No. B232655
Los Angeles Superior Court Case No. BS125233

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

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

REPLY BRIEF OF APPELLANT NEIGHBORS FOR SMART RAIL

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I. INTRODUCTION

Since its inception, Petitioner and Appellant Neighbors for Smart Rail ("NFSR") has supported the development of transportation alternatives for Los Angeles that meet long-term regional mobility objectives while ensuring public safety and avoiding adverse environmental impacts. As approved by the Exposition Metro Line Construction Authority Board (the "Expo Board"), the proposed light rail line connecting Culver City to Santa Monica (the "Project") offers the *potential* for regional, long-term benefits, but will also result in significant adverse impacts on the existing residential neighborhoods and commercial districts along the proposed rail corridor that have not been adequately addressed. Among other things, the Project will severely impede the flow of automobile traffic on all major north-south thoroughfares on the Westside of Los Angeles, including those that provide access to Interstate 10, while simultaneously fostering growth and increasing traffic congestion in the vicinity of proposed transit stations. Given the importance of the Project to the region, and because the traffic, noise, safety, and other impacts of the Project will last for decades, it is imperative that our elected and appointed public officials get it right.

Through this action, NFSR seeks to ensure that all decisions concerning the Project are based on a comprehensive and legally adequate environmental study, which must properly disclose and analyze the Project's short-, medium- and long-term local and regional impacts. As shown in the Opening Brief of Appellant NFSR (the "Opening Brief") and here, the Environmental Impact Report ("EIR") for the Project fails to satisfy numerous requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*, and legal precedents established by both the California Supreme Court and the California Court of Appeal. Among its more glaring deficiencies, the EIR

evaluates key aspects of the Project's traffic and air quality impacts only against a projected future (2030) baseline, while failing to also evaluate these impacts against the existing environmental conditions, as required by law. See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, *Sunnyvale West Neighborhood Assn. 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).

In an attempt to sidestep their obligations under CEQA, Respondent Exposition Metro Line Construction Authority ("Expo"), the Expo Board, and Real Parties-in-Interest and Respondents Los Angeles County Metropolitan Transportation Authority and the Los Angeles County Metropolitan Transportation Authority Board (collectively "Metro"), present a blizzard of arguments, none of which have merit. For example, regarding the EIR's use of an improper baseline, Expo, the Expo Board and Metro (collectively, "Respondents") suggest that *Sunnyvale* and *Madera Oversight Coalition* were incorrectly decided and are inconsistent with *Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal. 4th 310 ("*CBE*"). However, as shown in the Opening Brief of Appellant NFSR (the "Opening Brief"), *Sunnyvale* and *Madera Oversight Coalition* are entirely consistent with the California Supreme Court's decision in *CBE* and were correctly decided.

Respondents also argue that even if *Sunnyvale* and *Madera Oversight Coalition* were correctly decided, that somehow the particular characteristics of the Project warrant an entirely different rule here. Notwithstanding Expo's unavailing attempts to distinguish the facts in the present case, Expo clearly violated CEQA pursuant to *Sunnyvale* and

Madera Oversight Coalition. Transit projects are not exempt from the rules that apply to other projects.

Respondents' arguments regarding the EIR's other numerous deficiencies are equally unavailing. As shown in the Opening Brief and below, the EIR failed to adequately analyze and disclose the Project's cumulative impacts, in clear violation of CEQA Guidelines section 15130, subd. (b).[1] The EIR also failed to adequately analyze and disclose the Project's growth-inducing impacts, failed to properly account for reliance on Sepulveda Boulevard as a regional alternative to Interstate 405, failed to adequately evaluate grade-separated Project alternatives, and includes legally inadequate and unenforceable mitigation measures. Furthermore, the Project was revised and significant new information was added *after* circulation of the draft EIR (the "DEIR"), thereby preventing the general public and relevant government agencies from having a meaningful opportunity to review and comment on the Project's substantial adverse environmental impacts. Accordingly, the EIR should have been revised and recirculated prior to its certification.

Unable to defend the EIR's use of an improper baseline and its wholly inadequate discussion of the Project's cumulative impacts, Respondents attempt to hide behind a procedural defense. Specifically, Respondents allege that concerns regarding the EIR's improper baseline and inadequate cumulative impact analysis were not raised during the administrative process. However, as demonstrated below, public comments concerning the EIR clearly challenged its contents and methodology

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[1] "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.

regarding the improper baseline and inadequate cumulative impacts analysis.

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. Seemingly conceding the EIR's deficiencies, Respondents argue that the Court should simply "sever" those elements of the Project implicated by the legally inadequate components of the EIR, while still permitting development of the Project to proceed. However, there is no legal or factual basis for such a severance. The EIR's numerous deficiencies permeate the entire document and undermine Expo's evaluation of the Project as a whole. Any one of the EIR's many substantive and procedural defects in this case requires the Court to set aside the Project approval in its entirety, pending Expo's preparation of a legally adequate EIR. See *LandValue 77, LLC v. Bd. of Trustees of California State Univ.* (2011) 193 Cal.App.4th 675, 682 (holding that if an EIR is inadequate in any respect, then approval of the entire project, along with certification of the EIR, must be set aside).

II. NFSR EXHAUSTED ITS ADMINISTRATIVE REMEDIES

Without having raised the issue below, Expo asserts here that NFSR is barred from challenging Expo's improper use of a future environmental baseline to analyze the Project's traffic and air quality impacts, as well as the EIR's inadequate cumulative impacts analysis, on the grounds that these issues were not properly exhausted during the Project's administrative review and approval process. This assertion is not supported by the record.

A. Standard for Exhaustion

Pursuant to the "exhaustion of administrative remedies doctrine," in order for a writ petitioner to prosecute a particular CEQA claim, the issue

must have been raised during the relevant administrative process. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 162-163; see also Pub. Res. Code § 21177, subd. (a). By requiring petitioners to first seek administrative relief, the exhaustion doctrine ensures that the administrative agency "will have had its opportunity to act and to render litigation unnecessary...". *Citizens Assn. for Sensible Development of Bishop Area, supra* 172 Cal.App.3d at 163, quoting *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 267.

"'[G]eneralized environmental comments at public hearings,' 'relatively ... bland and general references to environmental matters' [citation omitted]" and "'[g]eneral objections to project approval....'[citation omitted]" are not sufficient to satisfy the administrative exhaustion of an issue. *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36. However, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1051. See also *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750 (holding that petitioners need not identify an EIR's "precise legal inadequacy", as long as objections "fairly apprise" the agency of the petitioner's concerns regarding a project "deleterious [impacts] to the surrounding community"); *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176 (holding that written letters and verbal testimony to a school board, despite the absence of specific statutory citations, were sufficient to alert the school district to methodological flaws in its environmental review); *Citizens Assn. for Sensible Development of Bishop Area, supra,* 172 Cal.App.3d at 163 (holding that a letter from a number of community

members expressing concern regarding deterioration of the downtown area and increased traffic was sufficient to exhaust administrative remedies concerning the inadequacy of a cumulative impact analysis). Moreover, a petitioner is not limited to only asserting those claims that it made during the administrative process, rather "[a] party can litigate issues that were timely raised by others." *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1263. See also Pub. Res. Code § 21177, subd. (a) ("An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person..."). As shown below, the issues raised by NFSR in the present action were exhausted during the administrative process.

B. NFSR Exhausted its Administrative Remedies Concerning Environmental Baseline Issues

Expo claims that NFSR did not exhaust its administrative remedies regarding Expo's improper use of a future environmental baseline to analyze the Project's impacts to traffic and air quality, stating that "[d]uring the administrative proceedings, no one criticized the Draft EIR for using what Appellant is now calling a 'hypothetical' 2030 baseline to analyze any of these impacts." (Expo Br.[2], p. 8.)

In addition to a letter submitted to Expo by NFSR specifically noting the EIR's failure to use a proper environmental baseline (727 AR[3] 46952), a number of other public comments questioned Expo's reliance on

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[2] "Expo Br." refers to the Respondents' Brief filed by Expo and the Expo Board on November 8, 2011.

[3] "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.

speculative future conditions, rather than existing conditions, to determine the Project's impacts. For example, regarding the EIR's evaluation of traffic impacts, one commenter wrote:

> The Project Draft EIR ***understates the impact*** of the Project's traffic. For example,...Table 3.2-14... provides the intersection conditions for the years 2030 for the No-Build and LRT alternatives for Segment 1 (*i.e.,* the eastern portion of the Expo ROW). The impact is measured in this table by ***comparing the change in intersection performance between the No-Build alternative and LRT alternative in 2030*** and concludes that each of the 15 intersections will not be significantly impacted. ***Nowhere in the in Draft EIR does it evaluate the impact between the Project-added traffic to existing conditions***. This is only half the story and directly conflicts with the Expo Authority's stated procedure for analyzing significant impacts..."
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> 38 AR 04639 (emphasis added.)

The same commenter also wrote:

> The traffic impact analysis is incomplete since it ***does no[t] provide an analysis of the traffic impacts between the Project alternatives and existing conditions***. Simply analyzing the impact between the Project and the No-Build Alternative to determine significant impacts is universally condemned by CEQA treatises and case law. ***The correct analysis of significant impacts is to compare the Project-generated traffic to the existing baseline***.
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> 38 AR 04640 (emphasis added.)

Thus, the exact issue claimed by NFSR in the present action was clearly raised during the administrative proceedings. Indeed, the FEIR responds to this comment by admitting that the Project's traffic impacts are only evaluated in light of future, rather than existing conditions.[4]

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[4] "[E]xisting levels of service at study area intersections are provided in DEIR Table 3.2-1 (Thresholds of Significance for Expo Phase 2). Table 3.2-14 ... through Table 3.2-27 ... provide comparisons on 2030 No Project conditions to 2030 conditions with the proposed LRT project. ***The***

In addition, during public testimony before Expo's Exposition Corridor Project Team on February 18, 2009, one commenter expressly stated that "I'm going to speak to the deficiencies in the DEIR itself. First thing is reported traffic reductions from the Project. ***It doesn't look at traffic reductions from traffic right now***, but it compares it to the no-build option." 43 AR 07644 (emphasis added.) See also 37 AR 04018. Furthermore, a homeowners association commented that Expo's traffic impact analysis could not be verified due to the speculative nature of using forecasted 2030 conditions, rather than existing conditions, as a baseline. 35 AR 02612.

It is abundantly clear that these focused comments specifically identify Expo's methodological flaws and are not merely "generalized environmental comments," "bland and general reference to environmental matters," or "general objections to project approval." *Sierra Club v. City of Orange*, *supra,* 163 Cal.App.4th at 535-36. Rather, these comments sufficiently alerted Expo that its "method of analysis was faulty." *East Peninsula Ed. Council, supra,* 210 Cal.App.3d at 176. Expo therefore had an opportunity to render this litigation unnecessary by evaluating the Project's traffic and air quality impacts against existing conditions, but elected not to do so.

C. NFSR Exhausted its Administrative Remedies Concerning Defects in the EIR's Cumulative Traffic Impact Analysis

Moreover, Metro argues that the EIR's deficient cumulative impacts analysis, resulting from Expo's failure to analyze the localized traffic impacts of the proposed development of approximately 265,000 square feet of commercial floor area and approximately 500 residential units (the "Casden Project") on a site immediately adjacent to the proposed

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threshold of significance for traffic impacts is based on the comparison of these two future scenarios." 38 AR 04639, emphasis added.

Sepulveda transit station (29 AR 00865; 522 AR 33409-22, 33425), "was never brought to the Authority's attention during the administrative proceedings." (Metro Br.,[5] p. 13.) Accordingly, Metro claims that NFSR may not challenge the sufficiency of the EIR's cumulative impacts analysis on exhaustion grounds.

The EIR's failure to properly account for the Casden Project was exhausted during the administrative process. Commenters emphasized that "[t]he DEIR fails to mention the impacts of the proposed Casden Project on Sepulveda Boulevard and Pico Boulevard. The construction of this project and Expo Phase 2 will ***cause a combined negative impact*** upon the neighborhood surrounding the right-of-way. The impact of the Casden Project must be studied." 37 AR 03413; 03491 (emphasis added.) Another commenter expressed concern that "[t]he DEIR fails to evaluate known related projects. Specifically, it fails to evaluate interactions with...the Casden Project...[which] renders the DEIR inaccurate and useless as an environmental document." 35 AR 02330, 02382.

These and other comments highlighting the inadequacy of the EIR's cumulative impact analysis contained sufficient specificity to apprise Expo of the deficiencies in the cumulative impact analysis related to the Casden Project.

III. EXPO FAILED TO UTILIZE A PROPER ENVIRONMENTAL BASELINE

The EIR erroneously evaluates key aspects of the Project's traffic and air quality impacts against a hypothetical future (2030) baseline while failing to also compare these impacts to the ***existing*** environmental conditions, as required by law. See *Madera Oversight Coalition, supra,*

[5] "Metro Br." refers to the Real Party in Interests' Responding Brief filed by Metro on November 8, 2011.

199 Cal.App.4th 48, *Sunnyvale, supra,* 190 Cal.App.4th 1351. (Opening Br., pp. 10-20.) In doing so, Expo's analysis simply ignores the first 15 years of the Project's operational impacts, in clear violation of CEQA.

A. Under *CBE, Madera Oversight Coalition* and *Sunnyvale*, Agency Discretion Regarding Baseline Selection is Limited

Madera Oversight Coalition unambiguously holds that "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." *Madera Oversight Coalition, supra,* 199 Cal.App.4th at 90. Moreover, as conceded by Expo, "*Sunnyvale* concluded that the selection of a post-approval baseline to determine the significance of traffic and air quality impacts is ***not subject to the substantial evidence standard.***" (Expo. Br., p. 11; emphasis added.) Yet, Expo nevertheless asks this Court to "uphold the Authority's decision [to use a future baseline for various impact analyses] because it is supported by substantial evidence." (Expo. Br., p. 15.) In short, Expo asks this Court to hold that *Sunnyvale* and *Madera Oversight Coalition* were wrongly decided. (*Ibid.*) However, *Sunnyvale* and *Madera Oversight Coalition* are both wholly consistent with the express language and intent of the California Supreme Court's decision in *CBE* and there is no basis for this Court to decide otherwise.

In *CBE,* the Supreme Court held that the South Coast Air Quality Management District (the "District") violated CEQA by calculating a project's impacts by comparing increased refinery emissions to limits allowed under prior permits, rather than existing conditions.*CBE, supra,* 48 Cal. 4th 310, 322 "By comparing the proposed project to what *could* happen, rather than to what was actually happening," the District 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. *Ibid.*, emphasis in the original.

Expo asks this Court to interpret *CBE* as holding that agencies may elect to use any future baseline, as long as such determination is supported by substantial evidence. However, the *CBE* Court expressly limited agency discretion, stating that "an agency enjoys the discretion to decide...exactly how the ***existing physical conditions without the project*** can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." *CBE, supra,* 48 Cal.4th at 328. The *CBE* court explains the limited circumstances under which agencies are permitted to deviate from the normal practice, pursuant to CEQA Guidelines section 15125, subd. (a), of using existing environmental conditions "at the time the notice of preparation [of an EIR] is published" as the baseline, as follows:

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

Thus, under *CBE*, an agency has no discretion to select a future, post-approval environmental baseline. (Expo Br., p. 17.) Rather, any discretion is limited to choosing the "period of environmental review" or, at the latest, the "expected date of approval."

Expo argues that *CBE*'s reference to the expected date of approval is "merely illustrative" of the broad discretion granted to agencies to select an environmental baseline, and that *CBE* cannot be read "to create a restriction that limits future predicted conditions to only those that will exist at or before the time of project approval." (*Ibid.*) However, Expo simply ignores the express language and intent of *CBE*'s holding that only under limited circumstances (*i.e.,* rapidly fluctuating environmental conditions) may a lead agency exercise its discretion to select a baseline reflecting conditions after the issuance of the NOP, but no later than the expected date of project approval, in order to avoid using a misleadingly elevated or depressed baseline. *CBE, supra,* 48 Cal.4th at 328. Here, despite the inability to point to any language in *CBE* that permits the use of any post-approval baseline, Expo used a baseline nearly two decades after the date of Project approval.

Moreover, the *Madera Oversight Coalition* Court held as follows:

> We adopt the following legal conclusions based on the precedent established by *Sunnyvale*: (a) A baseline used in an EIR ***must reflect existing physical conditions***; (b) lead agencies ***do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR***; and (c) lead agencies do have the discretion to select a period or point in time for determining existing physical conditions other than the two points specified in subdivision (a) of Guidelines section 15125, so long as the period or point selected ***predates the certification of the EIR***.
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> *Madera Oversight Coalition, supra,* 199 Cal.App.4th at 89-90 (emphasis added).

The *Madera Oversight Coalition* Court wholly rejected the argument that CEQA and Guidelines section 15125 "provide flexibility in the choice of the baseline physical conditions used to analyze impacts so long as existing conditions are described in the EIR." *Id.* at 89. In the present case,

while purporting to have described existing conditions, Expo nevertheless failed to evaluate impacts against conditions at a point between the issuance of the NOP and certification of the EIR.

Madera Oversight Coalition and *Sunnyvale*, which prohibit the use of a post-approval baseline, are therefore entirely consistent with *CBE.* Under these recent authorities, Expo certainly cannot justify its reliance on a 2030 environmental baseline – 20 years after Project approval and 15 years after the expected commencement of Project operations.

B. The Project is Not Distinguishable From *Sunnyvale* and *Madera Oversight Coalition*

Unable to demonstrate that *Sunnyvale* and *Madera Oversight Coalition* are inconsistent with *CBE,* Expo attempts to distinguish the present case from *Sunnyvale* and *Madera Oversight Coalition*, essentially arguing for a judicially-created exemption for transit projects. (Expo. Br., pp. 32-34.) Specifically, Expo asserts that the rule articulated in *Sunnyvale* and *Madera Oversight Coalition* should not apply here because in those cases, the respective projects under review were a street extension and a mixed-used real estate development project. Expo claims that "[t]hese cases are inapposite because they do not involve a transit project that reduces automobile trips and automobile emissions." (Expo. Br., p. 32.) Expos suggests that somehow using an existing-condition baseline is only appropriate if a project will "clearly…generate substantial new automobile trips and traffic" or "may result in direct and indirect increases in automobile trips and automobile emissions." (Expo Br., p. 33.)

Expo merely points to distinctions without a difference. Expo does not and cannot cite any authority for the proposition that a different baseline for a traffic study is justified simply because the project under

review would not "generate" traffic. In fact, this argument was made and specifically rejected by the Court in *Sunnyvale*.[6]

Moreover, Expo's reasoning is entirely circular, as the EIR uses a 2030 baseline to show that the Project will result in a future regional trip reduction, thereby purportedly justifying the use of a 2030 baseline. Expo's conclusions regarding trip-reduction are the result of a fundamentally flawed traffic study and exposes an overly simplistic perspective that a traffic study need only evaluate long-term regional trip *generation*. Expo asks this Court to simply assume that if transit projects have long-term regional traffic and air quality benefits, then agencies are wholly exempt from disclosing or evaluating any other short- and medium-term localized effects resulting from the changes in traffic distribution that cause congestion (*e.g.*, once the Project is 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 – blocking these streets for up to 112 seconds.) That is, Expo asks that agencies should be permitted to begin with the assumption that transit project are necessarily beneficial for the region over the long term, and on that basis forego any analysis of the Project's impacts as compared to existing conditions. However, regardless of whether a transit project reduces regional trips, given the complexity of the transportation network, it is essential that an EIR allow for informed decision-making regarding localized, short- and medium-term

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[6] In *Sunnyvale,* the lead agency argued that the impacts of the project in that case could be evaluated under different procedures, since the project "is different from other development projects because it not a 'traffic generator' but rather a 'traffic congestion-relief project." 190 Cal.App.4th at 1380. Finding no basis for such disparate treatment in the CEQA statute, CEQA Guidelines or case law, the Court stated that "[t]he statute requires the impacts of ***any proposed project*** to be evaluated against a baseline of existing environmental conditions." *Ibid.*, emphasis added.

transportation impacts, as well. Creating a special rule for transit projects, as proposed by Expo, would thwart this essential CEQA objective.

C. Expo's Use of an Erroneous Legal Standard Constitutes a Failure to Proceed in the Manner Required By Law

Expo devotes a significant portion of its brief attempting to show that the methodology it elected to use in the EIR is supported by substantial evidence. (Expo., Br., p. 21-30.) As discussed above, under established case law, agency discretion is limited, and Expo abused its discretion by choosing to use a hypothetical, post-approval, future baseline. Thus, whether such choice was supported by substantial evidence is entirely irrelevant. See *Sunnyvale, supra,* 190 Cal.App.4th at 1371, 1380-1381 (holding that an agency's use of an erroneous baseline must be reviewed independently by the courts and is not subject to the substantial evidence test.). See also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88 ("In the context of a 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.'")

Expo argues that the EIR's methodology was adequate because it "discussed" existing and future conditions in order to evaluate the Project's traffic impacts, claiming that "[t]he FEIR directly compares existing measures of traffic performance (daily and peak vehicle miles traveled, daily and peak vehicle hours traveled, daily and peak average speed) against these performance measures under the project alternatives." (Expo Br., 12.) However, while the documents that Expo cites (*e.g.*, 3 AR 00017; 11 AR 003336-45, 00353-54; 72 AR 10737-40) contain information *describing* existing conditions and future regional impacts, they do not include any evaluation of the Project's localized impacts on study area intersections and roadway segments under existing conditions. Therefore, based on this limited analysis, it is impossible for the general public and

decision makers to verify whether the Project triggers the applicable significance thresholds.

Expo asserts that "the touchstone for determining an EIR's compliance with CEQA is whether the EIR includes the information to allow an informed decision regarding the project's environmental impacts." (Expo Br. p. 13.) Expo contends that its use of a future baseline served this "larger purpose" merely because information was presented regarding the current environmental conditions. (*Ibid.*) In other words, Expo suggests that based on this raw information, the general public and decision-makers could have figured out what the Project's environmental impacts would be on their own.

Simply including information is not enough. Instead, an agency must present data "in a manner calculated to adequately inform the public and decision makers." See *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659 (holding that an EIR was inadequate because it did not "clearly identify the baseline assumptions regarding mine operations".) Where decisionmakers and the general public are "forced to sift through obscure minutiae or appendices in order to ferret out the fundamental baseline assumptions that are being used for purposes of the environmental analysis", an EIR "falls short of the requirement of a good faith effort at full disclosure. (Guidelines, § 15151.)" *Ibid.*

Madera Oversight Coalition held, in part, that an EIR's traffic analysis was legally inadequate because it had "fail[ed] to clearly identify the baseline [that was] used to quantify the project's impacts on traffic." 199 Cal.App.4th at 96 In *Madera Oversight Coalition*, one section of the EIR contained a discussion of existing traffic conditions, and in another section, "the EIR made an attempt to compare existing conditions with projections of what traffic conditions would be in 2025 with and without the project." *Id.* at 93-95. However, nowhere did the EIR explicitly state

that existing conditions constitute a baseline. *Id.* at 93-95. Accordingly, the *Madera Oversight Coalition* Court reasoned that it was "unable to state with certainty that existing conditions were used as the baseline for determining the significance of the project's potential impacts on traffic." *Id.* at 95. The Court analogized this shortcoming to its prior decision in *San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at 659, in which it had held that the failure to clearly identify baseline assumptions "clearly falls short of the requirement of a good faith effort at full disclosure." *Id.* at 95. Thus, regardless of how detailed an EIR's description of existing conditions, the failure to clearly and unambiguously show that existing conditions are used as the baseline constitutes a violation of CEQA.

Expo's scattered references to existing conditions fall short for the same reason. In the present case, the Los Angeles Superior Court (the "Trial Court") erroneously found that the EIR was adequate because, in various sections, it *discussed* both the existing and future conditions when analyzing traffic impacts. 3 JA[7] 0719. Because Expo cannot show that the EIR used existing conditions as an environmental baseline to evaluate the Project's local impacts on study area intersections and roadway segments, Expo invites this Court to make the same error as the Trial Court. *Ibid.* Here, Expo cites to various isolated references to existing conditions throughout the EIR to give the appearance that such conditions were used as the baseline. (*e.g.,* Expo Br., p. 12.) But, in violation of CEQA, Expo never compared the Project's direct impacts to existing conditions. Moreover, to the extent that there is any ambiguity or uncertainty as to whether existing conditions were used as the baseline for analyzing traffic and air quality impacts, the EIR was inadequate for that reason alone and must be set aside.

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[7] "JA" refers to the three-volume Joint Appendix In Lieu of Clerk's Transcript.

D. Expo Confuses CEQA's Requirements for Cumulative Impacts Analysis and Alternatives Analysis with Direct Project Impact Analysis.

To support the argument that it should be allowed to use a future (2030) baseline, Expo argues that the Guidelines place "emphasis on the need to consider future conditions." (Expo Br., p. 19.) More specifically, Expo contends that "[t]he CEQA Guidelines specify a number of other factors to be considered in assessing the significance of an environmental effect that negate the suggestion that ***as a matter of law***, agencies are restricted to considering conditions accruing no later than the time of project approval." (Expo Br., p. 21; emphasis in original.)

Expo's argument must be rejected for at least two reasons. First, NFSR is not arguing that agencies are "restricted" to considering only the conditions prior to project approval, as erroneously implied by Expo. Indeed, in *Sunnyvale*, the Court acknowledged that expected future conditions may be considered in determining a proposed project's impacts on the environment. *Sunnyvale*, *supra*, 190 Cal.App.4th at 1381. NFSR does contend, however, that using projected future conditions alone as the environmental baseline is procedurally improper and constitutes prejudicial error. Because the EIR in this case evaluated the Project's traffic and air quality impacts only against assumed future (2030) conditions, the EIR is inadequate as a matter of law. *Id.* at 1380 (holding that "nothing in the law authorizes environmental impacts to be evaluated only against predicted future conditions more than a decade after EIR certification and project approval.").[8]

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[8] In *Pfeiffer v. City of Sunnyvale City Council* (November 22, 2011, H036310) __ Cal.App.4th __ [2011 DJDAR 16916] the Sixth District Court was recently called upon to review the adequacy of an EIR for a medical office project that used multiple baselines to analyze the project's traffic impacts. The Court upheld the EIR's traffic impacts analysis only because

Second, in its attempt to justify its use of a future (2030) baseline, Expo relies upon sections of the Guidelines that do not even apply. Specifically, Expo relies upon Guidelines section 15064, subd. (h), stating that "the need to consider future conditions is especially acute..." (Expo Br., p. 19). However, section 15064, subd (h) only concerns the discussion of *cumulative* impacts. Although Guidelines section 15064, subd. (h), "requires consideration of probable future projects" (Expo. Br., p. 20) for the evaluation of cumulative impacts, it has absolutely no bearing on determining what constitutes a proper baseline for evaluating the Project's direct impacts. In effect, Expo argues that the EIR need only analyze the Project's cumulative impacts on traffic and air quality, and that this analysis will also suffice for purposes of evaluating the Project's direct impacts. (Expo Br., p. 30.) Expo's extensive discussion of Guidelines section 15064, subd. (h), thereby conflates the issue of establishing a proper baseline for evaluating Project impacts with the elements of a proper cumulative impact analysis. (Expo. Br., p. 19-21.)

Expo also relies on Guidelines section 15126.6, subd. (e)(2) to support its reliance on future conditions. (Expo Br., p. 23.) However, section 15126.6, subd. (e)(2) only applies to an EIR's analysis of the "No Project" Alternative, and provides absolutely no authority for an agency to use post-approval, future conditions as an environmental baseline for analyzing the Project's impacts.

The correct Guidelines sections (*i.e.*, the sections that establish the baseline for evaluating the impacts of the project itself) are sections 15126.2 and 15125. Section 15126.2, subd. (a), clearly states that in assessing the impact of a project on the environment, the lead agency "should normally limit its examination to changes in the ***existing physical***

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it was satisfied that the EIR included an evaluation of the project's traffic impacts compared to existing conditions. *Id.* at 16924.

conditions in the affected area as they exist at the time the notice of preparation is published," "giving due consideration to both the short-term and long-term effects." (emphasis added.) Similarly, section 15125, subd. (a), states:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, ***as they exist at the time the notice of preparation is published***... from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions ***by which a lead agency determines whether an impact is significant***. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives. (emphasis added.)[9]

Thus, under CEQA, an EIR must evaluate (i) Project impacts, (ii) cumulative impacts, and (iii) the "No Project" Alternative. It is improper for a lead agency to solely engage in the latter two analyses. While it may be permissible for a lead agency to also utilize future projections for certain analyses, an EIR's failure to include analyses of a project's impacts against existing conditions constitutes an abuse of discretion.

In short, NFSR does not argue that projections of future conditions have no place in an EIR, but simply that they may not serve as substitute for using existing conditions as the environmental baseline.

E. Expo Should Not be Exempt from Sunnyvale and Madera Oversight Coalition

While recognizing that the "general rule is that judicial decisions are given retroactive effect," Expo argues that it should nevertheless be exempt

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[9] See *Sunnyvale, supra,* 190 Cal.App.4th at 1379 ("We do not construe the word "normally," as used in CEQA Guidelines section 15125, subdivision (a)...to mean that a lead agency has carte blanche to select the conditions on some future, post-approval date as the "baseline" so long it acts reasonably as shown by substantial evidence.")

from the holding in *Sunnyvale,* suggesting that Expo had reasonably relied on a "former rule" and that a change in the rule was unforeseeable. (Expo. Br., p. 11.) However, the courts in *Sunnyvale* and *Madera Oversight Coalition* clarified, but did not change, requirements under CEQA. Expo can cite to no cases holding that an agency may use an environmental baseline fifteen years beyond the date of Project implementation, regardless of whether the use of such baseline is supported by substantial evidence. Moreover, no fairness and public policy considerations have been identified that would warrant creating a special rule for Expo in this case. *Woods v. Young* (1991) 53 Cal.3d 315, 330. Therefore, there is no basis for Expo to avoid application of the holdings in *Sunnyvale* and *Madera Oversight Coalition.*

F. The EIR Used an Incorrect Baseline for Its Analysis of Greenhouse Gas Impacts.

In the Opening Brief, NFSR showed that Expo failed to comply with Guidelines section 15064.4, subd. (b)(1), which unambiguously 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***." (emphasis added). Instead, the FEIR uses the 2030 "No Build" conditions as the environmental baseline to evaluate the Project's greenhouse gas ("GHG") emissions, which assumes increased regional population growth, vehicles-miles traveled and emissions through 2030. 14 AR 00526-28.

In defense of its failure to prepare an adequate GHG analysis, Expo argues, without citing any authority, that because Guidelines section 15064.4 became effective after approval of the Project, the "analysis complies fully with the available guidance from the regulatory agencies regarding the evaluation of [GHG]." (Expo Br., p. 30.) However,

compliance with such "available guidance" (even if assumed to be true) does not excuse Expo's failure to comply with the law.

While the CEQA Guidelines must be afforded great weight, they are principally a mechanism "for the implementation of [CEQA] by public agencies." Pub. Res. Code § 21083, subd. (a). See also Guidelines § 15000. Thus, the adoption of Guidelines section 15064.4 did not constitute a new law, but rather was merely a new interpretation of a lead agency's obligations under CEQA. Moreover, as discussed above, Guidelines section 15125, subd. (a), establishing the requirement that existing conditions must be used as the environmental baseline, was in effect prior to Project approval. Accordingly, the fact that Guidelines section 15064.4 became effective after Project approval is irrelevant and does not excuse Expo's failure to adequately evaluate GHG impacts against existing conditions.

IV. EXPO FAILED TO ADEQUATELY ANALYZE THE PROJECT'S GROWTH-INDUCING IMPACTS

In the Opening Brief, NFSR showed that the FEIR's discussion of the Project's potential growth-inducing impacts is fatally incomplete. (Opening Br., pp. 21-24.) 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."). Specifically, Expo failed to account for major development projects that have already been proposed near planned stations along the Phase II corridor, in order to capitalize on proximity and access to the Project, including 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. For example, the Casden Project's draft initial study expressly states that among its objectives is the establishment

of new uses "that capitalize on future light rail and Metro Rapid public transit." 522 AR 33445. Thus, because these types of real estate development projects depend on, and are facilitated by, the construction and operation of the light rail Project, they clearly fall within the required scope of the growth-inducing impacts analysis.

Metro argues that the Project's growth-inducting impacts, such as those associated with Casden Project, do not warrant analysis and disclosure because "the specific environmental impacts of proposed future projects for which no application has been submitted prior to the Notice of Preparation ("NOP") for the Project are speculative" and were not "reasonably foreseeable." (Metro Br., p. 7.) Metro further asserts that no such analysis was necessary because "CEQA does not require any discussion of the impacts of a ***hypothetical project.***" (*Ibid.*)

Metro's argument is wholly off-base because the CEQA Guidelines do not state that only "reasonably foreseeable" projects must be considered in the analysis of growth-inducing impacts. Instead, Guidelines section 15126.2, subd. (d) states as follows:

> "[The EIR must] [d]iscuss 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. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of ***some projects which may encourage and facilitate other activities*** that could significantly affect the environment, either individually or cumulatively. (emphasis added.)

In this case, the Project clearly encouraged and facilitated the development of high-density, mixed-use, transit-oriented development,

such as the Casden Project. In fact, some of these projects, including the Casden Project, exceeded 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.

Moreover, even if Expo were only required to consider projects that are reasonably foreseeable, Metro's claim that the Casden Project was not reasonably foreseeable is disingenuous. Although entitlement applications and the NOP for the Casden Project had not yet been filed when the Project NOP was issued, Expo nevertheless had direct knowledge of the Casden Project when it was preparing the EIR. For example, the Casden Project is clearly referenced, discussed, and identified as a "related project" in the DEIR. 520 AR 33405-6; 29 AR 00865. Furthermore, the administrative record contains 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). The administrative record also shows that Expo had been engaged in ongoing 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 Casden Project was not "reasonably foreseeable" and that no analysis was required "because of the speculative nature of the impacts" is directly contradicted by the administrative record.

V. EXPO FAILED TO ADEQUATELY ANALYZE THE PROJECT'S CUMULATIVE IMPACTS

In the Opening Brief, NFSR showed that the FEIR's discussion of the Project's potential cumulative impacts on traffic is inadequate, because it does not comply with Guidelines, section 15130, subds. (b)(4) and (b)(5) and failed to consider the *localized* traffic impacts of related projects, such as the Casden Project. (Opening Br., pp. 24-29.) Specifically, the FEIR's summary of projections does not satisfy all applicable requirements under Guidelines section 15130, subd. (b). Pursuant to Guidelines, section 15130, subd. (b)(4), the FEIR was required to provide a summary of the expected environmental effects to be produced by the "related projects" identified in the FEIR's "blended" cumulative impacts analysis. 29 AR 00863. Moreover, as required by Guidelines section 15130, subd. (b)(5), the FEIR was required to provide a reasonable analysis of the cumulative impacts of the "relevant" projects. As a result, the FEIR fails to meaningfully analyze the Project's potential cumulative impacts. 29 AR 00862-77.

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). The Casden Project was expressly identified in the EIR as a "related project." 29 AR 00865 Moreover, as shown above, Expo knew about the Casden Project, regardless of whether entitlement applications had yet been formally submitted.[10] (See Section IV, *supra.*)

The Casden Project will clearly add substantial additional traffic to the nearby intersection of Pico and Sepulveda Boulevards, which already

[10] 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. County of Madera, supra*, 167 Cal.App.4th at 1127-28.

operates at an unacceptable LOS F during the peak hour and would serve as the access point to one of Expo's primary light rail stations. 11 AR 00338. Nonetheless, the FEIR did not even attempt to quantify the traffic generation or interactions with the Casden Project or even discuss the potential cumulative traffic impacts at this highly-congested intersection. *Ibid.* 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 00347. 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 01055.

Without any explanation, Metro defends the FEIR's omission of these required elements by arguing that they "would read the summary-of-projections approach out of the plain text [of the CEQA Guidelines." (Metro Br., p. 17.) This is simply not true. The use of the "summary of projections" avoids the need to prepare a list of all "past, present, and probable future projects." However, nothing in CEQA Guidelines section 15130 suggests that by simply preparing the summary of projections, an agency is relieved of all remaining obligations. Instead, the structure of CEQA Guidelines section 15130 clearly indicates that the agency must still analyze the cumulative impacts of "relevant projects," such as Casden. Metro's argument would effectively eliminate section 15130, subd. (b)(5) from the CEQA Guidelines.

Metro does not cite any authority for the proposition that Expo's utilization of a summary of projections approach per Guidelines section 15130, subd. (b)(1)(A) exempts the lead agency from the additional disclosure or analysis of cumulative impacts as required by sections 15130, subds. (b)(4) and (b)(5). (Metro Br., p. 17.)

VI. THE EIR'S INADEQUATE ANALYSIS OF PROJECT IMPACTS ON SEPULVEDA BOULEVARD IS NOT MOOT

As shown in the Opening Brief, the FEIR did not adequately evaluate the use of Sepulveda Boulevard as a region-serving, north-south alternative to Interstate 405 ("I-405"). (Opening Br., p. 20.) Accordingly, the FEIR's discussion of the Project's potential traffic impacts was not prepared with a "sufficient degree of analysis" to provide decisionmakers with adequate information to enable them to make informed decisions regarding the environmental consequences of their actions. Guidelines, § 15151.

Expo claims that "[t]he Authority's inclusion of the Sepulveda grade-separation in the Project eliminates any argument that the Project might somehow cause significant traffic problems on Sepulveda when there is a major traffic incident on I-405." (Expo. Br., p. 34.) See also Expo Request for Judicial Notice ("RJN") Ex. A. In fact, the opposite is true. Providing grade-separation for the Project at Sepulveda Boulevard, while maintaining at-grade rail crossings at the remaining major north-south thoroughfares on the Westside (*i.e.,* Overland Avenue, Westwood Boulevard, Military Avenue) will merely attract more vehicles toward Sepulveda Boulevard for north-south trips. If anything, providing grade separation only at Sepulveda Boulevard may actually exacerbate the traffic impacts resulting from the diversion of traffic during incidents on I-405. Simply including grade-separation for the Project at Sepulveda Boulevard does not properly account for Sepulveda's role as a substitute route between the Westside and the San Fernando Valley.

VII. THE EIR'S PURPORTED "EVALUATION" OF GRADE-SEPARATED CROSSINGS WAS WHOLLY DEFICIENT

The Legislature has declared that it is the policy of this state that governmental agencies at all levels must "consider alternatives to proposed actions affecting the environment," and that public agencies "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ...." Pub. Res. Code §§ 21001, subd. (g), and 21002. Accordingly, an EIR must "describe a range of reasonable alternatives to a project, or to the location of 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." Guidelines, § 15126.6. Although an EIR is not required to discuss alternatives beyond what is realistically possible, it must "produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." *San Bernardino Valley Audubon Soc'y., Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-751.

In its Opening Brief, NFSR showed that the EIR failed to achieve these goals by omitting an evaluation of grade-separated crossings at two major north/south thoroughfares within Segment 1 (Overland Avenue and Westwood Boulevard) as either a design option or alternative. (Opening Br., pp. 39-44.) In other words, the EIR failed to produce information that would permit a "reasonable choice" between street widening and the removal of parking, the methods of addressing impacts associated with these crossings favored by Expo staff, and grade-separation, which has overwhelming support among community stakeholders and would further the adopted policy of the California Public Utilities Commission ("CPUC")

to "reduce the number of at-grade crossings on rail corridors" as part of its "mission to reduce hazards associated with at-grade crossings ...." 101 AR 14947-14956; 678 AR 37846-38003; 679 AR 38004-38288; 34 AR 01109. NFSR also showed that the omission of any meaningful evaluation of grade separation as a potentially feasible way to lessen or avoid the traffic and public safety impacts of the Project rendered the EIR wholly inadequate for use by the CPUC in connection with its decision regarding the proposed rail crossings.[11]

In an attempt to defend the EIR's failure to evaluate grade-separation as a design option or alternative, Respondents advance three arguments. These arguments lack merit and must be rejected.

First, Respondents argue that there was no need for the EIR to consider grade-separation within Segment 1 in light of the EIR's conclusion that the Project's at-grade crossings would not have "significant" impacts. (Metro Br., pp. 22-26.) However, this argument ignores that the EIR only reached this conclusion by identifying measures that would ordinarily be deemed "mitigation measures" (such as adding new traffic lanes that would extend one or more blocks on either side of the crossing) and incorporating these measures into the Project description *before* evaluating the Project's impacts. 9 AR 00303-306. In other words, Respondents argue that the FEIR need not consider both alternatives and mitigation measures for the same potential impacts – an argument that was flatly rejected by the California Supreme Court in *Laurel Heights Improvement Assn. of San*

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[11] The CPUC must give final regulatory approval for any proposed "at-grade" rail crossings, and is therefore a "responsible agency" for the Project under CEQA. 11 AR 00346; 8 AR 00239. 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).

Francisco, Inc. v. Regents of the Univ. of California (1988) 47 Cal.3d 376, 403-4. There, the Regents argued that no discussion of alternatives was necessary given the EIR's conclusion that all significant environmental effects would be mitigated to a level of insignificance. *Id.* at 399-400. The Court rejected this argument and held that "under CEQA an environmental impact report must include a meaningful discussion of both project alternatives and mitigation measures." *Id.* at 403.

Grade separation was a potentially feasible way to avoid the impacts of the Project and should have been evaluated as a design option or Project alternative, and not merely as an afterthought. See *Laurel Heights, supra,* 47 Cal.3d at 400 (Noting that one of an EIR's major functions "is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official"). The FEIR's cursory, belated and dismissive discussion of grade separation within Segment 1 was clearly insufficient to permit a reasonable choice of alternatives. See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 885 (rejecting EIR's conclusion that an "enclosed facility" alternative is unworthy of in-depth consideration).

Second, Respondents argue that substantial evidence supports Expo's determination that the grade-separation design options proposed by NFSR and other members of the public, including a depressed profile (*i.e.*, trench) option, would cause significant impacts and would increase the cost of the Project. (Metro Br., pp. 26-28.) This argument is completely irrelevant because neither the EIR nor Respondents reached any conclusions regarding the *feasibility* of any of the available grade-separation options. *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1457 (In determining the nature and scope of alternatives to be examined in an EIR, local agencies shall be guided by the doctrine of feasibility.). See Pub. Res. Code § 21061.1 (definition of

"feasible"). The mere fact that an alternative may have one or more environmental effects or would be more expensive does not render the alternative "infeasible" or otherwise justify its rejection. See Guidelines, § 15126.6, subd. (f)(1) (listing the factors that may considered when addressing the feasibility of alternatives, and clarifying that "[n]o one of these factors establishes a fixed limit on the scope of reasonable alternatives."). See also *Center for Biological Diversity, supra*, 185 Cal.App.4th at 883 (The fact that an alternative may be more expensive is not sufficient to show that the alternative is financially infeasible; what is required is evidence that the additional costs are sufficiently severe as to render it impractical to proceed with the project).[12]

Third, Respondents argue that the FEIR's analysis does not "prevent" the CPUC from acting as a responsible agency. (Metro. Br., pp. 31-32.) In support of this argument, Respondents state that the CPUC submitted comments on the DEIR and did not submit any comments regarding the "adequacy of the FEIR's evaluation of the at-grade crossings of Overland Avenue or Westwood Boulevard." (*Ibid.*) However, Respondents have not, and cannot, cite any authority for the proposition that an EIR's discussion of a particular topic is adequate simply because a

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[12] Furthermore, none of the "evidence" cited by Respondents was contained in the DEIR, and most was contained in internal memoranda prepared after the FEIR was issued. 715 AR 45995-46008; 716 AR 46009-24; 717 AR 46025-32; 718 46033-93. As such, the EIR clearly failed to select and discuss a range of feasible alternatives "in a manner to foster meaningful public participation and informed decision making." Guidelines, § 15126.6, subd. (f). See also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ("[W]hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings ... cannot supply what is lacking in the report") and *Laurel Heights, supra*, 47 Cal.3d at 405 (holding that the reasons why certain alternatives were rejected "must be discussed ***in the EIR*** in sufficient detail to enable meaningful participation and criticism by the public.") (Emphasis added.).

responsible agency did not contend otherwise.[13] By failing to address NFSR's arguments on the merits, Respondents concede their validity.

VIII. THE EIR'S MITIGATION MEASURES ARE INADEQUATE

As set forth in detail in the Opening Brief, 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. (Opening Br., pp. 31-39.) In response, Expo erroneously argues that the record contains substantial evidence supporting the adequacy of the EIR's mitigation measures to address the Project's impacts. (Expo. Br., pp. 35-46.)

A. Inadequate Mitigation of Spillover Parking Impacts

Expo recognizes that at least four of the Project's stations may have an inadequate supply of off-street parking, thereby creating "spillover" parking impacts in residential neighborhoods. (Expo. Br., p. 36.) To mitigate this impact on residents, the EIR merely "requires" Metro to "work with" local jurisdictions to implement residential parking permit programs. 11 AR 00413-4. However, committing to talking about something is fundamentally different than committing to actually doing something. The EIR creates no tangible, enforceable commitment by the relevant local jurisdictions to implement the parking permit program, even if such mitigation is warranted by extreme parking shortages.

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[13] Citing Guidelines, § 15096, subd. (e)(2), Respondents assert that "any such claims at this late date are waived." This section of the Guidelines indicates only that, that by failing to "take the issue to court" within 30 days, the CPUC may have waived any right to challenge the EIR. However, CPUC's ability to challenge the EIR is not at issue here. Section 15096, subd. (e)(2) says nothing about NFSR's right to challenge the EIR on this ground.

Expo claims that the adequacy of this mitigation measure is supported by substantial evidence because similar programs have worked elsewhere. (Expo Br., p. 37.) NFSR does not argue, as Expo suggests, that parking permit programs are infeasible, ineffective, or uncommon. (Expo Br., p. 40.) Whether parking permit programs work in practice is entirely irrelevant here, because nothing in the EIR requires the implementation of a parking permit program. In fact, the implementation of parking permit programs is entirely outside of Expo's control.[14]

Moreover, Expo claims that "[t]o ensure implementation [of the permit parking programs], Metro has agreed to reimburse local jurisdictions for the costs associated with implementing permit programs." (Expo. Br. p. 37.) Likewise, promising reimbursement to local governments for program administration creates no affirmative duty and does not ensure implementation.

Citing *Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011 ("*SOCA*"), Expo asserts that the parking permit program is somehow enforceable because the EIR uses a 100% parking utilization "performance standard" to protect against claims of improper deferral. (Expo Br., p. 38.) However, there is no evidence to support the conclusion that upon 100% parking utilization, a permit program would be implemented. Instead, the only action "required" when the 100% parking utilization threshold is met for a given neighborhood is that Metro "work with" the applicable jurisdiction(s). By employing a 100% parking utilization "performance standard," the EIR may actually encourage Metro to avoid taking any action until there is no available parking. Therefore, even if a parking permit program were to be

[14] There is nothing in the administrative record to show that any of the relevant local jurisdictions (*i.e.*, Culver City, Los Angeles, Santa Monica) have committed to implementing a parking permit program.

implemented, despite the absence of any such enforceable requirement in the EIR, there will be a time lag, when the program is being established, during which no parking will be available.

Moreover, *SOCA* is also easily distinguished. In *SOCA*, the City of Sacramento proposed the expansion of its own convention center and related commercial development. 229 Cal.App.3d at 1016. Among the mitigation measures incorporated in the EIR to address potential parking impacts in *SOCA* were constructing additional parking, promoting regional/national conventions and promoting alternative modes of transportation for convention attendees. *Id.* at 1035-1036. Thus, the City of Sacramento was both the project developer and had regulatory control and there was no question of enforceability. Here, Metro ultimately has no authority to implement a residential parking permit program.

Expo also claims that the EIR complies with *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116, arguing that *Gray* only requires that an EIR present a "'viable solution' that will effectively mitigate an impact to a less than significant problem." (Expo. Br., p. 39.) *Gray* requires more. In *Gray*, the Court of Appeals rejected a mitigation measure to address the loss of potable well water resulting from mining operations by providing replacement water to residents in the form of bottled water. *Id.* at 1116-1117. In doing so, the Court explained that the mitigation measure would 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*** and caused a decline in the water levels of their wells." *Ibid.* (emphasis added.)

Expo's attempt to distinguish *Gray* makes no sense. Expo says that it is "not proposing to eliminate parking at residents' street or homes; rather, MM TR-4 addresses environmental impacts resulting from a loss of ***public*** parking." (Expo Br., p. 40; emphasis in original.) However, street-

parking will be eliminated in front of residences along Overland Avenue and Westwood Boulevard, which will force residents to compete with transit riders for on-street spaces on adjoining streets. 11 AR 00365, 00416-419. Furthermore, as transit station parking lots approach 100% utilization, riders will park on residential streets, thereby limiting the supply of available on-street parking spaces for residents.[15] These residents may be forced to circle the block multiple times in order to find a space, or to park further from their homes. If implemented, a permit system will likely require residents to pay for a resource that was previously free. Thus, these residents will not be able to use public street parking in close proximity to their homes in substantially the same manner that they were accustomed to doing if the Project had not existed.

Citing *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 697, Expo argues that "[t]he social inconvenience of having to hunt for scarce parking spaces is not an environmental impact." In *San Franciscans*, the challenged EIR concluded that "[p]arking shortfalls relative to demand are not considered significant environmental impacts in the urban context of San Francisco." Parking deficits are an inconvenience to drivers, but not a significant physical impact on the environment." *Ibid.* (emphasis added.) Thus, there was no need for the identification of mitigation measures because the EIR concluded that the impacts of parking deficits was not a significant impact on the environment in that context (*e.g.*, San Francisco enforces a "transit

[15] In fact, as a result of subsequent actions by the Expo Board, this problem will only get worse. The FEIR indicated that the Expo/Westwood Station would require 268 parking spaces. 11 AR 00412. In March 2011, the Expo Board approved the "Expo/Westwood Station No Parking" design option (RJN Ex. A), which will further exacerbate the parking shortage by eliminating the 170 station-area parking spaces.

first policy"). *Ibid.* Mitigation measures were needed only to address the "secondary" effects on traffic and air quality. *Ibid.*

In contrast, the EIR in this case found that the loss of parking was a significant impact. 11 AR 00412. Because Expo determined that the Project would cause a significant adverse parking impact, the EIR was required to identify adequate mitigation. Expo cannot now flee from the EIR's conclusion that in this context, loss of parking was a significant adverse effect of its Project.

Here, NFSR does not contend that the "social inconvenience" of inadequate parking must be studied. Rather, the EIR acknowledges that the reduction and increased scarcity of parking for residents near transit stations will result in an adverse impact in parking supply unless mitigation measures are imposed. As demonstrated in the Opening Brief and above, the measures identified in the EIR for this purpose are inadequate and/or unenforceable.

B. Inadequate Mitigation of Noise and Vibration Impacts

The EIR does not adequately mitigate the Project's noise and vibration impacts. (Opening Br., pp. 34-36.) For examples, mitigation measure MM NOI-1 states that where sound walls and berms cannot meet a specified standard, Expo or Metro must provide for "sound insulation," mechanical ventilation, or some other unspecified "alternative." Although the FEIR provides no information concerning how such improvements to private structures would actually be "provided," and there is no evidence in the record that such sound insulation could be feasibly accomplished, Expo claims that "CEQA does not require this level of specificity." (Expo. Br., p. 42.) Instead, Expo can only say that "[s]ound insulation is a well-established, proven mitigation measure..." (*Ibid.*) However, even assuming that it is, the EIR does not explain the mechanism and processes

for implementation. Thus, there is no basis to conclude that MM NOI-1 is feasible.

Moreover, any such sound insulation will not be effective unless impacted residents keep their windows closed at all times, and would not mitigate any noise impacts to residents when they are outside. Thus, there is no substantial evidence to support a conclusion that sound insulation would be feasible or effective, since it would not allow residents to use their property in the same manner to which they are currently accustomed. See *Gray*, *supra*, 167 Cal.App.4th at 1116-1117 (holding that there was no substantial evidence that the mitigation measures identified in an EIR would be feasible or effective in remedying the potential significant problem of declining water levels in residential wells because the measures would not provide residents "with the ability to use water in substantially the same manner that they were accustomed to doing if the Project has not existed."). Responds concede the merits of this contention by ignoring it in their briefs.

IX. EXPO WAS REQUIRED TO RECIRCULATE THE EIR PRIOR TO CERTIFICATION

Pursuant to Public Resources Code section 21092 and CEQA Guidelines section 15088.5, subd. (a), recirculation of an EIR for public review and comment is required if "significant new information" was added to the FEIR, and the public would be deprived of a "meaningful opportunity to comment on a substantial adverse environmental effect" of the Project in the absence of recirculation.

As shown in the Opening Brief, following circulation of the DEIR, Expo made major changes to the Project and prepared numerous additional studies. Opening Br., p. 44-49; 11 AR 00331, 00342; 14 AR 00525-30; 21 AR 00641. For example, Expo waited until the FEIR to even discuss any

grade-separated alternatives at Overland Avenue, Westwood Boulevard and Sepulveda Boulevard and the elimination of a proposed 170-space "park-and-ride" lot at the Expo/Westwood Station, which Expo projected will have over 5,000 daily boardings. 9 AR 00251, 00258, 00303-00306; 7 AR 00174; see also Metro Br., p. 20.

In addition, the FEIR contained new information regarding noise impacts related the operation of grade-separated design options, station public address systems and impacts to studio uses (21 AR 00672-675, 00642, 00666-670). Compared to the DEIR, new information in the FEIR showed a 5.5% increase in number of receptors that will be "moderately" impacted by noise and a 36.7% increase in the number of receptors that will be "severely" impacted. 21 AR 00672. As a result of this significant increase in the severity of noise impacts, the FEIR proposes at least five additional locations requiring sound walls as mitigation. 21 AR 00673-75. Therefore, the public was denied an meaningful opportunity to comment on these previously undisclosed impacts, as well as the efficacy and potential impacts of additional sound walls, and any potential mitigation measures to address such impacts. See Guidelines, § 15088.5, subd. (a).

Attempting to justify Expo's failure to recirculate, Metro argues that the new information, included only in the FEIR, does not implicate any significant impacts. (See, *e.g.,* Metro Br., p. 37.) However, Respondents' suggestion that the Sepulveda Boulevard grade-separated (elevated) design option, which was only included in the FEIR, will not have aesthetic impacts is belied by information in the FEIR itself. Specifically, in evaluating the Venice/Sepulveda elevated grade-separation under LRT Alternatives 3 and 4, the EIR found as follows:

> The introduction of an aerial guideway on supporting columns or retained fill...would result in a ***substantial change in visual conditions*** along Sepulveda Boulevard. In particular, the LRT structure would become ***visually***

dominant because of its elevated position with respect to the roadway and the one- to three-story multi-family residential buildings below the structure on both sides of Sepulveda Boulevard. The structure would present an ***imposing visual feature*** in relation to the street level views of Sepulveda Boulevard. Thus, the visual impact of the aerial structure in this area would be a ***potentially significant impact*** as the structure would become the focal point along a street dominated by street level multi-family residential and educational land uses.

Visual conditions along Venice Boulevard would substantially change where the LRT Alternative transitions to an aerial structure as it turns north towards Sepulveda Boulevard. The guideway would become ***visually dominant because of its elevated position with respect to the roadway***, and would assume physical dominance with respect to vehicles and the existing one- to three-story buildings near the structure. The structure would present an ***imposing visual feature in relation to the street level views of Venice Boulevard***. The height of the guideway could create a ***sense of physical encroachment*** for the occupants of the commercial and residential structures located along Venice Boulevard, and ***a potentially significant impact would result.***

12 AR 00475-478 (emphasis added.)

Metro also admits that one of the Project alternatives (Venice/Venice)was eliminated because "if an elevated [rail] line were used...the visual impacts and shadow from an aerial structure in a ***largely low-rise area*** would be significant." (Metro Br., p. 30, emphasis added.) Expo had also eliminated consideration of the Overland Avenue and Westwood Boulevard-Aerial Structure Design Option because it would "creat[e] a large physical barrier that would bisect the neighborhood...[and] would contribute a dominant visual element to the neighborhood/ community." 9 AR 00305. All of the characteristics of the adverse visual impacts described above will also apply to the Sepulveda Boulevard grade-separated design option that was only described in the FEIR.

Metro claims that "substantial evidence supports [Expo's] determination that there are no new significant effect" warranting recirculation. (Metro Br., p. 32.) The Sepulveda Grade Separation design option requires the construction of a thirty-foot high, retained fill embankment to support the aerial structure, which will loom above a neighborhood of primarily single-story residences. 48 AR 08072, 12 AR 00474. The EIR fails to evaluate the aesthetic impacts on these homes, beyond the mere assertion that "[r]esidents to the south along Exposition Boulevard would have the greatest visibility of the aerial structure; however, these views would be screened as feasible as landscaping would be incorporated to screen the Expo ROW from view, as would other design features specified by the Metro Design Criteria to reduce visual impacts." 12 AR 00474. However, there is no evidence in the record to support a conclusion that the incorporation of landscaping or other "design features" would reduce the aesthetic impacts to a level of insignificance. Expo should not be able to "hide behind its own failure to gather relevant data." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

In addition, Expo argues that the information that it added to the FEIR could not be "significant" because NFSR "does not cite any evidence in the administrative record to support its claim that any adjustments in the sound wall will be ineffective or result in a 'new significant environmental impact.'" (Metro Br., p. 34.) Expo's reasoning turns the CEQA process on its head. Because Project changes occurred *after* circulation of the DEIR, NFSR, along with the general public, was denied the proper opportunity to raise the issue during the administrative process.

Notwithstanding the fact that the revised Project descriptions and supplemental analyses were never circulated for public review and comment, Expo also seems to suggest that the public and interested stakeholders have an affirmative duty to *prove* the impacts resulting from

changes to the Project following circulation of the DEIR. Any such interpretation would force the public to produce definitive evidence of the impact, without the benefit of the mandated opportunity for public review and comment. This Court should not allow EXPO to hide behind such circular reasoning and increase the evidentiary burden on stakeholders and the general public.

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)(4). As discussed above, the DEIR failed to evaluate grade-separated alternatives from, and including, Overland Avenue to Sepulveda Boulevard, thereby rendering it fundamentally inadequate. Expo waited until preparation of the FEIR to disclose some, albeit insufficient, information regarding the potential for grade separation at various intersections within Segment 1. 11 AR 00356-59. However, because this information was not contained in the document that was circulated for public comment, the EIR was fundamentally inadequate.

X. EXPO'S DECISIONS TO APPROVE THE PROJECT AND CERTIFY THE EIR MUST BE SET ASIDE IN THEIR ENTIRETY

Essentially conceding the legal inadequacy of the EIR, both Expo and Metro asks this Court to "sever [the inadequate components] and allow the rest [of the Project] to proceed." (Expo Br., p. 47, Metro Br., p. 38.) In other words, Expo and Metro again ask for special treatment.

Respondents' reliance on *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1180 is misplaced. In *Anderson*, an EIR was prepared for a shopping center project, which included a Wal-Mart and other nearby commercial pad sites. *Id. at* 1179. The EIR's analysis of certain distinct components of the shopping center, such as the

Wal-Mart, were legally adequate. *Id. at 1180.* However, the EIR failed to include an analysis of the traffic and air quality impacts for a proposed gas station. *Id.* at 1179. Therefore, because the EIR's defects only concerned the gas station and not the remainder of the shopping center project, the analysis of which was wholly unaffected by the identified deficiency of the EIR, the *Anderson* Court permitted the shopping center development to proceed while prohibiting development of the gas station pending a legally adequate environmental review for that project component. *Id.* at 1181. Here, the EIR's glaring inadequacies implicate the entire Project. Expo does not and cannot identify any discrete or severable aspects of the Project that are unaffected by the EIR's numerous deficiencies.

Furthermore, there is no basis for permitting partial certification as suggested by Expo. See *LandValue 77, supra,* 193 Cal.App.4th 675, 682 (holding that the court's determination that an EIR for a development project on a university campus was inadequate in certain respects required that both the certification of the EIR and the approval of the entire project be set aside). Accordingly, the Project should not proceed until Expo revises and certifies an EIR that fully complies with CEQA.

XI. 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 in their entirety.

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DATED: December 2, 2011 ELKINS KALT WEINTRAUB REUBEN GARTSIDE LLP

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

B232655 / LASC NO. BS125233

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