

Senate Bill No. 436

CHAPTER 590

An act to amend Section 65965 of, to add Sections 65966 and 65967 to, and to add and repeal Section 65968 of, the Government Code, relating to land use.

[Approved by Governor October 8, 2011. Filed with
Secretary of State October 8, 2011.]

LEGISLATIVE COUNSEL'S DIGEST

SB 436, Kehoe. Land use: mitigation lands: nonprofit organizations.

The Planning and Zoning Law authorizes a state or local public agency, if the agency requires a property owner to transfer to the agency an interest in real property to mitigate an adverse impact upon natural resources caused by permitting the development of a project or facility, to authorize a nonprofit organization to hold title to and manage that interest in real property, provided that the nonprofit organization meets specified requirements.

This bill would revise these provisions and would additionally authorize a state or local public agency to authorize a nonprofit organization, a special district, a for-profit entity, a person, or another entity to hold title to and manage an interest in property held for mitigation purposes, subject to certain requirements. This bill would also provide that if a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency is authorized to take any action that it deems necessary to meet its mitigation obligations, including, but not limited to, providing funds to a nonprofit organization to acquire land or easements that satisfy the agency's mitigation obligations, including funds that have been set aside for the long-term management of any lands or easements conveyed to a nonprofit organization, as specified. This bill would, until January 1, 2022, require a special district or nonprofit organization that holds funds on behalf of a local agency, for the long-term management of land, to comply with certain requirements. The bill would also state the findings and declarations of the Legislature with respect to the preservation of natural resources through mitigation, and would state that it is in the best interest of the public to allow state and local public agencies and nonprofit organizations to utilize the tools and strategies they need for improving the effectiveness, cost efficiency, and durability of mitigation for California's natural resources.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) State and local laws protect a variety of natural resources, and also require permits to be issued for the development of certain projects or facilities.

(b) In furtherance of these laws, state or local public agencies may require a project proponent to transfer an interest in real property to mitigate any adverse impact upon natural resources caused by permitting the development of a project or facility.

(c) It is a widespread practice that funds are set aside for the long-term stewardship of the property protected for mitigation purposes by the project proponent at the time the property is protected.

(d) Lands and real property interests that are protected to achieve the mitigation may be held by public agencies, special districts, nonprofit organizations, or other entities, including for-profit entities.

(e) Many state and local agencies work with special districts, nonprofit organizations, and property owners in valuable and cost-effective public-private partnerships to identify properties that meet the mitigation requirements and to hold and provide long-term stewardship of the real property interests.

(f) There are tools and strategies available for improving the effectiveness, cost efficiency, and durability of mitigation for California's natural resources.

(g) It is in the best interest of the public to allow public agencies, special districts, nonprofit organizations, and property owners to utilize the tools and strategies they need for improving the effectiveness, cost efficiency, and durability of mitigation for California's natural resources.

(h) It is important that entities that are qualified as to experience, capacity, and knowledge hold and manage property for mitigation purposes and any accompanying funds.

(i) There are numerous benefits, including decreased financial risk, creation of efficiencies, and maintaining partnerships, for the real property and accompanying long-term funding to be held and managed by the same entity.

(j) The state recognizes that it is widespread practice for the holder of a mitigation property or a conservation easement to also hold and manage the long-term funding dedicated to the property.

(k) The state seeks strategies that allow and provide for this practice to continue while providing appropriate standards and public oversight to ensure that the funds endure for the long-term stewardship of the protected property and its associated natural resources.

(l) California has numerous laws and regulations that provide strong protections for the funds that are held, managed, invested, and disbursed for the long-term stewardship of mitigation properties. There are also detailed national standards in generally accepted accounting practices for both nonprofit organizations and public agencies. These protections include, but are not limited to, at the state level the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code), the Nonprofit Public Benefit Corporation Law (Part 2 (commencing

with Section 5110) of Division 2 of Title 1 of the Corporations Code), and the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code); and at the national level the accounting standards promulgated by the Financial Accounting Standards Board, the federal Bankruptcy Code (Title 11 of the United States Code), and provisions governing federal tax-exempt status.

(m) The Attorney General is fully authorized to enforce the provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code) and the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code) that identifies the nonprofit governing body's obligations to protect the assets and mission of the nonprofit, and the provision that the governing body can be jointly and severally liable for any failure to do so. In addition, the Attorney General has enforcement rights and obligations regarding noncompliance, mismanagement, or misuse of endowment funds, including the recovery of any endowment funds. The Attorney General is also a necessary party to proceedings affecting the disposition of assets of a charitable trust.

(n) The Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code) provides strong direction and requirements for the holding, managing, investing, and disbursing of endowment funds held by nonprofits and public agencies, as defined. The act recognizes the distinction between permanently restricted funds and temporarily restricted funds and imposes requirements for each. Both types of funds are relevant to the management of funds for the long-term stewardship of land.

(o) The goal of managing funds held for the long-term stewardship of land is to achieve intergenerational equity as embodied in the Uniform Prudent Management of Institutional Funds Act and extensively cited in the financial literature. Considerable guidance is provided in the act and in the implementing accounting standards about achieving this objective.

(p) The state acknowledges that existing laws, regulations, and accounting standards create a strong body of protections for the range of issues that may arise in the long-term management of endowments for protecting mitigation properties. These protections provide sufficient financial security for the funds upon which the state may rely.

(q) Due to the existing protections in law, regulation, and accounting standards, this chapter does not impose any liability or duty to perform upon a state or local agency with regard to reviewing or approving special districts or nonprofit organizations with regard to holding endowments.

SEC. 2. Section 65965 of the Government Code is amended to read:

65965. For the purposes of this chapter, the following definitions apply:

(a) "Accompanying funds" means the funds that may be conveyed solely for the long-term stewardship of a property. Also known as "endowments," these funds are held and managed consistent with subdivision (b) of Section 65966 and with the Uniform Prudent Management of Institutional Funds

Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code). Accompanying funds do not include funds conveyed for meeting short-term performance objectives of a project.

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

(c) “Department” means the Department of Fish and Game.

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

(e) “Mitigation agreement” means a written agreement between a public agency, the project proponent, and the special district, nonprofit organization, for-profit entity, or other entity that holds the property. A mitigation agreement governs the long-term stewardship of a property and accompanying funds, and shall specify any reporting requirements or elements, including due dates of reports.

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

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

(h) “Special district” means any special district formed pursuant to Article 3 (commencing with Section 5500) of Chapter 3 of Division 5 or Division 26 (commencing with Section 35100) of the Public Resources Code, or any resource conservation district organized pursuant to Division 9 (commencing with Section 9001) of the Public Resources Code.

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

SEC. 3. Section 65966 is added to the Government Code, to read:

65966. (a) Any conservation easement created as a component of satisfying a local or state mitigation requirement shall be perpetual in duration, whether created pursuant to Section 51075 of this code or Section 815 of the Civil Code.

(b) Any local or state agency that requires property to be protected pursuant to subdivision (a) or (b) of Section 65967 may identify how the funding needs of the long-term stewardship of the property will be met. If accompanying funds are conveyed at the time the property is protected, all of the following shall apply:

(1) The accompanying funds shall be held, managed, invested, and disbursed solely for the long-term stewardship of the specific property for which the funds were set aside.

(2) The accompanying funds shall be calculated to include a principal amount that, when managed and invested, will produce revenues that are

reasonably sufficient to cover the annual stewardship costs of the property in perpetuity.

(3) The principal amount shall be defined and managed as permanently restricted funds.

(4) Any one-time payment, as defined by subdivision (f), and earnings from the principal shall be managed as temporarily restricted funds.

(5) The accompanying funds shall be held, managed, invested, and disbursed consistent with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code).

(c) If a local agency holds the accompanying funds, the local agency shall do all of the following:

(1) Hold, manage, and invest the accompanying funds consistent with subdivision (b) to the extent allowed by law.

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

(3) Utilize accounting standards consistent with standards promulgated by the Governmental Accounting Standards Board.

(d) A special district or a nonprofit organization that holds funds pursuant to this chapter, including, but not limited to, accompanying funds, moneys to acquire land or easements, or moneys for initial stewardship costs, shall provide the local or state agency with an annual fiscal report that contains at least the same information as required by Internal Revenue Service Form 990 regarding the funds.

(e) If a state or local agency authorizes a special district or nonprofit organization to hold property pursuant to subdivision (a) or (b) of Section 65967, the agency may require an administrative endowment from the project proponent, as a one-time payment for reasonable costs associated with reviewing qualifications, approving holders, and regular oversight of compliance and performance. The administrative endowment shall be held, managed, and invested to produce an annual revenue sufficient to cover the costs of reviewing qualifications, approving holders, and ongoing oversight.

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

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

(1) Review the qualifications of a special district or nonprofit organization to effectively manage and steward natural land or resources pursuant to subdivisions (c) and (d) of Section 65967.

(2) Review the qualifications of a nonprofit to hold and manage the accompanying funds that are set aside for long-term stewardship of the property.

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

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

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

(j) Nothing in this section shall prohibit a state agency from exercising any powers described in subdivisions (c), (e), (f), or (g).

SEC. 4. Section 65967 is added to the Government Code, to read:

65967. (a) If a state or local agency requires a project proponent to transfer property to mitigate any adverse impact upon natural resources caused by permitting the development of a project or facility, the agency may authorize a special district, a nonprofit organization, a for-profit entity, a person, or another entity to hold title to and manage that property.

(b) If a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency may take any action that the agency deems necessary in order to meet its mitigation obligations, including, but not limited to, the following:

(1) Transfer the interest to a special district or to a nonprofit organization that meets the requirements set forth in subdivision (c).

(2) Provide funds to a nonprofit organization, a special district, a for-profit entity, a person, or other entity to acquire land or easements that satisfy the agency's mitigation obligations.

(c) If a state or local agency authorizes a nonprofit organization to hold title to and manage the property, that nonprofit organization shall meet all of the following requirements:

(1) The nonprofit organization shall be exempt from taxation as an organization described in Section 501(c)(3) of the Internal Revenue Code.

(2) The nonprofit organization shall be qualified to do business in this state.

(3) The nonprofit organization shall be a "qualified organization" as defined in Section 170(h)(3) of the Internal Revenue Code.

(4) The nonprofit organization shall have as its principal purpose and activity the direct protection or stewardship of land, water, or natural resources, including, but not limited to, agricultural lands, wildlife habitat, wetlands, endangered species habitat, open-space areas, and outdoor recreational areas.

(d) A state or local agency shall 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. The local agency may adopt guidelines to assist it in that review process, which may include, but are not limited to, the use of or reliance upon guidelines, standards, or accreditation established by a qualified entity that are in widespread state or national use.

(e) The state or local agency may require the special district or nonprofit organization to submit a report not more than once every 12 months and for the number of years specified in the mitigation agreement that details the stewardship and condition of the property and any other requirements pursuant to the mitigation agreement for the property.

(f) The recorded instrument that places the fee title or partial interest in real property with a special district, nonprofit organization, or for-profit entity, pursuant to subdivision (a) or (b) shall include a provision that if the state or local agency or its successor agency reasonably determines that the property conveyed to meet the mitigation requirement is not being held, monitored, or stewarded for conservation purposes in the manner specified in that instrument or in the mitigation agreement, the property shall revert to the state or local agency, or to another public agency, special district, or nonprofit organization pursuant to subdivisions (c) and (d) and subject to approval by the state or local agency. If a state or local agency determines that a property must revert, it shall work with the parties to the mitigation agreement, or other affected entities, to ensure that any contracts, permits, funding, or other obligations and responsibilities are met.

SEC. 5. Section 65968 is added to the Government Code, to read:

65968. (a) Notwithstanding Section 13014 of the Fish and Game Code, if accompanying funds are conveyed pursuant to Section 65966 for property conveyed pursuant to Section 65967, the accompanying funds may be held by the same special district or nonprofit organization that holds the property pursuant to this section.

(b) Except as permitted below, the accompanying funds shall be held by the agency that requires the mitigation or by the special district or nonprofit organization that holds the property. The exceptions to this requirement are the following:

(1) Accompanying funds that are held by an entity other than the state or holder of the mitigation property as of January 1, 2012.

(2) Accompanying funds that are held by another entity pursuant to the terms of a natural community conservation plan (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code) or a safe harbor agreement (Article 3.7 (commencing with Section 2089.2) of Chapter 1.5 of Division 3 of the Fish and Game Code) that is executed on or before January 1, 2012.

(3) Where existing law prohibits the holder of the mitigation property to hold the endowment, including for-profit entities.

(c) The special district or nonprofit organization shall hold, manage, invest, and disburse the funds in furtherance of the long-term stewardship of the property for which the funds were set aside.

(d) The holder of accompanying funds shall meet all of the following requirements:

(1) The holder has the capacity to effectively manage the mitigation funds.

(2) The holder has the capacity to achieve reasonable rates of return on the investment of those funds similar to those of other prudent investors.

(3) The holder utilizes generally accepted accounting practices as promulgated by either of the following:

(A) The Financial Accounting Standards Board for nonprofit organizations.

(B) The Governmental Accounting Standards Board for public agencies, to the extent those practices do not conflict with any requirement for special districts in Article 2 (commencing with Section 53630) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

(4) The holder will be able to ensure that funds are accounted for, and tied to, a specific property.

(5) If the holder is a nonprofit organization, it has an investment policy that is consistent with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code).

(e) Except for a mitigation agreement prepared by a state agency, the mitigation agreement that authorizes the funds to be conveyed to a special district or nonprofit organization pursuant to subdivision (a) shall include a provision that requires the accompanying funds held by a special district or a nonprofit organization to revert to the local agency, or to a successor organization identified by the agency and subject to subdivision (d), if any of the following occurs:

(1) The special district or nonprofit organization ceases to exist.

(2) The special district or nonprofit organization is dissolved.

(3) The special district or nonprofit organization becomes bankrupt or insolvent.

(4) The local agency reasonably determines that the accompanying funds held by the special district or nonprofit organization, or its successor entity, are not being held, managed, invested, or disbursed for conservation purposes and consistent with the mitigation agreement and legal requirements. Any reverted funds shall continue to be held, managed, and disbursed only for long-term stewardship and benefit of the specific property for which they were set aside. If the funds revert from the special district or nonprofit organization, the special district or nonprofit organization may choose to relinquish the property. If the property is relinquished, the local agency shall accept title to the property or identify an approved special district or nonprofit organization to accept title to the property.

(f) Nothing in this section shall prohibit a state or local agency from determining that a special district or nonprofit organization meets the requirements of this section and is qualified to hold the accompanying funds, or including a provision in the mitigation agreement as described in subdivision (e).

(g) Subject to subdivision (e), any accompanying funds that are conveyed to and held by a special district or nonprofit organization pursuant to this section shall continue to be held by the entity if this section is repealed and those funds are conveyed prior to the date this section is repealed.

(h) This section shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.