

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AMENDING COUNCIL POLICY 7-13 “POLICY FOR THE SALE OF SURPLUS PROPERTY WITH PROVISIONS RELATING TO AFFORDABLE HOUSING” TO CONFORM WITH THE CALIFORNIA SURPLUS LAND ACT

WHEREAS, the City Council of the City of San José (“City”) adopted City Council Policy 7-13, “Policy for the Sale of Surplus Property with Provisions Relating to Affordable Housing”, by City Council action on April 26, 2016, to update the City’s procedure for the disposition of surplus City-owned property to reflect the general terms of Assembly Bill 2135 which went into effect on January 1, 2015 (“Policy”); and

WHEREAS, this Policy is designed to facilitate the process for identifying and disposing of residential surplus land, guides how the City designates property as “surplus,” and the process by which it must be transferred or sold, with the intention to prioritize affordable housing development, and a secondary emphasis on the development of open space and spaces for educational use; AND

WHEREAS, in 2019, the California Legislature amended Cal. Gov. Code Section 54220 et seq. (“Surplus Land Act”), implementing new requirements for local agencies’ sale of surplus land including, but not limited to, requiring written notice of availability; and

WHEREAS, as a charter city, the City took the position that it was not required to follow the requirements of the Surplus Land Act where it was inconsistent with the City’s Municipal Code, however this position was held to be invalid by the courts in the case of Anderson v. City of San José (Santa Clara Sup. Court Case No. 16CV297950, Sixth Appellate District Case No. H045271) which held that the Surplus Land Act constitutionally applies to charter cities; and

WHEREAS, since this ruling, the City has acted in a manner consistent with state law as it pertains to the sale of surplus land and has followed state law in the event of any inconsistencies between the Municipal Code and the Surplus Land Act; and

WHEREAS, on May 21, 2021, the Office of the City Auditor published Audit #21-03, “Real Estate Services: Better Tools and Coordination Can Improve Asset Management and Service Delivery,” with recommendations to better manage the City’s real estate assets, including Recommendation #6 which states: “In order to ensure compliance with California’s Surplus Land Act, the Real Estate Division should work with the City Attorney’s Office to update Council Policy 7-13 and the San José Municipal Code (Chapter 4.20) and bring to the City Council for approval”; and

WHEREAS, the City desires to amend the Policy to conform with the Surplus Land Act, as recommended by the Office of the City Auditor; and

WHEREAS, this Policy supersedes City Council Policy 7-13 approved by the City Council on April 26, 2016;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The revised City Council Policy 7-13, entitled “Policy for the Sale of Surplus Property with Provisions Relating to Affordable Housing”, which revised policy is attached hereto as Exhibit A and incorporated herein by this reference as though fully set forth herein, is hereby approved and shall, as of the date and time of adoption of this Resolution, replace City Council Policy 7-13 approved by the City Council on April 26, 2016.

ADOPTED this _____ day of _____, 2022, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk

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COUNCIL POLICY

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EFFECTIVE DATE April 26, 2016	REVISED DATE	
APPROVED BY COUNCIL ACTION	04/26/2016, Item 4.1	

BACKGROUND

~~On April 30, 2013, Council approved amendments to the Municipal Code 4.20, Procedure for Selling City-Owned Property that implemented certain processes to recognize differences between property types, including estimated value, size and marketability, to more appropriately match a sale process to a specific property. The goals were to streamline and expedite the process which would recognize additional revenue and provide a more efficient use of resources.~~

~~In 2019, the California Legislature amended the Surplus Land Act, implementing new requirements for local agencies' sale of surplus land including, but not limited to, requiring written notice of availability, defining with specificity "surplus lands" and expanding the definition of "exempt surplus land." The Surplus Land Act at Cal. Gov. Code § 54220 et seq., as may be amended from time to time, and with accompanying guidelines, may hereinafter be referred to as "SLA."~~

Municipal Code Chapter 4.20, Procedure for Selling City-Owned Property, provides that all sales of municipally-owned real property shall be accomplished: (i) by a competitive process; (ii) at fair market value; (iii) after notice to the public ~~as provided in Section 4.20.040J~~; (iv) upon ~~e~~Council finding and determination that any such real property is surplus; and/or (v) otherwise upon such terms and conditions as the ~~e~~Council may direct ~~and as otherwise in compliance with the SLA~~. The purpose of this Policy is to outline a process that is specific to ~~residential~~ surplus land ~~and which conforms to procedure mandated under the updated SLA. prioritizes affordable housing uses over park or school uses and prior to the sale to a private party.~~

The most recently approved revisions to Municipal Code Chapter 4.20 focused on replacing the City's procedure for the disposition of real property with the recently expanded procedures of the disposition of real property required under the SLA, as it may be amended from time to time. ~~the following areas:~~

- ~~• Establishing concurrent action steps, rather than the previous sequential steps.~~

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- ~~• Decreasing the number of Council actions required for the selling of surplus City-owned property.~~
- ~~• Distinguishing between developable properties and those properties which were deemed undevelopable such as fragments left over from a street improvement project.~~
- ~~• Increasing the City Manager's authority to authorize sales of properties that are not developable with a market value that is less than \$500,000.~~
- ~~• Conducting Requests for Interest, instead of Requests for Proposal for prospective buyers.~~
- ~~• Expanding Staff's ability to negotiate directly on sites unlikely to have multiple offers.~~
- ~~• Authorizing Staff to receive unsolicited offers on City owned properties.~~

~~The Council also repealed the prior Council Resolution No. 74359 "Approving Recommendations for the Outreach and City Process for Sales of Surplus Properties" and approved the "Process for Determining Whether Property is Surplus", which was attached to the February 28, 2013 Council memo as Attachment A.~~

PURPOSE

This policy provides additional clarification and is designed to facilitate the process for identifying and disposing of ~~residential~~ surplus land as provided in the Municipal Code and in the SLA. The policy strengthens the ability for affordable housing developers, among other specified entities, to acquire surplus land, and it contains affordable housing requirements under certain circumstances. The policy also affirms that surplus land can be sold by the City for a below market rate in certain specified circumstances. Finally, the policy restates Council's previous direction regarding the importance of promoting affordable housing within the City in addition to open space, and the development of educational institutions, in accordance with the SLA.

POLICY

The following information generally outlines the process that shall be used when evaluating City owned property for a potential surplus sale. Exhibit A to this policy provides the specific steps that shall be performed in determining whether a property is surplus to the needs of the City and if so, the actions that are required to sell the surplus property.

A. Determining Whether Property is Surplus to the needs of the City

1. Real Estate staff shall maintain a list of all City real estate assets including location, size, zoning, and other property related information that has been

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placed in their custody. It should be noted that there are additional City owned properties outside of the inventory maintained in Real Estate that is maintained by other City Departments such as parks, housing sites, libraries, airport related property, and community centers.

2. Real Estate staff shall confirm ownership, prepare various documents related to size and configuration of the property, develop a preliminary estimate of value, and identify any restrictions on use when a site is being evaluated for a potential surplus sale.
3. Real Estate staff shall communicate with other City Departments including but not limited to the Housing Department, Parks, Recreation and Neighborhood Services, Department of Transportation, and the Department of Public Works to determine if there is a current or intended future use of the subject property, in order to determine whether the property should be considered "needed for, or adaptable to, a City use".
4. If a City use is identified for the subject property, the Department requesting such use shall conduct a fiscal analysis for the property. During this internal review period Real Estate staff shall also undertake their analysis of whether the subject property is independently developable and develop a good faith estimate of the market value for the property.
5. Real Estate staff will prepare an ~~informational~~ memorandum to the City Council advising them of the results of steps "24" through "4", above, (including identification of all internal stakeholders and outside parties with whom communications were had, and a summary of the basis for all conclusions reached) and, if applicable, staff's ~~intention~~ recommendation to proceed to declare the subject property surplus under the SLA and to subsequently, market and dispose of the property. Any real property disposed of through the authority granted to the City Manager under Chapter 4.04 of the Municipal Code that does not require separate Council approval shall not be subject this requirement.
6. If it is determined that there is a bona fide need to keep the property for City purposes, the property ~~is removed from the list of potential~~ shall not be included in the City's list of surplus properties.
7. If no City use is identified ~~and~~, Real Estate staff ~~shall~~ determines that the subject property should be declared surplus real property, staff shall follow the formal disposition process mandated by the SLA and the internal process as described in Exhibit A.

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~~a. Provide a written notification letter with an offer to sell or lease the property for a period of 35 years or more to a "Preferred Entity" for the development of:~~

- ~~i. Affordable housing; or~~
- ~~ii. Parkland, recreational use, or open space purposes; or~~
- ~~iii. School facilities.~~

~~All notices shall be sent by first class mail and shall include the location and a description of the property. Priority shall be given to the development of the property to provide affordable housing for lower income elderly or disabled persons or households, and other lower income households.~~

~~8. The Preferred Entities will have sixty (60) days (notification period) to notify the City of their interest in entering into negotiations for the acquisition of the property. At the conclusion of the sixty (60) day notification period, if a Preferred Entity has contacted Real Estate and expressed an interest in acquiring the property the parties will begin good faith negotiations at reaching an acceptable offer to both parties.~~

~~B. Preferred Entity Sales Process~~

- ~~1. If the City receives notification of the intent to purchase or lease from a Preferred Entity, the City shall enter into good faith negotiations to determine a mutually satisfactory sales price or lease terms. If needed to achieve the public purpose, the sales price may be below the fair market value. If the terms cannot be agreed upon after a period of not less than 90 days, the land may be sold at fair market on the open market.~~
- ~~2. If the surplus property is zoned for residential development, and more than one Preferred Entity makes an offer to purchase or desires to enter into a long term lease (35 years or more) for the surplus property, the City shall give first priority to the Preferred Entity that agrees to comply with the affordable housing requirements or proposes to provide the greatest number of units at the deepest level of affordability.~~
- ~~3. If a Preferred Entity proposes to use the surplus property to develop low or moderate income housing, no less than twenty five percent (25%) of the total housing units developed on the parcel(s) shall be available at affordable prices for rental for lower income households or for sale property to moderate income households for at least fifty five (55) years.~~

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~~4. If the site cannot be used for an affordable housing development, and if the property is already being used for a park or a recreational purpose, or if the land is designated for park and recreational use in the local general plan and will be developed for that purpose, first priority shall be given to a Preferred Entity that intends to use the site for a park or a recreational purpose.~~

~~5. A Preferred Entity may provide a payment period of up to 20 years for the property. The payment period for land sold for an affordable housing use may exceed 20 years but may not exceed the period of affordability.~~

~~C. Market Rate Surplus Land Sales~~

~~1. If no City use is identified and there are no bids submitted by a Preferred Entity, Real Estate staff will post a sign on the property notifying the public of the City's intent to surplus the property, post the surplus property on the Real Estate website, advertise the property in a local newspaper for a minimum of two consecutive weekends, post the property on various on-line services, and notify parties which have expressed an interest in acquiring the property.~~

~~2. If surplus property is sold or entered into a long term lease (35 years or more) and the new owner proposes to use the property for the development of ten (10) or more residential uses, then the entity (or its successor in interest) shall provide no less than fifteen percent (15%) of the total number of units developed on the parcel(s) at affordable prices for rental or for sale property.~~

~~a. An affordable housing restriction documenting the 15% of the total number of units constructed shall be provided to be affordable for ownership housing to a household earning no more than 100% of the Area Median Income (AMI), but can be sold to a household earning up to 120% of the AMI; or at an affordable rent, for a household at 60% of the AMI. The affordable housing restriction shall be recorded at the time of transfer or the execution of the long term lease. Ownership restrictions shall include an equity sharing agreement that requires the owner to share future appreciation with the City. The amount attributed to the City shall be the difference between the market price and the affordable price.~~

~~3. If surplus property is sold for a use other than residential development, an affordable housing restriction shall be recorded as described above.~~

~~4. The affordable housing restriction shall run with the land for fifty-five (55) years and shall be enforceable against any owner (or its successor in interest) who violates the covenant or restriction. If the property is entered into~~

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~~a long term lease of thirty five (35) or more years the affordable housing restriction shall run for the term of the lease including any extension to the original lease or subsequent lease of the property but not to exceed a total of fifty five (55) years from the date of the original recording of the affordable housing restriction.~~

~~D. Exceptions and Exemptions~~

~~The following are exceptions to the guidelines provided in Section B and Section C above and are exempt from the Affordable Restriction required under this Policy.~~

- ~~1. If a property is not contiguous to land used for a park, recreation, open space, or low and moderate income housing purposes; and is not located in an enterprise zone; and is either: (a) less than five thousand (5,000) square feet in size; (b) less than the legal residential lot size in the City; or (c) has no record of access and is less than ten thousand (10,000) square feet in size.~~
- ~~2. If the property is for a high-rise rental development in the downtown and if the developer obtains all necessary approvals from the Planning, Building, and Code Enforcement Department and pulls the projects building permits by June 30, 2021 the property would be exempt from the Affordable Restriction required under this Policy.~~
- ~~3. The Municipal Code allows land to be sold for another public purpose and allows a private sale of property for economic development purposes, if known in advance, staff will notify the Council of its intent to conduct a direct sale in the Annual Report.~~
- ~~4. Staff may request an exemption from this policy to meet another City goal and prioritize the sale of the surplus property for parks, schools, or other reasons, such as economic development. Any exemptions shall be approved by City Council.
 - ~~a. Since this policy is intended to restate Council's previous direction regarding the importance of promoting affordable housing within the City in addition to open space, and the development of educational institutions, Real Estate staff shall provide a written notification letter to the 'Preferred Entities' of staff's intention of requesting an exemption from the guidelines provided in this policy.~~~~

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~~b. All notices shall be sent by first class mail and shall include the location and a description of the property and shall be mailed no later than ten (10) days before the Council Meeting.~~

~~**E. Property that can not be developed with a fair market value of less than Five Hundred Thousand dollars (\$500,000)**~~

~~1. After completing the actions identified in Section A for 'Determining Whether Property is Surplus to the needs of the City' and receiving a determination from the Director of Economic Development that the property: i) is not needed for or adaptable to City use; ii) is not independently developable; and iii) has a market value of less than \$500,000, the City Manager may declare the subject property surplus, which decision shall include a summary of the basis for all conclusions reached concerning subsections i, ii and iii, immediately above. Such decision shall be posted on the City's website, and staff may proceed with disposition of the surplus property. If the subject property is not determined to be surplus by the City Manager as provided above, any decision to surplus the property must be taken to the City Council for action.~~

~~**BF. Annual Reporting of Surplus Sold Property**~~

~~1. Real Estate staff shall coordinate with the Department of Finance to create and maintain a list of properties that are declared surplus to the needs of the City and shall submit the list to the California Department of Housing and Community Development (HCD), as required by the SLA, prepare an informational report of properties declared surplus and properties sold for the City Council on an annual basis. This report is intended, in particular, to highlight for the City Council those properties that staff intends to begin reviewing for the purposes of conducting a surplus analysis, as well as those properties that have been declared surplus and sold without bringing the action to Council during the previous period. The report can also indicate if the property was sold or entered into a long term lease for the purpose of affordable housing.~~

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EXHIBIT A

Process to Determine Whether Property is Surplus to the needs of the City and Subsequent Sale of the Property

- A. **Prepare the File** - Real Estate staff will confirm ownership, prepare various documents related to size and configuration, develop a preliminary estimate of value, and identify any restrictions on use.
- B. **Conduct Internal Review** - Real Estate staff will communicate with internal stakeholders to determine if there is a current or intended future use of the subject property, in order to determine whether the property should be considered "needed for, or adaptable to, City use".
- C. **Fiscal Analysis by Internal Stakeholders** - If there is an interest expressed by an internal stakeholder, the requesting party conducts a fiscal analysis determining the cost/benefit of retaining the property. During the fiscal analysis Real Estate staff will determine if the property is independently developable and will develop a good faith estimate of the market value of the subject property.
- D. **Retain Property in City Inventory** - If it is determined that there is a bona fide need to keep the property for City purposes, the property is removed from the list of potential surplus properties. If it is determined the property should continue to be considered for surplus sale continue to Step E.
- E. **Inform the City Council of the Results of Steps "A" through "D", above** – Real Estate staff will prepare an ~~informational~~ memorandum to the City Council advising them of the results of steps "A" through "D", above (including identification of all internal stakeholders and outside parties with whom communications were had, and a summary of the basis for all conclusions reached) and, if applicable, staff's ~~intention to proceed to~~ recommendation of a declaration of surplus under the SLA and to subsequently, market and dispose of the property. Any real property disposed of through the authority granted to the City Manager under Chapter 4.04 of the Municipal Code which does not require separate Council approval shall not be subject this requirement.
- F. ~~Response from City Council from Information Memo~~ – If one or more of the Council responds to the Informational Memo requesting additional information Real Estate staff responds with the requested information. If there are no responses from the Council Real Estate staff proceeds to Step G.

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~~FG. **Initiate/Proceed with the SLA54222 Disposition Process** - If no City use is identified, Real Estate staff shall prepares the notification letter in accordance with Government Code Section 54220 et seq. and distributes to the current list of open space, educational use, and the Housing Department for distribution to affordable housing agencies (Preferred Entities). The Preferred Entities will have sixty (60) days (notification period) to notify the City of their interest in entering into negotiations for the acquisition of the property. At the conclusion of the sixty (60) day negotiation period, if a Preferred Entity has contacted Real Estate and expressed an interest in acquiring the property proceed to Step H. If no Preferred Entities have contacted Real Estate proceed to Step I commence the disposition process prescribed in the SLA which includes, generally and as of the time of the adoption of this policy, the following:~~

- ~~• providing a notice of availability of the property to certain specified entities;~~
- ~~• exemptions classifying “exempt surplus land” under certain specified conditions;~~
- ~~• procedures for the negotiation and the final disposition of the property;~~
- ~~• specific affordable housing minimum requirements;~~
- ~~• certain deed restrictions on the future use of the property; and~~
- ~~• other specified procedures and requirements.~~

~~H. **Request to Purchase Received from one or more Preferred Entities** - If one or more Preferred Entities request to purchase a potential surplus property Real Estate staff will negotiate in good faith with each entity individually for a minimum of ninety (90) days (negotiation period). At the end of the negotiation period which began at the conclusion of the sixty (60) day notification period (or a total of 150 days) identified in Step G, there are three (3) options~~

~~**Option One** - A single Preferred Entity submitted a bid to purchase the property and the bid reflects the estimated market value of the property. Real Estate staff would continue to Step K.~~

~~**Option Two** - There are more than one bid submitted from Preferred Entities.~~

~~a. If the bids are from multiple Preferred Entities in affordable housing, open space, or educational use, the affordable housing bid is given the priority over the other submitted bidders. Real Estate staff negotiates with each affordable housing bidder until the highest most qualified bidder is determined. The highest most qualified bidder between multiple affordable housing entities is determined by the bidder that proposes the highest price for the property and the greatest number of units at the deepest level of affordability. Once the highest and most qualified bidder is determined continue to Step K.~~

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~~b. If the bids are from multiple Preferred Entities which does not include affordable housing, Real Estate staff negotiates with each bidding party until the highest most qualified bidder is determined. Once the highest and most qualified bidder is determined continue to Step K.~~

~~**Option Three**—Staff are unable to reach an agreement with a Preferred Entity. Real Estate staff would continue to Step I.~~

~~I. **Initiate Public Outreach**—If no City use is identified, or there are no bids submitted by a Preferred Entity, or staff and the Preferred Entity are unable to reach an agreement, Real Estate staff will post a sign on the property notifying the public of the City's intent to surplus the property, post the surplus property on the Real Estate website, advertise the property in a local newspaper for a minimum of two consecutive weekends, post the property on various on-line services, and notify parties which have expressed an interest in acquiring the property.~~

~~J. **Complete Public Outreach**—Real Estate staff responds to any inquiries related to the property. If there is an offer proceed to Step K.~~

~~K. **Complete Process**—The transaction would either be with a Preferred Entity or private party and a determination needs to be made whether the property is developable Or not. If the property is determined to be undevelopable proceed to Step L. If the property is determined to be developable proceed to Step M.~~

~~L. **Determine if the property is undevelopable**—Based upon the determination by Real Estate staff that the property: i) is not needed for, or adaptable to, City use, ii) is not independently developable, and iii) has a market value of less than \$500,000, the City Manager may adopt the recommendation of the Director of Economic Development and decide to declare the subject property surplus, which decision shall include a summary of the basis for all conclusions reached concerning subsections i, ii and iii, immediately above. Such decision shall be posted on the City's website, whereupon staff may proceed with disposition of the property. Such decision will not be adopted any sooner than fourteen days following the date of the informational memo described in Step "E", above. If the subject property is not deemed surplus by action of the City Manager as provided above, or does not meet the criteria above (ie. the property is developable) any decision to surplus must be taken to City Council for approval.~~

~~M. **Property is developable**—If the property is sold on the open market, the Surplus Sale policy requires that if it is ever used for the development often (10) or more residential uses, then the entity (or its successor in interest) must provide not less than fifteen percent (15%) of the total number of units developed on the parcel(s) at~~

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~~affordable prices for rental, for sale, or long term lease (35 years or more) of the property. An affordable housing restriction documenting the total number of restricted units and the affordable prices must be recorded against the surplus land at the time of sale. The restriction is to run with the land for fifty five (55) years, and be enforceable against any owner (or its successor in interest) who violates the covenant or restriction.~~

GN. **Prepare Annual Report of Surplus and Sold Properties** - Real Estate staff ~~shall coordinate with the Department of Finance to create and maintain a list of properties that are declared surplus to the needs of the City and shall submit this list to the HCD, as required by the SLA.~~ will prepare an informational report of properties declared surplus and properties sold for the City Council on an annual basis. This report is intended, in particular, to highlight for the City Council those properties that staff intends to analyze for the surplus process, as well as those properties that have been declared surplus and sold in the prior time period, including those properties that were sold for affordable housing or where a housing restriction was recorded at the time of the transfer.

H0. **Significant or Unusual Properties** - The City Manager may modify the process described above from time to time in order to accommodate circumstances applicable to significant or unusual properties, so long as the modifications do not conflict with Chapter 4.20 of the San José Municipal Code and the SLA.