
THIRD READING

Bill No: AB 168
Author: Aguiar-Curry (D), et al.
Amended: 8/25/20 in Senate
Vote: 27 - Urgency

SENATE HOUSING COMMITTEE: 11-0, 7/2/19

AYES: Wiener, Morrell, Bates, Caballero, Durazo, McGuire, Moorlach, Roth, Skinner, Umberg, Wieckowski

SENATE ENVIRONMENTAL QUALITY COMMITTEE: 7-0, 7/3/19

AYES: Allen, Bates, Dahle, Hill, Skinner, Stern, Wieckowski

SENATE GOVERNANCE & FIN. COMMITTEE: 7-0, 7/10/19

AYES: McGuire, Moorlach, Beall, Hertzberg, Hurtado, Nielsen, Wiener

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE HOUSING COMMITTEE: 10-0, 8/6/20 (Pursuant to Senate Rule 29.10)

AYES: Wiener, Bates, Caballero, Durazo, McGuire, Moorlach, Roth, Skinner, Umberg, Wieckowski

NO VOTE RECORDED: Morrell

ASSEMBLY FLOOR: 76-0, 5/13/19 - See last page for vote

SUBJECT: Planning and zoning: annual report: housing development:
streamlined approvals

SOURCE: Author

DIGEST: This bill requires a pre-consultation process with a California Native American tribe prior to the submission of an SB 35 (Wiener, Chapter 366, Statutes of 2017) permit, which entitles a developer to a streamlined housing approval process, in order to identify and protect tribal cultural resources.

Senate Floor Amendments of 8/25/20 change consultation timelines from “business days” to “days”; freeze local rules at the time the “notice of intent” is submitted; and reconcile chaptering conflicts with the following bills: AB 831 (Grayson), AB 2345 (Gonzalez), and SB 1085 (Skinner).

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” (TCR) 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, Chapter 532, Statutes of 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 TCR or alternatives that would avoid significant impacts to a TCR. Declares that a project with an effect that may cause a substantial adverse change in the significance of a TCR is a project that may have a significant effect on the environment, and that public agencies must, when feasible, avoid damaging effects to any TCR.
- 4) Requires a local planning agency, annually by April 1, to submit a report to the legislative body, the Office of Planning and Research (OPR), and the Department of Housing and Community (HCD) development that includes data points and updates on housing plans and approvals.

This bill:

- 1) Adds to the annual report to OPR and HCD the progress of a local planning agency in adopting or amending its general plan or local open-space element in compliance with its obligations to consult with California Native American tribes, and to identify and protect, preserve, and mitigate impacts to places, features, and objects in sacred sites, as specified.
- 2) Defines “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 and, where feasible, seeking agreement. Consultation between local governments and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality

with respect to places that have traditional tribal cultural importance. A lead agency shall consult the tribal consultation best practices described in the “State of California Tribal Consultation Guidelines: Supplement to the General Plan Guidelines” prepared by OPR.

- 3) Defines “scoping” as the act of participating in early discussions or investigations between the local government and California Native American tribe, and the development proponent if authorized by the California Native American tribe, regarding the potential effects a proposed development could have on a potential TCR or California Native American tribe, as defined.
- 4) States that it is the Legislature’s intent that the objective zoning standards, objective subdivision standards, and objective design review be adopted with the requirements in SB 18 (Burton, Chapter 905, Statutes of 2004), which requires a city or county, prior to the adoption or amendment of a general plan, to conduct consultations with California Native American tribes for the purpose of preserving places, features, and objects protected, as specified, that are within the city's or county's jurisdiction.
- 5) Requires, prior to submitting an SB 35 permit application, the developer shall submit a notice of intent to submit an application to the local government. The notice of intent shall be in the form of a preliminary application that includes specified information.
- 6) Requires the local government, upon receipt of the notice of intent to submit an SB 35 application, to engage in a scoping consultation regarding the proposed development with any California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development. Requires the local government to contact the Native American Heritage Commission for assistance in identifying any California Native American tribe that is traditionally and culturally affiliated with the geographic area.
- 7) Requires the timeline for noticing and commencing the scoping consultation to be carried out as follows:
 - a) The local government shall provide formal notice of the developers’ intent to submit an SB 35 application to each specified California Native American tribe within 30 days of receiving the notice of intent. The formal notice shall include the following information:
 - i) A description of the proposed development.

- ii) The location of the proposed development.
 - iii) An invitation to engage in scoping consultation.
- b) Each California Native American tribe that receives a formal notice shall have 30 days from the receipt of the notice to accept the invitation to engage in scoping consultation.
- c) If the local government receives a response to engage in the scoping consultation, the local government shall begin the scoping consultation within 30 days of receiving the response.
- 8) Requires the scoping consultation to recognize that California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue and shall take into account the cultural significance of the TCR to the culturally affiliated California Native American tribe.
- 9) Requires the parties to the scoping consultation to be the local government and any specified California Native American tribe. More than one specified California Native American tribe may participate in the scoping consultation, and each California Native American tribe may request to engage in separate scoping consultations with the local government.
- 10) Authorizes a developer and its consultants to participate in the scoping consultation if all of the following are met:
- a) The developer and its consultants agree to respect the principles set forth in this bill.
 - b) The California Native American tribe participating in the scoping consultation approves the participation. The California Native American tribe may rescind its approval at any time.
 - c) The parties shall comply with specified confidentiality requirements.
- 11) Prohibits the CEQA from applying to scoping consultation.
- 12) Authorizes a developer to submit an SB 35 application following the conclusion of scoping consultation if the parties find that no potential TCR would be affected by the proposed development.
- 13) Authorizes a developer to submit an SB 35 application following the conclusion of scoping consultation if the parties find that a potential TCR

could be affected by the proposed development and an enforceable agreement is documented between the California Native American tribe and the local government on methods, measures, and conditions for TCR treatment. The local government shall ensure that the enforceable agreement is included in the requirements and conditions for the proposed development.

- 14) Prohibits a developer from being eligible for SB 35 streamlining if, after concluding the scoping consultation, the parties find that a potential TCR could be affected by the proposed development and an enforceable agreement is not documented between the California Native American tribe and the local government regarding measures, methods, and conditions for TCR treatment.
- 15) Provides that the scoping consultation is concluded if either of the following occur:
 - a) The parties document an enforceable agreement concerning methods, measures, and conditions to avoid or address potential impacts to TCR that are or may be present.
 - b) One or more parties to the scoping consultation, acting in good faith and after reasonable effort, conclude that a mutual agreement on methods, measures, and conditions to avoid or address impacts to TCR that are or may be present cannot be reached.
- 16) Requires that, if the development or environmental setting substantially changes after the completion of the scoping consultation, the local government shall notify the California Native American tribe of the changes and engage in a subsequent scoping consultation if requested by the California Native American tribe.
- 17) Authorizes a local government to accept an SB 35 application only if one of the following applies:
 - a) A California Native American tribe that received formal notice of the development proponent's notice of intent did not accept the invitation to engage in a scoping consultation.
 - b) The California Native American tribe accepted an invitation to engage in a scoping consultation but substantially failed to engage in the scoping consultation after repeated documented attempts by the local government to engage with the California Native American tribe.

- c) The parties to a scoping consultation find that no TCR will be affected by the proposed development.
 - d) A scoping consultation between a California Native American tribe and the local government has occurred and resulted in an agreement.
- 18) Prohibits a project from eligibility for SB 35 streamlining if any of the following apply:
- a) There is a TCR on a national, state, tribal, or local historic register list located on the site of the project.
 - b) There is a potential TCR that could be affected by the proposed development and the parties do not document an enforceable agreement on methods, measures, and conditions for TCR treatment.
 - c) The parties to the scoping consultation do not agree as to whether a potential TCR will be affected by the proposed development.
- 19) Requires, if a project is ineligible for SB 35 streamlining, the local government to provide written documentation to a developer that shall include information on how the developer may seek a conditional use permit or other discretionary approval of the development from the local government.
- 20) Provides that this bill is not intended to limit consultation and discussion between a local government and a California Native American tribe pursuant to any other applicable law, confidentiality provisions under other applicable law, the protection of religious exercise to the fullest extent permitted under existing law, or the ability of a California Native American tribe to submit information to the local government or participate in the process of the local government.
- 21) Provides that this bill shall not apply to any project that has been approved for SB 35 streamlining before the effective date of this bill.

NOTES: Please refer to the most recent Senate Housing Committee policy analysis for further information.

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

SUPPORT: (Verified 8/26/20)

Agua Caliente Band of Cahuilla Indians
Barona Band of Mission Indians

Big Valley Band of Pomo Indians
California Nations Indian Gaming Association
California Tribal Business Alliance
Dry Creek Rancheria Band of Pomo Indians
Federated Indians of Graton Rancheria
Fernandeño Tataviam Band of Mission Indians
Habematolel Pomo of Upper Lake
Jamul Indian Village of California
Livable California
Middletown Rancheria
Mooretown Rancheria
Morongo Band of Mission Indians
Nototomne Cultural Preservation
Pala Band of Mission Indians
Pechanga Band of Luiseno Mission Indians
Rincon San Luiseno Band of Indians
Santa Ynez Band of Chumash Indians
Sycuan Band of the Kumeyaay Nation
Tolowa Dee-Ni' Nation
Tribal Alliance of Sovereign Indian Nations
Tule River Tribe
Twenty-nine Palms Band of Mission Indians
United Auburn Indian Community
Wilton Rancheria
Yocha Dehe Wintun Nation

OPPOSITION: (Verified 8/26/20)

Bay Area Housing Action Coalition
California Association of Realtors
California Building Industry Association
California Business Properties Association
International Council of Shopping Centers
NAIOP of California

ARGUMENTS IN SUPPORT: According to the author, “AB 168 is consistent with existing California law, which protects tribal sacred sites. Without this bill, tribal cultural resources may be subject to avoidable 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. Early identification and consultation with California tribes will ensure that generations of Californians will play a role in honoring the culture and sovereignty of Native American tribes and communities, and facilitate necessary housing development by avoiding litigation. On June 18, 2019, Governor Newsom issued an Executive Order about California's history saying, 'California must reckon with our dark history. We can never undo the wrongs inflicted on the peoples who have lived on this land that we now call California since time immemorial, but we can work together to build bridges, tell the truth about our past and begin to heal deep wounds.' It is time our Legislature put the Governor's words into action by restoring the right of tribal governments to engage the development process under SB 35."

ARGUMENTS IN OPPOSITION: According to a coalition, which includes the California Building Industry Association, the California Business Properties Association, California Association of Realtors, the International Council of Shopping Centers, and NAIOP California submitted an oppose unless amended letter. This coalition supports the intent to provide California Native American tribes with consultation as part of the SB 35 permitting process, but states that the language in AB 168 goes beyond the AB 52 process by "giving tribes an unchallengeable veto over whether a housing project is eligible for SB 35's entitlement process." This group requests the author to mirror existing California state law and ensure that a decision as to whether a housing project is eligible for SB 35 be able to challenge the decision in court. This group also requests that AB 168 be amended to clarify that its provisions only apply to applications submitted after the bills effective date. "Basic principles of fairness and due process dictate that the validity of already submitted applications should be judged by the law that was in effect at the time the application was submitted."

ASSEMBLY FLOOR: 76-0, 5/13/19

AYES: Aguiar-Curry, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Chu, Cooley, Cooper, Cunningham, Dahle, Daly, Diep, Eggman, Flora, Fong, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager-Dove, Kiley, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, Obernolte, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood, Rendon

NO VOTE RECORDED: Arambula, Brough, Burke, Frazier

Prepared by: Alison Hughes / HOUSING / (916) 651-4124
8/26/20 15:05:28

**** **END** ****