
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2019 - 2020 Regular

Bill No: AB 168
Author: Aguiar-Curry
Version: 7/1/2019
Urgency: No
Consultant: Genevieve M. Wong

Hearing Date: 7/3/2019
Fiscal: No

SUBJECT: Housing: streamlined approvals

DIGEST: Requires a local government to engage in a scoping consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of a development before deeming the development's application submitted for purposes of a streamlined, ministerial approval process.

ANALYSIS:

Existing law:

- 1) Defines a "California Native American tribe" to mean a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004 (Public Resources Code (PRC) §21073).
- 2) Defines "Tribal cultural resources" to mean either 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 of the following:
 - 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, as defined.
 - 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 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. Requires any mitigation measures agreed upon in this consultation be in an adopted mitigation monitoring and reporting program (PRC §§21080.3.1 – 21080.3.2, 21082.3).
- 4) 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 (PRC §§21084.2, 21084.3).
- 5) Allows a development proponent to submit an application for a development that is subject to a streamlined, ministerial approval process, and not subject to a conditional use permit, provided that:
 - a) The development contains two or more residential units and satisfies specified objective planning standards, including being located on an urban infill site that is zoned for residential or residential mixed-use, with at least two-thirds of the square footage designated for residential use (Government Code (Gov. C.) §§65913.4(a)(1), (2)).
 - b) If the development includes units that are subsidized, the development proponent must record a long-term affordability covenant on the units, as specified (Gov. C. §64913.4(a)(3)).
 - c) The development is located in a jurisdiction that has been determined by the state Department of Housing and Community Development (HCD) to have issued insufficient building permits to meet its share of the regional housing need assessment (RHNA), and the development is subject to a requirement mandating a minimum percentage of below market rate housing, as specified (Gov. C. §65913.4(a)(4)).
 - d) The development proponent has certified to the locality that either the entirety of the development is a public work, or that all construction workers employed by the project will be paid at least prevailing wage, as specified. For specified developments, a skilled and trained workforce must be used (Gov. C. §65914.3(a)(8)).

- e) The development is not located in environmentally unsafe or sensitive areas, including a coastal zone, prime farmland, wetlands, a high or very high fire severity zone, a hazardous waste site, an earthquake fault zone, a flood plain or floodway, lands identified for conservation in an adopted natural community conservation plan, habitats for protected species, and lands under conservation easement (Gov. C. §65913.4(a)(6)).

This bill:

- 1) Requires a local government to engage in a scoping consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of a development before deeming the development's application submitted for purposes of a streamlined, ministerial approval process.
 - a) If a potential tribal cultural resource is located on the development site, prohibits the local government from approving the application until the local government has consulted with a California Native American tribe in accordance with specified provisions intended to avoid or minimize impacts to tribal cultural resources.
 - b) If no potential tribal cultural resource is located on the development site, allows the local government to review and approve the application for the development.
- 2) Requires the scoping consultation 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.
- 3) Defines "scoping consultation" 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. Requires the scoping consultation to be conducted in a way that is mutually respectful of each party's sovereignty.
- 4) Prohibits these provisions from being construed to apply any provisions of CEQA, except as specifically indicated under this bill, to a development eligible for the streamlined, ministerial approval process.

- 5) Makes certain findings and declarations regarding

Background

- 1) Background on CEQA.

- a) *Overview of CEQA Process.* CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions in the CEQA guidelines. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration. If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an EIR.

Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

- b) *What is analyzed in an environmental review?* An environmental review analyzes the significant direct and indirect environmental impacts of a proposed project and may include water quality, surface and subsurface hydrology, land use and agricultural resources, transportation and circulation, air quality and greenhouse gas emissions, terrestrial and aquatic biological resources, aesthetics, geology and soils, recreation, public services and utilities such as water supply and wastewater disposal, and cultural resources. The analysis must also evaluate the cumulative impacts of any past, present, and reasonably foreseeable projects/activities within study areas that are applicable to the resources being evaluated. A study area for a proposed project must not be limited to the footprint of the project because many environmental impacts of a development extend beyond the identified project boundary. Also, CEQA stipulates that the environmental impacts must be measured against existing physical conditions within the project area, not future, allowable conditions.

- c) *CEQA provides a hub for multi-disciplinary regulatory process.* An environmental review provides a forum for all the described issue areas to be considered together rather than siloed from one another. It provides a comprehensive review of the project, considering all applicable environmental laws and how those laws interact with one another. For example, it would be prudent for a lead agency to know that a proposal to mitigate a significant impact (i.e. alleviate temporary traffic congestion, due to construction of a development project, by detouring traffic to an alternative route) may trigger a new significant impact (i.e. the detour may redirect the impact onto a sensitive resource, such as a habitat of an endangered species). The environmental impact caused by the proposed mitigation measure should be evaluated as well. CEQA provides the opportunity to analyze a broad spectrum of a project's potential environmental impacts and how each impact may intertwine with one another.
- 2) *Land use planning and permitting.* The Planning and Zoning Law requires every county and city to adopt a general plan that sets out planned uses for all of the area covered by the plan. A general plan must include seven mandatory elements, including a housing element that establishes the locations and densities of housing, among other requirements, and must incorporate environmental justice concerns. Cities' and counties' major land use decisions—including most zoning ordinances and other aspects of development permitting—must be consistent with their general plans. In this way, the general plan is a blueprint for future development.

The Planning and Zoning Law also establishes a planning agency in each city and county, which may be a separate planning commission, administrative body, or the legislative body of the city or county itself. Public notice must be given at least 10 days in advance of hearings where most permitting decisions will be made. The law also allows residents to appeal permitting decisions and other actions to either a board of appeals or the legislative body of the city or county. Cities and counties may adopt ordinances governing the appeals process, which can entail appeals of decisions by planning officials to the planning commission and the city council or county board of supervisors.

- 3) *Ministerial approvals.* Cities and counties enact zoning ordinances to implement their general plans. Zoning determines the type of housing that can be built. Some local ordinances provide “ministerial” processes for approving projects. Projects reviewed ministerially require only an administrative review designed to ensure they are consistent with the existing general plan and zoning rules, as well as meeting 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.

Ministerial approvals remove a project from all discretionary decisions of a local government, including an environmental review under CEQA. Thus, establishing processes to approve certain types of projects ministerially, also creates exemptions from CEQA.

- 4) *Senate Bill 35*. In 2017, SB 35 (Wiener), Chapter 366, created a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment (RHNA) numbers. A number of lands were exempted from this streamlined development process, including lands located in a coastal zone, wetlands, a high or very high fire severity zone, a hazardous waste site, an earthquake fault zone, a flood plain or floodway, lands identified for conservation in an adopted natural community conservation plan, and lands under conservation easement.
- 5) *Tribal Cultural Resources*. 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 in 2014 under AB 52. 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.

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 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.

Comments

- 1) *Purpose of Bill.* According to the author, “AB 168 is consistent with California laws, which protect tribal lands. Without this bill, tribal cultural resources may be subject to unwanted destruction and desecration in favor of housing developments. 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 consult 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.”
- 2) *Protecting tribal cultural resources.* AB 168 purports to use the already existing CEQA process established by AB 52 (2014) to protect potential tribal cultural resources during the streamlined, approval process. While simple enough in concept, cross-referencing to already existing CEQA provisions could potentially lead to confusion as some CEQA terminology under the AB 52 process does not have a counterpart in a ministerial approval process context. For example, reference to the term “environmental review document.” The existing AB 52 process requires that any mitigation measures agreed upon in the consultation process be recommended for inclusion in the environmental document. However, in a ministerial approval, there is no environmental document, only an application. A question arises as to what would be the equivalent document in this scenario?

As the bill moves through the legislative process, the author shall continue to work with stakeholders to ensure that language is carefully crafted to ensure that tribal cultural resources continue to be protected and there is no confusion of the part of local governments on their responsibilities under this bill.

Related/Prior Legislation

SB 35 (Wiener, Mitchell, Chapter 366, Statutes of 2017) created a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment (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.

SB 18 (Burton, Chapter 905, Statutes of 2004) required local governments to contact and consult with California Native American Tribes before the amendment or adoption of a general plan, specific plan, or designation of open space.

SB 1828 (Burton, Chesbro, 2002) would have subjected projects under CEQA and the Surface Mining and Reclamation Act of 1975 that could affect a Native American tribe's sacred site to additional conditions and approvals. AB 1828 was vetoed by Governor Davis.

TRIPLE REFERRAL:

This measure will be heard in the Senate Housing Committee July 2, 2019. If this measure is approved by the Senate Housing Committee it will be heard by the Senate Environmental Quality Committee July 3. If the measure is approved by this committee, the do pass motion must include the action to re-refer the bill to the Senate Governance and Finance Committee.

SOURCE: Author

SUPPORT:

Big Valley Rancheria
Dry Creek Rancheria Band of Pomo Indians
Habematolel Pomo of Upper Lake
Middletown Rancheria of Pomo Indians of California
Mooretown Rancheria
Tolowa Dee-ni' Nation
Pala Band of Mission Indians
Wilton Rancheria
Yocha Dehe Wintun Nation

OPPOSITION:

None received

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