California Housing Defense Fund

v.

City of La Cañada Flintridge

Case No. 23STCP02614
Related to Case No. 23STCP02571

Hearing: February 18, 2024
Location: Stanley Mosk Courthouse
Department: 82
Judge: Stephen I. Goorvitch

Order Setting Bond Amount

INTRODUCTION

California Housing Defense Fund ("CHDF" or "Petitioner") filed this action on July 25, 2023, alleging that the City of La Cañada Flintridge (the "City" or "Respondent") violated the "Builder's Remedy" provision of California's Housing Accountability Act, Government Code section 65589.5 (the "HAA") in connection with an application for a real estate development project filed by Real Party in Interest 600 Foothill Owner LP ("600 Foothill" or the "Real Party"). On April 5, 2024, the court (Beckloff, J.) granted the petition and entered judgment in favor of CHDF. On April 11, 2024, the City filed a notice of appeal, and CHDF filed a motion for an appeal bond under Government Code section 65589.5(m). On November 8, 2024, the court issued an order finding that the HAA's bond provision applies to the City, and that a bond is required even if Petitioner is not the project applicant. Now, the court orders the City to post a bond in the amount of $14 million.

PROCEDURAL HISTORY

On June 17, 2024, CHDF filed a motion for appeal bond (the "bond motion") under Government Code section 65589.5(m). The motion was supported by a declaration from Jonathan C. Curtis, a founding member of Cedar Street Partners, LLC ("Cedar"), a real estate development firm that manages 600 Foothill. Curtis estimated that the bond should be set at approximately $27 million based upon the following estimates: (1) Lost net income to date of $8 million, (2) Future lost net income of $3.75 million, (3) Future expenses of approximately $13.75 million, and (4) Attorneys' fees of $1.5 million. (See Declaration of Jonathan C. Curtis, dated June 17, 2024, at ¶¶ 3, 30.) However, in the motion, CHDF sought an appeal bond of approximately $14 million.

On August 16, 2024, the court's clerk received a telephone call from counsel for the City seeking to reserve a hearing date for 16 motions to compel. (See Court's Minute Order, dated August 16, 2024.) Upon reviewing the docket, the court learned that the Real Party had filed a motion for a protective order in response to the City's deposition subpoenas. (See *ibid.*) The court construed the City's opposition to the motion as a motion to reopen discovery and continued the hearing. (See Court's Minute Order, dated September 25, 2024.) The court also ordered the parties to meet-and-confer concerning a discovery plan and scheduled an informal discovery conference. (See *ibid.*)

The court held an informal discovery conference on October 2, 2024. (See Court's Minute Order, dated October 2, 2024.) The parties represented that they had resolved their discovery disputes, pending the deposition of Mr. Curtis. (See Notice of Withdrawal of Motions, dated October 15, 2024.) Per the parties' stipulation, the court authorized the City to pursue certain discovery from Allstate Lending Group. (See Court's Minute Order, dated October 2, 2024.)

The City filed an opposition to the motion for appeal bond on October 28, 2024. In advance of the hearing on November 8, 2024, the court posted a tentative order setting the bond in the amount of $1 million. (See Court's Minute Order, dated November 8, 2024.) At the hearing, Plaintiff indicated that it wanted to take the deposition of Defendant's expert, if necessary, and the court agreed. (See *ibid.*) Following the hearing, on the morning of November 18, 2024, the court issued an order finding that the HAA's bond provision applies to the City and that a bond is required even if Petitioner is not the project applicant. (See Court's Order, dated November 18, 2024.)

The court held a hearing on the afternoon of November 18, 2024. (See Court's Minute Order, dated November 18, 2024, at 1:30 p.m.) The court ordered the deposition of the City's expert to occur on December 4, 2024, and authorized supplemental briefing. (See *ibid.*) The court continued the hearing to January 9, 2025. (See *ibid.*) Due to the Eaton Canyon fire, the court continued the hearing to February 7, 2025, which was the first available hearing date. (See Court's Minute Order, dated January 16, 2025.) Due to a docketing error with the briefs, the court continued the hearing to February 18, 2025. Following the hearing, the court took the motion under submission.

LEGAL STANDARD

The HAA states in relevant part as follows:

> Upon entry of the trial court's order, a party may . . . appeal the judgment or order of the trial court under Section 904.1 of the Code of Civil Procedure. If 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 plaintiff if the plaintiff is the project applicant.

(Gov. Code § 65589.5(m).)

EVIDENTIARY ISSUES

The court overrules the City's objections to the relevant portions of Jonathan Curtis's declaration following his deposition for the reasons stated in Petitioner's opposition to the City's motion to strike and objections. The court also recognizes that the projected losses are necessarily estimates for purposes of setting the appeals bond. The court grants the Real Party's request for judicial notice.

DISCUSSION

Petitioner seeks a bond in the amount of $14,096,952 based upon potential losses of $587,373 per month for a 24-month period. This is in excess of the estimates provided by Jonathan Curtis, who initially suggested an appeal bond of $25,621,190 plus $1.5 million in attorneys' fees. By contrast, the City argues that the bond should be based only upon out-of-pocket carrying costs of the loan and the property. This is the dispute the court must resolve: Whether the appeal bond required by the HAA should be based on the housing developer's potential losses or carrying costs of the loan and property.

The rules governing statutory interpretation are clear:

> We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, internal citations omitted.) Section 65589.5(m) does not include criteria for the court to consider in setting the amount of the bond. The statute merely states that the court has discretion to set the amount of the bond.

Accordingly, the court considers other aspects of the HAA to determine how to exercise its discretion. The statute instructs as follows: "It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L).) As the court previously noted in ruling on the first part of this motion: "Ensuring that the City pursues only a meritorious appeal, and compensating the real party for the resulting delays, facilities housing." (See Court's Order, dated November 18, 2024, at 4.)

The legislative history does not benefit the City's position that the appeal bond should be limited only to the carrying costs of the loan and property. To the contrary. The court previously granted Petitioner's request for judicial notice of the legislative history. (See *id.* at 2.) In enacting the HAA's bond provision, the Legislature recognized that:

> 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.

(Petitioner's Request for Judicial Notice Exh. A at 2.) This suggests that the bond should account for the consequences of delay, *e.g.*, increased construction costs, to ensure that real party can still build the housing if Petitioner prevails on appeal.

The City argues that the court should rely on Code of Civil Procedure section 917.9, which states in pertinent part:

> (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.
>
> [¶]
>
> (d) For the purpose of this section, "damages" means either of the following:
>
> (1) Reasonable compensation for the loss of use of the money or property.

(Code Civ. Proc. § 917.9(b), (d).) The City argues that there is no economic use for the property because no housing project has been approved, so the "damages" are limited to carrying costs. The court rejects that argument. Section 917.9 states that the bond should be based on damages that the real party "may sustain," and the relevant phrase—"Reasonable compensation for the loss of use of the . . . property"—is not limited to "actual" or "permitted" use. Nor is the City's argument supported by the legislative intent of the HAA. Had the Legislature intended to limit the bond to reasonable compensation for the loss of actual, permitted use, the HAA could have made that clear. Simply, the City's interpretation of 917.9 contradicts the legislative intent of the HAA, which is to facilitate housing and to ensure that developers who prevail on appeal can still build their projects, notwithstanding increased costs and delays.

Based upon the foregoing, the court finds that the amount of the bond should be based on the housing developer's total potential losses and not just carrying costs of the loan and property. Having reviewed the declaration of Jonathan C. Curtis, as well as his deposition, the court adopts Petitioner's estimates and methodology and orders a bond of $14 million. This number does not "shock the conscience," as they say, given the potential overhead and inflation associated with a construction project of this nature. Moreover, this number is consistent with those bonds set in similar cases. (See Real Party's Request for Judicial Notice, Exhs. A-D.)

The City makes a series of arguments in the alternative which are not persuasive. In particular, the City argues that the real party's estimates are speculative because they are based on assumptions: "[I]f [the real party] managed to build exactly the project it has in mind, if there were no construction delays, if, as the Court noted, it even passed CEQA review, if it were timely in every respect." (The City's Supplemental Brief, filed December 23, 2024, at 5:20-23.) Any appeal bond necessarily will involve speculation in assessing potential damages. The City's argument is not persuasive because the City asks the real party to undertake the CEQA review—

an expensive and time-consuming process—while it simultaneously challenges Judge Beckloff's decision to grant the petition. The court has considered the City's remaining arguments, and none is persuasive.

CONCLUSION AND ORDER

Based upon the foregoing, the court orders as follows:

1. Plaintiff's motion for an appeal bond pursuant to Government Code section 65589.5(m) is granted. The court finds that the amount of the bond should be based on the housing developer's total potential losses and not just carrying costs of the loan and property.

2. The court orders the City of La Cañada Flintridge to post a bond of $14 million within thirty (30) days or to dismiss its appeal.

3. The court's clerk shall provide notice.

IT IS SO ORDERED

Dated: February 28, 2024

Stephen I. Goorvitch
Superior Court Judge