Client Alert.

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"No One Can Stop Change": Court Upholds Use of Future Baseline Under CEQA

By Michael Steel, Miles Imwalle, and Megan Jennings

In the past two years, a handful of court decisions have been read to narrow local agency authority to use a "future baseline" approach to analyze impacts under the California Environmental Quality Act (CEQA). Now, the Second District Court of Appeal has concluded that use of a future baseline, as long as it is supported by substantial evidence, is an appropriate way of analyzing traffic and air quality impacts for long-term infrastructure projects – a decision that the court acknowledges puts it in "fundamental disagreement" with the Fifth and Sixth Districts.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority[1] concerns the proposal to construct a 6.6-mile light rail line connecting Culver City with Santa Monica, following construction of an initial phase from downtown Los Angeles to Culver City. The "Expo Authority," charged with implementing the light rail project, determined that existing conditions (in 2009) did not provide a reasonable baseline to determine how the project would affect traffic and air quality. Instead, for these impacts, the Environmental Impact Report used conditions projected to exist in 2030 as the baseline. Petitioners filed suit, claiming (among other things) that use of this future baseline was prohibited as a matter of law. The trial court denied the petition, and the Court of Appeal has affirmed.

This may come as a relief to local agencies – especially in the Second District – that believe future baselines provide a more meaningful basis for analysis of impacts in the context of constantly changing conditions. But it is not clear how broadly *Neighbors* will be interpreted, and to the extent it directly conflicts with recent case law, it will likely lead to confusion regarding permissible baselines. The apparent conflict in the law, and lead agencies' need for clarity, may make the topic ripe for California Supreme Court review.

RECENT BASELINE CASES

The recent line of baseline cases begins with *Communities for a Better Environment v. South Coast Air Quality Management District* (*CBE*).[2] There, the Supreme Court rejected using maximum air emission levels allowable under existing permits as a baseline, as these "hypothetical conditions" were not a realistic depiction of existing conditions and instead provided an "illusory basis" for determining that a project would have no significant effects, despite acknowledged increases in emissions. The Court emphasized that a long line of cases has held that the baseline for analysis must be "existing physical conditions." Following *CBE*, three cases have addressed the appropriate application of baseline conditions in the context of project-related traffic impacts.

- *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale*[3]: The EIR for a road improvement project identified the baseline as conditions that might exist in 2020 following buildout under the City's General Plan. The court found that the City committed a prejudicial abuse of discretion for failing to disclose how the project would impact the *existing*

[1] Case No. B232655 (filed April 17, 2012).

[2] 48 Cal. 4th 310 (2010).

[3] 190 Cal. App. 4th 1351 (6th Dist. 2010).

environment. The court recognized that in certain limited circumstances it is permissible to set a baseline other than conditions precisely at the time a Notice of Preparation is published.[4] However, the court concluded that "nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval." Our prior client alert on *Sunnyvale West* can be found here.

- *Madera Oversight Coalition v. County of Madera*[5]: The EIR for a mixed-use development project evaluated three traffic scenarios: (1) existing conditions, (2) "far-term" (cumulative) baseline conditions, and (3) far-term (cumulative) plus project conditions. The court acknowledged that extensive information was provided about existing conditions, and recognized that the EIR attempted to compare existing conditions with future projections, with and without the project. Nevertheless, the EIR did not explicitly state that existing conditions constituted a baseline. Following *Sunnyvale*, the court adopted the conclusions that "a baseline used in an EIR must reflect existing physical conditions; [and] 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 …" On this premise, the court found the EIR deficient.

- *Pfeiffer v. City of Sunnyvale*[6]: For a proposal to expand a medical campus, the EIR compared four scenarios: (1) existing conditions, (2) "background" conditions (existing conditions multiplied by a growth factor plus traffic from approved developments), (3) background plus project conditions, and (4) cumulative (2020) conditions. Upholding the city's certification of the EIR, the court found that, unlike in *Sunnyvale West*, the baselines included existing conditions as well as traffic from approved but not yet constructed development, and that "the foreseeable impacts of pursuing the project may actually be understood and weighed."

These recent cases have caused some uncertainty on the critical question of what baseline to use. Most practitioners have conservatively used existing conditions as the baseline, even though commentators have noted that existing conditions may not yield an accurate depiction of a project's impacts, particularly for projects that take years to build out and for conditions that are subject to change, such as traffic and air quality.

NEIGHBORS FOR SMART RAIL

In *Neighbors*, the petitioners urged the court to follow the *Sunnyvale/Madera* trend and conclude that the use of a future (2030) baseline for traffic and air quality conditions violated CEQA by obscuring the severity of the light rail project's impacts. The court, however, disagreed:

> As 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. An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010), would only enable decision makers and the public to consider the impact of the rail line *if it were here today.* Many people who live in neighborhoods near the proposed light rail line may wish things would stay the same, but no one can stop change. … An analysis of the project's impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later.

[4] For example, this might occur if traffic is expected to increase significantly during the CEQA process due to development actually underway, in which case it may be more appropriate to project traffic levels as of the date the project would be approved.

[5] 199 Cal. App. 4th 48 (5th Dist. 2011).

[6] 200 Cal. App. 4th 1552 (6th Dist. 2011).

The court examined *CBE*, as binding precedent, and found it did not require a contrary conclusion; "hypothetical allowable conditions" are distinguishable from projected future conditions, which the court characterized as "inevitable." With respect to *Sunnyvale* and *Madera*, however, the court went further and expressly rejected their conclusions that, as a matter of law, impacts for any project *must* be measured against conditions existing before certification of the EIR.

THE FUTURE OF FUTURE BASELINES?

Given the new rift between the Second District on one hand and the Fifth and Sixth Districts on the other, and given the frequency with which local agencies must grapple with baseline issues during CEQA review for major projects, the *Neighbors* petitioners may try to take their case to the Supreme Court, on the basis that the Court's review is "necessary to secure uniformity of decision or to settle an important question of law."[7]

In the meantime, confusion is likely to abound among lead agencies. Those in the Second District's jurisdiction may take comfort in the court's approach and feel free to determine the appropriate baseline on the basis of substantial evidence. Those in the Fifth District are not likely to find much flexibility under the strongly stated rule in *Madera*. But elsewhere – including in the Sixth District, with the *Sunnyvale* and *Pfeiffer* cases arguably pointing in different directions – it will likely remain unclear whether legal vulnerability will result from use of a future baseline, or perhaps even from *failure* to use a future baseline in certain situations. Unless and until the Supreme Court provides clarity on this issue, lead agencies will need to carefully consider the factors weighing for and against relying on a future baseline.

Finally, it is important to note that although the *Neighbors* court broadly disapproved of the holdings in *Sunnyvale* and *Madera*, it also appeared careful to state its holding narrowly. Specifically, it only holds that use of a future baseline may be appropriate to analyze "traffic and air quality effects of a long-term infrastructure project." For this reason, and given the divergent case law, future courts may be unwilling to extend *Neighbors*' expansive treatment of baselines to other kinds of projects or other types of impacts.

Contact:

David Gold
(415) 268-7205
dgold@mofo.com

Zane Gresham
(415) 268-7145
zgresham@mofo.com

Miles Imwalle
(415) 268-6523
mimwalle@mofo.com

Michael Steel
(415) 268-7350
msteel@mofo.com

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[7] Cal. Rules of Court, Rule 8.500(b).