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# Break Out the Crystal Ball—But Only If You Have the Evidence to Support It: California Supreme Court Affirms Agency Discretion to Utilize Baseline of Projected Future Conditions

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In a highly anticipated decision published today, the California Supreme Court affirmed that the use of a future baseline for analyzing certain environmental impacts is appropriate when supported by substantial evidence. The decision, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (Case No. S202828, August 5, 2013) (*Neighbors*), confirms that, under the California Environmental Quality Act (CEQA), a public agency may choose, in some circumstances, to evaluate the impacts of a potential project against a baseline consisting solely of projected future conditions. However, the agency's choice *must* be justified by substantial evidence that an analysis based on existing conditions would be misleading or without value to EIR users. This CEQA baseline approach contrasts with the conventional baseline analysis that assumes the existing physical conditions in the affected area during the period of environmental review.

The decision confirms that while the use of existing conditions is the “normal baseline” under CEQA, in limited circumstances (particularly for large-scale, long-term development projects), factual circumstances may justify an agency relying on future conditions in order to “prevent misinforming or misleading the public and decision makers.” What is crucial is to make sure the administrative record supports the decision to adopt a different baseline approach.

### BASELINE APPROACH UNDER *NEIGHBORS*

That is the lesson of *Neighbors*. The case involved a challenge to the Exposition Metro Line Construction Authority's (Expo Authority) environmental impact report (EIR) for the construction of a 6.6-mile light rail line connecting downtown Los Angeles with Santa Monica. CEQA requires that an EIR 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.” CEQA Guidelines § 15125(a). “The environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” *Id.*

In *Neighbors*, the EIR used existing physical environmental conditions as the baseline for most environmental topics, but, for the analysis of the air quality and traffic impacts, used a combination of existing transit services and improvements that the Regional Transportation Plan identified as projects to be constructed by the year 2030. Petitioners sought to have the EIR and other project approvals set aside, claiming that Expo Authority's

# Client Alert

reliance on a different baseline based on “hypothetical” future conditions violated CEQA. The Second District disagreed and upheld that Expo Authority’s use of a projected future baseline.

Expanding previous holdings on the issue, the California Supreme Court agreed that the lead agency has discretion to choose a baseline that differs from existing conditions and that “[p]rojected future conditions may be used as the sole baseline for impacts analysis *if* their use in place of measures existing conditions—a departure from the norm stated in Guidelines section 15125(a)—is justified by unusual aspects of the project or the surrounding conditions” (emphasis added).

Previously, the California Supreme Court rejected the use of “hypothetical allowable conditions” in *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal. 4th 310 (2010) (*CBE*). That case concerned modifications to a petroleum facility analyzed under a baseline operational level that assumed maximum operation of the refinery, even though the refinery did not operate at maximum capacity under normal operations. In *Neighbors*, the Court was quick to point out that its holding in *CBE* did not “decide either the propriety of using solely a future conditions baseline or the standard of review by which such a choice is to be judged.” Rather, the Court insisted that the case furthered the rationale that agencies have discretion in their CEQA analyses to utilize the most appropriate baseline to measure existing conditions so that the EIR is as useful an informational document as possible—not to choose between an existing conditions baseline or one that only looks at future conditions. This clarification puts to rest any argument, based on *Sunnyvale West Neighborhood Ass’n v. City of Sunnyvale City Council*, 190 Cal. App. 4th 1351 (2010) and *Madera Oversight Coalition, Inc. v. County of Madera*, 199 Cal. App. 4th 48 (2011), that the use of future baseline is prohibited under any circumstances.

Indeed, the Court recognized that a future baseline approach may be preferable in some situations where analyzing a project’s impacts on existing environmental conditions is “uninformative or misleading to decision makers and the public.” The Court stressed that if an agency chooses this path of substituting a future conditions analysis for one based on existing conditions, the agency bears a heavy burden of justifying this approach.

And that is the rub here. Despite approving the use of an alternative baseline approach in some circumstances, the Court found “no substantial evidence” in the record supporting Expo Authority’s decision to omit an analysis of project impacts on existing air and traffic conditions. In reality, Expo Authority’s EIR failed to provide information as to any *operational* impacts that could occur in the project’s first 15 years of operation and only focused on construction impacts. Nonetheless, the Court found the agency’s abuse of discretion to be non-prejudicial and the formal use of a year 2030 baseline to be an “insubstantial, technical error.” Thus, the EIR remained valid.

## LOOKING TO THE FUTURE

Today’s decision closes out a year-long chapter of legal uncertainty, utilization of multiple baselines and administrative headaches for public entities and developers of unique large-scale, long-term infrastructure and regulatory projects. As is often the case for such projects, rapidly changing background conditions (due to inevitable population growth, traffic, air quality and GHG impacts, among others) during lengthy project approval and construction periods may necessitate and justify utilizing a future baseline analysis. In these situations, it is not always realistic to utilize existing conditions when analyzing projected environmental impacts. As in the *CBE*

## Client Alert

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case, not every project is running at “full steam” at day zero. The Court’s decision in *Neighbors* provides a bit of comfort to project proponents that as long as substantial evidence supports an agency’s decision to rely on a baseline of projected future conditions, and doing so does not overlook impacts expected during the project’s initial phases of operation, the agency has discretion to take such an approach.

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