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Authors:

Craig D. Hardwick

Crafting a Winning Bid Under California's Surplus Land Act

Are you qualified to build affordable housing? If so, every city, county, school district and other public agency in California wants to sell you their surplus land. In fact, they are *required* to offer it to you—but only if you take the right steps to let them know you're interested.

California's Surplus Land Act

It's no secret that there's a shortage of affordable housing in California. One of the many ways the state is seeking to address the shortage is through the Surplus Land Act, or SLA, codified at Government Code §§ 54220 through 54234. Section 54220(a) of the SLA states, "The Legislature reaffirms its declaration that housing is of vital statewide importance to the health, safety, and welfare of the residents of this state and that provision of a decent home and a suitable living environment for every Californian is a priority of the highest order. The Legislature further declares that a shortage of sites available for housing for persons and families of low and moderate income is a barrier to addressing urgent statewide housing needs and that ***surplus government land, prior to disposition, should be made available for that purpose***." (emphasis added).

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Qualifying a Private Developer to Buy Surplus Land

How is that surplus land made available to a private housing developer? It's a fairly simple process, but it requires the developer to take the proactive step of notifying the California Department of Housing and Community Development of the developer's interest in surplus land, while also submitting a self-certification as a "Housing Sponsor." Any individual, corporation, general or limited partnership, or other legal entity—both for-profit and nonprofit—can do this per Health & Safety Code § 50074. The simple three-page self-certification form is available on the department's website. Among other things, it requires the developer to certify that it is qualified to own, build, acquire or rehabilitate low- and moderate-income housing, and that it will make not less than 25% of the units developed on the surplus land available at an affordable cost to lower-income households.

Government Entity's "Surplus Land" Declaration

The SLA applies to all "local agencies" in California, a term defined by Government Code §54221(a)(1) as "every city . . . 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

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instrumentality thereof that is empowered to acquire and hold real property." Before a local agency can sell its real property, or lease it for a term in excess of 15 years, the local agency must declare the property to be "surplus land" defined by §54221(b)(1) to mean "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." While most surplus land is subject to the SLA, there are plenty of exceptions discussed at the end of this article.

What Qualifies as Surplus Land?

Wondering what types of property could be offered as surplus land? Almost anything can qualify. Land is deemed to be surplus if it is owned in fee simple by the local agency but is not necessary for the agency's use.

Notice to Bidders

Once a local agency has declared it to be surplus land, the land cannot immediately be sold or leased. In fact, the agency cannot yet even participate in negotiations to sell or lease it. Instead, the agency must first send written notices of the availability of the property. Developers who have certified as a Housing Sponsor are entitled to receive notice, together with a host of others, as follows:

- In addition to notifying Housing Sponsors, a notice of availability for the purpose of developing low- and moderate-income housing must be sent to any local public entity within whose jurisdiction the surplus land is located.
- A notice of availability for open-space purposes must be sent to parks and recreation departments within the city and county in which the land is located, to any regional park authority in the area, and to the State Resources Agency.
- A notice of availability of land suitable for school facilities construction or use must be sent to each school district in which the land is located.

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- A notice of availability for the purpose of developing property located within an infill opportunity zone or within a transit village plan must be sent to any city, county, or certain other local agencies having jurisdiction.

Time Available to Respond

Once the local agency delivers the notices of availability, each recipient has 60 days in which to notify the local agency that the recipient is interested in buying or leasing the land. There's no real advantage to being the first to respond since the local agency is prohibited from commencing negotiations with any responder until that 60-day period ends. A developer should therefore take the time necessary to prepare a proposal that will be attractive to the local agency.

Tailoring Your Proposal to Achieve Highest Priority

Because the local agency wishing to dispose of its surplus land must send notices to so many prospective buyers and lessees, the agency will almost always receive multiple responses from those wishing to buy or lease the surplus land. In order to make your proposal stand out and be the one most likely to be accepted, you'll need to craft your bid with the SLA's priority rules in mind. Unlike most public bidding scenarios, priority under the SLA is based not on the highest price offered, but instead on the most affordable housing offered.

If the local agency receives a notice of interest from more than one entity, then first priority must be given to the entity that agrees to use the site for low- and moderate-income housing (the only exception being that if the surplus land is already being used for park or recreation purposes, and a responding entity agrees to continue to use the land for park or recreation purposes, then first priority must be given to that entity.). If the local agency receives a notice of interest from more than one entity that agrees to provide low- and moderate-income housing, then priority must be given to the entity that proposes to provide the greatest number of such units. If more than one entity proposes the same number of such units, priority must be given to the entity that proposes "the

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deepest average level of affordability."

At a minimum, your proposal must set aside no less than 25% of the proposed housing units for low- and moderate-income buyers or renters. The more low- and moderate-income units you propose to build, the better your chances of acquiring the surplus land. Emphasizing low-income over moderate-income units will create a "deeper" average level of affordability, improving your chances even more.

The Negotiation Phase

Once the 60-day response period ends—and not before—the local agency must then enter into good faith negotiations with any person, private entity, or governmental entity that responded and expressed interest in buying or leasing the surplus land. The negotiation period is 90 days, and the local agency may negotiate with all such entities simultaneously. This means that even if another responder has proposed a greater number of affordable units than you have, you still have a chance of prevailing if the local agency and that other responder cannot agree upon the price and/or other terms.

Final Approval by Department of Housing and Community Development

If you are the successful proposer and strike a deal with the local agency by the end of the 90-day period, you are still not assured of being able to buy or lease the surplus land. Before agreeing to terms for the disposition of surplus land, the local agency must provide the Department of Housing and Community Development with a description of the notices of availability sent, a description of the negotiations with any responding entities, and a copy of any affordability restrictions that are to be recorded against the land pursuant to the terms of the SLA. The local agency can submit this information as soon as it has completed negotiations. The department then has 30 days to notify the local agency of any aspect of the proposed sale which the department believes will violate the SLA, and the local agency has a minimum of 60 days to

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respond. This can certainly delay the closing, and sometimes even kill the deal.

What if Negotiations Fail to Result in a Sale?

If you failed to submit a timely response to the local agency's notice of the availability of the surplus land, it's possible you'll get a second chance. The local agency can sell the surplus land to a person or entity who did not respond to a notice of availability, but only if (a) the agency received no responses, or (b) good faith negotiations with the responding entities did not result in an agreement upon price and terms within the 90-day negotiation period. However, if the sale or lease is then made to a buyer/tenant who nevertheless builds 10 or more residential units on the property, at least 15% of those units must be sold or rented at affordable housing costs or affordable rent, as those terms are defined in Health and Safety Code sections 50052.5 and 50053.

What Happens if the Local Agency Fails to Comply with the Surplus Land Act?

If, after you've purchased or leased the surplus land, it is determined that the local agency failed to follow the requirements of the SLA, you're in luck. Failure by the local agency to comply with the SLA "shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value." But the local agency won't be as lucky. Failure to comply subjects the local agency to penalties.

Fact that Land Is Valuable Doesn't Exempt It from "Surplus" Status

As noted above, the goal of the SLA is to generate housing, not revenue. If a local agency's unused land could be sold or leased more profitably for non-housing purposes, the agency might be tempted to avoid the SLA's restrictions by contending that revenue generation is an "agency use." However, the SLA closes that loophole. Per the SLA, "agency's use" does not include "commercial

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or industrial uses or activities, including nongovernment 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." In other words, the agency cannot claim that the property is not "surplus"—and thereby avoid the SLA's requirements—if the agency simply wants to sell, lease or develop the land for the purpose of generating revenue.

What Types of Surplus Land Are Exempt from the SLA?

There are numerous legitimate exemptions provided by the SLA. Surplus land that qualifies as exempt under the SLA's definitions does not need to be offered for housing or other purposes. The exceptions appear at subsections (f)(1)(A) through (S) of Government Code § 54221 and are *very briefly* summarized as follows:

- Land transferred by cities or counties for low-income housing purposes
- Parcels smaller than one-half acre, unless adjacent to other government-owned open-space or housing land
- Surplus land exchanged for other land necessary to the agency's use
- Surplus land being transferred to another local, state, or federal agency or to a California Indian tribe
- Former streets
- Surplus land that is put out to competitive bid for low- or moderate-income housing uses, which may include ancillary ground-floor commercial uses
- Surplus land of between one and 10 acres which is put to open, competitive bid by a local agency for development of at least 300 housing units, at least 25% of which will be restricted to lower income households
- Surplus land totaling 10 or more acres for sale to one or more buyers, through a competitive bidding process, pursuant to a plan or ordinance adopted by the local agency or state

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statute for development of between 300 and 10,000 housing units, at least 25% of which will be restricted to lower income households

- Mixed use development meeting certain affordable housing thresholds and not located in an urbanized area
- Surplus land that is subject to valid legal restrictions, not created by the agency, that prohibit housing
- Land received in trust whose disposal is authorized by statute
- The following transactions pertaining to school district property: sales or leases of excess school property in accordance with the districtwide policies and procedures developed by the district based on input from a duly appointed district advisory committee; joint-occupancy leases of school buildings pursuant to Education Code §§17515 through 17526; exchange of school district property; transfer of community college district property to cities, counties and park districts; construction of joint-use buildings on community college property; leases of community college property to cities and counties; joint use of community college property; and provision of affordable rental housing to teachers and employees of elementary and high school districts under the Teacher Housing Act of 2016 (Health and Safety Code §§ 53570 through 53574)
- Surplus land on former military bases
- Land used by a "district" for the commercial, industrial, investment or revenue-generation purposes authorized by Government Code § 542221(c), which in some cases requires the district to make a public declaration that the proposed use will "directly further the express purpose of agency work or operations"
- Certain lands transferred before June 30, 2019
- Land that is already subject to one of eight specified use-restrictions
- Land owned by a California public-use airport on which residential uses are prohibited by FAA order

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- Land transferred to a community land trust, if certain specified conditions are met
- Surplus land meeting specified conditions which is owned by local transportation agencies.

Additional Exemptions for Large Cities

Effective January 1, 2024, the adoption of Government Code § 54222.3.1 amended the SLA to create four additional exemptions available to cities with populations exceeding 2.5 million. Such cities may now dispose of land for the following purposes without complying with the SLA: (a) a "Low Barrier Navigation Center," which is a service-enriched temporary housing shelter defined in Government Code § 65660; (b) certain supportive housing; (c) certain transitional housing for youth and young adults; and (d) affordable housing. In order to take advantage of these exemptions, those large cities must satisfy a number of procedural requirements set forth in § 54222.3.1.

Conclusion: The Developer's Playbook

Here's what affordable housing developers need to do to get the most benefit from the Surplus Land Act:

- Register as a Housing Sponsor with the California Department of Housing and Community Development.
- Be diligent about monitoring notices of available land from local agencies—you'll receive several each year.
- When you see something you like, use the full 60 days to prepare your response, keeping in mind that while the offering price is important, the amounts and types of affordable housing you propose to offer is what will make your response rise to the top.
- Don't give up if another responder proposes a greater number or "deeper" average number of affordable housing units than you. You have 90 days to negotiate. You may be able to augment the types or amounts of affordable housing you can build, or you might see offers which were initially ahead of

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yours drop out if the offeror and agency can't agree on price and terms.

- Finally, don't give up if you missed the response deadline. There's always a chance that no one responded or that the agency can't negotiate a deal within the required 90-day period. If that happens, the local agency is free to sell the property to anyone who did not respond to the initial offer—including you.

For more information, please contact the author or any attorney with Frost Brown Todd's Real Estate Practice.

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