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THE FUTURE OF CONSERVATION EASEMENTS AS MITIGATION UNDER CEQA

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The California Court of Appeal's recent decision in *V Lions Farming, LLC v. County of Kern*[2] provides important clarity on the use of agricultural conservation easements (ACEs) for mitigating the conversion of agricultural land under the California Environmental Quality Act[3] (CEQA), even where the ACEs, operating by themselves, cannot fully offset or replace the agricultural land converted by a project. The case resolves questions that had arisen in recent years about the sufficiency of ACEs—and, more broadly, the use of conservation easements to preserve habitat or other resources—as effective mitigation under CEQA.

EVOLUTION OF AGRICULTURAL CONSERVATION EASEMENTS AS MITIGATION

CEQA requires public agencies to adopt mitigation measures to avoid or substantially lessen a project's significant environmental impacts where feasible.[4] Historically, "mitigation" was defined in the CEQA Guidelines to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.[5]

Courts have long recognized the preservation of habitat as an acceptable form of compensatory mitigation to offset unavoidable adverse project impacts to natural resources.[6] Conservation easements are often used to further such preservation efforts. A conservation easement is a legal instrument, typically in the form of a deed restriction, that restricts the allowable uses on a property so that it is preserved in perpetuity in its natural, scenic, historical, agricultural, forested, or open-space condition.[7]

In *Masonite Corp. v. County of Mendocino*,[8] the Court of Appeal held that "ACEs may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources."[9] That case involved a challenge to an Environmental Impact Report (EIR) prepared by Mendocino County for a proposed surface mine where most of the site was classified as prime farmland under the state's Farmland Mapping and Monitoring Program.[10] Mendocino County determined that there were no feasible mitigation measures to address the project's impacts to

agricultural lands, asserting that ACEs could address indirect and cumulative effects but not the direct conversion of farmland.[11] Disagreeing with Mendocino County, the Court of Appeal held that ACEs can mitigate the direct loss of farmland because they provide substitute resources that compensate for converted farmland and, therefore, fit within the definition of "mitigation" under CEQA Guidelines section 15370(e).[12] The court also compared ACEs to the offsite preservation of habitat—which it described as "an accepted means of mitigating impacts on biological resources"—and found no reason to differentiate between the two.[13] *Masonite* was an important decision to project developers in rural areas and public agencies with jurisdiction over agricultural lands because it provided support for using ACEs as mitigation for conversion of farmland.

In 2018, the California Natural Resources Agency revised the definition of "mitigation" in the CEQA Guidelines to incorporate the Court of Appeal's decision in *Masonite*. With this revision, the definition of mitigation now includes: "Compensating for the impact by replacing or providing substitute resources or environments, *including through permanent protection of such resources in the form of conservation easements*" (2018 amendment language in italics).[14]

KERN COUNTY'S OIL AND GAS WELL PERMITTING ORDINANCE

Several years after *Masonite*, the Court of Appeal decided *King & Gardiner Farms, LLC v. County of Kern*,[15] a case challenging Kern County's CEQA compliance when it adopted an ordinance to streamline the permitting process for new oil and gas wells. The ordinance's CEQA analysis and ultimate EIR estimated that the ordinance's new permitting process would result in the annual permanent conversion of 298 acres of agricultural land in Kern County.[16] The EIR used a no-net-loss threshold of significance for farmland conversion, resulting in a determination that the annual conversion of 298 acres of farmland was a significant impact.[17] To mitigate this impact, the EIR included a mitigation measure that would require oil and gas well permit applicants to undertake one the following measures at a 1:1 ratio for disturbed agricultural land:

(a) Funding and/or purchasing agricultural conservation easements or a similar instrument acceptable to the County (to be managed and maintained by an appropriate entity);

(b) Purchasing credits for conservation of agricultural lands from an established agricultural farmland mitigation bank or an equivalent agricultural farmland preservation program managed by the County;

(c) Restoring agricultural lands to productive use through the removal of legacy oil and gas production equipment, including well abandonment and removal of surface equipment; or

(d) Participating in any agricultural land mitigation program adopted by Kern County that provides equal or more effective mitigation than the measures listed above.[18]

Kern County determined that implementation of this mitigation measure would reduce the farmland conversion impact to a less-than-significant level.[19]

In its review of the case, the Court of Appeal held that only the restoration of agricultural lands (mitigation option (c)) would fully offset the impacts to agricultural lands, whereas the other three identified mitigation options either were too vague or did not actually mitigate the impacts to achieve no net loss of farmland.[20]

The court further held that ACEs could not reduce the project's impacts to less-than-significant levels given Kern County's no-net-loss threshold of significance, which deemed *any* conversion of agricultural land a significant impact.[21] The court noted that ACEs merely *preserve existing* agricultural land and prevent future farmland conversion, rather than *creating new* agricultural land to replace the agricultural land lost.[22] Thus, the court held that because an ACE "does not offset the loss of agricultural land (in whole or in part), the easement does not reduce a project's impact on agricultural land" to a less-than-significant level; ACEs "would not change the net effect of the annual conversions" resulting in 298 fewer acres of agricultural land each year.[23]

The court addressed *Masonite* in a brief footnote, distinguishing that earlier case as having considered only the legal feasibility of ACEs, not whether ACEs could reduce a project's impacts to a less-than-significant level.[24] Because Kern County prepared its EIR and adopted the ordinance prior to the enactment of the 2018 CEQA Guidelines amendment, the *King & Gardiner Farms* decision did not address the amendment's addition of conservation easements as suitable mitigation.

THE AFTERMATH OF *KING & GARDINER FARMS*

The Court of Appeal's decision in *King & Gardiner Farms* opened the door to questions about whether ACEs—and, by extension, conservation easements intended to preserve other resources such as habitat for sensitive species—could suffice as acceptable mitigation under CEQA.

On remand following the *King & Gardiner Farms* decision, Kern County prepared a Supplemental Recirculated EIR and adopted a revised oil and gas well permitting ordinance in 2021.[25] In the Supplemental Recirculated EIR, the County stated that, based on its interpretation of the Court of Appeal's decision in *King & Gardiner Farms*, ACEs would not be an effective means of providing even partial mitigation for farmland conversion impacts.[26] The County thus declined to include ACEs as a mitigation measure for the ordinance's significant impacts on agricultural land conversion.[27]

The following year, in *Save the Hill Group v. City of Livermore*, the Court of Appeal rejected an argument asserted under the *King & Gardiner Farms* ruling that conservation easements to preserve sensitive habitats were not sufficient mitigation.[28] *Save the Hill Group* involved a challenge to the EIR for a housing development project in the City of Livermore. The City determined that the developer's acquisition of an 85-acre compensatory mitigation site as a conservation easement would be sufficient mitigation to reduce the project's impacts to special-status species and sensitive habitats.[29] The petitioner cited the court's holding in *King & Gardiner Farms* in asserting that preservation of existing resources would not offset the loss of impacted resources.[30] The Court of Appeal did not find *King & Gardiner Farms* persuasive or helpful to the petitioner's arguments, stating instead that the referenced case, in fact, recognized that conservation easements are just one acceptable tool that agencies use to mitigate environmental impacts.[31] The court upheld the City's determination that the proposed conservation easement was adequate mitigation for the permanent loss of habitat and, consistent with CEQA Guidelines section 15370(e), would compensate for project impacts by "*providing substitute resources or environments.*"[32]

THE COURT OF APPEAL'S DECISION IN *V LIONS FARMING*

In *V Lions Farming*, the Court of Appeal considered a CEQA challenge to Kern County's adoption of the revised oil and gas permitting ordinance originally at issue in *King & Gardiner Farms*.[33] The court held that the County misinterpreted its earlier decision in *King & Gardiner Farms* by rejecting ACEs as sufficient mitigation for the revised ordinance's impacts on farmland conversion.[34] The court recognized the ambiguity of its language in *King & Gardiner Farms* and clarified that its decision was not intended to stand for the broad proposition that ACEs are never an effective form of mitigation for the conversion of agricultural land.[35] Rather, the court explained, *King & Gardiner Farms* had narrowly held that ACEs could not be effective at reducing the impact of farmland conversions to a less-than-significant level given the no-net-loss threshold of significance used in the County's EIR.[36] Under *King & Gardiner Farms*, because the County's no-net-loss threshold of significance meant that conversion of *any* agricultural land was a significant impact, no amount of existing agricultural land preserved by an ACE, by itself, could have reduced the ordinance's impacts to a less-than-significant level.[37]

The court in *V Lions Farming* went on to confirm that ACEs can serve as an effective form of compensatory mitigation for the conversion of agricultural land, even if ACEs are only partially effective and unable to replace the lost farmland or otherwise result in no net loss of agricultural land.[38] The court concluded that the CEQA Guidelines' definition of mitigation to entail "providing substitute resources"[39] includes permanently protecting existing agricultural land.[40] The court affirmed that its holding in *V Lions Farming* was consistent with *Masonite* and *Save the Hill Group*, as well as other decisions upholding the use of conservation easements to mitigate impacts on habitat loss.[41] The court also noted that federal agencies recognize conservation easements as a form of compensatory mitigation and commonly use conservation easements as a mitigation tool, particularly in instances where a project may impact wetlands under the Clean Water Act or habitat under the Endangered Species Act.[42] The court reasoned that its interpretation of CEQA Guidelines section 15370(e) would further CEQA's primary purpose of long-term environmental protection by ultimately ensuring lasting protection of agricultural land through ACEs.[43] The Court of Appeal concluded that Kern County did not comply with CEQA when it eliminated ACEs as a potential mitigation measure to offset the revised ordinance's impacts on agricultural land conversions.[44]

IMPLICATIONS AND CONCLUSION

The Court of Appeal's holding in *V Lions Farming*—as well as in *Masonite*, *Save The Hill Group*, and other earlier cases upholding conservation easements as effective mitigation

for species and habitat impacts[45]—supports the continued use of conservation easements as a permissible type of compensatory mitigation under CEQA, consistent with CEQA Guidelines section 15370(e). The *V Lions Farming* decision is significant not just for projects that result in conversion of agricultural lands (such as many resource extraction, utility-scale renewable energy, and greenfield residential development projects in rural areas) but, more broadly, for projects that result in habitat or species impacts that could be mitigated through the creation of conservation easements.

For projects that result in farmland conversion deemed to be a significant impact under CEQA, agencies should consider the feasibility of ACEs as one potential mitigation strategy. CEQA mitigation is considered feasible if it is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."[46] Even though ACEs can be sufficient and effective mitigation, lead agencies may still potentially find them to be infeasible in certain circumstances due to economic or other reasons.[47]

Where ACEs are considered feasible mitigation options, whether they are ultimately determined to sufficiently mitigate project impacts to a less-than-significant level may vary depending on the lead agency's threshold of significance for assessing agriculture impacts. In cases where there is a no-net-loss threshold of significance, *King & Gardiner Farms* and *V Lions Farming* confirm that ACEs alone cannot mitigate the impact of farmland conversion to a less-than-significant level. In such circumstances, agencies should instead consider whether there are other feasible measures that, either on their own or in combination with ACEs, could fully offset the conversion of farmland; if there are not, agencies may consider ACEs as partially effective at mitigating the significant impact. Where a lead agency does not use a no-net-loss threshold of significance, it is more likely the agency could find ACEs, by themselves, to be effective at lessening the impact of farmland conversion to a less-than-significant level. Notably, in any event, the chosen threshold must be supported by substantial evidence.[48]

The *V Lions Farming* and *King & Gardiner Farms* cases both highlight the considerable power that lead agencies have when establishing pertinent thresholds of significance, a matter over which the lead agency has substantial discretion so long as it is supported by substantial evidence. For instance, Kern County's no-net-loss threshold of significance, which was at issue in both of the above cases, meant that any conversion of agricultural land would result in a significant impact. In other circumstances, however, lead agencies have approved a less severe quantitative or qualitative threshold of significance that tolerates some amount of agricultural land conversion. Lead agencies also can use the California Department of Conservation's Land Evaluation and Site Assessment Model, which provides a quantitative measure of potential significance based on project- and site-specific factors; this model is recognized in CEQA Guidelines Appendix G as an optional tool that can be used to assess the significance of impacts on agriculture and farmland.[49] In any event, thresholds of significance matter (and do not necessarily have to equate to zero net loss) and, ultimately, determine whether ACEs can sufficiently mitigate a project's impact to a less-than-significant level.

Finally, it is important to remember that jurisdictions may still impose restrictions and mitigation requirements on farmland conversions through their General Plans and zoning ordinances, independent of CEQA's requirements. These can include broad-based General Plan policies that support maintaining productive farmland, as well as specific mitigation requirements relevant to farmland conversion. As an example of the latter, in February 2024, Fresno County amended its General Plan to add a new policy (Policy LU-A.23) that generally requires ACEs or other compensatory mitigation for discretionary land use projects that permanently convert at least 20 acres of agricultural land.[50] Projects must be consistent with and comply with General Plan policies even if the local jurisdiction finds that mitigation is infeasible under CEQA.

Going forward, the decision in *V Lions Farming* should put to rest questions that had arisen among CEQA practitioners in the aftermath of *King & Gardiner Farms* about the viability of using conservation easements as acceptable mitigation under CEQA. Conservation easements that preserve farmland, habitat, or other resources may be effective mitigation consistent with CEQA Guidelines section 15370(e), but their ability to mitigate an impact to a less-than-significant level will ultimately depend on the lead agency's chosen threshold of significance.

ENDNOTES

1. Jennifer Jeffers and Jacob Aronson are senior counsel and Zachary Rego is an associate at Allen Matkins Leck Gamble Mallory & Natsis LLP in San Francisco.
2. *V Lions Farming, LLC v. Cnty. of Kern*, 100 Cal. App. 5th 412 (2024).
3. Cal. Pub. Res. Code §§ 21000 *et seq.*

4. Cal. Code Regs. tit. 14, div. 6, ch. 3 [hereinafter "CEQA Guidelines"], §§ 15091(a), 15092(b).
5. CEQA Guidelines § 15370.
6. *See, e.g.*, *Endangered Habitats League, Inc. v. Cnty. of Orange*, 131 Cal. App. 4th 777, 794 (2005) (impacts to habitat mitigated by "on-site or off-site preservation of similar habitat at a ratio of at least two to one"); *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 278 (2012) (conversion of habitat mitigated by conservation of "other annual grassland habitat at a one-to-one ratio").
7. Cal. Civ. Code § 815.1.
8. *Masonite Corp. v. Cnty. of Mendocino*, 218 Cal. App. 4th 230 (2013).
9. *Id.* at 238.
10. *Id.* at 235.
11. *Id.* at 236.
12. *Id.* at 238.
13. *Id.* at 238–39.
14. CEQA Guidelines § 15370(e).
15. *King & Gardiner Farms, LLC v. Cnty. of Kern*, 45 Cal. App. 5th 814 (2020).
16. *Id.* at 870.
17. *Id.* at 871.
18. *Id.*
19. *Id.*
20. *Id.* at 872–79.
21. *Id.* at 876.
22. *Id.* at 875.
23. *Id.*
24. *Id.* at 875 n.32.
25. *V Lions Farming*, 100 Cal. App. 5th at 419.
26. *Id.* at 425.
27. *Id.*
28. *Save the Hill Grp. v. City of Livermore*, 76 Cal. App. 5th 1092, 1117 (2022).
29. *Id.* at 1116.
30. *Id.* at 1117.
31. *Id.*
32. *Id.* (italics in original).
33. *V Lions Farming*, 100 Cal. App. 5th at 418.
34. *Id.* at 427–28.
35. *Id.* at 421.
36. *Id.* at 427.
37. *Id.*
38. *Id.* at 437.
39. CEQA Guidelines § 15370(e).
40. *V Lions Farming*, 100 Cal. App. 5th at 437.
41. *Id.* at 436.
42. *Id.* at 429–31.
43. *Id.* at 436–37.
44. *Id.* at 437.
45. *See supra* note 6.
46. CEQA Guidelines § 15364.
47. *See, e.g.*, *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, 190 Cal. App. 4th 316, 351–52 (2010) (upholding as supported by substantial evidence an EIR determination that ACEs and similar mitigation for farmland conversion were not economically feasible because long-term farming in the area was no longer financially viable).
48. CEQA Guidelines § 15064.7.
49. *See* Cal. Dep't of Conservation, *Land Evaluation & Site Assessment (LESA) Model*, https://www.conservation.ca.gov/dlrp/Pages/qh_lesa.aspx (last visited Oct. 25, 2024).
50. Cnty. of Fresno, General Plan 2-32 (Feb. 2024), https://www.fresnocountyca.gov/files/sharedassets/county/v/1/public-works-and-planning/development-services/planning-and-land-use/general-plan/fcgpr_general-plan_county_final_2024_02.pdf.

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