

**No. B232655**

Los Angeles Superior Court Case No. BS125233

In the  
**COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT, DIVISION EIGHT**

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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.*

Appeal from the Superior Court of Los Angeles County  
Honorable Thomas I. McKnew, Jr., Judge Presiding

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**OPENING BRIEF OF APPELLANT  
NEIGHBORS FOR SMART RAIL**

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

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT	Court of Appeal Case Number: B232655
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): John M. Bowman, SBN 137383 Elkins Kalt Weintraub Reuben Gartside LLP 2049 Century Park East, Suite 2700 Los Angeles, CA 90067 TELEPHONE NO.: (310) 746-4400 FAX NO. (Optional): (310) 746-4499 E-MAIL ADDRESS (Optional): jbowman@elkinskalt.com ATTORNEY FOR (Name): Neighbors For Smart Rail	Superior Court Case Number: BS125233
APPELLANT/PETITIONER: Neighbors For Smart Rail  RESPONDENT/REAL PARTY IN INTEREST: Exposition Metro Line Construction	FOR COURT USE ONLY
<p align="center"><b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b></p> <p>(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE    <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE</p>	
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1. This form is being submitted on behalf of the following party (name): Neighbors For Smart Rail

2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 15, 2011

John M. Bowman  
\_\_\_\_\_  
(TYPE OR PRINT NAME)

▶   
\_\_\_\_\_  
(SIGNATURE OF PARTY OR ATTORNEY)

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## I. INTRODUCTION

When properly designed and implemented, rail transit projects have the potential to provide environmentally sound transportation alternatives and regional economic benefits. However, without adequate environmental analysis and proper mitigation, such projects can cause significant adverse impacts on local communities, including increased traffic congestion and pedestrian safety hazards at surface rail crossings, vibrations and increased noise levels within adjacent residential neighborhoods, and severe parking shortages near transit stations. This is such a case.

Respondent Exposition Metro Line Construction Authority (“Expo”) is currently building a light rail line from downtown Los Angeles to Culver City (“Expo Phase I”). In February 2010, Respondent Exposition Metro Line Construction Authority Board (“Expo Board”) approved a 6.6-mile extension of the Expo Phase I from its terminus in Culver City to Santa Monica (the “Project”).

The approved Project generally follows a pre-existing right-of-way for several miles, primarily through residential neighborhoods, crossing a number of major north/south thoroughfares at grade, and eventually diverging from the right-of-way and running down the center of Colorado Avenue to the proposed terminus in downtown Santa Monica. Once operational, over 280 light rail trains will cross several major north/south streets at grade level each day (every 2 ½ minutes during peak periods), impeding the flow of automobile traffic on these already busy and congested streets. The proposed surface street crossings, some of which are adjacent to schools, will also create serious safety risks for pedestrians, including young children, and motorists. The Project will also generate substantial noise from “wheel squeal,” horns, audible warnings at crossing gates, and other sources. Without substantial revisions of the Project, or

additional mitigation measures, the adverse environmental impacts of the Project will be borne by everyone who lives or works on the westside of Los Angeles for decades to come.

As required by the California Environmental Quality Act (“CEQA”), Public Resources Code sections 21000 *et seq.*, Expo prepared an environmental impact report for the Project (the “EIR”), which was subsequently certified by the Expo Board. However, the EIR is grossly deficient and fails to conform to legal precedents established by the California Supreme Court and the California Court of Appeal. Among other things, the EIR evaluates key aspects of the Project’s effects on traffic and air quality against a hypothetical future (2030) baseline, but fails to also evaluate these effects against the existing environmental conditions, as required by law. *See Sunnyvale West Neighborhood Ass’n. v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 (holding that the use of hypothetical, future conditions as the environmental baseline results in illusory comparisons, thereby misleading the public and contravening CEQA’s intent). The EIR also fails to properly or adequately address grade-separated rail crossings at Overland Avenue and other major north/south thoroughfares as a design option or project alternative, despite the California Public Utilities Commission’s adopted policy of discouraging new “at-grade” rail crossings.

Petitioner Neighbors For Smart Rail (“NFSR”) is a non-profit corporation comprised of a coalition of homeowners’ associations, community groups and unaffiliated citizens who support the development of intelligent transportation solutions for Los Angeles that are safe, well-planned, and environmentally beneficial. NFSR does not oppose the Project per se, but seeks to ensure that all decisions concerning the Project

are based on a legally adequate environmental study, which must provide the public with the opportunity for meaningful review and comment.

NFSR brings this action on behalf of itself and the public to compel Expo to set aside its decisions concerning the Project and to prepare and circulate a complete and adequate EIR before Expo takes any further action on the Project. Specifically, the EIR must be revised to fully disclose the Project's environmental impacts (*i.e.*, traffic, air quality and greenhouse gas emissions) based on legally required analytical methods, including reliance on the correct environmental baseline. The revised EIR must also include a proper and complete analysis of the Project's growth-inducing impacts and cumulative traffic impacts, and must include feasible and enforceable mitigation measures to address parking, noise, public safety, and construction-related impacts. Finally, the EIR must be revised to include an adequate evaluation of a grade-separated design option or alternative for the Project (*e.g.*, running the rail line beneath the streets in a shallow trench) at congested north-south thoroughfares.

## II. STATEMENT OF THE FACTS

### A. The Expo Phase 2 Project

Expo proposes to “extend high-capacity, high-frequency transit service from the Westside of Los Angeles to Santa Monica.” 6 AR 00155.<sup>1</sup> This project, known as the Exposition Corridor Transit Project Phase 2 (“Expo Phase 2”), would operate within the Exposition Transit Corridor,

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

which generally follows the Exposition right-of-way (“ROW”)<sup>2</sup> from downtown Los Angeles to Santa Monica. 8 AR 00214. Expo Phase 2 would traverse approximately 7 to 8 miles of the Westside of Los Angeles from the terminus of the Expo Phase I project at the Venice/Robertson Station in Culver City to downtown Santa Monica. *Ibid.*; 3 AR 00018.

**B. Notice of Preparation/Scoping**

On February 12, 2007, Expo issued a Notice of Preparation (“NOP”) announcing its intent to prepare an environmental impact report (“EIR”) for Expo Phase 2. 6 AR 00156; 196 AR 20839-44. During the ensuing public “scoping” period, Expo received over 1,800 comments from public agencies, individuals, homeowners’ associations, businesses, and NFSR regarding the proper scope of the EIR. 6 AR 00156; 222-223 AR 21259-23626. Many of these public comments expressed strong concern regarding the impacts of at-grade rail crossings of major north-south streets, particularly Overland Avenue, Westwood Boulevard, Military Avenue and Sepulveda Boulevard (*See, e.g.*, 222 AR 22161-67, 21273, 21298-99, 23192-93), and specifically requested that Expo study the feasibility of grade-separation at these major surface streets (*e.g.*, constructing a segment of the rail line below grade). *See, e.g.*, 222 AR 22986-95, 23150, 23407-25.

**C. Draft EIR**

On January 28, 2009, Expo released the draft EIR for the Expo Phase 2 project (the “DEIR”). 520 AR 33405-6. The DEIR did not define a single proposed “project” for evaluation, but instead purported to describe and evaluate six project alternatives, including the “No-Build” Alternative,

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<sup>2</sup> The ROW is owned by Real Party-in-Interest and Respondent Los Angeles County Metropolitan Transportation Authority (“Metro”). 8 AR 00214.

which was defined as existing transit services plus certain approved regional transportation improvements to be constructed by the year 2030, and the “TSM Alternative,” consisting of a new rapid bus route connecting downtown Culver City with downtown Santa Monica and service improvements to various bus routes. 520 AR 33405-6; 78 AR 12428-30. The DEIR’s remaining four alternatives consist of a light rail line beginning at the Expo Phase 1 terminus in Culver City and ending in downtown Santa Monica, with each following a slightly different alignment. 78 AR 12428-9. These included Light Rail Transit (“LRT”) Alternative 2, which was eventually approved by Expo as the Project.

Each alternative light rail alignment is divided into segments (1, 1a, 2, 3, and 3a). 78 AR 12510. Segment 1, which is common to both LRT Alternative 1 and LRT Alternative 2, is an approximately 3-mile-long portion of the ROW that passes through a predominately residential area, near schools and parks. 78 AR 12511-14. As defined in the DEIR, both LRT Alternative 1 and LRT Alternative 2 would include four consecutive at-grade (surface) crossings within Segment 1, from and including the ROW’s intersections with Overland Avenue, Westwood Boulevard, Military Avenue, and Sepulveda Boulevard. *Ibid.* This segment also includes a proposed at-grade station (the “Expo/Westwood Station”) and 170-space parking lot within the ROW east of Westwood Boulevard. 78 AR 12514.

The DEIR also briefly discussed several alternatives that were “considered” but rejected by Expo, including an alignment from Culver City to a station in Venice following Venice Boulevard. 78 AR 12538-50. However, no alternatives included grade-separated crossings within Segment 1 between and including Overland Avenue and Sepulveda Boulevard, as had been requested by the public during the scoping process.

With respect to LRT Alternative 1 and LRT Alternative 2, the DEIR concluded that the Expo Phase 2 project would have “significant and unavoidable” impacts on aesthetics and air quality during construction. 78 AR 13010-12. In all other respects, the DEIR concluded that the potential impacts of LRT Alternative 1 and LRT Alternative 2 would be less than significant or could be reduced to a “less than significant” level by implementing specified mitigation measures. 78 AR 12429-33, 12437-66, 13040-44. For example, the DEIR concluded that the potential traffic impacts of LRT Alternative 1 or LRT Alternative 2 would be less than significant and that no mitigation measures were necessary (other than parking). *Ibid.* The DEIR reached this counterintuitive conclusion by, among other things, incorporating certain proposed street improvements (e.g., adding traffic lanes) into the description of these alternatives *before* analyzing the potential traffic impacts. 78 AR 12511-22.

**D. Public Comments on the DEIR**

During the DEIR public comment period, Expo received over 8,979 written and oral comments from organizations (including schools, neighborhood associations and business groups) and individuals. 3 AR 00156; 33 AR 00950-01045; 34 AR 01055-84. Expo also received detailed and, in some cases, highly critical comments from other governmental agencies. For example, in a letter dated March 26, 2009, the Los Angeles Department of Transportation (“LADOT”) stated that, based on its own analysis of the proposed at-grade crossings, “significant unmitigated impacts could occur ....”. 34 AR 01179. After noting that “several of the proposed at-grade crossings are adjacent to or near schools and parks and are expected to present safety issues for pedestrians accessing these [crossings],” LADOT identified various concerns about each proposed at-grade crossing, including “[o]perational, safety and parking problems for

traffic, residents, pedestrians and light rail trains” at Overland Avenue, and the “[i]nfeasibility of creating additional travel lanes on Westwood Boulevard without creating unmitigated impacts to fronting residences ...”. 34 AR 01184. Similarly, the California Public Utilities Commission (“CPUC”) commented that “[c]onstructing tracks at the existing Right of Way elevations is likely to result in trespassing issues and pedestrian conflicts similar to those currently experienced along other Metro Rail corridors in Los Angeles.” 34 AR 01109.

**E. Recommended Preferred Alternative**

Shortly after the close of the DEIR’s public comment period, the Expo Board voted to pursue LRT Alternative 2 (hereinafter the “Project”) as the “recommended preferred alternative” in the final EIR (the “FEIR”). 101 AR 14947-8. Over the next eight months, Expo staff consulted with various public agencies, conducted additional surveys, and prepared additional studies. 6 AR 00156; 34 AR 01056-60, 01067-8.

**F. Final EIR**

The FEIR was released on December 18, 2009. 5 AR 00141-76 AR 12414; 3 AR 00016. The Project, as described in the FEIR, included significant material changes from the description of LRT Alternative 2 in the DEIR, such as a grade-separated crossing at Centinela Avenue, a third northbound lane on Sepulveda Boulevard, and the “redistribution” (*i.e.*, elimination) of parking from the Colorado/4<sup>th</sup> Street Station. 7 AR 00173. The FEIR also included several new “design options,” such as the “Expo/Westwood Station No Parking” option (*i.e.* eliminating the 170 surface parking spaces proposed for reservation for transit patrons) and the “Sepulveda Grade Separation” option (grade separation with a bridge structure and an elevated Expo/Sepulveda Station). 7 AR 00174. The FEIR contained extensive revisions to the DEIR due to Project changes,

conclusions of additional studies completed after the DEIR was circulated for comment, and other new information. *See, e.g.*, 7 AR 00159-00212; 9 AR 00241-11 AR 00438; 13 AR 00495-14 AR 00530; 21 AR 2100641-696, 24 AR 00715-730, and 28 AR 00797-856; *See also* underscored and crossed-out text, *passim*.)

**G. Expo Board Decision**

On February 4, 2010, the Expo Board certified the FEIR, adopted findings of fact (“Findings”) and a Statement of Overriding Considerations, and approved the Project. 1 AR 00001 - 3 AR 00131. The Expo Board also adopted motions directing Expo staff to include the Expo/Westwood Station no parking design option and the Sepulveda Grade Separation design option as part of preliminary engineering conducted for the Project, and to report back “regarding additional funding that may be available to fund the Sepulveda Grade Separation.” 118 AR 15030-31.

**H. Trial Court Proceedings**

NFSR filed a petition for writ of mandate, challenging Expo’s compliance with CEQA. 1 Joint Appendix (“JA”) 0001-0021. Following briefing and oral argument, the Trial Court denied NFSR’s petition. 3 JA 0716-725. Final judgment was entered on March 4, 2011.<sup>3</sup> 3 JA 0745-746. NFSR filed a notice of appeal on April 25, 2011. 3 JA 0806-809.

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<sup>3</sup> Final judgment entered by the Trial Court disposed of all claims at issue in the underlying action.



### III. STANDARD OF REVIEW

In reviewing an agency's quasi-legislative action for non-compliance with CEQA, courts must determine "whether there was a prejudicial abuse of discretion," which is established if (i) "the agency has not proceeded in a manner required by law" or (ii) "if the determination or decision is not supported by substantial evidence." Public Res. Code, § 21168.5.; *See also Sunnyvale, supra*, 190 Cal.App.4th at 1371. "An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus actions, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decisions; in that sense appellate judicial review under CEQA is de novo." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427. While the court may not substitute its judgment for that of the agency, it must "scrupulously enforce all legislatively mandated CEQA requirements." *Id.* at 435.

CEQA must be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. "[A] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. "In the context of review for abuse of discretion, an agency's 'use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.'" *Ibid.*, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88. *See also Vineyard Area Citizens, supra*, 40 Cal.4th at 435 ("Where a claim is predominately one of improper procedure rather than a

dispute over facts, [courts] review the agency's action de novo, scrupulously enforcing all legislatively mandated requirements.”)

Expo's actions, including certification of the FEIR, must be supported by substantial evidence. “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,<sup>4</sup> § 15384. “Speculation and conjecture” regarding a project's potential environmental impacts do not amount to substantial evidence, even when presented by an expert. *Citizens Comm. to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1170. Instead, credible analysis is required to uphold an EIR's conclusions. *Kings County Farm Bureau, supra*, 221 Cal.App.3d 692.

#### IV. THE EIR FAILS AS AN INFORMATIONAL DOCUMENT

##### A. **The EIR's Evaluation of Potential Impacts is Inadequate Because It Uses an Improper Baseline for Analysis of Traffic, Air Quality and Greenhouse Gas Impacts**

An accurate environmental baseline is essential to understanding and comparing project impacts. Without an accurate baseline, “the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred.” *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 128. Under “normal circumstances” the environmental baseline against which a project's impacts must be evaluated in an EIR is the existing environmental setting when the NOP is issued, rather than some future, hypothetical scenario. *Sunnyvale, supra*, 190 Cal.App.4th at

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<sup>4</sup> “Guidelines” refers to the regulations codified in title 14, sections 15000 *et seq.* of the California Code of Regulations, which have been “prescribed by the Secretary of Resources to be followed by all State and local agencies in California in the implementation of [CEQA].” Guidelines, § 15000.

1373; *See also* Guidelines, § 15125, subd. (a). Permitting variation in baselines leads to speculation, increased uncertainty and diluted public confidence in the analysis of the magnitude of potential environmental impacts. *Sunnyvale, supra*, 190 Cal.App.4th at 1374.

In *Sunnyvale*, an EIR was prepared for a proposed street extension project. The EIR utilized projected traffic conditions in 2020 as the environmental baseline, rather than the existing conditions when environmental review commenced, on the grounds that such baseline offered “the most accurate and informative portrayal” of the impacts of the project. *Id.* at 1358. The *Sunnyvale* Court rejected the use of future conditions as the baseline, holding that “nothing in [CEQA] authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval.” *Id.* at 1380. Furthermore, the “[u]se of a [future, post-approval] ‘baseline,’ cannot be upheld since that approach contravenes CEQA regardless of whether the agency’s choice of methodology for projecting those future conditions is supported by substantial evidence. The ‘industry practice’ of evaluating transportation improvement projects based on future scenarios does not alter CEQA’s mandates.” *Id.* at 1380-1381.

In *Madera Oversight Coalition, Inc. v. County of Madera* (Sept. 13, 2011, F059153) \_\_ Cal.App.4th \_\_ [2011 DJDAR 13943, 13963], the California Court of Appeal (Fifth District) found *Sunnyvale* “persuasive” in holding that an EIR for a mixed-use project was inadequate because the Court was unable to determine with certainty that the EIR used existing (as opposed to future predicted) conditions as the baseline for determining the significance of the project’s potential traffic impacts. The *Madera Oversight Coalition* Court held that:

“We adopt the following legal conclusions based on the precedent established by *Sunnyvale*: (a) A baseline used in an EIR must reflect existing physical conditions; (b) lead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR; and (c) lead agencies do have the discretion to select a period or point in time for determining existing physical conditions other than the two points specified in subdivision (a) of Guidelines section 15125, so long as the period or point selected predates the certification of the EIR.”

*Id.* at 13962 (emphasis in original).

Furthermore, the California Supreme Court confirmed that CEQA requires the comparison of project impacts to actual physical conditions existing at the time of analysis. Specifically, in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310 (“*CBE v. SCAQMD*”), the court held that the South Coast Air Quality Management District (“SCAQMD”) violated CEQA by erroneously comparing the increased air emissions from a proposed refinery project to maximum capacity limits allowed under previously issued permits. “By comparing the proposed project to what *could* happen, rather than to what was actually happening,” SCAQMD utilized “hypothetical” conditions as its baseline, resulting in “illusory” comparisons that “can only mislead the public to the reality of the impacts and subvert full consideration of the actual environmental impacts” of the project. *Id.* at 322 (emphasis in the original).

Here, the Trial Court ruled below that the EIR was adequate, in part, because Expo purportedly “did discuss both the existing and future conditions when analyzing traffic impacts.” 3 JA 0719 However, the documents cited by the Trial Court (11 AR 00350, 34 AR 001055, 72 AR 010706-8) only show that Expo disclosed existing conditions, not that the

Project's impacts were analyzed in comparison to existing conditions.<sup>5</sup> Contrary to this ruling, the FEIR evaluated key aspects of the Project's traffic, air quality, and climate impacts only against assumed future (2030) conditions. Indeed, in its Findings, Expo admits that it used "future" baseline conditions in assessing the Project's traffic and air quality impacts:

For most of the environmental topics in the FEIR and in these Findings, the Authority finds that existing environmental conditions are the appropriate baseline condition for the purpose of determining whether an impact is significant. However, the Authority ... *is electing to utilize the future baseline conditions for the purposes of determining the significance of impacts to traffic and air quality.*

3 AR 00017 (emphasis added).

An EIR is inadequate if it fails to clearly show that the baseline being used to quantify environmental impacts represents existing conditions. *Madera Oversight Coalition, supra, \_\_ Cal.App.4th \_\_* [2011 DJDAR at 13965] By electing to use hypothetical "future" conditions as the baseline for analyzing impacts on traffic, air quality, and climate change, the FEIR fails to comply with CEQA.

Furthermore, the FEIR repeatedly and improperly used the "No Build" conditions as the environmental baseline to evaluate certain air quality, traffic and greenhouse gas impacts. 14 AR 00527, 11 AR 00383-386, 11 AR 00397-400, 11 AR 00405-08.<sup>6</sup> However, the "No Build" conditions do not constitute existing environmental conditions. Instead, the

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<sup>5</sup> E.g., FEIR Table 2-1 presents existing LOS and delays during the AM and PM peak hours for study area intersections, but does not compare the Project's impacts to these existing conditions. 72 AR 10706.

<sup>6</sup> As shown in Tables 3.2-14, 3.2-15, 3.2-20, 3.2-21, 3.2-26, and 3.2-27, the FEIR's traffic impact analysis evaluated study area intersections by comparison to 2030 "No Build" conditions. 11 AR 00383-86, 00397-400, 00405-408.

“No Build” conditions represent a future, hypothetical scenario that assumes the completion of various regional transportation improvements. 9 AR 241. For example, the 2030 “No Build” conditions assume the completion of the Interstate 405 Carpool Lane Widening Project, the Interstate 10/Robertson Boulevard interchange, and the Overland Avenue Bridge Widening, among others. 9 AR 242-243. The 2030 “No Build” conditions also assume “full implementation of the Metro Rapid Bus Program, which includes 28 routes across the county, as well as planned peak-only [Bus Rapid Transit] along Wilshire Boulevard between Western Avenue and Centinela Avenue.” 9 AR 244. Thus, the FEIR is also inadequate because it utilizes “hypothetical” conditions as its comparative baseline. *See CBE v. SCAQMD, supra*, 48 Cal.4th at 322.

1. The EIR Used an Incorrect Baseline for Traffic Analysis

The FEIR acknowledges that it evaluates the transportation impacts of the Project “against projected future traffic conditions in the year 2030.” 34 AR 1057. *See also* 11 AR 00346-347, 00351; 72 AR 10722,<sup>7</sup> 10737.<sup>8</sup> The FEIR explains that “[t]raffic conditions for the design year of 2030 were forecasted and evaluated for the “No Build” [Alternative].” 11 AR 00346.

The traffic impact analysis was therefore skewed by employing a threshold of significance that compares the Project and the other LRT alternatives to the 2030 “No Build” conditions, rather than to existing conditions. Specifically, the FEIR’s threshold for assessing the Project’s

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<sup>7</sup> “[The Transportation/Traffic Impact Assessment] describes the impacts resulting from a number of *future* [emphasis added] transportation scenarios analyzed ...”. 72 AR 10722.

<sup>8</sup> “Performance measures for all future scenarios are *compared to the results of 2030 No-Build Alternative* [emphasis added] to the region, Los Angeles County and for the study area.” 72 AR 10737

potential impacts on the operation of selected street intersections was whether the Project would cause an intersection's level of service ("LOS") "under the No-Build [alternative]" to deteriorate from an acceptable LOS to an unacceptable LOS ...." by 2030. 11 AR 00350-2, 00382-86. As described above, the 2030 "No Build" conditions do not reflect existing conditions, but instead consist of projected future conditions, including the assumed implementation of a broad range of planned regional infrastructure improvements. 9 AR 00242-46. Thus, the FEIR analyzed the Project's impacts on street intersections by comparing the Project to a hypothetical future scenario, in direct contravention of *Sunnyvale and Madera Oversight Coalition*. See also *CBE v. SCAQMD*, *supra*, 48 Cal.4th at 322 (baseline does not include hypothetical "activity that *could* or *should* be present").<sup>9</sup>

The FEIR's use of future (2030) conditions as the environmental baseline and its failure to evaluate potential traffic impacts against existing conditions constitute prejudicial abuse of discretion because it "precluded informed decisionmaking by the lead agency [and] informed participation by the public." *Madera Oversight Coalition*, *supra*, \_\_ Cal.App.4th \_\_ [2011 DJDAR at 13952]. The Trial Court ruled below that "[b]y analyzing delay as a result of the Project at a higher number of congested intersections in year 2030, the FEIR adopted a more rigorous test for identifying significant traffic impacts." 3 JA 0718. However, there is no factual basis for this conclusion. Indeed, the use of existing conditions as the baseline would

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<sup>9</sup> The FEIR's failure to compare the Project's impacts to existing conditions is compounded by the FEIR's use of different baselines to evaluate the traffic impacts of different alternatives, creating highly misleading "oranges to apples" comparisons. Specifically, the FEIR notes that assumed future "base" traffic volumes were determined using a "growth-factoring process." 11 AR 00347. As shown on FEIR Table 3.2-3 different growth factors were assumed for different alternatives. Thus, each alternative's impacts were evaluated using different "baselines," each of which assumed a different future condition. 11 AR 00348.

have likely revealed additional and/or more severe traffic impacts. For example, under existing conditions, the intersection of Manning Avenue/I-10 Westbound and National Boulevard is at LOS D with a 37.5 second delay in the PM Peak Hour. 72 AR 10708. In 2030, the FEIR forecasts that with the Project, the same intersection will operate at LOS E, with a 56.3 second delay. 11 AR 00386. Thus, because this intersection would experience both a diminished LOS and a greater than 4 second increase in delay, the traffic impact should be identified as significant. However, when compared to the 2030 “No Build” conditions, as was done in the FEIR, the impact of the Project is portrayed as decreasing the delay time, while maintaining LOS E.<sup>10</sup> Accordingly, the FEIR’s conclusion that the Project would have no significant impact on the intersection is not supported by substantial evidence. *Ibid.*

The Trial Court upheld Expo’s use of the 2030 baseline on the grounds that such a baseline was supported by substantial evidence. 3 JA 0718-719. In so ruling, the Trial Court contravened *Sunnyvale*, which held that an agency’s use of an incorrect baseline is not subject to the substantial evidence test, but is instead a failure to follow proper procedure, which is reviewed *de novo*. *Sunnyvale, supra*, 190 Cal.App.4th at 1376, 1383. 3 JA 0718-719. The *Sunnyvale* Court stated that “[w]e do not construe the word “normally,” as used in Guidelines section 15125, subdivision (a)...to mean that a lead agency has carte blanche to select the conditions on some future,

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<sup>10</sup> The FEIR’s analysis of the following intersections exhibits the same error: Intersection No. 28 (Bundy Drive and Pico Boulevard), AM Peak Hour. 11 AR 00397; Intersection No. 26 (Bundy Drive and Olympic Boulevard), PM Peak Hour. 11 AR 00399; Intersection No. 29 (Barrington Avenue and Olympic Boulevard), PM Peak Hour. 11 AR 00400; Intersection No. 34 (Sawtelle Boulevard and Pico Boulevard, PM Peak Hour. 11 AR 0040; Intersection No. 15. (20<sup>th</sup> Street and Olympic Boulevard), AM Peak Hour. 11 AR 00400.



post-approval date as the “baseline” so long as it acts reasonably as shown by substantial evidence.” *Id.* at 1379. Instead, the *Sunnyvale* Court rejected the use of a hypothetical future baseline, even if supported by substantial evidence, stating that “nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval.” *Id.* at 1380.<sup>11</sup>

In *Sunnyvale*, a baseline of 2020 was chosen because, it was assumed, the proposed street extension would “not be complete and in use” until that date. *Sunnyvale, supra*, 190 Cal.App.4th at 1359. However, the *Sunnyvale* Court expressly rejected this approach, holding that “[e]ven if we were to assume that the decision to use projected 2020 conditions as a “baseline” did not constitute a failure to proceed in a manner required by law (a position to which we do not subscribe), the administrative record does not contain substantial evidence to support the decision to deviate from the norm.” *Sunnyvale, supra*, 190 Cal.App.4th at 1383. Here, Expo elected to use 2030 as the baseline for the FEIR’s traffic analysis, although operation of the system is expected to begin in 2015. 101 AR 14956. By doing so, the FEIR completely ignores the Project’s first fifteen years of impacts. If the facts in *Sunnyvale* were insufficient to justify the utilization of a future baseline, then certainly the same is true in the present case.

Furthermore, as indicated above, under *Madera Oversight Coalition, supra*, \_\_\_ Cal.App.4th \_\_\_ [13943 DJDAR at 13962], a lead agency has no discretion to use a baseline predicted to occur on a date subsequent to the certification of the EIR. Here, Expo adopted a baseline that was two

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<sup>11</sup> Expo, along with other public agencies, formally requested depublication of *Sunnyvale*. However, the request was denied by the California Supreme Court.

decades subsequent to the certification of the FEIR, thereby failing to comply with CEQA.

Finally, in its brief below, Expo erroneously conflated two distinct CEQA-mandated requirements of an EIR. Specifically, Expo argued that its use of a future, post-approval baseline was permitted under Guidelines section 15126.6, subd. (e)(3)(B). 2 JA 0462. However, Guidelines section 15126.6 solely applies to the scope of the alternatives analysis. As clearly stated in Guidelines section 15126.2 subd. (a), “[i]n assessing the impact of a proposed project on the environment, the Lead Agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published...”. *See also* Guidelines, § 15125, subd. (a) (“This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.”). In fact, Guidelines section 15126.6 subd. (e)(1) expressly distinguishes the baseline from the “no project” alternative, stating that: “The no project alternative analysis is not the baseline for determining whether the proposed project’s environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline (see Section 15125).”

2. The EIR Used an Incorrect Baseline for Air Quality Analysis

The FEIR also fails to use the existing conditions as the baseline in assessing the Project’s potential impacts on air quality.<sup>12</sup> Specifically, the FEIR selectively defines the existing conditions baseline as equivalent to the FEIR’s “No-Build” Alternative. 9 AR 00242; 13 AR 00506. *See also*

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<sup>12</sup> Although the FEIR includes a summary of existing conditions, they are not used to analyze the impacts on vehicle miles traveled (“VMT”) or criteria pollutant emissions. See 59 AR 08294-95, 08310.

13 AR 508 (“LRT Alternatives would result in a VMT that would be comparable to **future** baseline conditions ...”). As the “No-Build” Alternative assumes increased regional population growth through 2030, with commensurate assumed increases in traffic congestion and air emissions through that time period (9 AR 00242; 13 AR 00505-10), the use of this hypothetical, future scenario provided the public and decision-makers with a misleadingly elevated criteria pollutant emissions baseline. *CBE v. SCAQMD*, *supra*, 48 Cal.4th at 322.

Expo asserted below that the FEIR was consistent with SCAQMD Significance Thresholds, which prescribe the use of assumed future conditions as the baseline for projects with protracted construction schedules. 2 JA 0467. However, the SCAQMD CEQA Handbook simply states that for projects built over a series of years, air quality impact analyses should use the conditions at project build-out as the baseline. 122 AR 15326. Nothing in the SCAQMD CEQA Handbook authorizes the use of a baseline set at fifteen years *after* completion of a project.

By presenting an elevated baseline, the FEIR skewed its comparison of Project emissions, and allowed the FEIR to purportedly show annual reductions in air emissions if the Project is implemented. 13 AR 00505, 00508-10.

3. The EIR Used an Incorrect Baseline for Greenhouse Gas Analysis

Guidelines section 15064.4, subd. (b)(1) states that when “assessing the significance of impacts from greenhouse gas emission on the environment,” a lead agency should consider “[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting.” In this case, the FEIR fails to use existing conditions as environmental baseline to evaluate the Project’s

impacts on GHG emissions. Instead, the FEIR uses the 2030 “No Build” conditions as the environmental baseline, which assumes increased regional population growth, VMT and emissions through 2030. 14 AR 00526-28. Accordingly, the FEIR failed to compare GHG emissions to “existing” conditions as required by Guidelines section 15064.4.

**B. The EIR’s Conclusions Regarding Traffic Impacts are Not Supported by Sufficient Degree of Analysis**

An EIR must be prepared with a “sufficient degree of analysis” to provide decisionmakers with information that enables them to make informed decisions regarding the environmental consequences of their actions. Guidelines § 15151. The FEIR’s discussion of the Project’s potential traffic impacts fails to meet this standard because it does not adequately account for Sepulveda Boulevard’s service as an alternative north-south route to Interstate 405 (“I-405”).

The Los Angeles Department of Transportation (“LADOT”) commented that “Sepulveda Boulevard serves as an alternative route to I-405 when incidents occur and the traffic volumes used for analysis do not consider these occurrences.” 34 AR 01190. Furthermore, the FEIR acknowledges that I-405 “is operating over-capacity in all segments within the study area.” 11 AR 00333. Expo argued below that it “met with LADOT several times” to study impacts on Sepulveda Boulevard, and that LADOT had “confirmed that Project operations at Sepulveda Blvd. ‘would not impact the operation at adjacent signalized intersections.’” 2 JA 0468-470. However, the document cited by Expo in support of this assertion, an LADOT letter dated October 15, 2009 (the “LADOT Letter”), does not indicate that potential impacts to Sepulveda Boulevard when used as an alternative to I-405 had been actually evaluated, let alone resolved. *Ibid.*; 687AR 38391. To the contrary, after noting that the conclusions regarding the operation of nearby intersections only reflect “normal conditions,”

LADOT repeated its earlier concern regarding the FEIR's failure to consider impacts on Sepulveda Boulevard when it serves as a *de facto* alternative route for the I-405 during freeway incidents. 687 AR 38391.

The FEIR's failure to address the Project's potential traffic impacts on Sepulveda Boulevard during common "incidents" on Interstate 405 renders the FEIR's traffic analysis incomplete and inadequate.

Accordingly, the FEIR should be set aside. *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs of the City of Oakland* (2001) 91 Cal.App.4th 1344 (EIR's failure to include a meaningful analysis of nighttime flights was sufficient basis to set aside EIR). *See also Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428 (failure to address an issue constitutes abuse of discretion); *Kings County Farm Bureau, supra*, 221 Cal.App.3d 692.

**C. The EIR's Growth-Inducing Impacts Analysis is Inadequate**

An EIR must discuss "the ways in which the proposed Project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment," including projects that would remove obstacles to growth. Guidelines, § 15126.2, subd. (d). Moreover, in discussing such "growth-inducing" effects, "[i]t must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment." *Ibid.*

Here, the FEIR indicates that one of the Project's basic purposes is to "[s]pur redevelopment and revitalization plans through the availability of efficient and reliable high-capacity transit service." 7 AR 00160. Expo found that "the [Project] could result in community investment and the development of Transit Oriented Development (TOD) around station areas." 3 AR 00108. However, although the Project will catalyze development around the planned transit stations, the FEIR's discussion of

the Project's potential growth-inducing impacts is remarkably cursory (less than two pages) and wholly deficient. 29 AR 00862-63.

The discussion first implies that the Project would merely "accommodate" rather than encourage regional growth. 29 AR 00862. However, this ignores that the Project will certainly influence the particular locations where growth occurs. By failing to discuss the potential impacts of concentrating new development around the planned stations, the FEIR's discussion of the potential growth-inducing impacts is fatally incomplete. *See* Guidelines, § 15126.5 subd. (a) ("The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected."). *See also Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1218 (EIRs for two shopping centers were inadequate because, in part, the studies insufficiently analyzed the projects' cumulative impacts relating to growth inducement.)

Growth is regularly induced by major infrastructure investments, such as the Project. *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 732-3 (EIR failed to adequately discuss growth-inducing impacts of sewer expansion). Because the Project will catalyze the concentration of growth around transit stations, the FEIR should have included a discussion of the potential impacts of such development. Expo claimed below that transit-concentrated development need not be analyzed because such development is consistent with previously adopted land use plans. 2 JA 0473. However, irrespective of the consistency of transit-concentrated development with adopted plans, under CEQA, Expo is not excused from considering the potential impacts

caused by such development.<sup>13</sup> See *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354 (“CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan; it concerns itself with the impacts of the project on the environment, defined as the existing physical conditions in the affected area.”).

In fact, in order to capitalize on proximity and access to the Project, major development projects have already been proposed near planned stations along the Phase II corridor, some of which vastly exceed the permissible size and density allowed under current land use plans. 29 AR 00864-5; 522 AR 33408-91; 727 AR 46969; 780 AR 52797-8; 781 AR 52800-1. For example, the FEIR’s list of related projects includes a large mixed-use project proposed for construction at 11122 W. Pico Boulevard (the “Casden Project”), adjacent to the proposed Sepulveda transit station. 29 AR 00865. The draft initial study for the Casden Project states that one of its objectives is to establish new uses “that capitalize on future light rail and Metro Rapid public transit.” 522 AR 33445.

Expo argued below that the FEIR need not discuss growth associated with projects for which applications had not been filed as of the date of NOP issuance. 2 JA 0470-471. However, there is no law supporting the assertion that a lead agency is excused from evaluating the growth-inducing impacts of an infrastructure project simply because specific entitlement applications have not yet been submitted for reasonably foreseeable

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<sup>13</sup> The FEIR neither discussed nor expressly relied upon any environmental analyses that may have been prepared for those plans with which the Project is purportedly consistent. Because the adopted plans (and any associated environmental analyses) were not incorporated into the EIR by reference, they are not components of the required environmental review for the Project.

projects. Furthermore, the caselaw cited by Expo below, *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 72-77 (“*SFFRG*”), is inapposite, as it addresses the analysis of cumulative effects, not growth-inducing effects, and does not hold that only “probable future projects” warrant consideration under the analysis of growth-inducing impacts. 2 JA 0471.

In addition, the FEIR improperly assumes that growth around the planned transit stations (some of which are within or near residential neighborhoods) is necessarily beneficial and of little significance to the environment, in violation of CEQA. See Guidelines, § 15126.2 subd. (d). Specifically, in its brief discussion of the Project’s potential growth-inducing impacts, the FEIR states as follows:

*Given that the Exposition transit corridor area is a **planned and desired land use** ... the **intensification of land uses around transit station areas with mixed uses and higher densities** reflects an embracement of “smart growth” principles—that projected growth should be focused or directed toward areas with available infrastructure and supportive of reduced vehicle miles traveled, fewer air emissions, and reduced energy consumption.*

29 AR 00862 (emphasis added).

By discussing only the benefits of the “intensification of land uses” around transit station areas while ignoring the potential localized impacts of such “intensification” (e.g., traffic, parking, aesthetics, noise, light and glare, etc.), the FEIR presents a completely one-sided picture that is inconsistent with CEQA’s goal of fostering informed decision-making and public participation.

**D. The EIR’s Analysis of Cumulative Traffic Impacts is Inadequate**

An EIR must discuss and thoroughly analyze the “cumulative impacts” of a project, which are those impacts “created as a result of the



combination of the project evaluated in the EIR together with other projects causing related impacts.” Guidelines § 15130, subd. (a)(1). Proper cumulative impact analysis is essential to the EIR “because the full environmental impact of a proposed project cannot be gauged in a vacuum,” but must instead account for other existing and reasonably foreseeable projects. *Bakersfield Citizens, supra* 124 Cal.App.4th at 1214 (quoting *CBE v. SCAQMD, supra*, 103 Cal.App.4th at 114).

The Guidelines prescribe specific elements that are necessary for an adequate cumulative impacts analysis, including either (i) a list of past, present, and future projects producing related or cumulative impacts, or (ii) a summary of projections contained in an adopted general plan or related planning document which described or evaluated regional or area wide conditions contributing to the cumulative impact. Guidelines, § 15130, subd. (b). In addition, a cumulative impacts analysis must include (i) a “summary of the expected environmental effects to be produced by” other projects that contribute to the cumulative impact, (ii) a “reasonable analysis of the cumulative impacts of the relevant projects,” and (iii) an examination of “reasonable, feasible options for mitigating or avoiding the project’s contribution to any significant cumulative effects.” Guidelines, §§15130, subd. (b)(4) and (5). Moreover, if the lead agency concludes that the cumulative impact is less than significant, it must “identify facts and analysis” in support of this conclusion. Guidelines, § 15130, subd. (a)(2). Conclusory, unsubstantiated discussions of cumulative impacts fail to satisfy CEQA’s objective of comparing the problems associated with a proposed project and its alternatives. *See Citizens to Preserve the Ojai, supra*, 176 Cal.App.3d at 429-432.

Here, the FEIR’s analysis of cumulative traffic impacts is grossly inadequate, given its failure to consider the *localized* traffic impacts of

related projects, and other deficiencies. The FEIR states that it conducted a “blended” cumulative impacts analysis based on an evaluation of (i) a summary of projections from plans, (ii) improvement projects from the 2008 Regional Transportation Plan and Metro’s 2009 Long Range Transportation Plan, and (iii) a list of recently proposed or planned projects. 29 AR 00863. The FEIR does not, however, provide a summary of the expected environmental effects to be produced by the related projects, as required by Guidelines, section 15130, subd. (b)(4), and fails to meaningfully analyze the Project’s potential cumulative impacts. 29 AR 00862-77. The FEIR also fails to provide a reasonable analysis of the cumulative impacts of the “relevant” projects. 29 AR 00866, 00872-3. *See also* Guidelines, § 15130, subd. (b)(5).

The Trial Court erroneously held that Expo’s utilization of a summary of projections approach per Guidelines section 15130, subd. (b)(1)(A) exempts the lead agency from any additional disclosure or analysis of cumulative impacts. 3 JA 0721. However, the FEIR’s summary of projections, while arguably satisfying Guidelines section 15130, subd. (b)(1), does not satisfy the remaining requirements under Guidelines section 15130, subd. (b). Here, the FEIR ignores known, related projects that will have direct, localized, cumulative impacts that are not captured by the “summary of projections,” thereby failing to comply with Guidelines section 15130, subd. (b)(4) or (b)(5).

As noted above, the FEIR’s list of related projects included the Casden Project, which would add approximately 265,000 square feet of commercial floor area and approximately 500 residential units on a site that is immediately adjacent to the proposed Sepulveda transit station. 29 AR 00865; 522 AR 33409-10, 33425. According to a draft initial study of the Casden Project dated February 2009, the Casden Project’s “residents and

future patrons would generate vehicle and transit trips throughout the day,” and that the “resulting increase in the use of the area's transportation facilities could exceed roadway and transit system capacities” and “has the potential to adversely affect roadway conditions around the project site.” 522 AR 33486.

Although the Casden Project will clearly add substantial additional traffic to the nearby intersection of Pico and Sepulveda Boulevards – which already operates at an unacceptable LOS F during the peak hour – the FEIR made no attempt to actually quantify the traffic generated by the Casden Project or even discuss the potential cumulative traffic impacts at this highly-congested intersection. 11 AR 00338. Instead, to evaluate localized station-area cumulative impacts, the FEIR merely relied on regional traffic volumes and adjusted for assumed trip reduction based on transit ridership, station-area parking and drop-off/pick-up, and trip diversions. 11 AR 347. As described in the FEIR, this methodology does not account for additional concentrated growth around future transit stations or the “more localized impacts” of related projects. 34 AR 1055. Accordingly, the FEIR’s cumulative impacts analysis is fatally deficient. *See Kings County Farm Bureau, supra*, 221 Cal.App.3d at 720-721, *See also Bakersfield Citizens, supra*, 124 Cal.App.4th at 1216-17.

Citing *SFFRG, supra*, 151 Cal.App.3d 61, Expo argued below that the FEIR was not required to discuss the Casden Project in its cumulative impacts analysis because an entitlement application for the Casden Project had not yet been filed when the Project’s NOP was issued. 2 JA 0479. In *SFFRG*, the court noted that it is both reasonable and practical for a lead agency to disclose and include projects that are under environmental review in an EIR’s discussion of cumulative effects. *SFFRG, supra*, 151 Cal.App.3d at 75-77. However, nothing in *SFFRG* remotely suggests that

an agency may ignore known related projects simply because applications have not yet been filed when the NOP is issued for the project under review. On the contrary, “any nearby future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review should be considered as a probable future project for the purposes of cumulative impact analysis.” *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-28.

The Casden Project is clearly a related project, and is identified as such in the FEIR. 29 AP 00865. The Casden Project was obviously known to Expo, given that it is referenced, discussed, and identified as a “related project” in the DEIR, which was released for comment in January 2009. 520 AR 33405-6; 29 AR 00865. Furthermore, the certified Record of Proceedings in this case includes a draft initial study of the Casden Project dated February 2009 (one month after the DEIR was released for the Project), which provides extensive information regarding the Casden Project. *See* 522 AR 33409-22 (proposed development plans), 33425-28 (project description), 33429 (discussion of project characteristics, including “pedestrian access to the proposed Exposition Line Rail Platform ...”), 33446 (required discretionary and ministerial actions, including a notation that Metro may have jurisdiction over specific activities associated with the Casden Project).<sup>14</sup> The record also shows that Expo was engaged in discussions with Casden regarding “joint development,” as reflected in Expo’s June 23, 2009 community “update.” 634 AR 36458. Thus, Expo’s argument that the FEIR was not required to consider the Casden Project in its discussion of cumulative effects is disingenuous. Expo possessed

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<sup>14</sup> The developer of the Casden Project had clearly devoted “significant time and financial resources” to prepare for review of the proposed project long before the DEIR for the Project was released. *See Gray v. Madera, supra*, 167 Cal.App.4th at 1127-28.

substantial information regarding the Casden project, and should have evaluated it as a “probable future project” in the FEIR’s discussion of cumulative effects.<sup>15</sup>

The Casden Project’s omission from the cumulative impact analysis constitutes a prejudicial error.<sup>16</sup> Expo should not be exempt from considering it in the FEIR’s cumulative impact analysis simply because, at the time the NOP was issued for the Project, applications for the Casden Project had not been submitted. As noted above, there is no authority for such a rule, which would eviscerate the intent of Guidelines section 15130, subd. (b).

**E. The EIR Fails to Include Adequate Mitigation for Significant Adverse Impacts Related to Parking, Noise/Vibration, Safety, and Construction**

Under CEQA, EIRs must include a description and analysis of feasible measures which could minimize a project’s significant adverse impacts. Guidelines, § 15126.4, subd. (a)(1). Moreover, public agencies may not approve projects that cause significant adverse environmental impacts if feasible mitigation exists. Public Res. Code, §§ 21002 and 21081. *See also Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 134 (“[This requirement] ensures there is evidence of the public agency’s actual consideration of alternatives and mitigation

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<sup>15</sup> Expo’s reliance upon the “summary of projections in adopted plans” approach is further undermined by the Casden Project’s need for a General Plan amendment, zone change, and other discretionary entitlements to allow increased intensity. 522 AR 33446.

<sup>16</sup> The Trial Court stated that the issue of cumulative traffic impacts generated by future projects was first raised by NFSR in its opening brief. 3 JA 0721. On the contrary, the deficiencies in the EIR’s cumulative impacts analysis were raised by NFSR, and others, during the administrative proceedings. 35 AR 01745, 01783-90, 01819, 01838, 02085, 02336, 02442, 03413; 727 AR 46972-74.

measures, and reveals to citizens the analytical process by which the public agency arrived at its decision.”). *Ibid.*

An agency’s conclusion that the mitigation measures will be feasible and effective must be supported by substantial evidence. *See Gray v. Madera, supra*, 167 Cal.App.4th at 1118-19. *See also Laurel Heights Improvement Assoc. of San Francisco, Inc. v. Regents of the University of California* (1988) 47 Cal.3d. 376, 407 (“*Laurel Heights I*”). Courts need not grant judicial deference to inadequate or unsupported agency conclusions. *Id.* at 409.

In addition, mitigation measures must provide affected residents with the ability to use and/or access resources in substantially the same manner that they were accustomed to doing if the Project had not existed. *Gray v. Madera, supra*, 167 Cal.App.4th at 1118-19 (mitigation measure to provide bottled water as a replacement for declining well water was inadequate because it did not “provide neighboring residents with the ability to use water in substantially the same manner that they were accustomed to doing if the Project had not existed...”).

Furthermore, substantial evidence must support the agency’s conclusion that the mitigation measures are “required in, or incorporated into” the Project. *See Public Res. Code, §§ 21081 and 210816, subd. (b).* In *Federation of Hillside & Canyon Associations* (2000) 83 Cal.App.4th 1252, 1260, the Court held that because there was “great uncertainty as to whether the mitigation measures would ever be funded or implemented” and no policy would prevent development of the proposed project without mitigation, there was not substantial evidence to support the agency’s finding that mitigation measures had adequately been “required in, or incorporated into” the Project. *Id.* at 1256-1263.

CEQA generally prohibits deferral of the formulation of mitigation measures “until some future time,” unless they “specify performance standards which would mitigate the significant effect of the project...”. Guidelines, § 15126.4, subd. (a)(1)(B). *See also San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th at 668-71; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-794 (measure to mitigate noise impacts was inadequate because it solely required the preparation of acoustical reports, without any established evaluative criteria). A lead agency’s commitment to a “specific mitigation goal” is not a sufficient performance standard. *See Gray v. County of Madera, supra*, 167 Cal.App.4th at 1119.

As set forth below, the FEIR failed to adequately describe and/or analyze feasible and adequate mitigation measures, and improperly deferred the formulation of mitigation measures until after Project approval, in the areas of parking, noise and vibrations, public safety, and construction.

1. Parking Impacts Mitigation – Spillover Parking

The FEIR admits that without mitigation, the Project could have a significant adverse impact because “demand for parking will exceed the proposed supply at several stations, resulting in some parking intrusion into adjacent neighborhoods.” 7 AR 00178-9; 11 AR 00413. To mitigate this potentially significant impact, the FEIR identifies mitigation measure MM TR-4, which provides, in relevant part, as follows:

In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service .... If a parking shortage is determined to have occurred ... due to the parking activity of the LRT patrons, *Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program*

*for the impacted neighborhoods. ... Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs .... Metro will not be responsible for the costs of permits for residents desiring to park on the streets in the permit districts. For those locations where station spillover parking cannot be addressed through the implementation of a permit parking program, alternative mitigation options include time-restricted, metered, or shared parking arrangements. Metro will work with the local jurisdictions to determine which option(s) to implement.*

11AR 00413-4 (emphasis added).

The FEIR concludes that this measure would reduce the station-area spillover parking impacts to “less than significant.” *Ibid.* However, the record does not contain substantial evidence supporting the feasibility or effectiveness of MM TR-4, or that the measures described in MM TR-4 were “required in,” or “incorporated into” the Project.

Simply requiring Metro (a separate agency) to “work with” local agencies and affected communities to “assess” the need for a permit parking program provides no assurance that any such program will ever be formed, or that it would be effective in preventing “spillover” parking. Indeed, the measure concedes that it may not be possible to address spillover parking in some locations through a permit system, and there is no evidence or analysis to support a conclusion that any of the identified “back up” options (*i.e.*, time-restricted, metered, or shared parking) would even be implemented by the applicable local jurisdictions, let alone effective. These measures also constitute improper deferral of mitigation. *Gray v. County of Madera, supra* 167 Cal.App.4th at 1119.

Under MM TR-4, even if a permit program is established, Metro is not obligated to reimburse residents for the cost of a parking permit. 11 AR 00413-14. Consequently, residents will either be forced to pay for permits



or surrender their use of convenient on-street parking. Thus, in violation of *Gray v. Madera*, MM TR-4 does not ensure that residents in the vicinity of LRT stations will retain their ability to park in their neighborhoods in substantially the same manner to which they are currently accustomed.

Finally, all of the measures described in MMTR-4 require approval and/or implementation by local agencies beyond Expo's control. Thus, there is "great uncertainty as to whether the mitigation measures would ever be funded or implemented" and no policy would prevent development of the Project without mitigation. See *Federation of Hillside & Canyon Associations v. City of Los Angeles*, *supra*, 83 Cal.App.4th at 1260.

## 2. Parking Impacts Mitigation – Removal of Street Parking

The FEIR also acknowledges that the Project will eliminate on-street parking spaces, thus requiring mitigation. 11 AR 00429. For Colorado Avenue, for example, the FEIR proposes mitigation measures MM TR-9, MM TR-9(a), and MM TR-9(b). Collectively, these measures (i) concede that "[r]eplacement parking would be required along the impacted portions of Colorado Avenue," (ii) identify two "potential replacement parking lots," each of which would require the acquisition of property, and (iii) suggest that "implementation of diagonal parking on adjacent streets (after extensive neighborhood outreach)" or other unspecified "replacement options" would "reduce" the parking impacts. 11 AR 00431-2. The FEIR concludes that these measures would reduce the potential impacts from lost on-street parking spaces to "less than significant" levels. However, there is not substantial evidence in the record that these measures would be feasible.

First, Expo's ability to acquire replacement lots is purely speculative. In fact, because of the high cost of land in the area, the FEIR assumed that parking could only be provided on public rights-of-way or on

property that would be acquired for project-related features, such as stations or guideways.<sup>17</sup> 78 AR 12560. Furthermore, the FEIR lacks any specificity regarding the location of any replacement parking that might be provided through diagonal striping.

In addition, there is not substantial evidence in the record supporting a conclusion that MM TR-9, MM TR-9 (a), MM TR-9 (b) were “required in,” or “incorporated into” the Project or otherwise made enforceable. These measures contain no assurance that replacement parking will actually be provided. 11 AR 00413. Thus, there is “great uncertainty as to whether the mitigation measures would ever be funded or implemented” and no policy would prevent development of the Project without mitigation. *See Federation of Hillside & Canyon Associations, supra*, 83 Cal.App.4th 1260.

Finally, MM TR-9, MM TR-9 (a), MM TR-9 (b) constitute improper deferral of mitigation, as there are no specific performance standards against which compliance can be measured. 11 AR 00413-414. *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70, 89-96 (“Untested” mitigation measures of “unknown efficacy” are inadequate).

### 3. Mitigation of Noise/Vibration Impacts

The Project will generate noise from numerous sources, including noise from steel wheels rolling on steel rails (particularly within crossovers and other special trackwork), “wheel squeal” along curves, train propulsion noise, train-mounted horns, crossing-gate warning bells at street-level crossings, and station public address systems. 21 AR 00641-3.

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<sup>17</sup> The FEIR states as follows: “Due to the high cost of property within the study area, the average cost per parking space is between \$73,000 and \$105,000 (in 2008 dollars). 9 AR 00313.

Accordingly, the FEIR acknowledges that the Project could expose the public to noise levels in excess of applicable standards during the operational phase. 21 AR 00664-80.

To mitigate this impact, the FEIR proposes mitigation measure MM NOI-1, which provides, in relevant, part as follows:

*Except where noise impacts are due to special trackwork at crossovers and turnouts, the predicted noise impact can be eliminated with sound walls or berms .... A 7 to 9 dB reduction in operational noise can be expected in all locations where sound walls block direct lines of sight between the sound source and the receiver. This excludes receivers located in high-rise apartment buildings. .... If during Final Engineering or Operations it is determined that measures described above are not practicable or do not provide sufficient noise mitigation, the Expo Authority or Metro, as appropriate, shall provide for sound insulation of residences and other noise-sensitive facilities as another alternative that could be used. Sound insulation involves upgrading or replacing existing windows and doors, and weather stripping windows and doors. Installing a mechanical ventilation system may be needed so that windows do not need to be opened for ventilation.* The mitigation measures will ensure that noise levels will be below the applicable FTA impact threshold for moderate noise impact.

21 AR 00674-5 (emphasis added).

This measure purports to incorporate a performance standard (FTA impact threshold), while conceding that sound walls and/or berms will not be effective in meeting this standard in certain situations (*e.g.*, near high-rise apartment buildings and areas where special trackwork would be installed). In these situations, Expo or Metro must provide for “sound insulation,” mechanical ventilation, or some other unspecified “alternative.” The FEIR provides no information how such improvements to private structures would actually be “provided” by Expo or Metro, and there is no evidence in the record to support a conclusion that it would be feasible to

do so in all cases. Furthermore, the improvements would not be effective unless the impacted residents keep their windows closed at all times, and would not mitigate noise impacts while residents are outdoors (*e.g.* enjoying their patios or backyards). As such, the proposed mitigation would not restore the affected residents to the position that they are currently accustomed to, and is therefore inadequate. *See Gray v. Madera, supra*, 167 Cal.App.4th at 1119.

#### 4. Mitigation of Public Safety Impacts

Various governmental agencies and members of the public commented that the Project could result in significant public safety impacts, including potential hazards for motorists and pedestrians (including risks to children who must cross the proposed rail line to reach local schools and parks), as well as impediments to emergency responders' access to residential neighborhoods and limited egress for residents in an emergency. 35 AR 01764-67; 34 AR 01181, 01191-92. Accordingly, the FEIR acknowledges that the Project could result in adverse public safety impacts, but asserts that these would be reduced to level of insignificance by implementing mitigation measure MM SAF-1. 24 AR 00725-28.

Measure MM SAF-1 generally provides that Metro shall “coordinate” with the affected cities, “inform” them of Metro’s emergency response procedures, and “provide a detailed description” of its emergency response procedures so as to provide such agencies with “knowledge” of Metro’s response plan. *Ibid.* Additionally, measure MM SAF-1 provides that Metro shall “encourage” the cities to update their procedures to address implementation of an LRT Alternative. *Ibid.*

The conclusion that MM SAF-1 would reduce the potentially significant adverse public safety impacts to “less than significant” levels assumes that such unspecified future coordination, encouragement, and

sharing of information regarding emergency response procedures will adequately address the particular risks created by the Project. However, the record does not contain substantial evidence to support a conclusion that measure MM SAF-1 would be effective. Instead, MM SAF-1 simply consists of vaguely-defined coordination and planning efforts, and the FEIR is devoid of any evidence that such efforts could actually reduce the identified risks of the Project. The FEIR notes that other cities have successfully implemented the procedures identified in MM SAF-1, but does not provide any meaningful information concerning these programs. *See* 34 AR 1071.

Furthermore, there is not substantial evidence in the record that MM SAF-1 was “required in,” or “incorporated into,” the Project. Because MM SAF-1 depends upon actions by other governmental agencies, there is no assurance that these other agencies will actually implement any of the necessary “updates” to their emergency response plans. Therefore, there is “great uncertainty as to whether the mitigation measures would ever be funded or implemented” and no policy would prevent development of the Project without mitigation. *See Federation of Hillside & Canyon Associations, supra*, 83 Cal.App.4th 1260.

Finally, given the absence of any performance standards against which the required planning and coordination efforts can be measured, MM SAF-1 constitutes improper deferral of mitigation. *Endangered Habitats League, Inc. v. County of Orange, supra*, 131 Cal.App.4th at 793-794 (subsequent regulatory approval is not adequate mitigation).

##### 5. Mitigation of Construction Impacts

The FEIR acknowledges that during the Project’s four-year construction period, it could cause numerous significant impacts, including traffic impacts associated with extended street and lane closures on major

arterials and the associated diversion of vehicle traffic through residential neighborhoods. 7 AR 00200-01; 28 AR 00822-26. The FEIR concludes, however, that such impacts can be reduced to a level of insignificance through the implementation of mitigation measures. *Ibid.*

Specifically, measure MM CON-2 simply requires the preparation of Worksite Traffic Control Plans (“WTCP”) prior to construction (7 AR 00200, 28 AR 00823-4) and measure MM CON-3 provides that no designated Major or Secondary Highway will be closed to vehicular or pedestrian traffic except at night or on weekends, “unless approval is granted by the jurisdiction in which it is located.” 7 AR 00200, 28 AR 00824. However, the record does not contain substantial evidence to support the conclusion that these measures would be effective or feasible at mitigating construction-related traffic impacts.

First, the FEIR establishes no standards by which relevant jurisdictions may approve non-evening or non-weekend closures of Major or Secondary Highways under MM CON-3. 28 AR 00824. Therefore, it is impossible to conclude that MM CON-3 would effective or feasible.

Second, the record does not contain substantial evidence supporting a conclusion that MM CON-2 would be feasible. MM CON-2 requires that the traffic control plans maintain designated Safe Routes to School “wherever possible” when nearby schools are in session, but fails to address the potential safety impacts that may arise where maintaining such designated Safe Routes to School would not be possible.<sup>18</sup> Moreover, MM CON-2 (b) improperly defers mitigation without including any performance standards. 28 AR 00823-4. In the absence of any standards, the record

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<sup>18</sup> LADOT noted that the Project’s “construction phase is expected to result in conflicts with the City’s Pedestrian Routes to School Program, resulting in unsafe conditions ....”. 34 AR 01186.

does not contain substantial evidence supporting a conclusion that MM CON-2 would be enforceable. *Ibid.*

**F. The EIR Fails to Adequately Evaluate Grade-Separation within Segment 1 as a Design Option or Alternative**

Pursuant to Guidelines section 15126.6, subd. (a), an EIR must “describe a range of reasonable alternatives to the project...which would *feasibly attain most of the basic objectives of the project* but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” (emphasis added) Although an EIR is not required to evaluate every conceivable alternative, potentially feasible alternatives are necessary to “foster informed decisionmaking and public participation.” *Ibid.* There must also be enough variation between project alternatives to allow for informed decision making. *Mann v. Cmty. Redevelopment Agency* (1991) 233 Cal.App.3d 1143.

An EIR’s alternatives analysis must focus on alternatives that are “capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” Guidelines, § 15126.6, subd. (b). The adequacy of an EIR’s alternatives analysis is also evaluated in light of the extent to which the alternatives provide relief from the project’s impacts. *See Sequoyah Hills HOA* (1993) 23 Cal.App.4th 704. *See also Friends of the Eel River* (2003) 108 Cal.App.4th 859. For the reasons discussed below, the FEIR’s discussion of alternatives fails to foster informed decision-making or public participation and is therefore inadequate.<sup>19</sup>

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<sup>19</sup> Of the six alternatives selected for consideration in the FEIR, two “do not meet the purpose and need for the Expo Phase 2 project.” 7 AR 00163,

1. The EIR failed to adequately evaluate grade-separation

The Project's proposed at-grade crossings within Segment 1 generated substantial concern and controversy within the community at-large. 34 AR 01057-60; 222 AR 22161-67; 21273; 21298-99. Moreover, the record in this case is replete with evidence that such at-grade crossings are unsafe and could cause significant traffic, noise, vibration, aesthetic, and other environmental impacts. 34 AR 01180-4; 729 AR 47033; 730 AR 47034-47037; 731 AR 47039-40. In particular, the Project's at-grade crossing at Overland Avenue is immediately adjacent to an elementary school, posing significant safety risks to children who must cross the rail right-of-way to reach their school. 78 AR 012659; 34 AR 01189. Numerous technical reports show that grade-separated rail is necessary to reduce air emissions impacts and vehicle delay resulting from the Project's trains blocking major thoroughfares. 34 AR 01577-81; 776 AR 52612.

Expo was asked to consider an alternative or design option with grade-separation in Segment 1 (from and including Overland Avenue to Sepulveda Boulevard) in order to explore this potentially feasible way to avoid or lessen the impacts of the Project. 222 AR 22161-67, 21273, 21298-9. Expo also received multiple petitions from community organizations, including the Overland Elementary PTA and NFSR, highlighting the extent to which a grade-separation alternative or design option would address the Project's adverse impacts. 101 AR 14955.

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00174. Thus, the FEIR only discusses four alternatives that would meet "most" of the Project's objectives. However, these alternatives all involve the extension of the Expo Phase 1 light rail line, follow roughly the same alignment, and have similar impacts. Indeed, the FEIR acknowledges that all of the "LRT Alternatives would lead to localized traffic impacts and removal of parking spaces, as well as potential noise and vibration impacts, visual quality and potential cultural resource impacts, and property acquisitions ...". 7 AR 00166.



LADOT also urged “serious consideration” of grade separation “due to the important role of Sepulveda in serving regional traffic.” 687 AR 38391. Although the DEIR recognizes that the “study area’s freeways and streets carry some of the highest traffic volumes in Southern California” the DEIR did not even mention a grade-separated alternative or design option. 11 AR 331. Moreover, while the FEIR briefly discussed and rejected the option of grade-separation at Overland Avenue and Westwood Boulevard, this cursory discussion failed to address whether such an alternative or design option could potentially avoid or reduce the impacts of the Project. 11 AR 00356-59.

Moreover, nothing in the record supports a conclusion that grade separation is infeasible.<sup>20</sup> The FEIR identified certain additional costs and technical “challenges” potentially associated with grade-separation within Segment 1. 9 AR 00303-6. However, the FEIR did not reach any conclusion regarding the feasibility of such grade-separation. *See Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1457. For example, the FEIR mentions that the cost of grade separation at Overland and Westwood would be “greater” than an at-grade crossing. 9 AR 00305-6. However, higher costs alone do not support a finding of infeasibility. *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599. Expo did not show that any “additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” *Ibid.* While also citing various technical “challenges” to constructing a trench at this location, such as the presence of a large storm drain and certain hydrological constraints, the FEIR does not demonstrate

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<sup>20</sup> CEQA defines the term “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Resources Code, § 21061.1.)

that these challenges could not be overcome, or that the grade-separated alternative or design option is otherwise infeasible.<sup>21</sup> 9 AR 00303-6..

The factors that may be considered in eliminating alternatives from detailed consideration in an EIR include: (i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental effects. Guidelines, § 15126.6, subd. (c). Here, the FEIR's truncated discussion of grade-separation at Overland and Westwood did not address items (i) or (iii), and stopped well short of demonstrating item (ii). As such, the FEIR's rejection of grade separation within Segment 1 was not supported by substantial evidence.<sup>22</sup> See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884.

The FEIR states that the Project's crossings at Overland Avenue and Westwood Boulevard were evaluated under the Metro Grade Crossing Policy. 11 AR 00356-61; 34 AR 01057-60. However, that evaluation did not specifically address whether a grade-separated crossing (e.g. trench) was "feasible" and whether it would feasibly avoid or minimize the Project's potential traffic and safety impacts. Rather, that evaluation

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<sup>21</sup> NFSR presented a study prepared by a qualified engineering firm demonstrating the feasibility of a "depressed profile alternative" (i.e., trench) extending under Overland Avenue, Westwood Boulevard, Military Avenue, and Sepulveda Boulevard. 728 AR 46992-47031. See *Save Round Valley, supra*, 157 Cal.App.4th at 1457. ("If an alternative is identified as at least potentially feasible, an in-depth discussion is required.")

<sup>22</sup> The FEIR includes a brief, inadequate discussion of grade separation at Overland Avenue and Westwood Boulevard and only addressed grade separation at Sepulveda Boulevard as a potential "design option." However, none of this information appeared in the DEIR. The requirement that an EIR consider a reasonable range of alternatives applies to draft EIRs as well as final EIRs. See Guidelines §§ 15084, subd. (a), 15126.6, subd. (a).

addressed the opposite question: whether, focusing on operational considerations, the at-grade configuration preferred by Expo would be feasible. 9 AR 00303-06. Furthermore, the Metro Grade Crossing Policy has been the subject of serious controversy, and has been roundly criticized for placing too much weight on the ability of trains to operate and too little weight on safety and environmental concerns. *See, e.g.*, 730 AR 47034-47037; *see also* 34 AR 01577-81.

In short, grade separation within Segment 1 had the potential to avoid or reduce the environmental impacts of the Project, was at least potentially feasible, and should have been discussed in detail as a potential alternative or design option to the Project.

2. The EIR's failure to adequately evaluate grade-separation prevents it from serving the function of informing the CPUC, a responsible agency

The CPUC must give final regulatory approval for any proposed “at-grade” rail crossing, “notwithstanding the recommendations resulting from application of the [Metro Grade Crossing] Policy...”. 11 AR 00346. Such approval will occur following certification of the FEIR. 34 AR 1060. As such, the CPUC is a “responsible agency” under CEQA.<sup>23</sup> As a responsible agency, the CPUC must “consider the environmental effects of the [Project] as shown in the [FEIR], and rely upon the FEIR in evaluating the proposed crossings “prior to acting upon or approving” the Project.” 8 AR 00239; Guidelines, §§ 15381, 15096, subd. (a) and (f); 15050, subd. (b).

Responsible agencies are required to assume that an EIR complies with CEQA and is legally adequate. Pub. Resources Code, § 21167.3. Accordingly, in order to foster informed decision-making regarding

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<sup>23</sup> A “responsible agency” is any public agency other than the lead agency, which has discretionary approval power over any aspect of the project. Guidelines, § 15381.

environmental impacts, it is critical that a lead agency prepare an EIR that is adequate not only for its own purposes, but also for those of responsible agencies, such as the CPUC. *See* Guidelines, § 15151 (“An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them make a decision which intelligently takes account of environmental consequences.”)

In its comment letter on the DEIR, the CPUC stated that “[a]s part of its mission to reduce hazards associated with at-grade crossings, the Commission’s policy is to reduce the number of at-grade crossings on rail corridors.” 34 AR 1109. Because the FEIR did not discuss grade-separation at Overland Avenue and Westwood Boulevard as a design option or an alternative, Expo “stacked the deck” against grade separation and deprived the CPUC from accessing adequate environmental information required to evaluate alternatives and make an informed decision.<sup>24</sup>

V. **EXPO’S FAILURE TO RECIRCULATE THE EIR VIOLATED CEQA**

A lead agency must recirculate the EIR and permit additional comment, “[w]hen significant new information is added to an environmental impact report” after notice and public comment but “prior to certification[.]” Public Res. Code, § 21092. *See also* Guidelines, § 15088.5, subd. (a). Recirculation ensures that a revised EIR is subjected to the same scrutiny that occurs in the draft stage. *Sutter Sensible Planning*,

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<sup>24</sup> Guidelines section 15004, subd. (b)(2)(B) prohibits public agencies from “undertak[ing] actions concerning the proposed public project that would ... limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not:...take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.”

*Inc. v. Bd. of Supervisors* (1987) 122 Cal.App.3d 813, 822. “Information” includes changes in the project and additional data, and is “significant” if its addition to the EIR “deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.” Guidelines, § 15088.5, subd. (a); *Laurel Heights Improvement Assoc. v. Regents of the Univ. of California* (1993) 6 Cal.4th 1112, 1129 (*Laurel Heights II*). Recirculation is required if “[a] substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.” Guidelines, § 15088.5, subd. (a)(2).

Here, following circulation of the DEIR, major changes were made to the Project and numerous additional studies were undertaken. 11 AR 00331, 00342; 14 AR 00525-30; 21 AR 00641. As a result, “significant new information” was added to the FEIR requiring recirculation.

**A. Major Changes Were Made to the Project After Circulation of the DEIR**

Following the DEIR comment period, Expo conducted “extensive agency coordination and community outreach” and “conducted additional technical and environmental analysis,” which resulted in major changes to the LRT Alternatives. 7 AR 00159. These changes included the addition of a third northbound lane on Sepulveda Boulevard, grade separation at Centinela Avenue (11 AR 00360), modifications to the “parking replacement options along the project ...” (11 AR 00431), the elimination of the proposed parking lot at the Colorado/4<sup>th</sup> Street station (11 AR 00404; 3 AR 00021), and modifications to the noise and vibration mitigation measures based on additional testing at nearby studios and schools. 21 AR 00666-7. The FEIR also described and evaluated several new “design

options,” including major changes to Santa Monica maintenance facility that were ultimately approved by Expo as part of the Project. 7 AR 00174, 9 AR 00251, 3AR 00009. Additional FEIR design options included grade-separation via an aerial structure at Sepulveda Boulevard and the elimination of a proposed 170-space “park-and-ride” lot at the Expo/Westwood Station. 9 AR 258, 7 AR 00174; 9 AR 00251.<sup>25</sup>

This new information incorporating the Project changes described above was extensive, and clearly deprived the public of a meaningful opportunity to comment upon the potential adverse effects of the Project or feasible ways to mitigate or avoid such effects. As such, recirculation of the FEIR was required.

**B. Significant New Information Was Added to the EIR Following Circulation of the DEIR**

Following circulation of the DEIR, significant new information was added to the EIR regarding noise, traffic, and parking impacts, thus requiring recirculation.

**1. Significant New Information Was Added to the EIR Regarding Noise Impacts Following Circulation of the DEIR**

New information added to the FEIR shows that the number of receptors that will be “moderately” impacted by noise will increase from 162 to 171, and the number of receptors that will be “severely” impacted will increase from 49 to 67. 21 AR 00672. Furthermore, new information in the FEIR shows, for the first time, that studio uses along the Sepulveda-Cloverfield segment will be severely impacted by noise. 21 AR 00666-70. The FEIR also includes new information regarding station public address

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<sup>25</sup> Although elimination of the Expo/Westwood “park-and-ride” lot was not formally approved by the Expo Board on February 4, 2010, the Board directed staff to include this option “as part of the preliminary engineering” conducted for the Project. 118 AR 15030.

systems, which may cause significant noise impacts during nighttime hours. 21 AR 00642.

Furthermore, as a result of Expo's acknowledged increase in the severity of noise impacts, the FEIR proposes at least five additional locations requiring sound walls as mitigation. 21 AR 00673-75. The public was denied an opportunity to comment on the efficacy and potential impacts of these additional sound walls, as well as potential mitigation measures to address such impacts. *See* Guidelines, § 15088.5, subd. (a).

2. Significant New Information Was Added to the EIR Regarding Traffic Impacts Following Circulation of the DEIR

After circulation of the DEIR, additional studies were prepared evaluating additional grade separations. 11 AR 00356-61. These studies, and the FEIR's conclusions based on them, were discussed in the FEIR. *Ibid.* Furthermore, the FEIR acknowledges that these studies "resulted in changes to the project, including modifications to impacts and mitigation measures." 11 AR 331. The public did not have a meaningful opportunity to review and comment on any of these additional studies and conclusions.

Furthermore, the FEIR noted that after circulation of the DEIR, "signal phasing at the intersection of Westwood Boulevard and Exposition Boulevard North was refined, resulting in a revised LOS and delay" as shown in FEIR Tables 3.2-14 and 3.2-15. 11 AR 00358, 00383-86. The DEIR had indicated that during the morning peak hour, this intersection would remain at LOS A and with a delay of only 4 seconds. AR 12616-17. However, the FEIR shows that the LOS would drop from A to D, and the delay would increase 950 percent, from 4 to 38 seconds. 11 AR 00383-86. Similarly, for the afternoon peak hour, the DEIR indicated that this intersection would operate at LOS B with a delay of 10.9 seconds. 78 AR 12616-7. However, new information in the FEIR shows that this

intersection would fall to LOS C, with the delay more than doubling from 10.9 seconds to 23.4 seconds. 11 AR 00383-86. Each of these changes constitutes a “substantial increase in the severity of an environmental impact” requiring recirculation. *See* Guidelines, § 15088.5 (a)(2). *See also Vineyard Area Citizens, supra*, 40 Cal. 4th 412, 447-50.

3. Significant New Information Was Added to the EIR Regarding Parking Impacts Following Circulation of the DEIR

Additional parking surveys were conducted after the DEIR public comment period. 11 AR 00342. Moreover, the “areas of the surveys were expanded to further clarify the parking availability and restrictions on adjacent streets.” *Ibid.* As a result, significant new information was added to the FEIR regarding the availability of, and restrictions on, the “potential replacement options” that had been identified in the DEIR for the loss of on-street parking spaces along Sepulveda Boulevard, Westwood Boulevard, and Overland Avenue. 78 AR 12642-47; 11 AR 00416-21; 00417-20. This new information directly undermines the FEIR’s conclusion that the Project would have a less than significant impact upon the supply of on-street parking along Sepulveda Boulevard, Westwood Boulevard, and Overland Avenue.

C. The Fundamental Inadequacy of the DEIR Requires Recirculation

Recirculation is also required when a DEIR is “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” Guidelines, § 15088.5, subd. (a)(1)(4). An EIR “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, supra*, 40 Cal.4th at 449–450. Essential information must be included in the DEIR, and simply adding information to the FEIR does not cure the defect of failing to comply with this requirement and may preclude meaningful public review. Guidelines, §§ 15120, 15122-15131. Only recirculation can cure the defect in such a situation. *See Sunnyvale, supra*, 190 Cal.App.4th at 1388 (“[I]nformation introduced at the end of the environmental review process without analysis or the benefit of public scrutiny or participation does not fulfill the informational function of an EIR.”). *See also Save our Peninsula, supra*, 87 Cal.App.4th at 99.

For the reasons discussed in Section V.F above, the DEIR’s failure to address grade-separation from and including Overland Avenue to Sepulveda Boulevard rendered the DEIR “fundamentally and basically inadequate and conclusory in nature such that meaningful public review and comment were precluded.” Guidelines, § 15088.5, subd. (a)(4). The FEIR included some, albeit insufficient, information regarding the potential for grade separation at various intersections within Segment 1. 11 AR 00356-59. However, this information was not contained in the document that was circulated for public comment. To ensure the opportunity for meaningful public review, the DEIR should have been revised and recirculated.

## **VI. CONCLUSION**

For the reasons set forth above, the Trial Court's judgment should be reversed, with instructions to issue a writ of mandate setting aside Expo's decisions to certify the FEIR and approve the Project.


DATED: September 15, 2011 ELKINS KALT WEINTRAUB REUBEN  
GARTSIDE LLP

By:   
\_\_\_\_\_  
John M. Bowman  
Attorneys for Petitioner and Appellant  
NEIGHBORS FOR SMART RAIL

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, Rule 28.1(d)(1))**

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DATED: September 15, 2011 ELKINS KALT WEINTRAUB REUBEN  
GARTSIDE LLP

By:   
\_\_\_\_\_  
John M. Bowman  
Attorneys for Petitioner and Appellant  
NEIGHBORS FOR SMART RAIL

**PROOF OF SERVICE**

***NEIGHBORS FOR SMART RAIL V. EXPOSITION METRO LINE  
CONSTRUCTION AUTHORITY, ET AL.***

**B232655 / LASC NO. BS125233**

**STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES**

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2049 Century Park East, Suite 2700, Los Angeles, California 90067.

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CHERYL PICKENS

**SERVICE LIST**

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

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

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

Supreme Court of California (via Overnight Express)  
Office of the Clerk, 1<sup>st</sup> Floor  
350 McAllister Street  
San Francisco, CA 94102  
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