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#### Transmitted via email

February 1, 2016

Honorable Mayor Liccardo and Members of the City Council  
City of San Jose  
200 East Santa Clara Street, 18<sup>th</sup> Floor  
San Jose, CA 95113

Dear Mayor Liccardo, Vice-Mayor Herrera, and Councilmembers Jones, Kalra, Peralez, Nguyen, Carrasco, Oliverio, Nguyen, Rocha, and Khamis:

#### Re: Item 4.1 on the February 2, 2015 Council Agenda—ADOPTING A CITY POLICY FOR THE SALE OF SURPLUS PROPERTY WITH PROVISIONS RELATING TO AFFORDABLE HOUSING

SV@Home is the voice of affordable housing in Silicon Valley, representing a broad range of interests, from leading employers who are driving the Bay Area economy to labor and service organizations, to nonprofit and for-profit developers who provide housing and services to those most in need.

On behalf of our members and the undersigned partner organizations, we write today to request that the Council not approve the draft policy as it currently stands and direct staff to bring back a policy that is compliant with the State Surplus Lands Act (SLA). San Jose is subject to the SLA and, as it currently stands, the draft policy does not comply with the Act.

San Jose has been a leader in the region and State when it comes to affordable housing, and has continued to seek ways to increase the supply of affordable homes after the dissolution of redevelopment and the loss and reduction of other critical housing funds. Despite these efforts, San Jose, Santa Clara County, and the Bay Area as a whole face a severe housing affordability crisis. According to the City's website, San Jose renters must earn \$54/hour (\$112,520/year) to afford the average rent for a two bedroom, two-bath apartment.

The fact is that the funds that the City has are insufficient to produce the number of affordable housing units needed, and cities must consider all available tools to respond. Surplus land is one way a city can help facilitate the creation of new affordable homes.

The Legislature realized this when it passed the Surplus Lands Act in 1976. As the City’s memo states, “California Government Code Section 54222 required (sic) that any local agency selling surplus land provide notice to and negotiate in good faith to sell surplus property to entities that undertake affordable housing, parks, or school development.” The law has been amended several times, most recently with the passage of AB 2135, which strengthened the requirements governing affordable housing and became effective on January 1, 2015. The staff memo indicates that the City has “generally” followed this law in the past.

The staff memo before the Council recommends adopting a policy that only partially responds to State law. Limiting the applicability of the policy to sales (and not leases), exempting high-rise developments in the downtown, and targeting homeowners with higher incomes than the law allows, are a few of the ways the draft policy differs from the Act.

The impetus for this stance, as we understand, is that the City believes that including affordable housing requirements as a condition of the sale of City-owned land will result in a lower price for the land. Therefore, the City has determined that, as a charter city, it is not required to comply with all of the law’s requirements, contending that that disposal of surplus property is traditionally a municipal affair and not within the purview of land use and zoning.

First, we would point out that the statute specifically states that, while a jurisdiction may choose to sell land at less than fair market value, nothing in the law compels them to do so. But most importantly, we strongly disagree with the City’s determination that it does not need to follow the SLA because it is a charter city governed by the charter “home rule” provision in the California Constitution. Land use and zoning decisions and affordable housing generally, have long been held to be a matter of Statewide concern and are therefore not within the purview of home rule. Accordingly, whenever the Legislature adopts land use zoning or affordable housing statute , it generally expressly provides that the statute applies to charter cities as it did with the SLA—

*54221. (a) As used in this article, the term "local agency" means every city, whether organized under general law **or by charter**, county, city and county, and district, including school districts of any kind or class, empowered to acquire and hold real property.*

Other statutes that regulate local government’s sale of public property also expressly apply to charter cities (see Government Code Sections 34363 and 34364).

It is concerning that the City has moved forward with negotiations on projects after January 1, 2015 without considering the requirements of the law, and that the City is now moving forward to adopt a policy that would allow these developments to move forward without affordable housing. The City of Oakland recently pushed forward a project that did not follow the law, and was forced to start over when the City Attorney wrote a confidential, but widely circulated

memo that correctly states that the process was not handled according to the law. (Enclosed)  
Oakland is a charter city.

The City has been a great supporter of affordable housing and has recognized the value of inclusionary housing policies. As a result, we find it puzzling that the City would not support such a requirement for land that it owns. We strongly urge the Council to ensure that it is following the law as it relates to surplus lands.

Thank you for your consideration.

Sincerely,

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Mike Rawson, Public Interest Law Project  
Sam Tepperman-Gelfant and David Zisser, Public Advocates  
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Kevin Zwick and Julie Quinn, Housing Trust Silicon Valley  
Jennifer Loving and Alejandra Herrera, Destination: Home  
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Amie Fishman, Non-Profit Housing Association of Northern California  
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# CITY OF OAKLAND



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## LEGAL OPINION

### ATTORNEY-CLIENT COMMUNICATION PRIVILEGED AND CONFIDENTIAL

February 17, 2015

HONORABLE CITY COUNCIL  
Oakland, California

**RE: APPLICATION OF SURPLUS LANDS ACT AMENDMENTS TO 12<sup>TH</sup>  
STREET REMAINDER PROJECT**

Dear President Gibson McElhaney and Members of the Council:

#### I. Introduction

This opinion addresses the surplus Land's Act application to the 12<sup>th</sup> Street Remainder Project. The opinion accompanies closed session reports from the City Attorney's Office and the City Administrator's Office.

#### II. Questions and Brief Answers

##### Question No. 1:

Does the California Surplus Lands Act require that the City offer the 12<sup>th</sup> Street remainder property to other entities before agreeing to convey the property to UrbanCore?

##### Brief Answer

Yes, the 12<sup>th</sup> Street remainder project site qualifies as surplus land, and the California Surplus Lands Act therefore requires the City to offer the property to "preferred entities" designated in the Act, for 60 days before agreeing to convey the property to UrbanCore.

Question No. 2:

Does the recent amendment to the California Surplus Lands Act that imposes a fifteen percent (15%) inclusionary housing requirement on surplus land conveyed for residential projects apply to the 12<sup>th</sup> Street remainder project?

Brief Answer:

Yes, the recent amendment to the Surplus Lands Act (AB 2135) which took effect in January 2015 applies to the 12<sup>th</sup> Street remainder project. AB 2135 sets aside units for lower income households if a designated "preferred entity" responds to the City's offer to convey the property, but does not reach agreement with the City on the terms of conveyance. The subsequent purchaser of the property or long term lessee pursuant to ground lease then would be required to rent or sell at least 15% of project units to lower income households at an affordable rent or housing cost if the project has at least ten residential units.

**III. Analysis**

A. Background on the 12<sup>th</sup> Street remainder project.

The 12<sup>th</sup> Street remainder parcel is an approximately one acre, developable parcel that resulted from the reconfiguration of 12<sup>th</sup> Street as part of the Lake Merritt Park improvement project. The Redevelopment Agency acquired the property from the City in 2011.

The Redevelopment Agency received several unsolicited expressions of interest from developers, but, pursuant to Council direction, issued a Request for Proposals ("RFP") for development of the site in 2012. (Since the Redevelopment Agency was not subject to the Surplus Lands Act, the Agency did not pursue the Surplus Lands Act process prior to issuing the RFP.) After evaluating proposals in response to the RFP, Council authorized an Exclusive Negotiating Agreement ("ENA") with UrbanCore Development, LLC, for development of 298 residential units, plus retail space, on the site. The City entered into the ENA in July, 2013.

Meanwhile, the State Controller's Office, pursuant to its "clawback" powers under the state law dissolving redevelopment agencies, concluded that the 2011 transfer of the 12<sup>th</sup> Street remainder property from the City to the Redevelopment Agency was not authorized, and in August, 2013, ordered that the property be returned to the City. The Oakland Redevelopment Successor Agency (as successor to the Redevelopment Agency) reconveyed the property to the City in April, 2014. The City has never pursued the Surplus Lands Act process on this site.

UrbanCore has undertaken significant predevelopment work on the project under the ENA. However, the ENA is clear that entering into the ENA does not entitle the developer to acquire the property, that the City Council reserves sole discretion whether or not to move forward with the project, that any transaction is subject to compliance with all applicable laws, and that if the City decides not to move forward with a sale or lease, the City will have no obligations or liability to the developer.<sup>1</sup> The ENA expired on January 5, 2015.

B. The Surplus Land Act applies to the 12<sup>th</sup> Street remainder property.

The California Surplus Lands Act (California Government Code Sections 54220, et seq.) has long required cities<sup>2</sup> and other public agencies to offer "surplus land" to various "preferred entities" before selling or leasing the property on the open market.<sup>3</sup> "Surplus lands" means land that is "determined to be no longer necessary for the agency's use," except property held for the purpose of exchange. There are various exemptions, such as land parcels less than 5,000 square feet. "Preferred entities" include local housing public entities (such as the county housing department, the housing authority, and state housing agencies), parks agencies, school districts,

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<sup>1</sup> Recital C states the parties' "...understanding that this does not constitute a binding commitment on the part of the City to any project or developer for the Property." Section 1.2 repeats the "...understanding that no commitment has been made by the City or Developer to the Project as set forth therein," and further states that "...if the City Council declines to authorize execution of the DDA or similar instruments for any reason, then, without further action, this Agreement shall automatically terminate and no Party shall have further rights or obligations with respect to the other." Similarly, Section 6 provides that "Developer understands that the City Council retains the sole and absolute discretion to approve or not approve the Project or any alternative project proposed by Developer. If the terms of a mutually satisfactory DDA have not been negotiated by Developer and City staff during the Negotiation Period, or if the City Council declines to authorize a DDA for any reason, then, without further action, this Agreement shall automatically terminate and no Party shall have further rights or obligations with respect to the other." Finally Section 9 provides that "This Agreement does not obligate the City to transfer the Property to Developer or any other person, nor does it obligate the City to approve the Project or any other project. Developer acknowledges and agrees that no City commitment to move forward with the Project can be made other than by an ordinance of the City Council and subject to the requirements of CEQA and other applicable laws, and understands that adoption of any such ordinance will be at the City Council's sole and absolute discretion. Any costs incurred by Developer, Developer's members or partners, or other members of the Project development team to comply with its obligations under this Agreement or to negotiate the DDA shall be the sole responsibility of Developer, and in no event shall the City have any responsibility to pay for or reimburse Developer for any of said costs."

<sup>2</sup> The Surplus Lands Act applies to charter cities.

<sup>3</sup> "Any local agency disposing of surplus land shall send, prior to disposing of that property, a written offer to sell or lease the property as follows: (a) A written offer to sell or lease for the purpose of developing low and moderate income housing shall be sent to any local public entity, as defined in Section 50079 of the Health and Safety Code, within whose jurisdiction the surplus land is located. Housing sponsors, as defined by Section 50074 of the Health and Safety Code, shall be sent, upon written request, a written offer to sell or lease surplus land for the purpose of developing low and moderate income housing. . ." (Gov. Code section 54222

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nonprofit enterprise zone associations and transportation agencies (if the property is in an infill zone or transit village area). In addition, the Act provides that "housing sponsors" are entitled to offers "upon written request." "Housing sponsors" means any entity certified by the agency as qualified to develop housing.

In the past, no housing sponsors in Oakland have requested to receive Surplus Lands Act notices, and therefore the practice in the City has been to send notices only to public entities. Recently, staff have discussed expanding the practice to send notices to the nonprofit housing developers on the City's "NOFA list" (i.e., the list of developers that receive the Notice of Funding Availability for affordable housing development funds), but thus far no notices have been sent out to this expanded list. While the language in the Surplus Lands Act says that housing sponsors only get sent offers "upon written request," the Legislature's declaration of the statute's purpose to encourage affordable housing development on public land could be the basis for an argument for a more expansive practice:

The Legislature reaffirms its declaration that housing is of vital statewide importance to the health, safety and welfare of the residents of this state and that provision of a decent home and a suitable living environment for every Californian is a priority of the highest order. The Legislature further declares that there is a shortage of sites available for housing for persons and families of low and moderate income and that surplus government land, prior to disposition, should be made available for that purpose. (Gov. Code section 54220.)

There is no case law on whether a city that has received no written requests from housing sponsors for Surplus Lands Act notices has any legal obligation to send notices to housing sponsors.

1. The Surplus Lands Act requires that the City offer surplus property to the preferred entities in writing.

The Act requires that the conveying public agency send a written offer to sell or lease the surplus property to the preferred entities. A preferred entity then has 60 days to respond to the offer. If there is no response, the agency is free to convey the land on the open market. If there is a response, the agency and the responder must enter into good faith negotiations over conveyance terms. If there is no agreement on terms within 90 days, the agency is free to convey the property on the open market. The Act does not require an agency to convey property to a preferred entity for less than its fair market value, although it does authorize such below-market transactions if the agency so chooses.

The Surplus Lands Act did not apply to conveyances of property by redevelopment agencies, nor to conveyances from a city to a redevelopment agency. In Oakland, compliance with the Act was rarely an issue because nearly all

conveyances of land for economic development projects were handled by the Redevelopment Agency.

Now that redevelopment agencies have been dissolved, economic development conveyances will be handled by the City, and compliance with the Surplus Lands Act will be more of an issue. However, the City has taken the position that land that has never been in City use, such as land that was purchased by the City or the Redevelopment Agency to be land-banked for eventual transfer to a developer, is not "surplus land" for purposes of the Act. Since the Act defines surplus land as land "no longer necessary" for the City's use, this presupposes that surplus land is only land that was at some point necessary for the City's use, such as land that supported a City public facility. If the City acquired land simply with the intention to reconvey the land to a developer, that land does not fit within the statutory meaning of "surplus." This position has not been challenged; but it also has not been an issue in the past since the Redevelopment Agency owned most of the land that was conveyed for economic development projects.

In any event, the 12<sup>th</sup> Street remainder property clearly qualifies as "surplus lands" under the Act. It is former City right-of-way that is no longer necessary for the City's use as a roadway. None of the exemptions in the Act apply. Therefore, the Act imposes a legal duty on the City to offer the property to the preferred entities for 60 days prior to entering into an LDDA or a DDA,<sup>4</sup> and to enter into good faith negotiations for up to 90 days with whatever preferred entity responds to the offer. However, the City is not required to agree to convey the property for less than its fair market value.

The developer's attorney has suggested that the City may not be subject to the Act for this property under a theory that the City is "estopped" from offering the property by virtue of the ENA and the implied determination of the City prior to entering into the ENA that the property is not subject to the Act. This theory is without merit. A city cannot contract away its statutory obligations under state law. Principles of estoppel do not override state law requirements. Plus the terms of the ENA (which has since expired) clearly put the developer on notice that the City was not committing to convey the property to the developer, and that any conveyance would be subject to compliance with state law. Accordingly, there is nothing that would legally preclude the City from complying with the Surplus Lands Act now by sending out the required offer notices.<sup>5</sup> Nor would the City face any legal liability if it agreed to convey the property to a preferred entity or another entity other than UrbanCore.

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<sup>4</sup> Council recently adopted a policy preferring long-term ground leases of City property over fee sales. That policy would apply to this project.

<sup>5</sup> Since the ENA has expired, entering into negotiations with a preferred entity would not breach the exclusive negotiations clause of the ENA.

2. Amendments to the Surplus Lands Act imposing an inclusionary housing requirement on surplus land would likely apply to the 12<sup>th</sup> Street remainder project.

The Surplus Lands Act was recently amended by Assembly Bill 2135. The governor signed the bill into law on September 27, 2014, and it took effect in January 2015. The bill was sponsored by various affordable housing advocates.

AB 2135, among other things, provides that, if the conveying agency fails to reach agreement regarding price and terms with a preferred entity and then conveys the property on the open market, and if the property then is developed with 10 or more residential units by the purchasing entity, the purchasing entity must rent or sell not less than 15% of the units to lower income households at an affordable rent or affordable housing cost (generally at no more than 30% of a lower income household's income). Lower income household are households at or below 80% of area median income. The affordability restrictions must be included in covenants recorded on the property prior to land use entitlements for the project. The restrictions for rental units must be in effect for 55 years. In effect, AB 2135 triggers an inclusionary housing requirement on conveyed surplus land, whether or not the land is conveyed to an affordable housing developer.

As noted above, the City is required to send written offers to convey the 12<sup>th</sup> Street remainder property to the list of preferred entities. If a preferred entity does not respond within the 60-day notice period, our Office believes that the City likely would then be free to enter into a LDDA or DDA with UrbanCore, and no inclusionary requirement would attach to the property.<sup>6</sup> However, if a preferred entity does respond within 60 days, and the City and the entity do not reach agreement on the price and terms of a conveyance, the City is free to enter into an LDDA or DDA with UrbanCore, **but** UrbanCore thereafter would be subject to the 15% inclusionary requirement.

Note: given that the affordable housing organizations sponsored AB 2135 and are aware of the pending nature of the 12<sup>th</sup> Street remainder project, it is highly likely that one or more nonprofit housing developers will request that the City send them the City's offer to purchase, even if they are not interested in buying the property at its

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<sup>6</sup> There is some ambiguity in the law whether the inclusionary requirement would be triggered even if no preferred entity responds to the City's offer. AB 2135 provides that the 15% set aside applies "if the local agency does not agree to price and terms with an entity to which notice and an opportunity to purchase or lease are given pursuant to this article..." The reference to a failure to "agree" to price and terms presupposes that there has been an offer of price and terms for a conveyance from a preferred entity and some negotiations between the agency and a preferred entity over the price and terms. Thus, it assumes a scenario in which a preferred entity has responded to the offer and triggers the negotiation requirement, but there is never a meeting of the minds on the terms of a transaction. We conclude that if there is no response at all to the City's offer, there has been no failure to "agree" on price on terms since there were no negotiations at all on price and terms to begin with.

current fair market value, to trigger the inclusionary requirements of AB 2135 on the eventual development.

3. If the City does not comply with its statutory legal duty to offer the 12<sup>th</sup> Street remainder property, a preferred entity and possibly an Oakland taxpayer could block the conveyance to UrbanCore.

If the City does not comply with its statutory obligation to send the written offer to the preferred entities to acquire the 12<sup>th</sup> Street remainder site as required under the Surplus Lands Act, a preferred entity could file a lawsuit asking a court to prevent the disposition of the property to UrbanCore, under the theory that the City has failed to comply with mandatory state law. There also is the possibility (which we are researching) that a taxpayer would have standing to file a lawsuit challenging the disposition. The plaintiff likely would file a writ petition asking the court to issue a writ of mandamus compelling the City to comply with the state law, i.e., to send the written offer to the preferred entities; the plaintiff also likely would request the court to issue a temporary restraining order or preliminary injunction ordering the City not to move ahead with the disposition until the court hears the writ petition. Given the plain language of the state law, it is likely that the court would issue a TRO or preliminary injunction and that the court would issue a writ compelling the City to comply with the state law. The City likely would be liable for the plaintiff's attorneys' fees in such a case.

The language in the statute that states that the City has a duty to provide a written offer to housing sponsors "upon written request" would allow the City to argue that it had no duty to send a written offer to housing sponsors who did not submit a written request therefor. Housing sponsors could file a standing request with the City asking that the City send them written offers to sell or lease surplus property. Given the tension between the statutory language and the statement of legislative intent, we cannot advise that it is more likely than not that such an argument would prevail in court. In any event, the statute explicitly imposes a legal duty on the City to send written offers to the designated public entities, and housing sponsors who were the proponents of AB 2135 likely will submit written requests for offers, and the City then would clearly be obligated to make offers to those housing sponsors.

With regard to other remedies, the Act does not explicitly provide for an action for damages against the City once an LDDA or DDA has been executed or the property has been conveyed. Nor would it be clear what damages a preferred entity would suffer, given that the Act does not entitle the preferred entity to purchase the property for less than fair market value. The Act provides that "the failure by a local agency to comply with this article shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value." Thus, a plaintiff could not invalidate the transfer of the 12<sup>th</sup> Street remainder property once it is conveyed to UrbanCore by lease or sale or, arguably, once the City and UrbanCore enter into an LDDA or DDA legally committing the City to convey the property to UrbanCore. A plaintiff would therefore have to take legal action prior to execution of the LDDA or DDA.

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### III. Conclusion

Our Office appreciates the policy and equity issues given that this project and negotiations have been ongoing for some time before the enactment of AB 2135, and the value of having a minority-owned developer involved in developing Oakland. We also understand the importance of preserving economic diversity in Oakland and support the policy underpinnings of the State Surplus Lands Act, namely to make surplus government land available for housing for low and moderate income families and persons. However, the law is in effect and it will impact not just this project but a number of properties. Perhaps the reduction in Fair Market Value will allow the project to pencil out with a 15% affordable housing requirement in place.

Also, the general policy to lease vs. sell City property is in effect. That policy requires that the City dispose of property by long term lease unless the Council, pursuant to the City Administrator's recommendation makes an exception based on findings that a sale is in the City's best interests. (A copy of Resolution No. 85324 C.M.S. which established the policy is attached.) Our Office and the City Administrator agree that these exceptions and findings should be made at the outset, before the issuance of an RFP based on a robust analysis if the City Administrator believes an exception to the policy is in the City's best interests. Otherwise, in accordance with the Council's policy, the RFP and other negotiations would proceed on the basis of a long term lease. The latter occurred with the Forest City Uptown project and the development of the former Oakland Army Base and OMSS.

Given that the policy was adopted in December 2014, the Council will need to make appropriate findings and policy decisions regarding projects that were in negotiations before the policy took effect.

Very truly yours,



BARBARA J. PARKER  
City Attorney

cc: City Administrator

Attorneys Assigned:  
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