

**RESOLUTION NO. 2011-187**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE  
CERTIFYING AN ENVIRONMENTAL IMPACT REPORT FOR THE  
SWAINSON'S HAWK FEE UPDATE**

**WHEREAS**, the California Environmental Quality Act (CEQA), requires development to mitigate for potential significant impacts to special status species, including impacts to habitat for these species; and

**WHEREAS**, the Swainson's hawk is a special status species because it has been listed by the California Fish and Game Commission as a threatened species; and

**WHEREAS**, in order to ensure that adequate mitigation is provided for habitat loss due to development, the City offers developers a fee option to mitigation as outlined in Chapter 16.130 of the Elk Grove Municipal Code; and

**WHEREAS**, the City has prepared a Swainson's Hawk Habitat Impact Fee Nexus Study (the "Study") dated August 25, 2010, which details the relationship between the cost to purchase mitigation land and the proposed fee; and

**WHEREAS**, the City determined that the adoption of the Swainson's Hawk Habitat Impact Fee (also referred to herein as the "Project") is subject to the California Environmental Quality Act (CEQA), Public Resources Code §21000 et seq. and that an Environmental Impact Report (EIR) need be prepared to evaluate the potential environmental effects of the Project; and

**WHEREAS**, in compliance with Public Resources Code §21080.4, a Notice of Preparation (NOP) was prepared by the City of Elk Grove and was distributed to the State Clearinghouse, Office of Planning and Research, responsible agencies and other interested parties on January 21, 2011 with the comment period ending on February 22, 2011; and

**WHEREAS**, the City of Elk Grove distributed a Notice of Availability for the Project's Draft EIR on May 13, 2011, which started the 45-day public review period, ending on June 27, 2011; and

**WHEREAS**, the Draft EIR was filed with the State Clearinghouse (SCH No. 2011012055) and was distributed to public agencies and other interested parties for public review and comment; and

**WHEREAS**, the City of Elk Grove prepared a Final EIR, which consists of: 1) Draft EIR, 2) comments received on the Draft EIR during the public review period, and 3) responses to comments received.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Elk Grove as follows:

**1. Certification of the Final Environmental Impact Report (EIR)**

- A. The City Council hereby certifies that the Final EIR has been completed in compliance with the requirements of the California Environmental Quality Act (CEQA).
- B. The City Council hereby certifies that the Final EIR was presented to the City Council and that the City Council reviewed and considered the information contained in the Final EIR prior to taking action on the Project.
- C. The City Council hereby certifies that the Final EIR reflects the independent judgment and analysis of the City Council.

**2. Findings on Impacts**

The City Council finds that the Final EIR identifies potentially significant impacts that cannot be mitigated to a less than significant level and are thus considered significant and unavoidable. The City Council makes the findings with respect to these significant and unavoidable impacts as set forth in Exhibit A.

**3. Findings on Alternatives**

The City Council finds that the alternatives analyzed in the Final EIR are rejected because the alternatives would not achieve the project objectives. The City Council makes the finding as set forth in Exhibit A, attached hereto and incorporated herein by reference.

**4. Statement of Overriding Considerations**

The City Council finds that there are no feasible mitigation measures or project alternatives that would mitigate or substantially lessen the impacts from the Project. Despite the occurrence of these significant effects, however, the City Council chooses to approve the project because, in its view, the environmental, social, and other benefits of the project will render the significant effects acceptable as described in Statement of Overriding Considerations as set forth in Exhibit A.

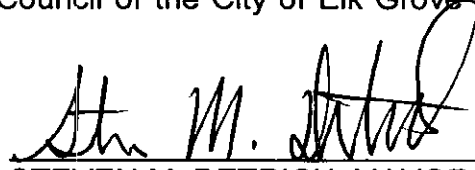
**5. Adoption of the Mitigation Monitoring and Reporting Program**

The City Council hereby adopts the Mitigation Monitoring and Reporting Program, as set forth in Exhibit B, attached hereto and incorporated herein by reference.

**6. Other Findings**

The City Council finds that issues raised during the public comment period and written comment letters submitted after the close of the public review period of the Draft EIR do not involve any new significant impacts or "significant new information" that would require recirculation of the Draft EIR pursuant to CEQA Guidelines Section 15088.5.

**PASSED AND ADOPTED** by the City Council of the City of Elk Grove this 28<sup>th</sup> day of September 2011.

  
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STEVEN M. DETRICK, MAYOR of the  
CITY OF ELK GROVE

ATTEST:

  
\_\_\_\_\_  
JASON LINDGREN, CITY CLERK

APPROVED AS TO FORM:

  
\_\_\_\_\_  
JONATHAN HOBBS,  
INTERIM CITY ATTORNEY

# **EXHIBIT A**

## **THE CITY OF ELK GROVE FINDINGS REQUIRED UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (Public Resources Code Section 21000 et seq.)**

**for the**

### **Elk Grove Swainson's Hawk Habitat Fee Project**

#### **I. INTRODUCTION**

##### **ENVIRONMENTAL DOCUMENT**

The City of Elk Grove ("City") prepared a Draft and Final Environmental Impact Report ("Final EIR") for the proposed Elk Grove Swainson's Hawk Habitat Fees project ("Swainson's Hawk Ordinance" or "proposed project").

The proposed Swainson's Hawk Ordinance applies to any project that (1) has been found to result in a potentially significant impact to Swainson's hawk foraging habitat through the California Environmental Quality Act ("CEQA") process; or (2) is subject to Chapter 16.130 of the Elk Grove Municipal Code.

The proposed Swainson's Hawk Habitat Fees project includes the following components:

1. Provide a mechanism to address the impacts of development to Swainson's hawk foraging habitat through either fee payment or direct habitat conservation by individual development projects.
2. Establish an updated development impact fee to mitigate for impacts to Swainson's hawk foraging habitat.
3. Require an annual adjustment to the fee based on a specified cost index. The proposed fee includes \$8,921 per acre for easement acquisition, \$444 for monitoring and reporting, and \$281 for administration.
4. Result in fee title purchase, conservation easement purchase, or other mechanisms for the conservation of Swainson's hawk foraging habitat in perpetuity.

Projects of 40 acres or more that would result in Swainson's hawk impacts would continue to be required to preserve suitable foraging habitat, whereas projects of less than 40 acres would be allowed to pay a development impact fee as established by the proposed project.

Please refer to Chapter 2.0, Project Description, of the Draft Environmental Impact Report ("Draft EIR") for a detailed description of the proposed project, project objectives, and agency approvals associated with the proposed project.

##### **FINDINGS AND STATEMENT OF OVERRIDING CONSIDERATIONS**

The Findings of Fact and Statement of Overriding Considerations set forth below ("Findings") are made and adopted by the City Council, as the City's findings under CEQA (Public Resources Code, Section 21000 et seq.) and the CEQA Guidelines (California Code of Regulations, Title 14, Section 15000 et seq.) relating to the proposed project. The Findings provide the written analysis and independent conclusions of the City Council regarding the project's environmental impacts, mitigation measures, alternatives to the

project, and the overriding considerations, which, in the City Council's view, justify approval of the Elk Grove Swainson's Hawk Ordinance.

## **II. GENERAL FINDINGS AND OVERVIEW**

### **RELATIONSHIP TO THE CITY OF ELK GROVE GENERAL PLAN**

The City adopted its General Plan ("General Plan") in November 2003. The Elk Grove Swainson's Hawk Habitat Fees project is subject to and must be consistent with the City's General Plan. The General Plan provides a broad framework for planning the future of the City of Elk Grove. It is the official policy statement of the City Council to guide the private and public development of the city in a manner that will gain the maximum social and economic benefit to its citizens. The proposed project is consistent with the General Plan and specifically consistent with the City's goal of preserving areas where special-status animal species and critical habitat are known to be present. An analysis of the project's consistency with the City's General Plan is included on page 2.0-6 of the Draft EIR.

### **PROCEDURAL BACKGROUND**

In accordance with Section 15082 of the CEQA Guidelines, the City of Elk Grove prepared and circulated a Notice of Preparation (NOP) and Initial Study (IS) for the proposed project for public and agency review on January 21, 2011. The NOP and IS were included as Appendix A to the Draft EIR. The one comment letter received in response to the NOP was included as Appendix B to the Draft EIR. This comment was considered and addressed during preparation of the EIR.

Upon completion of the Draft EIR for the proposed project (State Clearinghouse No. 2011012055), the City prepared and distributed a Notice of Availability on May 13, 2011, pursuant to CEQA Guidelines Section 15087. Pursuant to CEQA Guidelines Sections 15087 and 15105, a 45-day public comment and review period was opened on May 13, 2011, and was closed on June 27, 2011. No new significant environmental issues, beyond those already covered in the Draft EIR, were raised during the comment period, and the Final EIR was prepared. Responses to comments received on the Draft EIR did not involve any changes to the project that would create new significant impacts or provide significant new information that would require recirculation of the Draft EIR pursuant to CEQA Guidelines Section 15088.5. Responses to comments were provided in the Final EIR, and responses were sent to public agencies that commented on the Draft EIR 10 days prior to certification of the Final EIR.

### **PROJECT HISTORY**

Upon incorporation, the City adopted Sacramento County's Swainson's Hawk Impact Mitigation Fees Ordinance as Chapter 16.130 of the Elk Grove Municipal Code, which provided the options of preserving suitable lands or paying fees to mitigate for the loss of hawk foraging habitat. At the time of city incorporation, the fee was \$1,132 per acre (\$750 per acre for acquisition + \$382 for administrative costs). Subsequently, the City amended the Swainson's Hawk Ordinance in 2003 to modify the fee structure and address rising habitat conservation costs. In 2004, the City amended the Swainson's Hawk Ordinance to require projects of 40 acres and greater to provide direct land-for-land mitigation. The City amended the Swainson's Hawk Ordinance again in 2005 to reflect increased monitoring and habitat conservation costs. Given the current downturn in the economy, particularly to real estate values, the City Council directed staff to revise the fee to be consistent with the current value of habitat conservation easements.

### **RECORD OF PROCEEDINGS AND CUSTODIAN OF RECORD**

For purposes of CEQA and these Findings, the record of proceedings for the project consists of the following documents, at a minimum:

- Notice of Preparation, Notice of Availability, and all other public notices issued by the City in conjunction with the project (January 11, 2011, and May 13, 2011);
- Final Environmental Impact Report for the Elk Grove Swainson's Hawk Habitat Fees project, prepared by De Novo Planning Group (July 2011);
- All comments submitted by agencies or members of the public during the 30-day public comment period on the NOP and the 45-day public comment period on the Draft EIR;
- All comments and correspondence submitted to the City with respect to the project, in addition to comments on the NOP and Draft EIR;
- The Mitigation Monitoring and Reporting Program for the project;
- All findings and resolutions adopted by City decision-makers in connection with the project, and all documents cited or referred to therein;
- All non-draft and/or nonconfidential reports, studies, memoranda, maps, staff reports, or other planning documents relating to the project prepared by the City, consultants to the City, or responsible or trustee agencies with respect to the City's compliance with the requirements of CEQA and with respect to the City's actions on the project;
- City of Elk Grove General Plan, adopted November 2003 and amended May 2007;
- City of Elk Grove Zoning Code, July 2003; and
- Any other materials required for the record of proceedings by Public Resources Code Section 21167.6(e).

The custodian of the documents and materials comprising the record of proceedings is the Environmental Planning Manager, City of Elk Grove, Development Services, Planning, whose office is located at 8401 Laguna Palms Way in Elk Grove, California, 95758. Office hours are from 8:00 a.m. through 5:00 p.m. Monday through Friday. The City of Elk Grove Planning Department may be reached by phone at (916) 478-2265.

## CONSIDERATION OF THE ENVIRONMENTAL IMPACT REPORT

In adopting these Findings, the City Council finds that the Final EIR was presented to the City Council, which reviewed and considered the information in the Final EIR prior to approving the Elk Grove Swainson's Hawk Habitat Fees project. By these Findings, the City Council ratifies, adopts, and incorporates the analysis, explanations, findings, responses to comments, and conclusions of the Final EIR. The Final EIR represents the independent judgment of the City.

## SEVERABILITY

If any term, provision, or portion of these Findings or the application of these Findings to a particular situation is held by a court to be invalid, void, or unenforceable, the remaining provisions of these Findings, or their application to other actions related to the Elk Grove Swainson's Hawk Habitat Fees project, shall continue in full force and effect unless amended or modified by the City.

## CEQA FINDINGS

Public Resources Code Section 21002 provides that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would

*substantially lessen* the significant environmental effects of such project" [italics added]. The same statute states that the procedures required by CEQA "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will *avoid* or *substantially lessen* such significant effects" [italics added]. Section 21002 goes on to state that "in the event [that] specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."

The mandate and principles announced in Public Resources Code Section 21002 are implemented, in part, through the requirement that agencies must adopt findings before approving projects for which EIRs are required (see Public Resources Code, Section 21081, subd. (a); CEQA Guidelines Section 15091, subd. (a)). For each significant environmental effect identified in an EIR for a proposed project, the approving agency must issue a written finding reaching one or more of three permissible conclusions. The first such finding is that "[c]hanges or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR" (CEQA Guidelines Section 15091, subd. (a)(1)). The second permissible finding is that "[s]uch changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency" (CEQA Guidelines Section 15091, subd. (a)(2)). The third potential conclusion is that "[s]pecific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR" (CEQA Guidelines Section 15091, subd. (a)(3)).

Public Resources Code Section 21061.1 defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." CEQA Guidelines Section 15364 adds another factor: "legal" considerations (see also *Citizens of Goleta Valley v. Board of Supervisors* ("Goleta II") (1990) 52 Cal.3d 553, 565). The concept of feasibility also encompasses the question of whether a particular alternative or mitigation measure promotes the underlying goals and objectives of a project (*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 410, 417). "[F]easibility" under CEQA encompasses "desirability" to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors" (Ibid; see also *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715).

The CEQA Guidelines do not define the difference between "avoiding" a significant environmental effect and merely "substantially lessening" such an effect. The City must therefore glean the meaning of these terms from the other contexts in which the terms are used. Public Resources Code Section 21081, on which CEQA Guidelines Section 15091 is based, uses the term "mitigate" rather than "substantially lessen." The CEQA Guidelines therefore equate mitigating with substantially lessening. Such an understanding of the statutory term is consistent with the policies underlying CEQA, which include the policy that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects" (Public Resources Code Section 21002).

For purposes of these Findings, the term "avoid" refers to the effectiveness of one or more mitigation measures to reduce an otherwise significant effect to a less than significant level. In contrast, the term "substantially lessen" refers to the effectiveness of such measure or measures to substantially reduce the severity of a significant effect but not to reduce that effect to a less than significant level. These interpretations appear to be mandated by the holding in *Laurel Hills Homeowners Association v. City Council* (1978) 83 Cal.App.3d 515, 519–521, in which the Court of Appeal held that an agency had satisfied its obligation to substantially lessen or avoid significant effects by adopting numerous mitigation measures, not all of which rendered the significant impacts in question less than significant.

Although CEQA Guidelines Section 15091 requires only that approving agencies specify that a particular significant effect is "avoid[ed] or substantially lessen[ed]," these Findings, for purposes of clarity, in each

case will specify whether the effect in question has been reduced to a less than significant level or has simply been substantially lessened but remains significant.

Moreover, although CEQA Guidelines Section 15091, read literally, does not require findings to address environmental effects that an EIR identifies as merely "potentially significant," these Findings will nevertheless fully account for all such effects identified in the Final EIR.

CEQA requires that the lead agency adopt mitigation measures or alternatives, where feasible, to substantially lessen or avoid significant environmental impacts that would otherwise occur. Project modification or alternatives are not required, however, where such changes are infeasible or where the responsibility for modifying the project lies with some other agency (CEQA Guidelines Section 15091, subd. (a), (b)).

With respect to a project for which significant impacts are not avoided or substantially lessened, a public agency, after adopting proper findings, may nevertheless approve the project if the agency first adopts a statement of overriding considerations setting forth the specific reasons why the agency found that the project's "benefits" rendered "acceptable" its "unavoidable adverse environmental effects" (CEQA Guidelines Sections 15093, 15043, subd. (b); see also Public Resources Code Section 21081, subd. (b)). The California Supreme Court has stated, "[t]he wisdom of approving . . . any development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced" (*Goleta II*, 52 Cal.3d at p. 576).

These Findings constitute the City's best efforts to set forth the evidentiary and policy basis for its decision to approve the proposed project in a manner consistent with the requirements of CEQA. To the extent these Findings conclude that various proposed mitigation measures outlined in the Final EIR are feasible and have not been modified, superseded or withdrawn, the City hereby binds itself to implement these measures. These Findings, in other words, are not merely informational, but rather constitute a binding set of obligations that will come into effect when the City adopts a resolution approving the project.

### **III. FINDINGS AND RECOMMENDATIONS REGARDING SIGNIFICANT AND UNAVOIDABLE IMPACTS**

#### **BIOLOGICAL RESOURCES**

#### **1. Have a substantial adverse effect on any special-status species, movement habitat, corridors, and nursery sites of Swainson's hawk (EIR Impact 3.0-2)**

- (a) Potential Impact.** The proposed project would result in the collection of fees for the purchase and preservation of land suitable for Swainson's hawk foraging habitat. The fee program itself would not cause a direct physical change to the environment. However, it may take time for the City to build up a sufficient balance of impact fees to be able to fund the actual purchase of eligible Swainson's hawk foraging habitat land. In addition, property values could rise prior to the proposed annual adjustment or in excess of the annual adjustment. As such, a short-term impact may exist due to the time gap between when the fee is paid and the actual conservation of suitable foraging habitat. In the long term, this potential for disparity between the amount of the fee and the actual cost to conserve suitable foraging habitat may result in mitigation occurring at a ratio lower than what is required by the Elk Grove Municipal Code Chapter 16.130.040(A), which requires mitigation at a one-to-one ratio.



(b) **Mitigation Measures.** The following mitigation measure is hereby adopted and will be implemented as provided by the Mitigation Monitoring and Reporting Program:

**MM 3.1.** On or before August 1 of each year, the Planning Director shall report to the City Council on the implementation of Chapter 16.130. The report shall include the following:

1. Project Applicant Habitat Conservation Purchases: Identification of habitat preserved pursuant to Sections 16.13.010 (A and C).
2. Impact Mitigation Fees:
  - a. Identification of projects (location, acreage, habitat description, proximity to closest known Swainson's hawk nest) that paid the mitigation fee pursuant to Section 16.13.010 (B and C).
  - b. Identification of land conserved pursuant to Section 16.130.080, including location, acreage, habitat description, and proximity to closest known Swainson's hawk nest.
  - c. Identification by allowed use (habitat purchase, administration, monitoring) of (i) the total amount in the impact mitigation fee fund; (ii) amount collected over the last year; (iii) amount expended over the last year; and (iv) amount planned for expenditure in the future year.
3. Identification of Issues: The report shall address potential issues associated with Chapter 16.130, including whether the fee amount is generally proportional to the cost of suitable foraging habitat; the progress the City is making in spending collected funds and preserving habitat; and any issues with the monitoring of conserved habitat lands. If any issues are identified that pose a substantial impediment to the ongoing use of Chapter 16.130 to mitigation for impacts to Swainson's hawk foraging habitat as described in Section 16.130.010, potential resolutions to the issues shall be identified and appropriate action taken within six months.

(c) **Findings.** Based on the Final EIR and the entire record before the City Council, the City Council adopts the following findings: there are no feasible mitigation measures available to reduce this impact to a level that is less than significant. The effects therefore remain significant and unavoidable.

- (1) Significant of Mitigation: Although a mitigation measure has been identified for this impact, the potential remains for there to be a lag in the timing of mitigation, for mitigation to occur at a ratio of less than one to one, and for habitat lands of lesser quality to be conserved. Therefore, this impact would remain significant and unavoidable.
- (2) Overriding Considerations: The environmental, economic, social, and other benefits of the project override the significant adverse impacts of the project, as more fully stated in the Statement of Overriding Considerations in Section VII, below.

**2. Cumulative impacts to Swainson's hawk (EIR Impact 4.1-1)**

- (a) **Potential Impact.** Regional development (within 10 miles of the city) would occur regardless of adoption of the proposed project in accordance with the applicable general plans. The proposed project would not directly approve any development projects and would not change the significance of environmental impacts associated with approval of future development and other planning projects. Much of this regional development would likely occur on agricultural and/or open space lands that are considered suitable foraging habitat for Swainson's hawk. The applicable land use agency would be required to mitigate for the loss of land to development through on-site preservation or the payment of fees. These mitigation programs would have the potential to mitigate at a less than one-to-one ratio due to fluctuations in the market value of conservation easements. The proposed project would have short-term and long-term impacts on Swainson's hawk foraging habitat that would be cumulatively considerable.
- (b) **Mitigation Measures.** None available.
- (c) **Findings.** Based on the Final EIR and the entire record before the City Council, the City Council adopts the following findings: there are no feasible mitigation measures available to reduce this impact to a level that is less than cumulatively considerable. The effects therefore remain significant and unavoidable.
  - (1) Overriding Considerations: The environmental, economic, social, and other benefits of the project override the significant adverse impacts of the project, as more fully stated in the Statement of Overriding Considerations in Section VII, below.

**IV. FINDINGS AND RECOMMENDATIONS REGARDING SIGNIFICANT IMPACTS WHICH ARE AVOIDED OR MITIGATED TO A LESS THAN SIGNIFICANT LEVEL**

The Draft EIR did not identify any significant impacts that are avoided or mitigated to a less than significant level.

**V. FINDINGS AND RECOMMENDATIONS REGARDING THOSE IMPACTS WHICH ARE LESS THAN SIGNIFICANT**

Specific impacts within the following categories of environmental effects were found to be less than significant without mitigation as set forth in more detail in the Draft EIR.

**Biological Resources:** The following specific impacts were found to be less than significant: 3.0-1 (Draft EIR pages 3.0-11 to 3.0-12); 3.0-3 (Draft EIR pages 3.0-13 to 3.0-14); 3.0-5 (Draft EIR page 3.0-14); and 3.0-6 (Draft EIR page 3.0-15).

**Cumulative Impacts:** The following specific impact was found to be less than significant: 4.1-2 (Draft EIR page 4.0-10)

**VI. PROJECT ALTERNATIVES**

**BACKGROUND/LEGAL REQUIREMENTS**

Public Resources Code Section 21002 provides that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would *substantially lessen* the significant environmental effects of such projects" [italics added]. The same

statute states that the procedures required by CEQA "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will *avoid* or *substantially lessen* such significant effects" [italics added]. Section 21002 goes on to state that "in the event [that] specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."

CEQA defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors" (Public Resources Code Section 21061.1). The CEQA Guidelines add another factor: "legal" considerations (CEQA Guidelines Section 15364; see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 (*Goleta II*)). Among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries, and whether the proponent can reasonably acquire, control, or otherwise have access to the alternative site (CEQA Guidelines Section 15126.6, subd. (f)(1)). The concept of feasibility also encompasses the question of whether a particular alternative or mitigation measure promotes the underlying goals and objectives of a project (*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 410, 417).

Where a significant impact can be substantially lessened (i.e., mitigated to an "acceptable level") solely by the adoption of mitigation measures, the lead agency, in drafting its findings, has no obligation to consider the feasibility of alternatives with respect to that impact, even if the alternative would mitigate the impact to a greater degree than the project (Public Resources Code Section 21002; *Laurel Hills Homeowners Association, supra*, 83 Cal.App.3d at p. 521; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 691, 730–731 and *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 400–403). In short, CEQA requires that the lead agency adopt mitigation measures or alternatives, where feasible, to substantially lessen or avoid significant environmental impacts that would otherwise occur. Project modification or alternatives are not required, however, where such changes are infeasible or where the responsibility of modifying the project lies with some other agency (CEQA Guidelines Section 15091, subs. (a), (b)).

With respect to a project for which significant impacts are not avoided or substantially lessened, a public agency, after adopting proper findings, may nevertheless approve the project if the agency first adopts a statement of overriding considerations setting forth the specific reasons why the agency found the project's "benefits" rendered "acceptable" compared to its "unavoidable adverse environmental effects" (CEQA Guidelines Sections 15093, 15043, subd. (b); see also Public Resources Code Section 21081, subd. (b)). The California Supreme Court has stated that "[t]he wisdom of approving . . . any development project, a delicate task which requires a balancing of interest, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced" (*Goleta II, supra*, 52 Cal.3d at p. 576).

The preceding discussion regarding project impacts revealed that most effects would be less than significant and would not require mitigation. There are also two impacts which were identified as significant and unavoidable and which cannot be substantially lessened, as the only feasible mitigation measure available would not fully reduce the impacts to an insignificant level or because no feasible mitigations measures could be identified.

Thus, as a legal matter, the City, in considering alternatives in these Findings, need only determine whether any alternatives are environmentally superior with respect to those significant and unavoidable impacts. If any alternatives are in fact superior with respect to those impacts, the City is then required to determine whether the alternatives are feasible. If the City determines that no alternative is both feasible and environmentally superior with respect to the unavoidable significant impacts identified in the Draft EIR, the City may approve the project as mitigated after adopting a Statement of Overriding Considerations.

CEQA does not require that all possible alternatives be evaluated, only that “a range of feasible alternatives” be discussed so as to encourage both meaningful public participation and informed decision-making (CEQA Guidelines Section 15126.6, subd. (a)). “The discussion of alternatives need not be exhaustive, and the requirement as to the discussion of alternatives is subject to a construction of reasonableness. The statute does not demand what is not realistically possible given the limitation of time, energy, and funds. ‘Crystal ball’ inquiry is not required.” (*Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286; see also CEQA Guidelines Section 15126.6, subd. (f)(3).) Indeed, as stated by the court in *Village of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028, although there may be “literally thousands of ‘reasonable alternatives’ to the proposed project . . . the statutory requirements for consideration of alternatives must be judged against a rule of reason” (quoting *Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910). “Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned” (Ibid. at p. 1029). The requirement has been fulfilled here; the Draft EIR examined the project alternatives in detail, exploring their comparative advantages and disadvantages with respect to the project. As the following discussion demonstrates, however, only the project as proposed is feasible in light of the project objectives and other considerations.

## B. IDENTIFICATION OF PROJECT OBJECTIVES

The CEQA Guidelines state that the “range of potential alternatives to the project shall include those that could feasibly accomplish most of the basic purposes of the project and could avoid or substantially lessen one or more of the significant effects” of the project (CEQA Guidelines Section 15126(d)). Thus, an evaluation of the project objectives is key to determining which alternatives should be assessed in the EIR.

The objectives of the Elk Grove Swainson’s Hawk Habitat Fees project are as follows:

1. Ensure that impacts to Swainson’s hawk foraging habitat are addressed and mitigated on an equitable basis;
2. Provide effective and environmentally sound Swainson’s hawk foraging habitat mitigation requirements that do not unduly restrict the feasibility of smaller development projects;
3. Address fluctuations in the real estate and conservation easement markets; and
4. Provide certainty to project applicants for smaller projects as to the method and cost of mitigation for Swainson’s hawk habitat impacts.

## C. ALTERNATIVES ANALYSIS IN EIR

Based on the background information and legal requirements described above as well as CEQA Guidelines Section 15126.6, the City selected and evaluated the alternatives listed below.

### 1. No Project Alternative

Under Alternative 1 (the No Project Alternative), the City would continue to implement Chapter 16.130, including the adopted fee structure, and no changes would be made to the Swainson’s Hawk Ordinance.

- (a) **Findings.** The No Project Alternative is rejected as an alternative because it would not lessen either of the significant and unavoidable impacts identified under the proposed project and because it would not achieve project objectives 1, 2, or 3.

- (b) **Explanation.** This alternative would maintain the existing fee program, which has the same potential to result in a short-term time gap between when the fee is paid and the actual conservation of suitable foraging habitat as well as a greater potential to result in mitigation occurring at a less than one-to-one ratio because it does not adjust for market fluctuations. In addition, this alternative would not achieve most of the City's objectives for this project because: (1) it would maintain the current fee structure, which does not reflect the current market value of easements, resulting in an inequitable approach to mitigation; (2) it would restrict the feasibility of both small and large projects by imposing an unreasonably high fee given current market conditions; and (3) it does not address fluctuations in the real estate and conservation easement markets.

For the reasons stated above, the No Project Alternative was not found to be environmentally superior to the proposed project and was rejected as infeasible.

## 2. Land Conservation Alternative

Alternative 2 (the Land Conservation Alternative) would revise the Swainson's Hawk Ordinance to require projects to conserve land through dedication of an easement, deed of trust, or other acceptable mechanism, at a one-to-one ratio for each acre of Swainson's hawk foraging habitat removed by a project, regardless of project size. Under this alternative, a per-acre fee for loss of foraging habitat would not be collected since project applicants would be required to directly conserve land; however, applicants would pay administration and monitoring fees consistent with the amounts proposed by the proposed project.

- (a) **Findings.** The Land Conservation Alternative is rejected as an alternative because it would not achieve project objectives 2 or 4.
- (b) **Explanation.** This alternative would reduce the significant and unavoidable impacts identified under the proposed project by eliminating the potential for a short-term time gap to occur between fee collection and easement purchase and by eliminating the potential for fluctuations in the market to result in mitigation occurring at a less than one-to-one ratio as a fee program would not be implemented. However, this alternative would not achieve two of the City's objectives for the project because it is infeasible, both practically and financially, to establish conservation easements for small portions of land. Attempts to directly mitigate for habitat on projects smaller than 40 acres would undermine the effectiveness of the broader mitigation strategy by fragmenting, rather than consolidating, valuable habitat.

For the reasons stated above, the Land Conservation Alternative was found to be environmentally superior to the proposed project but was rejected as infeasible.

## 3. Project-Based Fee Payment Alternative

Alternative 3 (the Project-Based Payment Alternative) would revise the Swainson's Hawk Ordinance to require projects that remove Swainson's hawk foraging habitat to pay a per-acre fee based on the current market cost for a habitat conservation easement as well as an established fee for administration and monitoring of the program. Each individual project would be required to prepare a fee study, which would be reviewed by the City to determine whether the study was acceptable, to determine the current market value for a conservation easement on habitat land comparable to that removed by the proposed project. The City would review the fee study and, once the appropriate market value was determined, the project applicant would pay the fee, as well as the City's administration and monitoring fees, prior to land disturbance. The City would use the fees to purchase

conservation easements in a manner comparable to that proposed for the proposed Swainson's Hawk Habitat Fees project.

- (a) **Findings.** The Project-Based Fee Payment Alternative is rejected as an alternative because it would not achieve project objectives 2 or 4.
- (b) **Explanation.** This alternative would result in a similar short-term impact due to the time gap between when the project-specific fee is paid and when the conservation easements are actually purchased. However, because the fee would be determined at the time a development project is proposed, it would be less likely to result in a disparity between the fee and the actual cost of purchasing the conservation easement. Therefore, this alternative would slightly reduce long-term environmental effects as compared to the proposed project. However, this alternative would not achieve two of the City's objectives for the project because smaller projects are unlikely to be able to afford the cost of preparing a project-specific fee study and because the cost would be unknown until the completion of the fee study.

For the reasons stated above, the Project-Based Fee Payment Alternative was found to be environmentally superior to the proposed project but was rejected as infeasible.

#### 4. Fee Guarantee Alternative

Under Alternative 4 (the Fee Guarantee Alternative), the proposed project would be revised to include provisions that would guarantee compensation at a one-to-one ratio by the developer for the loss of Swainson's hawk foraging habitat for projects that require a subdivision map. Project applicants would be required to provide a guarantee in the form of a surety bond, letter of credit, cash credit, or other acceptable financial guarantee at the time the fee is paid in order to ensure payment of the annually adjusted fee until such time that conservation easements are actually purchased with the adjusted fee. Under this alternative, any deficit between the fee paid and the adjusted fee will be paid to the City by the developer.

- (a) **Findings.** The Fee Guarantee Alternative is rejected as an alternative because it would not achieve project objective 1.
- (b) **Explanation.** This alternative would result in a similar short-term impact as the proposed project because a time gap between when the fee is paid and when conservation easements are purchased would still occur. However, smaller projects (fewer than 40 acres) that request a tentative subdivision map would be required to provide a guarantee that any deficit between the fee collected and the actual cost of habitat conservation lands will be paid by the developer. As a result, this alternative would slightly reduce long-term environmental effects resulting from a potential disparity between the fee paid and the actual cost of purchasing the conservation easement. However, this alternative would not achieve the City's objective of ensuring that impacts to Swainson's hawk foraging habitat are addressed and mitigated on an equitable basis, because smaller projects that do not request a tentative map would not be held to the same standards as other, larger projects, while the loss of hawk habitat remains the same.

For the reasons stated above, the Fee Guarantee Alternative was found to be environmentally superior to the proposed project but was rejected as infeasible.

## 5. Alternatives Considered But Removed From Further Consideration

A Notice of Preparation was circulated to the public to solicit recommendations for a reasonable range of alternatives to the proposed project. No other specific alternatives were recommended by commenting agencies or the general public during the NOP public review process.

## 6. Environmentally Superior Alternative

CEQA requires that an environmentally superior alternative be identified among the alternatives that are analyzed in the EIR. If the No Project Alternative is the environmentally superior alternative, an EIR must also identify an environmentally superior alternative among the other alternatives (CEQA Guidelines Section 15126(e)(2)). The environmentally superior alternative is that alternative with the least adverse environmental impacts when compared to the proposed project.

As summarized in Table 5-5 of the Draft EIR, Alternative 2 (Land Conservation Alternative) was determined to be the environmentally superior alternative because it provides the greatest reduction of potential impacts as compared to the other alternatives. Alternative 4 (Fee Guarantee Alternative) is the second best alternative in terms of environmental impacts.

## VII. STATEMENT OF OVERRIDING CONSIDERATIONS RELATED TO THE ELK GROVE SWAINSON'S HAWK HABITAT FEES PROJECT CEQA FINDINGS

As set forth in the preceding sections, the City Council's approval of the Elk Grove Swainson's Hawk Habitat Fees project will result in two significant adverse environmental effects related to the potential for fluctuations in market conditions to result in a preservation ratio of less than one-to-one acre preserved per acre affected. There are no feasible mitigation measures or project alternatives that would mitigate or substantially lessen these impacts. Despite the occurrence of these significant effects, however, the City Council chooses to approve the project because, in its view, the environmental, social, and other benefits of the project will render the significant effects acceptable.

In making this Statement of Overriding Considerations in support of the Findings of Fact and the project, the City Council has considered the information contained in the EIR for the project. The City Council has balanced the project's benefits against the unavoidable adverse impacts identified in the EIR.

The following statement identifies the reasons why, in the City Council's judgment, the benefits of the project, as approved, outweigh the two unavoidable significant effects. Any one of these reasons is sufficient to justify approval of the project. Thus, even if a court were to conclude that not every reason is supported by substantial evidence, the City Council would stand by its determination that each individual reason is sufficient. The substantial evidence supporting the various benefits can be found in the preceding findings, which are incorporated by reference into this section.

The proposed project provides a unique opportunity for the City to achieve a variety of important goals that will benefit both the city and the region. Some of the project benefits include the following:

- **Ensure mitigation of impacts to Swainson's hawk foraging habitat.** The proposed project would amend the City's existing fee structure to reflect the current market costs to conserve suitable habitat and monitor and administer the fee program. This amendment would ensure that adequate fee revenues are obtained to purchase sufficient conservation easements and ensure that impacts to Swainson's hawk foraging habitat are mitigated at a one-to-one ratio as required by Elk Grove Municipal Code Chapter 16.130.040(a) and consistent with the mitigation requirements of the California Department of Fish and Game.
- **Address market fluctuations.** The proposed project would amend the City's existing fee structure to include an annual adjustment to the fee based on a specific cost or price index. This would ensure that the fee program can respond to future fluctuations in market conditions and

avoid revenue shortages that could inhibit the City's ability to adequately mitigate impacts to Swainson's hawk foraging habitat.

- **Provide clear and specific method of mitigation for small projects.** Development projects that would result in the loss of Swainson's hawk foraging habitat would be required to mitigate for the impact either through payment of a development impact fee or conservation of suitable habitat lands. Small projects (40 acres or smaller), for which on-site conservation of suitable habitat lands is less feasible, would be provided with a clear and specific method for mitigation through the payment of a development impact fee.

## CONCLUSION

Based on the objectives identified for the project, review of the project, review of the EIR, and consideration of public and agency comments, the City has determined that the project should be approved and that any remaining unmitigated environmental impacts attributable to the project are outweighed by the specific environmental, social, and other overriding considerations. The project's residual environmental impacts, as described in the EIR and these Findings, are minor in comparison to the environmental, financial, and equity benefits obtained by updating the fee program as proposed. The project refines the program to ensure its continued success and the fairness in its application. As such, the program is better positioned to effectively mitigate for habitat and protect Swainson's hawks.

The City has determined that any environmental detriment caused by the Elk Grove Swainson's Hawk Habitat Fees project has been outweighed and counterbalanced by the significant environmental and financial benefits that would result from implementation of the project.



## **EXHIBIT B**

# **MITIGATION MONITORING AND REPORTING PROGRAM**

**MM 3.1.** On or before August 1 of each year, the Planning Director shall report to the City Council on the implementation of Chapter 16.130. The report shall include the following:

1. Project Applicant Habitat Conservation Purchases: Identification of habitat preserved pursuant to Sections 16.13.010 (A and C).
2. Impact Mitigation Fees:
  - a. Identification of projects (location, acreage, habitat description, proximity to closest known Swainson's hawk nest) that paid the mitigation fee pursuant to Section 16.13.010 (B and C).
  - b. Identification of land conserved pursuant to Section 16.130.080, including location, acreage, habitat description, and proximity to closest known Swainson's hawk nest.
  - c. Identification by allowed use (habitat purchase, administration, monitoring) of (i) the total amount in the impact mitigation fee fund; (ii) amount collected over the last year; (iii) amount expended over the last year; and (iv) amount planned for expenditure in the future year.
3. Identification of Issues: The report shall address potential issues associated with Chapter 16.130, including whether the fee amount is generally proportional to the cost of suitable foraging habitat; the progress the City is making in spending collected funds and preserving habitat; and any issues with the monitoring of conserved habitat lands. If any issues are identified that pose a substantial impediment to the ongoing use of Chapter 16.130 to mitigation for impacts to Swainson's hawk foraging habitat as described in Section 16.130.010, potential resolutions to the issues shall be identified and appropriate action taken within six months.

**CERTIFICATION  
ELK GROVE CITY COUNCIL RESOLUTION NO. 2011-187**

**STATE OF CALIFORNIA            )**  
**COUNTY OF SACRAMENTO        )        ss**  
**CITY OF ELK GROVE             )**

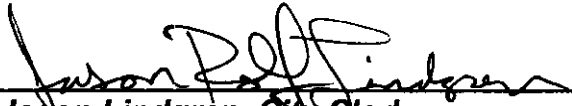
***I, Jason Lindgren, City Clerk of the City of Elk Grove, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Elk Grove at a regular meeting of said Council held on September 28, 2011 by the following vote:***

**AYES :        COUNCILMEMBERS:        *Detrick, Cooper, Davis, Hume, Scherman***

**NOES:        COUNCILMEMBERS:        *None***

**ABSTAIN :   COUNCILMEMBERS:        *None***

**ABSENT:     COUNCILMEMBERS:        *None***

  
**Jason Lindgren, City Clerk  
City of Elk Grove, California**