

Assembly Bill (AB) 1486 Questions and Answers (Q&A)

The California Department of Housing and Community Development (HCD) is responsible for implementing Assembly Bill (AB) 1486 (Ting, 2019) related to surplus land. HCD's mission is to promote safe, affordable homes and strong vibrant communities throughout California so that every California resident can live, work, and play in healthy communities of opportunity. One of the challenges in building new affordable homes is acquiring land suitable for housing. Assembly Bill 1486 aims to connect developers who are interested in building affordable homes to surplus local public land that is both available and suitable for housing development.

The following is HCD's best interpretation of certain aspects of the Surplus Land Act (SLA) as of July 2020. HCD reserves the right to change its opinion on any of the matters discussed below in light of new facts or legal guidance from the Legislature, the Courts, etc.

HCD will provide additional information about the SLA through Guidelines that will be available in January 2021.

Please send questions/requests for technical assistance to publiclands@hcd.ca.gov.

DEFINITIONS

1. Q: To which entities do the SLA's noticing requirements apply?

A: Pursuant to Government Code (GC) 54222 notices of availability must be sent by all local agencies disposing of surplus land. GC 54221(a)(1) defines "local agency" to mean every city, whether organized under general law or by charter, county, city and county, district, including school, sewer, water, utility, and local and regional park districts of any kind or class, joint powers authority, successor agency to a former redevelopment agency, housing authority, or other political subdivision of this state and any instrumentality thereof that is empowered to acquire and hold real property.

2. Q: What is the difference between "surplus land" and "exempt surplus land"?

A: Pursuant to GC 54221(b)(1) and 54221(b)(2), "surplus land" means land owned in fee simple by any local agency for which the local agency's governing body takes formal action in a regular public meeting declaring that the land is surplus and is not necessary for the agency's use. "Exempt surplus land" is land that is declared as such by the governing body of a local agency that meets the criteria for an exemption in GC 54221(f)(1) as supported by written findings.

3. Q: Does a "disposition" of surplus land under the SLA include leasing?
- A: Yes, several sections of the SLA (GC 54220(c), 54222(e), 54223(a), 54226, and 54227(a)) refer to leases in addition to land sales when describing dispositions of surplus land.
4. Q: Is a joint powers authority (JPA) subject to GC 54230 (requirement to report the inventory of surplus land through the Housing Element Annual Progress Report) if a city or county is a member of the JPA?
- A: No - Only individual cities and counties are subject to GC 54230 because only these entities are required to submit a Housing Element Annual Progress Report (APR) to HCD pursuant to GC 65400(a)(2).
5. Q: Is the effective date for AB 1486 January 1, 2020?
- A: Yes – As of January 1, 2020, local agencies must comply with all parts of the SLA including those changes made by AB 1486. However, the changes made to the SLA by AB 1486 do not apply to a local agency which has entered into, as of September 30, 2019, an Exclusive Negotiating Agreement (ENA) or a legally binding agreement to dispose of property and completes the disposition of the property by December 31, 2022.
- HCD will begin implementing its 30-day review of surplus land dispositions per GC 54230.5 beginning January 1, 2021.
6. Q: Can a local agency disposing of property declare the property “surplus land”, then, if the local agency successfully completes negotiations to transfer the property to another local agency or a state or federal agency, declare a property “exempt surplus land” pursuant to GC 54221(f)(1)(D) at the same time the local agency’s governing body authorizes the transfer of that property to the transferee agency?
- A: Yes – the above scenario appears to be consistent with the SLA so long as the transferring local agency complies with the SLA’s provisions regarding declaring real property as either surplus or exempt surplus land (for more detail on surplus vs. exempt surplus land see e.g., GC 54221(b)(1)).
7. Q: Do residential units restricted to moderate income households count toward the 75% of residential units in a housing development that must be restricted to lower-income households, as defined in Health and Safety Code (HSC) section 50079.5, in order for a property to be considered “exempt surplus land” pursuant to GC 54221(f)(1)(F)(i)?

- A. No – At least 75% of the residential units in the housing development must be restricted to "lower-income" households in order for a property to be considered "exempt surplus land" pursuant to GC 54221(f)(1)(F)(i).
8. Q: Under certain circumstances, the SLA (see e.g., GC 54222.5, 54233, 54233.5) requires not less than 15% or 25% of the total number of units developed on surplus land to be affordable to lower-income households, as defined by HSC 50079.5. Can density bonus units affordable to lower-income households count toward these requirements?
- A: Yes, both the 25% and 15% requirements are applied to the total of all units to be developed on the surplus land. The total number of units to be developed on the site includes the density bonus units.
9. Q: If a local agency is looking to dispose of property that is necessary for the agency's use, does this meet the definition of surplus land?
- A: No, this property would not meet the definition of surplus land (see GC 54221(c) for further information on "agency's use").

NEGOTIATIONS

10. Q: If a local agency initiated a Request for Proposal (RFP) process prior to AB 1486 becoming effective but had no ENA or legally binding agreement to dispose of property executed as of September 30, 2019, do the requirements of the SLA in place before the effective date of AB 1486 apply?
- A: No, the current version of the SLA would apply.
11. Q: The SLA appears to rank competing proposals for surplus land based on the amount and level of affordable housing provided. May a local agency consider other criteria in their negotiations?
- A: Yes - The SLA does not appear to prohibit a local agency from considering other factors in negotiating for disposal of surplus land, as long as, the agency complies with the priority provisions in the SLA. (See GC 54227).
12. Q: When does the 90-day good faith negotiation period referenced in GC 54223(a) begin? Does it start after the 60-day notice period referenced in GC 54222(e) has ended?
- A: The negotiation period discussed in GC 54223(a) begins after the local agency has received a notice of interest from an entity desiring to

purchase or lease the surplus land. Negotiations can begin during the 60-day notice period mentioned in GC 54222(e).

For example, if an entity desiring to purchase or lease surplus land responds to a notice of availability on the second day after it is sent, then the 90-day good faith negotiation period begins only after the disposing agency receives the entity's notice of interest (i.e., the entity's response to the notice of availability). (See GC 54223(a).) The 90-day period begins on the first day that the disposing agency and entity actually begin good faith negotiations. The 90-day clock would begin running on that day (which could be a few days or a few weeks after the disposing agency received the entity's notice of interest).

Sample Timeline

- March 1, 2020 - disposing agency sends notice of availability of surplus land (GC 54222);
- March 10, 2020 – entity desiring to purchase or lease the surplus land sends notice of interest to the disposing agency;
- March 12, 2020 – disposing agency receives notice of interest from entity desiring to purchase or lease the surplus land;
- March 13, 2020 – 90-day good faith negotiation period begins (on whatever day the parties begin good faith negotiations) (GC 54223(a));
- April 30, 2020 – LAST DAY for an entity desiring to purchase or lease the surplus land to respond to notice of availability (GC 54222);
- June 10, 2020 – LAST DAY of good faith negotiation period (GC 54223(a));
- June 11, 2020 – FIRST DAY that disposing agency may dispose of the surplus land (without regard to SLA; except for GC 54233) if the agency has not agreed upon price or terms with interested entity.

13. Q: Can a mixed-use, transit-oriented housing development on city-owned land consisting of workforce and affordable multifamily housing be considered “exempt surplus land”?

A: POSSIBLY - in order to qualify as “exempt surplus land” under the SLA, the mixed-use development must comply with GC 54221(f)(1)(F)(ii) which states:

A mixed-use development that is more than one acre in area, that includes not less than 300 housing units, and that restricts at least 25 percent of the residential units to lower-income households, as defined in HSC 50079.5,

with an affordable sales price or an affordable rent, as defined in HSC 50052.5 and 50053, for a minimum of 55 years for rental housing and 45 years for ownership housing.

14. Q: If a local agency packages multiple parcels of surplus land for disposition and receives an offer from a developer on only one of the parcels, does the local agency have to engage in good faith negotiations under GC 54223 with that developer, or would the developer automatically be “disqualified” because it didn’t make an offer on the entire package?

A: The SLA does not specifically address this situation. However, it does require the following regarding negotiations:

“After the disposing agency has received a notice of interest from the entity desiring to purchase or lease the land on terms that comply with this article, the disposing agency and the entity shall enter into good faith negotiations to determine a mutually satisfactory sales price and terms or lease terms. If the price or terms cannot be agreed upon after a good faith negotiation period of not less than 90 days, the land may be disposed of without further regard to this article, except that Section 54233 shall apply.” (GC 54223(a)).

15. Q: Are local agencies that are disposing of surplus land required to negotiate with “housing sponsors” certified by the California Housing Finance Agency (CalHFA) that have notified HCD of their interest in surplus land if the “housing sponsors” plans for the property are outside of the local agencies’ vision for the property?

A: Yes, so long as the “housing sponsor” notifies the local agency in writing of its interest in purchasing or leasing the surplus land within 60 days of when the notice of availability is sent, then the local agency must engage in “good faith negotiations” with the “housing sponsor.” “If the price or terms cannot be agreed upon after a good faith negotiation period of not less than 90 days, the land may be disposed of without further regard to this article, except that Section 54233 shall apply.” (GC 54223(a)).

16. Q: How do I learn more information about getting certified by CalHFA as a Housing Sponsor?

A: For more information about getting certified by CalHFA as a Housing Sponsor, please see CalHFA’s “Housing Sponsor Certification” page at the following link:

<https://www.calhfa.ca.gov/multifamily/sponsor/index.htm>

EXEMPTIONS

17. Q: If land, either for sale or future development, which is held in the Community Redevelopment Property Trust Fund or designated in a long-range property management plan (LRP), is the subject of an ENA or a legally binding agreement to dispose of the property entered into by December 31, 2020, and completes the disposition by December 31, 2022 subject to the prior version of the SLA (i.e., before AB 1486, Ting 2019 went into effect)?

A: Yes, this is required pursuant to GC 54234(b)(1)(A).

18. Q: Do complicated land negotiations involving Private Public Partnerships receive special consideration under the SLA?

A: No. The SLA is silent on this issue.

19. Q: If a local agency (Local Agency #1) would like to buy land from another local agency (Local Agency #2) for the use of Local Agency #1, does Local Agency #2 have to declare the property "surplus land", and send notices to multiple local public entities and housing sponsors, and consider multiple offers; or can Local Agency #2 transfer the property directly to Local Agency #1?

A: As long as the land qualifies as "exempt surplus land" then the SLA would not apply to the local agency's disposal of it. The various meanings of "exempt surplus land" are described in GC section 54221(f)(1).

20. Q: Will the December 31, 2022 deadline to dispose of former redevelopment agency properties under GC 54234(b)(1) be extended as a result of delays caused by Covid-19?

A: No - Unless the law is subsequently amended to provide for such an extension or other legal action extends the deadline.

TIMING

21. Q: Will local agencies be required to report SLA compliance activities to HCD prior to January 1, 2021 when HCD makes reporting forms available?

A: Until HCD is required to implement GC 54230.5 beginning on January 1, 2021, HCD will review:

- Notices of availability, complaints and other information received or requested.

- All notices of availability of surplus land (as HCD qualifies as a “local public entity” (per GC 54222(a)(1)), notices must be sent to HCD by email or U.S. postal mail).
- Jurisdiction-owned sites identified in the housing element sites inventory which are subsequently disposed of and reported on Table G of the APR.

Beginning January 1, 2020, GC 65585.1 requires HCD to notify a city, county, or city and county that the city, county, or city and county is in violation of the SLA and allows HCD to notify the office of the Attorney General of SLA violations.

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22. Q: Can local agency-owned land that was subject to a Disposition and Development Agreement (DDA) as of September 30, 2019 but was not disposed of by December 31, 2022 be re-designated as "surplus land" or "exempt surplus land" in a new public hearing?

A: Yes - Under the SLA, the fact that a local agency does not dispose of surplus land (subject to an ENA or legally binding agreement to dispose of property entered into by September 30, 2019) prior to December 31, 2022 merely means that the local agency must comply with the current version of the SLA. Presumably, the local agency may hold a new public hearing to consider changing a prior declaration of "surplus land" or "exempt surplus land."

Pursuant to GC 54221(b)(1), the action by the local agency’s governing body must be supported by written findings before the local agency may take any action to dispose of the subject property consistent with the agency’s policies or procedures.

23. Q: Is the SLA sensitive to the length of a lease of surplus land?

A: No - Under the SLA, leases of varying terms should be treated the same (as long as the lease otherwise complies with California law in all other respects).

24. Q: Is a local agency permitted under the SLA to enter into a below market rate, long term lease?

A: The SLA is silent on this issue. However, it does not appear to prohibit a local agency from entering into a low-cost, long term ground lease of surplus land with a “housing sponsor” as defined by HSC 50074.

25. Q: When do the affordability restrictions required by GC 54233 apply to surplus land?

A: Assuming that a local agency is unable to sell surplus land to an entity to which notice of availability of land was given after fully complying with the SLA or if no entity to which a notice of availability was given responds to that notice, GC 54233 requires the local agency to record affordable housing covenants or restrictions on the surplus land when the purchaser/lessee develops 10 or more residential units.

NOTICING

26. Q: When does the 60-day response period in GC 54222(e) begin?

A: The 60-day response period begins to run “after the [local] agency's notice of availability . . . is sent via certified mail or . . . electronic mail” to all of the mandatory recipients listed in GC 54222.

For reference, GC 54222 reads as follows:

“The entity or association desiring to purchase or lease the surplus land for any of the purposes authorized by this section shall notify in writing the disposing agency of its interest in purchasing or leasing the land within 60 days after the agency's notice of availability of the land is sent via certified mail or provided via electronic mail.”

27. Q: Do local agencies send notices of availability only as to surplus land?

A: Yes - Any local agency disposing of surplus land shall send, prior to disposing of that property or participating in negotiations to dispose of that property, a written notice of availability for the development of low and moderate income housing to any local public entity, as defined in HSC 50079, within whose jurisdiction the surplus land is located. Housing Sponsors, as defined by HSC 50074, that have notified HCD of their interest in surplus land shall also be sent notice of availability of surplus land for the purpose of developing low- and moderate-L/M income housing. All notices shall be sent by electronic mail, or certified mail, and shall include the location and a description of the property. AB 1255 (R. Rivas, 2019) also requires that cities and counties report an inventory of surplus and excess land to HCD beginning in 2020 (see also question 20 above).

LAND USE

28. Q: Does the SLA allow a local agency to require that surplus land be developed for a purpose other than low- and moderate-income housing,

open-space purposes, school facilities construction, developing property located within an infill opportunity zone designated pursuant to GC 65088.4 or within an area covered by a transit village plan adopted pursuant to the Transit Village Development Planning Act of 1994 (Commencing with GC 65460).

A: No – Such a requirement would be inconsistent with the SLA.

29. Q: Who receives notice of availability if the surplus land is zoned for open-space?

A: A written notice of availability for open-space purposes shall be sent: (1) to any park or recreation department of any city within which the land may be situated; (2) to any park or recreation department of the county within which the land is situated; (3) to any regional park authority having jurisdiction within the area in which the land is situated; and (4) to the State Resources Agency or any agency that may succeed to its powers. (GC 54222(b); see also GC 54221(d) and GC 54221(f)(2)).

30. Q: Does the local agency make the determination of residential vs. open space uses?

A: The SLA is silent on who makes the “open space” determination. However, GC 54221(f)(2) lists certain lands that automatically trigger a mandatory written notice of availability for open-space purposes.

31. Q: Are local agencies currently (as of July 2020) required to provide a copy of any restrictions recorded against surplus land to HCD on a form prescribed by HCD?

A: No - However, as of January 1, 2020, local agencies are required to deed restrict properties subject to GC 54233 or 54233.5 and HCD may send a notice of violation if a local agency fails to comply with this requirement. The deed restriction form is not required from HCD until January 1, 2021 and will be adopted in HCD’s Guidelines. Local agencies may provide HCD a copy of the deed restriction until such time as a form for that purpose has been adopted.