Case No. B184025

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

DAVID PROKOP,

Plaintiff/Appellant,

vs.

CITY OF LOS ANGELES,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES
SUPERIOR COURT CASE NO. BC 305 404
HONORABLE ROLF M. TREU

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The question raised by this appeal is whether, as a matter of law, Defendant, the CITY OF LOS ANGELES ("CITY"), is absolutely immune from liability for injuries suffered by Plaintiff, DAVID PROKOP ("PROKOP") as a result of a dangerous condition the CITY caused to exist on the Los Angeles River Bikeway ("LA River Bikeway" or "Bikeway"), which is a "Class I" bikeway, designed, constructed and funded pursuant to the Bicycle Transportation Act (codified at *Streets and Highways Code* Sections 890 *et seq*.). The trial court erroneously concluded that the "matter [was] put to rest" by the decision in *Farnham v. City of Los Angeles* (1984) 68 Cal.App.4th 1097, wherein a fact pattern similar - - but far from identical - - to the one at bar was analyzed. Relying exclusively on *Farnham*, the lower court concluded that "immunity clearly applies" and, without any other discussion, granted summary judgment in favor of the CITY based solely on *Government Code* Section 831.4.[1] *Farnham*, however, was wrongly decided and is also distinguishable from the case at bar.

In *Farnham*, Division Two of this Second District Court of Appeal held that because another Class I bikeway, the Sepulveda Basin Bikeway, "does not qualify as a street or highway," the CITY could not be liable for

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[1] Hereinafter, unless otherwise specified, statutory citations refer to sections of the *Government Code*.

creating and maintaining a dangerous condition thereon. Instead, the bikeway there at issue was deemed to necessarily be “a ‘trail’ within the definition of Section 831.4,” the dangerous condition of which could not give rise to liability on the part of the CITY because (according to the *Farnham* court) the government is absolutely immunized against injuries it causes to occur on any public way that might reasonably be called a “trail.”

The *Farnham* decision, however, misapplied Section 831.4, erroneously refused to consider applicable portions of the *Streets and Highways Code*, and failed to recognize and/or analyze other provisions of state and local law which are inconsistent with such a grant of immunity, and which should have compelled a contrary result. Moreover, even if the *Farnham* court could have properly concluded that the Sepulveda Basin Bikeway (on which the injury there at issue occurred) was a “trail” giving rise to the absolute governmental immunity pursuant to subsections (a) and (b) of Section 831.4, it was still error for the trial court in this case to find the LA River Bikeway is likewise a “trail” and that the CITY could therefore create and maintain a dangerous condition thereon without incurring liability for injuries caused thereby.

Finally, the accident in which PROKOP was injured (“Accident”) occurred - - by the CITY’s own admission - - outside of the confines of the alleged “trail,” and dangerous conditions existed both inside and outside the

boundaries of the LA River Bikeway. Therefore, even if the CITY were statutorily relieved by Section 831.4 of liability for damages caused by the dangerous condition it caused to exist **on** the LA River Bikeway, the statute still would not preclude PROKOP from recovering damages in this case based on the dangerous trap that awaited him immediately once he got **off** the Bikeway.

STATEMENT OF THE CASE

1. FACTUAL BACKGROUND

PROKOP was injured on the west side of a gateway ("Bicycle Gate") that provided egress for westbound bicycle and other traffic (and ingress for eastbound traffic) from (and to) the Bikeway. According to the CITY the Bicycle Gate was "located outside the boundary (edgeline)" of the LA River Bikeway (which the CITY insists on referring to as a "recreational bicycle trail[2]").

According to the declaration of the CITY's Professional

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[2] There is no legal definition of "recreational bicycle trail," and at no point do City planning documents refer to the LA River Bikeway by this term. The City's use of the term is clearly a self-serving attempt to recharacterize the nature and purpose of the Bikeway in order to artificially advance its argument that the Bikeway falls under the Section 831.4 umbrella, and "[n]o continuation of continuous bicycle facilities exist[ed] to the west beyond the [Bicycle Gate]." [Clerk's Transcript ("CT") 0132:21-24.]

Transportation Engineer, Michael J. Uyeno ("Uyeno Declaration"or "Uyeno Dec."), the Bicycle Gate "was not meant to be one where bicycles are ridden through at a high rate of speed." Nevertheless, PROKOP offered evidence that "on a Saturday morning, none of the many cyclists . . . observed using normal bicycles walked his bicycle through the gate. [CT 0104:2-4.] In fact, PROKOP's expert, Forester, testified:

> The only one that did walk his bicycle was riding a long-wheelbase recumbent, and, even walking, he barely managed to fit it through the curves of the gateway." [CT 0104:4-5.]

Moreover, one of the CITY-retained experts, David Royer ("Royer") (a Civil Engineer and Traffic Engineer), admits to personally observing at least "some . . . bicyclists riding through" the Bicycle Gate, and concedes that it was possible to ride through while still exercising "due care," although doing so required the cyclists to "carefully line up their bicycle[s'] path with the gate opening"of the Bicycle Gate.

The LA River Bikeway was a "facilit[y] that provide[d] primarily for bicycle travel," consisting of "a completely separated right-of-way designated for the exclusive use of bicycles and pedestrians." (*S&H Code* §890.4(a).) As such it was undeniably a "bikeway" - - specifically a "Class I bikeway" - - as defined by *Streets and Highways Code* Section 890.4. It was also used by vehicles owned and/or operated by the CITY and the County for service and maintenance, and during emergencies. Such

vehicles could enter the bikeway at its western terminus through a "wide double door gate" ("Motor Traffic Exclusion Gate"), which was normally kept locked. The Motor Traffic Exclusion Gate intersected the far western edge of the Bikeway at a 90-degree angle and ran perpendicularly across the entire bikeway (extending beyond on the north and south sides thereof). In addition, "both sides" of the Bikeway (i.e., the northern boundary and the southern boundary) were "enclosed by . . . fences," which ran parallel to the Bikeway ("Northern Fence" and "Southern Fence," respectively).

Because of the locked Motor Traffic Exclusion Gate erected directly in the path of a westbound bicyclist, the Bicycle Gate was located "to the right of the . . . bikeway." Egress was accomplished by angling gently to the right (to the west-northwest) while approaching the end of the bikeway. A large white arrow ("Outgoing Arrow") (the tip of which wa only about 18 inches from the Bicycle Gate) had been painted on the surface of the trail, directing westbound bicyclists to the Bicycle Gate. In addition, the words "BIKE" and "WALK" were painted on the bikeway surface just to the east of the Outgoing Arrow (beginning at a point approximately 8 feet and 18 inches from the Bicycle Gate). Therefore, in the unlikely event that a bicyclist was looking straight down at the pavement on the LA River Bikeway when he was approaching the Bicycle Gate, he would see, as he scanned the pavement in front of him, the word "BIKE," the word

"WALK" (both weathered and faded)[3], and then the Outgoing Arrow directing him to turn slightly to the right, to cross over the white line at the northern (i.e. right) edge of the bikeway, and then to proceed straight through the Bicycle Gate.

A bicyclist who was unfamiliar with the Bicycle Gate configuration would likely be caught unawares, however, if he followed what appeared to be fairly straightforward directions (consisting primarily of the Outgoing Arrow) regarding how to maneuver through the Bicycle Gate. Immediately to the west of the Exit, the Northern Fence - - which had been running parallel to (and well to the north of) the LA River Bikeway - - sharply turned to the left (i.e. south) toward the Exit. As a result, the Outgoing Arrow pointed directly into the angled portion of the Northern Fence ("Angled Portion" or "Angled Fence"), and a bicyclist who proceeded in the direction of the arrow for more than a bike length (i.e. about 5 feet) was destined to squarely collide (as PROKOP did) with the Angled Fence, which , at that point, was reinforced with inflexible heavy metal posts running vertically and diagonally across the chain link.

The only way to avoid such a collision was to make a sharp turn to

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[3] If he were not looking down reading the pavement as he rode but instead was focusing his attention (as most bicyclists would) on the Outgoing Arrow and the Bicycle Gate itself, he like would not have comprehended the meaning and import of the words at all.

the left (i.e. south) immediately after making the relatively gentle turn to the right (i.e. north) and passing the front wheel of the bicycle through the Bicycle Gate. The necessity of such an abrupt change of direction was not at all apparent to the exiting bicyclist, however, as the southward turn of the Northern Fence, and the resulting stretch of Angled Fence, was all but invisible from the east side of the Exit. Moreover, one would have logically expected to be able to travel in the direction of the large Outgoing Arrow that pointed the way out for at least a reasonable distance before having to change direction again.

Notwithstanding the fact that the need for a quick, sharp left turn was not visually apparent to a westward-traveling bicyclist, there were no signs posted advising of the tricky route through the Exit, nor any warnings of any kind to alert bicyclists of the need for a sudden change in direction once outside the Exit in order to avoid the Angled Portion of the Northern Fence as it cut directly across the path designated by the Outgoing Arrow.[4] Accordingly, even the most reasonable bicyclist using the Bikeway with the utmost due care, was likely to be deceived by the design of the Exit.

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[4] Subsequent to the Accident, other markings on the pavement were added. Specifically, a white arrow was painted on the western side of the Exit ("Incoming Arrow") pointing to the Northeast (i.e. it would be pointing directly toward the bicyclist who was fortunate enough to make the sharp left turn required to avoid the Angled Fence.

At approximately 2:00 pm on the day of the Accident, PROKOP was riding in a westerly direction on the LA River Bikeway. As he approached the Double Gate, he noticed that it was closed and he could not continue to travel west without changing course. He therefore "head[ed] towards the exit" to the north, in order to avoid the Motor Traffic Exclusion Gate which prevented him from continuing in a straight line. PROKOP followed the Outgoing Arrow through the Exit and, because the Angled Portion of the Northern Fence unexpectedly "cut in [at] such a sharp angle that [PROKOP] had no time to react," PROKOP collided with it "approximately a foot away" from one of the solid metal posts that were part of the Angled Fence. Among his various injuries, PROKOP received a "very very bad gash" in his head which required over 100 stitches to close.

2. <u>PROCEDURAL BACKGROUND</u>

A. PROKOP's Complaint

On November 3, 2003, PROKOP caused to be filed in the Los Angeles Superior Court, a complaint against the CITY, seeking damages for the injuries he suffered as a result of the above-described dangerous condition of the Bikeway. He specifically alleged that the CITY not only had constructive knowledge of the dangerous condition, but, in fact, had

created it by the manner in which the CITY designed, constructed and maintained the bikeway. Also attached to PROKOP's Complaint was proof of compliance with the procedures for filing a claim against an governmental entity prior to filing suit. [CT 0007-0025.]

B. The CITY's Answer

On December 18, 2003, the CITY filed a general denial in response to PROKOP's Complaint. In addition, the CITY asserted a number of affirmative defenses, including a claim of immunity pursuant to *Government Code* Sections 815.2, 818.6, 820.2, 820.8, 821.4, 835.4, 840 and 840.6.[5] [CT 0026-0029.]

C. The CITY's Motion For Summary Judgment

(1) The CITY's Moving Papers And The Royer Declaration

On January 6, 2005, the CITY filed a Motion for Summary Judgment ("MSJ"). In the CITY's accompanying "Separate Statement of Undisputed Material Facts" ("CITY Separate Statement"), the following allegedly undisputed facts were supported by the expert declaration testimony of the CITY's expert, :

- The Bikeway "was designed by the CITY" [CT 0031:13-14];

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5 Notably, no affirmative defense based on Section 831.4 was asserted. Accordingly, the CITY may well have waived the defense.

and,

- The Bikeway was "constructed on a CITY . . . easement" [CT 0031:19-21].

The CITY Separate Statement also acknowledged that the "exit portal" at the western end of the Bikeway (i.e. the Bicycle Gate) was forty-two inches wide, and that PROKOP "struck his head on a chain link fence, approximately five feet past the exit portal." [CT 0032:19-20; 0033:14-17.]

In his supporting declaration, also provided additional, somewhat more in-depth information on behalf of the CITY. He testified that:

- He had reviewed "Los Angeles Department of Transportation Records" for the LA Bikeway and the "design plans for the construction of the LA Bikeway." [CT 0069:16-32 (¶3).]
- "In 1993/94 the CITY of Los Angeles designed" the LA River Bikeway. [CT 0069:23-24 (¶4).]
- The Bikeway was "constructed on CITY of Los Angeles recreational easement upon Los Angeles County Flood Control property." [CT 0070:3-4 (¶7).]
- "Los Angeles River Bikeway Phase 1-A, Plan Number D-30564, was designed and approved under the direction of . . . the Los Angeles City Engineer," who had "discretionary

authority to develop and approve the design plans for the CITY of Los Angeles." [CT 0070:6-10 (¶¶7, 8).]

- "[T]he design" of the Bikeway was "not only reasonable but [was] an excellent design that far surpasse[d] reasonableness. . . [T]here was no defect in the design or operation of the [Bikeway] at the time of the [A]ccident . . . [S]aid designs conformed to all Federal, State, and City design standards." [CT 0070:111-20 (¶¶10, 11).]
- At the point where the Accident took place, the Bikeway met "current design standards and was constructed in accordance with design plans." [CT 0070:21-23 (¶12).]
- The Bikeway did "<u>not</u> constitute a dangerous condition of public property," as that term is defined by Section 830 of the *Government Code*. "The [Bicycle Gate] width is of sufficient width to safely walk a bicycle through the gate. The gate present[ed] no danger to a bicyclist using due care and obeying the pavement message to 'Walk Bike.'" [CT 0071:1-5 (¶14).] [Underlining in original.]

Based on purportedly undisputed facts (including but not limited to the foregoing), the CITY contended that, as a matter of law: (i) it could establish the defense of immunity based on *Government Code* Section

831.4; (ii) there was no dangerous condition on the LA Bikeway that caused the Accident; and, (iii) if there was a dangerous condition on the LA Bikeway that caused the Accident, the CITY did not have actual or constructive notice of it.

(2) PROKOP's Opposing Papers And The Forester Declaration

PROKOP's substantive opposition to the CITY's MSJ is based largely upon the Declaration of John Forester ("Forester"), "a consulting engineer, expert witness and educator in effective cycling, bicycles, highways and bikeways, and traffic laws." [CT 0093:7-10 (¶10).] Forester "disagree[d] . . . with 's conclusion that 'the design of the [LA River Bikeway] . . . was . . . reasonable," and with his conclusion that the design of the LA River Bikeway at the Accident site "conformed to all Federal, State, and City design standards." [CT 0093:25-0094:1 (¶2).] Specifically, Forester explained:

> **"Th[e] [B]ikeway is not a Recreational Bicycle Trail, but is a Class I bikeway according to California *Streets and Highways Code* 890.4(a). The portion of [the LA River Bikeway] at the [A]ccident site is deficient with regard to the standards required by *Streets and Highways Code* §890, embodied as *California Highway Design Manual* Chapter 1000, and also with the comparable Federal standard, the *Guide for Bicycle Facilities of the Association of American State Highway and Transportation Officials* . . . ."** [CT 0094:1-6 (¶2).]

Forester also pointed out that:

> **"*Streets and Highways Code* §891 requires that: 'All city, county, regional, and other local agencies responsible for the development or operation of bikeways or roadways where bicycle travel is permitted shall utilize all minimum safety design criteria and uniform specifications and symbols for signs, markers, and traffic control devices established pursuant to Sections 890.6 and 890.8 [of the *Streets and Highways Code*]."** [CT 0094:26-0035:2 (¶3.1).]

Forester's testimony in this regard was particularly important, since he was "president of the California Association of Bicycling Organizations" and, in that capacity, "actively participat[ed] in the work of the California Bicycle Facilities Committee in the preparation" of the standards to which he refers. Accordingly, he was in the unique position of being able to testify (as he did) that the intent of the Bicycle Facilities Committee was to create standards that would require "that a bike path . . . be designed and constructed with the same degree of care as any other roadway, with the exception that it was not designed for travel by motor vehicles." [CT 0095:11-16 (¶3.1).]

Forester also quoted from "Chapter 4" of the "City of Los Angeles, General Plan, Transportation Element, Bicycle Plan" ("LA Bicycle Plan"), whereat "Design Standards are set forth:

> **"All Class I (bike path) and Class II (bike lane) facilities shall be designed to the mandatory standards set forth in Chapter 1000 of the CALTRANS Highway Design Manual. In addition to these state-mandated minimum standards, [additional] standards shall also apply to these respective facilities . . . ."** [CT 0095:26-0096:2.]

Forester's declaration also included other relevant excerpts from public information and official announcements made by or on behalf of the CITY about the LA River Bikeway. For example, Forester explained that, on the internet:

> **"The Los Angeles Bureau of Street Services, Engineering Division, made the following announcement . . . 'The Bikeway Section [of the Engineering Division of the Los Angeles Department of Public Works Bureau of Street Services] prepares plans, specifications, and manages construction of bikeway projects in the CITY of Los Angeles. Bikeway projects recently constructed include the Los Angeles River Bikepath Phase 1-A and Phase 1-D . . . . Upcoming projects included the Los Angeles River Bikepath Phase 1-B . . . ."** [CT 0097:4-11 (¶3.2).]

As explained by Forester, the Bicycle Gate on the LA River Bikeway whereat PROKOP's Accident occurred **did not** meet these minimum standards. He states:

> **"The [LA River Bikeway] is actually the service road for the flood control district, and as such is essentially a narrow paved roadway sufficient for trucks and other services vehicles. Therefore, for most of its length it meets the requirements for a Class I bikeway in terms of width, turn radius, grade, and surface smoothness. To prevent public access, both sides are enclosed by chain link fences and its entrances are closed by pairs of chain link gates. [¶] To allow its daytime use as a bikeway, the fences at the entrances have been modified to provide gates for bicycle traffic. . . . To allow bicycle access when [the chain-link] gates are closed, which is the normal condition, the fence adjacent to the gate was moved laterally, towards the river, to provide width for a special bicycle gate. . . . [B]icyclists [leaving the bikeway at its western end] have**

> **to curve right, then curve left through the gate, then curve left some more to avoid the fence, then curve right to return to the original line of travel."** [CT 0098:16-0099:3 ¶4).]

The foregoing configuration, in Forester's expert opinion, was non-compliant with the applicable standards for Class I bikeways ("Standards") in a number of respects.[6] For example, Forester opined:

- The design of "barriers" precluding the "entry by motor vehicles" onto a bikeway, was deficient because the standards required that the passageway for ingress and egress for bicycle and other permissible types of traffic should consist of an opening that is no less than 1.5 meters wide, so that "bicycle-towed trailers" and "adult tricycles" can pass without difficult, and "to assure adequate room for safe bicycle passage without dismounting." The Bicycle Gate is "only 45 inches" (42 inches according to the CITY), or 1.14 meters wide - - far short of the required 1.5 meters. [CT 0101:27-0102:7.]
- The Bicycle Gate also fails to "provid[e] the recommended

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[6] There is clearly at least a question of fact on this critical point, as testified that the designs for the LA River Bikeway "conformed to all Federal, State and City design standards." [CT 0070:11-20.] Forester disagreed [CT 0101:25-0103:12 (¶¶ 7, 8); see also 0103:14-0104:25 (¶ 9).]

clearance distance from lateral obstructions." [CT 0102:9-15.]

- "The curves before, during and after the [Bicycle Gate] for bicyclists are considerably sharper" than the minimum curve radius required by the Standards. [CT 0102:17-24.]

Summing up the effect of the design deficiencies of the Bicycle Gate, Forester states:

> **"As a result of these deficiencies, the cyclist approaching the bicycle gate in the same direction as PROKOP traveled has to negotiate a narrow gap by making three sharp curves (the initial curve to the right need not be made sharply) while enclosed by a chain link fence that is too close to the bikeway. Furthermore, the sharpness of the farther curve is not apparent to the cyclist, a visual effect that can be called a trap. . . . The following deficiencies from the required standard combined to cause PROKOP's accident: the inadequate width of the opening, the failure to provide clearance from obstructions, the sharpness of the turns. Amplifying the effect of these deficiencies is the visual appearance that conceals the fact that the further curve is sharper than it appears."** [CT 0102:28-0103:12.]

Finally, Forester, commented on the effect of painting the words "BIKE" and "WALK" on the pavement immediately in front of the Bicycle Gate:

> **"Painted on the bikeway surface, at both ends of the gateway corridor, are arrows pointing toward the gate with the words WALK BIKE.**
>
> **Aside from the fact that these warning words demonstrate**

that the CITY is aware that its design of bicycle gateway is dangerous, these words raise two issues: necessity and effectiveness.

Warning signs are ordinarily required where a roadway or bikeway changes character or requires slower speeds than usual for that section of the facility. It is always better to construct the roadway or bikeway so safely that warning signs are not required, provided that it can be done at reasonable cost. As indicated below, there is no necessity for installing such signs at the accident location because the bikeway could have been built, even possibly at less cost, without the dangerous deficiencies that made the warnings necessary.

A warning to WALK BIKE is ineffective. I have seen many such warnings, and I have yet to see the majority of cyclists obey them. . . . In the minds of more experienced cyclists . . . the WALK BIKE warning conveys either stupidity by the designer or a narrow-minded attempt to avoid liability. If it had been impossible to avoid constructing the dangerous design, the appropriate warning sign would have been the multiple-curve yellow diamond sign (MUTCD W1-5) with 5 under it as the maximum safe speed for the gateway. Such a sign would warn the cyclist of the nature of the danger ahead, which is the proper use of a warning sign.

Furthermore, the location of the WALK BIKE road surface marking is far too close to the gateway to inform the cyclist at the necessary time. A cyclist approaching at the bikeway standard design speed of 25 mph would not have time and distance to adjust his speed and conduct to conform to the safe speed and approach angle. In actual fact, the presence of the gates closing off the bikeway is the warning that would alert such a cyclist. With a gate across the bikeway, the cyclist must try to figure out what he is expected to do to continue in whatever direction the bikeway takes, and that requires slowing to such a speed where he can observe what needs to be done, and then change speed and direction to do it.

The WALK BIKE warning has no legal effect. Drivers are required to obey signs and markings, but WALK BIKE is not listed in the Manual of Uniform Traffic Control Devices. Therefore, WALK BIKE is not an official marking. Violation of it can neither be prosecuted nor considered to be an unsafe driving behavior." [CT 0103:16-0104:25.]

(3) The CITY's Reply Papers - - The Supplemental Declaration And The Uyedo Declaration

In reply, the CITY completely ignored a number of enactments that imposed a mandatory duty on the CITY to establish and comply with mandatory safety standards on the LA Bikeway, including *Streets & Highways Code* Section 890.6, which provides, in part:

> **"The department [of transportation], in cooperation with county and city governments, shall establish minimum safety design criteria of the planning and construction of bikeways and roadways where bicycle travel is permitted."**

The CITY also side-stepped critical questions about its non-compliance with mandatory duties by erroneously claiming that "the CITY . . . was never mandated to use the Chapter 1000 of the California Highway Design Manual criteria."[7] [CT 0125:18-27.] In addition, the CITY appeared to be

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[7] As support for this statement, the CITY relied on the "forward" to the *Highway Design Manual*, which allegedly states: "It is not intended that any standard of conduct or duty toward the public shall be created or imposed by the publication of this manual." [CT 0133:4-8 (¶6).] The CITY conveniently overlooks the mandate of *Streets and Highways Code* Section 891, as well as other "enactments" establishing a mandatory duty on the part of the CITY to comply with the standards set forth in the

arguing that because PROKOP did not walk his bicycle through the Bicycle Gate, no dangerous condition existed. Finally, disregarding the fact that the CITY **created** the dangerous condition at the Bicycle Gate, the CITY claimed that it had no notice thereof, simply because it claimed it had no record of other incidents similar to PROKOP's Accident. [CT 0126:25-0129:24.]

In support of the Reply, the CITY submitted a Supplemental Declaration of (“Supplemental Declaration” or “Supp. Dec.”) and a Declaration of Michael J. Uyeno (“Uyeno Declaration” or “Uyeno Dec.”).

a. *The Supplemental Declaration*

In the Supplemental Declaration, stated:

> **“The gate in question is located at the entrance/exit to the [LA River Bikeway]. The gate is a pedestrian gate and is located outside of the boundary (edge line) of the actual recreational bicycle trail. No continuation of contiguous bicycle facilities exists to the west beyond the gated entrance/exit.**
>
> **[¶] The gate is 42 to 44 inches wide and is not meant to accommodate bicycle riding through the gate. This is why the pavement marking recommending ‘WALK BIKE’ is**

Highway Design Manual. (See e.g., LA River Bicycle Plan; see also, 23 CCR §132(a)(4) [“Bicycle trails within an adopted plan of flood control must be maintained to a level safe for bicycle traffic and acceptable to the local flood control maintaining agency and the Department of Water Resources,” and specifically requires “a minimum shoulder width of one (1) foot on each side of the pavement”].)

painted on the trail surface. I did observe some of the bicyclists ride through the gate. Those riders used '<u>due care</u>' while passing through the gate. None attempted to ride at a fast speed through the gate or did not carefully line up their bicycle path with the gate opening.[8] There have been no prior complaints about the gate operation, and no other bicycle collisions involving the gate have been reported prior to this incidence." [CT 0132:21-0133:3 (¶¶4, 5).]

In addition, Royer also acknowledged:

"The subject recreational bicycle trail is utilized not only by bicyclists, but also occasionally used by pedestrians, joggers, roller bladers, service vehicles, and utility vehicles. Although the trail is well maintained, it is subject to occasional obstructions and to uses other than its intended bicycle usage." [CT 0133:20-23 (¶8).]

b. *The Uyeno Declaration*

Michael J. Uyeno ("Uyeno"), a Senior Transportation Engineer for the City of Los Angeles Department of Transportation ("CITY DOT"), testified that he was in charge of overseeing the "Bikeway section" of the CITY DOT. [CT 0135:3-9 (¶¶ 1, 2).] In support of the CITY's Reply, Uyeno offered the following by way of declaration:

"[T]he [Motor Traffic Exclusion Gate] at the subject location is. . . normally kept locked except during usage by the CITY or County for maintenance or emergencies. . . . The reasonable and foreseeable use of the portal is the

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[8] There is **no evidence** that PROKOP attempted to "ride at a fast speed" through the Bicycle Gate, that PROKOP did not "carefully line up his bicycle's path with the [Bicycle Gate's] opening," or otherwise did not use the same "due care" Royer observed other bicyclists exercising.

entrance and exit of the Bikeway by riders walking their bikes; pedestrians walking and roller skaters, etc. This portal was not meant to be one where bicycles are ridden through at a high rate of speed. Riding through the portal increases the risk of injury to pedestrians and other users of this recreational trail/bikeway. . . . The [Bicycle Gate] is intended to be used by all patrons exercising due care as to the personal safety of bikers and pedestrians. At the portal there are 'Walk Bike' markings. Further the trail/portal offset is designed to slow down the rider, force him to dismount and walk the bike for his or her own safety and the safety of other pedestrian traffic." [CT 0135:18-0136:1 (¶¶5-7).]

D. The Ruling

The hearing on the CITY's MSJ took place on April 11, 2005. Thereat, Judge Rolf M. Treu granted the motion. Judge Treu's tentative ruling, which became the final order of the court, reads:

"Defendant CITY contends that plaintiff is barred from recovery because the CITY is immune from liability under Cal. Gov't Code § 831.4. Plaintiff contends the bikeway in question is a Class I Bikeway, according to Street and Highways Code 890.4, and the CITY is therefore not immune.

The matter is put to rest, however, by *Farnham v. City of Los Angeles* 68 Cal.App.4th 1097, which holds that a 'class I bikeway is a 'trail' within the definition of section 831.4, subdivision (b).'

There is therefore no triable issue of fact, as the immunity clearly applies.

The Court having decided the immunity issue, the further issues raised in the moving papers are not discussed." [CT 0151; see also CT 0152-0156.]

3. <u>THE BICYCLE TRANSPORTATION ACT AND RELATED ENACTMENTS</u>

In 1993, the California Legislature enacted the Bicycle Transportation Act (*S&H Code* §§ 890-894.8) as part of Chapter 8 (entitled "Non-Motorized Transportation") of Division 1 (entitled "State Highways") of the *Streets and Highways Code*. The stated intent of the Bicycle Transportation Act is to establish a bicycle transportation system which has "the physical safety of the bicyclist . . . as a major planning component," and also has "the capacity to accommodate bicyclists of all ages and skills." (*S&H Code* § 890.)

Toward this end, Section 891.8(a) of the *Streets and Highways Code* empowers "[t]he governing body of a city, county, or local agency" to "[e]stablish bikeways." (*S&H Code* § 891.8.) The term "bikeway" means "all facilities that provide primarily for bicycle travel," and is broken down into three categories:

> **"(a) Class I bikeways, such as a "bike path," which provide a completely separated right-of-way designated for the exclusive use of bicycles and pedestrians with crossflows by motorists minimized.**
>
> **(b) Class II bikeways, such as a "bike lane," which provide a restricted right-of-way designated for the exclusive or semiexclusive use of bicycles with through travel by motor vehicles or pedestrians prohibited, but with vehicle parking and crossflows by pedestrians and motorists permitted.**

> **(c) Class III bikeways, such as an onstreet or offstreet "bike route," which provide a right-of-way designated by signs or permanent markings and shared with pedestrians or motorists."** (*S&H Code* § 890.4.)

Sections 890.6 and 890.8 (respectively) of the *Streets and Highways Code* require the California Department of Transportation to "establish minimum safety design criteria for . . . bikeways" and to "establish uniform specifications and symbols for signs, markers and traffic control devices to . . . improve safety . . . for bicyclists," and *Streets and Highways Code* Section 891 mandates compliance therewith:

> **"All city, county, regional, and other local agencies responsible for the development or operation of bikeways or roadways where bicycle travel is permitted <u>shall utilize</u> all minium safety design criteria and uniform specifications and symbols for signs markers, and traffic control devices established pursuant to Sections 890.6 and 890.8."** (Emphasis added.)

Likewise, *Vehicle Code* Section 21207(b) provides that bikeways established thereunder (i.e., bikeways other than bicycle lanes established on state highways or county highways) "shall be constructed in compliance with Section 891 of the *Streets and Highways Code*." Thus **all** bikeways - - regardless of the type of roadway on which they are established or the statutory scheme pursuant to which they were created - - are **required** by law to meet minimum standards.

STATEMENT OF APPEALABILITY

On June 23, 2005 PROKOP filed a notice of appeal of the summary judgment entered in favor of the CITY. [CT 00175-176.] A summary judgment entered under *Code of Civil Procedure* section 437c is an appealable judgment. (*Code of Civil Procedure* § 437c(m)(1).)

ARGUMENT

1. THE CITY'S RELIANCE ON THE TORT CLAIMS ACT IN GENERAL, AND SECTION 831.4 IN PARTICULAR, TO AVOID LIABILITY IS MISPLACED

The CITY cannot deny the existence of its mandatory duty to comply with minimum safety design criteria established pursuant to *Streets & Highways Code* Section 890.6 and to utilize uniform specifications for signage as traffic control devices pursuant to Section 890.8. Nevertheless, it illogically attempts to argue that, because it is a governmental entity, it is immune from liability for failure to discharge its mandatory duties even though those duties are set forth in statutes specifically directed at governmental agencies.

The CITY accomplishes this anomalous result by invoking the ancient doctrine of governmental immunity. In 1961, the California Supreme Court abolished the (already much-eroded) "rule of the doctrine of governmental immunity from tort liability" calling it "mistaken and unjust."

(*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 214.)[9] After "careful study and development" of new legislation statutorily defining the scope of immunity afforded the government in California (Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu* (1963) 15 Stan.L.Rev. 163-164), the California Tort Claims Act of 1963 ("Tort Claims Act") was enacted and codified, for the most part, at Division 3.6 of the *Government Code* (§§810-998.2). The Tort Claims Act is a "carefully structured, comprehensive framework" premised on *Muskopf*'s conclusion that, even for governmental entities:

> **"[W]hen there is negligence, the rule is liability, immunity is the exception."** (*Muskopf* at 210.)

Based on this premise, statutes in Division 3.6 of the *Government Code* (along with a relatively few statutes scattered throughout other Codes) provide for the liability of governmental entitles under certain conditions. Division 3.6 also contains "many sections granting public entitles . . . broad immunities from liability." (*Government Code* § 815, "Legislative

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9 Prior to 1961, in California it was "generally accepted that when acting in its governmental capacity a sovereign [could] not be sued except where . . . constitutional or statutory law" specifically authorized such a suit. (*Talley v. Northern San Diego Hosp. District* (1953) 41 Cal. 2d 33, 36.) "[I]n the absence of a statute," a municipality was likewise immunized from any liability that was based on its "failure to discharge a duty arising from a governmental function." (*Stang v. City Of Mill Valley* (1952) 38 Cal. 2d 486, 488.)

Committee Comment – Senate.") The CITY has ignored this comprehensive scheme of enumerated liabilities and immunities, however, by seizing onto one of the 'broad immunities" recognized by the Tort Claims Act, without considering the corresponding (and often even broad) liabilities created thereby.

Specifically, the CITY bases its entire defense on the immunity provided by Section 831.4, without even acknowledging liability such as that created by Sections 815.6 and 835.

A. Liability Pursuant to Section 815.6

One of the "General Conditions Relating to Liability" set forth in Chapter 1 of Part 2 is codified at Section 815.6 which (according to the official "Law Revision Commission Comments") "declares the familiar rule, applicable to both public entities and private persons, that failure to comply with applicable statutory or regulatory standards is negligence unless reasonable diligence has been exercised in an effort to comply with those standards." Section 815.6 reads:

> **"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."**

Government Code section 815.6 "applies to public entities the . . .

rule . . . that violation of a legislatively prescribed standard of care creates a rebuttable presumption of negligence." (*Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 292-93, citing Van Alstyne, *Cal. Government Tort Liability* (Cont.Ed.Bar 1980) §2.41, p. 93.) The legislative history of Section 815.6 reveals the legislative intent behind the statute:

> **"Public entities should be liable for the damages that result from their failure to exercise reasonable diligence to comply with applicable standards of safety and performance established by statute or regulation. . . . [W]hen minimum standards of safety and performance have been fixed by statute or regulation - - as, for example, the duty to supervise pupils under [the] *Education Code* . . . and the rules of the State Board of Education, the duty to provide lifeguards to serve at public swimming pools under *Health and Safety Code* section 24101.4 and the regulations of the State Department of Public Health, <u>or the duty to meet applicable requirements established by law in the construction of improvements--there should be no discretion to fail to comply with those minimum standards</u>."** (Van Alstyne, *Recommendation Relating to Sovereign Immunity*, 4 Calif.Law Rev'n Comm'n Reports 801, 816 (1963) (Emphasis added.))

The type of "mandatory duties" recognized by Section 815.6 include the duty imposed by *Labor Code* Section 3800 on a county to obtain a certificate of workers' compensation coverage for all applicants for building permits (*Morris v. Marin* (1977) 18 Cal.3d 901); the duty imposed by *Penal Code* Section 1384 on a city to release a prisoner upon dismissal of all charges (*Sullivan v. City of Los Angeles* (1974) 12 Cal.3d 710); the duty

imposed by *Business and Professions Code* Section 7031.5 on a city to secure evidence that contractor applying for building permit is duly licensed (*Young v. City of Inglewood* (1979) 92 Cal.App.3d 437); and the duty of a state under *Penal Code* Sections 11116.6 and 11117 to make proper record of dismissal of criminal proceedings (*Bradford v. State of California* (1973) 36 Cal.App.3d 16).

This case cries out for the application of Section 815.6, even more than the aforementioned cases and other reported decisions applying the statute.

(1) The CITY Had Mandatory Duties To Establish And Utilize Minimum Safety Standards

Mandatory duties of the type described by Section 815.6 are created by *Streets and Highways Code* Sections 890.6, 890.8 and 891. Sections 890.6 and 890.8 (respectively) of that Code require the California Department of Transportation to "establish minimum safety design criteria for . . . bikeways" and to "establish uniform specifications and symbols for signs, markers and traffic control devices to . . . improve safety . . . for bicyclists," and *Streets and Highways Code* Section 891 mandates compliance therewith:

> **"All city, county, regional, and other local agencies responsible for the development or operation of bikeways or roadways where bicycle travel is permitted <u>shall utilize</u> all minium safety design criteria and uniform**

specifications and symbols for signs markers, and traffic control devices established pursuant to Sections 890.6 and 890.8." (Emphasis added.)

A mandatory duty to comply with Section 891 is also set forth in *Vehicle Code* Section 21207(b) .

Finally, PROKOP also submitted evidence of an additional mandatory duty flowing from the LA Bicycle Plan, which provides that "Class I . . . facilities <u>shall be</u> designed to the mandatory standards set forth in Chapter 1000 of the CALTRANS Highway Design Manual" (emphasis added) and also imposes additional minimum standard requirements. [See CT 0095:26-0096:2.][10]

(2) Section 891 Is Designed To Protect Against The Risk Of The Type Of Injury That PROKOP Sustained

The intent of the California Legislature in enacting the Bicycle Transportation Act is articulated in Section 890 of the *Streets and Highways Code*. Therein, it is expressly stated that one of the purposes of the statutes set forth in said act is "the physical safety of the bicyclist." From this statutory explanation (as well as common sense), it is clear that the design and implementation requirements of Sections 890.6, 890.8 and 891 were

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[10] The fact that the Highway Design Manual may say that the guidelines are not mandatory, does not detract from the fact that the Streets and Highways Code and the LA Bicycle River Bicycle Plan do make them mandatory.

enacted to protect bicyclists - - like PROKOP - - while riding on bikeways.

(3) PROKOP's Injury Was Proximately Caused By The CITY's Failure To Discharge Its Mandatory Duty To Utilize Minimum Design Standards

Forester explains that the Exit fails to comply with the Highway Design Manual in that: it is too narrow, has insufficient clearance from lateral obstructions, and requires the bicyclist to make too-sharp turns. [CT 0101:27-0102:24.] He also notes that the Exit should have permitted "safe bicycle passage" for cyclists "without dismounting. [CT 0101:27-0102:7.] According to Forrester's expert opinion, these deficiencies "combined to cause PROKOP's [A]ccident." [CT010228-0103:12.] Clearly, then, PROKOP at least presented evidence from which a jury could find that his injury was proximately caused by the CITY's failure to comply with the mandates of various enactments to design and build a **safe** bikeway.

(4) The CITY Made No Effort To Establish That It Exercised Reasonable Diligence To Discharge Its Mandatory Duties

The CITY, in its MSJ, did not even attempt to argue that it exercised reasonable diligence to discharge its mandatory duties to build a safe bikeway. Instead, it merely denied the existence of any such duties. As such, the CITY not only failed to offer evidence that must - - or even could - - support a finding of diligence, it actually took a position that precluded such a finding (since, the CITY could not have diligently attempted to

comply with a duty it contends does not exist).

B. LIABILITY PURSUANT TO SECTION 835

As a general rule (subject to statutory exceptions):

> **"[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:**
>
> **(a) A negligent or wrongful act or omission of an employee of the public entity . . . created the dangerous condition; or**
>
> **(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."** (*Gov. Code* §835.)

Pursuant to this section, it has been held that a county was not entitled to summary judgment where the alleged dangerous condition of a sidewalk caused plaintiff's injury (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64), and that a cause of action for wrongful death was sufficiently alleged against a city that created and/or maintained a dangerous condition on public sidewalks by affirmatively encouraging citizens to drive motor vehicles thereon (*Quelvog v. City of Long Beach* (1970) 6 Cal.App.3d 584). Likewise, the liability of public entities pursuant to Section 835 for dangerous conditions created on public streets was

recognized in *Curreri v. City and County of San Francisco* (1968) 262 Cal.App.2d 603 [failure of city to construct six-inch curbs as required by specifications for roadway could be liable] and in *Johnston v. Yolo County* (1969) 274 Cal.App.2d 46 [city that built unsafe, too-sharp, curve in roadway and failed to post warnings thereof, could be held liable for injuries resulting therefrom].

(1) The Condition Of The Western Terminus Of The LA River Bikeway Was Dangerous At The Time Of PROKOP's Accident

Both the opinion testimony of Forester (including the testimony regarding the failure to comply with applicable safety standards), and the fact of the Accident itself[11] establish that the Exit was dangerous at the time that PROKOP passed through it.

(2) The Dangerous Condition Of The Western Terminus Of The LA River Bikeway Created A Reasonably Foreseeable Risk Of The Type Of Injury PROKOP Sustained

One purpose of the width, clearance and minimum curve radius requirements imposed by the Highway Design Standards manual (and other

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[11] Section 830.5(a) provides that "where the doctrine of *res ipsa loquitur* is applicable, the happening of the accident which results in injury" may be "evidence that the public property was in a dangerous condition." Here, there is at least a question of fact regarding whether or not the *res ipsa loquitur* doctrine applies.

applicable guidelines) is to ensure that bicyclists can safely ride through "without dismounting." [CT 0101:27- 0102:7.] Especially in light of the CITY's strenuous argument that, had PROKOP walked his bike through the Exit, he would not have been injured (perhaps coupled with the painted words "BIKE" and "WALK" on the bikeway's surface) it is apparent that it was not only foreseeable that cyclists riding through the narrow and deceptively sinuous Bicycle Gate would be injured, but also that the CITY specifically foresaw the danger.

(3) The CITY Negligently And/Or Wrongfully Created The Dangerous Condition And Necessarily Had Actual Notice Of The Condition From The Time It Created It

PROKOP offered (truthful) evidence that the LA River Bikeway was designed and constructed by the CITY, which thereafter took credit for the bikeway and its supposedly superior safety features. [See e.g., CT 0097:4-11.] The failure to comply with mandatory requirements renders that construction both negligent and wrongful. By virtue of the fact that the CITY was responsible for building the bikeway and the Exit which it so staunchly defends, the CITY necessarily knew of it.

C. The Immunity Created By Section 831.4

Section 831.4 provides, in its entirety:

> "A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes,

is not liable for an injury caused by a condition of:

(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.

(b) Any trail used for the above purposes.

(c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads."

The section was enacted as part of the original Tort Claims Act. It was amended in 1968, 1970, 1972 and 1979.[12] With one exception,

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[12] The history is given in *Giannuzzi v. State of California* (1993) 17 Cal.App.4th 462: "When originally enacted in 1963, section 831.4 had two simple subjects of its immunity. Subdivision (a) dealt with 'Any unpaved road which provides access to fishing, hunting, or primitive camping, recreational or scenic areas.' Subdivision (b) read in its entirety: 'Any hiking, riding, fishing or hunting trail.' (Stats. 1963, ch. 1681, § 1, p 3273; see Stats. 1968, ch 714, § 1, p 1416.) "Amendments passed in 1970 expanded subdivision (a) to reach 'Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, water sports, recreational or scenic areas,' and entirely reframed subdivision (b) as it presently reads. (Stat. 1970, ch 807, § 2, p 1530). "In 1972 subdivision (a) was further broadened by inserting the words 'including animal and all

however, all of the case law decided thereunder post-dates the 1979 amendment.[13] Since 1979, six published court of appeal decisions[14] (coincidentally, all out of the Courts of Appeal of either the First or Second District) have interpreted and/or analyzed the scope of so-called "trail immunity" under the statute:[15] *Giannuzzi, supra*; *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413; *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606; *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097; *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221; and, *Astenius v. State* (2005) 126 Cal.App.4th 472.

(1) *Case Law Interpreting Section 831.4*

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types of vehicular riding.' (Stats. 1972, ch 1200, § 2, p 2323). "Subdivision (c) was added in 1979. (Stats 1979, ch 1010, § 1, p 3434)."

[13] The exception is the case of *Hernandez v. Imperial Irrigation District* (1967) 248 Cal.App.2d 625, wherein it was held that it was a question of fact "whether a hunting area existed in the vicinity" of the "unpaved maintenance road" on which the plaintiffs' decedent was killed, and "whether the road was one which provided access to that area." (*Hernandez* at 627.)

[14] The California Supreme Court has yet to specifically address the meaning and effect of Section 831.4.

[15] In another First District case, *State of California v. Superior Court* (1995) 32 Cal.App.4th 325, the plaintiff unsuccessfully attempted to avoid immunity by alleging an injury created by the **combination** of the natural condition of a dirt trail and third party conduct - - neither of which would, individually, give rise to liability on the part of a governmental entity. (See *Hayes v. State of California* (1974) 11 Cal.3d 469, 472).

a. *Giannuzzi* And *Armenio* (First District)

Giannuzzi v. State of California, supra and *Armenio v. County of San Mateo, supra,* were both decided by the First District Court of Appeal. In neither case did plaintiff deny that he was injured on a "trail;" in both cases the plaintiff argued that his claim was outside the scope of Section 831.4 because the trail on which the injuries occurred was not one which "provide[d] access to fishing, hunting, camping, hiking, riding, including . . . vehicular riding, water sports, recreational or scenic areas,"[16] but was itself the object of the recreational - - specifically "riding" - - activity. The First District held in both cases, that subdivision (b) of Section 831.4 "precludes liability for injuries caused by the condition of trails" on which the activities of "fishing, hunting, camping, hiking [and] riding" take place, not just trails which provide access to the aforementioned recreational activities. (*Giannuzzi* at 467; See also, *Armenio* at 417 [commenting that the use of the plural term "purposes" in subsection (b) supported a finding that immunity

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[16] In *Giannuzzi*, a motorcyclist was injured on what was indisputably "an established dirt trail" in a State Park. The plaintiff did not argue that he was not injured on a "trail." In *Armenio*, the plaintiff - - a bicyclist riding on a paved surface - - likewise did not dispute the fact that his injury took place on a "trail" within the meaning of Section 831.4; he argued only that "the immunity granted by section 831.4 [did] not apply to the kind of trail on which his injuries occurred." (*Armenio* at 416.) It was apparently stipulated that the accident took place on a "surfaced trail with rest areas for bicyclists, hikers, joggers and equestrians." (*Id.* at 415.)

extends to the condition of the trails themselves that are used for the enumerated recreational activities, not just trails used for the singular purpose of "access" to said recreation].)

The plaintiff in *Armenio* also advanced the argument that Section 831.4's "immunity does not extend to paved trails." (*Armenio* at 418.) Effectively ignoring the distinction between paved and unpaved trails on easements recognized by subsection (c), the *Armenio* court held that "the nature of the trail's surface is irrelevant to questions of immunity." (*Id.*)

b. *Carroll* and *Farnham* (Second District)

(i) *Carroll*

The first reported case wherein a plaintiff directly challenged the application of the label "trail" to a public way similar to the one here at issue, was *Carroll v. County of Los Angeles, supra*. In that case a roller-blader was injured on the "South Bay Bicycle Path," allegedly as a result of a crack that had formed in the paved surface of the bicycle path. The cursory and superficial opinion,[17] however, for the most part, does nothing more than cite *Giannuzzi* and *Armenio* (as well as *State of California*) for the proposition that Section 831.4 extends immunity to

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[17] The entire *Carroll* opinion is barely more than 1000 words and, if the court's verbatim recitation of the language of Section 831.4 is left out of the word count, no more than 915 words were devoted to the legal question raised thereby.

injuries caused by the condition of trails (paved or unpaved) used to access recreational activities and trails (paved or unpaved) on which the recreational activity takes place.

The *Carroll* court devoted only 66 words to the question of whether the South Bay Bicycle Path was a "trail" - - to wit:

> **"Appellant contends that the word 'trail' does not apply to a paved bicycle path. We disagree. The words 'trail' and 'path' are synonymous. (Rodale, The Synonym Finder (1978) Rodale Press, Inc., p. 1249.) Webster's Collegiate Dictionary (10th ed.1995) at page 1251 defines a trail as 'a marked or established *path* or route....' (Italics added.) We hold that the [South Bay Bicycle] Path qualifies as a 'trail' under subdivision (b)."** (*Carroll* at 609.)

(ii) *Farnham*

In *Farnham v. City of Los Angeles*, *supra*, the Second District, relying heavily on *Carroll*'s perfunctory analysis of the definition of the term "trail" in Section 831.4, concluded that the CITY was immune for injuries sustained by a bicyclist on the Sepulveda Basin Bikeway, after a portion of the bikeway collapsed, throwing the bicyclist into a ditch.

The plaintiff in *Farnham* also "raise[d] an argument not raised in *Carroll*," however. He contended that the Sepulveda Basin Bikeway was "part of the public streets and highways and thus does not qualify as a 'trail' under section 831.4, subdivision (b)." The Second District summarily rejected the argument, however, because:

> **“Regardless of the fact that a bicycle path may come under the broad brush of being part of the streets and highway system in general, a Class I Bikeway does not qualify as a street or highway.”** (*Farnham* at 1101.)

The rationale for the foregoing conclusion was that, pursuant to the *Vehicle Code*, “a street or highway is open to the public for vehicular traffic,” and “[a] bicycle is not considered a vehicle.” (*Id.*, citing *Vehicle Code* §§ 231, 360, 590, 670.) Although nothing in the Bicycle Transportation Act requires a bikeway to fall within the Vehicle Code’s definition of “street” and/or “highway” in order for the Act’s mandates to apply the *Farnham* court concluded that violation of the standards enacted to foster safety on Class I bikeways could be disregarded by a city. In so doing, the *Farnham* court completely disregarded the fact that a “Class I bikeway” is, by definition, part of “a bicycle transportation system . . . established under *Streets and Highways Code* Section 890 *et seq.*,” which provides for “construction design requirements and the allotment of state funds for counties and cities whose plans meet state approval.”

c. *Treweek* (First District)

In 2000, the First District of the California Court of Appeal was given another opportunity to address the issues raised by *Giannuzzi* and its progeny, in the case of *Treweek v. City of Napa*, *supra*, wherein the City of Napa argued that a ramp leading to a city dock gave way and caused the

plaintiff to fall was an immunized "trail." Relying on those portions of *Giannuzzi* and *Armenio* that concluded that subsection (b) of Section 831.4 immunizes public entities from injuries caused by the condition of trails which are themselves the object of recreational activities, the plaintiff in *Treweek* argued that, even if the ramp was a "trail," the city was not immune from dangerous conditions created thereon, because the ramp only provided **access** to an enumerated recreational activity. After a detailed analysis of *Gianuzzi*, *Armenio*, *Carroll* and *Farnham*, the *Treweek* court "reject[ed] appellant's claim that the ramp cannot fall within the coverage of subdivision (b) because it was used only for access." (*Treweek* at 229.)

Significantly, however, the foregoing conclusion did not end the *Treweek* court's analysis. The decision goes on to address the important (and theretofore under-appreciated) question of what, exactly, constitutes a "trail," and to criticize, to some degree, the analyses related thereto engaged in by the Second District in *Carroll* and *Farnham*:

> **"Apparently unable to find a dictionary definition of the term 'trail' that did not also include a sense of a natural or unconstructed component, the *Carroll* court relied instead upon a synonym finder equating "trail" with "path" and . . . strategic use of ellipses[18] . . . . to h[o]ld that the [South**

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[18] The ellipses "allowed the [*Carroll*] court to ignore" that portion of the dictionary definition of "trail" it cited, which indicated that a "trail" usually traverses "a wilderness,"or "a forest or mountainous region." Specifically, the *Carroll* Court stated that "Webster's Collegiate Dictionary

> **Bay Bicycle] Path qualified as a 'trail' under subdivision (b).**" (*Treweek* at 231.)

Although the *Treweek* court went on to comment that it had "no difficulty accepting extension of recreational trails immunity to trails such as the paved Class I bike path running along the perimeter of a large park," to "the paved Sawyer Camp Trail," or to a "paved bicycle path stretching along the coast," it could not agree that a "ramp is . . .a 'trail.'" (*Id.* at 232.) Taking the effect of such a ruling to its logical conclusion, the court noted:

> **"For us to allow that, simply because it leads from land to water the ramp in question is a 'trail' would result in almost no limit on what might be considered a 'trail' for purposes of the statute, so long as it provided 'access' to recreational opportunities. Such an elastic definition would cover not only the ramp at issue here, but as well the boat dock and perhaps even the parking lot, as people regularly traverse both on their way to recreational opportunities on the Napa River. Conceivably, a 'trail' so defined could include a sidewalk or even an elevator from which one might enjoy an ocean view. Calling a ramp connecting a parking lot to a boat dock a "trail" under subdivision (b) of section 831.4 stretches the definition too far."** (*Id.*)

The unequivocal holding of *Treweek*, then, is that "standing alone, a boat ramp is not a 'trail' within the meaning of subdivision (b) of section

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(10th ed.1995) . . . defines trail as 'a marked or established *path* or route . . .' (Italics added.) (*Carroll* at 609.) The "complete definition" is: "(1): a track made by passage esp. through a wilderness; (2): a marked or established path or route esp. through a forest or mountainous region." (*Treweek* at 231, fn 6, quoting *Webster's Collegiate Dict.* (10th ed.1995) at p. 1251.)

831.4." (*Id.*)

d. *Astenius* (Second District)

The most recent published decision addressing the scope of Section 831.4 is the Second District case of *Astenius v. State if California*, *supra*. In *Astenius*, the plaintiffs' mother died while riding an "off road vehicle" at the Hungry Valley State Vehicular Recreation Area. It was alleged that her death was the result of California's failure to post warnings of a known dangerous condition - - an extremely steep trail with very rough terrain.

The Second District, in a typically brief opinion, rejected the argument that Section 831.4 is designed to extend immunity only to unimproved public property. It also disagreed with the contention that the State had a duty to warn of the dangerous condition, notwithstanding Section 831.4. Based on the absence of any language in the statute supporting plaintiffs' positions. It also (erroneously) dismissed plaintiffs' claims that California's breach of a mandatory duty caused the death. The entirety of the court's analysis in this regard, however, is the conclusory statement that "any breach of [a mandatory] duty comes within the scope of the immunity provisions of section 831.4." (*Astenius* at 476.)

D. <u>Proper Analysis Of The Interrelationship Between Sections 815.6, 831.4 and 835 Reveals That The CITY's Absolute Immunity Argument Is Without Merit</u>

According to the CITY, Section 831.4 may be analyzed in a vacuum.

As long as an injury occurs on a "trail," reasons the CITY, there is absolute immunity, and the liability recognized by Section 815.6 and/or nor Section 835 need not be considered. If this were correct, decades of work invested by engineers such as Forester in order to establish safety standards for bikeways - - including Class I bikeways - - would all have been for naught. The CITY is not correct, however, and the proper analysis reveals that its self-serving and overly simplistic interpretation of the Tort Claims Act must be rejected.

The City's first analytical error is claiming immunity before considering the nature and basis of its potential liability. "Conceptually, questions of statutory immunity do not become relevant until it has been determined that the government entity owes a duty of care to the plaintiff and would be liable in the absence of such immunity." (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 612-613, citing, *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201-202.) In this case, the fact that the CITY owed a duty of care to PROKOP is evidenced by *Streets and Highways* Code Section 891, which mandates the use of specific "safety design criteria and uniform specifications and symbols for signs."

As previously discussed, in California, "[i]n the absence of a constitutional requirement," such a duty of care is owed by public entities

"only if a statute . . . declar[es] them to be liable." (*Walt Rankin*, *supra*, citing *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.) Here, not one, but two statutes provide that the CITY may be liable. First, pursuant to *Government Code* Section 815.6,[19] liability may attach for breaching the specific duty created by *Streets and Highways Code* Section 891. Second, *Government Code* Section 835 provides that a public entity may be liable for creating and/or maintaining a dangerous condition on public property.

Whether the CITY would **actually** be liable pursuant to Section 815.6 and/or 835, but for its claimed immunity, is clearly a question of fact (which was neither raised nor decided by way of the CITY's MSJ). PROKOP recognizes, however, that summary judgment would still be appropriate if, as a matter of law, principles of immunity would prevent the potential liability from ever becoming actual liability. That is not the case here, however.

After the bases for potential liability have been identified, the question of whether principles of immunity would preclude imposition of

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[19] It seems unlikely that the CITY would deny that the above-referenced statute imposes a mandatory duty on it. In the even that such a question is raised, however, it would be a question of law, which clearly should be answered by this court in the affirmative. (See, *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.)

such liability in any event, becomes analytically ripe. In this case, addressing the immunity issue requires an examination of the relationship between Section 831.4 immunity, on one hand, and Section 815.6 and/or Section 835 liability, on the other hand. While there are no reported decisions containing these precise analyses, it is settled that:

> **"[T]he liability imposed by *Government Code* section 815.6 . . . takes precedence over the immunity provisions of *Government Code* section 818.4 . . ."** (*Slagle Constr. Co. v. County of Contra Costa County* (1977) 67 Cal.App.3d 559, 562; See also, *Cancun Homeowners Assn. v. City of San Juan Capistrano* (1989) 215 Cal.App.3d 1352, 1357.)

Similarly, in *Walt Rankin*, *supra*, the court confirmed that if the immunities granted by Sections 818.2 and 818.4 allowed a governmental entity to avoid liability for failure to discharge a mandatory duty, then Section 815.6 would be "completely eviscerate[d]." (*Walt Rankin* at 629, citing *Elton v. County of Orange* (1970) 3 Cal.App.3de 1053, 1059.)

In *Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586, 590, the court implicitly concluded that **if** the plaintiff could have pointed to a mandatory duty imposed on the defendant county by an enactment, then the liability created thereby would not have been defeated by the immunity in Section 831.2 for injuries caused by the natural condition of unimproved public property. Likewise, the court in *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 974-975, suggested that the defendant violated

a mandatory duty, the immunity for injuries resulting from hazardous recreational activities would not have protected it from responsibility for the drowning death of plaintiff's decedent. Immunity was recognized, however, because the plaintiff could not identify an applicable enactment imposing a mandatory duty - - i.e. a law or ordinance requiring the governmental entity to "*itself comply* with a particular minimum standard of safety or performance." (*Wood* at 974 (italics in original).) In a case such as the one at bar, however, where the CITY is specifically identified as an entity that is **required** to utilize "minimum standard[s] of safety" on bikeways, immunity should not be allowed to supersede the liability created by Section 815.6.

Finally, it cannot be denied that the legislature intended to hold public entities responsible for dangerous conditions they **created** and/or **maintained**, notwithstanding immunities designed to encourage recreational activities on public property. The official Law Revision Commission Reports articulates this intent:

> **"There is much public property in the State over which public entities exercise little or no supervision. They permit the public to use bodies of water and water courses for recreational activities, and to use remote trails and roads for hunting, fishing, riding and camping. It is desirable to preserve these uses of public property, but such uses would likely be curtailed if the public entities owning such property were required by law to make extensive inspections of the property for the purpose of**

> **discovering potential hazards. Hence, public entities should be immune from liability for conditions of such property unless they have actual knowledge of concealed hazards, not likely to be apparent to the users of the property, and fail to take reasonable steps to warn of the hazards."** (4 Cal.L.Rev'n Comm'n Reports 824 (1963).)

A governmental entity necessarily has "actual knowledge" of a condition it, itself created. Since the legislature **specifically** commented that no immunity should attach in such a case, it would be illogical to interpret the Tort Claims Act to relieve the CITY of the liability imposed on it by Section 835, by holding that the immunity of Section 831.4 takes precedence in a case where an injury is caused by a dangerous condition on a man made transportation facility designed and constructed by the CITY.

2. THE PRECEDENT SET BY *FARNHAM* DOES NOT SUPPORT THE AWARD OF SUMMARY JUDGMENT IN FAVOR OF THE CITY

A. *Farnham* Was Wrongly Decided

(1) *The Farnham Court Improperly Dismissed Streets and Highways Code With A Grossly Inadequate Analysis*

The *Farnham* court recognized (indeed, effectively stipulated) that the Sepulveda Basin Bikeway was a "Class I bikeway," as that term is defined in *Streets and Highways Code* Section 890.4. The court illogically held, however, that because a Class I bikeway does not qualify as a "street" or a "highway" - - using the *Vehicle Code's* definition of those terms - - the

provisions of the *Streets and Highways Code* that impose mandatory duties on the CITY, need not be considered. The defects in this theory are obvious and numerous.

First, the *Farnham* court does not even attempt to explain why the statutes contained within the *Streets and Highways Code* would only be relevant to those public ways that qualify as "streets" and/or "highways." Nowhere in the *Code* is there any suggestion that its scope is so limited and, indeed, the very fact that it contains provisions which are, by their terms, applicable to "bikeway" (including Class I "bikeways" (see *S&H Code* §§ 892-894.2) which, according to *Farnham*, could never constitute "streets" or "highways") directly disproves the premise that only streets and highways are governed by the *Streets and Highways Code*.

Second, even if it were necessary for a Class I bikeway or other thoroughfare to be a "street" or a "highway" before the statutes in the *Streets and Highways Code* could be applied thereto, one would think that it would be appropriate to look to the definitions in the *Streets and Highways Code* - - not the *Vehicle Code* - - in order to make that determination.[20]

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[20] *Vehicle Code* Section 100 provides that the definitions contained therein "govern the construction of this code" - - i.e. the Vehicle Code. (*Veh. Code* §100.) There is no indication that they also govern the construction of the *Streets & Highways Code* - - let alone that the *Vehicle Code* definitions determine whether the provisions of the *Streets and Highways Code* are even operative in a given situation.

For purposes of the Vehicle Code, a "'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street." (*Veh. Code* § 360.) "As used in [the Streets and Highways] Code," however, the terms "highway" and "street" are both defined (for at least some purposes) as "any public highway, road, street, avenue, alley, lane, driveway, place, court, **or trail**. (*S&H Code* §§ 960.5, 8308 (emphasis added).) A "highway within the meaning of the *Streets and Highways Code* also includes places where vehicle travel is not permitted and/or is not possible, such as "culverts, curbs, [and] drains," and in fact, extends to "all works incidental to highway construction, improvement and maintenance." (*S&H Code* § 23.) Moreover, the primary purpose of a "highway" has been recognized by case law, as the "passing and repassing of the public" (*Arques v. City of Sausalito* (1954) 126 Cal.App.2d 403); vehicular traffic is not required.[21]

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[21] It should also be noted that the definition term "road" reasonably includes a "trail." In *Muscolino v. Superior Court* (1959) 172 Cal.App.2d 525, for example, it was argued in opposition to efforts by the county of Los Angeles to condemn a strip of land to be part of a riding and hiking trail system (from which motor vehicles would be excluded), that "a riding and hiking trail is neither a highway nor a road . . . and . . . therefore is not a purpose as to which the power of eminent domain [was] given to the county" by the then-operative statute granting eminent domain power. In response, the court concluded: "The word 'roads' is a generic term and includes all public ways." (*Muscolino* at 526.) The *Muscolino* court relied on a decision of the California Supreme Court, *Fischer v. County of Shasta*

Third, it has been held that rights of way acquired for "highway purposes" (as bikeways are pursuant to *Streets and Highways Code*) are included in the term "highways" (20 Ops.Atty.Gen. 205), and the term "construction," as used in the *Streets and Highways Code*, includes "[a]cquisition of rights of way" "bridges" (*S&H Code* § 29; *see also*, 31 Ops.AttyGen. 286 [construction includes acquisition of rights of way]), and the term "maintenance" extends to the "preservation . . . of rights of way . . . in [a] safe and usable condition . . ." (*S&H Code* § 27(a)).

Fourth, it cannot be said that "trails" are outside the scope of the *Streets and Highways Code*, since numerous provisions thereof, by their express terms, govern "trails." For example, Section 902 provides that a "toll trail" (as well as a "toll road" and a "toll bridge") becomes a "free county highway" upon expiration of its franchise. Several sections of the *Streets and Highways Code* address the creation and maintenance of stock trails (see, e.g., *S&H Code* §§ 104 [permitting California Department of Transportation ("Department") to acquire real property for construction and

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(1956) 46 Cal.2d 771. Therein, the definition of the word "road" was explored in more depth. The Supreme Court held: "The word 'road' is a generic term which includes highways, streets, public ways and thoroughfares. Webster's New International Dictionary (2d ed. 1937), page 2155, defines the word 'road' as: 'A place where one may ride; an open way or public passage for vehicles, persons, and animals . . . .'" (*Fischer* at 774-75.)

maintenance of stock trails and acknowledging that such use is for "state highway purposes"]; 105 [permitting the Department to construct and designate stock trails]; 943 [permitting the board of supervisors to designate unnecessary county highways as stock trails]; 954 [same]; 888.2 [authorizing Department to incorporate non-motorized transportation facilities that would conform to the California Recreational Trail System Plan into the design of the state highway system; and 1670 [allowing Board to enter into cooperative agreements with the federal government[22] for the survey, construction or maintenance of trails].)

Fifth, multiple sections of the *Streets and Highways Code* recognize that the definition of "highway" (at least in some instances) includes "trail." Sections 906 and 180 for example mandate a minimum width of 40 feet for

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[22] Significantly, federal law does not recognize the narrow definitions of "road" and "trail" urged by the CITY. For example, 23 U.S.C. § 101( ), requires only a "road or street under the jurisdiction of and maintained by a public authority" only be "open to public travel" (not "vehicular travel") in order to qualify as a "public road." (See also, 23 U.S.C. § 402(c) [distributing a portion of the federal funds to be used for federally mandated highway safety programs" "in the ratio which the public road mileage in each State bears to the total public road mileage in the United States," with the term "'public road' mean[ing] any road . . . open to public travel"].) Moreover, the Federal statute's definition of the term "park road," acknowledges that a "public road" may "includ[e] a bridge built primarily for pedestrian use," so long as it has a "capacity for use by emergency vehicles." (23 U.S.C. § 101(a)(19), (27); See also, 23 U.S.C. § 204(a)(1) [including "park roads" within the scope of the term "Federal roads that are public roads"].)

"all county highways" and "city streets" (respectively) "other than bridges, alleys, lanes and trails."

(2) *Established Principles of Statutory Interpretation Preclude A Reading Of Section 831.4 As A Blanket Grant Of Absolute Immunity For Injuries Caused By The Condition Of Any Bikeway*

In order to grant summary judgment for the CITY, the trial court had to: (i) agree with *Farnham's* adoption of *Carroll's* conclusion that "a paved bicycle path" necessarily "qualifies as a 'trail' under the immunity provisions of *Government Code* Section 831.4;" and, (ii) concur with *Farnham's* conclusion that "a governmental entity has immunity from liability for an injury suffered on any trail" - - which, according to *Carroll*, includes any paved bicycle path - - "being used . . . to access any recreational or scenic area" or which "itself is the object of the . . . recreational activity." These conclusions run directly counter, however, to any reasonable statutory interpretation of Section 831.4.

An analysis of a statute's meaning[23] properly begins with an examination of its text. (*Elsner v. Uveges* (2005) 34 Cal.4th 915, 927.) In addition:

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[23] The interpretation of a statute is a question of law, which is reviewed *de novo* by a reviewing court. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

> **“The words of a statute are to be accorded their usual, ordinary import. Moreover, they are to be construed in context, keeping in mind the nature and purpose of the statute in which they appear, and the various parts of a statute are to be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.”** (*Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 418, citing *Moyer v. Workmen's Comp. Appeals Bd., supra,* 10 Cal.3d at p. 230; See also, *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 933 ["Our duty is to harmonize statutes wherever possible"].)

Notwithstanding the foregoing directive, the interpretation placed on Section 831.4 by the *Farnham* and *Carroll* courts neither “harmonize[s]” the potential internal inconsistencies in the statute’s language, nor considered the “context of the statutory framework” of the Tort Claims Act. Specifically, the broad interpretation in said decisions of the language “[a]ny trail used for the above purposes” in subsection (b), effectively nullifies subsection (c) and/or portions thereof.

For example, *Carroll* holds that because “the words ‘trail’ and ‘path’” are listed as synonyms in a “Synonym Finder,” and because the word “path” is included in one dictionary definition of the word “trail,” all paths - - and specifically all bicycle paths - - are trails within the meaning of subsection (b) of Section 813.4. (*Carroll* at 609.) One need look no further than subsection (c), however, to see the fallacy of this logic. Subsection (c) extends qualified immunity to a “paved **trail**, walkway, **path** or sidewalk”

that meets certain criteria (emphasis added).

"[A] statutory interpretation that makes items on a list unnecessary or redundant is inconsistent with accepted principles of statutory construction." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159-1160; see also, Legacy Group v. City of Wasco (2003) 106 Cal.App.4th 1305, 1313 [construing provision in one statute to mean that a decision to adopt, amend or modify a development agreement is not a decision "concerning a subdivision" since contrary interpretation would render "concerning a subdivision" language in another statute redundant and unnecessary].) Wherever reasonable, statutory constructions that produce internal harmony and avoid redundancy are preferred. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114, 172 Cal.Rptr. 194, 624 P.2d 244.)

If the words "trail" and "path" in Section 831.4 had the same meaning, one of the terms would be "unnecessary or redundant." The construction placed by *Carroll* on subsection (b), therefore, is directly contrary to a directive of the California Supreme Court regarding proper statutory construction. Concluding that a "path" - - specifically, a public way imprecisely referred to as a "bike path" - - is **not** a trail, on the other hand, would properly "give meaning and effect, not only to the section as a whole, but to each and every part thereof." (*Dempsey v. Market Street Ry.*

Co., 23 Cal.2d 110, 113.)

Moreover, even if one overlooks the surplusage that is created by assuming that all paths are trails, the interpretation of Section 831.4 articulated in *Carroll* and adopted by *Farnham* still violates established rules of statutory interpretation, because it creates an irreconcilable conflict between subsection (b) and subsection (c). If no "public entity . . . or grantor of a public easement" can be liable "for an injury caused by a condition" of any trail used" to access the enumerated recreational activities, as well as any trail the use of which is, "itself the object of" an enumerated recreational activity, then there would be no need for a separate provision in Section 831.4 immunizing a "public entity . . . or grantor of a public easement" from liability "for an injury caused by a condition of . . . [a]ny paved trail used for the [recreational] purposes" described in subsection (a). The only way these provisions of Section 831.4 can be reconciled is to impute the adjective "unpaved" that modifies the word "trail" in subsection (a) to the word "trail" in subsection (b). In that way, subsections (a) and (b), on one hand, and subsection (c) on the other, govern the mutually exclusive categories of "unpaved road[s]" and "trail[s]" and "paved trail[s], walkway[s], path[s] and sidewalk[s]," respectively. (See Honey Springs Homeowners Ass'n, Inc. v. Board of Sup'rs of San Diego County (*Presenting Jamul*) (1984) 157 Cal.App.3d 1122,1138 [imputing

the adjective "urban" to statutory language to render it consistent with the obvious intent of a statutory scheme].)

B. ***Farnham* Is Distinguishable From The Case At Bar**

Even if *Farnham* had not been wrongly decided, it still would not have "put to rest" the questions raised by PROKOP, as his case is distinguishable from *Farnham* in several important respects.

First, although the Sepulveda Basin Bikeway which was the subject of *Farnham* was **designated** a "Class I bikeway" pursuant to the Bicycle Transportation Act, nothing in the opinion suggests that it was built pursuant to the Bicycle Transportation Act and there is no discussion therein regarding any mandatory duty to utilize minimum safety design criteria when the Sepulveda Basin Bikeway was designed and built.

More importantly, the cause of PROKOP's injury is fundamentally different from the cause of the injury at issue in *Farnham*. In *Farnham*, it was the **condition** of the bikeway that allegedly caused its surface to collapse and the plaintiff to be injured, whereas here the problem is with **design** of the Exit. Thus, if there was any immunity to be had, it would be design immunity pursuant to Section 830.6. Since the CITY made no effort to establish the necessary elements of design immunity as part of its MSJ, however, the MSJ clearly could not have been granted on that ground.

(1) The CITY Had A Duty To Warn Pursuant To

Subsection (c) Of Section 831.4

As explained above, even if the LA River Bikeway is properly classified as a "trail" within the meaning of Subsection (b) of Section 831.4, the CITY is not relieved of liability for the dangerous condition it created thereon, by failing to discharge its mandatory duty to build and maintain the bikeway in accordance with minimum safety standards.

Assuming *arguendo*, however, that by calling the bikeway a "trail," the CITY could somehow discharge its liability, it would nevertheless still have at least potential liability to PROKOP, based on subsection (c) of the statute.

Despite the *Farnham* court's insistence that Section 831.4 must be read to "apply full immunity to any trail, paved or unpaved" (*Farnham* at 1103), it cannot be denied that the plain language of subsection (c) provides for only **qualified** immunity for certain "paved trail[s]."

Specifically, with regard to "[a]ny paved trail . . . on an easement of way which has been granted to a public entity, which . . . provides access to any unimproved property," the CITY has an express duty to "reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail . . . which constitutes a hazard to health or safety." The CITY has admitted that the LA River Bikeway is on an easement [CT 0031:19-21; 0070:3-4], and Forester has pointed out that the bikeway

(which, according to the CITY, is "recreational") is designed, in part, to "connect regional open spaces." [CT 0096:26-28.] There is at least a question of fact, then, as to whether or not the LA River Bikeway constitutes "paved trail . . . on an easement . . . which . . . provides access to . . . unimproved property." If such a finding were made, then Section 831.4's duty to warn (which incidentally, would also be a Section 815.6 mandatory duty) would be implicated and there would be a triable issue of fact for a jury to decide whether the ambiguous "BIKE" "WALK" words painted on the pavement would constitute a sufficient warning of the sharp left PROKOP would have had to make to avoid the angled fence.

A duty to warn also arises from Section 830.8, wherein the so-called "trap exception" to immunity is set forth - - to wit, that a public entity may be liable for failure to provide warning signs if a sign was necessary to warn of a dangerous condition which would not be reasonably apparent to, and would not have been anticipated by, a person using the bikeway with due care. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 327.) As explained in detail by Forester (and as would be evident even in the absence of such opinion testimony), the deceptive signage (i.e. the Outgoing Arrow) and the invisibility of the Angled Fence created by chain link on both sides of the Exit, clearly "trapped" PROKOP into believing that he could proceed through the Exit in the direction of the Outgoing Arrow, and certainly

concealed the fact that, in reality, PROKOP would have needed to abruptly alter his course by perhaps 45 degrees in order to avoid the disaster with which he was faced.

This fact pattern is nearly identical to that of *Cameron*. There, the California Supreme Court found that plaintiffs had introduced sufficient evidence to show that, due to uneven superelevation of a highway, a driver entering a curve on a highway "at a lawful speed and exercising due care would be unable to perceive" that the curve was actually an "S-curve" requiring the driver to reverse the direction of his turn. The superelevation, the evidence suggested, "would trap the driver into thinking the curve would continue to the left, while it in fact continues to the right." "[W]arning signs," held the *Cameron* court, "indicating the proper speed to negotiate the curve, if obeyed by the driver, would eliminate the dangerousness" caused by the condition. Therefore, the evidence presented was held to be sufficient to support a finding that the state was negligent in failing to warn of the dangerous condition."

The foregoing analysis is directly applicable to the facts at bar. The physical and photographic evidence, as well as Forester's testimony that the Exit has a "visual appearance that conceals the fact that the further curve is sharper than it appears" [CT 0102:28-0103:12] and his opinion that the ambiguous markings that existed at the site were far from adequate as

"warnings" [*id.*], all compel the same result the Supreme Court reached in *Cameron* - - the CITY has at least potential liability for creating and concealing a "trap."

(2) PROKOP's Injury Was Caused, At Least In Part, By A Dangerous Condition Outside The Confines Of The Alleged "Trail"

Finally, the CITY has admitted that PROKOP's Accident took place **outside** the confines of the LA River Bikeway. [CT 0132:21-0122:3.] Thus, even if the LA River Bikeway is a "trail," and even if the CITY were therefore entitled to absolute immunity for injuries caused by a condition of the "trail," the CITY could not claim immunity for an injury caused by the dangerous condition of the public property just to the west of the "trail."

3. CONCLUSION

As demonstrated by the foregoing, the superficial analysis of *Farnham* is lacking in many respects. Moreover, this case is not *Farnham*. PROKOP is entitled to his day in court. The summary judgment ruling in favor of the CITY must be reversed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

I certify that the text of this brief, exclusive of covers, table of contents, table of authorities and certificate of compliance, consists of 7,253 words as counted by the Corel WordPerfect version 11 word-processing program used to generate the brief.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 15260 Ventura Blvd., Suite 920, Sherman Oaks, California.

On May 5, 2006, I served the foregoing document(s) described as **RESPONDENT'S BRIEF** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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☐ **By Overnight Mail:** I served the foregoing document(s) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed above. I am readily familiar with the firm's practice of collection and processing correspondence for OVERNIGHT DELIVERY. Under that practice it would be deposited with FEDERAL EXPRESS on that same date at Sherman Oaks, California in the ordinary course of business.

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☐ **By Personal Service:** I served the foregoing document(s) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed above. I delivered such envelope by hand to the offices of the addressee.

Executed on May 5, 2006, at Sherman Oaks, California.

X **State:** I declare under penalty of perjury under the laws of the State of California that the Above is true and correct.

☐ **Federal:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

____

DEBBIE GONZALES

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