

1 LESLIE J. GIRARD (SBN 098906)

Filing fee exempt: Gov. Code § 6103

Acting County Counsel

2 WENDY S. STRIMLING (SBN 136243)

Assistant County Counsel

3 WILLIAM M. LITT (SBN 166614)

Deputy County Counsel

4 OFFICE OF THE MONTEREY COUNTY COUNSEL

168 W. Alisal Street, Third Floor

5 Salinas, CA 93901-2439

Telephone: (831) 755-5045

6 Facsimile: (831) 755-5283

Email: strimlingw@co.monterey.ca.us

7
8 Attorneys for Respondents COUNTY OF MONTEREY et al.

9 JAMES G. MOOSE (SBN 119374)

NATHAN O. GEORGE (SBN 303707)

10 REMY MOOSE MANLEY, LLP

555 Capitol Mall, Suite 800

11 Sacramento, CA 95814

12 Telephone: (916) 443-2745

Email: jmoose@rmmenvirolaw.com

13 Attorneys for Real Party in Interest Rancho Cañada Ventures et al.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF MONTEREY

16 CARMEL VALLEY ASSOCIATION, INC., a
17 California nonprofit corporation,

Case No. 17CV000131

18 Petitioner,

**STATUS REPORT TO SUPERIOR COURT
REGARDING PENDING APPEALS AND
SECOND REVISED DRAFT
ENVIRONMENTAL IMPACT REPORT**

19 vs.

20 COUNTY OF MONTEREY, BOARD OF
21 SUPERVISORS OF THE COUNTY OF
MONTEREY, and DOES 1 THROUGH 15,

Hon. Lydia M. Villarreal

Dept. 1

22 Respondents,

Date Action Filed: January 12, 2017

Judgment Entered: July 6, 2018

23
24 RANCHO CAÑADA VENTURE, LLC;
25 CARMEL DEVELOPMENT COMPANY,
26 R. ALAN WILLIAMS, and DOES 16
THROUGH 30, inclusive

27 Real Party in Interest.

1 **INTRODUCTION**

2 Respondents COUNTY OF MONTEREY and BOARD OF SUPERVISORS OF THE
3 COUNTY OF MONTEREY (County) and Real Parties in Interest RANCHO CAÑADA VENTURE,
4 LLC (RCV) et al. are jointly submitting this Status Report to keep the Court informed of the manner in
5 which the various Parties have responded, and continue to respond, to the
6 Amended Judgment (Judgment) and Peremptory Writ of Mandate (Writ) that the Court issued in this
7 case in July 2018. Although the County and RCV are aware that they are under no obligation to file a
8 Status Report of this kind, they have taken the unusual step of doing so in order to be completely
9 transparent with the court, with Petitioner CARMEL VALLEY ASSOCIATION (CVA), and with
10 members of the public who are interested in the proposed project, Rancho Cañada Village, in light of
11 certain recent events relating to the proposed project.

12 As will be explained below, the County has recently embarked on the preparation of what it is
13 intending to call the Second Revised Draft Environmental Impact Report (EIR) for the Project. The
14 County is doing so notwithstanding the facts that, in the pending appeals, RCV is currently defending
15 the original Final EIR, and the County is seeking reversal on a separate issue unrelated to the adequacy
16 of that original EIR. Because this situation is somewhat unusual, and could easily lead to
17 misunderstandings, the County and RCV determined that it was appropriate to prepare an explanatory
18 document of this kind. The County and RCV are aware that, although this Court’s jurisdiction is limited
19 during the pendency of the appeals in this case, some of the issues discussed herein may be relevant to
20 future proceedings in this Court.

21 **DISCUSSION**

22 **A. Issues Addressed in Trial Court**

23 As the Court will recall, CVA included a variety of claims in its Petition for Writ of Mandamus
24 and subsequent briefing. Invoking the California Environmental Quality Act (CEQA) (Pub. Resources
25 Code, § 21000 et seq.), CVA alleged that the County’s Final EIR was deficient in two ways: first, the
26 Project Description was inaccurate; and second, the inaccurate Project Description caused the analysis

1 of alternatives to be deficient. More specifically, CVA argued that the Project Description in the June
2 2016 Revised Draft EIR (RDEIR) violated CEQA because it described both the proposed 281-unit
3 Project and the 130-unit Alternative in comparable levels of detail. CVA argued that, by analyzing the
4 impacts of the 130-unit Alternative and the Project in equivalent level of detail, the County impeded
5 public participation and “created confusion and misunderstanding.”

6 CVA also attacked the County’s approval of the Project by contending that there was no
7 substantial evidence to support the Board’s adoption of “Finding Number 18,” by which the Board of
8 Supervisors (Board) found that “unusual circumstances” justified a modification to the mix of
9 affordability set forth in section 18.40.110.A of the Monterey County Code (Section 18.40.110 is part
10 of the Inclusionary Housing Ordinance, which is codified at Chapter 18.40 of the County Code).

11 CVA’s lawsuit also included additional claims directed solely at the County, independent of the
12 Board’s approval of the Project. First, CVA argued that the County had violated Government Code
13 section 65860, subdivision (c), by failing to update the County’s affordable housing ordinance within a
14 “reasonable time” after amending the General Plan in 2010. That statute provides that “[i]n the event
15 that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan,
16 or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it
17 is consistent with the general plan as amended.”

18 Second, CVA also argued that the County had violated its own 2010 General Plan by failing to
19 establish a Development Evaluation System (DES) by which to assess the potential merits of new
20 development projects proposed outside of certain priority development areas.

21 This Court ruled in favor of CVA with respect to its CEQA claims, its challenge to Finding 18,
22 and its claim that the County had violated Government Code section 65860, subdivision (c). The Court
23 ruled in the County’s favor with respect to CVA’s claim that the County violated its General Plan by
24 not establishing the DES in a timely manner.

1 decision regarding the County policy requiring the creation of DES system. Additional briefs remain to
2 be filed, but their due dates have been delayed by various orders from the Court of Appeal extending
3 deadlines due to challenges created by the COVID-19 crisis.

4
5 **D. State Policy Directive for Local Governments to Approve More Housing**

6 In 2018 and 2019, while the appeal process was unfolding, the California Legislature passed a
7 number of statutes addressing what the Legislature considered to be a statewide housing crisis. Two of
8 the most important pieces of legislation are worth mentioning here. In 2018, the Legislature
9 substantially amended the Housing Accountability Act (Stats. 2018, ch. 243), which, among many
10 other things, added the following factual findings, among many others, to Government Code section
11 65589.5, subdivision (a)(1):

12 (A) The lack of housing, including emergency shelters, is a critical problem that threatens
13 the economic, environmental, and social quality of life in California.

14 (B) California housing has become the most expensive in the nation. The excessive cost
15 of the state’s housing supply is partially caused by activities and policies of many local
16 governments that limit the approval of housing, increase the cost of land for housing, and
require that high fees and exactions be paid by producers of housing.

17 (C) Among the consequences of those actions are discrimination against low-income and
18 minority households, lack of housing to support employment growth, imbalance in jobs
and housing, reduced mobility, urban sprawl, excessive commuting, and air quality
19 deterioration.

20 (D) Many local governments do not give adequate attention to the economic,
21 environmental, and social costs of decisions that result in disapproval of housing
development projects, reduction in density of housing projects, and excessive standards
22 for housing development projects.

23 This same legislation stated that “[a]ccording to reports and data, California has accumulated an
24 unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units
25 annually to keep pace with growth through 2025,” and that “California’s overall homeownership rate is
26 at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as

1 well as in the supply of housing per capita. Only one-half of California's households are able to afford
2 the cost of housing in their local regions.” (Gov. Code, § 65589.5, subds. (a)(2)(D), (a)(2)(E).)

3 In 2019, the Legislature enacted the California Housing Crisis Act of 2019 (Stats.2019, c. 654, §
4 2), which included the legislative finding that “[t]he housing crisis harms families across California and
5 has resulted in all of the following:

6 (A) Increased poverty and homelessness, especially first-time homelessness.

7 (B) Forced lower income residents into crowded and unsafe housing in urban areas.

8 (C) Forced families into lower cost new housing in greenfields at the urban-rural
9 interface with longer commute times and a higher exposure to fire hazard.

10 (D) Forced public employees, health care providers, teachers, and others, including
11 critical safety personnel, into more affordable housing farther from the communities they
12 serve, which will exacerbate future disaster response challenges in high-cost, high-
congestion areas and increase risk to life.

13 (E) Driven families out of the state or into communities away from good schools and
14 services, making the ZIP Code where one grew up the largest determinate of later access
15 to opportunities and social mobility, disrupting family life, and increasing health
problems due to long commutes that may exceed three hours per day.”

16
17 **E. The County’s Decision to Revise the EIR Despite Pending Appeals and Cross-Appeal**

18 While the appeals and cross-appeals continued, RCV approached the County about “fixing” the
19 EIR pursuant to this Court’s Judgment and Writ even while the appeals and cross-appeals remained
20 pending. In making this request, RCV emphasized that, as is evident from the above-referenced
21 legislation, the Project would directly address the State’s need for more housing. RCV brought to the
22 attention of County Counsel case law authorizing a respondent agency to “voluntarily comply” with a
23 superior court writ while a real party in interest defended on appeal the agency action that gave rise to
24 the writ.
25
26

1 After confirming through legal research that such an undertaking was permissible, the County
2 agreed to undertake preparation of a revised EIR, concluding that such a document might be completed
3 before resolution of the pending appeals and cross-appeals.

4 Although the statewide housing crisis provided some of the motivation for RCV to ask the
5 County to prepare a revised EIR while the appeals and cross-appeals are still pending, the Board of
6 Supervisors will, as it must under CEQA, exercise its independent judgment and analysis with respect
7 to the Second Revised EIR that is under preparation.

8
9 **F. Legal Authority for Preparing New EIR While Appeals are Pending**

10 The County and RCV are aware that, in general, where a public agency, as a respondent in a
11 writ of mandate action, acts in response to trial court’s judgment and peremptory writ by “curing” the
12 legal infirmity giving rise to the judgment and writ, the agency waives its right to appeal. (*Bruce v.*
13 *Gregory* (1967) 65 Cal.2d 666, 671.) Faced with an adverse trial court ruling on a particular claim or
14 cause of action, a respondent agency is thus faced with a choice: either appeal or comply. Where the
15 agency complies, an appeal might be moot. “The rationale is, ‘No purpose would be served in directing
16 the doing of that which has already been done.’” (*Muller v. Municipal Court* (1956) 146 Cal.App.2d
17 231, 232.) “[T]he remedy of mandamus will not be employed where the respondents show that they are
18 willing to perform the duty without the coercion of the writ.” (*George v. Beaty* (1927) 85 Cal.App. 525,
19 529.)

20 The law is clear, however, that a respondent agency may take action in response to a trial court
21 judgment and writ while a real party in interest appeals. For example, in *Save Our Residential*
22 *Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745 (*SORE*), the trial court found
23 problems with an EIR and then granted an award of attorneys’ fees to the prevailing petitioners. While
24 the applicant real party in interest, Rossmoor, appealed both the judgment on the merits and the fee
25 award, the respondent agency complied with the trial court’s peremptory writ by preparing and
26 certifying a new supplemental EIR, which the trial court found adequate after the petitioners filed a new

1 lawsuit. (*Id.* at pp. 1748-1749.) The Court of Appeal did not reach the merits of the real parties’ appeal
2 until after the second CEQA lawsuit was on appeal.

3 The Court of Appeal *rejected* the notion that the respondent agency’s voluntary compliance
4 with the original peremptory writ had rendered the real party’s appeal moot:

5 Even if this appeal were otherwise moot as a result of the City’s actual compliance with
6 the writ’s mandate, the trial court’s award of attorney fees to SORE pursuant to Code of
7 Civil Procedure section 1021.5 would preclude us from dismissing the appeal. Because
8 the award of attorney fees depends on the propriety of the trial court’s ruling on the
9 merits of the action, the appeal is not moot. [Citations.]

10 Finally, even if the City has waived its right to appeal the issuance of the writ by
11 complying with its directives, the City is powerless to waive Rossmoor’s right to appeal.
12 [Citations.]

13 (9 Cal.App.4th at pp. 1750-1751.)

14 Thus, as long as a real party in interest pursues appeals of the merits of a CEQA case and is
15 resisting attempts to pay attorneys’ fees to petitioners who prevailed in the trial court, a respondent
16 agency may act on the trial court’s writ, thereby “curing” what was wrong with the CEQA document,
17 without rendering the real party’s appeals moot.

18 Here, CVA filed a motion for attorneys’ fees pursuant to Code of Civil Procedure section
19 1021.5, but subsequently entered into a stipulation with RCV and the County to defer the definitive
20 resolution of the issue of attorneys’ fees until after the appeals and cross-appeals are resolved. Under
21 the terms of the stipulation, RCV has agreed to a set amount of attorneys’ fees to CVA if CVA’s
22 position after the appeal is no different than it was at the end of the superior court proceeding. The
23 agreement is clear, however, that RCV intends to pursue its appeal in the hope of avoiding any liability
24 for attorneys’ fees.

25 In *Protect Niles v. City of Fremont* (2018) 25 Cal.App.4th 1129, 1140 (*Protect Niles*), the court
26 addressed issues similar to those addressed in *SORE, supra*. In *Protect Niles*, the trial court issued a
27 judgment and writ setting aside a mitigated negative declaration and related approvals for a proposed
28 residential complex, and ordered the respondent agency to prepare an EIR. After the real party in
interest appealed and the City of Fremont started preparing an EIR, the petitioner made a motion to
dismiss the appeal on mootness grounds. The Court of Appeal was unpersuaded:

1 The *City* has voluntarily complied with the trial court’s directive to prepare an EIR, but
2 the *City* is not an appellant in this case. The appellant, Valley Oak, was not commanded
3 to take any particular action by the trial court and thus cannot have voluntarily complied
4 with the trial court’s order. Valley Oak’s alleged submission of a revised Project
5 application is not tantamount to withdrawal of its original Project application or
6 abandonment of its legal position in this appeal that the original application was
7 properly approved by the *City* without preparation of an EIR. Dismissal of an appeal is
8 discretionary[.] [Citations.] We decline to do so at this late date. Moreover, the appeal is
9 not truly “moot.” Were Valley Oak to prevail in this appeal, the *City*’s 2015 Project
10 approval would be restored regardless of the status of the revised application and EIR.

11 (*Id.* at p. 1140 [italics original; footnote deleted].)

12 Two important points can be drawn from these passages from *Protect Niles*. First, as in *SORE*, a
13 real party in interest may pursue an appeal on its merits even while the respondent agency “voluntarily
14 complie[s]” with the trial court’s judgment and writ. And second, a real party in interest, even while
15 pursuing an appeal, may participate actively in the respondent’s “voluntary compliance efforts.” (*Ibid.*)
16 As the court noted, the applicant submitted a “revised Project application,” which the court said was
17 “not tantamount to withdrawal of its original Project application or abandonment of its legal position in
18 this appeal that the original application was properly approved by the *City* without preparation of an
19 EIR.” (*Ibid.*)

20 As emphasized earlier, the County has *not* appealed the superior court’s adverse CEQA rulings,
21 but instead has limited its appeal to the Government Code issue that is independent of the project issues
22 on appeal. Under the complex circumstances described above, the County is free under *SORE* and
23 *Protect Niles* to voluntarily comply with portions of the superior court’s judgment and writ addressing
24 CEQA issues without prejudice to RCV’s pursuit of its appeal on those same issues. Consistent with
25 the *Protect Niles* decision discussed above, the County is doing so on a voluntary basis, and with the
26 recognition that, if RCV prevails on its CEQA appeal, the County’s December 2016 project approvals
27 will stand.

28 Because the appeals have stayed the effect of the existing Judgment in this case, the County has
not filed any return to this Court’s Writ. This Status Report is analogous to, though not a substitute for,
an initial return in that the present submission informs the Court of actions recently taken by the
County in response to the Writ. The County is hopeful that this Court will appreciate being informed of
these actions.

1 CONCLUSION

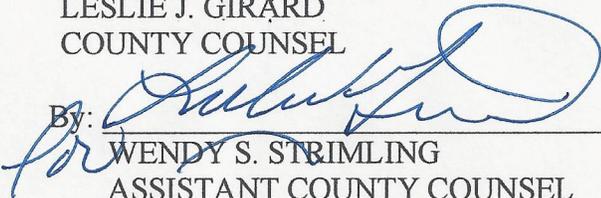
2 As explained earlier, the County and RCV understand that the submission of this document was
3 not required and is somewhat unusual. Though it serves a purpose similar to that of an initial return, it
4 is not styled as such, given the pending appeals. As the preceding discussion explains, the County and
5 RCV concluded that filing this Status Report would be helpful to both the Court and CVA in light of
6 the complexities associated with the current posture of the litigation and the current status of the
7 proposed project. The County and RCV wanted this Court, which is surely aware of the appeals, to hear
8 about the revised EIR from them rather from some other source. The County and RCV also welcomed
9 the opportunity, through this filing, to explain the current situation to CVA.

10 This submission is not intended to elicit a response from CVA. The County and RCV are not
11 requesting any relief, or seeking any other action from this Court. This filing is purely informational. it
12 remains possible that all three Parties will be back before this Court in the future in connection with a
13 future return.

14 Respectfully submitted,

15 Dated: May 7, 2020

16 LESLIE J. GIRARD
17 COUNTY COUNSEL

18 By: 

19 WENDY S. STRIMLING
20 ASSISTANT COUNTY COUNSEL
21 Attorneys for Respondents
22 COUNTY OF MONTEREY et al.

23 Dated: May 7, 2020

24 REMY MOOSE MANLEY, LLP

25 By: 

26 JAMES G. MOOSE
27 Attorneys for Real Parties in Interest
28 RANCHO CAÑADA VENTURE, LLC et al.

3 **PROOF OF SERVICE**

4 I, Kaitlyn E. Conover, am employed in the County of Sacramento. My business address is 555
5 Capitol Mall, Suite 800, Sacramento, California 95814, and email address is
6 kconover@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled
7 action.

8 I am familiar with Remy Moose Manley, LLP's practice for collection and processing mail
9 whereby mail is sealed, given the appropriate postage and placed in a designated mail collection area.
10 Each day mail is collected and deposited in a USPS mailbox after the close of each business day.

11 On May 8, 2020, I served the following:

12 **STATUS REPORT TO SUPERIOR COURT REGARDING PENDING APPEALS AND**
13 **SECOND REVISED DRAFT ENVIRONMENTAL IMPACT REPORT**

- 14 **BY FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope,
15 with postage fully prepaid, addressed to the following person(s) or representative(s) as listed
16 below, and placed for collection and mailing following ordinary business practices.
- 17 **BY OVERNIGHT DELIVERY** by causing a true copy thereof to be placed in an envelope or
18 package designated by the express service carrier with delivery fees paid or provided for,
19 addressed to the person(s) or representative(s) as listed below, and deposited in a dropbox or
20 other facility regularly maintained by the express service carrier.
- 21 **BY ELECTRONIC TRANSMISSION OR EMAIL** by causing a true copy thereof to be
22 electronically delivered to the following person(s) or representative(s) at the email address(es)
23 listed below. I did not receive any electronic message or other indication that the transmission
24 was unsuccessful.
- 25 **BY ELECTRONIC TRANSMISSION** by causing a true copy thereof to be electronically
26 delivered to the following person(s) or representative(s) at the email address(es) listed below,
27 via the Court's approved electronic filing service provider. I did not receive any electronic
28 message or other indication that the transmission was unsuccessful.

29 **SEE ATTACHED SERVICE LIST**

30 I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of
31 May 2020, at Sacramento, California.

32 

33 Kaitlyn E. Conover

1 *Carmel Valley Associations, Inc. v. County of Monterey, et al.*
2 Monterey County Superior Court Case No. 17CV000131

3 **SERVICE LIST**

<p>4 William P. Parkin 5 Yuchih Pearl Kan 6 WITTWER PARKIN LLP 7 147 S. River Street, Suite 221 8 Santa Cruz, CA 95060 9 Telephone: (831) 429-4055 10 Facsimile: (831) 429-4057 11 E-mail: <u>wparkin@wittwerparkin.com</u></p>	<p>Attorneys for Petitioner <i>Carmel Valley Associations, Inc.</i></p> <p>VIA EMAIL</p>
<p>12 LESLIE J. GIRARD 13 Acting County Counsel 14 WENDY S. STRIMLING 15 Senior Deputy County Counsel 16 WILLIAM M. LITT 17 Deputy County Counsel 18 County of Monterey 19 168 W Alisal Street, 3rd Floor, 20 Salinas, CA 93901-2680 21 Phone Number: (831) 755-5115 22 Fax Number: (831) 757-5792 23 Email: <u>mckeecj@co.monterey.ca.us</u></p>	<p>Attorney for Respondents County of Monterey, et al.</p> <p>VIA EMAIL</p>