BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Neighbors for Smart Rail for Rehearing of Resolution SX-100 and for Oral Argument	)	Application 11-12-010 (Filed December 4, 2011

"NEIGHBORS FOR SMART RAIL'S OPENING LEGAL BRIEF IN THE MATTER OF THE REHEARING OF CALIFORNIA PUBLIC UTILITIES COMMMISSION RESOLUTION SX-100"

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I. Introduction

Neighbors for Smart Rail ("NFSR") is a non-profit corporation comprised of a coalition of homeowners' associations, community groups and unaffiliated citizens who support the development of intelligent transportation solutions for Los Angeles that are safe, well-planned, efficient and conform to the highest federal and state standards for safety, transportation benefits, and mitigation of environmental impacts. Many of its members live and work in the immediate vicinity of the proposed Expo Phase 2 project.

NFSR does not oppose the project per se, but opposes construction of a project without the opportunity for the public and the decision makers to have a proper and legally valid environmental study which, among other things, identifies and adequately evaluates a reasonable range of alternatives as required by law, including grade separations at key intersections.

II. Background

The Exposition Metro Line Construction Authority ("Expo" or Expo Authority") is charged with planning and constructing the Exposition Corridor Light Rail Transit Project ("Project", or "Phase 2 Project").When complete the project will provide public transit service between downtown Los Angeles and the City of Santa Monica. Phase 1 of the project, an 8.5 mile segment from downtown Los Angeles to Culver City has been completed. Phase 2 of the project will extend approximately 6.7 miles from the terminus of Phase 1 in Culver City, to the downtown area of Santa Monica. As the lead agency under CEQA, the Expo Authority prepared an environmental impact report for the Project (the "EIR") which was certified by the Expo Board in February 2010.

However, NFSR alleges that the EIR is grossly deficient in numerous respects, and fails to conform to legal standards established by both California Supreme Court and California Court of Appeal decisions regarding the proper methodology for analyzing project impacts under CEQA. Among other things, the EIR evaluates key aspects of the Project's effects on traffic and air quality against a hypothetical future (2030) baseline, but fails to also evaluate these effects against the existing environmental conditions, as required by law. See *Communities for a Better Environment* v. *South Coast Air Quality Management Dist.* (2010) 48 Ca1.4th 310,322; Sunnyvale *West Neighborhood Ass'n. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 (holding that the use of hypothetical, future conditions as the environmental baseline results in illusory comparisons and misleads the public, contravening CEQA's intent) and *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48.

NFSR further alleges that the EIR fails to adequately address and mitigate the significant impacts of spillover parking in neighborhoods surrounding the proposed new Expo Phase 2 stations. Expo's use of an improper hypothetical future baseline and failure to use a baseline of

existing conditions are among issues underlying NFSR's *Petition for Review* submitted to the California Supreme Court ("CASC") on May 25, 2012. On August 8, 2012, by unanimous decision of all seven judges, the Supreme Court of California accepted NFSR's *Petition for Review* of B125233 (Case No. S202828).

On November 14, 2011 the Commission approved and issued Resolution SX-100 granting Exposition Metro Line Construction Authority ("Expo" or "Expo Authority") authorization pursuant to Commission General Order 164-D ("GO 164-D") to construct 16 new at-grade and 11 grade-separated highway-light rail crossings as part of Phase 2 of the Exposition Corridor Light Rail Transit Project.

On December 3, 2011, NFSR filed an *Application for Rehearing with Oral Argument* before the Commission. On June 25, 2012 the Commission issued Decision 12-06-041, an *Order Granting Limited Rehearing of Resolution Sx-100 on Issues Involving CEQA and Due Process, And Denying Rehearing in All Other Respects.*

The order granting rehearing stated the following:

> "In its rehearing application, NFSR challenges Resolution SX-100 on the following grounds: (1) at-grade crossings are not cheaper, and Expo cannot claim cost as a factor in eliminating analysis and adoption of grade separations if they did not seek funding for those options; (2) the Commission failed in its duties as a responsible agency under the California Environmental Quality Act ("CEQA"), and the Commission cannot claim it did not know the requirements of CEQA; (3) the Commission failed to comply with section 13.6 of the Commission's Rules of Practice and Procedure, which states that the substantial rights of the parties must be protected; (4) the Commission has lost objectivity in proceedings with LACMTA and therefore further fails to serve the public interest and need for transparency, due diligence and due process in transit planning in Los Angeles County; (5) the metro grade crossing policy circumvents safety and defers environmental review; (6) NFSR agrees with Commissioner Simon that the public was excluded in the crossing approvals, and the Commission erred in relying on Expo to conduct public outreach; and (7) the ratesetting categorization wrongly disallows intervenor compensation for parties who are members of the public. NFSR also requests oral argument on its rehearing application.

> We have carefully considered the arguments raised in the application for rehearing, and are of the opinion that **good cause has been established to grant limited rehearing on issues involving CEQA and due process** (D12-06-041, p. 3)." (Emphasis added).

The purpose of our filing here today is to make a showing that the California Public Utilities Commission failed to comply with their duties as a Responsible Agency under CEQA, and that their failures constitute an abuse of discretion resulting in the improper approval of the Expo Phase 2 crossings. Regarding the sufficiency of Expo's EIR, NFSR herein incorporates their briefs filed and pending resolution with the CASC.

III. The Project Approvals Violate CEQA.

The CEQA concerns at issue in the rehearing of SX-100 are unsettled at this time and thus no Commission determinations at this point can be considered final. Any further action on the part of the Commission which relies on the validity of Expo's Phase 2 FEIR would be rendered invalid by a CASC decision favoring Plaintiffs, NFSR.

The CPUC is the approving authority for railroad crossings across the entire state of California, and a responsible agency under CEQA, thus any decisions made in rehearing SX-100 become precedent for all subsequent crossing approvals under consideration in the state, not just on Expo Phase 2. As consistency with previous Commission decisions is one of the *Commission Standards of Practicability* every crossing approval under review must be mindful of the use of a proper baseline of existing environmental conditions and thus disregard the decision by the Second District appellate court in NFSR v. Expo.

As it stands today, all Commission review must be done in light of the controlling authorities (*Quintano v. Mercury Casualty Co. (1995) 11 Cal. 4th 1049)*[3] in place prior to the

[3] *Quintano v. Mercury Casualty Co. (1995) 11 Cal. 4th 1049* holding that a California Supreme Court Review supersedes appellate decisions and serves to de-publish the appellate decision unless the Supreme Court orders otherwise.

Second District Appellate Court's decision holding for Expo's improper use of a hypothetical future conditions as the baseline for determining traffic and air quality impacts. The controlling authorities for the CEQA baseline issue are in unison that an ***existing*** baseline must be used, (*CBE*, *supra*, 48 Cal.4th at 319, an agency's use of an improper baseline constitutes a failure to proceed in the manner required by law; *Sunnyvale, supra,* 190 Cal.App.4th 1351 rejects the use of predicted future conditions as the sole baseline for determining traffic impacts of a project, even if supported by substantial *evidence; Madera Oversight Coalition, supra* 199 Cal.App.4th 48 stating "A baseline used in an EIR must reflect existing physical conditions; (b) 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*").*

IV. The Commission failed to make findings as to the "infeasibility" of alternatives to significant impacts of Expo Phase 2 light rail crossings, thus the grade crossing approvals were granted in error and should be withdrawn.

The California Legislature has found the preservation of a quality environment to be a matter of statewide concern (§ 21000, subd. (a)) and stated that all state agencies must give "major consideration" to preventing environmental damage when regulating activities affecting the quality of the environment. (Id., subd. (g).) Among the enumerated policies of the state is the requirement that all governmental agencies "consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefit and costs and ... consider alternatives to proposed actions affecting the environment." (§ 21001, subd. (g).) To meet these goals, CEQA and its Guidelines (Cal.Admin.Code, tit. 14, § 15000 et seq. (hereinafter "Guidelines")) outline a comprehensive scheme to evaluate potential adverse environmental effects.

A fundamental purpose of CEQA is for decision-makers and the public to be made aware of the significant environmental impacts of a proposed project before the project is approved. (*Laurel Heights*, *supra*, 47 Cal.3d at 390-391; Pub. Resources Code, § 21100.) The failure of the Commission to make findings undermines this fundamental purpose because it does not properly or adequately evaluate the potential significant impacts of the Project in a number of areas.

An Environmental Impact Report ("EIR"), as noted by the court in *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437 should provide information and affirmation to the public that the least impacting actions utilizing the best mitigation has been employed to preserve the human and natural environment:

> "The EIR is the primary means of achieving the Legislatures' considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.' [Citation.] The EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible official to environmental changes before they have reached ecological points of no return.' [Citation.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] Because the EIR must be certified or rejected by public officials, it is a document of accountability. … The EIR process protects not only the environment but also informed self-government."

The allusion to an "alarm bell" here is especially relevant on the Phase 2 train project as alarm bells and train horns will sound for 56-112 seconds, 24 times hourly, 22 hours a day at the many consecutive at-grade crossings 30 feet from some homes and 70 feet from Overland Avenue Elementary School. As the trains approach, cross and clear the crossings, the alarms will signal to the community that all north/south Traffic has come to a halt before an impervious wall of trains whose Traffic and Air Quality impacts on the existing environment have not been examined. It will also remind the Expo Corridor communities that the State rail crossing oversight agency, the California Public Utilities Commission has failed to abide by their obligations to public safety and environmental preservation of the rail crossing environments on

the Expo Phase 2 trains. In approving each congested, environmentally degrading crossing across the Cities of Los Angeles and Santa Monica the Commission has abandoned the Citizenry to endure unexamined and unmitigated impacts for the next 75-100 years when they may have been avoided or lessened by a proper evaluation of the feasibility of alternatives. The Commission did no such evaluation and made no Findings regarding alternatives, the resulting abuse of discretion should nullify the crossing approvals granted in SX-100.

The single paragraph describing the Commission's evaluation and approval of the Phase 2 FEIR falls woefully below the CEQA standard required of a Responsible Agency who, in this case, has discretionary approvals of rail crossings in the City of Los Angeles and City of Santa Monica. In approving the crossings as requested in Resolution SX-100, the Commission states:

> *"The Commission reviewed and considered the lead agency's FEIR and finds, where feasible, Expo Authority adopted mitigations to reduce the impacts to less-than-significant levels, and that remaining significant impacts were lessened to the extent possible through adoption of additional mitigations. The Commission finds the FEIR, NOD, and SOC adequate for our decision-making purposes."*(SX-100, p.9)

The record fails to show the deliberative process or alternatives analysis that lead to that conclusive statement, or any indication at all that more than a cursory look and tacit approval were given to Project alternatives which would lessen or eliminate significant impacts. That single statement in no way meets the standard CEQA requires of Responsible Agents to make findings on the "infeasibility" of any alternative or alternative mitigation which would lessen or eliminate significant impacts of the Expo Project. Having not made changes or alterations in the project to avoid or mitigate the listed significant environmental effects, the Commission was required by CEQA to find that some consideration made "the mitigation measures or project

alternatives identified in the" EIR infeasible (Guidelines, § 21081(c).)[1]. See ***Village Laguna of Laguna Beach, Inc. v. Board of Supervisors (1982) 134 Cal. App. 3d 1022 (185 Cal. Rptr 41).*** The plain meaning of the statute requires that each of those mitigation measures or project alternatives which are identified in the EIR and are not adopted must be expressly rejected as infeasible. See also *Citizens for Quality Growth v. City of Mt. Shasta, 198 Cal. App. 3d 433* wherein the Court of Appeal held that the city violated the California Environmental Quality Act ("CEQA"), " by failing to make findings adopting or rejecting proposed mitigation measures for environmental impacts identified by environmental impact report regarding development of a parcel; (2) city was required by the Act to evaluate proposed alternatives before adopting a statement of overriding considerations for development of parcel which contained wetlands..."

The court ruled here that mere passing references to the Project certification did not constitute a finding. Among the 21 potentially significant impacts identified by the City of Mt. Shasta EIR were: **increased traffic congestion, degradation of air quality, increased health risks, alteration of the sites visual character**. Each of these same impacts was noted in the pantheon of potential impacts of identified by the Expo Phase 2 EIR.

If the Commission, as the only State rail over sight agency, fails to make the required CEQA Findings then who shall? The continued and increasing cooptation and disregard of rightful oversight on transportation projects in Los Angeles County is the hallmark of MTA and the Expo

[1] Public Resources Code, § 21081 no public agency may approve or carry out a project for which an environmental impact report has been completed which identifies one or more significant effects, unless the agency makes specified findings as to measures which mitigate such effects. The purposes of § 21081 are that there be some evidence that the alternatives or mitigation measures in the report actually were considered by the agency, and that there be a disclosure of the analytic route the agency traveled from evidence to action. Thus, when a project is approved that will significantly affect the environment, the burden is on the approving agency to affirmatively show that it has considered the identified means of lessening or avoiding the project's significant effects and to explain its decision allowing those adverse changes to occur. The agency must incorporate such measures, or make other approved findings, before approving a proposed project with identified significant environmental impact.

Authority. Oversight of Responsible Agencies on this project has followed a predictable trajectory which initially sees calls for the safety and superior transportation benefits of grade separation fade to tacit acceptance of generic, mechanical crossing apparatus which has failed time and again to protect the public on similar crossings throughout the County. It is not only an abuse of discretion which invalidates the Commission crossing approvals, the more ominous result is the imposition of under-performing, highly impacting, socially unjust and fatally hazardous rail transit in Los Angeles.

In short, grade separation at Overland Avenue and Westwood Boulevard had the potential to avoid or lessen the environmental impacts of the Project, was at least potentially feasible, and should have been discussed in detail by the Commission as a potential alternative to the Project as proposed. Likewise, not constructing a station at Westwood Boulevard, just four blocks from the next station at Sepulveda Boulevard would have eliminated the unavoidable significant impacts on visual aesthetics and spillover parking in the residential neighborhood surrounding the proposed station.

Finally, lacking an EIR that used an ***existing*** baseline for a CEQA compliant evaluation of environmental impacts, the Commission must determine whether they can even legally make dispositive findings as to the safety impacts of traffic and air quality resulting from the Expo Phase 2 project until the California Supreme Court rules on the validity of the Phase 2 EIR. Nothing in the environmental record of the Phase 2 project supports the identification or mitigation of Project impacts to Traffic and Air Quality in the existing communities in the Expo corridor on the day Expo fires up the first train. The CPUC failed to make findings as to why the extensive street alterations on Overland, Westwood, Military and Sepulveda would be less

impacting than a below-grade (or above grade alignment) on Phase 2.[2] It is a fact that the CPUC indicated their approval for those four consecutive at-grade intersections within a ½ mile without questioning whether any alternatives to added lanes to increase stacking space for cars at the crossings would increase traffic and air pollution in the area. (FEIR, 3.2-28-30)). Further, in contravention of CEQA, CPUC made these conclusion in the absence of existing environmental baseline analyses for traffic and air quality. That is the case despite the fact that the Commission made initial determinations that all three crossings should be grade separated, a determination shared by LADOT, LAUSD and the local community. They made no Findings which constitutes an abuse of discretion and a betrayal of their obligations to the public to ensure safe projects.

V. The Commission failed to make findings on the significant impact of spillover parking which Expo has identified in neighborhoods and commercial areas within ¼ mile of the Phase 2 train stations. (FEIR, p.3.2-83)

Stating improbably that "At stations where no dedicated station parking is proposed to be provided, only drop-off auto access is forecasted in addition to walk/transit access," For stations three stations in West Los Angeles (National/Palms, Westwood, and Sepulveda, Expo has forecast over 12,000 daily boardings. Expo will be removing 299 street parking spots (including 56 along National Blvd to make room for an on street bike path). **The sum total of the new parking added will be 260 spots at the Sepulveda station**. The Westwood station alone is predicted to have 5,000 daily boardings, street parking removal, and only a 20 spot lot reserved for residents only. It was suggested by NFSR and others, that given the four block proximity of two stations (Westwood and Sepulveda), that the Westwood Station was superfluous. A single station at Sepulveda, incorporating a transit center with ample parking would not only lessen the adverse parking impacts at Westwood but also the need for street widening, added lanes, mature

[2] The fact that the Sepulveda crossing was ultimately designed as an elevated crossing was unrelated to RCES input. On 11/12/2010 RCES staff Preliminary Recommendations approved the at-grade crossing at Sepulveda, stating that, "RCES did not object to 10 proposed grade-separated, and 14 proposed at-grade crossings." (SX-100, p.6).

tree removal, traffic and air quality impacts, and the additional construction costs of **two** stations so incredibly close together. Over 1000 verifiable stakeholder signatures asked for the removal of the redundant station and added their voices to make a total of 2000 stakeholders total who also requested a below grade crossing at Westwood. Either alternative would lessen the parking impacts.

A below grade crossing would preserve street parking although in and of itself would not remedy the need for parking for the anticipated 5000 daily passenger trips. The north/south congestion currently experienced by Overland, Westwood and Sepulveda alone should have provided the impetus for the Commission to review other alternatives as CEQA requires, in anticipation of the additional congestion and delay from the Expo project. One reasonable alternative overlooked by the Commission was the elimination of the redundant Westwood station located in the middle of a residential community, with which has no parking, when the Sepulveda Station is a mere four blocks away at a commercial crossroads.

In order to mitigate this potentially significant impact, the FEIR identifies mitigation measure MM TR-4, which provides, in relevant part, as follows:

> "In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service …. If a parking shortage is determined to have occurred (i.e., existing parking space utilization increases to 100 percent) due to the parking activity of the LRT patrons, Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods. … Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs …. Metro will not be responsible for the costs of permits for residents desiring to park on the streets in the permit districts. For those locations where station spillover parking cannot be addressed through the implementation of a permit parking program, alternative mitigation options include time-restricted, metered, or shared parking arrangements. Metro will work with the local jurisdictions to determine which option(s) to implement."

The Commission failed to evaluate the efficacy and legality of MM TR-4[3] as mitigation for significant parking impacts which will greatly affect traffic and air quality at every Expo crossing in West Los Angeles. Even LADOT understood that other alternatives would better mitigate the identified parking impacts anticipated, suggesting to Expo that *"[r]ather than creating facilities that are expected to generate spillover parking problems and proposing unsatisfactory measures to mitigate them after the fact, the project should provide an adequate supply of parking at any proposed transit stop"* (FEIR, p. ?). Some NFSR Expo Corridor residents adjacent to the Westwood station were apprehensive about security, noise, privacy, light intrusion attendant to Expo's suggestion of a 170 car parking lot surrounding the station. They needn't have worried. As the area surrounding the station is a FEMA flood plain, the special channelization and drainage costs to address the parking lot construction made elimination of the lot altogether Expo's preferred choice.

Unfortunately, in contravention of CEQA, Expo provided no measurable, enforceable mitigation for the "no-parking" alternative at Westwood. Also unfortunate, the Commission failed to address whether there were other alternatives to the "no-parking" option that could lessen or eliminate the impacts. The Commission failed to make findings as to the "infeasibility" of alternative mitigation measures to the approved project. By making no change to Expo's project alternatives which would avoid or mitigate the identified significant environmental

[3] Although for this purpose NFSR is confining its interests to specific issues in West Los Angeles, the failure of the Commission to develop and publish findings was not limited to crossings in WLA. For Colorado Avenue, the FEIR proposes mitigation measures MM TR-9, MM TR-9(a), and MM TR-9(b). Collectively, these measures (1) concede that "[r]eplacement parking would be required along the impacted portions of Colorado Avenue," (2) identifies two "potential replacement parking lots," each of which would require the acquisition of property, and (3) suggests that "implementation of diagonal parking on adjacent streets (after extensive neighborhood outreach) …" or other unspecified "replacement options" would "reduce" the parking impacts. (FEIR p.) This measure suffers from the same defects noted above for measure MM TR-4. Additionally, this measure is inadequate because the ability of Expo to acquire "replacement parking lots" is uncertain and speculative – particular in light of the high land costs in the area.

impacts, the Commission was required by CEQA to find that some consideration made "the mitigation measures or project alternatives identified in the" EIR infeasible. (s 21081(c).) The clear meaning of the statute requires that each mitigation measure or project alternative which is identified in the EIR and but not adopted must be expressly rejected as infeasible. The Commission, however, simply accepted each of Expo's preferred alternatives and made no findings as required by their duties as a Responsible Agent. This is in direct contravention of the law.

VI. Publication of the Decision of the Second District Court of Appeal, Division Eight (BS125233) is no longer the controlling authority on the use of a proper baseline for CEQA evaluation.

The published decision of the Second District radically departs from CEQA Guidelines established by *CBE* and affirmed by *Sunnyvale West* and *Madera,* thus the CEQA baseline issue is in conflict. The California Supreme Court has commenced a Review to re-establish certainty on the baseline issue and other alleged CEQA deficiencies in Expo's EIR. A grant of review supersedes the court of appeal's opinion, at least pending disposition of the Court's review, [Quintano v. Mercury Casualty Co. (1995) 11 Cal. 4th 1049, 1067 n.6, 48 Cal.Rper. 2d 1, 906 P. 2nd 1057]. No court of appeal decision superseded by a grant of review is to be published, or remain published, unless the Supreme Court expressly orders otherwise. After granting review, the Court may order that the opinion of the court of appeal be, or remain published in whole or in part [Cal. Rules of Ct., Rule 8. 1105(e)]. The Supreme Court has issued no such order in this case. Therefore, any rehearing of SX-100 that goes forward before the CASC rules must be adjudicated pursuant to the current controlling authorities of CBE, Sunnyvale West and Madera. The Commission cannot, within its authority, support any other

conclusion.

VII. The use of a hypothetical future baseline to evaluate real world impacts to traffic operations and emergency vehicle response at Overland Avenue and Westwood Boulevard crossings fails to inform the Commission or the Public as to the safety or impacts when train operations begin.

The Expo FEIR failed to disclose, and the Commission failed to ask what the impacts to the community would be to existing Levels of Service ("LOS") to Overland Avenue and Westwood Boulevard with the implementation of the Project's at-grade crossings in 2015. Instead the evaluation of those intersections presents a hypothetical level of delay to a projected 2030 streetscape to which various street improvements have been imposed. Even with the projected street improvements, Expo maintains there will be as much as 47 seconds of delay to each at vehicle northbound on Overland in 2030 traffic conditions. This Commission should have determined what the impact would be to existing vehicle traffic with addition of the Project because it is today's taxpaying commuters and it is today's emergency responders who must navigate the impacted north/south streets daily. With budget cutbacks to our fire/life safety resources in Los Angeles currently experiencing reduced service and slowing response times as stations are required to cover wider and wider areas, it is imperative that we know what the existing, real world impacts of the light rail project will be on area traffic.

VIII. The Commission failed to make findings on the significant impacts of the Project to Traffic and Air Quality on the existing environment.

Expo states clearly in the *Exposition Corridor Transit Project Phase 2 Findings of Fact*, ("Findings") that for the two most important areas of impact likely from a fixed rail transit project, Traffic and Air Quality, they chose to use a baseline of hypothetical projected conditions

20 years beyond commencement of their environmental impact review to determine significance of impacts,

> **"3.1.5 *Level of Service***
> *Implementation of the RPA would not degrade study area intersections projected to operate above level of service (LOS) E, or further degrade the study area intersections that are* **already projected to operate at LOS E or F under year 2030 No-Build conditions**. *As such, the RPA would not result in significant delay impacts to any of the study intersections relative to the No-Build Alternative, resulting in less-than-significant impacts* "(Findings, p.3-2).(Emphasis added.)

Because of Expo's arbitrary decision to contravene CEQA by using a **hypothetical** baseline of ***projected*** conditions in the year 2030, some 15 years after the Project's planned implementation and more than 20 years beyond the NOP, the Commission cannot verify the safety of the Expo Phase 2 crossings wherein they relied on Expo's FEIR and Findings. Thus, any part of the crossing approvals granted in SX-100 which relied on the Traffic and Air Quality studies in Expo's FEIR are invalid. Furthermore, any part of the SX-100 approvals which should have relied on a Traffic study of existing impacts, such as delay to emergency responders or parking, is also invalid as we have no existing traffic baseline study with which to evaluate the delay to first responders in 2015, or impacts to area parking when the project begins blocking consecutive intersections 290 times daily (24 times hourly in peak periods) for the 56-112 seconds it takes the trains to approach, cross and clear intersections. Had the Commission made Findings of Fact on Expo's identified significant impacts and mitigation alternatives as CEQA requires they may have come to different conclusions as to the safety of Expo's at-grade crossings prior to approving Resolution SX-100.

IX. Commission Due Process requires that Public Participation and outreach claims provided by the Expo Authority should not be considered sufficient compliance for the Commission's Standards of Practicability or for CEQA.

The testimony of the Board of Commissioners demonstrated no knowledge as to whether any public participation was sought by the Commission, or whether any attempt was made to determine the sufficiency of any public participation alleged by Expo. NFSR submitted a CD containing 2,000 petition signatures and contact information from members of the affected public to the Expo Authority for inclusion in the official record of the project. All verifiable signatories supported below grade crossings at Overland and Westwood and the majority supported elimination of the Westwood Station as an alternative to identified significant unavoidable impacts to the nearby community. The Expo Scoping Comments and the volumes of responses to the DEIR are very clear in their support of grade separation at key crossings. An extraordinary level of due diligence on the part of the public supporting grade separation below Overland, Westwood and Sepulveda, has been exhibited in the record and the Commission and RCES have failed to fairly evaluate it, nor have they solicited any independent public opinion on grade separation.

Rick Thorpe, in his Prepared Testimony (Thorpe Testimony, p. 16), states that the "The Commission's own record demonstrates that there were more members of the general public in support of Resolution SX-100 than opposed it. However, contrary to Commission Rules of Practice and Procedure[4], NFSR never received any service of comments from the "general public" to which Mr. Thorpe refers. We received a single opposition letter submitted by United Communities Association. Therefore, any and all demonstration of support from whatever

[4] **14.5. (Rule 14.5) Comment on Draft or Alternate Resolution**
Any person may comment on a draft or alternate resolution by serving (but not filing) comments on the director of the Commission division that issued the draft resolution by no later than ten days before the Commission meeting when the draft or alternate resolution is first scheduled for consideration (as indicated on the first page of the draft or alternate resolution). Comments shall be concurrently served on all Commissioners, the Chief Administrative Law Judge, the General Counsel, and either (a) all persons shown on the service list appended to the draft or alternate resolution, if any, or (b) in accordance with the instructions accompanying the notice of the resolution as an agenda item in the Commission's Daily Calendar. Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 311(e), 311(g), Public Utilities Code.

source should be either disregarded, or accepted without exception, because service of the comments to this SX-100 hearing was equally deficient on all sides. Further the e-mail "support" solicited by Expo Authority required only a click on a link and an electronic response was recorded favoring passage of Draft Resolution SX-100. A closer examination will reveal that many of them are anonymous, and many of them are the same person making multiple electronic entries.

In addition, Mr. Thorpe's exhortation that "it is essential that the Commission take into account the expertise and credibility of all those participants, and not allow a few unhappy neighbors to overshadow a consensus of responsible agencies and experts," and that, "the Commission must remember that a few disgruntled people don't necessarily represent "affected members of the general public."

It would be hard for the Commission to forget Mr. Thorpe's comments as it was just 4 short years ago (August, 2008) when Mr. Thorpe said the nearly the same thing to the Commission in his Prepared Testimony in the Expo Phase 1 Public Hearing (Commission Application 06-12-005 et al) stating, "- it is essential that the Commission take into account the expertise and credibility of all those participants, and not allow a few disgruntled voices to overshadow a consensus of responsible agencies and experts."

Mr. Thorpe's contempt for the Public is apparent, but only serves to point out a pattern and practice cultivated and repeatedly documented by MTA and Expo Authority that undermines the intentions of CEQA and the Commission which both maintain policies of public inclusion in the decision making process. "Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and

evaluate public reactions to environmental issues related to the agency's activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency." (Public Resources Code Section 15201).

The Expo Authority chose to use a Design-Build construction method which, in their interpretation, takes a project completely through the environmental process at less than a 10% design level (FEIR, p.?). In doing so the Public and decisionmakers are denied the benefit of meaningful participation because their questions about the project, its impacts and alternatives are deflected by Expo because they cannot be answered until "Final design", which takes place well beyond the FEIR certification and well beyond any citizen's useful ability to comment.

X. A convincing showing that Expo Authority has eliminated all potential safety hazards is impossible without evaluation of project impacts on existing conditions and Expo Authority has done no such study.

Contrary to CEQA, Expo Authority did no study of project impacts to existing conditions for Traffic and Air Quality. It is therefore impossible to determine with the certainty required of the Commission in approving at-grade and other crossings that all potential safety hazards have been eliminated. The Rail Crossing Hazard Analysis ("RCHAR").

XI. The commission failed to properly evaluate Expo's compliance with the Commission Standards of Practicability in determining the need for grade separation.

The Commission Rules require that Agencies bear the burden of proving that grade-separations are not practicable at Overland Avenue, Westwood Boulevard, and Sepulveda Boulevard. Expo has not met that burden. Expo's belated and cursory discussion of this issue was wholly insufficient and did not reach any conclusion regarding the feasibility of grade separation at these intersections, nor of their infeasibility or impracticability. They simply said

they were too costly and that they may take a longer construction period. The Public was not given the chance to comment as to whether they would approve of any increased costs if it increased the safety of the crossings and eliminated other environmental impacts.

Pub. Util. Code § 1202(c) gives the Commission the exclusive power to require, where in its judgment it would be practicable, a separation of grade at any crossing. The Commission failed to make CEQA Findings as to the infeasibility of other alternatives to the at-grade crossings even though grade separations would lessen significant impacts. The Commission erred in finding that Expo's crossing determinations and environmental analysis were sufficient to support approvals of the at-grade crossings at Overland Avenue, Westwood Boulevard, and Sepulveda Boulevard when they were informed by NFSR (and should have known previously) that Expo only used an improper, hypothetical future baseline to determine impacts to Traffic and Air Quality.

Nothing in GO 164-D precludes the necessity of a railroad agency's compliance with Commission Standards of Practicability ("Standards") and the Public Utilities Code. Expo had the duty to incorporate the "Standards" in their CEQA review as the Guidelines require Lead Agencies to consider Responsible Agency over sight duties and "To the fullest extent possible, the Lead Agency should integrate CEQA review with the related environmental review and consultation requirements." (Guidelines, § 15124, subd. (d)(C).) As a Responsible Agency, the Commission had the right and obligation to require, oversee and evaluate Expo's full compliance and to independently act if Expo's mandated goals conflicted with CPUC obligations as a Responsible Agent under CEQA, or in its rail safety oversight duties to the State of California.

Whether or not the Authority submitted formal applications for the Expo crossings approvals, they should still be held responsible for satisfying the Commission Standards pursuant to Commission precedent {D.82-04-033 (City of San Mateo), D.92-01-017 (City of Oceanside),

and D.98-09-059 (City of San Diego) where the Commission denied requests for at-grade crossings because it was found a separation of grade was practicable. The Commission has clearly stated and repeatedly upheld that,

> **"…railroad grade separations constitute ultimate protection, since all grade crossing accidents and delays then are eliminated. It has long been recognized that the Commission should not grant applications for crossings at grade where there is a heavy movement of trains, unless public convenience and necessity absolutely demand such a crossing (*Mayfield v. S.P. Co.* (1913) 3 CRC 474). The advantages which might accrue by way of added convenience and financial benefit are outweighed by the dangers and hazards attendant upon a crossing at grade. Accident incidence is related to increases in the number of crossings; therefore, grade crossings should be avoided whenever it is possible to do so (*Kern County Bd. Of Supervisors* (1951) 51 CPUC 317). (*City of San Mateo* (1982) 8 CPUC2d at 580-81.)"**

Further, San Mateo continues to describe the burden of a railroad agency in constructing at-grade rail crossings where there is a heavy volume of passengers. (*City of San Mateo, supra*, at 581.) The Exposition Authority has stated as a rationale for building the Phase II Expo line that it is likely to carry the largest volume of passengers in the country. With headways delivering those passengers every 2 ½ minutes during peak periods, crossing oversaturated intersections at 55 mph (RCHAR, p.16, 30) accidents are certain and fatalities are inevitable if the crossings are constructed at-grade. Every argument for building this Project is an argument for grade separating it at critically congested intersections.

XII. Expo Phase 1 has already experience failing track design and dangerous crossing geometry is putting vehicles, pedestrians and bike riders at risk.

In the Prepared Testimony of Richard D. Thorpe, Expo CEO Thorpe expounds unconvincingly that a convincing showing has been made that Expo has eliminated all safety hazards on the Phase 2 project (Thorpe Testimony, p.10). Citing use of safety measures on other light rail lines operating in Los Angeles County, Thorpe says, for instance, the "Expo Phase 1 project has had no safety issues or accidents since its opening in April of this year." The *Los Angeles Times* (September 21, 2012) not two months ago reported that, "*In the wake of criticism about the safety of the new Expo Line, transit officials are making* ***improvements for pedestrians and motorists at 21 street crossings along the light-rail route****... "There is no question the reason for the improvements is to make the crossings safer for motorists and pedestrians," said Vijay Khawani, MTA's executive officer for corporate safety.* (Emphasis added.) $287,500 has been allocated for the safety improvements, including 14 enhancements to the crossing at Exposition and Rodeo Road where *"Expo trains travel at 40 mph through a maze of traffic signals, signs, crosswalks and pavement markings for bicycles."*

In addition, on May 20, 2012, the *Los Angeles Times* reported that a defective "junction" where the Blue Line interfaces with Expo Phase 1 at Washington and Flower presents potential maintenance and safety issues, " including a heightened risk that southbound Blue Line trains could derail in the sharply curving intersection — or elsewhere along their route — because of equipment damage." MTA first expressed concerns about the junction in 2010 and initially called for replacement of the junction. However, the CPUC allowed the Expo Line to open anyway after instituting a continuous inspection program to monitor track repairs that Expo chose over replacement.

Further, regarding the Pasadena Gold Line, CPUC Case No. 06-10-015, *Pasadena Avenue Monterey Road Committee vs. Los Angeles County Metropolitan Transportation Authority; the*

Los Angeles to Pasadena Metro Blue Lin Construction Authority, and the City of South Pasadena, filed *August, 2012 Status Report of Defendant City of South Pasadena* reports that one remaining grade crossing reconfiguration from a March 2004 Settlement agreement is awaiting MTA's review and ground breaking on the combined crossing safety enhancement and noise mitigation is hoping to break ground in October 2012 – **more than six years after the Settlement**. It appears from the report that some of the items in the settlement agreement may never be completed because MTA says there is no funding.

XIII. If the Commission proceeds with the Rehearing of SX-100 prior to Final Ruling of the California Supreme Court, the decisions resulting may be inconsistent with subsequent decisions coming from The Supreme Court of California.

The CASC has jurisdiction to review decisions rendered by the Commission. Any decision on the Commission Rehearing of SX-100 is therefore subject to CASC review. Since the CASC is the appellate authority over the CPUC the standard of review applied by the courts of appeal to CPUC decisions and orders in this case would encompass a determination of whether: (1) the commission acted without, or in excess of, its powers or jurisdiction; (2) the commission has not proceeded in a manner required by law; **(3) the decision of the commission is not supported by the findings; (4) the findings in the decision are not supported by substantial evidence in light of the whole record**; (Emphasis added.)(5) the commission's order was procured by fraud or was an abuse of discretion; or (6) the commission's order or decision violates a constitutional right.

Concerning item "(3)" and "(4)" in bold above, the Commission made **no** findings in rendering its decision to approve Resolution SX-100. It then follows that the missing findings could not have been supported by "substantial evidence in light of the whole record." The

Commission Order Granting Rehearing requires that the Rehearing, "(3) based on the record evidence, make specific findings for each significant effect of the project that is related to the Commission's crossing jurisdiction" (Decision 12-06-041, p.4). Both Expo's DEIR and FEIR should be included in the record supporting the Commission findings. If the Commission denies NFSR's request for a Stay pending a CASC decision, the Commission must evaluate Expo's environmental documents pursuant to current controlling authorities and make the required findings. Lacking a baseline of existing conditions to evaluate the impacts of the Phase 2 project on the real-world crossings, the documents cannot support a determination of crossing safety on crossings previously approved. AQ failure to produce Findings is an error subject to appeal. How can the Commission continue to preserve crossing approvals which they now know to be based on Expo's admittedly flawed CEQA procedures?

XIV. Conclusion

Based on the foregoing , good cause has been shown that the crossing approvals granted by Commission Resolution SX-100 should be withdrawn until the Commission makes legally adequate findings under CEQA. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, Opening Brief on the Merits and Points and Authorities* (Case No. S202828) which has previously been submitted in these proceedings. Further, that cannot be accomplished until the Supreme Court of California renders its decision on Case No. S202828, unless the Commission uses the current controlling authorities (requiring the use of an existing baseline of environmental conditions against which to measure the impacts of the Project) to evaluate Traffic and Air Quality impacts of the Project in a new or Supplemental EIR. Regarding the Commission's failure of Due Process, NFSR herein incorporates by this reference the previously filed NFSR Application for Rehearing and the Exhibits therein.

Respectfully Submitted,

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Neighbors for Smart Rail