

ORDINANCE NO. 22-2004

**AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
AMENDING CHAPTER 16.130 OF THE ELK GROVE MUNICIPAL CODE RELATING
TO SWAINSON'S HAWK IMPACT MITIGATION**

The City Council of the City of Elk Grove does ordain as follows:

Section 1. Purpose.

The purpose of this ordinance is to amend Chapter 16.130 of the Elk Grove Municipal Code related to mitigation for adverse impacts to Swainson's hawk habitat.

Section 2. Findings

- a. The most effective means of mitigation for the loss of suitable Swainson's hawk foraging habitat is the direct preservation, in perpetuity, of equally suitable foraging habitat on an acre-per-acre ratio.
- b. The requirement of direct preservation for projects of less than 40 acres may be infeasible and for such projects, mitigation by payment of a fee is adequate.
- c. The volume of past, existing, and anticipated development proposals in the City that will potentially require mitigation for the loss of Swainson's hawk habitat indicate an immediate need to assure adequate preservation of suitable Swainson's hawk habitat.
- d. In order to ensure that all future development projects mitigate for the loss of Swainson's hawk habitat, the imposition of a revised mitigation measure for projects of 40 acres and greater is necessary.
- e. Any delay in imposing the requirement of direct land preservation as mitigation for the loss of Swainson's hawk habitat for projects 40 acres or greater threatens the City's ability to protect sufficient habitat in the future and creates an immediate harm to the City's responsibility to protect biological resources.
- f. It is necessary for and in the interests of the public health, safety, and welfare that this Ordinance be effective immediately upon its adoption in order to provide adequate mitigation for the loss of Swainson's hawk habitat.

Section 3: 16.130.010 of Chapter 16.130, Title 16 is hereby amended to read as follows:

16.130.010 PURPOSE AND INTENT. The City of Elk Grove City Council finds that the continued expansion of urban uses into the agricultural lands within the City that are identified through the California Environmental Quality Act ("CEQA") process to provide suitable foraging habitat for the Swainson's Hawk, a listed threatened species under the

California Endangered Species Act, will, absent mitigation, result in a significant reduction of such foraging habitat. The reduction in foraging habitat can occur through requests for zoning changes of agriculturally zoned lands to land use designations that enable land to be reduced to parcel sizes too small to support Swainson's Hawk foraging habitat or through requests for land use entitlements for non-agricultural uses that are incompatible with the maintenance of Swainson's Hawk foraging habitat. The California Department of Fish and Game ("DFG") has determined that parcels of land of five (5) acres or more in size are recognized to be the minimum acreage required for viable foraging habitat. Requests to subdivide AR-1 or AR-2 zoned property, with an original total acreage size of five (5) acres or more to the lot sizes permitted under these zoning designations can also result in the reduction of foraging habitat for the Swainson's Hawk. For any such requests, which are within ten miles of a Swainson's Hawk nest, the City Council desires to establish an additional means of mitigating for loss of Swainson's Hawk foraging habitat.

The City has identified, in consultation with the California Department of Fish and Game, that suitable foraging habitat for Swainson's Hawk exists in established land conservation programs in Sacramento County and also in agricultural and open lands currently not part of a conservation program. The City finds that the most effective means of mitigation for the loss of suitable Swainson's hawk foraging habitat is the direct preservation, in perpetuity, of equally suitable foraging habitat on an acre-per-acre ratio. Such preservation should occur, pursuant to this Chapter, prior to the onset of development activities that cause the impact (i.e. land clearing and site grading). Development project proponents should be responsible for locating and acquiring the appropriate land or legal instruments (such as a conservation easement) that will ensure its preservation as Swainson's hawk foraging habitat in perpetuity. The City also finds that it may be infeasible to acquire easements for less than 40 acres and that proponents of projects less than 40 acres should have the option to mitigate adverse impacts to Swainson's hawk foraging habitat through the payment of an impact mitigation fee. An impact mitigation fee, as established pursuant to this Chapter, will provide funds to acquire available land with suitable Swainson's Hawk foraging habitat values. Such acquisition will create mitigation for the loss of this habitat through real property acquisition in fee or through conservation easements to facilitate the expansion of land conservation programs which include the preservation and management of Swainson's Hawk foraging habitat.

The City Council recognizes that mitigation for foraging habitat for the Swainson's Hawk is only feasible when replacement habitat is provided within the known foraging area for the hawk. In order to provide adequate mitigation for the loss of Swainson's Hawk foraging habitat under CEQA through the provisions of this Chapter, the City Council deems it necessary to expand the scope of this mitigation fee program to parcels located within the geographical foraging area of the Swainson's Hawk that are owned and/or managed by a conservation organization where the location of mitigation parcels and the conservation organization are acceptable to the Department of Fish and Game.

The City Council finds that the direct preservation of suitable Swainson's hawk foraging habitat or the payment of an impact mitigation fee by project proponents for the actual acquisition of such habitat will meet the requirements of mitigation under CEQA, by reducing the level of impact to Swainson's Hawk foraging habitat to a less than significant level for those parcels falling within the scope of this Chapter as set forth herein. The City Council intends that the requirement of direct preservation of suitable Swainson's hawk foraging habitat for projects 40 acres and greater and the requirement of an impact mitigation fee for projects less than 40 acres, in the amount set forth in this Chapter, shall be included as mitigation options. Said mitigation shall arise when the environmental review process for a request falling within the scope of this Chapter concludes that there would be a significant impact or a significant cumulative impact on the Swainson's Hawk foraging habitat for which mitigation, pursuant to all applicable provisions of the Public Resources Code section 21000 et seq. and the Cal. Code of Regulations, Title 24, section 15000 et seq., is required. The City Council also recognizes its continued authority to determine based on specific economic, social, legal, technical or other considerations that mitigation for Swainson's Hawk foraging habitat is infeasible or that evidence has been presented to the City Council, which the Council determines eliminates the need for such mitigation.

Section 4: 16.130.020 of Chapter 16.130, Title 16 is hereby amended to read as follows:

16.130.020 DEFINITIONS. "AGRICULTURAL DESIGNATION" shall mean land which is zoned any of the following zoning designations or combinations thereof: AG-80, AG-20, AR-10, AR-5, A-10, A-2.

"CEQA" means the California Environmental Quality Act.

"DFG" means the California Department of Fish and Game.

"PROJECT" shall mean the total combined gross acreage of a parcel or parcels included in a development proposal subject to CEQA review.

"URBAN DESIGNATION" shall mean land which is zoned any of the following zoning designations or combinations thereof: a "residential land use zone" as set forth in Sacramento County Zoning Code Section 201-01, a "commercial land use zone" as set forth in Sacramento County Zoning Code Section 225-10 or an "industrial land use zone" as set forth in Sacramento County Zoning Code Section 230-10; a specific plan designation or a special planning area designation encompassing any of the aforementioned zoning designations or combinations thereof.

Section 5: 16.130.030 of Chapter 16.130, Title 16 is hereby amended to read as follows:

16.130.030 APPLICABILITY. (a) This Chapter shall apply to any project that has been determined through the CEQA process to result in a potential significant impact or potential significant cumulative impact on Swainson's Hawk foraging habitat for which mitigation measures have been identified as necessary to reduce that impact to a less than significant level, and for which any of the following requests are being sought:

- (1) any request for a change in land use designation from an Agricultural Designation to an Urban Designation, or
- (2) any request to subdivide five (5) acres or more of contiguous land zoned AR-1 or AR-2, or

- (3) any request for a land use entitlement for a non-agricultural use of land zoned with an Agricultural Designation or
- (4) any request for a land use entitlement for a non-agricultural use of land five (5) acres or more in size zoned AR-1 or AR-2, or
- (5) any public improvement project proposed by any department or agency of the City of Elk Grove on land with an Agricultural Designation.

(b) This Chapter shall apply to any project approved prior to the effective date of this Chapter which was conditioned to require mitigation for impacts to Swainson's Hawk foraging habitat and which mitigation has not been completed through the payment of a fee or other mechanism included in such mitigation measure.

Section 6: 16.130.040 of Chapter 16.130, Title 16 is hereby amended to read as follows:

16.130.040 CONDITIONS. (a) On and after the effective date of this Chapter, for any project 40 acres and greater falling within the provisions of Section 16.130.030 of this Chapter, the following mitigation measure shall be required to reduce the impact to Swainson's Hawk foraging habitat of that particular project to a less than significant level:

The Project applicant shall acquire conservation easements or other instruments to preserve suitable foraging habitat for Swainson's hawk, as determined by the California Department of Fish and Game. The location of mitigation parcels as well as the conservation instruments protecting them shall be acceptable to the City and to the California Department of Fish and Game. The amount of land preserved shall be governed by a 1:1 mitigation ratio for each acre developed at the Project site. In deciding whether to approve the land proposed for preservation by the Project applicant, the City shall consider the benefits of preserving lands in proximity to other protected lands. The preservation of land shall be done prior to any site disturbance, such as clearing or grubbing, or the issuance of any permits for grading, building, or other site improvements, whichever occurs first. In addition, the City shall impose the following minimum conservation easement content standards:

- a) The land to be preserved shall be deemed suitable Swainson's hawk foraging habitat by the California Department of Fish and Game.
- b) All owners of the mitigation land shall execute the document encumbering the land.
- c) The document shall be recordable and contain an accurate legal description of the mitigation land.
- d) The document shall prohibit any activity which substantially impairs or diminishes the land's capacity as suitable Swainson's hawk foraging habitat.
- e) If the land's suitability as foraging habitat is related to existing agricultural uses on the land, the document shall protect any existing water rights necessary to maintain such agricultural uses on the land covered by the document, and retain such water rights for ongoing use on the mitigation land.
- f) The applicant shall pay to the City a mitigation monitoring fee to cover the costs of administering, monitoring and enforcing the document in an amount

determined by the receiving entity, not to exceed 10% of the easement price paid by the applicant, or a different amount approved by the City Council, not to exceed 15% of the easement price paid by the applicant.

- g) Interests in mitigation land shall be held in trust by an entity acceptable to the City and/or the City in perpetuity. The entity shall not sell, lease, or convey any interest in mitigation land which it shall acquire without the prior written approval of the City.
- h) The City shall be named a beneficiary under any document conveying the interest in the mitigation land to an entity acceptable to the City.
- i) If any qualifying entity owning an interest in mitigation land ceases to exist, the duty to hold, administer, monitor and enforce the interest shall be transferred to another entity acceptable to the City or to the City.

Before committing to the preservation of any particular land pursuant to this measure, the Project proponent shall obtain the City's approval of the land proposed for preservation. This mitigation measure may be fulfilled in combination with a mitigation measure imposed on the project requiring the preservation of agricultural land as long as the agricultural land is determined by the Department of Fish and Game to be suitable Swainson's hawk habitat.

(b) On and after the effective date of this Chapter, for any project less than 40 acres falling within the provisions of Section 16.130.030 of this Chapter, the following mitigation measures shall be included within the mitigation measure options identified to reduce the impact to Swainson's Hawk foraging habitat of that particular project to a less than significant level:

- Prior to any site disturbance, such as clearing or grubbing, or the issuance of any permits for grading, building, or other site improvements, whichever occurs first, the project applicant shall preserve 1.0 acre of similar habitat for each acre lost. This land shall be protected through a fee title or conservation easement acceptable to the CDFG and the City of Elk Grove as set forth in Chapter 16.130.040(a) of the City of Elk Grove Municipal Code as such may be amended from time to time and to the extent that said Chapter remains in effect, OR
- Prior to any site disturbance, such as clearing or grubbing, or the issuance of any permits for grading, building, or other site improvements, whichever occurs first, the project applicant shall Submit payment of Swainson's hawk impact mitigation fee per acre of habitat impacted (payment shall be at a 1:1 ratio) to the City of Elk Grove in the amount set forth in Chapter 16.130 of the City of Elk Grove Code as such may be amended from time to time and to the extent that said chapter remains in effect.

(c) The requirement of direct land preservation or payment of an impact mitigation fee established pursuant to this Chapter is also applicable to those projects that were approved prior to the effective date of this Chapter and which are conditioned to require mitigation for impacts to Swainson's Hawk foraging habitat to include the option to participate in a future Swainson's Hawk mitigation policy/program adopted by the City

Council, provided the property owner/developer of any such project has not yet completed an alternative mitigation measure for impacts to Swainson's Hawk foraging habitat and provided that the parcel(s) included in such a previously granted request fall within the scope of this Chapter as set forth in Section 16.130.030.

Section 7: 16.130.045 of Chapter 16.130, Title 16 is hereby added to read as follows:

16.130.045 IMPACT MITIGATION FEE. The impact mitigation fee shall be that amount established by resolution of the Elk Grove City Council as such may be amended from time to time.

Section 8: 16.130.060 of Chapter 16.130, Title 16 is hereby repealed

Section 9: 16.130.070 of Chapter 16.130, Title 16 is hereby repealed

Section 10: 16.130.90 of Chapter 16.130, Title 16 is hereby repealed.

Section 11: 16.130.110 of Chapter 16.130, Title 16 is hereby amended to read as follows:

16.130.110 AUTHORITY OF CITY COUNCIL TO OVERRIDE MITIGATION MEASURES. Nothing herein shall be construed to preclude the City Council's consideration or approval of other means of mitigating significant impact or significant cumulative impact on Swainson's Hawk foraging habitat or to limit the City Council's authority to override mitigation measures for reasons permitted by CEQA.

Section 12: CEQA

This action qualifies as a Section 15308, Class 8 Exemption; Actions by Regulatory Agencies for the protection of the environment.

Section 13: No Mandatory Duty of Care

This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City or any officer or employee thereof a mandatory duty of care towards persons and property within or without the City, so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 14: Severability

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. This City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof and intends that the invalid portions should be severed and the balance of the ordinance be enforced.

Section 15: Effective Date and Publication

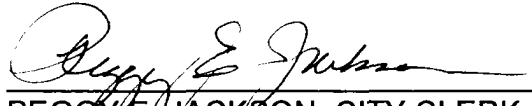
This Urgency Ordinance shall take effect immediately upon its adoption by a 4/5th's vote of this City Council. The City Council also intends that the public hearing, City Council consideration and vote on this ordinance on July 21, 2004 also constitute the introduction of a regular ordinance, to be followed by a second reading no sooner than five days after the introduction with the regular ordinance becoming effective 30 days after its adoption. In lieu of publication of the full text of the ordinance within 15 days after its passage, a summary of the ordinance may be published at least five days prior to and fifteen (15) days after adoption by the City Council and a certified copy shall be posted in the office of the City Clerk, pursuant to GC 36933(c)(1).

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 21st day of July 2004.



SOPHIA SCHERMAN, MAYOR of the
CITY OF ELK GROVE

ATTEST:



PEGGY E. JACKSON, CITY CLERK

APPROVED AS TO FORM:



ANTHONY B. MANZANETTI,
CITY ATTORNEY

Effective Date: July 21, 2004

AYES: Scherman, Soares, Briggs, Cooper
NOES: None
ABSTAIN: None
ABSENT: Leary