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A D D E N D U M

For the Agenda of:
May 11, 2005
Agenda Item No. 21

TO: BOARD OF SUPERVISORS

ON: **SWAINSON'S HAWK ORDINANCE - 05-POB-0230**

ASSESSOR'S PARCEL NO.: County Wide

- REQUEST:
1. **Amend** the Swainson's Hawk Impact Mitigation Fees Ordinance (Chapter 16.130) as identified in Alternative #1 of the program issues section of the April 27, 2005 staff report to address fees, provide coverage for the entire unincorporated County and require up-front land acquisition for projects 20 acres and larger.
 2. **Introduce** the attached Swainson's Hawk Impact Mitigation Fees Ordinance (Attachment A), waive the full reading and continue two weeks for adoption. This Ordinance amends Sacramento County Code, Section 16.130.
 3. **Adopt** the resolution adjusting the various fees associated with the Ordinance (Attachment B from 4/27/05 staff report).
 4. **Direct Staff** to return at a later date to address the Agreement for Funding and Acquisition of Swainson's Hawk Foraging Habitat (Agreement) among the California Department of Fish and Game (DFG), The Nature Conservancy (TNC) and the County of Sacramento (County).

ENVIRONMENTAL DOCUMENT: **CATEGORICAL EXEMPTION**

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I. BACKGROUND:

On April 27, 2005, the Planning and Community Development Department presented this item to your Board, at which time you also accepted public testimony. A number of issues were raised and the Planning Department was directed to return with a report back on May 11, 2005.

The Board requested:

- A more detailed analysis of the criteria for selecting the 20-acre cutoff for the fee option
- Exploration of the possibility of indexing the fee for periodic adjustments
- A consideration of out-of-County mitigation
- A brief overview of the monies in the Swainson's Hawk Trust Fund

Mr. Jim Pachl, representing Friends of the Swainson's Hawk and the Sierra Club, testified and submitted a comment letter (Attachment B) containing some suggested revisions for the proposed ordinance amendment. The Building Industry Association (BIA) expressed a desire to have the easements be one-party instead of three-party in their letter submitted at the time of the hearing (Attachment C) and in testimony.

II. ANALYSIS:

A. 20-Acre vs. 40-Acre Cutoff

Planning staff recommends using a 20-acre cutoff instead of the 40-acre cutoff utilized recently by the City of Elk Grove. In order to assist the Board in making a final determination on an appropriate cutoff, the Department has analyzed two indicators in regards to this recommendation. The first analysis is of the acreage size of all residential development projects in the pipeline at this time. The results of this analysis are summarized in the following table.

The second table shows Swainson's Hawk fees collected to-date and the project acreages associated with those fees.

Residential Acreage in the Pipeline				
Acreage Range	Number of Projects	Percentage of Projects	Total Acreage	Percentage of Acreage
Less than 20	59	59%	421	14%
20 to less than 40	13	13%	392	13%
40 and above	28	28%	2138	73%
Grand totals	100	100%	2950	100%

* this figure does not include the acreage in the Easton project or the Elverta Specific Plan.

Swainson's Hawk Fee Project Sizes				
Acreage Range	Number of Projects	Percentage of Acreage	Total Acreage	Percentage of Acreage
Less than 20	60	73%	548	31%
20 to less than 40	11	13.5%	320	18%
40 and above	11	13.5%	902	51%
Grand totals	82	100%	1769	100%

The two tables above show that the majority of projects are less than twenty acres in size while the majority of the acres developed are by relatively few projects that are greater than forty acres in size. The projects between twenty and forty acres in size are limited in numbers and represent the smallest acreage values of the three categories.

B. Swainson's Hawk Trust Fund

The Board requested a briefing on the monies collected by the Swainson's Hawk Trust Fund under the past fee structure. The following table shows the amount of money collected at each fee amount and the monies spent so far on acquisition.

Swainson's Hawk Trust Fund Fees and Withdrawals		
	Fees Collected	Withdrawals for Acquisition
Fees Collected from 1988 to September 2003 @ \$750/acre	\$ 1,134,619	\$ 832,964
Fees Collected from August 2003 to April 26, 2005 @ 2500/acre + 333/acre O&M	\$ 432,329	\$ 480,000 (approximate) Pending
Fees Collected since April 26, 2005 @ 2500/acre + 333/acre O&M	\$ 434,866	0
Total	\$ 2,001,814	1, 312,964

C. Real Estate Value Indexing and Our Recommendation to Set Fees by Resolution

The Planning Department has explored the idea of trying to create an index of land values that could be used to regularly and systematically update the Swainson's Hawk fee in order to compensate for changes in land values. We have been unable to identify an effective measure by which to compare land prices in real time for rural areas that can reflect the speculative nature of the land market the Sacramento region is facing. In addition, an index would not make up for the difference in land values between the time of fee payment by the applicant and the time when the County and its conservation partners could arrange a purchase.

Staff recommends setting the various Swainson's Hawk program fees by resolution instead of through ordinance. By switching the fees from ordinance based to resolution based, staff can periodically review land prices and recommend adjustments in fees to the Board. This adjustment would simplify the process and avoid a rush of fee payments during the ordinance amendment waiting period.

As an example we just received a payment of \$413,618 to mitigate for 146 acres. If that payment were made at the level of fees recommended today, it would have been \$2,682,750. The later figure more closely represents what it will take, at today's prices, for our conservation partners to acquire and manage a 146-acre mitigation site. This circumstance illustrates two benefits of the amendment. First, the large size of the project would have required they acquire their own land.

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Second, if they were of a size to access a fee, by adopting fees by resolution we would prevent future projects that have a fee option from rushing in to pay before the new fees took effect.

D. Three Party Easements

The BIA's letter indicates that they would prefer one-party conservation easements and questions the need for three-party easements. Under the current ordinance, the following three parties are required: the Nature Conservancy (or equivalent), DFG and Sacramento County. Three-party easements place extra assurances on the guarantee that the property will remain protected in perpetuity, since the easement would require the agreement of all three parties before the property could be transferred or the easement modified. Also the three-party easement helps to ensure continuity and stability of the preserve system should one of the partners cease to exist. Lastly, there is a good chance that without an in perpetuity, three-party easement in place on existing preserves, the South Sacramento Habitat Conservation Plan would not be able to accept and receive credit for the properties acquired under the Swainson's Hawk Program.

E. Language Changes to the Ordinance – Friends of the Swainson's Hawk Letter

Below is a discussion of staff recommendations relative to a letter submitted by Mr. Jim Pachl, representing Friends of the Swainson's Hawk and the Sierra Club (Attachment C).

- Mr. Pachl opposes the fee option for projects 20 acres or less. As indicated above, the BIA would like to see the fee cutoff point at the larger size of 40 acres. The Department recommended a 20-acre cutoff.
- In items 1 thru 4 of Mr. Pachl's letter, he suggests certain clarifying language to the ordinance which strengthens the concept that both the County and DFG must approve of purchases and easement language. Additionally per his comments we want to clarify section 16.130.040(A)(1)(a)(x) to clearly say that the interest in a property shall be transferred to an entity acceptable to the County or to the County itself. These have been added to the amendment ordinance language in 16.130.040(A)(1)(a)(xi),(iv),(vi) and (x){Attachment A}.
- Mr. Pachl, in item #5, requests mitigation occur in areas nearby where the development will occur, planners will be working with DFG to develop a map indicating where mitigation can occur.

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- Item #6 calls for the County not to permit any development in the Swainson's Hawk Zone identified by the Natomas Basin Habitat Conservation Plan (NBHCP). This restriction would not be consistent with our Garden Highway Special Planning Area, the Agricultural-Residential designations, or the Public/Quasi Public designation of the International Airport that are shown on the County's 1993 General Plan Land Use Diagram. Staff doesn't support this request.
- Item #7 addresses the issue of "double-counting", which is allowing one property to serve the mitigation needs of multiple species. The Department does not wish to prevent a property from being used as both Swainson's Hawk and wetlands mitigation, for example, and therefore does not support Mr. Pacht's request.

In Mr. Pacht's conclusion he recommends the County operate a land bank in order to always stay ahead of mitigation. Board members expressed some support for this idea, but stated that the County should not be the manager of the bank.

F. Out-of-County Mitigation

As mentioned above and in the April 27, 2005 staff report, suitable mitigation lands for the Swainson's Hawk in the North Area are becoming limited. There has been some discussion of allowing out-of-County mitigation. However, by preserving as much land as possible inside the County at this time, we reduce the amount land that will have to be acquired when the South Sacramento Habitat Conservation Plan comes on-line. Also the lands preserved will serve as an amenity for our County residents and agri-tourists giving them relief from the developed landscape.

G. Conservation Easement Template

The Planning Department has a sample easement on file and will coordinate with County Counsel, the Department of Real Estate, DFG and our conservation partners to update the template and make it available to applicants.

H. Operations and Management Fee

This fee sets ceilings on what amount our conservation partners can require when we accept easement or fee title. It is also part of the reserve needed to defend the easement or title should it be challenged or need modification. It is the same fee adopted by the City of Elk Grove a few months ago. There are other methods for calculating endowments for conservation easements. For example the Center for Natural Lands Management produces computer software that will calculate these

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fees on a case-by-case basis based on certain parameters. Utilization of such software is a possibility and our conservation partners already use it for other land deals outside of the Swainson's Hawk Program. To utilize this software would however leave the issue of a maximum fee open ended and remove some financial certainty from the process for developers and would slow down the approval process.

The Department has become aware of a potential issue with the calculation of the percentage based fee. If a person had bought a property ten years ago for a very low price and held that property until now and they used it for mitigation for some other property they were developing, they would have a management and operations fee calculated on a very low sales price. This is not the intent of the current amendment and therefore staff has modified the new ordinance to address this by requiring properties that have not sold in the 365 days prior to the transfer of the title or easement to the Swainson's Hawk Program to obtain an appraisal. The fee would then be then based on the appraised value at the same percentages as if the property was just sold within the 365 days prior.

III. CONCLUSION:

Staff recommends that your Board approve the revised ordinance as provided in Attachment A. This would allow fees to be set by resolution, provide coverage for the entire unincorporated County and require up-front land acquisition for projects 20 acres and larger. Additionally staff recommends your Board adopt the resolution setting the new Swainson's Hawk Program fees. Finally, we ask that you direct staff to address the Agreement between the County and the Nature Conservancy and to include the Sacramento Valley Conservancy as another of our conservation partners.

In the event that your Board chooses not to amend the Swainson's Hawk Ordinance as described above, we recommend the immediate repeal of the existing Swainson's Hawk Ordinance in order to cease the collection of an inadequate mitigation fee and address legal liability issues. The steps to repeal the ordinance are described below.

Introduce the attached Swainson's Hawk Impact Mitigation Fees Ordinance (Attachment I from 4/27/05 staff report), waive the full reading and continue for two weeks for adoption. This Ordinance repeals Sacramento County Code, Section 16.130.

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IV. ATTACHMENTS:

- A. Swainson's Hawk Ordinance Amendment
- B. Letter from Jim Pachl
- C. Letter from Building Industry Association

This report was prepared by John Lundgren.

5/9/05

SCC NO. _____

AN ORDINANCE AMENDING CHAPTER 16.130, SECTIONS 16.130.010 THROUGH 16.130.130, TITLE 16 OF THE SACRAMENTO COUNTY CODE RELATING TO SWAINSON'S HAWK IMPACT MITIGATION FEES.

The Board of Supervisors of the County of Sacramento, State of California, ordains as follows:

SECTION 1: Chapter 16.130, Sections 16.130.010 through 16.130.130, of Title 16 is hereby amended to read as follows:

16.130.010 Purpose and Intent.

The Board of Supervisors finds that the continued expansion of urban and agricultural-residential uses into the agriculturally zoned lands of within the Urban Services Boundary of Sacramento County ("County") that are identified through the California Environmental Quality Act ("CEQA") process or by appropriate regulatory agencies to provide suitable foraging habitat for the Swainson's hawkHawk, 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 hawkHawk foraging habitat or through requests for land use entitlements for non-agricultural uses that are incompatible with the maintenance of Swainson's hawkHawk foraging habitat. The California Department of Fish and Game ("DFG") has determined that parcels of land of five 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 hawkHawk. For any such requests on parcels located within the Urban Services Boundary, as the defined boundary of urban development under the 1993 General Plan, which are in excess of one mile of a Swainson's hawk nest which nest is outside of the Urban Services Boundary and which fall within the geographical scope and application of this Chapter, which are within ten (10) miles of a Swainson's Hawk nest the Board of Supervisors desires to establish an additional means of mitigating for loss of Swainson's hawkHawk foraging habitat.

Conservation Element Policy CO-68 of the General Plan, provides that the County shall support and facilitate the creation of large natural preserves. In furtherance thereof, the Board of Supervisors has identifieddetermined, in consultation with DFG, that suitable foraging habitat for the Swainson's Hawk exists in both established land conservation programs in South Sacramento County which includes existing and potential foraging habitat for the Swainson's Hawk, and also in agricultural and open lands currently not part of a conservation program.hawk. The Board of Supervisors 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 basis based on gross project size. 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 conservation easements) that will ensure the preservation of Swainson's Hawk foraging habitat in perpetuity. The Board of Supervisors also finds that it may be infeasible to acquire easements for less than twenty (20) acres and proponents of projects that consist of parcels less than twenty (20) acres in size 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~~Hawk foraging habitat values, ~~within the boundaries of these conservation programs.~~ Such acquisition will create mitigation for the loss of this habitat as well as implementing CO-68 by protection of open space and agricultural land 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~~Hawk foraging habitat.

The Board of Supervisors recognizes that mitigation for foraging habitat for the Swainson's ~~hawk~~Hawk is only feasible when replacement habitat is provided within the known foraging ~~arearadius~~radius for the ~~hawkhawk~~Hawk. ~~The Board of Supervisors recognizes that Swainson's hawk foraging habitat that is beyond the foraging radius for those nests located along the Cosumnes and Deer Creek rivers cannot be adequately mitigated through acquisition of foraging habitat lands inside the Cosumnes or Deer Creek river preservation areas. The Board of Supervisors recognizes that acquisition options within a limited geographical boundary and constraints by uses not conducive to Swainson's hawk foraging habitat do not provide adequate mitigation opportunities. The Board of Supervisors also acknowledges that the mitigation fee amount established in this Chapter is only viable due to the existence of these specific, established land conservation programs, which include an existing system of land management practices, thus alleviating the necessity of requiring additional monies or a higher mitigation fee in order to enhance, manage and maintain foraging habitat acquired pursuant to this Chapter. Therefore, in order to provide adequate mitigation for the loss of Swainson's hawkHawk foraging habitat pursuant to under CEQA, through the collection of a themitigation fee acquisition of mitigation habitat either by procurement of a conservation easement or by fee title is necessary. Further, the Board of Supervisors deems it necessary to include within the scope of possible mitigation sites this mitigation fee program parcels that are located within the geographical foraging arearadius of the Swainson's Hhawk in the unincorporated County, south of the American River, including areas outside the Urban Services Boundary, excluding the City of Galt's Sphere of Influence.16.130.010 that are and that are owned and/or managed by a conservation organization at wherein the a location of the mitigation parcel and the conservation organization are is acceptable to DFG.~~

The Board further finds that the direct preservation of suitable Swainson's Hawk foraging habitat or the is payment of an impact mitigation fee 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~~Hawk foraging habitat to a less than significant level for those parcels falling within the scope of this Chapter as set forth herein. The Board of Supervisors intends that the requirement of direct preservation of suitable Swainson's

[Hawk foraging habitat for projects twenty \(20\) acres and larger and the requirement of an impact mitigation fee for projects less than twenty \(20\) acres](#), in the amount set forth in this Chapter, shall be included as one of the mitigation options. Said mitigation shall arise when the environmental review process for a request falling within the scope of this Chapter concludes there would be a significant impact or a significant cumulative impact on the Swainson's [hawkHawk](#) foraging habitat for which mitigation, pursuant to all applicable provisions of the Public Resources Code [Ssection 21000 et seq.](#) and the California Code of Regulations, Title 24, [Ssection 15000 et seq.](#), is required. The Board also recognizes its continued authority to determine, based on specific economic, social, legal, technical or other considerations, that mitigation for Swainson's [hawkHawk](#) foraging habitat is infeasible or that evidence has been presented to the Board, which the Board determines eliminates the need for such mitigation.

16.130.020 Definitions.

"Agricultural Designation" means land which is zoned any of the following zoning designations or combinations thereof: AG-160, AG-80, AG-40, AG-20, UR, IR, AR-10, AR-5, A-80, A-20, A-10.

"CEQA" means the California Environmental Quality Act.

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

["Habitat Conservation Plan \(HCP\)" means any plan, approved by the United States Fish and Wildlife Service \(USFWS\) designed to protect one or more species in exchange for a take permit issued by the \(USFWS\) for certain species.](#)

["Habitat Conservation Plan \(HCP\) area" means the area identified within an individual HCP including both the areas covered for take as well as for reserves for that particular HCP.](#)

["Project" shall mean the total combined gross acreage of a parcel or parcels included in a development proposal subject to CEQA review.](#)

"Urban Services Boundary" means that boundary identified in the Land Use Element of the 1993 General Plan as the ultimate boundary of the urban area in the unincorporated County for purposes of the 1993 General Plan policies and goal.

"Urban Designation" means 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.

16.130.030 Applicability.

[aA.](#) This ~~chapter~~[Chapter](#) shall apply to any of the following requests for which all of the criteria set forth in subsection ([Bb](#)) have been satisfied:

1. To any request for a change in land use designation from an Agricultural Designation to an Urban Designation, or
2. To any request to subdivide five acres or more of contiguous land zoned AR-1 or AR-2, or
3. To any request for a land use entitlement for a non-agricultural use of land zoned with an Agricultural Designation, or

4. To any request for a land use entitlement for a non-agricultural use of land five acres or more in size zoned AR-1 or AR-2, or

5. To any public improvement project proposed by any department or agency of Sacramento County on land with an Agricultural Designation, or

6. To any request to subdivide five (5) acres or more of contiguous land zoned as an Urban Designation to less than five (5) acres.

bB. This Chapter shall apply to any request falling within subsection (a) for which all of the following criteria have been satisfied:

1. The entire underlying parcel(s) for the request are located within the defined scope of this Chapter as set forth in subsection (c) hereof,

2. The underlying parcel(s) for the request are identified through the CEQA process, based on the DFG staff report regarding mitigation for impacts to Swainson's ~~hawk~~Hawks in the Central Valley of California, to provide suitable Swainson's ~~hawk~~Hawk foraging habitat, and

3. Following consultation with DFG, it has been determined through the CEQA process that the request will result in a significant impact or significant cumulative impact on Swainson's ~~hawk~~Hawk foraging habitat for which mitigation measures have been identified as necessary to reduce that impact to a less than significant level.

cC. The scope of this Chapter encompasses any ~~project~~parcel located entirely within that portion of the unincorporated area of Sacramento County ~~bounded by the American River to the north and the county to the west, south and east., not in an approved Habitat Conservation Plan area that addresses Swainson's Hawk.~~

16.130.040 Conditions.

aA. On and after the effective date of this Chapter, for any request falling within the provisions of Section 16.130.030 of this Chapter, one of the following two mitigation measures shall be included within the mitigation measure options identified to reduce the impact to Swainson's Hawk foraging habitat of that particular request to a less than significant level: ~~Prior to Improvement Plan approval or Building Permit issuance, whichever occurs first, the property owner/developer shall submit payment of the Swainson's hawk impact mitigation fee per acre impacted to the Department of Planning and Community Development in the amount as set forth in Chapter 16.130 of the Sacramento County Code as such may be amended from time to time and to the extent that said Chapter remains in effect.~~

1. For projects 20 acres or more in size:

a. 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 acquire suitable Swainson's Hawk foraging habitat, as determined by DFG and approved by the County.

i. The project applicant shall preserve through conservation easement(s) or fee title one (1) acre of similar habitat for each acre developed.

ii. The land to be preserved shall be deemed suitable Swainson's Hawk foraging habitat by DFG.

iii. The project applicant shall transfer said easement(s) or title to the County, DFG and a third party conservation organization as acceptable to the County and DFG. The County may, at its discretion, waive the requirement for a third party conservation organization to be party to the easement or fee title. Such third party conservation

organizations shall be characterized by non-profit 501(C)(3) status with the Internal Revenue Service and be acceptable to both the County and DFG.

iv. All owners of the mitigation land shall execute the document encumbering the land, including lien holders with right of foreclosure senior to the conservation easement.

v. The document shall be recordable and contain an accurate legal description of the mitigation land.

vi. The document shall prohibit any activity which substantially impairs or diminishes the land's capacity as suitable Swainson's Hawk foraging habitat and the content and form of the document must be acceptable to the County and DFG.

vii. 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.

viii. The applicant shall pay to the County a mitigation operations and maintenance 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 or purchase price paid by the applicant, or a different amount approved by the Board of Supervisors, not to exceed 15% of the easement or purchase price paid by the applicant. If the land in question has not been sold in fee title or by easement in the last year 365 days from the date of transfer to the County or its conservation partner, then the fee shall be calculated based on a current appraisal for the purchase price of the land not to exceed 10% of that appraised value or a different amount approved by the board of supervisors, not to exceed 15% of the appraised value.

ix. The entity shall not sell, lease, or convey any interest in mitigation land which it acquires without the prior written approval of the County and DFG and the County shall be named a beneficiary under any document conveying the interest in the mitigation land to an entity acceptable to the County.

x. 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 County or transferred to the County itself.

xi. Before committing to the preservation of any particular land pursuant to this measure, the project proponent shall obtain the County's and DFG'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 DFG to be suitable Swainson's hawk habitat.

2. For Projects less than 20 acres in size:

a. 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 acquire suitable Swainson's Hawk foraging habitat, as determined by DFG and approved by the County.

i. The project applicant shall preserve through conservation easement(s) or fee title one (1) acre of similar habitat for each acre developed.

ii. The land to be preserved shall be deemed suitable Swainson's Hawk foraging habitat by DFG.

iii. The project applicant shall transfer said easement(s) or title to the County, DFG and a third party conservation organization as acceptable to the County and DFG.

The County may, at its discretion, waive the requirement for a third party conservation organization to be party to the easement or fee title. Such third party conservation organizations shall be characterized by non-profit 501(C)(3) status with the Internal Revenue Service and be acceptable to both the County and DFG.

iv. All owners of the mitigation land shall execute the document encumbering the land.

v. The document shall be recordable and contain an accurate legal description of the mitigation land.

vi. The document shall prohibit any activity which substantially impairs or diminishes the land's capacity as suitable Swainson's Hawk foraging habitat.

vii. 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.

viii. The applicant shall pay to the County a mitigation operations and maintenance 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 or fee title price paid by the applicant, or a different amount approved by the Board of Supervisors, not to exceed 15% of the easement or fee title price paid by the applicant.

ix. The entity shall not sell, lease, or convey any interest in mitigation land which it acquires without the prior written approval of the County and DFG and the County shall be named a beneficiary under any document conveying the interest in the mitigation land to an entity acceptable to the County.

x. 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 County or to the County.

xi. Before committing to the preservation of any particular land pursuant to this measure, the project proponent shall obtain the County'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 DFG to be suitable Swainson's hawk habitat.

b. Or, as an alternative, for projects less than twenty (20) acres in size:

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 a Swainson's Hawk impact mitigation fee per acre of habitat developed to the County in the amount set forth in Chapter 16.130.050 of the Sacramento County Code as such may be amended from time to time and to the extent that said chapter remains in effect.

bB. The requirement for direct land preservation or payment of an impact mitigation fee established pursuant to this Chapter is also applicable to those requests for a change in land use designations or grants of land use entitlements that were granted 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 Board of Supervisors, 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.

16.130.050 Impact Mitigation Fee.

~~The fee of two thousand five hundred dollars (\$2,500.00) per acre of impact is hereby established. The Impact Mitigation Fee will be established by resolution of the Board of Supervisors.~~ This fee may from time to time be amended by resolution of the Board of Supervisors.

16.130.060 Time of Payment.

Payment in full of the impact mitigation fee established pursuant to this Chapter shall be required 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 approval of site improvement plans unless site improvement plan approval is not required, in which case payment in full shall be required prior to issuance of any building permits.~~ For projects falling under Section 16.130.040(~~b~~B), payment in full of the impact mitigation fee established pursuant to this Chapter shall be required prior to approval of site improvement plans unless such site improvements plans have already received final approval prior to the effective date of this ~~e~~Cchapter, in which case payment in full shall be required prior to issuance of any building permits. Election to mitigate impacts through payment of the impact mitigation fee must occur prior to the initiation of alternative mitigation measures.

16.130.070 Impact Mitigation Fee Credit.

Mitigation fee credit may be given for vernal pool or other preserves which contain suitable Swainson's Hawk foraging habitat, including preserves ~~that are~~ established pursuant to a previously County approved Mitigation Monitoring and Reporting Program for the subject parcel(s). Prior determination by DFG of the viability of the preserve for Swainson's Hawk foraging habitat is required ~~and p~~Preserves deemed viable by DFG shall receive credit on a 1:1 ratio. In the event that the credit received does not satisfy the acreage required for the mitigation obligation, additional mitigation shall be required through any of the other mitigation measure options identified in the applicable environmental report to the extent necessary to reduce the impacts on the Swainson's Hawk foraging habitat to a less than significant level.

16.130.080 Use of Impact Mitigation Fee Funds.

~~a~~A. The County shall establish a separate interest-bearing fund within the County Treasury, in which monies collected pursuant to this Chapter shall be deposited.

~~b~~B. Monies from said fund shall be transferred pursuant to the terms and conditions of the agreement entitled "Agreement for the Funding and Acquisition of Swainson's Hawk Foraging Habitat." Monies from said fund shall be used for the specific acquisition of lands, in fee simple or through a conservation easement, ~~that~~ which isarea located in the unincorporated County, ~~south of the American River,~~ outside the Urban Services Boundary, ~~excluding the City of Galt's Sphere of Influence.~~

~~c~~C. Pursuant to the terms and conditions of said Agreement, said lands shall be held in perpetuity for Swainson's Hawk foraging habitat.

16.130.090 Exemption.

Parcels included within the boundaries of an established habitat conservation plan area which provides for mitigation for Swainson's Hawk foraging habitat shall be subject to the mitigation provisions and requirements of that plan and shall not be subject to the provisions of this Chapter.

16.130.100 Administrative Fee.

An administrative fee ~~charged not to exceed \$382.00~~ per impact mitigation fee, easement or fee title submitted to County will be established by resolution of the Board of Supervisors ~~is hereby established~~ for the purpose of funding the costs of administering the Swainson's Hawk impact mitigation ~~fee~~ program established pursuant to this ~~c~~Chapter. Payment of this fee is in addition to the fee obligations established pursuant to Section 16.130.050 and 16.130.130 and shall be due and payable 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, at the time of approval of site improvement plans, unless site improvement plan approval is not required, in which case payment in full shall be required prior to issuance of any building permits. For projects falling under Section 16.130.040(~~b~~B), payment of this fee is in addition to the fee obligations established pursuant to Section 16.130.050 and shall be due and payable at the time of approval of site improvement plans unless such site improvements plans have already received final approval prior to the effective date of this Chapter, in which case payment of this fee in addition to the fee obligations established pursuant to Section 16.130.050 shall be required prior to issuance of any building permits. This fee may from time to time be amended by resolution of the Board of Supervisors.

16.130.110 Authority of Board to Override Mitigation Measures.

Nothing herein shall be construed to preclude the Board of Supervisors' consideration or approval of other means of mitigating significant impact or significant cumulative impact on Swainson's Hawk foraging habitat or to limit the Board's authority to override mitigation measures for reasons permitted by CEQA.

16.130.120 Authority of Director of Planning and Community Development Department to Accept Easements.

Authority on behalf of the County to accept easements ~~G~~granted ~~P~~pursuant ~~t~~to ~~t~~the ~~t~~terms ~~a~~and ~~c~~conditions ~~o~~of ~~t~~the ~~a~~agreement ~~e~~entitled "Agreement For The Funding And Acquisition Of Swainson's Hawk Foraging Habitat" ~~i~~is ~~H~~hereby ~~d~~delegated ~~t~~to ~~t~~the ~~d~~director ~~o~~of ~~t~~the ~~a~~and ~~c~~community development department, ~~S~~subject ~~t~~to ~~a~~approval ~~o~~of ~~C~~ounty counsel ~~a~~as ~~t~~to ~~f~~form.

16.130.130 Operations and Management Fee.

For projects utilizing the fee option of 16.130.050 ~~a~~An operations and management fee will be established by resolution of the Board of Supervisors of three hundred thirty-three dollars (\$333.00) per acre is hereby established for the purpose of reimbursing conservancies for their administrative costs incurred in acquiring and monitoring easements. Payment of the fee is in addition to the fee obligations established pursuant to Sections 16.130.050 and 16.130.100 and shall be due and payable 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 at the time of approval of site improvement plans, unless site improvement plan approval is not required, in which case payment in full shall be required prior to issuance of any building permits.~~ For projects falling under Section 16.130.040(B), payment of this fee is in addition to the fee obligations established pursuant to Section 16.130.050 and shall be due and payable at the time of approval of site improvement plans unless such site improvement plans have already received final approval prior to the effective date of this Chapter, in which case payment of this fee in addition to the fee obligations established pursuant to Section 16.130.050 shall be required prior to issuance of any building permits. This fee may from time to time be amended by resolution of the Board of Supervisors.

SECTION 2. This ordinance was introduced and the title thereof read at the regular meeting of the Board of Supervisors on _____ and on _____ further reading was waived by the unanimous vote of the Supervisors present.

This ordinance shall take effect and be in full force on and after thirty (30) days from the date of its passage, and before the expiration of fifteen (15) days from the date of its passage it shall be published once with the names of the members of the Board of Supervisors voting for and against the same, said publication to be made in a newspaper of general circulation published in the County of Sacramento.

On a motion by Supervisor _____, seconded by Supervisor _____, the foregoing ordinance was passed and adopted by the Board of Supervisors of the County of Sacramento, State of California, this ____ day of _____, 2005, by the following vote:

AYES: Supervisors,

NOES: Supervisors,

ABSENT: Supervisors,

Chairperson of the Board of Supervisors
of Sacramento County, California

(SEAL)

ATTEST: _____
Clerk of the
Board of Supervisors

w:\ordinances\2005\chapter 16.130 sh ordinance - strike-through.doc

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jpachl@sbcglobal.net

April 26, 2005

Sacramento County Board of Supervisors
700 H Street
Sacramento, CA 95814

FAX: 874-7593

RE: Amendment of Sacramento County Swainson's Hawk ("SWH") mitigation ordinance,
County Ordinance 16.130.080; **Board Agenda for April 27, 2005**, 3 p.m., Item 34.

Dear Chairman Dickinson and Supervisors Collin, McGlashan, Notolli, and Peters,

I am writing on behalf of my clients Friends of the Swainson's Hawk and Sierra Club, who strongly recommend that the Board adopted the proposed Amendment to its Swainson's Hawk Impact Mitigation Fee Ordinance, EXCEPT FOR the provision for payment of fees to mitigate for impacts of projects of 20 acres or less. My clients also urge that the Board consider the revisions suggested below. Staff should be commended for their excellent work. The existing SWH Mitigation Ordinance fails to mitigate, and does not meet the standards of CEQA and the California Endangered Species Act, for the reasons stated in my letter to Planning Director Robert Sherry, February 12, 2005

Some from the development community will object to the cost of providing suitable mitigation land in an amount equal to land developed. It should be remembered that the speculation-driven high cost of agricultural land in Sacramento County outside of the Urban Service Boundary has been driven, in part, by expectation of future urban development outside of the Urban Service Boundary, which is being advocated by some of the same parties who complain about the high cost of acquiring mitigation land.

We respectfully suggest the following revisions to the proposed Amendment, to clarify and strengthen, so as to better accomplish the County's goals. These suggestions were e-mailed to staff last week:

1. ADD to 16.130.040(A)(1)(a)(ii): "The location of proposed mitigation parcels must be approved in advance by DFG and the County;" or modify 16.130.040(A)(1)(a)(xi) to read "proponent shall obtain the County's and DFG's approval."
2. ADD to 16.130.040(A)(1)(a)(iv): after all owners of mitigation land, add "including lienholders with right of foreclosure senior to the conservation easement."

3. ADD to 16.130.040(A)(1)(a)(vi): "The content and form of the document must be acceptable to County and to DFG."
4. REVISION to 16.130.040(A)(1)(a)(x): It says that interest shall be transferred to another entity "acceptable to County or the County". Looks like clerical error, recommendation probably meant to say "transferred to another entity acceptable to the County and to DFG."
4. ADD to 16.130.040: "Recognizing Sacramento County's interest in preserving open space and creating natural preserves within Sacramento County (General Plan Policy CO-68), all mitigation land shall be located in Sacramento County."

I understand that this is the current practice, but it should be stated as a written policy.

5. ADD to 16.130.040: "Recognizing that mitigation for loss of SWH foraging habitat is best accomplished by preserving foraging habitat reasonably close to the nests of local populations of SWH impacted by the loss of habitat, and reasonably close to the site of the habitat lost. All SWH foraging habitat preserved to mitigate for loss of SWH foraging habitat south of the American River shall be located south of the American River. Mitigation parcels for loss of foraging habitat between the American and Cosumnes Rivers shall be located south of the American River and north of, or alongside, the Cosumnes River. Mitigation parcels for loss of foraging habitat south of the Cosumnes River shall generally be located alongside of, or south of, the Cosumnes River, at location approved by DFG. Mitigation parcels for loss of foraging habitat north of the American River shall be located north of the American River. Mitigation parcels for loss of foraging habitat in the Natomas Basin (in areas not covered by the Metro Air Park or Natomas Basin HCP) shall be located in the Natomas Basin, in Sacramento County."

(NOTE: The Natomas Basin and Metro Air Park HCP's require that all Natomas mitigation be within the Natomas Basin.)

6. ADD to 16.130.040: "Recognizing that in the Natomas Basin, the mitigation strategy of the Natomas Basin and Metro Air Park Habitat Conservation Plans designate a "Swainson's Hawk Zone", comprised of a mile-wide area, measured from the toe of the landward side of the Sacramento River levee, which parallels the Garden Highway from I-80 northward to the Natomas Cross-Canal (Natomas Basin HCP, p. V-10 and Figure 13; NBHCP Implementing Agreement, p. 36); and recognizing that the mitigation program of the Natomas Basin HCP states that it is essential that development within the SWH Zone be avoided to minimize and fully mitigate adverse impacts to SWH under the NBHCP (Natomas Basin HCP, p. VII-20); County shall not permit new development within the Swainson's Hawk Zone, including new agricultural residential development and parcel splits which would entitle new development or new agricultural-residential use, within the Swainson's Hawk Zone."

The above comments are applicable to equivalent sections of 16.130.040(B)(2) (projects of less than 20 acres.)

7. ADD to 16.130.070: "This provision shall not be construed to allow double-counting," or equivalent wording to make it clear that the same mitigation parcel cannot be credited as mitigation more than once. This is currently County policy, but it should be spelled out by ordinance.

My clients OPPOSE the provision for payment of fee in lieu of mitigation land for development of parcels of less than 20 acres. We understand the reasons, but experience has shown that the funds will likely remain in the bank while land prices increase. Administering these funds, looking for land, and negotiating price is yet another time-consuming task for County staff, who are forced to prioritize between tasks that must be done today, and tasks that can be done "later." We strongly urge that instead the County acquire, or arrange with a conservancy to acquire, a suitable area in south Sacramento County north of or next to the Cosumnes of several hundred acres which can be used as a "mitigation bank" for small projects of less than 20 acres, repaid with developer fees calculated on actual cost.

The Natomas Basin HCP requires that mitigation always remain 200 acres ahead of development, and presently is several hundred acres ahead, which provides the ability to mitigate with fees for small projects. Elk Grove recently adopted a fee ordinance for small projects, but is negotiating with TNC for the equivalent to a mitigation bank for small projects, reimbursed with small-project fees as they come in. We strongly urge that County explore similar arrangements.

Attached hereto is a separate e-mail message from Jude Lamare, President of the Friends of the Swainson's Hawk, dated April 19, 2005, which I urge that you consider.

Thank you for the opportunity to comment, and many thanks to County staff for their good work.

Very Truly Yours,

James P. Pacht



Building Industry Association of Superior California

"Building Toward A Better Future"

April 26, 2005

The Honorable Roger Dickinson, Chair, *via facsimile*
Sacramento County Board of Supervisors
700 H Street, Suite 2450
Sacramento, CA 95814

Re: Swainson's Hawk Ordinance – Board Agenda of April 27, 2005

Dear Supervisor Dickinson:

Thank you for providing the Building Industry Association of Superior California (BIA) an opportunity to comment on the County's proposed amendment to its Swainson's Hawk Ordinance. We understand your efforts to preserve Swainson's Hawks' habitat and we are willing to partner with the County to help achieve your vision.

After reviewing the draft ordinance language, I provide you with the below-described points of interest and concern.

□ **16.130.010 – Purpose and Intent**

"The Board of Supervisors also finds that it may be infeasible to acquire easements for less than 20 acres...parcels less than 20 acres in size (may make) payment of an impact mitigation fee."

The option to pay an "impact mitigation fee" is very important. As you are aware, some development interests will not have the staff resources nor may parcels 21.0 acres in size be available which meet the Swainson's Hawk criteria. Therefore, the BIA believes it would be reasonable to allow projects that are less than 40.0 acres in size to pay an "impact mitigation fee" which allows the County to acquire appropriate habitat for the Hawks' preservation. The 40.0 acre threshold would be identical to the City of Elk Grove's mitigation program.

We are very concerned that the staff-recommended 20-acre limit would be onerous to the development community, especially with respect to commercial developments and small "mom and pop" homebuilders. As recent projects reflect, to meet the varied needs of the community, many commercial projects now include centers with stores and facilities that often push a project's size beyond 20 acres.

Current language:

“For any such requests on parcels, which are within ten miles of a Swainson’s Hawk nest, the Board of Supervisors desires to establish an additional means of mitigating for loss of Swainson’s Hawk foraging habitat.”

The BIA requests that the County clarify support as to why a ten-mile distance is being requested. Also, we request that the County confirm that a suitable inventory of land is available for sale within ten miles of active nests within the County.

□ **16.130.040 – Conditions**

a. 1) C.

Current language:

“The project applicant shall transfer said easement(s) or title to the County, DFG and a third party conservation organization.”

Suggested language:

“The project applicant shall transfer said easement(s) or title to the County or DFG or a third party conservation organization.”

K. “Before committing to the preservation of any particular land pursuant to this measure, the project applicant shall obtain the County’s approval of the land proposed for preservation.” “...as long as the agricultural land is determined by DFG to be suitable Swainson’s Hawk habitat.”

Certainty in the process is a significant issue for the development community. The County, through coordination with the Department of Fish and Game (DGF), should establish a definitive approval process and timeline for determining the acceptance of proposed mitigation sites. One method may be a requirement that, “within 10 business days of an applicant’s request to use a site for mitigation, the County shall provide a determination of the suitability of the site.”

H. Current language:

“The applicant shall pay to the County a mitigation operations and maintenance 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 Board of Supervisors, not to exceed 15% of the easement price paid by the applicant.”

Although the 10 percent and 15 percent figures, as applied, set ceilings for potential administrative fees, they appear to be high. The BIA requests that staff explain the rationale in setting these figures for lands that shall remain in agricultural production.

❑ **Other – Create a “conservation easement” template**

The creation of a County-approved conservation easement template could help standardize the application process. As discussed in prior meetings with County staff, the BIA hopes that this task is prioritized.

❑ **Other options**

Initially, County staff indicated to the BIA that they may propose an option to create a mechanism for the County to serve as a “bank” that acquires mitigation land and sells credits to those seeking mitigation. This option deserves further consideration as it may relieve some smaller applicants from an onerous bargaining position and process. The BIA would appreciate an opportunity to work with County staff to further explore this option.

Again, we understand the County’s efforts to protect this state-listed species and we are willing to partner with you. However, as you discuss this important policy, please keep in mind that providing flexibility in its implementation will help the development community be a part of the solution.

Please do not hesitate to call me on my mobile phone, at (916) 416-3815, if you have any questions or suggestions.

Sincerely,

Ardie Zahedani
Legislative Advocate

cc: Members of the Sacramento County Board of Supervisors
Staff of the Sacramento County Board of Supervisors
Mr. John Griffin, Griffin Industries, BIA Sacramento Area Council Chairman
Mr. George Kammerer, Hefner, Stark and Marois