

August 23, 2016

VIA E-MAIL ([cc@rpvca.gov](mailto:cc@rpvca.gov)) AND CONFIRMED BY U.S. MAIL

Hon. Ken Dyda, Mayor  
City of Rancho Palos Verdes  
30940 Hawthorne Blvd.  
Rancho Palos Verdes, CA 90275

RE: *Elkmont Canyon*, Case No. ZON2014-00229

Dear Mayor Dida:

This office is litigation counsel for “Save Elkmont Canyon” – a group of over 59 residents of Rolling Hill Estates and Rancho Palos Verdes who oppose the pending application by Lionel Perera to develop Elkmont Canyon. Although we are mindful that the only pending application before the City Council is the narrow question of whether the City should grant access to Hawthorne Boulevard from the landlocked property, the broader questions of the environmental impacts of the proposed construction are also addressed below.

The homeowners around Elkmont Canyon purchased their homes at market prices reflective of the serene views of Elkmont Canyon. They relied on the fact that decades ago, the owner of Elkmont Canyon publicly dedicated all rights of ingress and egress. In contrast, Mr. Perera purchased his property at a significant, below-market discount because the lot was landlocked. He (and his predecessors) knew they were purchasing landlocked property without any legal right of access. The pending application to develop the property is legally deficient and must be denied.

## 1. The Property and its History of Ownership and Development

**The 1961 Abandonment of Ingress and Egress Rights.** In 1961, Tract Map No. 24719 was recorded including a dedication by the then-owner of Elkmont Canyon, the Elkmont Land Co. The dedication for public use confirmed that the owners of the Elkmont Canyon lots “hereby abandon all easements of ingress and egress” to and from Hawthorne Boulevard. The owner recorded the Tract Map on April 12, 1961. Elkmont Canyon has been landlocked without access to roads since 1961.



In 1962, the Elkmont Land Co. illegally subdivided the canyon into 13 separate portions by grant deed. Between 1962 and 2000 the land was held by various entities.<sup>1</sup> On March 21, 2005, Elkmont Canyon was purchased by Abdul Aziz Khakwani (“Khakwani.”) The City’s files include a title policy. Item 10 of that title policy notes the issue of access.

**The 2006 Application for 13 Certificates of Compliance.** In 2006, Khakwani, applied for thirteen certificates of compliance as to thirteen portions of the property (Case Nos. SUB2006-00004-00016). The application was denied by the Planning Director and the denial was upheld by the Planning Commission. In connection with that application, the City Attorney wrote an April 28, 2006 letter concerning the access limitations for the property as noted in Tract Map No. 24719.

This access limitation has the practical effect of making the subject property landlocked. Prior to development, legal access rights must be obtained. However, due to the dedication of access rights through the recordation of Tract No. 24719, **the City is under no obligation to give up its right to prohibit access from Hawthorne Boulevard to the property.**

(April 28, 2006 Letter by David Snow to Kit Fox, emphasis added).

That cautionary language was also contained in a May 2, 2006 letter by the City to the property owner.

**The City of RHE’s Opposition to Construction in Elkmont Canyon.** In connection with the 2006 application, David Wahba, Planning Director for the City of Rolling Hills Estates wrote to Joel Rojas, then-Planning Director for the City. Wahba noted that RHE objected to the subdivision of Elkmont Canyon into thirteen lots:

The City of Rolling Hills Estates would also like to go on record to state that **we would be opposed to a subdivision within this canyon area including the construction of homes**, due to the close proximity of existing homes located in Rolling Hills Estates to the South on Willow Wood Road and Silver Spring Road and to homes located on Elkmont Drive. Further, **this area serves as a natural drainage course**, a buffer between the homes in our two cities **and may have soils and geology concerns to adjacent homes**. Lastly, access to this subdivision would be provided via Hawthorne Blvd., in the event that a private property owner wouldn’t grant an access

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<sup>1</sup> A full description of the title history of Elkmont Canyon is set forth in an April 28, 2006 letter by then-Assistant City Attorney, David Snow to then-City planner, Kit Fox.



easement, **which could be problematic given the speeds and traffic flow on Hawthorne Blvd.**

(August 17, 2006 letter by David Wahba to Joel Rojas, emphasis added).<sup>2</sup>

On August 22, 2006, Kit Fox issued a staff report recommending that the appeal of the director's determination concerning the number of lots be denied. That staff report contains the following statements:

- The subject property is a vacant 4.45 acre canyon.
- Two acres of the canyon are encumbered by slope, storm drain and sewer easements and flood hazard areas that were recorded with Tract No. 24719 in April 1961.
- "In addition, the canyon has no legal rights of access to either Silver Spur road or Hawthorne Boulevard because the rights of ingress egress and abandonment by the original subdivider of the tract in April 1961."

On August 22, 2006, the Planning Commission upheld the director's decision and denied the appeal. Thereafter, a certificate of compliance was recorded in connection with Elkmont Canyon as instrument number 06-2441596.<sup>3</sup> That document included a number of conditions, including, the first condition that the owner "obtain rights of access to the parcel in a manner acceptable to the City of Rancho Palos Verdes."

**The 2006 Consideration to Re-Zone Elkmont Canyon to Open Space Hazard.** On September 12, 2006, the Planning Commission was scheduled to consider whether to rezone Elkmont Canyon from residential to "Open Space Hazard." The staff report for that item included Staff's estimation that the Elkmont Canyon only contained one acre that was not encumbered by extreme slope areas, easements or flood areas. The staff report indicated that "the property would still have no legal access to a public right-of-way."

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<sup>2</sup> Members of Save Elkmont Canyon have been in touch with the City of Rolling Hills Estates' planning department. We are informed that they remain opposed to the development of this canyon. Before the application proceeds further, we would urge the City to consult with the City of Rolling Hills Estates to ascertain their view on the project.

<sup>3</sup> Although it is not determinative of the outcome of this development application, we observe that the certificate of compliance issued and recorded in 2006 may not have been legally sufficient. We note that on February 12, 2016, Amy Seeraty emailed Mr. Perera concerning questions about the sufficiency of the certificate.



The rezoning hearing was deferred to October 10, 2006. At that meeting, the city staff recommended that no action be taken to re-zone the property and the Planning Commission accepted that recommendation.

**The 2007-2013 Efforts to Sell or Commercially Develop the Property as a Banquet Hall or Montessori School.** In August 2007, the City wrote to Khakwani in response to requests to develop the property. The City's August 24, 2007 letter states that the property has no legal access and only the City Council could grant such access.

- Between 2007 and 2011, the land was listed for sale by real estate agent Yasin Shahzad of Real Dreams Realty, Inc. The listing stated “ask City regarding how to get access.” And included “request permission to have access from Hawthorne Blvd.”
- On September 21, 2010, the City wrote to Sakeena Mirza in connection with an inquiry about obtaining access to the Property. Ms. Mirza was considering operating a Montessori school on the Property. In that letter, the City advised Mirza that staff would not recommend that the City Council permit access from Hawthorne Blvd. for any commercial use of the property.
- On January 3, 2011, Khakwani wrote to the city and requested that the matter of access be put before the Planning Commission and City Council.
- On January 19, 2011, the City wrote to Khakwani and reminded him that staff would not recommend that the City Council permit access from Hawthorne Blvd. for any commercial use of the property.
- In mid-2011, Khakwani continued to write to the City to request access. On July 29, 2011, he offered to sell the property to the City for at least \$1.625 million.
- In March 2013, Dean Pernicone contacted the City about developing the property as banquet hall. The banquet hall idea was later abandoned.
- July 17, 2014, Lionel Perera writes to the City indicating that he recently purchased the property from Khakwani for \$500,000.

## **2. The Current Project**

The pending application was initiated on June 17, 2014 when the owner filed a “Residential Planning Application” with the City. The application describes a 10,832 square foot two-story home to be constructed on 4.48 acres of undeveloped canyon land. The development will include a guest home and a staggering 24,360 square foot



driveway (the equivalent of half a football field). The application discloses that there will be 17,060 cubic yards of grading.

City Staff has determined that the application should be split into two steps: First, the access issue should be reviewed by the City Council in accordance with Resolution 90-93 to address the issue of access to Hawthorne. If the City Council grants the application, then the matter is to be set before the Planning Commission for consideration of access, grading, compatibility, etc.

### **3. The Application Should be Deemed Incomplete Due to the Lack of Signatures of “Directly Affected Property Owners.”**

Staff has concluded that the applicant must comply with the procedures set forth in Resolution No. 90-93. That resolution requires that any application be accompanied by “signatures of at least 50% of the directly affected property owners, as determined by the Director of Public Works.” (Res. No. 90-93, § 1 (d).) We are informed that Ara Mihranian made the determination that only Mr. Perera signature was necessary for the application to proceed. Respectfully, we disagree with Mr. Mihranian’s decision. All residents bordering Elkmont Canyon will be “directly affected” by granting ingress and egress rights to Elkmont Canyon. In formulating Resolution No. 90-93, the City’s required signatures of 50 percent of multiple property owners. The inclusion of a percentage and reference to more than one property owner suggests that the City intended in enacting Resolution No. 90-93 that affected neighbors – not just the owner seeking access – needed to be involved in the application. If the City had intended to only require the property owner who wanted access sign the application, then the additional requirement of a 50 percent of “directly affected” neighbors would have been superfluous. The requirement of signatures of directly affected neighbors was obviously included by the 1990 City Council as a means to avoid the very situation presented by this application.

We suggest that, at a minimum, all homes along Elkmont Drive, Willow Wood Road, Silver Spring Drive and Foxpoint Lane be included in the signature requirement. Until such time as those signatures are obtained, the application should be rejected and deemed incomplete.

### **4. The “Access” and “Planning” Issues Should be Determined at the Same Time**

The California Environmental Quality Act (“CEQA,” Pub. Resources Code, § 21000 et seq.) precludes “piecemeal” review of environmental impacts. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358). Staff’s current approach to have the City Council review only the issue of access without consideration of the grading, compatibility and other significant environmental impacts of the project constitutes an impermissible “piecemeal” review of this project. Respectfully, staff is wrong. The entire project and its attendant affects must be considered in its totality to comply with CEQA.



**5. The City Should Find that the Construction of a Massive Single Family Home, Guest House and 24,360 Foot Drive Way, All Requiring 17,000 Cubic Yards in Grading in a Sensitive Landslide Area Constitutes “Unusual Circumstances” Requiring CEQA Review**

CEQA normally does not apply to the construction of a single family residence. (Cal. Code Regs., tit. 14, § 15303). However, the categorical exemptions for single family residences should not apply here due to the unusual size, location, nature and scope of the project and the resulting significant environmental impacts. As the California Supreme Court has held “an agency may not apply a categorical exemption without considering evidence in its files of potentially significant effects...” (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103). The following potential significant effects are presented by the project and constitute “unusual circumstances”:

- a. **Traffic.** The most obvious impact of the project is granting access to and from the proposed home off of a new driveway to be constructed on Hawthorne Blvd. Hawthorne is a major artery into and out of Palos Verdes. On May 7, 2015, Mr. Perera provided a sight distance analysis for the proposed driveway off of Hawthorne. The analysis, paid for by Mr. Perera, was prepared by KOA Corporation (the “KOA Study.”) The KOA Study relies on traffic volume from 2003. The KOA Study uses traffic volumes of 18,028. The KOA Study data is outdated. On September 10, 2010, the City had a traffic impact analysis prepared by Wildan Engineering (the “Wildan Report.”) The Wildan Report indicated daily volumes of 27,965 in 2010 with a suggested future growth rate of 0.646% per year. Regardless of which data and which report is relied on, the impact of this project on Hawthorne Blvd. needs to be examined in the context of CEQA and mitigation measures, if any are feasible, must be examined.
- b. **Slope Stability.** The project contemplates significant grading. As pointed out in the City of RHE’s 2006 letter opposed to development, there are geology and grading issues in Elkmont Canyon. The canyon contains extreme slopes of more than 35% grade. Past landslides have occurred in the area. In 2008, there was a landslide in the Silver Spring / Foxpoint area. The landslide was about 500 feet from the proposed access point that Mr. Perera wants on Hawthorne.

In addition to the 2008 Fox Point landslide, the City should consider the nearby landslide at Rock Bluff Park. The parcel was originally developed as residential until a landslide occurred in 1960. The surface of this park still shifts today. The Rock Bluff Park is located approximately 2,300 feet from the proposed access point on Hawthorne Blvd.



As part of the application process, the City should consult with the City of Rolling Hills Estates' Planning and Building & Safety staff to learn about the significant grading and slope stability issues presented by the 2008 Foxpoint and 1960 Rock Bluff landslide.

Moreover, on December 17, 2013, the City and the City of Rolling Hills Estates prepared a Multijurisdictional Hazard Mitigation Plan (the "Hazard Plan.") That document discussed the hazard risks that development creates. Page 147 of the Hazard Plan describes areas that are "particularly susceptible to landslides." Such areas, according to the Hazard Plan, have the following features:

- On or close to steep hills
- Steep road-cuts or excavations
- Existing landslides or places of known historic landslides
- Steep areas where surface runoff is channeled
- Fan-shaped areas of sediment and boulder accumulation at the outlets of canyons
- Canyon areas below hillsides and mountains that have had recent wildfires.

With the exception of the final point, all of the features that the City identifies in its Hazard Plan as "particularly susceptible to landslides" are present in Elkmont Canyon.

The Hazard Plan also notes that allowing water to flow in such areas may trigger landslides. Even allowing the watering of a lawn may result in "damaging landslides." (Hazard Plan, p. 145). Likewise, altering the vegetation and removing native vegetation "increases the risks of landslide." (Hazard Plan, p. 145).

Because the proposed project in Elkmont Canyon meets the City's definition of areas "particularly susceptible to landslides," a CEQA analysis of the impacts of the project and any possible mitigation measures should be prepared.

- c. **Flood Zone.** As indicated in the City's correspondence to the property owners over the years, Elkmont Canyon is covered by easements for slope, storm drain, sewer and flood purposes. The development proposed by Mr. Perera should be analyzed in the context of CEQA so that the significant impacts of the project can be identified and any feasible mitigation measures be discussed by the City Council.



- d. **Fire Hazard.** Any home built at the end of the canyon would have a solitary escape route from fire. A fire at the mouth of the canyon would cut the homeowner's sole route off leading to an unreasonable risk of death. However, the fire risks to the project applicant are dwarfed by the risks created for the neighboring homes at the top of Elkmont Canyon. According to FEMA, constructing a home at the bottom of a narrow canyon creates an unreasonable risk of wildfires: "A wildfire at the bottom of a vegetated canyon can lead to extremely hazardous conditions upslope. A canyon acts like a chimney, collecting hot gases and directing superheated convection and radiant heat upslope. Canyons funnel winds...that can fan a fire and lead to extreme fire behavior (rapid spread of the wildfire and ignition of an entire area). An entire canyon can pre-heat from rising hot air and gases and explode in flames, creating a firestorm." (Homebuilder's Guide to Construction in Wildfire Zones, Technical Fact Sheet Series, FEMA P-737 (Sept. 2008).) The risks of fire to the applicant and his neighbors should be assessed in the context of CEQA to ensure that all significant impacts are identified and mitigation measures, if any, are put into place.
- e. **Impact on Habitat.** Elkmont Canyon is home to an extremely large number of native birds (possibly protected) including nesting raptors-various owl species, various hawk species, hummingbirds, various perching birds, numerous butterfly species, coyotes, raccoons, squirrels, reptiles, skunks, fox and possums. The canyon is filled with native plants, trees, shrubs, wildflowers which provide food, shelter and nesting areas for this wildlife. The native vegetation also controls erosion of the slopes of the canyon. Grading and construction will create a significant threat to the native nesting birds, butterflies, and other wildlife that rely on Elkmont Canyon to survive. There will be a complete loss of the canyon ecosystem.
- f. **Impact on Property Values.** The property values for the neighbors will plummet if this construction is authorized. View of a canyon or open space has a profound effect on property values. This proposed development will diminish property values and take away privacy and views of the residents.
- g. **Noise Impacts.** The project contemplates significant grading in the near term. The activity along the driveway and in the home will also have long term noise impacts as sound is amplified in the canyon to the homes above. The short term and long term noise impacts of the project should be identified and any mitigation measures put into place.



The foregoing environmental impacts constitute “unusual circumstances” warranting the preparation of an EIR and application of CEQA to this project. We respectfully request that the City Council direct staff to apply CEQA and require the applicant to prepare an Environmental Impact Report.

**6. Granting Unprecedented Access to Hawthorne Would Constitute a Gift of Public Property / Funds**

The relinquishment of ingress and egress rights in 1961 constitutes public property held in trust by the City of RPV. If the City vacates those rights without consideration, it will constitute an illegal gift of public funds and a violation of the quasi-fiduciary relationship the City has towards Elkmont Canyon. (*Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 104). The City is under no legal obligation to relinquish the rights it obtained in 1961 and should not voluntarily do so without the City receiving consideration for such rights.

**7. The Council Should Reject the Owner’s Veiled and Baseless Threats of Litigation Over an Unlawful Taking**

The correspondence from the owner of the project includes veiled threats of litigation over “takings” of his property. For example, on July 22, 2011, the property owner requested payment of \$1.625 million from the City as compensation for the “non use” of his property. The City’s file on “Elkmont Canyon” reflects an unsubstantiated fear by City staff of a “takings” lawsuit. On December 14, 2015, at 2:02 p.m., Amy Seeraty sent an email stating that “Ara also pointed out that since it has already been determined that there is a legal lot (created through that conditional certificate of compliance), it would be considered a ‘taking’ if the Council were to deny the access.” Respectfully, Ara Mihranian, is wrong. The pending application is not to determine whether a legal lot exists. That determination was made by the City in 2006. The pending application is to determine whether the owner (who bought the property with actual and constructive notice that it had no legal right of access) can enlarge existing rights by creating access rights were no such legal rights existed before. Any decision by the City Council to maintain the status quo and withhold enlargement of legal rights is not a “takings” within the meaning of the Fifth and Fourteenth Amendments.

Any “takings” claim by the property owner has no merit because the City has not “taken away” access. Elkmont Canyon has been landlocked since 1961. The City has never reduced the uses that the property owners of Elkmont Canyon have had over the years. A “takings” claim under the Fifth and Fourteenth Amendments of the United States Constitution requires a plaintiff to show that the City’s regulation of a property deprives the owner of all its economic use. (*Yee v. City of Escondido* (1992) 503 U.S. 519). However, all economic use was eliminated in 1961 when the original subdivider relinquished access rights. The City has taken no action between 1961 and the present to diminish the owner’s use. Moreover, the fact that a particular piece of



property happens to be landlocked does not require that neighboring properties provide an easement. (*Murphy v. Burch* (2009) 46 Cal.4th 157, 171).

Even if a valid “takings” claim could be asserted, given that the owners were on constructive notice of the access issues since 1961 and actual notice of the access issues since 2006, any claim for a taking has long since expired under the statute of limitations. Before voting to grant the owner access to Hawthorne Blvd., the City Council should ask the City Attorney to advise the council members in closed session on the exposure to litigation for a “takings” claim should the City deny the application concerning access. In particular, the council should ask the City Attorney, in closed session, whether any such claim would be time barred or whether the City’s actions in denying the application constitute a “takings” within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.

#### **8. The Council has Never Decided the Access Issue Before and Staff’s Recommendations are non-Binding on the Council**

An August 18, 2016 Daily Breeze article quoted Mr. Perera suggesting that the City had already decided to give his property to access in 2011. The article states:

[Perera] cites a 2011 letter as the basis for his belief that he will be granted permission to create access. In the letter from So Kim, then-associate planner for Rancho Palos Verdes, to Abdul Aziz Khakwani, the former owner of the land, Kim said the city would support granting access to the canyon from Hawthorne Boulevard for the construction of one home. “They’re going to give the access no matter what, because it’s a legal lot and I’m paying property tax,” Perera said.

It should be noted that a January 19, 2011 letter by Kit Fox of the City to the property owner stated that staff would not support a contemplated commercial development of the property, staff would only support a residential development but that **“the decision to grant access (or not) ultimately lies with the City Council and not with the staff...”** While Mr. Perera claims to rely on statements made by So Kim, the City’s file is replete with letters to the property owner that development applications are approved by the City Council, not individual staff members and that the City is under no obligation to grant the owner the access rights relinquished in 1961. Any argument by Mr. Perera that he relied on staff statements should be reviewed in the context of multiple other statements by staff that the City Council makes these types of determinations.

#### **9. The Concerns of Non-Residents are Valid and Should be Heeded**

The City is now grappling with two lawsuits over the approval of a variance to allow the Green Hills mausoleum to remain. That conflict occurred in large part because the concerns of non-residents (from the City of Lomita) went unheeded by



City staff. We would urge the City not to repeat that same mistake here. The residents of Rolling Hills Estates have valid concerns regarding this project and we would suggest that their concerns be taken seriously. Moreover, the environmental impacts described above will affect residents of the City and residents of neighboring Rolling Hills Estates in equal measures.

#### **10. Conclusion**

The project application is incomplete and need not be considered by the City Council until 50 percent of the affected neighbors sign the application requesting access. Should the application ever be completed, the City should require an Environmental Impact Report to assess the significant impacts identified in this letter and develop adequate mitigation measures, if any such measures are feasible. The threats of litigation by Mr. Perera lack merit and are time-barred. On behalf of Save Elkmont Canyon, I wanted to thank you in advance for your thoughtful consideration of these important issues. I would also suggest that members of the council and staff members processing this application visit the affected properties bordering Elkmont Canyon before voting on this issue. If I can help facilitate such a visit, please let me know.

Respectfully submitted,

Jeffrey Lewis

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