



KINGS COUNTY COMMUNITY DEVELOPMENT AGENCY

Gregory R. Gatzka, Director

Web Site: www.countyofkings.com/planning/index.html

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Christopher Calfee, Sr. Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Via Electronic Mail

Re: Comments on OPR Preliminary Evaluation of LOS Alternatives

Dear Mr. Calfee:

I am writing on behalf of the Kings County Community Development Agency to comment on OPR's December 30, 2013 document entitled "Preliminary Evaluation of Alternative Methods of Transportation Analysis" ("Preliminary Evaluation"). My comments are addressed principally to Section V of the document. I respectfully disagree with OPR's analysis of SB 743 as it relates to areas outside of transit priority areas.

As I understand the Preliminary Evaluation, OPR intends to promulgate guidelines establishing a single, statewide set of criteria for evaluating transportation impacts as part of the CEQA process. It is also my understanding that OPR interprets new Public Resources Code section 21099, subdivision (b)(2) to mean that upon certification of these guidelines, automobile delays as described solely by LOS shall not be considered a significant impact on the environment for purposes of CEQA, regardless of whether a proposed project is located within a transit priority area. I question the efficacy of adopting a single, statewide standard for measuring traffic impacts. Additionally, after reviewing the statutory scheme and legislative history with County Counsel, it is my department's position that subdivision (b)(2) does not apply to non-transit priority areas.

As explained in Section IV of the Preliminary Evaluation, LOS is not a perfect measure of traffic impacts. However, many of the problems noted in Section IV do not apply in rural areas like unincorporated Kings County. In particular, the limited geographic scope of LOS analysis is not a concern in an area where any congested areas are sufficiently far enough apart not to create cumulatively significant impacts. Conversely, use of VMT or similar metrics in rural areas, where farms, homes, and businesses are spread out, frequently may require the time and expense of an EIR where previously one would not have been required. This additional administrative burden is not likely to produce improved environmental outcomes, however, because in most such cases there will be ample substantial evidence of overriding considerations to justify the

development of a proposed project. Rural communities cannot be expected place moratoria on development to accommodate new traffic metrics.

It is apparent why LOS is not an appropriate measure of traffic impacts in transit priority areas. LOS is biased against transit-oriented development, yet we know that moving housing and businesses closer to public transit stops can help make public transportation a more viable alternative, thereby minimizing traffic impacts and reducing our state's carbon footprint. However, despite its defects and its tendency to overstate traffic impacts in transit priority areas, relative to the other metrics analyzed in the Preliminary Evaluation, LOS is an effective means of measuring traffic congestion. Increased traffic congestion is a physical change to the human environment, and therefore should be analyzed as part of CEQA's comprehensive environmental review process. (See Pub. Res. Code, § 21060.5 [defining "environment" for purposes of CEQA].) Thus, outside transit priority areas, LOS still merits analysis.

Additionally, under the Congestion Management Act ("CMA") found at Government Code section 65088, *et seq.*, except in areas designated as infill opportunity zones, local governments are required to minimize traffic congestion measured in terms of LOS. Tethering analysis of traffic impacts under CEQA to LOS is an efficient means of achieving the goals of the CMA. In order to remain in compliance with the CMA, whether or not local agencies consider LOS in reviewing projects under CEQA, it will still be necessary to measure LOS for purposes of calculating impact fees and deciding whether or not to approve projects. Essentially mandating this extra layer of review will impose unfair and unnecessary burdens on applicants and agencies alike. Agencies are already mandated to evaluate project impacts on noise, GHG emissions, and safety. It is unnecessary to add VMT or similar metrics into the mix as a proxy for measuring traffic congestion, noise, emissions, and safety impacts.

For these reasons, outside of transit priority areas, local agencies should retain discretion to use LOS to measure traffic impacts for purposes of CEQA. Fortunately, Public Resources Code section 21099 does not deprive agencies of this discretion. It is true that subdivision (b)(2) of section 21099 states that upon certification of new traffic guidelines "automobile delay, as described solely by level of service or similar measures of vehicular capacity or traffic congestion shall not be considered a significant impact on the environment pursuant to this division, except in locations specifically identified in the guidelines, if any." However, as part of subdivision (b), which expressly pertains only to transit priority areas, it is clear that this language was not intended to apply to non-transit priority areas.

I appreciate the point in the Preliminary Evaluation that similar language proposed in SB 731 was more explicit in limiting the application of the provisions of what is now section 21099, subdivision (b)(2) to transit priority areas, but the fact that the Legislature did not include that same verbiage in SB 743 is not dispositive in showing that subdivision (b)(2) should apply statewide. Evaluating at the structure of the statutory scheme as a whole, subdivision (b)(2) is not ambiguous, and it is axiomatic that resort to legislative history is unnecessary where the language of a statute is clear. It is also worth noting that SB 731 did not pass into law, in part, because of opposition from local agencies. To the extent that SB 743 retained certain provisions of SB 731, this was sold to agencies as a compromise. The notion that the absence of language in SB 743 that was contained in SB 731 is evidence of a legislative intent to impose more, instead of fewer, restrictions on local agency discretion is not borne out by the history leading up to the passage of SB 743.

As further evidence of the Legislature's intent, subdivision (c) of the statute, which pertains expressly to non-transit priority areas, states that OPR may adopt "alternative" metrics for use in such areas. This language contrasts sharply with the directory language of subdivision (b), in which the use of the word "alternative" is absent. Thus, the Legislature intended that standards developed for non-transit priority areas be "alternatives" that local agencies may use in their discretion. Tellingly, subdivision (b)(4) of the statute, which again pertains expressly to transit priority areas, states that subdivision (b) "does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements pursuant to the police power or any other authority." Similar language is not included in subdivision (c), even though when reading the statute as a whole, the Legislature cannot have intended section 21099 to deprive local agencies of more discretion with respect to non-transit priority areas than with respect to transit priority areas. This apparent contradiction can be explained by the fact that, insofar as any new measures proposed by OPR for use in non-transit priority areas are merely "alternatives" to LOS, there was no need for the Legislature to state explicitly that section 21099 is not intended to deprive local agencies of the ability to use LOS for purposes other than CEQA with respect to non-transit priority areas.

The foregoing construction of section 21099 finds support in the legislative history. On September 12, 2013, the Senate Committee on Environmental Quality issued a report stating that SB 743 "authorizes OPR to update the standard for analyzing transportation impacts of projects to replace LOS in transit priority areas and *as an alternative to LOS* in locations outside of transit priority areas, to the extent authorized by the Congestion Management Act." (Emphasis added.) The same day, a Senate floor report was issued analyzing SB 743. The report included a single bullet point describing how the bill would impact traffic analysis for transit priority areas. Underneath that bullet point was a subpoint describing the language of section 21099, subdivision (b)(2). Traffic analysis in non-transit priority areas was discussed in a separate bullet point, which made no reference to the provisions of subdivision (b)(2), but which instead stated simply that the bill "authorizes OPR to adopt CEQA guidelines establishing metrics for analysis of transportation impacts that are *alternatives* to LOS to be used outside transit priority areas." (Emphasis added.) Nearly identical language is included in a September 12, 2013 Assembly floor report, and Assembly committee reports from around the same time focus almost exclusively on the ramifications of SB 743 for Kings Stadium, with no reference at all to LOS. While it may have been the intent of SB 743's author to shoehorn subdivision (b)(2)'s requirement into subdivision (c) of section 21099 by excluding language that he included in SB 731, that intent was never called out to other members of the Legislature that voted on SB 743, and they cannot be presumed to have had the same intent, particularly where the statutory language is clear.

Accordingly, I urge OPR to reconsider its interpretation of SB 743. I also ask OPR to consider that different transportation metrics may be more useful in different types of communities. Specifically, I request that OPR consider that LOS may be the most appropriate metric available for measuring traffic impacts in large, spread out rural areas like unincorporated Kings County.

Sincerely,



Gregory R. Gatzka, Director
Kings County Community Development Agency