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,

v.

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

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

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

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS EXPOSITION METRO LINE CONSTRUCTION AUTHORITY; EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD, AND REAL PARTIES IN INTEREST AND RESPONDENTS LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY BOARD

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I. INTRODUCTION

Amici curiae California State Association of Counties, League of California Cities, and the City of Los Angeles (collectively "Amici") support the arguments articulated by respondents Exposition Metro Line Construction Authority and Exposition Metro Line Construction Authority Board, and by real parties in interest and respondents Los Angeles County Metropolitan Transportation Authority and Los Angeles County Metropolitan Transportation Authority Board. We urge this Court to uphold the superior court decision.

Amici offer the added perspective of the local agencies across this state that are tasked with completing California Environmental Quality Act ("CEQA") review of large infrastructure projects. As municipalities across California plan for population growth, attempt to catalyze economic growth, and work to comply with California's various laws requiring substantial reductions in greenhouse gas emissions, large projects aimed at addressing long-term concerns and at meeting long-range goals will only proliferate.

The project at issue in this case is a prime example. The Expo Phase 2 Project ("Project") is part of Los Angeles Mayor Antonio Villaraigosa's 30/10 initiative. See http://www.metro.net/news/simple_pr/30-10-initiative-accelerate-transit-projects/. The 30/10 initiative would use long-term sales tax revenue as collateral for long-term bonds and a federal loan that will enable completion of twelve mass transit projects in ten years, rather than the originally projected thirty years. http://www.metro.net/projects/30-10/. The 30/10 initiative is expected to spur creation of 160,000 new jobs and lead to several annual benefits, including 77 million more transit boardings,

521,000 fewer pounds of mobile source pollution, 10.3 million fewer gallons of gasoline used, and 191 million fewer vehicle miles traveled. *Id.*

Major infrastructure projects like this one are typically evaluated and approved long before they are scheduled to come on line. As a result, the potential impacts of major infrastructure projects may be best measured against the physical conditions that will exist when they are scheduled to come on line. This is especially true for "physical" conditions such as traffic, which is not a fixed physical condition, but rather, a function of many surrounding circumstances.

Selection of an appropriate environmental baseline is crucial to informed decision-making. Municipalities must be allowed to choose a baseline that will best inform the decision-making process by identifying the real impacts of a project. An agency's discretion to establish the proper baseline to evaluate environmental impacts is captured by CEQA Guideline § 15125(a). CEQA Guidelines, 14 Cal. Code Regs 15125(a). Courts should respect agency discretion to select an environmental baseline so long as the agency's determination is supported by substantial evidence.

By respecting agency discretion to select a future baseline in appropriate cases, courts ensure that CEQA's purposes, such as engaging in meaningful environmental review, ensuring good-faith disclosure, and enabling informed decision-making, are fulfilled. See, e.g., CEQA Guidelines, 14 Cal. Code Regs §§ 15002(a) & 15151; *Laurel Heights Improvement Assn. v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 402 (identifying fostering of informed decision-making as CEQA's "fundamental goal"); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 232 ("An EIR, when looked at as a whole, must

provide a reasonable, good faith disclosure and analysis of the project's environmental impacts.").

Recent court of appeal decisions *Sunnyvale West Neighborhood Association v. Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 ("*Sunnyvale West*"), and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 ("*Madera Oversight*") cast doubt on the ability of local agencies to exercise discretion when determining the appropriate environmental baseline for evaluation of large infrastructure projects. These cases conflict with *Communities for a Better Environment v. South Coast Air Quality Management District*, where the California Supreme Court stated that an agency's determination of environmental baseline is a factual question subject to review for support by substantial evidence. *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328 ("*CBE*").

Sunnyvale West has already been called into question by the court that decided it. In *Pfeiffer v. City of Sunnyvale* (October 28, 2011) ____ Cal.App.4th ____, 2011 DAR 16916, 16923-24 (11/25/11) the Sixth District distinguished its own decision while upholding the use of a future baseline to assess the traffic impacts of a project.[1]

To enable municipalities to engage in meaningful planning, we respectfully ask this court to reject *Sunnyvale West's* and *Madera*

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[1] *Sunnyvale West* is particularly suspect given the Sixth District Court of Appeal's recent decision in *Pfeiffer*. See *Kenney v. Antioch Live Oak School Dist.* (1936) 18 Cal.App.2d 226, 231(where there is conflict between two court of appeals decisions, later decision prevails); 16 Cal.Jur.3d (2002) Courts, § 297 ("As a general rule, where there are two or more conflicting decisions rendered by a court or by courts of equal dignity, the decision last rendered should prevail.").

Oversight's incorrect statement of the standard of review for environmental baseline determinations as inconsistent with standard announced by the California Supreme Court in *CBE*. *CBE, supra,* 48 Cal.4th at 328; *Sunnyvale West, supra*, 90 Cal.App.4th 1351; *Madera Oversight, supra*, 199 Cal.App.4th 48.

II. ARGUMENT

In *CBE*, when the Supreme Court stated that the determination of the environmental baseline is a question of fact subject to review for support by substantial evidence, it affirmed a principle that was already well-established in CEQA case law. See *CBE, supra*, 48 Cal.4th at 328. The departure by *Sunnyvale West* and *Madera Oversight* from this basic principle is unwarranted and stems from misreading the CEQA Guidelines and the statutory provisions those guidelines are intended to implement. Nothing in CEQA's statutory language mandates a time at which existing environmental conditions must be measured, and the CEQA Guidelines recognize this by affording agencies the discretion to deviate from the norm, if necessary. See CEQA Guidelines, 14 Cal. Code Regs § 15125(a). When municipalities engage in CEQA review of large infrastructure projects, the discretion to choose a future baseline is vitally important to ensuring that the environmental review process meets CEQA's fundamental purpose of fostering informed decision-making.

A. In CEQA cases, courts defer to agency determinations on questions of fact.

Courts review agency compliance with CEQA for prejudicial abuse of discretion. *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426. Abuse of discretion is established if the agency fails to proceed in the manner required by law or if a determination made by the

agency is not supported by substantial evidence. *Id.*; Pub. Resources Code, § 21168.5. Where a question of fact is involved, courts review the agency's decision to determine whether it is supported by substantial evidence in the administrative record. See *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 393.

B. Determination of the appropriate environmental baseline is a question of fact.

As the California Supreme Court stated in *CBE*, designating the environmental baseline for a project is a factual determination that courts review for support by substantial evidence. *CBE*, 48 Cal.4th at 328. In so holding, the Supreme Court recognized the inherent flexibility built into CEQA Guidelines § 15125(a) and affirmed a well-established line of court of appeals decisions.

Guidelines § 15125(a) states that the physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation ("NOP") is published or at the time environmental review commenced "will *normally* constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." CEQA Guidelines, 14 Cal. Code Regs § 15125(a) (emphasis added); *see also* CEQA Guidelines, 14 Cal. Code Regs § 15126.2(a) ("In assessing the impact of a proposed project on the environment, the Lead Agency should *normally* limit its examination to change in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or . . . at the time environmental analysis is commenced." (emphasis added)). By including the word "normally," the guidelines implicitly recognize the need for flexibility in determining the appropriate environmental baseline for environmental review of a project.

Courts generally recognize this need for flexibility in making the environmental baseline determination for a project, particularly when environmental review must grapple with the effects of inevitable growth. As the Court of Appeal noted in *Save Our Peninsula v. Monterey County Board of Supervisors*, "the date for establishing [a] baseline cannot be a rigid one... For instance, where the issue involves an impact on traffic levels, the EIR might necessarily take into account the normal increase in traffic over time." *Save Our Peninsula*, (2001) 87 Cal.App.4th 99, 125-26.

Building on this recognized need for flexibility, courts have traditionally considered the environmental baseline determination a factual question subject to review for support by substantial evidence in the record. See *e.g.*, *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 ("The central issue remains whether there is substantial evidence to support the county's decision not to deviate from the norm in selecting 1997 as the baseline in the circumstances of the case before us."); *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 659 (concluding that County's determination of baseline was supported by substantial evidence).

In *CBE*, the Supreme Court recently reaffirmed that the environmental baseline determination is a question of fact:

> Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.

48 Cal.4th at 328; see also *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal. App.4th 316, 337-38 (citing *CBE* for the

proposition that determination of environmental baseline is not governed by an inflexible rule).

C. *Sunnyvale West* and *Madera Oversight* conflict with *CBE's* statement of the standard of review applicable to environmental baseline determinations.

Sunnyvale West and *Madera Oversight* fail to recognize the importance of agency expertise in environmental baseline determinations. Any court following those decisions will hamper the ability of reviewing agencies to engage in meaningful environmental review of large scale infrastructure projects, which often take years to move from design to actual operation and which are typically designed to address inevitable future conditions like increased traffic congestion. See *Sunnyvale Wes*, *supra*, 190 Cal.App.4th 1351; *Madera Oversight*, *supra*, 199 Cal.App.4th 48. While it is true that courts must ensure agency compliance with the law, *Sunnyvale West* and *Madera Oversight* reach faulty conclusions concerning CEQA law governing environmental baseline determinations. As a result, they nullify *CBE's* mandate that environmental baseline determinations be reviewed for substantial evidence. *See CBE*, *supra*, 48 Cal.4th at 328.

1. *Sunnyvale West* and *Madera Oversight*.

In *Sunnyvale West*, the court of appeals invalidated an EIR concerning the Mary Avenue Extension, a road construction project designed to alleviate traffic congestion. *Sunnyvale West, supra*, 190 Cal.App.4th at 1361. To evaluate project impacts to traffic, the City of Sunnyvale considered traffic impacts of the project as compared to predicted traffic conditions without the project in 2020, which is when project proponents expected the extension would be complete and operational. *Id.* at 1359-60.

The court of appeals affirmed the trial court's grant of a writ of mandate, and determined that using a 2020 environmental baseline constituted a failure to proceed as required by law. *Id.* at 1383. To support this holding, it concluded that the term "normally" in Guidelines § 15125(a) extended to agencies the option to choose a baseline that does not represent conditions at the time of NOP publication or commencement of environmental review only where conditions at that time would "not be representative of the generally existing conditions." *Id.* at 1380.

Sunnyvale West failed to recognize *CBE*'s mandate that determination of environmental baseline is reviewed for support by substantial evidence. See *CBE*, 48 Cal.4th at 328 ("An agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, *as with all CEQA factual determinations, for support by substantial evidence*." (emphasis added)). Building on *Sunnyvale West's* inaccurate statement of the law concerning review of an agency's environmental baseline determination, in *Madera Oversight*, another Court of Appeals panel concluded 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*, *supra,* 199 Cal.App.4th at 90.

2. *Sunnyvale West's* conflict with CBE stems from an unreasonable interpretation of CEQA Guideline § 15125(a).

The *Sunnyvale West* court's conclusion that choosing a future baseline amounted to a failure to proceed as required by law stemmed from its unreasonable interpretation of the word "normally" in CEQA Guideline § 15125(a). See *Sunnyvale West*, *supra,* 190 Cal.App.4th at 1379-80. Guideline 15125(a) states in relevant part:

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

CEQA Guidelines, 14 Cal. Code Regs § 15125(a) (emphasis added). Despite the plain language of the Guideline, the *Sunnyvale West* court concluded that only in extremely limited circumstances may an agency deviate from an environmental baseline consisting of conditions at the time of NOP publication or environmental review commencement. *Sunnyvale West, supra* 190 Cal.App.4th at 1380. As applied to large infrastructure projects, this interpretation of § 15125(a) is inconsistent with CEQA's statutory purpose, and as such should be rejected. See Gov. Code, § 11342.2 ("whenever . . . a state agency has the authority to adopt regulations to implement, interpret, make specific, or otherwise carry out the provisions of [a] statute, no regulation adopted is valid unless (1) consistent and not in conflict with the statute, and (2) reasonably necessary to effectuate the purpose of the statute"); *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108 (A regulation should not enlarge or impair the scope of the governing statute).

Guideline § 15125(a) implements CEQA §§ 21100 and 21060.5. See CEQA Guidelines, 14 Cal. Code Regs § 15125(a); Pub. Resources Code, §§ 21100 & 21060.5. Section 21100(b)(1) requires an EIR to set forth "all significant effects on the environment of the proposed project," and § 21060.5 defines "environment" as "the physical conditions which exist within the project area which will be affected by a proposed project."

Section 21060.5 does not specify the time at which conditions must exist to be identified as the affected environment. Thus, contrary to the conclusion reached in *Sunnyvale West* and elaborated on in *Madera Oversight*, CEQA itself does not require that the effects of a proposed project be evaluated relative to environmental conditions as they existed at the time of NOP publication or the completion of environmental review. See *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351; *Madera Oversight*, *supra*, 199 Cal.App.4th 48.

If anything, § 21060.5's statement that the environment consists of physical conditions "which will be affected by a proposed project" suggests that a future baseline may be mandatory for accurate assessment of potential impacts of large, long-term projects where inevitable environmental change will result from factors other than project completion. In such a case, the project may not be built until years after approval, and physical conditions as they exist at the time of NOP publication or the start of environmental review will differ from the physical conditions that "will be affected" by the project. Pub. Resources Code. § 21060.5. In the case of traffic impacts, the conditions existing at the time of project approval may be of little relevance to the impacts of the project that will not be implemented for years.

Thus, while it might "normally" make sense for the majority of projects subject to CEQA review to be evaluated against environmental conditions as they exist at the time of NOP publication or the start of environmental review, in other cases it makes no sense. Guideline § 15125(a)'s inclusion of the word "normally" acknowledges that agency discretion is necessary to address such situations. However, *Sunnyvale West's* interpretation of § 15125(a) and its underlying statutory provisions

prevents agencies from exercising discretion to select an environmental baseline that will enable meaningful environmental review. See *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351; see also *Madera Oversight*, *supra*, 199 Cal.App.4th 48.

The principle underlying *CBE* is that projects subject to CEQA review are proposed in areas with widely varying environmental conditions and come in too many shapes and sizes to establish a rigid rule governing environmental baseline determinations. See *CBE*, *supra*, 44 Cal.4th at 328. Given that environmental baseline determinations have long been considered a question of fact, and that the Guidelines require deference to agency decision-making on questions of fact, a more reasonable interpretation of § 15125(a) is required. The Guidelines should be interpreted to recognize that agency expertise is critical to determining how to best analyze a project's environmental impacts. Specifically, § 15125 should be interpreted to allow agencies to select an alternate baseline when environmental conditions as they exist at the time of NOP publication or the start of environmental review do not accurately represent "the physical conditions which exist within the project area *which will be affected by a proposed project.*" Pub. Resources Code, § 21060.5 (emphasis added). Further, agencies should be afforded the discretion to choose an environmental baseline that *will* accurately represent the conditions that will be affected by the project. Because *Sunnyvale West* and *Madera Oversight* fail to meet this standard, we respectfully ask this court to reject the holdings in those cases when evaluating the environmental baseline determination at issue in this case. *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351; *Madera Oversight*, *supra*, 199 Cal.App.4th 48.

Indeed, in *Pfeiffer v. City of Sunnyvale City Council*, (October 28, 2011) ___ Cal.App.4th ___, 2011 DAR16916, the limits of *Sunnyvale West's* interpretation of § 15125(a) was implicitly acknowledged by the same court that issued *Sunnyvale West.* In *Pfeiffer*, the Sixth District Court of Appeal upheld the City of Sunnyvale's use of a future baseline for its traffic analysis that multiplied existing traffic volume by a growth factor and considered inevitable additional traffic that would result from approved but not yet constructed developments in the project area. *Id.* at 16922-24. In upholding the city's use of a future baseline in *Pfeiffer*, the court relied on the discretion afforded to agencies under *CBE. Id.* at 16922-23. The traffic analysis relied on to determine baseline conditions in the instant case is similar to that upheld in *Pfeiffer*. *Pfeiffer* demonstrates that courts are already recognizing the unreasonable limitations placed on reviewing agencies by *Sunnyvale West* and its progeny *Madera Oversight*. See *id.*; *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351; *Madera Oversight*, *supra*, 199 Cal.App.4th 48.

3. *Sunnyvale West* and *Madera Oversight* will prevent agencies from completing meaningful environmental review of large infrastructure projects.

As discussed *supra*, large infrastructure projects help municipalities plan for inevitable population growth, spur economic growth, and comply with various laws governing greenhouse gas emissions and other planning initiatives. For review of these projects, analyzing project impacts relative to physical conditions at the time of NOP publication, the start of environmental review, or the time of approval does not provide a meaningful metric because it ignores inevitable growth and change that will occur before the project is undertaken. Further, such projects have no impacts at the time of approval, and evaluating against such an early

baseline invites illusory analysis that fails the purpose of CEQA, which is to identify the project's significant environmental impacts. See CEQA Guidelines, 14 Cal. Code Regs § 15002(a). These large, long-term projects present a classic case in which agencies must be able to take advantage of the discretion afforded them by § 15125(a).

Being required to consider impacts relative to an early baseline may not allow an agency to comply with CEQA's mandate that an EIR identify "significant effects on the environment *of the proposed project*." Pub. Res. Code, § 21100(b)(1) ("The environmental impacts report shall include a detailed statement setting forth... all significant effects on the environment of the proposed project.") (emphasis added). When analyzing a project that will not come on line until years after approval, comparing physical conditions as they exist at the time of project approval to conditions at the time the project comes on line may prevent the agency from segregating changes in the existing environment attributable to inevitable growth from changes in the existing environment resulting from the project. This is particularly true in the case of a large transportation infrastructure project such as the one at issue in this case; it often takes several years for use of a transit system to increase to the point that the system is fully operational.

Teasing out the effects of a project from the effects of inevitable environmental change is especially important when analyzing factors that are particularly susceptible to change, such as traffic or water supply. Identifying a future baseline that characterizes those inevitable changes that will occur between the time of NOP publication (or the time of approval) and the time when a project comes on line allows an agency to identify the impacts resulting from the project itself, as required by CEQA. See Pub. Resources Code, §§ 21060.5 & 21100(b)(1).

In short, a meaningful comparison cannot always be made between conditions as they exist at the time of environmental review and the conditions that will exist when a project comes on line. In those cases, an agency should be free to identify a future baseline. CEQA requires identification of the significant impacts of a project, and allowing agencies to focus on actual project impacts fulfills this purpose. See Pub. Resources Code, § 21100(b)(1).

CEQA is aimed at ensuring informed decision-making and disclosure; it should not be used to force expert agencies to engage in analysis that will not aid in consideration of the environmental effects of a project. Cf. *Laurel Heights Improvement Assoc. v. Regents of Univ. of California* (1993) 6 Cal.4th 1112, 1132 ("Rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576)). Requiring agencies to analyze large infrastructure projects relative to an early baseline would violate these basic tenets of CEQA.

The instant case stands as a prime example of the shortcomings of *Sunnyvale West* and *Madera Oversight* as applied to review of large infrastructure projects. The administrative record amply demonstrates that traffic congestion and pollutant emissions related to automobile use will increase in the project area.[2] Where the record demonstrates an inevitable environmental trend that the project subject to CEQA review was designed

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[2] Appellants have never contested the inevitability of increased traffic congestion in the project area or the fact that substantial evidence in the record supports the conclusion that congestion will increase.

to address, agencies should be able to choose an environmental baseline that allows for meaningful environmental review.

III. CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the trial court's judgment and reject Appellant's invitation to adopt the flawed analysis in *Sunnyvale West*, as followed by *Madera Oversight.* Lead agencies must—and do under the text of the statute and Supreme Court precedent—have the discretion to establish the proper baseline for projects. When considering long-term infrastructure projects, this may call for using a future baseline in appropriate cases, as Respondents did here.

Dated: December 15, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this brief consists of 3,833 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief.

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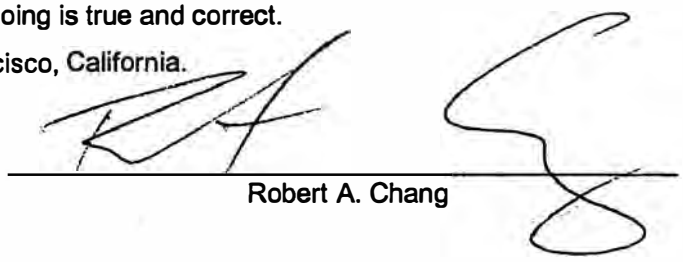

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