

Introduced by Senator KehoeFebruary 16, 2012

An act to amend Sections 65965, 65966, 65967, and 65968 of the Government Code, relating to land use, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1094, as introduced, Kehoe. Land use: mitigation lands: nonprofit organizations.

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. Existing law 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.

This bill would authorize an agency, in connection with the provisions described above, to also permit a governmental entity to hold title to, and manage that interest in, real property, as well as any accompanying funds. This bill would remove the requirement that a state or local agency exercise due diligence in reviewing the qualifications of a special district or nonprofit organization to effectively manage the accompanying funds. This bill would also modify the requirements that the holder of accompanying funds must meet, and would provide that

those requirements also apply to accompanying funds that are secured at the time the property is protected.

Existing law generally requires that the accompanying funds described above be held by the agency that requires the mitigation or by the special district or nonprofit organization that holds the property. Existing law excepts certain situations from this requirement, including, among others, if the accompanying funds are held by another entity pursuant to a natural community conservation plan or a safe harbor agreement that is executed on or before January 1, 2012.

This bill would require that, in order to qualify for that exception, the natural community conservation plan or safe harbor agreement be at a recognized initial, interim, or final stage on or before January 1, 2012. This bill also would add 2 additional exceptions to that requirement.

This bill would authorize a state or local agency to allow the accompanying funds to be temporarily held in an escrow account until a specified date, after which time the bill would require the state or local agency to transfer the accompanying funds to the entity that will permanently hold them.

This bill would also make technical, nonsubstantive changes to those provisions.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: 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) "Accompanying funds" means the funds that may be
 6 conveyed solely for the long-term stewardship of a property. Also
 7 known as "endowments," these funds are held and managed
 8 consistent with subdivision (b) of Section 65966 and with the
 9 Uniform Prudent Management of Institutional Funds Act (Part 7
 10 commencing with Section 18501) of Division 9 of the Probate
 11 Code). Accompanying funds do not include funds conveyed for
 12 meeting short-term performance objectives of a project.

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

4 ~~(e) “Department” means the Department of Fish and Game.~~

5 ~~(d)~~

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

11 (d) “Governmental entity” means any state agency, office,
12 officer, department, division, bureau, board, and commission, and
13 any city, county, or city and county.

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

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

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

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

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

37 SEC. 2. Section 65966 of the Government Code is amended
38 to read:

39 65966. (a) Any conservation easement created as a component
40 of satisfying a local or state mitigation requirement shall be

1 perpetual in duration, whether created pursuant to ~~Section 51075~~
2 *Chapter 6.6 (commencing with Section 51070) of Part 1 of Division*
3 *1 of Title 5 of this code or ~~Section 815 Chapter 4 (commencing~~*
4 *with Section 815) of Title 2 of Part 2 of the Civil Code.*

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

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

14 (2) The accompanying funds shall be calculated to include a
15 principal amount that, when managed and invested, ~~will produce~~
16 ~~revenues that are reasonably sufficient~~ *is reasonably anticipated*
17 to cover the annual stewardship costs of the property in perpetuity.

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

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

23 (5) The accompanying funds shall be held, managed, invested,
24 and disbursed consistent with the Uniform Prudent Management
25 of Institutional Funds Act (Part 7 (commencing with Section
26 18501) of Division 9 of the Probate Code).

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

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

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

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

35 (d) A *governmental entity*, special district, or a nonprofit
36 organization that holds funds pursuant to this chapter, including,
37 but not limited to, accompanying funds, moneys to acquire land
38 or easements, or moneys for initial stewardship costs, shall provide
39 the local or state agency with an annual fiscal report that contains

1 at least the same information as required by Internal Revenue
2 Service Form 990 regarding the funds.

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

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

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

23 (1) Review the qualifications of a *governmental entity*, special
24 district, or nonprofit organization to effectively manage and
25 steward natural land or resources pursuant to subdivisions (c) and
26 (d) of Section 65967.

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

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

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

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

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

7 SEC. 3. Section 65967 of the Government Code is amended
8 to read:

9 65967. (a) If a state or local agency requires a project
10 proponent to transfer property to mitigate any adverse impact upon
11 natural resources caused by permitting the development of a project
12 or facility, the agency may authorize a *governmental entity*, special
13 district, a nonprofit organization, a for-profit entity, a person, or
14 another entity to hold title to and manage that property.

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

20 (1) Transfer the interest to a *governmental entity* special district,
21 or ~~to~~ a nonprofit organization that meets the requirements set forth
22 in subdivision (c).

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

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

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

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

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

37 (4) The nonprofit organization shall have as its principal purpose
38 and activity the direct protection or stewardship of land, water, or
39 natural resources, including, but not limited to, agricultural lands,

1 wildlife habitat, wetlands, endangered species habitat, open-space
2 areas, and outdoor recreational areas.

3 (d) A state or local agency shall exercise due diligence in
4 reviewing the qualifications of a *governmental entity*, special
5 district, or nonprofit organization to effectively manage and
6 steward land, water, or natural resources, ~~as well as the~~
7 ~~accompanying funds~~. The local agency may adopt guidelines to
8 assist it in that review process, which may include, but are not
9 limited to, the use of or reliance upon guidelines, standards, or
10 accreditation established by a qualified entity that are in widespread
11 state or national use.

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

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

34 SEC. 4. Section 65968 of the Government Code is amended
35 to read:

36 65968. (a) Notwithstanding Section 13014 of the Fish and
37 Game Code, if accompanying funds are conveyed pursuant to
38 Section 65966 for property conveyed pursuant to Section 65967,
39 the accompanying funds may be held by the same *governmental*

1 *entity*, special district, or nonprofit organization that holds the
2 property pursuant to this section.

3 (b) Except as permitted below, the accompanying funds shall
4 be held by the agency *or agencies* that ~~requires~~ *require* the
5 mitigation or by the *governmental entity*, special district, or
6 nonprofit organization that holds the property *or holds an interest*
7 *in the property for conservation purposes*. The exceptions to this
8 requirement are the following:

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

11 (2) Accompanying funds that are held by another entity pursuant
12 to the terms of a natural community conservation plan ~~(Chapter~~
13 ~~10 (commencing with Section 2800) of Division 3 of the Fish and~~
14 ~~Game Code) or a safe harbor agreement (Article 3.7 (commencing~~
15 ~~with Section 2089.2) of Chapter 1.5 of Division 3 of the Fish and~~
16 ~~Game Code) that is executed on or before January 1, 2012. In order~~
17 ~~for this paragraph to apply, on or before January 1, 2012, a~~
18 ~~natural community conservation plan or a safe harbor agreement~~
19 ~~shall be at a recognized initial, interim, or final stage as reflected~~
20 ~~in the completion of planning agreements, framework plans,~~
21 ~~subarea plans, implementing agreements, or other documents that~~
22 ~~are part of the recognized natural community conservation plan~~
23 ~~process as described in Chapter 10 (commencing with Section~~
24 ~~2800) of Division 3 of the Fish and Game Code, or a safe harbor~~
25 ~~agreement as described in Article 3.7 (commencing with Section~~
26 ~~2089.2) of Chapter 1.5 of Division 3 of the Fish and Game Code.~~

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

29 (4) *If the mitigation property is held or managed by a federal*
30 *agency.*

31 (5) *If a federal agency objects to the qualifications of the*
32 *proposed endowment holder.*

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

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

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

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

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

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

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

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

15 (5) If the holder is a nonprofit organization, it has an investment
16 policy that is consistent with the Uniform Prudent Management
17 of Institutional Funds Act (Part 7 (commencing with Section
18 18501) of Division 9 of the Probate Code).

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

27 (1) The *governmental entity*, special district, or nonprofit
28 organization ceases to exist.

29 (2) The *governmental entity*, special district, or nonprofit
30 organization is dissolved.

31 (3) The *governmental entity*, special district, or nonprofit
32 organization becomes bankrupt or insolvent.

33 (4) The local agency reasonably determines that the
34 accompanying funds held by the *governmental entity*, special
35 district, or nonprofit organization, or its successor entity, are not
36 being held, managed, invested, or disbursed for conservation
37 purposes and consistent with the mitigation agreement and legal
38 requirements. Any reverted funds shall continue to be held,
39 managed, and disbursed only for long-term stewardship and benefit
40 of the specific property for which they were set aside. If the funds

1 revert from the *governmental entity*, special district, or nonprofit
2 organization, the special district or nonprofit organization may
3 choose to relinquish the property. If the property is relinquished,
4 the local agency shall accept title to the property or identify an
5 approved *governmental entity*, special district, or nonprofit
6 organization to accept title to the property.

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

13 (g) *A state or local agency may allow the accompanying funds*
14 *to be held temporarily in an escrow account until December 31,*
15 *2012, after which time the funds shall be transferred to the entity*
16 *that will permanently hold the accompanying funds.*

17 ~~(g)~~

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

23 ~~(h)~~

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

27 SEC. 5. This act is an urgency statute necessary for the
28 immediate preservation of the public peace, health, or safety within
29 the meaning of Article IV of the Constitution and shall go into
30 immediate effect. The facts constituting the necessity are:

31 In order to ensure that mitigation projects are approved in a
32 timely manner, particularly in relation to desert renewable energy
33 projects, it is necessary that this act take effect immediately.