Final Updated Surplus Land Act Guidelines
Response to Comments
August 1, 2024

The California Department of Housing and Community Development (HCD) released the draft updated Surplus Land Act (SLA) Guidelines on February 23, 2024, for a 30-day public comment period. This document summarizes how comments received during that period were considered and/or incorporated into the Guidelines. Some comments included technical or minor modifications to phrasing in the Guidelines. HCD incorporated those changes where appropriate.

HCD sincerely appreciates all the effort and thought that went into developing the extensive and detailed comments received, particularly those from local jurisdiction partners with whom HCD works on a daily basis to implement the SLA. HCD incorporated as many comments as possible. In an effort to be responsive to the feedback provided by local agency partners, HCD made 36 changes to the Guidelines. In those cases where a comment could not be incorporated into the updated Guidelines, HCD has provided a rationale in this document. However, in all aspects of the Guidelines, HCD endeavors to continually improve its procedures so that dispositions are processed as efficiently as possible and with as little administrative burden to local agencies as the law permits. As always, HCD continues to be available for technical assistance.

The proposed changes are reflected in the August 1, 2024 version of the Guidelines, available at www.hcd.ca.gov/planning-and-community-development/public-lands-affordable-housing-development, with changes from the previous draft Guidelines shown in strikethrough and red underline format.

HCD received 395 comments from 113 individuals and organizations. Copies of these comments can be requested by emailing SLAGuidelines@hcd.ca.gov.

Comments were received from the following individuals, agencies, and organizations*:

1. Association of California Healthcare Districts
2. Association of California Water Agencies
3. Bear Valley Water District
4. Biola Community Services District
5. BWS Law
6. California Association of Sanitation Agencies
7. California Municipal Utilities Association
8. California Special Districts Association
9. California Association for Local Economic Development
10. California Building Industry Association
11. California State Association of Counties
12. CalTrain
13. Cambria Community Services District

14. Castro Valley Sanitary District
15. Chowchilla Cemetery District
16. Chino Valley Fire District
17. City of Biggs
18. City of Buena Park
19. City of Chico
20. City of Fairfield
21. City of Garden Grove
22. City of Lancaster
23. City of Los Altos
24. City of Los Angeles
25. City of Mountain View
26. City of Ontario
27. City of Palmdale
28. City of Rancho Cucamonga
29. City of Tustin
30. City of San Bernardino
31. City of Santa Rosa
32. City of Shafter
33. Communities for a Better Environment
34. Consolidated Mosquito Abatement District
35. Costa Mesa Sanitary District
36. County of Los Angeles
37. County of Sacramento
38. County of Tulare
39. Cucamonga Valley Water District
40. Delta Mosquito and Vector Control District
41. Delhi County Water District
42. Desert Recreation District
43. EAH Housing
44. East Bay Housing Organizations
45. East Side Mosquito Abatement District
46. El Dorado Hills Community Services District
47. Fresno Mosquito District
48. Goleta Sanitation District
49. Groveland Community Services District
50. Hansen Bridgett Law Firm
51. Helix Water District
52. Hilmar County Water District
53. Housing Leadership Council of San Mateo County
54. Kern River Valley Cemetery District
55. Kern County Citrus Pest Control District
56. Kingsburg Healthcare District

57. Kosmont Realty
58. League of California Cities
59. LEUCADIA Wastewater District
60. Live Oak Cemetery District
61. Los Angeles County Metropolitan Transportation Authority
62. Los Angeles County Sanitation District
63. Madera/Chowchilla Resource Conservation District
64. Mammoth Community Water District
65. McKinleyville Community Services District
66. Mesa Water District
67. Montara Water and Sanitary District
68. Mt. View Sanitation District
69. Nonprofit Housing Association of Northern California
70. North County Fire Protection District
71. Olivenhain Municipal Water District
72. Orange County Mosquito District
73. Orange County Transportation Authority
74. Pine Grove Community Service District
75. Public Advocates
76. Public Interest Law Project
77. Rancho California Water District
78. Rand Paster Nelson Law Firm
79. Ross Valley Sanitary District
80. RSG Solutions
81. Running Springs Water District
82. Rural County Representatives of California
83. Sacramento Regional Transit District
84. San Diego Metropolitan Transit System
85. San Gabriel Valley Council of Governments
86. San Juan Water District
87. San Miguel Community Services District
88. San Francisco Metropolitan Transit Agency
89. San Francisco Office of Economic and Workforce Development
90. San Diego Housing Federation
91. San Ramon Valley Fire Protection District
92. Silveyville Cemetery District
93. Solano Irrigation District
94. SOMOS Law Group
95. South San Joaquin Irrigation District
96. Stockton East Water District
97. Summerland Sanitary District
98. Tahoe City Public Utility District
99. Three Valleys Municipal Water District
100. TKE Engineering, Inc.

101. Town of Discovery Bay
102. Truckee-Donner Recreation & Park District
103. Truckee Sanitation District
104. Tulare Mosquito Abatement District
105. Tuolumne County
106. Turlock Mosquito Abatement District
107. Urban Counties of California
108. Ventura Port District
109. Vista Irrigation District
110. Wasco Recreation and Parks District
111. Western Center on Law and Poverty
112. Westlands Water District
113. Winton Water and Sanitary District

* All public comments were taken directly from commentors' source material. HCD did not edit public comments for grammar, spelling, or citations to statute or Guidelines.

Article 1. Program Overview

Comment 1 (Commentors 44, 69, 76, 90, 53, 75, and 111): The reference to "subsequently enacted legislation" should explicitly reference AB 480, SB 747, and other 2023 legislation that amended the SLA.

Response: It is not HCD practice to identify all the legislative bills that have amended the underlying statute, which in this instance is AB 1486. The Legislature is continually updating the SLA, and attempting to include all bill references risks missing newly enacted bills.

Section 100: Applicability

Comment 2 (Commentor 9): New proposed section 100 states that the updated guidelines apply on and after the date of adoption as follows: a) For the disposition of surplus land, the Guidelines are proposed to apply based on the date the local agency issued the Notice of Availability (NOA). b) For exempt surplus land determinations, the Guidelines are proposed to apply based on the date the local agency declared the property exempt surplus land. Comment: HCD's delayed issuance of these guidelines (potentially to be adopted four or more months following the effective date of major 2023 SLA legislation) should not have the effect of creating additional delays for local agencies or limit the ability of local agencies to utilize new exemptions and other provisions of statute included in 2023 Legislation that are effective as of January 1, 2024, by requiring local agencies to re-issue NOA's, or re-declare exempt surplus lands, or by complying with draft Updated Guidelines that exceed or are inconsistent with the Act. These Guidelines should clarify that the Updated Guidelines shall take effect on the date of final adoption by HCD, but that the Act and any applicable provisions of HCD's existing Guidelines now in effect that are not in conflict with the Act shall apply to any

disposal of surplus land or exempt surplus land pending between January 1, 2024 and the date of final adoption of these Updated Guidelines.

Response: HCD partially agrees with the Comment. The language in Section 100 refers to applicability of the Guidelines, not to any new or future statutes. All statutes are applicable and enforceable on the date of adoption. HCD is clarifying that dispositions or exemption declarations will not be bound by the new Guidelines if the actions were initiated prior to final adoption of the Guidelines. It is likely that many local agencies will be in the middle of an SLA action when the Guidelines are adopted. To add additional clarity, however, HCD has added language specifically noting that bills affecting the SLA are enforceable on the date the bill takes effect.

Section 101: Guidelines

Comment 3 (Commentors 44, 69, 76, 90, 53, 75, and 111): Sec 101 Add to the list of local agency responsibilities: “Make findings that land to be disposed of is either surplus land or exempt surplus land,” and “Provide HCD with the written findings and declarations that land is either surplus land or exempt surplus land and the basis for exemption.”

Response: HCD partially agrees with the Comment. The Guidelines address the responsibilities of local agencies in comprehensive detail in Articles II, III, and IV of the Guidelines. To clarify that the identified activities in Section 101 are not exhaustive, HCD has added the following underlined language, “Major actors and their responsibilities include, but are not limited to:”

Section 102: Definitions

Introduction

Comment 4 (Commentor 9): This section states that “for terms defined in statute, any changes to statutory definitions shall supersede the definition in the Guidelines.” Comment: This statement reflects a foundational legal construct that statutory language supersedes Guidelines, which we agree with. The concern, however, is it only appears intended to operate prospectively. Our concern with various aspects of these draft Guidelines is with areas where they appear to exceed the language and authority of existing statute, including as enacted by 2023 Legislation. HCD’s Guidelines should not conflict with, alter, or exceed the scope of statute. If HCD desires to enact or alter laws related to the Surplus Land Act, those proposals should be introduced as proposed statutory changes that are subject to review and approval by the Legislature.

Response: HCD disagrees with the Comment. HCD is noting that the Guidelines clarify existing law. Additionally, in anticipation of future statutory changes to the SLA, HCD is also clarifying that new laws will supersede existing Guidelines.

Definition of “Area Median Income” – Section 102(b)

Comment 5 (Commentors 44, 69, 76, 90, 53, 75, and 111): “Area Median Income” and the abbreviation “AMI” should be made a defined term and not just defined in the context of 102(b).

Response: HCD agrees with the Comment. New language clarifying “Area Median Income” has been added to both Section 102(b) and 102(c).

Definition of “Description of Negotiations” – Section 102(g)

Comment 6 (Commentor 12): In Section 102(g), the “description of negotiations” is adjusted to mean “a written summary of the negotiations that occurred between the local agency and each entity which responded to an NOA. The written summary must be accompanied by copies of written correspondence (e.g., emails, letters, etc.) that include (1) the respondent’s interest in the surplus land, (2) the local agency’s request for additional information from the respondent, (3) any responses to such requests, (4) a description of any significant changes proposed by the respondent, (5) confirmation from the local agency to the respondent indicating negotiations have concluded, and (6) if applicable, a copy of the draft Purchase and Sale Agreement, Disposition and Development Agreement, Lease Agreement or Exclusive Negotiating Agreement.” This exhaustive list of essentially most if not all communications is administratively burdensome to agencies and could be streamlined into HCD creating a form for agencies to fill out that covers the information requested.

Comment 7 (Commentors 44, 69, 76, 90, 53, 75, and 111): Desc of Negotiations: The written summary should also specify the terms of the offer that each responding entity made with respect to number of units, number of affordable units, and the specified affordability level of the units, and if agreement was not reached, a description of the provisions for which there was no agreement

Comment 8 (Commentor 33): CBE strongly supports the proposed definition of “Description of Negotiations as set forth in Guidelines Section 102(g). CBE asks that the summary of negotiations also require agencies to disclose: 1) Whether, during the two years prior to issuing the NOA, the agency received any offers or was aware of any interested parties. 2) Whether the agency was communicating with any other interested entity/party during negotiations regarding the property. 3) The names of any entities/parties with which the agency communicated during the negotiations. 4) The number of times any employee of the agency met with any entity/party that responded to the notice. 5) A list of all interested parties.

Comment 9 (Commentor 28): The requirement that the written summary must be accompanied by copies of written correspondence that include six listed items should be clarified to specify that the items in nos. 2, 3 and 4 apply only “if applicable”.

Response: The information HCD receives through the description of negotiations is essential to ensure every affordable housing developer that notifies the local agency of its interest in the site receives 90 days of good faith negations. During the initial four

years enforcing the SLA, numerous local agencies sought technical assistance from HCD asking for clarity concerning what constitutes “a description of negotiations.” The draft updated Guidelines provide clearly defined deliverables so local agencies know, with more precision, what documents must be retained and delivered to meet the requirements of Government Code section 54230.5. When identifying the required documentation, HCD sought to balance the need for transparency in negotiations against creating excessive administrative burdens for local agencies.

In response to comments received, HCD has revised the definition of “description of negotiations” to include a reference “to a form prescribed by HCD in Appendix B.” The amended Appendix B will provide an efficient and easily accessible mechanism for local agencies to provide HCD with the necessary “summary of negotiations” information. HCD also added the language “if applicable” to Section 102(g) of the Guidelines.

Definition of “Disposition of Surplus Land” – Section 102(i)(1)(A)

Comment 13 (Commentor 28): This section should be clarified to specify that in connection with a donation of land, the entering into of an affordability restriction or covenant by the developer with respect to the subject property is not deemed nonmonetary consideration. If, instead, this provision is meant to reverse HCD’s current position that a donation of land is not a sale for purposes of the SLA, then HCD should clarify that a donation of land is not a disposition if the subject property is conveyed after the effective date of the Updated Guidelines, provided that the local agency approved the donation prior to such date.

Comment 30 (Commentor 10): This section of the proposed Guidelines contains revisions which in most respects reflect statutory changes made in 2023 Legislation. Comment: The concern we raise with this provision is its reference to a disposal of “land exchanged for monetary or non-monetary consideration.” This language should be clarified so that it is “surplus land” and not interpreted to have any effect on the existing statutory exemptions for land exchanges between local agencies as “exempt surplus land” under Sec. 54221(f), including land transfers described under paragraphs (C), (D), and (E) of that subdivision. This disposition language should only apply to the disposition of “surplus land.”

Response: With regards to Comment 13, this section of the Guidelines is intended to clarify that a local agency may not trade land for some other “consideration” to avoid the SLA. However, recording an affordability covenant would not qualify as consideration. HCD agrees with Comment 30 that the qualifying language “for monetary or non-monetary consideration” does not apply to exempt surplus land as described in Government Code, Sections 54221(f)(C)-(E). Sections 103(c)(5)-(7) of the Guidelines establishes that such exempt surplus land is not subject to the phrase “for monetary or non-monetary consideration.” However, HCD disagrees with the Comment because the language “for monetary or non-monetary consideration” is found in Section 102(i), which only defines the disposition of surplus land.

Definition of "Disposition of Surplus Land" – Section 102(i)(1)(B)

Comment 10 (Commentor 5): A basic purchase option is a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price specified in the option. (Petrolink, Inc. v. Lantel Enterprises (2018) 21 Cal.App.5th 375, 384, citing Erich v. Granoff (1980) 109 Cal.App.3d 920, 927–928.) In other words, an option is a contract [1.next.westlaw.com] under which the optionee purchases the unilateral right and power to create a purchase contract during the life of the option." (See Petrolink, Inc., supra, 21 Cal.App.5th at 384.) Therefore, how does HCD envision implementing the provision that states that "[a] lease that is for a term of 15 years or less that includes an option to purchase is considered a disposition of surplus land at the time the option to purchase is exercised." The public agency will be put in breach of the option contract if it transmits an NOA for a parcel subject to the option.

Comment 11 (Commentor 61): The Surplus Land Act Guidelines issued by HCD in April 2021 defined the term "disposition of surplus land" to include "an enforceable option to lease, as defined by [the] Guidelines," but the new draft Guidelines have deleted the clarification. HCD got it right the first time. Under California law, an option is, for the optionor (i.e., the local agency), an irrevocable and continuing offer to sell or lease the land. Once a local agency has entered into an option agreement, it has effectively disposed of the land. The California Supreme Court has explained that "[a]n option, as a matter of legal theory, is considered to have a dual nature: on the one hand it is an irrevocable offer, which upon acceptance ripens into a bilateral contract, and on the other hand, it is a unilateral contract which binds the optionor to perform an underlying agreement upon the optionee's performance of a...The definition of "disposition of surplus land" in Section 102(i) must be revised to reinstate the original provision that, "[A]n enforceable option to lease, as defined by these Guidelines, will qualify as a lease for purposes of these Guidelines. Palo Alto Town & Country Village, Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 502. "From the point of view of the optionor's duty it is binding upon the making of the option contract." Id. at 503. "Thus it has been held in California that an option to purchase real property 'is by no means a sale of property, but is the sale of a right to purchase.'" Ibid. (quoting Hicks v. Christeson (1917) 174 Cal. 712, 716).

Comment 12 (Commentor 78): The thrust of our comments is to urge HCD to clarify in the Draft Guidelines that entering into an option to purchase or lease public property will, at least under some circumstances, constitute a "disposition of surplus land" as defined in Section 102(i) of the Draft Guidelines. The reasons we believe entering into an option agreement should qualify as a disposition under the SLA are as follows: Section 102(h) of the current SLA Guidelines provides that "an enforceable option to lease, as defined in these Guidelines, will qualify as a lease for purposes of these Guidelines." This provision is deleted in the Draft Guidelines.

Comment 17 (Commentor 78): The Definition of “Dispose” in Government Code § 54221(d) Lacks Sufficient Specificity and Needs to Be Clarified by HCD. As of January 1, 2024, Government Code Section 54221(d) defines “dispose” to mean, with some caveats, either the sale or lease of surplus land. However, “sale” and “lease” are not themselves defined terms. Given property transactions involving public land may take forms that are similar, but not identical, to a traditional sale or lease structure - for example, an option contract - it is important for HCD to clarify how such similar transactions fit into the overall scheme of the SLA and when such transactions constitute a legal disposition.

Comment 18 (Commentor 78): Government Code § 54222(f)(3) Implies that Entering into an Option Agreement for Non-Exempt Surplus Land Is a Disposition. Government Code Section 54222 requires local agencies to send a written notice of availability of a property “before disposing of that property or participating in negotiations to dispose of that property.” Subsection (f)(3) further provides that “participating in negotiations” does not include “Negotiating … [an] option agreement for the purposes of complying with subparagraphs (A), (F), (G), (H), or (I) of paragraph (1) of subdivision (f) of Section 54221,” which are subsections of the definition of “exempt surplus land.”

Comment 19 (Commentor 78): Treating the Entering of an Option Agreement as a Disposition Best Serves the Purposes of the SLA and Best Addresses the Practical Reality of How Options Work In Practice. One of the fundamental tenants of the SLA is to provide affordable housing developers the opportunity to negotiate for the sale or lease of public land before the local agency irrevocably commits itself to an alternative use for the property. In practice, that is exactly what an option agreement does. An option to purchase or lease is irrevocable by the optioner (in this case, the local agency), 2 and may be exercised unilaterally by the optionee (developer). Thus, although there may be other contingencies in the option agreement, when a local agency enters into an option agreement to sell or lease land, it has substantially committed itself to a specific future transfer of a legal interest in the property.

Comment 20 (Commentor 78): Government Code § 54234 Provides Additional Reasons for Treating “Entering Into an Option Agreement” as a Disposition. Government Code Section 54234(a)(1) and (a)(2) exempt certain property dispositions from compliance with post-2019 amendments to the SLA. These exemptions apply where the local agency took certain actions prior to September 30, 2019 (namely, entering into an exclusive negotiating agreement (“ENA”) or legally binding agreement to dispose of property) and where “the disposition is completed prior to December 31, 2027.”

Comment 15 (Commentor 12): The statute defines disposition relative to leases as “The entering of a lease for surplus land, which is for a term longer than 15 years, inclusive of any extension or renewal options included in the terms of the initial lease, entered into on or after January 1, 2024.” The draft guidelines by contrast define disposition relative to leases in Section 102(i)(1)(B) as follows: “A lease with a term of 15 years or less that includes an option to extend or renew is a disposition if the sum of the term of the

original lease and the extension or renewal is greater than 15 years." This is not the intent of the statute. Further, the guidelines state "A lease that is for a term of 15 years or less that includes an option to purchase is considered a disposition of surplus land at the time the option to purchase is exercised." Purchase options were not covered by statute and we recommend this language be changed to strike this.

Response: HCD agrees with Comment 10. HCD incorporated changes to the Guidelines which establish that a lease with an "option to purchase" is considered a disposition of surplus land at the point of *execution* of the lease. HCD disagrees with Comments 11, 12, 17, 18, 19, and 20. An option to purchase or lease does not constitute a completed disposition for purposes of Government Code section 54234. However, entering into a legally binding agreement that includes either an option to lease surplus land for a term that exceeds 15 years or an option to purchase surplus land would constitute taking an action to dispose of surplus land as described in Government Code Section 54221, subdivision (b)(1). Prior to taking such an action, a local agency must declare the land either surplus land (and issue an NOA, etc.) or exempt surplus land. With respect to Comment 15, the purpose of Guidelines is to provide clarity in areas of policy where the Legislature remained silent.

Definition of "Development" and "Demolition" – Section 102(i)(2)(B)(i)-(iii)

Comment 14 (Commentor 29): There are a variety of types of leases that the City and other public agencies enter into for a variety of reasons. HCD should not simply state that development is "placing a building on the land." In many instances, leases that will not require development in the more traditional sense will still require a temporary office building/trailer, a guard shack, a restroom facility, etc. Without defining what a "building" is, the City and other public agencies are open to challenge and/or litigation for a lease that may generate revenue for the City on vacant property and is not being used for development purposes. HCD should clarify that any lease with improvements that are not "changing the character of the land from its existing condition…by constructing or placing a building or buildings on the land" is not a disposition.

Comment 16 (Commentor 25): The City does wish to highlight concerns with respect to Sec. 102(i)(2)(B) to these Guidelines, that "development" is not interpreted to preclude the replacement of temporary facilities and related improvements, and that "demolition" is not interpreted to preclude reasonable tenant improvements to existing buildings, such as to comply with building codes and replace buildings that reach the end of their structural life with in-kind buildings

Comment 21 (Commentor 32): Uncertainty related to long-term leases: In 2023, SLA legislation clarified that both leases for 15 years or less, and leases of any term on which no development or demolition will occur, are not considered a "disposition" under the SLA. Those statutory clarifications are very helpful. However, the City does wish to highlight concerns with respect to Sec. 102(i)(2)(B)) to these Guidelines, that "development" is not interpreted to preclude the placement of temporary structures and

related improvements, and that “demolition” is not interpreted to preclude reasonable tenant improvements to existing buildings, such as to comply with building codes.

Comment 23 (Commentors 44, 69, 76, 90, 53, 75, and 111): Disp (sic) of Surplus Land: The reference in (2)(B)(i) that “development” means placing land in a “more useable” condition is vague and subjective. The clause “to a more useable condition” should be deleted so it reads “…changing the character of the land by constructing or placing a building or buildings on the land…”

Comment 24 (Commentor 33): CBE requests additional safeguards to ensure the definition of “Disposition” set forth in Section 102(i)(2)(B) does not become an oppressive loophole. If new housing units are produced or made available during the term of a lease subject to Guidelines Section 102(i)(2)(B), HCD must set forth a process for ensuring that those new housing units comply with the affordability requirements of the SLA. CBE further requests that any permits for development or demolition be made publicly available. Without CBE’s proposed monitoring and public reporting, this guideline could foreseeably allow an agency to lease a property for 100 years free and clear with no affordability requirements. Under this definition, the SLA could be bypassed so long as the parties (whether true or not) assert that the transaction is a lease pursuant to this section and that any proposed development or demolition are updates to existing building.

Comment 25 (Commentor 94): Under the proposed Guidelines, there is an open question as to whether adaptive reuse projects such as our client’s qualify as a “disposition” under the SLA. The proposed Guidelines state that a lease for surplus land where “no development or demolition will occur” does not constitute a disposition under the SLA. (Guidelines, Section 102, subd. (i)(2)(B).) The Guidelines further define “development” in this context to include “reusing an existing building for a purpose other than the purpose for which it was originally built or designed.” (Guidelines, Section 102, subd. (i)(2)(B)(i).) Yet, the Guidelines also expressly exclude from the definition of development “making improvements, renovations, or updates to an existing building, while preserving its structural integrity.” (Guidelines, Section 102, subd. (i)(2)(B)(iii).)

Response: HCD agrees with Comments 14, 16, 21, and 23. The existing language makes clear that temporary structures that can be easily removed, or tenant improvements, are not changing the condition or character of the land. However, HCD has added new language to clarify that replacing existing buildings may not constitute a disposition. The new language reads, “Development and demolition do not include making improvements, renovations, or updates to an existing building, while preserving its structural integrity**,** or replacing an existing building that has reached the end of its structural life with a building that will be used for the same purpose.” With respect to Comment 24, this suggestion goes beyond statute and is not within HCD’s authority. Under the SLA, HCD is not authorized to enforce affordability requirements. Section 54222.5 of the SLA identifies six (6) entities that may monitor and enforce affordability requirements. HCD is not one of those 6 entities. With respect to Comment 25, the

Guidelines are clear that reusing an existing building for a purpose other than its original purpose (i.e., adaptive reuse) is a disposition. HCD added language to clarify that replacing an existing building for the same purpose is not a disposition.

Definition of "Disposition and Development Agreement" – Section 102(j)

Comment 26 (Commentor 28): This section should be modified to specify that the agreement binds the local agency if permits and entitlements are obtained and the developer satisfies other conditions precedent contained in the agreement. A common example of such a closing condition is that the developer obtain the necessary financing for the project.

Response: HCD agrees with the Comment. Language has been revised to reflect requested change. New draft language reads, "... if permits and other entitlements for the project are obtained and other applicable conditions are met."

Definition of "Exclusive Negotiating Agreement" – Section 102(l)

Comment 27 (Commentors 44, 69, 76, 90, 53, 75, and 111): ENA: This definition should be amended to note that an ENA doesn't just restrict parties from "making similar deals." An ENA prohibits a property owner from negotiating with or considering offers from any other prospective purchaser/lessee.

Response: HCD agrees with the Comment. New draft language has been amended to reflect that an ENA prohibits local agencies from negotiating with other entities once an ENA has been adopted.

Definition of "Findings Letter" – Section 102(o)

Comment 28 (Commentors 44, 69, 76, 90, 53, 75, and 111): Findings Letter: The second sentence is not a definition but a procedural guideline and is already addressed in Section 400.

Response: HCD disagrees with the Comment. The current definition provides more clarity. HCD wants to make especially clear that after receiving a Findings Letter, a local agency always has the opportunity to respond with additional documentation or a plan to cure and correct.

Definition of "Housing Sponsor" – Section 102(r)

Comment 29 (Commentors 44, 69, 76, 90, 53, 75, and 111): Housing Sponsor: This definition should explicitly include entities that have self-certified as housing sponsors in accordance with CalHFA's procedures and form as provided for at https://www.calhfa.ca.gov/apps/HSC/HSC. Calling this out here would also make eligible entities aware that such self-certification is available.

Response: HCD agrees with the Comment. A link to the CalHFA Certified Housing Provider self-certification website has been added to the Guidelines.

Section 103: Exemptions

Terminated Agreements – Section 103(b)(7)

Comment 31 (Commentors 44, 69, 76, 90, 53, 75, and 111): Terminated agreements: The statute limits the ability to revive terminated agreements to agreements revived prior to January 1, 2024. See the last sentence of Government Code 54234(d).

Comment 32 (Commentor 30): Section 103 (b) (7) This section discusses the new provision within recently enacted legislation that allows for the disposition deadline extension to December 2027 (previously December 2022) for agreements entered into prior to September 2019.

Response: HCD understands the rationale behind the Comments. However, the language in the statute appears to be a drafting error. Using the January 1, 2024 deadline, which is the date the statute was adopted, would render this provision meaningless and unusable.

Extension of Grandfathering Deadlines, Developments Lager than 100 units – Section 103(a)(3)

Comment 33 (Commentor 28): Pursuant to Government Code Section 54234(a)(3), this section should be modified to reflect that entering into a DDA to dispose of the property, and not the actual disposition of the property, is required to occur by December 31, 2027.

Response: HCD agrees with the Comment. Guidelines have been modified by removing language that required the disposition be completed by December 31, 2027 and replaced it with language requiring the local agency to enter into a DDA before December 31, 2027.

Small parcel exemption – Section 103(c)(3)

Comment 36 (Commentors 73 and 85): The exception in Section 103(c)(3)(A)(i) states that “each parcel of land shall be considered a distinct unit of exempt surplus land, except that contiguous parcels that are disposed of simultaneously to the same receiving entity, or any entity working in concert with another receiving entity, shall be treated as a single unit of land.” There are multiple areas within the SLA where the Legislature intended to treat contiguous land in a certain manner, including in the small parcel exemption, but in drafting the recent amendments the Legislature chose not to introduce the concept of contiguous parcels or put any conditions on the disposition of parcels that are less than one-half acre in area. The statute is very clear that individual parcels that meet this exemption can be disposed of without further regard to the SLA.1 Furthermore, this exception will cause confusion and uncertainty as to how it should be implemented in practice. For example, if an agency acquired three contiguous parcels of land that are 10,000 square feet each to construct a project, the statute clearly allows the agency to declare each individual parcel as exempt surplus land and proceed with

the disposition of the property without further regard to the SLA. Many agencies would simultaneously market each individual property to the public for purchase. If, however, a buyer offers to purchase all three parcels in one transaction, would this mean that the agency could not accept this offer, would have to go back and declare these parcels as surplus land, and then go through the noticing process even though each individual property was declared exempt and marketed separately for sale? It is unclear what the agency's obligations are should a potential buyer seek to purchase multiple contiguous parcels, notwithstanding how they were marketed for sale. An exception should not be triggered by how a potential buyer responds as that is out of the agency's control

Comment 37 (Commentor 5): Sections 103(3) and 202(c): Disposition of contiguous small surplus land parcels (less than 0.5 acre) to be treated as one single unit of land to the same receiving entity presents a challenge to the local agency who may wish to dispose of each parcel separately at the agency's discretion. Additionally, the local agency does not know who the receiving entity will be prior to SLA compliance nor does the agency have authority to negotiate with a potential receiving entity based on existing SLA guidelines.

Response: HCD disagrees with the Comments. In Government Code section 54220, the Legislature clearly declares the intent and purpose of the SLA is to make land suitable for affordable housing available to affordable housing developers. Contiguous parcels of land, measuring more than ½ acre, sold to the same purchasing entity are suitable for the development of affordable housing, and it is HCD's mandate to make such land available to affordable housing developers. Additionally, it is important to note that the contiguity restrictions only apply where the same contiguous parcels are sold to the same receiving entity. As such, HCD has added identical language to Section 202(c).

Agency to agency transfer exemption – Section 103(c)(5)

Comment 38 (Commentors 44, 69, 76, 90, 53, 75, and 111): Agency to Agency transfer: This provision misstates the requirement in the statute. There is no requirement that the third party agree to use the property for an agency use. The statute requires that the property ultimately must be transferred to another local agency for that agency's use. The Guidelines should require that the disposition agreement with the third party must require that this subsequent transfer take place within a specified period.

Response: HCD agrees with the Comment. Language has been amended to remove references that mandate a third party must use property for "agency's use." New language also clarifies that the property must ultimately be transferred to a local agency within a reasonable amount of time.

Exempt surplus land for affordable housing – Section 103(c)(7)

Comments 34 and 39 (Commentor 80): Section 103 (B) and law states "A mixed-use development that is more than one acre but less than 10 acres in area. The land may

be a single parcel or multiple adjacent or non-adjacent parcels." Please clarify that the "land" must be 1-10 acres, not the development.

Comment 35 (Commentors 44, 69, 76, 90, 53, 75, and 111): 103(c)(2) This term is already defined separately at 103(c)(7). To avoid confusion, we recommend instead retaining the original heading ("City or County Surplus Land Transferred Pursuant to Government Code Section 25539.4 or 37364.")

Response: HCD agrees with Comments 34 and 39. Language has been revised to indicate that the surplus land, not the housing development, must be between 1 and 10 acres. HCD partially agrees with Comment 35. Language has been revised to clarify titles of subsections. Section 103(c)(2) is now "City- and County-Owned Land for Affordable Housing Development", and Section 103(c)(7) is now "Mixed-Use Developments for Affordable Housing."

Mix-use development, 10 or more acres, Exemption – Section 103(c)(7)(C)(iv)

Comment 40 (Commentor 57): Section 103(7)(c)(iv): Requirements for concurrent construction of residential housing with nonresidential development, as well as the need for 25% of total planned affordable units to be made available at the same time as 25% of the nonresidential uses is problematic. This requirement presents a burden to overall development timing and project economics. Every project is different and there are too many circumstances that govern the sequencing of a build-out such as financing, environmental conditions and mitigations, infrastructure delivery, and many others. This provision could prevent a site from being positioned to accommodate affordable housing because of the artificial matching of delivered components on a pari passu basis.

Response: HCD disagrees with the Comment. Current language is consistent with statute. Section 103(c)(7)(C)(iv) notes, "If nonresidential development is included in the development pursuant to this subparagraph, at least 25 percent of the total planned units affordable to lower income households shall be made available for lease or sale and permitted for use and occupancy before or at the same time with every 25 percent of nonresidential development made available for lease or sale and permitted for use and occupancy."

Mixed-Use Developments, Multiple – Section 103(c)(7)(A)-(C)

Comment 41 (Commentors 44, 69, 76, 90, 53, 75, and 111): Subsections (A), (B), and (C)(iii). "At the time of sale" should be "At time of Disposition" to ensure that recorded affordability covenants are required in the case of leases as well as sales of surplus land. Section 103(c)(7)(C)(i)(I). "300 or more residential units" should read "300 residential units". Anything greater implied by "or more" is covered by the following paragraph. Section 103(c)(7)(C)(v), line 5. The phrase "if an action occurs after disposition" should read "if an action occurring after disposition" or "if an action that occurs after disposition." Section 103(c)(7)(D) The reference to "the affordability requirements found in Section 102(a) of these Guidelines" is insufficient. The definition

of “Affordable housing” in Section 102(a) refers to affordable housing cost and affordable rent but does not include the term of such restrictions. The statute explicitly requires terms of 55 years for rental housing, 45 years for owner-occupied housing, and 50 years for housing located on tribal trust lands. The Guidelines should include these time limits.

Comment 42 (Commentor 94): (our) reimagined project would not comply with the stringent requirements of the Guidelines, Section 103(c)(7), such as the open competitive bid requirement (Guidelines, Section 103(c)(7)(C)(ii)) or the 300-housing unit minimum (Guidelines, Section 103(c)(7)(C)(i)(I)). We recommend providing an alternative pathway for cities such as Compton that may not have resources for a solicitation process or capacity for 300 units but that would especially stand to benefit from community-serving redevelopment projects such as our client’s project. For instance, we propose including additional language in Section 103(c)(7)(C) clarifying that cities that fall below a certain size or that have been historically under-resourced need only meet a defined set of minimum requirements to satisfy the solicitation process. Overly onerous requirements may paradoxically result in lesser housing development by stymying otherwise promising landfill remediation projects with housing components.

Response: HCD partially agrees with Comment 41. HCD disagrees that language should read “300 units” as that language is too specific and does not include developments greater than 300 units. HCD also disagrees with recommended changes to “affordable housing” language as Guidelines already refer to the Heath and Safety Code definition and “Affordable housing cost” and “Affordable housing rent” are defined in Sections 102(b) and (c). HCD agrees with the Comment as it applies to the language “if an action that occurs after disposition.” Although this language is directly from statute, it appears that the statute is missing language. HCD revised the Guidelines to read: “...if an action occurs after disposition <u>that violates this subsection</u>...” HCD disagrees with Comment 42 as it goes beyond statute and HCD’s authority.

Exemptions for Valid Legal Restriction – Section 103(c)(8)

Comment 43 (Commentors 44, 69, 76, 90, 53, 75, and 111): Valid Legal Restriction: Section 103(c)(8)(A)(iv) [incorrectly labeled as “ii”]. We strongly disagree that valid legal restrictions may include “local voter-approved Initiatives.” The statute at Section 54221(f)(1)(J)(i) specifically covers only “surplus land that is subject to a valid legal restriction that is not imposed by the local agency”. This is not limited to restrictions imposed by the local legislative body. Restrictions imposed by voter initiative are tantamount to restrictions imposed by the legislative body of the local agency. Deeming local voter initiatives as presumptively valid legal restrictions would create a loophole for skirting the requirements of the SLA for sites that don’t otherwise qualify for an exemption.

Response: HCD agrees with the Comment. The courts have consistently ruled that when a populace of any jurisdiction employs its initiative or referendum power, that populace is temporarily acting in the capacity of the legislative body. Therefore, a local city or county initiative would be no different than if the City or County Council adopted the same language. For reference, please see *Spencer v. City of Alhambra* (1941) 44 Cal. App. 2d 75, 77; *Rossi v. Brown* (1995) 9 Cal. 4th 688, 715–16 and *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591.

Exemptions for School Districts – Section 103(c)(10)

Comment 44 (Commentor 57): Exemptions for School Districts: Please clarify if K-12 school districts and community college districts are exempt from the SLA process. In Section 103(c)(10), it is indicated that some school districts in certain situations would be expressly required to comply with SLA guidelines, which is unclear in what specific circumstances that applies. What special circumstance would require a school district to comply with SLA?

Comment 45 (Commentors 44, 69, 76, 90, 53, 75, and 111): 103 (c)(10) The list of applicable sections of the Education Code should read "…81399, 81420, or 81422…" AB 480 included the addition of the word "or" to section 54221(f)(1)(L)(i) to make clear that compliance with any of the cited sections of the Education Code is sufficient to qualify as Exempt Surplus Land.

Response: HCD disagrees with Comment 44. In specific cases where school districts are exempt from the SLA, the Guidelines already identify the relevant code sections. Also, please note the additional language clarifying the applicability of the SLA to school district land found in the new Section 103(c)(13). HCD agrees with Comment 45. The word "or" has been added to the Guidelines.

Mixed-Use Affordable Housing Exemption for Transportation Districts – Section 103(c)(18)

Comment 46 (Commentor 88): The Surplus Land Act includes exempt surplus land for "local agencies whose primary mission or purpose is to supply the public with a transportation system" (Section 54221(f)(1)(S)). The draft guidelines conflicts with the Surplus Land Act in changing the "local agencies" to be land owned by "transportation districts" (Section 103(18)). "District" has a specific meaning in the Surplus Land Act, which changes the applicability of this exempt surplus land section. Thus, this section must be revised to match the Surplus Land Act language.

Comment 47 (Commentor 88): The draft guidelines in at least two sections undermine the building of affordable housing and undermines an agency's ability to achieve its Regional Housing Needs Allocation goals or climate change goals. Section 300(a)(3) requires affordable housing units to be constructed and completed not later than the unrestricted units and non-residential portion of the development. Section 103(c)(18) has similar language. In an ideal world, phasing would occur in this way, but the

sections simplify and misunderstand the complexities of affordable housing financing. Affordable housing may be dependent on the construction of other phases of a development as such housing often requires complex funding arrangements (e.g., cross-subsidies) and 100% affordable housing buildings, thereby putting an entire development in jeopardy. Thus, these sections must be deleted or revised to match the Surplus Land Act language.

Comment 48 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 103(c)(18)(A)(ii). This paragraph refers only to the affordability restrictions contained in Section 102(a) of the Guidelines. The minimum term of affordability of 55 years for rental housing, 45 years for owner-occupied housing, and 50 years for housing located on tribal trust lands should be explicitly stated here.

Comment 49 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 103(c)(18)(A)(iii). This paragraph correctly states that the agency may not dispose of land for non-housing purposes until there is a legally binding agreement (entered into since January 1, 2020) to dispose of at least 25 percent of the land for affordable housing in the agency's adopted plan or policy. However, the examples that follow mistakenly calculate this as 25 percent of the required affordable units. The agency's adopted plan must designate the specific parcels on which the affordable units will be located and calculate the total area of that land, and the agency must then dispose of 25 percent of that land area prior to entering into an agreement to dispose of land for non-residential development.

Comment 50 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 103(c)(18)(B)(ii). This paragraph refers to "each housing project" and "the project being proposed" but it is not clear what this means, particularly in the case of disposition of multiple parcels that may have multiple "projects" developed over time. The last sentence here is unnecessary and may lead to more confusion rather than clarification.

Response: HCD agrees with Comment 46. In the interest of being specific with respect to transportation districts, HCD amended the language to read "Land owned by local agencies whose primary mission or purpose is to supply the public with a transportation system may be used to develop..." HCD disagrees with Comment 47, as it applies to Section 103(c)(18). (See below for comments concerning Section 300(a)(3).) The statute requires that certain affordable housing requirements must be met "prior to" acting on developments for non-residential purposes. Statute requires "(vi) Prior to entering into an agreement to dispose of a parcel for non-residential development on land designated for the purposes authorized pursuant to this subparagraph in an agency's adopted land use plan or policy, the agency, since January 1, 2020, must have entered into an agreement to dispose of a minimum of 25 percent of the land designated for affordable housing pursuant to subclause (II)." HCD disagrees with Comment 48. The relevant affordability definitions and terms are already included and defined in the Definitions section of the Guidelines. HCD agrees with Comment 49. Housing formulas have been removed and subparagraph (iii) now reads: "... to dispose of at least 25 percent of the land pursuant to subparagraph (ii)." HCD agrees with

Comment 50. Paragraph (B)(ii) now reads: “Include the appropriate affordability covenants or restrictions recorded against surplus land that will be used to meet the plan’s affordability requirements. At least 25 percent of the residential units proposed, in the entirety of the land use plan or policy, but not necessarily individual parcels, must include affordable housing pursuant to Section 102(a) of these Guidelines.”

Exempt Surplus Land Reporting Requirements – Section 103(e)

Comments 51-115 (Commentors 1, 2, 3, 4, 6, 7, 8, 11, 13, 14, 15, 16, 34, 35, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 74, 77, 79, 81, 82, 86, 87, 91, 92, 93, 95, 96, 97,99, 101, 102, 103, 104, 106, 107, 108, 109, 110, 112, and 113): The Draft Updated Guidelines Misapply the SLA to the Agency’s Use Land and Improperly Purport to Apply the SLA to Exempt Surplus Land. The Draft Updated Guidelines continue to fail to include any reference whatsoever to the plain language of Government Code Section 54222.3, which conflicts with many of the proposed guidelines’ changes related to exempt surplus land, and plainly states that: “This article shall not apply to the disposal of exempt surplus land as defined in Section 54221 by an agency of the state or any local agency.” Unless a code section specifically references applicability to exempt surplus land, the presumption is that all the provisions of this article do not apply to “exempt surplus land” (upon determination by an agency that a parcel is “exempt surplus land”). For an example of where a single particular type of “exempt surplus land” is expressly referenced as subject to the SLA (pursuant to a process to comply with HCD approval), see 54221(f)(1)(P)(iv). The Draft Updated Guidelines unjustifiably place HCD in the middle of exempt surplus land determinations notwithstanding those statutory limitations.

Comment 116 (Commentor 9): This additional process affecting the disposal of exempt surplus lands is in direct conflict with Section 54233 of the SLA. HCD lacks statutory authority to implement this. Similar proposals in AB 480 (Ting), were rejected by the Senate Governance an Finance Committee, in committee amendments reflected in the 7/3/23 version of the bill. Furthermore, this expanded process will significantly complicate and delay the ability of local agencies to dispose of land which the Legislature has specifically identified as exempt, and which by statute, is not subject to the provisions of the Act. Under this new provision in the Guidelines, HCD can bog-down disposals by requesting “additional documentation,” to start another 30-day review clock, second-guess local agencies over dispositions, request additional findings, making them respond to new finding letters, etc. Similar to HCD’s changes to “agency’s use, it appears that HCD intends to use this as a way to begin a new review process for all dispositions of property of a local agency including those identified as “exempt surplus land,” and create new delays by beginning to question whether property qualifies as “exempt surplus land” under these new provisions. This proposal has no basis in statute.

Comment 117 (Commentor 61): In general, although Metro has acquiesced to HCD’s request that it provide HCD with a 30-day prior notice (including a copy of its

determination, together with written findings supporting the determination) for disposition of "exempt surplus land," it is worth noting that the requirements set forth in Section 400(e) of the Guidelines are an impermissible enlargement of the SLA. In fact, the SLA itself does not require a local agency to provide HCD with 30-day prior notice for all categories of "exempt surplus land." The SLA requires only that a local agency make a determination of "exempt surplus land," as supported by written findings, before the local agency takes action to dispose of the land. See Gov. Code § 54221(b)(1). And, for just one category of "exempt surplus land," i.e., in Government Code Section 54221(f)(1)(P)(iv), the Legislature requires a local agency to provide HCD with a 30-day prior notice with respect to a disposition.

Response: HCD disagrees with the Comments. HCD has authority to review proposed "exempt surplus land" dispositions under the SLA pursuant to Government Code sections 54230, 54230.5(b)(1), 65585.1, etc. Under the SLA, HCD is required to review all surplus land dispositions and therefore, HCD must also review exempt surplus land dispositions to ensure they are not, in fact and in law, "surplus land dispositions."

Section 104 – Agency's Use

Definition of Agency's Use – Section 104(a)

Comment 118 (Commentor 9): (we oppose) narrowing the interpretation of the scope of permissible "agency's use" by dropping the expansive phrasing of statute "shall include, but not limited to" to precede the list of examples of agency use, and substituting it with only the word "include." Sec. 104(a). Narrowing the scope of permissible "agency's use" to "agency work or operations," which the statute does not so limit "agency's use". Sec. 104(a).

Comment 119 (Commentor 28): To maintain consistency with Government Code Section 54221(c), this section should specify that "agency's use" shall include, "but not be limited to", the uses specified in this section. The phrase, "or any such development designed to support the work and operations of an agency project" in Section 104(a)(3) should be deleted or clarified.

Comment 120 (Commentors 44, 69, 76, 90, 53, 75, and 111): This paragraph states that land disposed to "support agency work or operations" qualifies as "agency's use". This is not correct and is explicitly contradicted by statutory language at Government Code 54221(c)(1) that limits "agency's use" to "land that is being used, or is planned to be used pursuant to a written plan adopted the local agency's governing board, for agency work or operations…" Section 54221(c)(2)(A) makes clear that land disposed for purposes other than agency work or operations, including generation of revenue that might be construed as supporting agency work or operations, is not considered agency's use. Section 54221(c)(2)(B) then establishes a specific exception for districts that such other uses may constitute "agency's use" if the agency's governing body declares that such use will "directly further the express purpose of agency work or

operations." Districts are the only local agency for which land disposed of to "support" agency work or operations might constitute agency's use.

Comment 121 (Commentor 94): We also wish to emphasize the importance of the HCD giving consideration to special projects focused on cultural development. One of our clients plans to create an art museum at a central location in the Downtown Los Angeles. The creation of the museum centers on promoting healing, education, and cultural preservation while also uplifting voices and experiences within Chicano and Mexican arts and culture. The SLA guidelines should account for transformative projects such as our client's museum project at unique sites by clarifying the definition of "Agency work or operations" in Section 104(a)(1) of the Guidelines to more clearly include public-private partnership educational and cultural facilities. The provision of such institutions is an essential function of local agencies in California.

Response: HCD agrees with Comments 118-120. To provide clarity, HCD has added the language "including but not limited to," to Section 104(a) and deleted "or any such development designed to support the work and operations of an agency project" in Section 104(a)(3). HCD disagrees with Comment 121. The inclusion of "public private partnerships" would go beyond statute. The list of examples in the Guidelines aligns with statute.

Agency's Use, Entirety of Use – Section 104(a)(2)

Comment 122 (Commentor 9): Restricting the use of property reserved for "agency's use" by establishing new criteria that the identified land must be used in its entirety for agency's use, and that that it must comply with the SLA disposal process for any portion of the land that alleged by HCD to not be used for agency's use. This proposal has no basis in statute. Sec. 104(a)(2).

Response: HCD mostly disagrees with the Comment. Allowing a local agency to dispose of a large parcel of land as "agency's use" when only a small portion of that land will be used for agency's use would create a significant loophole in the SLA. Instead, the Guidelines require the disposition of larger parcels of land via the standard disposition process, but at the same time allow a local agency to place a reasonable condition/restriction on the portion of the land that will be used for agency's use within the issuance of the NOA. This allows local agencies to use their land in creative ways that result in various types of uses. However, HCD has removed the following language: "Only land intended and, in fact, used in its entirety by a local agency for agency's use will qualify as agency's use."

Eminent Domain Transfers – Section 104(b)

Comment 123 (Commentor 9): Establishing conditions for the disposal of local agency property that was acquired by eminent domain. This proposal has no basis in statute. Sec. 104(b)

Comment 124 (Commentor 85): SGVCOG appreciates the clarification HCD added to the Draft Guidelines regarding what constitutes an “agency’s use” in the context of properties acquired in accordance with Eminent Domain Law. A majority of SGVCOG’s surplus land consists of parcels acquired, in whole or in part, through the Eminent Domain Law in order to build public infrastructure that benefits the traveling public in the San Gabriel Valley. The purpose of including this clarification of an agency’s use was to recognize that property acquisitions can be handled to further the Eminent Domain Law statutory requirements to mitigate potential damages to a private property owner consistent with the agency’s obligation to acquire property in a manner that is compatible with the greatest public good and the least private injury. Proposed Section 104(b)(1) states that an agency’s use applies when “land is transferred to another property owner for the purpose of mitigating impacts to the transferee property owner resulting from the local agency’s development project.” The use of the word development creates a bit of ambiguity since the term is not defined. Most eminent domain actions do not involve development as that term is generally understood, but rather transportation projects, such as road improvements, rail projects, bike lanes, and other types of transit. SGVCOG requests that the term “development” be removed from this definition so that this clarification of agency’s use applies to a variety of public projects where agencies may need to acquire eminent domain and mitigate damages to private property owners.

Comment 125 (Commentor 50): In reviewing the draft Updated Surplus Land Act Guidelines, I noticed the language in Section 104(b) regarding the transfer of land that was acquired by means of eminent domain. Specifically, section 104(b)(2) limits this provision to land that was acquired for the express purpose of transferring the land “to another entity with eminent domain authority.” It is not clear why this limitation is needed or justified and the Statement of Reasons does not explain it at all. I am aware of significant public projects where the lead agency has not had the power of eminent domain and had to rely on related agencies to acquire property by eminent domain and transfer it to them. If I read this limitation correctly, it would only allow the transfer of land to an agency that already had the power of eminent domain. This would mean that a transfer to an agency without eminent domain power would need to go through the surplus land process, even when the land is required for a public project and even when the agency that seeks the property has paid the condemning agency to acquire it. I can’t conceive of a reason for using this wording and urge you to remove the words “with eminent domain authority” from section 104(b)(2).

Response: HCD disagrees with Comment 123. Transportation districts needed clarity regarding eminent domain transactions. The Guidelines language clarifies that such transactions, within a clearly defined scope, qualify as agency’s use. HCD agrees with Comments 124 and 125. HCD changed the term “development” to “project” and removed the language “with eminent domain authority” as a qualifier for the receiving entity.

Agency's Use Reporting Requirements – Section 104(c)

Comments 126-180 (Commentors 1, 2, 3, 4, 6, 7, 8, 11, 13, 14, 15, 16, 34, 35, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 74, 77, 79, 81, 82, 86, 87, 91, 92, 93, 95, 96, 97,99, 101, 102, 103, 104, 106, 107, 108, 109, 110, 112, and 113): The Draft Updated Guidelines Misapply the SLA to the Agency's Use Land and Improperly Purport to Apply the SLA to Exempt Surplus Land. Agency's use is a category of land which is neither surplus land nor exempt surplus land, for which the SLA preserves certain local agency prerogatives. AB 480 and SB 747 did not make material changes to the SLA's agency's use provisions, and evidence clear legislative intent not to do so. The Draft Updated Guidelines delete an existing definition of agency's use land in Section 102(d), which had been consistent with statute negotiated by local agencies to remove opposition to AB 1486. This problem is exacerbated in proposed Section 102(cc), which changes the definition of Surplus Land by incorporating a reference to the proposed Section 104 Agency's Use definition, therefore causing an inconsistency between the Surplus Land definition in the Draft Updated Guidelines and statute and consequently undermining local agencies' utilization of land for agency's use purposes.

Comment 181 (Commentor 9): Establishing a new "Notice of Disposition" requirement for properties disposed under "agency's use," which requires a local agency to provide documentation to HCD that the land meets the definition of "agency's use" in these revised Guidelines 30 days prior to disposition. It appears that HCD intends to use this as a way to begin a new review process for all dispositions of property of a local agency including those identified as "agency's use," and create new delays by beginning to question whether all portions of a property qualify under these new definitions. This proposal has no basis in statute. Sec. 104(c). Comment: There is no statutory authority for these major revisions to "agency's use." Moreover, the Legislature specifically rejected provisions in AB 480 (Ting), Ch. 788 of 2023, which proposed to provide HCD authority over disposals of exempt surplus land and agency's use. (See relevant analysis of AB 480 from the Senate Governance and Finance Committee, and amendments made by the committee to the bill, including the deletion of proposed section 54221.5 in the 7/3/23 version). The chaptered version of AB 480 made only three minor changes to expand the statutory definition of "agency's use,"

Comment 182 (Commentors 44, 69, 76, 90, 53, 75, and 111): 104(c) The language here should refer to "A local agency that is a district" and should then reference Section 104(a)(4)

Response: HCD disagrees with Comments 126-181. HCD has authority to review proposed "Agency's Use" dispositions under the SLA pursuant to Government Code sections 54230, 54230.5(b)(1), 65585.1, etc. Under the SLA, HCD is required to review all surplus land dispositions and therefore, HCD must also review "agency's use" dispositions to ensure they are not, in fact and in law, "surplus land dispositions." HCD

disagrees with Comment 182. Section 104(c) describes noticing requirements to HCD and those requirements apply to all local agencies, not just districts.

Article II

Section 200 – Surplus Land Determination Process

Surplus Land Determination Process, Introduction – Section 200(a)

Comment 183 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 200(a). This section should make clear that, with the exception of the actions noted in paragraphs (1) through (3), an agency should not only refrain from negotiating, but must also not solicit or accept offers to purchase or develop surplus land until the agency has first sent Notices of Availability to the specified entities and, if it receives any responses, completes negotiations with those parties. We have seen instances where agencies have declared land to Availability to specified entities. Such actions create the impression that the agency is not serious about negotiating first with those specified entities and will immediately consider proposals from others.

Response: HCD agrees with the Comment. HCD has added the following language, "A local agency may not solicit or accept offers to purchase or develop surplus land until the agency has first sent an NOA and, if the agency receives any responses to the NOA, completed negotiations with those parties."

Section 201 – Notice of Availability

Noticing HCD – Section 201(a)

Comment 184 (Commentor 29): Section 201 (a)(1)(A): with the elimination of the publiclands@hcd.gov email address, how can the issuance of the NOA be directed to HCD for the purposes of satisfying this requirement? Is there/will there be a new procedure? Should agencies mail out a physical copy of the NOA to HCD's main address? Will there be a new email address to include during the issuance process? Currently there is an auto reply attached to the publiclands@hcd.gov address that states the address is no longer monitored with the adoption of the new portal

Response: HCD agrees with the Comment and has added language indicating NOAs should be sent to HCD via the SLA Portal.

Notice of Availability – Section 201(a)

Comment 186 (Commentors 44, 69, 76, 90, 53, 75, and 111): Sec 201 Section 54222 of the SLA refers separately to (a) "a written notice of availability for developing low- and moderate-income housing," (b) "a written notice of availability for open-space purposes," (c) a written notice of availability of land suitable for school facilities construction or use by a school district for open-space purpose," and (d) a written notice of availability for developing property located within an infill opportunity zone". It is unclear whether this language anticipates separate notices or even an agency determination as to which of

these uses is appropriate, but subsequent language in Section 54227 makes clear that an agency should be soliciting interest from all four of these entity types.

Response: HCD agrees with the Comment. HCD has added language clarifying that a local entity must send an NOA to *all* the identified entities in Section 201.

Definition of Local Public Entity – Section 201(a)(1)(A)

Comment 185 (Commentor 18): Please include guidelines or a supplement document that provides more clarification or examples on who/what constitutes a "local public entity" and "park/recreation agencies" for notification purposes. For a City looking to dispose of surplus land, the provided definition, in its attempt to cover the vast array of possibilities that exist throughout the state, is so broad it is unclear how to meet this requirement. Thank you.

Response: HCD partially agrees with the Comment. HCD has added the statutory definition of "Local Public Agency" to Section 102(t) of the Guidelines.

Section 202 – Disposal of Surplus Land for Affordable Housing

Disposal of Surplus Land, Introduction – Section 202

Comment 187 (Commentors 44, 69, 76, 90, 53, 75, and 111): Sec 202: This section states that a local agency must declare property to be surplus land prior to negotiating the disposal of that land. This should instead note that the declaration must take place prior to taking any action to dispose of that land, as required by Section 54221(b)(1) of the SLA. This includes restrictions not only on negotiations, but also on issuance of RFPs or RFQs to entities other than those specified in Section 201 of the Guidelines. Section 202. must make clear that the declaration must take place prior to taking any action to dispose of that land, as required by Section 54221(b)(1) of the SLA.

Comment 192 (Commentors 44, 69, 76, 90, 53, 75, and 111): This section refers only to disposal of surplus land for affordable housing. Either in this or the preceding section, the Guidelines should also discuss how to respond to notices of interest for developing land for open space, for education, or in infill opportunity zones or transit village plans. Sections 202(a)(1)(A)(i) and (ii) These sections might better be placed in Section 200(a).

Response: HCD agrees with Comment 187 and has changed the language from "Prior to negotiating the disposal of surplus land" to "Prior to taking any action to dispose of surplus land...." HCD disagrees with Comment 192. This recommendation is outside of HCD's purview.

Restrictions on Issuance of an RFP – Section 202(a)(1)(A)

Comment 193 (Commentor 100): Sec. 202 (a)(A)(ii): "If a notice of interest is received in response to an NOA, a request for proposals may not be issued until after the conclusion of the 90-day negotiation period." First of all, the wording is singular ("a

notice of interest") not plural. It should be plural (i.e., "If notices of Interest are"). Also, a notice of interest is not a proposal. With this in mind, after the 60-day hang period for the NOA, if there is one or more NOIs, the local entity needs to request information from a NOI interested party that describes what their proposed project consists of. Remember, local jurisdictions are always looking for physical, financial and affordability feasibility. HCD should encourage this type of concern. a minimum, a request for information is necessary in most cases (some jurisdictions call such requests an RFP). After receiving the requested information, it could be followed by requests for clarifications and interviews. Once that process is completed, if may be possible to make a selection, but not always. In other words, it could take much longer for several reasons (e.g., background checks).

Comment 194 (Commentor 100): Restricting the issuance of an RFP until after the 90-day negotiation period makes no sense. It violates the principle of "time is of the essence" for honest business dealings. A work around could be to change the name of the request for proposals to the request for information. It seems to me that HCD needs to define what it means by an RFP. Further, a local jurisdiction should not be prohibited from requesting information from a NOI interested party at any time.

Response: HCD disagrees with the Comments. Guidelines language uses the singular of "notice" to ensure the law will trigger even if only one Notice of Interest is received. In response to Comment 194, under current the Guidelines language, local agencies are not prohibited from requesting additional information from entities responding to an NOA with an NOI. Local agencies are permitted to seek additional development, cost, and proposal information typically solicited in an RFP from those entities. The Guidelines only prohibit local agencies from soliciting additional NOIs from entities that did not respond to the NOA via an RFP within the 60-day noticing period and 90-day good faith negotiation period, so as not to violate the Good Faith Negotiations requirements of the SLA.

Local Agency Control of Zoning Decisions – Section 202(a)(1)(C)

Comment 190 (Commentor 57): Zoning compliance: The Draft Guidelines require clarity on a local agency's authority to approve or deny land use zoning entitlement decisions when zoning does not allow residential on a property to be declared surplus. Per Government Code section 54223(b), "nothing in this subdivision shall restrict a local jurisdiction's authority or discretion to approve land use, zoning, or entitlement decisions in connection with the surplus land." Therefore, the guidelines should include language that refers specifically to Government Code section 54223(b).

Comment 191 (Commentor 57): Additional clarity, if a city's parcel doesn't align with housing (zoning)?

Response: HCD agrees with Comments 190 and 191 and has added relevant language from statute affirming local control over zoning decisions.

Good Faith Negotiations – Section 202(a)(1)(C)

Comments 192-247 (Commentors 1, 2, 3, 4, 6, 7, 8, 11, 13, 14, 15, 16, 34, 35, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 74, 77, 79, 81, 82, 86, 87, 91, 92, 93, 95, 96, 97,99, 101, 102, 103, 104, 106, 107, 108, 109, 110, 112, and 113): The Draft Updated Guidelines Subject Local Agencies to a Subjective Open-Ended Definition of "Good Faith Negotiations." Government Code Section 54223 requires that "After the disposing agency has received a notice of interest from the entity desiring to purchase or lease the surplus land on terms that comply with this article, the disposing agency and the entity shall enter into good faith negotiations to determine a mutually satisfactory sales price and terms or lease terms. If the price or terms cannot be agreed upon after a good faith negotiation period of not less than 90 days, the local agency may dispose of the surplus land without further regard to this article.…" The Draft Updated Guidelines undermine the clear timelines established in statute by requiring in Section 202(a)(1)(C)(iv)(V) that a local agency not "arbitrarily end active negotiations after 90 days of good faith negotiations." Section 202(a)(1)(C)(iv)(V) adds a subjective and open-ended requirement for a local agency to continue negotiating after 90 days even though 90 days of negotiations is all that is required by statute. This transforms what is a clear standard in statute into a subjective standard in the Draft Updated Guidelines, thereby interfering with local agencies' ability to efficiently conclude negotiations and transactions. This also exposes local agencies to litigation risk over whether the specific circumstances of a conclusion of negotiations after the 90 days required by statute was "arbitrary."

Comment 248 (Commentor 9): Empowering HCD staff to review concluded negotiations that do not result in an agreement with a housing developer to determine whether they were conducted in "good faith" by adding subjective evaluation criteria such as in (Sec. 202(a)(C)(iv): whether there was a "serious effort" to meet at reasonable times and attempt to reach agreement. This is a completely subjective standard.

Comment 249 (Commentor 9): Empowering HCD staff to opine on whether "reasonable offers" were responded to. Statute (Sec.54221(b)(3)) is clear that local agencies are not required to sell a property for less than market value. So will HCD staff now be determining that offers of less than market value are "reasonable?"

Comment 250 (Commentor 9): Empowering HCD staff to determine whether active negotiations were ended "arbitrarily" after 90 days of good faith negotiations. This moves the goal posts and erodes the clarity of the existing statutory 90-day deadline. It also provides an opportunity for the potential purchaser to engage in stall and delay tactics and potentially work with sympathetic HCD staff to attempt to leverage a lower price or better terms

Comment 251 (Commentor 9): Empowering HCD staff (under Sec. 202(a)(C)(iii)) to request purchase, sale and lease agreements from a local agency disposing of surplus land when good-faith negotiations do not result in disposition to an affordable housing

entity. There is no basis for this continued opportunity for delay, leverage, and intrusion by HCD in statute. If negotiations have concluded, the local agency is free to dispose of the property. Furthermore, providing such ongoing unchecked power and subjective leverage to staffers who can continue to drag out property disposals which can involve millions of dollars invites concerns over the potential for ethical violations.

Comment 252 (Commentor 85): While the Draft Guidelines provide clarity in the good faith negotiation process, proposed Section 202(a)(1)(C)(iv)(V) would extend the good faith negotiation requirement beyond the required 90 days, which is inconsistent with the SLA.3 This proposed revision states that in order to constitute good faith negotiations, the agency must "not arbitrarily end active negotiations after 90 days of good faith negotiations." It is unclear what it would mean to arbitrarily end negotiations, and Government Code Section 54223 is very clear that if the parties cannot agree upon price or terms after a period of 90 days, then the local agency may dispose of the surplus property without further regard to the SLA, with the exception of the requirement to record a deed restriction on the property. In essence, the Draft Guideline could be interpreted to require an agency to continue good faith negotiations past 90 days and used by potential buyers as leverage against an agency. A 90-day period of good faith negotiations is a significant period of time, and if a deal cannot be reached by that time, the agency should be able to move on, even if to another potential provider of affordable housing. If a deal with an affordable housing developer is close, most public agencies, especially the SGVCOG, would continue to negotiate since starting the process all over with another potential buyer would be time consuming and further delay the disposition of property. Holding onto properties for long periods of time causes many issues for the SGVCOG, including additional costs related to ongoing negotiations as well as recurring maintenance costs, such as graffiti/vandalism on properties, especially if they are vacant. If the parties negotiate in good faith for a period of 90 days but cannot reach an agreement for any reason, the statute permits the agency to dispose of the property. In our view, the Draft Guideline conflicts with the statutory language and should be modified to remove this requirement.

Comment 253 (Commentor 28): This section should be modified to clarify that this requirement applies with respect to a respondent that has timely submitted a notice of interest that complies with the SLA.

Comment 254 (Commentor 28): Government Code Section 54223 provides that if the price or terms cannot be negotiated after a good faith negotiation period of at least 90 days, the local agency may dispose of the surplus land without further regard to the SLA, except for the requirement to record an affordability covenant pursuant to Government Code Section 54233. Any purchase and sale agreement or lease contemplated by Section 202(a)(1)(C)(iii) would necessarily be entered into after the end of the good faith negotiation period and, therefore, HCD has no authority to request such agreements.

Comment 255 (Commentor 28): The existing Guidelines already define “good faith negotiation” to mean to deal honestly and fairly with the other party throughout the negotiation process. This existing Guidelines provide sufficient guidance and there is no need to add additional vague and subjective requirements.

Comment 256 (Commentor 29): Define “serious effort” as it relates to meeting at reasonable times and attempts to reach agreements.

Comment 257 (Commentor 29): The SLA states that nothing requires a local agency to dispose of property for less than Fair Market Value. Please define what “reasonable offers” refers to if the local agency will not be disposing for less than its Fair Market

Comment 258 (Commentor 33): Section 200(a) should make clear that, agencies must not only refrain from negotiating, but must also not solicit or accept offers to purchase or develop surplus land until the agency has first sent Notices of Availability.

Comment 259 (Commentor 10): We also oppose the proposed requirement in Section 202(C)(iii) of the Guidelines and in Appendix B (Item 7) where HCD will require that a disposing agency submit to HCD the purchase agreement or lease for surplus land where the land is sold or leased to a private developer after the expiration of the SLA 90-day negotiation period where the disposing agency failed to reach a deal with an affordable developer that had expressed interest in the surplus land. Current law does not impose that requirement on the disposing agency; rather Government Code Sections 54223(a) and 54233 only require that HCD receive a copy of the required 15% affordability restriction that must be recorded in the event of such a land sale, but it does not require that the purchase agreement or lease be provided to HCD. We believe that these provisions should be deleted.

Comment 260 (Commentor 84): This definition (description of negotiations) is unduly broad and could be burdensome to agencies with limited staff. It appears to require the creation of a complete “record” of the communications between the parties. Some of the documents that “must” be attached could also be considered confidential by specific legal privileges or non-disclosure agreements typical in some negotiations. It also assumes that a simple letter or other document describing the local agency’s negotiations would not be sufficient or that an agency communication is entitled to zero weight or credibility. MTS would recommend that HCD create form for agencies to fill out summarizing the negotiations. Additional documentation beyond the summary of negotiations prepared by the local agency should only be requested if necessary to clarify an ambiguity or answer an HCD question.

Response: HCD partially agrees with Comments 192-247, 252, and 255-257. Guidelines language in Section 202(a)(1)(C)(iv) has been amended to “Activities that demonstrate good faith negotiations include, but are not limited to:” In doing so, HCD clarifies that these are examples of activities that demonstrate good faith negotiations, but may not be required for every disposition.

HCD disagrees with Comment 248. The statute requires local agencies to submit a description of negotiations to HCD. It is clear the Legislature intended for HCD to review those negotiations for compliance with the SLA. HCD disagrees with Comments 249 and 250. This language is meant to clarify that while local agencies are required to respond to offers generally, those offers must be reasonable – the local agency does not have to respond to proposals that are clearly non-responsive to the NOA. HCD disagrees with Comments 251, 254, and 259. This provision in the Guidelines is meant to give HCD the ability to review a final price to ensure that local agencies do not reject fair market value offers from housing developers and then accept a less than fair market offer from a non-housing developer. HCD disagrees with Comment 253. The Guidelines are clear that the notice must be submitted during the 60-day period. HCD disagrees with Comment 258. The Guidelines are clear that issuing RFPs/RFQs, etc., except in limited circumstances pursuant to Section 200(a), do constitute negotiations. HCD agrees with Comment 260 and will create a form for the submission of good faith negotiations documentation. Please see Section *Definition of "Description of Negotiations" – Section 102(g).*

Local Agency Conditions on Notices of Availability – Section 202(a)(2)(D)(iv)

Comment 262 (Commentor 100): Proposed Amendments to Section 202 (a)(2)(D)(iii) and (iv): Conditions and restrictions required by the local agency as seller: A local agency may provide entities with real property related information concerning decrements (i.e., easements, soil conditions, contamination, hazardous waste, earthquake fault lines, adjacency to railroad tracks, aviation easements, lack of infrastructure, environmental risks of any kind, statutory real estate transfer disclosures, etc.), preferably within the NOA or supplemental written statements. A local agency may also include references to applicable federal, state, county of local laws or ordinances and/or regulations that may apply to the affected real property (these are typically development and building related). Seek guidance from HCD pursuant to Section 400 before including any other conditions or restrictions for which the local agency wishes to include within a NOA or supplemental written statements. The SLA requires good faith negotiations. If the parties cannot resolve issues that would preclude agreement with respect to the form and details of disposition within the negotiation period (i.e., 90 days or more), local agencies are encouraged to seek guidance from HCD.

Response: HCD appreciates the Comment but disagrees that the suggested new language is necessary.

Definition of First Priority – Section 202(a)(3)

Comment 188 (Commentor 89): The first is Section 202. Disposal of Surplus Land for Affordable Housing. The language states that 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. While this seems like a way to prioritize maximizing the number of affordable units, it does not consider the financial feasibility of a project. Without considering the financial feasibility of a project alongside the proposed number of affordable units, a project may experience delay, amendments, or dormancy because it does not have the feasibility necessary to be successful. We ask that local jurisdictions have the ability to create their own list of criteria that can include number of affordable units and a proposed funding plan.

Comment 189 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 202(a)(1)(C)(iv). We greatly appreciate the added language defining what constitutes "good faith negotiations." Section 202(a)(3). This section should clarify what it means to "give priority" to particular entities.

Response: HCD disagrees with Comment 188. The statute does not identify "financial feasibility" as a criterion for project selection. However, with respect to both Comments 188 and 189, requiring that local agencies give "first priority" does not mean guaranteeing a particular outcome. The Guidelines provide local agencies with significant flexibility when selecting housing developments that meet localized needs. Section 400(b)(3) provides local agencies with the option to select proposals other than those that propose "to provide the greatest number of units" as long as it is accompanied by a letter of explanation that provides a reasonable justification for selecting an alternative proposal.

Recording of Affordability Covenants – Section 202(b)(1)(A)(ii)

Comment 261 (Commentors 44, 69, 76, 90, 53, 75, and 111): Section 202(b)(1)(A)(ii). This section should require restrictions be recorded against the surplus land at the time of sale or lease.

Response: HCD agrees with the Comment and has revised the language in the Guidelines accordingly and for consistency with the statute.

Article III

<u>Section 300 – Requirements When an Entity Proposes to Use the Surplus Land for Developing Affordable Housing</u>

General Comment – Section 300

Comment 263 (Commentor 33): CBE suggests Article III Section 300 reflect the following concerns, surplus land in the following zones listed below shall be exempt from development of affordable housing unless proper environmental review and full remediation is conducted: Land on or within 1,600 feet of a current industrial use or land zoned for future industrial use by right Land on or within 3,200 feet of a facility that currently or previously extracts or refines oil or gas Land within 1,000 feet of freeways

Response: HCD disagrees with the Comment. These recommendations are beyond the scope of HCD's authority.

Producing Affordable Housing Concurrently with Market Rate Housing – Section 300(a)(3)

Comment 264 (Commentor 29): The new guidelines require that affordability be constructed at the same time as market rate units. It takes time, and it delays the construction of affordability units. We cannot dictate how long the developer takes. (oral comment)

Comment 265 (Commentor 23): The City of Los Altos has a comment regarding Section 300(a)(3) (see page 35). This provision is not pro-housing as it too restrictive related to affordable housing development and the timing of when it is to be built in relationship to non-restricted housing units or other non-residential development components of a multi-phase project

Comment 266 (Commentor 43): Section 300. Requirements When an Entity Proposes to Use the Surplus Land for Developing Affordable Housing The affordable residential units must be constructed and completed not later than the unrestricted units and non-residential portion of the development. If the development occurs in phases, the affordability requirement must be met in each phase. I understand the intent, but it does not meet reality. This requirement poses to be problematic for the entirety of the development. Considering the complexities of financing and construction, the timing for the affordable housing could be vastly different from market rate housing. There are many instances where the market rate units are built before the affordable units when in standalone buildings. Some examples include the timing of available financing, the infrastructure needing to be built before the affordable building, the additional financing and operations complexity of the mixed income building because of high need target populations, or the requirements for entitlements. "Affordable rent" means that for rental housing, the rent is restricted for a minimum of 55 years, and 50 years for housing located on tribal trust lands. including a reasonable utility allowance, rent shall not exceed:

Comment 267 (Commentor 28): This section should be modified to provide that the purchase and sale agreement, DDA, or other conveyance agreement for the subject property shall contain provisions that require the affordable units to be developed at substantially the same time as the unrestricted units and non-residential development, if feasible.

Comment 268 (Commentor 29): There is no statutory authority within the original amended SLA or any of the subsequently enacted legislation for HCD to require affordable units to be completed at the same time as any "unrestricted" units. The SLA requires only that a local agency deed restrict property; there is no requirement on construction priority or timelines. In fact, this new requirement would impose new restrictions on the development of housing, which runs contrary to the purpose of the

SLA. This is beyond the authority granted in statute and should be removed from the Draft Updated SLA Guidelines entirely.

Comment 269 (Commentor 10): Section 300(a)(3) of the Guidelines includes a new requirement that in any affordability restriction recorded under the SLA, the affordable housing units must be built not later than the unrestricted housing units and the non-residential portion of a mixed-use, mixed-income development. This insertion of a time requirement by HCD to build the affordable units is not in the current SLA legislation. HCD says in its Statement of Reasons that this is a clarification of existing law. We do not believe that is correct. The current law only requires the recordation of an affordability restriction on the land to be developed with the affordable units but imposes no timing requirement for the construction of those units.

Comment 270 (Commentor 24): Regarding the proposed Guidelines, we believe that the State may be trying prevent public agencies from promising to build a mixed-use development on public land that includes agencies from promising to build a mixed-use development on public land that includes. Sec. 103(c)(7)(C)(iv): Guidelines require, for mixed-use developments, that residential units must be constructed concurrently with non-residential components. Sec. 103(c)(7)(C)(iv)(I): Statute requires, for mixed-use developments, that 25% of total affordable units must be made available for rent/sale at same time as 25% of the nonresidential development is made available for lease/sale. Guidelines require that the percent of nonresidential development is to be computed by taking the total square footage of commercial component (identified in DDA) and multiplying by .25%.Sec. 103(c)(7)(E): Guidelines require where surplus land is more than one parcel or one parcel to be subdivided, and the parcel(s) qualify for one of the exemptions under Gov. Code 54221(F)(-(I), the parcels can be treated as one parcel. Financing for affordable housing is scarce and competitive. Proposed affordable housing projects usually need to apply for multiple competitive sources in order to secure the entire amount of funding they need to build the affordable housing. The date of the start of construction can often slip past when they were originally predicted.• Financing for other types of development can also be affected by external factors, but that financing does not have the same level of competition built-in, which means that it is more predictable than affordable housing financing.• Therefore, tying the construction and completion of affordable units to commercial or market-rate residential development is impractical, and it will result in affordable housing that is delayed or possibly never completed.• Finally, mixed-use and mixed-income developments are often phased. The reasons for phasing include financing, environmental clean-up, construction logistics, market absorption, and organizational capacity. Forcing public agencies to meet affordability in each phase will handicap the public agencies from designing new developments to meet the needs of the community.

Comment 271 (Commentor 57): Section 103(7)(c)(iv): Requirements for concurrent construction of residential housing with nonresidential development, as well as the need for 25% of total planned affordable units to be made available at the same time as 25%

of the nonresidential uses is problematic. This requirement presents a burden to overall development timing and project economics. Every project is different and there are too many circumstances that govern the sequencing of a build-out such as financing, environmental conditions and mitigations, infrastructure delivery, and many others. This provision could prevent a site from being positioned to accommodate affordable housing because of the artificial matching of delivered components on a pari passu basis.

Comment 272 (Commentor 88): The draft guidelines in at least two sections undermine the building of affordable housing and undermines an agency's ability to achieve its Regional Housing Needs Allocation goals or climate change goals. Section 300(a)(3) requires affordable housing units to be constructed and completed not later than the unrestricted units and non-residential portion of the development. Section 103(c)(18) has similar language. In an ideal world, phasing would occur in this way, but the sections simplify and misunderstand the complexities of affordable housing financing. Affordable housing may be dependent on the construction of other phases of a development as such housing often requires complex funding arrangements (e.g., cross-subsidies) and 100% affordable housing buildings, thereby putting an entire development in jeopardy. Thus, these sections must be deleted or revised to match the Surplus Land Act language.

Comment 273 (Commentor 33): CBE firmly supports HCD's efforts to ensure much-needed affordable-housing units are timely built by requiring affordable units be built at the same time as unrestricted units.

Response: HCD partially agrees with the Comments. Although it is important that housing developed on land disposed of through the SLA ultimately contains the legally required mix of market-rate and affordable housing, HCD agrees that flexibility with respect to timing and financing is sometimes necessary. Therefore, HCD has amended the language of this subsection to read, "The affordable residential units <u>required under the covenant described in subdivision (b) below</u> must be developed prior to <u>or at substantially the same time as</u> ~~constructed and completed not later than~~ the unrestricted units and non-residential portion of the development. If the development occurs in phases, the affordability requirement ~~must~~ <u>should</u> be met in each phase."

Article IV – Reporting Requirements

<u>Section 400 – Local Agency Reporting Requirements</u>

HCD Review of Conditions Placed on NOAs – Section 400(a)(1)

Comment 274 (Commentor 33): We oppose the removal of Guidelines Section 400. Local Agency Reporting Requirements (a)(1) "such conditions or restrictions must be reviewed by HCD prior to the initiation of negotiations with any interested and qualified developer."

Comment 275 (Commentors 44, 69, 76, 90, 53, 75 and 111): Sec 400 We are opposed to the deletion of the language in the last sentence of section (a)(1) requiring prior

review by HCD of any conditions or restrictions included in a Notice of Availability. One way to deal with this issue would be to explicitly require inclusion of all attachments and conditions when NOAs are submitted to HCD.

Response: HCD disagrees with the Comments. Statute does not require that HCD review NOAs before they are issued. Therefore, HCD advises local agencies to submit NOAs that contain conditions to HCD for review.

Post-Negotiation Notice and Proposed Disposition Summary – Section 400(b)

Comment 276 (Commentor 28): This section should be clarified to require a local agency to send HCD proof that the local agency sent the NOA to the housing sponsors and local public entities at the addresses that were made available to the local agency. For example, if an email to a housing sponsor sent to the email address on HCD's website is undeliverable, this should not affect the local agency's compliance with the SLA.

Comment 277 (Commentor 61): In Sections 101(b) and 400(b)(1) of the draft Guidelines, HCD proposes to require that local agencies provide HCD with "proof of delivery of the NOA to all CalHFA-certified housing sponsors and local public entities." It is uncertain what HCD envisions for the "proof of delivery," but, requiring local agencies to distribute the NOA by registered mail or other forms non-electronic delivery would be an unnecessary additional administrative burden on the local agencies. Sections 101(b) and 400(b)(1) of the draft Guidelines are an impermissible alteration, amendment, and enlargement of the scope of the SLA and must be deleted

Comment 278 (Commentor 57): Appendix B: Description of Disposition Form that is required per Section 400(b), requesting compliance/approval at the conclusion of negotiations should be revised, as it does not account for many scenarios that are encountered in a typical disposition process. The form should include a question that allows a local agency to declare the reason for terminating negotiations with interested parties within its authority, as expressed in the SLA guidelines in Section 202(4)(A). This circumstance inherently impacts the local agency's compliance status with subsequent questions throughout the worksheet.

Response: HCD agrees with Comment 276 and has amended language to clarify that local agencies are not responsible for inaccurate emails or contact information provided by affordable developers to the CalHFA Certified Housing Provider List. HCD disagrees with Comment 277. Electronic delivery of NOAs is acceptable, and HCD only requires a copy of the email as documentation. With respect to Comment 278, HCD is in the process of updating its forms, including Appendix B,

Documentation Submission Flexibility – Section 400(c)

Comment 279 (Commentor 28): This section should be clarified to specify that a local agency is required to receive a Findings Letter only once regardless of when the disposition of the property occurs instead of "even if a final disposition does not result".

Comment 280 (Commentors 44, 69, 76, 90, 53, 75, and 111): Sec 400 (c) This section should explicitly state that while agencies may submit disposition documents any time after the NOA period and good faith negotiation period have elapsed, that submission must take place at least 30 days prior to disposing of the surplus land.

Response: HCD agrees with the Comments. To add additional clarity, language in 400(c) has been amended to: "... regardless of when a final disposition occurs."

Documentation for Alternative Mechanisms to Declare Land Exempt – Section 400(e)

Comment 281 (Commentor 37): 400 (e)(2): Please clarify if this section applies to all local agency determinations of exempt surplus land. The confusion is that 400(e)(1) references "a copy of a resolution (or other document recording formal action) . . . written findings". Or does HCD intend that the alternate process that does not include a resolution must include written findings as well?

Comment 282 (Commentor 57): Exempt Surplus Land: Sections in the Draft Guidelines regarding the declaration of exempt surplus land (i.e., Section 103 and 400(e)) present a lack of clarity on the process in that there are inconsistent references related to requirements for local agencies in the current Guidelines. There is no clarity on whether local agencies can choose to proceed with the exemption process through a public meeting or written notice. For example, the Draft Guidelines require both a public meeting and 30-day written notice (Section 103(c)(1)), while a separate section (400(e)) only indicates a 30-day written notice is needed

Comment 283 (Commentors 44, 69, 76, 90, 53, 75, and 111): 400 (e) For exemptions not requiring a public hearing, the Guideline should require agencies to provide proof of publication of the notice of the exemption and findings.

Response: HCD agrees with the Comments. To provide clarity for local agencies declaring land exempt under Government Code section 54221(f)(1)(A), (B), (E), (K), (L), or (Q), HCD has added the following language: "The notice must include a citation to the exemption (e.g., Gov. Code section 54221(f)(1)(A) for an affordable housing project), a contact name and email for public comments, and findings/reasons the land meets the exemption. HCD will accept online or newspaper publishing of the notice with evidence it was published and made available for 30 days (daily publication is not necessary). For newspaper publication, HCD will accept a notice published in a newspaper of general circulation in the local agency's area. For online publication, the notice must be available for the full 30 days, at minimum."

Article V

<u>Section 500 – HCD Monitoring, Recording and Reporting</u>

Start of 30-Day Response Period – Section 500(c)(1)(A)

Comment 284 (Commentor 9): Providing that HCD's 30-day response period begins to run only when HCD receives all of the required documentation. This provides an

opportunity for HCD to delay the response to a local agency by continuing to ask for additional information and documentation. Sec. 500(1)(a) states that HCD may delay notification of any missing documentation or information within 30 days of receiving the initial information. So, on day 28 or 29, HCD staff can simply request more information and trigger another 30-day period.

Comment 285 (Commentor 28): This section should be clarified to specify that HCD may issue a final Determination Letter 30 days after the local agency's submittal if HCD determines that the proposed sale or lease will not violate the SLA.

Response: HCD disagrees with the Comments. It is HCD's practice to notify local agencies almost immediately upon discovery of missing documents. Only in rare cases, where HCD may not immediately be able to discern the need for additional documentation, would the delay occur. With respect to Comment 285, statute does not require HCD to issue a letter finding no violation, but HCD strives to do this in practice.

Section 501 – Penalties

All Legal Remedies – Section 501(a)

Comment 286 (Commentor 58): HCD's remedies – Section 501(a): Section 501(a) allows HCD to enforce the SLA and "pursue all applicable legal and equitable remedies" if a local agency disposes of land in violation of the SLA. This section of the Guidelines is inconsistent with Section 54230.6

Response: HCD partially agrees with the Comment. Government Code section 54230.6 is clear that HCD may not undo land sales. However, HCD has revised the Guidelines to clarify that HCD may pursue all applicable legal and equitable remedies consistent with Government code section 54230.6.

Errors that Do Not Impact the Availability of Affordable Housing – Section 501(b)(1)(a)

Comments 287-339 (Commentors 1, 2, 3, 4, 6, 7, 8, 11, 13, 14, 15, 16, 34, 35, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 74, 77, 79, 81, 82, 86, 87, 91, 92, 93, 95, 96, 97,99, 101, 102, 103, 104, 106, 107, 108, 109, 110, 112, and 113): The Draft Updated Guidelines Misapply SLA Penalty Provisions while Making Changes in Conflict with Statute. AB 747 and AB 480 amended the SLA penalty provisions found in Government Code Section 54230.5 to provide a fair process for assessing and calculating penalties for specified violations of the SLA, while providing that such penalties shall not apply to violations that do not impact the availability and priority of, or the construction of, housing affordable to lower income households or the ultimate disposition of the land in compliance with the article, such as clerical errors. The Draft Updated Guidelines are inconsistent with and undermine these important statutory changes.

Response: HCD partially agrees with the Comments. Use of the phrase, "in no case" may be overly restrictive. HCD has amended the language to read, "Failure to issue an

NOA, to notice the required entities, to provide at least 90 days of good faith negotiations, or to provide a recorded covenant to HCD may impact the availability, priority, or construction of affordable housing or the ultimate disposition of the land in compliance with the SLA." The amended language clarifies that failure to complete the required elements of the SLA would likely impact the availability, priority, and construction of affordable housing, but not necessarily in all cases.

Third-Party Enforcement of the SLA – Section 502(b)

Comments 340-392 (Commentors 1, 2, 3, 4, 6, 7, 8, 11, 13, 14, 15, 16, 34, 35, 39, 40, 41, 42, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 74, 77, 79, 81, 82, 86, 87, 91, 92, 93, 95, 96, 97,99, 101, 102, 103, 104, 106, 107, 108, 109, 110, 112, and 113): The Draft Updated Guidelines Allow Third Parties to Issue Notices of Alleged Violations of the SLA Directly to Public Agencies with No Basis in Statute, Exposing Local Agencies to Unaccountable Interference with Operations. The Draft Updated Guidelines purport to grant third party entities (i.e., not HCD) the ability to issue notices of alleged violations of the SLA directly to local agencies. For example, Section 102(u) defines a "Notice of Alleged Violation" as a written communication sent to a local agency (with a copy to HCD) by a public (not HCD) or private entity alleging violations of the SLA. Allowing third parties to directly trigger enforcement deadlines for local agencies without HCD review and determination of a violation is not supported by statute and could wreak havoc on local agency transactions and operations. This provision of the Draft Updated Guidelines is also inconsistent with Government Code Section 54230.5(a)(1) which imposes penalties for disposals of surplus land in violation of the SLA after receiving a notification from HCD.

Comment 393 (Commentor 9): These Guidelines propose a new process not authorized by statute whereby third parties (rather than directing their concerns to HCD) can send "Notices of Alleged Violations" to local agencies. Comment: The SLA is confusing enough. Here HCD is proposing a chaotic process where third parties (many who may have financial interests in acquiring properties) can allege (or threaten to allege) violations of the SLA, potentially calculated to gain negotiation leverage or intimidation. The statute directs HCD to enforce the SLA and provides no authority for HCD to sanction such a wildcat third party allegation process as a substitute for its own actions. Private parties with concerns over SLA compliance should direct their communication to HCD.

Comment 394 (Commentors 44, 69, 76, 90, 53, 75, and 111): We encourage incorporating the following sections onto Section 502. Add: (c)(3). The penalties and remedies that are available through enforcement by private or public entities are those identified in Section 501 of these Guidelines. [Gov. C. 54230.5(a)]. Section 54230.5(a) provides for both the assessment of penalties and enforcement by private parties (those "beneficially interested") Add: (c)(4). A local agency is prohibited from finalizing the disposition of surplus land subject to a Notice of Violation until an open, public meeting is held pursuant to this Section. [Gov. C. 54230.5(a); Gov. C. 54230.7 and .8]

Comment 395 (Commentors 44, 69, 76, 90, 53, 75, and 111): Sec 502 (c)Add a paragraph (3) making it clear that the penalties are available to a public or private entity seeking enforcement. SLA Section 54230.5(a) provides for both assessment of penalties and other remedies. Add a paragraph (4) to provide, as with HCD enforcement, a local agency may not finalize disposition of land subject to a Notice of Violation until after holding an open meeting per SLA Sections 54230.5(a) and 54230.7

Response: HCD disagrees with Comments 340-393. Third party enforcement of the SLA has been a part of the SLA since the 2019 amendments (AB 1486). The initial SLA Guidelines, published in 2021, outlined the process for third-party enforcement in Section 502 – Private Enforcement. The Revised Draft Guidelines do not add this private right of action, but simply seek to clarify that local agencies are entitled to 60 days to respond to a private entity before that entity may take any action against a local agency. With respect to Comments 394 and 395, HCD partially agrees. The suggestion to add (c)(3) is unnecessary because Subsection (b) already says that a public or private entity may enforce 54230.5. However, the language in Subsection (c)(4) is an important new statutory requirement and corresponding language has been added to the Guidelines.

Other Changes

Applicability and Noticing Requirements for Exempt Surplus Land within Coastal Zones, on or eligible for the National Register of Historic Places, adjacent to a State Park, and the Lake Tahoe Region – Section 103(d)

HCD amended Section 103(d) as follows: "~~Section 103, subdivisions (c)(1)–(c)(17) of these Guidelines, with the exception of subdivision (c)(8), do not apply if the surplus land is located in one of the four locations listed below.~~ If the surplus land is located in one of ~~these~~ the four ~~locations,~~ locations below, an NOA for open space purposes must be sent via email or certified mail to the entities identified in Government Code section 54222(b) and ~~HCD.~~ HCD before a local agency may dispose of the land pursuant to Section 103(c)(2)-(8) and (10)-(19) of these Guidelines. ~~The local agency must follow the steps outlined in Government Code section 54230.5(b)(1), with the exception of any restrictions to be recorded against the property if the property is sold to another state or local agency. A local agency is permitted, but not required, to send the NOA to affordable housing providers.~~"

Reason: This change clarifies the procedure for disposing of exempt surplus land within designated areas (coastal zones, on or eligible for the National Register of Historic Places, adjacent to a state park, or in the Lake Tahoe region). Local agencies disposing of exempt surplus land within these four areas must still issue an NOA for open space purposes. After this obligation is met, the property may qualify as exempt surplus land if it meets one of the criteria found in Section 103(c)(2)-(8) and (10)-(19). If the property does not qualify as exempt surplus land, then the local agency must dispose of the property as surplus land through the standard process, including an NOA to affordable housing providers.