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File 3053.2

**Via Hand Delivery**

Sue Chang, Senior City Planner  
Jimmy C. Liao, City Planner  
Environmental Review Section  
Department of City Planning  
200 N. Spring Street, 7th Floor  
Los Angeles, CA 90012-4801

**Re: Final EIR No. ENV-1999-3251-EIR**  
**Project Title: Mountaingate Project**  
**State Clearinghouse No. 2003071197**  
**Testing Tentative Tract Map No. 53072**

Dear Ms. Chang and Mr. Liao:

This letter supplements our April 7, 2005, letter written on behalf of the Canyon Back Alliance and the Upper Mandeville Canyon Property Owners' Association, objecting to the Final EIR for the above-referenced Mountaingate development project.

The developer's apparent plan is to realign, gate and privatize Canyonback Trail as it passes through the Canyonback Ridge project site. This has triggered great public concern. More than 250 protest letters have been sent to the Planning Department in the past month.<sup>1</sup> The public strongly opposes these heavy-handed efforts to take parkland trails that have been enjoyed by the public for decades.

This is an extreme case. The public already has a vested right of access to the Canyonback Trail, including the section along the ridgeline through the developer's property. This section of the trail has been enjoyed by the public since at least the 1940's –

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<sup>1</sup> Exhs. 127 (Protest Letters), and 128 (letters from Brentwood Community Council and Federation of Hillside and Canyon Associations). This recent onslaught of opposition is in addition to the wide-spread public opposition already on record. *Canyon Back Alliance/UMCA letter of April 7, 2005 ("April 7, 2005 Letter")*, pages 45-46 (citing Exhibits).

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continuously and without limitation or any contradicting claim of right. But this long-established history of recreational use is completely ignored in the EIR, as if the project's adverse impact on recreational use is not subject to CEQA. But if that is the claimed justification for ignoring the project's impact on the recreational use and enjoyment of Canyonback Trail, it is legally baseless. The failure to address the project's likely substantial, adverse impact on the recreational use<sup>2</sup> and aesthetic enjoyment<sup>3</sup> of the trail requires completion of the Supplemental EIR process before any further planning proceeds.

## I. INTRODUCTION

The developer's apparent plan is to "realign" the public trail by moving it off the ridgeline and onto a private road passing through a gated enclave – which would inevitably be guarded by private security guards intent on discouraging public use of the trail. The assumption seems to be that the developer has a "right" to realign and privatize the trail, without considering the long history of public use and the impact on this recreational enjoyment of the public parklands.

*First*, the plan to realign Canyonback Trail is independently actionable – if approved by the City. The public has a *vested* right of access to the existing ridgeline trail based on its long-established and continuous use and enjoyment of the trail and the scenic views afforded by its ridgeline location. But even *apart* from that right, CEQA demands careful EIR scrutiny of the project's impact on the public's recreational use of the trail, whether that use achieves the status of vested right or not. The developer's plan to "realign" the public trail off the scenic ridgeline and through the private, gated enclave substantially degrades the long-enjoyed public use. This clear negative impact is improperly ignored in the EIR.

*Second*, moving the trail into a gated enclave will impair the quality of public use. The architecture of exclusion naturally repels the uninvited public. And it creates a structure for inhibiting the few who are not repelled by the gates alone. Security guards on private streets within gated walls are far more inhibiting and often over-zealous than along open public streets. This type of power is frequently abused, even when the public has a legal right of

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<sup>2</sup> *Gentry v. City of Murietta*, 36 Cal. App. 4th 1359, 1417 (1995); *Baldwin v. City of Los Angeles*, 70 Cal. App. 4th 819, 842 (1999).

<sup>3</sup> *Ocean View Estates Homeowners Assoc., Inc. v. Montecito Water Distr.*, 116 Cal. App. 4th 396, 401 (2004); Guidelines, App. G, § (I)(a), (c).

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entry.<sup>4</sup> The plan to move the trail onto a private, gated road thereby degrades the quality of public access on public parkland trails.

None of these adverse recreational effects are considered in the EIR—though CEQA requires a full description of the project’s environmental setting, its potentially adverse effects, and ways to avoid or mitigate the project’s substantial, adverse effects. These defects can *only* be cured through a Supplemental EIR addressing the project’s impact on recreational use.<sup>5</sup>

***CEQA MANDATES THE FOLLOWING:***

(1) *A Supplemental EIR addressing the project’s impact on recreational use of the trails must be prepared and circulated for public comment.*

(2) *The Supplemental EIR must consider the feasibility of leaving the trail in its historic location – along the ridgeline and outside of the proposed gated enclave.* This mitigation would require the developer to remove the residence now plotted on Lot 28 so that the Canyonback Trail can remain in its historic and current location, outside the planned gated enclave – thereby minimizing the project’s adverse impact on the public’s long-established recreational use.

(3) An *alternative* mitigation option that must be analyzed in the Supplemental EIR is to *require that the road be made a public street.* This option would have a greater adverse impact than the first, but must be assessed in the Supplemental EIR *if* the first mitigation option is determined to be infeasible – after a thorough Supplemental EIR analysis. The benefit of requiring that the road be dedicated as a public street is that it could not be privatized or gated as long as it is used by the public for recreational purposes.

(4) *The Supplemental EIR must analyze the project’s impact on the recreational use of the Mount St. Mary’s Fire Trail – a topic that was completely ignored in the EIR.*

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<sup>4</sup> April 7, 2005 Letter, Exh. 10, p. 2 (letter from Santa Monica Mountains Conservancy), and Exh. 18 (article explaining HOA’s intimidation of trail users despite right of access).

<sup>5</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Distr. Ag. Assoc.*, 42 Cal. 3d 929, 936 (1986).

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Finally, it is critical that the entire planning process *cease* until the Supplemental EIR process is completed. Otherwise, the City's approval of the Tract Map would create vested rights eliminating essential mitigation options.<sup>6</sup>

## II. LEGAL ANALYSIS

### A. The Project Impairs Recreational Access.

#### 1. A strategic decision was made to ignore public access.

The EIR's failure to describe (1) the public's long-standing recreational use of the Canyonback Trail and (2) ways to avoid or minimize the project's impairment of recreational trail use renders the EIR irremediably deficient. The plan to sever consideration of the project's adverse impact on recreational use was deliberate. As early as November 2000, 4½ years before the Final EIR was circulated, the decision was made to ignore public access: "The access will just be changed. That will be negotiated . . . at a later time." "It was agreed this was not an issue right now."<sup>7</sup> By the time the Final EIR was circulated on February 22, 2005, there was still no publicly-disclosed plan for solving the glaringly obvious access problem.

This severance of the public-access problem from the EIR process minimizes the range of potential mitigation options. That is precisely why CEQA prohibits the severance of reasonably foreseeable project impacts. Here, the two most effective mitigation measures would be eliminated if the proposed Vesting Tract Map is approved without first completing the Supplemental EIR process.

#### 2. The two most important mitigation measures must be analyzed in a Supplemental EIR.

The proposal to "realign" Canyonback Trail adversely affects the public's recreational use of the trail. *First*, the historic location of the trail is on the ridgeline. The EIR plan is apparently to move the trail away from the scenic and natural ridgeline (although even this is not clear due to equivocation in the Final EIR). The "realigned" trail would be positioned between the proposed residential homes, away from the ridgeline, and on a "private" street. This relocation would degrade the natural aesthetic quality of the trail – replacing the scenic

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<sup>6</sup> Guidelines § 15004(b)(2), (c), and discussion of 1998 amendment.

<sup>7</sup> Exh. 25 (CD-11 Planning Deputy's notes from November 16, 2000 Planning meeting).

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ridgeline views with “views” of the proposed private street, the private residences, and vehicles parked on or passing through the street. The proposal also degrades access by requiring trail users to enter a private and gated enclave, where they will likely be exposed to scrutiny and harassment from private security guards employed by the future residents.

The most obvious way to protect the *aesthetic* and *recreational* character of the public trail would be to **leave the trail at its current location along the ridgeline, and not realign the trail along the proposed private road within the planned gated enclave.** The current plan is to build a home (at Lot 28) right on top of the existing public trail. Doing so would necessitate “realignment” of the existing public trail. But realigning the trail to pass through a gated enclave degrades the recreational and aesthetic quality of the public trail. Why must the public’s long-standing recreational use of the trail and the aesthetic views afforded by its ridgeline location be forfeited for a single private residence? Even if the public did not have an enforceable right to maintain its historic ridge-line placement, CEQA would still mandate full EIR mitigation analysis of this impact on recreational use. The Supplemental EIR must analyze the feasibility of **removing this single, proposed residence in order to maintain the public trail in its existing location.** This mitigation would allow unimpaired public use of the scenic trail, without forcing trail users to pass through the private, gated enclave.

A second mitigation must also be analyzed, as a *worst-case* alternative if the trail realigned along the road into the proposed gated enclave. The Supplemental EIR should analyze the mitigation measure of **requiring the developer to dedicate for public use the proposed Canyonback Road extension.** The EIR simply proposes to make the road a private street, with gates restricting vehicular access, without analyzing the negative impact on public access to the public trail. By doing so, the public trail would pass through the gated private community, where the streets will likely be guarded by overzealous private security forces answerable to the private homeowners. This tract design is guaranteed to inhibit public use of the trail and foster private abuse of the public’s long-standing right of access. By contrast, a “public” street cannot be gated and private security guards lack authority to regulate the use of public streets, unlike private streets.

This is clearly a feasible mitigation option. There is no *need* to privatize the proposed road. The developer’s project coordinator, Frans Bigelow, admitted as much during the May 3, 2005, Brentwood Community Council (“BCC”) meeting. When asked why it was necessary to gate and privatize the street, he candidly responded that it is useful for “*marketing*” and that it is a “*sales tool*.” This mitigation option is therefore feasible.

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Finally, it is critical to recognize that the proposed Tract Map cannot be considered until *after* the Supplemental EIR process is completed. The proposed “Vesting” Tract Map, if approved, would improperly limit the range of mitigation alternatives – and make the two most effective mitigation options impossible. Doing so violates the very purpose of CEQA, which is to assure that the full range of mitigation options are considered *before* development activity renders them impractical or impossible.<sup>8</sup>

### 3. The public has a long-established right of access.

CEQA requires that the EIR describe the project environment with sufficient particularity to delineate the “baseline” conditions necessary to measure the project’s environmental impact.<sup>9</sup> Not only does the EIR fail to describe the existing public use of the public trail, but the developer’s representative has denigrated the public’s access “right” as effectively non-existent.<sup>10</sup> There is no EIR analysis to support that characterization and, in fact, the long-established public use of the trail long ago ripened into a prescriptive dedication for public use.

Of course, it is *not* necessary to prove “prescriptive dedication” as a prerequisite to EIR review of a project’s impact on recreational use. CEQA establishes an *independent statutory requirement*. The lead agency must adopt feasible mitigation measures that would significantly reduce a project’s adverse environmental effects.<sup>11</sup> While the lead agency has discretion in assessing the “feasibility” of a mitigation measure, the CEQA process requires that these types of decisions be transparent within the EIR – providing an important measure of political accountability.<sup>12</sup> Mitigation of adverse environmental effects is therefore *not* dependent on proof that the public has a legally enforceable right to that which would be necessary to mitigate the project’s adverse impact.

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<sup>8</sup> Guidelines § 15004(c).

<sup>9</sup> *Save Our Peninsula Comm. v. Monterey Co. Bd. of Superv.*, 87 Cal. App. 4th 99, 119-120 (2001).

<sup>10</sup> At the May 3, 2005, BCC meeting, Mr. Bigelow described Canyonback Trail as an “unofficial” trail on private property, implying that trail users have no “right” to hike along the trail as it passes through the Canyonback Ridge project area.

<sup>11</sup> *Los Angeles Unif. School District v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1028-1029 (1997).

<sup>12</sup> *Save Our Peninsula*, 87 Cal. App. 4th at 128-129; *Cadiz Land Co. v. Rail Cycle*, 83 Cal. App. 4th 74, 94 (2000).

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In this case, however, the public actually has a legally-enforceable right to maintain its right of access along the Canyonback ridgeline. Exhibits 109 to 121 and 129 demonstrate that the Canyonback Trail was used before 1972 for a period of more than 5 years, with full knowledge of the owner, without asking or receiving permission to do so, and without objection.<sup>13</sup> In fact, the exhibits establish that the “Kenter Fire Road” has been widely used by the public continuously since at least the 1940’s for a wide variety of recreational purposes. The section of the Kenter Fire Road that passes through Canyonback Ridge is referred to today as “Canyonback Trail,” but it is simply the portion of the Kenter Fire Road that passes through the Canyonback area. Hikers, horseback riders, bicyclists (not just mountain bikers, but their precursors from the Schwinn “Sting Ray” generation), people walking dogs and others have enjoyed the trail and its scenic views for more than 40 years. Thus, contrary to Mr. Bigelow’s unsupported assertion that the public has no right of access, and the Final EIR’s unsupported denigration of Canyonback trail as an “unofficial” trail, the public *already* has an enforceable right of access along the ridgeline.

This existing right of access to the parkland trail should have been described in the EIR in order to establish the baseline for measuring the project’s impact on the public’s recreational use and in assessing mitigation options. The failure to do so renders the EIR grossly deficient.

#### **B. Private Negotiations Cannot “Cure” The EIR’s Gross Deficiencies.**

The developer has recently engaged in private negotiations with a single homeowners’ association. This process has occurred outside the transparent EIR process, between two private parties. The developer has apparently promised to record a written easement providing that the trail will be realigned along a private, gated road, but there will be a pedestrian access that is supposed to remain open at all times.

Private agreements outside the EIR process are antithetical to CEQA. CEQA mandates a process that guarantees transparency through the EIR, not side deals privately negotiated outside the four corners of the EIR. Private agreements entered into after the Final EIR is circulated cannot therefore cure a deficient EIR.<sup>14</sup>

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<sup>13</sup> *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 38 (1970); *Friends of the Trails v. Blasius*, 78 Cal. App. 4th 810, 820-822 (2000).

<sup>14</sup> *Galante Vineyards v. Monterey Peninsula Water Mngt. Dist.*, 60 Cal. App. 4th 1109, 1122 (1997).

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The good faith of the homeowners association that negotiated the deal is clear. They are fighting a serious threat to continued public access against a large and powerful developer. But the best deal they were able to negotiate with the developer is insufficient under CEQA. The deal would effectively bargain-away the public's enforceable right of way across the Canyonback ridgeline. While the bargain provides certain measures of protection not included in the (inadequate) EIR, the deal forfeits important public rights. Specifically, it acquiesces to the developer's demands that (1) the public trail be moved away off the scenic ridgeline in order to provide privileged views to a single private homeowner, and (2) the trail would be moved to a private and gated street.

The valiant efforts of the homeowners association to protect public access are not sufficient to insulate the developer from the legally-mandated CEQA review process. CEQA requires an on-the-record EIR analysis of the project's substantial adverse impact on recreational use. A proper EIR analysis in the context of this project would have required the developer to plan its tract layout around the public trail, not realign the public trail to suit the developer's marketing desires.

**C. The Project Also Impairs Recreational Access On The Mount St. Mary's Fire Road.**

The Stoney Hill portion of the development project would also have a substantially adverse impact on the public's recreational use of the trails. The EIR says *nothing* about this likely impairment of public recreational access. But at the May 3, 2005, BCC meeting, the developer's representatives indicated that the proposed Stoney Hill development would be gated. That would impair public recreational access between the Mount St. Mary's Fire Road and Canyonback Trail.

The Mount St. Mary's Fire Road has been used freely by the public since at least 1960 for a variety of recreational uses, including hiking, horseback riding, appreciation of scenic views, and mountain biking.<sup>15</sup> It is a well-maintained trail, with scenic views.<sup>16</sup> It is also an important connector trail for those residing east of Bundy Avenue. The Mount St. Mary's Fire Road connects to the Canyonback Trail – a main link to the Big Wild trail system.

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<sup>15</sup> Exh. 109 (Decl. of Deborah Schwartz, para. 7-8, Exhs. L, M, P); Exh.119 (Decl. of Christopher Byk, para. 4-7, Exhs. L, M, P); Exh. 118 (Decl. of Eric Edmunds, para. 11-14).

<sup>16</sup> Exh. 123 (photos from trail).

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Terminating public access to the Canyonback Trail from the Mount St. Mary's Fire Road would substantially impair public recreational access, especially for those residing east of Bundy Avenue.<sup>17</sup> It would also impair access for those commuting from the Valley to the Barrington sections of Brentwood and West Los Angeles, and those traveling to UCLA and the Westwood shopping area. Nothing in the EIR provides even a hint of this adverse recreational impact. The Supplemental EIR must address this project impact.

The developer may argue that access between the Canyonback Trail and the Mount St. Mary's Fire Road is impossible not because of the developer's plan to privatize the extension of Stoney Hill Road but because the existing Stoney Hill community is gated, thereby preventing public access. It is true that existing Stoney Hill is gated.<sup>18</sup> But the gates on Stoney Hill Road are illegal and must be removed. Once they are removed, the public will again have access to and from the Canyonback-Mount St. Mary's Fire Road link.

The existing Stoney Hill gates are illegal because California law prohibits gates or other devices for restricting public access on public streets.<sup>19</sup> Stoney Hill Road is a public street. Nevertheless, the City has purported to "close" this street to the public, permitting street access to residents and their invited guests only.<sup>20</sup> A sign at the main Stoney Hill gate states "Street Withdrawn From Public Use Pursuant [sic] To Sec 37359 Of The State Government Code."<sup>21</sup> The appellate court, however, has already held that this statute does not authorize the City to remove a public street from public use in order to provide restricted access to residents.<sup>22</sup> Access can *only* be restricted to residents on private roads, never on public streets like Stoney Hill Road. Stoney Hill Road cannot be vacated because it provides recreational access between the Canyonback Trail and the Mount St. Mary's Fire

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<sup>17</sup> Exh. 119 (Byk Decl., para. 4-7).

<sup>18</sup> Exhs. 119 (Byk Decl., para. 5-6); Exh. 118 (Edmunds Decl., para. 14); Exh. 124 (photos of Stoney Hill gates).

<sup>19</sup> Vehicle Code section 21101.6.

<sup>20</sup> Exh. 125 (photo of City sign on Stoney Hill gate).

<sup>21</sup> Exh. 125 (photo of sign).

<sup>22</sup> *Citizens Against Gated Enclaves v. Whitley Heights Civic Assoc.*, 23 Cal. App. 4<sup>th</sup> 812, 822-823(1994) (expressly holding that that Gov. Code § 37359 does not authorize the City of Los Angeles to remove a public street from public use in order to provide restricted access to residents).

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Trail. Public streets serving legitimate public street purposes, including non-vehicular street purposes, cannot be vacated.<sup>23</sup> Stoney Hill Road and Promontory Road (which is also a public street closed to public access by the Stoney Hill gate) serve a legitimate public use by providing public access between the Mount St. Mary's Fire Road and the Canyonback Trail, gateway to the Big Wild.

The Stoney Hill gates are therefore illegal and cannot be relied upon to demonstrate that the proposed extension of Stoney Hill Road is not needed for public access. Consequently, the Supplemental EIR must address the adverse impact on recreational use.

**D. Confusion Created By The “Bypass Trail” Has Precluded Meaningful Public Comment.**

Our April 7, 2005 letter addressed a so-called bypass trail that would realign Canyonback Trail along the unstable, landslide-ridden western slopes of Canyonback Ridge, above Upper Mandeville Canyon. The City and the developer have assured the public that this “bypass trail” is not part of the project and (by necessary implication) it will not be made a part of the project during the public hearing process. But if the bypass trail is incorporated into the Tract Map or otherwise linked to the project, then a Supplemental EIR would be required to assess the environmental impact of the proposed trail. As explained by geologist Jeffrey Holt in his declaration, the proposed bypass trail would place lives and property in jeopardy, and would be impossible to maintain.<sup>24</sup>

Assuming that the bypass trail will not be linked in any way to the project, it has nevertheless interfered with the EIR process. The Santa Monica Mountains Conservancy (“SMMC”) responded to the Draft EIR by demanding that a Supplemental EIR be circulated to address the project’s likely adverse impact on public access.<sup>25</sup> But the SMMC’s April 4, 2005, letter in response to the Final EIR assumes that a “by-pass trail” is part of the project and that it will mitigate or avoid the project’s adverse impact on public access. A Supplemental EIR is therefore still necessary to address the unanswered concerns raised in the SMMC’s September 2003 letter.

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<sup>23</sup> Streets & Highways Code § 8323; *Whitley Heights*, 23 Cal. App. 4<sup>th</sup> at 820-821.

<sup>24</sup> Exh. 122 (Decl. of Jeffrey Holt, Mountain Geology).

<sup>25</sup> Exh. 106 (Sept. 22, 2003 letter from SMMC to Planning Dept.).

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**III. CONCLUSION**

A Supplemental EIR must be prepared to address the project’s likely adverse impacts on public recreation along the trails passing through the development site, including both Canyonback Trail and the Mount St. Mary’s Fire Road. The development project and the Tract Map approval process cannot proceed until the Supplemental EIR process is completed. Otherwise, the most critical project mitigation options will be lost before they are even analyzed.

CENTER FOR LAW IN THE PUBLIC INTEREST

BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS & LINCENBERG, P.C.

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