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LAW ALERT

SHORTAGE OF AFFORDABLE HOUSING IS A STATEWIDE CONCERN, EVEN IN CHARTER CITIES

Four bills passed this year affecting the disposition of surplus lands for affordable housing and other purposes that will go into effect on January 1, 2020. The most significant is AB 1486, which overhauls the Surplus Land Act. Local agencies that violate the new requirements will face steep penalties. Three other bills of note include AB 1255, SB 6, and SB 211. A recent court decision upheld the applicability of the Surplus Land Act to charter cities. On November 26, 2019, the Sixth District Court of Appeal certified *Anderson v. City of San Jose* for publication, in which the court upheld the application of the Surplus Land Act to charter cities.

CURRENT LAW

The Surplus Land Act (Government Code section 54220, *et seq.*) describes procedures a local government agency must follow prior to selling or leasing "surplus land," defined as land no longer needed for agency use. Before disposing of surplus land, an agency must provide notice to housing authorities, affordable housing developers, park and recreation agencies, schools, and other organizations and agencies as specified, indicating that the land is available for sale or lease for affordable housing, open space, education, or specified economic development purposes. If any recipient of the notice expresses interest in acquiring the land, then the local agency must negotiate in good faith with that party for at least 90 days. If multiple entities express interest, the priority must be given to proposals to use the property for affordable housing, unless the land is already being used for a park or designated for park use. If the parties cannot agree on terms of sale or lease after 90 days, then the local agency is free to dispose of the property on the open market, subject to the caveat that if the property is sold or leased for market rate housing, it must be disposed of subject to a recorded restriction requiring at least 15% of units constructed be made available at an affordable housing cost or affordable rent to lower income households.

AB 1486

AB 1486 clarifies existing ambiguities in the Surplus Land Act. First, it states that the Act applies to any local agency, or instrumentality of a local agency, empowered to acquire and hold real property. This includes joint powers authorities, every type of local special district including dependent special districts, housing authorities, and successor agencies to former redevelopment authorities. Because it applies to "instrumentalities" of local agencies, it will likely now also apply to nonprofit entities controlled by local agencies.

AB 1486 also clarifies the definition of "surplus land." Formerly, it was generally assumed that the disposition of property for economic development constituted agency "use." AB 1486 states explicitly that disposition for economic development is not agency use of land. Furthermore, under AB 1486, any land that a local agency intends to sell or lease is either "exempt" or "surplus." Exemptions are set forth particularly in AB 1486, and include certain land being sold for affordable housing, certain small lots and right-of-way remnants, land held for exchange for other property for the agency's use, land disposed in favor of another government

agency, and certain other dispositions authorized by statute. All other properties are "surplus," even if the land is identified in a long-range property management plan.

At the outset of the disposition process the agency will now be required to declare the land either surplus or exempt, which must be based on written findings. For lands declared surplus, a notice of availability must be sent. However, agencies should contact the California Department of Housing and Community Development (HCD) before sending notice to affordable housing developers, as agencies must send a notice of availability to those who have expressed an interest to HCD. In some cases, notice of availability must be sent for open space purposes even if land is declared exempt. If the local agency receives a request to negotiate in response to a notice of availability, it is prohibited under AB 1486 from negotiating terms that would prevent residential use (even if not permitted by the existing zoning), reduce density below what is allowed by zoning, or impose design requirements that would have a substantial adverse effect on viability for affordable housing. However, nothing requires an agency to approve entitlements required for the project.

At the end of the process, and before the local agency may finally dispose of the property, it must give HCD notice of the intended disposition, together with information showing how the agency complied with the Surplus Land Act. HCD will have 30 days to review that information, and to notify the local agency of any deficiency. If the local agency sells the land despite a deficiency finding, it may be liable to disgorge up to 50% of the sale proceeds into an affordable housing fund.

Although it takes effect on January 1, 2020, AB 1486 will not apply to land disposed of after January 1, 2020, if pursuant to an exclusive negotiating agreement or other binding agreement entered into prior to September 30, 2019, and provided that the disposition is completed by December 31, 2022. An exception applies to land identified in a long-range property management plan, so long as the land is subject to a binding agreement by December 31, 2020.

On a final note, keep in mind when deciding whether a disposition is exempt that there may be exemptions from the Surplus Land Act outside of the Act itself. For example, the Act exempts disposition of county land for affordable housing purposes pursuant to Government Code section 25539.4. In contrast, the city analogue to section 25539.4, Government Code section 37364, is not listed in the Act as providing an exemption. However, section 37364 states that statute applies "notwithstanding… any other provision of law." Arguably then, a disposition pursuant to section 37364 should also be exempt. This result seems correct because section 37364 furthers the Surplus Land Act's purpose to make property available for affordable housing, whereas compliance with the Surplus Land Act in connection with a disposition under section 37364 would significantly complicate the transaction.

OTHER SURPLUS LAND BILLS

In addition to AB 1486, the following bills go into effect on January 1, 2020:

- AB 1255 and SB 6 require local and state agencies to cooperate in creating a searchable database of surplus government lands available for sale or lease in the state. To help create this inventory, by December 31 each year beginning in 2020, each local agency must prepare a central inventory of its surplus lands, which must be provided to HCD by April 1 every year beginning in 2021.

- SB 211 gives CalTrans new authority to lease certain state highway rights-of-way to local agencies for $1 for temporary emergency shelters or food distribution programs.

ANDERSON V. SAN JOSE

In *Anderson v. City of San Jose,* the Sixth District Court of Appeal held that because the shortage of affordable housing in California is a "statewide concern," the Surplus Land Act preempts charter city laws that concern the disposition of surplus land for affordable housing. *Anderson* is based on the version

of the Surplus Land Act in effect before the passage of AB 1486. The inquiry concerning the applicability of the Surplus Land Act to charter cities arose out of the state constitutional grant of power known as "home rule." Under home rule, charter cities maintain "sovereignty over municipal affairs."

However, the spheres of "statewide concern" and "municipal affairs" are not always clearly segregated, as was the case in *Anderson*. Thus, to determine whether home rule applied to San Jose's "Policy for the Sale of Surplus Property with Provisions Relating to Affordable Housing," the court applied a four-part framework derived from *California Fed. Savings & Loan Assn. v. City of Los Angeles*. The analysis under the first two elements of the framework were not contested: (i) that the sale of surplus land is a municipal affair, and (ii) that there is an actual conflict between the Surplus Land Act and San Jose's policy.

To address the last two elements, the court analyzed whether (iii) the shortage of sites available for affordable housing is a matter of statewide concern, and (iv) whether the Surplus Land Act was narrowly tailored to address the shortage. While recognizing the municipal interest in disposing of surplus government property, the court concluded that "the well-documented shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing demonstrate 'extramunicipal concerns' justifying statewide application of the Act's affordable housing priorities." Additionally, the court concluded that the Surplus Land Act is sufficiently tailored to avoid unnecessary interference with local government because a charter city still maintains discretion over certain aspects, such as whether the land is deemed surplus and the price of the land, and is not required to sell the property to any particular buyer. Thus, the affordable housing provision of the Surplus Land Act is applicable to general law cities and charter cities alike.

For more information on surplus lands, please contact Rafael Yaquián, Barbara Kautz, Erin Lapeyrolerie, Erik Ramakrishnan, or any other Goldfarb & Lipman attorney at 510-836-6336.

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