



Back to the Future: The CEQA Future Baseline Question Is Back in Court as the Supreme Court Grants Review of *Neighbors for Smart Rail*

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Introduction

In the past two years, the courts of appeal have published four decisions addressing the question whether CEQA permits a lead agency to use a projected future conditions baseline to determine whether a project will have a significant impact on traffic, noise, or air quality. In the first two decisions, the courts said "no"; in the most recent decisions, the courts said "yes." On August 8th, the Supreme Court unanimously voted to grant a petition to review the most recent decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2012) 205 Cal.App.4th 552.

Thus, the future baseline question is back in court, this time with the promise of a definitive answer from the high court. The Supreme Court's decision could impact pending transportation projects throughout California with a construction value in many billions of dollars.

As explained in a previous E-Alert, in *Neighbors for Smart Rail*, the Second District Court of Appeal upheld the Exposition Metro Line Construction Authority's use of a projected future conditions baseline to determine the significance of a light rail line's impacts on traffic, air quality, and greenhouse gas emissions on the west side of Los Angeles and Santa Monica. The decision was welcome news for lead agencies throughout the state, especially agencies undertaking major transportation infrastructure projects, because it upheld a well-established approach to the analysis of traffic and air quality impacts endorsed by regional transportation and air quality agencies in California.

But because the Second DCA expressly rejected a contrary holding by the Sixth DCA in *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 135 ("*Sunnyvale*"), the Court will review the question whether, in appropriate circumstances and, as always, when supported by substantial evidence, a CEQA lead agency may use projected future conditions to determine the significance of potential impacts of a major transportation project on traffic and air quality.

The Future Baseline Issue

In February 2010, the Exposition Metro Line Construction Authority approved Phase 2 of the Exposition Corridor light rail line between Culver City and Santa Monica in Los Angeles County after certifying the EIR for the project. The Authority used existing traffic data, official population projections, and approved traffic and air quality models to project regional traffic and air quality conditions in 2030. The EIR compared projected traffic and air quality conditions with and without the project in 2030. The EIR also disclosed changes in traffic and air quality from the date of the preparation of the EIR. But the Authority exercised its discretion to use projected future conditions with and without the project to determine the significance of the traffic and air quality impacts of the light rail's operation because, at the time the EIR was being prepared, construction was not expected to be completed until 2015, and the full operational effects of the new transportation alternative would not be manifest until 2030.

Neighbors for Smart Rail filed a petition in superior court seeking to invalidate the project approval. Among other things, it argued that the Authority should have used traffic and air quality conditions as of the initiation of CEQA review in 2007 as the baseline for determining the significance of traffic and air quality impacts. Both the superior court and the court of appeal rejected that argument, as well as every other alleged inadequacy in the EIR.

Disagreeing with the holding in *Sunnyvale*, the court in *Neighbors for Smart Rail* held that "in a proper case, and when supported by substantial evidence, use of projected conditions may be an appropriate way to measure the environmental impacts that a project will have on traffic, air quality and greenhouse gas emissions." The court reasoned that "[a]s a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public." The court concluded that "[a] decision to measure environmental effects of a long-term project by looking at those effects in the long term is neither hypothetical nor illusory. It is a realistic and rational decision."

Indeed, in *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552 the Sixth DCA itself appeared to back away from its controversial baseline holding in *Sunnyvale*. In *Pfeiffer*, the court held that the city did not abuse its discretion by using a methodology similar to the one upheld by the Court of Appeal in *Neighbors for Smart Rail*.

The Standard of Review Issue

Central to the baseline issue is the proper standard for judicial review of an agency's selection of a CEQA baseline. In *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, the Supreme Court applied the substantial evidence standard of review to a lead agency's selection of a maximum permitted air emissions baseline to assess the air quality impacts of a refinery project. In *Sunnyvale*, the court held that the substantial evidence standard of review did not apply to an agency's use of a future baseline. The court held that CEQA precludes use of a future conditions baseline to

determine significance, even if there is substantial evidence to support such a baseline. The court in *Neighbors for Smart Rail*, however, found no basis in CEQA, the CEQA Guidelines, or *Communities for a Better Environment* for that holding.

What Does This Mean for Your Project?

The Supreme Court's grant of review means that *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* may not be cited as legal precedent. But this does not mean that the Court thinks the case was wrongly decided, or, conversely, that *Sunnyvale* was correctly decided. Indeed, the grant of review indicates that the Court believes that the lower courts will benefit from its guidance on this important legal question, and may indicate that the Court will affirm the long-standing discretion of lead agencies to determine the most informative way to evaluate project impacts to inform themselves and the public of the environmental consequences of their actions.

(Note: Nossaman represents the Exposition Metro Line Construction Authority and Authority Board in the litigation.)