

SURPLUS LAND ACT

AFFORDABLE HOUSING FAQ

(As Amended by AB 1486 (Ting, 2019))¹

PUBLIC LANDS FOR PUBLIC GOOD WORKING GROUP—AUGUST 2021

Great Communities Collaborative

San Francisco Foundation

We hope this FAQ will help guide communities, advocates, and public agencies on how to effectively and adequately implement the Surplus Land Act. Surplus public property is an essential resource for creating inclusive development, especially since so much of it is located in areas near transit and employment opportunities.

¹ Government Code §§ 54220 – 54234. As of the issuance of this FAQ, AB 1271 (Ting), which would make additional clarifications and improvements in the SLA, has become a “two-year” bill and will be taken up by the Legislature in 2022. Stay tuned!

SUMMARY

The California Surplus Land Act (Government Code sections 54220-54234) requires local agencies disposing of their surplus land to *prioritize affordable housing development*. **AB 1486 (Ting, 2019)** enacted detailed requirements described below and summarized on this page.

Local Agency Obligations:

- 1) Prior to Taking Any Action to Dispose of any Agency-owned Land by Sale or Lease:
 - **Declare the Land Surplus or Exempt Surplus** at a regular public meeting.
 - **Issue Notice of Availability** of the land for development of affordable housing with at least 25% affordable to lower income households to all **qualified developers** registering with the Department of Housing and Community Development (HCD). [Notices of availability must also be sent to local school & park districts and other local government entities.]
 - **Send a copy of the Notice to HCD** for inclusion on HCD's **Expression-of-Interest List**.

- 2) Negotiate in Good Faith with Affordable Housing Developers that Submit a Notice of Interest Within 60 days and with:
 - Priority to the developer offering the most affordable units at greatest affordability
 - Minimum 90-day negotiation period
 - Terms that make affordable housing feasible

- 3) Submit a formal Description of Negotiations to HCD.
 - Respond to the determinations of HCD regarding any noncompliance with the SLA.

- 4) Convey the property for development Only if Subject to One of these Conditions:
 - a. At least 25% of the units affordable to lower income household UNLESS:
 - No Notice of Interest is received, *or*
 - The agency is not able to reach agreement with an interested developer.
 - b. At least 15% of the units affordable to lower income households IF:
 - No agreement with an affordable housing developer, and
 - The development will include at least 10 residential units

Enforcement of the SLA:

- Potential Residents, Affordable Housing Developers and Other Agencies may sue
- Financial Penalties if land disposed of in violation of the SLA, but the conveyance of the land cannot be voided.
- AG may sue.

Look for Information:

- HCD's Website: [Public Lands for Affordable Housing Development \(ca.gov\)](https://www.hcd.ca.gov/public-lands)
- Land Inventory in the City or County's Housing Element
- Annual Progress Report filed with HCD: [Annual Progress Reports \(ca.gov\)](https://www.hcd.ca.gov/annual-progress-reports)

QUESTIONS & ANSWERS

DEFINITION OF TERMS (See [HCD SLA Guidelines](#), § 102.²)

1. What is “Surplus Public Land?”

The Act defines “surplus land” as land owned “by any local agency for which the local agency’s governing body takes formal action declaring that the land is surplus and is *not necessary for the agency’s use.*”

An agency may not take any action to dispose of land, including entering into negotiations to dispose of land, until it complies with the SLA procedures. And the first step the the SLA requires is that the agency make a finding that the land is either “surplus” or “exempt surplus.” § 54221 (b). No agency may dispose of a parcel until it makes one of those findings. A local agency is permitted to declare multiple parcels surplus or exempt surplus in a single action on an annual basis.

By December 31 of each year each city and county must make a central inventory of all exempt or non-exempt surplus land. § 54230. They must also identify any public land identified as in excess of their foreseeable needs pursuant to Government Code § 50569. As of April 1, 2021 they must annually make a description of each of these parcels and report the information to the Department of Housing and Community Development as part of the Annual Progress Report they submit to HCD every year pursuant to Government Code § 65400. This information must be provided to an individual or housing developer on request without charge.

2. What is a “Local Agency?”

Local agencies include cities, counties, transit agencies, special districts, redevelopment successor agencies, housing authorities, joint powers authorities, school districts, park districts or other political subdivisions empowered to acquire real property. §54221(a).

3. What is “Disposition” of Land?

Disposition is the conveyance of land owned by a local agency by *sale or lease*. Some short term leases are not considered Disposition (HCD Guidelines § 102(h)):

- a. Lease of land on which no development or demolition will occur.
- b. Lease term less than 5 years *including* extensions, amendments or options.

An enforceable *option* to lease, however, qualifies as a disposition.

² https://www.hcd.ca.gov/community-development/docs/SLA_Guidelines_final.pdf. These were adopted in April 2021.

4. What is “Agency’s Use?”

“Agency’s Use” includes land currently being used or planned to be used “pursuant to a written plan adopted by the local agency’s governing board” for or in support of “agency work or operations....” §54221(c)(1). (This includes “utility sites, watershed property, land being used for conservation purposes, land for demonstration, or educational purposes related to greenhouse gas emissions, and buffer sites near sensitive governmental uses” (i.e. wastewater treatment plants.)

Agency’s use does *not* include “commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development.” *And it does not include disposal of land for “sole purpose of investment or generation of revenue....”* §54221(c)(2)(A)

Special Districts. Special rules apply. Except for transportation districts, agency’s use may include commercial or industrial activities and activities for the purpose of investment or generating revenue, *but only if* the activity: (a) Directly furthers the express purpose of the agency’s work or operations, or (b) Is expressly authorized by statute. §54233.5; HCD Guideline § 102(d).

5. What is Affordable Housing?

Rents at no more than 30% of 60% Area Median Income (Health & Safety Code § 50053). 30% of 80% of AMI is too high.

LAND EXEMPT FROM THE SURPLUS LAND ACT

6. What is *Exempt Surplus Land*? (See HCD Guidelines § 103)

Exempt surplus land is defined in § 54221(f) and includes:

- a. Small sites not contiguous to other public land used for open-space or low- and moderate-income housing purposes and provided it is sold to the owner of a contiguous parcel.
- b. Land an agency is exchanging for another property necessary for the agency’s use.
- c. Land an agency is transferring to another government agency.
- d. A former street, right of way, or easement conveyed to the owner of an adjacent property.
- e. Land offered through a competitive bid process for either:
 - A development where 75% of the housing units will be restricted to lower income households at an affordable rent or sales price (45 years for sales, 55 years for rentals), or
 - A mixed-use development of not less than 300 housing units where 25% of the units will be restricted to lower income households at an affordable rent or sales price (45 years for sales, 55 years for rentals)

[These are exempt because the affordability requirements meet or exceed the SLA affordability requirements.]

- f. Land subject to valid legal restrictions not imposed by the agency (probably including any voter measures) and that would make housing prohibited unless there is a feasible method to satisfactorily mitigate or avoid the prohibition. (A nonresidential land use designation is not a legal restriction that would make housing prohibited and does not make the land exempt.)

If a property is declared exempt, a copy of the resolution must be sent to HCD 30 days prior to disposition. HCD Guidelines § 400(e).

DISPOSITION PROCESS

7. **What Are the Steps for Disposition of Non-Exempt Surplus Land?** *Prior* to disposition or negotiations to dispose of surplus land, the following must occur. §54222; HCD Guidelines §§ 200, 201, 202.
 - a. **Notice of Availability (NOA)—Priority for Affordable Housing.** Local agency sends a written notice of availability to: 1) public agencies and affordable housing developers (for housing); 2) park and recreational districts or authorities and the State Resources Agency (for parks/open space; 3) local school districts (for school facilities) & 4) public entities in an infill opportunity zone. Any notice of interest for affordable housing development receives first priority over notices of the other areas, e.g. open space, parks and schools. §54222.5, §54227.
 - b. **NOA Recipients must Include:**
 - *HCD*, which must maintain an up-to-date listing of notices of availability on its website. §54222(a)(2);
 - *Public entities* within the jurisdiction where the land is located; and
 - *Housing sponsors/developers* who have notified HCD of their interest in developing surplus sites with at least 25% housing affordable to lower income households.³ §54222(a)(1), §54222.5; HCD Guideline § 202(b)(3)(B).
 - c. **Notice of Interest in Site Within 60 Days After Notice of Availability.** Any interested qualified entity notifies the local agency within 60 days. §54222(e).
 - d. **Negotiations in Good Faith for Not Less than 90 Days with All Qualified Developers Submitting a Notice of Interest.** §54223(a); HCD Guideline §202(b)(3)(A).

³ Affordable Housing developers should make a practice of regularly reviewing HCD's website for notices of availability in a region where they are interested in developing. [Public Lands for Affordable Housing Development \(ca.gov\)](https://www.hcd.ca.gov/public-lands-for-affordable-housing-development)

- e. **First Priority to the Entity Offering the Most Affordable Units and Deepest Affordability.** The deepest level of affordability means lowest level of “average affordability” for affordable units. *However*, an agency may negotiate concurrently with all entities proposing affordable housing meeting the minimum requirements of 25% housing affordable to lower income households. §54227(a), but if two entities propose the same number of affordable units, the entity offering the deepest level of affordability receives priority. § 54222.5; HCD Guideline § 202(b)(3)(B).
- f. **HCD Approval Required Prior to Approval of Disposition.** § 54230.5; HCD Guidelines § 400.
- Agency must send HCD 1) a description of the notices of availability and any negotiations conducted, and 2) a copy of affordability restrictions to be recorded. §54230.5(b)(1).
 - HCD must review the information and submit written findings within 30 days and give the agency 60 days to respond. §54230.5(b)(2).
 - Agency must either: 1) correct HCD identified issues, or 2) provide findings explaining why HCD’s findings are incorrect. §54230.5(b)(3).
 - HCD may reject the agency’s findings and may notify the agency of the violation.
- g. **If No Agreement is Reached or No Priority Offers are Received, Land May Be Sold for Non-Affordable Housing Uses.** §54223(a). *However*, if the development includes 10 or more residential units, 15% must be affordable to lower income households. §54233.
8. **What is “Participating in Negotiations?”** It is the process of negotiating with another person or entity for the disposal of land, but does not include undertaking appraisals, due diligence, discussion with real estate professionals not representing a potential buyer, issuance of an RFQ or internal discussions with staff and elected officials. §54222(f).
9. **What are “Good Faith Negotiations?”** Good faith negotiations must include use of surplus land for residential purposes and may not include terms that:
- Disallow residential use as a condition of disposal.
 - Reduce maximum density or lot coverage.
 - Require additional design/architectural standards having a substantial adverse effect on viability or affordability of lower or moderate income housing. § 54223(b); HCD Guideline §202(a)(1)(C).

However, terms negotiated may include limitations on residential use or density *if* they would have a specific, adverse impact on public health & safety or the operation of agency facilities and satisfactory mitigation is not feasible. § 54223(c).

If an entity believes the local agency has not negotiated in good faith, it should immediately notify HCD at: publiclands@hcd.ca.gov. HCD Guideline § 202(a)(1)(E).

10. What are the Grounds to Reject an Offer?

- a. Disagreement on price
- b. Priority given to project with greatest number of affordable units or, if a tie, lowest average level of affordability;
- c. applicant not responsive to agency's "reasonable conditions as described in the NOA" provided the conditions are consistent with HCD's Guidelines and reviewed by HCD. HCD Guideline §202(b)(4).

11. What are the Disposition Requirements for an Entity Selected to Develop Affordable Housing? At least 25% of the units must be affordable to and occupied by lower income households⁴ for a period of at least 55 years for rental units and 45 years for ownership units. These requirements must be included in deed restrictions recorded against the property. The local agency must provide a copy of these restrictions to HCD. HCD Guidelines § 300.

12. What are the Disposition Requirements if a Local Agency Cannot Reach Agreement with An Affordable Housing Developer after Good Faith Negotiations? If the land is sold to another developer and 10 or more residential units are developed, not less than 15% of the units must be made available and affordable to lower income households and deed restricted for that use. HCD Guideline § 202(c). To ensure compliance with this requirement, if it is unknown whether housing will be constructed on the land, we recommend that before disposing of the property, local agencies record covenants that state that if housing is built on the site in the future, 15% must be affordable

13. May a Local Agency Choose to Sell or Lease Surplus Land at Market Value or Below? The law permits sale or lease for less than market value but does not require it. §54226.

14. Are some Existing Negotiations for Disposition Only Subject to the Pre-AB 1486 Procedures? Yes, but they are *not* exempt from the SLA obligation to prioritize disposition for affordable housing. Exempt from the specific AB 1486 procedures are projects with exclusive negotiating agreements (ENAs) including some former redevelopment agency property. § 54234; HCD Guideline § 103(b).

- a. If an agency had entered into an ENA or legally binding agreement to dispose of property prior to September 20, 2019, the disposition is subject to the pre-AB 1486 law, provided the disposition is completed by 12-31-22. §54234(a).

⁴ Rents at no more than 30% of 60% Area Median Income (Health & Safety Code § 50053). 30% of 80% of AMI is too high.

- b. Property in the Community Redevelopment Property Trust Fund subject to an ENA or legally binding disposition agreement entered into no later than 12-31-20 is subject to the pre-AB 1486 law, provided disposition is completed by 12-31-22.⁵

15. Are there Different Requirements for Special Districts? Yes, districts other than transit districts may dispose of land that is zoned to permit residential use (or rezoned within 5 years) provided 15% percent of developments of 10 or more units are affordable to lower income households. §54233.5; HCD Guideline § 202(c)(2).

MONITORING, ENFORCEMENT AND CONSEQUENCES FOR NONCOMPLIANCE

16. What are the Local Agency Reporting Requirements? § 54230.5

- a. **Determination of Surplus Property.** Starting 4-1-21, a central inventory of surplus property must be reported to HCD annually in the Housing Element Annual Progress Report that all jurisdictions must submit. §§ 54230, 65400; HCD Guidelines § 200(c).
- b. **Notice of Exemption.** If a local agency determines that a property is exempt, it must notify HCD at least 30 days prior to disposition. HCD Guidelines § 400(e)
- c. **Pre-Negotiation.** The local agency must submit a Notice of Availability (NOA) to: HCD, all interested housing sponsors from which HCD has received notice and local public entities within the jurisdiction. HCD Guidelines § 400(a).
- d. **Post-Negotiation.** Following negotiations, *but prior to disposing of the land*, the local agency must provide for HCD's review: the NOA, any Notices of Interest, a description of the negotiations, and copies of the deed restrictions to be recorded. And if it disposes of land to an affordable housing entity that does not have first priority pursuant to § 54227, it must provide an explanation to HCD. HCD Guidelines § 400(b).

17. How will HCD Monitor Compliance with the SLA? HCD will review the information about disposition submitted to HCD by the local agencies. If it finds a violation of the SLA, it must issue written findings and a **Notice of Violation (NOV)** within 30 days (unless the agency fails to submit a Complete Submittal form). It then must provide the agency with at least 60 days to respond. *Before disposing of the property*, the local agency response must either correct all violations or provide written responses demonstrating that the agency is in compliance. §§ 54230, 54230.5; HCD Guidelines § 500.

18. What are the Methods of Enforcement Available for Violation of the SLA Prior to Disposition? HCD, the AG and third parties are authorized to enforce the SLA prior to disposition.

⁵ This date is extended for local agency and redevelopment property if the failure to complete disposition is due to a law suit to a date 6 months after the conclusion of the litigation.

- a. **HCD Issues Notice of Violation and May Take Legal Action.** As described in # 16, after receiving information on a proposed disposition, HCD will issue a NOV if it determines the disposition would violate the SLA and give the local agency a chance to respond. If HCD determines the responses are deficient, it will notify the agency and may notify the Attorney General and/or seek to enforce the SLA in court. HCD Guidelines § 501(a).
- b. **Third Party Enforcement.** A public entity within the jurisdiction, an affordable housing sponsor that sent a Notice of Interest, a person who would have been eligible to apply for residency in any affordable housing developed, a housing advocacy organization *or any beneficially interested person or entity* may bring a court action to enforce the SLA.⁶ § 54230.5; HCD Guidelines § 502. The suit may be brought at any time during the disposition process when the local agency has violated the SLA.

19. What are the Consequences for Disposition in Violation of the SLA? Financial penalties but disposition is not invalidated. § 54230.5; HCD Guidelines §§ 501(b).

- a. Penalty for disposition after HCD finds violation—30% of sale price (50% for subsequent violations) to be deposited into a local housing trust fund or other specified State funds. § 54230.5(a).
- b. Low income persons, housing organizations and other “beneficially interested” person or entity may bring suit to enforce the penalty after first giving a 60 day notice to cure. § 54230.5(a).⁷
- c. Failure to comply with the SLA does not invalidate a transfer or purchase. § 54230.6.

PLANNING AND REPORTING OBLIGATIONS

20. What are the Planning and Reporting Requirements for Cities and Counties? In addition to reporting to HCD on the results of each Notice of Availability, cities and counties must inventory the sites they own and:

- Include in the housing element’s inventory of land a description of any plans to dispose of their sites, including how the city or county will comply with the SLA. § 65583.2
- In their Annual Progress Report to the Office of Planning and Research on Housing Element Implementation list: 1) all sites they own that are either surplus land pursuant to § 54221 or land in excess of foreseeable needs pursuant to § 50569 ,

⁶ A “beneficially interested person” is a person with a special interest in a statutory *duty or one enforcing the public interest* by bringing a writ of mandate action against a governmental entity pursuant to Civil Code § 1021.5.

⁷ Note: The SLA Guidelines also provide that before an action may be brought to enforce § 54230.5 a party must first provide HCD with a notice of intent to enforce. HCD Guidelines § 502(b). This requirement is not authorized by § 54230.5, and we have notified HCD of this error.

and 2) all sites included in the housing element inventory that have been sold, leased or otherwise disposed of. § 65400.1 Annual Progress Reports are available on HCD's website: [Annual Progress Reports \(ca.gov\)](https://www.hcd.ca.gov/annual-progress-reports)