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June 16, 2005

File No. 9999.32

VIA HAND DELIVERYRockard J. Delgadillo
City Attorney
City of Los Angeles
200 North Main Street, Suite 800
Los Angeles, CA 90012Mike Patonai
West Los Angeles District Engineer
Bureau of Engineering
1828 Sawtelle Blvd., Third Floor
Los Angeles, CA 90025**Re: Illegal Gates On Canyonback-Mt. St. Mary's Trail Route;
Mountaingate Development Project**
*(Final EIR No. ENV-1999-3251-EIR; Testing Tentative Tract Map No.
53072)*

Dear Mr. Delgadillo and Mr. Patonai:

This letter is written on behalf of the Canyon Back Alliance, a concerned citizens' coalition dedicated to preserving public access to parkland trails in the Santa Monica Mountains. The Planning Department for the City of Los Angeles is considering Castle & Cooke's proposal for the development of 29 homes in the Mountaingate community in the Santa Monica Mountains. Canyon Back Alliance has filed written objections to the Final Environmental Impact Report.¹

¹ Exh. A (April 7, 2005 letter); Exh. B (May 17, 2005 letter). All exhibits are on the enclosed disc.

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This letter concerns two separate but related matters. (1) The gates and fencing surrounding the existing "Stoney Hill" section of the Mountaingate subdivision, which *unlawfully* restrict public access on the public streets that connect the Canyonback Trail with the Mt. St. Mary's Fire Road trail. Restoration of the public streets to public use, as mandated by state law, will restore the historic Canyonback-Mt. St. Mary's trail route. (2) Castle & Cooke's development plan calls for the extension of Stoney Hill Road at its southern terminus, as well as the privatization and gating of the proposed street extension at both ends. *If* permitted, this development plan will do that which the existing Stoney Hill gates and fences do illegally – restrict public access on the public roads connecting the Mt. St. Mary's and Canyonback trails. Consequently, we ask that (1) the Bureau of Engineering immediately restore open and unrestricted public access to the Stoney Hill streets and (2) the City Attorney's Office immediately inform the Planning Department that the existing barriers to the Stoney Hill streets are illegal and will be removed.

SUMMARY

The illegality of the existing Stoney Hill Gates *and* the proposed Stoney Hill development's adverse impact on the public's recreational use of the Canyonback-Mt. St. Mary's trail route compel immediate action. *First*, we *demand* that the City of Los Angeles, acting through Mike Patonai, Department of Public Works, Bureau of Engineering, remove all gates, fences or other structures that restrict public access to the public streets within the Stoney Hill Enclave. Bureau of Engineering officials, as the local municipal officials responsible for maintaining these public streets in an open and unrestricted manner as mandated by Vehicle Code § 21101.6, have a non-discretionary, ministerial duty to enforce this state law.

Second, we demand that the City Attorney's Office *immediately* advise the Planning Department that the Stoney Hill Gates are illegal and will be removed. This legal advice is necessary because the Bureau of Engineering has erroneously advised the Planning Commission that the Gates are legal. *If* the existing Stoney Hill Gates were legal, which they are not, the developer's plan to prohibit public access on the proposed extension of Stoney Hill Road might not significantly impair recreational access along the Mt. St. Mary's-Canyonback trail route because such access would already be legally restricted. But since the existing gates are illegal, and access must be restored pursuant to Vehicle Code § 21101.6, the developer's plan to close public

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access to Stoney Hill Road *would terminate public access* along the Canyonback-Mt. St. Mary's trail route. CEQA mandates that this type of significant adverse impact on the public's use and enjoyment of a recreational trail route must be analyzed in a Supplemental EIR *before* a decision is made on the developer's proposed Vesting Tract Map. Hence the urgent need for the City Attorney to inform Planning that the existing Stoney Hill Gates are illegal.

A. The City Must Restore Public Access To The Stoney Hill Streets.

The City of Los Angeles purported to withdraw the public streets within the Stoney Hill Enclave from public use in 1983. In doing so, the City invoked Government Code § 37359.² The City, however, lacks statutory authority to withdraw *public streets* from public use while allowing local residents to continue using the streets. The City already knows this established legal fact. In 1994, the Court of Appeal expressly ruled that the City of Los Angeles had *no authority* to withdraw public streets from public use while allowing local residents to continue using the "withdrawn" streets. *Citizens Against Gated Enclaves v. Whitley Heights*, 23 Cal. App. 4th 812, 818 (1994). The *Whitley Heights* Court specifically held that the City's reliance on Government Code § 37359 was an unauthorized artifice for evading the dictates of Vehicle Code § 21101.6. Consequently, City's purported Gov. Code § 37359, "withdrawal" of the Stoney Hill public streets from public use, which allows local residents exclusive use of the streets, is likewise a legal nullity.

The City's statutory duty to maintain equal access on public streets like those in the Stoney Hill Enclave is plainly stated in Vehicle Code § 21101.6, which codifies the public's fundamental right of equal access as articulated in *City of Lafayette v. County of Contra Costa*, 91 Cal. App. 3d 749 (1977). The statute specifies 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." The Stoney Hill Gates, like those in *Whitley Heights*,

² Exh. 130 (Public Records Request, dated May 19, 2005); Exh. 131 (Response to Request and select records); Exh. 125 (signs posted outside Stoney Hill Gated Enclave).

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clearly violate Vehicle Code § 21101.6 and should never have been installed. The City's failure to remove the illegal gates *after* the *Whitley Heights* decision is inexcusable.

Remarkably, the Bureau of Engineering has willfully chosen not to enforce Vehicle Code § 21101.6. More than ten years after *Whitley Heights* made crystal clear that the City lacks authority to withdraw public streets from public use while allowing privileged use by local residents, the City continues to confer upon the politically-connected Stoney Hill residents³ exclusive access to the illegally withdrawn public streets. This failure to maintain equal access to public streets violates the Bureau's non-discretionary duty to enforce state law. As the Supreme Court recently emphasized, when a duly enacted statute imposes a ministerial duty⁴ upon an executive official to follow the dictates of the statute in performing a mandated act, the official has *no authority* to disregard the statutory mandate. *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1068-1069, 1080 (2004).

1. The City *illegally* withdrew the Stoney Hill public streets from public use.

The blatant illegality of the City's conduct could not be clearer. "The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control." *Ex Parte Daniels*, 183 Cal. 636, 639 (1920);

³ Exh. 32 (Bill Boyarsky, *Money Buys Control*, Jewish Journal (April 2, 2004), describing political clout exercised by Louise Frankel, Stoney Hill resident and President of the Mountaingate Community Association, who "took credit for her precinct registering a high vote for [CD-11 Councilwoman Cindy] Miscikowski"); Exh. 35 (describing Ms. Frankel as "well connected political activist"); Exh. 37 (CD-11 e-mail, describing meeting between CD-11 staffer and Louise and Ernie Frankel; "Ernie is making a hard sell to include the privatization of Stoney Hill Road on the proposed tract map").

⁴ "A ministerial act is an act that a public officer is required to perform in a prescribed manner or in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when given state of facts exist." *Kavanaugh v. West Sonoma County Union High School Dist.*, 29 Cal. 4th 911, 916 (2003).

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Rumford v. City of Berkeley, 31 Cal. 3d 545, 549-550, 553 (1982). The public right to use the streets for travel or transportation is not a mere privilege; it is “a common and fundamental right.” *Citizens Against Gated Enclaves v. Whitley Heights*, 23 Cal. App. 4th 812, 819 (1994) (quoting *City of Lafayette v. County of Contra Costa*, 91 Cal. App. 3d 749, 753 (1979)). This right applies equally to all people of the state. Consequently, public streets cannot be “partially” closed, whereby a privileged few are given a preferential right of access. *Id.* This fundamental right was codified after *Lafayette* in Vehicle Code § 21101.6.

The *Whitley Heights* court recognized that the effect of withdrawing the streets from public use was to restrict public use while allowing local residents preferential access. That constitutes an illegal “partial closure” in violation of the public’s fundamental right of equal access to public streets. The Court in *Whitley Heights* held that the *only* lawful mechanisms for effecting a partial closure are through the street vacation and street abandonment procedures, pursuant to Streets & Highways Code § 8323 and 959, respectively. But street vacation and abandonment procedures are not authorized for “exclusive private use” or if “there is a present or future use for the road.” *Whitley Heights*, 23 Cal. App. 4th at 820-821. The City could not (and “wisely” did not even try to) justify its partial street closure on either basis because (1) the public streets were gated for exclusive private use *and* (2) the roads, if not gated, would be used for travel by the public. *Id.*

In *Whitley Heights*, the City of Los Angeles (appearing as *amicus curie* in support of the gated enclave) argued that it properly terminated public access to the public streets within the Whitley Heights enclave by withdrawing the streets from public use under Government Code §§ 37359 and 37361. The Court of Appeal flatly rejected the City’s reliance on Government Code § 37359. The general authority to withdraw public streets from public use conferred by Government Code § 37359 does not authorize the partial closure of a street. If it did, it would nullify the specific prohibitions of Vehicle Code § 21101.6 and the “fundamental right” of equal access to public streets that § 21101.6 was designed to codify. As recognized in *Whitley Heights*, the City’s interpretation of Government Code § 37359 would eviscerate the public’s right of equal access to public streets because any partial closure could just as easily be labeled a “withdrawal” from public use. Fundamental and express statutory rights cannot be so easily usurped. *Whitley Heights*, 23 Cal. App. 4th at 823-824.

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2. The Stoney Hill Gates must therefore be *removed*.

Local executive officials have a mandatory duty to enforce state law. *Lockyer*, 33 Cal. 4th at 1080, 1093, 1094 fn. 24. The Bureau of Engineering, however, has apparently chosen not to enforce Vehicle Code § 21101.6 in the manner required by *Whitley Heights*. Instead, the Bureau of Engineering has decided to allow local residents to restrict public access to public streets if those streets were “withdrawn” from public use under Government Code § 37359 *before* the *Whitley Heights* decision.

Absent highly unusual circumstances, such as a drastic break with established precedent, judicial interpretations of statutory law *must* be applied retroactively.⁵ The *Whitley Heights* decision represents no dramatic break from established precedent. *Just the opposite*. The decision is founded upon well-established precedent; it simply rejects what it finds to be the City’s improper attempt to *nullify* established judicial precedent and the statute designed to codify that precedent. The Court held that the City’s purported reliance on Government Code § 37359 as authority for partially closing the public streets (1) was an improper attempt to evade the clear mandate of Vehicle Code § 21101.6, (2) ignored the “fundamental right” of equal access to public streets as recognized in the landmark *City of Lafayette* decision, which held that municipalities have no power to partially close public streets by allowing access to only a select few members of the public, and (3) side-stepped the ruling in *Rumford v. City of Berkeley*, 31 Cal. 3d 545 (1982), which held that the statute authorizing municipalities to “close” public streets does *not* authorize a “partial closure,” whereby the general public cannot freely use the streets, but local residents can do so.

In sum, there is no justification for the City’s failure to apply *Whitley Heights* to public streets that it “withdrew” from public use in violation of Vehicle Code § 21001.6 *before* 1994. The law did not change in 1994. City officials are therefore

⁵ *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978-982 (1989) (“general rule that judicial decisions are given retroactive effect is basic in our legal tradition”); *Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 24 (1995), applying *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) (civil decisions “must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule”).

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charged with the non-discretionary responsibility for enforcing Vehicle Code § 21101.6 as interpreted by the courts, not picking and choosing when to apply the law. The City must therefore reinstate unrestricted public access on the public streets within the Stoney Hill Enclave.

3. The public is being deprived of its historic trail access.

The public harm is significant. Long before the Mountaingate community was developed, the Canyonback section of the Kenter Fire Road trail connected directly to the Mt. Saint Mary's Fire Road trail.⁶ The public enjoyed unrestricted recreational use of the path connecting the Canyonback and Mt. St. Mary's trails. Public recreational access along this route continued even *after* construction of the Stoney Hill Enclave, but it has become increasingly difficult during the past ten years.⁷

Today, the Stoney Hill Gates illegally restrict public access on the public roads that connect the two historic trails. While residents of the Stoney Hill Enclave and their invited guests enjoy unrestricted access, the general public does not.⁸ This deprives the general public of the fundamental right to equal access recognized by judicial decision (*Lafayette*) and codified by statute (Veh. Code § 21101.6). While the public continues to enjoy the Mt. St. Mary's Fire Road Trail, "a perfectly pleasant mountain road, with views of the Getty Center," that enjoyable route "ends abruptly after about two miles; you run smack up against a difficult-to-cross barrier at the

⁶ Exh. 132 (USGS aerial photo from August 1967 depicting path connecting Canyonback and Mt. St. Mary's trails through the area on which Stoney Hill Enclave was later constructed).

⁷ Exh. 109 (Schwartz Decl., testifying to the continuous public recreational use of the Canyonback-Mt. St. Mary's route from 1960 through 1983); Exh. 119 (Byk Decl., testifying to continuous public recreational use of the Canyonback-Mt. St. Mary's route from 1974-present); Exh. 118 (Edmunds Decl., testifying to continuous public recreational use of the Canyonback-Mt. St. Mary's route from 1979-present).

⁸ Exhs. 118 & 119.

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Mountain Gate housing development.”⁹ The illegal Stoney Hill Gates blocking access to the public streets must be removed in order to restore the historic Mt. St. Mary’s-Canyonback trail route.

B. The Planning Department Must Be Advised That The Stoney Hill Gates Are Illegal.

The Canyon Back Alliance formally requests that the City Attorney advise the Planning Department that the gates and fences restricting public access to the Stoney Hill streets are illegal and must be removed. This information about the legal status of the existing Stoney Hill gates and fences is critical in assessing the environmental impact of Castle & Cooke’s development proposal. This information must be provided before the Planning Department approves the developer’s proposed Vesting Tract Map, which, if approved, would forever sever public access along the Canyonback-Mt. St. Mary’s trail route.

CEQA mandates that this type of adverse recreational impact cannot be approved absent a *full EIR analysis* of the adverse impact on recreational use and feasible ways to avoid or mitigate that impact.¹⁰ But unless the Planning Department is informed that the existing Stoney Hill gates/fences are illegal, it will likely assume that the Stoney Hill streets were properly withdrawn from public use and, therefore, the new project will have *no* adverse impact on the already severed Canyonback-Mt. St. Mary’s trail route.

1. The Bureau of Engineering’s erroneous legal advice.

The Canyonback-Mt. St. Mary’s trail route was raised at the public hearing held on May 18, 2005, before Hearing Officer Emily Gabel-Luddy, Department of Planning. The Canyon Back Alliance objected that the EIR is deficient for failure to analyze the project’s significant, adverse impact on the recreational use of the Canyonback-Mt. St. Mary’s trail route. This adverse recreational impact, which should

⁹ Exh. 133 (Bruce Hayes, Nice Places To Jog In West Los Angeles, www.linguistics.ucla.edu/people/hayes/Personal/Jogging/Index.htm).

¹⁰ Exh. A, pp. 7, 15-17, 18-19, 24-31, 38-42.

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have been analyzed in the EIR, must be addressed in a Supplemental EIR *before* the Planning Department considers the developer's proposed Vesting Tract Map.¹¹

But the Planning Department is unlikely to recognize the critical fact that the existing Stoney Hill Gates are illegal because the Bureau of Engineering representative expressly advised the Hearing Officer at the May 18, 2005 public hearing that the withdrawal of the Stoney Hill streets from public use "was done properly, legally, and . . . the permit to put a gate was issued legally." The Bureau of Engineering representative explained that he had reviewed the Bureau's files and assured the Hearing Officer that the "gate was put up there by the correct process." The Planning Department is likely to rely on that agency determination in assessing the legal status of the existing gates.

2. The City Attorney's Office must clarify the illegal status of the Stoney Hill Gates.

The Planning Department will not properly assess the likely impact of the Stoney Hill project unless it is advised that the existing Stoney Hill Gates are illegal and that they will be removed. With that information, the Planning Department should understand that the developer's plan to gate-off the proposed extension of Stoney Hill Road, if approved, would adversely affect the public's recreational use of the Canyonback-Mt. St. Mary's trail route.

The City Attorney's Office has a duty to inform the Planning Department that the gates are illegal. The City Attorney's Office represented the City in the *Whitley Heights* matter and must understand this clear ruling and its impact on the Stoney Hill streets. The Bureau of Engineering's refusal to follow the law in the manner required by Vehicle Code § 21101.6 and *Whitley Heights* has not only resulted in the existing violation of the public's right of access on the Stoney Hill streets, it now threatens *another* injustice during the planning process for the new Stoney Hill development.

¹¹ Exh. B, pp. 8-10.

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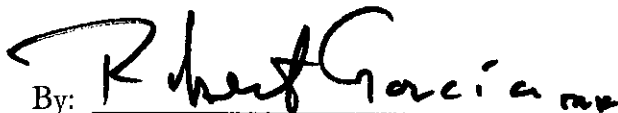
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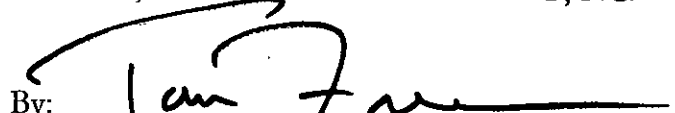
For these reasons, (1) the Bureau of Engineering must immediately restore unimpeded public access on the Stoney Hill streets and (2) the City Attorney must advise the Planning Department that the Stoney Hill Gates are illegal.

Our expectation and sincere hope is that the City Attorney will promptly bring the City of Los Angeles into compliance with the law, without need for a "private attorney general" action. We ask for the courtesy of a prompt response to this letter from the City Attorney by July 27, 2005.

CENTER FOR LAW IN THE PUBLIC INTEREST

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

By: 
Robert García, Executive Director

By: 
Thomas R. Fregman

TRF:slp

Enclosures on disc

- cc: Christy-Numano Hiura,
Deputy City Attorney
- Sue Chang/Jimmy Liao,
City Planning Dept. **(For Inclusion In Admin. Record)**
- Bill Lockyer, Attorney General
- Bill Rosendahl, City Councilman (Elect), CD-11
- John B. Murdock, Counsel, Save Our Mountains, Inc.
- Eric Edmunds, Save Our Mountains, Inc.