

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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April 18, 2023

Joe Perez, Director
Community Development Department
8930 Limonite Avenue
Jurupa Valley, CA 92509

RE: Camino Terrace Apartments – Letter of Technical Assistance

Dear Joe Perez:

The California Department Housing and Community Development (HCD) received a letter from the City of Jurupa Valley (City) dated February 10, 2023, in response to HCD's technical assistance regarding the Camino Terrace Apartments (Project), a proposed multi-family development consisting of 80 affordable housing units. The purpose of this letter is to recap the discussion between HCD and the City at the ensuing March 2, 2023 meeting and to further provide technical assistance related to the implementation provisions of the tribal scoping consultation under the Streamlined Ministerial Approval Process created by Senate Bill (SB) 35 (Chapter 366, Statutes of 2017) and codified in Government Code section 65913.4.

Background

On June 24, 2022, HCD sent a letter of technical assistance to the City regarding the Project. On July 19, 2022, HCD received a letter from the City in response to HCD's technical assistance letter dated June 24, 2022. The City disagreed with HCD's technical assistance letter. In addition to the Project's location in the Very High Fire Hazard Severity Zone (VHFHSZ), the City determined that the Project did not qualify for the Streamlined Ministerial Approval Process based on the potential to disturb the cultural resources of the Rincon Band of Luiseno Indians (Rincon Band). In addition, on August 4, 2022, the City provided a project timeline with additional information regarding the Project to HCD.

On December 23, 2022, HCD sent a second letter of technical assistance to the City regarding the Project. The letter provided technical assistance related to the City's evaluation of the Project's eligibility under the Streamlined Ministerial Approval Process. The letter states the Project's location in a VHFHSZ does not preclude the Project from eligibility for Streamlined Ministerial Approval Process and that, based on an email sent to the County from the Rincon Band, the tribe has "no further questions at this time and

can conclude consultation.” However, HCD asked the City to verify with the Rincon Band whether the consultation was concluded.

On February 10, 2023, HCD received the City’s response to HCD’s technical assistance letter dated December 23, 2022. The City had contacted the Rincon Band to confirm whether consultation was concluded. It appears that a misunderstanding led the Rincon Band’s Cultural Resources Manager, Cheryl Madrigal, to mistakenly believe that she had been corresponding with the City and not the County. According to the City, Cheryl Madrigal reiterated the conclusion of her June 22, 2022 letter, that “[t]he Tribe believes potential exists to disturb surface and subsurface cultural resources throughout the duration of the project.” In addition, it appears the City received correspondence from a second tribe, the Gabrieleno Band of Mission Indians – Kizh Nation (Gabrieleno Band), that states “there will be a potential to disturb tribal cultural resources that still exists as a result of the Camino Terrace Apartments.”

On March 2, 2023, HCD met with City representatives regarding the response letter sent by the City. HCD explained the tribal consultation process and responsibility of the City. Below are the statutory requirements for the tribal scoping consultation and the roles of each party.

Tribal scoping consultation and the defined roles of each party

AB 168 (Chapter 166, Statutes of 2020 and codified in Gov. Code, §§ 65400, 65913.4, and 65941.1) created a process for tribal scoping consultation for housing development proposals seeking review under the Streamlined Ministerial Approval Process. The roles and responsibilities are outlined below:

- **Developer Responsibility:** Before submitting an application for the Streamlined Ministerial Approval Process, developers must submit a notice of intent to submit an application to a local government (Gov. Code, § 65913.4, subd. (b)(1)(A)(i)).
- **Local Government Responsibility:** Within 30 calendar days of receiving the developer’s preliminary application, the local government must provide formal notice to each Tribe traditionally and culturally affiliated with the geographic area of the project site (Gov. Code, § 65913.4, subd. (b)(1)(A)(iii)(I)). The formal notice must include the location and a description of the proposed development and an invitation to engage in scoping consultation (Gov. Code, § 65913.4, subd. (b)(1)(A)(iii)(I)(ia-ic)).
 - The local government shall contact the Native American Heritage Commission (NAHC) for assistance in identifying any California Native American Tribe that is traditionally and culturally affiliated with the geographic area of the proposed development. (Gov. Code, § 65913.4, subd. (b)(1)(A)(ii)).
- **Tribal Responsibility:** Each Tribe that receives this notice has 30 calendar days to accept the invitation to engage in consultation (Gov. Code, § 65913.4, subd. (b)(1)(A)(iii)(II)).

- **Local Government Responsibility:** The local government must initiate scoping consultation within 30 calendar days of a Tribe's acceptance of the invitation to engage in scoping consultation (Gov. Code, § 65913.4, subd. (b)(1)(A)(iii)(III)).

It appears the City denied the applicant's request to utilize the Streamlined Ministerial Approval Process for the Project in part because the City received a letter from the Rincon Band stating that "the Tribe believes potential exists to disturb surface and subsurface cultural resources throughout the duration of the project." However, it is not clear to HCD the extent to which the City is implementing its responsibility under Government Code section 65913.4, subdivision (b)(1)(A). Based on the meeting with City staff on March 2, 2023, it appears that the City is failing to meet its statutory responsibility to engage in a tribal scoping consultation. Tribal scoping consultation must be between the City and the Tribe, and it is the City's role to lead the consultation to conclusion. If the City does not engage in tribal consultation, the City is not fulfilling the role of implementing the tribal scoping consultation under the Streamlined Ministerial Approval Process.

Simply receiving a letter from a tribe that indicates potential disturbance of cultural resources does not conclude a tribal consultation. A tribal scoping consultation concludes if either 1) the parties to the scoping consultation (i.e., the Local Government and the Tribe) document an enforceable agreement concerning methods, measures, and conditions to avoid or address potential impacts to tribal cultural resources that are or may be present (Gov. Code, § 65913.4, subd. (b)(2)(D)(i)); or 2) one or more parties to the consultation, acting in good faith and after a reasonable effort, conclude that a mutual agreement cannot be achieved (Gov. Code, § 65913.4, subd. (b)(2)(D)(ii)).

The Rincon Band requested a cultural resources survey, including an archaeological record search, to identify any potential impacts to cultural resources. Despite the misunderstanding over the proper parties to the communication, when the study was provided, the Rincon Band seemed to indicate, via email, it was ready to conclude consultation.

Further, during the March 2, 2023 meeting, the City indicated that it had recirculated the proposed Project to additional tribes, including the Gabrieleno Band, when the applicant applied for funding in the summer of 2022. It appears the Gabrieleno Band had already been notified of the Project in January 2022 among the other tribes notified at the time the applicant submitted its intent to file an SB 35 application. It is further curious to HCD why the City did not communicate to HCD nor the Applicant prior to its February 10, 2023 letter to HCD that the Gabrieleno Band had raised concerns about the Project.

As the City acknowledged in the March 2, 2023 meeting, this Project remains subject to the National Environmental Policy Act (NEPA) because of its funding source, and there will be continued opportunities for both the Rincon Band and the Gabrieleno Band to engage with this Project. Through the NEPA process, the Tribes may request conditions of approval on the Project, including common requests such as on-site monitoring of

Earth disturbance. However, it should be noted for future reference that while this is true for this Project, an SB 35 project that is not subject to NEPA could use the SB 35 tribal consultation to document an enforceable agreement to avoid or address potential impacts to tribal cultural resources, and it is the City's role to facilitate the documentation during the SB 35 tribal consultation.

Conclusion

HCD expects the City to meet its statutory obligation to engage in consultation with the Rincon Band of Luiseno Indians and the Gabrieleno Band of Mission Indians – Kizh Nation. This is an act that only the City can perform. By May 2, 2023, please provide a specific plan and timeline for engaging both tribes as required by Government Code section 65913.4.

For further reference, attached is a document prepared by the Governor's Office of Planning and Research (OPR) regarding AB 168: Tribal Scoping Consultation Requirements for Projects Seeking Review Under the Streamlined Ministerial Approval Process.¹

HCD appreciates the opportunity to provide information regarding the tribal consultation process under SB 35. If you have questions or need additional information, please contact Fidel Herrera, at fidel.herrera@hcd.ca.gov with any questions.

Sincerely,



Shannan West
Housing Accountability Unit Chief

¹ Also available on OPR's website: https://opr.ca.gov/ceqa/docs/20201202-AB_168_Advisory_FINAL.pdf



AB 168: Tribal Scoping Consultation Requirements for Projects Seeking Review Under the Streamlined Ministerial Approval Process (SB 35)

AB 168 (Aguilar-Curry, 2020) created a process for tribal scoping consultation (“consultation”) for housing development proposals seeking review under the streamlined ministerial approval process created by SB 35 (Wiener, 2017). Developers are now required to submit a preliminary application with key project details (found in Government Code §65913.4(b)(1)(A)) and engage in tribal scoping consultation that potentially influences the project’s eligibility for ministerial approval.

This document provides an overview of this new process pursuant to AB 168 and answers some common questions related to this new law. This document specifically focuses on the scoping consultation requirement related to SB 35’s streamlined ministerial approval process and not consultation requirements that may be required by other laws unless otherwise noted.

This document provides guidance only and should not be construed as legal advice. OPR provides this technical advisory as a resource for the public to use at their discretion. OPR is not enforcing or attempting to enforce any part of the recommendations or information contained herein.

When does AB 168 take effect?

Immediately. AB 168 contained an urgency clause, which means that the bill took effect on **September 25, 2020**, when the Governor signed the bill. This law does not apply to any projects that obtained ministerial approval under SB 35 by the local government prior to this date (Government Code §65913.4(b)(8)).

The Governor's Office of Planning and Research (OPR) advises that projects with pending applications under review should engage in this tribal consultation to ensure compliance with the requirements of AB 168.

What information must be included in a preliminary application?

Before submitting an application for SB 35 approval, development proponents must now submit a notice of intent to submit an application, which includes a preliminary application. The preliminary application and its requirements are described in existing statute (Government Code §65941.1); it is also the same preliminary application referenced in SB 330 (Statutes of 2019).

The California Department of Housing and Community Development (HCD) has developed a standardized form that applicants for housing development projects may use for the purpose of satisfying the requirements for submittal of a preliminary application if a local agency has not developed its own application form. The form and more information on the SB 330 preliminary application can be found at <https://www.hcd.ca.gov/community-development/accountability-enforcement/statutory-determinations.shtml>

A preliminary application must include all of the following information:

1. The project's location, including the parcel number, a legal description, and address, as applicable
2. The existing uses of the site and the identification of major physical alterations to the property
3. A site plan showing the location of the property; as well as the massing, height, approximate square footage, and elevations showing design, color, and material of each building to be occupied
4. The proposed land uses by number of units and square feet of residential and nonresidential development using the applicable categories in the applicable zoning ordinance
5. The proposed number of parking spaces
6. Any proposed point sources of air or water pollutants

7. Any species of special concern known to occur on the property
8. Whether a portion of the property is located within any of the following:
 - a. A very high wildfire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Government Code Section 51178
 - b. Wetlands, as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993)
 - c. A hazardous waste site listed pursuant to Government Code Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Health and Safety Code Section 25356
 - d. A special flood hazard area subject to inundation by the 1 percent annual chance flood (100-year flood) as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency
 - e. A delineated earthquake fault zone as determined by the State Geologist in any official maps published by the State Geologist, unless the development complies with applicable seismic protection building code standards adopted by the California Building Standards Commission under the California Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code), and by any local building department under Chapter 12.2 (commencing with Section 8875) of Division 1 of Title 2
 - f. A stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code
9. Any historic or cultural resources known to exist on the property
10. The number of proposed below market rate units and their affordability levels
11. The number of bonus units and any incentives, concessions, waivers, or parking reductions pursuant to Density Bonus Law (Government Code Section 65915)
12. Whether any approvals under the Subdivision Map Act (Division 2 of Title 7 (commencing with Section 66410) of the Government Code), including, but not limited to, a parcel map, tentative map, or condominium map, are being requested
13. The applicant's contact information, and, if the applicant does not own the property, the property owner's consent to submit the application

14. For a housing development proposed to be located within the coastal zone, whether any portion of the property contains any of the following:
 - a. Wetlands, as defined by subdivision (b) of Section 13577 of Title 14 of the California Code of Regulations
 - b. Environmentally sensitive habitat areas, as defined by Public Resources Code Section 13577
 - c. A tsunami run-up zone
 - d. Use of the site for public access to or along the coast
15. The number of existing residential units on the project site that will be demolished and whether each unit is occupied or unoccupied
16. A site map showing a stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code and an aerial site photograph showing existing site conditions of environmental site features that would be subject to regulations by a public agency, including creeks and wetlands
17. The location of any recorded public easement, such as easements for storm drains, water lines, and other public rights of way

How are Tribes identified for scoping consultation?

Upon receipt of a development proponent's preliminary application, the local government must "engage in ... consultation regarding the proposed development with any California Native American Tribe that is traditionally and culturally affiliated with the geographic area, as described in Section 21080.3.1 of the Public Resources Code" and "contact the Native American Heritage Commission for assistance in identifying any California Native American Tribe" (Government Code §65913.4(b)(1)(A)(ii)).

What is the timeline for consultation?

The statute adopts a 30-30-30 timeline. Within **30 calendar days** of receiving the developer's preliminary application, the local government must provide formal notice for each Tribe traditionally and culturally affiliated with the geographic area of the project site (Government Code §65913.4(b)(1)(A)(ii)). The formal notice must include the location and a description of the proposed development, and an invitation to engage in scoping consultation (Government Code §65913.4(b)(1)(A)(iii)(I)(ia-ic)).

Each Tribe that receives this notice has **30 calendar days** to accept the invitation to engage in consultation (Government Code §65913.4(b)(1)(A)(iii)(II)).

The local government must initiate consultation within **30 calendar days** of a Tribe's acceptance of the invitation to engage in consultation (Government Code §65913.4(b)(1)(A)(iii)(III)).

Who participates in the consultation?

The local government and any California Native American Tribe that is traditionally or culturally affiliated with the geographic area of the project site may participate in the consultation. In cases where more than one Tribe participates in consultation, the local government must grant separate consultation with a Tribe if individual consultation is requested (Government Code §65913.4(b)(1)(C)).

The development proponent and its consultants may participate in consultation if they agree to respect the principles established in AB 168, engage in good faith, and the Tribe approves of the proponent's participation. **The Tribe may revoke this approval at any time during the consultation process** (Government Code §65913.4(b)(1)(C)).

AB 168 requires that consultation must recognize that California Native American Tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue, and shall take into account the cultural significance of the resource to the Tribe (Government Code §65913.4(b)(1)(B)).

What confidentiality requirements apply to the consultation process?

Consultation must comply with the confidentiality requirements established in Government Code Section 6254(r), Government Code Section 6254.10, Public Resources Code Section 21082.3(c), and California Code of Regulations, Title 14, Section 15120(d). Additionally, the Tribe may adopt any additional confidentiality requirements applicable to the consultation (Government Code §65913.4(b)(1)(D)).

Does the California Environmental Quality Act (CEQA) apply to the consultation process?

No, the tribal consultation required pursuant to AB 168 is not considered a project under CEQA (Government Code §65913.4(b)(1)(E)).

When does tribal consultation conclude?

Tribal consultation concludes either 1) upon documentation of an enforceable agreement regarding the treatment of tribal resources at the project site (Government Code §65913.4(b)(2)(D)(i)), or 2) one or more parties to the consultation, **acting in good faith and after a reasonable effort**, conclude that a mutual agreement cannot be achieved (Government Code §65913.4(b)(2)(D)(ii)).

What are the potential outcomes of the tribal consultation?

If the parties participating in tribal consultation determine that there is no potential impact to tribal cultural resources resulting from the project, then the development proponent may submit an application for ministerial approval pursuant to SB 35 (Government Code §65913.4(b)(2)(A)).

If the tribal consultation identifies a potential impact to tribal cultural resources resulting from the project, then the parties must document an enforceable agreement regarding the methods, measures, and conditions for treatment of tribal cultural resources. **This agreement must be a condition of approval** for the project application for SB 35 approval (Government Code §65913.4(b)(2)(B)).

If the parties are unable to reach an enforceable agreement regarding treatment of tribal cultural resources that may be present on the project site, then the development proponent is ineligible for ministerial approval under SB 35 (Government Code §65913.4(b)(2)(C)).

What is now required for a project to qualify for SB 35 ministerial approval?

A project is **eligible** for the ministerial approval established under SB 35 if **any** of the following conditions apply:

1. A Tribe that received notice of the developer's submission of a pre-application did not respond to the invitation to engage in consultation within 30 days (Government Code §65913.4(b)(3)(A));

2. A Tribe accepted an invitation to engage in tribal consultation but failed to engage after repeated attempts by the local government to initiate consultation (Government Code §65913.4(b)(3)(B));
3. The consultation concluded that there is no potential harm to tribal cultural resources resulting from the project (Government Code §65913.4(b)(3)(C)); OR
4. The consultation identified potential impacts to tribal cultural resources, and the parties committed to a documented, enforceable agreement regarding the treatment of potential resources (Government Code §65913.4(b)(3)(D))

Pursuant to AB 168, what might disqualify a project from ministerial approval under SB 35?

A project would be **ineligible** for ministerial approval pursuant to SB 35 if **any** of the following conditions apply:

1. The project site contains a tribal cultural resource that is listed on a national, tribal, state, or local historic register (Government Code §65913.4(b)(4)(A));
2. The parties to scoping consultation do not agree on whether the project will impact tribal cultural resources (Government Code §65913.4(b)(4)(B)); OR
3. A potential tribal cultural resource would be affected by the proposed project, and the parties to scoping consultation were unable to document an enforceable agreement regarding the treatment of potential tribal resources (Government Code §65913.4(b)(4)(C))

What documentation is required upon conclusion of the tribal consultation?

If the consultation concludes that the project would not affect potential tribal cultural resources, **no further documentation is required** and the development proponent may proceed with submission of its application for ministerial approval under SB 35 (Government Code §65913.4(b)(2)(A)).

If the consultation results in documentation of an enforceable agreement regarding the treatment of potential tribal resources, that **agreement must be attached** to the local government's approval of the application for SB 35 ministerial approval (Government Code §65913.4(b)(20)(B)).

If the consultation results in disqualification of the project from SB 35's streamlined ministerial approval process, the **local government must provide written documentation** of the fact, with an explanation for the project's ineligibility, to the development proponent and the Tribe or Tribes participating in the consultation (Government Code §65913.4(b)(5)(A)). The documentation provided to the development proponent must also include information on how to seek a conditional use permit or other discretionary approval of the project from the local government (Government Code §65913.4(b)(5)(B)).

What happens if the project changes after the conclusion of tribal consultation?

If the development or environmental setting substantially changes after the consultation, the local government must notify the Tribe of the change and engage in a **subsequent consultation if requested** by the Tribe or Tribes (Government Code §65913.4(b)(2)(E)).

While the bill does not specify a timeline for this subsequent notification and consultation, OPR recommends adhering to the 30-30-30 timeline required for the initial consultation.

For the purposes of this consultation, OPR advises that a project or environmental setting may "substantially change" if 1) those changes will require major revisions to the environmental impact report, or 2) if new information that was not available or could not have been known during preparation of the environmental impact report becomes available (see Public Resources Code §21166).