SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

40 MAIN STREET OFFICES, LLC, Petitioner, vs. CITY OF LOS ALTOS, et al., Respondents.	Case No. 19CV349845 (Lead case, consol. with Case No. 19CV350422) ORDER SETTING AMOUNT OF BOND ON APPEAL (Govt. Code, § 65589.5, subd. (m).)
CALIFORNIA RENTERS LEGAL ADVOCACY & EDUCATION FUND, et al., Petitioners, vs. CITY OF LOS ALTOS, et al., Respondents.	

The motion of petitioner 40 Main Street Offices, LLC for an order setting the amount of the bond or undertaking on appeal to be posted by respondents the City of Los Altos, the City of Los Altos City Council, and the City of Los Altos Community Development Department (collectively, the City, who are appellants on appeal) under Government Code section 65589.5,

subdivision (m) came on for hearing before the Honorable Helen E. Williams on August 21, 2020, at 9:00 a.m. in Department 22 of the court. Daniel R. Golub and Genna Yarkin of Holland & Knight appeared for petitioner and project applicant 40 Main Street Offices, LLC (Developer); Emily L. Brough of Zacks, Freedman & Patterson appeared for petitioners California Renters Legal Advocacy & Education Fund, San Francisco Bay Area Renters Federation, Victoria Fierce, and Sonja Trauss (collectively, Renters); Arthur J. Friedman of Sheppard Mullin Richter & Hampton LLP appeared for respondents, the City. The Court having carefully considered the papers filed by the parties, the matters of which the Court takes judicial notice, the arguments of counsel, and the applicable law, Court finds and orders as follows.

Renters and Developer (collectively, petitioners) alleged in their ultimately consolidated petitions for relief in mandate that the City had unlawfully denied Developer's building project proposal in violation of the applicable streamlining statute (SB 35, Govt. Code, § 65913.4), the Housing Accountability Act (Govt. Code, § 65589.5), and the Density Bonus Law (Govt. Code, § 65915). Based on these allegations, petitioners each sought writs of mandate compelling the City to approve Developer's streamlined application for development.

On April 27, 2020, the Court granted the consolidated petitions by written Order. In the Order, the Court concluded, among other things, that the City had violated the Housing Accountability Act. On May 13, 2020, the Court entered Judgment in favor of petitioners and directed the issuance of a peremptory writ of mandate commanding the City to take certain actions consistent with the Order and Judgment. The writ as issued by the Clerk of the Court directed the City to file an initial return within 60 days of service of the writ. In its Judgment, and as reflected in the writ, the Court retained jurisdiction for various purposes, including determining further remedies as necessary under the Housing Accountability Act.

After service of the writ, the City did not comply its directives or file a return as directed. But on July 8, 2020, the City appealed from the judgment. (See Sixth District Court of Appeal docket no. H048270.) The City apparently took the position that the appeal itself automatically stayed the Judgment and writ without any affirmative stay or undertaking. The City did not seek a stay of the Judgment or the writ from the trial court or the Court of Appeal. Nor did the City

seek to have the Court set the amount of the bond "to the benefit of the [petitioner] if the [petitioner] is the project applicant" as required by the Housing Accountability Act. (Govt. Code, § 65589.5, subd. (m).) Nor did the City otherwise attempt by agreement or otherwise to post a bond or undertaking on appeal, which bond is expressly required under these circumstances. (*Ibid.*) Accordingly, at least to the extent the Judgment and the commands of the writ adjudicate and direct relief under the Housing Accountability Act, those adjudications and directives do not appear to be currently stayed on appeal and the City has not complied with them.

As a consequence, Developer, as project applicant, has moved the Court to set the amount of the bond on appeal to be posted by the City under Government Code section 65589.5, subdivision (m). Developer ultimately requests that the bond be set in the amount of $13,836,324.00, which amount it argues is supported by the Declarations and Supplemental Declarations it filed in support of the motion and which include expert opinion testimony on claimed monetary impacts or consequential damages Developer is asserted to already have sustained and is likely to sustain during the pendency of appeal, assuming the Judgment is ultimately affirmed. (See Declarations of Gary Herbert and Theodore G. Sorenson filed July 30, 2020, and Supplemental declarations of Gary Herbert and Theodore G. Sorenson filed August 14, 2020.) In this regard, Developer contends that the period of appeal—during which it is likely to sustain such impacts or damages—should be estimated at 30 months for purposes of setting the bond amount. (See Declaration of Daniel R. Golub.)

The City, while now seeming to acknowledge that such a bond is statutorily required to stay the Judgment on appeal, challenges the admissibility of large swaths of Developer's declarations offered in support of the motion.[1] The City further contends that 17 months is the

[1] In this regard, the City has submitted 36 pages of objections to Developer's proffered evidence with multiple bases of objection set out for each portion of challenged testimony but just one box for the Court to indicate its single ruling on the multiple bases of objection interposed. While the Court understands the need for a party to preserve evidentiary objections, the Court declines to individually rule on every single one made here by the City, which the Court considers a burdensome and excessive exercise in the context of this motion. But, as reflected in this Order, the Court will rule on objections or general categories of objection that it deems are material to the disposition of the motion.

appropriate estimated duration of the appeal, and it urges that the bond amount be set in the range of $100,000.

As noted, Government Code section 65589.4, subdivision (m) provides in pertinent part that "[i]f the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the [petitioner] if the [petitioner] is the project applicant," as Developer is here. The statute itself contains no express measure or specific criteria to be taken into account in the setting of the bond. But legislative history materials (of which the Court takes judicial notice under Evidence Code section 452 on Developer's request) include the following statements: "This bill adds fines and an appeals bond requirement to the enforcement provisions of the Anti-NIMBY Law. Affordable housing developers have found that, even if they are successful in an anti-NIMBY court action against a local government, they often lose their projects as a result of increases in costs, loss of permits or land, or other consequences of the amount of time it took to get through the legal process. This bill originally gave courts the option of awarding actual damages to successful developer plaintiffs to make up for these losses, increase the likelihood of the project actually being built, and create a disincentive to local governments to force a case into court. As a result of negotiations between the interested parties, this bill now authorizes the assessment of fines on local governments that are found to have acted in bad faith in disapproving a project and failed to carry out the court's order or judgment within 60 days. This bill also allows a court to vacate the action of a local government and deem a project approved with court-appointed standard conditions if the community has failed to comply with a court order within 60 days." (Ass. Floor Analysis of Sen. Bill 575, as amended Aug. 18, 2005, Ex. B to Declaration of Daniel Golub.)

In the absence of specified criteria to be considered in determining the amount of an appeal bond under Government Code section 65589.5, subdivision (m), the Court also notes the provisions of Code of Civil Procedure section 917.9. At subdivision (a)(2), this statute analogously provides for the discretionary requirement of a bond on appeal to stay the enforcement of a judgment or order requiring an appellant to perform an act for the respondent's benefit. The Judgment and writ do exactly that here but the setting and posting of a bond on

appeal is mandatory under the Housing Accountability Act, not discretionary. Under Code of Civil Procedure section 917.9, subdivision (b), the "undertaking shall be in a sum fixed by the court and shall be in an amount sufficient to cover all damages which the respondent may sustain by reason of the stay in the enforcement of the judgment or order." Subdivision (c) provides that the undertaking "shall be conditioned upon the performance of the judgment or order appealed from or payment of the sums required by the judgment or order appealed from, if the judgment or order is affirmed or the appeal is withdrawn or dismissed, and it shall provide that if the judgment or order appealed from or any part of it is affirmed, or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay of enforcement of the judgment." Under subdivision (d), " 'damages' means ... [r]easonable compensation for the loss of use of the money or property ... [or] payment of" costs awarded to the respondent.[2] Under Code of Civil Procedure section 917.9, a bond or undertaking so required as a matter of discretion guarantees an unsuccessful appellant's eventual performance of the commands of the appealed judgment or order, and protects the respondent from damages resulting while the appealed judgment or order is stayed by the discretionary undertaking. (See *Estate of Murphy* (1971) 16 Cal.App.3d 564, 568 [when there is a risk of loss of benefits during an appeal, "Equity demands that, as between respondent and appellant, the appellant who seeks the stay should assume the risk."].)

In connection with this motion, and as noted, the Court grants Developer's request for judicial notice of the Assembly Floor Analysis of amendments to Government Code section 65offered as Exhibit B to the Declaration of Daniel R. Golub. The Court denies the same request with respect to Exhibit A—the Los Altos press release dated July 8, 2020—on the basis of lack of relevance.[3]

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[2] Developer's motion and this Order setting the amount of bond on appeal do not take into account costs of suit or an award of attorney fees for which petitioners have now moved to be included as part of the Judgment. It may be that a second bond on appeal will be required to stay execution of what ultimately may be a money judgment. But those issues are not now before the Court.

[3] On its own motion, the Court further takes judicial notice of the relevant pages of the Judicial Council of California Court Statistics Reports from 2017, 2018, and 2019. These pages

The Court next turns to the City's many objections to evidence. First, the Court denies the City's wholesale request to strike the Supplemental Declarations of Theodore G. Sorenson and Gary Herbert filed with Developer's reply brief. These declarations are merely responsive to the City's objections to evidence interposed with its opposition to the motion; the Supplemental Declarations raise no new theories or arguments and they may be viewed as supplying information that was claimed to be foundational gaps in what was offered in the original Declarations filed with the moving papers on July 30, 2020, just as permissible curative opinion testimony would be allowed in live testimony in court to overcome evidentiary objections. The City offers no opinion evidence of its own as to matters relevant to the bond amount and it leaves many factual premises of the Developer's proffered expert opinions undisturbed. Further, many of the objections do not technically go to admissibility of evidence but rather to its weight. And the City shows no prejudice. (*Professional Engineers in California Government v. Brown* (2014) 229 Cal.App.4th 861, 874-875 [trial court retains discretion to consider evidence, including that submitted on reply]; *Savea v. YRC Inc.* (2019) 34 Cal.App.5th 173, 182 [supplemental request for judicial notice submitted on reply raised no new arguments or theories and was merely responsive to opposition to first request].) Finally, in some sense, it is the City's burden as appellant under Government Code section 65589.5, subdivision (m) to perfect the required stay on appeal by posting the mandatory bond in an amount to be set by the Court. Yet the City took no steps to initiate that setting, forcing Developer to pursue this motion as the moving party. For all these reasons, the Court denies the City's motion to strike the Supplemental Declarations.

To the extent the City objected to evidence from any source of Developer's claimed "past damages," meaning those claimed to have been suffered between denial of project approval in

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show in tables and graphs generated from immediately prior years the time from notice of appeal to the filing of opinion in civil cases for all six of the State's District Courts of Appeal and the Summary of Filings and Dispositions. Taking into account the time periods shown for the Sixth District Court of Appeal, and adding 45 to 60 days for the issuance of a remittitur (assuming no review by the California Supreme Court), two to two and one-half years for the life of this appeal, or 30 months as argued by Developer, is a reasonable estimate, particularly in view of the fact, also judicially noticed, that that Court has a recent judicial vacancy that will take some time for the Governor to fill.

2019 and the time in July 2020 when the City was supposed to have complied with the Judgment and writ, the Court sustains those objections on the basis of relevance. This period of time is outside the relevant period for purposes of a bond or undertaking on appeal from the Judgment entered in May 2020 and directing compliance by the City within 60 days. The Court likewise sustains the City's objections to evidence from any source in support of dollar amounts representing the claimed risk of a "black swan" economic-loss event that could entirely wipe out Developer's project during the life of the appeal, on the basis that these amounts and opinions on the claimed risk are speculative and conclusory, and based on conjecture more than reliable, accepted, or established facts.

The Court further sustains the City's objections to paragraphs 6(g), 7(g), and 9-23 of the Declaration of Theodore G. Sorenson; paragraph 2 of the Declaration of Daniel R. Golub and Exhibit A thereto; and paragraphs 3(g) and 4(g) of the Supplemental Declaration of Theodore G. Sorenson, all on the basis of relevance.

The balance of the City's evidentiary objections are overruled, specifically the foundational, hearsay, and "best evidence" objections to evidence that is not already excluded per the above rulings. For foundational purposes as to portions of the declarations not already excluded above, the Court considers each declarant's two declarations together as a whole and finds them sufficient to support the opinions expressed. (Sorenson and Herbert Declarations and Supplemental Declarations.) Many of the foundational objections in any event go to the weight of the evidence, which the Court will assess and subscribe. As to many of the hearsay objections, an expert may rely on hearsay in forming an opinion and may relate that he or she did so in general terms to the trier of fact. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685-686.) Moreover, many of the matters objected to here on the basis of hearsay are not "case-specific" facts required to be independently proven by competent evidence or covered by a hearsay exception. (*Id.* at p. 686.) And the Legislature repealed the "best evidence rule" in 1998. (See Evid. Code, § 1500, repealed by Stats. 1998, ch. 100, § 1.) Under the modern secondary evidence rule, "[t]he content of a writing may be proved by an otherwise admissible original (Evid. Code, § 1520) or by "otherwise admissible secondary evidence" (Evid. Code, § 1521. (See, e.g., *Molenda v. Dept. of*

Motor Vehicles (2009) 172 Cal.App.4th 974, 994 [discussing relationship between secondary evidence rule and hearsay rule]; *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 14.) Of import here too is that the secondary evidence rule is not applicable to the extent testimony pertains to operative facts and not the contents of a writing, even if a writing exists as an alternate source of the same facts. To the extent the City here objects to financial information contained in documents and referenced in declarations, this information need not necessarily be proven through writings memorializing these operative facts. (See, e.g., *Crinella v. Northwestern Pac. R. Co.* (1927) 85 Cal.App. 440, 446 [secondary evidence rule not implicated].)

Having considered the admissible evidence and operative legal principles, the Court in its discretion sets the amount of the bond on appeal to be posted by the City under Government Code section 65589.5, subdivision (m) at $7,000,000.00. The bond must be posted within 10 business days from service of this order.

IT IS SO ORDERED.

Date: September 2, 2020

HELEN E. WILLIAMS
Judge of the Superior Court