

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

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January 12, 2022

Jennifer Ott
Assistant City Manager/
Development Services Director
City of Hayward
777 B Street
Hayward, CA 94541

Dear Jennifer Ott:

RE: HCD's Response to the City of Hayward's Determination of SR-238 Parcel Group Properties as Exempt Surplus Land

Thank you for contacting the Department of Housing and Community Development (HCD) regarding the City of Hayward's (City) claim that the State Route-238 Properties ("SR-238 Properties") are either "exempt surplus land" under the Surplus Land Act (SLA), or are not subject to the SLA. HCD reviewed the City's December 2, 2021 letter and other documentation you provided, and considered the City's arguments listed below relating to the disposition of the SR-238 Properties:

- Government Code section 54226 applies to the disposition of the SR-238 Properties because the requirements of the Local Alternative Transportation Improvement Program Statutes ("LATIP Statutes"), the court-approved settlement agreement (SR Settlement Agreement), and the Purchase and Sale Agreement, dated as of January 20, 2016, as amended (Purchase Agreement) between the City and California Department of Transportation (Caltrans) conflict with the terms of the SLA.
- The SR-238 Properties qualify as exempt surplus land under Government Code section 54221(f)(1)(H) because the properties were granted by Caltrans in trust to the City and the disposition of the properties is authorized under the LATIP Statutes.
- The disposition of SR-238 Properties meets the requirements of Government Code section 54234(a)(1); therefore, the disposition is subject to the SLA as it existed on December 31, 2019.

However, as explained in more detail in this letter, HCD finds that:

- Government Code section 54226, which provides that the SLA does not apply when it conflicts with another law, does not apply to the disposition of the SR-238

Properties because the SLA does not conflict with the LATIP Statutes, the SR Settlement Agreement, or the Purchase Agreement between the City and Caltrans.

- The SR-238 Properties do not qualify as “exempt surplus land” under Government Code section 54221(f)(1)(H) because Caltrans neither granted the SR-238 Properties in trust, nor did the City acquire the properties for trust purposes.
- The disposition of the SR-238 Properties, except for Parcel Group-3 properties, does not meet the requirements of Government section 54234(a)(1) because the City did not enter into an exclusive negotiating agreement (ENA) to dispose of the SR-238 Properties but entered into a Purchase Agreement to purchase the properties from Caltrans.

HCD concurs that the disposition of the Parcel Group-3 properties meets the requirements of Government Code section 54234(a)(1) if the parties elected to extend the valid ENA. Therefore, the disposition would not be subject to the current version of the SLA and would instead be subject to the SLA as it existed on December 31, 2019, provided the disposition is completed by December 31, 2022.

The Surplus Land Act does not Conflict with the Local Alternative Transportation Improvement Program Statutes (Gov. Code sections 14528.6 and 14528.65)

In its December 2, 2021 letter, the City argued that Government Code section 54226 applies to the disposition of the SR-238 Properties because the terms of the SLA conflict with Government Code sections 14528.6 and 14528.65 of the LATIP Statutes.

However, HCD finds that the SLA does not conflict with Government Code section 14528.6 because this section does not contain any provisions relating to the disposition of the SR-238 Properties by the City. The requirements found in Government Code section 14528.6, which are listed below, are specifically for the implementation, by Caltrans, of the Local Alternative Transportation Improvement Program (LATIP) and administration of the proceeds from the sale of the excess properties. Specifically,

- Government Code section 14528.6(a) establishes the LATIP and specifies the goals of the program.
- Government Code section 14528.6(b) specifies the eligible and ineligible uses of the excess properties when the properties were under Caltrans ownership. Specifically, this section provides that Caltrans can neither use the excess properties nor the proceeds from the sale of the excess properties for housing. However, after Caltrans sells the excess properties, the properties may be disposed for housing purposes.
- Government Code section 14528.6 (c) specifies the eligible uses of the proceeds from the sale of the excess properties.

HCD also finds that Government Code section 14528.65 does not conflict with the SLA because this section contains provisions relating to the disposition of the excess

properties by Caltrans (referred to as “department” in the LATIP Statutes). This section would therefore not apply to the disposition of the properties by the City. This includes Government Code section 14528.65(a)(2), which states that Caltrans is not required to comply with the Surplus Residential Property Act (Article 8.5 (commencing with Section 54235)) when disposing of the excess property. This subdivision would therefore not apply to the disposition of the SR-238 properties by the City.

Furthermore, although Government Code section 14528.65(a)(4) and (6) requires Caltrans to dispose of the excess property “as is,” via direct sale at a fair market value determined by an appraiser, HCD finds that if the City were to dispose of the SR-238 Properties pursuant to these requirements, it would not conflict with the SLA. Instead, it would be consistent with the SLA because Government Code section 54226 provides that, “[T]his article shall not be interpreted to limit the power of any local agency to sell or lease surplus land at fair market value or at less than fair market value, and any sale or lease at or less than fair market value consistent with this article shall not be construed as inconsistent with an agency’s purpose.” (Emphasis added).

For these reasons, HCD finds that the SLA does not conflict with the LATIP Statutes (Government Code sections 14528.6 and 14528.65) as argued by the City.

SR-238 Properties Were Not Granted in Trust by the California Department of Transportation

In its December 2, 2021 letter, the City argued that the SR-238 Properties qualify as “exempt surplus land” under Government Code section 54221(f)(1)(H) because the SR-238 Properties were granted by Caltrans to the City in trust and the disposition of the SR-238 Properties is authorized under the LATIP Statutes. Additionally, the City argued that the terms of the Purchase Agreement demonstrate that the SR-238 Properties are held in trust for the benefit of Caltrans.

However, as explained in more detail below, HCD finds that the SR-238 Properties do not qualify as “exempt surplus land” under Government Code section 54221(f)(1)(H). According to Government Code section 54221(f)(1)(H), “exempt surplus land” means:

“[S]urplus 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. (Emphasis added.)

Based on the documentation provided, HCD finds that Caltrans neither granted the SR-238 Properties in trust, nor did the City acquire the properties for trust purposes. Instead, Caltrans sold the SR-238 Properties via “direct sales” pursuant to the Purchase Agreement dated January 20, 2016, for an estimated value of \$54,749,200. And the City is required to pay Caltrans an estimated amount of \$54,749,200 by a certain date. (See Memorandum: Conveyance of Excess State Owned Real Property To City Of Hayward).

Additionally, even if we assume that Caltrans granted the SR-238 Properties in trust to the City, the disposition of the SR-238 Properties is not authorized or required subject to conditions established by statute. As stated above, the City is not required to dispose of the SR-238 Properties pursuant to the LATIP Statutes because Government Code section 14528.6 establishes the LATIP program, and Government Code section 14528.65 specifies the requirements for Caltrans, and not the City, to dispose of the excess properties.

For these reasons, HCD finds that the SR-238 Properties do not qualify as “exempt surplus land” under Government Code section 54221(f)(1)(H).

The Surplus Land Act does not Conflict with the Purchase Agreement, as dated January 20, 2016, or the Court Approved Settlement Agreement

According to the term(s) of the Purchase Agreement, Caltrans sold the SR-238 Properties to the City under the condition that the City must pay the full “Property Purchase Price” for the SR-238 Properties to Caltrans not later than six years from the approval date of the Purchase Agreement (see Section 1.4 of the Purchase Agreement). If the City fails to pay the full “Property Purchase Price” by the end of the six-year term, Caltrans has the right to exercise its Power of Termination. (See Section 4.1 of the Purchase Agreement).

HCD finds that the City’s obligation under the Purchase Agreement is to pay Caltrans the full “Property Purchase Price” for the SR-238 Properties over the course of six years or sooner. The Purchase Agreement does not necessarily require the City to dispose of the SR-238 Properties by the end of the six-year term. The City may elect to sell the SR-238 Properties to third parties or may use the Properties for its public purposes, so long as the City pays Caltrans the full “Property Purchase Price” by the end of the six-year term.

If the City elects to sell the SR-238 Properties, HCD finds that nothing in the Purchase Agreement, which is between Caltrans (seller) and the City of Hayward (buyer), prevents the City from selling the SR-238 Properties to third parties pursuant to the SLA. However, even if the SLA were to conflict with the terms of the Purchase Agreement, the terms of the SLA supersede the terms of the Purchase Agreement because as a local agency disposing of surplus land, the City is required to comply with the SLA.

The City also argued that the SLA conflicts with the SR Settlement Agreement because the SR Settlement Agreement requires “in part that the Department sell the Rte. 238 Excess Properties at fair market value...” Additionally, the City argued that the SR Settlement Agreement, “expressly contains limitation on the sale of the SR-238 Properties,” and the “imposition of the SLA requirements would be an impediment or obstacle to the sale of the SR-238 Properties and a direct impairment of the terms of the Purchase Agreement and the Settlement Agreement.”

Based on the documentation provided, HCD finds that the terms of the SLA do not conflict with the SR Settlement Agreement for two reasons. First, the SLA does not prevent a local agency from selling the surplus land at fair market value. According to Government Code sections 54221(b)(3), “[N]othing in this article prevents a local agency from obtaining fair market value for the disposition of surplus land...,” and, Government Code section 54226 provides, “[T]his article shall not be interpreted to limit the power of any local agency to sell or lease surplus land at fair market value or at less than fair market value, and any sale or lease at or less than fair market value...” (Emphasis Added.)

Second, the SR Settlement Agreement does not contain any provisions that prevent the City from disposing of the SR-238 Properties pursuant to the SLA. The SR Settlement Agreement specifies how Caltrans and the City are required to use the proceeds from the sale of the excess properties and how to compensate the eligible residence households.

For these reasons, HCD finds that Government Code section 54226 does not apply to the disposition of the SR-238 Properties because the SLA does not conflict with the terms of the Purchase Agreement or the SR Settlement Agreement.

SR-238 Properties, Except for Parcel Group-3 Properties, are Not Subject to the Pre-Assembly Bill 1486 Surplus Land Act

HCD considered the City’s argument that the SR-238 Properties are exempt from the SLA, as amended by Assembly Bill 1486, under Government Code section 54234(a)(1) because “the City and Caltrans entered into the Purchase Agreement in 2016, and under the Purchase Agreement, the City is required to sell the SR 238 Properties to third-parties (see Section 2.3 of the Purchase Agreement) in accordance with the requirements therein.”

HCD finds that the disposition of the SR-238 Properties does not meet the requirements of Government Code section 54234(a)(1) for two reasons. First, the City did not enter into an ENA to dispose of the SR-238 Properties but entered into a Purchase Agreement to purchase the properties from Caltrans. For Government Code section 54234(a)(1) to apply to the disposition of the SR-238 Properties, the City was required to enter into an ENA or legally binding agreement on or before September 30, 2019 to dispose of the properties.

Second, HCD finds that, under the Purchase Agreement, the City is not required to sell the SR 238 Properties to third parties over the course of six years. Section 2.3 of the Purchase Agreement states that “[I]t is understood that after Department’s transfer of the title to City as provided for herein, City contemplates selling all or a portion of the Property to third parties with the proceeds of such sales to be used to pay the Property Purchase Price...” (Emphasis Added). The City contemplating to sell the SR-238 Properties does not have the same meaning as the Purchase Agreement requiring the City to sell the properties by the end of the six-year term. Additionally, HCD finds that

the City's obligation under the Purchase Agreement is to pay Caltrans the full "Property Purchase Price" of the SR-238 Properties over the course of six years or sooner. The Purchase Agreement does not necessarily require the City to dispose of the SR-238 Properties by the end of the six-year term.

For these reasons, HCD finds that the SR-238 Properties, except for Parcel Group-3 Properties do not meet the requirements of Government Code section 54234(a)(1); therefore, the disposition of the properties is not subject to the SLA as it existed on December 31, 2019.

Parcel Group-3 Properties are Subject to the Pre-Assembly Bill 1486 Surplus Land Act

Government Code section 54234(a)(1) states:

If a local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property, the provisions of this article as it existed on December 31, 2019, shall apply, without regard to the changes made to this article by Chapter 664 of the Statutes of 2019, and all subsequent amendments to this article, to the disposition of the property to the party that had entered into such agreement or its successors or assigns, provided the disposition is completed not later than December 31, 2022." (Emphasis Added.)

Based on the documentation provided, the City entered into an ENA with Eden Housing, Inc., a California nonprofit public benefit corporation, Pacific West Communities, Inc., an Idaho corporation, and Strategic Growth Partners, Inc., an Idaho corporation (collectively the "Developer") on November 30, 2018 for the disposition of the Parcel Group-3 Properties. The original ENA ran through November 25, 2019. The City entered into an Amendment to Exclusive Negotiation Right Agreement with the Developer on May 22, 2020 to extend the ENA until June 2021. Subsequently, the City entered into a Second Amendment to Exclusive Negotiation Right Agreement with the Developer on June 27, 2021 to extend the ENA until December 31, 2021.

HCD finds that the disposition of the Parcel Group 3 properties meets the requirements of Government Code section 54234(a)(1) because the City entered into an ENA with the Developer on September 30, 2019 and had a valid ENA until December 31, 2021. The Second Amendment to Exclusive Negotiation Right Agreement contains an option to twice extend the negotiating period for an additional three months subject to agreement of the parties. If the parties elected to extend the ENA, the disposition of the Parcel Group 3 properties remain subject to the SLA as it existed on December 31, 2019, provided the disposition is completed by December 31, 2022. Therefore, if the ENA was extended and the City completes the disposition before December 31, 2022, the disposition of the Parcel Group-3 Properties is not subject to further HCD review. After the City has completed the disposition of the Parcel Group 3 properties, the City must

submit documentation to HCD demonstrating that the disposition was completed prior to December 31, 2022.

Conclusion

After reviewing the evidence submitted by the City, HCD has determined that the SLA does not conflict with the LATIP statutes, as argued by the City. Additionally, HCD has determined that the SR-238 Properties do not qualify for “exempt surplus land” under Government Code section 54221(f)(1)(H), nor is the disposition of the properties subject to the SLA as it existed on December 31, 2019, except for the Parcel Group-3 properties.

Pursuant to Government Code section 54230.5(a)(1), a local agency disposing of surplus land in violation of the SLA may lead to enforcement resulting in penalties equaling 30 percent of the sale price for the first violation and up to 50 percent for subsequent violations. Therefore, the City must follow standard Surplus Land Act protocols when disposing of the other parcel groups of SR-238 Properties, including but not limited to, the following:

1. Declare the land “surplus” (as supported by written findings) and not necessary for the City’s use at a regular public meeting.
2. Send a Notice of Availability via certified mail or email to the entities listed in Government Code section 54222 and allow each entity 60 days to respond; HCD maintains a list of Housing Sponsors that have notified HCD of their interest in surplus property on its website: <https://hcd.ca.gov/community-development/docs/AB1486DeveloperInterestList.xlsx>.
3. Engage in good faith negotiations for 90 days with entities that respond in a timely fashion to the Notice of Availability.
4. Submit documentation to HCD prior to agreeing to disposition terms per Government Code section 54230.5(b).
5. Record the required affordability covenant on the Property.

Please email publiclands@hcd.ca.gov if you have any questions or need to further discuss the disposition of the SR-238 Properties under the SLA.

Sincerely,



Jillian Burgos
Innovative Projects Manager
Housing Policy Development