(**Without Reference to File**)

CONCURRENCE IN SENATE AMENDMENTS
AB 168 (Aguiar-Curry)
As Amended August 25, 2020
2/3 vote. Urgency

SUMMARY:

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 (TCRs).

The Senate Amendments:
Substantially amend the version passed by the Assembly. Specifically, the amendments:

1) Remove the language stating that it is the intent of the Legislature that the process to determine whether a development is located on a site that is a tribal cultural resource occur before the development proponent submits an application under this section, that the determination involves a consultation process with California Native American tribes, and that the determination can be made ministerially.

2) Require, prior to submitting an SB 35 permit application, the developer must submit a notice of intent to submit an application to the local government. The notice of intent must be in the form of a preliminary application that includes specified information.

3) Require the local government, upon receipt of the notice of intent to submit an SB 35 application, to engage in a scoping consultation, as defined, regarding the proposed development with any California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development, as follows:

    a) Require 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;

    b) Provide specified timelines for noticing and commencing the scoping consultation.

    c) Require 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. 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 must take into account the cultural significance of the TCR to the culturally affiliated California Native American tribe.

    d) Authorize a developer and its consultants to participate in the scoping consultation if all of the following are met:

i) The developer and its consultants agree to respect the principles set forth in this bill;

ii) 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; and

iii) The parties must comply with specified confidentiality requirements.

e) Prohibit the California Environmental Quality Act (CEQA) from applying to scoping consultation.

f) Provide that the scoping consultation is concluded if either of the following occur:

i) 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; or

ii) 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.

4) Authorize a developer to submit an SB 35 application following the conclusion of scoping consultation if either:

a) The parties find that no potential TCR would be affected by the proposed development; or

b) 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. In such an instance, the local government must ensure that the enforceable agreement is included in the requirements and conditions for the proposed development.

5) Prohibit 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.

6) Authorize 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; or

d) A scoping consultation between a California Native American tribe and the local government has occurred and resulted in an agreement.

7) Prohibit 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; or

c) The parties to the scoping consultation do not agree as to whether a potential TCR will be affected by the proposed development.

8) Require, if a project is ineligible for SB 35 streamlining, the local government to provide written documentation to a developer that must include information on how the developer may seek a conditional use permit or other discretionary approval of the development from the local government.

9) Require that, if the development or environmental setting substantially changes after the completion of the scoping consultation, the local government must notify the California Native American tribe of the changes and engage in a subsequent scoping consultation if requested by the California Native American tribe.

10) Provide 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.

11) Provide that this bill must not apply to any project that has been approved for SB 35 streamlining before the effective date of this bill.

12) Add to the annual report to the Governor's Office of Planning and Research (OPR) and the Department of Housing and Community Development (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.

13) Include an urgency clause.

COMMENTS:

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 CEQA, while projects permitted ministerially generally are not. The process is often time consuming and has a high degree of uncertainty. Additionally, these processes vary greatly from jurisdiction to jurisdiction.

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 through a ministerial approval process. In other words, projects eligible for SB 35 do not go through CEQA and cannot be denied by local governments if they meet specified criteria. Eligible projects must meet specified objective criteria to qualify for SB 35 streamlining; this provides clarity to the local government and development proponents as to which projects qualify for streamlining. In order to protect environmentally sensitive sites, however, SB 35 exempts specified sites from eligibility for streamlining, including but not limited to sites within a very high fire severity zone, wetlands, hazardous waste sites, or containing habitats for protected species.

Tribal cultural resources. Tribal Cultural Resources (TCRs) are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe. TCRs are sometimes referred to as "sacred sites." The phrase "Tribal Cultural Resources" was first legally recognized in California 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. The process established by AB 52 is crucial for a tribal community to participate in a consultation process to identify TCRs and mitigate any impact to those sites. In some instances, TCRs 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; a tribe may choose to not publicly disclose locations due to concerns that the sites may be at risk for desecration.

Unlike other protected resources under CEQA, SB 35 did not include a process for the treatment of TCRs, which therefore puts TCRs at risk of destruction. This bill is intended to create a process to ensure TCRs are protected within the SB 35 streamlining process, while also facilitating the construction of desperately needed housing in California.

Scoping consultation process in SB 35. Under the provisions in this bill, before submitting an SB 35 application, a developer applicant sends a pre-application to the city stating their intent to submit an SB 35 application. The city is then required to engage with a California Native American tribe traditionally and culturally affiliated with the proposed project site in a scoping

consultation using AB 52 timelines. The scoping consultation must operate under specified confidentiality provisions. The developer may participate in the scoping consultation if authorized by the California Native American tribe.

At the conclusion of the scoping consultation, if the parties find no potential TCR will be affected, an SB 35 application may be submitted. If the parties find that a potential TCR could be affected, and the parties can agree to methods, measures, and conditions to treat the TCR, the applicant may submit an SB 35 application. If the parties find that a potential TCR could be affected, and there is no agreement to methods, measures, and conditions to treat the TCR, the applicant may not submit an SB 35 application. Consultation concludes when the parties reach an agreement or one or more parties agree that after reasonable effort, agreement could not be reached.

Deviations from AB 52. By adding tribes to the "failure to agree" provisions in statute, this bill effectively grants California Native American tribes land use decision-making power over whether a project can proceed with an SB 35 application or not. Under the existing AB 52 process, the city makes the ultimate decision as to whether a TCR exists or whether it can be mitigated. This delegation of decision-making power would be unprecedented and would grant California Native American tribes municipal decision-making power over housing projects under a city or county's jurisdiction.

Additionally, the process contemplated under AB 168 does not grant a developer a legal remedy if their project is prohibited from using the SB 35 process. Under the current SB 35 law, a developer has two kinds of remedies if a city finds that the project is ineligible for streamlining (both legal writs of mandates compelling a local government to take action). For example, if a city finds that there is a protected habitat located on a site proposed for SB 35 streamlining, the developer can sue the city for a Writ of Mandate showing that there is not a protected habitat and request the court compel the city to provide the SB 35 permit.

According to several groups writing in opposition to this bill, "[c]urrent law does not empower the State of California or any local government to make decisions—whether regarding land use or anything else—that may not be challenged in court." The same groups request amendments be taken to ensure that the decision as to whether a housing project is eligible for SB 35 be afforded the same treatment and be able to be challenged in court.

According to Legislative Counsel, "Under the amendments to [SB 35] proposed by AB 168, both the city and the tribe would be vested with equal authority in connection with the consultation process. Neither party may overrule the other; rather, the parties must agree regarding the existence and treatment of tribal cultural resources in order for the development to be eligible for streamlining.

"Accordingly, if a developer wanted to challenge the rejection of a development's eligibility for the ministerial approval process, the developer would need to challenge a decision that was made jointly by two separate decision makers. This would mean that if a city wanted to authorize the ministerial process but the tribe disagreed, an action against the city could not be maintained because the city would have no authority to independently authorize the use of that process. Thus, the developer would need to challenge the tribe's decision, which would be possible only if the tribe is subject to the jurisdiction of a California court."

Legislative Counsel finds that based on the California Native American tribes' sovereign immunity, the California Native American tribes cannot be sued, which means that if the California Native American tribe or the local government rejects the streamlining, there is no remedy available.

The remedies available under SB 35 would only be available if the city was the sole decision-making entity. Since AB 168 would vest a California Native American tribe with equal decision-making in the streamlining process, it would not be possible to sue the city.

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 Support:
Supporters argue that this bill would ensure necessary protections for tribal cultural resources and correct an imbalance in the regulatory process. According to the Pechanga Band of Luiseño Indians, "AB 168 is a solid reasonable solution to the omission of tribal governments and tribal cultural resources from the SB 35 streamlining process and ensures the Tribe does not lose any of the long fought for legal rights and standing presently codified in State law."

Arguments in Opposition:
Opponents argue that the bill would undermine the ministerial nature of the SB 35 process and other existing protections under current law. According to a coalition, which includes the California Building Industry Association and the California Association of Realtors, "we do not object to legislation ensuring that SB 35 housing approvals must adhere to the same rules and criteria that govern tribal consultations and the treatment of Native American cultural resources under CEQA. But the current version of AB 168 goes much further and sets a troubling precedent that some land use decisions cannot be reviewed by the courts. AB 168 eliminates due process by giving tribes an unchallengeable veto over whether housing projects are eligible for SB 35. AB 168 goes beyond SB 35 policy, eliminating the housing accountability act's vested rights protections for all housing projects by allowing post hoc listing of tribal cultural resources."

FISCAL COMMENTS:

According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

VOTES:

ASM HOUSING AND COMMUNITY DEVELOPMENT: 7-0-1
YES: Chiu, Diep, Gabriel, Gloria, Limón, Maienschein, Quirk-Silva
ABS, ABST OR NV: Kiley

ASSEMBLY FLOOR: 76-0-4
YES: 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, O'Donnell, Obernolte, 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
ABS, ABST OR NV: Arambula, Brough, Burke, Frazier

UPDATED:

VERSION: August 25, 2020

CONSULTANT: Steve Wertheim / H. & C.D. / (916) 319-2085 FN: 0003605