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Mayor Patrick Hume and Councilmembers  
City of Elk Grove  
8380 Laguna Palms Drive  
Elk Grove, CA 95758

via delivery at Council meeting

RE: City Council Regular Meeting 1/28/09, Agenda item 8.1.  
Proposed revision of Elk Grove Code 16.130, Swainson's Hawk Ordinance  
Environmental Impact Report is required

Dear Mayor Hume and Councilmembers,

I represent Friends of the Swainson's Hawk. Tonight staff will present for Council discussion and direction (but not for action) some proposed amendments to Elk Grove's Swainson's Hawk Mitigation Ordinance (Elk Grove Code 16.130), which applies to any project which has been determined through the CEQA process to result in a potential significant impact or significant cumulative impact on Swainson's Hawk foraging habitat. The current Ordinance provides that conversion of any undeveloped parcel which is five acres or greater in size from agricultural designation to non-agricultural use incompatible with Swainson's Hawk foraging (e.g.: urban development) must be mitigated by either (1) acquisition of one parcel of mitigation land to be preserved by fee title or conservation easement for SWH foraging purposes, or, (2) in the case of projects smaller than 40 acres, by payment of a fee which is sufficient to acquire one acre of mitigation land for every acre converted to non-agricultural use.

The revisions, affecting Elk Grove east of Highway 99, are purportedly intended to address the perceived inequity of requiring full 1 to 1 mitigation (by acquisition or fee) for development of smaller undeveloped parcels (between 5 and 40 acres) surrounded by developed parcels which may have substantially reduced the SWH foraging value of the isolated vacant small parcels. However, the proposed revisions do not address the "small parcel" issue. Instead, the revisions would establish a greatly reduced mitigation ratio lacking biological basis, fails to mitigate impacts of loss of Swainson's Hawk foraging habitat to less than significant, and greatly reduces or eliminates mitigation for future development on some large undeveloped parcels.

**The proposed revisions of the Ordinance are a "Project" under CEQA which requires an Environmental Impact Report** before adoption of the revisions. Adoption of an ordinance which has potential for resulting in direct or indirect physical change in the environment is an "activity" by local government which is a "project" subject to CEQA. Public Resources Code §21065(a), CEQA Guideline §15378(a). See *Rosenthal v Board of Supervisors* (1975) 44 Cal. App., 3d 815, 823; *Apartment Association of Greater Los Angeles v City* (2001) 90 Cal., App. 4th 1162, 1172-1173 ("ordinances passed by cities are clearly activities undertaken by a public agency and thus projects under CEQA"); 60 Ops. Cal. Atty. Gen. 335 (1977) ("ordinances and resolutions adopted by a local agency are projects within the meaning of CEQA").

"A lead agency shall find that a project may have a significant impact on the environment and thereby require an EIR to be prepared for the project" where the project has the potential to "substantially reduce the habitat of a fish or wildlife species" or "reduce the range of an endangered, rare or threatened species". CEQA Guideline §15065.

The proposed revisions have the potential for physical change on the environment and to substantially reduce the habitat of endangered Swainson's Hawk as follows; Due to the sizeable number of Swainson's Hawk nests within five miles of the affected area, conversion of any area of Swainson's Hawk foraging habitat (e.g.: any undeveloped land) in Elk Grove to urban development would directly and cumulatively substantially reduce the habitat and range of Swainson's Hawks using that area to forage for rodents to feed nestlings. Nest starvation is a leading cause of mortality of Swainson's Hawk nestlings. The current Elk Grove Swainson's Hawk Ordinance reduces the effect of future conversion of undeveloped land to urban use by requiring the permanent preservation of an equal amount of suitable agricultural land which is permanently restricted to uses which are compatible with Swainson's Hawk foraging. The proposed revisions to the Ordinance will decrease and in some cases eliminate the preservation of compensatory mitigation habitat when there is future urbanization and thus lead to increased impacts on the Swainson's Hawk (e.g.: increased nest mortality).

Adoption of the proposed revisions without a full EIR could expose the adoption of the Ordinance and individual projects affected by the proposed revised Ordinance to legal challenge under CEQA, which requires that project impacts be mitigated to less than significant or, if infeasible, then to the maximum extent feasible.

Please understand that 1 to 1 mitigation for loss of Swainson's Hawk foraging habitat does not fully compensate. A mitigation ratio of 1 to 1 means that (1) if there are 100 undeveloped acres suitable for Swainson's Hawk foraging, and (2) if 50 are developed and 50 permanently preserved for Swainson's hawk foraging, then net result is that there are 50 acres of Swainson's hawk habitat instead of the former 100 acres. The 50 mitigation acres are permanently preserved against future development, but there is not full compensation of lost habitat values unless the habitat value of the mitigation land is

doubled, so that the enhanced 50 acre mitigation parcel provides the level of habitat values formerly provided by the original 100 undeveloped acres. In the real world, enhancement of habitat values is very often infeasible even when the mitigation land is actively managed for habitat values by a conservation organization, due to constraints of soil conditions, economics, etc, and is impossible where the mitigation habitat is private commercial farmland subject to a conservation easement that prevent incompatible uses but cannot otherwise dictate the landowner's use of the property.

My client is willing to work with the City and California Department of Fish and Game to help formulate revisions that would address concerns about equitability in certain areas, while continuing to mitigate for habitat loss to the extent required by the current ordinance.

Respectfully submitted,

James P. Pachl