

**State of California
Office of Administrative Law**

In re:
Department of Transportation

Regulatory Action:

Title 21, California Code of Regulations

**Adopt sections: 1475, 1476, 1477, 1478,
1479, 1480, 1481, 1482,
1483, 1484, 1485, 1486,
1487, 1488, 1489, 1490,
1491**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2015-1224-02 S

DECISION SUMMARY

On December 24, 2015, the California Department of Transportation (Department) submitted to the Office of Administrative Law (OAL) this rulemaking action which concerns the sale by the State of California of surplus residential properties which the Department has determined to be excess real properties because they are no longer needed or used for a state highway or other public purpose.

OAL disapproved the proposed regulations for the Department's failure to comply with the clarity and necessity standards and with various procedural requirements of the Administrative Procedure Act (APA), pursuant to Government Code sections 11349, 11349.1, 11346.2, 11346.9, 11347.1, and 11347.3 and certain regulations that implement those statutes.

BACKGROUND

In this regulatory action, the Department proposes to adopt new Chapter 9.5 (known as the Affordable Sales Program) in Division 2 of Title 21 of the California Code of Regulations. The proposed regulations would establish the procedures which will enable the Department, pursuant to Government Code section 54235 et seq., to dispose of surplus residential properties originally acquired by the state for a State Route 710 extension in the cities of Los Angeles, Pasadena, and South Pasadena. Among other provisions, the regulations endeavor to increase the number of low and moderate income homeowners by allowing qualified individuals and households to purchase homes on the basis of affordability and will set forth the standards used to calculate the appropriate purchase prices to fulfill the state's mission of providing affordable home ownership to Californians.

More specifically, the regulations establish the priority of eligible purchasers and income eligibility criteria, as well as standards for: affordable price and reasonable price sales; offers of sale; the offer-acceptance process; contracts of sale; and close of escrow. The regulations also contain provisions regarding penalties for noncompliance with sales restrictions by purchasers, Department sales restriction monitoring, and purchaser financing.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from the APA. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide a meaningful opportunity for public comment on regulations before they become effective.

A. Clarity.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them." Moreover, it shall be presumed that a regulation does not comply with the clarity standard if any of the following conditions exist: the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; the language of the regulation conflicts with the agency's description of the effect of the regulation; or the regulation uses language incorrectly. (tit. 1, Cal. Code Regs., sec. 16(a).) As a result of its review, OAL found that a number of proposed provisions failed to meet the clarity standards of Government Code section 11349(c) and/or section 16(a) of Title 1 of the California Code of Regulations (CCR).

(1) Section 1476(l).

Section 1476(l) defines the term "fair market value" but is silent as to whether the term means the property being sold in an "as is" condition or not. The governing statute defines "fair market value" as meaning in an "as is" condition. (Gov. Code, sec.

54236(f).) The proposed regulation is unclear as to whether the definition of this term implicitly also means that it is in an “as is” condition, or whether the regulation is attempting to exclude this condition, in which case it would be inconsistent with the statute.

(2) Section 1477(a).

In establishing the purchaser priority sequence for the sales of these residences, Government Code section 54237 includes the requirement that certain tenants and former tenants be tenants in good standing with all rent obligations in order to qualify to purchase these residences within the fourth priority of prospective buyers. Gov. Code section 54237(e). Section 1477(a) of the regulations, however, adds a “good standing” requirement to each of the first three priorities of prospective buyers at subdivisions (a)(1), (a)(2) and (a)(3). The regulation is unclear regarding whether the Department intends to enforce this requirement with respect to each of the first three priorities of prospective buyers despite the limitation of this requirement to only the fourth priority in the statute. To the extent the Department intends to apply this requirement to any of the first three purchaser priorities, section 1477(a)(1) – (3) would also violate the consistency standard of the APA.

(3) Section 1476(b).

Section 1476(b) uses the term “prospective purchaser.” However, the term “prospective buyer” is defined at section 1476(aa). It is unclear whether the term “prospective purchaser” is synonymous with the defined term “prospective buyer,” or whether it is intended as a distinct term, in which case it is unclear because it is not defined.

(4) Section 1476(b).

Section 1476(b) defines the term “affordable price” and states that “under no circumstances shall it be more than the Department approved appraised fair market value nor less than the original acquisition price paid by the Department.” However, the regulation will not be easily understood by those persons directly affected by it in the situation in which the current fair market value of a property has declined below the acquisition price paid by the Department. The regulation has omitted clarifying language contained in the corresponding statute which addresses this situation and provides that the affordable price shall not be less than the price paid by the agency for the original acquisition, unless the acquisition price was greater than the current fair market value, and shall not be greater than fair market value. (Gov. Code, sec. 54237(b).)

(5) Section 1476(j).

Section 1476(j) provides that: “Department approved appraised fair market value” means the fair market value as determined by a licensed appraiser, and reviewed and

accepted by the Department.” It is unclear what standards the Department will use to review and accept an appraised fair market value.

(6) Section 1478(b)(5).

Section 1478(b)(5) uses the term “qualified tenant” but is unclear because this term is not defined in these regulations or in the Affordable Rent Program at Title 21 CCR section 2653, et seq.

(7) Section 1478(d)(5).

Section 1478(d)(5) provides that: “[t]he owner may refinance a loan...subject to the prior written approval by the Department, provided any net cash proceeds derived from such refinancing shall be limited to an amount equal to the current appreciation, if any, over and above the net equity to which the CalHFA is entitled under this subparagraph.” The regulation is unclear as to what the standards are for the Department’s prior written approval. Whether they are limited to refinancing situations in which any net proceeds are limited as further described in this subdivision, or whether they may include other standards for written Department approval, is not clear.

(8) Section 1482(b)(3).

Section 1482(b)(3) cross references Government Code section 54237(a)(2) and (3) for provisions prohibiting ownership interests in real property. The regulation is unclear because those subdivisions of the statute do not address that issue.

(9) Section 1483.

Section 1483(a) and (b) provide as follows:

(a) Prospective buyers that submit initial responses to the Conditional Offer Prior to Sale in accordance with section 1482 that are deemed to be incomplete or insufficient shall be notified by certified mail of the incompleteness or insufficiency of the response within 30 calendar days of the Department receiving such initial response[;] however, failure to provide timely notification shall not be deemed to be a determination of completeness or sufficiency. Additional required documentation must be mailed, by certified mail, to the address identified in the notice and postmarked no later than 60 calendar days from the date of mailing such notification of incompleteness or insufficient documentation. Failure of the prospective buyer to respond satisfactorily as determined by the Department and within the time period shall be deemed a rejection of the offer.

(b) Notwithstanding 1481(a), prospective buyers shall have a maximum of 250 calendar days to respond with complete and sufficient documentation in accordance with section 1482 as determined by the Department. The

Department may, however, at its sole discretion, and upon the prospective buyer showing good cause, grant an extension but in no case shall the maximum number of calendar days exceed 250 for receipt of complete and sufficient documentation.

In the first sentence of section 1483(b), it is unclear whether the maximum 250-day period to respond with complete and sufficient documentation begins to run from the first or last or some other day within the 120-day period of the conditional offer prior to sale under section 1481(a).

It is unclear from section 1483 what the status would be of, for example, a prospective purchaser who does not respond to the Conditional Offer Prior to Sale with sufficient documentation during the 120 day period under section 1481(a), and who is notified by the Department of the insufficiency of the documentation he/she did timely submit but who does not respond with complete and sufficient documentation within the additional 60 days provided in section 1483(a), and who, thereafter, but within the maximum 250 days, requests an extension for good cause under section 1483(b). Because section 1483(a) deems a failure to respond with sufficient documentation within the additional 60 day period to be a rejection of the offer, it is unclear whether such a prospective purchaser could, after his/her offer was deemed rejected but within 250 days, still accept the original Conditional Offer Prior to Sale ahead of another, intervening prospective purchaser.

(10) Section 1485(b).

Section 1485(b) provides as follows:

When two or more respondents have equal eligibility for a particular surplus residential property, each respondent's relative priority for purchasing the surplus residential property will be ranked according to the postmarked date of the acceptance of the Conditional Offer Prior to Sale. Notwithstanding the foregoing sentence, one or more respondents with equal eligibility for a particular surplus residential property first offered to a housing-related private or public entity in accordance with section 1478 shall be ranked in a manner determined by the housing-related private or public entity.

The second sentence of this provision is unclear because use of the phrase "one or more" does not work in conjunction with "equal eligibility," because there cannot be one with equal eligibility with him/her/itself.

The second sentence of this provision is also unclear because it is unknown what standards will be used by the housing-related entity to rank equally eligible respondents. OAL also notes that it could not identify under what authority the Department may delegate the development and application of such standards to a housing-related entity.

The second sentence of this provision is also unclear because of the phrase: "first offered to a housing related private or public entity in accordance with section 1478." It is unclear whether use of the word "first" means that the sentence only applies in situations where the first entity or person to which/whom a property is offered for sale is a housing related private or public entity. If a property is "first" offered for sale to one of the persons or households in the higher priorities of section 1477(a)(1)(2) and/or (3), and none of those buy the property, and it is next offered to a housing-related private or public entity pursuant to section 1477(a)(4), and that entity buys it, the second sentence of section 1485(b) would seem not to apply. But it is unclear if this is the Department's intent.

(11) Section 1488(a).

Section 1488(a) provides:

(a) Pursuant to Government Code section 54238, in the event a buyer of surplus residential property does not comply with use and resale restrictions imposed pursuant to this chapter, the Department may require that the buyer pay the Department the difference between the actual price paid by the buyer for the surplus residential property and the fair market value of such property....

Although the statute cited in the regulation also uses the term "may," the Department is now exercising this discretion to include this power of requiring repayment within its regulations. The regulation, however, remains unclear regarding what standards the Department will use to determine when it will require repayment after it has discovered noncompliance.

(12) Section 1476(a) and (b).

Section 1476(a) and (b) together define the term "affordable price" in relation to the term "affordable housing cost." The affordable price of homes for families earning up to 150% of the area median income is stated as a range beginning at 28% of gross income and up to a maximum of 35% times 150% of area median income. Presumably, those families earning above the level of income that would otherwise qualify them as families of low or moderate income would be offered an affordable price that is 28% of their gross income. Presumably, those families earning 150%, but not more, of area median income would be offered an affordable price that is 35% of 150% of area median income (or 35% of their gross income). The regulation is unclear, however, as to what the affordable price would be for a family earning, for example, 125% of area median income or how that price would be determined. Government Code section 11349(c) provides that regulations must be "easily understood by those persons directly affected by them."

Prior to resubmission of this rulemaking action to OAL, the Department must revise the provisions described above so as to satisfy the clarity standard and must make the

revised text of the regulations available for public comment for at least 15 days pursuant to Government Code section 11346.8(c).

B. Necessity.

The Necessity standard of the APA is primarily addressed in an agency's Initial Statement of Reasons (ISR). Government Code section 11346.2(b)(1) requires that the ISR contain, among other things, the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. In this action, certain detailed terms and provisions lacked the agency's rationale for the determination that each was reasonably necessary.

Lengthy, multi-element definitions of terms such as "fair market value," "minimum property standards," and "principal place of residence" were not explained in terms of the need for the various terms and conditions within them. The selection of 120 days in sections 1480 and 1481; the 30, 60, and 250 day time periods in section 1483; the amount of \$3,000 in section 1486(c); and the loan requirements in section 1491(b) were also not explained in terms of the need for these provisions.

Prior to resubmission of this rulemaking action to OAL for review, the Department must prepare an addendum to the ISR which includes an explanation of why the provisions discussed above are necessary to carry out the purposes for which they were proposed and must make the document available for at least 15 days for public comment pursuant to Government Code section 11347.1.

C. Administrative Procedure Act Requirements.

The Department failed to comply with several APA procedural requirements as discussed below.

(1) Failure to comply with Government Code section 11347.3.

(a) In several responses to public comments, the Department acknowledges that this rulemaking action is subject to the California Environmental Quality Act (CEQA). (See also Gov. Code, sec. 54325.) CEQA and its regulations require that prior to approving or carrying out a project, the lead agency shall certify that the final Environmental Impact Report (EIR) has been completed in compliance with CEQA. (See Pub. Resources Code, sec. 21100(a) and tit. 14, Cal. Code Regs., secs. 15004, 15089, 15090, and 15092.) CEQA regulations define "approval" as the decision by a public agency which commits the agency to a definite course of action in regard to a project. (Tit. 14, Cal. Code Regs., sec. 15352(a).) Thus, the Department's adoption of regulations was an approval of the Affordable Sales Program project for purposes of requiring certification of a final EIR. *Poet, LLC v. Cal. Air*

Resources Board (2013) 218 Cal.App.4th 681, at 719-726; see also *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, at 128.

The administrative record in this action did not include the draft or a final EIR. A copy of the final EIR must be added to the record pursuant to Government Code section 11347.3(b)(11).

(b) The Department of Finance submitted a second comment letter dated April 13, 2015, to the Department regarding the Department's Standardized Regulatory Impact Analysis, but it is missing from the record of this action and must be added to the record pursuant to Government Code section 11347.3(b)(6).

(c) The Department responded in writing to the Department of Finance comment letter of April 13, 2015, but the Department's response is missing from the record and must be added to the record pursuant to Government Code section 11347.3(b)(7).

(d) Regarding the Department's pre-notice stakeholder workshop and written comment period concerning the proposed Affordable Sales Program, the Department's ISR states: "[a]ll comments and recommendations received were reviewed, evaluated, and, as deemed appropriate, incorporated into this newly proposed regulation. All comments relied upon will be included in the rulemaking record and made available." The record contains no such comments. All such relied upon comments must be added to the record pursuant to Government Code section 11347.3(b)(7).

(e) Pages 48 and 68 of the transcript of the August 6, 2015 public hearing on the Draft Environmental Impact Report include testimony by the witness that he submitted certain documents during the hearing, but no documents are attached as exhibits to the transcript or are otherwise itemized in the record. To the extent any documents were submitted by the witness concerning the Affordable Sales Program, they must be added to the record pursuant to Government Code section 11347.3(b)(7).

(2) Failure to comply with Government Code section 11346.2(b)(3) or section 11347.1 regarding documents relied upon by the Department in the development of the regulations.

In the Table of Contents of the Department's record of this action, the Department lists four documents on which it relied in the development of these regulations. Only one of these documents was identified as relied upon by the Department in the ISR pursuant to Government Code section 11346.2(b)(3), and none of the remaining three was noticed to the public pursuant to

Government Code section 11347.1. If these three remaining documents were technical, theoretical, or empirical studies, reports or similar documents upon which the Department relied in the development of the regulations, they must be made available to the public for comment for a minimum of 15 days pursuant to Government Code section 11347.1.

(3) Failure to comply with Government Code section 11347.1(e).

The Department's certification of mailing of its July 1, 2015 Notice of Modifications to the text of the regulations and of the addition of documents to the rulemaking record does not certify compliance with mailing requirements for both notifications but rather only with respect to the Notice of Modifications to the text. A redrafted certification of mailing is required under both Title 1 CCR section 44 and Government Code section 11347.1(e).

(4) Failure to comply with Government Code section 11346.9(a)(3) regarding the Department's summary and response to public comments in its Final Statement of Reasons (FSR).

(a) In response to certain public comments, the Department refers commenters to the Department's Frequently Asked Questions (FAQ) document concerning the Affordable Sales Program. However, the FAQ is not attached to the Department's summary and response to comments or otherwise included in the record.

(b) The Department failed to summarize and/or respond to a number of public comments in the FSR. OAL has separately itemized those deficiencies for the Department.

(5) Failure to comply with Government Code section 11346.2(a)(2) concerning the listing of all applicable authority and reference statutes following each adopted regulation.

OAL has separately itemized for the Department those sections of the proposed regulations which do not properly list the applicable authority and reference statutes in the note following each new section.

Prior to resubmission of this rulemaking action to OAL for review, the Department must remedy the APA procedural violations listed above.

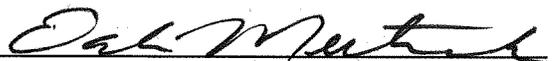
CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Department may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. The Department shall make all substantial regulatory text changes, which are sufficiently

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related to the original text, and any additional documents relied upon, as well as its addendum to the ISR, available for at least 15 days for public comment pursuant to Government Code sections 11346.8 and 11347.1, respectively. OAL reserves the right to review the Department's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

Date: 2/16/2016



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