

AMENDED IN ASSEMBLY MAY 1, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 1799

Introduced by Assembly Member Gordon
(Coauthors: Assembly Members Alejo, Campos, and Wieckowski)
(Coauthors: Senators Beall and Correa)

February 18, 2014

An act to amend Sections 65965 and 65966 of the Government Code, relating to land use.

LEGISLATIVE COUNSEL'S DIGEST

AB 1799, as amended, Gordon. Land use: mitigation lands.

~~The Planning and Zoning Law provides that if a state or local agency requires a person to transfer to that agency an interest in real property to mitigate the environmental impact of a project or facility, that agency may authorize specified entities to hold title to, and manage that interest in, real property, as well as any accompanying funds, provided those entities meet specified requirements. Existing law requires that if accompanying funds, as defined, are conveyed at the time the property is protected, then the holder of those accompanying funds must meet specified requirements and requires a state or local agency to exercise due diligence in reviewing the qualifications of a special district or nonprofit organization to effectively manage and steward land, water, or natural resources, as well as the accompanying funds. Existing law requires a conservation easement created as a component of satisfying a local or state mitigation requirement to be perpetual in duration, and sets forth the requirements for long-term stewardship of property by various entities, including, among others, local governmental entities and nonprofit organizations.~~

The Planning and Zoning Law authorizes a state or local agency, where that agency requires a project proponent to transfer property to mitigate adverse project impacts upon natural resources, to in turn authorize a government entity, special district, or any of certain types of parties to hold title to, and manage, the transferred property. Existing law also allows a state or local agency that has required such a transfer of property for mitigation purposes to identify the funding needs for the long-term stewardship of the property, and establishes various requirements with respect to the amount and management of any endowment conveyed or secured for purposes of funding the protection of the property.

~~This bill would eliminate the requirement of an endowment or other financial mechanism for long-term stewardship where a governmental entity or special district is the entity required to provide the long-term stewardship, where a governmental entity or specified district is the transferee of the property, specify that an endowment or other financial mechanism is not required if the governmental entity or special district provides evidence to the local or state agency that it possesses an investment-grade, as defined, credit rating by a nationally recognized statistical rating organization, and provides either a resolution adopted by the legislative body of the governmental entity or special district or organization or other equivalent evidence of financial reliability, and enters into a contractual agreement, containing certain elements, with the local or state agency enforcing the mitigation requirements, as specified. This bill would require a participating governmental entity or special district to submit an annual report to the Department of Fish and Wildlife of the governmental entity's or special district's accounts receivables and discharged accounts, as specified.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 65965 of the Government Code is
- 2 amended to read:
- 3 65965. For the purposes of this chapter, the following
- 4 definitions apply:
- 5 (a) "Endowment" means the funds that are conveyed solely for
- 6 the long-term stewardship of a mitigation property. Endowment
- 7 funds are held as charitable trusts that are permanently restricted

1 to paying the costs of long-term management and stewardship of
2 the mitigation property for which the funds were set aside.
3 Endowments shall be governed by the underlying laws, regulations,
4 and specific governmental approvals under those laws and
5 regulations pursuant to which the endowments were exacted,
6 consistent with subdivision (b) of Section 65966 and with the
7 Uniform Prudent Management of Institutional Funds Act (Part 7
8 (commencing with Section 18501) of Division 9 of the Probate
9 Code). Endowments do not include funds conveyed for meeting
10 short-term performance objectives of a project.

11 (b) “Community foundation” means any community foundation
12 that meets all of the following requirements:

13 (1) Meets the requirements of a community trust under Section
14 1.170A-9(f)(10)-(11) of Title 26 of the Code of Federal
15 Regulations.

16 (2) Is exempt from taxation as an organization described in
17 Section 501(c)(3) of the Internal Revenue Code.

18 (3) Is qualified to do business in this state.

19 (4) Is a “qualified organization” as defined in Section 170(h)(3)
20 of the Internal Revenue Code.

21 (5) Has complied with National Standards for U.S. Community
22 Foundations as determined by the Community Foundations
23 National Standards Board, a supporting organization of the Council
24 on Foundations.

25 (6) Is registered with the Registry of Charitable Trusts
26 maintained by the Attorney General pursuant to Section 12584.

27 (c) “Conservation easement” means a conservation easement
28 created pursuant to Chapter 4 (commencing with Section 815) of
29 Title 2 of Part 2 of Division 2 of the Civil Code.

30 (d) “Direct protection” means the permanent protection,
31 conservation, and preservation of lands, waters, or natural
32 resources, including, but not limited to, agricultural lands, wildlife
33 habitat, wetlands, endangered species habitat, open-space areas,
34 or outdoor recreational areas.

35 (e) “Governmental entity” means any state agency, office,
36 officer, department, division, bureau, board, commission, public
37 postsecondary educational institution, city, county, or city and
38 county, or a joint powers authority formed pursuant to the Joint
39 Exercise of Powers Act (Chapter 5 (commencing with Section

1 6500) of Division 7 of Title 1) that meets either of the following
2 requirements:

3 (1) The joint powers authority was created for the principal
4 purpose and activity of the direct protection or stewardship of land,
5 water, or natural resources, including, but not limited to,
6 agricultural lands, wildlife habitat, wetlands, endangered species
7 habitat, open-space areas, and outdoor recreational areas.

8 (2) The joint powers authority was created for the purpose of
9 constructing, maintaining, managing, controlling, and operating
10 transportation infrastructure, such as major thoroughfares and
11 bridges.

12 (f) (1) “Mitigation agreement” means either of the following:

13 (A) A written agreement between the project proponent and the
14 entity qualified to hold the property and the endowment pursuant
15 to this chapter, which is submitted to the state or local agency for
16 the purpose of obtaining any permit, clearance, or mitigation
17 approval from that state or local agency.

18 (B) A written agreement between the project proponent and the
19 entity qualified to hold the property pursuant to this chapter,
20 including any agreement with an entity qualified to hold the
21 endowment pursuant to this chapter, which is submitted to the state
22 or local agency for the purpose of obtaining any permit, clearance,
23 or mitigation approval from that state or local agency.

24 (2) A mitigation agreement shall govern the long-term
25 stewardship of the property and the endowment.

26 (g) “Congressionally chartered foundation” means a nonprofit
27 organization that meets all of the following requirements:

28 (1) Is chartered by the United States Congress.

29 (2) Is exempt from taxation as an organization described in
30 Section 501(c)(3) of the Internal Revenue Code.

31 (3) Is qualified to do business in this state.

32 (4) Is registered with the Registry of Charitable Trusts
33 maintained by the Attorney General pursuant to Section 12584.

34 (5) Has as a purpose the conservation and management of fish,
35 wildlife, plants, and other natural resources, which includes, but
36 is not limited to, the direct protection or stewardship of land, water,
37 or natural wildlife habitat, wetlands, endangered species habitat,
38 open-space areas, and outdoor recreational areas.

39 (h) “Investment grade” means a credit rating ~~provided by a~~
40 ~~nationally recognized statistical rating organization that indicates~~

1 a relatively low risk of default. For purposes of this subdivision,
2 “nationally recognized statistical rating organization” means a
3 rating agency designated by the Securities and Exchange
4 Commission as being nationally recognized: *based on securities*
5 *rated by Standard & Poor’s Rating Services as AAA, AA, A, or*
6 *BBB, or by Moody’s Investors Service as Aaa, Aa, A, or Baa,*
7 *including a rating with a “+” or “-” designation or other*
8 *variations that occur within these ratings.*

9 (i) “Nonprofit organization” means any nonprofit organization
10 that meets all of the following requirements:

11 (1) Is exempt from taxation as an organization described in
12 Section 501(c)(3) of the Internal Revenue Code.

13 (2) Is qualified to do business in this state.

14 (3) Is a “qualified organization” as defined in Section 170(h)(3)
15 of the Internal Revenue Code.

16 (4) Is registered with the Registry of Charitable Trusts
17 maintained by the Attorney General pursuant to Section 12584.

18 (5) Has as its principal purpose and activity the direct protection
19 or stewardship of land, water, or natural resources, including, but
20 not limited to, agricultural lands, wildlife habitat, wetlands,
21 endangered species habitat, open-space areas, and outdoor
22 recreational areas.

23 (j) “Project proponent” means an individual, business entity,
24 agency, or other entity that is developing a project or facility and
25 is required to mitigate any adverse impact upon natural resources.

26 (k) “Property” means fee title land or any partial interest in real
27 property, including a conservation easement, that may be conveyed
28 pursuant to a mitigation requirement by a state or local agency.

29 (l) “Special district” means any of the following special districts:

30 (1) A special district formed pursuant to Article 3 (commencing
31 with Section 5500) of Chapter 3 of Division 5 or Division 26
32 (commencing with Section 35100) of the Public Resources Code.

33 (2) A resource conservation district organized pursuant to
34 Division 9 (commencing with Section 9001) of the Public
35 Resources Code.

36 (3) A district organized or formed pursuant to the Metropolitan
37 Water District Act (Chapter 209 of the Statutes of 1969).

38 (4) A county water district organized under Division 12
39 (commencing with Section 30000) of the Water Code, that has
40 more than 5,000 acres of mitigation lands.

1 (5) A special district formed pursuant to Chapter 2 (commencing
2 with Section 11561) of Division 6 of the Public Utilities Code that
3 provides water and wastewater treatment services.

4 (6) A district organized or formed pursuant to the County Water
5 Authority Act (Chapter 545 of the Statutes of 1943).

6 (7) A local flood control district formed pursuant to any law.

7 (m) “Stewardship” encompasses the range of activities involved
8 in controlling, monitoring, and managing for conservation purposes
9 a property, or a conservation or open-space easement, as defined
10 by the terms of the easement, and its attendant resources.

11 SEC. 2. Section 65966 of the Government Code is amended
12 to read:

13 65966. (a) Any conservation easement created as a component
14 of satisfying a local or state mitigation requirement shall be
15 perpetual in duration, whether created pursuant to Chapter 6.6
16 (commencing with Section 51070) of Part 1 of Division 1 of Title
17 5 of this code or Chapter 4 (commencing with Section 815) of
18 Title 2 of Part 2 of the Civil Code.

19 (b) Any local or state agency that requires property to be
20 protected pursuant to subdivision (a) or (b) of Section 65967 may
21 identify how the funding needs of the long-term stewardship of
22 the property will be met. Nothing in this chapter shall be construed
23 as otherwise precluding other methods of funding for the long-term
24 stewardship of the property. If an endowment is conveyed or
25 secured at the time the property is protected, all of the following
26 shall apply:

27 (1) The endowment shall be held, managed, invested, and
28 disbursed solely for, and permanently restricted to, the long-term
29 stewardship of the specific property for which the funds were set
30 aside.

31 (2) The endowment shall be calculated to include a principal
32 amount that, when managed and invested, is reasonably anticipated
33 to cover the annual stewardship costs of the property in perpetuity.

34 (3) The endowment shall be held, managed, invested, disbursed,
35 and governed as described in subdivision (a) of Section 65965
36 consistent with the Uniform Prudent Management of Institutional
37 Funds Act (Part 7 (commencing with Section 18501) of Division
38 9 of the Probate Code).

39 (c) If a nonprofit corporation holds the endowment, the nonprofit
40 shall utilize generally accepted accounting practices that are

1 promulgated by the Financial Accounting Standards Board or any
2 successor entity.

3 (d) If a local agency holds the endowment, the local agency
4 shall do all of the following:

5 (1) Hold, manage, and invest the endowment consistent with
6 subdivision (b) to the extent allowed by law.

7 (2) Disburse funds on a timely basis to meet the stewardship
8 expenses of the entity holding the property.

9 (3) Utilize accounting standards consistent with standards
10 promulgated by the Governmental Accounting Standards Board
11 or any successor entity.

12 (e) (1) Unless the mitigation agreement provides that another
13 person or entity shall prepare the annual fiscal report described
14 below, a governmental entity, community foundation, special
15 district, a congressionally chartered foundation, or a nonprofit
16 organization that holds funds pursuant to this chapter, including
17 an endowment or moneys for initial stewardship costs, shall provide
18 the local or state agency that required the endowment with an
19 annual fiscal report that contains at least the following elements
20 with respect to each individual endowment dedicated and held by
21 that entity:

22 (A) The balance of each individual endowment at the beginning
23 of the reporting period.

24 (B) The amount of any contribution to the endowment during
25 the reporting period including, but not limited to, gifts, grants, and
26 contributions received.

27 (C) The net amounts of investment earnings, gains, and losses
28 during the reporting period, including both realized and unrealized
29 amounts.

30 (D) The amounts distributed during the reporting period that
31 accomplish the purpose for which the endowment was established.

32 (E) The administrative expenses charged to the endowment
33 from internal or third-party sources during the reporting period.

34 (F) The balance of the endowment or other fund at the end of
35 the reporting period.

36 (G) The specific asset allocation percentages including, but not
37 limited to, cash, fixed income, equities, and alternative investments.

38 (H) The most recent financial statements for the organization
39 audited by an independent auditor who is, at a minimum, a certified
40 public accountant.

1 (2) If an entity is required to submit an identical annual fiscal
2 report pursuant to paragraph (1) to the Department of Fish and
3 ~~Game Wildlife~~ and any other state or local agency, then that report
4 shall be provided only to the Department of Fish and ~~Game~~
5 *Wildlife*. In that instance, the Department of Fish and ~~Game Wildlife~~
6 shall provide a copy of that annual fiscal report on its Internet Web
7 site for a minimum of five years.

8 (f) If a state agency authorizes a governmental entity, special
9 district, or nonprofit organization to hold property pursuant to
10 subdivision (a) or (b) of Section 65967 in connection with a
11 development project, the agency may require the project proponent
12 to pay a one-time fee that does not exceed the reasonable costs of
13 the agency in reviewing qualifications of potential holders of the
14 property and approving those holders. This one-time fee shall be
15 collected only if the agency can demonstrate its actual review of
16 qualifications and approval of holders.

17 (g) If a local agency authorizes a governmental entity, special
18 district, or nonprofit organization to hold property or an endowment
19 pursuant to this chapter, the agency may require the project
20 proponent to pay a one-time fee that does not exceed the reasonable
21 costs of the agency in reviewing qualifications of the parties
22 identified in the mitigation agreement, approving those parties,
23 and any regular oversight over those parties to ensure that the
24 parties are complying with all applicable laws. This one-time fee
25 shall be collected only if the agency can demonstrate its actual
26 review of qualifications, approval of parties, or regular oversight
27 of compliance and performance.

28 (h) A local agency may require a project proponent to provide
29 a one-time payment that will provide for the initial stewardship
30 costs for up to three years while the endowment begins to
31 accumulate investment earnings. The funds for the initial
32 stewardship costs are distinct from the funds that may be conveyed
33 for long-term stewardship, construction, or other costs. If there are
34 funds remaining at the completion of the initial stewardship period,
35 the funds shall be conveyed to the project proponent.

36 (i) The local agency may contract with or designate a qualified
37 third party to do any of the following:

38 (1) Review the qualifications of a governmental entity, special
39 district, or nonprofit organization to effectively manage and

1 steward natural land or resources pursuant to subdivision (c) of
2 Section 65967.

3 (2) Review the qualifications of a governmental entity,
4 community foundation, or nonprofit organization to hold and
5 manage the endowment that is set aside for long-term stewardship
6 of the property.

7 (3) Review reports or other performance indicators to evaluate
8 the stewardship of lands, natural resources, or funds, and
9 compliance with the mitigation agreement.

10 (j) If a property conserved pursuant to subdivision (a) or (b) of
11 Section 65967 is condemned, the net proceeds from the
12 condemnation of the real property interest set aside for mitigation
13 purposes shall be used for the purchase of property that replaces
14 the natural resource characteristics the original mitigation was
15 intended to protect, or as near as reasonably feasible. Any
16 endowment held for the condemned property shall be held for the
17 long-term stewardship of the replacement property.

18 (k) Unless prohibited by law, no provision in this chapter is
19 intended to prohibit for-profit entities from holding, acquiring, or
20 providing property for mitigation purposes.

21 (l) Nothing in this section shall prohibit a state agency from
22 exercising any powers described in subdivision (d), (g), or (h).

23 (m) A governmental entity, special district, or nonprofit
24 organization may contract with a community foundation or
25 congressionally chartered foundation at any time to hold, manage,
26 and invest the endowment for a mitigation property and disburse
27 payments from the endowment to the holder of the mitigation
28 property consistent with the fund agreement.

29 (n) Except as expressly authorized in paragraph (1) of
30 subdivision (e), the mitigation agreement shall not include any
31 provision to waive or exempt the parties from any requirement, in
32 whole or part, of this chapter.

33 (o) Subdivisions (b) to (e), inclusive, shall not apply to funds,
34 including funds from mitigation fees, held for the long-term
35 management and stewardship of property pursuant to either an
36 interim or approved habitat conservation plan pursuant to Chapter
37 35 (commencing with Section 1531) of Title 16 of the United
38 States Code or an interim or approved natural community
39 conservation plan pursuant to Chapter 10 (commencing with
40 Section 2800) of Division 3 of the Fish and Game Code, if, in the

1 interim or approved plan documents, the permitting agency
2 determines the endowment to be established with those funds will
3 be adequate and provides a schedule for funding the endowment.

4 (p) (1) If a governmental entity or special district is the project
5 proponent required to provide long-term stewardship of property
6 pursuant to subdivision (b), an endowment or other financial
7 mechanism for long-term stewardship shall not be required if the
8 governmental entity or special district provides evidence to the
9 local or state agency that it possesses an investment-grade credit
10 rating by a nationally recognized statistical rating organization or
11 other equivalent evidence of financial reliability, and ~~provides one~~
12 ~~of the following:~~

13 ~~(A) A resolution to fund the long-term stewardship of the~~
14 ~~property adopted by the board or legislative body of the~~
15 ~~governmental entity or special district.~~

16 ~~(B) A enters into a contractual agreement with the state or local~~
17 ~~agency enforcing the mitigation requirements to fund the long-term~~
18 ~~stewardship of the property. property that includes all of the~~
19 ~~following:~~

20 ~~(2) A resolution or contract provided pursuant to paragraph (1)~~
21 ~~shall include all of the following:~~

22 (A) A summary of the governmental entity or special district’s
23 current and projected financial state.

24 (B) A finding regarding a financial analysis conducted on annual
25 management costs.

26 (C) An annual pledge of revenue to cover the annual mitigation
27 requirements.

28 (D) An annual pledge of revenue to cover the annual
29 management costs.

30 (E) Use of accounting standards consistent with standards
31 promulgated by the Governmental Accounting Standards Board
32 or its successor entity.

33 (F) An annual fiscal report.

34 (G) *An agreement to post collateral for performance of the*
35 *long-term stewardship in the form of a performance bond, escrow*
36 *account, casualty insurance, or letter of credit. The instrument*
37 *shall include, at a minimum, a contingency fund equivalent to five*
38 *years of long-term management costs for the mitigation lands.*

39 (3)

1 (2) If the governmental entity or special district is subsequently
2 downgraded below an investment-grade credit ~~rating~~ *rating*, as
3 *described in subdivision (h) of Section 65965*, by a nationally
4 recognized statistical rating organization or fails to maintain an
5 equivalent standard of financial reliability, the state or local agency
6 enforcing the mitigation requirement may provide written notice
7 thereof and require the governmental entity or special district to
8 ~~post collateral for performance of the long-term stewardship in~~
9 ~~the form of a performance bond, escrow account, casualty~~
10 ~~insurance, letter of credit, or other appropriate instrument. The~~
11 ~~obligation to maintain collateral shall end, and all unused collateral~~
12 ~~shall be canceled or refunded, upon the governmental entity or~~
13 ~~special district providing evidence of its return to an~~
14 ~~investment-grade credit rating by a nationally recognized statistical~~
15 ~~rating organization or other equivalent evidence of financial~~
16 ~~reliability.~~ *provide an endowment for the long-term stewardship*
17 *of the property.*

18 (4)

19 (3) If the governmental entity or special district fails to
20 adequately fund the long-term stewardship ~~by revoking, failing to~~
21 ~~comply with, or otherwise rendering ineffective the board~~
22 ~~resolution described in paragraph (1), or or, after being provided~~
23 written notice, fails to cure within the remedy period set forth in
24 the contractual agreement, the state or local agency enforcing the
25 mitigation requirement may, in addition to any contractual
26 remedies, require the governmental entity or special district to ~~post~~
27 ~~collateral for performance of the long-term stewardship in the form~~
28 ~~of a performance bond, escrow account, casualty insurance, letter~~
29 ~~of credit, or other appropriate instrument.~~ *provide an endowment.*

30 (4) (A) *A participating governmental entity or special district*
31 *shall submit to the Department of Fish and Wildlife an annual*
32 *report of the governmental entity's or special district's accounts*
33 *receivables and discharged accounts.*

34 (B) *The Department of Fish and Wildlife shall inform the*
35 *governmental entity or special district, not less than 60 days before*
36 *the annual report is required to be submitted, of both of the*
37 *following:*

38 (i) *The format of the annual report.*

39 (ii) *The submission date for the annual report.*

1 (5) *This subdivision shall become inoperative on January 1,*
2 *2020, unless a later enacted statute deletes or extends that date.*

O