

Identifying Baseline Conditions under CEQA — Back to the Future?



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If you grew up in the 1980s as I did, you are intimately familiar with the movie *Back to the Future*, the highest grossing film of 1985. In the film, Marty McFly (played by Michael J. Fox) is sent back in time

via a plutonium-fueled time machine made out of a DeLorean to 1955, where he meets his future parents in high school and accidentally becomes his mother's romantic interest. McFly then sets out to repair the damage to history (and preserve his future existence) by coaxing his parents-to-be to fall in love and find a way to return back to 1985.

Many planners analyzing a project's potential impacts are themselves tempted to go 'back to the future' by using past or even future baseline conditions as the starting point, or baseline, for impact analysis. Pursuant to recent decisions by the California Supreme Court and Fourth District Court of Appeal in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 and *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, doing just that is permitted in certain situations. Before delving into the key facts and decisions in the *Neighbors for Smart Rail* and *North County Advocates* cases however, a quick CEQA primer and summary of relevant court decisions is in order.

Pursuant to CEQA, a full Environmental Impact Report ("EIR") must be prepared for a proposed project if there is any substantial evidence in the record that a project may have a significant adverse effect on the environment. Once a lead agency determines that an EIR is required, two tasks are fundamental — preparing an accurate, stable, and finite description of the proposed project, and describing the environmental setting. When describing a project's environmental setting, CEQA mandates that "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time ... environmental analysis is

commenced. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." Thus, by law, the baseline conditions to be described and used for impact analysis under CEQA are "normally" those that exist on the ground when CEQA review for a project begins. By using the word "normally," the Guidelines created the possibility that some other point in time could be used in defining the baseline conditions. Many have explored this opportunity over the years with varying results.

[Note: Descriptions of the project and baseline conditions are also required when preparing impact analyses short of a full EIR. *I.e.*, a Negative Declaration or Mitigated Negative Declaration, as the initial study must also contain a description of the project and an identification of the environmental setting per Guidelines Section 15063(d)(2).]

Historically, a majority of the published court decisions addressing the issue have overturned CEQA documents that utilized baseline conditions other than those existing at the time CEQA review commenced. Most notably, the CA Supreme Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, addressing ConocoPhillips's application to modify a petroleum refinery to expand operations emitting nitrogen oxides, approved a line of prior Court of Appeal decisions that concluded the baseline for CEQA analysis must be the existing physical conditions in the affected area, that is, the real conditions on the ground, rather than hypothetical baseline conditions. A key fact underlying that decision was that the South Coast Air Quality Management District used a baseline for nitrogen oxide emissions equal to emissions from refinery operation at the maximum level allowed under the pre-expansion permit *even though ConocoPhillips had never operated the facility at those max-permitted levels*. As such, the nitrogen oxide baseline condition used in that instance was truly hypothetical, bearing no relation to existing let alone past conditions.

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In 2013, the California Supreme Court revisited the baseline issue in *Neighbors for Smart Rail* and provided some much needed clarity, particularly regarding the exclusive use of a *future* conditions baseline. At issue in that case was the propriety of an EIR prepared for the Expo Phase 2 project in Los Angeles, which was the second phase of a light-rail transit project which would connect Santa Monica to Culver City and, together with the previously constructed Phase 1 project, provide high-capacity transit service between Santa Monica and downtown LA in order to alleviate extensive traffic congestion along the Interstate 10 freeway. Because the Expo Phase 2 project was to be constructed and operated at street level in most areas such that the rail trains could impede vehicles along the corridor, the EIR was required to analyze the significance of those potential traffic impacts. Notably, the EIR omitted an existing conditions baseline (2007, when environmental review began) and analyzed its traffic and air emissions impacts only against future background conditions projected to exist in the year 2030, when the project was expected to be completed.

The Supreme Court ultimately held that a lead agency has discretion to omit existing conditions analyses by substituting a baseline consisting of environmental conditions projected to exist solely in the future, but to do so the agency must justify its decision with substantial evidence showing an existing conditions analysis would be misleading or without informational value. Many CEQA practitioners commented on the decision at the time by noting the difficulty if not impossibility of justifying the exclusive use of a future conditions baseline, likely based on the fact that the Supreme Court actually held that the Exposition Metro Line Construction Authority did not do so in the *Neighbors for Smart Rail* case.

That brings us to the recent decision in the *North County Advocates* case. There, the Court of Appeal addressed the legality of the EIR prepared for a regional shopping center renovation project in Carlsbad. The project included demolition and reconstruction of a 148,159 square foot building within the mall that formerly housed a Robinsons-May store which had been fully occupied for over 30 years until vacated by Robinsons-May in 2006, after which that building had lower and shifting occupancy levels by various retailers. Notably, under a Precise Plan approved by the City in 1977, the mall owner was entitled to renovate the interior of the former Robinsons-May building and fully occupy it without obtaining any further discretionary approvals.

Based on these facts, the City's EIR used a traffic baseline that augmented actual traffic counts with traffic volumes based on a fully occupied Robinsons-May building using trip generation rates and estimates for a "Super Regional Shopping Center" land use taken from a 2002 SANDAG publication. Using the deferential substantial evidence standard of review identified in *Neighbors For Smart Rail*, the Court of Appeal upheld the EIR's use of the augmented traffic baseline as being supported by substantial evidence. The key to the court's decision was that the City's traffic baseline was not hypothetical because it was not based solely on the entitlement to reoccupy the building at any time without discretionary action, but was also based on the actual historical operation of the space at full occupancy for more than 30 years and the recently fluctuating occupancy of the former Robinsons-May space.

Given the numerous aging malls currently being re-envisioned and redeveloped across the state, it is important to consider looking beyond traditional existing conditions baseline determinations.

In sum, when identifying baseline conditions for CEQA impact analysis, it is safest to use existing, on-the-ground conditions. However, it is permissible to use a baseline that goes 'back to the future' (by instead using actual historical or projected future conditions) so long as the baseline determination is supported by substantial evidence and demonstrates that a pure existing conditions analysis would be misleading or without informational value. It is also very important to consult expert CEQA attorneys because, in addition to these tricky baseline rules, as explained in Barbara Schussman's preceding article, the future of traffic impact analysis under CEQA will soon change dramatically upon the adoption of new CEQA Guidelines that will move CEQA traffic impact methodology away from a focus on level of service and toward vehicle miles traveled.

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