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File 3053.2

BY 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:

We are writing on behalf of the Upper Mandeville Canyon Property Owners' Association ("UMCA") and the Canyon Back Alliance, a citizens group formed in July 2004 to oppose efforts to restrict public access to the Canyonback Trail in the Westridge-Canyon Back Wilderness Park. The UMCA submitted written objections to the Draft Environmental Impact Report on September 22, 2003. The Canyon Back Alliance was formed after the comment period for the Draft EIR expired.

The Mountaingate Project EIR calls for the privatization, realignment and gating of the Canyonback Trail as it passes through the project site. The UMCA and the Canyon Back Alliance object to the EIR because it fails to identify or analyze the significant adverse environmental effects that would result from the proposed actions. Specifically, the proposed actions would adversely affect the environment by (1) restricting public access to public parkland through the privatization and gating of the Trail; (2) degrading the quality of public access by realigning Canyonback Trail off the stable Canyonback Ridge and onto or under steep, landslide-ridden slopes that are not suitable for a safe, stable multi-use public trail like the Canyonback Trail, and (3) destabilizing the already unstable Canyonback Ridge slopes through the Canyonback Trail realignment, substantially increasing the risk of landslides and mudslides, and

jeopardizing life and property for residents of the Upper Mandeville Canyon community, which lies at the base of the Canyonback Ridge watershed.

The EIR is therefore invalid for three separate and independent reasons. *First*, the EIR proposal to create a *private* road along the section of the Canyonback Trail that passes through the Canyonback Ridge section of the Castle & Cooke development project would have a potentially significant adverse environmental effect. This aspect of the EIR violates CEQA because the Draft EIR failed to identify this environmental effect or even contain an environmental description sufficient to identify or measure it. The Final EIR exacerbates this deficiency by proposing to sever this clear project impact. Either the extension of Canyonback Road is made a public street, just like existing Canyonback Road, or a Supplemental EIR must be circulated for public comment.

Second, the Final EIR is hopelessly vague in stating that the Canyonback Trail will be realigned. While it is *possible* that the project's trail realignment will not have a significant adverse environmental effect, depending on the specifics of the chosen realignment, the Final EIR provides no assurance that any such realignment will be selected. This deficiency must be cured by a Supplemental EIR specifying the precise contours of the trail alignment *before* the Tract Map is approved and realignment options are limited.

Third, the City and the developer should make clear that the irresponsible trail realignment plan is no part of this project and that it will not be made a condition of project approval at any time in the process. The City and developer should also make clear that, as indicated in the Final EIR, there will be no grading whatsoever (including trail building) along the landslide-ridden western slopes of Canyonback Ridge.

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I. SUMMARY OF OBJECTIONS

The Mountaingate EIR proposes that the developer/applicant would extend existing Canyonback Road, a public road, through the Canyonback Ridge portion of the project site. In doing so, the extension would utilize and realign the existing paved access road that connects Canyonback Road to property maintained by the Department of Water and Power located immediately to the south of the Canyonback Ridge project site. This access road is also part of the "Canyonback Trail," a public trail that connects the two major sections of the Westridge-Canyon Back Wilderness Park trails. The Canyonback Trail thereby provides a critical link to the "Big Wild," a series of public trails covering more than 20,000 acres in the Santa Monica Mountains.

By privatizing a section of the Canyonback Trail, the project would substantially impair public access to public parkland recreational trails. This direct and readily foreseeable environmental effect, however, is improperly ignored in the EIR. This is a blatant violation of CEQA's mandate that a Project EIR identify all reasonably foreseeable, significant adverse environmental effects that may be caused by any aspect of the project.[1] The EIR must also provide a detailed analysis of these effects, focusing on feasible ways to avoid or minimize them.[2] The Mountaingate EIR thereby fails "to meet the most important purpose of CEQA, to fully inform the decision makers and the public of the environmental impacts of the choices before them. A new EIR must, therefore, be drafted."[3]

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[1] *Los Angeles Unified School Dist. v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1028 (1997).

[2] *Ocean View Est. HOA v. Montecito Water Dist.*, 116 Cal. App. 4th 396, 400-401 (2004).

[3] *Planning and Conservation League v. Dept. of Water Resources*, 83 Cal. App. 4th 892, 920 (2000).

1. Privatizing And Gating The Trail Would Impair Parkland Access.

A development project that would curtail established recreational uses of public parkland has a significant, adverse effect upon the environment under CEQA.[4] The EIR, however, fails to address the fact that the applicant's proposal to privatize and gate the Canyonback Trail will diminish the public's existing use of the Trail.

The EIR raises important public-access questions, but does not answer them. The Final EIR states that "pedestrian access" will be provided. But it fails to describe what the term "pedestrian access" means, discuss whether there are limitations on the "pedestrian access" that would be imposed, compare the scope of public access currently available, or identify any mechanism whatsoever for protecting the public's right to "pedestrian access" in the future.

First, what is "pedestrian access"? Does it include people walking dogs, or riding bikes or horses? The Canyonback Trail is a multi-use public trail that has historically been used by hikers, runners, mountain-bike riders, foot and bike commuters, horseback riders, nature lovers, and people walking dogs. Any impairment of this access would be a significant, adverse environmental effect. Yet the EIR fails to include the basic information needed to analyze this issue.

Second, the proposed private ownership of this critical access trail raises concerns about the private control of public parkland. Will security guards – hired by and beholden to future residents of the proposed private residential enclave – inhibit public use of the public trails? The use of security gating itself poses access problems that should have been addressed in the EIR. This type of gate-keeping power, especially when combined with private security forces, is easy to exploit in a manner that prevents, restricts or inhibits public access, and this type of control has been exploited by homeowner associations and private security guards in similar situations. The EIR is silent on the details necessary for CEQA analysis.

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[4] *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1417 (1995); *Baldwin v. City of Los Angeles*, 70 Cal. App. 4th 819, 842 (1999).

Another critical issue is whether public access will be limited to daylight hours. Not only does the EIR fail to describe measures that would be taken to assure continued, unrestricted night-and-day public access, but the City Council representative for the area has previously expressed her desire to limit public access on a "dawn to dusk" basis. But the Canyonback Trail and the many public trails connected to it throughout the 20,000-plus acre Big Wild urban wilderness park are now and have historically been enjoyed around the clock. While *other* trails maintained by the Mountains Recreation and Conservation Authority ("MRCA") and the Santa Monica Mountains Conservancy ("SMMC") are closed at night, the Canyonback Trail does not close. Any restriction of public access along the Canyonback Trail at night or before sunrise would significantly curtail the public's existing right to enjoy the natural parkland treasures of the Santa Monica Mountains' Big Wild trail system.

Finally, the public parkland trails accessible through the Canyonback Trail were acquired with public funds. Canyonback Trail, as it passes through the project site, will become a private street, owned by the residents or their homeowners association. CEQA requires that the EIR proscribe ways to protect against significant adverse effects, such as restriction of public access to park trails. Yet, nothing in the Mountaingate EIR limits the project's future residents from barring or otherwise restricting public access on what would become their private street/trail.

2. The Undisclosed Plan To Realign The Canyonback Trail.

The Final EIR states that the Canyonback Trail will be realigned, but no details are provided. The EIR indicates that the realignment might obviate the need for trail users to pass through the development project. This vagueness alone renders the EIR inadequate for failure to describe the project's trail realignment and evaluate the significant environmental effects and ways to mitigate any such effects.

This lack of disclosure was intentional. The developer met privately with City representatives and representatives of a neighboring homeowners group in November 2000, at which time the public access issue was raised. Instead of openly addressing this issue during the environmental review process, as required under CEQA, a decision was made to remove it from the transparent EIR process. Specifically, the Final EIR provides that the developer will "negotiate" access with the Santa Monica Mountains Conservancy, apparently as part of the negotiations for dedicating 288 acres of open

space land to the Conservancy.[5] By linking the trail access/realignment "negotiation" with the dedication, the developer would have the opportunity to use the dedication as leverage in obtaining a more favorable resolution of the public access/trail realignment. And this bargaining of public access to recreational trails would be outside the EIR process, shielded from the light of CEQA-mandated public scrutiny. CEQA tolerates no such thing.

Second, the project plan to privatize and perhaps (or perhaps not) realign the trail may have a significant environmental impact and cannot therefore be severed from the project's environmental review. The City, as the lead agency, is responsible for making the non-delegable decision on how to address the potentially significant environmental effects of privatization and realignment. Third, it would be particularly improper to delegate decision-making authority to the Conservancy when it clearly has a stake in the project, due to the possibility of a property dedication.

This entire plan to remove the public access issue from environmental review through backroom dealing violates CEQA. Perhaps the foremost purpose of the EIR process is to alleviate public concern that environmental issues will be negotiated and decided by well-connected developers and government officials outside the transparent EIR process. But the Mountaingate EIR would fail to do just that. To this very day, the public's future recreational use of public parkland remains an unknown variable, subject to the type of private dealings anathema to the CEQA process.

These closed-door negotiations are continuing to the present. Documents obtained through the Public Records Act reveal that secret meetings in February 2005 were held with City officials and a well-connected facilitator/lobbyist intent on restricting public access to the Canyonback Trail. The purpose of these meetings has apparently been to develop "strategies for coordinating [the Mountaingate EIR] with the Canyonback issue."[6]

The "Canyonback issue" involves the City's February 2004 issuance of a Revocable Permit authorizing the Crown Homeowners Association to construct a security

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[5] Exh. 27.

[6] Exh. 26.

gate blocking access to Canyonback Road to the north of Mountaingate Drive. That plan ended in failure when the City Attorney's Office recognized that doing so would be illegal. But that setback has not ended the Crown's persistent, behind-closed-doors efforts to keep the public off the Canyonback Trail.

The Crown's lobbyist, Gary Morris of GLM Associates, has met privately with the City to plan a strategy for coordinating the Mountaingate project with the Crown's efforts to privatize Canyonback Road. The new plan is to carve an "alternative" trail along the western slope of Canyonback Ridge, which forms the eastern hillside for Upper Mandeville Canyon. Mr. Morris has met with public officials and led them to believe that his plan to realign the trail is supported by both the Crown HOA and Castle & Cooke. The plan is to create the alternative trail and then vacate and gate all of Canyonback Road, barring any public access through the Crown neighborhood to the north of Mountaingate Drive and the new development to the south.

Castle & Cooke, however, has denied any participation in Mr. Morris' planned trail realignment. The developer recently stated in no uncertain terms that "This is not its trail" and it will not pay for the trail or support any type of assessment or other funding for the trail. Nevertheless, the developer's project planner, Psomas, has revealed that the Crown will propose the trail realignment as a project "benefit" that should be included in the tract map. And Psomas suspects that Councilwoman Miscikowski's Office will support that proposed project mitigation.

This secret plan, however, is mentioned nowhere in the Draft or Final EIRs. While the developer insists that it has no involvement with the realignment proposal, that does not change the fact that the proposed "mitigation," if inserted into the tract map, would violate CEQA. The statute is clear that a supplemental EIR is required and must be recirculated if the required mitigation would have a potentially significant, adverse environmental impact. That is so regardless of whether the project applicant devised the mitigation or not.[7]

[7] Cal. Code Regs., title 14, CEQA Guidelines ("Guidelines") § 15088.5(a)(1).

3. A "Realigned" Canyonback Trail Will Degrade Public Access.

Rumors of the secret trail realignment have caused great concern to members of the public. We obtained a copy of the undisclosed realignment map through the Public Records Act. The map does indeed depict a realigned trail that would be cut into and at the base of the steep western slopes of Canyonback Ridge. The secret plan to push the Canyonback Trail off the Ridge and onto the unstable western slopes would substantially degrade public access.

Mr. Morris' trail realignment depicts a new trail cut along very steep slopes amidst at least six huge landslides. The average slope is at a 1:1 (45 degrees) ratio, which is too steep for creating a natural trail. On relatively stable terrain, a multi-use trail constructed on such a severe slope would require concrete retaining walls, excavation, fill and the use of concrete piles to support the retaining walls. These piles would have to be founded into the bedrock every few feet of the approximately 2-mile trail. This type of raised trail would cost millions of dollars, *if it could be constructed*.

The proposed trail site, however, would require construction almost fully within irremediable landslides. This land is far too unstable to risk life and property by sinking piles into landslide terrain with historic landslide remains that have been measured by the developer's geological team at more than 60-feet deep. The instability of this entire area has prevented any development. That is why the Draft EIR and Final EIR clearly reflect the geologists' unanimous conclusion that the entire western slope area is too unstable for development or grading.

That, however, has not stopped Mr. Morris and the Crown. And we are afraid that the City may embrace their irresponsible trail-realignment proposal as a "win-win." Trail users would get a natural hiking environment and Crown residents and future residents of the new development would have private, gated streets, unburdened with any public access obligations.

But that win-win would really be a win-lose because a reliable public trail cannot be maintained in the landslide-ridden area depicted on Mr. Morris' secret map. In essence, the public would be pushed off the stable slopes of this critical access trail, and down onto and under the unstable landslide terrain. This still secret plan would require the public to forfeit the reliable pathway provided by existing Canyonback Trail, a main "feeder" trail into a vast network of inter-linked trails, in favor of an unstable trail that

will be impossible to maintain and likely be out-of-service much of the time. This sub-standard trail would eventually fall into disuse because it would be unsafe and insufficient to support the necessary multi-use purposes served by the existing Canyonback Trail, and far too expensive to maintain.

It is difficult to believe that anyone would condone such an improper strategy. But the information dribbling out from City Hall supports this rumor. And the Draft and Final EIR lend credence as well. The public access problems created by the project were evident from the start of the project, but have never been made a part of the EIR process. Vague language in the Final EIR suggests that there will be a last minute attempt to sneak the secret trail into the tract map. Doing so would be illegal and it would make a mockery of the EIR process. CEQA requires a transparent decisional process on environmental matters, not secret deals between well-connected insiders.

4. The New Path Would Jeopardize Life And Property.

The most remarkable thing about Mr. Morris' realignment is the carelessness with which it was designed. This is supposed to be a 4-6 foot wide trail cut into landslide terrain at the top of the watershed area for Upper Mandeville Canyon. There is a tragic history of water and debris flow, landslides and mudslides throughout the Mandeville Canyon Watershed, which includes the western slopes of Canyonback Ridge. Mandeville Canyon residents have died, lost their homes and suffered substantial property damages. No geologist would ever approve such a reckless plan.

Significantly, the UMCA and individual residents of the Upper Mandeville Canyon community objected to the Draft EIR based on concerns about grading the western slope of Canyonback Ridge. The developer's geologist and the City's Engineering Geologist have recognized that Canyonback Ridge's western slope is far too dangerous for grading or development. That is why the Final EIR assures the concerned Mandeville Canyon residents that there will be no grading whatsoever on the western slope of Canyonback Ridge.

Now, at the 11th hour, after the close of public comment and after issuance of the Final EIR, secret plans are in the offing to carve into Canyonback Ridge's western slope a 2-mile trail. The trail, however, simply cannot be done – safely. Indeed, when the developer's lead geologist saw the trail-realignment map last week, he recognized immediately that the plan was absurd. His blunt assessment requires no elaboration:

"Infeasible." To cut such a trail in the landslides at the top of the Upper Mandeville Canyon watershed would senselessly risk life and property. And to what end? The Gate advocates' back-room dealings, occurring outside the transparent CEQA process, are designed to further just one dubious purpose – the privatization of Canyonback Road.

What would be the public benefit of this privatization scheme? Canyonback Road is among the most crime-free areas in Los Angeles, with virtually no history of reportable crime. There is just one reason for the persistent efforts to privatize and gate Canyonback Road. It would inflate property values for those privileged to live surrounded by public parkland bought and maintained with public funds. In return, the public would get an unstable, inferior public trail that will likely be rendered unusable in short order. And Upper Mandeville Canyon residents would be exposed to tremendous risks to life and property. This is precisely the type of environmental sell-out that CEQA sought to prevent through the transparent decisional process it requires.

II. The EIR Plan To Privatize, Gate, And Realign Canyonback Trail.

The Draft EIR provides that the project applicant and developer, Castle & Cooke, has proposed to develop 29 homes in the Mountaingate area of Brentwood, seven of which would be constructed along Canyonback Ridge.[8] Under the project plans, the developer would realign an existing access road running through the Canyonback Ridge section of the project site. The existing access road connects the southern end of Canyonback Road, a public street, to a Water Tank on City-owned property maintained by the Department of Water and Power, which is south of the Canyonback Ridge project site.[9]

This access road is *also* a dedicated public trail supporting multiple recreational uses, the "Canyonback Trail." The Canyonback Trail is within the Westridge-Canyon

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[8] Draft EIR, II-12.

[9] Draft EIR, II-12; Psomas, 2nd Revised Tentative Tract Map No. 53072, June 17, 2003 ("Tract Map"); Exh. 1 (photographs depicting Canyonback Ridge, including the Canyonback Trail through Canyonback Road, the Canyonback Ridge project site and the Water Tank.)

Back Wilderness Park and is a major artery for a series of widely-used public trails.[10] The 2nd Revised Detail Vesting Tentative Tract Map No. 53072 identifies this access road as a "private street and easement" with a "security gate." The Draft EIR states that there will be "pedestrian access" at the gate.[11] But the Draft EIR contains no discussion or analysis of the potentially significant adverse environmental effects of the project plan to privatize, gate and realign the access road, which is also the Canyonback Trail.

III. The CEQA Public Disclosure Process

The Legislature enacted CEQA to protect, rehabilitate and enhance the environment.[12] The tool for achieving these goals is public disclosure. CEQA requires comprehensive disclosures concerning activities that may potentially have an adverse impact on the environment.[13] CEQA therefore mandates the preparation of an EIR whenever a public agency considers a project that "may" have a "substantial effect on the environment."[14] CEQA's focus on adverse environmental impacts broadly covers any adverse change in physical conditions of the environment, including changes in land use, scenic views, recreational uses, and other environmental concerns addressed in state or local planning guidelines.[15]

The EIR process is "the heart of CEQA."[16] The lead public agency must notify the public when a draft EIR has been prepared and make that draft report available for

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[10] Exh. 2 (Westridge-Canyon Back Wilderness Park Map).

[11] Draft EIR, II-12.

[12] Pub. Res. Code § 21001 (a).

[13] *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 391 (1988), citing Pub. Res. Code § 21061 and Cal. Code Regs., tit. 14, § 15000 et seq. ("CEQA Guidelines" or "Guidelines"), Guidelines § 15003 (b) – (e).

[14] Pub. Res. Code §§ 21100, 21151; Guidelines § 15002 (f)(1).

[15] Guidelines, Appendix G, Subd. I, VI(iv), IX, XIV.

[16] Guidelines § 15003 (a).

public review and comment.[17] The lead agency must consider and respond to comments addressing potentially significant environmental impacts of the project submitted during the public comment period.[18] The lead agency's analysis and comments on the submitted recommendations and objections must be provided in writing in the final EIR. If the lead agency's position varies from the recommendations submitted by those commenting on the project's adverse environmental impacts and ways to minimize or avoid those impacts, then the lead agency must address the rejected recommendations "in detail" and specify its "reasons" for rejecting the recommendations. The lead agency must provide a "good faith, reasoned analysis" in response to the rejected recommendations or objections. "Conclusory statements unsupported by factual information will not suffice."[19]

If the *final* EIR identifies a significant environmental impact not disclosed in the *draft* EIR, the final EIR must be re-circulated for public comment, thereby providing the public and interested public agencies a fair opportunity to comment on the previously-undisclosed environmental impacts.[20] Recirculation is required even if new significant environmental effects are caused by mitigation measures suggested during public comment after circulation of the Draft EIR.[21]

The EIR process is designed to assure public disclosure and involvement whenever state or local government action threatens to degrade environmental resources. The EIR is therefore an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they reach the ecological point of no return."[22] The goal is "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its

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17 Pub. Res. Code §§ 21092, 21092.1.

18 Guidelines §§ 15087, 15088.

19 Guidelines § 15088(c).

20 Guidelines § 15088.5.

21 Guidelines 15088.5(a)(1).

22 *Laurel Heights*, 47 Cal. 3d at 392.

action."[23] And, because the EIR must be certified or rejected by public officials, it is "a document of public accountability."[24] "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." Consequently, the "EIR process protects not only the environment but also informed self-government."[25]

In violation of CEQA's essential purpose, trail users and residents of Upper Mandeville Canyon have every reason to fear that their environmental concerns are not being considered. CEQA mandates that all significant, adverse environmental effects be analyzed in the Draft EIR, with thorough analysis about ways to eliminate or minimize the significant, adverse environmental impacts.[26] Yet that is precisely what the Draft and Final EIR fail to do.

The public access and realignment-related hillside stability problems are effectively swept under the rug. While these critical issues are side-stepped, the project approvals sought via this EIR will set in stone development plans that could otherwise have been altered to mitigate the public-access and trail stability issues.[27] Meanwhile, trail users and residents of Upper Mandeville Canyon must worry that their environmental concerns are being bargained away in secret meetings involving City officials, paid lobbyists and other insiders seeking to restrict public access.

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[23] *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86 (1974); Guidelines § 15003(d).

[24] *Laurel Heights*, 47 Cal. 3d at 392.

[25] *Laurel Heights*, 47 Cal. 3d at 392.

[26] *Santa Clarita Org. for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 723 (2003).

[27] *Bozung v. Local Agency Formation Comm.*, 13 Cal. 3d 263, 282 (1975).

IV. The Draft EIR Fails To Address The Significant Adverse Environmental Effects of Gating and Privatizing Canyonback Trail.

The Draft EIR depicts a realigned road connecting Canyonback Road to the DWP Water Tank south of the project site. Presumably, the realigned road represents the Canyonback Trail. The Draft EIR and the Vesting Map indicate that the road/trail would become a private street (with easement), which would be blocked by a security gate with pedestrian access at the point of entry from existing Canyonback Road. The possibility that the proposed privatization and security gating might impair public access to public parkland is obvious.

The Draft EIR, however, does not identify the risk that privatizing and gating the trail will impair public access to Canyonback Trail as a potentially significant environmental effect; it does not describe the public parkland trails surrounding the project site; it does not compare the scope of public access that would be provided to the proposed private/gated trail with the access available as of the time the Draft EIR was prepared; and it fails to identify and analyze ways to avoid or minimize any impairment of public access to the public parkland. The Draft EIR is therefore inadequate as a matter of law and must be revised and recirculated to fully address the public-access problem.

A. Impairing Public Access to Public Parkland Is A Significant, Adverse Environmental Impact.

A "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project."[28] In determining whether an aspect of the project may adversely affect the project area's environment, the lead agency must consider "direct physical changes in the environment which may be caused by the project."[29] Restricting public access onto publicly-owned parkland and providing unrestricted access to local residents of a proposed residential development would clearly constitute a significant effect on the environment under CEQA.

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[28] Guidelines §15382.

[29] Guidelines §15064(d).

California courts have already recognized that a "significant adverse impact on established recreational uses" constitutes a significant, adverse effect on the environment under CEQA.[30] This recognition that impairing public access to public parkland trails is a significant adverse environmental effect is consistent with established Supreme Court precedent holding that equal access to public parkland is a "fundamental right" of this state's residents.[31] Further, the public trails in the Santa Monica Mountains are an "environmental resource that [is] rare or unique to the region" that "would be affected by the project."[32] Indeed, state and community plans recognize the significance of preserving public access to recreational trails, as recognized in the Draft EIR: "it is the policy of the Brentwood-Pacific Palisades District Plan (Policy 4-1.5) to provide access to facilities for equestrian, hiking and cycling trails."[33] This public policy is shared by the major planning documents covering this portion of the Santa Monica Mountains, all of which recognize the environmental benefit provided by the recreational and scenic-appreciation opportunities of the public trails.[34] Finally, and definitively, the City Council passed a motion in August 1998, recognizing that "Canyonback Road serves and will continue to serve as a major entry point into the Santa Monica Mountains by the public, maintaining this access is an important goal to the City of Los Angeles."[35]

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[30] *Gentry v. City of Murrietta*, 36 Cal. App. 4th 1359, 1417 (1995); *Baldwin v. City of Los Angeles*, 70 Cal. App. 4th 819, 842 (1999).

[31] *Rumford v. City of Berkeley*, 31 Cal. 3d 545, 550 (1982); Exh. 3 (letter, Freeman to Delgadillo, July 23, 2004); Exh. 4 (letter, Freeman to Delgadillo, Aug. 4, 2004).

[32] Guidelines §15125(a), (c).

[33] Draft EIR, IV.O-38.

[34] Brentwood-Pacific Palisades Plan, III-12 to III-13, citing (1) General Development Plans for the Santa Monica Mountains, State Dept. of Parks and Recreation; (2) Santa Monica Comprehensive Plan, State of California; and (3) Santa Monica Mountains Land Protection Plan, U.S. Dept. of the Interior.

[35] Exh. 5 (Motion presented by Cindy Miscikowski, Councilmember, 11th District, Aug. 4, 1998).

It is therefore beyond reasonable dispute that if the proposed privatization and gating impairs the current scope of public access to public parkland trails, that impact qualifies as a significant, adverse environmental effect under CEQA.

B. The Draft EIR Fails To Describe The Environmental Setting In Sufficient Detail To Identify The Impact On Public Access.

Whether a development project may impair public access requires a description of the surrounding environmental conditions sufficient to alert the public and the governmental decision-makers about the potential for environmental degradation. The critical environmental description vis-à-vis the public access issue involves the fact that the access road/trail is also a public trail and that access to the trail is critical to established recreational uses. The Draft EIR, however, fails to provide any such description, rendering it inadequate.

The Draft EIR also fails to describe the scope of public access as of the date the Draft EIR was prepared. This "baseline" description of public access as it exists before the project is approved is necessary to measure the extent to which the project would degrade public access to the parkland trails. Again, the Draft EIR is silent on this critical issue, which renders it invalid.

1. CEQA requires a baseline description.

An EIR must describe the project area's "existing environment" in sufficient detail to provide a "baseline" for measuring the impact of the developer's proposed project.[36] Specifically, the EIR must provide a description of the environment in the vicinity of the project, from both a local and regional perspective, placing special emphasis on "environmental resources that are rare or unique to that region and would be affected by the project."[37] In doing so, the EIR should discuss any inconsistencies between the

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[36] 1 Stephen L. Kostka & Michael H. Zischke, *Practice Under The California Environmental Quality Act*, § 12.26, pp. 488-489 (CEB 2004) ("Kostka Zischke"); *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 119-120 (2001).

[37] Guidelines § 15125(a), (c).

proposed project and any applicable general or regional plans.[38] This determination of the "baseline" environmental conditions must be "the first rather than the last step in the environmental review process."[39]

California courts recognize that an EIR fails its essential purpose if the environmental context for the proposed project is not described in adequate detail to understand the project's potentially adverse environmental effects.[40] A leading case is *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus,*[41] where the EIR described a proposed residential development as being surrounded by agricultural lands with established agricultural uses.[42] The description would leave an ordinary reader with the impression that the surrounding area is mostly non-descript farmland.[43] This characterization was held to be inaccurate and misleading because it failed to address the fact that a wetlands wildlife preserve was located nearby and that wetlands may be located within the project site.[44] "The DEIR completely fails to mention and consider" the nearby wetlands wildlife preserve, rendering it inadequate.[45]

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[38] Guidelines § 15125(d).

[39] *Save Our Peninsula Committee v. Monterey County Supervisors*, 87 Cal. App. 4th 99, 125 (2001).

[40] *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 952 (1999)

[41] 27 Cal. App. 4th 713 (1994).

[42] 27 Cal. App. 4th at 723.

[43] 27 Cal. App. 4th at 724.

[44] 27 Cal. App. 4th at 724.

[45] 7 Cal. App. 4th at 725.

2. The EIR fails to describe the parkland environment or the "baseline" scope of public access to the Canyonback Trail.

The Mountaingate Draft EIR occasionally mentions in passing that there is a "hiking trail" in the area, which it minimizes as being an "unofficial trail,"[46] without defining what is meant by the disparaging term. The sparing references to the trail appear in a context that would lead a normal reader to assume this "trail" is of little significance: "The proposed project site is currently undeveloped land with a hiking trail and service dirt road for the DWP on-site water tank and electrical transmission lines. Apart from the existing Mountaingate Community and the golf course, the site is surrounded by open space."[47]

In order to understand and measure the environmental significance of the project's plan to privatize and gate the Canyonback Trail, the Draft EIR should have described the following essential environmental characteristics: (1) the proposed development along Canyonback Ridge lies within the Westridge-Canyon Back Wilderness Park;[48] (2) this "breathtaking 1,518-acre open space preserve above Mandeville Canyon" was dedicated to the Santa Monica Mountains Conservancy on February 20, 1999;[49] (3) this dedicated Wilderness Park "provides more than 1,400 acres of open space bordered by Upper Mandeville Canyon, Sullivan Canyon, Mission Canyon and San Vicente Mountain Park;"[50] (4) "the Westridge fire road [referred to as the "Canyonback Trail" in the area of the project's Canyonback Ridge site] provides convenient trail access for hikers, bicyclists and equestrians along the north-south ridgeline,"[51] (5) the trail "is contiguous with the 20,000-acre urban wilderness park known as the 'Big Wild'";[52] (6) this trail is

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46 Draft EIR, VI-6.

47 Draft EIR, IV.S-2.

48 Exh. 1 (aerial photos of development area and neighboring parkland).

49 Exh. 6, pp. 1-2) (Westridge-Canyon Back Park dedication and Park information); Exh. 6, p. 3 (Councilwoman Miscikowski at Park dedication ceremony).

50 Exh. 2.

51 Exh. 2 (Westridge-Canyon Back Wilderness Park trail map).

52 Exh. 2.

enjoyed by "hundreds of joggers, hikers and dog walkers who don't live on the ridge top and use the street to get from one dirt fire road to another and to the 20,000-acre Santa Monica Mountains paradise known as the Big Wild;"[53] and (7) the general public has long enjoyed free and unrestricted access to the Santa Monica Mountains through the Canyonback Trail, which is also known as the Kenter Fire Road.

Long before any of the Mountaingate homes were developed, the public enjoyed unrestricted recreational access through what is now the project site, along the Kenter Fire Road. The Kenter Fire Road runs from the northern end of Kenter Avenue in Brentwood to the east end of "dirt" Mulholland. The Canyonback Trail, which connects the two sections of the Kenter Fire Road, stands in the "bulls-eye" of the Westridge-Canyon Back Wilderness Park. It is a major "trunk line" necessary to provide broad public access to the Westridge-Canyon Back Wilderness Park. The Canyonback Trail is therefore an integral part of the 20,000-plus acre Big Wild network of parks inter-linked trails for public use and wildlife habitat, extending from the San Fernando Valley to the Pacific Ocean.[54] The Park commands 360 degree panoramas of snowcapped Mount Baldy, the Channel Islands, the Valley, and southeast to the distant Laguna Mountains in Orange County. It is enjoyed by hikers, joggers, dog walkers, bicyclists and nature lovers.[55]

The inadequate environmental description makes it impossible for the public and the governmental decision-makers to determine *from the EIR* whether the project would have an adverse impact on public access to public parkland.[56] With no environmental

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[53] Exh. 7 (LA Times, Editorial, Aug. 3, 2004); Exh. 8 (letter, M. Chrisman, Cal. Sec'y of Resources, to R. Garcia, Oct. 22, 2004); Exh. 9 (LAMountains.com, Westridge-Canyon Back Wilderness Park).

[54] Exh. 3, pp. 3-4.

[55] Exh. 3, pp. 3-4.

[56] *Cadiz Land Co. v. Rail Cycle*, 83 Cal. App. 4th 74, 94 (2000); *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 128-129 (2001); *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal. App. 4th 1109, 1122 (1997).

description of the parkland access that would be restricted by the proposed privatization, there is no basis for a reasoned governmental determination that privatization of the trail would have a significant environmental effect and no reasoned basis for deciding whether the planned privatization should be rejected or mitigated. By virtue of the same informational deficiency, the Draft EIR provides no foundation for public accountability.[57]

By failing to describe the environment as required under CEQA, the Draft EIR fails to sound the "environmental alarm bell" that privatizing and gating the Canyonback Trail may have an adverse impact on established recreational and aesthetic uses of the Westridge-Canyonback Wilderness Park trails. This lack of information in the draft circulated for public comment renders the review process incurably inadequate.[58] The non-existent environmental disclosure in the Draft EIR therefore violates CEQA and requires revision and recirculation of the EIR.[59]

C. The Draft EIR Fails To Identify Or Consider Ways To Avoid Or Minimize The Project's Significant Impact On Public Access.

The Draft EIR is also invalid because it fails to provide a "complete analysis of the environmental consequences" of the project's plan to privatize and gate the Canyonback Trail.[60] An EIR must "identify and focus on the significant environmental effects of the proposed project," including changes to "existing physical conditions."[61] "Direct and

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[57] *Save Our Peninsula*, 87 Cal. App. 4th at 120-121, 125.

[58] *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal. App. 4th 1109, 1124 (1997).

[59] *Kostka & Zischke*, § 12.5, pp. 464-465 (citing *San Juaquin Raptor/Wildlife*, 27 Cal. App. 4th 713); *Save Our Peninsula*, 87 Cal. App. 4th at 130-131; *Galante Vineyards*, 60 Cal. App. 4th at 1124-1125;

[60] *Planning and Conservation League v. Dept. of Water Resources*, 83 Cal. App. 4th 892, 915 (2000).

[61] Guidelines § 15126.2(a).

indirect significant effects of the project on the environment shall be clearly identified and described giving due consideration to both the short-term and long-term effects."[62]

The Draft EIR, however, ignores the reasonably foreseeable environmental effects of the proposed privatization and gating of Canyonback Trail.

First, the designation of a street as "private" as opposed to "public" removes an important statutory protection of public access. Public access on a public street cannot be restricted by private residents or homeowners' associations. No gates can be constructed on public streets. And a public street that provides a convenient means of public access to public parkland cannot be privatized through the statutory vacation process. The public's right of access to public streets is protected by Vehicle Code Section 21101.6, which provides that "local authorities may not place gates or other selective devices on any street which deny or restrict the access of certain members of the public to the street, while permitting others unrestricted access to the street." It is therefore illegal to construct a gate across a public street if doing so restricts equal access for legitimate public uses. This statute was intended to codify the public's "fundamental right" of access to public streets and parklands.[63]

The plan to designate the extension of Canyonback Road as a private (as opposed to public) street clearly jeopardizes the public's right to access the road/trail. Yet the Draft EIR fails to consider this impact or evaluate the pros and cons of privatization. In particular, there is no discussion of the fact that by privatizing the road/trail, the public will lose the enforceable right of access that the government must protect under Vehicle Code § 21101.6. Privatization makes it much more difficult and expensive to protect the public's right of access – as illustrated by the current fiasco in Millard Canyon.[64]

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[62] Guidelines § 15126.2(a).

[63] *Rumsford v. City of Berkeley*, 31 Cal. 3d 545, 550 (1982); *City of Lafayette v. County of Contra Costa*, 91 Cal. App. 3d 749 (1979); Exh. 3 (letter-brief describing scope of public's fundamental right of access to public lands).

[64] Exh. 18 (Liz Valsamis, *Homeowners' Signs Bar Access To Trail*, Los Angeles Daily Journal Jan. 14, 2005); Exh. 59 (Louis Sahagun, *Canyon Neighbors Gird for Another Legal Battle*, Los Angeles Times (Jan. 18, 2005).

The cost of protecting the public's right of access would be shifted from the government, which has a duty to maintain public access on public streets, as mandated under the Vehicle Code, onto the public, which would bear the economic burden of defending against any diminution in the right of access. Privatization would thereby increase the cost of protecting the right of public access, which is a diminution in the right itself. Further, the EIR should have, but does not, provide any assurance that whatever access is provided initially will later be enforceable. *Nothing in the Draft EIR* limits the right of future residents to prohibit public access through what would become their private street.[65] Once the City privatizes what has historically been a public access path, the impairment of access is inevitable.

Further, the Draft EIR provides for a "security gate" blocking access to the Canyonback Trail/Canyonback Road extension. Although "pedestrian access" has been promised, the EIR fails to specify the scope of this access. Will access be limited to "pedestrians"? Does the term "pedestrian" include those riding bikes or horses, or walking dogs? The Draft EIR is silent. Will there be any other restrictions on public access? And putting aside what the developer promises to construct, there is nothing in the Draft EIR to prevent the future owner of the private road/trail from imposing harsher restrictions, which is a common occurrence.

The construction of a security gate at the trail's entrance further jeopardizes the public's established recreational use of Canyonback Trail. A security gate provides the architecture for restricting public access and intimidating members of the public. The Fossil Ridge Park in Sherman Oaks provides an important illustration of the access problems likely to arise if a gate is installed. The park is accessible through a road within a residential development. The private community was required to provide public access during park hours. But the gate and private security guard hired to control access have been used to inhibit public use of the public parkland.[66] The proposed gating of the Canyonback Trail poses the same inherent risk.

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[65] Guidelines § 15126.4(a)(2).

[66] Exh. 10 (letter, R. Skei, SMMC, to C. Miscikowski, Aug. 6, 2004).

Nothing in the Draft EIR would prevent the area's future property owners or homeowners' association from barring *all access* to the Canyonback Trail, including the "pedestrian access" that is specified in the project description. While the Draft EIR states that a "pedestrian" will have access, there is no indication as to whether this access is a matter of right or permission. The Draft EIR does not answer the important questions, such as will "pedestrian access" will be available five years from now? Or twenty years from now? The Draft EIR is *silent* on that issue, and thereby places public access at risk by failing to consider and implement mitigation measures adequate to protect against this foreseeable risk.

The Draft EIR is likewise silent on whether access will be limited to certain times of day. Will access be available only from dawn to dusk? Or will access be unrestricted at all times, which is the current scope of public access on the Canyonback Trail?[67] Will trail users be required to sign-in with or request access from a security guard? Will any other inhibiting security measures be utilized at the proposed gate, or within the private street? The Draft EIR provides no basis for assuming that the private, gated community will be precluded from over-zealously controlling public access through its private street.

The public access risks created by the project plan as described in the Draft EIR are *identical to* the risks posed by the City's plan to restrict public access on current Canyonback Road. In February 2004, the City issued a Revocable Permit to the Crown HOA authorizing the construction of a security gate restricting public access onto Canyonback Road, which is also part of the Canyonback Trail.[68] The City allowed the Crown HOA to (1) restrict public access to daylight hours, and (2) require trail users to

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[67] Exh. 10, p. 3 (Memorandum of Ranger Walt Young, Aug. 5, 2004) (describing public access to Westridge-Canyon Back Wilderness Park trails as available 24 hours per day).

[68] Exh. 11 (letter, C. Miscikowski to M. Patonai, Bur. of Eng., Oct. 21, 2003, and e-mail from J. Pietroski to K. Keller, July 14, 2004); Exh. 12 (letter, C. Numano-Hiura to T. Freeman, Aug. 23, 2004); Exh. 13 (L.A. Daily Journal, Aug. 1, 2004); Exh. 14 (L.A. Daily Journal, Aug. 25, 2004).

request access during daylight hours from a remotely-located private security guard via a video-monitoring phone.[69]

The Draft EIR raises the same public-access problems as the illegal Canyonback Road Gate. Assuming that the proposed gate would likewise limit access hours to "dawn to dusk" and would employ a security guard to monitor access to the "private street" – and nothing in the Draft EIR would prevent future residents from doing so, or worse – the proposed privatization and gating raise many significant public access problems.

First, the Canyonback Trail currently is and historically has been accessible at all times. The Canyonback Trail is part of the "Big Wild" trail system, which is used by many people as a circuit. State Parks, the largest landowner in Big Wild, does not have night closures of its parkland, nor do any other governmental entities within the Big Wild restrict nighttime trail use. The Mountains Recreation and Conservation Authority Rangers who patrol the area do not restrict trail use at night, due to this well-established, legitimate post-sunset trail use that crosses jurisdictional boundaries. In fact, restricting night-time access would risk stranding trail users on the wrong side of the gate after traversing many miles of trails.[70] Consequently, those using the trails for recreational purposes are free to do so *before* sunrise and *after* sunset. And many do. Indeed, hiking, bicycling, jogging or strolling at night, under a full moon, or before the crack of dawn, are common public uses of the intersecting Big Wild trails. Gating and privatizing the Canyonback Trail as it passes through the Canyonback Ridge development would improperly jeopardize these public recreational uses.

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[69] The City Attorney's Office subsequently terminated the gating of Canyonback Road because a public street cannot be gated or privatized if used for legitimate public purposes, such as accessing public parkland.

[70] One of the most popular trails in the area is located near Kenter Avenue, which the public has historically accessed from many trailheads in the Santa Monica Mountains, including those along Mulholland Drive, Reseda Boulevard, Hollyhock, and several other inter-linked trailheads. If the proposed gate on Canyonback Ridge is closed at night, individuals would be stuck on the Kenter side of the Gate to return back to Mulholland after it is locked. Exh. 3, pp. 3-4.

Second, the Canyonback Trail links the Kenter-Mulholland corridor, which is used by bicycle commuters who live in the West Los Angeles area and work in the Encino and Tarzana areas, and vice versa. The proposed Canyonback Ridge gate would restrict this longstanding access route through public parkland. Protecting this bicycle access route is consistent with the community plan's protection and promotion of this bicycle commuter access.[71] In a time when our region is contending with increasing traffic congestion and population growth, closing through access to the unpaved roads would put bicycle commuters back in their cars, if they have cars, and would prevent future commuting by mountain bicyclists. Limiting public access to the Canyonback Trail to daylight hours will discourage bicycle commuting. It will also expose riders to risk. Bicyclists would be stranded and forced to use alternate, far out-of-the-way routes via Sepulveda and Sunset Boulevards, which are extremely hazardous for mountain bicyclists, especially after sunset or before sunrise.[72]

Third, allowing private security guards employed by and answerable to private residents to control access to public parkland would inhibit public use of the parkland areas accessible through the Canyonback Trail. The fact that the "gatekeeper" to public parkland would not be employed by the public would create a substantial risk of abuse. The existence of entry gates and private security forces inevitably inhibits public use of public parklands. Experience at other locations indicates that private security guards often restrict access improperly.[73] This has been a problem for the SMMC in the few instances where public access has been provided through private, gated streets. In one situation, the developer granted the SMMC an easement to secure public access to parkland. But the street was private, gated, and patrolled by a security guard hired by the residents or HOA. While the guards did not *prohibit* the public from accessing the parkland trails, it restricted their right to do so by requiring trail users to relinquish their

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[71] Brentwood-Pacific Palisades Community Plan, III-25 to III-26, Goal 14, Obj. 14.1, Policy 14.1.1.

[72] Exh. 74 (letter, Concerned Off-Road Bicyclists Association, to C. Miscikowski).

[73] Exh. 10.

drivers' licenses until they exit through the entry gates.[74] Over time, trail users tire of these types of hassles and stop using these trails. Public use of public parkland trails will thereby be discouraged, limiting the utility of public parkland paid for with public funds.

Fourth, restricting public access in any manner not currently allowed – such as dawn-to-dusk rules – would impair fire protection in this "Very High Fire Hazard Severity Zone."[75] MRCA Ranger Walt Young has recognized that any restriction of public access to the Canyonback Trail after dark would significantly impair fire protection of this vulnerable area: "with the ever-present threat of wildfire, I cannot imagine taking any action which would prevent hikers from freely traveling in the backcountry. Thirty years of public safety experience in Search & Rescue, Wildland Firefighting and Law Enforcement as a Park Ranger leaves me no doubt that this proposal is a bad idea."[76]

Finally, the mere presence of a security gate structure inhibits public use. The prevalent use of so-called "faux gates" illustrates the impact of gating the Canyonback Trail, even if trail users were actually permitted unrestricted entry at all times: "The message delivered by the 18-foot-high stone columns and thick iron gates at the entrance to Simi Valley's Long Canyon development is clear: Keep moving if you have no business here."[77] While the gates to the Long Canyon development are always swung

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[74] The SMMC's Executive Director explained this problem to Jeffrey B. Ray of Psomas and Frans Bigelow, Castle & Cooke's Project Manager, during a meeting at Psomas' office on March 29, 2005 (the "March 29, 2005 Psomas Meeting").

[75] Exh. 61 (LAFD publication explaining "Very High Fire Hazard Severity Zone" designation); The spread of fire through the area threatens not just those living in Mountaingate, but residents throughout the hillside communities. The tragic 1978 "Mandeville Fire" began off Mulholland Drive and moved to the Mountaingate area before descending into Mandeville Canyon, and beyond. Exh. 15; Exh. 60 (letter, Wendy-Sue Rosen, UMCA, to C. Miscikowski, June 23, 2004) (expressing concern about fire safety).

[76] Exh. 10, p. 3 (Memo, Ranger Walt Young).

[77] Exh. 16 (Evan Halper, *Communities Say Keep Out – By Bluffing*, Los Angeles Times, May 28, 2002, B-7).

open, the message and effect is the same as with functional locking gates. Experts have concluded that fake gates are just as effective as real gates in keeping the public off public property: "The fakes seem to have many of the same psychological effects as [functioning] gates. They put people on notice that the area is protected."[78] The impact of a functioning security gate, blocking access through a private gated community, but with "pedestrian access," is likely to have an even greater intimidating impact than a "faux gate."

D. A Revised EIR Must Be Circulated For Public Comment.

The significant environmental risks due to the project plan to privatize and gate the trail/road are simply ignored in the Draft EIR. They are not identified and, as a result, there is no analysis of potential ways to avoid or mitigate these risks. That violates the core purpose of the EIR process, which is to assure that the information necessary to analyze these environmental problems is provided in the draft EIR, thereby providing the public with a proper basis for making *informed* comments to which the lead agency must meaningfully respond.

The Legislature mandated that a draft EIR must be circulated for public comment based on (1) its conclusion that members of the public can make "significant contributions to environmental protection" and (2) the belief that transparent governmental decision-making on matters of environmental significance is essential to "notions of democratic decision-making."[79] The Draft EIR plays a vital role in the CEQA process because (1) it provides the general public the opportunity to review and comment upon the significant environmental effects of a proposed project,[80] and (2) it

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[78] Exh. 16, quoting Ed Blakely, co-author of *Fortress America: Gated Communities in the United States*.

[79] *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association*, 42 Cal. 3d 929, 936 (1986).

[80] Guidelines § 15086 (requiring lead agency to consult with and request comments from members of public and other responsible agencies); § 15087 (requiring public notice of Draft EIR); § 15105 (requiring lead agency to provide sufficient time for public review (footnote continued)

requires that the lead agency respond to those public comments with a good-faith, reasoned analysis.[81]

The Draft Mountaingate EIR fails to describe or evaluate the significant environmental effects of gating or privatizing the trail, and it likewise fails to evaluate feasible mitigation options. A Draft EIR that is "so fundamentally and basically inadequate" as to preclude meaningful public comment must be revised (or supplemented) and recirculated for public comment.[82]

V. The Final EIR Further Distorts The CEQA Process.

It is important to recognize that even if the Final EIR adequately described the project's potentially significant environmental effects and carefully analyzed ways to avoid or minimize those effects, the inadequate Draft EIR would still have doomed the Mountaingate EIR process to failure, meaning the need to recirculate for public comment, because the deficient Draft EIR denied the public an opportunity to make fully-informed comments and receive adequate responses to such comments.

But, for purposes of evaluating this environmental review process, no such subtle distinctions are necessary. The Final EIR is just as inadequate as the Draft EIR. And it is now clear that the Draft and Final EIRs are deficient by design. Public comment focused on the Draft EIR's non-existent analysis of the trail access issues, but the Final EIR has studiously avoided providing any meaningful information or pinning down the developer's future options in any meaningful way. There is nothing in the Final EIR that would restrict future residents from terminating public access or limiting it in ways not currently allowed.

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and written comments); § 15204 (describing nature of public comments to be provided upon review of Draft EIR).

[81] Guidelines § 15088.

[82] *Laurel Heights Impr. Dist. v. Regents of Univ. Cal.*, 6 Cal. 4th 1112(1993); Guidelines § 15088.5(a)(4).

A. Timely Objections Were Raised Concerning The Improper Failure To Address The Gating And Privatization Of The Canyonback Trail.

The Santa Monica Mountains Conservancy ("SMMC"), the Upper Mandeville Canyon Property Owners' Association ("UMCA"), the Brentwood Hills Homeowners Association ("BHHA"), and other members of the public objected that the Draft EIR failed adequately to address the public access issue.[83]

The SMMC objected that (1) the gated development project would "completely sever the [Canyonback] trail along the [Canyonback] ridge," and (2) the Draft EIR fails to include any discussion of mitigation measures that would minimize or alleviate this adverse impact.[84] The SMMC advised that these fundamental defects require revision and recirculation.[85] The SMMC's conclusion is consistent with the CEQA Guidelines and caselaw interpreting CEQA.[86] The SMMC too stated that the Draft EIR must be re-circulated because it fails to analyze in any manner the project's adverse impacts on the Canyonback Trail.[87]

The UMCA likewise objected that the "prospect of removal of this access" to the Canyonback Trail and "the likelihood that the home development will be guard-gated is an unacceptable aspect of this proposed project."[88] The BHHA similarly objected that

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[83] Final EIR, III.B-10, III.E-7, III.D-51, III.D-57.

[84] Final EIR, III.B-10.

[85] Final EIR, III.B-17, Comment 6.12.

[86] Guidelines § 15088.5(a)(4) (recirculation required for conclusory analysis); Guidelines §§ 15126.2, 15126.4 (EIR must consider and discuss significant environmental impacts and mitigation); *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 130-131 (2001) (holding that public cannot be denied "opportunity to test, access and evaluate" critical information not included in draft EIR if the undisclosed information is necessary to make "an informed judgment as to the validity" of the recommended action).

[87] Final EIR, III.B-8.

[88] Final EIR, III.D-57.

the Draft EIR's reference to a "gate and pedestrian access" is "vague and ambiguous regarding the locking or unlocking of the gate and pedestrian access." In objecting to this vague description, which fails to provide any assurance that access to public parkland will be protected, the BHHA highlighted the fact that "[p]ast experience with the gated entry to Mountain Crest Lane, immediately adjacent to the proposed Canyonback Road extension, shows that this will create impediments to through hikers."[89] The BHHA asked that a revised EIR "explain in detail what is suggested by the [gate and pedestrian access] language, and what mitigation measures would insure that the passageway is not locked or blocked."[90]

B. The Final EIR Improperly Severs Consideration Of The Environmental Impacts Of Privatization And Gating.

The "core" function of an EIR is to describe the significant environmental effects that may result from a project and thoroughly analyze ways to eliminate or minimize those effects.[91] To do so, the EIR must (1) specify the significant effects a project would have on the environment[92] and (2) propose, describe and evaluate feasible mitigation measures that would eliminate or minimize the identified significant effects.[93] This standard mandates that an EIR for a development project, like the proposed Mountaingate development project, describe *all* reasonably foreseeable significant effects that may be

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89 Final EIR, III.D-51.

90 Final EIR, III.D-51.

91 *Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara*, 52 Cal.3d 553, 564-656 (1990).

92 Pub. Res. Code § 21100(b)(1); Guidelines § 15126(a).

93 Pub. Res. Code § 21100(b)(3); Guidelines § 15126(e).

caused by the described project in any of its planned phases.[94] The development project cannot therefore be divided into separate "projects" with separate EIRs.[95]

The CEQA Guidelines define a "project" as "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately."[96] The term is broadly interpreted in order to provide maximum protection to the environment and ensure that government officials are held accountable for their decisions.[97] This expansive definition of "project" prevents governmental officials from "chopping a large project into many little ones,"[98] which would "stultify the objectives of [CEQA's environmental] reporting process."[99] An "accurate, stable and finite project description is [therefore] the *sine qua non* of an informative and legally sufficient EIR." The public decision-makers and members of the public can properly "balance the proposal's benefit against its environmental costs, consider mitigation measures [and] assess the advantage of terminating the proposal" only if *all* of the reasonably foreseeable effects are considered.[100] Otherwise, the EIR fails to provide an "accurate view of the project, thereby preventing the lead agency from making informed decisions based on an analysis of all significant adverse effects and ways to eliminate or minimize them."[101]

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94 *Los Angeles Unified School Dist. v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1027-1028 (1997).

95 *City of Antioch v. City Council of City of Pittsburgh*, 232 Cal. App. 3d 1325, 1334 (1986); *Citizens Assoc. for Sensible Dev. of Bishop v. Co. of Inyo*, 172 Cal. App. 3d 151, 167 (1985).

96 Guidelines § 15378(a).

97 *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 730 (1994).

98 27 Cal. App. 4th at 730.

99 *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 190-193 (1977).

100 *County of Inyo*, 71 Cal. App. 3d at 192-193.

101 *County of Inyo*, 71 Cal. App. 3d at 193; see generally *Kostka & Zischke*, § 12.8, pp. 474-475.

A potentially significant adverse environmental effect is "ripe" for EIR analysis if it is "a reasonably foreseeable consequence of the plan."[102] The rule is simple: If a project can be expected to raise a significant environmental impact, then the lead agency cannot *defer* analysis of the potential effect in the EIR.[103] The City, as the lead agency, must therefore consider the significant environmental effects of the project at the earliest feasible time, before taking any action that may limit the range of available mitigation measures,[104] and must coordinate the EIR preparation to the "maximum extent feasible" for concurrent (not consecutive) planning, analysis and approval.[105] Full EIR review of the entire project must therefore occur early in the planning process, while maximum flexibility exists.[106] And when the EIR is for a specific development project, it cannot be divided into separate "projects" with separate EIRs.[107]

1. The Final EIR sweeps the public-access problem "under the rug."

The Final EIR purports to address the public-access problems identified during the Public Comment period in "Response to Comment 6.3," which it generously but inaccurately characterizes as being a "detailed discussion about the Canyonback Trail."[108] The response, however, indicates only that (1) the "existing state trail will be realigned and constructed to maintain public access," (2) the developer "will consult with the Santa Monica Mountains Conservancy on final trail design plans" and (3) the "proposed Canyonback Road gate will include [i] a pedestrian gate for hiking access, which will

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[102] *Los Angeles Unified School District v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1028 (1997), citing *Laurel Heights*, 47 Cal. 3d at 396.

[103] *Los Angeles Unified*, 58 Cal. App. 4th at 1028. citing *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 199 (1996).

[104] Guidelines § 15004(b)(2)(B).

[105] Guidelines § 15004(c).

[106] *Sundstrom*, 202 Cal. App. 3d at 307.

[107] *City of Antioch*, 232 Cal. App. 3d at 1334.

[108] Final EIR, IIIB-8 (Response 6.1).

remain unlocked, or [ii] a trail will be provided around the gate."[109] This is an improper severance of the public-access problem from the EIR and an improper delegation of the lead agency's obligation to prevent or mitigate the problem.

First, the Final EIR fails to describe or analyze the impact of privatizing the trail, just as this problem was ignored in the Draft EIR. This substantial defect renders the Final EIR just as inadequate as the Draft because it leaves everything at play. Nothing in the Draft or Final EIR prevents residents of the development or their HOA from barring access, restricting it in ways that have never before been allowed, or inhibiting access through over-zealous security measures. Whether or not the City or developer have ideas for doing so, the EIR is silent and that is what counts.[110]

Second, the Final EIR *defers* consideration of the public-access problems raised by the construction of a "pedestrian gate for hiking access." While the Final EIR states that the pedestrian gate will "remain unlocked" (unless the trail is realigned),[111] no details are provided. Does the EIR's reference to "pedestrians" and "hiking" mean that the future residents of the Canyonback Ridge community will be permitted to exclude anyone else, such as those walking dogs, riding bikes or horses? These recreational uses are currently permitted on the Canyonback Trail, but will they be permitted in the future, once the Canyonback Trail is partially privatized and gated? Will there be a legally *adequate* mechanism for enforcing the public right of access if future residents decide to restrict public access into their private, gated community? The Final EIR provides *no answers* to these critical questions.

Third, the Final EIR states that the Canyonback Trail will be realigned, but it leaves open the design of the realignment. Will the realigned trail degrade in any manner the existing public access, such as by diverting the state trail onto or under the landside-

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[109] Final EIR, III-B-10 (Response 6.3), III.D-51 (Response 14.3), III.D-57 (Response 15.3); III.E-7 (Response 17.11).

[110] *Planning and Conservation League v. Dept .of Water Resources*, 83 Cal. App. 4th 892, 919-920 (2000), citing *Laurel Heights*, 47 Cal. 3d at 404-405.

[111] Final EIR, III.B-10 (Response 6.3).

prone Canyonback Ridge?[112] Will the diverted trail be sufficient to permit multi-use access to accommodate hikers, bicyclists, horseback riders, and joggers, as does the current Canyonback Trail? Will the realignment degrade the current aesthetics of the existing trail by re-routing trail users off of the scenic ridge and through a residential development? Instead of answering these critical questions, the Final EIR simply *defers* analysis, stating only that the manner of realignment will be decided later, apparently by the project applicant in non-public consultation with the Santa Monica Mountains Conservancy. Indeed, the Final EIR does not even disclose whether the proposed (future) trail realignment will obviate the need for access to the Canyonback Road extension. This too is left for future resolution, by the project applicant and the Santa Monica Mountains Conservancy.

2. The public access problem cannot be deferred.

While the Draft EIR simply ignored the public access problems created by the project's proposed privatization and gating of the Canyonback Trail, public comments focused directly on this problem. These public comments required consideration and resolution: "Problems raised by the public and responsible experts require a good faith reasoned analysis in response."[113] And the need for reasoned, factual response is particularly acute when critical comments have been submitted by another governmental agency.[114] By so mandating a detailed, reasoned analysis, CEQA "ensures that stubborn problems or serious criticism are not 'swept under the rug.'"[115] Instead of providing reasoned, factual responses, the final EIR passes the buck by deferring any substantive

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[112] Exh. 17, Engineering Geological Mem., Mountain Geology, Inc., March 2, 2005.

[113] *Santa Clara Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 723 (2003).

[114] *People v. County of Kern*, 62 Cal. App. 3d 761, 772 (1976).

[115] 106 Cal. App. 4th at 723, quoting *Cleary v. County of Stanislaus*, 118 Cal. App. 3d 348, 357 (1981).

response until sometime in the future, after the EIR is certified. That type of non-response is inadequate.[116]

The rule against severing projects is easily applied to development projects. The lead agency simply cannot split the "project" by deferring EIR consideration of any aspect of the project.[117] CEQA's mandate to consider all reasonably foreseeable effects of a project even requires the lead agency to consider and evaluate future impacts, including reasonably foreseeable future development.[118] The Mountaingate EIR, however, requires no such foresight into future projects. The significant, adverse environmental effect is based directly on the project's proposed gating and privatization; it is not based on future projects or expansions. But the "future projects" cases illustrate the broad scope of CEQA's mandate to analyze reasonably foreseeable impacts, even when they require foresight.

A seminal case is *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, where the court held that a residential development project could not properly be based on an EIR that deferred for another day discussion and analysis of potentially adverse impacts caused by the project's waste-water treatment needs. The appellate court held that the project's environmental impact could not properly be analyzed without considering the foreseeable effect of the waste-water requirements. The decision to approve or reject the project, which required detailed consideration of project mitigation and alternatives, could not properly be made absent full disclosure and consideration of

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[116] *Santa Clarita Org. for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 723 (2003).

[117] *City of Antioch*, 232 Cal. App. 3d at 1334; *City of Santee v. County of San Diego*, 214 Cal. App. 3d 1438, 1450 (1989).

[118] *Laurel Heights Improvement Assoc. of S.F. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 396 (1988), holding that "an EIR must include an analyses of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."

all the project's foreseeable, potentially adverse environmental impacts. Failure to consider such foreseeable, potentially significant effects rendered the EIR invalid.[119]

The CEQA mandate that the EIR contain an adequate description of foreseeable effects is also illustrated in *Stanislaus Natural Heritage Project v. County of Stanislaus.*[120] In that case, the lead agency approved a program EIR for a 5,000 residential unit project, which would be developed in several phases over a 25-year period.[121] The EIR, however, failed to describe how the developer would procure the necessary water supply for the development. The EIR addressed only the developer's procurement of water sufficient for the first five years of the 25-year phased development project.[122] The EIR in *Stanislaus Heritage*, like the City's non-analysis of the public-access problems in the Mountaingate EIR, simply deferred consideration of the water-procurement problem. To "mitigate" this potentially significant environmental impact, the EIR provided that (1) development beyond the first five years shall not be permitted unless the developer can establish that sufficient water resources have been procured and that the environmental impacts have been studied and mitigated, and (2) additional environmental review of such further water acquisitions will be required for the further phases of development.[123]

This proposal to defer consideration of foreseeable, future environmental impacts "defeated a fundamental purpose of CEQA: to 'inform the public and responsible officials of the environmental consequences of their decisions before they are made.'"[124] An EIR that does not specifically address significant adverse effects that a project can

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[119] 27 Cal. App. 4th at 732-733.

[120] 48 Cal. App. 4th 182 (1996).

[121] 48 Cal. App. 4th at 188.

[122] 48 Cal. App. 4th at 195.

[123] 48 Cal. App. 4th at 195.

[124] 48 Cal. App. 4th at 195.

reasonably be expected to cause, and methods for mitigating or avoiding the expected effects, does not comply with CEQA.[125]

The gating and privatization of the Canyonback Trail is part of the Canyonback Ridge development project. If the potentially significant environmental impacts of this action are not identified, discussed and analyzed in the detailed manner required under Guidelines § 15126 and § 15126.2, then critical environmental "decisions" will effectively be made by default. The Final EIR states that the Canyonback Trail will be realigned.[126] The realignment of a public trail properly requires an evaluation of measures for avoiding or minimizing the adverse public access and aesthetic effects of any such realignment.[127] But if the project plans and Vesting Tract Map are approved now, under the existing EIR, then the range of mitigation options will be narrowed.

Similarly, if the Canyonback Trail cannot be realigned to avoid passing through the development site, then an option for mitigating the adverse effect of the project on public access would be to make the new, realigned street "public," to preserve the public's right of access through Vehicle Code §§ 21101(a)(1), 21106.1; and Streets and Highways Code § 8324(b). But if the proposed Map is approved, creating a vested right to a "private street," that will limit options for mitigating the significant environment effects of the project. That is why the lead agency cannot properly defer environmental analyses by splitting a single development project into smaller pieces. Doing so subverts the EIR's core purpose – the identification of a project's significant adverse effects and analysis of ways to avoid or minimize any such effects.[128] This core function cannot be

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[125] Id.

[126] Final EIR, III.B-10 (Response 6.3).

[127] *Ocean View Estates Homeowners Assoc. Inc. v. Montecito Water Dist.*, 116 Cal. App. 4th 396, 402 (2004).

[128] *Citizens of Goleta Valley v. Board of Supervisors of Co. of Santa Barbara*, 52 Cal. 3d 553, 564-565 (1990).

accomplished if the lead agency defers consideration of a project's significant environmental effects.[129]

VI. The City Cannot Delegate Its Responsibility To The Santa Monica Mountains Conservancy.

The EIR's proposed "mitigation" of the public-access issue is effectively to delegate the City's responsibility to the Santa Monica Mountains Conservancy ("SMMC"). This it cannot do.

The City, as the lead agency, is responsible for weighing the pros and cons of the proposed project.[130] The Guidelines make clear that the City "shall not delegate" its statutory responsibility to review a project's significant effects, evaluate those effects and ways of avoiding or minimizing them, and make the findings required under CEQA based on that evaluation process.[131] This non-delegable responsibility ensures that the lead agency makes a fully informed decision and that it is held accountable for its decision.[132]

In violation of this statutory responsibility, the Final EIR simply delegates the problem to the SMMC and the project applicant, for resolution in the future, outside this EIR process. The Final EIR therefore fails to describe or evaluate measures that would

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[129] *Santa Clara Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 721-723 (2003); *Planning and Conservation League v. Dept. of Water Resources*, 83 Cal. App. 4th 892, 915-920 (2000); *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 195-206 (1996); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 730-732 (1994); *Santiago County Water District v. County of Orange*, 118 Cal. App. 3d 818, 829-831 (1981).

[130] Guidelines § 15021.

[131] Guidelines § 15025(b)(1-2), and Discussion.

[132] Guidelines § 15025, Discussion.

minimize or avoid significant environmental effects of the project, in violation of CEQA's non-delegation rule.[133]

The CEQA non-delegation rule is illustrated in *Sundstrom v. County of Mendocino*,[134] where the court considered an EIR prepared in support of a private sewage treatment plant. In that case, it was reasonably foreseeable at the time the EIR was prepared that construction of the sewage treatment plant would create a need for sludge disposal. But the lead agency effectively removed this problem from the scope of the EIR by "trusting that the Regional Water Quality Control Board and the applicant would work out some solution in the future."[135] By delegating its CEQA obligation to evaluate this foreseeable, significant environmental effect of the project, the lead agency failed to "insure the integrity of the process of decisions" and made it possible that the problem would be "swept under the rug."[136]

Similarly, the lead agency in *Citizens for Quality Growth v. City of Mt. Shasta*[137] failed to consider any mitigation measures to alleviate potential effects on wetlands due to a rezoning and general amendment plan. The EIR simply provided that any wetlands-related concerns must be assessed by the U.S. Army Corps of Engineers in connection with a fill permit application that the developer would be required to seek from the Corps under the Clean Water Act. The City failed properly to discharge its responsibility to analyze independently the foreseeable effects of rezoning and evaluate ways to mitigate such effects.[138]

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[133] *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 91 Cal. App. 4th 342, 360 (2001).

[134] 202 Cal. App. 3d 296 (1988).

[135] 202 Cal. App. 3d at 309.

[136] 202 Cal. App. 3d at 309, quoting *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assoc.*, 42 Cal. 3d 929, 935 (1986).

[137] 198 Cal. App. 3d 433 (1988).

[138] 198 Cal. App. 3d at 442 & n.8. The lead agency is only relieved of its CEQA obligation to consider significant environmental effects (1) when another agency has (footnote continued)

The Final EIR does not address the tough questions about the project plan to privatize, realign and gate the Canyonback Trail. The EIR should have considered whether the foreseeable negative effects of privatizing and gating Canyonback Road could have been avoided by designating the street a public street and/or not permitting any type of gate because the applicant failed to propose an alternative alignment for public access during the pre-Draft EIR planning stage. Perhaps if the City accepted its responsibility to engage in a full CEQA-mitigation analysis, comparing the pros and cons of the proposed privatization/gating, it would conclude that there is little or no public benefit to gating the public trail, and substantial adverse effects that cannot be avoided. Instead of doing so, however, the Final EIR simply delegates to the SMMC and the applicant the responsibility for resolving the issue – outside the public, EIR process. This is precisely the type of evasion that CEQA was enacted to prevent.

Moreover, the California Supreme Court has recognized that even more problematic than the improper delegation of the lead agency's responsibility to another agency is the delegation of such responsibility to an agency with an economic interest in the project.[139] The Final EIR proposes to delegate responsibility for protecting public access to the SMMC, a potential beneficiary of the developer's plan to donate open space land if the project is approved. The Final EIR would thereby shield from CEQA/EIR scrutiny the public-access mitigation terms established through off-the-record negotiations conducted by an agency with a stake in the project as a potential beneficiary of the developer's open space dedication.

Finally, even apart from the lead agency's improper delegation of responsibility and the SMMC's stake in the project, the Final EIR is deficient because the proposed "mitigation" is nothing more than simply trusting that another public agency will *later*

"exclusive" jurisdiction and (2) the EIR provides *specific findings* to support such a delegation. Guidelines § 15091(a)(2) and (3). The SMMC does *not* have exclusive jurisdiction to protect access to public trails in the Santa Monica Mountains. Pub. Res. Code § 33008(a) (c).

[139] *Bozung v. Local Agency Formation Commission*, 13 Cal. 3d 263, 283-284 (1975).

make sure that the access problem is properly mitigated. That is no mitigation at all.[140] This complete failure to address the public access problem arising from the project's privatization, gating and realignment elements is grossly insufficient to support either informed or accountable environmental decision-making and is therefore "fatal."[141]

VII. The Final EIR Fails To Ensure That Legally Enforceable Mitigation Measures Protect Public Access.

The Final EIR must describe the specific measures necessary to minimize or avoid the project's significant adverse environmental effects. And it must describe how the critical mitigation measures will be implemented and enforced, not merely adopted then neglected.[142]

The Final EIR drops the ball completely on this critical requirement. No mitigation measures are even proposed, much less does the EIR consider methods for rendering them effective and fully enforceable. It is easy to envision the problems likely to arise. The City need look no further than the current fiasco in historic Millard Canyon.[143] The public has enjoyed and freely used the Millard Canyon trail in the foothills of present-day Altadena for hundreds of years, dating back to its use as a trade route for the Tonguas or Gabrieliños Native Americans. In the early 1990s, a group of developers obtained permission to develop a 279-home development that hugs the mountains and provides access to the public trail. The County of Los Angeles required, as a condition for development, that the developers provide a public-access easement to the open space behind the development, thereby maintaining public access to the trail.

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[140] *Sundstrom*, 202 Cal. App. 3d at 308-309; *Save Our Peninsula*, 87 Cal. App. 4th at 122.

[141] *Napa Citizens for Honest Government v. Napa Co. Bd. of Dir.*, 91 Cal. App. 4th 342, 360-361 (2001); Pub. Res. Code § 21100(b)(3); Guidelines § 15126(e).

[142] Guidelines § 15126.4; *Federation of Hillside Canyon Associations v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1261 (2000).

[143] Exh. 18 (Liz Valsamis, *Homeowners' Signs Bar Access To Trail*, Los Angeles Daily Journal, Jan. 14, 2005); Exh. 59 (Louis Sahagun, *Canyon Neighbors Gird for Another Legal Battle*, Los Angeles Times, Jan. 18, 2005).

But the developer is long gone and the homeowners' association that now owns the property contends that conditions limiting the developer's rights do not apply to the homeowners association. As a result, "No Trespassing" signs intimidate the public from using the public trail.

This illustrates why CEQA requires the EIR to specify not only the measures taken to avoid or minimize adverse environmental effects stemming from a development project, but also specify and take public comment on the measures adopted for assuring that the mitigation measures are effective and legally enforceable. The Mountaingate EIR is plainly deficient because it says nothing about either mitigation or measures to render mitigation effective and enforceable.

VIII. Public Access To The Canyonback Trail Is A Matter Of "Serious Public Controversy."

The existence of "serious public controversy" concerning a potentially significant environmental effect of a development project is a factor weighing heavily in favor of undertaking a thorough EIR analysis.[144] "Serious public controversy" is an important factor because "[o]ne major purpose of an EIR is . . . to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action."[145]

The proposed privatization and gating of the Canyonback Trail has effectively been "swept under the rug" by the Draft EIR's failure to disclose facts sufficient to trigger the public controversy that would have followed a full and adequate CEQA disclosure. But the exact same public-access issue was raised when the City issued a revocable permit to gate existing Canyonback Road. The general public first learned of

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[144] *Sundstrom*, 202 Cal. App. 3d at 310, quoting *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 85-86 (1974). While a serious public controversy standing alone is not sufficient to establish a significant environmental effect (Guidelines § 15064(f)(4)), it is an important factor that, in conjunction with others, can establish a significant effect. *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 131 (2001).

[145] *Sundstrom*, 202 Cal. App. 3d at 310, quoting *No Oil*, 13 Cal. 3d at 85-86.

the gating when construction began in June 2004. The public opposition to this attempted privatization of the Canyonback Trail was swift and overwhelming.[146]

The Canyonback Gate was the subject of a Los Angeles Times Editorial, which put this controversy in plain terms: "Here's an easy civics lesson: A private homeowners association wants to gate off a public street used by many to get to a public park. It needs city permission to do so. What should city leaders say? The obvious answer is: No way."[147]

The Canyon Back Alliance was formed to oppose the gating and privatization of Canyonback Road. The Alliance was supported by the following groups: The Center for Law in the Public Interest, Antes Columbus Football Club, Brentwood Hills Homeowners Association, Brentwood Homeowners Association, Citizens for a Safe Sepulveda, Concerned Citizens of South Central Los Angeles, Concerned Off-Road Bicyclists Association (CORBA), Environment California, International Mountain Bicycling Association (IMBA), Latino Urban Forum, LA City Bicycle Advisory Committee, LA Leggers, Los Angeles County Bicycle Coalition, Los Angeles Metropolitan Churches, Mandeville Canyon Association, Residents of Beverly Glen, the Sierra Club's Santa Monica Mountains Task Force, Trail Runners Club, Upper Mandeville Canyon Association, and Velo Club La Grange.[148]

State Assembly Member Paul Koretz, 42nd District, wrote Councilwoman Miscikowski to express his opposition to the Canyonback Gate, writing that (1) he is "concerned that the installation of this gate will restrict access to public land," (2) "approval of this gate sets a bad precedent that could result in further restriction to other public land in the Santa Monica Mountains and other regions," and (3) Miscikowski

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[146] Exh. 62 (Martha Groves, G*ates Would Cut Off Public Access*, Los Angeles Times, July 29, 2004); Exh. 63 (Letters to Editor, Los Angeles Times, Aug. 6, 2004).

[147] Exh. 8.

[148] Exh. 19.

should reconsider her position because public officials "should be looking for ways to open access to public land."[149]

State Senator Sheila Kuehl, 23rd District, sent a letter to Councilwoman Miscikowski expressing her opposition to the gating of this public-access point. Senator Kuehl explains: "the state has made a large investment in the acquisition of the 'Big Wild' lands, and public access is a general condition of the expenditure of public funds." "Public funding should guarantee public access."[150]

State Attorney General Bill Lockyer sent a letter to the Canyon Back Alliance lawyers: "It is readily apparent that the street serves a critical role in providing access to well used public parks and trails in the Santa Monica Mountains." Any attempt to limit public access "raises serious questions."[151]

Mike Chrisman, Secretary for the Resources Agency of the State of California, expressed the Agency's opposition to the Canyonback Gate.[152] And the Santa Monica Mountains Conservancy opposed the Canyonback Gate because it would restrict public access on public trails that are not and cannot be closed to the public, day or night. Further, as explained by Mountains Recreation & Conservation Authority Ranger Walt Young, any proposal that would block trail access after dark would "pose a severe threat to public safety." Ranger Young also warned that restricting access through these areas would hinder fire protection. "I cannot imagine taking any action which would prevent hikers from freely traveling in the backcountry. Thirty years of public safety experience in Search & Rescue, Wildland Firefighting and Law Enforcement as a Park Ranger leaves me no doubt that this proposal is a bad idea."[153]

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[149] Exh. 20.

[150] Exh. 21.

[151] Exh. 22.

[152] Exh. 8.

[153] Exh. 10.

The Center for Law in the Public Interest is a nationally-recognized leader in the Urban Parks Movement.[154] A co-signatory to this letter and the moving force behind the broad-based efforts to "Keep Canyon Back Trail Open For All"[155] and reestablish "Access for All to Historic Millard Canyon,"[156] the Center submitted a formal protest letter to Councilwoman Miscikowski on August 13, 2004.[157]

Protest letters were also sent by the City of Los Angeles' Bicycle Advisory Committee,[158] the Santa Monica Mountains Task Force, Sierra Club,[159] the Concerned Off-Road Bicyclists Association,[160] and several community organizations urging Councilwoman Miscikowski not to allow the established Canyonback Trail access point to be privatized and gated.[161]

Residents throughout Los Angeles sent written objections opposing construction of a gate that would restrict public access to the Canyonback Trail. More than 175 protesting letter writers indicated that they strongly opposed the gating of Canyonback Road/Canyonback Trail because it provides critical access to the Westridge-Canyon Back Wilderness Park and the Big Wild series of public parkland trails. They objected to (1) the restriction of public access on a dawn-to-dusk basis and (2) the construction of a security gate, monitored by private security guards beholden to a private homeowners

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[154] Exh. 76 (www.clipi.org, Urban Parks Movement).

[155] Exh. 76, pp. 4-5.

[156] Exh. 76, pp. 5-6.

[157] Exh. 77.

[158] Exh. 79.

[159] Exh. 78.

[160] Exh. 74.

[161] Exhibit 75 (letters from the UMCA, Brentwood Hills Homeowners Association, Mandeville Canyon Association, and Residents of Beverly Glen).

association, which effectively inhibits public use of public parkland trails, with the implied but unambiguous message "You Are Not Welcome, Turn Around And Leave."[162]

IX. The "Plan" To Realign Canyonback Trail Grossly Distorts The EIR Process.

The Final EIR states that Canyonback Trail will be realigned and constructed to maintain public access by constructing *either* (1) "a pedestrian gate for hiking access, which will remain unlocked, or (2) a trail will be provided around the gate." The Final EIR further provides that the Santa Monica Mountains Conservancy ("SMMC") will be consulted on "*final* trail design plans."[163]

Simply put, there is *no trail realignment proposal* at all. In response to the public access problems identified through the public comment process, the Final EIR provides two conflicting "solutions." The trail will *either* be realigned to the *east* of the existing DWP access road – and therefore wholly *within* the planned residential development area – or to the *west* of the DWP access road – which is the only available location for a realignment *outside* the development site. The Final EIR does not describe the design of either realignment. Indeed, the Final EIR necessarily implies that there is no design yet, hence the proposal for future consultation with the SMMC. Specifically, the eastward realignment option contains no details or analysis of the impact on recreational trail users. The westward option not only fails to provide those specifics, it also contradicts the Final EIR's unambiguous response to concerns by Mandeville Canyon residents living at the toe of the watershed: *"No grading is proposed to the south of the existing water tank or on the slopes that directly drain to Mandeville Canyon."*[164]

This vague response is a gross violation of CEQA's mandate that the Final EIR provide "a detailed analysis" and "good faith" response to public comment.[165] It likewise violates CEQA's mandate that the EIR provide a thorough analysis of any potentially

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[162] Exh. 101 (letters protesting Canyonback Gate).

[163] Final EIR III.B-10, Response 6.3.

[164] Final EIR, III.E-22, Response 21.2.

[165] *Cleary v. County of Stanislaus*, 118 Cal. App. 3d 348, 357 (1981).

significant adverse effects of a project that are "reasonably foreseeable."[166] This obligation applies to mitigation measures *imposed on* the applicant as well as project features *propo*sed *by* the applicant.[167] Instead of providing a meaningful response to the clearly foreseeable, adverse environmental impact of any trail realignment, the Final EIR improperly defers a response for a later date, outside the EIR process.

A. The Developer Has Always Known That Trail Realignment Would Be Necessary, But Chose Not To Submit To Environmental Review.

CEQA mandates that an EIR cover all components of a project in order to ensure that all significant effects are subjected to environmental review.[168] There is no question that the need to realign the trail was reasonably foreseeable[169] at the outset of project planning. But Castle & Cooke chose not to address the issue.

1. Castle & Cooke decided at the outset not to address trail realignment during environmental review.

On November 16, 2000, Castle & Cooke's Project Manager at the time, Ilene Miles, met with Louise Frankel, President of the Mountainview Homeowners Association ("MHA"), her husband Ernest Frankel, Past President of the Mountaingate Open Space Management Association ("MOSMA"), geologists hired by Castle & Cooke and the Mountaingate area representatives, and a staff person from Councilwoman Miscikowski's Office ("CD-11"). This meeting occurred after the City, and Councilwoman Miscikowski in particular, refused to back down when Castle & Cooke filed a lawsuit challenging the City's decision to apply the Brentwood-Pacific Palisades Community

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[166] *City of Antioch v. City Council of Pittsburgh*, 187 Cal. App. 3d 1325, 1337-1338 (1986).

[167] *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District*, 116 Cal. App. 4th 396, 400-401 (2004).

[168] Guidelines § 15126; *Kostka & Zischke*, § 12.18.

[169] *Laurel Heights*, 47 Cal. 3d at 396 (holding that EIR must include an analysis of a project's "reasonably foreseeable consequences").

Plan's slope-density requirements to the Mountaingate development project. The City's action reduced the size of the hillside development from 117 to 29 homes.[170]

Ilene Miles stated that Castle & Cooke would soon begin its environmental review process and that the purpose of the meeting was to identify issues for EIR consideration. The Mountaingate geologist asked "where will SMMC access be?" Ms. Miles responded that "The access will just be changed. That will be negotiated w/ Castle & Cooke, SMMC, & MOSMA at a later date."[171]

It is now 4½ years later, but that "later date" still has not arrived. The Draft and Final EIR provide *no details* on the trail realignment. By severing trail realignment from the EIR process, the public is deprived of the meaningful input that CEQA requires. Will the realigned trail degrade public access? The current alignment is stable on the ridge. The hillside slopes, by contrast, are landslide-ridden and severely unstable, rendering any trail realignment off the ridge onto the slopes a significant impairment of the trail's existing recreational use.

The possibility of realignment raises other risks too. Will a realigned trail forfeit aesthetically pleasing views[172] for recreational trail users? Will it render existing views from other portions of the trail, or other trails within the view-shed, less natural? Can these environmental effects be avoided or mitigated? *Public* review and comment on a properly-circulated draft EIR that analyzes these issues and mitigation possibilities is the

[170] Exh. 23 (November 13, 1997 News Release); Exh. 24 (MOSMA/MCA description of settlement with Castle & Cooke).

[171] Exh. 25 (Notes, Nov. 16, 2000).

[172] *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District*, 116 Cal. App. 4th 396, 401 (2004) (holding that project may have a significant negative aesthetic impact on scenic views); Guidelines, Appendix G, § (I)(a),(c).

CEQA-mandated procedure for addressing these environmental issues and ensuring that sufficient mitigation efforts have been made.[173] But that has not occurred.

2. Trail realignment requires mitigation analysis within the project's EIR.

Mitigation analysis is the EIR's core function.[174] Realignment risks a degradation of the trail's existing recreational uses as well as aesthetic concerns. The Final EIR addresses the potentially significant adverse environmental effects of trail realignment on public access and the view-shed simply by stating that these trail design issues will later be negotiated between Castle & Cooke and the SMMC. That is a wholly inadequate mitigation.

First, passing the buck is not "mitigation" under CEQA.[175] *Second*, the lead agency's mitigation-related decisions and mitigation analysis must be reflected within the four corners of the EIR.[176] Doing so is particularly important on issues like trail realignment. The environmental quality of one trail alignment as opposed to another (or others) is an evaluative decision that necessarily requires a weighing of the relative "pros and cons" of the various proposed alignments. Alignment "X" might provide better views for hikers, or a more stable path, but at a higher cost for the developer because it will require the residential structures and/or streets to placed in less desirable areas. By contrast, Alternative "Y" may have the opposite consequences. And Alternative "Z" may fall somewhere in between. The ultimate resolution of this "negotiation" is precisely the

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[173] *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural* Association, 42 Cal. 3d 929, 936 (1987) (describing public's role in EIR process); Guidelines § 15126.4 (describing mitigation analysis).

[174] *Los Angeles Unif. School Dist. v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1029 (1997).

[175] *Sundstrom v. Co. of Mendocino*, 202 Cal. App. 3d 296, 308-309 (1988).

[176] Guidelines § 15126; § 15126.2(a), (b); § 15126.4(a).

type of environmental decision that must take place within the public light cast by the EIR process.[177]

The question under CEQA is not whether the lead agency has made the "best" decision. Even if the Final EIR were to result in the best possible decision, "the argument misses the point of environmental review. Environmental review derives its vitality from public participation. That is the element missing here. The public was never informed of the significant impacts [that will later be] discussed by" the SMMC and the developer.[178]

The Final EIR's plan to defer a decision on trail realignment until *after* the EIR process is also invalid because that process will necessarily limit the range of mitigation options. The trail cannot be realigned through homes and the placement of streets, yards and other elements that will be established through the EIR process. Yet, the Final EIR would defer any decision on trail alignment until *after* the Vesting Tract Map has been approved – thereby limiting the lead agency's options for mitigating the significant environmental impacts of realignment by removing options for realignment.

The Final EIR plan to defer resolution of the trail realignment problem thereby violates CEQA's mandates (1) not to undertake actions on a project that would "limit the choice of alternatives or mitigation measures before completion of CEQA compliance" and (2) to coordinate environmental review to the "maximum extent feasible" to "run concurrently, not consecutively," which enables the lead agency to "consider the significant effects of a project before taking actions which may limit their choice of potential project alternatives or mitigation measures."[179]

The Tract Map cannot be certified or approved until after the trail realignment is addressed and circulated in a new or supplemental EIR.

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[177] *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 196-197 (1996).

[178] *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District*, 116 Cal. App. 4th 396, 400-401 (2004).

[179] Guidelines § 15004(b)(2), (c), and Discussion of 1998 amendment.

3. The SMMC has an interest in the project, which precludes it from being the final arbiter of trail realignment.

The Final EIR proposes that trail realignment will be designed later, in consultation with the SMMC. This is an improper delegation of the lead agency's non-delegable duty to mitigate adverse environmental effects, as described above. But the proposal has an even more insidious element. It would relegate the realignment decision to the status of an arms-length deal between two entities with their own economic interests at stake – and it would take this negotiation outside the EIR. This is another gross violation of CEQA.

The Final EIR provides that the developer will dedicate open space property, but "it has not yet been determined whether the land will be dedicated to the Mountains Recreation and Conservation Authority."[180] The MRCA is a local government public entity established pursuant to the Joint Powers Act, which represents a partnership between the SMMC, the Conejo Recreation and Park District and the Rancho Simi Recreation and Park District. The Final EIR's proposed mechanism for delegating public-access protection to the SMMC creates an inherent conflict because the developer would have the power in "negotiations" to condition its dedication to the MRCA upon the SMMC's approval of the developer's public-access plan.

While representatives of the UMCA and Canyon Back Alliance have the highest respect for the SMMC and the tremendous work it has performed, and performs every day, it would simply be improper to ask an agency with an interest in the project to make decisions that CEQA requires to be "approached neutrally." Indeed, the Final EIR puts the SMMC in the impossible position of having to balance its institutional interest in open space acquisition with the public interest in achieving optimal trail alignment. That provides the developer with bargaining power that is wholly improper under CEQA. Further, this negotiation would occur outside the light of a publicly-distributed EIR.

[180] Final EIR § III.B-12 (Response 6.6).

Nothing in CEQA would permit this type of environmental bargaining outside the EIR and therefore insulated from public review.[181]

B. The Secret Plan To Realign Canyonback Trail Requires Full EIR Disclosure, Analysis And Recirculation For Public Comment.

There is reason for concern that proponents of the ill-fated Canyonback Gate, in consultation with Councilwoman Miscikowski, have a secret plan to hijack the CEQA process. The plan is apparently to insert into the Tract Map a realigned trail that would divert the existing Canyonback Trail off Canyonback Road and onto the steep, landslide-ridden slopes below it.

This "plan" was not disclosed in the Draft or Final EIR. If the secretly planned trail is ever constructed, it will degrade the quality of public access by replacing a wide, paved trail atop the ridge with an inferior trail built along steep and unstable mountain slopes, passing over and under six already-identified, unstable and irremediable landslides. But, most irresponsibly, this ill-considered trail realignment would endanger residents in the Upper Mandeville Canyon area by carving a two-mile trail along unstable hillsides in an area with a long history of geological instability, thereby increasing significantly the risk of mudslides and landslides within the watershed areas below the proposed alternative trail.

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[181] "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. At the very least, however, the People have a right to expect that those who must decide will approach their task neutrally, with no parochial interest at stake. Of course, we do not impugn the motives and integrity of the officials of the particular city involved in the present dispute. Speaking generally, therefore, it seems clear that the officials of a municipality which has cooperated with a developer to the extent that it requests an annexation of that developer's property for the express purpose of converting it from agricultural land into an urban subdivision, may find it difficult, if not impossible, to put regional environmental considerations above the narrow selfish interests of the city." *Bozung v. Local Agency Formation Commission*, 13 Cal. 3d 263, 283 (1975).

When the developer's lead geologist saw the trail alignment for the first time, on March 29, 2005, he aptly described it with a single, well-chosen word: "Infeasible."[182]

1. The secret strategy for "coordinating" the Crown's Canyonback Gate project with the Mountaingate development project.

On February 10, 2005, Castle & Cooke's Frans Bigelow and Psomas' Jeffrey Ray contacted Kevin Keller, Cindy Miscikowski's Chief Planning Deputy, requesting a meeting. Bigelow and Ray wanted to update the Councilwoman on the Mountaingate development project and, as Mr. Keller noted in his e-mail to Ms. Miscikowski, "they may wish to discuss strategies for coordinating with the Canyonback issue."[183]

During a March 29, 2005, meeting at Psomas' office,[184] however, Mr. Ray and Mr. Bigelow claimed that the plan to coordinate Mr. Morris' Canyonback Gate issue with the development project was in no way something to which they were a party. Mr. Bigelow said that he had never even met Mr. Morris until early 2005, and that he had never seen Mr. Morris' trail-alignment map until that time. He met with Mr. Morris and, after reviewing the planned realignment, he said that he told Morris that Castle & Cooke has no interest in the proposed trail.

There is good reason to believe, however, that Castle & Cooke's alleged non-participation in the alternative trail strategy was over-stated during the March 29, 2005 meeting. Mr. Bigelow and Mr. Ray carefully chose their words in denying any

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[182] This observation was made at a March 29, 2005 meeting at Psomas' office in West Los Angeles.

[183] Exh. 26 (e-mail, K. Keller to C. Miscikowski).

[184] On March 29, 2005, Jeffrey Ray of Psomas and Frans Bigelow, Project Manager for Castle & Cooke, met with UMCA Board President Wendy-Sue Rosen, UMCA Vice President Desmond McDonald, Brentwood Hills Homeowners Association ("BHHA") Board member Eric Edmunds, John Murdock, outside counsel for BHHA, Tom Freeman, UMCA Board member/outside counsel for UMCA and Canyon Back Alliance, Jennifer Coon, outside counsel for UMCA and Canyon Back Alliance, and SMMC Executive Director Joe Edmiston.

participation in the Crown HOA's proposed trail. They emphasized that (1) the alternative trail was not part of "their project"; and (2) Castle & Cooke will not agree to construct a trail "on their property" because of concerns about liability.

Is Castle & Cooke aware that plans are afoot to use this EIR process to advance the Crown's alternative trail scheme? Have those plans been designed to benefit Castle & Cooke? The answer to both questions appears to be "yes."

First, Mr. Bigelow said that Castle & Cooke would not agree to build a trail because of liability concerns. But Castle & Cooke's liability concerns have been addressed in Councilman Miscikowski's February 14, 2005 meeting with Gary Morris, where it was agreed that trail construction would not occur until *after* the unstable Open Space area (identified as "Lot 30" in the EIR) is dedicated to the SMMC – thereby removing Castle & Cooke's risk of liability.

Second, the plan for introducing the trail realignment into the tract map process would be proposed by the Crown during the public hearings – it would not be proposed by Castle & Cooke – thereby supporting Mr. Bigelow's characterization of the trail realignment as not being a part of "their project." Presumably Castle & Cooke believes (incorrectly) that if the alternative trail is added to the Tract Map by force, then it is not part of "their project" for EIR purposes.

Third, Castle & Cooke flatly denied that it has any connection with the alternative trail proposal, but they have nevertheless refused to make clear that they oppose it. Mr. Bigelow acknowledged during the March 29 meeting that the risk of liability from any such trail was not a risk that his client was willing to assume and the obvious liability/safety risks created by the Crown's trail were recognized by Jose Sanchez, the lead geologist for the development project. Mr. Sanchez said that the realignment plan was "infeasible" due to the landslide remains throughout Lot 30. Yet Mr. Bigelow refused our request to submit a simple letter to the Planning Department clarifying that Castle & Cooke opposes the Crown's proposed trail because it would be unsafe. *Why?* Because the trail is in fact supported by Castle & Cooke – as long as liability is passed on to others and they are not required to circulate an EIR analysis of the trail realignment.

Fourth, the Final EIR is purposefully vague in describing the "trail realignment." This is consistent with Castle & Cooke's purposeful avoidance of the public access and trail realignment issue throughout the process.

Fifth, Mr. Bigelow emphasized more than once that *if* the trail is realigned (at a "future time" and "out of our control" and "not planned by us"), then his client should be permitted to terminate all public access through the development.

Sixth, the February 14, 2005 plan is to construct the alternative trail *in order to* allow privatization and full gating of Canyonback Road, which is what Castle & Cooke has sought to achieve for the past several years, as described below.

2. The Crown HOA's plan to gate and privatize Canyonback Road has long involved Castle & Cooke.

The Crown first began its efforts to gate Canyonback Road in 1995 after learning that a guarded security gate had been installed to block public access onto the streets of Brentwood Circle, where Cindy Miscikowski (then Chief of Staff for Councilman Marvin Braude) resides.[185] When the Crown's initial efforts failed, after *hundreds* of City residents and trail users signed a petition opposing the privatization and gating of Canyonback,[186] the HOA approached Castle & Cooke.

Castle & Cooke was then in the early planning stages of this development project. When Castle & Cooke learned of the Crown's failure to gate Canyonback Road, it

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[185] Exh. 28 ("The City Council recently approved a street vacation for a gate at Brentwood Circle. We need to act now while the 'climate' for street vacation is favorable!"; "Property values will increase 10%-20%"; "We are the only ungated community in Mountaingate. Therefore all the sightseers, cruisers, and malingers come to our street. . . . Why not spend the money on a gate to avoid problems and, at the same time, increase the value of your property!"); Exh. 64 (LA Times article quoting Brentwood Circle resident on virtue of privatizing and gating: "This will keep out the riffraff.").

[186] Exh. 100 (Petition In Opposition To The Privatization Of Canyonback Road).

suggested that a gate be located on Mountaingate Drive, which would keep non-resident vehicles off Canyonback Road entirely, not just off the Crown's section north of Mountaingate Drive. The Crown HOA was "very excited" about Castle & Cooke's proposal to share this cost burden, which they believed would make the Crown's dream of a gate a reality. The prize in sight was not, however, security: "Crown property values stand to increase dramatically and problems resulting from careless pedestrians with their dogs will cease." [187]

The plan to gate Mountaingate Road, however, was quashed when prominent community activist Louise Frankel, President of the neighboring Mountainview Homeowners Association, opposed the gate and let Councilwoman Miscikowski know of her opposition. She argued that a gate on Mountaingate Drive would impose a hardship on members of her HOA given their proximity to the proposed gate and their lack of need for a gate because their community was already gated.[188]

Louise Frankel is an influential supporter of Councilwoman Miscikowski. As former *Los Angeles Times* political columnist Bill Boyarsky reported in April 2004, "Frankel took credit for her precinct registering a high vote for Miscikowski, "'and that's because I walked door to door,' she said."[189] Significantly, however, Ms. Frankel tempered her position on her neighbors' plan by emphasizing that her HOA "affirm[s] our support for a Crown Homeowners Association gate to be placed on Canyonback."[190] Perhaps in an effort to mend fences after ripping down the would-be Mountaingate Gate,

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[187] Exh. 29, p. 2 (Draft Minutes, Crown HOA Annual Meeting, Dec. 14, 1999). The Crown focus on keeping dog walkers off the street/trail seems to be second only to the expected increase in property values in terms of rallying community support for privatization and gating. See e.g., Exh. 30 (Minutes, Crown HOA Meeting. Oct. 10, 2000, "the position of the Board is to privatize the street, post appropriate signs and hire security to keep uninvited strangers, dog walkers, and others off the street").

[188] Exh. 31 (May 31, 2000 letter from L. Frankel to C. Miscikowski).

[189] Exh. 32 (Bill Boyarsky, *Money Buys Control*, The Jewish Journal of Greater Los Angeles, April 4, 2004).

[190] Exh. 31 (letter, L. Frankel to C. Miscikowski, May 31, 2000).

Ms. Frankel put her significant influence behind the Crown's effort to privatize Canyonback Road.

The Crown informed Ms. Frankel and Castle & Cooke that its new plan was to privatize Canyonback Road and hire a full-time guard to patrol the street, "with authority to remove people who do not belong there."[191] The privatization of Canyonback Road would not be sought in conjunction with a permit to construct a security gate, presumably because the prior attempt to gate the road failed. But is was clear that the Crown's decision to seek privatization only was done in order to make gating easier. Privatization would be the Trojan Horse. The Crown's plan was to privatize first, which would then allow the HOA to construct a gate on the private street without the City's permission. A Trojan Horse plan depends on subtlety, a characteristic that failed the Crown on this occasion. The "draft" Minutes (subsequently revised to eliminate the outbreak of candor) make the HOA's intent clear: "The [Crown] Board feels privatization of the street is a positive first step, and as soon as this is done they will take the next step towards having it gated."[192]

3. A powerful contributor asked Miscikowski to support the gating effort.

Louise Frankel's involvement was a cause for concern among the Crown residents opposed to privatizing the street. Lionel Margolin, then a Crown member, attended the September 2000 Crown HOA Board meeting and reported as follows: "It was clear that there is a plan to pretend that privatization is unrelated to the gate as the President tried to limit discussion to this issue alone. However, there were a number of people present who expressed impatience about how long it was taking to put a gate in place. Most ominous was [Board member Sheila] Jacobs' statement that Louise Frankel, (the well connected political activist who killed placement of the gate on Mountaingate Dr) is going to contact Councilwoman Cindy Miscikowski, to speak to her in favor of privatizing Canyonback (Crown side only)."[193]

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[191] Exh. 33 (Aug. 24, 2000 letter from Gary Morris to Louise Frankel, Crown HOA representatives, and Ilene Miles, Castle & Cooke's Project Manager).

[192] Exh. 34, p. 2, (Minutes, Crown HOA Bd. Of Dir. Meeting, September 12, 2000).

[193] Exh. 35 (Sept. 12, 2000, memo from L. Margolin to neighbors opposing gate).

A few months after it was announced that Ms. Frankel would contact the Councilwoman, a meeting was scheduled with Councilwoman Miscikowski and the Crown HOA's representatives, including its lobbyist, Gary Morris of GLM Associates.[194] Ms. Frankel's advocacy on behalf of the Crown's effort to privatize Canyonback Road is consistent with her husband's advocacy to privatize Stoney Hill Road as part of Castle & Cooke's project.[195] On January 23, 2001, presumably after Ms. Frankel's meeting with Councilwoman Miscikowski, Gary Morris met with the residents who opposed the HOA's efforts to privatize and gate the street. Morris informed them that Councilwoman Miscikowski's Office agreed to change the rules for vacating the road. Canyonback Road could be vacated by a mere super-majority vote of the HOA's membership instead of the previously-required unanimous approval.

4. Councilwoman Miscikowski agreed to an unprecedented street-vacation policy in aid of privatizing Canyonback.

The Crown was successful in its efforts to change the rules for vacating Canyonback Road. By June 2001, Councilwoman Miscikowski agreed to support the Crown's plan to proceed with the vacation process based not on a unanimous consent of the residents, but a mere 75% vote.[196] This change of rules required a change of the Crown's bylaws and, most dramatically, a change in the City's established practice.

Up until the Crown's application, the City's practice was to require unanimous support from *all* residents along the street before it would proceed with a street vacation request. The reasons for this practice were described to CD-11 staff by Edmund Yew,

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[194] Exh. 36 (Jan. 11, 2001 fax memo to C. Miscikowski from Crown residents opposed to gate) (providing information to Miscikowski in anticipation of her meeting with HOA Members; "Although the proponents of the gate have stated that they understand they will need to allow a pass through for cyclists and hikers during the day, they also have made it clear that their purpose is to discourage as much as possible anyone from actually using Canyonback once it is privatized, gated and a guard is stationed at the gate.").

[195] Exh. 37 (Nov. 2, 2004, e-mail from K. Keller to C. Miscikowski) ("Ernie is making a hard sell to include the privatization of Stoney Hill Road on the proposed tract map.").

[196] Exh. 39 , p. 3 (Crown HOA Answers to Questions, June 14, 2001).

Bureau of Engineering, Manager, Land Development: "I just feel that if the City is taking away a public street access to someone's property, I want to make sure the City has all the consents from all property owners. . . . I just don't see the benefit from the City's point of view of requiring anything but 100% consent. . . . I don't want the City to set a precedent to take the position that a homeowners association can speak for all owners, knowing that there are dissensions among the members already." [197] This was apparently the first time the City had ever moved to privatize a street based on the HOA's authority to act for its members, including dissenting members.[198]

Despite Mr. Yew's objections and his acknowledged expertise, Councilwoman Miscikowski chose to break with established precedent and vacate Canyonback Road without the residents' unanimous approval.[199] In the January 2001 meeting between Councilwoman Miscikowski's Office and Gary Morris, Morris obtained the Office's approval for his plan to seek street vacation without the unanimous support of all Canyonback Road residents. This special dispensation marked a change from the requirement stated in the City Engineer's 1999 Report, which required that "consents to the vacation be secured from *all* property owners adjoining the area to be vacated."[200]

This was not the only irregularity in the Canyonback process. On March 26, 2003, the City Council's three-member Public Works Committee decided on a 2-0 vote to forward the HOA's request to privatize Canyonback Road to the full City Council. Yet two of the Committee's three members were absent. Councilmember Nick Pacheco was absent and Councilmember Tom LaBonge, who is reflected as the second "Yes" vote,

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[197] Exh. 40 (e-mail message from E. Yew (Manager, Bur. Of Eng., Land Dev't) to J. Pietroski (CD-11, Ass't Planning Deputy), Jan. 21, 2004).

[198] Exh. 40 (e-mail message from E. Yew to J. Pietroski, dated Jan. 22, 2004).

[199] Exh. 41 (e-mail message from J. Pietroski to E. Yew, Jan. 23, 2004) ("in talking with the Councilwoman she explained that we already looked at this issue several years ago and the way these properties are owned, are unlike a regular Single Family Home, they are more like a condo Association, where the HOA does actually own the land… so thanks for your expertise and for now I think we are fine to move forward.").

[200] Exh. 38, p. 3 (Office of City Engineer Report, March 23, 1999) (emphasis added).

was likewise absent. "I wasn't there. That meeting wasn't on my calendar."[201] Despite that irregularity, the gating proposal was *deemed* to have passed this requirement too.

5. There have never been any legitimate "security" concerns to justify privatizing/gating the public trail.

The Crown's Application for Street Vacation indicates that the purpose of the proposed vacation is security.[202] The Crown has never provided any data to support the notion that gating is needed for security purposes. And in August 2002, when LAPD Chief Lead Officer for the area Dennis Hinman spoke to the Crown's Neighborhood Watch group, he informed the group that "Mountaingate is almost void of crime." There were only four reported incidents from August 2001 to August 2003 and two or three of the incidents were questionable.[203]

On July 6, 2004, Gary Morris and Richard Zien, Chairman of the Crown's Gate Committee, appeared at a Brentwood Community Council meeting. When questioned about the need for privatizing and gating the remote public street, Mr. Morris stated that a gate was needed to deter crime, specifying that "drug dealing," arson and other types of felonious conduct have plagued the Crown community due to unrestricted public entry through Canyonback Road.

When the audience responded with audible skepticism, Mr. Zien candidly admitted that crime was *not* an issue for Crown residents. The real problem was traffic related. According to Mr. Zien, commuters taking Sepulveda Boulevard to the Valley mistake Mountaingate Drive as a short-cut to the Valley. These alleged would-be short-

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[201] Exh. 42 (Bob Pool, *Gate Issue Remains Open For Discussion*, Los Angeles Times, Metro Desk, p. 3 (April 28, 2003).

[202] Exh. 43 (Sept. 19, 1995, Application for Street Vacation).

[203] Exh. 44 (Neighborhood Watch Meeting, Aug., 3, 2002).

cut drivers must then make U-turns at the end of Canyonback Road. Mr. Zien, however, was not able to say why a simple "No Outlet" sign would not solve the problem.[204]

Mitchell Feinstein, a MOSMA Board Member, has verified that Mr. Morris' claims about drug dealing, criminal trespass and arson on Canyonback Road have no basis in fact. MOSMA is responsible for the private security patrols in the Mountaingate area and, as a Board member, Mr. Feinstein is privy to information about the crime reports. "The facts and records do not support any such criminal activity. There are no police reports of any such incidents . . . there is no crime. No felony has ever been reported to the police."[205]

We filed a Public Records Act request with the LAPD, seeking documents concerning crime reports for Canyonback Road.[206] The LAPD responded that state law precludes it from producing documents except for crime reports during the six months prior to the request. The LAPD received *no reports* of any crime occurring on Canyonback Road during that six month period.[207]

Finally, the Crown's complaints about cut-through traffic have never been supported by any data, and is inherently incredible. First, DOT measured the street's traffic flows at 24 vehicles during the peak morning hour and only about 20 vehicles during the evening peak hour.[208] And the road is abnormally wide – sixty feet across – because it was originally designed as a scenic highway providing access to a massive

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[204] Exh. 45, p. 2 (Canyon Echoes, Aug. 2004); Exh. 46, p. 4 (Statement of M. Feinstein, read during July 29, 2004 meeting at CD-11 Office).

[205] Exh. 46 (M. Feinstein Statement, July 29, 2004, read during meeting at CD-11 Office).

[206] Exh. 65 (Public Records Act request).

[207] Exh. 66 (LAPD Response to Public Records Act request).

[208] Exh. 69, (draft Planning Department's Staff Report, prepared to support the Crown's application to downgrade Canyonback Road from Secondary Highway to Local Street, as a necessary pre-condition for street vacation.).

hillside development that was never built. By any standard, the Canyonback Road traffic data falls far short of a serious cut-through traffic problem.

The real motivation for privatizing and gating Canyonback has always been property values. The HOA has consistently sold its members on the gating proposal based on the advice of real estate advisors who "have told us that with privatization closure and gating of our street, *all* of our property values will increase by a *minimum* of 10-15%."[209]

6. The City Attorney blocked the illegal privatization and gating of Canyonback.

The City Attorney's Office terminated the illegal gating of Canyonback Road in August 2004. In doing so, the Office recognized that "the Canyonback street vacation will not proceed as originally proposed due to the public access issue." The project, however, was not completely terminated: The City Attorney's Office has "been informed that the Council District Office 11 is currently working with the community to find alternative solutions to address this issue." [210] But it is now clear that while Council District 11 was working with the *Crown* community, no representative from Council District 11 was even communicating with the adversely impacted community of trail users.

7. The Canyon Back Alliance expressed its concerns about the inadequacy and danger of realigning the trail in August 2004.

Councilwoman Miscikowski sent an August 27, 2004 e-mail to "Concerned Residents" after the City Attorney shut down the gate construction. In her e-mail, the Councilwoman indicates that the Crown's efforts to privatize and gate the trail may still be realized if an alternative trail could be constructed around existing Canyonback Road.

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[209] Exh. 47, p. 1, (July 20, 1999 Crown HOA letter to members).

[210] Exh. 12 (Letter from Christy Numano-Hiura, City Attorney's Office, to Tom Freeman, dated Aug. 23, 2004).

The alternative trail option was raised at a July 29, 2004 meeting at Councilwoman Miscikowski's Office, attended by proponents and opponents of the Canyonback Gate. Miscikowski promised to schedule another meeting in a few weeks to discuss whether an alternative trail would be feasible. Immediately after this meeting, Councilwoman Miscikowski, speaking to Sid Garcia, an ABC Channel 7 Eyewitness News reporter, said that she was working with the community and another meeting would take place in August to address a possible alternative trail. This promise to conduct a meeting with Gate proponents and opponents was reaffirmed by Kevin Keller a week later, as reported in the Daily Journal: "Last week, Miscikowski held a private meeting in her office Thursday to try to come up with a compromise. The meeting was unsuccessful, Keller said. 'We didn't get everything settled in one meeting,' Keller said. Keller said that there are plans for additional meetings, possibly within two-to-three weeks. . . . The council wants to see access between sunrise and sunset, the manner is how that's achieved … that's what's being discussed."[211]

The Canyon Back Alliance responded to the Councilwoman's August 27, 2004, e-mail to Concerned Residents in order to ensure that concerns about a possible trail realignment would be considered. First, the SMMC had already evaluated this option several years earlier and determined it was not feasible. Second, the extreme slope would seem to preclude construction of a multi-use trail that could safely accommodate all the existing uses of the trail, thereby degrading the quality of this established public use. Third, the steep hillside would create erosion problems that would render the trail an inadequate alternative to the existing trail.[212]

The promised meeting with Councilwoman Miscikowski, which was highly anticipated by the Gate opponents who had met with her on July 29, 2004, never occurred. The Councilwoman's staff reported that she was too busy for a meeting and that Gate opponents would be contacted when a meeting was scheduled.[213] From July 29,

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[211] Exh. 48, p. 2 (Stefanie Knapp, *Gate May Make Cranky Neighbors*, Los Angeles Daily Journal, Aug. 3, 2004).

[212] Exh. 49 (Freeman e-mail to C. Miscikowski, dated Aug. 27, 2004).

[213] Exh. 50.

2004 to this day, all meetings involving the Councilwoman or her staff concerning the alternative trail have been kept secret from those supporting public access.

The strategy of avoiding public participation was consistent with Gary Morris' advice. After Mr. Morris attended a July 13, 2004 Brentwood Community Council meeting, where community members expressed concern that a security gate was being constructed on the Canyonback Trail, Morris cynically dismissed their concerns in a memo to Julie Pietroski, the CD-11 staffer handling the project, and his HOA client: "I think it is unfortunate but understandable that people with little or no real interest in the matter, who have only now been made aware of the gating of Canyonback, would react negatively; they have nothing to gain and just perhaps, possibly, they might have something to lose – even though most of them have never been or will be on the street in question. I hope this can be framed in context and not allowed to fester and grow."[214]

Presumably removing the issue from public view was determined to be the most effective way to prevent public concern from festering and growing.

8. The Public Has Been Excluded From The City's Meetings About The "Alternative Trail."

The coordination of the Canyonback Road privatization and the Canyonback Ridge development appeared inevitable by August 2004, when CD-11 staff members predicted that Kevin Keller, handling the development project, would be "dragged into" the Canyonback Gate "mess" if it eventually gets "rolled into Castle & Cooke's project."[215] That possibility of combining the development project with the privatization/ gating of Canyonback Trail was the subject of obvious concern: "this whole thing is going to be a mess. . . messier mess."[216]

By November 2004, the process for rolling the two projects together appeared to become a reality. As Julie Pietroski reported to Kevin Keller: "I spoke with Gary M.

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[214] Exh. 51 (G. Morris memo to J. Pietroski, R. Zien, S. Jacobs, dated July 13, 2004).

[215] Exh. 52 (e-mail message from J. Pietroski to K. Keller, dated Aug. 4, 2004).

[216] Exh. 52 (e-mail message from K. Keller to J. Pietroski, dated Aug. 4, 2004).

recently who has been meeting with Castle & Cooke recently about the possibility of a trail, apparently he has mapped it out and it wouldn't be across the ridge it would be a longer trail, about 2 miles in length."[217] That was followed by an e-mail from Jeffrey Ray of Psomas, to Kevin Keller, indicating that he would like to discuss matters related to the Mountaingate project, including the Canyonback Road privatization.[218]

Yet, Councilwoman Miscikowski had good reason to suspect that any plan to realign the trail was doomed to fail. Her staff had contacted the SMMC in August 2004, requesting a meeting with Joe Edmiston, Exec. Dir. SMMC, or Paul Edelman, Dep. Dir. of SMMC, to discuss whether an alternative trail might be feasible. At that time, her staff knew that a Sierra Club member[219] had offered to construct a trail and that the Crown had endorsed the proposal. Miscikowski initially believed that the proposed alternative trail would be a "win-win" because trail access could be preserved, while Canyonback residents would be able to gate and privatize their street.[220]

That led to a meeting involving Julie Pietroski, CD-11, Jeff Moore of the City's Bureau of Engineering, and Paul Edelman from the SMMC, which occurred in October 2004. Julie Pietroski's notes indicate that Edelman did not believe a trail carved into the hillside would provide sufficient access to support the scope of the public's current recreational use of the Canyonback Trail. Any such trail would be narrow, making it a challenge for people to pass each other, it would require a lot of maintenance, and it would not be environmentally friendly.[221]

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[217] Exh. 53 (e-mail from J. Pietroski to K. Keller, dated Nov. 2, 2004).

[218] Exh. 54 (e-mail from J. Ray to K. Keller, dated Nov. 19, 2004).

[219] Mary Ann Webster of the Sierra Club had sent an e-mail to the Crown HOA on July 30, 2004, indicating that her husband is a trail consultant (1) who would design and work with volunteers to build an alternative trail, or (2) if the HOA would prefer hiring a contractor, he would design a trail that could be cut into the hillside for about $25,000 using workers with a tractor. Exh. 55 (e-mail from Mary Ann Webster, Sierra Club, to Richard Zien, Crown HOA, dated July 30, 2004).

[220] Exh. 56 (e-mail from J. Pietroski to R. Skei, SMMC, dated Aug. 27, 2004).

[221] Exh. 57 (J. Pietroski Notes, October 13, 2004 meeting).

9. The secret plan to coordinate the Mountaingate project and Canyonback Gate, while avoiding CEQA-mandated disclosures.

On February 14, 2005, a meeting took place involving Councilwoman Miscikowski, Kevin Keller, and presumably Gary Morris. Mr. Keller's notes reflect the following plan: (1) The Vesting Tract Map providing for a security-gated and privatized extension of Canyonback Road will be submitted for approval; (2) the "alternative trail" will be added to the Vesting Tract Map before it is approved; (3) Castle & Cooke will donate 288 acres of Open Space land to the SMMC; (4) the trail will be constructed *after* the Open Space land is dedicated to the SMMC; (5) once the alternative trail is created, the Crown HOA will seek to privatize and gate Canyonback Road.[222] The new trail would also allow the future HOA for Castle & Cooke's development to terminate pedestrian access through the development, as Frans Bigelow made clear during the March 29, 2005 meeting.

Gary Morris subsequently met with the SMMC to pitch this secret plan to realign the trail. At the March 29th meeting at Psomas' West LA Office, Joe Edmiston said that he met with Mr. Morris and a man who represented the Crown HOA. Frans Bigelow informed Mr. Edmiston that the gentleman with Mr. Morris was Richard Zien, President of the Crown HOA. During this meeting, which occurred some time in early January 2005, Mr. Morris clearly led the SMMC representatives to believe that he was proposing the trail realignment on behalf of *both* the Crown and Castle & Cooke.[223]

The Crown HOA was aware that the wheels were turning. At its January 28, 2005 Board Meeting, the Board reported to the community that its controversial gate was back on track: "Gate Report Steve Jacobs reported that currently the association is waiting for sign-offs on plans that have been approved. Once these are obtained the gate will

[222] Exh. 27 (K. Keller Notes, Feb. 14, 2005).

[223] Gary Morris apparently is not an SMMC booster. In May 1997, he had this advice for Castle & Cooke: "You must contend with the input and interference of the Santa Monica Mountains Conservancy. They are like a bad cold except they do not go away." Exh. 68 (letter, G. Morris to B. Freeman, Castle & Cooke, May 14, 1997).

move forward."[224] The City Attorney's recent action now makes clear that the Crown HOA was correct.

10. The "fix" is in.

On August 23, 2004, the City Attorney's Office ordered the Crown to cease all work on the Canyonback Gate due to the public access problem. The Crown subsequently asked for permission to finish the gate structure even if it could not at that point close the gate. The City Attorney's Office rejected this request on October 27, 2004.[225] But that was before the February 14, 2005 meeting. After plotting out the "new plans" for privatizing Canyonback Road, Councilwoman Miscikowski instructed Julie Pietroski to "update City Attorney with [the] new plans."[226]

Things began to change radically after that. By April 5, 2005, the Crown was back at work putting the finishing touches on the Canyonback Gate. When this unauthorized work was reported to the City Attorney's Office, Assistant City Attorney Christy Numano-Hiura acknowledged that the Crown had no permit to do the work, yet. But Ms. Numano-Hiura stated that the Office has agreed to allow the Crown to finish its Gate once a new or amended permit is issued. She indicated that the Crown should be allowed to continue working on the Gate because it was still planning to seek street vacation at a later date.

This is consistent with the February 14, 2005 scheme outlined in Cindy Miscikowski's Office. A realigned trail will be inserted into the Tract Map during the public hearing process and a trail will be constructed once the property is dedicated to the SMMC. When that happens, all of Canyonback Road will be privatized and security gated, and the trail will be realigned onto the unstable, landslide ridden hillside, thereby jeopardizing lives and property of those residing below in Mandeville Canyon.

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[224] Exh. 57 (Minutes, Crown HOA Bd. of Dir. Meeting, Jan. 28, 2005).

[225] Exh. 102 (letter from C. Numano-Hiura, City Attorney's office, to N. Brestoff, dated Oct. 27, 2004).

[226] Exh. 27 (K. Keller Notes, Feb. 14, 2005).

C. Gary Morris' Trail Realignment Would Grossly Degrade Public Access.

In March 2004, Jeffrey Ray told UMCA President that he expects the Crown to propose the alternative trail during the first public hearing. He also expects that the City will take the position that construction of the alternative trail would be a "benefit" to both the Crown and the SMMC. Kevin Keller's February 14, 2005 notes indicate that Councilwoman Miscikowski discussed with Gary Morris the strategy of depicting the "alternative" trail on the Tract Map. The alternative trail, however, has never been disclosed to the public and, most significantly, it was not included in either the Draft or Final EIR.

We recently obtained a copy of Gary Morris' map through the Public Records Act.[227] The trail realignment as depicted on the map would divert public access off the Canyonback Ridge and onto what Councilwoman Miscikowski has properly characterized as its "unstable slope." The proposal to realign the Canyonback Trail onto the landslide-ridden slopes would degrade and jeopardize public access. The Geotechnical Investigation Report prepared by Leighton and Associates for Castle & Cooke identifies *six* landslides along the proposed alternative trail.[228] These landslides have been facilitated by "the pervasive, westerly-dipping foliation and clay seams in the Santa Monica Slate Formation bedrock."[229] None of these landslides will be remediated.[230]

Landslide Qls-1 is located along and above the proposed point of public access to the realigned Canyonback Trail, where Canyonback Road would connect to the realigned Canyonback Trail. This critical access point, however, is precariously placed along and under a 30-foot deep landslide. Landslide Qls-2 has a high measure of 56-feet deep. Its subsidiary landslide, Qls-2a, measured at 46-feet deep. Landslide Qls-3 has been

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[227] Exh. 67 (Map of alternative trail).

[228] The Leighton and Associates Geotechnical Report identifies the following landslides existing along the proposed trail realignment: Qls-1, Qls-2, Qls-2a, Qls-3, Qls-3a, Qls-4.

[229] Draft EIR, Vol II, Leighton Report, p. 12.

[230] Leighton Report, Table 2, p. 24.

measured at a depth of up to 68 feet, though drilling was limited because the boring equipment failed to reach bedrock. Landslide Qls-3a was observed at a depth of 62 feet of landslide materials before the boring equipment's limits were reached. Finally, Qls-4 was measured at a depth of 26 feet.[231]

CEQA requires that, if Gary Morris' trail is made a part of the project, including the rumored attempt to incorporate the trail into the Tract Map, then there must be a supplemental EIR circulated before work commences or the existing EIR is considered. If the alternative trail map is approved through the tract map approval process or made a condition of the project, it is a part of the project for EIR purposes, whether desired by the project applicant or not. This is clear from Guidelines § 15088.5, which provides that an EIR must be recirculated before certification if significant new environmental impact would result from the project or from a new mitigation measure imposed on the developer."[232]

D. Most Significantly, The Alternative Trail Would Threaten Life And Property In Upper Mandeville Canyon.

A project impact constitutes a "significant environmental effect" if it might expose people to the risk of death or injury, or expose structures to the risk of loss through (1) landslides, soil erosion and related types of geological or soil-related instability, (2) drainage-related problems, including an increase in expected water run-off or alteration of drainage patterns, or (3) mudflow.[233] The alternative trail would substantially increase the risk to life and property for residents of the Upper Mandeville Community residing at the toe of the watershed.

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[231] Leighton Report, pp. 13-14.

[232] Guidelines § 15088.5(a)(1); *Ocean View Estates Homeowners Assoc., Inc. v Montecito Water District*, 116 Cal. App. 4th 396, 400-402 (2004).

[233] Guidelines, Appendix G, §§ VI(a)-(c); VIII(c)-(e), (h)-(j).

1. Mandeville Canyon has a tragic history of flooding, mudslides and landslides.

The Upper Mandeville Canyon community has suffered tragic losses due to fire, flood, landslides and mud and debris slides. The public record is well established, but requires special emphasis to assure that Gary Morris' irresponsible proposal never sees the light of day.

Mandeville Canyon has been designated both a "Special Flood Risk Area"[234] and a "Very High Fire Hazard Severity Zone."[235] The combination of fire and flood creates an enhanced risk to life and property, as clearly explained by Councilwoman Miscikowski:

"Mandeville Canyon is unique in that rainstorms tend to bring significant amounts of debris down off the hillsides into the canyon, particularly in years following area fires. In two major rain events in the canyon over the last few decades, after wildfires in or near the canyon, huge amounts of water, mud, rocks and debris made its way down the canyon through the watercourse. For example, in a flood in the winter of 1980, significant property damage occurred, as well as loss of life. In many cases, this damage and loss was directly attributed to the fact that the watercourse, carrying a huge amount of debris, was channeled into underground pipes, pipes which could not handle the mass of material coming at once."[236]

The heightened danger caused by any blockage of watercourse devices or other flood-control mechanisms was again recognized by the Councilwoman in a series of important letters and motions intended to ensure that residents and public employees protect the integrity of the drainage system. The key is to prevent any blockage of the

[234] Exh. 81 (City of Los Angeles, Bur. of Eng., Special Order, March 5, 2002).

[235] Exh. 60.

[236] Exhibit 82 (letter from C. Miscikowski to Bd. of Public Works and letter to Dept. of Bldg & Safety, dated Sept. 10 and 11, 2001).

drainage channels and devices. Disaster results when channels are blocked, causing flooding, mudslides, debris slides and other related risks to life and property.[237]

Upper Mandeville Canyon suffered tremendous losses in the November 1969 Floods.[238] Upper Mandeville residents along the 3100 block were particularly hard hit. Robert and Rea Westenhaver, 3156 Mandeville Canyon Road, had to climb onto their roof as debris filled the watercourse, pushing a tremendous mud-flow onto their property. Almost a foot of mud spread throughout their home, and approximately five feet of dirt was left in the parking area and courtyard outside their home. A detached, single-story workshop was turned into matchsticks, with a file cabinet washing down to Chalon Road, about two miles away.[239] This watercourse channel has overflowed its banks due to blockages at least twice since 1969. It took more than a year to repair the property damages.

The Westenhaver residence is just one of many residences at the toe of the landslide area through which Mr. Morris' mapped realignment would traverse. The current residents at 3156 Mandeville Canyon Road, the Williams family, recently suffered extensive property damages during the January 2005 storms.[240] Their home was "yellow tagged" by the City. Judith Taylor, 3252 Mandeville Canyon Road, lives within the same watershed area and likewise suffered damages during the January 2005 storms due to mudflow from the hillsides.[241]

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[237] Exh. 83 (letter from C. Miscikowski to Bur. of Eng., July 2004); Exh. 84 (Motions concerning watercourse protection and education programs and amendment to Flood Hazard Map to include Mandeville Canyon).

[238] Exh. 85 (newspaper reports, 1969 flooding in Mandeville Canyon).

[239] Information provided by UMCA Board Member Desmond McDonald, the Westenhaver's grandson.

[240] Exh. 86 (pictures of 3156 MCR residence and landslide damage).

[241] Exh. 87 (Feb. 25, 2005 e-mail, describing property damages caused by mudflow from hillsides; pictures of debris removal after storms; invoices for debris-removal services).

These recent storm-related damages merely illustrate the existing risks – *without* the landslide destabilization that would be caused by Mr. Morris' planned grading. What would have happened if the watercourse, which was not obstructed during the 2005 storms, was filled with landslide materials destabilized by the type of grading envisioned by Mr. Morris' trail realignment plan?

The 1978 Mandeville Fire, which began on Mulholland Drive and spread through the northern borders of the Mountaingate area before spreading to Mandeville Canyon, illustrates what happens when erosion, in that case caused by fire, produces debris that is carried by heavy rains, blocking watercourses and other flood-control devices. After the 1978 Fire, Mandeville Canyon suffered tragic flooding in March 1979 *and* February 1980. Lives were lost, homes destroyed, and virtually all residents were stranded as Mandeville Canyon Road was rendered impassible.[242]

During the 2005 storms, flooding occurred in areas where the drainage channels had been blocked or filled with hillside debris. A debris revetment located above 3345 Mandeville Canyon Road had been partially removed before the storms. Consequently, debris that would have been stopped by the revetment flowed into and filled the area's drainage devices, causing raging rivers to flow through residential properties and down the street, dumping rocks and debris along the way and onto Mandeville Canyon Road – the community's sole means of ingress and egress.[243] Photographs taken during the 2005 storms make these dangers plain.[244]

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[242] Exh. 88 (newspaper reports of March 1979 Flood); Exh. 89 (newspaper reports of February 1980 Flood).

[243] Exh. 90 (photographs of January 2005 flood waters traveling through hillside channels and through residential community onto road). The watercourse and flood control devices on a side street off Mandeville Canyon Road, at 3363 to 3407 Mandeville Canyon Road, were also filled, causing an uncontrolled river to rush down the private road and onto Mandeville Canyon Road, demonstrating the power of hillside floodwaters. Exh. 91 (photos of escaping flood waters).

[244] Exh. 92 (photos of flood waters at 3345 MCR); Exh. 93 (3585 MCR); Exh. 94 (3489 MCR); Exh. 95 (3715 MCR); Exh. 96 (3099 MCR).

The potential for liability due to the alteration of a flood-prone area's natural drainage course is well-illustrated by the *Costello* case. The Costello family resided at 2950 Mandeville Canyon Road. Their home was destroyed by a mudslide. They sued the City of Los Angeles and others, alleging that the mudslide was caused in part by the City's grading of a fire road just below the ridgeline east of Mandeville Canyon. The destabilized area lies just south of where Mr. Morris plans to have the alternative trail graded. The case was settled for $1.6 million, with the City paying $1.0 million. The City recently spent an additional $300,000 in an effort to provide flood control protection along the fire road.[245]

2. The threat to Upper Mandeville Canyon.

The UMCA hired geologist Jeffrey Holt, Mountain Geology, to examine the proposed trail. Mr. Holt concluded that any attempt to grade a trail along Canyonback Ridge's unstable slopes would jeopardize life and property. His conclusion is based on the following factors:

(1) The steep slopes along which the trail would be built, which feature an average 1:1 slope gradient (45 degrees);

(2) the numerous landslides upon which it would be built;

(3) the prevalence of fill, residual soil and landslide debris throughout the proposed trail and the entire watershed area;

(4) the concentration of drainage from the proposed trail area through various west-trending tributary canyons;

(5) the fact that the concentrated drainage flows into the Upper Mandeville Canyon area, which lies at the base of the watershed;

(6) the physical relief from the Canyonback Ridge down to Mandeville Canyon, which is on the order of 500 feet;

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[245] Exh. 97 (City File No. 99-0633).

(7) the indication on Geologic maps that foliation planes dip towards the north, i.e. towards Upper Mandeville Canyon;

(8) the fact that north-facing and northeast-facing slopes in the Upper Mandeville Canyon area are considered potentially unstable;

(9) the fact that the soil underlying the eastern portion of Upper Mandeville Canyon is subject to downhill creep and erosion;

(10) the numerous flood control and storm drainage systems within the canyon bottoms near Mandeville Canyon Road, which are subject to failure during heavy rain especially when filled with debris; and

(11) the well-documented history of flooding and mudflow problems along Mandeville Canyon Road for the past 50 years.[246]

Mr. Holt has therefore concluded that "*Any grading on the sensitive slopes will increase the potential for additional mudflows, debris flows, landslides, and flooding to occur, which could adversely effect the properties at the toe of slopes along Mandeville Canyon Road.*"[247]

Councilwoman Miscikowski is likewise aware that Canyonback Ridge's western hillside is far too unstable for grading. She said so in a September 2003 e-mail responding to concern expressed by the SMMC about the project plan to develop homes on Canyonback Ridge: "The few homes on the west side at Canyonback are [on] the ridge lines but [at the] lower end of the ridgeline. But to do otherwise would require much more grading and slope work. *They can't build on the side of an unstable slope!*"[248]

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[246] Exh. 17, pp. 3-6 (J. Holt, Mountain Geology, Engineering Geologic Memorandum).

[247] Exh. 17, p. 6.

[248] Exh. 71 (e-mail from C. Miscikowski to K. Montet, Sept. 16, 2003) (italics added); See also Exh. 72 (K. Keller e-mail to D. Provost, Sept. 30, 2004) (characterizing as "one of the most important provisions of this [Final EIR] will be the grading report;" "As you (footnote continued)

Jose Sanchez, Leighton and Associates, immediately recognized that the alternative trail was infeasible. During the May 29th meeting at Psomas' West LA Office, Mr. Sanchez stated that he had never seen Mr. Morris' map before and that no such trail could be safely constructed in the landslide-ridden area. It would be "infeasible." Indeed, Mr. Sanchez, who personally supervised the geological work, including the borings made in the landslides, could see no way to construct a safe trail. The landslides were too deep and unstable, even if there were millions to spend. This is obvious by a comparison of Leighton and Associates' landslide map, a copy of which is attached at Exhibit 70, and the Gary Morris trail, Exhibit 67.

Castle & Cooke is also well aware of the fact that this landslide-ridden area is too unstable for any kind of grading. In June 2002, Frans Bigelow met with Louise and Ernest Frankel, Jeffrey Ray, Sharon Mitchell (Psomas), Thomas Slosson, Slosson and Associates, Supervising Engineering Geologist, who was retained by the Mountaingate groups represented by the Frankels, and others.[249] Mr. Slosson asked the developers *who would be responsible for maintaining Lot 30*, the large Open Space tract through which Mr. Morris' proposed trail would traverse. When Psomas indicated that the intention was to "give it to the SMMC," Mr. Slosson responded: "*But you are leaving things in open space that you know are landslides. This is going to the SMMC*." To which Mr. Bigelow responded: "*Well, they have that on a lot of their lots. We just need to make sure it won't effect the homes*."[250]

Indeed, even the "stable" section of Canyonback Ridge, where the Crown HOA residents reside, has a history of hillside instability. Several homes on the northwestern

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know, many of our residents are very concerned about grading and slopes;" "Our office is also very supportive of strict and well-reviewed grading conditions – especially in this area and history"); Exh. 73 (K. Keller e-mail to D. Prevost, dated Jan. 7, 2005) ("Geology is a primary topic of concern for many community members").

[249] Exh. 80 (CD-11 Staff notes from June 7, 2002 meeting).

[250] Exh. 80, p. 2.

side of Canyonback Road, which lie atop the Upper Mandeville Canyon watershed, have experienced instability problems requiring substantial remedial work.[251]

Finally, the City of Los Angeles' January 19, 2005 Geology/Soil Report identified Lot 30 as potentially unstable and requires that title must remain with Castle & Cooke unless and until some other person or entity is willing to assume the risks of purchasing the property. In order to ensure that any new owner fully understands the risks of owning this unstable, landslide-ridden area, the City requires that "a notarized covenant and agreement" be filed with the County Recorder's Office "acknowledging the potential for landsliding on lots 30, 31, and 32."[252]

X. CONCLUSION

First, the EIR proposal to create a *private* road along the section of the Canyonback Trail that passes through the Canyonback Ridge section of the Castle & Cooke development project would have a potentially significant adverse environmental effect. This aspect of the EIR violates CEQA because the Draft EIR failed to identify this environmental effect or even contain an environmental description sufficient to identify or measure it. The Final EIR exacerbates this deficiency by proposing to sever this clear project impact. Either the extension of Canyonback Road is made a public street, just like existing Canyonback Road, or a Supplemental EIR must be circulated for public comment.

Second, the Final EIR is hopelessly vague in stating that the Canyonback Trail will be realigned. While it is *possible* that the project's trail realignment will not have a significant adverse environmental effect, depending on the specifics of the chosen realignment, the Final EIR provides no assurance that any such realignment will be selected. This deficiency must be cured by a Supplemental EIR specifying the precise contours of the trail alignment *before* the Tract Map is approved and realignment options are limited.

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[251] Exh. 98 (Geology-related reports and grading applications to repair hillside instability for residences at 2233, 2213, and 2201 Canyonback Road).

[252] Exh. 99 (City of LA, Geology/Soils Report, Jan. 19, 2005).

Third, the City and the developer should make clear that the irresponsible Crown HOA/ Garry Morris trail realignment plan is no part of this project and that it will not be made a condition of project approval at any time in the process. The City and developer should also make clear that, as indicated in the Final EIR, there will be no grading whatsoever (including trail building) along the landslide-ridden western slopes of Canyonback Ridge.

CENTER FOR LAW IN THE PUBLIC INTEREST

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