



April 21, 2016

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

**Re: Demand that the City of San José Comply with the Surplus Land Act**

Dear San José Mayor and City Councilmembers:

We write on behalf of Sarah Anderson and Urban Habitat to request full legal compliance with the California Surplus Land Act and Federal and State fair housing laws in the City Council's proposed Council Policy for the disposition of surplus land. Sarah Anderson is a San José resident who became homeless as a result of domestic violence and who has struggled to obtain affordable housing due to the lack of supply. Urban Habitat is an organization that works to advance equitable policies to create a just and connected Bay Area for low-income communities and communities of color by increasing the power and capacity in these communities.

In particular, we ask that the Council reject or modify the proposed Council Policy included as item #4.1 on the agenda for the April 26<sup>th</sup> City Council meeting prior to adoption to ensure that it fully complies with the state Surplus Land Act and federal and state fair housing laws. The Policy as currently proposed is substantially noncompliant with applicable state law in a number of important ways, which we set forth below.

**A. The California Surplus Land Act Governs San José's Disposition of Surplus Land**

The California Surplus Land Act (California Government Code §§ 54220 et seq) requires that all cities, including charter cities, prioritize surplus property for affordable housing.<sup>1</sup> To accomplish this mandate, the Act sets forth detailed requirements that all cities must follow when selling or leasing land that is "no longer necessary for the agency's use."<sup>2</sup>

Among the Act's requirements, local agencies must send a written offer to sell or lease the land for developing low- and moderate-income housing to affordable housing developers<sup>3</sup>, give first priority to and enter good faith negotiations with an interested entity that proposes to make at least 25 percent of the total number of units developed on the parcel affordable to lower income households<sup>4</sup>, give priority to an entity that proposes to provide the greatest number of affordable

<sup>1</sup> "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." Gov. Code § 54221(a).

<sup>2</sup> Gov. Code § 54221(b).

<sup>3</sup> Id. at § 54222.

<sup>4</sup> Id. at §§ 54222, 54222.5, and 54227.

units at the most deeply affordable levels<sup>5</sup>, and ensure that any development with at least 10 units include at least 15 percent of the units as affordable to lower-income households.<sup>6</sup>

### **B. San José's Proposed Council Policy Materially Conflicts with the Surplus Land Act**

The proposed Council Policy on surplus property explicitly and unavoidably contradicts the Surplus Land Act in a number of important ways, including the following:

- The policy exempts high-rise development in the downtown area from any procedural or substantive requirement related to affordable housing “if the developer obtains all necessary approvals ... and pulls the project’s building permits by June 30, 2021.”<sup>7</sup> The Act allows no such exemption.
- The policy allows for-sale units in mixed-income development on surplus land “to be affordable to households with incomes at 100 percent of Area Median Income (AMI), with eligible buyers being households with incomes at or below 120% of AMI.”<sup>8</sup> However, the Act requires that these units be affordable to lower-income households making less than 80% of Area Median Income.<sup>9</sup>
- The policy allows City staff to “request an exemption from this policy to meet another City goal and prioritize the sale of surplus property for parks, schools, or other reasons, such as economic development”<sup>10</sup> and permits the City Manager to modify the process for determining whether property is surplus “to accommodate circumstances applicable to significant or unusual properties.”<sup>11</sup> The Act allows no such discretion.

Adopting and applying a policy with these (or any) exceptions, exemptions, or contradictions to the Act would place the City out of compliance with state law.

### **C. San José's Proposed Policy Violates Federal and State Fair Housing Law**

The City’s failure to adopt a policy that adequately prioritizes affordable housing is also inconsistent with the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968)<sup>12</sup> and the state Fair Employment and Housing Act (Gov. Code §§ 12900 et seq.).<sup>13</sup> Seventy-two percent of San José’s lower-income renter households, who are disproportionately racial and

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<sup>5</sup> Id. at § 54227.

<sup>6</sup> Id. at § 54233.

<sup>7</sup> Draft Policy section (D)(2).

<sup>8</sup> Draft Policy section (C)(2).

<sup>9</sup> Gov. Code § 54222.5; *see also* Cal. Health & Saf. Code § 50079.5

<sup>10</sup> Draft Policy section (D)(4).

<sup>11</sup> Draft Policy section (O).

<sup>12</sup> The federal Fair Housing Act prohibits practices that “actually or predictably result[] in a disparate impact on a group of persons or creates, increase, reinforces, or perpetuates segregated housing patterns....” Department of Housing and Urban Development (HUD), 24 CFR Part 100, Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule, Federal Register, Vol. 78, No. 32, Part IV (Feb. 15, 2013) 11482 (24 CFR 100.500(a)), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf>.

<sup>13</sup> California’s Fair Employment and Housing Act (FEHA) makes it “unlawful ... to discriminate through public or private land use practices, decisions, and authorizations” that have “the effect, regardless of intent, of unlawfully discriminating on the basis of [a] protected class.” Gov. Code § 12955.8(b).



ethnic minorities<sup>14</sup>, are housing cost-burdened, paying more than 30 percent of household income for rent.<sup>15</sup> They and other low-income households are in desperate need of affordable housing in San Jose.

Adopting the proposed City Council policy on surplus property disposition with the existing exemptions will reduce the amount of housing that would otherwise be available for lower-income households and therefore likely have a disparate impact on people of color and individuals with disabilities, violating state and federal fair housing laws. Moreover, adopting the policy would likely violate the City's duty to affirmatively further fair housing by perpetuating segregation in the city and reducing housing choice for protected populations.<sup>16</sup>

Finally, in addition to violating the City's legal obligations, the draft policy misses a critical opportunity to support affordable housing through a means which is readily at its disposal. By replacing this unlawful policy with a legally compliant policy that fully prioritizes the use of surplus lands for affordable housing, the City could take an important step towards meeting its most pressing public need using resources already in its possession.

#### **D. Request for Compliance**

We request that the City Council act immediately to ensure that the City of San José is in full compliance with these laws, both in the local policy it adopts and in its implementation of that policy. In particular, the Council should: (1) reject the proposed policy as it currently stands unless it is revised to fully comply with the Surplus Land Act and state and federal fair housing requirements and (2) comply fully with the Surplus Land Act when disposing of any surplus property. If the City adopts a policy in conflict with state and federal law, we may be forced to seek relief in court.

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<sup>14</sup> For example, while just 32 percent of white households are renters, 65 percent of African American households and 60 percent of Hispanic households are renters. U.S. Census Bureau, 2010-2014 American Community Survey 5-Year Estimates, available at [www.factfinder.census.gov](http://www.factfinder.census.gov).

<sup>15</sup> HUD, CHAS Data 2008-2012, available at [https://www.huduser.gov/portal/datasets/cp/CHAS/data\\_querytool\\_chas.html](https://www.huduser.gov/portal/datasets/cp/CHAS/data_querytool_chas.html).

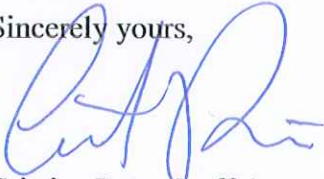
<sup>16</sup> As an entitlement jurisdiction that receives federal housing funds from HUD, the City is required to "affirmatively further fair housing" by "taking meaningful actions ... that ... address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns...." This duty "extends to all of a [city's] activities and programs relating to housing and urban development." HUD, 24 CFR Parts 5, 91, 92 *et al.*, Affirmatively Furthering Fair Housing; Final Rule, Federal Register, Vol. 80, No. 136, Part III (July 16, 2015) 42353 (§ 5.152), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf>.

April 21, 2016

Page 4 of 4

By complying with these legal requirements, the City will also demonstrate responsible stewardship of public land and promote a vision for San José that supports inclusion and diversity. If you have any questions, or wish to discuss further our position in this matter, you can reach us directly at (510) 903-2678. We look forward to the timely resolution of this matter and the avoidance of litigation.

Sincerely yours,



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