

1 LISA ELLS – 243657
ALEXANDER GOURSE – 321631
2 ROSEN BIEN GALVAN & GRUNFELD LLP
101 Mission Street, Sixth Floor
3 San Francisco, California 94105
Telephone: (415) 433-6830
4 Facsimile: (415) 433-7104
Email: lells@rbgg.com
5 agourse@rbgg.com

6 DYLAN CASEY – 325222
NICHOLAS ECKENWILER – 348744
7 CALIFORNIA HOUSING DEFENSE FUND
360 Grand Ave #323
8 Oakland, California 94610
Telephone: (443) 223-8231
9 Email: dylan@calhdf.org
nick@calhdf.org

10 Attorneys for Petitioner and Plaintiff

11
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.
27
28

Case No. 23STCP02614
Related Case No. 23STCP02575

**CALHDF'S REPLY IN SUPPORT OF
MOTION FOR APPEAL BOND
PURSUANT TO GOV. CODE
§ 65589.5(m)**

Judge: Hon. Stephen I. Goorvitch
Dept: 82

Trial Date: March 1, 2024

Bond Hearing Date: November 8, 2024

Action Filed: July 25, 2023

1 The City of La Cañada Flintridge (“City”), like many exclusionary suburbs, knows that
2 it can exploit the delays inherent in the judicial process to kill housing development projects it
3 would otherwise be required to approve. It has already succeeded in delaying 600 Foothill’s
4 project for half a decade, and it has made abundantly clear that it will continue to use every
5 tool at its disposal to evade the Legislature’s efforts to streamline local housing development
6 processes. These are exactly the circumstances the Legislature had in mind when it added a
7 mandatory appeal-bond requirement to the Housing Accountability Act. This Court should
8 grant CalHDF’s Motion in full and order the City to post within 14 days a bond in the amount
9 of \$14,096,952.

10 **I. CODE OF CIVIL PROCEDURE SECTION 995.220 DOES NOT NULLIFY THE**
11 **HOUSING ACCOUNTABILITY ACT’S MANDATORY BOND**
12 **REQUIREMENT.**

12 The City first asserts that it cannot be required to post any bond at all because municipal
13 governments are insulated from ordinary bond requirements by Code of Civil Procedure
14 section 995.220. (Opp. at 5-6). As CalHDF explained in its Motion, however, the Housing
15 Accountability Act (“HAA”) *expressly requires* municipal governments to post appeal bonds
16 in HAA cases, and thus creates an exception to the normal rule under Section 995.220. (*See*
17 *Mot.* at 4; Gov. Code, § 65589.5, subd. (m)(1) [“If the local agency appeals the judgment of
18 the trial court, the local agency shall post a bond[.]”]). The City contends that Section 995.220
19 overrides the HAA. But Section 995.2220 is a statute, not a constitution or other source of
20 higher law, and therefore must be construed in a way that *harmonizes* its requirements with
21 those in the HAA’s bond provision in order to “maintain[] the integrity” of both statutes. (*See,*
22 *e.g., People v. Encerti* (1982) 130 Cal.App.3d 791, 797.) Harmonization is not difficult in this
23 case. The HAA’s bond provision creates a limited exception to Section 995.220 that applies
24 only to judgments arising under the HAA. Indeed, the HAA *must* create such an exception: to
25 hold otherwise would render the HAA’s bond requirement, which by its terms applies *only* to
26 municipal governments’ appeals of judgments under the HAA, “completely meaningless when
27 enacted.” (*Mukasey, supra*, 2008 WL 314486, at *34; *Ste. Marie v. Riverside County Regional*
28 *Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 289 [statutes must be read “so that all parts

1 are harmonized and given effect”], citation omitted.)

2 Even if it were *not* possible to reconcile the HAA’s bond requirement with Section
3 995.220, moreover, the City’s argument would still be wrong because the HAA’s bond
4 provision is both more specific than Section 995.220 and was enacted decades after Section
5 995.220. The HAA’s bond requirement therefore supersedes. (See *Lopez v. Sony Electronics, Inc.*
6 (2018) 5 Cal.5th 627, 640 [“If conflicting statutes cannot be reconciled, later enactments
7 supersede earlier ones ... and more specific provisions take precedence over more general
8 ones.”], citation omitted.) This is true even where, as here, the more general statute includes
9 the language “notwithstanding any other statute.” (See, e.g., *Oregon Natural Resources*
10 *Council v. Thomas* (9th Cir. 1996) 92 F.3d 792, 797; *Bautista-Perez v. Mukasey* (N.D. Cal.,
11 Feb. 4, 2008) No. C 07-4192-(TEH), 2008 WL 314486, at *33-34.)

12 The City’s argument about implied repeals is similarly inapplicable here. The HAA
13 does not implicitly *repeal* Section 995.220, it creates a *limited exception* to that statute that
14 applies only where a municipality appeals a judgment issued by a trial court pursuant to the
15 HAA. (Gov. Code, § 65589.5, subd. (m)(1).) The interpretive canon relating to implied
16 repeals therefore has no relevance here. (See, e.g., *Stone Street Capital, LLC v. California*
17 *State Lottery Com.* (2008) 165 Cal.App.4th 109, 124-25; *Medical Board v. Superior Court*
18 (2001) 88 Cal.App.4th 1001, 1018.)

19 Even if it were relevant—and it is not, for the reasons identified above—the implied-
20 repeals canon merely articulates a *presumption* against implied repeals, not a *prohibition* as the
21 City claims here. (See *Encerti, supra*, 130 Cal.App.3d at pp. 796-797 [implied repeals “are not
22 favored,” but can occur nonetheless “where there is no rational basis for harmonizing the two
23 potentially conflicting statutes”], citation omitted; Opp. at 6.) And that presumption would be
24 easily rebutted in this case even if it applied: The HAA’s requirements—including the bond
25 requirement at issue in this motion—are *specifically directed at local governments*. (See, e.g.,
26 Gov. Code, § 65589.5, subd. (a)(1)((K) [describing Legislature’s intent to “meaningfully and
27 effectively curb[] the capability of local governments to deny, reduce the density for, or render
28 infeasible housing development projects”]; *id.*, subd. (d) [prohibiting “[a] local agency” from

1 disapproving housing development projects except under specified conditions]; *id.*, subd. (j)(1)
2 [same]; *id.*, subd. (m)(1) [bond required “if the local agency appeals the judgment of the trial
3 court”].) That is more than enough to find an implied repeal of Section 995.220 in the limited
4 context of municipalities’ appeals of HAA judgments.

5 The City’s remaining arguments on this issue are similarly meritless. (See Opp. at 7-8.)
6 The Court need not rely on the Legislature’s command that the HAA be liberally construed in
7 favor of “the approval and provision of housing” because the statute *unambiguously* requires
8 local governments who appeal HAA judgments to post a bond. (Gov. Code, § 65589.5, subd.
9 (m)(1).) But in any event, the HAA’s bond requirement is indisputably related to “the
10 approval and provision of housing.” (See Mot. at 5-6 [describing Legislature’s intent in adding
11 HAA’s bond requirement to ensure that housing developers do not “lose their projects as a
12 result of increases in costs, loss of permits or land, or other consequences of the amount of
13 time it took to get through the legal process”].) The City’s claim that the bond requirement
14 applies only where the Court has already imposed fines, meanwhile, is similarly indefensible.
15 (See Opp. at 8-9.) The HAA’s bond provision states that the City must post a bond “if [it]
16 appeals the judgment of the trial court,” not if it appeals a judgment imposing fines. (Gov.
17 Code, § 65589.5, subd. (m)(1).) And the fact that the HAA *will*, if the City does not comply
18 with the April 5 Judgment, require this Court to impose a minimum fine of \$10,000 for each
19 housing unit in 600 Foothill’s proposal (*see* Gov. Code, § 65589.5, subd. (k)(1)B)), weighs *in*
20 *favor* of strictly enforcing the statute’s mandatory bond requirement because it evidences the
21 Legislature’s intent to put teeth into trial courts’ HAA determinations.

22 The City, by the statute’s plain command, must post a bond. Any other ruling would
23 nullify the HAA’s bond provision in direct contravention of the law.

24 **II. THE CITY MUST POST A BOND REGARDLESS OF THE PETITIONER’S**
25 **IDENTITY**

26 The HAA’s appeal bond requirement opens with an unequivocal command: “If the
27 local agency appeals the judgment of the trial court, the local agency shall post a bond.” (Gov.
28 Code, § 65589.5, subd. (m)(1).) It goes on to say that the bond shall be “to the benefit of the

1 plaintiff if the plaintiff is the project applicant.” (*Id.*) The City interprets the latter clause to
2 mean that only the project applicant can seek an appeal bond. That is error. The latter clause
3 neither states nor implies that *only* the project applicant may seek a bond. Rather, it provides
4 direction as to the party whom the bond should benefit. It is, in other words, an *addition* to the
5 language requiring the City to post a bond, not a *limitation* on that language. Furthermore, as
6 explained above, the HAA must “be interpreted and implemented in a manner to afford the
7 fullest possible weight to the interest of, and the approval and provision of, housing.” (*Id.* at
8 subd. (a)(2)(L).) Preventing parties other than the project applicant from seeking a bond, when
9 those parties are specifically authorized by statute to bring suit to enforce the HAA’s terms,
10 would contravene this directive.

11 The purposes of the bond provision also favor allowing both CalHDF and the State of
12 California to seek a bond. The bond provision ensures that the cost of the delay associated
13 with an appeal from a judgment under the HAA does not kill the housing project at issue. (See
14 Mot. at 5-6.) The bond provision also deters recalcitrant anti-housing jurisdictions such as the
15 City from filing frivolous appeals by making it costly for them to do so. (See *id.*) The bond
16 sought by both CalHDF and the State furthers both of these purposes.

17 Finally, the HAA’s bond provision should operate consistently and not turn on the
18 procedural quirks of a given lawsuit. It makes little sense to enforce the bond requirement
19 where the developer benefits from a trial court judgment as petitioner, but not where it does so
20 as a real party in interest. Courts have recognized this logic in analogous circumstances. In
21 *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, for example, the
22 First District affirmed a bond ordered at the request of a real-party-in-interest housing
23 developer where the relevant statute specified that a “defendant” could move for a bond. (See
24 *id.* at pp. 1135-1136; Code Civ. Proc., § 529.2.) And in *Venice Canals Resident Home Owners*
25 *Assn. v. Superior Court* (1977) 72 Cal.App.3d 675, the Court of Appeal affirmed an injunction
26 bond in favor of the real-party-in-interest developers, recognizing that they were “subjected to
27 damages occasioned by delay in completion” of their projects. (*Id.* at p. 680.)

28 The City makes much of the fact that the developer in this case, 600 Foothill, brought its

1 own, separate action, which has not yet come to judgment. This is irrelevant. There has been
2 no judgment in the 600 Foothill case only because the City filed a frivolous anti-SLAPP
3 motion in that case and then filed an interlocutory appeal from Judge Beckloff’s thorough,
4 well-reasoned order denying that motion. (See Order, filed Nov. 22, 2023 in case no.
5 23STCP02575; Notice of Appeal, filed Jan. 18, 2024 in case no. 23STCP02575; *Hewlett-*
6 *Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1185 [“[H]owever unsound an
7 anti-SLAPP motion may be, it will typically stop the entire lawsuit dead in its tracks until an
8 appellate court completes its review.”].) 600 Foothill has not sought a bond in that case (as
9 there is no judgment entered), so there is no risk that any portion of the bond requested here
10 would be duplicative. The City’s own potentially sanctionable conduct in 600 Foothill’s
11 separate action provides no justification for withholding a bond in this case. Doing so would
12 ignore the plain text of the HAA and reward the City for dilatory litigation tactics that are
13 clearly aimed at killing 600 Foothill’s badly needed housing project through delay.

14 **III. THE CURTIS DECLARATION IS ADMISSIBLE AND PROVIDES AMPLE**
15 **EVIDENCE TO SUPPORT A BOND IN THE AMOUNT OF \$14,096,952.**

16 In support of its motion, CalHDF submitted a declaration (“Curtis Declaration”) from
17 Jonathan Curtis, a founding member of Cedar Street Partners, LLC, which controls 600
18 Foothill, LLC. (Curtis Decl. ¶ 15.) Mr. Curtis, a businessman and attorney with thirty years
19 of experience in the real estate industry, testified as to the losses he expects 600 Foothill will
20 sustain due to delays in obtaining permit approvals from the City as a result of the City’s
21 appeal. (See generally *id.*) The City argues that the Curtis Declaration is inadmissible in its
22 entirety because Mr. Curtis purportedly lacks personal knowledge of the financial model on
23 which his estimates of future losses are premised, and because Mr. Curtis’s personal financial
24 interest in 600 Foothill’s project precludes him from offering expert opinions. (Opp. at 10-11.)
25 Both arguments are meritless.

26 First, Mr. Curtis established during his deposition that he [REDACTED]

27 [REDACTED]

28 [REDACTED]. He testified, for example, that he [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]. That is more than sufficient to establish his

6 personal knowledge of the model to offer testimony about its predictions, as corporate officers
7 regularly testify to the projected profits and losses of the corporation on the basis of “facts and
8 data” made known to them, “on-the-job experience,” and knowledge of “relevant historical ...
9 facts.” (*Lord & Taylor, LLC v. White Flint, L.P.* (4th Cir. 2017) 849 F.3d 567, 575-576.)

10 Indeed, the California Evidence Code expressly provides that “[a]n officer ... designated by a
11 corporation, partnership, or unincorporated association that is the owner of the property” may
12 testify as to a property’s value without being qualified as an expert (Evid. Code, § 813, subd.
13 (a)(3)), and may rely on information “that is of a type ... relied upon by an expert” (Evid.
14 Code, § 814). This makes sense: Corporate officers like Mr. Curtis have direct knowledge and
15 experience with their business’s finances, and they present an informed perspective on
16 precisely the types of projected losses Mr. Curtis testified to in his declaration. (See, e.g.,
17 Curtis Decl. ¶¶ 21, 27-28; *Lord & Taylor*, 849 F.3d at pp. 575-576 [projected construction
18 costs]; *Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 974 [revenue
19 projections]); *Sutter Health v. Eden Township Healthcare Dist.* (2016) 6 Cal.App.5th 60, 64
20 [anticipated losses due to inability to obtain financing].) The City is simply wrong that
21 Mr. Curtis’s testimony could only be offered by an expert witness.

22 Even if the City were correct that the relevant testimony required a qualified expert,
23 moreover, the City’s claim that Mr. Curtis lacks the requisite qualifications both ignores his
24 decades of experience in the real estate industry (see Curtis Decl. ¶¶ 4, 9-15) and
25 mischaracterizes the law regarding “disinterested” experts. (See Opp. at 10-11.) The City’s
26 cases involved third-party experts testifying in general terms about the reliability and
27 acceptance within the scientific community of technologies such as polygraphs in which they
28 had overwhelming personal and professional investments. (See, e.g., *In re Jordan R.* (2012)

1 205 Cal.App.4th 111, 123, 131.) These cases have no bearing on the substantial body of
2 caselaw allowing business officers to testify as to the financial outlook and revenue
3 expectations of their businesses.

4 Finally, to the extent the City had remaining concerns after Mr. Curtis’s deposition
5 about the methodology used to prepare 600 Foothill’s financial model, they could have noticed
6 a deposition of Alexandra Hack to further explore this topic. They did not do so, despite the
7 fact that they learned of Ms. Hack’s role in preparing the model more than three weeks before
8 their opposition deadline. (See Curtis Decl. at 1.) Mr. Curtis’s declaration provides ample
9 support for a bond in the amount of \$14,092,952.

10 **IV. THE CITY DID NOT EVEN DISCLOSE THE EXISTENCE OF ITS EXPERT,
11 LET ALONE MAKE HIM AVAILABLE FOR DEPOSITION.**

12 The City’s next argument—that Mr. Curtis’s testimony rests on flawed assumptions—
13 (Opp. at 11-18)—fails because the City has provided no competent evidence whatsoever to
14 support it. The City did not disclose the existence of their purported expert, Paul W. Pocalyko,
15 until they filed his declaration with their opposition papers, four days before CalHDF’s reply
16 deadline—despite having had notice of Mr. Curtis’s testimony for more than *four months* (see
17 Curtis Decl., filed June 17, 2024), and despite their successful efforts to persuade this Court
18 that they must be permitted to take Mr. Curtis’s deposition (See City’s Opp. to Mot. for
19 Protective Order, filed September 11, 2024; Order Denying Motion for Protective Order, filed
20 September 25, 2024.) As a result of the City’s actions, neither CalHDF nor the State nor 600
21 Foothill had any opportunity whatsoever to examine Mr. Pocalyko for the purpose of
22 evaluating whether his experience as a certified public accountant is sufficient to qualify him
23 as an expert in matters relevant to his testimony. Nor have CalHDF, the State, or 600 Foothill
24 had any opportunity to challenge the substantive claims and assumptions in Mr. Pocalyko’s
25 declaration in the four days since they learned of his existence. This is classic sandbagging
26 and it is more than sufficient grounds for the Court to give zero weight to Mr. Pocalyko’s
27 testimony in its consideration of the proper bond amount in this case. (See Code Civ. Proc.,
28 § 2034.300 [listing grounds for exclusion of expert opinion testimony].)

1 **IV. THE BOND AMOUNT IS NOT LIMITED TO CARRYING COSTS.**

2 The City next asserts that the bond amount sought is too speculative, but the City’s
3 argument rests on rules that limit damages in tort and contract cases, not rules governing the
4 proper amount for an appeal bond. (See Opp. at 17-18.) The Court’s task here is not to reduce
5 a long income stream to fixed amount, as in a typical lost-profits or damages analysis; it is to
6 identify the likely effect on 600 Foothill of a two-year delay resulting from the City’s appeal,
7 and to order a bond that is sufficient both to compensate 600 Foothill for the delay *and* to deter
8 meritless appeals. (Mot. at 5, 7-8; *Adanna Car Wash Corp. v. Gomez* (2018) 87 Cal.App.5th
9 642, 649 [purpose of analogous bond requirement in Labor Code section 98.2(b) “is to
10 discourage employers from filing frivolous appeals”].) That task does not require the degree
11 of certainty and precision proposed by the City. Indeed, the City’s proposed approach to
12 calculating the bond would neither compensate 600 Foothill for the likely effects of delay nor
13 deter the City from continuing to abuse the legal process in hopes of killing the project through
14 delay.

15 Regardless, the City’s argument fails even on its own terms because its cases show that
16 evidence of lost profits and related damages is sufficient “where [it] makes *reasonably* certain
17 their occurrence and extent.” (*Sargon Enterprises, Inc. v. University of Southern California*
18 (2012) 55 Cal.4th 747, 773-774, emphasis added and citation omitted.) The Curtis Declaration
19 and the financial model on which it rests make the occurrence and extent of the projected
20 impact of delay on 600 Foothill reasonably certain under the circumstances here. And this is
21 sufficient to establish lost profits, even under the (stricter) tort and contract law standard the
22 City points to. (*Sargon Enterprises, supra*, 55 Cal.4th at p. 775 [“Courts must not be too quick
23 to exclude expert evidence as speculative merely because the expert cannot say with absolute
24 certainty what the profits would have been.”].) This is especially true in light of Mr. Curtis’s
25 extensive experience in finance and real estate. (See Curtis Decl., ¶¶ 9-15.) And it is
26 particularly true here because the HAA’s bond provision must “be interpreted and
27 implemented in a manner to afford the fullest possible weight to the interest of, and the
28 approval and provision of, housing,” (Gov. Code, § 65589.5, subd. (a)(2)(L).)

1 **V. THE CITY DOES NOT SERIOUSLY ARGUE IT CANNOT AFFORD TO POST**
2 **A BOND IN THE REQUESTED AMOUNT.**

3 The City's opposition gestures at the supposed unfairness of the bond amount CalHDF
4 seeks, but it offers no evidence that this amount exceeds the City's ability to pay. Since the
5 City would bear the burden of proof on an indigency defense to the HAA's bond requirement,
6 the Court has no basis to reduce the bond amount on that ground. (See *Williams v.*
7 *Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 614.)

8 **CONCLUSION**

9 The Court should grant CalHDF's motion and order the City to post, within 14 days, a
10 bond in the amount of \$14,096,952.

11
12 Respectfully submitted,

13 DATED: November 1, 2024

CALIFORNIA HOUSING DEFENSE FUND

14 By: /s/ Nicholas Eckenwiler

15 Nicholas Eckenwiler

16
17 DATED: November 1, 2024

ROSEN BIEN GALVAN & GRUNFELD LLP

18 By: /s/ Alexander Gourse

19 Alexander Gourse

20 Attorneys for Petitioner and Plaintiff
21
22
23
24
25
26
27
28