Surplus Land Act Guidelines

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November 2020

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OVERVIEW

Article I summarizes the purpose and scope of the Surplus Land Act (SLA) by identifying the objectives of the Guidelines and defining key terms within the law. This section also defines lands exempt from the provisions of the SLA.

Article II describes the mechanisms for identifying and disposing of surplus lands. This Article also describes requirements for developments built upon disposed surplus land.

Article III identifies the affordable housing requirements for developments built upon disposed surplus land. Described within are requirements for affordable housing on surplus land sold under the auspices of the SLA, requirements for affordable housing on surplus land where there is no sale under SLA, and requirements for affordable housing on surplus land that is developed at a later date. Article III also identifies surplus land exempt from the SLA.

Article IV summarizes the notification, recording, and reporting requirements to the California Department of Housing and Community Development (HCD) under the SLA.

Article V explains HCD's obligations to monitor local agency compliance with the SLA and identifies the escalating penalties associated with noncompliance.

The following table summarizes the anticipated timeline for the Surplus Land Act Guidelines.

Table 1: Anticipated timeline for Surplus Land Act Guidelines

Draft Guidelines	November 13, 2020
Webinar	November 19, 2020
Public Comment Period	November 13, 2020 – December 7, 2020
Incorporate/Respond to Public Comments	December 7, 2020 – December 31, 2020
Final Guidelines Released	January 1, 2021

HCD may make adjustments to the projected timeline as needed.

ARTICLE I. PROGRAM OVERVIEW

AB 1486 (Statutes of 2019, Chapter 664) and AB 1255 (Statutes of 2019, Chapter 661) made changes to the Surplus Land Act (SLA) found in **Government Code Title 5, Division 2, Part 1, Chapter 5, Article 8. Surplus Land.** Generally, the purpose of the amendments is to promote affordable housing development on unused or underutilized public land throughout the state to respond to the existing affordable housing crisis. The amendments to the SLA adopted with AB 1486 and AB 1255 clarify and strengthen reporting and enforcement provisions of the SLA to promote increased compliance with the Act.

AB 1486 took effect January 1, 2020.

As of that date, HCD began reviewing notices that local agencies are required to send by email or U.S. postal mail pursuant to Government Code Section 54222(a)(1) and examining complaints and other information received or requested to confirm compliance with the SLA pursuant to Government Code Section 65585.1. As of that date, HCD also began collecting (in Table G of the Housing Element Annual Progress Report (APR)) information on jurisdiction-owned sites identified in the housing element sites inventory, and subsequently disposed of by the jurisdiction.

Beginning January 1, 2021, HCD is required to begin implementing Government Code Section 54230.5, including, but not limited to, adopting these Guidelines; reviewing each local agency's description of the notices of availability sent, negotiations conducted with any responding entities, and copies of any restrictions to be recorded against the property pursuant to Government Code Sections 54233 or 54233.5; submitting written findings to local agencies; and, if necessary, assessing penalties to local agencies that dispose of surplus property in violation of the SLA in conjunction with the Attorney General.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54222, Section 54230, Section 54230.5(b)(2)(A), Section 54233, Section 54233, Section 54233.5, Section 65585.1.

Section 101. Guidelines

(a) These SLA Guidelines (hereinafter "Guidelines") implement, interpret, and make specific the SLA. The forms that appear in the Appendices of these Guidelines may be updated from time to time upon approval by the Director of HCD or the Director's designee.

(b) These Guidelines establish and revise terms, conditions, forms, and procedures for the proper identification and disposition of various types of surplus land as well as provide detail on expectations and sanctions related to SLA compliance. Major actors and their responsibilities include:

(1) Local agencies:

A) Provide notices of availability of surplus land for lease or purchase to local public entities and housing sponsors as required by Government Code Section 54222 on the form provided in Appendix A;

B) Where applicable, receive notices of interest from entities desiring to purchase or lease surplus land and negotiate with entities in good faith;

C) Provide HCD with descriptions of the notices of availability sent, and negotiations conducted with any responding entities, regarding the disposal of the parcel of surplus land on the form provided in Appendix B;

D) Forward to HCD a copy of any restrictions to be recorded against the surplus land pursuant to Government Code Section 54233 or 54233.5, whichever is applicable, in the form prescribed by HCD in Appendix B.; And

E) If the local agency is a city, county, or city and county, beginning April 1, 2021, the local agency must report annually information about all locally owned surplus land sites pursuant to Government Code Section 54230. Reporting shall be in table H of the APR in accordance with APR instructions.

(2) Housing sponsors, as defined by Section 50074 of the Health and Safety Code, may notify HCD of their interest in surplus land pursuant to Government Code Section 54222(a)(1) using the survey in Appendix D.

(3) HCD will maintain updates of interested housing sponsors and inventories of publicly owned surplus land and a list of notices of availability.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221, Section 54222, Section 54230, Section 54230.5, subdivision (b)(2)(A), Section 54230.5, subdivision (b)(2)(D), Section 54233, Section 54233.5; Health and Safety Code Section 50074.

Section 102. Definitions

All terms not defined below shall, unless their context suggests otherwise, be interpreted in accordance with the meanings of terms provided in the SLA and Article 10.6 of Government Code Sections 65580 – 65589.11 (housing elements).

(a) **"Affordable housing"** means housing available at affordable housing cost, as defined in Section 50052.5 of the Health and Safety Code, to lower-income households, or affordable rent, as defined in Section 50053 of the Health and Safety Code, to lower-income households as defined in Section 50079.5 of the Health and Safety Code.

(b) **"Affordable housing cost"** means that for owner-occupied housing, the sales price at which the monthly ownership cost including principal, interest, taxes, insurance, and utilities equals:

(1) For extremely low-income households the product of 30 percent times 30 percent of the area median income adjusted for family size appropriate for the unit.

(2) For very low-income households the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit.

(3) For lower-income households whose gross incomes exceed the maximum income for very low-income households and does not exceed 70 percent of the area median income adjusted for family size, the product of 30 percent times 70 percent of the area median income adjusted for family size appropriate for the unit. In addition, for any lower-income household that has a gross income that equals or exceeds 70 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable housing cost not exceed 30 percent of the gross income of the household.

(4) For moderate-income households, affordable housing cost shall not be less than 28 percent of the gross income of the household, nor exceed the product of 35 percent times 110 percent of area median income adjusted for family size appropriate for the unit. In addition, for any moderate-income household that has a gross income that exceeds 110 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable housing cost not exceed 35 percent of the gross income of the household.

(c) "**Affordable rent"** means that, including a reasonable utility allowance, rent shall not exceed:

(1) For extremely low-income households, the product of 30 percent times 30 percent of the area median income adjusted for family size appropriate for the unit.

(2) For very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit.

(3) For lower-income households whose gross incomes exceed the maximum income for very low-income households, the product of 30 percent times 60 percent of the area median income adjusted for family size appropriate for the unit. In addition, for those lower-income households with gross incomes that exceed 60 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of the gross income of the household.

(4) For moderate-income households, the product of 30 percent times 110 percent of the area median income adjusted for family size appropriate for the unit. In addition, for those moderate-income households whose gross incomes exceed 110 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of the gross income of the household.

(d) **"Agency's use".** Except as provided below, "agency's use" shall include, but not be limited to, land that is being used, is planned to be used pursuant to a written plan adopted by the local agency's governing board for agency work or operations, including, but not limited to, utility sites, watershed property, land being used for conservation purposes, land for demonstration, exhibition, or educational purposes related to greenhouse gas emissions, and buffer sites near sensitive governmental uses, including, but not limited to, waste water treatment plants as described in Government Code Section 54221(c)(1).

(1) Agency's use shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. Property disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency's use.

(2) In the case of a local agency that is a district, excepting those whose primary mission or purpose is to supply the public with a transportation system, "agency's use" may include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development, or be for the sole purpose of investment or generation of revenue if the agency's governing body takes action in a public meeting declaring that the use of the site will do one of the following:

(A) Directly further the express purpose of agency work or operations.

(B) Be expressly authorized by a statute governing the local agency, provided the district complies with Government Code Section 54233.5 where applicable

(e) **"APR"** means the Annual Progress Report from each city, county and city and county detailing the agency's implementation of the housing element of its general plan submitted to and using forms and definitions adopted by HCD.

(f) **"Assisted unit"** means a unit that is subject to rent and/or occupancy restrictions, as a result of financial assistance, as specified in a regulatory agreement.

(g) **"CalHFA"** means the California Housing Finance Agency.

(h) "**Disposition of surplus land"** means the sale or lease of local agency-owned land formally declared surplus.

(i) **"District"** includes all districts within the state, including, but not limited to, all special districts, sewer, water, utility, and local and regional park districts, and any other political subdivision of the state that is a district.

(j) "**Exclusive Negotiation Agreement (ENA)"** means a legally binding agreement used to dispose of "surplus land" that binds a prospective buyer and seller under which neither can make any similar deals with the other's competitors for a specified period. See Appendix C for an example of an ENA.

(k) "**Fair market value**" is the price a particular parcel would sell for on the open market when certain conditions are met. Those conditions are: (1) the parties involved are aware of all the facts, (2) are acting in their own interest, (3) are free of any pressure to buy or sell, and (4) have ample time to make the decision. In cases where fair market value has not been established an appraisal may be conducted. If, following a single appraisal, consensus on fair market value remains absent, a second appraisal is frequently obtained.

(l) **"Good faith negotiation"** means to deal honestly and fairly with the other so that each party receives the benefits of the negotiated contract while achieving the deepest level of affordability and the greatest number of units at the completion of the negotiation.

(m) **"HCD"** means the California Department of Housing and Community Development.

(n) **"Housing sponsor"** means any individual, joint venture, partnership, limited partnership, trust, corporation, limited equity housing cooperative, cooperative, local public entity, duly constituted governing body of an Indian reservation or rancheria, tribally designated housing entity, or other legal entity, or any combination thereof, certified by CalHFA pursuant to rules and regulations of CalHFA as qualified to either own, construct, acquire, or rehabilitate a housing development, whether for profit, nonprofit, or organized for limited profit, and subject to the regulatory powers of CalHFA pursuant to rules and regulations of CalHFA and other specified terms and conditions. "Housing sponsor" includes persons and families of low or moderate income who are approved by CalHFA as eligible to own and occupy a housing development and individuals and legal entities receiving property improvement loans through CalHFA.

(o) "**Local agency"** means 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.

(p) **"Lower-income households**" means persons and families whose income does not exceed the qualifying limits for lower-income families as established and amended from

time to time pursuant to Section 8 of the United States Housing Act of 1937. Lower-income households includes very low-income households, as defined in Section 50105, and extremely low-income households, as defined in Section 50106 of the Health and Safety Code. As used here, area median income means the median family income of a a surrounding and comparable area to where the surplus land is located.

(q) **"Open-space purposes**" means the use of land for public recreation, enjoyment of scenic beauty, or conservation or use of natural resources.

(r) **"Persons and families of low or moderate income**" means persons and families whose income does not exceed 120 percent of area median income adjusted for family size by HCD in accordance with adjustment factors adopted and amended from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the United States Housing Act of 1937.

(s) "**Planning period"** means the time period between the due date for an agency's preparation or update of its housing element and the due date for the next housing element according to the applicable schedule described in paragraphs (2) and (3) of subdivision (e) of Government Code Section 65588. Generally, the "Planning period" is eight years.

(t) **"RHNA"** means Regional Housing Needs Allocation to be developed by HCD in consultation with each council of governments, where appropriate, which shall determine the existing and projected need for housing for each region.

(u) **"Surplus land"** means land owed in fee for which a local agency's governing body takes formal action at a regular public hearing declaring land to be surplus and not necessary for a local agency's use. "Surplus land" may be declared either "surplus" or "exempt surplus" as supported by written findings consistent with the local agency's policies & procedures and section 103 of these guidelines. A local agency, on an annual basis, may declare multiple parcels as "surplus" or "exempt surplus."

(v) **"Transitional housing"** means a rental housing development operating under programmatic constraints that require the termination of assistance after a specified time or event, in no case less than six months after initial occupancy, and the re-renting of the assisted unit to another eligible participant.

(w) **"Unit"** for the purposes of these Guidelines, means a residential unit that is used as a primary residence by its occupants, consistent with the definition of a unit as utilized by the US Census Bureau and the California Department of Finance, including efficiency units, residential hotel units, and units used as transitional housing.

(x) **"Use by right"** refers to a property owner's use of property and structures in a manner consistent with that which is listed as permissible in the zoning district in which the property is located. Such a use is permitted in a zoning district and is therefore not subject to discretionary review and approval by a local government. As used herein, it shall mean that the local government's review of the owner-occupied or multifamily

residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a "project" for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code. Any subdivision of the sites shall be subject to all laws, including, but not limited to, the local government ordinance implementing the Subdivision Map Act. A local ordinance may provide that "use by right" does not exempt the use from design review. However, that design review shall not constitute a "project" for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code. "Use by right" for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5 of the Government Code.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221, Section 54222, Section 54222.5, Section 54223, Section 54226, Section 54230, Section 54230.5, Section 54233, Section 54233.5, Section 54234, Section 65400, Sections 65580 – 65589.11; Health and Safety Code Section 50052.5, Section 50053, Section 50074, Section 50079.5, 50093; Public Resources Code, Division 13 (Section 21000 et seq.).

Section 103. Exemptions

(a) These Guidelines apply to the disposal of all surplus lands.

(b) Surplus land that meets one or more of the following conditions is exempt from Articles II and III of these Guidelines:

(1) An ENA or legally binding agreement to dispose of property is not subject to the requirements of AB 1486 and must comply with the SLA as it existed on December 31, 2019.

(A) Surplus land subject to an ENA to dispose of property is not subject to the requirements of these Guidelines so long as the local agency entered into the ENA on or before September 30, 2019, and the disposition of the property is completed by December 31, 2022. An example of an ENA is contained in Appendix C.

(B) The disposal of any surplus land pursuant to a qualifying ENA must still comply with the SLA as it existed on December 31, 2019.

(C) The deadline for disposal of property set out in Paragraph (A) above may be extended if the disposition of property, the local agency's right or ability to dispose of the property, or a development project for which such property is proposed to be transferred, is the subject of judicial challenge, by petition for writ of mandate, complaint for declaratory relief or otherwise, to the date that is six months following the final conclusion of such litigation.

(2) Land held in a community redevelopment property trust fund or Designated in a long-range property management plan is not subject to the requirements of these Guidelines if both of the following apply:

(A) An ENA or legally binding agreement for disposition of the property is entered into not later than December 31, 2020.

(B) The disposition is completed by December 31, 2022.

(C) The deadline for disposal of the property set out in Paragraph (B) above may be extended if the land subject to the trust fund or management plan is the subject of litigation, including, but not limited to, litigation challenging the disposition of such property, the right or ability to dispose of the property, or a development project for which such property is proposed to be transferred, the dates specified in Paragraph (B) shall be extended to the date that is six months following the final conclusion of such litigation.

(3) Surplus lands declared to be exempt by the local agency. Other surplus land may be exempt from these Guidelines provided that the governing board of a local agency declares the property to be “exempt surplus land” at a regular public meeting and the declaration is supported by written findings demonstrating that the land is of one or more of the following types:

(A) County Surplus Land Transferred for the Development of Affordable Housing with restrictions as described in Government Code Section 25539.4.

(B) Small Surplus Land Parcels sold to an owner of contiguous land that is:

(i) less than 5,000 square feet in area;

(ii) less than the minimum legal residential building lot size for the jurisdiction in which the parcel is located, or 5,000 square feet in area, whichever is less; or

(iii) has no record access, is less than 10,000 square feet in area, and is not contiguous to land owned by a state or local agency that is used for open-space or low- and moderate-income housing purposes.

(C) Exchange of Surplus Land. Surplus land that a local agency is exchanging for another property necessary for the local agency’s use.

(D) Local Agency to Agency Surplus Land Transfer. Local agency surplus land is transferred to another local, state, or federal agency for the transferor agency’s use.

(E) Surplus Street Land. Surplus land that is a former street, right of way, or easement, and is conveyed to an owner of an adjacent property.

(F) Exempt Surplus Land for Affordable Housing. Land declared “Exempt Surplus Land” that is advertised to all entities identified in subdivision (a) of Section 54222 of the Government Code and who are then invited to participate in the competitive bid process for either of the purposes identified below:

(i) A housing development (including mixed-use developments with ancillary commercial ground floor uses), that restricts 100 percent of the residential units to persons and families of low or moderate-income, with at least 75 percent of the residential units restricted to lower-income households as affordable housing pursuant to Section 102(a) of these Guidelines. In no event shall the maximum affordable sales price or rent level be higher than 20 percent below the median market rents or sales prices for the neighborhood in which the site is located.

(ii) 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 Health and Safety Code Section 50079.5 as affordable housing pursuant to Section 102(a) of these Guidelines.

(G) Validly Restricted Surplus Land. Surplus land that is subject to valid legal restrictions not imposed by the local agency such as zoning, covenants, or other restrictions that are and that would make housing prohibited, unless there is a feasible method to satisfactorily mitigate or avoid the prohibition on the site.

(H) Surplus Trust Lands. Surplus land that was granted by the state in trust to a local agency or that was acquired by the local agency for trust purposes by purchase or exchange, and for which disposal of the land is authorized or required subject to conditions established by statute.

(I) School District Surplus Land. Land that is subject to Education Code Sections 17388, 17515, 17536, 81192, 81397, 81399, 81420, and 81422 and Part 14 of Division 31 of the Health and Safety Code commencing with Health and Safety Code Section 53570, unless compliance with the SLA is expressly required.

(J) Transfers of Surplus Parking Lot Land. Surplus parking lot land that has been transferred before June 30, 2019, by the state to a local agency pursuant to Streets and Highways Code Section 32667, and has a minimum planned residential density of at least 100 dwelling units per acre,

and includes 100 or more residential units that are restricted to persons and families of low or moderate-income pursuant to Government Code Section 54221(f)(1)(K).

(c) No Exemption Determination: Any determination by a local agency that its surplus lands are exempt from the SLA must be supported by written findings and shall be provided to HCD pursuant to Section 400(e) of these Guidelines.

Note: Authority cited: Government Code Section 54230, subdivision (c)(2), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221, Section 54222, Section 54222.3, Section 54223, Section 54226, Section 54227, Section 54230, Section 54230.5, Section 54233, Section 54234, subdivisions (a)(2), (b)(1), (b)(2), Section 25539, Section 25539.4, Section 37364; Education Code Section 17388, Section 17515, Section 17536, Section 81192, Section 81397, Section 81399, Section 81420, and Section 81422; Health and Safety Code Sections 53570 et seq.; Streets and Highways Code Section 32667.

ARTICLE II. SURPLUS LAND

Section 200. Surplus Land Determination Process

(a) Land must be declared either “surplus land” or “exempt surplus land” before a local agency may take any action to dispose of it.

(b) Surplus land shall have the definition set forth in Section 102(v) of these Guidelines and Exempt surplus land shall have the definition and meet the requirements set forth in Section 103(b)(3) of these Guidelines.

(c) Beginning April 1, 2021, “a central inventory of all surplus land” shall be reported to HCD no later than April 1 of each year on Table H of the city or county’s APR submitted pursuant to Government Code 65400(a)(2).

Note: Authority cited: Government Code Section 54230, subdivision (c)(2), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54230, Section 65400.

Section 201. Notice of Availability

Any local agency disposing of surplus land, prior to disposing of that property or participating in negotiations to dispose of that property with a prospective transferee, shall send a written notice of availability (NOA) to certain parties designated in the SLA. The notice shall be in a form prescribed by HCD in Appendix A of these Guidelines and shall comply with the following.

(a) Low- and Moderate-Income Housing Availability Notice

(1) A written notice of the availability of surplus land provided on the form contained in Appendix A of these Guidelines for the purpose of developing low- and moderate-income housing shall be sent to the following:

(A) HCD and any local public entity as defined in Health and Safety Code Section 50079 within whose jurisdiction the surplus land is located. HCD will maintain on its website an up-to-date listing of all notices of availability throughout the state.

(B) Housing sponsors that have notified HCD of their interest in surplus land that is in the county in which the surplus land is located or in all California counties. Housing sponsors must notify HCD of their interest in surplus land by completing a survey provided by HCD. Those interested in receiving notices from local agencies based on HCD's expressions-of-interest list are responsible for keeping their addresses and contacts current.

(2) An entity not on HCD's list may also respond to a NOA.

(3) All responses shall be time stamped by the local agency as they are received.

(4) All NOAs shall be sent by certified mail or email and shall include the location and a description of the surplus land.

(5) A NOA cannot be sent before the governing body for the local agency has declared the land for which the notice is being issued to be "surplus land", and any such notice sent prematurely will not be deemed valid.

(b) Park, Recreation and Open Space availability notices shall comply with the conditions and follow the requirements as described in Government Code Sections 54221(f)(2), 54222, and 54227(b).

(c) School facilities surplus land availability notices shall comply with the conditions and follow the requirements as described in Government Code Section 54222(c).

(d) Infill Opportunity Zone or Transit Village Plan surplus land availability notices shall comply with the conditions and follow the requirements as described in Government Code Section 54222(d).

Note: Authority cited: Government Code Section 54230, subdivision (c)(2), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221(f)(2), Section 54222, and Section 54227(b); Health and Safety Code Section 50079.

Section 202. Disposal of Surplus Land for Affordable Housing

After the governing board of a local agency has held the required public meeting for the disposition of surplus land, as described in Section 102(h) of these Guidelines, a Low- and Moderate-Income Housing Availability Notice described in Section 201(a) must be sent to local public entities and interested housing sponsors identified by the expressions-of-interest list maintained by HCD and invite those interested to respond to the local agency with a notice of interest.

(a) Negotiating Disposition of Surplus Land for Affordable Housing

(1) Response to a NOA of surplus land for the development of affordable housing

(A) 60 Days to Respond.

An entity or association interested in developing Surplus Land for affordable housing must 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.

(i) A local agency may not issue a request for proposals on surplus land less than 60 days from the date that the local agency issues the NOA of surplus land.

(ii) If a notice of interest is received in response to a NOA a request for proposals may not be issued until after the conclusion of the 90-day negotiation period.

(B) Upon Receipt of Notice of Interest.

If a local agency disposing of surplus land receives a timely notice of interest from a proper entity, then a 90-day good faith negotiation period begins on the first day that the local agency and the prospective transferee actually begin negotiations. If the price or terms cannot be agreed upon after the full good faith negotiation period, then the local agency may dispose of the surplus land as provided by Government Code Section 54233.

(C) 90-Day, Good faith negotiation period. For purposes of the 90-day, good-faith negotiation period, residential use of the surplus land by the prospective transferee shall be deemed an acceptable use. Terms agreed to as part of the 90-day, good-faith negotiation period must comply with the following:

(i) A local agency cannot prohibit residential use of the surplus land as a condition of a sale or lease.

(ii) A local agency cannot reduce the authorized number of residential units or the maximum lot coverage of the surplus land below what is allowed by zoning or general plan requirements.

(iii) A local agency may not require, as a condition of sale or lease, any design standards or architectural requirements that would have a substantial negative effect on the viability or affordability of a housing development for very low, low-or moderate-income

households, other than the minimum standards required by general plan, zoning, and subdivision standards and criteria.

(D) For the purposes of complying with the SLA's requirements regarding NOAs, "participating in negotiations" does not include the commissioning of appraisals, due diligence prior to the sale or lease of the surplus land, discussions with brokers or real estate agents not representing a potential buyer, or other studies to determine value or best use of the surplus land, issuance of a request for qualifications, development of marketing materials, or discussions conducted exclusively among local agency employees and elected officials. (Gov. Code Section 54222(f))

(E) If an entity believes a local agency has not negotiated with it in good faith pursuant to this section, the entity may notify HCD by emailing publiclands@hcd.ca.gov.

(F) Sample negotiation process timeline. The following represents a sample timeline for a good faith negotiation per the definition in Section 102(m) of these Guidelines. Minor departures from this sample do not constitute per se bad faith, and differences in the timeline may be justified in extraordinary circumstances.

- March 1, 2020 – disposing agency sends a NOA of surplus land as described in Section 201;
- March 10, 2020 – entity desiring to purchase or lease the surplus land sends notice of interest to 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 commences, as described in Section 202(a)(1)(C);
- April 30, 2020 – last day for an entity desiring to purchase or lease the surplus land to respond to the NOA;
- June 10, 2020 – last day of 90-day, good faith negotiation period;
- June 11, 2020 –first day that disposing agency may dispose of the surplus land without regard to the amendments to the SLA enacted by AB 1486. Disposing agency must still follow the original provisions of the SLA found in Government Code 54233.

(2) Terms

(A) As part of the 90-day, good faith negotiation period, a local agency and a prospective transferee may agree to limitations on residential use or density if, without such limitations, the residential use or density would have a specific, adverse impact, supported by written findings, upon the public health or safety or upon the local agency's operation or facilities, and there is no feasible method to satisfactorily mitigate the impact.

(B) For low and moderate-income housing purposes, a local agency may agree to a payment period for a sale of surplus land of up to 20 years in any contract of sale or sale by trust deed for the land. Such payment period may exceed 20 years but shall not exceed the term that the surplus land is required to be used for low- or moderate-income housing.

(C) A local agency may sell surplus land at fair market value or less than fair market value.

(D) Agreement between the local agency and buyer.

(i) Failure to agree on sale/purchase price of land: If “fair market value” was determined by a single appraisal, a second appraisal value commissioned from a mutually acceptable firm may be averaged with the initial value to determine a sales price.

(ii) Partial lease/acquisition: Agency may accept a partial lease or sale of originally advertised land as long as remnant parcel is sufficiently large enough to attract bidders upon re-advertisement, written justification for the action is to accompany Appendix B report to HCD, and HCD approves the action.

(iii) Agency change of mind: With prior approval by HCD, and initiated by submission of a written “notice of withdrawal” sent to all housing sponsors, local public entities, and HCD, a local agency may withdraw its NOA. Proposed withdrawal shall be supported by a written explanation submitted to HCD explaining need for a withdrawal.

(iv) Conditions and restrictions required by the local agency as seller: The local agency may provide potential “qualified sponsors” with the city’s vision for the land in question which must be included in the NOA and approved by HCD pursuant to Section 400. The parties are required by the SLA to then negotiate in good faith. If it appears that the parties cannot resolve issues that would preclude a disposition within the 90-day negotiation period, the parties may discuss the issue(s) with HCD.

(b) Payment Period for Surplus Land Disposed of in Contract of Sale or Sale by Trust Deed

(1) If surplus land is disposed of for housing for persons and families of low and moderate income, the payment period shall not exceed the term that the land is required to be used for low- or moderate-income housing.

(2) If surplus land is disposed of for park or recreation purposes, for open-space purposes, or for school purposes, the local agency may provide for a payment period of up to 20 years.

(3) Competing Bids

(A) A local agency may negotiate concurrently with all entities that provide notice of interest for the purpose of developing affordable housing that meets the requirements of Government Code Section 54222.5.

(B) In the event that any local agency disposing of surplus land receives a notice of interest to purchase or lease that land from more than one of the entities to which a NOA was given, or from one entity to which a NOA was given, and one or more entities to which a NOA was not given, the local agency shall give first priority to the entity or entities that agree to use the site for affordable housing that meets the requirements of Government Code Section 54222.5 described as follows:

(i) Not less than 25 percent of the total number of units developed (which number includes density bonus units) shall be affordable housing as defined by Section 102(a) of these Guidelines.

(ii) If more than one entity proposes the same number of units that meet the requirements of Government Code Section 54222.5, priority shall be given to the entity that proposes the deepest average level of affordability for the affordable units.

(C) If the local agency receives notices of interest from more than one entity that agrees to meet the requirements of Government Code Section 54222.5, then the local agency shall give priority to the entity that proposes to provide the greatest number of units that meet the requirements of Government Code Section 54222.5.

(4) Grounds for local agency to reject offer:

(A) A local agency may reject an offer when the local agency and buyer cannot agree on sales price.

(B) A local agency may reject an offer when priority is given to a competing application that includes a greater number of affordable units or, in case of a tie in the number, the lowest average level of affordability consistent with Government Code Section 54222.5.

(C) A local agency may reject an offer when the bidder is not responsive to a local agency's reasonable goals/preferences as described in the NOA, where consistent with these Guidelines and SLA, and such goals and preferences are approved by HCD.

(c) Requirements If Negotiations End with No Sale or Lease of Surplus Land

(1) Local Agencies That Are Not Districts.

(A) If the local agency does not agree to price and terms with an entity to which NOA of land was given pursuant to this article, or if no entity to which a NOA was given pursuant to these Guidelines responds to that notice, then the land in question may be sold to any buyer for any purpose.

In such a case, if 10 or more residential units are developed on the property, not less than 15 percent of the total number of residential units developed on the parcels shall be sold or rented as affordable housing as defined by Section 102(a) of these Guidelines.

(B) The entity shall agree to the following additional requirements:

(i) Rental units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 55 years. Ownership units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 45 years. The initial occupants of all ownership units on the property shall be lower-income households and the unit shall be subject to an equity sharing agreement consistent with Health and Safety Code Section 65915(c)(2). Any subsequent occupants shall also be lower income households, if necessary, for the unit to remain occupied by lower income households, for at least 45 years.

(ii) The requirements set out in subdivision (a) above shall be contained in a covenant or restriction recorded against the surplus land at the time of sale, which by its express terms shall run with the land and shall be enforceable by any of the following parties, against any owner who violates the covenant or restriction and each successor in interest who continues the violation:

I. The local agency that disposed of the property.

I. Any resident of an affordable ownership or rental unit described in subdivision (a).

II. A resident's association with members who reside in units described in subdivision (a).

III. A former resident of a unit described in subdivision (a) who last resided in that unit.

IV. An applicant seeking to enforce the covenants or restrictions for a particular unit, ownership or rental as described in

subdivision (a), if the applicant conforms to all of the following:

a. Is of low- or moderate-income, as defined in Section 50093 of the Health and Safety Code;

b. Is able and willing to occupy that particular unit; and

c. Was denied occupancy of that particular unit due to an alleged breach of a covenant or restriction implementing Government Code Section 54222.5.

d. A person on an affordable housing waiting list who is of low or moderate income, as defined in Section 50093 of the Health and Safety Code, and who is able and willing to occupy a unit subject to this provision of the Guidelines.

(C) A local agency shall provide a copy of any restrictions recorded against the property to HCD as an attachment to the form prescribed by HCD in Appendix B.

(2) Districts.

(A) If a local agency that is a district, excepting those whose primary mission or purpose is to supply the public with a transportation system, disposes of surplus land where local zoning permits development of 10 or more residential units or is rezoned within five years of the disposal to permit the development of 10 or more residential units, and 10 or more residential units are developed on the property, not less than 15 percent of the total number of residential units developed on the parcel shall be sold or rented as affordable housing as defined by Section 102(a) of these Guidelines, and the additional requirements contained in Section 202(c)(1)(B)(i-ii) of these Guidelines shall apply.

(B) A local agency shall provide a copy of any restrictions recorded against the property to HCD on the form prescribed by HCD in Appendix B of these Guidelines.

(C) This subsection shall not apply to projects as defined in Health and Safety Code Section 32121(j).

Note: Authority cited: Government Code Section 54230, subdivision (c)(2), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221,

Section 54222, Section 54222.5, Section 54223, Section 54225, Section 54226, Section 54227, Section 54233; Health and Safety Code Section 32121

Section 203. Bidding Requirements for Exempt Surplus Land for Affordable Housing

(a) Land declared exempt surplus land by a local agency's governing body may be subject to bidding requirements if used for one of the purposes described in Section 103(a)(3)(F)(i) and (ii) of these Guidelines.

(b) The local agency must put the land out for open, competitive bid. All entities identified in Section 202 must be invited to participate in the competitive bid process.

Note: Authority cited: Government Code Section 54230, subdivision (c)(2), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54221, subdivision (f)(1)(F)(i-ii).

ARTICLE III. REQUIREMENTS TO BE PLACED ON SURPLUS LAND FOR AFFORDABLE HOUSING

Section 300. Requirements When an Entity Proposes to Use the Surplus Land for Developing Affordable Housing

(a) An entity proposing to use the surplus land for affordable housing shall agree to make no less than 25 percent of the total number of units developed on the parcels as affordable housing pursuant to Section 102(a) of these Guidelines. The entity shall agree to the following additional requirements:

(1) Rental units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 55 years.

(2) Ownership units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 45 years. The initial occupants of all ownership units on the property shall be lower-income households and the unit shall be subject to an equity sharing agreement consistent with Health and Safety Code Section 65915(c)(2). Any subsequent occupants shall also be lower-income households, if necessary, for the unit to remain occupied by lower-income households, for at least 45 years.

(b) The requirements set out in subdivision (a) above shall be contained in a covenant or restriction recorded against the surplus land at the time of sale, which by its express terms shall run with the land and shall be enforceable by any of the following parties, against any owner who violates the covenant or restriction and each successor in interest who continues the violation:

(1) The local agency that disposed of the property.

(2) Any resident of an affordable ownership or rental unit described in subdivision (a).

(3) A resident's association with members who reside in units described in subdivision (a).

(4) A former resident of a unit described in subdivision (a) who last resided in that unit.

(5) An applicant seeking to enforce the covenants or restrictions for a particular unit, ownership or rental as described in subdivision (a), if the applicant conforms to all of the following:

(A) Is of low- or moderate-income, as defined in Section 50093 of the Health and Safety Code;

(B) Is able and willing to occupy that particular unit; and

(C) Was denied occupancy of that particular unit due to an alleged breach of a covenant or restriction implementing Government Code Section 54222.5.

(6) A person on an affordable housing waiting list who is of low or moderate income, as defined in Section 50093 of the Health and Safety Code, and who is able and willing to occupy a unit subject to this provision of the Guidelines.

(c) A local agency shall provide a copy of any restrictions recorded against the property to HCD as an attachment to the form prescribed by HCD in Appendix B.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54222.5, Section 54233; Health and Safety Code Section 50093, Section 65915.

ARTICLE IV. REPORTING REQUIREMENTS

Section 400. Local Agency Reporting Requirements

(a) Pre-Negotiation and Disposal Notice. A local agency must submit a NOA to HCD and all interested housing sponsors.

(1) Prior to disposing of surplus land or participating in negotiations to dispose of surplus land with a prospective transferee, a written NOA shall be sent to HCD on the form in Appendix A pursuant to Section 201 of these Guidelines. If the NOA includes any direction regarding the form of development or vision for the land

suggested by the local agency, such directions and visioning must be approved by HCD prior to the initiation of negotiations with any interested and qualified developer.

(b) Post-Negotiation Notice and Proposed Disposition Summary: A proposed disposition summary must to be sent to HCD on Appendix B at the conclusion of negotiations for the disposition of surplus land.

(1) Prior to finalizing any agreements or disposing any surplus lands, and at least 30 days before entering into any legally binding documents to dispose of the property, the local agency shall provide to HCD a description of the NOAs sent, negotiations conducted with any responding entities, including any non-solicited expressions of interest in regard to the disposal of the surplus land, and a copy of any restrictions to be recorded against the property pursuant to Government Code Sections 54233 or 54233.5, whichever is applicable, in a form prescribed by HCD in Appendix B.

(2) A local agency may submit this information to HCD after it has sent NOAs required by Government Code Section 54222 and concluded negotiations with any responding entities. Article V of these Guidelines provides details on HCD's required review.

(c) A local agency shall provide a copy of any restrictions to be recorded against the property pursuant to sections 202(d)(1)(B) and 300(b) of these Guidelines as an attachment to Appendix B.

(d) A local agency that is a city, county, or city and county shall submit an APR pursuant to Government Code 65400 including the following information:

(1) A central inventory of all surplus land and all lands as of December 31 each in excess of its foreseeable needs, if any, identified pursuant to Government Code Section 50569. Beginning in 2021, this inventory is to be submitted to HCD by April 1 of each year. This inventory will become part of the APR as Table H. Please reference Section 601 for web links which detail APR and housing element requirements.

(2) Jurisdiction-owned sites identified in the housing element sites inventory subsequently disposed of by the jurisdiction in Table G of the Housing Element APR.

(e) Notice of Exemption Determination: A local agency that determines that property is exempt from the SLA shall support such a determination with written findings and shall provide a copy of the written determination at least 30 days prior to disposition.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 50569, Section 54221, Section 54222, Section 54230.5, Section 54233, Section 54233.5, Section 65400.

ARTICLE V. PERFORMANCE MONITORING AND PENALTIES

Section 500. HCD Monitoring, Recording, and Reporting

(a) Initiation of Monitoring. Beginning on January 1, 2021, HCD shall initiate monitoring of local agency compliance with certain requirements imposed by the SLA.

(b) Educational Materials and Technical Assistance. To assist agencies with SLA compliance, HCD will from time to time make available educational resources and materials regarding the SLA and these Guidelines to local agencies and the public.

(c) HCD Findings:

(1) Review: HCD shall review the information submitted by a local agency pursuant to Section 400of these Guidelines.

(2) Notice of Violation (NOV): HCD shall consider and make findings on whether the local agency's proposed sale or lease of the surplus land will violate the SLA and these Guidelines. If HCD determines that the proposed sale or lease will violate the SLA, HCD shall make written findings and provide them to the local agency within 30 days of receipt of the local agency's submittal and HCD shall provide the local agency at least 60 days to respond to the NOV before taking any other action.

(d) The local agency shall consider HCD's written findings made pursuant to Section 500(c) and shall do one of the following:

(1) Correct any issues identified by HCD.

(2) Provide written responses to HCD prior to disposition of the land explaining how its process for disposing of surplus land complies with the SLA and addressing HCD's written findings.

(e) HCD shall evaluate any written responses provided by the local agency pursuant to Section 500(d) to determine whether the local agency's findings are deficient to address the issues identified by HCD.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54230.5

Section 501. Penalties

(a) Local agency's failure to adequately respond to HCD.

(1) If the local agency does not correct issues identified by HCD's written findings or does not provide written findings explaining the reason its process for selling or leasing surplus land complies with the SLA, HCD shall notify the local agency and may notify the Attorney General that the local agency is in violation of the SLA, who may seek to enforce the act and pursue remedies, including, but not limited to, injunctive or declarative relief.

(2) If the local agency provides written findings explaining the reason its process for selling or leasing surplus land complies with the SLA, but HCD determines that the findings are deficient pursuant to Section 500(e), HCD shall notify the local agency and may notify the Attorney General that the local agency is in violation of the SLA, who may seek to enforce the act and pursue remedies, including, but not limited to, injunctive or declarative relief.

(b) Local agency's violation of surplus land disposition requirements; administrative penalties.

(1) A local agency that disposes of land in violation of the SLA after receiving a notice of violation from HCD that the agency is in violation of the SLA pursuant to HCD's review as described in Section 500(c).

(2) A local agency shall have 60 days from the date of the NOV to cure or correct an alleged violation before an action may be brought to enforce Government Code Section 54230.5 including penalties pursuant to Section 501(b)(3) of these guidelines, unless the local agency disposes of the land before curing or correcting the alleged violation.

(3) If the local agency fails to correct the violation within 60 days, an administrative penalty of 30 percent of the final sale price of the land sold in violation of the SLA, or 50 percent for subsequent violations, shall be invoiced by HCD.

(4) Upon receipt of HCD's invoice, the local agency may appeal the penalty assessment to the Director by submitting to the Director a written appeal. The written appeal shall be limited to a statement of relevant facts, arguments, and evidence demonstrating the error of law, procedure, or fact upon which the appeal is based. Pursuant to statute, penalties are mandatory in the absence of such error and cannot be waived or modified for grounds not stated in Government Code Title 5, Division 2, Part 1, Chapter 5, Article 8.

(5) Once the written appeal is submitted to the Director, HCD may request but is not required to accept additional information or materials for consideration. Appeals are to be submitted to the Director at following address:

California Department of Housing and Community Development
Division of Housing Policy Development
2020 W. El Camino Avenue, Suite 500
Sacramento, California 95833

(6) The Director will accept appeals delivered through a carrier service such as the U.S. Postal Service, UPS, FedEx, or other carrier services that provide date stamp verification of delivery. Deliveries must be received during HCD's weekday (non-state holiday) business hours of 9:00 a.m. to 5:00 p.m. Pacific Standard Time.

(7) Appeals must be received by the Director no later than thirty (30) business days from the date of HCD's invoice of the assessed administrative penalty.

(8) The Director shall render the decision in writing within forty-five (45) business days after notice and hearing in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(9) The Director's decision shall be the final agency decision.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 6250 et seq., Section 54222, Section 54230.5, Section 65589.5.

Section 502. Private Enforcement

(a) Those who have been notified of the availability of surplus land per Government Code Section 54222, or a person who would have been eligible to apply for residency in any affordable housing developed or a housing organization as defined in Government Code Section 65589.5, or any beneficially interested person or entity, may bring an action to enforce Government Code Section 54230.5.

(b) Prior to bringing an action pursuant to subdivision (a) above, a notice of intent to enforce the SLA shall be provided to the local agency and to HCD, identifying the alleged violations of these Guidelines and/or the SLA.

(c) If HCD has not issued a NOV, the local agency shall have 60 days from the notice provided in subdivision (b) to cure or correct an alleged violation before an action may be brought, unless the local agency disposes of the land before curing or correcting the alleged violation, or HCD deems the alleged violation not to be a violation in less than 60 days.

Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Section 54222, Section 54230.5, Section 65589.5.

Appendix A – Notice of Availability Form

Appendix B – Description of Disposition Form

Appendix C – Sample Exclusive Negotiating Agreement

Appendix D – HCD Survey to Indicate Interest in Surplus Land

Housing sponsors, as defined by Section 50074 of the Health and Safety Code, may notify HCD of their interest in surplus land pursuant to Section Government Code 54222(a)(1) using the survey at the link below:

https://www.surveymonkey.com/r/ZRCC3FL