

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,

vs.

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

REAL PARTY IN INTERESTS' RESPONDING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION		Court of Appeal Case Number: B232655
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FOR COURT USE ONLY		
APPELLANT/PETITIONER: Neighbors For Smart Rail		
RESPONDENT/REAL PARTY IN INTEREST: Exposition Metro Line Construction Authority; Exposition Metro Line Construction Authority Board		
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS		
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Los Angeles County Metropolitan Transportation

1. This form is being submitted on behalf of the following party (*name*): Authority

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (<i>Explain</i>):
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- (1)
(2)
(3)
(4)
(5)

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 4, 2011

Ronald W. Stamm

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

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I. PRELIMINARY STATEMENT.

Pursuant to California Rules of Court Rule 8.200(a)(5), Real Parties in Interest Los Angeles County Metropolitan Transportation Authority and Los Angeles County Metropolitan Transportation Authority Board (“Metro”) hereby join in the Responding Brief of Respondents Exposition Metro Line Construction Authority and Exposition Metro Line Construction Authority (“Authority”), filed concurrently herewith. The Authority addresses specific issues raised by Appellant Neighbors for Smart Rail (“NFSR”) and not addressed in Metro’s brief.

II. INTRODUCTION.

Los Angeles County faces a mobility crisis. For the last several decades the County has had the dubious distinction of having the worst congestion and most unhealthy air quality in the nation. Over three decades ago, the citizens decided to do something about it by adopting sales tax measures to finance the construction of an extensive rail transit system in the County. (30 AR 00887-88.)

The Exposition Corridor Light Rail Project (the “Expo Phase 2 Project” or “Project”) challenged by NFSR in this lawsuit, is the product of decades of Metro’s careful planning and environmental studies of the rail transit system working in conjunction with multiple local, state and federal agencies. The environmental impact report challenged here is the second environmental impact report evaluating alternatives for a light rail transit line on the Westside of Los Angeles (“Westside”). (5 AR 00141-77, 77 AR 12415.)

As a result of these efforts, the County has an extensive rail transit system serving many parts of our region. The existing system demonstrates that rail transit works to provide a modern and convenient alternative to the

private automobile and to buses on congested streets. NFSR makes hyperbolic claims that the Project will cause significant traffic and air quality impacts. Numerous environmental studies, backed by the experience of the last two decades, demonstrate otherwise. Metro and the other regional transportation and air quality agencies, have all concluded that transit projects, like the Project, are essential if our citizens are to enjoy mobility and clean air.

The lengthy administrative record demonstrates that the Authority and Metro considered a wide range of alternatives to the Expo Phase 2 Project, carefully evaluated potential environmental impacts and adopted numerous measures to mitigate potential effects. The Final Environmental Impact Report (“FEIR”) for the Project reflects a good-faith effort by the Authority and Metro to comply with CEQA. The Authority’s decision to certify the FEIR and to approve the Project is supported by substantial evidence and should be upheld by this Court so that the Authority and Metro can proceed to construct this essential project and provide much needed mobility, traffic relief and jobs for our citizens.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE AUTHORITY’S DETERMINATION THAT THE FINAL ENVIRONMENTAL IMPACT REPORT COMPLIED WITH CEQA.

A. The FEIR’s Discussion of Growth-Inducing Impacts Is Adequate.

NFSR claims that the discussion of the Project’s growth-inducing impacts is deficient because it “fail[s] to discuss the potential impacts of concentrating new development around the planned stations.” (App. Br., 22.) NFSR also faults the FEIR for allegedly assuming that transit-oriented development is necessarily beneficial. (*Id.*, 24.) As the trial court found,

NFSR ignores substantial evidence in the record that supports the Authority’s conclusion that the Project’s growth-inducing impacts would be less-than-significant and that the forecasted transit-oriented development will have beneficial effects. (3 JA 000720.) NFSR’s argument must be rejected. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 541 [A challenge to an EIR “must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal.”].)

NFSR also fails to address the controlling law. Under CEQA, the Authority may limit discussion of the Project’s less-than-significant growth-inducing impacts “to a brief explanation as to why those effects are not potentially significant.” (Pub. Resources Code, § 21002.1, subd. (e); see also *id.* § 21100, subd. (c).) Moreover, where, as here, (1) the growth-inducing effects of a project are indirect environmental impacts, and not the sole purpose of the project, (2) the FEIR discloses proposed transit-oriented projects, and (3) the proposed projects will themselves undergo environmental analysis, “[n]othing in the Guidelines, or in the cases, requires more than a *general* analysis of projected growth.” (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 (“*Napa Valley Citizens*”), emphasis added; *Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 226-228 [only general discussion of growth-inducing impacts required where it removes only one of numerous obstacles to growth and future development will undergo separate CEQA review].)

1. Substantial Evidence Supports the Conclusion that the Project Will Have a Less-than-Significant Growth-Inducing Impact.

Citing the CEQA Guidelines,¹ the FEIR explains that the Project will not result in any significant growth-inducing impact because (1) it does not remove an impediment to growth, (2) it does not result in the urbanization of land in a remote location, (3) it does not establish a precedent-setting action the way a zoning or general plan amendment approval might, and (4) economic growth and expansion will not occur in the area as a result of the Project. (29 AR 00861-62; 35 AR 01782 [citing Guidelines, § 15126.2, subd. (d)].)

The FEIR discloses in great detail the adopted land use plans that support transit-oriented development within a half mile of proposed stations. (20 AR 00619 [Transit-Supportive Land Uses within 0.5 Miles of Proposed Stations]; 66 AR 10117-9 [Final Land Use Technical Background Report and Transit-Oriented Land Uses Served by Proposed Stations].) The Authority also assessed the compatibility and consistency of the Project with existing and future land uses based upon the applicable locally adopted land use plans. (20 AR 00616-21; 66 AR 10101.)

The Project will accommodate the anticipated growth in population and transit-oriented development already contemplated in local land use plans – all of which were analyzed pursuant to CEQA. (20 AR 00618-21; 29 AR 00861-62; 66 AR 10126-37.) This conclusion is supported by substantial evidence. Specifically, the FEIR disclosed the existing and forecasted regional population and job growth, job densities, and transit-

¹ All references to “Guidelines” are to the State CEQA Guidelines, Cal. Code Regs., tit. 14, §§15000 et seq.

oriented development within the Project study area in the Southern California Association of Governments (“SCAG”)² Regional Transportation Plan (“RTP”), Regional Transportation Improvement Plan (“RTIP”), Regional Comprehensive Plan and Guide (“RCPG”), and Regional Comprehensive Plan (“RCP”). (8 AR 00218 [Table 1.2-1], 00219-22; 11 AR 00345; 20 AR 00616; 66 AR 10126-29.)

Under Federal and State law, SCAG prepares an RTP that plans for transportation, growth management, hazardous waste management, and air quality. (20 AR 00616.) SCAG’s 2008 RTP is a long-range plan that identifies multi-modal regional transportation needs and investments out to the plan horizon year of 2035. (66 AR 10128.) Not only does the RTP include the Expo Phase 2 Project among the list of projects with already-committed funding (11 AR 00345; 20 AR 00616; 66 AR 10128; 439 AR 30069 [2008 RTP Project List], 30032 [explaining same]), it specifically “[e]ncourage[s] land-use and growth patterns that complement our transportation investments,” “recognizes that many existing transportation corridors lack the residential and commercial density to adequately support non-auto transit uses . . . ,” and “incorporates . . . land-use policies as a means to influence transportation performance and the economy in the region.” (66 AR 10128.) SCAG’s RCP serves as a framework to guide decision-making with respect to the growth and changes that can be anticipated in the region through the year 2035.

In light of the RTP and RCP, the FEIR analyzed the Project’s consistency with SCAG’s broad policies and specific implementation

² SCAG is the designated Metropolitan Planning Organization for the southern California region.

measures with special attention to the goal of supporting transit-oriented development, mass transit, and reducing vehicle miles traveled, energy use, and air emissions. (66 AR 10162-67, 329 AR 27295, 436 AR 29154.)

The FEIR also analyzed the Project's consistency with the following local land use planning documents: West Los Angeles Community Plan; Palms-Mar Vista-Del Ray Community Plan; Culver City General Plan Land Use Element (specifically discussing the Project); Santa Monica General Plan Land Use and Circulation Element ("LUCE"); Santa Monica's Zoning Ordinance; and Santa Monica Civic Center Specific Plan. (20 AR 00618; 66 AR 10129-37, 10167-84, see also 35 AR 001782 [R-L560-30], stating that the "[Proposed West Los Angeles] Community Plan and the LRT project are considered to be mutually supportive".)

Based on those approved regional and local plans, the Authority found that the Project will not have any significant growth-inducing impacts; rather, it will serve transit-dependent populations that are currently underserved by mass transit and accommodate projected growth. (7 AR 00159-60; 8 AR 00214-216; 35 AR 01782; 29 AR 00862-63; 66 AR 10184-94.) Courts have upheld analogous findings. (See, e.g., *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1128-1129; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 877.)

NFSR alludes to unspecified "major development projects" that have "already been proposed" near stations that NFSR claims may exceed the permissible size and density allowed under current land use plans. Without evidence, NFSR asserts that these other developments may have significant environmental impacts of their own that must be analyzed in the FEIR for the Project. (App. Br., 23.) For instance, NFSR claims that the FEIR

should have analyzed the environmental impacts of a mixed-use structure proposed by Casden West LA, LLC, to be located adjacent to a Project station at Sepulveda Boulevard (the “Casden project”). (*Ibid.*)

But as the FEIR explains, the specific environmental impacts of proposed future projects for which no application had been submitted prior to the Notice of Preparation (“NOP”) for the Project are speculative. (Guidelines, § 15064, subd. (d)(3); *Fedn. of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265 [“An EIR must analyze the growth-inducing impact of a project, including reasonably foreseeable consequences but not speculative effects.”].)

A project that is not “probable” is also not “reasonably foreseeable,” and so too its potential environmental impacts. NFSR’s converse proposition, for which it cites no authority, would require endless environmental review because each time an application for another project is filed, its potential impacts would have to be disclosed and analyzed in the EIR. (See *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576 [“[R]ules 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.”].)

No application for the Casden project was on file with the City of Los Angeles until well after the EIR for the Expo Phase 2 Project was initiated and the Notice of Preparation (“NOP”) was filed.³ (29 AR 00865 [Table 5.4-1].) CEQA does not require any discussion of the impacts of a hypothetical project. (CEQA Guidelines, § 15064, subd. (d)(3); *Fedn. of*

³ A Notice of Preparation for the Casden project was filed with the Office of Planning and Research on June 10, 2009. See <http://www.ceqanet.ca.gov/ProjDocList.asp?ProjectPK=598249>.

Hillside & Canyon Assns., *supra*, 83 Cal.App.4th at p. 1265; see also *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 72-77 [“probable future projects” may be limited to those projects requiring an agency approval for an application which has been received at the time the NOP is released].) Indeed, even after development project applications have been filed, they often undergo dramatic transformation during the CEQA process in response to comments and agency concerns. (*County of Orange v. Super. Ct.* (2003) 113 Cal.App.4th 1, 10 [“It is . . . the very nature of CEQA that ‘projects’ will be ‘modified’ to protect the environment”]; *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 [observing that CEQA is an “interactive process of assessment of environmental impacts and responsive project modification which must be genuine,” and holding that the project at issue “must be open for public discussion and agency modification during the CEQA process”].)

Likewise, the impacts of the proposed project at Bergamot Station in Santa Monica, referenced but not discussed by NFSR, were unknowable because no project application had been filed at the time the EIR for the Expo Phase 2 Project was initiated. (780 AR 52798.)

Thus, the FEIR was not required to analyze the impacts of the proposed Casden project, or any other project for which no application had been submitted, because of the speculative nature of the impacts of those projects. (*Napa Valley Citizens*, *supra*, 91 Cal.App.4th at pp. 367-371; *Clover Valley Found.*, *supra*, 197 Cal.App.4th at p. 228; *Fedn. of Hillside and Canyon Assns.*, *supra*, 83 Cal.App.4th at p. 1265.)

Nevertheless, the FEIR did consider reasonably foreseeable impacts of future growth in the Project study area. As explained in the FEIR's response to comments:

The Casden project has not yet been approved for construction, and is therefore speculative. The Casden project was listed in the projects considered under Cumulative Impacts. In addition, jobs and housing that would potentially be created by the project are included within the 2030 SCAG Growth Estimates used in the Travel Demand Model.

(37 AR 03413 [R-E629-24]); see also 11 AR 00347, 00350-51.) Indeed, as explained in the response to comments, factoring in both the projected future growth (based on population and traffic growth) *and* the growth in traffic due to specific transit-oriented projects would result in an overestimate of projected growth:

The traffic volume development approach which uses a regional model in calculating traffic growth percentages inherently accounts for ambient growth, as well as all cumulative projects and is consistent with CEQA (refer also to DEIR Section 5.4 [Cumulative Impacts]). *The inclusion of additional traffic from specific known development projects will create double counting and exaggeration of future volumes, as the assumed growth percentages are not merely constant numbers, were customized to logical subareas, were coordinated with local agencies, and tend to be conservative.”*

(34 AR 01279 [Resp. R-L408-5], emphasis added.) In light of the foregoing, the analysis of growth-inducing impacts exceeds CEQA's mandate that lead agencies make a good faith effort to disclose environmental impacts. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 [“CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive.”].)

In addition, because substantial evidence supports the Authority’s determination that the Project will have less-than-significant growth-inducing impacts, even if the two projects NFSR cites were substantial evidence that the Project may have a significant growth-inducing impact, which they are not, a reviewing court “may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.”” (*In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1161-1162 [quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564].)

To summarize, the FEIR’s analysis of growth-inducing impacts is adequate because the FEIR discloses future growth in and around the Project area in sufficient detail to allow informed decision making and public participation; the Project is not designed *solely* to induce growth or transit-oriented development; the transit-oriented projects to which NFSR alludes and their potential impacts are speculative; such projects are not indirect effects because their final design, approval, and construction depend on a host of other factors, including market conditions; and, each such project will undergo its own environmental review under CEQA. (781 AR 52800).⁴ (*Napa Valley Citizens, supra*, 91 Cal.App.4th at pp. 369-

⁴ NFSR seeks to dismiss this substantial evidence by mischaracterizing the Authority’s argument as claiming that “transit-concentrated development need not be analyzed because such development is consistent with previously adopted land use plans.” (App. Br., 22.) The Authority is not arguing that other development projects need not undergo CEQA analysis if they are consistent with approved land use plans. It is arguing that such consistency provides substantial evidence that any of the Project’s “growth-inducing” impacts, which were fully disclosed in the FEIR, are not significant, and, therefore, need not be analyzed in the FEIR for the Expo

371; *Clover Valley Found. v. City of Rocklin*, *supra*, 197 Cal.App.4th at pp. 226-228.) Moreover, because the FEIR concludes, based on substantial evidence, that the growth-inducing impacts are less than significant, nothing more than a “brief explanation” of the Authority’s reason for reaching this conclusion is required. (Pub. Resources Code, § 21002.1, subd. (e); see also *id.*, § 21100, subd. (c).) The FEIR’s discussion of growth-inducing impacts far exceeds this requirement.

2. The Authorities NFSR Cites Are Inapposite.

NFSR cites *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1218 (“*Bakersfield*”), and *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 732-733 (“*San Joaquin Raptor*”), but each is easily distinguished on its facts.

In *Bakersfield*, *supra*, the court held that the EIRs for two retail projects were inadequate because each failed to consider the *cumulative impacts* of the two projects on urban blight in the area surrounding the projects. (124 Cal.App.4th at p. 1218.) There, unlike here, “neither EIR contain[ed] *any* discussion of or reference to retail development in the area surrounding the project site.” (*Id.* at p. 1213, emphasis added.) Thus, *Bakersfield* did not address growth-inducing impacts, and, unlike the EIRs in *Bakersfield*, the FEIR here included lengthy and detailed discussion of transit-supportive and transit-oriented development in the Project area. Thus, NFSR’s reliance on *Bakersfield* is misplaced.

Phase 2 Project in great detail. (Pub. Resources Code, § 21002.1, subd. (e); see also *id.*, § 21100, subd. (c).)

In *San Joaquin Raptor*, *supra*, the court held that the EIR failed to adequately analyze the potential growth-inducing impacts of a new sewer line because,

far from considering the cumulative growth inducing effects of the development project and the sewer expansion, the DEIR actually asserts the sewer expansion will **not** be growth inducing because it will “only include capacity to serve the development within the project site.” This conclusion is **contradicted** by statements in the expansion EIR, such as the “[p]otential creation of additional capacity beyond that capacity necessary to accommodate known residential growth.”

(*San Joaquin Raptor*, 27 Cal.App.4th at p. 733, emphasis original.) Unlike the EIR at issue in *San Joaquin Raptor*, the Project FEIR does not base its conclusion of no significant impact on a patently false assertion; but, rather fully discloses the fact that the Project will accommodate transit-oriented development.

NFSR also cites Guidelines section 15126.5, subdivision (a) (App. Br., 22), but that Guideline only applies where a project’s growth-inducing impacts are **significant**. As demonstrated, substantial evidence supports the FEIR’s determination that the Project will not have significant growth-inducing impacts. Thus, NFSR’s argument has no basis in law.

3. Substantial Evidence Supports the Conclusion that Transit-Oriented Development Will Have Beneficial Effects.

Contrary to NFSR’s claim, the FEIR does not merely “assume” that transit-oriented development near Project stations “is necessarily beneficial,” nor does it ignore the Project’s impacts on traffic, parking, aesthetics, light and glare. (App. Br., 24.) As demonstrated in Section III.B.2., below, the FEIR discloses and analyzes “localized” impacts of the Project. In addition, the record abounds with substantial evidence to

support the Authority's finding that transit-oriented development, which focuses projected growth "toward areas with available infrastructure and supportive of reduced vehicle miles traveled, fewer air emissions, and reduced energy consumption," has beneficial effects. (See, e.g., 13 AR 000506-10; 29 AR 00861-62, 00866-67; 59 AR 08278-09487 [air quality]; 11 AR 00353-4 [traffic]; 3 AR 00106-107 [reduced VMT and VHT].)

The FEIR discloses planned and proposed growth-inducing impacts, and its analysis of projected transit-oriented development is supported by substantial evidence. Thus, NFSR has failed to carry its burden of proving otherwise.

B. Substantial Evidence Supports the FEIR's Evaluation of Cumulative Impacts on Traffic.

1. NFSR Failed to Exhaust Its Administrative Remedies Regarding the Alleged Defects in the Cumulative Traffic Impacts Analysis.

The FEIR's conclusion that the Project will not have a significant cumulative impact on traffic or any other resource is supported by substantial evidence, and, therefore, the FEIR need only include a brief explanation for its conclusion. (2 JA 000477-480.) The trial court agreed. (3 JA 000721.)

As the trial court also properly determined, the Court need not reach NFSR's argument because the alleged failure to adequately analyze the "localized" cumulative impacts at the intersection of Sepulveda and Pico Boulevards was never brought to the Authority's attention during the administrative proceedings. (*Ibid.*) Exhaustion of administrative remedies during the public comment period is a jurisdictional requirement. (Pub. Resources Code, § 21177, subd. (a); *Bakersfield, supra*, 124 Cal.App.4th p. 1199.) The petitioner bears the burden of proving that the issue was

timely raised before the lead agency. (*Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.)

NFSR itself raised a host of specific alleged defects in the cumulative impact analysis in three lengthy comment letters. (34 AR 01568 [comment L481-3]; 35 AR 01783-90 [comment L560-32]; 727 AR 46957, 46963, 46971, 46972-74), but no comments were submitted claiming that the Authority's analysis of cumulative impacts was inadequate because "the Casden Project will clearly add substantial additional traffic to the nearby intersection of Pico and Sepulveda Boulevards." (App. Br., 27.)

Only one comment out of NFSR's numerous record citations (App. Br., 29, fn. 16) hints at NFSR's claim that the Casden project will "clearly" have a cumulatively significant traffic impact on that intersection. (See 37 AR 03413, Comment E629-24 ["The construction of [the Casden] project and Expo Phase 2 will cause a combined negative impact upon the **neighborhood** surrounding the right-of-way." (Emphasis added)].) This lone comment does not express NFSR's concern about cumulative "localized" traffic impacts of the Project in combination with the Casden project on the Sepulveda/Pico intersection. Thus, the trial court correctly held that the issue was not properly before the court. (*Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 274.)

Any rejoinder that the Authority was on notice that "something or other" was allegedly wrong with the cumulative impacts analysis is not sufficient. (See, e.g., *Sierra Club v. City of Orange, supra*, 163 Cal.App.4th at p. 536 ["[G]eneralized environmental comments at public hearings,' 'relatively . . . bland and general references to environmental

matters’ [citation], or ‘isolated and unelaborated comment[s]’ [citation] will not suffice [to preserve an issue for appeal under CEQA].”]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 [finding a failure to exhaust issue of alleged inconsistency with *county*’s general plan where comment claimed inconsistency with *city*’s general plan].)

2. Even If NFSR Had Exhausted Its Administrative Remedies, Substantial Evidence Supports the Authority’s Cumulative Impact Analysis.

Where, as here, a project will not have a significant cumulative impact on one or more resources, the lead agency must briefly explain the basis for that determination. There are two ways that a project may not have a significant cumulative impact: (1) its contribution to a cumulative impact may not be cumulatively considerable, or (2) the combined cumulative impact of the project and other relevant projects may not be significant. The Guidelines provide: “Where a lead agency is examining a project with an incremental effect that is not ‘cumulatively considerable,’ a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable.” (Guidelines, § 15130, subd. (a).) Likewise, “[w]hen the combined cumulative impact . . . is not significant, the EIR shall briefly indicate why the cumulative impact is not significant . . .” and “identify facts and analysis supporting the lead agency’s conclusion.” (*Id.* § 15130, subd. (a)(2).)

Applying these principles, *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 909 (“LAUSD”) held that LAUSD’s “relatively brief explanation for its conclusion [that the project

would not contribute to cumulative impacts on air quality] is sufficient.” (*Id.* at pp. 908-909.) In *LAUSD*, the EIR described how a project’s cumulative impact on air quality was less than significant because it “reduced the rate of growth of vehicle miles traveled, and [was] consistent with the [Air Quality Management Plan].” (*Ibid.*)

Contrary to NFSR’s claims, the Authority provided substantial evidence in support of its conclusion that the “localized” cumulative impacts on traffic will be less than significant by incorporating the discussion of the Project’s traffic impacts in Section 3.2 of the FEIR. (29 AR 00866; 11 AR 00331-438 [Section 3.2].) Localized cumulative traffic impacts were analyzed using HCM Methodology adopted by the Transportation Research Board. (11 AR 0347; 34 AR 01055 [Master Response 1]; 2 JA 000517 [Pet’r Reply Br.]; see also Authority Brief, § IV.A.6.)

NFSR has not challenged the adequacy of the HCM methodology, nor has NFSR argued that the inputs to that model fail to provide substantial evidence to support the FEIR’s determination that cumulative traffic impacts are less than significant.

To the contrary, the FEIR demonstrates that the Project will result in a net *benefit*, both in terms of vehicle hours traveled/vehicle miles traveled in the Project study area and Los Angeles County (11 AR 00348, 00352-54 [LRT Alternatives & Table 3.2-5]), and in terms of its impacts on the level of service at the Sepulveda/Pico intersection (11 AR 00371 [less-than-significant impacts at at-grade crossings and nearby intersections, including Sepulveda/Pico], 00375 [existing and 2030 no-build LOS at Sepulveda/Pico], 00383 [reduced delay at Sepulveda/Pico during AM peak hour], 00385 [reduced delay during PM peak hour]).

Because the FEIR found the Project's impact neither cumulatively considerable nor cumulatively significant, only a "brief statement" indicating the evidentiary basis for the Authority's conclusion was required. (Guidelines, § 15130, subd. (a); *LAUSD*, *supra*, 176 Cal.App. at pp. 908-909.)

NFSR's complaint that the FEIR's cumulative impact section did not specifically quantify the potential traffic generated by the Casden project also fails on the merits. A discussion of cumulative impacts may rely on *either* "[a] list of past, present, and probable future projects producing related or cumulative impacts . . . , or [¶] [a] summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect. . . . [such as] a general plan, regional transportation plan, or plans for the reduction of greenhouse gas emissions." (Guidelines, § 15130, subd. (b)(1)(A)-(B), emphasis added.)⁵

The FEIR followed Guidelines section 15130, subdivision (b)(1)(B) for cumulative transportation/traffic impacts. (29 AR 00866, 11 AR 00331-438 [Section 3.2]; 72 AR 10693-12247 [Final EIR Transportation/Traffic

⁵ NFSR argues that Guidelines section 15130, subds. (b)(4) and (b)(5) require a lead agency that uses the summary-of-projections approach to also provide a reasonable analysis of the cumulative impacts of "relevant" projects like the Casden project. (App. Br., 26.) But such an interpretation of the Guideline would read the summary-of-projections approach out of the plain text, which runs contrary to common sense and a fundamental canon of statutory interpretation. (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 634, 635.)

Technical Background Report].)⁶ The FEIR study area included the intersection at Pico and Sepulveda Boulevards that NFSR claims received inadequate study. (72 AR 10704-09.) Significantly, **NFSR does not challenge the adequacy of that analysis.** Instead, it complained, for the first time at trial, that the transportation/traffic cumulative impact analysis did not use **both** the “summary of projections” **and** “list of projects” approaches. (2 JA 000421-22; App. Br., 26-29.) Thus, even if NFSR had exhausted its administrative remedies, which it did not, it has failed to carry its burden of proving that the cumulative impact analysis is not supported by substantial evidence.

NFSR cites, without argument, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721; *Bakersfield, supra*, 124 Cal.App.4th at pp. 1216-1217, and *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-1128. None of these cases holds that a lead agency is required to conduct both a summary-of-projections **and** a list-of-related-projects approach to analyzing cumulative impacts.

In *Kings County*, the agency employed a “ratio” method to compare the individual project’s air quality impact against the cumulative impact to conclude that the project’s impacts were not cumulatively considerable. (221 Cal.App.3d at p. 721.) The FEIR does not use a ratio method – it compares cumulative traffic conditions in 2030 under the No-Build Alternative with cumulative conditions in 2030 with construction of the

⁶ In addition, as demonstrated above, at the time the EIR for the Expo Phase 2 Project was initiated on Feb. 23, 2007 (206 AR 21041-43), there was no application on file for the Casden project. Thus, it need not be considered even if the list method were used. (*San Franciscans for Reasonable Growth, supra*, 151 Cal.App.3d at pp. 72-77.)

Project. (29 AR 00866; 11 AR 00347-48, 00414-15.) In addition, the conclusion that the cumulative traffic impacts on the Sepulveda/Pico intersection is neither cumulatively considerable nor cumulatively significant is supported by the evidence that the Project will reduce congestion at that intersection. (11 AR 00383, 00385; see also 118 AR 15030, 15032; Authority's RJD, Exh. A.)

In *Bakersfield, supra*, the two Wal-Mart super centers at issue were in no way speculative at the time CEQA analysis was initiated because the real party was the applicant for both projects. In addition, the real party had to seek amendments to the City's general plan because projects of the sizes proposed were not contemplated. Here, as stated in Section III.A.1., above, the FEIR relied upon all growth in population, jobs, and economic activity as well as the contemplated transit-oriented development disclosed in both regional and local planning documents, even if they did not specifically contemplate the Casden project. (29 AR 00863-65.) Thus, "double counting" the impacts by conducting a blended analysis of cumulative impacts was not a problem for the two projects at issue in *Bakersfield*. It is here. (34 AR 01279.)

The third and final case cited by NFSR, *Gray v. County of Madera, supra*, actually undermines its argument. In *Gray*, the court **upheld** the lead agency's exercise of discretion to use the project application date as the cut-off for including projects to be considered in the cumulative impacts analysis. (167 Cal.App.4th at p. 1128.) The court there ultimately held that substantial evidence in the record did not support the cumulative impacts analysis because the lead agency failed to disclose in the EIR which planning documents were used in the summary-of-projections analysis. (*Ibid.*) Such is not the case here. (29 AR 00863-65.)

NFSR failed to exhaust its cumulative impacts argument regarding “localized” cumulative traffic impacts on the Sepulveda/Pico intersection. Nevertheless, substantial evidence in the record supports the FEIR’s conclusions regarding cumulative traffic impacts at that intersection.

C. The Evaluation of Project Alternatives Complies with CEQA.

Over the last decade, regional transportation agencies in Los Angeles have analyzed dozens of alternatives for relieving traffic congestion and improving mobility on the Westside. (329 AR 27324-91, 738 AR 48226.) For the Expo Phase 2 Project alone, the Authority considered nine alternatives plus No-Build and Transportation System Management (“TSM”) Alternatives during the screening process (9 AR 00288-301), and conducted detailed analyses of six alternatives and five additional design options in the FEIR (*id.* 00241-88).

The Authority evaluated grade-separation of Overland Avenue and Westwood Boulevard. (9 AR 00303-06; 715 AR 45995-46008 [Technical Memorandum]; 718 AR 46033-93 [Overland-Westwood Grade-Separation Cost Study].) NFSR nevertheless claims that the Authority’s evaluation of alternatives is inadequate because it failed to rule out as infeasible NFSR’s preference to have the tracks adjacent to the Cheviot Hills neighborhood separated from Overland Avenue and Westwood Boulevard either by a “trench” that would underground the tracks and the Sepulveda station, or by an aerial structure that would elevate the tracks and the Sepulveda station. (App. Br., 40-43.) Specifically, NFSR argues that grade-separation at Overland Avenue, Westwood Boulevard, and Sepulveda Boulevard “could potentially avoid or reduce the impacts of the Project[,]” and therefore, it

must either be considered in detail, or it must be ruled out as infeasible.

(*Ibid.*)

But NFSR omits two facts that undermine its argument: First, a grade-separation of three intersections in Segment 1 of the LRT alternatives is not a project alternative, since it could not, in and of itself, possibly fulfill the goals of the Project, which include improving regional mobility by connecting to downtown Los Angeles, the Westside and Santa Monica. (3 AR 00023; Guidelines, § 15126.6, subd. (a).)⁷ At most, the separation of Overland and Westwood is a mitigation measure. But since NFSR has failed to identify any impacts found to be significant that their preferred design would avoid or substantially lessen, and because grade-separation of Overland and Westwood itself causes significant impacts, the FEIR need not consider them as mitigation measures. (Guidelines, § 15126.4, subds. (a)(3), (a)(1)(D).)⁸

Second, the Project, as designed and mitigated, will not have any significant impacts that its grade-separated design option would avoid or substantially lessen. In fact, the FEIR *did* analyze NFSR's preferred design

⁷ *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599; *A Local & Reg'l Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 642 fn. 8; *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 234-238; *Village Laguna of Laguna Beach v. Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1028-1029.

⁸ NFSR has not raised, and therefore has waived any argument that the FEIR is inadequate because it failed to consider NFSR's grade-separated design options as mitigation measures. (*A Local & Reg'l Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1804 [issue cannot be asserted for the first time on appeal].) Nevertheless, such an argument fails for the same reasons its alternatives argument fails as stated in Sections III.C.1. and III.C.2., below.

and found that it would cause significant adverse impacts at considerable cost to taxpayers.

1. **Neither of NFSR's Grade-Separation Variants for Segment 1 of LRT 1 or 2 Merit Further Analysis Because Neither Would Reduce *Significant* Impacts.**

CEQA requires the lead agency to consider a “reasonable range” of alternatives to a proposed project “which would feasibly attain most of the basic objectives of the project ***but would avoid or substantially lessen any of the significant effects of the project.***” (Guidelines, § 15126.6, subd. (a), emphasis added.) “The range of alternatives is governed by the ‘rule of reason,’ which requires only an analysis of those alternatives necessary to permit a reasoned choice.” (*Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1177-1178.) “[A]n EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation.” (Guidelines, § 15126.6, subd. (a); see also fn. 7, *supra*.) “Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) ***inability to avoid significant environmental impacts.***” (Guidelines, § 15126.6, subd. (c), emphasis added.)

Substantial evidence supports the Authority’s determination that neither of NFSR’s proffered grade-separation variants for Segment 1 would reduce any ***significant*** environmental impact. Pursuant to the Guidelines, “[a]n EIR shall describe a range of reasonable alternatives to the project . . . , which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the ***significant*** effects

of the project, and evaluate the comparative merits of the alternatives.” (Guidelines, § 15126.6, subd. (a); *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 566 [an EIR must consider a reasonable range of feasible alternatives that “*offer substantial environmental advantages over the project proposal*,” emphasis added]; Guidelines, § 15126.4, subd. (a)(3) [“Mitigation measures are not required for effects which are not found to be significant.”].) Thus, the Authority was not required to find that NFSR’s grade-separation variants of Segment 1 were infeasible. In any event, the detailed analysis of grade-separation of Overland and Westwood documented significant engineering and environmental problems associated with grade-separation at these locations.

This is consistent with CEQA. “The purpose of an environmental impact report is to identify the *significant* effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those *significant* effects can be mitigated or avoided.” (Pub. Resources Code, §§ 21002.1, subd. (a), emphasis added; see *id.* § 21081, subd. (a).)

The cases cited by NFSR for the proposition that the Authority was required to find its grade-separated design options infeasible are inapposite. In each the court was asked to decide whether substantial evidence supported an infeasibility finding for alternatives that would avoid or substantially lessen *significant* impacts. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1454-1455; *Uphold Our Heritage v. Town of Woodside*, *supra*, 147 Cal.App.4th at pp. 601-602; *Ctr. for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 875-876, 884.) CEQA does not require an agency to make an infeasibility finding for an alternative “*found unsuitable for*

presentation in the EIR for other reasons.” (1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. 2010) Project Alternatives, § 15.9, p. 739, emphasis added.)

NFSR also cites *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704 and *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 for the general proposition that “[t]he adequacy of an EIR’s alternatives analysis is also evaluated in light of the extent to which the alternatives provide relief from the project’s impacts.” (App. Br., 39.) Neither case stands for that proposition.

Sequoyah Hills Homeowners Assn., *supra*, actually undermines NFSR’s argument. There the lead agency determined that a housing project would have *significant* visual impacts, and the petitioner argued that in light of that finding, the agency should have studied lower density alternatives to address the visual impacts. (23 Cal.App.4th at p. 713-714.) But the court rejected this argument:

Plainly, the EIR was not required to analyze every possible lower-density alternative that was or might have been proposed. (See *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028-1029 [185 Cal.Rptr. 41].) As in *Village Laguna*, we conclude that the EIR evaluation of plans for development of 0, 36, 45, 46 and 63 units at the Oak Knoll site was ‘sufficient to satisfy the informational goal of CEQA. (134 Cal.App.3d at p. 1028.)

(*Id.* at p. 714.)

In *Friends of the Eel River*, *supra*, 108 Cal.App.4th at pp. 873-874 the court held that the EIR failed to disclose that curtailments of water diversions to the affected river were pending before FERC. Thus, not only was its cumulative impacts analysis inadequate, “[t]he Agency must discuss

project alternatives that would mitigate any *significant* cumulative impact of the proposed curtailment of Eel River diversions [pending before FERC] and the Agency’s Project.” (*Ibid.*)

Thus, none of the cited authorities supports NFSR’s general proposition that a lead agency must study in detail any potentially feasible alternative or variant of any alternative that might reduce any impact whatsoever, significant or not. If that were the case, environmental analysis would never end.

Nevertheless, in response to public comment, and in coordination with Los Angeles Department of Transportation (“LADOT”), the Authority conducted additional analysis of the Overland and Westwood crossings (9 AR 00303), and studied the grade-separation design option for LRT 2 (as requested by NFSR) to determine if it would satisfy basic project objectives while reducing significant impacts (*id.* 00304). Contrary to NFSR’s suggestion, LADOT concurred with the Authority’s determination that the Project could operate at-grade at both crossings *without significant environmental impacts*. (*Id.* 00303; 34 AR 01059; 72 AR 12138-45 [LADOT Letter, Oct. 2009]).)

NFSR fails to argue, let alone prove, that there is no substantial evidence to support the FEIR’s determination that the at-grade crossings at Overland Avenue and Westwood Boulevard will not have significant impacts that would be avoided or lessened by NFSR’s grade-separated design options. Instead, NFSR claims that the record is “replete” with evidence that the at-grade crossings in Segment 1 will cause significant impacts. (App. Br., 40.)

Even if that were the case, which it is not, it would be irrelevant. Under the controlling standard of review, if substantial evidence in the

record supports the Authority's analysis, the Court must uphold the agency's action. (Guidelines, § 15151; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573-574; *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 863.) Ultimately, NFSR implicitly concedes this point, since it claims only that its design options should have been analyzed in detail because "grade-separation within Segment 1 had the potential to avoid or reduce the environmental [not **significant** environmental] impacts of the Project." (App. Br., 43.)

Substantial evidence in the record supports the Authority's decision not to include further detailed analysis of grade-separation at Overland and Westwood because neither would reduce any significant impact.

2. Substantial Evidence Supports the Determination that Each of NFSR's Grade-Separated Design Options Would Cause Significant Impacts.

Among other grade-separation design options for Segment 1, the Authority analyzed NFSR's proposal to include either a 3,500-foot long trench and underground station spanning Overland Avenue and Westwood Boulevard, or, alternatively, a 3,000-foot long aerial structure and elevated station. (9 AR 00303-06; 715 AR 45995-46008 [Technical Memorandum Analyzing Four Grade-Separation Design Options for Segment 1]; 716 AR 46009-24 [Plans, Profiles, and Typical Cross Sections]; 717 AR 46025-32 [Drainage Memorandum]; 718 AR 46033-93 [Overland-Westwood Grade-Separation Cost Study].) The Authority ultimately concluded that these grade-separated design options did not merit additional evaluation because neither would reduce any significant environmental impacts, and each would cause more severe significant construction and operational environmental impacts. (9 AR 00306; 715 AR 46008; 3 AR 00091.)

The 3,500-foot trench would bisect two large gravity-fed storm drains, requiring a costly pumping station, or requiring a significantly deeper trench. (9 AR 00304.) An underground station with ventilation would be required, and the entire trench would need to be flood-proofed because the area is in a FEMA Special Flood Hazard Zone AO. (*Id.* 00305.) In addition, a construction trench and underground station would result in greater noise and vibration impacts, more aesthetic impacts due to the increased size of the construction footprint, increased haul loads and routes through adjacent neighborhoods and near the Overland Elementary School, greater traffic detours and lane closures, increased dust and other air emissions, and a longer duration of construction impacts than the Project (*Ibid.*) Finally, the costs would be considerably higher than the proposed at-grade alignment (*ibid.*; see also 715 AR 46008 [estimating cost for trench at \$224.3 million more than the Project]), but no ridership benefits would result. (9 AR 00305.) For these reasons, and because the at-grade alignment would not result in any significant impacts, the Authority did not propose a trench design option at Overland Avenue and Westwood Boulevard. (*Id.* 00306; 3 AR 00091.)

The aerial structure design option would reach 30 feet in height and extend 3,000 feet, creating a large physical barrier that would bisect the neighborhood, resulting in greater visual impacts than the at-grade alignment. (9 AR 00305.) The aerial structure would cause other more severe construction impacts than construction of an at-grade alignment, including increased haul loads and routes through neighborhoods, more noise, vibration, traffic detours, lane closures, adverse air quality and aesthetic impacts. (*Id.* 00306.) An aerial structure would also considerably increase the Project costs. (*Ibid.*; see also 715 AR 46008 [\$65.9 million

cost estimate]; 718 AR 46040.) Therefore, the aerial structure design option for Segment 1 was not retained for further consideration. (9 AR 00306; 3 AR 00091.)

Substantial evidence in the record demonstrates that the Authority evaluated a reasonable range of alternatives that fostered public participation, and substantial evidence supports the Authority's decision not to subject NFSR's grade-separation design options to additional evaluation.⁹ Thus, the alternatives analysis must be upheld.

3. The Authority Studied a Reasonable Range of Project Alternatives.

In a footnote, NFSR suggests that the range of alternatives subjected to detailed study in the FEIR was too narrow because it studied six alternatives, four of which involve extension of the Expo Phase 1 light rail line, and which would have "similar impacts." (App. Br., 39-40 n.19.)

NFSR fails to cite any authority holding that an analysis of six project alternatives is inadequate simply because the lead agency ultimately determined that two of them would not meet the purpose and need of the project, and that the remaining four would have similar impacts. Indeed, two of the cases NFSR cites are directly to the contrary. In *Sequoyah Hills Homeowners Assn.*, *supra*, 23 Cal.App.4th at p. 714, the court upheld as adequate an EIR that analyzed a no-project alternative and three housing project alternatives of varying densities at the same site that would all have

⁹ For the same reasons, NFSR's grade-separated design options need not be analyzed in detail as mitigation measures. (Guidelines, § 15126.4, subd. (a)(1)(D) [“If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed”].)

similar adverse visual impacts. In *Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151, the court held: “The [Project] FEIR discusses four alternatives, which represent enough of a variation to allow informed decisionmaking.”

The range of alternatives analyzed in the FEIR reflects suggestions provided by the public and by the many public agencies that participated in the CEQA process. (See 32 AR 901-942.) The FEIR provided the public and the decision-makers with a range of alternatives for addressing the project objectives.

Thus, NFSR has failed to carry its burden of proving that the range of alternatives analyzed in the FEIR was so narrow that it prevented informed decision-making and public participation. The facts are to the contrary.

At the outset, the Authority evaluated alternatives including various transportation “modes” (bus rapid transit (“BRT”)), rail, monorail and personal rapid transit) and multiple alternative light rail transit (“LRT”) routes. (3 AR 00087-96; 9 AR 00288-90; 34 AR 01080; 221 AR 21179-82 [Scoping Report (May 2007)]; 298 AR 26378-416 [Screening Meeting PowerPoint]; 412 AR 28947-60 [Final Alternatives Screening Report].)

The BRT alternative was eliminated from detailed analysis because it would have substantially fewer boardings than the LRT alternatives and significant traffic impacts on north/south cross streets during peak hours. (9 AR 00298-99, 00294-95; 412 AR 28980-81, 28990-91.) The Authority eliminated the LRT Venice/Venice alternative from further discussion because it would generate even fewer boardings than the BRT alternative due to fewer current and future jobs in the vicinity, lower population projections, and less proximity to major study area trip generators. (9 AR

00299; 412 AR 28991.) Moreover, the Venice/Venice alternative would require numerous property acquisitions to widen Venice Boulevard, resulting in significant community disruption. Alternatively, if an elevated line were used to lower the number of acquisitions, the visual impacts and shadow from an aerial structure in a largely low-rise area would be significant. (9 AR 00299-300; 412 AR 28991.)

The FEIR included a “No Project” alternative because it is required under CEQA “to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project.” (Guidelines, § 15126.6, subd. (e)(1).) “The No-Build Alternative consists of the existing transit services as well as improvements explicitly committed to be constructed.” (9 AR 00241.) The No-Build Alternative was not selected because it would not meet the purpose and need of the Expo Phase 2 Project. (3 AR 00023-24, 00096.)

The FEIR also included detailed analysis of a Transportation Systems Management (“TSM”) alternative that “identifies transit improvements above and beyond the No-Build Alternative . . . with the goal of improving transit services as much as possible without making major capital investment in new infrastructure, and specifically without constructing the Expo Phase 2 project.” (9 AR 00246.) Ultimately the Authority did not adopt the TSM alternative because it failed to achieve most of the project objectives. (3 AR 00096; see *id.* 00023-24.)

The Authority’s evaluation of six alternatives in the FEIR constitutes a reasonable range of potentially feasible alternatives that fostered informed decision-making and public participation. NFSR has failed to meet its burden of proving otherwise.

4. The FEIR’s Alternatives Analysis Does Not Prevent the CPUC from Acting as a Responsible Agency.

NFSR claims that the FEIR “deprived the CPUC from accessing adequate environmental information required to evaluate alternatives and make an informed decision.” (App. Br., 44.) NFSR fails to demonstrate that the FEIR did not analyze a reasonable range of alternatives, or that it did not demonstrate that grade-separation at Overland Avenue or Westwood Boulevard would reduce or avoid any significant environmental impacts without causing significant impacts of their own. Thus, the CPUC is not deprived “from accessing adequate environmental information” regarding the at-grade crossings in Segment 1.

The Guidelines require responsible agencies, such as the CPUC, to focus their comments on any shortcomings in the draft EIR or on additional alternatives or mitigation measures which the EIR should include. (Guidelines, § 15096, subd. (d).) Here, after consultation with the CPUC as a responsible agency was completed, the CPUC recognized the additional work and analysis that was conducted on the at-grade crossings, including those at Overland Avenue and Westwood Boulevard, which resulted in proposed project revisions and mitigation measures to further reduce impacts. (11 AR 00360-361.) Accordingly, the CPUC stated in a letter to the Authority, dated December 4, 2009, that “the Expo Authority has been responsive to issues raised by the CPUC staff and LADOT concerning the impacts of the proposed crossings.” (*Id.* at 000361.) The CPUC did not submit any subsequent comments that raised any issue regarding the adequacy of the FEIR’s evaluation of the at-grade crossings of Overland Avenue or Westwood Boulevard. Thus, any such claims at this late date are waived. (Guidelines, § 15096, subd. (e)(2).)

Substantial evidence in the record demonstrates that the CPUC actively participated in the CEQA process by consulting with the Authority regarding the analysis of the grade crossings. Thus, the Authority has done nothing to prevent the FEIR from serving the function of informing the CPUC in its role as a responsible agency.

NFSR suggests that the Authority has prevented the CPUC from making an informed decision about NFSR's preferred grade-separated design options by "staking the deck" against grade-separation. (App. Br., 44 & fn. 24 [citing, without explanation, Guidelines, § 15004, subd. (b)(2)(B)].) The CPUC's active consultation with the Authority concerning the FEIR's grade crossing analysis disproves this accusation.

D. Recirculation Is Not Required Because the New Information Does Not Disclose Any New Significant Impacts.

In response to comments on the Draft EIR, the Authority did precisely what CEQA commands: it conducted additional Project analysis and added design changes and mitigation measures to further reduce impacts. Nevertheless, NFSR claims that "new" information added in the FEIR's response to comments requires recirculation of the FEIR. (App. Br., pp. 44-49.) But CEQA does not require recirculation where, as here, substantial evidence supports the Authority's determination that there are no new significant effects and that the Overland/Westwood trench would not reduce significant impacts.

If a lead agency adds "significant new information" to an EIR after the draft EIR has been circulated, but before certifying the final document, it must recirculate at least those portions of the EIR to which such information has been added. (Pub. Resources Code, § 21092.1; Guidelines,

§ 15088.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447.) “New information added to an EIR is ***not*** ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a ***substantial adverse environmental effect*** of the project ***or a feasible way to mitigate or avoid such an effect . . .*** that the project’s proponents have declined to implement.” (Guidelines, § 15088.5, subd. (a), emphasis added.) Section 15088.5 of the Guidelines codifies *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112 (“*Laurel Heights II*”). In *Laurel Heights II*, the Court reasoned that “[r]ecirculation was intended to be an exception, rather than the general rule.” (*Laurel Heights II, supra*, 6 Cal.4th at p. 1132.)

NFSR first argues without evidence or authority that “major changes” added to the FEIR “clearly” require recirculation. (App. Br., 45-46.) By failing to support its claim that any of the listed changes “clearly” result in a substantial adverse environmental effect, NFSR forfeits this argument. (*Inyo Citizens for Better Planning v. Bd. of Supervisors* (2009) 180 Cal.App.4th 1, 14.)

1. Substantial Evidence Supports the Conclusion that Additional Mitigation Measures Will Reduce Noise Impacts to a Less-than-Significant Level.

In response to the comments on the Draft EIR regarding noise and vibration impacts, the Authority conducted supplemental noise analysis, focusing on receptors such as residential areas, schools, and recording studios. (21 AR 00641, 00656-57.) As a result of the additional studies, the FEIR proposes that sound walls be adjusted in several locations to

ensure that noise impacts will be mitigated to less-than-significant levels.

(*Id.* 00673-75.)

NFSR claims that “[t]he public was denied an opportunity to comment on the efficacy and potential impacts of these additional sound walls.” (App. Br., 47.) The trial court rejected this argument stating “[i]f anything, the information added (five additional sound walls, signal phasing, and parking surveys) served to lessen the severity of the impact.” (3 JA 000724.)

NFSR does not cite any evidence in the administrative record to support its claim that any adjustments in the sound wall will be ineffective or result in a “new significant environmental impact.” (Guidelines, § 15088.5, subd. (a)(1).) Sound walls are a well-established measure to reduce noise effects of transportation projects. The Draft EIR and FEIR included a discussion of the use of sound walls to attenuate noise. (21 AR 00666-67, 00673, 00675.) Substantial evidence supports the Authority’s conclusion that noise will be mitigated to less than significant, and NFSR has failed to show that any of the sound walls or other sound mitigation measures will result in new substantial impacts.¹⁰

¹⁰ As indicated in Table 3.12-10 (21 AR 00673-74), several of the “new” sound walls were either included in the Draft EIR (e.g. Military-Sepulveda), and are therefore not “new,” or they shifted location to overlap with existing sound walls along the opposite side of the alignment (e.g. Westwood-Military), or were simply relocated from one side of the alignment to the other (e.g., West Pico-Federal). All but one of the “new” sections of sound wall are located in the Expo right-of-way. (21 AR 00673-4 [Table 3.12-10]; 48 AR 08069, 008071, 008073, 08072.) As the Authority explained in the response to comments, the sound walls will not result in division of communities since trespassing in the right-of-way is already prohibited and access via north-south roadways will be maintained, and visual impacts will be nonexistent or minimal due to heavy vegetation in the right-of-way or pre-existing walls along the back lot lines of adjacent residences. (34 AR 01387.) In addition, the sound wall adjacent to the

2. Project Modifications Will Not Cause Any New Significant Traffic Impact that Is Not Mitigated to a Less-than-Significant Level.

NFSR claims that refinement in signal phasing at the intersection of Westwood and Exposition North Boulevards would cause a new significant impact by increasing the average delay during the morning peak hour.

(App. Br., 47.) NFSR fails to disclose that even with an increase in average delay, *the intersection will operate below the threshold of significance.*

(11 AR 00350.) For intersections operating at an acceptable level under No-Build conditions (i.e., LOS D or better), the impact is significant only if the project would result in a deterioration to LOS E or F. (10 AR 00323; 11 AR 00351.) For intersections operating at LOS E or LOS F under No-Build conditions, an impact is not significant unless it increases the average vehicle delay by 4 or more seconds. (10 AR 00323; 11 AR 00351.)

Substantial evidence in the record supports the FEIR's conclusion that the phasing refinement will not result in significant impacts. (11 AR 00383, 00385.) Thus, the additional information does not disclose a new significant impact that would require recirculation.

NFSR mischaracterizes the trigger for recirculation, stating that “[e]ach of these changes constitutes a ‘substantial increase in the severity of

Lantana campus (21 AR 00670, 00674; 48 AR 08069) will be in front of an existing 8-12 foot security wall and combination fence/wall surrounding the maintenance facility, so it would add no new visual impacts. (34 AR 01068.) As for the new section of sound wall added to mitigate noise at the Crossroads School (21 AR 00674; 49 AR 08083), the visual character of the area is mostly commercial and industrial in nature. (12 AR 00464, 00460 [photographs].) Any visual impacts will be mitigated to less than significant through landscaping, use of vegetation to deter graffiti, and application of the *Metro Design Guidelines*. (34 AR 01147-48.)

an environmental impact’ requiring recirculation.” (App. Br., 48 [citing Guidelines, § 15088.5, subd. (a)(2)].) But the cited Guideline actually provides that recirculation is required where added information discloses “a substantial increase in the severity of an environmental impact would result *unless mitigation measures are adopted that reduce the impact to a level of insignificance.*” (Guidelines, § 15088.5, subd. (a)(2), emphasis added.) Where, as here, none of the new information cited by NFSR reveals substantial increase in the severity of an impact that would exceed the applicable threshold of significance, recirculation is not required.

3. Project Modifications Will Not Cause Any New Significant Parking Impact that Is Not Mitigated to a Less-than-Significant Level.

NFSR makes the cryptic claim that “this new information” [referring to 78 AR 12642-47; 11 AR 00416-21] undermines the conclusion that the Project will have a less-than-significant impact on the supply of parking along Sepulveda and Westwood Boulevards and Overland Avenue. (App. Br., 48.) Since NFSR does not identify specific evidence in the record to support its claim, it has forfeited this issue. (*Inyo Citizens for Better Planning, supra*, 180 Cal.App.4th at p. 14.)

Nevertheless, there is substantial evidence to support the conclusion that the revised parking surveys do not disclose a new significant impact that would require recirculation. The supplemental parking surveys confirmed that relative to the parking spaces to be removed *that are actually being utilized*, there are sufficient parking spaces on adjacent streets that can serve as replacement parking. (*Id.* 00416-29.) The FEIR concludes that in most segments, including the Expo right-of-way, there is sufficient alternate on-street parking available to accommodate the removed

utilized on-street parking spaces. (11 AR 00429.) New information added to an EIR that “clarifies or amplifies . . . an adequate EIR” does not require recirculation. (Guidelines, § 15088.5, subd. (b).)

4. Inclusion of Analysis of Grade-Separation Design Alternatives Does Not Constitute Significant New Information Because At-Grade Crossings at Overland and Westwood Will Have No Significant Impacts.

NFSR claims that the Draft EIR’s failure to address grade-separation from and including Overland Avenue to Sepulveda Boulevard rendered it “inadequate and conclusory in nature such that meaningful public review and comment were precluded.” (App. Br., 49 [quoting Guidelines, § 15088.5, subd. (a)(4)].) But the cited portion of NFSR’s brief (Section V.F.) does not argue that the Draft EIR’s discussion of alternatives was so “conclusory” in nature that meaningful public review and comment were precluded. Indeed, as NFSR’s comment letters and submission of the “Southstar Report” on grade-separation alternatives in Segment 1 demonstrates (727 AR 46941), NFSR was clearly not precluded from meaningful public review and comment on the Draft EIR.

Again, “[n]ew information added to an EIR is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon *a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect . . .* that the project’s proponents have declined to implement.” (Guidelines, § 15088.5, subd. (a), emphasis added.) The foregoing discussion demonstrates that substantial evidence supports the determination that at-grade crossings at Overland Avenue and Westwood Boulevard will not have any significant impacts that NFSR’s preferred design options would

avoid or substantially reduce. Thus, the additional analysis of grade-separation of Overland Avenue and Westwood Boulevard does not constitute “significant new information.”

IV. THE COURT MUST LIMIT THE SCOPE OF ANY MANDATE.

If the Court determines that there is any ground for reversal based on a prejudicial inadequacy of one or more findings, the Court’s order “shall include only those mandates which are necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA].” (Pub. Resources Code, §21168.9, subd. (b).) For instance, if the inadequacy only concerns the impacts of one component of the Project, the Court should sever that component and allow the rest to proceed. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1180.) Otherwise, the peremptory writ of mandate shall be limited to “specific action as may be necessary to bring the determination, finding, or decision into compliance [with CEQA].” (Pub. Resources Code, §21168.9, subd. (c).)

V. CONCLUSION

For the reasons stated above, and for the reasons stated in the Authority's brief, filed concurrently, the Court must reject NFSR's challenge to the Project.

Dated: November 7, 2011

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CERTIFICATE OF WORD COUNT
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PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

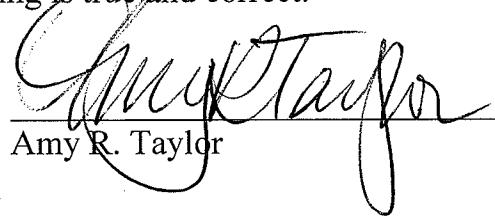
On November 8, 2011, I served the foregoing **REAL PARTY IN INTERESTS' RESPONDING BRIEF** on parties to the within action as follows:

SEE ATTACHED SERVICE LIST

- (By U.S. Mail) On the same date, at my said place of business, a true copy thereof enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.
- (By Personal Service) By causing RS Professional Services to deliver a true copy thereof enclosed in a sealed envelope by hand to the offices of the addressee.

Executed on November 8, 2011.

- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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