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## SENATE COMMITTEE ON HOUSING

Senator Scott Wiener, Chair

2019 - 2020 Regular

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<b>Bill No:</b>	AB 168	<b>Hearing Date:</b>	7/2/2019
<b>Author:</b>	Aguiar-Curry		
<b>Version:</b>	7/1/2019 Amended		
<b>Urgency:</b>	No	<b>Fiscal:</b>	No
<b>Consultant:</b>	Alison Hughes		

**SUBJECT:** Housing: streamlined approvals

**DIGEST:** This bill establishes a scoping consultation process before the submission of a SB 35 application to determine if there are potential tribal cultural resources on a proposed project site. If there are tribal cultural resources, the applicant must go through a process, as specified, to identify tribal cultural resources and mitigate any impact to those sites.

### ANALYSIS:

#### *Existing law:*

- 1) Provides that specified development projects, under SB 35 (Wiener, 2017), may submit an application subject to a streamlined, ministerial approval process and not subject to a conditional use permit if the development is not on a site that is any of the following:
  - a) A coastal zone.
  - b) Either prime farmland or farmland of statewide importance, as specified, or land zoned or designated for agricultural protection or preservation by a local ballot measure that was approved by the voters of that jurisdiction.
  - c) Wetlands, as defined.
  - d) Within a very high fire severity zone or within a high or very high fire hazard severity zone, as specified.
  - e) A hazardous waste site, as specified.
  - f) Within a delineated earthquake fault zone unless the development complies with applicable seismic protection building code standards adopted by the Building Standards Commission and any local building department.
  - g) Within a special flood hazard area or regulatory floodway as specified.
  - h) Lands identified for conservation, as specified.
  - i) Habitat for protected species, as specified.
  - j) Lands under conservation easement.

- 2) Defines “tribal cultural resource” as any of the following:
  - a) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either (i) included or determined to be eligible for inclusion in the California Register of Historical Resources, or (ii) included in a local register of historical resources.
  - b) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be a significant resource to a California Native American Tribe.
  - c) A cultural landscape, to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
- 3) Requires, under AB 52 (Gatto, 2014), the lead agency responsible for reviewing a project under the California Environmental Quality Act (CEQA), prior to the release of certain CEQA reports for a project, to consult with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, as requested by the tribe. As a part of this consultation, the parties may propose mitigation measures capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource. Declares that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment, and that public agencies must, when feasible, avoid damaging effects to any tribal cultural resource.

**This bill [as proposed to be amended July 1st]:**

- 1) Requires the local government, before it begins to review and approve an application, shall engage in a scoping consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the development. Requires the scoping consultation to be limited to determining whether any potential tribal resource is located on the development site.
- 2) Defines “scoping consultation” process as the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values, with the goal of determining whether a tribal cultural resource is located on the development site. The

scoping consultation shall be conducted in a way that is mutually respectful of each party's sovereignty.

- 3) Requires the scoping consultation process to be conducted in a way that is mutually respectful of each party's sovereignty, and recognizes that California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue. Any determination will take into account the significance of the resource to the culturally affiliated California Native American tribe.
- 4) Provides that if, after completing the scoping consultation, it is determined that no potential tribal cultural resource is located on the development site, the local government may review and approve the SB 35 application.
- 5) Requires that, if it is determined that a potential tribal cultural resource is located on the development site, the local government shall not approve the SB 35 application until the local government has consulted with a California Native American tribe and followed the requirements under AB 52.
- 6) Declares that a California Native American tribe that participates in the AB 52 process is entitled to all the rights and remedies that the tribe would be entitled in connection with the AB 52 process.
- 7) Declares that the requirements under this bill shall not be construed to apply any provisions of CEQA except those provisions specifically indicated in the AB 52 process.
- 8) States Legislative intent that this bill is intended to clarify that SB 35 did not intend to divest California Native American tribes of input during the streamlined approval process or CEQA process.
- 9) States Legislative intent that this bill intends to implement the California Native American tribe consultation process established by AB 52 should there be a potential for tribal resources to be present on a site considered by a development using SB 35.

## COMMENTS

- 1) *Purpose of the bill.* According to the author, this bill "is consistent with existing California law, which protects tribal lands. Without this bill, tribal cultural resources may be subject to destruction and desecration. We have lost much of our State's Native history, and once a religious or cultural artifact, site,

or burial ground is lost, it cannot be replaced. To honor California's history and diversity, it is important that we continue to honor the consultation process with Native American tribes and protect tribal cultural resources. Protecting these sacred places will ensure that generations of Californians to come can value the sovereignty of Native American tribes and communities, and facilitate housing development by avoiding litigation.”

- 2) *Housing streamlining and SB 35*. Before building new housing, housing developers must obtain one or more permits from local planning departments and must also obtain approval from local planning commissions, city councils, or county board of supervisors. Some housing projects can be permitted by city or county planning staff ministerially or without further approval from elected officials. Projects reviewed ministerially require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. Most large housing projects are not allowed ministerial review. Instead, these projects are vetted through both public hearings and administrative review. Most housing projects that require discretionary review and approval are subject to review under the California Environmental Quality Act (CEQA), while projects permitted ministerially generally are not.

SB 35 (Wiener, Chapter 366, Statutes of 2017) requires local jurisdictions that have not met their above moderate-income or lower-income regional housing needs assessment (RHNA) to streamline certain developments.

- 3) *Tribal cultural sites*. According to the 2010 Census, California has the highest Native American population in the country, with approximately 720,000 people in the state who identify as Native American. There are currently 109 federally recognized Indian tribes in California and 78 entities petitioning for recognition. California tribes currently have nearly 100 separate reservations or Rancherias.

The phrase “Tribal Cultural Resources” in California was first legally recognized and defined under AB 52 (Gatto, Chapter 532, Statutes of 2014) under CEQA. The primary intent of AB 52 was to include California Native American Tribes early in the environmental review process and to establish a new category of resources related to Native Americans that require consideration under CEQA, known as tribal cultural resources. The process established by AB 52 is crucial for a tribal community to participate in a consultation process to identify tribal cultural resources and mitigate any impact to those sites.

Tribal cultural resources are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe.

Tribal cultural resources are sometimes referred to as “sacred sites” more generally. Sacred sites may be burial grounds, important archaeological areas, or religious objects. They are like churches, and are often sites of special ceremonies and healing. Tribal cultural resources are of central importance to Native American nations because Native religion and culture is essential to the survival of Native American/American Indian nations as a distinctive cultural and political group. Many Native Americans have land-based religions, meaning they practice their religion within specific geographic locations; their faith renders that land is itself a sacred, living being.

In some instances, tribal cultural resources have been publicly identified, such as those included or determined to be eligible for inclusion in the California Register of Historical Resources or a local registry of historical resources. However, this is not always the case. Identification may require additional analysis and process or a tribe may choose to not publicly disclose locations due to a concerns that the sites may be at risk for desecration, whether purposeful or not.

This bill establishes a scoping consultation process before the submission of a SB 35 application to determine if there are potential tribal cultural resources on a proposed project site. If there are tribal cultural resources, the applicant will then have to go through CEQA (limited to the AB 52 process) to identify tribal cultural resources and mitigate any impact to those sites. If there are no tribal cultural resources on the proposed site, then the project can continue to seek an SB 35 permit. A local government is not authorized to provide an SB 35 permit until the scoping consultation and, if applicable, AB 52 process, has been completed.

- 4) *Ongoing discussions.* The amendments taken on July 1st are intended to codify an agreement reached between stakeholders, the author’s office, and the Committee. This language will likely need to be modified/improved to make clarifications. The Chair and author remain committed to working out these issues before this bill reaches the Senate Floor.
- 5) *Triple-referred.* This bill is also referred to the Environmental Quality Committee (second) and the Governance and Finance Committee (third).

## **RELATED LEGISLATION:**

**SB 35 (Wiener, Chapter 366, Statutes of 2017)**— created a streamlined, ministerial approval process for infill developments in localities that have failed to meet their RHNA numbers.

**AB 52 (Gatto, Chapter 532, Statutes of 2014)** — established procedures and requirements under the California Environmental Quality Act (CEQA) for the purpose of avoiding or minimizing impacts to tribal cultural resources.

**FISCAL EFFECT:** Appropriation: No    Fiscal Com.: No    Local: No

**POSITIONS:** (Communicated to the committee before noon on Wednesday, June 26, 2019.)

**SUPPORT:**

Big Valley Band Of Pomo Indians  
Dry Creek Rancheria Band Of Pomo Indians  
Fernandeño Tataviam Band Of Mission Indians  
Habematolel Pomo Of Upper Lake  
Jamul Indian Village Of California  
Middletown Rancheria  
Mooretown Rancheria  
Pala Band Of Mission Indians  
Tolowa Dee-Ni' Nation  
Tule River Tribe  
Wilton Rancheria  
Yocha Dehe Wintun Nation

**OPPOSITION:**

None received.

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