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Neighbors Takes Sunnyvale Down a Different Track

California Supreme Court CEQA decision clarifies future baselines are permissible — under limited circumstances.

In a major development for real estate and infrastructure development projects across California, on August 5, 2013, the California Supreme Court issued a split decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, et al.* (*Neighbors*), ¹ a California Environmental Quality Act (CEQA) challenge to an important light rail transit project in the Los Angeles region. Overturning (in part) two California Court of Appeal decisions, the California Supreme Court held that under CEQA a public agency has the discretion to study a project's environmental impacts against future physical conditions instead of against physical conditions that exist at the time the environmental analysis is prepared — even if the future conditions analyzed are many years away. However, the Court severely constrained that discretion, holding that an agency may only choose to avoid using an existing conditions baseline where (1) the departure is justified by unusual factual circumstances — *i.e.*, "unusual aspects of the project or surrounding conditions"; and (2) where "an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public." Absent an agency supporting these specific determinations with substantial evidence in the record, analyzing a project's impacts against existing conditions at the time a CEQA analysis is prepared remains the "norm" in California.

Establishing the Proper Baseline under CEQA

California public agencies use CEQA documents such as environmental impact reports (EIRs) or negative declarations to evaluate potentially significant environmental impacts of proposed development projects. Under CEQA, in order to determine whether a project's potential environmental impact is significant, CEQA documents must measure that impact against the physical environmental conditions in the absence of the project, which is commonly referred to as the "baseline" for the environmental analysis. The use of a proper baseline is critical because an environmental impact may not appear to be significant when measured against one baseline, but may be significant when measured against another.

Section 15125(a) of the CEQA Guidelines specifies that in evaluating a project's potentially significant impacts on the environment, a lead agency "should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."

In recent years, multiple CEQA lawsuits have challenged how much leeway lead agencies have to set the baseline against which to study a project's environmental impacts. These lawsuits have led to different districts of the California Court of Appeal issuing conflicting decisions. Though *Neighbors* arguably clears up some of that conflict, the new test the California Supreme Court articulated will likely create additional challenges to CEQA documents that only use future conditions baselines.

Conflicting Court of Appeal Opinions Spur the Supreme Court's Review

Until nearly three years ago, many public agencies in California assessed a project's traffic impacts against the intersection, roadway and freeway conditions projected to occur upon the completion of a project. The rationale for this approach was based on the idea that if a project will not be completed for many years, the most accurate description of its impacts would be based on the traffic conditions that exist at the time the project actually results in new traffic.

However, in 2010 and 2011, two California appellate court opinions — *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council (Sunnyvale)*⁴ and *Madera Oversight Coalition, Inc. v. County of Madera (Madera)*⁵ — rejected this approach, causing many cities, counties and project applicants to change long-held practices to conform to the sudden shift in case law.

When read together, *Sunnyvale* and *Madera* stand for the proposition that while a lead agency retains some discretion when selecting the baseline against which to compare a project's traffic impacts, the agency must conduct a primary CEQA traffic assessment that analyzes the project's traffic impacts against conditions as they exist no later than the date of anticipated project approval, even if the project would not be built for over a decade. Eleven months after *Sunnyvale*, a different panel in the same Court of Appeal district provided agencies some additional discretion to use future traffic baselines in *Pfeiffer v. City of Sunnyvale City Council (Pfeiffer)*. The *Pfeiffer* court distinguished *Sunnyvale*, holding that lead agencies may use future traffic baselines as long as the CEQA document also analyzes existing traffic conditions.

In May 2012, a different Court of Appeal district squarely rejected *Sunnyvale* and *Madera*. In *Neighbors*, project opponents challenged the EIR for Phase 2 of the Expo Line light rail project that would connect Culver City and Santa Monica, alleging the EIR improperly used projected future conditions in 2030 as a baseline for analyzing traffic, air quality and greenhouse gas impacts. The Second District held that, contrary to *Sunnyvale* and *Madera*, a public agency's use of projected future conditions as the sole baseline for evaluating a project's environmental impacts is permissible, so long as the agency's predictions regarding such future conditions are supported by substantial evidence.

Given the irreconcilable conflict between the appellate courts the Second District's decision in *Neighbors* created, the California Supreme Court granted review in *Neighbors*.

The California Supreme Court Speaks: A Future Baseline is Allowed... But Only Under Limited Circumstances

The California Supreme Court affirmed the Second District, in part, adopting a middle ground less restrictive than *Sunnyvale* and *Madera* but more restrictive than *Neighbors*.

"Majority" Opinion Rejects Sunnyvale, in Part

A majority of the Supreme Court's justices (Justices Werdegar, Kennard, Corrigan and Liu) held that "while an agency preparing an EIR has discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions

projected to exist in the future, the agency must *justify its decision by showing [that]* an existing conditions analysis would be misleading or without informational value." Read another way, the Supreme Court held that unless substantial evidence in the record demonstrates that a CEQA analysis based on existing conditions would tend to be misleading or without informational value, an agency *must* measure a project's environmental impacts against an existing conditions baseline.

While the California Supreme Court overruled the Court of Appeal's holdings in *Sunnyvale* and *Madera* that an agency may *never* employ predicted future conditions as the sole baseline for assessing a project's impacts, the Court in essence affirmed those decisions to the extent they declared that the CEQA Guidelines clearly establish that an existing conditions baseline is the norm for an EIR's environmental impact analysis. Accordingly, should an agency desire to use a future conditions baseline in a CEQA analysis, the agency cannot just state that such an analysis would be more informative than evaluating impacts against existing conditions. Rather, the Court held that "[p]rojected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions...is justified by *unusual aspects of the project or the surrounding conditions*."

Therefore, an agency must justify the use of a future conditions baseline with substantial evidence when it substitutes that analysis for one based on existing conditions: "[The] omission of an existing conditions analysis must be justified, even if the project is designed to alleviate adverse environmental conditions over the long term." According to the Supreme Court, however, "nothing in CEQA law precludes an agency, as well, from considering *both* types of baseline—existing and future conditions—in its primary analysis of the project's significant adverse effects." Based on this reasoning, the Supreme Court confirmed that the required justification is needed only where an "agency *substitutes* a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency's decision to examine project impacts on *both* existing and future conditions.

Amplifying the scope of an "existing conditions" analysis, the California Supreme Court appears to have equated a baseline existing at the time a project would become operational as a possible proxy for existing conditions. The Court noted that "in appropriate circumstances an existing conditions analysis may take account of environmental conditions that will exist when the project begins operations; the agency is not strictly limited to those prevailing during the period of EIR preparation." The Court left to the agency's discretion how "best to define such a baseline under the circumstance of rapidly changing environmental conditions," and noted that nothing in CEQA "preclud[es] an agency from employing, under appropriate factual circumstances, a baseline of conditions expected to obtain at the time the proposed project would go into operation." Nevertheless, even the use of a "date of operations" baseline instead of an existing conditions baseline may need to be justified and supported by substantial evidence under the same standard articulated for *any* future baseline.

No Harm, No Foul: EIR's Analysis Ruled Inadequate, But a Plurality Finds No Prejudice

The California Supreme Court rejected Respondent Expo Authority's sole use of a projected 2030 baseline because the baseline did not meet the Court's newly articulated standard. Specifically, a majority of the Court's justices found no substantial evidence supporting Expo Authority's implicit decision that an existing conditions analysis would have been misleading or without informational value. The Court held that nothing in the record supported Expo Authority's assertion that "existing physical environmental conditions...do not provide a reasonable baseline" and "without such evidence the Expo Authority cannot justify its decision to completely omit an analysis of the project's impacts on existing traffic congestion and air quality." ¹⁶

However, and somewhat surprisingly, a plurality of the California Supreme Court's justices found the agency's error to have no prejudicial effect, and so the Court did not require corrections to the agency's EIR (which could have required this major transportation project, already under construction, to be stopped). The Court found that the EIR's robust and extensive traffic and air quality impact analyses (using a year 2030 baseline) were sufficient, and did not preclude informed decisionmaking and informed public participation. Specifically, the Court found that "the same analys[es] performed against existing...conditions would [not] have produced any substantially different information" as project area air quality and traffic conditions are likely to have improved by 2030 — the time at which the EIR concluded there would be no significant impacts in these areas. In allowing this important light rail project to proceed without revising the EIR, the Court was clear to limit this holding to "the specific circumstances of this case." It may be difficult to reconcile this part of the opinion with other case law requiring projects to be blocked when their EIRs have been deemed inadequate, and the Court provided very little explanation for its conclusion.

Uncertainty Persists: The Practical Effect of the Majority's Ruling?

Focusing on the unintended consequences which may result from the majority opinion, Justice Baxter, joined by Chief Justice Cantil-Sakauye and Justice Chin, filed a partial concurrence and dissent. Contrary to the majority's ruling, Justice Baxter's opinion found that substantial evidence in the record clearly supported Expo Authority's use of the 2030 baseline in place of an existing conditions baseline, in significant part because the EIR relied upon state-of-the-art forecasting models "that accounted for existing traffic conditions, approved population and employment growth projections, and resulting changes in traffic."

Justice Baxter also found that the majority's restrictions on agency discretion (*i.e.*, the "misleading or without informational value" standard) and creation of the baseline reflecting conditions at the project's date of implementation have no support under CEQA. Honing in on the likely future practical impact of the majority's decision, the concurrence and dissent found that "the stated restrictions are ambiguous and create opportunities for litigation over their applicability."²⁰ To that end, Justice Baxter articulated that "[i]t is unclear how an agency might show that an existing conditions analysis would be 'uninformative' or 'misleading,' without actually conducting such an analysis."²¹ "[T]he ease of alleging an abuse of discretion under the majority's analysis is likely to prompt challenges whenever an existing conditions baseline is omitted, causing delays that may add significantly to a project's costs or derail it altogether."²²

Conclusion

After three years of uncertainty surrounding what baseline conditions to use for traffic assessments, the California Supreme Court has established a new test governing when a future conditions baseline may be used instead of an existing conditions baseline. Despite the Court's majority opinion, lead agencies and project applicants may nonetheless find themselves continuing to litigate the evidence used to justify the use of a future baseline in a CEQA analysis. As a result, should administrative agencies and project applicants choose to select future baselines in a CEQA analysis, they should ensure they amass sufficient evidence in the record to justify the use of those baselines. In the absence of such evidence, and a demonstration that an existing conditions baseline would be "misleading or without informational value," lead agencies and project applicants would be wise to include an analysis against an existing conditions baseline in any EIR.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

James L. Arnone james.arnone@lw.com +1.213.891.8204 Los Angeles

Winston P. Stromberg winston.stromberg@lw.com +1.213.891.8983 Los Angeles Duncan Joseph Moore dj.moore@lw.com +1.213.891.7758 Los Angeles

Michele L. Leonelli michele.leonelli@lw.com +1.213.891.8903 Los Angeles

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Endnotes

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (August 5, 2013, S202828) __ Cal.4th __ (Neighbors) (lead opn. of Werdegar, J.).

Id. at p. 11 (lead opn. of Werdegar, J.).

³ California Code of Regulations, title 14, section 15125, emphasis added.

⁴ Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council (2010) 190 Cal.App.4th 1351.

Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal. App. 4th 48.

⁶ Pfeiffer v. City of Sunnyvale City Council (2011) 200 Cal.App.4th 1552.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2012), formerly published at 204 Cal.App.4th 1480.

⁸ Neighbors, supra, at p. 19, emphasis added. Though only three justices signed on to the "majority" opinion, Justice Liu filed a separate concurrence and dissent which agreed with the "majority" opinion's holding "that existing conditions comprise the normal baseline for measuring environmental impacts and that an agency may forego analysing impacts against a baseline of existing conditions only 'if such an analysis would be uninformative or misleading to decision makers and the public.'" *Id.* (con. & dis. opn. of Liu, J.)

⁹ *Id.* at p. 11 (lead opn. of Werdegar, J.), emphasis added.

Id. at p. 16 (lead opn. of Werdegar, J.).

¹¹ Id. at p. 15 (lead opn. of Werdegar, J.).

¹² Id. at p. 14 (lead opn. of Werdegar, J.), emphasis in original.

¹³ Id. at p. 12 (lead opn. of Werdegar, J.).

¹⁴ Id. (lead opn. of Werdegar, J.).

¹⁵ Id. at p. 13 (lead opn. of Werdegar, J.).

¹⁶ Id. at p. 24 (lead opn. of Werdegar, J.).

Id. (lead opn. of Werdegar, J.).

¹⁸ *Id.* at p. 30 (lead opn. of Werdegar, J.).

Neighbors, supra, at p. 8 (con. & dis. opn. of Baxter, J.).

Id. at p. 3 (con. & dis. opn. of Baxter, J.).

²¹ *Id.* at p. 17 (con. & dis. opn. of Baxter, J.).

²² Id. (con. & dis. opn. of Baxter, J.).