

Senate Bill 18 (SB 18) and Local Planning Framework

Local Planning Framework

By law, each county and city must adopt a “comprehensive, long-term general plan for the physical development of the county or city.”¹ A General Plan sets out allowed land uses and the required elements, which address integral components of the city or county. It may be adopted as a whole, or part-by-part. The General Plan and its elements are to be integrated and form an internally consistent and compatible set of policies. They establish a blueprint for how development is to take place in the community, presenting “objectives, principles, standards, and plan proposals.”² Ultimately, a General Plan reflects the values and priorities of the community.³ Just as the General Plan and its elements must be internally consistent, zoning and other subsequent land use decisions must also be consistent with the General and Specific Plans.⁴

The process of developing or amending a **General Plan** typically follows these steps:⁵

1. The city or county planning agency initiates preparation or amendment of a part or all of the general plan⁶

GENERAL PLAN ELEMENTS

Land use

Designates the general distribution, location, and “extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, greenways, . . . and other categories of public and private uses of land.”

Circulation

Consists of “the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, any military airports and ports, and other local public utilities and facilities, all correlated with the land use element of the plan.”

Housing

Analyzes “existing and projected housing needs” and states the “goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.”

¹ Cal. Gov’t Code § 65300 (Deering, LEXIS through Ch. 16 of 2022 Reg. Sess.).

² Cal. Gov’t Code § 65302.

³ GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, *State of California General Plan Guidelines*, 1 (July 31, 2017), https://opr.ca.gov/docs/OPR_COMPLETE_7.31.17.pdf [hereinafter General Plan Guidelines].

⁴ Cal. Gov’t Code § 65300.5.

⁵ Cal. Gov’t Code § 65351.

⁶ Cal. Gov’t Code § 65100 (the functions of a planning agency may be assigned to a planning department, planning commission(s), administrative bodies or hearing officers, and/or the legislative body itself); *see also* §65301 (the plan may be adopted as a whole or in parts); *see also* GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, *Tribal Consultation Guidelines: Supplement to General Plan Guidelines*, 12 (Nov. 14, 2005), http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf [hereinafter Tribal Consultation Guidelines] (stating that actions to initiate adoption or amendment of the general plan are to be taken in a “duly noticed public meeting, and may include, but are not limited to, any of the following: appropriation of funds, adoption of a work program, engaging the services of a consultant, or directing the planning staff to begin research on the activity.”).

2. The planning agency notifies interested Tribes and offers to engage in consultation (**SB 18**).⁷
3. The draft plan is referred to statutorily determined potentially affected entities, including local California Native American Tribes, which have 45 days to provide comment.⁸
4. Adoption or amendment of a general or specific plan triggers CEQA review, and consequently Tribal consultation under AB 52.⁹ There must be at least one public scoping meeting on the EIS. Before adopting or amending a plan, the legislative body must have considered and certified the EIS and made findings as to the adequacy of mitigation of any environmental effects.¹⁰ Tribal consultation under SB 18 for plan adoption or amendment and AB 52 consultation may coincide; however, the statutes have different triggers and timelines.¹¹
5. The planning commission (if constituted) holds at least one public hearing on the draft plan, with 10 days' prior notice, and then makes a recommendation to send the plan to the legislative body.¹² Among other entities, the planning commission

GENERAL PLAN ELEMENTS

Noise

Identifies, evaluates, and proposes mitigation of community noise problems.

Safety

Protects against unreasonable risks of “the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence; liquefaction; and other seismic hazards identified [in the statute] and other geologic hazards . . . ; flooding; and wildland and urban fires.” Relative to climate change, it must include a vulnerability assessment, a “set of adaptation and resilience goals, policies, and objectives,” and a “set of feasible implementation measures designed to carry out the goals, policies, and objectives.”

⁷ Cal. Gov't Code §§ 65352.3, 65562.5.

⁸ Tribal Consultation Guidelines, *supra* note 6 at 11. These entities include adjacent/enclosed cities or counties, local school districts, area-wide planning agencies, federal agencies and branches of the US armed forces, the State Water Resources Board, the public water system and any groundwater management agency, local California Native American Tribes, the state forestry resource board and fire protection agencies, and other related agencies. The referral requirement is separate from the tribal consultation requirement.

⁹ General Plan Guidelines, *supra* note 3, at 272 (recommending careful coordination between plan development and the CEQA process); *see also* Cal. Code Regs. tit. 14 § 15378(a)(1) (2022) (defining a “project” subject to CEQA as inclusive of the adoption or amendment of a general or specific plan).

¹⁰ Cal. Code Regs. tit. 14 § 15091.

¹¹ Terrie L. Robinson, *Tribal Consultation under AB 52: Requirements and Best Practices*, CALIFORNIA NATIVE AMERICAN HERITAGE COMMISSION, http://nahc.ca.gov/wp-content/uploads/2015/04/AB52TribalConsultationRequirementsAndBestPractices_Revised_3_9_16.pdf (last visited June 10, 2022). Under SB 18, Tribes on the NAHC list must be notified of the opportunity for consultation whether or not they have requested notification; Tribes have 90 rather than 30 days to respond. *See* CEQA discussion.

¹² Cal. Gov't Code § 65353(a).

must send prior notice of the hearing to those California Native American Tribes that have requested notice.¹³

6. The legislative body (e.g., the city council or county board of supervisors) holds at least one public hearing, with prior notice of at least 10 days, including to those California Native American Tribes that have requested it.¹⁴
7. Once adopted by the legislative body, the planning agency implements the plan through specific plans, zoning, and/or ordinances. It generally implements zoning by enacting ordinances.
8. The legislative body may later amend all or part of the draft plan, initiating the amendment in the manner specified by the body.¹⁵

The legislative body may direct the planning agency to prepare a **Specific Plan** in order to systematically implement the general plan. A Specific Plan is tailored to address specific elements, issues, and/or geographic areas.¹⁶ It may include both policies and zoning regulations. A specific plan must describe:

- Land use in the plan area (including a map).
- Distribution of components such as transportation, waste disposal, water, and energy.
- Development standards.
- Natural resources conservation and use standards.

The purposes of the Open Space element include **protecting tribal cultural places and resources**, defined as “places, features, and objects described in Sections 5097.9 and 5097.995 [5097.993] of the Public Resources Code.”

GENERAL PLAN ELEMENTS

Environmental Justice

“[R]elated goals, policies, and objectives integrated in other elements, that identifies disadvantaged communities within the area covered by the general plan of the city, county, or city and county, if the city, county, or city and county has a disadvantaged community.” It addresses the public health, civic engagement, and other program needs of disadvantaged communities.

Conservation

Addresses “conservation, development, and utilization of natural resources, including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources.” It may also cover land and water reclamation; water pollution prevention and control; use of land in stream channels and other areas; soil and beach/shore erosion prevention, control and correction; watershed protection; and rock, sand, and gravel resources.

Open Space

Covers land or water set aside in the open space plan for purposes that can include preservation of natural resources, managed resource production, outdoor recreation, public health and safety, military installations, and/or preservation of tribal cultural places. The purposes of the Open Space element include **protecting tribal cultural places and resources**, defined as “places, features, and objects described in Sections 5097.9 and 5097.995 [5097.993] of the Public Resources Code.”

¹³ Cal. Gov’t Code § 65092(a).

¹⁴ Cal. Gov’t Code § 65355; Cal. Gov’t Code § 65092.

¹⁵ Cal. Gov’t Code § 65358(a).

¹⁶ Cal. Gov’t Code § 65450.

- Implementation measures such as regulations, programs, public works projects, and finance.¹⁷

When developing specific plans, the planning agency must follow the same procedures as for general plans, but may adopt them by either resolution, as for a general plan, or ordinance, as for zoning.¹⁸

TYPES OF LOCAL PLANNING DOCUMENTS

General Plan

Comprehensive, long-term plan for the physical development of the county or city

Specific Plan

Addresses all or part of the geographic area covered by the general plan and includes standards and criteria and implementation measures

Elements of the General Plan

Land use, circulation, housing, conservation, open space, noise, safety, and environmental justice

Local Open Space Plan

The open-space element

Amendment of a General or Specific Plan is carried out in the manner specified by legislative body, but requires the same public participation, hearing, recommendation, and adoption procedures as for adopting the original plan.¹⁹ General and specific plans may be amended where required by state mandate (e.g., to incorporate a newly required element or part of an element) or when the legislative body determines that amendment is in the public interest.²⁰ For most purposes, amendments may not take place more than four times per year.²¹

¹⁷ Cal. Gov't Code § 65451.

¹⁸ Cal. Gov't Code § 65453; *See also* General Plan Guidelines, *supra* note 3, at 239-40 (stating “[a] specific plan is a hybrid that can combine policy statements with development regulations (Cal Gov’ Code § 65450). It can be used to address the development requirements for a single project such as urban infill or a planned community. As a result, its emphasis is on concrete standards and development criteria. Its text and diagrams will address the planning of necessary infrastructure and facilities, as well as land uses and open space. In addition, it will specify those programs and regulations necessary to finance infrastructure and public works projects. A specific plan may be adopted either by resolution, like a general plan, or by ordinances such as zoning.”).

¹⁹ Cal. Gov't Code §§ 65350-65362.

²⁰ Cal. Gov't Code § 65358(a).

²¹ Cal. Gov't Code § 65358.

Local governments are required to submit **annual reports** on their general plans to the legislative body of the city or county, Governor’s Office of Planning and Research, and state Department of Housing and Community Development.²² The report covers the status of the general plan and progress in its implementation, as well as specified information that includes compliance with regulations for the housing element and an update on the progress in implementing the requirements to consult with Tribes and to protect tribal cultural places. The 2019 Annual Planning Survey included questions as to counties’ and cities’ implementation of Tribal consultation in plans and practices.²³

The Government Code provides that the adoption of part or all of the general plan or adoption of any amendment to the plan or part “shall be **reviewable** pursuant to section 1085 of the Code of Civil Procedure” as a legislative act.²⁴ Courts have entertained actions alleging inconsistency of a project/amendment with the General Plan and failure to meet minimum substantive plan standards, including required elements.²⁵ Courts must issue a writ of mandate, allowing standing, where a party has a “substantial beneficial interest” in having a ministerial duty performed, and “there is not a plain, speedy, and adequate remedy, in the ordinary course of law.”²⁶ A *beneficial interest* is “some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.”²⁷ Beneficially interested parties are those “in fact adversely affected by governmental action.”²⁸ Additionally, the beneficial interest must be “direct and substantial.”²⁹

²² Cal. Gov’t Code § 65400(a)(2)(K); AB 168 added the requirement to consult with Tribes on tribal cultural resources in relation to housing, disallowing any exception for fast-tracking developments, and to report on incorporating consultation in plans.

²³ Governor’s Office of Planning and Research, State of California, *2019 Annual Planning Survey Results*, 25, August 2020

²⁴ Cal. Gov’t Code § 65301; Cal. Civ. Proc. Code § 1085(a) (West 2019) states, “A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.”

²⁵ See *Endangered Habitats League v. County of Orange*, 131 Cal.App.4th 777, 782 (Cal. Ct. App. 2005).

²⁶ Cal. Civ. Proc. Code § 1086; *California Assn. of Medical Products Suppliers v. Maxwell-Jolly*, 199 Cal.App.4th 286, 302 (Cal. Ct. App. 2011).

²⁷ *Luke v. City of Los Angeles*, B290741, 6 (Cal. Ct. App. Aug. 7, 2019); *Murrieta Valley Unified School Dist. v. County of Riverside*, 228 Cal.App.3d 1212 (1991) (school district had a beneficial interest and thereby standing to challenge a general plan as to both compliance with CEQA and with Government Code statutory adequacy and consistency requirements for general plans when the plan would have had an impact on school overcrowding) [note this case has received some negative treatment].

²⁸ *California Ass’n of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 CA4th 286, 302.

²⁹ *Id.*

To prove beneficial interest, a party must meet the equivalent “federal ‘injury in fact’ test, which requires a party to prove by a preponderance of the evidence that it has suffered ‘an invasion of a legally protected interest that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” ’ ”³⁰.

A party may also have public interest standing, an exception to the beneficial interest standard,³¹ which occurs when the claimant is seeking to enforce a public right or duty, as a citizen.³² The standard of review is limited to whether the act was arbitrary or capricious, lacked evidentiary support, or failed to follow required procedures.³³

Senate Bill 18 and OPR Tribal Consultation Guidelines

The above section explained how local planning documents serve as the blueprint for how a city or county can use and develop the land within its jurisdiction. Although these lands are the same lands that California Native American Tribes stewarded over millennia, prior to the passage of SB 18, local governments had no obligation to consult with Tribes when developing or amending a general or specific plan.³⁴

SB 18 requires cities and counties in California to engage in government-to-government consultation with Tribal governments when adopting or amending a general or specific plan,³⁵ or when considering a proposal for open space, in order to protect and safeguard traditional tribal cultural places.³⁶ After initiating action to adopt or amend a general or specific plan,³⁷ the local government must (1) obtain, from the Native American Heritage

³⁰ *Association of Deputy District Attorneys for Los Angeles County v. Gascon*, 79 Cal.App.5th 503, 524 (2022) (quoting *SJJC Aviation Services, LLC. v. City of San Jose*, 12 Cal.App.5th 1043, 1053 (2017)); see *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352, 362 (1999); *Synergy Project Management*, 33 Cal.App.5th 21, 31 (2019).

³¹ *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899 (Cal. Ct. App. 2012).

³² See *Waste Management of Alameda County, Inc. v. County of Alameda*, 79 Cal. App. 4th 1223 (2000) (finding that the petitioner, a waste disposal company, could not establish a “beneficial interest” needed for CEQA standing because its interests – competition with a rival landfill – fell outside CEQA’s zone of interest); See also *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011) (finding the corporate entity had citizen suit standing under the “public interest” exception; however, claimant also had a beneficial interest in the matter.).

³³ *SN Sands Corp. v. City and County of San Francisco*, 167 Cal. App. 4th 185, 191 (2008).

³⁴ Fahley, Michele, *Protecting the Ancestors, SB 18 and Cultural Resource Protection*, News from Native California; Berkeley Vo. 22, Iss. 3, (Spring 2009); 23-24.

³⁵ An act to amend Section 815.3 of the Civil Code, to amend Sections 65040.2, 65092, 65351, 65352, and 65560 of, and to add Sections 65352.3, 65352.4, and 65562.5 to the Government Code, relating to traditional tribal cultural places; Sec. 65352.3.

³⁶ Cal. Gov’t Code § 65562.5.

³⁷ Although not stated in the statute, a rule requires that procedures applicable to general plan adoption and amendments also apply to specific plans.

Commission (NAHC), contact information for Tribes that the NAHC has determined have tribal cultural places within the local government's jurisdiction; and (2) offer to consult with them regarding potential impacts on those places from the proposed plan.³⁸ Local governments are obligated to carry out consultation with those Tribes that respond within the requisite time period, and conclude consultation prior to taking final action to adopt or amend the plan. Local governments are to protect the confidentiality of Tribal information divulged during consultation.³⁹ When proposing open space that contains cultural place(s), local governments must also consult with Tribes on the NAHC contact list.

SB 18 also provides opportunities other than consultation for Tribes to participate in the public process of plan development and protect their cultural places. These opportunities for referral and comment on the plan, and notice of public hearings, are described in the previous section. Tribes, under the law, are also authorized to use conservation easements to protect their traditional resources and lands.⁴⁰ Rather than setting detailed standards, the law required the Office of Planning and Research (OPR), in consultation with tribes, to develop the advisory Tribal Consultation Guidelines (Guidelines) for how to preserve places and mitigate impacts as well as procedures to identify the appropriate Tribes, protect confidentiality of information, and facilitate voluntary landowner protection.⁴¹

Legislative purposes of SB 18

Recognize that California Native American places are essential elements for tribal traditions.

Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in land use planning.

Establish government-to-government consultations regarding potential means to preserve tribal places, determine the necessary confidentiality of their specific location required, and develop proper treatment and management plans.

Ensure that local and tribal governments have information early in the land use planning process to avoid potential conflicts.

Enable California Native American tribes to manage and act as caretakers of tribal places.

Encourage local governments to consider preservation of tribal places by placing them in open space.

Encourage local governments to consider the cultural aspects of tribal places early in land use planning.

³⁸ See discussion *infra* Timeline.

³⁹ Cal. Gov't Code §§ 65352.4, 65562.5

⁴⁰ Sen. Bill 18, 2003-2004 Reg. Sess. (Cal. 2004) [hereinafter SB 18]; see Cal. Civ. Code § 815.3(c).

⁴¹ See *generally*, Tribal Consultation Guidelines, *supra* note 8; Cal. Gov't Code § 65040.2(g).

Subjects of consultation

SB 18 identifies the following as the subjects of consultation:

- “Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine;”⁴²
- “a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1,⁴³ including any historic or prehistoric ruins, any burial ground, any archaeological or historic site, any inscriptions made by Native Americans at such a site, any archaeological or historic Native American rock art, or any archaeological or historic feature of a Native American historic, cultural, or sacred site.”⁴⁴

Resources listed in the California Register of Historic Resources under Sec. 5024.1

(c) may include those:

- (1) Associated with significant historical and cultural events
- (2) Associated with lives of important persons
- (3) Containing distinctive characteristics of a “type, period, region, or method of construction,” or highly creative/artistic individual
- (4) providing or likely to provide important prehistoric or historic information

(d) shall include those:

- (1) Listed in National Register of Historic Places
- (2) State Historic Landmark No. 770 and subsequent landmarks
- (3) Recommended points of historic interest

(e) may include, if nominated under subdivision (f), and the commission determines to be significant:

- (1) individual resources that are nominated according to procedures,
- (2) historic resources part of an historic district
- (3) resources significant in historical resources surveys
- (4) resources that the city or county designates as landmarks or historic properties or under an ordinance
- (5) Local landmarks or historic properties designated under any municipal or county ordinance

⁴² Cal. Pub. Res. Code § 5097 (West 2019); *see also* Tribal Consultation Guidelines, *supra* note 39, at 4-5 (clarifying that “religious or ceremonial sites and sacred shrines may include places associated with creation stories or other significant spiritual history, as well as modern day places of worship. Collection or gathering sites are specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other crafts and uses important to on-going cultural traditions and identities. These places may qualify as religious or ceremonial sites as well as sites that are listed or eligible for listing in the California Register of Historic Resources.”).

⁴³ *See infra* figure XX (citing Cal. Pub. Res. Code § 5024.1). Subsection (f) provides procedures for nominating resources to be included in the register, and (g) provides procedures for identifying significant resources in historical resources surveys.

⁴⁴ Cal. Pub. Res. Code § 5097.993; *see also* Tribal Consultation Guidelines, *supra* note 6, at 4-5 (elaborating that “[a]rchaeological or historic sites may include places of tribal habitation and activity, in addition to burial grounds or cemeteries.”).

The Guidelines elaborate on the statutory categories:

- *“Archaeological or historic sites* may include places of tribal habitation and activity, in addition to burial grounds or cemeteries.”
- *“religious or ceremonial sites and sacred shrines”* may include places associated with “significant spiritual history” and “modern day places of worship.”
- *“Collection or gathering sites* are specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other crafts and uses important to on-going cultural traditions and identities.”⁴⁵

The NAHC inventories . . .

“[P]laces of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands.”

“Native American sacred places that are located on public lands,” reviewing current administrative and statutory protections accorded to such places

Tribes’ information and requests regarding cultural places that should be protected by the Commission

Following its statutory authority, the NAHC compiles a list that identifies those Tribes that have traditional lands or cultural places within the jurisdiction of a city or county.⁴⁶ In making those determinations, it inventories Native American sacred and social places.⁴⁷

Notably, the law and Guidelines provide that local governments through consultation, and the NAHC may receive information about cultural places from Tribes , recognizing that a Tribe may be the only source of knowledge as to the existence and/or location of its tribal cultural places.⁴⁸ For example, as part of the documentation to determine which non-federally-recognized Tribes to include on the contact list, the NAHC asks Tribes to identify their traditional and culturally-affiliated areas.⁴⁹ Recently enacted legislation, SB 168, also

⁴⁵ Tribal Consultation Guidelines, *supra* note 6, at 4-5. “These places may qualify as religious or ceremonial sites as well as sites that are listed or eligible for listing in the California Register of Historic Resources.”

⁴⁶ *Id.* at 8.

⁴⁷ Cal. Pub. Res. Code § 5097.91-5097.97.

⁴⁸ See also Tribal Consultation Guidelines, *supra* note 6, at 17 (describing that for land affected by the general or specific plan, the failure to identify cultural places through the NAHC and CHRIS “does not preclude the existence of a cultural place” and “a tribe may be the only source of information regarding the existence of a cultural place;” see also Tribal Consultation Guidelines, *supra* note 6, at 19 (similarly, when considering an open space proposal, the Guidelines advise that “[l]ocal governments should contact each tribe on the list provided by the NAHC to learn whether any cultural places are located on the land proposed as open space.”).

⁴⁹ NAHC, “Documentation for Inclusion of Non-Federally Recognized California Native American Tribes On the Native American Heritage Commission Tribal Consultation List”; see Native American Heritage Commission, *Request for Tribal Consultation* (August 6, 2021), <http://nahc.ca.gov/wp-content/uploads/2021/08/Request-for-Consultation-NAHC-Contact-List.pdf> (the Tribe is to “include a

recognizes that tribes have “special expertise to identify, evaluate, and interpret tribal cultural resources,”⁵⁰ and not all tribal cultural resources may be included on official registers.

Substantive consultation obligations of Tribes and local governments

Defining consultation

SB 18 defines **consultation** as “the *meaningful and timely* process of *seeking, discussing, and considering* carefully the *views of others*, in a manner that is *cognizant* of all parties’ *cultural values* and, *where feasible, seeking agreement*. Consultation between government agencies and Native American tribes shall be conducted in a way that is *mutually respectful of each party’s sovereignty*.⁵¹ Consultation shall also *recognize the tribes’ potential needs for confidentiality* with respect to places that have traditional tribal cultural significance.”⁵²

The **Guidelines** discuss elements of consultation that is meaningful, timely, and respectful of sovereignty.

The local government should focus on identifying the Tribe’s issues relative to the cultural place, which can include values, religious beliefs, and traditional practices and laws. Both parties should take care to consider the other’s views. The local government should consider the “full range of acceptable ways” to accommodate the Tribe’s concerns,⁵³ Consultation is to be a timely process. The local government should take the necessary action to initiate consultation as soon as possible after the initiation of the plan or open space proposal.⁵⁴ Once initiated, the parties should allow for an ongoing process to take place before reaching a final decision.⁵⁵

map describing the tribe’s traditional and culturally affiliated territory, including the California counties by which the tribe would like to be contacted for the purposes of formal consultation.)”. It has not been clarified whether if a Tribe identifies such places to the NAHC, the NAHC always accepts that information in creating its list of traditional lands associated with particular Tribes, and in creating the list of Tribes that local governments must contact for consultation.

⁵⁰ Assem. Bill 168, § 1 2019-2020 Reg. Sess. (Cal. 2020) (“(f) Many tribal cultural resources are not on historic registers or lists for a variety of reasons, including the need to keep the location and use of these places confidential to protect their spiritual integrity and to help protect them from damage and desecration and because previous nomination and listing efforts may not have considered tribal cultural values. (g) California Native American tribes have special expertise to identify, evaluate, and interpret tribal cultural resources because of their traditional aboriginal ties to their tribal homelands and the traditional cultural, ecological, and tribal knowledge that comes from those ancestral ties.”) [hereinafter AB 168].

⁵¹ Tribes include both federally recognized Tribes and those recognized by the State of California.

⁵² Cal. Gov’t Code § 65352.4 (emphasis added).

⁵³ Tribal Consultation Guidelines, *supra* note 6, at 16.

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 16.

Recognizing that the parties to consultation are the Tribal and local governments, a high-level representative of the local government should make the initial contact to the Tribe. With both parties' agreement, the governments may delegate part of the process to other staff.⁵⁶

Timeliness, the goal of consensus, sovereignty, and confidentiality are discussed further in the sections below.

Purposes of consultation

The stated purpose of consultation on the adoption or amendment of a general or specific plan is to preserve or mitigate impacts to traditional tribal cultural places, features, and objects.⁵⁷ When considering a proposal for open space, the purposes are to determine the confidentiality required to protect the cultural site's identity, location, and use; and to develop its appropriate treatment in any new or existing management plan.⁵⁸ Consultation on open space proposals may additionally consider:⁵⁹

- Tribal involvement in treatment and management of the cultural place.
- Tribal access to the cultural place.
- Level of disclosure of Tribal information needed to protect the place.
- The Tribe's recommendations for management practices and limiting certain land uses.

"Preservation," according to the Guidelines, "is the conscious act of avoiding or protecting a cultural place from adverse impacts including loss or harm."⁶⁰ This can mean the following:

- Preventing the site from being disturbed.⁶¹
- Relocating proposed areas of development in order to avoid impacts.
- Preserving the site as open space, taking measures to ensure that public use does not disturb it.

⁵⁶ *Id.*

⁵⁷ Cal. Gov't Code § 65352.3 "[preserving or mitigating] impacts to traditional cultural places, features, and objects described in Sections 5097.9 and 5097.995 [actually 5097.993]."

⁵⁸ Cal. Gov't Code § 65562.5.

⁵⁹ Tribal Consultation Guidelines, *supra* note 6, at 20.

⁶⁰ *Id.* at 23-4.

⁶¹ SB 18 uses both "place" and "site" to describe traditional tribal areas; *see* SB 18 §(1)(a)(1) (an objective of SB 18 is to preserve "California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places."); Cal. Gov't Code § 65352.3(a)(1) (consultation is for the purpose of "preserving or mitigating impacts to [tribal] places, features, and objects."); *see also* SB 18 §1(a) (refers to historical, religious and cultural "sites" as those needing protection); *but see* Tribal Consultation Guidelines, *supra* note 6, at 16 (using both "site" and "place" in describing traditional Tribal cultural areas).

The Guidelines suggest including policies to facilitate the protection of tribal cultural places in open space, the general plan, or separate ordinances.⁶²

Policies to protect cultural places can include . . .

- Limiting the types of land uses allowed in an open space designation
- Facilitating Tribes' access for maintenance and traditional use
- Protection of confidentiality of cultural places
- Giving developers incentives to voluntarily protect cultural places
- Incorporating protection of cultural places as part of a Habitat Conservation Plan or Natural Community Conservation Program
- Conforming other elements of the general plan that involve conservation of natural and cultural resources to the open space element

Mitigation, on the other hand, is the act of moderating the adverse impacts that the general plan or specific plan adoption or amendment may have on a cultural place.⁶³ Methods include:

- Limiting the degree or magnitude of the action and its implementation.
- Repairing, rehabilitating, or restoring the impacted cultural place.
- Monitoring and management of the cultural place.
- Designating open space land.⁶⁴
- Enhancement of habitat or open space properties for protection of cultural place.
- Development of an alternate site suitable for tribal purposes and acceptable to the Tribe.

The Guidelines advise local governments to recognize and consider that, because Tribes may hold vastly different philosophies, perspectives, and worldviews, their view may be that full preservation of the "physical and spiritual integrity" of the cultural place, and not mitigation, is the only appropriate way to protect the cultural place.⁶⁵

Supporting this understanding, AB 168 recognizes the importance of tribal cultural resources to "tribal government sovereignty and self-determination" and for cultural

⁶² Tribal Consultation Guidelines, *supra* note 6, at 32.

⁶³ *Id.* at 23-4.

⁶⁴ See Cal. Gov't Code § 65560.

⁶⁵ Tribal Consultation Guidelines, *supra* note 6, at 23 ("[M]itigation will not always be viewed as an appropriate option to protect cultural places;" instead, "the only appropriate treatment may be to preserve the cultural place without impact to its physical or spiritual integrity.").

tradition, heritages, and identities,” and therefore the need for “elevated scrutiny and protection” during development processes.⁶⁶

Reaching consensus

SB 18 makes consensus the primary goal of consultation, which result would be embodied in an agreement. The agreement must be feasible, defined as “capable of being accomplished in a successful manner within a reasonable time taking into account economic, environmental, social and technological factors.” Good faith is essential to the effort to resolve differences in a “mutually acceptable” way.⁶⁷ If neither the local government nor the Tribe, acting in good faith and after reasonable effort, concludes that mutual agreement can be reached concerning appropriate measures of preservation or mitigation, then consultation comes to a conclusion without any resolution between the parties.⁶⁸

Procedural requirements for consultation

Actions triggering consultation⁶⁹

Consultation comes into play in one of two types of planning actions,⁷⁰ action on a General or Specific Plan, or action on an Open Space proposal. The specific requirements differ slightly between the two types of actions.

There are two required triggers for the obligation of a local government to consult with a particular Tribe regarding a General or Specific Plan:

1. The local government initiates the process to adopt or amend a General or Specific Plan;⁷¹ *and*
2. The Tribe is on the NAHC’s consultation list for the local government.

⁶⁶ See AB 168, *supra* note 52. The statute requires consideration of and consultation on tribal cultural resources before approval of fast-tracked housing projects, which is carried out in the context of local planning and zoning. It also requires reporting on SB 18 progress in general plans.

⁶⁷ Tribal Consultation Guidelines, *supra* note 6, at 18 (referring to the ACHP definition of consultation as “conferring between two or more parties to identify issues and make a good faith attempt to find a mutually acceptable resolution of any differences identified.”).

⁶⁸ *Id* at 24 (“If, after conducting consultation in good faith and within the spirit of the definition, the tribe or local government cannot reach agreement on preservation or mitigation of any impact to a California Native American cultural place, neither party is required to take any action under Government Code §65352.3(a).”).

⁶⁹ Cal. Gov’t Code § 65352.3.

⁷⁰ Cal. Gov’t Code §§ 65352.3(a), 65562.5.

⁷¹ Cal. Gov’t Code § 65353.2.

Action on an Open Space proposal, which can involve amendment of a general plan or rezoning, also triggers consultation if all of the following three items come into play:

1. The local government initiates a proposal to designate Open Space.⁷²
2. The local government has identified cultural places, features or objects listed in Secs. 5097.9 or 5097.993 within its jurisdiction.⁷³
3. The Tribe has filed a written request for notice of public hearings pursuant to Government Code §65092.⁷⁴

Timeline

The steps in initiating and conducting consultation on **general and specific plans** under SB 18 are the following:

- The local government initiates adoption or amendment of a general or specific plan.
- The local government contacts NAHC to obtain the names of Tribes that are on the NAHC contact list for the particular jurisdiction.⁷⁵

Notice Should Contain...

- “A clear statement of purpose” for the consultation
- “A description of the proposed general plan or specific plan being considered, the reason for the proposal, and the specific geographic area(s) that will be affected by the proposal,” including any relevant technical documents.
- “Maps that clearly detail the geographic areas described in the explanation”
- “The deadline (date) by which the tribe must request a consultation”
- “Contact information for representatives of the local government to whom the tribe should respond”
- “Contact information for the project proponent/landowner(s)”
- “Information on proposed grading or other ground-disturbing activities”

⁷² Cal. Gov’t Code §§ 65562.5, 65562.5(e).

⁷³ Cal. Pub. Res. Code § 5097.9 (referring to Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property); *see also* Cal. Pub. Res. Code § 5097.993 (referring to Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1). Local governments may identify such places by contacting the Tribes on the NAHC contact list and requesting that they identify them, by conducting a search on CHRIS, or requesting that the NAHC conduct a search.

⁷⁴ *See* Cal. Gov’t Code § 65092(a) (those eligible for notice include “any person [including tribes] who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests.”).

⁷⁵ Cal. Gov’t Code § 65353.2; *see also* Tribal Consultation Guidelines, *supra* note 6, at 13 (recommending that the jurisdiction send a written request to the NAHC by certified mail or fax that includes the specific location of the proposed action and a request for the names and contacts of the Tribes on the SB 18 Consultation List); *see also* Tribal Consultation Guidelines, *supra* note 6, at 13 (suggesting that requests should include “the specific location of the area that is subject to the

- NAHC sends the local government the list of Tribes (along with associated contact information) that it must contact.⁷⁶
- The local government contacts each Tribe on the list to invite it to consult. There is no deadline by which local governments must contact each Tribe and invite it to participate in consultation. Nevertheless, the local government should contact them as soon as possible.⁷⁷
- A Tribe has 90 days to respond to the invitation to consult.⁷⁸ The local government may agree to extend the 90-day timeframe; the Tribe may also agree to a shorter timeframe.⁷⁹ The government need not pause development of the proposal during this period.⁸⁰
- Consultation begins, and may continue throughout the planning process.⁸¹
- Consultation concludes prior to final action being taken on plan adoption or amendment.⁸²

For **open space proposals**, the local government first determines whether there are tribal cultural places in the proposed area. It does this by conducting a records search itself through CHRIS and/or requesting a records search by the NAHC, and by contacting Tribes on the NAHC contact list.⁸³ The local government should ask each Tribe for assistance in identifying whether they are aware of any cultural places located in a proposed open space area.⁸⁴ If cultural places are identified, the local government then invites Tribes on the NAHC contact list to consult.

Points of contact

The Guidelines direct the NAHC to provide, for each Tribe, the name of the Tribe, a designated tribal representative's name, and associated contact information.⁸⁵ Initial contact ideally should be made by a local government official of sufficiently high rank, such as a departmental head.⁸⁶ Following initial contact, both parties may delegate specific roles to staff or other parties, such as representatives or professionals who provide legal, factual,

proposed action, preferably with a map clearly showing the area of land involved; [and] A statement that the local government is seeking information about tribes that are on the "SB 18 Consultation List.").

⁷⁶ Tribal Consultation Guidelines, *supra* note 6, at 13.

⁷⁷ *Id.*

⁷⁸ Cal. Gov't Code § 65352.3(a)(2).

⁷⁹ Tribal Consultation Guidelines, *supra* note 6, at 15.

⁸⁰ Cal. Gov't Code § 65352.3(a)(2).

⁸¹ Tribal Consultation Guidelines, *supra* note 6, at 11.

⁸² Cal. Gov't Code § 65353(a).

⁸³ Tribal Consultation Guidelines, *supra* note 6, at 19.

⁸⁴ *Id.*

⁸⁵ *Id.* at 13.

⁸⁶ *Id.*

or technical information.⁸⁷ Parties may specify the points at which high-ranking officials should be involved.

Consultation procedures

SB 18 does not require any particular process for carrying out consultation itself. The Guidelines note that consultation can be an iterative process, and emphasize the need for flexibility. A common format is a series of meetings carried out between the parties.⁸⁸ Face-to-face consultation is advised,⁸⁹ with both parties mutually determining the format, time, and location.

The statute does not provide for creating any specific protocols. The Guidelines recommend developing protocols, however, in which the local government and Tribe develop an agreement prior to consultations that sets out specifics on how consultation will be conducted and how the parties can maintain a cooperative relationship.⁹⁰

Consultation protocols may include...

- Representatives from each party.
- Points at which elected government leaders need to be involved.
- Preferred methods of contact and which tribal leaders to be contacted.
- Procedures, including method and timing, for giving and receiving notice.
- Preferred methods of consultation.
- Preferred meeting locations.
- Tribe's willingness to participate in joint consultations.
- Procedures for the Tribe to access consultation records.
- Procedures to maintain up-to-date contact information.

Exchange of information

An objective of SB 18 is the early exchange of information in order to avoid or minimize conflict in the land use planning process.⁹¹ The Guidelines emphasize sharing key project information in the notice offering consultation to Tribes.⁹² The local government should cooperate in providing any additional information that the Tribe requests.⁹³ Taking confidentiality into consideration, the Tribe provides information on its cultural places. When consulting, the local government should consider the Tribe's views as to the importance, protection, and treatment and management of the cultural places.⁹⁴

⁸⁷ *Id.* at 16-7.

⁸⁸ *Id.* at 18.

⁸⁹ *Id.* at 17 (stating "[e]ffective consultation is an ongoing process, not a single event."). Consultation can involve multiple parts, different methods of communication, and multiple meetings, some which could be face-to-face, while others are conducted remotely.

⁹⁰ *Id.* at 22.

⁹¹ SB 18 § 1(b)(4).

⁹² Tribal Consultation Guidelines, *supra* note 6, at 14.

⁹³ *Id.* at 15.

⁹⁴ *Id.*

Review by Office of Research and Policy

AB 168 added a provision requiring local governments to report on their progress in implementing SB 18 in their annual reports to the Office of Research and Policy, the Department of Housing and Community Development, and the local legislative body.⁹⁵

In their annual planning reports, local governments must include an update as to their progress in updating the general plan or open space element to comply with the consultation requirements of SB 18 and to “identify and protect, preserve, and mitigate impacts” to traditional places.

The 2019 Planning Survey provides an update on local government actions relative to consultation.

Selected results from the 2019 Annual Planning Survey⁹⁶

Action	Counties	Cities
<i>Entered into consultations with Tribal Governments regarding a General Plan and/or Specific Plan Amendment or Adoption</i>	~75%	~50%
<i>Developed protocols for consulting with Tribal governments</i>	~70%	~55%
<i>Designated Tribal liaisons or specific persons for consultation</i>	~48%	~31%
<i>Incorporated text into the general plan regarding the protection of Native American Cultural Resources</i>	~62%	~31%
<i>Used conservation easements to help protect Native American Cultural Resources</i>	~10%	~6%
<i>Met regularly with Tribal Governments outside of specific requirements for notice and consultation, when adopting or amending a General Plan or Specific Plan</i>	~28%	~10%

Although over 70% of counties and approximately 55% of cities have adopted protocols for consulting with Tribal Governments, the survey results did not specify whether consultation protocols were developed in collaboration with Tribes. The results mention whether there is General Plan text regarding protection of cultural resources, but do not

⁹⁵ Cal. Gov't Code § 65400(a)(2)(K) “The progress of the city or county in adopting or amending its general plan or local open-space element in compliance with its obligations to consult with California Native American tribes, and to identify and protect, preserve, and mitigate impacts to places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code, pursuant to Chapter 905 of the Statutes of 2004.”

⁹⁶ Governor’s Office of Planning and Research, *2019 Annual Planning Survey Results*, 25 (Aug. 2020), https://opr.ca.gov/docs/20200828-2019_Annual_Planning_Survey_Results.pdf.

distinguish those jurisdictions that have actually protected cultural resources in their open space.

Enforceability

SB 18 contains no separate provision for review, nor any citizen suit—nor *Tribal* or *Tribal citizen suit*—provision. There are few consultation standards on which to base enforcement. There are no identified recorded cases that consider the issue of whether the SB 18 consultation procedure itself is subject to judicial review.⁹⁷ However, the statute states that failure to *refer* the planning action to a Tribe is not a basis for judicial review.⁹⁸

Confidentiality

Local governments must protect the confidentiality of Tribal information in carrying out consultation on a general [or specific] plan.⁹⁹ When consulting on proposals regarding the open space element of a general plan, an item of consultation itself is determining the “confidentiality required to protect the specific identity, location, character, or use of the place, feature, or object.”¹⁰⁰

Legal protections for Tribes’ confidential information are included in the California Public Records Act (CPRA), intended to ensure public access to state and local government records, which contains two exceptions to its general disclosure requirement:

- 1) “[R]ecords of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Section 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency’ (Cal. Gov’t Code § 6254(r)); and
- 2) “[R]ecords that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation

⁹⁷ See case law discussion.

⁹⁸ Cal. Gov’t Code § 65353(c) (“this section is directory, not mandatory, and the failure to refer a proposed action to the other entities does not affect the validity of the action, if adopted.”); see also Cal. Gov’t Code § 65400(b). The statute is also silent on the reviewability of any failure to submit an update on plan progress regarding consultation or protection of cultural resources in open space.

⁹⁹ Cal. Gov’t Code § 65352.3(b) (“Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Section 65040.2, the city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.”).

¹⁰⁰ Cal. Gov’t Code § 65562.5. This determination with regard to the necessary level and scope of confidentiality would then carry over to the resulting open space plan.

process between a California Native American tribe and a state or local agency' (Cal. Gov't Code § 6254.10)."¹⁰¹

However, Tribes and local governments must still structure government-to-government consultation in a manner to avoid triggering the open meeting requirements of the Brown Act. The Brown Act requires that meetings of legislative bodies in California be open to the public whenever a quorum of the legislative body is present,¹⁰² and provides no exceptions for Tribal information. To protect the confidentiality of Tribal information during consultation and its later use in decision-making, any planning commission or other legislative body that participates in consultation with tribes would be advised to ensure those directly involved in meetings comprise less than a quorum, such as by designating a committee to participate in consultation.

In addition, parties should take confidentiality measures for the public hearing(s) conducted prior to adoption of a plan or plan amendment. The Guidelines suggest that the local government and Tribe agree early in the consultation process on what elements or summary of Tribal information may be made public, and procedures to ensure confidentiality of information that Tribes do not want to divulge.¹⁰³

Gaps and Shortcomings

SB 18 lacks explicit standards and requirements for most procedural and substantive elements of consultation, leaving gaps between the law's stated goals and the ability to implement them. The Guidelines contain recommendations, but they are not enforceable.

Standards are lacking for:

- How to determine or ensure that consultations are **meaningful**.
- Ensuring that **tribal information is taken into account** and **tribal concerns are addressed**.
- Specific efforts that must be made to reach **consensus**.
- **Time limits for offering consultation** to Tribes after initiating the plan adoption or amendment.
- Ensuring that consultation takes place **before critical decisions** are made on plan development.
- **Providing appropriate sufficiently substantive information regarding the nature of the proposal and potential impacts early in the planning process** and time limits for information exchange.

¹⁰¹ Tribal Consultation Guidelines, *supra* note 6, at 26.

¹⁰² Cal. Gov't Code § 54952(b) [hereinafter Brown Act].

¹⁰³ Tribal Consultation Guidelines, *supra* note 6, at 27.

- **Ensuring an exchange of information** on Tribal and agency views as to the subjects of consultation, impacts of the proposal on the Tribe, options to avoid or minimize impacts, and Tribal input into agency decisions.
- Specific requirements for **notice**, and the **form** of consultation.
- **Preserving tribal cultural places, including in open space, and/or developing proper treatment and management plans** for cultural places.
- Paths for Tribes to **manage or co-manage** their tribal places and cultural sites.
- **Dispute-resolution** process.
- No specific or formal **process for considering Tribal feedback**, justifying planning decisions, or providing an opportunity to respond.
- **Timeframe for consultation on open space proposals**

Although the law requires confidentiality to be maintained, there is no statutory exception to the public disclosure requirements of the Brown Act and public hearings; instead, the parties must make separate arrangements in order to avoid triggering disclosure in these settings.