

SURPLUS LAND ACT

AFFORDABLE HOUSING FAQ

October 2019 (Amended by AB 1486 (Ting, 2019))
(PUBLIC LANDS FOR PUBLIC GOOD WORKING GROUP)

The California Surplus Land Act (Government Code sections 54220-54233) requires local agencies disposing of their surplus land to *prioritize affordable housing development*. Prior to disposing of any agency-owned land, an agency must first declare, at a regular public meeting, based on written findings, that land is either surplus land or exempt surplus land.

Before disposing of or entering into negotiations to dispose of any surplus land, the agency first must issue a notice of availability for development of affordable housing with at least 25% affordable to lower income households. The agency must then negotiate in good faith with the prospective housing developers. If not able to reach agreement, or if no such offer is received, and the land is then sold to another entity, at least 15% of any housing developed on the site must be affordable. Violation of the SLA now carries a substantial financial penalty for the agency.

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. What is “Surplus” 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*.” Land must be declared either “surplus” or “exempt surplus” before the agency takes any action to dispose of it. § 54221 (b).

2. What is a “Local Agency?”

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

3. 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)

4. What is *Exempt Surplus Land*?

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

- Small sites not contiguous to other public land used for open-space or low- and moderate-income housing purposes and provided it is sold the owner of a contiguous parcel.
- Land an agency is exchanging for another property necessary for the agency’s use.
- Land an agency is transferring to another government agency.
- A former street, right of way, or easement conveyed to the owner of an adjacent property.
- Land offered through a competitive bid process for either:
 - a. 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
 - b. 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.]

- Land subject to valid legal restrictions *not* imposed by the agency and that would make housing prohibited *unless* there is a feasible method to satisfactory 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.)

5. 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)

- **Notice of Availability—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.** §54222.5, §54227.
- **Notice of Availability for Affordable Housing.** The notice of availability for affordable housing must go to:
 - a. To the California Dept. of Housing and Community Development (*HCD*), which must maintain an up-to-date listing of notices of availability on its website. §54222(a)(2);
 - b. To *public entities* within the jurisdiction where the land is located; and
 - c. To *housing sponsors/developers* who have notified HCD of their interest in developing surplus sites with at least 25% housing affordable to lower income households.¹ §54222(a)(1), §54222.5.
- **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).

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.

- **Negotiations in Good Faith for Not Less than 90 Days.** §54223(a).
- **HCD Approval Required Prior to Approval of Disposition Commencing 1-1-21.** After that date, the following must occur:
 - a. 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).

¹ 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.

- b. HCD must review the information and submit written findings within 30 days and give the agency 60 days to respond. §54230.5(b)(2).²
- c. Agency must either: 1) correct HCD identified issues, or 2) provide findings explaining why HCD’s findings are incorrect. §54230.5(b)(3).
- d. HCD may reject the agency’s findings and may notify the agency of the violation.

- **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.

6. 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).

7. What are “Good Faith Negotiations?” Good faith negotiations must include use of surplus land for residential purposes and may not:

- 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).

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).

8. 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.

9. What are the Consequences for Violation of the SLA? Financial penalties but disposition is not invalidated.

- 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).

² HCD must have adopted guidelines establishing uniform standards for review and otherwise implement the requirements of AB 1486 by 1-1-21. §54230.5(b)(2)(D), §54230.5(c).

- 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).
- Failure to comply with the SLA does not invalidate a transfer or purchase. §54230.6.

10. 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.

11. Are Some Currently Proposed Projects Subject to the Pre-AB 1486 SLA? Yes for some with exclusive negotiating agreements (ENAs) including some former redevelopment agency property.

- 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).
- 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 12-31-22.³

12. 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 (see # 5), 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.
- In their Annual Progress Report to the Office of Planning and Research on Housing Element Implementation list 1) all sites they own, and 2) a list of the sites included in the housing element inventory that have been sold, leased or otherwise disposed of. (§65400.1)

³ 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.