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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

14 CALIFORNIA HOUSING DEFENSE
FUND, a California nonprofit public
15 benefit corporation,
16 Petitioner and Plaintiff,
17 v.
18 CITY OF LA CAÑADA FLINTRIDGE,
19 Respondent and Defendant,
20 600 FOOTHILL OWNER, LP, a limited
21 partnership,
22 Real Party in Interest,
23 PEOPLE OF THE STATE OF
CALIFORNIA, EX REL. ROB BONTA;
24 CALIFORNIA DEPARTMENT OF
HOUSING AND COMMUNITY
25 DEVELOPMENT,
26 Petitioners-Intervenors.

Case No. 23STCP02614

**NOTICE OF MOTION AND MOTION
FOR APPEAL BOND PURSUANT TO
GOV. CODE § 65589.5(m);
MEMORANDUM OF POINTS AND
AUTHORITIES**

Judge: Hon. Stephen I. Goorvitch
Dept: 82
Trial Date: March 1, 2024

Action Filed: July 25, 2023

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 6, 2024 at 9:30am in Department 82 of
3 the above-referenced court located at 111 North Hill Street, Los Angeles, California 90012, or
4 as soon thereafter as the matter may be heard, Petitioner and Plaintiff California Housing
5 Defense Fund (“Petitioner”) will and hereby does move pursuant to Section 65589.5,
6 subdivision (m), of the Government Code for an order requiring Respondent City of La Cañada
7 Flintridge (“City”) to post with this Court an appeal bond in the amount of \$14,096,952.

8 The grounds for this motion are that the City has filed a Notice of Appeal of the Court’s
9 judgment pursuant to the Housing Accountability Act (“HAA”), and the HAA requires the City
10 to post a bond if it chooses to appeal that judgment. (Gov. Code, § 65589.5, subd. (m)(1).)
11 The ends of justice also strongly favor a bond to compensate Real Party in Interest for the
12 delays resulting from a non-meritorious appeal. The length of time it could take for the
13 Court’s judgment to be affirmed on appeal may impose such significant costs on Real Party in
14 Interest that it is forced to abandon the Project, thereby rendering the Court’s Judgment in
15 Petitioners’ favor ineffective and achieving a de facto victory for Respondent despite losing in
16 the courts.

17 This motion is based on this notice and motion, the accompanying Memorandum of
18 Points and Authorities, the accompanying Declaration of Jonathan C. Curtis and attachments
19 thereto, the accompanying Declaration of Alexander Gourse and attachments thereto, the
20 accompanying Request for Judicial Notice and attachments thereto, and the Administrative
21 Record and all prior filings in this action.

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[4492355.7]

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 This dispute is the latest chapter in the City of La Cañada Flintridge’s multi-year
3 campaign to evade its obligation to plan for an adequate supply of housing.¹ At every stage of
4 this case the City has opted for aggressive litigation instead of compromise—a strategy that has
5 failed them repeatedly.² But the City has evidently decided to stay the course and now refuses
6 to post the appeal bond expressly required by the Housing Accountability Act (“HAA”). (See
7 Gov. Code, § 65589.5, subd. (m)(1).) Because the HAA’s mandatory bond requirement was
8 designed to combat exactly the kind of scorched-earth litigation tactics³ the City continues to
9 engage in here, the Court should order the City to post within 14 days a bond in the amount of
10 \$14,096,952.

11 **FACTUAL BACKGROUND**

12 Petitioner California Housing Defense Fund (“CalHDF” or “Petitioner”) initiated this
13 action on July 25, 2023, alleging that the City violated the HAA when it disapproved Real
14 Party in Interest 600 Foothill Owner LP’s application to build a modest, five-story apartment
15 building. (See Verified Petition for Writ of Mandate and Complaint for Declaratory Relief,
16 filed July 25, 2023.) The Court overruled the City’s demurrer and denied its motion to strike
17 in November 2023, granted Petitioner’s and Petitioners-Intervenors’ respective petitions for
18 writ of mandate in March 2024, and entered a final judgment in favor of Petitioner and
19 Petitioners-Intervenors on April 5, 2024. (See Order Overruling Demurrer and Denying
20 Motion to Strike, filed November 22, 2023; Order on Petitions for Writ of Mandate and
21

22 ¹ See Petitioner’s Memorandum of Points & Authorities ISO Motion to Issue Writ of Mandate
23 (filed Dec. 29, 2023), pp. 5-12. See also Judge Chalfant’s July 11, 2023 Statement of Decision
24 and September 5, 2023 Judgment in *Californians for Homeownership v. City of La Cañada*
25 *Flintridge* (Case No. 23STCP00699, filed March 3, 2023).

26 ² See Order Overruling Demurrer and Denying Motion to Strike (filed Nov. 22, 2023); Order
27 on Petitions for Writ of Mandate and Complaints for Declaratory Relief (filed March 4, 2024);
28 Judgment (filed April 5, 2024).

³ See, e.g., Respondent’s Motion to Strike (filed Aug. 28, 2023); Respondent’s Demurrer (filed
Aug. 29, 2023); Respondent’s Evidentiary Objections to Petitioner’s Opening Brief (filed Feb.
5, 2024); Respondent’s Objections to Declaration of Dylan S. Casey (filed Feb. 5, 2024);
Respondent’s Evidentiary Objections to Declaration of Melinda S. Coy (filed Feb. 5, 2024);
Respondent’s Objections to Petitioner’s Request for Judicial Notice (filed Feb. 5, 2024).

1 Complaints for Declaratory Relief, filed March 4, 2024; Judgment, filed April 5, 2024.) The
2 City appealed the Judgment on April 11, 2024. (See Notice of Appeal, filed April 11, 2024.)

3 On May 23, 2024, Counsel for CalHDF reminded opposing counsel of the City’s
4 statutory obligation to post an appeal bond and offered to stipulate to a bond in the amount of
5 \$15,576,572. (See Declaration of Alexander Gourse (“Gourse Decl.,” filed herewith), ¶ 2 &
6 Ex. A.) One week later, counsel for the City responded that “[Y]our ‘offer’ is rejected
7 because, among other things, no bond is required.” (*Id.* ¶ 3 & Ex. B.) Counsel for the City did
8 not propose an alternative bond amount and did not offer any explanation for his assertion that
9 “no bond is required.” (*Id.*)

10 ARGUMENT

11 I. The City Must Post a Bond Pursuant to Government Code Section 65589.5, 12 subdivision (m)(1).

13 This is not an ordinary bond motion. Ordinarily, a local agency would be immune from
14 any generally applicable bond requirement pursuant to Code of Civil Procedure section
15 995.220. But in this instance, the Court found that the City violated the HAA,⁴ which
16 expressly requires a “local agency” to post a bond if it appeals a trial court’s judgment. (See
17 Gov. Code, § 65589.5, subd. (m)(1).)⁵ Ordinarily, moreover, a bond would be discretionary
18 where, as here, the “[a]ppellant is required to perform an act for respondent’s benefit pursuant
19 to judgment or order under appeal.” (Code Civ. Proc., § 917.9, subd. (a)(2).) But the HAA
20 states that a local agency “*shall* post a bond” if it appeals a judgment under the HAA (Gov.

21 _____
22 ⁴ See Order on Petitions for Writ of Mandate and Complaints for Declaratory Relief (filed
March 4, 2024); Judgment (filed April 5, 2024).

23 ⁵ Statutes “are to be construed together and harmonized, if possible, to maintain the integrity of
24 both statutes.” (*People v. Encerti* (1982) 130 Cal.App.3d 791, 797.) Section 65589.5(m),
25 which is the more-specific and later-enacted statute in this case, cannot be interpreted so that it
26 is to interpret Section 65589.5(m) as a limited exception to the general rule in Section 995.220.
27 (*See, e.g., Bautista-Perez v. Mukasey* (N.D. Cal., Feb. 4, 2008, No. C 07-4192-TEH) 2008 WL
28 314486, at *11–12 [more general statute, even one containing the language “notwithstanding
any other provisions of law,” cannot be read to override a “more specific and later-enacted”
statute, since that would make the latter statute “completely meaningless when enacted”]; *see
also, e.g., Oregon Natural Resources Council v. Thomas* (9th Cir. 1996) 92 F.3d 792, 797
[same].) .

1 Code, § 65589.5, subd. (m)(1), emphasis added), which imposes a *mandatory* duty on the City.
2 (*See, e.g., Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86-87 [Code of Civil Procedure
3 section using the word “shall” held to be mandatory because “[t]he word ‘shall’ is ordinarily
4 used in laws, regulations, or directives to express what is mandatory”]; *see also Griffin v. Lima*
5 (1954) 124 Cal.App.2d 697, 700 [Code Civ. Proc., § 529’s injunction bond requirement—
6 which states a court “must require an undertaking”—is mandatory].) Finally, whereas an
7 appeal bond ordinarily would run to the benefit of the appellee, the HAA requires that the bond
8 be posted for the benefit of the “project applicant.” (Gov. Code, § 65589.5, subd. (m)(1).) In
9 this case, the project applicant is Real Party in Interest 600 Foothill Owner LP, rather than the
10 appellees, and the HAA therefore requires that the City post a bond “to the benefit of” 600
11 Foothill Owner LP. (*Id.*; *see also Venice Canals Resident Home Owners Ass’n v. Superior Ct.*
12 (1977) 72 Cal.App.3d 675, 683 [affirming stay bond ordered for the benefit of non-party
13 applicants for development permits].)⁶

14 The HAA is popularly known as the “‘Anti NIMBY’ law” (*see Honchariw v. County of*
15 *Stanislaus* (2011) 200 Cal.App.4th 1066, 1068), and its mandatory bond requirement is
16 designed to combat one the most commonly used tools in the NIMBY arsenal: delay. The
17 Legislature added the mandatory bond requirement to the HAA in 2005 in response to
18 evidence that “even if [housing developers] are successful in an anti-NIMBY court action
19 against a local government, they often lose their projects as a result of increases in costs, loss
20 of permits or land, or other consequences of the amount of time it took to get through the legal
21 process.” (Petitioner’s Request for Judicial Notice (“RJN,” filed herewith), Ex. A p. 2
22

23 ⁶ Although 600 Foothill is the project applicant in this case and is not formally a plaintiff or
24 petitioner in this action, it is the Real Party in Interest and the delays caused by the City’s
25 meritless appeal risk denying it the benefit of the judgment just as if it were a petitioner. (*See*
26 *Venice Canals Resident Home Owners Ass’n v. Superior Ct.* (1977) 72 Cal.App.3d 675, 683
27 [affirming stay bond ordered to protect real parties in interest who had “spent considerable
28 time and money” obtaining development permits].) Nothing in the HAA suggests that an
appeal bond should *not* be required where the project applicant is the Real Party in Interest
instead of the petitioner or plaintiff. (*See* Gov. Code, § 65589.5, subd. (m)(1) [requiring that
the appeal bond “benefit” the plaintiff “if the plaintiff is the project applicant”]; *id.* at subd.
(a)(2)(L) [instructing courts to construe the HAA broadly to “afford the fullest possible weight
to the interest of, and the approval and provision of, housing”].)

1 [California Bill Analysis, Assembly Floor, S.B. 575 Assem., 8/18/2005].) Such an outcome is
2 a distinct possibility here: the **median** duration of an appeal in the Second District Court of
3 Appeal ranges from 452 days in Division 6 to 636 days in Division 7. (See RJN, Ex. B p. 36
4 [Judicial Council of California, Statewide Caseload Trends 2011-12 through 2020-21 (2022)].)
5 Accounting for an additional 45 to 60 days for issuance of a remittitur, two years is a
6 reasonable estimate of the expected duration of the City’s appeal. During that period, the costs
7 of delay to 600 Foothill will add up,⁷ increasing the odds of the Project’s failure despite victory
8 in the trial court.

9 Although an appeal bond is mandatory in *any* case where a city appeals an HAA
10 judgment, such a bond is especially appropriate in this case. The Project at issue in this case
11 (“Project”) reserves twenty percent of its units to be rented at rates affordable to low-income
12 households. (See Order on Petitions for Writ of Mandate (filed March 4, 2024), p. 12, fn. 8 .)
13 This means a thinner financial margin and hence a greater risk of the Project’s failure if the
14 City does not post a bond. (Declaration of Jonathan C. Curtis (“Curtis Decl.,” filed herewith)
15 ¶ 21.) And if the Project fails, there will likely be no possibility of *any* future residential
16 project on the site—especially not one with sixteen badly needed affordable units. This is
17 because the City has subsequently zoned the 1.3-acre site at issue here for twelve to fifteen
18 dwelling units per acre—a density that, according to the City’s own analysis, will not even
19 support a market-rate housing development project, much less one with low-income affordable
20 units. (See Administrative Record (“AR,” lodged Feb. 20, 2024) 3595, 5206-09).

21 Finally, this Court must require the City to post an appeal bond not only because of the
22 explicit requirement in Subdivision (m), but also to vindicate the HAA’s purpose and the
23

24 ⁷ Interest rates stand at their highest rate in nearly seventeen years, significantly increasing the
25 cost of borrowing—and consequently the costs of a delay resulting from an appeal.
26 (Declaration of Jonathan Curtis [“Curtis Decl.,” filed herewith] ¶ 23; *see also* RJN, Ex. C
27 [Board of Governors of the Federal Reserve System, Press Release, May 1, 2024].)
28 Capitalization rates have also risen since the Project’s inception, reducing the Project’s
financial prospects. (Curtis Decl. ¶ 24.) Furthermore, construction costs tend to rise over time,
again contributing to the costs of delay. (*Id.* ¶ 25.) And ongoing litigation makes it more
difficult for 600 Foothill to obtain and maintain financing for the Project, further imperiling its
chance at success. (*Id.* ¶ 31.)

1 Legislature’s command that the statute “be interpreted and implemented in a manner to afford
2 the fullest possible weight to the interest of, and the approval and provision of, housing” (Gov.
3 Code, § 65589.5, subd. (a)(2)(L)).

4 **II. Delays Resulting from the City’s Meritless Appeal Will Cost Real Party in Interest**
5 **at Least \$14,096,952, and this Court Should Order a Bond in that Amount.**

6 The Court should set the bond at the full amount of the loss 600 Foothill anticipates
7 suffering if the appeal proceeds through the merits. As demonstrated below, the reasonably
8 anticipated 24-month delay will cost 600 Foothill a minimum of \$14,096,952.

9 The purpose of a bond under the HAA is to ensure that project applicants receive
10 “[r]easonable compensation for the loss of use of the . . . property” for the duration of an
11 appeal. (*Cf.* Code Civ. Proc., § 917.9; *Venice Canals, supra*, 72 Cal.App.3d at 683.) The
12 HAA contains no express measure or specific criteria to be taken into account in the setting of
13 the bond amount, but the legislative history of the HAA again sheds light on how the Court
14 should proceed here: “[E]ven if they are successful in an anti-NIMBY court action [...] [
15 [developers] often lose their projects as result of increases in costs, loss of permits or land, or
16 other consequences of the amount of time it took to get through the legal process.” (RJN,
17 Ex. A p. 2 [California Bill Analysis, Assembly Floor, S.B. 575 Assem., 8/18/2005].) This
18 fear—that costs and delays resulting from the legal process can kill a housing development
19 project even if the applicant wins a judgment under the HAA in the trial court—is why the
20 legislature included the appeal bond provision. (*Id.*) In short, the legislative history shows that
21 the appeal bond in this case should match the costs 600 Foothill will incur due to the City’s
22 appeal.

23 This is consistent with other statutory bond requirements in California. Under Code of
24 Civil Procedure § 917.9(b), for example, which provides for appeal bonds in situations where
25 enforcement of the trial court order is stayed, the “undertaking shall be in a sum fixed by the
26 court and *shall be in an amount sufficient to cover all damages* which the respondent may
27 sustain by reason of the stay in the enforcement of the judgment or order” (emphasis added).
28 Subdivision (c) provides that the undertaking “shall be conditioned upon the performance of

1 the judgment or order appealed from or payment of the sums required by the judgment or order
2 appealed from, if the judgment or order is affirmed or the appeal is withdrawn or dismissed,
3 and it shall provide that if the judgment or order appealed from or any part of it is affirmed, or
4 the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent
5 may sustain by reason of the stay in the enforcement of the judgment.” The discretionary bond
6 or undertaking provided under Code of Civil Procedure § 917.9 is intended to guarantee that an
7 unsuccessful appellant will eventually perform its duties and to protect the prevailing party in
8 the trial court from damages resulting during the appeal. (*See Estate of Murphy* (1971) 16
9 Cal.App.3d 564, 568 [when there is risk of loss of benefits during an appeal, “Equity demands
10 that, as between respondent and appellant, the appellant who seeks the stay should assume the
11 risk.”].) With the HAA bond provision, the Legislature clearly had a similar aim—to protect
12 housing developers from the damages that accrue during the appeal—although in the case of
13 the HAA appeal bond, the requirement is mandatory, and it is not limited to situations in which
14 the trial court’s order is stayed pending appeal. The HAA requires the City to post a bond
15 equal to all costs that will result from the delay caused by its appeal.

16 Here, those costs, calculated on a per-month basis, are as follows:

- 17 • \$17,500 in additional payments for interest on loans financing the Project. (Curtis
18 Decl. ¶ 27.)
- 19 • \$55,000 in overhead, consisting of:
 - 20 ○ \$38,000 in general overhead salaries. (*Id.*)
 - 21 ○ \$3,000 in specific overhead of rent, utilities, taxes, and insurance payments.
22 (*Id.*)
 - 23 ○ \$14,000 in project management costs. (*Id.*)
- 24 • \$306,540 in additional costs due to construction cost inflation. (*Id.*)
- 25 • \$83,333 in the cost of equity capital. (*Id.*)
- 26 • \$125,000 in lost net rental income. (*Id.* ¶ 28.)

27 This adds up to \$587,373 in additional expenses and lost revenue for each month of delay.

28 Extrapolating that figure to account for the reasonably anticipated 24-month delay, the total

1 cost of an appeal to 600 Foothill sums to \$14,096,952. This is a conservative estimate, as it
2 relies on a low estimate of the rate at which construction costs increase over time (*id.* ¶ 25) and
3 assumes a 20 percent annual cost of equity capital, which is the *minimum* amount 600 Foothill
4 must pay for such financing (*id.* ¶ 27). The 24-month estimate for appeal’s duration may also
5 be conservative in light of the fact that, nearly two months after the City filed its appeal on
6 April 11, 2024, the Second District still had not assigned it a case number due to “backlog.”
7 (See Gourse Decl. ¶ 4 & Ex. C.) The City must post a bond to ensure that, if its appeal is
8 unsuccessful, 600 Foothill will ultimately receive compensation for the full amount it stands to
9 lose as a result of the delay.

10 **CONCLUSION**

11 For the foregoing reasons, CalHDF requests that this Court order the City to post a bond
12 within 14 days in the amount of **\$14,096,952**, to the benefit of Real Party in Interest 600
13 Foothill Owner LP.

14 DATED: June 17, 2024

Respectfully submitted,

15 CALIFORNIA HOUSING DEFENSE FUND

16
17 By: /s/ Nicholas Eckenwiler

18 Nicholas Eckenwiler

19 Attorneys for Petitioner and Plaintiff

20 DATED: June 17, 2024

Respectfully submitted,

21
22 ROSEN BIEN GALVAN & GRUNFELD LLP

23
24 By: /s/ Alexander Gourse

25 Alexander Gourse

26 Attorneys for Petitioner and Plaintiff
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