

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

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March 16, 2023

Nathan Freeman, Director
Community, Housing, and Economic Development
City of San Bernardino
290 North D Street
San Bernardino, CA 92401

Dear Nathan Freeman:

RE: Notice of Violation of the Surplus Land Act Regarding the City of San Bernardino's Surplus Land Disposition for the Property at 295 Carousel Mall (APNs 0134-181-28, 0134-201-25, 0134-211-34, 0134-211-36, 0134-211-38, 0134-221-43, 0134-221-45, 0134-231-27, 0134-231-28, 0134-231-29, 0134-231-31, 0134-291-11, 0134-301-20, and 0134-301-22)

The California Department of Housing and Community Development (HCD) hereby issues this Notice of Violation, pursuant to Government Code sections 54230.5 and 65585.1, to the City of San Bernardino (City) regarding the City's proposed disposition of the real property located at 295 Carousel Mall, San Bernardino, California (Property).

Pursuant to Government Code section 65585.1, subdivision (a), HCD must notify a city if HCD finds that the city has taken an action in violation of the Surplus Land Act (SLA). Additionally, pursuant to Government Code section 65585.1, subdivision (a), HCD may notify the California Office of the Attorney General that a city is in violation of the SLA. In this instance, the Attorney General has been made aware and assisted with HCD's investigation.

Under Government Code section 54230.5, subdivision (a)(1), the City has 60 days from the date of this Notice of Violation to cure or correct the violations noted herein. If the City does not cure or correct all such violations by May 15, 2023 and elects to proceed with the disposition of the Property, it will further violate the SLA's disposition and affordability requirements and be subject to assessment of a penalty. Pursuant to Government Code section 54230.5, subdivision (a)(1), a local agency disposing of land in violation of the SLA is liable for penalties equaling 30 percent of the sale price for the first violation and 50 percent for each subsequent violation.

Background

On August 5, 2021, HCD received documentation from the City for the purposes of processing the disposition of the Property under Government Code section 54230.5, subdivision (b)(1). On September 2, 2021, HCD issued a letter to the City approving the disposition based on the information and documentation provided by the City. HCD recently received information that the disposition documentation submitted to HCD by the City was incomplete and, in places, inaccurate.

Violation #1: The City Failed to Provide at least 90 Days of Good Faith Negotiations to All the Entities that Submitted Notices of Interest, in Violation of Government Code section 54223, subdivision (a).

HCD's approval of the Property's disposition was based on the documentation provided to HCD by the City. In the City's cover letter addressed to Director Gustavo Velasquez, the City stated that "the City did not receive any qualified notices of interest in response to the [Notice of Availability (NOA)]." Included in the disposition documentation, the City also submitted Appendix B, which documents many of the required steps in the disposition process. In particular, Question #5 of Appendix B asks, "After issuing a notice that surplus land was available, did *any entity* express interest in purchase or lease of the land?" (Emphasis added.) To this Question, the City answered: "No." Based on this and other assertions made by the City, HCD approved the City's disposition.

HCD has since been made aware that the City did, in fact, receive notices of interest for the Property. Upon information and belief, in response to the NOA issued by the City on May 20, 2021, BLVD Communities sent a letter of interest dated June 22, 2021, and Alliant Strategic Development sent an email inquiring about the Property on June 21, 2021. In the letter sent to the City by BLVD Communities, the developer states, "This Letter of Interest pertains to the City of San Bernardino's Notice of Availability for the Carousel Mall via the Surplus Land Act." (See attached.) In the email sent to the City by Alliant Strategic Development, the developer states, "We came across this Notice of Availability of Surplus Land for the Carousel Mall site in downtown San Bernardino. We are multifamily housing developers and would like to discuss what the City is looking for as we explore the opportunity." (See attached.)

Had HCD been aware that the City received these two notices of interest, HCD would have required the City to engage in at least 90 days of good faith negotiations with each entity as required by Government Code section 54223, subdivision (a). Even if these negotiations did not bear fruit, the City, at a minimum, was obligated to notify HCD that the City received the notices of interest. At the very least, the City should have responded "yes" to Question 5, above, and provided a detailed explanation as to why it chose not to proceed with good faith negotiations.

By failing to engage in at least 90 days of good faith negotiations with BLVD Communities or Alliant Strategic Development, and by failing to notify HCD of those notices of interest, the City violated Government Code section 54223, subdivision (a).

Violation #2: The City Negotiated with Prospective Developers and Selected a Developer *Prior* to Issuing a Notice of Availability of Surplus Land, in Violation of Government Code sections 54221, subdivision (b)(1), and 54222.

Based on publicly available documents on the City's website, it is evident that the City negotiated with at least one prospective developer *before* the City declared the Property surplus or issued an NOA.

Government Code section 54221, subdivision (b)(1), states that "[I]and shall be declared either 'surplus land' or 'exempt surplus land,' as supported by written findings, *before a local agency may take any action to dispose of it* consistent with an agency's policies or procedures." (Emphasis added.) Local agencies are then required to issue an NOA to all the required entities identified in Government Code section 54222, subdivision (a)(1). Government Code section 54222 states, "any local agency disposing of surplus land shall send, prior to disposing of that property *or participating in negotiations to dispose of that property* with a prospective transferee, a written notice of availability...." (Emphasis added.)

In the disposition documentation the City sent to HCD on August 5, 2021, the City included documents establishing that the City declared the Property to be surplus land on May 19, 2021, and that an NOA for the Property was issued on May 20, 2021. However, according to the City's Request for Council Action dated August 3, 2022, the City was actively negotiating with Renaissance Downtown USA/ICO Real Estate Group (RDICO) before declaring the land surplus, before issuing an NOA, and during the 60-day notice period after the NOA was issued. For example, on March 3, 2021, the "Council selected [RDICO] as the preferred development team for the Carousel Mall property," and on June 2 and 16, 2021, "staff provided an update on the progress of the negotiations between the City and RDICO." In addition, according to the Request for Council Action dated June 16, 2021, the City had issued a preliminary exclusive negotiating agreement (ENA) with RDICO on May 26, 2021, just after the NOA was issued and during the 60-day notice period, and promised a final ENA by July 21, 2021, just after the 60-day window would have closed. On August 18, 2021, the City Council "authorized the City Manager to execute the ENA" with RDICO, and to HD's knowledge, the ENA remains in force today.

In summary, the selection of a finalist for the project occurred before the City declared the land surplus and before the NOA was issued; the City's negotiations with that finalist occurred before the NOA was issued and into the 60-day notice period after the NOA was issued; and the issuance of a preliminary ENA occurred during the 60-day noticing period. By negotiating with entities prior to declaring the land "surplus" and before

issuing an NOA, the City violated Government Code sections 54221, subsection (b)(1), and 54222.

Violation #3: The City Failed to Give Priority for Affordable Housing in Violation of Government Code section 54227, subdivision (a).

As described above, the City failed to notify HCD about – and to negotiate in good faith with – two entities that responded to the NOA with letters of interest. Nevertheless, the City negotiated with RDICO, an entity that did *not* respond to the NOA.

Government Code section 54227, subdivision (a) requires that when a local agency “receives a notice of interest to purchase or lease [surplus] land from more than one of the entities to which a notice of available surplus land was given ..., the local agency shall give first priority to the entity or entities that agree to use the site for housing that meets the requirements of Section 54222.5.” Further, if “the local agency receives offers from more than one entity that agrees to meet the requirements of 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 Section 54222.5.” Section 54222.5 provides that an “entity proposing to use the surplus land for developing low- and moderate-income housing shall agree to make available *not less than 25 percent* of the total number of units developed on the parcels at affordable cost ... or affordable rent ... to *lower income* households....” (Emphasis added.)

In other words, a local agency must prioritize proposals to make at least 25 percent of the housing units affordable to lower-income households, and if the local agency receives more than one such proposal, the local agency must give priority to the proposal with the greatest number of affordable units.

Because more than one entity provided a notice of interest in the Property, the City was required to prioritize the entities according to Government Code section 54227. However, because the City did not negotiate with the two responding entities, and because the negotiations with RDICO were conducted outside of the SLA context (since RDICO did not respond to the NOA), the City failed to properly prioritize affordable housing and is therefore in violation of Government Code section 54227, subdivision (a).

Violation #4: The City Failed to Provide a Complete Description of Negotiations, in Violation of Government Code section 54230.5, subdivision (b)(1).

Government Code section 54230.5, subdivision (b)(1), requires that, “[p]rior to agreeing to terms for the disposition of surplus land, a local agency shall provide to [HCD] a description of ... negotiations conducted with any responding entities”

This requirement is further outlined in Section 400(b)(1) of HCD's SLA Guidelines:

“Prior to finalizing any agreements or disposing of any surplus land, the local agency shall provide to HCD a description of the NOAs sent, a description of the negotiations conducted with any responding entities, *including any non-solicited expressions of interest* in regard to the disposal of the surplus land...” (Emphasis added.)

The City's disposition documentation did not include *any* description of negotiations, as the City indicated that “no qualified entities responded” when, in fact, at least two notices of interest were received by the City and the City was actively negotiating with a third entity. An accurate description of negotiations should have been included with the disposition documentation and that description should have also included a summary of the negotiations taking place with RDICO.

In addition, section 400(b) of HCD's SLA Guidelines require, as part of the description of negotiations, submission of a completed Appendix B which asks, among other things, whether land will be sold to another entity for housing development. (See SLA Guidelines Appendix B Question #7.) In its Appendix B, the City answered “no” despite the fact, at the time the City submitted Appendix B, it was finalizing negotiations with RDICO and knew that the Property would be sold to an entity that would be developing housing.

By failing to report all expressions of interest or provide a description of negotiations with all responding entities, the City violated Government Code section 54320.5, subdivision (b)(1).

HCD Rescinds Its Previous Disposition Approval

Based on the new information as outlined above, HCD hereby rescinds its September 2, 2021, approval of the disposition of the Property.

Next Steps

Under Government Code section 54230.5, subdivision (a)(1), the City has 60 days from the date of this Notice of Violation to cure or correct all violations. The City may have multiple avenues it can pursue to comply with the SLA, and HCD invites the City to discuss these options.

HCD requests that the City suspend any further actions to dispose of the Property, including all negotiations with prospective developers. Given the City's current failure to comply with the SLA, it is imperative that, to ensure future compliance, the City communicate closely with HCD as it proceeds through each of the required steps.

HCD understands that negotiations related to disposition of the Property have included discussions with community-based organizations to address the holistic needs of underserved communities. While not required by the SLA, HCD encourages the City to continue those discussions.

If the City or its representatives have any questions or need additional technical assistance regarding the applicability of the SLA, please contact HCD at Publiclands@hcd.ca.gov. Additionally, if the City or its representatives have additional documentation that HCD staff has not yet reviewed that would fully address the alleged violations discussed in this letter, please send the documentation to Publiclands@hcd.ca.gov by May 15, 2023.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal flourish extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

cc: Sonia R. Carvalho, City Attorney (Attorney@SBCity.org)
Charles E. McNeely, Interim City Manager (Mcneely_ch@SBCity.org)
Hon. Helen Tran, Mayor (Mayor@SBCity.org)