

Moore, Tania

From: Fikes, Cathy
Sent: Friday, October 15, 2021 4:57 PM
To: Agenda Alerts
Subject: FW: 10.15.21 Stahl/Gelfand Letter to Mayor Carr and City Council re Closed Session Items 8 and 9 [IWOV-iManage.FID1035010]
Attachments: 2021-10-15 Stahl-Gelfand Letter to Mayor Carr and City Council.pdf

**SUPPLEMENTAL
COMMUNICATION**

Meeting Date: 10/19/2021

From: Karen Irias <karen.iriass@msrlegal.com>
Sent: Friday, October 15, 2021 4:33 PM
To: Carr, Kim <Kim.Carr@surfcity-hb.org>; Delgleize, Barbara <Barbara.Delgleize@surfcity-hb.org>; Peterson, Erik <Erik.Peterson@surfcity-hb.org>; Posey, Mike <Mike.Posey@surfcity-hb.org>; Kalmick, Dan <Dan.Kalmick@surfcity-hb.org>; Moser, Natalie <Natalie.Moser@surfcity-hb.org>; Bolton, Rhonda <Rhonda.Bolton@surfcity-hb.org>; Fikes, Cathy <CFikes@surfcity-hb.org>
Cc: Gates, Michael <Michael.Gates@surfcity-hb.org>; Estanislau, Robin <Robin.Estanislau@surfcity-hb.org>; Ken Stahl <ken.stahl@msrlegal.com>; 'matt@caforhomes.org' <matt@caforhomes.org>; Vikashni Pooni <vikashni.pooni@msrlegal.com>; Karen Wigylus <karen.wigylus@msrlegal.com>
Subject: 10.15.21 Stahl/Gelfand Letter to Mayor Carr and City Council re Closed Session Items 8 and 9 [IWOV-iManage.FID1035010]

Agenda Item No: 8 (21-776)

*This email is sent on behalf of Kenneth A. Stahl and Matthew Gelfand.
Replies may be directed to Mr. Stahl at Ken.Stahl@msrlegal.com. Thank you.*

Please include the attached letter and this e-mail with the agenda materials for closed session items 8 and 9 on the October 19, 2021 City Council meeting agenda.

Dear Mayor Carr and Members of the City Council:

We write on behalf of the petitioners in the above-referenced cases, THDT Investment, California Renters Legal Advocacy and Education Fund, and Californians for Homeownership. As you are aware, the court recently ruled in these cases that the City violated the Housing Accountability Act ("HAA") by denying THDT's proposal to build 48 homes at 8041 Ellis Avenue, and the City will be required to reconsider the project consistent with the HAA.

We are eager to work in collaboration with the City to ensure that the project is approved, and encourage the City to reconsider the project in the spirit of cooperation. THDT is committed to providing a safe, high-quality development that will offer much needed housing and contribute positively to the Beach and Edinger Corridors Specific Plan area.

If the City chooses to continue litigating the matter, however, we wish to inform you of some of the obstacles the City will face. In short, if the City appeals this ruling, the City will likely be wagering a staggering sum of its residents' tax dollars on a very slim chance of success. Under the HAA, in order for the City to appeal the superior court's decision, it is required to post a bond representing the applicant's projected damages from the delay caused by the appeal. Gov. Code § 65589.5(m). In a recent HAA case, the court found that the City of Los Altos illegally denied a 15-unit apartment building. The city attempted to file a notice of appeal, but the superior court then required the City to post an appeal bond in the amount of \$7,000,000.00. (A copy of the court's order is attached). The City chose to withdraw the notice of appeal rather than post the bond, but the

Court still ordered the City to pay nearly \$500,000 in damages for the delay caused by the notice of appeal, plus attorney fees.^[1] In this case, THDT projects that its damages from the delay likely to be caused by an appeal will be in a very similar range to the \$7,000,000.00 ordered in Los Altos.

If the City appeals and loses, which is very likely, the entire bond amount will then be paid to the applicant as damages. In addition, if the City loses the appeal, the HAA requires the City to pay all of the petitioners' court costs and attorney fees for the entire litigation including the appeal. Gov. Code § 65589.5(k)(1)(A)(ii).

The City's odds on appeal are not good. The HAA has been amended numerous times in recent years to limit the ability of cities to deny housing projects like this one, and so far every final court decision addressing the HAA has favored the applicants/petitioners. In the recent case of *California Renters Legal Advocacy and Education Fund v City of San Mateo*, for example, the appellate court ruled that the HAA was constitutional as applied against charter cities, and then found that the charter City of San Mateo violated it in denying a 10-unit housing project. The City of San Mateo recently settled the case and agreed to pay the petitioners \$450,000 in attorney fees.^[2]

Keep in mind that the City has already incurred substantial costs on this case. To date, the City has incurred over \$80,000 in expert witness fees, thousands of dollars in court costs, and dozens of hours of staff time. In addition, pursuant to the HAA, the petitioners are entitled to recover court costs and attorney fees, which we estimate will match or exceed the \$80,000 the City has already paid for the expert reports.

Of course, if the City chooses to appeal, it will likely incur far more substantial costs than what it has already incurred. For that reason, we encourage the City to forego the appeal and work with the applicant to approve the project.

Very truly yours,

MILLER STARR REGALIA



Kenneth A. Stahl

Very truly yours,

CALIFORNIANS FOR HOMEOWNERSHIP



Matthew Gelfand
KAS:kli

Attachment: September 2, 2020 *Los Altos* Court Order

cc: Michael Gates, City Attorney [michael.gates@surfcity-hb.org]
Robin Estanslau, City Clerk [Robin.Estanislau@surfcity-hb.org]

^[1] https://www.losaltosonline.com/news/state-law-judges-order-forces-council-approval-of-5-story-project-for-downtown/article_b91e734d-e185-5ee3-a9ce-3567bc8dd814.html.

² https://www.smdailyjournal.com/news/local/san-mateo-won-t-appeal-housing-ruling/article_eb01606a-2d4b-11ec-9639-2bd0b5af5af9.html

Karen Irias | Miller Starr Regalia

Assistant to Kenneth A. Stahl

1331 North California Boulevard, Fifth Floor, Walnut Creek, CA 94596

t: 925.935.9400 | d: 925.942.4541 | f: 925.933.4126 | karen.iriass@msrlegal.com | www.msrlegal.com



**MILLER STARR
REGALIA**

MILLER STARR REGALIA CONFIDENTIAL COMMUNICATION

This electronic mail message and any attachments are intended only for the use of the addressee(s) named above and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not an intended recipient, or the employee or agent responsible for delivering this e-mail to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you received this e-mail message in error, please immediately notify the sender by replying to this message or by telephone. Thank you.

^[1] https://www.losaltosonline.com/news/state-law-judges-order-forces-council-approval-of-5-story-project-for-downtown/article_b91e734d-e185-5ee3-a9ce-3567bc8dd814.html.

^[2] https://www.smdailyjournal.com/news/local/san-mateo-won-t-appeal-housing-ruling/article_eb01606a-2d4b-11ec-9639-2bd0b5af5af9.html.



**MILLER STARR
REGALIA**

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrllegal.com

Kenneth A. Stahl
Direct Dial: 949-688-2980
ken.stahl@msrllegal.com

October 15, 2021

VIA E-MAIL

Mayor Kim Carr
Members of the City Council
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
E-Mail: City.Council@surfcity-hb.org
Kim.Carr@surfcity-hb.org
barbara.delgleize@surfcity-hb.org
erik.peterson@surfcity-hb.org
mike.posey@surfcity-hb.org
Dan.Kalmick@surfcity-hb.org
Natalie.Moser@surfcity-hb.org
Rhonda.Bolton@surfcity-hb.org
CFikes@surfcity-hb.org

Re: *California Renters Legal Advocacy & Education Fund, et al. v. City of Huntington Beach*, Orange County Superior Court Case No. 30-2020-01140855-CU-WM-CJC
Californians For Homeownership, Inc. v. City of Huntington Beach, Orange County Superior Court Case No. 30-2019-01107760-CU-WM-CJC

Dear Mayor Carr and Members of the City Council:

We write on behalf of the petitioners in the above-referenced cases, THDT Investment, California Renters Legal Advocacy and Education Fund, and Californians for Homeownership. As you are aware, the court recently ruled in these cases that the City violated the Housing Accountability Act ("HAA") by denying THDT's proposal to build 48 homes at 8041 Ellis Avenue, and the City will be required to reconsider the project consistent with the HAA.

We are eager to work in collaboration with the City to ensure that the project is approved, and encourage the City to reconsider the project in the spirit of cooperation. THDT is committed to providing a safe, high-quality development that will offer much needed housing and contribute positively to the Beach and Edinger Corridors Specific Plan area.

Mayor Kim Carr
Members of the City Council
City of Huntington Beach
October 15, 2021
Page 2

If the City chooses to continue litigating the matter, however, we wish to inform you of some of the obstacles the City will face. In short, if the City appeals this ruling, the City will likely be wagering a staggering sum of its residents' tax dollars on a very slim chance of success. Under the HAA, in order for the City to appeal the superior court's decision, it is required to post a bond representing the applicant's projected damages from the delay caused by the appeal. Gov. Code § 65589.5(m). In a recent HAA case, the court found that the City of Los Altos illegally denied a 15-unit apartment building. The city attempted to file a notice of appeal, but the superior court then required the City to post an appeal bond in the amount of \$7,000,000.00. (A copy of the court's order is attached). The City chose to withdraw the notice of appeal rather than post the bond, but the Court still ordered the City to pay nearly \$500,000 in damages for the delay caused by the notice of appeal, plus attorney fees.¹ In this case, THDT projects that its damages from the delay likely to be caused by an appeal will be in a very similar range to the \$7,000,000.00 ordered in Los Altos.

If the City appeals and loses, which is very likely, the entire bond amount will then be paid to the applicant as damages. In addition, if the City loses the appeal, the HAA requires the City to pay all of the petitioners' court costs and attorney fees for the entire litigation including the appeal. Gov. Code § 65589.5(k)(1)(A)(ii).

The City's odds on appeal are not good. The HAA has been amended numerous times in recent years to limit the ability of cities to deny housing projects like this one, and so far every final court decision addressing the HAA has favored the applicants/petitioners. In the recent case of *California Renters Legal Advocacy and Education Fund v City of San Mateo*, for example, the appellate court ruled that the HAA was constitutional as applied against charter cities, and then found that the charter City of San Mateo violated it in denying a 10-unit housing project. The City of San Mateo recently settled the case and agreed to pay the petitioners \$450,000 in attorney fees.²

Keep in mind that the City has already incurred substantial costs on this case. To date, the City has incurred over \$80,000 in expert witness fees, thousands of dollars in court costs, and dozens of hours of staff time. In addition, pursuant to the HAA, the petitioners are entitled to recover court costs and attorney fees, which we estimate will match or exceed the \$80,000 the City has already paid for the expert reports.

¹ https://www.losaltosonline.com/news/state-law-judges-order-forces-council-approval-of-5-story-project-for-downtown/article_b91e734d-e185-5ee3-a9ce-3567bc8dd814.html.

² https://www.smdailyjournal.com/news/local/san-mateo-won-t-appeal-housing-ruling/article_eb01606a-2d4b-11ec-9639-2bd0b5af5af9.html.

Mayor Kim Carr
Members of the City Council
City of Huntington Beach
October 15, 2021
Page 3

Of course, if the City chooses to appeal, it will likely incur far more substantial costs than what it has already incurred. For that reason, we encourage the City to forego the appeal and work with the applicant to approve the project.

Very truly yours,

MILLER STARR REGALIA



Kenneth A. Stahl

Very truly yours,

CALIFORNIANS FOR HOMEOWNERSHIP



Matthew Gelfand

KAS:kli

Attachment: September 2, 2020 *Los Altos* Court Order

cc: Michael Gates, City Attorney [michael.gates@surfcity-hb.org]
Robin Estanslau, City Clerk [Robin.Estanislau@surfcity-hb.org]

Attachment 1

FILED

SEP - 2 2020

Clerk of the Court
Superior Court of CA County of Santa Clara
BY A. NAKAMOTO DEPUTY

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,

1 subdivision (m) came on for hearing before the Honorable Helen E. Williams on August 21,
2 2020, at 9:00 a.m. in Department 22 of the court. Daniel R. Golub and Genna Yarkin of Holland
3 & Knight appeared for petitioner and project applicant 40 Main Street Offices, LLC (Developer);
4 Emily L. Brough of Zacks, Freedman & Patterson appeared for petitioners California Renters
5 Legal Advocacy & Education Fund, San Francisco Bay Area Renters Federation, Victoria
6 Pierce, and Sonja Trauss (collectively, Renters); Arthur J. Friedman of Sheppard Mullin Richter
7 & Hampton LLP appeared for respondents, the City. The Court having carefully considered the
8 papers filed by the parties, the matters of which the Court takes judicial notice, the arguments of
9 counsel, and the applicable law, Court finds and orders as follows.

10 Renters and Developer (collectively, petitioners) alleged in their ultimately consolidated
11 petitions for relief in mandate that the City had unlawfully denied Developer's building project
12 proposal in violation of the applicable streamlining statute (SB 35, Govt. Code, § 65913.4), the
13 Housing Accountability Act (Govt. Code, § 65589.5), and the Density Bonus Law (Govt. Code,
14 § 65915). Based on these allegations, petitioners each sought writs of mandate compelling the
15 City to approve Developer's streamlined application for development.

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

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

1 seek to have the Court set the amount of the bond "to the benefit of the [petitioner] if the
2 [petitioner] is the project applicant" as required by the Housing Accountability Act. (Govt. Code,
3 § 65589.5, subd. (m).) Nor did the City otherwise attempt by agreement or otherwise to post a
4 bond or undertaking on appeal, which bond is expressly required under these circumstances.
5 (*Ibid.*) Accordingly, at least to the extent the Judgment and the commands of the writ adjudicate
6 and direct relief under the Housing Accountability Act, those adjudications and directives do not
7 appear to be currently stayed on appeal and the City has not complied with them.

8 As a consequence, Developer, as project applicant, has moved the Court to set the
9 amount of the bond on appeal to be posted by the City under Government Code section 65589.5,
10 subdivision (m). Developer ultimately requests that the bond be set in the amount of
11 \$13,836,324.00, which amount it argues is supported by the Declarations and Supplemental
12 Declarations it filed in support of the motion and which include expert opinion testimony on
13 claimed monetary impacts or consequential damages Developer is asserted to already have
14 sustained and is likely to sustain during the pendency of appeal, assuming the Judgment is
15 ultimately affirmed. (See Declarations of Gary Herbert and Theodore G. Sorenson filed July 30,
16 2020, and Supplemental declarations of Gary Herbert and Theodore G. Sorenson filed August
17 14, 2020.) In this regard, Developer contends that the period of appeal—during which it is likely
18 to sustain such impacts or damages—should be estimated at 30 months for purposes of setting
19 the bond amount. (See Declaration of Daniel R. Golub.)

20 The City, while now seeming to acknowledge that such a bond is statutorily required to
21 stay the Judgment on appeal, challenges the admissibility of large swaths of Developer's
22 declarations offered in support of the motion.¹ The City further contends that 17 months is the
23

24 ¹ In this regard, the City has submitted 36 pages of objections to Developer's proffered
25 evidence with multiple bases of objection set out for each portion of challenged testimony but
26 just one box for the Court to indicate its single ruling on the multiple bases of objection
27 interposed. While the Court understands the need for a party to preserve evidentiary objections,
28 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.

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

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

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

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

19 In connection with this motion, and as noted, the Court grants Developer’s request for
20 judicial notice of the Assembly Floor Analysis of amendments to Government Code section
21 65 offered as Exhibit B to the Declaration of Daniel R. Golub. The Court denies the same request
22 with respect to Exhibit A—the Los Altos press release dated July 8, 2020—on the basis of lack
23 of relevance.³

24
25 ² Developer’s motion and this Order setting the amount of bond on appeal do not take
26 into account costs of suit or an award of attorney fees for which petitioners have now moved to
27 be included as part of the Judgment. It may be that a second bond on appeal will be required to
28 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

1 The Court next turns to the City's many objections to evidence. First, the Court denies
2 the City's wholesale request to strike the Supplemental Declarations of Theodore G. Sorenson
3 and Gary Herbert filed with Developer's reply brief. These declarations are merely responsive to
4 the City's objections to evidence interposed with its opposition to the motion; the Supplemental
5 Declarations raise no new theories or arguments and they may be viewed as supplying
6 information that was claimed to be foundational gaps in what was offered in the original
7 Declarations filed with the moving papers on July 30, 2020, just as permissible curative opinion
8 testimony would be allowed in live testimony in court to overcome evidentiary objections. The
9 City offers no opinion evidence of its own as to matters relevant to the bond amount and it leaves
10 many factual premises of the Developer's proffered expert opinions undisturbed. Further, many
11 of the objections do not technically go to admissibility of evidence but rather to its weight. And
12 the City shows no prejudice. (*Professional Engineers in California Government v. Brown* (2014)
13 229 Cal.App.4th 861, 874-875 [trial court retains discretion to consider evidence, including that
14 submitted on reply]; *Savea v. YRC Inc.* (2019) 34 Cal.App.5th 173, 182 [supplemental request
15 for judicial notice submitted on reply raised no new arguments or theories and was merely
16 responsive to opposition to first request].) Finally, in some sense, it is the City's burden as
17 appellant under Government Code section 65589.5, subdivision (m) to perfect the required stay
18 on appeal by posting the mandatory bond in an amount to be set by the Court. Yet the City took
19 no steps to initiate that setting, forcing Developer to pursue this motion as the moving party. For
20 all these reasons, the Court denies the City's motion to strike the Supplemental Declarations.

21 To the extent the City objected to evidence from any source of Developer's claimed "past
22 damages," meaning those claimed to have been suffered between denial of project approval in
23

24
25 show in tables and graphs generated from immediately prior years the time from notice of appeal
26 to the filing of opinion in civil cases for all six of the State's District Courts of Appeal and the
27 Summary of Filings and Dispositions. Taking into account the time periods shown for the Sixth
28 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.

1 2019 and the time in July 2020 when the City was supposed to have complied with the Judgment
2 and writ, the Court sustains those objections on the basis of relevance. This period of time is
3 outside the relevant period for purposes of a bond or undertaking on appeal from the Judgment
4 entered in May 2020 and directing compliance by the City within 60 days. The Court likewise
5 sustains the City's objections to evidence from any source in support of dollar amounts
6 representing the claimed risk of a "black swan" economic-loss event that could entirely wipe out
7 Developer's project during the life of the appeal, on the basis that these amounts and opinions on
8 the claimed risk are speculative and conclusory, and based on conjecture more than reliable,
9 accepted, or established facts.

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

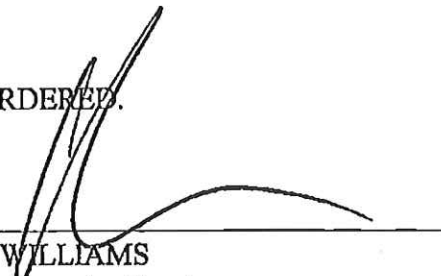
14 The balance of the City's evidentiary objections are overruled, specifically the
15 foundational, hearsay, and "best evidence" objections to evidence that is not already excluded
16 per the above rulings. For foundational purposes as to portions of the declarations not already
17 excluded above, the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

1 *Motor Vehicles* (2009) 172 Cal.App.4th 974, 994 [discussing relationship between secondary
2 evidence rule and hearsay rule]; *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018)
3 29 Cal.App.5th 1, 14.) Of import here too is that the secondary evidence rule is not applicable to
4 the extent testimony pertains to operative facts and not the contents of a writing, even if a writing
5 exists as an alternate source of the same facts. To the extent the City here objects to financial
6 information contained in documents and referenced in declarations, this information need not
7 necessarily be proven through writings memorializing these operative facts. (See, e.g., *Crinella*
8 *v. Northwestern Pac. R. Co.* (1927) 85 Cal.App. 440, 446 [secondary evidence rule not
9 implicated].)

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

14
15 IT IS SO ORDERED.

16
17 Date: September 2, 2020

18 
19 _____
20 HELEN E. WILLIAMS
21 Judge of the Superior Court
22
23
24
25
26
27
28