

Conservation Easements as Mitigation for Conversion of Farmland to Another Use: A Legal Analysis

By Stephen Kostka

Legislation adopted in 1993 directed the Resources Agency to amend Appendix G of the CEQA Guidelines to give lead agencies a method for ensuring that “the significant effects on the environment of agricultural land conversions are quantitatively and consistently considered in the environmental review process.” Pub Res C §21095(a). The goal of the legislation, as stated in its legislative findings, is the preservation of agricultural land due to the importance of the agriculture industry to the state’s economy. Stats 1993, ch 812, §1. The legislation defined “agricultural land” as “prime farmland, farmland of statewide importance or unique farmland,” under U.S. Department of Agriculture criteria, as modified for California. Pub Res C §21060.1. Consistent with these statutes, Appendix G of the CEQA Guidelines lists conversion of farmland to nonagricultural use as an environmental impact that must be evaluated under CEQA. CEQA Guidelines Appendix G: Environmental Checklist Form, II. Agriculture and Forestry Resources.

Neither the statute nor the Guidelines addresses mitigation for the impact of converting farmland to other uses, but several court decisions have considered the issue. These decisions have focused on whether conservation easements over off-site farmland can provide adequate mitigation for the loss of farmland to development.

In *Citizens for Open Government v. City of Lodi* (2006) 144 CA4th 865, the EIR concluded that constructing a shopping center on 40 acres of prime farmland would contribute to a significant cumulative impact, and that no mitigation could eliminate the impact because lost farmland cannot be recreated elsewhere. The EIR suggested, however, that permanent protection of an equivalent amount of farmland off-site could help curtail farmland conversions in the long run. The city required the applicant to acquire a conservation easement over 40 acres of other farmland as “partial mitigation,” but it rejected demands for easements over additional acreage, observing that no ratio of farmland-preserved to farmland-converted would avoid or reduce the loss of farmland due to the project. The court upheld the city’s determination that there was no feasible mitigation for the direct loss of farmland.

In contrast, the court in *Masonite Corp. v County of Mendocino* (2013) 218 CA4th 230 rejected the argument that off-site conservation easements are not effective mitigation. The EIR had concluded that off-site conservation easements could not mitigate the loss of farmland on the project site, because the off-site easement would not replace the lost farmland. The court disagreed, ruling that a conservation easement over off-site farmland “may appropriately mitigate the direct loss of farmland” that results from converting farmland to another use. Citing the CEQA Guideline which defines mitigation as including measures that compensate for an impact “by replacing or providing substitute resources or environments” the court held that although an off-site conservation easement would not “replace” the lost farmland or “provide substitute resources,” it would mitigate the impact by “preserving” substitute resources. 218 CA4th at 238, citing 14 Cal Code Regs §15370(e).

Following the *Masonite* decision, in 2018 the definition of compensatory mitigation in Guideline §15370(e) was amended. The amendment retained the original language stating that mitigation can include measures that compensate for an impact on a resource (such as farmland) “by replacing or providing substitute resources or environments” and added language stating “including through permanent protection of such resources in the form of conservation easements.” In its statement of reasons for the amendment, the Resources Agency stated it intended to incorporate the *Masonite* court’s ruling “that off-site agricultural conservation

easements constitute a potential means to mitigate for direct, in addition to cumulative and indirect, impacts to farmland.” California Natural Resources Agency, Final Statement of Reasons for Regulatory Action Amendments to the State CEQA Guidelines (Nov. 2018) at 64.

In *King & Gardiner Farms v County of Kern* (2020) 45 CA5th 814, 875, the court held that requiring conservation easements over off-site farmland did not provide effective mitigation for the impact of converting farmland to another use. The court observed that a conservation easement does not create new farmland to replace the land being converted, and thus does not offset the loss of farmland resulting from the project. The *King & Gardner* court referred to the holding in *Masonite* only briefly, explaining that while *Masonite* held the county had erred by finding conservation easements legally infeasible as mitigation, it “did not consider the net effect of implementing an agricultural conservation easement and whether a significant impact could be reduced to a less than significant level by such an easement.” 45 CA5th at 876 n32. See also *Friends of Kings River v County of Fresno* (2014) 232 CA4th 105, 126 (holding that *Masonite* does not stand for proposition that CEQA requires use of conservation easements as mitigation whenever they are economically feasible and project causes loss of farmland).

The *King & Gardiner* court did not consider the 2018 amendment to section §15370(e) because the EIR under review predated that amendment. Nevertheless, the court’s holding that off-site conservation easements are not effective mitigation for the direct impact to farmland when it is converted to another use calls into question the holding in *Masonite*, as well as the effect of the Guideline amendment. The *King & Gardiner* court concluded conservation easements do not mitigate the direct impact of farmland conversions because they do not offset or reduce the net loss of farmland that results. The *Masonite* court’s ruling that conservation easements mitigate the loss of farmland by “preserving” substitute resources sidesteps the key problem, namely, that preserving other farmland does not address the net loss of farmland that results when farmland is developed. See *King & Gardiner*, 45 CA5th at 876 and n32.

Guideline §15370(e), as amended, does not resolve this discrepancy. The amendment added language indicating permanent protection of resources “in the form of conservation easements” can provide compensatory mitigation, but it does not explain how and to what extent such a measure might be viewed as offsetting or reducing the loss of farmland that results when farmland is converted to another use. As a result, it is unclear whether it would be appropriate for a lead agency to find that requiring an off-site conservation easement as mitigation is sufficient to “avoid,” “minimize,” or “substantially lessen” the impact to farmland that results when it is developed. See Pub Res C §§21002, 21100(b)(3), 21081(a)(1); CEQA Guidelines §§15091(a)(1) 15092(b)(2).

Note: A modified and enlarged version of this post will be published in the upcoming edition of Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2021).