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February 16, 2009

**Via Facsimile Only: (408) 354-6065**

**Carey M. Sutton  
Chief Executive Officer  
Asante Real Estate Group  
325 Los Gatos Saratoga Road  
Los Gatos, CA 95030**

**Re: Asante Real Estate Group Contract for Purchase of Willow Glen Spur  
Trail Parcels from Union Pacific/Planned Development Proposal**

Dear Mr. Sutton:

As you know, I represent Save Our Trails, a public interest group of residents and neighborhood associations dedicated to assisting local governments to defend, acquire, construct and maintain the Santa Clara County Master Trail as established in the County and City General Plans, for the enjoyment of all persons.

The proposal of Asante Real Estate Group (“Asante Proposal”) for residential development of two parcels owned by Union Pacific that are designated in the City of San Jose General Plan as part of the Willow Glen Spur Trail has alerted the members of Save Our Trail to the need to form the group. The Asante Proposal would wreck the parcels involved as components of the Willow Glen Spur Trail, which is also popularly known as the “Three Creeks Trail” for its unique connectivity features described later in this letter. (See **Exhibit 1**, attached.) If approved, it would set a precedent for similar development of other privately owned parcels capable of collectively wrecking the County Master Trail throughout San Jose, and probably throughout the other 14 Cities and unincorporated territory in Santa Clara County as well.

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I am writing to confirm and perform my portion the agreement you and I made February 4, 2009, following the Community Meeting hosted by San Jose City Councilman Pierluigi Oliverio at which you presented the Asante Proposal.

That is, this letter describes the legal defects under California land use law I perceive in the Asante Proposal, as well as the environmental impact reporting required for the Proposal under the California Environment Quality Act ("CEQA"). Should City of San Jose ("City") approve the project without (1) curing these land use law defects, or (2) complying with these requirements of CEQA, the approval would be subject to invalidation by Court action.

## I.

### **THE 9 FT. AND 12 FT. TRAIL EASEMENTS IN THE ASANTE PROPOSAL VIOLATE THE CITY GENERAL PLAN REQUIREMENTS FOR: (1) A 30 FT. TRAIL EASEMENT AND (2) SUFFICIENT LIGHT, CLEARANCE AND SETBACKS FROM ADJACENT DEVELOPMENT TO ASSURE A SAFE AND AESTHETICALLY PLEASING RECREATIONAL EXPERIENCE.**

#### **A. General Plan/Project "Consistency" Requirement**

The well-established requirement that all land use project approvals made by a City be consistent with its own general plan has recently been summarized by the California Sixth District Court of Appeal, which is headquartered in San Jose and has appellate jurisdiction in the Counties of Santa Clara, Santa Cruz, Monterey, and San Benito, in the following language:

*"Among other things, state planning law requires adoption of a general plan. (§ 65300.) In the universe of local land use enactments, the general plan is 'at the top of the hierarchy of local government law regulating land use.' "* (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, 38 Cal.Rptr.2d 699, 889 P.2d 1019 (*DeVita* ).) ***Our state's high court has described "the function of a general plan as a 'constitution,' "*** and has labeled it the " 'basic land use charter governing the direction of future land use' " in the locality. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 542, 277 Cal.Rptr. 1, 802 P.2d 317; see also, e.g., *DeVita, supra*, at p. 773, 38 Cal.Rptr.2d 699, 889 P.2d 1019.)

***[4][5] Local land use decisions must be consistent with the general plan. Thus, for example, zoning ordinances, which are subordinate to the general plan, are required to be consistent with it. (§ 65860, subd. (a); Leshar Communications, Inc. v. City of Walnut Creek, supra, 52 Cal.3d at p. 541, 277 Cal.Rptr. 1, 802 P.2d 317.) The same is true of other local activities affecting land use, such as tentative maps or development agreements. (Curtin, California Land Use and Planning Law, supra, p. 10.) "Under***

*state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal.App.3d 800, 806, 184 Cal.Rptr. 371.) “Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances and the like.” (Ibid.) “The general plan consists of a ‘statement of development policies ... setting forth objectives, principles, standards, and plan proposals.’ (§ 65302.) The plan must include seven elements—land use, circulation, conservation, housing, noise, safety and open space—and address each of these elements in whatever level of detail local conditions require (id., § 65301).’ (DeVita, supra, 9 Cal.4th at p. 773, 38 Cal.Rptr.2d 699, 889 P.2d 1019.)”*

Fonseca v. City of Gilroy (2007) 148 Cal.App.4<sup>th</sup> 1174, 1182, bolding added.

The fundamentality of this “consistency” requirement in California law cannot be overstated. As the Courts have aptly put it: “**The consistency doctrine** has been described as “**the linchpin of California’s land use and development laws; it is the principle which infuse [s] the concept of planned growth with the force of law.**”...’ [Citation.]” (Families Unafraid to Uphold Rural etc. County v. Board of Supervisors (1998) 62 Cal.App.4<sup>th</sup> 1332, 1336, 74 Cal.Rptr.2d 1 ....quoting from Corona-Norco Unified School Dist. v. City of Corona (1993) 17 Cal.App.4<sup>th</sup> 985, 994, 21 Cal.Rptr.2d 803.)”

Napa Citizens for Honest Government v. Napa County Board of Supervisors (2001) 91 Cal.App.4<sup>th</sup> 342, 355, bolding added

## **B. The City General Plan Requirements for the Willow Glen Spur Trail in the Asante Proposal Parcels**

In the General Plan City of San Jose (sometimes hereafter the “General Plan”) entitled “San Jose 2020,” the Land Use/Transportation Diagram (**Exhibit 1**) designates the two parcels in the Asante Proposal as containing a portion of the Willow Glen Spur Trail (sometimes hereafter the “Trail”).

Appendix F of the “Strategic Plan” (**Exhibit 2**, attached) of the City of San Jose Greenprint, prepared by the Department of Parks, Recreation, and Neighborhood Services, describes the Trail as follows:

*“Willow Glen Spur Trail – This future 3.5-mile trail would replace the existing railroad spur when it is abandoned. This trail would **connect** the Los Gatos Creek Trail, the Guadalupe River Trail, and the Coyote Creek Trail in the **middle of San Jose.**”*

**Exhibit 2**, Strategic Plan, bolding added

The fact that the Willow Glen Spur Trail will connect these three major components of the Citywide Trail System, and will do so in the middle of San Jose, shows that the Trail is a **key piece** of the overall City trail system.

But, this key nature of Willow Glen Spur Trail is regional as well as City-wide, as shown by the sub-regional trail routes diagrams and textual descriptions from the Santa Clara County Trails Master Plan Update (Nov. 1995), which is attached as **Exhibit 3**.

The three trails (Los Gatos Creek, Guadalupe River and Coyote Creek) which the above quotation shows are connected by the Willow Glen Spur Trail actually link the Bay Area and its cities to the Bay Trail, the Bay Area Ridge Trail and the Monterey-Yosemite Trail. Thus, (1) the Los Gatos Creek Trail runs through Campbell and Los Gatos to the Bay Area Ridge Trail at Lexington Reservoir, (2) the Guadalupe River Trail runs from the Bay Trail to Guadalupe Reservoir, and (3) the Coyote Creek/Llagas Creek Trail runs from the Alameda County Line and the Bay Trail to the San Benito County line and the Monterey County Yosemite Trail. (See **Exhibit 3** and **Exhibit 1**.)

The Los Gatos Creek Trail is included in the “Scenic Routes and Trails Diagram” of the General Plan (attached as **Exhibit 4**). The General Plan describes the purpose of the Diagram as follows:

***“The Scenic Routes and Trails Diagram identifies San Jose’s most outstanding natural amenities and establishes guidelines to develop and preserve these resources.”***

*Scenic Routes, trails and pathways are incorporated into a single plan because they share many of the same characteristics and locations. They **all provide scenic views of the natural areas of San Jose** and are linear in form.”*

San Jose 2020 General Plan Text (as of May 20, 2008), p. 268, hereafter “General Plan Text,” bolding added

General Plan Text provides as follows for the “Trails and Pathways Corridors”:

### ***“Trails and Pathways***

*San Jose is an area rich in natural and scenic resources. Many areas of significant natural value...traverse the City including...the many streams that flow the urban area itself.*

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*Two regional trail systems are planned for the bay area: (1) the San Francisco Bay Trail, a regional hiking and bicycling trail around the perimeter of San Francisco and San Pablo Bay; and, (2) the Bay Area Ridge Trail, a regional system of recreational trail corridors planned to encircle the Bay area via the surrounding mountain ridges.*

*Portions of the Bay Trail and portions of the Short Term Alignment of the Ridge Trail are already included on the Scenic Routes and Trails Diagram.*

\*\*\*

***Trails and Pathways Corridors** are the interconnecting trail system in the City of San Jose, providing many important access links to regional parks and open spaces in or adjoining the City. The Scenic Routes and Trails Diagram indicates these focal points and designates the most feasible and accessible routes to develop trails.*

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***Some right-of-way linkages across private property may be required.** As the trail and pathway network continues to develop, joggers, hikers, equestrians and bicyclists will be able to enjoy trail experiences not commonly found in an urban environment.*

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***Trail design should provide sufficient light, vertical and horizontal clearance, and setbacks from adjacent development to ensure a safe and aesthetically pleasing recreational experience.** Trails should be built to meet the trail standards established by the Department of Neighborhood Services.*

*The types of trails which can be located in a designated Trail and Pathway Corridor are:*

- ***Hiking, Walking and Jogging:***

*Hiking Trails provide the most universal trail opportunities and are included in all the trail corridors of the plan.*

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- ***Bicycle Paths:***

*Bicycle Paths are generally separated from the roadway and provide a paved surface for bicyclists. Typically they are also open to pedestrians.*

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*In order to extend the network of bicycle paths throughout the City, hiking trails may be paved where feasible to allow off-street connections for bicyclists to desirable urban and natural recreation destinations and to employment centers.”*

General Plan Text, p. 272-273, some bolding and underling added.

The above-referenced trail standards established by the Department of Neighborhood Services are the “Uniform Interjurisdictional Trail Design, Use, and Management Guidelines,” the relevant portions of which are attached as **Exhibit 5**.

They show that for the “High Volume/Urban Experience” trail, (“Level 3”), which clearly describes the trail experience that would be associated with the Willow Glen Spur Trail (i.e., with “*Structures and other cultural improvements (parks, plazas, streets) nearby and readily evident;*” **Exhibit 5**, p. 3, “Level 3” column), the optimum Trail Route Easement/Right-of way for a low density residential setting (such as the Willow Glen Spur is in), is **30 feet (9.1 m)**. (**Exhibit 5**, p. 4)

Within this 30 feet easement width, “[s]hared-use trails should be designed as paved two-way paths and should have an optimum width of 12 feet (3.7 m) with a center strip....and minimal 2-foot (0.6 m), flush graded shoulders or a clear space on each side of the trail.” (**Exhibit 5**, pp. 4-5, underlining added.)

Design illustrations utilizing this 30 feet of the “Optimum Easement/Right-of-Way” standard for an “Urban Trail with Adjacent Landscaping” and a “Trail Adjacent to Street with Landscaping” are shown. (**Exhibit 5**, pp. 8 and 9, respectively)

**Exhibit 6**, the Site Plan for the Asante Proposal (taken from your Power Point presentation at the February 4<sup>th</sup> Community Meeting), **shows a clear and unmistakable**

**inconsistency** with the City General Plan's foregoing standards showing a width of 30 feet for trail easements.

Thus, Asante's "Northern Portion" Site Plan shows a "**12' TRAIL**" width, barely 1/3 the required 30 feet distance. (**Exhibit 6**, p.2)

A good deal worse, the "Site Plans Cont." for the Southern Portion (**Exhibit 6**, p. 3) merely states "**Trail system continues**," with no designation for a trail easement width at all. At the community meeting, you stated that the trail width would be **9 feet**, which is somewhat less than a 1/3 the width of the General Plan Standard.<sup>1</sup>

This pitiful proposal not only clearly violates the General Plan numerical width standards, but as well clearly violates the textual standard that "**Trail design should provide sufficient light, vertical and horizontal clearance and setbacks from adjacent development to assure a safe and aesthetically pleasing recreational experience.**" (General Plan Text, *supra*, p. 273, bolding and underlining added.)

A commentator on the Asante Proposal has fairly characterized its "trail" as "a first class alley" that would deal a "fatal blow" to the Willow Glen Spur Trail.

The "*aesthetically pleasing recreational experience*" contemplated by the General Plan Text and the illustrated Design Guidelines for the Trail is shown vividly in the photograph of the related Los Gatos Creek Connector Trail to Hamilton Place submitted by another commentator (**Exhibit 7**). This commentator points out that:

*"My concern with your [Asante] proposal is with the three homes...for the southern end of the project...two facing the cul-de-sac at the end of Riverside, the last facing Broadway, with the trail in a 12' easement at the back (western) edge. I can also see how **such a trail easement could quickly become uninviting**; it could get overgrown, it would be hard to sweep the pavement, and **it would give trail users the feeling of being 'trapped' in a dark alley** between the between the parallel fences; it would feel like the trail along Hwy. 87 (see photo), which, while it does provide connection, is not pleasant to use."*

Bolding added. (The photo is also in **Exhibit 7**.)

In summary, the Asante Proposal violates, in multiple ways, the legal requirement that the Proposal be consistent with the City General Plan provisions for the Willow Glen Spur Trail.

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<sup>1</sup> A strained examination of this Southern Portion page of the Site Plans does appear to show two designations which may say "9' Trail."

## II.

### THE “CHARTER CITY ZONING EXEMPTION” FROM THE GENERAL PLAN “CONSISTENCY” REQUIREMENT IS UNCONSTITUTIONAL

Were I representing Asante in this matter, I would be quick to argue that the Asante Proposal is not required to be consistent with the City General Plan provisions detailed above because: (1) the Proposal is to rezone the project land to Planned Development PD Zoning; (2) San Jose is a charter city; and (3) Government Code § 65860, which contains a requirement that “*city zoning ordinances shall be consistent with the general plan of the...city,*” appears in the same chapter as Government Code § 65803, which explicitly states that “*this chapter shall not apply to a charter city[.]*” The case of *Garat v. City of Riverside* (1991) 2 Cal.App.4<sup>th</sup> 259,280-2, (overruled on other grounds in *Morehart v. County of Santa Barbara* (1994) 725, 736) holds that this “charter city exemption” is legally valid.

This section of this letter, and the next three sections as well, will point out the reasons that this statutory “charter city zoning exemption” provision, ostensibly confirmed by the *Garat* case, is of no legal help to the Asante Proposal.

The court in the *Garat* case never considered the constitutionality of this statutory charter city zoning exemption, and therefore the *Garat* case provides no defense if the statutory exemption is unconstitutional – which it is, for the reasons shown below.

#### A. California Constitution, Article IV, § 16

*“(a) All laws of a general nature have uniform operation.*

*“(b) A local or special statute is invalid in any case if a general statute can be made applicable.”*

#### Article IV, § 16, a

Simply put, the above-referenced provision of Government Code § 65860 that “*city zoning ordinances shall be consistent with the general plan...of the...city*” is both a “law of the general nature,” and a “general statute.” The exemption from it in Government Code § 65803 for charter Cities would defeat the requirement that this law of a general nature “have uniform operation,” by preventing it from operating uniformly on all cities in the State. Equally, this “general statute” in § 65860 that requires consistency between general plans and zoning ordinances for “all cities” can

certainly be “made applicable” to charter cities. The § 65803 exemption from the consistency requirement for charter cities is therefore unconstitutional under Article IV, § 16.

In the more- refined analysis of case law:

*“A law...is general...when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction...it is a special law...if it confers particular privileges or imposes particular disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.”*

White v. Church (1986) 185  
Cal.App.3<sup>rd</sup> 627, 632, punctuation  
modified

Using the test of constitutionality set out in White v. Church, Section 65803 “flunks,” i.e., is a “special law.” That is:

Section 65803 confers “*particular privileges*” on project proponents located in charter cities (i.e., the privilege of exemption from the statewide general plan/zoning “consistency requirement” of § 65080). Moreover, it confers “*particular disabilities*” on project opponents in charter cities, (i.e., lack of the protection of the consistency requirement.

It confers this particular privilege and particular disability upon charter city project proponents and project opponents “*in exercise of their common right*,” as members of the public in all cities in California, to advocate project approval or disapproval to the local city officials entrusted by California general plan and zoning laws with decision making authority concerning project proposals. In both charter and general law cities, these proponents and opponents are *a class of persons who stand in precisely the same relation to the subject of the law*,” i.e., stand in the same relation to the general plan and the zoning ordinance in their cities.

But, the Legislature has “*arbitrarily selected from the general body*” of project proponents in California cities, the project proponents in charter cities, and has conferred upon them the special privilege of exemption from the consistency requirement that project proponents in general law cities labor under, even though project proponents in general law cities stand in precisely the same relation to the general plan and the zoning ordinance in their cities as project proponents in charter cities stand to the general plan and zoning ordinance in their cities.

Similarly, the Legislature has “*arbitrarily selected from the general body*” of project opponents in California cities, the project opponents in charter cities, and has conferred upon them the special disability of exemption from the consistency requirement that project opponents in general law cities benefit from, even though project opponents in general law cities stand in precisely the same relation to the general plan and the zoning ordinance in their cities as project opponents in charter cities stand to the general plan and zoning ordinance in their cities.

That is, fundamentally, the charter city exemption is without a rational basis, i.e., arbitrary. There is simply nothing about charter cities that makes all of them better land use planning entities than all of the general law cities, and thus rationally deserving of an exemption from the consistency requirement.

### III.

#### THE “CHARTER CITY EXEMPTION” FROM THE “CONSISTENCY REQUIREMENT” ALSO VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

*“No state shall...deny to any person within its jurisdiction the equal protection of the law.”*

United States Constitution, 14<sup>th</sup>  
Amendment, Section 1

*“The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against **intentional and arbitrary discrimination**, whether occasioned by **express terms of a statute** or by its improper execution through duly constituted agents.”*

Village of Willowbrook v. Olech  
528 U.S. 562, 564 (2000), bolding added.

The § 65803 attempt to exempt charter cities from the consistency requirement meets the essential elements stated in Village of Willowbrook for violation of the Equal Protection Clause. First, the discrimination it creates against project opponents in charter cities is obviously intentional, i.e., the Legislature does not pass legislation unintentionally. Second, this discrimination is arbitrary for the reason already given above, i.e., that whether a city is a general law city or a charter city bears no rational relation to the need for consistency in land use decisions. Finally, the discrimination

is occasioned by the express terms of a statute, i.e., the express terms of § 65803 exempting Charter Cities from the consistency requirement.

In summary, the fact that the Asante Proposal illegally violates the width requirements for trail easements in the City General Plan is not cured because the Proposal might receive PD Zoning approval the falls within the § 65803 exemption from the General Plan consistency requirement for zoning in charter cities – because the § 65803 exemption is unconstitutional.

#### IV.

**THE “PLANNED DEVELOPMENT ZONING” ATTEMPT TO  
CREATE VARIANCES WITHOUT COMPLYING WITH THE STATEWIDE  
ZONING VARIANCE STATUTE, GOVERNMENT CODE § 65906, IS  
LIKEWISE AN UNCONSTITUTIONAL VIOLATION OF BOTH ARTICLE  
IV, § 16 OF THE CALIFORNIA CONSTITUTION AND THE EQUAL  
PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.**

**A. Operatively, the “PD-Planned Development District” Is a “Local  
Statute” That Grants Zoning Variances.**

Chapter 20.60 of the San Jose Zoning Ordinance establishes the “PD – Planned Development District.” The PD District is effectuated by, among other things, a Planned Development Permit. (San Jose Zoning Ordinance § 20.60.020 A. 1) Unless and until a Planned Development Permit has been issued, property in territory in a Planned Development District may only be used as if it were in its “base district” alone, i.e., one of the 19 “base” City Zoning Districts listed in Table 20-10 in San Jose Zoning Ordinance § 20.10.060. (In the case of the Asante Proposal land, the base district is the “R-1-8 Residence District (8 Du/Acre)” District, which allows eight dwelling units per acre.) Except where a Planned Development Permit has been implemented, the regulations for development applicable to the base district zoning shall apply to all property in the Planned Development District. (San Jose Zoning Ordinance § 20.060.040 A).

However, when a PD permit has been implemented, the provisions of such Permit “*shall prevail over the regulations*” applicable to the base zoning district of the property. (San Jose Zoning Ordinance § 20.060.040 B). Thus, the operative effect of the PD-Planned Development District is to grant “variances” from the regulations applicable to the base zoning district of the property.

The San Jose Zoning Ordinance contains no requirements, qualifications, conditions, restrictions or limitations of any nature upon the creation or grant of PD-

Planned Development District zoning or rezoning, or upon the issuance of a Planned Development Permit.

**B. Government Code § 65906 Is A “General Statute” Governing The Grant Of Zoning Variances.**

Government Code § 65906 provides in relevant part as follows:

*“Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprive such property of privileges enjoyed by other property in the vicinity and under identical zoning classification. Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other property in the vicinity and zone in which such property is situated.”* (Bolding added)

Thus, the statewide zoning variance statute in § 65906 and the local and special “statute” in the City’s PD-Planned Development District both deal with precisely the same subject matter, i.e., the granting of “variances” or “exceptions” to the regulations of “base” zoning districts of a property. Both operate to cause the base district regulations not to apply to a given property.

Because they both deal with precisely the same subject matter, the situation is one in which, within the meaning of California Constitution Article IV, § 16, “A general statute [i.e., § 65906] can be made applicable,” so that under Article IV, § 16 the “local or special statute [i.e., the PD-Planned Development District] is invalid.”

Therefore, the PD-Planned Development District in the City’s Zoning Ordinance is unconstitutional under Article IV, § 16, and no variances from the terms of the R 1-8 Residence District (8 Du/Acre) zoning district regulations can lawfully be granted by the City for the Asante Proposal, unless the Asante Proposal satisfies the qualifying requirement for a zoning variance under Government Code § 65905, i.e., unless Asante can show that “because of special circumstances applicable to the property...the strict application of the zoning ordinances deprives the property of the privileges enjoyed by the other property in the vicinity and under identical zoning classification.”

Moreover, under § 65906, no variance can be granted unless it is made “subject to such conditions as well as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the

*limitations upon the other property in the vicinity and zone [i.e., the R-1-8 Residence District (8 Du/Acre) zone] in which such property is situated.”*

**C. The PD Planned Development District Violates the Equal Protection Clause of the United States Constitution.**

Section 65906 assures that zoning variances are not granted arbitrarily by requiring that (1) they be allowed only where special circumstances applicable to the property receiving the variance prevent the property from enjoying the privileges of the base zoning district unless the variance is granted,<sup>2</sup> and (2) conditions are imposed on the granting of the variance that will assure that the adjustment which the variance allows does not constitute a grant of special privileges that is inconsistent with the limitations on other properties in the base district.

The City’s PD Planned Development District, by contrast, arbitrarily imposes **no** such rational restrictions on the granting of a PD District or PD permit that will assure that the owner of the PD land is being required to abide by the zoning district limitations of the base district that all of the neighboring property owners in the base district must abide by under the regulations of the base district. Thus, without the equitable restrictions on granting variances contained in § 65906, the unrestricted PD District denies neighboring project opponents the equal protection of law, i.e., equal protection that enforces the base zoning district restrictions that all the neighbors in the base zone must live by.

Because the PD District can thus be granted arbitrarily, without any of the fairness and equality- of -treatment restrictions that § 65906 imposes on variances, it is “*intentional and arbitrary discrimination...by express terms of a statute*” against project opponents within the meaning of the Village of Willowbrook case cited above, and thus is a denial of federal Fourteenth Amendment equal protections.

**V.**

**EVEN IF THE ASANTE PROPOSAL WERE TO SUCCEED AGAINST THE FORGOING CONSTITUTIONAL CHALLENGES TO THE CHARTER CITY EXEMPTION AND THE PD ZONING, THE SUBDIVISION MAP APPROVAL REQUIRED FOR SALE OF THE PROPOSAL’S FOURTEEN RESIDENTIAL LOTS WILL REQUIRE PROJECT CONSISTENCY WITH THE GENERAL PLAN TRAIL REQUIREMENTS.**

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<sup>2</sup> The typical case is a residential lot that is smaller than the minimum lot size for the base zoning district, so that unless the variance is granted, the base district privilege of constructing a residence would unfairly be denied.

Even if all the foregoing constitutional arguments fail, so that the Planned Development Permit application, if approved, need not be consistent with the General Plan trail easement width standards as a matter of law, it appears unavoidable that the Asante Project also contemplates obtaining approval of a subdivision map dividing the Union Pacific property into fourteen residential lots, i.e., one for each of the fourteen “detached single family homes” expressly designated on the Northern Portion and Southern Portion of the Site Plan. (**Exhibit 6**, p. 2-3)

Unless such a subdivision map is approved, it will not be possible to sell title to individual lots to prospective purchasers, but only to sell fourteen undivided 1/14 interests in the Northern Portion and the Southern Portions lands – titles that will patently be unmarketable. Who would buy only a 1/14th of their own and everybody else’s property, and allow 13/14 of their own property to be owned by 13 other owners?

The application for a subdivision map will run smack into the following legal requirement:

*“A legislative body of a city or a county shall deny approval of a tentative [subdivision] map...if it makes any of the following findings:*

- (a) That the proposed map is **not consistent with applicable general and specific plans** as specified in § 65451.*
- (b) That the **design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.**”*

Government Code § 66474, bolding added.

Thus, the Asante Proposal will still be required to provide a 30 foot wide trail easement in order to meet the above requirement that its subdivision map be consistent with the General Plan, even if its PD Permit is not.<sup>3</sup>

## VI.

### **THE ASANTE PROPOSAL REQUIRES AN ENVIRONMENT IMPACT REPORT (“EIR”) ASSESSING THE “CUMULATIVE IMPACT” OF THE PROPOSAL AS A PRECEDENT FOR VIOLATING THE 30 FOOT EASEMENT REQUIREMENT ON THE COUNTYWIDE “MASTER**

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<sup>3</sup> The “*as specified in Section 65451*” language does not provide any “out” from the requirement for the subdivision map to be consistent with the “*applicable,*” (i.e., City) General Plan. Section 65451 merely describes the requirements for a specific plan.

## TRAIL” IN ALL 15 CITIES AND THE UNINCORPORATED TERRITORY IN SANTA CLARA COUNTY.

In processing the Asante Proposal, the City will be required to comply with the California Environmental Quality Act (“CEQA”), which requires that an Environmental Impact Report (“EIR”) be prepared for any proposal which may have a “significant effect” on the environment. (Public Resources Code § 21151 (a))

CEQA processing begins with an “Initial Study” to determine whether the proposal may have the significant effect on the environment. The City’s website shows that it uses a 29 page long modified form of the statewide Initial Study found in Appendix G of the State CEQA Guidelines. (14 California Code of Regulations, § 15000, et seq.)

Of greatest importance to the Asante Proposal is the requirement that, consistent with all other CEQA law, the Initial Study requires a mandatory finding of “significant effect,” and thus requires the preparation of an EIR, if the project has *“impacts that are individually limited, but cumulatively considerable,”* which means that *“the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”* (CEQA Guidelines, Appendix G, last page, subparagraph b)<sup>4</sup>

It is also well established that *“any substantial, negative effect of a project **on view and other features of beauty** could constitute a ‘significant’ environmental impact under CEQA.”* (Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4<sup>th</sup> 1597, 15604, **bolding added** – EIR required because the project blocked a beautiful view.)

As noted above, the City General Plan states that *“[t]rail design should provide sufficient...set backs from adjacent development to ensure a[n]...**aesthetically pleasing recreational experience**”* through trails that are *“built to meet the trail standards”* in the Interjurisdictional Trail Design Guidelines requiring trail easements 30 feet in width, not the 12 foot and 9 foot easements in the Asante Proposal. (General Plan, p. 273, **bolding added**).

As the General Plan further notes:

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<sup>4</sup> *“An EIR must be prepared if the cumulative impact may be significant and the project’s incremental effect, though individually limited, is cumulatively considerable... [which] means that the incremental effects of an individual project are considerable when viewed in connection with...past projects...other current projects, and...probable future projects.”* (CEQA Guidelines § 15064 (i) (1)); see also §§15065 and 15130.)

The “*many creeks and natural wooded areas cross the valley floor [as] ....natural linear pathways...provid[ing] the City of San Jose with many **scenic** and recreational opportunities.*” The “*Scenic Routes and Trails Diagram identifies **San Jose’s most outstanding natural amenities and establishes guidelines to develop and preserve these resources.***” The “*scenic routes, trails and pathways are incorporated into a single plan because...[t]hey all **provide scenic views** of the natural areas of San Jose [.]*”

(General Plan, p. 268, bolding added).

The Asante Proposal, with its portion of the Willow Glen Spur Trail shown as a tiny, cramped “trail” running with no landscaping through a residential neighborhood along the sidewalk (i.e., **the “1<sup>st</sup> class alley” that “would give trail users the feeling of being ‘trapped’ in a dark alley between the between the parallel fences”**) would obviously destroy the scenic linkage that the Willow Glen Spur Trail described in the General Plan is intended to provide between San Jose’s “most outstanding natural amenities,” by making it impossible (1) to “**provide sufficient...setbacks from adjacent development** to assure a safe...aesthetically pleasing recreational experience” and (2) to **provide the trees and other landscaping lining the trail** required and illustrated in the trail design and the 30 foot easement required in the General Plan. (General Plan Text, supra, p. 273, bolding and underlining added; and Trail Design Guidelines, **Exhibit 5**, p. 8 & 9).

The elimination of this trailside landscaping which would be forced by the too-small 9 and 12 foot trail easements of the Asante Proposal is clearly a “*substantial, negative effect ... on view and other features of beauty*” of the Willow Glen Spur Trail as it is described in the General Plan, and thus a “*significant’ environmental impact under CEQA*” within the meaning of the Quail Botanical Gardens Foundation, Inc. case cited above.

To allow the Asante Proposal with its too-small trail easement would clearly set a precedent that could be cited by any private developer in the City of San Jose (or even in any of the 14 other cities in Santa Clara County - each with part of the Countywide Master Trail subject to the same Uniform Interjurisdictional Trail Design Guidelines) as a basis to allow his, her or its project to also violate the 30 foot easement width and deprive the Master Trail of its landscaping and natural aesthetic beauty where the Trail passes through the developer’s property.

It is easy to hear such a future developer’s angry claim that not allowing him, her or it a trail easement of only 9 feet would deny the developer equal protection of the law because Asante was allowed such a trail easement by the City of San Jose. The argument would be invalid, because the Trail Design Guidelines requirement for a 30 foot easement

is “rational basis” for demanding the larger easement that defeats the “arbitrary discrimination” requirement for a valid equal protection claim under the Village of Willowbrook case cited above - but not if the City and the other local government stakeholders and interested members of the public intentionally abandon the requirement.

Thus, the clear negative effect on the aesthetic beauty of the Trail in the 9 feet trail easement of the Asante Proposal is a negative effect that, **even if arguably “limited” as to effect in the Asante Proposal itself, becomes “cumulatively considerable,”** when its precedent-setting potential is considered in light of (1) any past projects in the City (or other cities) which may not have been required to have the 30 feet easement, (2) present projects in the City (or other cities) seeking trail easements less than 30 feet, and (3) probable future such projects in the City (or other cities), i.e., in **all** undeveloped parcels designated as containing a part of the Countywide Master Trail anywhere in the City (or in other cities in Santa Clara County).

Therefore, the Asante Proposal has a significant cumulative aesthetic effect, and the requirement to study this potential cumulative effect in an EIR is triggered.<sup>5</sup>

### CONCLUSION

It must be noted that the foregoing discussion of the significant effects on the environment of the Asante Proposal is incomplete. It does not include, for example, and without limitation: (1) The potential significant effect of the admitted soil contamination on the project site from its historical use as railway; (2) the potential significant effect on wildlife (particularly salmon and steelhead trout) stemming from the fact that the Los Gatos Creek runs through the project area<sup>6</sup> and (3) the significant effect on human health

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<sup>5</sup> *“The following elements are necessary to an adequate discussion of significant cumulative impacts: (1) Either: (A) a list of past, present and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or (B) a summary of projections contained in an adopted general plan or related planning document, or in a prior environmental document which has been adopted or certified, which described or evaluated regional or area wide conditions contributing to the cumulative impact.” (CEQA Guidelines § 15130 (b))* The “list” approach (including “those projects outside the control of the agency,” i.e., outside the control of the City of San Jose - meaning past, present and probable future projects in the other 14 Cities) is the one which would be required for the Asante Proposal, because there is no adopted General Plan, or related planning document, or prior environmental document which has described or evaluated the regional or area wide conditions contributing to the cumulative impact, i.e., no general plan or environmental document which has studied **the cumulative effect of violations of the trail easement width requirement** - past, present or future - in San Jose or any other city in the County.

<sup>6</sup> This makes the Santa Clara Valley Water District and the California Department of Fish and Game “Responsible Agencies” (CEQA Guidelines § 15381), whose input must be sought in the preparation of the EIR. The treatment to be given the trestle spanning Los Gatos Creek will require obtaining a completely separate stream crossing permit from the Department of Fish and Game under Fish and Game Code § 1506. I recently visited the site. I was stunned at the great size of the creek, which seemed more on the scale of a river. Though presently greatly degraded with garbage and invasive plant species, it is an unexpectedly

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and safety of an extremely long 20 feet wide “private driveway” for the Proposal (instead of the usual 32 feet wide public street) that runs the entire length of the project, on which it would be required that all street side parking be prevented at all times to assure the 20 feet clear width necessary for fire trucks to negotiate the street.<sup>7</sup>

Additionally, the discussion of the non-CEQA legal defects in the Proposal should not be considered exhaustive, and is submitted without prejudice to the right to raise any others discovered hereafter.

I request that you now honor your obligations under our agreement, by requesting that Union Pacific allow you to provide me a copy of (1) your contract for purchase of the property for the Proposal for the sum of \$3,365,000.00, and (2) the old subdivision map for the property.

Finally, I take this opportunity to note that you advised me that although your contract with Union Pacific does not condition your obligation to purchase upon obtaining project approval from the City, it does impose other conditions upon your obligation to purchase that it will not be possible for Union Pacific to satisfy, and that therefore give you an unlimited right to “walk away from the deal” before the decision date in March 2009.

Please advise. Thank you for your anticipated courtesy and cooperation. Please feel free to contact me with any questions or comments, either personally or through counsel.

Very truly yours,

BRUCE TICHININ

cc: Save Our Trails  
BT: cz

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huge and continuous swath of wildlife habitat running hidden through the otherwise-completely-urbanized valley floor. It appears capable of being rather readily restored to robust ecological health if development projects adjoining or including it, such as the Asante Proposal, are required to do their part in using EIRs to mitigate significant environmental effects (Public Resources Code § 21002.1 (a) and (b)), and to carry out state policy to rehabilitate environmental quality. (Public Resources Code § 21001 (a))

<sup>7</sup> Source: James Carter, San Jose Fire Department, Retired.