

**ASSEMBLY BILL**

**No. 1799**

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

February 18, 2014

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1799, as introduced, 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.

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, if the governmental entity or special district provides evidence to the local or state agency that it possesses an investment-grade 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 a contractual agreement with the local or state agency enforcing the mitigation requirements, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.  
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  
8     to paying the costs of long-term management and stewardship of  
9     the mitigation property for which the funds were set aside.  
10    Endowments shall be governed by the underlying laws, regulations,  
11    and specific governmental approvals under those laws and  
12    regulations pursuant to which the endowments were exacted,  
13    consistent with subdivision (b) of Section 65966 and with the  
14    Uniform Prudent Management of Institutional Funds Act (Part 7  
15    (commencing with Section 18501) of Division 9 of the Probate  
16    Code). Endowments do not include funds conveyed for meeting  
17    short-term performance objectives of a project.  
18    (b) “Community foundation” means any community foundation  
19    that meets all of the following requirements:  
20    (1) Meets the requirements of a community trust under Section  
21    1.170A-9(f)(10)-(11) of Title 26 of the Code of Federal  
22    Regulations.  
23    (2) Is exempt from taxation as an organization described in  
24    Section 501(c)(3) of the Internal Revenue Code.  
25    (3) Is qualified to do business in this state.

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

3 (5) Has complied with National Standards for U.S. Community  
4 Foundations as determined by the Community Foundations  
5 National Standards Board, a supporting organization of the Council  
6 on Foundations.

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

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

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

17 (e) “Governmental entity” means any state agency, office,  
18 officer, department, division, bureau, board, commission, public  
19 postsecondary educational institution, city, county, or city and  
20 county, or a joint powers authority formed pursuant to the Joint  
21 Exercise of Powers Act (Chapter 5 (commencing with Section  
22 6500) of Division 7 of Title 1) that meets either of the following  
23 requirements:

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

29 (2) The joint powers authority was created for the purpose of  
30 constructing, maintaining, managing, controlling, and operating  
31 transportation infrastructure, such as major thoroughfares and  
32 bridges.

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

34 (A) A written agreement between the project proponent and the  
35 entity qualified to hold the property and the endowment pursuant  
36 to this chapter, which is submitted to the state or local agency for  
37 the purpose of obtaining any permit, clearance, or mitigation  
38 approval from that state or local agency.

39 (B) A written agreement between the project proponent and the  
40 entity qualified to hold the property pursuant to this chapter,

1 including any agreement with an entity qualified to hold the  
2 endowment pursuant to this chapter, which is submitted to the state  
3 or local agency for the purpose of obtaining any permit, clearance,  
4 or mitigation approval from that state or local agency.

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

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

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

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

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

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

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

20 (h) *“Investment grade” means a credit rating provided by a*  
21 *nationally recognized statistical rating organization that indicates*  
22 *a relatively low risk of default. For purposes of this subdivision,*  
23 *“nationally recognized statistical rating organization” means a*  
24 *rating agency designated by the Securities and Exchange*  
25 *Commission as being nationally recognized.*

26 ~~(h)~~

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

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

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

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

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

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

~~(i)~~

(j) “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.

~~(j)~~

(k) “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.

~~(k)~~

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

(1) A 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.

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

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

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

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

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

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

~~(i)~~

(m) “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. 2. Section 65966 of the Government Code is amended 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 Chapter 6.6 (commencing with Section 51070) of Part 1 of Division 1 of Title 5 of this code or Chapter 4 (commencing with Section 815) of Title 2 of Part 2 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. Nothing in this chapter shall be construed as otherwise precluding other methods of funding for the long-term stewardship of the property. If an endowment is conveyed or secured at the time the property is protected, all of the following shall apply:

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

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

(3) The endowment shall be held, managed, invested, disbursed, and governed as described in subdivision (a) of Section 65965 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 nonprofit corporation holds the endowment, the nonprofit shall utilize generally accepted accounting practices that are promulgated by the Financial Accounting Standards Board or any successor entity.

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

(1) Hold, manage, and invest the endowment 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 or any successor entity.

(e) (1) Unless the mitigation agreement provides that another person or entity shall prepare the annual fiscal report described below, a governmental entity, community foundation, special district, a congressionally chartered foundation, or a nonprofit organization that holds funds pursuant to this chapter, including an endowment or moneys for initial stewardship costs, shall provide the local or state agency that required the endowment with an

1 annual fiscal report that contains at least the following elements  
2 with respect to each individual endowment dedicated and held by  
3 that entity:

4 (A) The balance of each individual endowment at the beginning  
5 of the reporting period.

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

9 (C) The net amounts of investment earnings, gains, and losses  
10 during the reporting period, including both realized and unrealized  
11 amounts.

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

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

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

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

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

23 (2) If an entity is required to submit an identical annual fiscal  
24 report pursuant to paragraph (1) to the Department of Fish and  
25 Game and any other state or local agency, then that report shall be  
26 provided only to the Department of Fish and Game. In that  
27 instance, the Department of Fish and Game shall provide a copy  
28 of that annual fiscal report on its Internet Web site for a minimum  
29 of five years.

30 (f) If a state agency authorizes a governmental entity, special  
31 district, or nonprofit organization to hold property pursuant to  
32 subdivision (a) or (b) of Section 65967 in connection with a  
33 development project, the agency may require the project proponent  
34 to pay a one-time fee that does not exceed the reasonable costs of  
35 the agency in reviewing qualifications of potential holders of the  
36 property and approving those holders. This one-time fee shall be  
37 collected only if the agency can demonstrate its actual review of  
38 qualifications and approval of holders.

39 (g) If a local agency authorizes a governmental entity, special  
40 district, or nonprofit organization to hold property or an endowment

1 pursuant to this chapter, the agency may require the project  
2 proponent to pay a one-time fee that does not exceed the reasonable  
3 costs of the agency in reviewing qualifications of the parties  
4 identified in the mitigation agreement, approving those parties,  
5 and any regular oversight over those parties to ensure that the  
6 parties are complying with all applicable laws. This one-time fee  
7 shall be collected only if the agency can demonstrate its actual  
8 review of qualifications, approval of parties, or regular oversight  
9 of compliance and performance.

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

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

20 (1) Review the qualifications of a governmental entity, special  
21 district, or nonprofit organization to effectively manage and  
22 steward natural land or resources pursuant to subdivision (c) of  
23 Section 65967.

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

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

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



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

6 (m) A governmental entity, special district, or nonprofit  
7 organization may contract with a community foundation or  
8 congressionally chartered foundation at any time to hold, manage,  
9 and invest the endowment for a mitigation property and disburse  
10 payments from the endowment to the holder of the mitigation  
11 property consistent with the fund agreement.

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

16 (o) Subdivisions (b) to (e), inclusive, shall not apply to funds,  
17 including funds from mitigation fees, held for the long-term  
18 management and stewardship of property pursuant to either an  
19 interim or approved habitat conservation plan pursuant to Chapter  
20 35 (commencing with Section 1531) of Title 16 of the United  
21 States Code or an interim or approved natural community  
22 conservation plan pursuant to Chapter 10 (commencing with  
23 Section 2800) of Division 3 of the Fish and Game Code, if, in the  
24 interim or approved plan documents, the permitting agency  
25 determines the endowment to be established with those funds will  
26 be adequate and provides a schedule for funding the endowment.

27 (p) (1) *If a governmental entity or special district is the project*  
28 *proponent required to provide long-term stewardship of property*  
29 *pursuant to subdivision (b), an endowment or other financial*  
30 *mechanism for long-term stewardship shall not be required if the*  
31 *governmental entity or special district provides evidence to the*  
32 *local or state agency that it possesses an investment-grade credit*  
33 *rating by a nationally recognized statistical rating organization*  
34 *or other equivalent evidence of financial reliability, and provides*  
35 *one of the following:*

36 (A) *A resolution to fund the long-term stewardship of the*  
37 *property adopted by the board or legislative body of the*  
38 *governmental entity or special district.*

1 (B) A contractual agreement with the state or local agency  
2 enforcing the mitigation requirements to fund the long-term  
3 stewardship of the property.

4 (2) A resolution or contract provided pursuant to paragraph  
5 (1) shall include all of the following:

6 (A) A summary of the governmental entity or special district's  
7 current and projected financial state.

8 (B) A finding regarding a financial analysis conducted on  
9 annual management costs.

10 (C) An annual pledge of revenue to cover the annual mitigation  
11 requirements.

12 (D) An annual pledge of revenue to cover the annual  
13 management costs.

14 (E) Use of accounting standards consistent with standards  
15 promulgated by the Governmental Accounting Standards Board  
16 or its successor entity.

17 (F) An annual fiscal report.

18 (3) If the governmental entity or special district is subsequently  
19 downgraded below an investment-grade credit rating by a  
20 nationally recognized statistical rating organization or fails to  
21 maintain an equivalent standard of financial reliability, the state  
22 or local agency enforcing the mitigation requirement may provide  
23 written notice thereof and require the governmental entity or  
24 special district to post collateral for performance of the long-term  
25 stewardship in the form of a performance bond, escrow account,  
26 casualty insurance, letter of credit, or other appropriate  
27 instrument. The obligation to maintain collateral shall end, and  
28 all unused collateral shall be canceled or refunded, upon the  
29 governmental entity or special district providing evidence of its  
30 return to an investment-grade credit rating by a nationally  
31 recognized statistical rating organization or other equivalent  
32 evidence of financial reliability.

33 (4) If the governmental entity or special district fails to  
34 adequately fund the long-term stewardship by revoking, failing to  
35 comply with, or otherwise rendering ineffective the board  
36 resolution described in paragraph (1), or after being provided  
37 written notice, fails to cure within the remedy period set forth in  
38 the contractual agreement, the state or local agency enforcing the  
39 mitigation requirement may, in addition to any contractual  
40 remedies, require the governmental entity or special district to

- 1 *post collateral for performance of the long-term stewardship in*
- 2 *the form of a performance bond, escrow account, casualty*
- 3 *insurance, letter of credit, or other appropriate instrument.*

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