibility in determining the baseline condition. Section 15125, subdivision (a), explains that the baseline will "normally" consist of conditions existing as of the time of the NOP for an EIR:

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

Similarly, CEQA Guidelines section 15126.2, subdivision (a) provides that:

> In assessing the impact of a proposed project on the environment, the lead agency should *normally* limit its examination to changes in the existing physical condition in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time the environmental analysis is commenced. (Emphasis added.)

This Court also recognized, in *Communities for a Better Environment, supra,* 48 Cal.4th 310, that use of the word "normally" establishes that agencies have flexibility in setting the baseline, explaining:

> 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.)

Sunnyvale West interprets this language from *Communities for a Better Environment* as setting an absolute limit on how far in the future the baseline can be set. The Sixth District Court of Appeal held that, as a matter of law, a lead agency does not have "carte blanche to select the condition on some future, post-approval date as the 'baseline' so long as it acts reasonably as shown by substantial evidence." (*Sunnyvale West*, *supra*, 190 Cal.App.4th at p. 1379.) This was so even for a project that wasn't expected to be completed for several years, and, therefore, the operational impacts would not occur until several years later. The *Sunnyvale West* court explained "nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval." (*Sunnyvale West*, *supra*, 190 Cal.App.4th at p. 1380.) Without adding any further analysis, the court in *Madera Oversight*, *supra*, 199 Cal.App.4th 98, applied the holding in *Sunnyvale West* to a residential project. But nothing in *Communities for a Better Environment* suggests this Court established such a limit. Rather, the Court emphasized flexibility, supported by substantial evidence.

Petitioner urges the Court to adopt *Sunnyvale West*'s rigid view of CEQA Guidelines section 15125 and the term "normally" in a way that would, under circumstances like those for the Expo Line, potentially result in either meaningless analysis or mask the disclosure of reasonably foreseeable impacts. Petitioner's insistence on the use of a baseline set well prior to the operation of the first train carrying people on the Expo Line would not provide the kind of useful information to the public and agency decisionmakers that CEQA intends. As the Court of Appeal reasonably noted, "[a]n 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." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2012) 205 Cal.App.4th 552; Opinion, p. 15.) Petitioner fails to ever explain what, if anything, the agency's decisionmakers would be expected to do with such information if it were provided. Certainly it would be wasteful or even impact-causing in and of itself to require mitigation for these anachronistic and truly "hypothetical" impacts disclosed in such a fashion. The fundamental purpose of CEQA is that agencies disclose the significant impacts of the *project under review* and *feasible* measures to mitigate the significant impacts *of the project.* These fundamental purposes are not advanced by the hollow, paper-shuffling exercise that Petitioner's view, if adopted, would require.

This result cannot be the one that CEQA's informational purpose is intended to create. Rather, the Court should uphold the well-established interpretation that reserves to agencies their discretion, informed by the facts, circumstances, and substantial evidence surrounding each individual project, to select the baseline that best serves CEQA's purpose.

a. The same court that decided *Sunnyvale West* has expressly held that agencies have discretion to establish a future baseline where that choice is supported by substantial evidence.

The same court that decided *Sunnyvale West* quickly clarified that the determination of the baseline is an inherently factual determination that the lead agency has discretion to decide, and therefore, the appropriate standard of review is the substantial evidence standard. (*Pfeiffer*, *supra*, 200 Cal.App.4th 1552.) In *Pfeiffer*, the court also upheld the use of a projected future baseline. The project at issue in *Pfeiffer* was a hospital expansion. The traffic analysis in the EIR used a traffic analysis methodology indistinguishable to any material extent from the methodology used for the Expo Line. The *Pfeiffer* traffic study used a traffic demand model similar to the Metro Travel Demand Model used by the Expo Authority. The traffic study used the following traffic data and growth projections: existing conditions, "background" conditions, project conditions, and cumulative conditions (year 2020). (*Id.* at p. 1571.) The City's significance determinations were based on a comparison of the project scenario to the

"background" conditions. The "background" conditions included "[e]xisting peak-hour volumes multiplied by a growth factor plus traffic from approved but not yet constructed developments in the area. The traffic growth factor was developed based on the City of Sunnyvale's travel demand forecasting model." (*Ibid.*) In other words, the EIR's traffic baseline was a future condition that included existing traffic *and* traffic expected due to projected growth and future development. This is precisely the methodology reflected in Metro's Travel Demand Model and applied by the Expo Authority here. Like the methodology approved in *Pfeiffer,* the Expo Line traffic study here started with existing traffic levels in the Expo Line area, calculated a growth in traffic based on the official population and employment projections, and then calculated future traffic conditions in 2030 if the Expo Line is not built and if the Expo Line is built. In this fashion, the Expo Line traffic study identified the impacts *of the project* so that the Expo Authority could then identify and adopt feasible measures to mitigate the significant traffic impacts *of the project.*

In reaching the determination that it was proper to use a projected future baseline, the *Pfeiffer* court turned to *Communities for a Better Environment* and *Save Our Peninsula, supra,* 87 Cal.App.4th 99, discussed above, that holds that selecting an appropriate baseline is inherently a factual determination that agencies have the discretion to make. In rejecting

the petitioner's challenge to the traffic baseline, the *Pfeiffer* court explained:

> [A]ppellant's contention that a traffic baseline is limited to existing conditions lacks merit because, as we have discussed, *the California Supreme Court has instructed that predicted conditions may serve as an adequate baseline where environmental conditions vary*. "'[T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods.' [Citation]." (*Communities for a Better Environment*, *supra*, 48 Cal.4th at pp. 327-328.) Here, there was 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*. Moreover, appellants overlook the fact that the EIR included existing conditions, based on actual traffic counts, in its analysis of traffic impacts.

(*Pfeiffer*, *supra*, 200 Cal.App.4th at p.1572 [emphasis added].)

The *Pfeiffer* court went on to explain that "this court acknowledged in *Sunnyvale West* that future conditions may be considered in determining a proposed project's impacts on the environment." (*Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1573.) Because *Pfeiffer* was issued after *Sunnyvale West*, *Pfeiffer* should be persuasive, rather than *Sunnyvale West*. "As a general rule, where there are two or more conflicting decisions rendered by a court or by courts of equal dignity the decision last rendered should prevail." (16 Cal.Jur.3d (2002) Courts, § 297; *Kenney v. Antioch Live Oak School Dist.* (1936) 18 Cal.App.2d 226, 231; *In re Lane* (1962) 58 Cal.2d 99, 105 ["It is an established rule of law that a later decision overrules prior decisions

which conflict with it whether such prior decisions are mentioned and commented upon or not."].)

The *Pfeiffer* court distinguished *Sunnyvale West* on the basis that in *Pfeiffer*, "the traffic baselines included in the EIR were not limited to project traffic conditions in the year 2020, but also included existing conditions and the traffic growth anticipated from approved but not yet constructed developments." (*Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1573.) That rationale would support the EIR in this case, where the EIR set forth the existing traffic conditions and then used modeling of expected growth in traffic from population and employment projections to establish the 2030 baseline for the analysis of the project's operational impacts related to traffic and air quality. (See AR 3:00017; AR 11:00336-45, 00353-54; AR 72:10737-40 [Performance Measures for Current Year and Project Alternatives for Year 2030], 10748-49 [LOS E/F Intersections for Current and Year 2030 No-Build Alternative]; AR 13:00495-510, 00515-18 [air quality analysis]; AR 59:08294-95, 08310, 08391, 08406-09 [Existing Conditions], 08410-13 [No Build Conditions 2030], 08422-25 [Project 2030 Conditions], 08439-58 [Expo Construction 2011-2013].)

4. Petitioner fails to cite any substantial evidence to support its claims that the project may have near-term significant impacts.

Petitioner previously argued, based on the *Sunnyvale West* and *Madera Oversight* cases, that "an agency has no discretion to select a

future, post-approval environmental baseline." (Appellate Reply Brief of Neighbors for Smart Rail, p. 11.) After that contention was soundly rejected by the appellate court below, Petitioner now changes course and argues,[5] that the proper baseline can be set no later than the near-future – 2015. (e.g., OB, p. 29.)

In light of Petitioner's refusal to adopt a consistent view of the proper baseline the Expo Authority should have used, as well as Petitioner's failure to exhaust administrative remedies and provide evidence to the agency during its review process, it is not surprising that Petitioner can cite no substantial evidence supporting its theory that the agency's choice of a 2030 baseline somehow obscured a slew of interim significant impacts. Petitioner's assertions in this regard rely on nothing more than its own speculation and cynical assumptions, none of which are supported by the actual evidence in the record. For example, Petitioner spins a theory unsupported by any citations to the record opining (and impliedly imputing the EIR at hand) that "long range forecasts," prepared using "opaque

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[5] / As noted by the Court of Appeal in its opinion below (fn. 7) and as further briefed in detail in Respondents Exposition Metro Line Construction Authority et al.'s Answer Brief on the Merits, Petitioner failed to exhaust administrative remedies regarding this specific baseline argument. In fact, during the administrative process, Petitioner urged the Expo Authority to use a *2035* baseline, instead of 2030. (AR 727:46961-62.) Petitioner's position has therefore evolved from urging the Expo Authority to base its impacts assessment on conditions even farther into the future, to insisting on an existing conditions baseline, to its apparent current position that a near-term operations baseline is the proper choice.

mathematical models that are subject to potential manipulation by 'experts' to support a pre-determined conclusion," are "inherently less reliable." (OB, pp. 18-19.)

Petitioner further alleges that allowing the use of future baselines would encourage "gamesmanship" by unscrupulous project proponents. (OB, p. 18, fn. 3.) Tellingly, however, Petitioner cites to no evidence in this record challenging the long-range forecasts developed by the local, regional and state transportation and air quality management agencies indicating that, due to increases in population and employment, traffic congestion and resulting air emissions *will* increase in the project area. (See, e.g., AR 8:00218-234.) The EIR disclosed, for example, that the number of study area intersections operating at undesirable levels of congestion (with or without the project) would increase over the 20-year timeframe between the time of review to 2030. (AR 8:00233; see also AR 72:10738-10739.) Petitioner certainly cites to no evidence suggesting that, by basing assessment of the project's traffic and air quality impacts on the conditions in the agencies' accepted planning horizon, the EIR somehow minimized or disguised the magnitude of the Expo Line's impacts in the interim. Indeed, Petitioner cannot cite or impute such conclusions, because as the Expo Line is a regional transit system designed to gradually reduce people's reliance on cars and buses, it will *reduce* vehicle miles traveled and resulting air emissions, however incrementally. (AR 11:00353; AR 59:8303.) There is

no evidence in the record indicating or supporting an inference that the project's operation would cause any of the study intersections or regional air quality to get worse, either in the near or long term.[6]

In summary, CEQA allows an agency to establish a future baseline if that determination is supported by substantial evidence. Here, the Expo Authority's use of a 2030 baseline was well reasoned and supported by substantial evidence. While there are two outlier cases (*Sunnyvale West* and *Madera Oversight*) that purport to prohibit the use of a future baseline, the case law has since evolved, and the courts appear to be moving towards an agreement that future conditions can serve as a baseline for analysis of impacts if supported by substantial evidence. Nothing in this Court's case law is to the contrary. For these reasons, the Court should confirm that the Expo Authority's use of a 2030 baseline for the analysis of traffic and air quality impacts was appropriate under CEQA.

B. Mitigation Measure TR-4 adequately mitigates the potential for parking spillover impacts.

The Expo Line EIR took a very conservative approach to analyzing parking impacts. Even though parking impacts need not be considered

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[6] / Furthermore, Petitioner's complaint that the models projecting future conditions are nothing but "opaque mathematical models" subject to "manipulation" is a non-sequitur because those very same models are used to predict the impacts of the project. This is true for probably every moderate- to large-scale project analyzed under CEQA, where traffic and air quality impacts are determined by complex computer modeling performed by experts.

significant *environmental* impacts under CEQA, the EIR analyzed whether the project would "cause parking intrusion into adjacent neighborhoods or commercial areas where the demand for parking at a station exceeds the proposed parking lot capacity." (11 AR 00411.) Because there is a potential for station parking to spillover into adjacent neighborhoods, the Expo Authority – in consultation with Metro and the local agencies – adopted Mitigation Measure ("MM") TR-4. That measure requires:

> 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 parting activity of the LRT patrons, Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods. 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. (11 AR 00413-414.)

As an initial matter, there is no statutory or case authority requiring an EIR to identify specific measures to mitigate an anticipated shortfall in parking availability because the social inconvenience of having to search for scarce parking spaces is not an environmental impact. (*San Franciscans, supra,* 102 Cal. App. 4th at p. 697.) Nevertheless, the Authority endeavored to mitigate this potential social impact. Adding more parking has environmental impacts: the Authority would either have to purchase more property for surface parking, which could have land use impacts, or provide structured parking. (34 AR 01186.) Therefore, to minimize the potentially significant adverse impacts resulting from a shortage of parking, the Authority adopted MM TR-4. (3 AR 00054-55; 11 AR 00413-14.)

Petitioner claims that MM TR-4 is inadequate as a matter of law and constitutes impermissible deferral of the formulation of mitigation. The Court of Appeal correctly held that MM TR-4 is adequate and appropriate because it commits Metro to mitigating the impact and sets a specific performance standard. (Opinion, pp. 33-34.) The Court of Appeal also correctly determined there is substantial evidence the measure will be effective at mitigating the impact because it addresses the impact at issue (intrusion into neighborhoods) and because neighboring "residents will have street parking." (*Ibid.*)

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1. Mitigation Measure TR-4 is enforceable and has been incorporated into the project.

Prior to approving a project that has the potential to result in one or more significant effects, CEQA requires the agency to find that the mitigation measures proposed to mitigate such impacts are required in, or incorporated into, the project; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency; or that mitigation is infeasible and overriding considerations outweigh the significant environmental effects. (Pub. Resources Code, § 21081; Guidelines, § 15091, subd. (b).) CEQA also requires that a public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or *other measures*. (Pub. Resources Code, § 21081.6, subd. (b); see also CEQA Guidelines, § 15126.4, subd. (a)(2).) In this case, the record contains substantial evidence that the Authority's findings made with respect to MM TR-4 were appropriate and that MM TR-4 is enforceable. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198 [substantial evidence standard is applied to conclusions, findings, and determinations].)

MM TR-4 was expressly incorporated into the Project through the Resolution of Approval, the adopted CEQA Findings of Fact, and the adopted Mitigation Monitoring and Reporting Program (MMRP). (3 AR

00009, 00054-55, 00113.) As MM TR-4 obligates the Expo Authority and Metro to monitor the parking and, if parking exceeds 100-percent utilization of available parking spaces, obligates Metro to fund and implement a parking management program, the Expo Authority adopted the finding consistent with Public Resources Code Section 21081, subdivision (a)(1), and CEQA Guidelines Section 15091, subdivision (a)(1) (allowing a finding that "changes or alterations have been required in, or incorporated into, the project, which avoid or substantially lessen the significant environmental effect as identified in the final EIR"). (3 AR 00015, 00054.) But because Metro must work with affected jurisdictions to implement the parking management program under MM TR-4, the Expo Authority also made a finding that, consistent with Public Resources Code Section 21081, subdivision (a)(2) and CEQA Guidelines Section 15091, subdivision (a)(2), "such changes or alterations are within the responsibility of another public agency" and "can and should be adopted by such other agency." (*Ibid.*)[7]

MM TR-4 is also fully enforceable because it was adopted as part of the MMRP for the Expo Line. (3 AR 00009, 00113.) The intent of an MMRP is to prescribe and enforce a means for properly and successfully implementing the mitigation measures identified within the EIR for the

[7] / Petitioner incorrectly claims that the Authority did not make such a finding consistent with Public Resources Code Section 21081, subdivision (a)(2). (OB, p. 40, fn. 19.)

project. (Pub. Resources Code, § 21081.6; CEQA Guidelines, § 15097, subd. (c).) As such, this adopted MMRP prescribes the monitoring, implementing, and enforcement responsibility and the schedule for ensuring implementation and compliance with the mitigation measures. (*Ibid.*) As MM TR-4 is drafted in mandatory language and included in the adopted MMRP, the Expo Authority and Metro are *legally required* to monitor the parking and, if parking exceeds 100-percent utilization of available parking spaces, Metro is *legally required* to fund and implement a parking management program in cooperation with the agencies having jurisdiction over parking management. (See *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 452-454 [mitigation, upon adoption, becomes binding obligation of agency].)

Petitioner initially argues that this Court's review of MM TR-4 "presents a question of law subject to independent review." (OB, p. 36, citing *Madera Oversight*, *supra*, 199 Cal.App.4th 48.) In *Madera Oversight*, however, the issue raised was a question of law because it required the court to interpret CEQA Guidelines section 15126.4, subdivision (b)(3) to determine whether the methods for accomplishing "preservation in place" were factors that must be included in an EIR's discussion of mitigation measures for impacts to historical resources of an archaeological nature. (*Madera Oversight*, *supra*, 199 Cal.App.4th at p. 85.) In other words, the court resorted to reviewing and interpreting the

language of CEQA Guidelines section 15126.4, subdivision (b)(3) to determine whether the agency had failed to undertake an obligation required by CEQA.

Here, in contrast, as discussed above, the Authority has complied with its CEQA obligations with respect to MM TR-4. The Authority adopted the mitigation measure, adopted an MMRP, and adopted CEQA Findings of Fact. (3 AR 00009, 00054-55, 00113.) As such, the only question before this Court is whether the Authority's finding that MM TR-4 would reduce spillover parking impacts to a less-than-significant level is supported by substantial evidence. (See *Laurel Heights I, supra,* 47 Cal.3d at p. 407 [courts will uphold mitigation measures against attacks based on their alleged inadequacy where substantial evidence supports the agency's conclusion that the measures will be effective]; *Vineyard, supra*, 40 Cal.4th at p. 435 [substantial evidence standard applies to factual disputes over "whether adverse effects have been mitigated or could be better mitigated"].)

After first asserting that the Court's review of MM TR-4 presents a question of law, subject to independent review, Petitioner implicitly concedes that the substantial evidence standard applies when discussing the *Federation* case (*supra,* 83 Cal.App.4th 1252). (OB, p. 37.) Furthermore, the *Federation* case does not support Petitioner's argument that MM TR-4 is not enforceable.

The court in *Federation* explained that CEQA requires the agency to find, based on *substantial evidence*, that mitigation measures are "required in, or incorporated into, the project." (*Id.* at p. 1261.) Petitioner here argues that because MM TR-4 requires Metro to work with local jurisdictions to implement the second prong of the mitigation measure (implementation of parking management programs), there is no evidence in the record that MM TR-4 was "required or incorporated into the Project in a manner that ensures [its] implementation, or that such mitigation is fully enforceable." (OB, p. 37, citing *Federation, supra,* 83 Cal.App.4th 1252.) *Federation* is inapposite. There, the court held that certain transportation mitigation measures were inadequate because the City relied on a document that mentioned the possibility of such measures but did not *require* their implementation. (*Id.* at pp. 1255-1256, 1261.) In fact, the City had acknowledged "great uncertainty" as to whether the mitigation measures would be funded or implemented. (*Id.* at p. 1261.) As such, "[a]lthough the city adopted the mitigation measures, it did not require that they be implemented as a condition of the development allowed under the [project] and made no provision to ensure that they will actually be implemented or 'fully enforceable'." (*Ibid.*, citing Pub. Resources Code, § 21081.6, subd. (b).) Here, as discussed above, substantial evidence in the record supports a conclusion that mitigation measure MM TR-4 was incorporated into the Project and is fully enforceable.

2. The Expo Authority did not improperly defer the formulation of mitigation.

The CEQA Guidelines explain that formulation of mitigation measures should not be deferred until some future time, after project approval. (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) At the same time, the Guidelines recognize that mitigation measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way. (*Ibid.*) Thus, if the agency has identified one or more mitigation measures and has committed to mitigating the impact those measures address, then the principles forbidding improper deferral of mitigation are not implicated. (*CNPS v. Rancho Cordova, supra*, 172 Cal.App.4th at p. 623.)

Here, the formulation of the measures to mitigate the Project's potential spillover parking impacts has not been improperly deferred until some future time after project approval. Rather, MM TR-4 sets forth the specific parking management measures that could be implemented to mitigate the spillover parking impact: parking permit programs, time-restricted parking, metered parking, or shared parking. (11 AR 00413-414.) But because the parking analysis determined that there would not be a spillover parking impact on opening day, and because some station areas that do not have residential permit parking districts or time-restricted on-

street parking [8] could eventually be impacted by spillover parking, MM TR-4 requires Metro to "monitor the on-street parking activity in the area prior to the opening of service and...monitor the availability of parking monthly for six months following the opening of service." (11 AR 00413; 72 AR 10793-95.) If, during the six months following the opening of service, Metro determines that the existing parking space utilization has increased to 100 percent, and, therefore, a parking shortage has occurred, Metro is required to fund and implement one or more of the parking management measures set forth in MM TR-4 in cooperation with the agencies having jurisdiction over parking management. (11 AR 00413-414.) Substantial evidence in the record, moreover, shows that such parking management programs will be effective at reducing the impact. (11 AR 00413 [noting residential permit parking district and metered on-street parking already exists in some station areas which reduces the impact of spillover parking].)

MM TR-4 commits the Expo Authority and Metro to a specific performance standard. The use of performance standards allows an agency to commit to mitigating an impact, but defer formulation of precise mitigation measures to some future time. (See CEQA Guidelines, § 15126.4, subd. (a)(1)(B) ["measures may specify performance standards

[8] / For example, south of the Expo/Westwood Station, south of the Expo/Sepulveda Station, and south of the Expo/Bundy Station.

which would mitigate the significant effect of the project and which may be accomplished in more than one specified way"].) As explained in *CNPS v. Rancho Cordova*, "when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project." (*CNPS v. Rancho Cordova, supra,* 172 Cal.App.4th at p. 621, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011 (*SOCA*).) In *SOCA, supra,* the court upheld as adequate a mitigation measure to meet a performance standard of ninety percent 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.) [9]

[9] / Petitioner claims that the present case is distinguishable from *SOCA* because in that case the lead agency had committed *itself* to mitigating the impacts of parking and traffic, had already approved funds for a major study of downtown transportation and each of the measures identified in the EIR were within the lead agency's authority to implement. (OB, pp. 43-44 citing *SOCA, supra,* 229 Cal.App.3d 1029-1030.) But nearly the same circumstances exist in this case. As discussed above, the Authority and Metro have committed themselves to monitoring parking utilization to determine if an impact will result, have devised measures that can be implemented to mitigate an impact resulting from 100-percent utilization of existing parking and have committed to fund such measures. Moreover, evidence in the record supports a finding that the measures are effective and will be implemented by the jurisdictions affected by the spillover parking impact. (See Section B.3, *infra.*)

Consistent with the requirements set forth above, MM TR-4 commits to a specific performance standard: reducing existing parking space utilization to less than 100 percent. Moreover, MM TR-4 sets forth the specific measures that can be implemented to satisfy this criterion. Under this standard, if Metro's monitoring reveals that existing parking space utilization has reached 100 percent, Metro is required to fund and implement a parking management program in cooperation with the agencies having jurisdiction over parking management in order to reduce parking space utilization to below 100 percent. (11 AR 00413-414.) The parking management program could include a parking permit program or other mitigation options such as time-restricted, metered, or shared parking arrangements in the event a parking permit program is not possible. (11 AR 00413-414.) The EIR considers the permanent loss of existing on-street parking spaces that had been consistently utilized to meet the parking demands of nearby land uses to be an impact if there is *no* nearby alternate off-street or on-street parking. (11 AR 00351.) In other words, no significant impact results unless the Expo Line causes 100-percent utilization of existing parking. Therefore, reducing parking space utilization below 100 percent with the identified parking measures would reduce this impact to a less-than-significant level, as noted in the EIR. (11 AR 00414.) As discussed below, substantial evidence supports this conclusion.

Contrary to Petitioner's assertion, MM TR-4 does not "merely state[] a 'generalized goal' of mitigating a significant environmental effect." As such, *San Joaquin Raptor, supra,* 149 Cal.App.4th at p. 670, *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93 (*City of Richmond*), and *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (*Gray*), are inapposite and Petitioner's reliance on them is misplaced. Furthermore, in those cases, though the courts took issue with the "generalized goals" set forth as the performance standards, the larger issue indicating impermissible deferral was that the agency failed to either (1) identify any potential mitigation measures that might be incorporated in the future (e.g., *San Joaquin Raptor*) or (2) if such measures were identified, show how such measures could feasibly be implemented to meet the goal (e.g., *City of Richmond* and *Gray*). Here, MM TR-4 does not suffer from the same defects.

The performance standard set forth in MM TR-4 is, therefore, akin to the performance standard for the noise mitigation upheld by this Court in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 418. In that case, the EIR set forth daytime noise mitigation which utilized the city's noise ordinance as a performance standard for design of mechanical equipment. The mitigation required that equipment design would be reviewed by a qualified acoustical engineer for compliance with the noise standards. If the calculated noise from the fan

exceeded the standards, specific noise control treatments including fan silencers, barrier walls, or baffled enclosures will then be evaluated for the design of the fan to reduce the noise below the city noise standards. This Court held this mitigation was sufficient. Similarly, MM TR-4 requires Metro to fund and implement parking management measures in the event parking utilization reaches 100 percent in order to reduce parking utilization below the performance standard of 100 percent.[10]

In sum, the Expo Authority and Metro have satisfied their duty to mitigate the potentially significant impact relating to spillover parking. MM TR-4 sets forth specific parking management measures that can be implemented in the future in the event parking utilization reaches 100 percent. (11 AR 00413-414.) Substantial evidence in the record supports a finding that such measures have been incorporated into the project, are

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[10] / See also *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal. App. 4th 777, 794 [mitigation measure for gnatcatcher habitat found not to constitute impermissible deferral where, though the impact would be addressed sometime in the future, the EIR set out several possibilities for mitigating the impact]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 945-947 [where no special status species had been identified on site during surveys, mitigation requiring preconstruction surveys for five species with potential to occur on site and consultation with state and federal wildlife agencies if species were identified constituted sufficient mitigation, though the lead agency had not mandated any particular mitigation ratio or performance standards].) So too here, the Authority has a plan to implement and fund parking management measures in the event parking utilization reaches 100-percent utilization within six months of opening day.

enforceable, and will be effective, as described below. (3 AR 00009, 00054-55, 00113; 11 AR 00413-414.)

3. There is substantial evidence that Mitigation Measure TR-4 will reduce the impacts of parking intrusion in surrounding neighborhoods.

Substantial evidence supports a conclusion that mitigation measure MM TR-4 will, if needed, reduce the spillover impact to a less-than-significant level. The measure directs the Expo Authority and Metro to implement a program to monitor parking availability monthly for six months following the opening of services, and compliance with such an obligation is within their authority and control. (3 AR 00113.) In the event this monitoring indicates that parking utilization has reached 100 percent, Metro is required to work with the affected jurisdictions (of which there are potentially only three: Los Angeles, Culver City, and Santa Monica) to implement a parking permit program or alternative mitigation options (time-restricted, metered, or shared parking arrangements). (3 AR 00113.) Again, Metro has the authority and control to implement this requirement in coordination with affected jurisdictions. (3 AR 00113.)

While Metro cannot ultimately force these affected jurisdictions to implement the parking measures, it is clear from the administrative record that Metro and the Expo Authority already have a working relationship with those local agencies that would be affected by station spillover parking and that such agencies have reviewed and approved of the obligations

placed on them under MM TR-4. Indeed, members of the three cities' city councils sit on Expo's Board. (Pub. Utilities Code, § 132615, subds. (a)(1), (3)-(4).) And the FEIR expressly states that revisions to MM TR-4 for the Project in the FEIR which added the alternative mitigation options (time-restricted, metered, or shared parking arrangements) were devised in consultation with the potentially affected local agencies. (11 AR 00413, 00331.) Moreover, to ensure implementation, Metro has agreed to reimburse local jurisdictions for the costs associated with implementing permit programs. (3 AR 00113.) The administrative record also demonstrates that the parking measures in MM TR-4 are the types of measures that these jurisdictions have implemented in the past. The City of Los Angeles has previously adopted neighborhood parking permit programs to minimize potential spillover impacts in several neighborhoods near the Project. (11 AR 00413 [noting existing permit parking district north of the Expo/Westwood Station]; 72 AR 10795.) Metered on-street parking also already exists in some station areas which reduces the impact of spillover parking. (11 AR 00413 [noting metered on-street parking near Colorado/17th Street and Colorado/4th Street Stations].) A mitigation measure similar to MM TR-4 was also adopted for Phase 1 of the Expo Line. (739 AR 48431.)

Under the substantial evidence standard of review, Petitioner bears the burden to show that the three jurisdictions in the Expo Line area that

might potentially be affected by spillover parking impacts (Los Angeles, Culver City, Santa Monica) will fail to cooperate with the Authority in the implementation of MM TR-4 if the required monitoring reveals a significant impact. (Evid. Code, § 664; *State of Cal. v. Super. Ct.* (1990) 222 Cal.App.3d 1416, 1419 [under CEQA, an EIR is presumed adequate (Pub. Resources Code, § 21167.3), and the plaintiff in a CEQA action has the burden of proving otherwise]; *El Morro, supra,* 122 Cal.App.4th at p. 1351 [the courts must presume that an agency will carry out its obligations in accordance with the law; sheer speculation cannot carry petitioner's burden of proving otherwise].) Given the evidence of the affected jurisdictions' participation in composing the final version of MM TR-4 and the evidence of approved neighborhood parking permit programs on the Westside, the Second District correctly concluded that MM TR-4 is supported by substantial evidence, and refused to assume "that simply because the Expo Authority cannot require a local jurisdiction to adopt a permit program, the mitigation measure is inadequate." (Opinion, at p. 34, original italics; see *Laurel Heights I, supra*, 47 Cal.3d 376, 407 [courts will uphold mitigation measures against attacks based on their alleged inadequacy where substantial evidence supports the agency's conclusion that the measures will be effective.].)

In summary, MM TR-4 was adopted as part of the Expo Line approval, and it is an enforceable measure that will reduce the intrusion of

spillover parking into adjacent neighborhoods. There is substantial evidence that the mitigation will be effective to reduce the impact to a less-than-significant level, and therefore, the Expo Authorty's conclusions should be upheld.

CONCLUSION

Based on substantial evidence, the Expo Authority appropriately exercised its discretion to use a baseline set in the future, when the Expo Line will be fully operational. Furthermore, substantial evidence supports the Expo Authority's conclusion that parking spillover impacts will be mitigated to a less-than-significant level. For these reasons, the Second District's holdings should be affirmed.

Respectfully,

Dated: October 9, 2012

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1)

I, Tiffany K. Wright, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am the attorney of record for the Real Parties in Interests and Respondents in this action.

2. California Rules of Court, rule 8.204(c)(1), states that briefs produced on a computer must not exceed 14,000 words, including footnotes.

3. This Answer Brief on the Merits was produced on a computer using a word processing program. This Answer Brief on the Merits consists of 12,630 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

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Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, et al.,
California Supreme Court Case No. S202828
(Second District Court of Appeal, Division Eight, Case No. BS232655;
Los Angeles County Superior Court Case No. BS125233)

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I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

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Matthew C. Tabarangao

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