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17 UNITED STATES DISTRICT COURT  
18 EASTERN DISTRICT OF CALIFORNIA

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19 RICHARD PRICE, et al.,  
20  
21 Plaintiffs,  
22 v.  
23 CITY OF STOCKTON, et al.,  
24 Defendants.  
25

Case No.: CIV. S-02-0065 LKK KJM  
**OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**  
Date: April 25, 2005  
Time: 10:00 a.m.  
Dept.: 4  
Trial Date: March 7, 2006

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 Plaintiffs move the Court for a preliminary injunction obligating the City of Stockton (the  
3 "City") to construct low income housing and preventing the City from demolishing any building  
4 without providing for the construction of new housing. Plaintiffs, however, are not entitled to  
5 this injunction. As Part II explains, there is no irreparable harm that would come to plaintiffs  
6 from demolishing the vacant eyesore buildings that the City owns.

7 Plaintiffs' first alleged basis for this broad injunction is a provision of the California  
8 Redevelopment Law ("CRL") requiring a redevelopment agency to replace housing it  
9 demolishes in constructing a particular redevelopment project. Plaintiffs want to convert this  
10 redevelopment law provision of limited scope and application into a universal requirement  
11 applicable to virtually everything the City does within a redevelopment area, including the City's  
12 code enforcement efforts to eliminate the horrendous conditions in many downtown buildings  
13 and certain property acquisition efforts, none of which were funded by the Stockton  
14 Redevelopment Agency or carried out pursuant to agreements with the Stockton Redevelopment  
15 Agency.

16 As Part III below details, the provision of law on which plaintiffs rely, subdivision (a) of  
17 California Health & Safety Code Section 33413{ TA \l "Health & Safety Code Section 33413" \s  
18 "HSC Section 33413" \c 2 }, only requires construction of affordable housing units to replace  
19 affordable housing units that have been demolished when that demolition results from a project  
20 carried out by a redevelopment agency, a project carried out pursuant to an agreement with a  
21 redevelopment agency, or a project carried out with funding from a redevelopment agency.

22 This replacement housing obligation is one that arises from the invocation of the  
23 extraordinary redevelopment agency powers and extraordinary redevelopment agency funding to  
24 undertake a project resulting in demolition of housing. The replacement obligation does not  
25 apply in the circumstances here, where the housing demolition is a product of a City project,  
26 carried out by the City and funded by the City independent of the Redevelopment Agency.

1 As Part IV explains with respect to the Toni hotel, the Redevelopment Agency has met  
2 its replacement obligation in precisely the circumstances contemplated by Section 33413, where  
3 the Redevelopment Agency had entered into an agreement for a specific project (a parking  
4 structure) that demolished housing. In this circumstance, the Redevelopment Agency adopted a  
5 replacement plan for the housing units destroyed by the project, as required by Section 33413.

6 The second basis for plaintiffs' attempt to impose on the City the obligation to build  
7 affordable housing is an alleged violation of state and federal fair housing laws. Plaintiffs claim  
8 that the City's actions to enforce its health and safety regulations to downtown hotels had a  
9 discriminatory and disparate impact on both the disabled and on persons based on their "source  
10 of income" who were displaced in the course of the City's code enforcement.

11 As Part V and VI below detail, the City has not discriminated against or caused a  
12 disparate impact on any group. All hotel residents, wage earner or general relief ("GR")  
13 recipient, disabled or able-bodied, were treated alike – if a landlord's failure or refusal to repair a  
14 building necessitated vacation of the building, all residents were required to move out of the  
15 building. If there was any discrimination by the City, it was against the awful state of the  
16 downtown buildings with their myriad health and safety violations and sometimes inhuman  
17 living conditions that the City sought to eliminate through code enforcement.

18 Likewise, as Part V spells out in detail, there also was no disparate impact on the disabled  
19 as a result of the displacement of residents from the downtown hotels. The ratio of disabled  
20 displacees to all those displaced is actually smaller than the ratio of the disabled population of  
21 the City to the whole population of the City, or than the ratio of the disabled population in the  
22 downtown area to the whole population of that area.

23 As Part VI shows, the same is true of plaintiffs' claims about income discrimination. The  
24 City has not tried to segregate or discriminate against the low income population of the City.  
25 The City accommodates and has helped produce more than 3,200 units of housing in the City  
26 affordable to low income households, and is working to produce hundreds more affordable low

1 income units. Again, if the City is discriminating against anything, it is against the substandard  
2 downtown Stockton housing. The City is not discriminating against low income housing or  
3 those who live in that housing.

## 4 **II. THERE IS NO IRREPARABLE INJURY.**

5 Under the Ninth Circuit test for the grant of a preliminary injunction, there must be a  
6 showing of at least a "possibility of irreparable injury" for relief to be granted. Owner-Operator  
7 Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1111 (9th Cir. 2004){ TA \l "Owner-  
8 Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108 (9th Cir. 2004)" \s "Swift" \c  
9 8 }.<sup>1</sup> With regard to the replacement housing issue, plaintiffs have not shown any irreparable  
10 harm.

11 Plaintiffs' requested injunction first seeks to prevent the City from tearing down any of  
12 the downtown buildings. It is hard to see how any of the plaintiffs are saved from irreparable  
13 harm by preventing the City from demolishing any of these buildings. With the exception of the  
14 Main property, which remains occupied, the buildings the City has acquired are vacant,  
15 dilapidated buildings that are a nuisance and not particularly well-suited to rehabilitation. See  
16 Declaration of Steven Pinkerton, filed concurrently herewith ("Pinkerton Decl."), ¶ 18. Nor have  
17 plaintiffs suggested that any of these particular buildings could or should be rehabilitated.

18 Moreover, there is nothing in the law plaintiffs assert as the basis for injunction that  
19 suggests or dictates that these particular buildings be saved from the wrecking ball. Thus, even  
20 \_\_\_\_\_

21 <sup>1</sup> With regard to plaintiffs' claims under state law, state standards for injunctive relief may apply  
22 or, at a minimum, be a relevant factor the Court must consider. Kenneth Arms Tenant Ass'n v.  
23 Martinez 2001 U.S. Dist. Lexis 11470 (E.D. Cal. 2001){ TA \l "Kenneth Arms Tenant Ass'n v.  
24 Martinez 2001 U.S. Dist. Lexis 11470 (E.D. Cal. 2001)" \s "Kenneth Arms" \c 8 } (state law at  
25 least "informs" decision re: injunction under state law); Sims Snowboards, Inc. v. Kelly 863 F.2d  
26 643, 646-647 (9th Cir. 1988){ TA \l "Sims Snowboards, Inc. v. Kelly 863 F.2d 643 (9th Cir.  
1988)" \s "Sims Snowboards" \c 8 } (applying state law regarding injunctions to injunction  
sought on basis of state law). Although the California preliminary injunction standards are quite  
similar to the Ninth Circuit standards, under California law, more than just a "possibility" of  
irreparable harm or injury appears to be required. See White v. Davis 30 Cal.4th 528, 554-558  
(2003){ TA \l "White v. Davis 30 Cal.4th 528 (2003)" \s "White" \c 1 } (discussing the need for  
showing irreparable injury to obtain preliminary injunction).

1 assuming that the Court concludes that the City has some replacement housing obligation under  
2 state or federal fair housing laws or state redevelopment law, there is nothing in any of those  
3 laws that requires the City to provide that housing by rehabilitating the units that the City has  
4 acquired, some of which, like the St. Leo's, were a vacant eyesore long before the CHAT  
5 program began. See Declaration of Ronald Palmquist filed concurrently herewith ("Palmquist  
6 Decl."), ¶ 9.

7 For example, under the CRL, the replacement housing could be anywhere in the City,  
8 could be rental housing, for-sale housing or cooperative housing, and could be newly-  
9 constructed housing or rehabilitated housing. Nothing dictates how or where the housing is  
10 developed, rental versus ownership units, or if it is on the site of the demolished housing versus a  
11 different site. Health & Safety Code ¶ 33413. { TA \s "HSC Section 33413" } Thus, plaintiffs  
12 should not be able to obtain relief through the preliminary injunction by way of preservation of  
13 these downtown buildings when that preservation is not required under the CRL.

14 Plaintiffs' proposed order also prohibits the City from "vacating" a building without first  
15 preparing a replacement housing plan. This provision is irrational and may lead to irreparable  
16 harm. If the City is unable to vacate a building because of health and safety violations by the  
17 building owner, it is the occupants of the building who may suffer irreparable harm if they are  
18 injured or become ill as a result of remaining in the building. Moreover, if the City cannot use  
19 vacation orders to enforce its health and safety regulations without incurring the large cost of  
20 replacing each unit that must be closed as a result of the inaction of an irresponsible landlord, the  
21 City will be deterred from ever enforcing its health and safety codes. That is an end result that  
22 will not benefit the residents of downtown buildings, the plaintiffs or the City. The only winners  
23 will be the slumlords.

24 The last prong of plaintiffs' proposed order permits demolition of buildings if the City  
25 prepares a replacement housing plan. Under Health & Safety Code Section 33413{ TA \s "HSC  
26 Section 33413" }, such a plan must provide for replacement units to be produced within four

1 years following the demolition of buildings. In this case, because of this Court's previous order,  
2 the City has not demolished any of the buildings it owns or controls except for the Toni property,  
3 for which it prepared a replacement plan. See Section IV below.

4         Given the time permitted to replace units, even if the Court were to issue the plaintiffs'  
5 proposed injunction and the City proceeds to adopt a replacement plan and demolish a building  
6 within six months from now, the replacement housing would not have to be in service until  
7 September 2009. If the Court does not issue a preliminary injunction now, but ultimately rules  
8 in plaintiffs' favor on this issue at trial in March of 2006, at most the "delay" in the deadline for  
9 production of the housing would be six months – to February 2010 – four years after the Court's  
10 ruling. It is hard to see how any of the plaintiffs would be irreparably harmed by that kind of  
11 delay.

12         The Court has already ordered and the Court of Appeal has affirmed the right of the  
13 plaintiffs to relocation benefits and assistance. Consequently, plaintiffs are entitled to live in  
14 decent, safe and sanitary housing and to receive rental assistance payment sufficient to make the  
15 housing affordable to the plaintiffs. Plaintiffs are therefore unlikely to suffer any irreparable  
16 harm because any required replacement housing is completed in 2010 rather than 2009.

17 **III. THERE IS NO REPLACEMENT OBLIGATION HERE UNDER CALIFORNIA**  
18 **REDEVELOPMENT LAW.**

19 **A. Factual Background.**

20         The CHAT program in downtown Stockton was undertaken as a City of Stockton  
21 program, not a Redevelopment Agency program. There never was any Redevelopment Agency  
22 funding of the CHAT code enforcement activities. Pinkerton Decl., ¶ 6 and Ex. A thereto;  
23 Declaration of Mark Lewis, ¶ 11 and Ex. 4 thereto, filed March 18, 2002, Exhibit 2 to  
24 Defendants' Request for Judicial Notice filed concurrently herewith ("Lewis Decl., RJN-2").  
25 The City also undertook a property acquisition program in downtown Stockton which resulted in  
26 the City's acquisition of nine properties: the Terry, Commercial, Earle, La Verta, St. Leo's, Land,

1 Main, El Tecolote, and Toni. All of these acquisitions were acquired by the City with City funds  
2 for City public projects. Palmquist Decl., ¶ 2; Pinkerton Decl., ¶ 8. No Redevelopment Agency  
3 funds were used for any of these acquisitions. Id. With the exception of the Toni property  
4 discussed in Section IV below, none of these properties have been acquired for or needed for any  
5 of the projects of the Redevelopment Agency. Pinkerton Decl., ¶ 8.

6 The plaintiffs' moving papers indicate that the James, Mariposa and the Steve's property  
7 are closed. Declaration of K. Burrows ("Burrows Decl."), ¶¶ 3(d), (g) (h). Neither the City nor  
8 the Redevelopment Agency own or control these three properties. Pinkerton Decl., ¶ 8.

9 **B. Argument.**

10 **1. Introduction.**

11 Plaintiffs seek an injunction compelling production of housing on the grounds that the  
12 Stockton Redevelopment Agency is obligated to provide that housing pursuant to a specific  
13 provision of the CRL, namely subdivision (a) of Health & Safety Code Section 33413{ TA \s  
14 "HSC Section 33413" }.

15 The difficulty with plaintiffs' position on this issue is that, with one exception noted  
16 below, the Redevelopment Agency has not been involved with either code enforcement or  
17 acquisition of the buildings at issue in this case. As is explained in more detail below, the  
18 absence of Redevelopment Agency involvement in the activities that would result in demolition  
19 of those buildings precludes the court from granting any relief to the plaintiffs pursuant to Health  
20 & Safety Code Section 33413{ TA \s "HSC Section 33413" }.

21 The plaintiffs acknowledge the lack of Redevelopment Agency involvement in the code  
22 enforcement and acquisition activities. Nevertheless, plaintiffs seek to impose the Section  
23 33413{ TA \s "HSC Section 33413" } replacement obligation on the City because of the  
24 interrelationship between the City and the Redevelopment Agency on other projects and  
25 activities unrelated to the buildings at issue in this case. However, the fact that the City has  
26 funded Redevelopment Agency activities, the fact that City staff also serve as staff for the

1 Redevelopment Agency, and the fact that City activities may help redevelop Stockton does not  
2 change the fact that Section 33413{ TA \s "HSC Section 33413" } only applies to  
3 Redevelopment Agency projects, not to City ones.

4  
5 **2. Replacement Housing Requirement is a Consequence of the  
Extraordinary Powers of Redevelopment Agencies.**

6 The CRL imbues California redevelopment agencies with two extraordinary powers:  
7 first, redevelopment agencies have the power of eminent domain to condemn private property  
8 and then sell the acquired property to private developers who will agree to redevelop it. Health  
9 & Safety Code Section 33391{ TA \l "Health & Safety Code Section 33391" \s "HSC Section  
10 33391" \c 2 } (authorizing use of eminent domain); Health & Safety Code Section 33432{ TA \l  
11 "Health & Safety Code Section 33432" \s "HSC Section 33432" \c 2 } (requiring sale of acquired  
12 property conditioned on redevelopment of the property); Redevelopment Agency v. Hayes, 122  
13 Cal.App.2d 777, 786-797 (1954){ TA \l "Redevelopment Agency v. Hayes, 122 Cal.App.2d 777  
14 (1954)" \s "Hayes" \c 1 } (upholding constitutionality of California redevelopment agency  
15 acquisition and resale of land); see also Berman v. Parker, 348 U.S. 26, 33-34 (1954){ TA \l  
16 "Berman v. Parker, 348 U.S. 26 (1954)" \s "Berman" \c 8 } (upholding constitutionality of  
17 redevelopment agency purchase and resale of property).

18 One California Court of Appeal has described this eminent domain power as follows:  
19 "...redevelopment is an extraordinary remedy that allows property to be taken from one person  
20 through the power of eminent domain and transferred through the redevelopment agency to a  
21 private developer, all at public expense." Emmington v. Solano County Redevelopment Agency,  
22 195 Cal.App.3d 491, 501, n. 14 (1987){ TA \l "Emmington v. Solano County Redevelopment  
23 Agency, 195 Cal.App.3d 491 (1987)" \s "Emmington" \c 1 }.

24 In addition, redevelopment agencies have the right to receive all of the property taxes  
25 generated by assessed value growth in redevelopment project areas (or "tax increment") that,  
26 absent the redevelopment plan, would be paid to the government agencies that normally receive

1 the property taxes produced in a particular area, such as school districts, counties, and special  
2 districts. Cal.Constitution, Article XVI, Section 16{ TA \l "California Constitution, Article XVI,  
3 Section 16" \s "Cal.Const., Art. XVI, Section 16" \c 7 } (authoring tax increment financing for  
4 redevelopment agencies); Health & Safety Code Section 33670{ TA \l "Health & Safety Code  
5 Section 33670" \s "HSC Section 33670" \c 2 } (implementing tax increment financing for  
6 redevelopment agencies); Redevelopment Agency of San Bernardino v. County of San  
7 Bernardino, 21 Cal.3d 255, 257-258 (1978){ TA \l "Redevelopment Agency of San Bernardino  
8 v. County of San Bernardino, 21 Cal.3d 255 (1978) " \s "San Bernardino v. San Bernardino" \c  
9 1 } (explaining redevelopment agency tax increment financing). As a recent Court Appeal  
10 decision put it: "...the desirable goal of improving an area is 'insufficient' by itself to justify use  
11 of the extraordinary powers of redevelopment. If it were, tax increment financing at public  
12 expense would become commonplace as a subsidy to private enterprise." Beach-Courchesne v.  
13 City of Diamond Bar, 80 Cal.App.4th 388, 395 (2000){ TA \l "Beach-Courchesne v. City of  
14 Diamond Bar, 80 Cal.App.4th 388 (2000)" \s "Beach-Courchesne" \c 1 }.

15 With these extraordinary powers come extraordinary obligations. In the housing area,  
16 redevelopment agencies are required to spend 20% of the tax increment they receive to increase  
17 or improve the supply of moderate income and low income housing in the jurisdiction that the  
18 agency serves (Health & Safety Code Sections 33334.2{ TA \l "Health & Safety Code Section  
19 33334.2" \s "HSC Section 33334.2" \c 2 }, 33334.3{ TA \l "Health & Safety Code Section  
20 33334.3" \s "HSC Section 33334.3" \c 2 }), and at least 15% of all housing produced in a  
21 redevelopment project area must be affordable to moderate income and low income households.  
22 Health & Safety Code Section 33413{ TA \s "HSC Section 33413" }, subd. (b). In addition,  
23 under the section of law that plaintiffs advance here, Health & Safety Code Section 33413{ TA  
24 \s "HSC Section 33413" }, subd. (a), redevelopment agencies are obligated to replace any low or  
25 moderate income housing they destroy as part of the agency's redevelopment projects.

26 Other California government agencies are not generally required to replace housing that

1 they demolish in carrying out their projects. Thus, a school district is not obligated to provide  
2 replacement housing when it demolishes housing to build a school.<sup>2</sup> A city is not required to  
3 provide replacement housing when it demolishes housing to build a public pedestrian mall, a  
4 public baseball stadium, parking lot or any other public facility. A county is not required to  
5 provide replacement housing when it demolishes housing to build a convention center, a park,  
6 courthouse or jail. Likewise, the state is not required to replace housing it demolishes to build a  
7 freeway or a conference center. Nor is there any requirement that a government agency replace  
8 housing when it is closed, vacated or demolished as a result of enforcement of local or state  
9 health and safety regulations, land use regulations, criminal laws or tax laws.

10 The existence of limited exceptions proves the general rule. Infrastructure financing  
11 districts are required to provide replacement housing (Government Code Section 53395.5{ TA \I  
12 "Government Code Section 53395.5" \s "GC Section 53395.5" \c 2 }), but infrastructure  
13 financing districts, like redevelopment agencies, have the extraordinary ability to use tax  
14 increment financing. Government Code Section 53396{ TA \I "Government Code Section  
15 53396" \s "GC Section 53396" \c 2 }. In a coastal zone immediately adjacent to California's  
16 unique coastline, private developers seeking permits to develop new developments are required  
17 to replace any affordable housing that they demolish in the coastal zone, although in some cases  
18 replacement may not be required if it is not feasible. Government Code Section 65590{ TA \I  
19 "Government Code Section 65590" \s "GC Section 65590" \c 2 }, subd. (b)(1), (2), (3). The  
20 coastal zone requirement differs from that under Section 33413{ TA \s "HSC Section 33413" } in  
21 that it is not an obligation of the government agency but rather is imposed on private developers.  
22 The coastal zone requirement also does arise in an extraordinary circumstance – the

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24  
25 <sup>2</sup> School districts are authorized to provide replacement housing in certain narrow circumstances.  
26 Education Code Section 35278{ TA \I "Education Code Section 35278" \s "EC Section 35278" \c 2 }. However, that authority explicitly "does not require a [school district] to develop replacement housing..." Education Code Section 35278.5{ TA \I "Education Code Section 35278.5" \s "EC Section 35278.5" \c 2 }.

1 extraordinary physical asset the coastline provides to California residents. See Public Resources  
2 Code Section 30001{ TA \l "Public Resources Code Section 30001" \s "PRC Section 30001" \c 2  
3 } (setting forth legislative statement of the value of the coastal zone).

4 **3. The Legislative History of Section 33413(a).**

5 Contrary to plaintiffs' claims, Health & Safety Code Section 33413{ TA \s "HSC Section  
6 33413" } does not suddenly become applicable to acquisitions undertaken by government  
7 agencies other than a redevelopment agency because those acquisitions occur within an area  
8 governed by a redevelopment plan. That is clear from both the legislative history of Section  
9 33413{ TA \s "HSC Section 33413" } and the case law interpreting it.

10 When Section 33413{ TA \s "HSC Section 33413" } was originally enacted, it applied  
11 only to demolition of housing with direct redevelopment agency involvement. As originally  
12 enacted, the section required a redevelopment agency to replace housing demolished "as a result  
13 of a redevelopment project." See Chapter 970, Statutes of 1975, Section 3. Exhibit 1 to  
14 Declaration of Lee C. Rosenthal, filed concurrently herewith ("Rosenthal Decl."). The CRL  
15 defines a "redevelopment project" as "any undertaking" of a redevelopment agency pursuant to  
16 the CRL. Health & Safety Code Section 33010{ TA \l "Health & Safety Code Section 33010" \s  
17 "HSC Section 33010" \c 2 }. Thus, by definition, the original legislation applied only to  
18 redevelopment agency actions, a conclusion confirmed by numerous statements in the legislative  
19 history of the original section indicating that replacement is required "whenever a redevelopment  
20 agency destroys" housing units (Exhibits 2, 3 to Rosenthal Decl.), when housing is "destroyed by  
21 redevelopment agencies" (Exhibit 4 to Rosenthal Decl.), and to "redevelopment agencies which  
22 destroy housing." Exhibits 5, 6, 7 to Rosenthal Decl.

23 Thus, when enacted, Section 33413{ TA \s "HSC Section 33413" } applied only to  
24 demolition of housing by a redevelopment agency. It did not apply to the demolition of housing  
25 in the area governed by a redevelopment plan undertaken by a city, county, school district,  
26 federal agency, state agency, private property owner, or anyone else. Nor did it apply to

1 demolition of housing that might have been in concert with the goals of the redevelopment  
2 agency. Thus, for example, nothing in Section 33413{ TA \s "HSC Section 33413" } required  
3 replacement housing if the federal government undertook a project involving purchase of  
4 dilapidated housing in a redevelopment area and demolition of the housing and construction of  
5 new federal offices or a courthouse, even though that federal project forwarded the  
6 redevelopment agency's policies and goals of removing dilapidated housing and developing new  
7 buildings.

8 In 1989, Section 33413{ TA \s "HSC Section 33413" } was amended. See Chapter 1155,  
9 Statutes of 1989, Section 2.5 (Exhibit 8 to Rosenthal Decl.). That amendment made clear that  
10 there was a replacement obligation only when housing is destroyed by a project that is "subject  
11 to a written agreement" with the redevelopment agency, or by a project that "has received  
12 financial assistance" from a redevelopment agency. As a contemporaneous analysis of the  
13 legislation explained:

14 This measure would also clarify that this [replacement housing] provision  
15 only applies to housing subject to a written agreement or where the  
16 [redevelopment] agency provides some form of financial assistance.  
[Emphasis added.]

17 Office of Local Government Affairs Report on SB1287{ TA \l "Office of Local Government  
18 Affairs Report on SB1287" \s "Local Govt Affairs Report SB1287" \c 3 } [Chapter 1155] at p. 2  
19 (Exhibit 9 to Rosenthal Decl.); see also Senate Rules Committee Analysis of SB1287{ TA \l  
20 "Senate Rules Committee Analysis of SB1287" \s "Senate Analysis SB1287" \c 3 } (Exhibit 10  
21 to Rosenthal Decl. (indicating that replacement obligation applies "whenever a redevelopment  
22 agency destroys housing.")).

23 The operational provision of Section 33413{ TA \s "HSC Section 33413" }, as it was  
24 amended in 1989 by Chapter 1155{ TA \s "Local Govt Affairs Report SB1287" }, remains in  
25 effect today. Thus, as it currently stands, Section 33413{ TA \s "HSC Section 33413" } only  
26 requires the provision of replacement housing when the specific project resulting in the

1 demolition of the housing is subject to a written agreement with a redevelopment agency, or  
2 when the specific project resulting in demolition of the housing is undertaken with  
3 redevelopment agency financial assistance. Again, the mere fact that the actions of a person or  
4 entity other than the redevelopment agency may forward the policies or goals of the  
5 redevelopment agency is not a statutory trigger for replacement housing. Such actions may  
6 forward the policies or goals of the redevelopment agency but do not have the backing of the  
7 redevelopment agency's extraordinary powers.

8       There is only one California case interpreting Section 33413{ TA \s "HSC Section  
9 33413" }. In that case, Concerned Citizens of South Central Los Angeles v. Los Angeles Unified  
10 School District, 24 Cal.App.4th 826 (1994){ TA \l "Concerned Citizens of South Central Los  
11 Angeles v. Los Angeles Unified School District, 24 Cal.App.4th 826 (1994)" \s "Concerned  
12 Citizens" \c 1 }, a school district was undertaking a new elementary high school project which  
13 entailed acquisition and demolition of 67 housing units. The school district had consulted with  
14 the redevelopment agency in planning for the new school because the proposed school was in  
15 one of the agency's redevelopment areas. Id.{ TA \s "Concerned Citizens" } at 838. The plaintiff  
16 argued that there was an obligation to mitigate the loss of affordable housing resulting from the  
17 new school project and that the obligation arose under Section 33413{ TA \s "HSC Section  
18 33413" }. The Court of Appeal rejected this argument out of hand because that section "applies  
19 to redevelopment agencies, not school districts." Id.{ TA \s "Concerned Citizens" } at 842. The  
20 court reached this conclusion despite evidence in the record that the new school project would  
21 forward the city's plans for improving and redevelop the area "by focusing on...serious  
22 deficiencies in educational achievement." Id. at 839{ TA \s "Concerned Citizens" }.

23  
24       **4. The Fact That City Projects Forward Redevelopment Goals or Policies Does Not Create a Replacement Housing Obligation.**

25       To evade the clear import of Section 33413{ TA \s "HSC Section 33413" }, plaintiffs  
26 resort to several arguments that wildly expand the scope of Section 33413{ TA \s "HSC Section

1 33413" } beyond any reasonable interpretation of the statute. First, plaintiffs argue that Section  
2 33413{ TA \s "HSC Section 33413" } applies because the City's activities with regard to code  
3 enforcement and acquisition of downtown hotels were, in the words of this Court, a "single  
4 undertaking" that forwarded redevelopment goals. But the fact remains that all these code  
5 enforcement and acquisition activities are City, not Redevelopment Agency activities.

6 Certainly City projects can foster redevelopment goals in the sense that any activity that  
7 improves or removes the dilapidated buildings in downtown Stockton would foster  
8 redevelopment in downtown Stockton, as would similar activities undertaken by private parties  
9 or other government agencies. Thus, if a private party purchased a dilapidated hotel in  
10 downtown Stockton, demolished it and replaced it with a new retail or office building, that  
11 party's project would surely foster redevelopment. But, if that project is not undertaken subject  
12 to an agreement with the Redevelopment Agency or with financial assistance from the  
13 Redevelopment Agency, Section 33413{ TA \s "HSC Section 33413" } by its own terms does not  
14 apply. To conclude otherwise is to make Section 33413{ TA \s "HSC Section 33413" }  
15 universally applicable to each and every project undertaken in a redevelopment area, regardless  
16 of who undertakes the project or who provides the financing for the project. That is not what  
17 Section 33413{ TA \s "HSC Section 33413" } says.

18 Under plaintiffs' formulation of the law, the City would have a replacement obligation  
19 when the enforcement of its normal police and revenue powers results in vacation of housing. If  
20 an unscrupulous property owner begins using a dilapidated downtown warehouse as a home for  
21 drug dealers and prostitutes, flaunting the City's zoning regulations, building codes and criminal  
22 laws, the City will shut that building down. But in so doing, according to plaintiffs, because the  
23 City's actions help redevelop the area, the City will have to replace the housing that warehouse  
24 provided. Likewise, if an owner of a dilapidated downtown residential building fails to pay City  
25 taxes or fees and the City forecloses on a resulting tax or judgment lien, under plaintiffs' theory,  
26 the City has a replacement obligation. Yet there is nothing in Section 33413 that suggests that

1 these kinds of typical City activities, which are carried out daily within and outside  
2 redevelopment areas, are activities that trigger replacement housing obligations under Section  
3 33413 because they may somehow promote redevelopment.

4 **5. The City's Financial Support of Agency Projects Does Not Require**  
5 **Replacement Housing for City Projects.**

6 Plaintiffs claim that the City's financial support of Redevelopment Agency activities  
7 triggers the applicability of Section 33413{ TA \s "HSC Section 33413" } to City activities. The  
8 logic of this argument is overreaching. In making this argument, plaintiffs rely on an agreement  
9 between the City and the Redevelopment Agency providing for City funding of certain  
10 Redevelopment Agency activities. See Declaration of Deborah Collins ("Collins Decl."),  
11 Exhibit 2, Exhibit 3. This agreement provides City assistance to the Redevelopment Agency for  
12 five specific Redevelopment Agency projects within the West End redevelopment area.  
13 Pinkerton Decl., ¶ 7. Those projects are the movie cinema and retail complex, the Hotel  
14 Stockton project, the multi-modal transportation center, the Mercy Charities affordable housing  
15 development and the Fox Theater renovation, all projects carried out pursuant to agreements  
16 with or funding from the Redevelopment Agency. Pinkerton Decl., ¶¶ 7, 9, 12; Collins Decl.,  
17 Exhibit 2, Exhibit 3, Exhibit 7 and Exhibit 11. The City funding for these five Redevelopment  
18 Agency projects comes from federal loans and grants that the Redevelopment Agency may be  
19 required to repay. Pinkerton Decl., ¶ 7. The City and the Redevelopment Agency would agree  
20 that any housing that the Redevelopment Agency, the City, or the developers of those five  
21 projects demolish in the course of undertaking those five projects must be replaced under Section  
22 33413, because e{ TA \s "HSC Section 33413" }ach of those projects is being carried out  
23 pursuant to an agreement with or funding from the Redevelopment Agency.<sup>3</sup> However, in  
24

25 <sup>3</sup> As is discussed below in Part III, this is exactly why the Agency prepared a replacement plan  
26 for the Toni – it was being demolished to satisfy the Redevelopment Agency's parking  
obligations under the Redevelopment Agency's agreement for development of the movie theater  
complex. Pinkerton Decl., ¶¶ 9, 10.

1 making their argument, plaintiffs assume that the City involvement in the five specific  
2 Redevelopment Agency projects discussed above means that Section 33413{ TA \s "HSC  
3 Section 33413" } applies to each and every City undertaking or activity in the redevelopment  
4 area.

5 Plaintiffs assume that the "redevelopment project" to which Section 33413{ TA \s "HSC  
6 Section 33413" } refers constitutes the aggregate of all actions that a city ever takes in a  
7 redevelopment area. Therefore, plaintiffs claim, so long as the City has a written agreement with  
8 the Redevelopment Agency regarding any aspect of the Redevelopment Agency's activities,  
9 Section 33413{ TA \s "HSC Section 33413" } applies to each and every specific undertaking or  
10 project of the City resulting in demolition of housing, even if the undertaking or project is not the  
11 subject of a written agreement with the Redevelopment Agency and does not have  
12 Redevelopment Agency funding.

13 This argument is illogical and arbitrary in several ways. First of all, under plaintiffs'  
14 view of the world, there does not need to be any connection between the project that is subject to  
15 the written agreement and the demolition of housing. There need not be an agreement between  
16 the Redevelopment Agency and the City providing for or requiring the City to demolish the  
17 buildings the City has acquired. In fact, as noted above, for the buildings at issue in this case  
18 there are no such agreements. Rather, under plaintiffs' theory, replacement obligation arises  
19 throughout the entire redevelopment area because the City and Redevelopment Agency have an  
20 agreement for five projects unrelated to the demolition of the hotels – the movie theater, Hotel  
21 Stockton, Intermodal, Mercy, and Fox projects. Under plaintiffs' theory, there would be a  
22 replacement obligation throughout the entire redevelopment area if the City and Redevelopment  
23 Agency contracted for pencils on one project. Thus, plaintiffs' argument ignores the plain  
24 impact of Section 33413 that housing be replaced when it is destroyed as a result of a  
25 redevelopment agency undertaking, or as a result of the undertaking of another entity pursuant to  
26 an agreement with and/or with financial assistance from the agency. Nowhere does Section

1 33413{ TA \s "HSC Section 33413" } say that there is a replacement obligation when any person  
2 or entity with a contract with the redevelopment agency also demolishes housing, acting  
3 independently from the redevelopment agency.

4 Plaintiffs' theory is also illogical because it hinges the redevelopment agency's  
5 replacement obligation on the serendipity of the persons with whom the agency may have an  
6 agreement. Thus, under plaintiffs' formulation of the workings of Section 33413{ TA \s "HSC  
7 Section 33413" }, a redevelopment agency would have a replacement housing obligation if the  
8 person with whom the agency contracts for redevelopment area trash cans happens to undertake  
9 a project that results in elimination of housing in the redevelopment area. But there would be no  
10 obligation if a person with whom the agency had no agreement whatsoever undertakes a similar  
11 project in the redevelopment area that also results in demolition of housing. Such an irrational  
12 interpretation of a statute should never be adopted by the courts. Harris v. Capital Growth  
13 Investors XIV, 52 Cal.3d 1142, 1165-1166 (1991){ TA \l "Harris v. Capital Growth Investors  
14 XIV, 52 Cal.3d 1142 (1991)" \s "Harris v. Capital Growth" \c 1 } ("...it is presumed the  
15 Legislature intended reasonable results consistent with its intended purpose, not absurd  
16 results."); Coso Energy Developers v. County of Inyo, 122 Cal.App.4th 1512, 1528 (2004){ TA  
17 \l "Coso Energy Developers v. County of Inyo, 122 Cal.App.4th 1512 (2004)" \s "Coso" \c 1 }  
18 (rejecting interpretation of statute that would have "irrational" results).

19 In addition, such an interpretation would have the de facto result of requiring replacement  
20 housing for virtually all city projects undertaken within redevelopment areas, even though those  
21 city projects are, like the City's downtown hotel projects, not undertaken pursuant to or subject to  
22 an agreement with the redevelopment agency and do not receive redevelopment agency funding.

23 This is a consequence of the fact that city or county financial support of the redevelopment  
24 agency within its jurisdiction is an almost universal occurrence. Under plaintiffs' theory,  
25 financial assistance from the city to the redevelopment agency for a particular project would  
26 activate replacement housing obligations for all city projects, including those that do not have

1 redevelopment agency funding or agreements.<sup>4</sup>

2 Of the approximately 410 redevelopment agencies in California, more than 85% receive  
3 loans or grants from the city or county in which the redevelopment agency operates. See 2002-  
4 2003 Community Redevelopment Agencies Report, Steve Westley, California State Controller  
5 (May 3, 2004){ TA \l "2002-2003 Community Redevelopment Agencies Report, Steve Westley,  
6 California State Controller (May 3, 2004)" \s "CRAR" \c 3 }, pp. xx, 41-253, 404-618 (Exhibit  
7 11 to Rosenthal Decl.). Those cities and counties provided approximately \$370,000,000 in  
8 financial assistance to redevelopment agencies in 2002-2003, and the total debt obligation of  
9 redevelopment agencies to cities and counties exceeds \$7,395,000,000. Id. at pp. xii, xix{ TA \s  
10 "CRAR" }. Thus, under plaintiffs' formulation, most cities and counties would have replacement  
11 housing obligations for their own activities despite the absence of any requirement in Section  
12 33413{ TA \s "HSC Section 33413" } suggesting that outcome. If the Legislature had intended  
13 such an outcome, one would expect that it would have stated it directly, by requiring cities and  
14 counties to provide replacement housing when they demolish housing in redevelopment areas.

15 In fact, plaintiffs have it backwards. Under Section 33413{ TA \s "HSC Section 33413"  
16 }, it is a redevelopment agency's involvement by contract or provision of financial assistance in a  
17 city's projects that activates the replacement housing obligation. It is not the city's assistance or  
18 involvement in redevelopment agency projects that triggers replacement housing obligations.  
19 That, of course, is an obligation a redevelopment agency already has under Section 33413{ TA \s  
20 "HSC Section 33413" } when it demolishes housing itself or assists others in demolishing  
21 housing.

22  
23  
24 \_\_\_\_\_  
25 <sup>4</sup> Under plaintiffs' theory, there would be a replacement obligation if a city demolished housing  
26 prohibits redevelopment agency funding of city halls. This would be an odd result in that the CRL  
Health & Safety Code Section 33445, subsection (g).

1                   **6. Involvement of City Officers and Staff in Agency and City Projects**  
2                   **Does Not Require Replacement Housing for City Projects.**

3                   Lastly, plaintiffs argue that the connection between the City and the Redevelopment  
4 Agency in the form of City officials serving as staff of both the City and Redevelopment Agency  
5 puts the City on the hook for replacement housing under Health & Safety Code Section 33413{  
6 TA \s "HSC Section 33413" }. As with their other arguments, this one is overbroad and  
7 overreaching.

8                   There is inevitably a close relationship between a redevelopment agency and the city or  
9 county in which the redevelopment agency operates. The redevelopment agency cannot exist  
10 without action of the city or county. Health & Safety Code Section 33101{ TA \l "Health &  
11 Safety Code Section 33101" \s "HSC Section 33101" \c 2 }. In most cases, the city council or  
12 board of supervisors serves as the governing board of the redevelopment agency. Health &  
13 Safety Code Section 33200{ TA \l "Health & Safety Code Section 33200" \s "HSC Section  
14 33200" \c 2 }; see also Pinkerton Decl., ¶5; Beatty et al., Redevelopment in California (2004) at  
15 p. 17-18 (explaining that in the "vast majority" of cases the city council or board of supervisors  
16 serves as the governing board of the redevelopment agency) (Exhibit 12 to Rosenthal Decl.).

17                   In addition, a number of redevelopment agency actions must be reviewed and approved  
18 by the city council or board of supervisors, acting as the "legislative body," not as the governing  
19 board of the redevelopment agency. See Health & Safety Code Section 33413{ TA \s "HSC  
20 Section 33413" } (certain agency leases and sales of land); Health & Safety Code Section 33445{  
21 TA \l "Health & Safety Code Section 33445" \s "HSC Section 33445" \c 2 } (agency funding of  
22 certain public improvements); Health & Safety Code Section 33640{ TA \l "Health & Safety  
23 Code Section 33640" \s "HSC Section 33640" \c 2 } (issuance of agency bonds). In most cases,  
24 the staff of the city or county serves as the staff of the redevelopment agency. Such staff  
25 assistance is specifically authorized under the CRL. See Health & Safety Code Section 33128{  
26 TA \l "Health & Safety Code Section 33128" \s "HSC Section 33128" \c 2 } (stating that

1 redevelopment agency will "have access to the services and facilities of the planning  
2 commission, the city engineer, and other departments and offices of the..." city or county);  
3 Rosenthal Decl., ¶6.

4 Despite relationships between redevelopment agencies and cities, it is clear that they are  
5 legally separate entities. For example, cities and redevelopment agencies not responsible for  
6 each others' debts. As stated by the Court of Appeal in Pacific States Enterprises, Inc. v. City of  
7 Coachella, 13 Cal.App.4th 1414, 1424 (1993){ TA \l "Pacific States Enterprises, Inc. v. City of  
8 Coachella, 13 Cal.App.4th 1414 (1993)" \s "Pacific v. Coachella" \c 1 }:

9  
10 Redevelopment agencies are governmental entities that exist by virtue of state law  
and are separate and distinct from the communities in which they exist.

11 See also County of Solano v. Vallejo Redevelopment Agency, 75 Cal.App.4th 1262, 1266  
12 (1999){ TA \l "County of Solano v. Vallejo Redevelopment Agency, 75 Cal.App.4th 1262  
13 (1999)" \s "Solano v. Vallejo" \c 1 } ("...a redevelopment agency is a separate legal entity from  
14 the city that established it, and the city is not liable for the debts of the agency.").<sup>5</sup>

15 Further, Health & Safety Code Section 33644{ TA \l "Health & Safety Code Section  
16 33644" \s "HSC Section 33644" \c 2 } states that the obligations of the redevelopment agency are  
17 not a debt of the "community" – i.e., the city or county that brought the redevelopment agency  
18 into existence. See Health & Safety Code Section 33002{ TA \l "Health & Safety Code Section  
19 33002" \s "HSC Section 33002" \c 2 } (defining the "community" as the city or county); Health  
20 & Safety Code Section 33007{ TA \l "Health & Safety Code Section 33007" \s "HSC Section  
21 33007" \c 2 } (defining the "legislative body" as the city council of the city or board of  
22

23  
24 <sup>5</sup> In County of Solano v. Vallejo Redevelopment Agency, the court found the city liable for the  
25 agency's failure to meet its contractual payment obligations to the county on an unjust  
26 enrichment theory, citing evidence that the money that should have been paid to the county  
instead went to the city. 75 Cal.App.4th at 1277-1280. Here, there is no claim or evidence that  
the alleged failure of the Agency to provide replacement housing allowed the Redevelopment  
Agency to pay money to the City. In fact, plaintiffs claim just the opposite – that the City paid  
money to the Agency for the movie theater and other projects.

1 supervisors of the county). Likewise, Health & Safety Code Section 33129{ TA \l "Health &  
2 Safety Code Section 33129" \s "HSC Section 33129" \c 2 } specifies that any city or county grant  
3 to a redevelopment agency for administrative expenses does not make the agency a "department"  
4 of the city or county or subject agency staff to city or county rules.

5 The fact that staff of the City serves as staff of the Redevelopment Agency does not  
6 create liability for obligations that would not otherwise exist. This is borne out of the case law.  
7 In Pacific States Enterprises, Inc. v. City of Coachella{ TA \s "Pacific v. Coachella" }, supra, a  
8 developer sued the city seeking to hold the city liable for an alleged breach of a contract with the  
9 redevelopment agency. The negotiation and communications with respect to the alleged contract  
10 had been carried out on behalf of the redevelopment agency by the city manager. Id., 13  
11 Cal.App.4th at 1421-1423{ TA \s "Pacific v. Coachella" }. Despite the obvious relationship  
12 between the city and redevelopment agency, and the fact that it was a city official acting for the  
13 agency who took the actions complained of, the Court of Appeal upheld the dismissal of the  
14 claim against the city, noting that:

15 Well-established and well-recognized case law holds that the mere fact  
16 that the same body of officers act as the legislative body of two  
17 governmental entities does not mean that the two government agencies  
18 are, in actuality, one and the same.

19 Id. at 1424{ TA \s "Pacific v. Coachella" }.

20 To the same end is Tucker Land v. State, 94 Cal.App.4th 1191 (2001){ TA \l "Tucker  
21 Land v. State, 94 Cal.App.4th 1191 (2001)" \s "Tucker Land v. State" \c 1 }. In Tucker Land{  
22 TA \s "Tucker Land v. State" }, a state agency and two local government recreation districts  
23 formed a joint powers agency. The joint powers agency entered into a contract with the plaintiff  
24 who later sued on the contract and won a judgment against the joint powers agency. The  
25 plaintiff then sought to collect on the judgment from the state agency and recreation districts  
26 which had created the joint powers agency in the first place. In support of its position, the  
plaintiff, making an argument like that of the plaintiffs here, pointed to evidence that the state

1 and the recreation districts had formed the joint powers agency, that the board of the joint  
2 powers agency were representatives of the state and districts, that the executive director of the  
3 state agency was the executive director of the joint powers agency, that the manager of one of  
4 the joint powers agency the state agency managed was treasurer of the joint powers agency's  
5 properties, and that the state agency and districts had approval rights over the joint powers  
6 agency's budget. Id., 94 Cal.App.4th at 1201{ TA \s "Tucker Land v. State" }. Despite these  
7 facts highlighting the interrelationship among the joint powers agency and the state agency and  
8 districts that had created the joint powers agency, the Court of Appeal, relying in part on  
9 statutory provisions that permitted and contemplated the involvement of the creating agency in  
10 the affairs of the joint powers agency, concluded that the state and districts were not liable for  
11 the joint powers agency's obligations. Id. at 1202{ TA \s "Tucker Land v. State" }.

12 Likewise, in this case, as described above, the Legislature has provided for and  
13 contemplated the involvement of a redevelopment agency's creating city or county, and the city  
14 or county's officers and staff, in the affairs of the redevelopment agency. But as in Tucker Land{  
15 TA \s "Tucker Land v. State" } and Pacific State Enterprises, Inc.{ TA \s "Pacific v. Coachella"  
16 }, that involvement does not convert the City and Redevelopment Agency into a single entity for  
17 which all of the statutory obligations of the Redevelopment Agency suddenly become  
18 obligations applicable to the City as well.

19 The Legislature, having created the CRL and provided for city and county involvement in  
20 redevelopment agencies, certainly could have, in recognition of that involvement, required the  
21 city or county to comply with Section 33413{ TA \s "HSC Section 33413" } or various other  
22 redevelopment agency obligations whenever the city or county undertook activities or projects  
23 within a redevelopment area. But plaintiffs cannot point to any, nor is there any, provision of the  
24 CRL that imposes a replacement housing requirement on City actions because of the City's  
25 involvement through staff in Redevelopment Agency activities. In the absence of such  
26

1 provisions, this Court cannot create one.<sup>6</sup> See Lantzy v Centex Homes, 31 Cal.4th 363, 377-378  
2 (2003){ TA \l "Lantzy v Centex Homes, 31 Cal.4th 363 (2003)" \s "Lantzy v. Centex" \c 1 }  
3 (failure of Legislature to specifically provide statutory exception in light of presumed legislative  
4 knowledge of circumstances is good indication Legislature did not intend to enact exception);  
5 People for Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Board, 125  
6 Cal.App.4th 871, 877-882 (2005){ TA \l "People for Ethical Treatment of Animals, Inc. v.  
7 California Milk Producers Advisory Board, 125 Cal.App.4th 871 (2005)" \s "PETA v. California  
8 Milk Producers" \c 1 } (failure of Legislature to expressly include government agencies as  
9 entities subject to particular statute shows intent that statute not applicable to government  
10 agencies).

#### 11 **7. The City Does Not Control the Privately-Owned Buildings.**

12 As noted in the factual statement above, there are three properties that the plaintiffs claim  
13 are closed that the City does not own or control and instead are privately owned. There are  
14 obviously other residential buildings within the West End redevelopment area that are also  
15 privately owned.

16 Since the City and the Redevelopment Agency do not own or control these privately-

---

18  
19 <sup>6</sup> There are provisions of the CRL which the Legislature has explicitly made applicable to both  
20 the redevelopment agency and the city or county. For example, the conflict of interest  
21 provisions of the CRL are applicable to officers and employees of both the redevelopment  
22 agency and to the city or county officials or staff involved in redevelopment agency activity.  
23 See Health & Safety Code Section 33130{ TA \l "Health & Safety Code Section 33130" \s "HSC  
24 Section 33130" \c 2 }; Health & Safety Code Section 33130.5{ TA \l "Health & Safety Code  
25 Section 33130.5" \s "HSC Section 33130.5" \c 2 } (both applicable to officers or employees of  
26 the "agency or the community"). Similarly, both redevelopment agencies and their creating  
cities or counties are precluded from filing or financing certain kinds of litigation. Health &  
Safety Code Section 33515{ TA \l "Health & Safety Code Section 33515" \s "HSC Section  
33515" \c 2 }. The Legislature has also made cities and counties expressly liable for certain  
redevelopment agency payments to school funds in the event the redevelopment agency fails to  
make the payment. See Health & Safety Code Section 33681.8{ TA \l "Health & Safety Code  
Section 33681.8" \s "HSC Section 33681.8" \c 2 }(e); Health & Safety Code Section 33681.10{  
TA \l "Health & Safety Code Section 33681.10" \s "HSC Section 33681.10" \c 2 }(e); Health &  
Safety Code Section 33681.13{ TA \l "Health & Safety Code Section 33681.13" \s "HSC Section  
33681.13" \c 2 }(e); Health & Safety Code Section 33682(e).

1 controlled buildings, the City and Agency cannot prevent demolition, vacation or conversion of  
2 these buildings by their owners. Thus, no injunction in this case can or should extend to  
3 privately owned buildings.

4 **IV. THE REDEVELOPMENT AGENCY ADOPTED A VALID REPLACEMENT**  
5 **PLAN FOR THE TONI HOTEL.**

6 Plaintiffs raise a number of issues regarding the Toni property that require brief response.  
7 First, the Redevelopment Agency prepared and adopted a replacement housing plan for the Toni  
8 property because the building was being demolished in order to build a parking structure for a  
9 project (a downtown movie theater) that was developed pursuant to an agreement that obligated  
10 the Redevelopment Agency to construct the parking structure. Burrows Decl., Exhibit 20. The  
11 agreement required the Redevelopment Agency to provide or cause construction of a parking  
12 structure of at least 460 spaces within 700 feet of the downtown cinema site. Pinkerton Decl.,  
13 ¶ 9. Thus, a replacement housing plan was required because the Toni building was being  
14 demolished for a project – the downtown movie theater– that was the subject of an agreement  
15 with the Redevelopment Agency. As explained in Section III above, that is precisely the  
16 circumstance where a replacement housing plan is required under Health & Safety Code Section  
17 33413{ TA \s "HSC Section 33413" }.

18 Second, and contrary to plaintiff's claims, the Toni replacement housing plan fully  
19 complies with the CRL. Section 33413{ TA \s "HSC Section 33413" } requires replacement of  
20 units demolished at the income levels of the occupants of the units prior to demolition and then  
21 specifies the applicable levels – very low income, low income, moderate income. At the time  
22 the plan was prepared, only three of the eight units in the building were rented and those units  
23 were rented to very low income persons. Pinkerton Decl., ¶ 11. Based on that information, the  
24 replacement plan provides for replacement of all eight units at the very low income level on the  
25 assumption that, had the unoccupied units been rented, they would have been rented to very low  
26 income persons. Burrows Decl., Exhibit 20; Pinkerton Decl., ¶ 11.

1 Plaintiffs complain that the Toni replacement was improper because the residents could  
2 have been extremely low income persons. This ignores the explicit provisions of Section 33413{  
3 TA \s "HSC Section 33413" } that require replacement in only three categories of income – very  
4 low, low, and moderate income. There are no required graduations within those categories.  
5 There is no requirement that replacement housing accommodate the potentially infinite  
6 categories between zero income and the moderate income level. Thus, there is no required  
7 replacement category for "extremely, extremely low income", "extremely low income," "halfway  
8 between very low income and low income" or "somewhat moderate income." The only relevant  
9 categories are very low income, low income, and moderate income. Thus, the Redevelopment  
10 Agency has complied with Section 33413{ TA \s "HSC Section 33413" } by providing for eight  
11 replacement units for the eight Toni units that are affordable at the very low income level.

12 With regard to the Toni, plaintiffs also assert, without any evidence to back it up, that the  
13 persons displaced from the Toni as a result of the City's acquisition did not receive relocation  
14 benefits. That simply is not true. The persons displaced from the Toni were undeniably  
15 displaced by the City's acquisition and so were entitled to relocation benefits under state and  
16 potentially federal law, regardless of the issues in this litigation as to whether code enforcement  
17 activities require relocation benefits. Thus, those who moved from the Toni were provided  
18 relocation benefits and assistance in accordance with state and federal relocation laws when they  
19 moved. Palmquist Decl., ¶ 12. A relocation plan was prepared for the relocation. However,  
20 prior to the adoption of the plan and prior to the City providing any notice to the Toni tenants  
21 requiring them to move, the residents chose to voluntarily move and received relocation benefits  
22 from the City. Id. At that point, formal adoption of the relocation plan for a building that had no  
23 occupants would have been superfluous.

24 Lastly, plaintiffs complain about the Hotel Stockton as a replacement housing resource.  
25 The Hotel Stockton is a Redevelopment Agency project that, along with many other Stockton  
26 projects, reflect the City's commitment to providing decent affordable housing that does not have

1 the kinds of horrendous health and safety problems of the downtown hotels that were the subject  
2 of the CHAT program. The Hotel Stockton, which has just been completed and is currently  
3 being occupied, provides 156 units of housing affordable to persons of very low income or  
4 below. The development is in the middle of downtown Stockton within blocks of the buildings  
5 that are the subject of this action. Pinkerton Decl., ¶ 12. Although it was originally planned as  
6 senior housing, it would not have received tax credit funding if so restricted and so the  
7 development is not limited to seniors; approximately 26% of the admitted residents (25 of 90)  
8 are under 50. Pinkerton Decl., ¶ 13.

9 Moreover, the individual plaintiffs in this case have had no difficulty applying for  
10 residency in the Hotel Stockton. Plaintiffs Mr. Price and Mr. Cobbs received applications.  
11 Mr. Price has already been selected for tenancy and moved in; plaintiff Cobbs did not return his  
12 application. Id. at ¶ 14.

#### 13 **V. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF BASED ON THE FAIR** 14 **HOUSING ACT SHOULD BE DENIED.**

15 Plaintiffs contend that they are entitled to injunctive relief under the Fair Housing  
16 Amendments Act ("FHAA"), 42 U.S.C. Sections 3601 et seq. { TA \1 "42 U.S.C. Sections 3601 et  
17 seq." \s "FHAA 42 USC" \c 11 }, on the grounds that the City discriminated against disabled  
18 persons by making housing unavailable to the disabled. Plaintiffs assert that they have  
19 established a prima facie case of "disparate impact" discrimination which the City cannot rebut.  
20 On the contrary, plaintiffs are not entitled to injunctive relief under the FHAA{ TA \s "FHAA 42  
21 USC" } because plaintiffs' claim – indeed, all of plaintiffs' claims for both disability  
22 discrimination under the FHAA{ TA \s "FHAA 42 USC" } as well as their claims for disability  
23 and "source of income" discrimination under California's Fair Employment and Housing Act –  
24 fail at the threshold. There is, and can be, no evidence that the City's conduct adversely affected  
25 the disabled or affected persons based on their "source of income".

26 In addition, plaintiffs' statistics fail to demonstrate any disability discrimination, a

1 significantly adverse or disproportionate effect on disabled persons, or that disabled persons  
2 were segregated. Plaintiffs also fail to establish the factors in Arlington Heights Dev. Corp. v.  
3 Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977){ TA \l "Arlington Heights  
4 Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)" \s "Arlington  
5 Heights" \c 8 } factors. Moreover, the City's conduct is rationally related to a legitimate  
6 governmental interest, and therefore rebuts plaintiffs' purported prima facie case. These  
7 grounds, and the facts applicable to these grounds, are discussed in turn below.<sup>7</sup>

8 **A. Standards of Review Applied by Courts in the Ninth Circuit to Establish a**  
9 **Prima Facie Case of Disparate Impact Discrimination Under the FHAA.**

10 A recent Ninth Circuit case held that to establish a prima facie case of disparate impact  
11 under the FHAA, "a plaintiff must show at least that the defendant's actions had a discriminatory  
12 effect." Pfaff v. U.S. Dept. of Housing and Urban Development, 88 F.3d 739, 745 (9th Cir.  
13 1996){ TA \l "Pfaff v. U.S. Dept. of Housing and Urban Development, 88 F.3d 739 (9th Cir.  
14 1996)" \s "Pfaff v. US Housing" \c 8 }, citing Keith v. Volpe, 858 F.2d 467, 482 (9th Cir. 1988){  
15 TA \l "Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988)" \s "Keith v. Volpe" \c 8 } (other citations  
16 omitted) (hereinafter, "Keith II"). "'Discriminatory effect' describes conduct that actually or  
17 predictably resulted in discrimination." Keith II, 858 F.2d at 482{ TA \s "Keith v. Volpe" }  
18 (citation omitted). To make out a prima facie case of discrimination under the disparate impact  
19 theory the plaintiff must show: (1) the occurrence of certain outwardly neutral practices, and (2)  
20 a significantly adverse or disproportionate impact on persons of a particular protected class  
21 produced by the defendant's facially neutral acts or practices. Pfaff, 88 F.3d at 745 and n.1{ TA  
22 \s "Pfaff v. US Housing" } (citations omitted) (applying Title VII guideline from employment  
23 discrimination cases because courts have found Title VII analysis persuasive in FHAA Title VIII  
24 cases); accord, Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997){ TA \l "Gamble  
25 v. City of Escondido, 104 F.3d 300 (9th Cir. 1997)" \s "Gamble v. Escondido" \c 8 }.

26 \_\_\_\_\_  
<sup>7</sup> Moreover, as noted above in Section II, plaintiffs cannot demonstrate any irreparable harm.

1 A finding of discriminatory intent is not required to establish a prima facie case of  
2 disparate impact under the FHAA. Pfaff, 88 F.3d at 745-746{ TA \s "Pfaff v. US Housing" }.  
3 However, to establish a prima facie case of discrimination without intent, the charging party  
4 must "prove the discriminatory impact at issue; raising an inference of discriminatory intent is  
5 insufficient." Id. at 746{ TA \s "Pfaff v. US Housing" } (citations omitted); Gamble, 104 F.3d at  
6 306{ TA \s "Gamble v. Escondido" }. Valid statistical evidence is admissible for this purpose,  
7 but "[a] party charged with discrimination may diffuse a prima facie case against him, and hence  
8 avoid the need to supply a legally sufficient, nondiscriminatory reason in rebuttal, by  
9 successfully challenging the statistical basis of this case." Id. at 746{ TA \s "Gamble v.  
10 Escondido" }, citing Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990){ TA \l  
11 "Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990)" \s "Rose v. Wells Fargo" \c 8 };  
12 Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (1996){ TA \l "42 U.S.C.  
13 Section 2000e-2(k)(1)(B)(ii)" \s "Civil Rights Act 1991 42 USC" \c 11 } (respondent need not  
14 assert business necessity defense if he has shown that the employment practice does not cause  
15 disparate impact).

16 There are two kinds of racially discriminatory effects which a facially neutral decision  
17 about housing can produce. The first occurs when that decision has a greater adverse impact on  
18 one group than on another. Keith v. Volpe, 618 F.Supp. 1132, 1150 (C.D. Cal. 1985){ TA \l  
19 "Keith v. Volpe, 618 F.Supp. 1132 (C.D. Cal. 1985)" \s "Keith v. Volpe Supp" \c 8 }  
20 (hereinafter, "Keith I"), citing Arlington Heights{ TA \s "Arlington Heights" }. The second  
21 occurs when that decision has an adverse impact on the community involved: "if it perpetuates  
22 segregation and thereby prevents interracial association it will be considered invidious under the  
23 Fair Housing Act independently of the extent to which it produces a disparate effect on different  
24 racial groups." Keith I, 618 F.Supp. at 1151-52{ TA \s "Keith v. Volpe Supp" }, citing Arlington  
25 Heights, 558 F.2d at 1290{ TA \s "Arlington Heights" }.

26 In Pfaff{ TA \s "Pfaff v. US Housing" } and Gamble{ TA \s "Gamble v. Escondido" } the

1 Ninth Circuit settled on a standard of review in FHAA disparate impact cases. Both courts cite  
2 the prior Keith I{ TA \s "Keith v. Volpe Supp" } and/or Keith II{ TA \s "Keith v. Volpe" } cases.  
3 In Keith II{ TA \s "Keith v. Volpe" }, the Ninth Circuit recognized that the circuit had not  
4 determined whether proof of discriminatory effect was enough to establish the prima facie case,  
5 and indeed had not established the standard necessary for a prima facie case. Id. at 482-483{ TA  
6 \s "Keith v. Volpe" }. The court then implicitly declined to establish a standard of review,  
7 instead applying two separate tests established in other circuits. Id., 858 F.2d at 483-484{ TA \s  
8 "Keith v. Volpe" }. Under the first applicable test, proof of discriminatory effect is sufficient to  
9 establish a prima facie case of disparate impact housing discrimination under the FHAA. Id.{ TA  
10 \s "Keith v. Volpe" }. Under the second test, derived from Arlington Heights{ TA \s "Arlington  
11 Heights" }, courts consider four factors: (1) the strength of the plaintiff's showing of  
12 discriminatory effect, (2) whether there was some evidence of discriminatory intent; (3) what the  
13 defendant's interest was in taking the action complained of, and (4) whether the plaintiff sought  
14 to compel the defendant affirmatively to provide housing for the protected group or merely to  
15 restrain the defendant from interfering with individual property owners who wished to provide  
16 such housing. Keith II, 858 F.2d at 483{ TA \s "Keith v. Volpe" }, citing Arlington Heights, 558  
17 F.2d at 1290{ TA \s "Arlington Heights" } (other citation omitted).

18 The City will address each of these tests below. As demonstrated, plaintiffs have failed  
19 to establish a prima facie case of disparate impact discrimination based on disability under all of  
20 these tests.<sup>8</sup>

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21  
22  
23  
24  
25 <sup>8</sup> In addition to a claim under a theory of disparate impact, parties can establish violations of the  
26 FHAA{ TA \s "FHAA 42 USC" } under a theory of disparate treatment or for the failure of a  
municipality to make a reasonable accommodation for handicapped housing. Gamble, 104 F.3d  
at 304-305{ TA \s "Gamble v. Escondido" } (citations omitted). Plaintiffs here seek injunctive  
relief solely under a theory of disparate impact.

1           **B. Plaintiffs Cannot Demonstrate Any Disparate Impact Under the FHAA or**  
2           **FEHA.**

3           Plaintiffs assert that because the percentage of persons residing in the downtown hotels  
4 who were disabled or who received GR or SSI benefits was greater than the percentages of  
5 similarly-situated residents within the City of Stockton overall, plaintiffs have shown disparate  
6 impact discrimination. (Memorandum of Points and Authorities in Support of Plaintiffs' Motion  
7 to Amend Preliminary Injunction ("Moving Papers") at 1-3, 7-8, 23-24, 31-32.) Plaintiffs are  
8 incorrect.

9           In City of Alameda v. FG Managing Member, Inc., 2004 U.S. Dist. LEXIS 22150 (N.D.  
10 Cal., October 26, 2004){ TA \l "City of Alameda v. FG Managing Member, Inc.,  
11 2004 U.S. Dist. LEXIS 22150 (N.D. Cal., October 26, 2004)" \s "Alameda v. FG Managing  
12 Member" \c 8 }, the city sued defendant developer under California's Fair Employment and  
13 Housing Act, Government Code sections 12920 et seq. ("FEHA"){ TA \l "Government Code  
14 sections 12920 et seq." \s "FEHA GC 12920" \c 2 }, alleging housing discrimination. Defendant  
15 owned an apartment building that housed low and moderate income residents, and determined to  
16 vacate and terminate the tenancies of all tenants for a complete renovation of the apartments.  
17 The city's evidence of discrimination consisted of a statement on defendant's website that it was  
18 "predictable" that defendant's purchase and shut down of the apartments for renovation "will  
19 result in loss of housing for minorities, disabled, and especially families who rely on government  
20 rent subsidies." Id., slip op. at 14-15{ TA \s "Alameda v. FG Managing Member" }. The city  
21 alleged that defendant's decision to close the apartment building for a complete renovation and  
22 terminate every tenant's lease constituted disparate impact discrimination under FEHA{ TA \s  
23 "FEHA GC 12920" }, because of the effect it would have on such protected-class residents. The  
24 court summarily dismissed the city's case.

25           The court held that the city had failed to demonstrate a prima facie case of  
26 discrimination, because the city had failed to show *that protected groups were discriminated*

1 *against at a higher rate than white tenants:*

2 More importantly, however, plaintiff's briefing betrays a fundamental  
3 misunderstanding of the requirements for a claim of disparate-impact  
4 discrimination. The mere fact that each person affected by a practice or  
5 policy is also a member of a protected group does not establish a disparate  
6 impact. In order to succeed on its disparate-impact claim, plaintiff would  
7 have to show, for example, that the tenancies of African-American tenants  
8 were terminated at a higher rate than white residents. Not only has  
9 plaintiff failed to show such discrimination, it has not alleged it. Nor  
10 could it. All residents with month-to-month leases, regardless of status,  
11 received notice at the same time, will have their tenancies terminated at  
12 the same time, and have all been invited to apply to rent in the renovated  
13 building.

14 Id., slip op. at 15-16{ TA \s "Alameda v. FG Managing Member" }. Here, of course, the factual  
15 situation is entirely analogous. *All* the tenants of the downtown hotels, whether disabled, GR  
16 recipients, or SSI recipients, regardless of status, were moved out at the same time.

17 As in City of Alameda{ TA \s "Alameda v. FG Managing Member" }, plaintiffs' prima  
18 facie case of disparate impact discrimination is fundamentally flawed under either the FHAA{  
19 TA \s "FHAA 42 USC" } or FEHA{ TA \s "FEHA GC 12920" }, and should similarly be  
20 summarily rejected by this Court. Id.{ TA \s "Alameda v. FG Managing Member" }.

21 **C. Plaintiffs' Statistics Fail to Demonstrate Any Disparate Impact on the  
22 Disabled.**

23 As noted above, to establish a prima facie case of discrimination without intent under  
24 Pfaff{ TA \s "Pfaff v. US Housing" }, the charging party must "prove the discriminatory impact  
25 at issue; raising an inference of discriminatory intent is insufficient." Id. at 746{ TA \s "Pfaff v.  
26 US Housing" } (citations omitted); Gamble, 104 F.3d at 306{ TA \s "Gamble v. Escondido" }.  
But "[a] party charged with discrimination may diffuse a prima facie case against him, and hence  
avoid the need to supply a legally sufficient, nondiscriminatory reason in rebuttal, by  
successfully challenging the statistical basis of this case." Id. at 746{ TA \s "Gamble v.  
Escondido" }, citing Rose, 902 F.2d at 1424{ TA \s "Rose v. Wells Fargo" }; 42 U.S.C. § 2000e-  
2(k)(1)(B)(ii) (1996){ TA \s "Civil Rights Act 1991 42 USC" } (respondent need not assert

1 business necessity defense if he has shown that the employment practice does not cause disparate  
2 impact).

3 Plaintiffs' purported statistical basis for their disability discrimination claim is set forth in  
4 the Report of John R. Logan, Ph.D. (attached to plaintiffs' Declaration of John R. Logan).  
5 Plaintiffs assert that discriminatory impact is demonstrated because 17.3% of the persons  
6 displaced by the City's code enforcement conduct received SSI benefits, while only 9.4% of  
7 households citywide receive SSI. (Opening Brief at 7:9-18, 24:10-17.) Logan bases his opinion  
8 that the City discriminated against disabled persons by equating "disabled" with receipt of SSI  
9 benefits. "Income source can also serve as a proxy for disability." (Report at 6.) Logan opines  
10 that because the percentage of persons displaced is "significantly higher" than the percentage of  
11 households citywide, disability discrimination is demonstrated. Id. at 6-7.

12 Remarkably, Table 1 of Logan's report, entitled, "Income source and disability in  
13 Stockton, CA, 2000," proves the opposite conclusion. (Report, p. 5.)

14 First, in Tract 1, the area Logan establishes as where the closed buildings were located,  
15 30.6% of the residents reported as actually having a disability in the census. Clearly, the  
16 percentage of persons who reported disability in the census tract is "significantly higher" than the  
17 17.3% of the displaced persons who received SSI. Thus, disabled persons who were displaced  
18 represent a smaller percentage of the displaced population than do displaced persons in the  
19 census tract to the total census tract population.

20 Second, the citywide percentage of persons who reported some disability is 22.5%.  
21 (Table 1, Logan Report, p. 5.) Again, this figure is higher than the 17.3% of displaced persons  
22 who received SSI.

23 Third, even if one accepts Logan's theorem that "income source," *i.e.* receipt of SSI  
24 benefits, can serve as a proxy for "disability," Table 1 rebuts Logan's SSI claim here that the  
25 City's conduct had a significant disparate impact on SSI recipients. Table 1 clearly shows that  
26 the percentage of households receiving SSI benefits in Tract 1 is 23.0%, again a higher

1 percentage than the percentage of displaced households receiving SSI. Thus, assuming as Logan  
2 does that SSI equates to disabled, the disabled are still a higher percentage of the census tract  
3 population than they are of the displaced population.<sup>9</sup>

4 The 2000 Census and Logan's statistics therefore demonstrate that there was no disparate  
5 impact in this case. The census demonstrates instead that the City's conduct did not have any  
6 disproportionate impact on persons of a particular protected class produced by their acts, much  
7 less any *significantly* disproportionate impact on disabled persons, the showing that is required in  
8 order to establish a prima facie case of disparate impact discrimination. Pfaff, 88 F.3d at 745{  
9 TA \s "Pfaff v. US Housing" }. Plaintiffs' case of disparate impact discrimination based on  
10 disability under the FHAA{ TA \s "FHAA 42 USC" } therefore fails at the threshold.<sup>10</sup>

11 **D. Plaintiffs' Statistics, Even if Accepted at Face Value, Fail to Demonstrate**  
12 **Significantly Adverse or Disproportionate Effect on Disabled Persons.**

13 To make out a prima facie case of discrimination under the disparate impact theory based  
14 solely on disparate effect on the persons effected, the plaintiff must show: (1) the occurrence of  
15 certain outwardly neutral practices, and (2) a *significantly* adverse or disproportionate impact on  
16 persons of a particular protected class produced by the defendant's facially neutral acts or  
17 practices. Pfaff, 88 F.3d at 745{ TA \s "Pfaff v. US Housing" }; Gamble, 104 F.3d at 306{ TA \s  
18 "Gamble v. Escondido" } (emphasis supplied). Even if plaintiffs' contention that 17.3% of the  
19 displaced households who received SSI were disabled is accepted as true, 17.3% is an  
20 insufficient number of persons to establish a *significantly* adverse or disproportionate impact.

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21  
22 <sup>9</sup> The court in Moua v. City of Chico, 324 F.Supp.2d 1132, 1143 (E.D. Cal. 2004) (Levi, J.){ TA  
23 \l "Moua v. City of Chico, 324 F.Supp.2d 1132 (E.D. Cal. 2004)" \s "Moua v. Chico" \c 8 },  
24 recently rejected a report prepared by Professor Logan, finding the report did nothing to establish  
25 that a disproportionately harmful effect existed to establish a prima facie case under the FHAA{  
26 TA \s "FHAA 42 USC" }.

25 <sup>10</sup> For all these same reasons, plaintiffs' claim for disparate impact discrimination based on  
26 disability under the California Fair Employment and Housing Act also fails at the threshold.  
Walker v. City of Lakewood, 272 F.3d 1114, 1125-26 (9th Cir. 2001){ TA \l "Walker v. City of  
Lakewood, 272 F.3d 1114 (9th Cir. 2001)" \s "Walker v. Lakewood" \c 8 } (California courts  
look to federal decisions construing federal anti-discrimination laws for guidance).

1 Under Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984){ TA \l  
2 "Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984)" \s "Betsey v. Turtle Creek" \c  
3 8 }, "[t]he correct inquiry is whether the policy in question had a disproportionate impact on the  
4 minorities in the total group to which the policy was applied." The court in Mountain Side  
5 Mobile Estates Partnership v. HUD, 56 F.3d 1243, 1251-52 (10th Cir. 1995){ TA \l "Mountain  
6 Side Mobile Estates Partnership v. HUD, 56 F.3d 1243 (10th Cir. 1995)" \s "Mountain Side  
7 Mobile v. HUD" \c 8 }, concurred, citing a number of appellate court cases including a case from  
8 the Ninth Circuit, in which the courts limited their inquiry to the "statistical evidence regarding  
9 the narrowly defined area in question." Mountain Side at 1251{ TA \s "Mountain Side Mobile v.  
10 HUD" }.

11 Here, the City's conduct affected 17.3% of the displaced persons. This is not  
12 *significantly* adverse or proportionate so as to constitute illegal discriminatory impact. For  
13 example, in Betsey{ TA \s "Betsey v. Turtle Creek" }, the policy at issue affected 54.3% of non-  
14 white tenants in the building, as opposed to only 14.1% of the white tenants. Id. at 988{ TA \s  
15 "Betsey v. Turtle Creek" }; see also Keith II, 858 F.2d at 484{ TA \s "Keith v. Volpe" }  
16 (discriminatory effect shown where policy affected minorities in numbers two times more than it  
17 affected whites; two-thirds to one-third); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir.  
18 1982){ TA \l "Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)" \s "Halet v. Wend" \c 8 }  
19 (possibility of discriminatory effect shown where policy significantly affected minorities in  
20 greater percentages than whites: 38% of white households, 62% of black households, and 69% of  
21 Hispanic households).

22 Plaintiffs' own statistics demonstrate that, among the households affected by the  
23 purportedly discriminatory practice, the City's policy affected the *non-disabled* in far greater  
24 numbers than the disabled, in fact slightly less than five times more than it affected the disabled  
25 (if 17.3% were disabled, then 82.7% were not disabled). Plaintiffs therefore do not establish a  
26 *prima facie* case of discriminatory effect, and their case therefore fails at the threshold.

1           **E. Plaintiffs' Statistics Fail to Demonstrate That Disabled Persons Were**  
2           **Segregated.**

3           The second kind of disparate impact that courts have held to violate the FHAA focuses  
4 on the effect on the community. If the decision "perpetuates segregation and thereby prevents  
5 interracial association, it will be considered invidious under the Fair Housing Act independently  
6 of the extent to which it produces a disparate effect on different racial groups." Keith I, 618  
7 F.Supp. at 1151{ TA \s "Keith v. Volpe Supp" }, citing Arlington Heights, 558 F.2d at 1290{ TA  
8 \s "Alameda v. FG Managing Member" }. Plaintiffs' statistics fail to demonstrate *any*  
9 segregation, much less segregation of such a magnitude to constitute "invidious" discrimination.

10           As noted above, the number of persons who reported in the 2000 Census as having some  
11 disability *citywide* in the City of Stockton was 22.5%, or 49,645 out of the City's total population  
12 of 220,786. Table 1, Logan Report, p. 5. The total number of displaced persons who Logan and  
13 plaintiffs claim were disabled appears to be 52 persons. Table 3 and text, Logan Report, pp. 6-7.  
14 Logically, a policy that affects only 52 persons in a small area cannot establish segregation in a  
15 city of 220,786 persons, of which 49,645 are disabled.

16           Additionally, to the extent that plaintiffs are asking this Court to order the City to reopen  
17 the hotels or to construct new hotels in the downtown Stockton area, plaintiffs appear to be  
18 actually asking this Court to order the City to continue to segregate the disabled in the downtown  
19 area. For, if plaintiffs are correct that the number of residents in the downtown area are disabled  
20 in a greater percentage than residents citywide, then relocating the disabled in the downtown  
21 area would have the effect of segregating the disabled, not desegregating them.

22           Moreover, plaintiffs do not demonstrate that the hotel closures affected the disabled  
23 because of their disability. Rather, plaintiffs, again relying on the theorem that "disabled" is  
24 equated with receipt of SSI benefits, contend that the "disabled" will be segregated because they  
25 will not be able to afford to live in Stockton if the closed buildings do not reopen. **Moving**  
26 **Papers** at 26-28. But plaintiffs have not shown that the disabled would be affected in a manner

1 different from the manner in which all displaced would be affected. Therefore, plaintiffs do not  
2 show any discriminatory effects against the disabled as disabled persons, and therefore do not  
3 demonstrate that the hotel closures will segregate the disabled because of their disability.

4 Lastly, even if plaintiffs could show that the SSI displacees are poorer on average than  
5 the rest of the displacees, no segregation would be shown. The FHAA{ TA \s "FHAA 42 USC"  
6 } does not apply to neutral policies that may disparately impact the disabled simply because they  
7 may, on average, be poorer than non-disabled persons. Schanz v. The Village Apartments, 988  
8 F.Supp. 784, 790-791 (E.D. Mich. 1998){ TA \l "Schanz v. The Village Apartments, 988 F.Supp.  
9 784 (E.D. Mich. 1998)" \s "Schanz v. Village Apartments" \c 8 }, and cases there cited.

10 Plaintiffs fail to demonstrate a prima facie case of disparate impact discrimination under  
11 either of the two manners recognized by courts, namely a significantly adverse or proportionate  
12 effect on the disabled, or conduct that would cause segregation. Pfaff, 88 F.3d at 745{ TA \s  
13 "Pfaff v. US Housing" }.

#### 14 **F. Plaintiffs Fail to Establish the Arlington Heights Factors.**

15 Under the alternate test to establish disparate impact discrimination under the FHAA{ TA  
16 \s "FHAA 42 USC" } derived from Arlington Heights{ TA \s "Arlington Heights" }, courts  
17 consider four factors: (1) the strength of the plaintiff's showing of discriminatory effect, (2)  
18 whether there was some evidence of discriminatory intent; (3) what the defendant's interest was  
19 in taking the action complained of, and (4) whether the plaintiff sought to compel the defendant  
20 affirmatively to provide housing for the protected group or merely to restrain the defendant from  
21 interfering with individual property owners who wished to provide such housing. Keith II, 858  
22 F.2d at 483{ TA \s "Keith v. Volpe" }, citing Arlington Heights, 558 F.2d at 1290{ TA \s  
23 "Arlington Heights" } (other citation omitted). Plaintiffs fail to establish a prima facie case of  
24 discriminatory impact on the disabled under these factors as well.

#### 25 **1. Factor One: Strength of Showing of Discriminatory Effect.**

26 Factor one clearly cuts in the City's favor. The 2000 Census and plaintiffs' own statistics

1 fail to demonstrate any discriminatory effect or segregation. Additionally, the hotel closures  
2 affected every person of every class equally.

3 **2. Factor Two: Evidence of Discriminatory Intent.**

4 Factor two also clearly cuts in the City's favor. The 2000 Census and plaintiffs' own  
5 statistics demonstrate no evidence of discriminatory intent against the disabled. The City's  
6 conduct had less of an impact on the displaced disabled persons than on disabled households  
7 citywide. Plaintiffs cannot demonstrate discriminatory intent against the disabled where the  
8 policies in question did not have a greater effect on the disabled persons affected by the policy.

9 Plaintiffs' "evidence" of a purportedly discriminatory intent to discriminate against the  
10 disabled is also lacking. *Moving Papers* at 25-26. Plaintiffs equate knowledge that some of the  
11 persons who were displaced were disabled, and the City's request that County officials attend  
12 hotel closings with discriminatory intent. *Id.* at 25:1-11. First, because the purported effect of  
13 these displacements was not discriminatory, as demonstrated above, mere knowledge that some  
14 of the displaced persons were disabled does not establish discriminatory intent. *See City of*  
15 *Alameda, supra*, slip op. at \*15-16{ TA \s "Alameda v. FG Managing Member" }. Second, the  
16 City involved County officials and apprised them of the closings at the County's request,  
17 requesting that they identify displaced persons as "disabled" at the County's request, not in order  
18 to discriminate, but rather in order to assist with their relocation. (Rosenthal Decl., Ex. 14,  
19 Deposition of Georgia Polk at 63:20-64:15, 66:15-67:1.)

20 It is ironic that plaintiffs complain about the City's efforts to compile information on  
21 disability for purposes of relocation, when the applicable state and federal regulations regarding  
22 relocation *require* a displacing agency to obtain this type of information. For example, under the  
23 State of California relocation regulations, the displacing entity is required to personally interview  
24 displaces and obtain information concerning special needs such as a disability. 25 Cal. Code of  
25 Regulations, § 6048, subs. (b), (c){ TA \l "25 California Code of Regulations, Section 6048" \s  
26 "25 Cal. Code of Regulations § 6048" \c 3 }. This, of course, makes sense since a displacing

1 agency ought to be, and in fact is required to be, concerned about disabilities in trying to relocate  
2 people. See 49 Code of Federal Regulations, § 24.2(a)(8)(vii){ TA \l "49 Code of Federal  
3 Regulations Section 24.2" \s "49 Code of Federal Regulations § 24.2" \c 11 } (requiring that a  
4 comparable relocation unit for a handicapped person be one that accommodates the person's  
5 handicap); see also App. A to 49 Code of Federal Regulations, Part 24{ TA \l "App. A to 49  
6 Code of Federal Regulations, Part 24" \s "App. A to 49 Code of Federal Regulations, Part 24" \c  
7 11 } (discussing the need for and types of those accommodations).

8 Plaintiffs also point to alleged "procedural irregularities," "substantive law violations,"  
9 the City's decision to close the downtown hotels despite decades of indifference and the City's  
10 allegedly preventing owners from curing defects or by requiring the owners to comply with new  
11 building standards to show discriminatory intent. *Moving Papers* at 25:12-26:4. However, none  
12 of this "evidence" establishes *direct* evidence of intent to discriminate against the disabled, and  
13 therefore this factor cuts in favor of the City as well: "But it is evident that the equitable  
14 argument for relief is stronger when there is some *direct* evidence that defendant purposefully  
15 discriminated against members of minority groups because that evidence supports the inference  
16 that the defendant is a wrongdoer." *Arlington Heights*, 558 F.2d at 1292{ TA \s "Arlington  
17 Heights" } (finding no evidence of discriminatory intent where there was no *direct* evidence of  
18 purposeful discrimination, but concluding that this factor is the "least important" of the factors).

### 19 **3. Factor Three: The City's Interest in Taking the Action.**

20 Factor Three also cuts strongly in the City's favor. The City is entitled to deference under  
21 this factor if the Court finds that the City was not acting "outside the scope of its authority or  
22 abusing its power, ...". *Id.* at 1293{ TA \s "Arlington Heights" }. "[I]f the defendant is a  
23 governmental body acting within the ambit of legitimately derived authority, we will less readily  
24 find its action violates the Fair Housing Act." *Id.*{ TA \s "Arlington Heights" }. (citation  
25 omitted). Plaintiffs contend that the City's failure to plan for replacement housing means that the  
26 City is not entitled to such deference. *Moving Papers* at 26:5-9. However, the City's code

1 enforcement actions were legitimately within the City's authority. Even if the City is not entitled  
2 to deference, the City's interest in taking the code enforcement actions cuts strongly in favor of  
3 finding no FHAA discrimination.

4 The City's code enforcement activities were acts within the scope of the City's authority.  
5 Under the police power granted by the California Constitution, counties and cities have plenary  
6 authority to govern, subject only to the limitation that they exercise this power within their  
7 territorial limits and subordinate to state law. Cal. Const., art. XI, § 7{ TA \l "California  
8 Constitution, Article XI, Section 7" \s "Cal.Const., Art. XI, Section 7" \c 7 }. Apart from this  
9 limitation, the "police power [of a county or city] under this provision . . . is as broad as the  
10 police power exercisable by the Legislature itself." Birkenfeld v. City of Berkeley, 17 Cal.3d  
11 129, 140 (1976){ TA \l "Birkenfeld v. City of Berkeley, 17 Cal.3d 129 (1976)" \s "Birkenfeld v.  
12 Berkeley" \c 8 }. This police power is the legal basis for the enactment of ordinances that  
13 regulate conditions that may become a nuisance or health hazard or that promote social,  
14 economic or aesthetic considerations. Cal. Const., art. XI, § 7{ TA \s "Cal.Const., Art. XI,  
15 Section 7" }; Sullivan v. City of Los Angeles, 116 Cal.App.2d 807, 810 (1953){ TA \l "Sullivan  
16 v. City of Los Angeles, 116 Cal.App.2d 807 (1953)" \s "Sullivan v. LA" \c 1 }; see also, Peoria  
17 Area Landlord Ass'n v. City of Peoria, 168 F.Supp.2d 917, 923 (C.D. Ill. 2001){ TA \l "Peoria  
18 Area Landlord Ass'n v. City of Peoria, 168 F.Supp.2d 917 (C.D. Ill. 2001)" \s "Peoria Landlord  
19 Assn v. Peoria" \c 8 } (governmental interest in promoting public safety by protecting tenants  
20 from injuries resulting from housing code violations is important).

21 That the dilapidated downtown hotels constituted a nuisance or health hazard cannot be  
22 disputed. As established in the Declarations of Steve "Chuck" Lamar and Tim Sallady, and  
23 exhibits thereto, including code enforcement records and photographs, the conditions in many of  
24 these buildings were horrific. An inspection of the Terry hotel revealed 40,000 bats and over 3  
25 feet of bat guano (excrement); Sutter Manor, Commercial Hotel and Earle Hotel also had  
26 infestations of bats, known carriers of rabies; the Cosmos Hotel had carbon monoxide emissions

1 approximately 10 times the safety limit for human beings; the James Hotel received 46 health  
2 violations, 60 housing violations and 7 fire violations; the El Tecolote's violations exceed 130;  
3 the Hunter Apartments received numerous health violations, sufficient to be shut down by the  
4 health offices; and the Earle Hotel had over 1,000 fire, health and safety violations in addition to  
5 the bat infestation. Declaration of Steve "Chuck" Lamar, filed March 18, 2002, RJN-3 at  
6 ¶¶ 6-18; Declaration of Tim Sallady, filed March 18, 2002, RJN-1 at ¶¶ 6-18, and Ex. 2-20 (code  
7 enforcement records and report), and Ex. 11-27 (photographs). Furthermore, the San Joaquin  
8 County Civil Grand Jury had recommended that the City "inspect thoroughly and enforce the  
9 hotels on a regular basis." (Exhibit 1 to Lewis Decl., RJN-2.)

10 Moreover, and contrary to plaintiffs' implications, the City's decision to enforce the codes  
11 after "decades" of non-enforcement does not demonstrate bad faith or discriminatory intent. If  
12 that were the case, a city would never be able to change a bad policy for fear they would be  
13 liable for discrimination.

14 Lastly, the City did not close every hotel where it found code violations. Several hotels  
15 cured violations and avoided closure or reopened after curing violations. Supplemental Lamar  
16 Decl., RJN-4, at ¶¶ 3-14.

17 Accordingly, even if this Court declines to accord the City with deference in acting  
18 within their authority, the City has established that its interests in complying with the civil grand  
19 jury and in enforcing the codes to remedy the overwhelmingly execrable, unsafe and unsanitary  
20 conditions of these hotels are very strong. This factor therefore also cuts strongly in the City's  
21 favor.

22 **4. Factor Four: Nature Of Relief Sought By Plaintiffs.**

23 Plaintiffs ask this Court to prohibit the City from closing further buildings or demolishing  
24 closed buildings until the City adopts and implements a replacement housing plan. Of course,  
25 implementing the replacement housing plan requires the construction of the housing described in  
26 that plan. Thus, plaintiffs are requesting that the Court order the City to construct housing. This

1 is direct contrast to Arlington Heights{ TA \s "Arlington Heights" }, where the plaintiff sought to  
2 build housing but did not seek an order requiring the city to build or participate in building the  
3 housing. Id., 558 F.2d at 1293{ TA \s "Arlington Heights" }. Here, the City can only comply  
4 with the proposed injunction by building housing. This fourth factor therefore also cuts in favor  
5 of the City.

6 The City's research has not uncovered a case in which a court has ordered a defendant  
7 municipality to construct new housing as a remedy for a violation of the FHAA.<sup>11</sup> If such a case  
8 exists, it is the extraordinary exception.

9 Accordingly, the balance of the Arlington Heights{ TA \s "Arlington Heights" } factors  
10 cut strongly in the City's favor, and plaintiffs have therefore failed to establish disparate impact  
11 discrimination under this alternative test.

12 **G. The City's Conduct is Rationally Related to a Legitimate Governmental**  
13 **Interest, and Therefore Rebutts Plaintiffs' Purported Prima Facie Case.**

14 Even if a prima facie case of disparate impact discrimination is established, plaintiffs'  
15 motion should still be denied because the City's conduct is rationally related to a legitimate  
16 governmental interest, and therefore rebuts plaintiffs' purported prima facie case. Plaintiffs  
17 contend that the City can only rebut their purported prima facie case by showing that their  
18 conduct "was necessary to promote compelling government interest." Moving Papers at 28-29.  
19 Plaintiffs cite to United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974){ TA \l  
20 "United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)" \s "US v. Black Jack" \c 8 }  
21 and Betsey{ TA \s "Betsey v. Turtle Creek" } for this contention. However, both cases involved  
22 discrimination on the basis of race, and therefore are inapposite to discrimination on the basis of  
23 disability.

24 \_\_\_\_\_  
25 <sup>11</sup> In United States v. Yonkers Branch, 837 F.2d 1181 (2d Cir. 1987){ TA \l "United States v. Yonkers  
26 Branch, 837 F.2d 1181 (2d Cir. 1987)" \s "US v. Yonkers" \c 8 }, the court ordered the defendant city  
to change the location of the construction of 200 housing units from an area where the residents were  
primarily minorities to another area in the city. The city had already agreed to construct housing units.

1 In Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991){ TA \l  
2 "Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991)" \s "Familystyle v.  
3 St. Paul" \c 8 }, the Eighth Circuit rejected the application of Black Jack{ TA \s "US v. Black  
4 Jack" }, a prior decision of the same circuit, to a case involving disability discrimination. The  
5 court held, following City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985){ TA  
6 \l "City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)" \s "Cleburne v. Living  
7 Center" \c 8 }, that persons suffering from mental retardation do not constitute a suspect class.  
8 The court therefore held that "the second question in the disparate impact analysis" under the  
9 FHAA becomes whether the conduct is "rationally related to a legitimate governmental  
10 purpose." Id{ TA \s "Cleburne v. Living Center" }. The Ninth Circuit has also held that the  
11 physically handicapped are not a suspect class, and has similarly declined to apply the strict  
12 scrutiny test sought by plaintiffs here to the disabled, instead applying the "rationally related"  
13 test. Bonner v. Lewis, 857 F.2d 559, 565 (9th Cir. 1988){ TA \l "Bonner v. Lewis, 857 F.2d 559  
14 (9th Cir. 1988)" \s "Bonner v. Lewis" \c 8 } ("Handicapped individuals are not a suspect class.");  
15 California Ass'n of Physically Handicapped v. F.C.C., 721 F.2d 667, 670 (9th Cir. 1983){ TA \l  
16 "California Ass'n of Physically Handicapped v. F.C.C., 721 F.2d 667 (9th Cir. 1983)" \s "CA  
17 Handicapped v. FCC" \c 8 } ("No appellate court, however, has held that the handicapped are a  
18 suspect class [citation]. We decline to be the first."); see also Mountain Side, 56 F.3d at 1254-  
19 55{ TA \s "Mountain Side Mobile v. HUD" } (rejecting application of "compelling need or  
20 necessity" standard for defendant's rebuttal case).

21 The City's conduct clearly was rationally related to the legitimate governmental interest  
22 in the City exercising its police powers to remedy the conditions of the downtown buildings, not  
23 a pretext for discrimination against the disabled. The legitimate government interest overrides  
24 any discriminatory effect that may exist here. As demonstrated above in the City's Interest  
25 discussion of the Arlington Heights{ TA \s "Arlington Heights" } factors, Section V(F)(3) above,  
26 the City's interests in code enforcement were rationally related to the legitimate governmental

1 interest in enforcing its health and safety regulations applicable to these downtown buildings.  
2 Nor have plaintiffs shown that the City's code enforcement activities were a mere sham or that  
3 there was no "rational basis" in the record to support their code enforcement decisions. It is  
4 undisputed, and cannot be disputed, that the conditions in many of the downtown hotels were  
5 horrific, as shown by the code enforcement reports and photographs in the record in this case.  
6 See RJN-1, RJN-2, RJN-3.

7 Plaintiffs' quibbling about whether the City should or should not have permitted some of  
8 the hotels to remain open or should not have applied new building code is beside the point. The  
9 issue is not whether plaintiffs' code enforcement preferences are correct, but whether the City's  
10 code enforcement was "rationally related to a legitimate governmental interest." Clearly, the  
11 City's choice to close down the downtown hotels was legitimate. Plaintiffs might have  
12 undertaken code enforcement differently than the City, but they do not and can not dispute the  
13 deteriorated conditions of many of these downtown buildings and the City's legitimate interest in  
14 eliminating or ameliorating those conditions. See Berman v. Parker, 348 U.S. 26, 32-33 (1954){  
15 TA \s "Berman" } (upholding eminent domain decision to remedy blight in slums, holding that  
16 the court does not "sit to determine whether a particular housing project is or is not desirable").

17 Although the Court has preliminarily held that the City did not provide sufficient  
18 relocation benefits, that does not undercut the City's interest in exercising its police powers to  
19 remedy the conditions of the downtown hotels, or demonstrate discrimination on the basis of  
20 disability. The City therefore sets forth sufficient evidence, under any standard, to rebut any  
21 purported prima facie case of discriminatory impact based on disability.

22 **VI. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF BASED ON THE**  
23 **CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT SHOULD BE**  
24 **DENIED.**

24 **A. Introduction.**

25 Plaintiffs also assert that they are entitled to injunctive relief under the California Fair  
26 Employment and Housing Act ("FEHA"){ TA \s "FEHA GC 12920" }, Cal. Government Code

1 Sections 12955 and 12955.8, on the basis of housing discrimination based on disability and  
2 based on "source of income." California courts look to federal decisions construing federal anti-  
3 discrimination laws for guidance in interpreting the housing discrimination provisions in FEHA.  
4 Walker v. City of Lakewood, 272 F.3d 1114, 1125-26 (9th Cir. 2001){ TA \s "Walker v.  
5 Lakewood" } (California courts look to federal decisions construing federal anti-discrimination  
6 laws for guidance). Plaintiffs' disability discrimination claim and "source of income" claim  
7 under FEHA fail for the same reasons set forth in Section V, above, and in particular under City  
8 of Alameda{ TA \s "Alameda v. FG Managing Member" }. Additionally, plaintiffs' "source of  
9 income" discrimination claims under FEHA which are based on purported discrimination against  
10 SSI recipients also fail for the reasons set forth in Section V above. The 2000 Census and  
11 plaintiffs' own statistics fail to demonstrate any adverse impact on SSI recipients or that SSI  
12 recipients have been segregated by the City's conduct. Finally, other grounds on which relief  
13 should be denied and plaintiffs' other contentions are discussed below.

14 **B. GR Payments Are Not Subject to the "Source of Income" Anti-**  
15 **Discrimination Provisions of FEHA.**

16 California Government Code Section 12955, subd. (p)(1){ TA \s "FEHA GC 12920" }  
17 provides:

18 For purposes of this section, "source of income" means lawful, verifiable  
19 income paid directly to a tenant or paid to a representative of a tenant. For  
20 purposes of this section, a landlord is not considered a representative of a  
21 tenant.

22 San Joaquin County paid GR payments directly to the landlords of the GR recipients, and not to  
23 the GR recipients themselves. (Rosenthal Decl., Ex. 13, Deposition Transcript of Sharon  
24 Herrera at 309:6-310:23.) Section 12955's{ TA \s "FEHA GC 12920" } "source of income"  
25 provisions cannot therefore apply to the City here. Accordingly, on this ground alone, plaintiffs'  
26 request for a preliminary injunction based on GR "source of income" discrimination should be  
denied.

1           **C. Plaintiffs' Statistics Fail to Demonstrate That Persons Receiving GR Benefits**  
2           **Were Segregated.**

3           Plaintiffs' contentions that the City's conduct caused GR benefits recipients to suffer  
4 segregation are not supported by Professor Logan's statistics. Logan notes that the number of  
5 GR recipients resident in the 95202 zip code declined during the period after the hotel closings  
6 (July 2001 through June 2003). Logan Report, at 5-6 and Table 2. Logan opines: "These results  
7 support the conclusion that hotel closures in the 95202 zip code, rather than citywide changes in  
8 welfare reliance, are the primary reason for the substantial decline in this neighborhood's  
9 General Relief population between 2001 and 2003." Id. at 6. The underpinnings of this opinion  
10 are based on pure conjecture, however, and therefore the evidence only raises at most an  
11 inference of discriminatory conduct.

12           To "'prove the discriminatory impact at issue; raising an inference of discriminatory  
13 impact is insufficient.'" Id. at 746 (citations omitted); Gamble, 104 F.3d at 306{ TA \s "**Gamble**  
14 **v. Escondido**" }. Here, although the County of San Joaquin identified GR recipients by address  
15 prior to the hotel closings in 2001, in or about January or February 2002, the County changed its  
16 policy of requiring GR recipients to provide an address for receipt of benefits. Rosenthal Decl.,  
17 Herrera Depo. at 294:21-295:11. Logan's statistics therefore cannot prove that the number of  
18 GR recipients in the 95202 zip code actually declined at all. The decline therefore raises at most  
19 an inference of discriminatory impact, which is "insufficient" to prove the impact. Id.{ TA \s  
20 "**Gamble v. Escondido**" }. Plaintiffs have therefore failed to show discriminatory effect by  
21 segregation based on receipt of GR benefits.<sup>12</sup>

22  
23  
24 <sup>12</sup> Plaintiffs cite to certain deposition testimony by Ms. Herrera to support their claim that the  
25 hotel closures was the primary reason for the decrease in GR recipients in the downtown area,  
26 and a cause of homelessness. Moving Papers at 33. However, in later testimony, Ms. Herrera  
conceded that, even after the hotel closings had ended, the rate of homelessness increased, which  
she testified could be due to various economic factors independent of the hotel closings.  
(Rosenthal Decl., Ex. 13, Herrera Depo. at 296:18-298:15).

1           **D. Plaintiffs' "Evidence" of Discriminatory Intent Does Not Show "Source of**  
2           **Income" Discrimination.**

3           In addition to the purported grounds of discriminatory intent discussed and debunked in  
4           Section V(F)(2), above, plaintiffs further contend that discriminatory intent based on "source of  
5           income" discrimination is allegedly shown by a purported intent to discriminate against persons  
6           who received GR benefits. *Moving Papers* at 32-33. Plaintiffs allege that this intent to  
7           discriminate is evidence by the following: the City's staff "described" the downtown hotels as  
8           "GR hotels," the City's staff apprised County staff about hotel closings, and the "Mayor and City  
9           staff, as previously shown, *seemed to intend* this result," by allegedly "encouraging" the County  
10          staff to find GR recipients housing outside of Stockton. None of these contentions, even if true,  
11          demonstrate direct evidence of intentional discrimination.

12          Identification of the downtown hotels as "GR hotels" does not demonstrate direct  
13          evidence of discriminatory intent in and of itself. "Stray remarks" that play no role in a decision  
14          do not constitute sufficient evidence of discriminatory intent. *Gibbs v. Consolidated Services*,  
15          111 Cal.App.4th 794, 801 (2003){ TA \l "*Gibbs v. Consolidated Services*, 111 Cal.App.4th 794  
16          (2003)" \s "*Gibbs v. Consolidated Services*" \c 1 }, citing *Merrick v. Farmers Ins. Group*, 892  
17          F.2d 1434, 1439-39 (9th Cir. 1990){ TA \l "*Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th  
18          Cir. 1990)" \s "*Merrick v. Farmers*" \c 8 } (other citations omitted) (opinion expressed by  
19          plaintiff's supervisor that played no role in decision to terminate plaintiff is "nothing more" than  
20          a "stray remark"; such "stray remarks" do not establish discrimination). Similarly here, even if  
21          such remarks were made, the evidence establishes that the remarks did not play any role in the  
22          City's determination to close the downtown hotels, and therefore do not constitute discriminatory  
23          intent.

24          Moreover, the City itself did not use information about GR recipients for any  
25          preconceived plan to discriminate against such individuals. Ms. Herrera admitted that City  
26          officials never expressed any opinion about the character of GR recipients. Rather, only staff

1 persons on the CHAT team did so. Rosenthal Decl., Ex. 13, Herrera Depo. at 126:2-7. Further,  
2 the City involved County officials and apprised them of the closings at the County's request, and  
3 identified displaced persons as "GR recipients" at the County's request, apparently to facilitate  
4 relocation of GR recipients to buildings with landlords that would accept GR payments from the  
5 County as rent. Rosenthal Decl., Ex. 14, Polk Depo. At 63:20-64:15, 66:15-67:1. As Ms.  
6 Herrera stated, the City did not even look into the number of GR recipients living in the  
7 downtown area prior to the hotel closures. Id. at 141:7-12. Finally, there is no evidence that the  
8 alleged "encouragement" by City officials to disperse GR recipients actually resulted in any  
9 concerted action plan. Ms. Herrera admitted that only a "handful, probably no more than – no  
10 more than ten" persons were actually relocated outside the City. Rosenthal Decl., Ex. 13,  
11 Herrera Depo. at 41:14-19.

12 In addition, Professor Logan's statistics tend to demonstrate that the City's code  
13 enforcement efforts were intended to remedy the horrific conditions of the downtown hotels, not  
14 to discriminate against GR recipients. Table 2 shows that, while the number of GR recipients in  
15 zip code 95202 decreased from 2001 to 2003 (which numbers are suspect, as demonstrated  
16 above), the numbers of GR recipients in all other City of Stockton residents actually increased in  
17 the period from 2001 to 2003, from 369 to 371. Logan's statistics therefore show no evidence of  
18 the City's purported intent to discriminate against GR recipients in general.

19 In fact, the City actually has exhibited an affirmative commitment to providing housing  
20 for low income households. More than 3,288 units of housing in Stockton are restricted to low  
21 income or very low income persons. Pinkerton Decl. at ¶ 15 and Ex. B thereto. Many of these  
22 units were created with financial assistance from either the City or the Redevelopment Agency.  
23 Id. The City and Redevelopment Agency are also working on additional affordable housing  
24 projects throughout the City of Stockton. Pinkerton Decl. at ¶ 16 (projects listed). This  
25 commitment to providing low income housing is a significant indication of lack of intent to  
26 discriminate on the basis of income. Keith I, 618 F.Supp. at 1153{ TA \s "Keith v. Volpe Supp"

1 }.

2 Lastly, shifting some GR recipients out of Stockton would promote rather than deter  
3 economic integration of San Joaquin County. The San Joaquin County Civil Grand Jury noted  
4 that "the City of Stockton has borne a disproportionate cost of housing low and below income  
5 tenants." Exhibit 1 to Lewis Decl., RJN-2. The grand jury recommended that the County  
6 "develop a plan for adequate low-income housing that would require all communities in the  
7 county to accept general relief tenants." Id.; see also Pinkerton Decl. at ¶ 16 and Ex. C thereto  
8 (indicating that Stockton has less than 50% of the total county population, but more than 70% of  
9 the public and assisted housing in the county).

10 Accordingly, for all these reasons, the evidence is clear that the City's conduct was not  
11 intended to discriminate against GR recipients in general, but was solely intended to do what it  
12 was proposed to do, namely, remedy the horrific conditions of many of the downtown hotels.

13 **E. The City's Conduct was Rationally Related to a Legitimate Governmental**  
14 **Interest That Rebutts Plaintiffs' Purported Prima Facie Case for Disability**  
**and "Source of Income" Discrimination Under FEHA.**

15 Plaintiffs have failed to demonstrate a prima facie case under the disability or "source of  
16 income" discrimination provisions of FEHA, and therefore their request for an injunction should  
17 be denied on that basis. Moreover, plaintiffs fail to demonstrate that the City's conduct was not  
18 rationally related to a legitimate governmental interest.

19 As demonstrated in Section V(G), above, the City's conduct was rationally related to a  
20 legitimate governmental interest which carried out the purpose it was intended to serve, and  
21 therefore overrides any discriminatory effect it may have had. Plaintiffs contend that the strict  
22 scrutiny standard set forth in California Government Code Section 12955.8{ TA \s "FEHA GC  
23 12920" } must be applied to the City's conduct here. **Moving Papers** at 34. That section  
24 provides in relevant part that, in order to rebut a showing of disparate impact discrimination, the  
25 defendant is required to show that its conduct "is necessary to achieve an important purpose  
26 sufficiently compelling to override the discriminatory effect and effectively carries out the

1 purpose it is alleged to serve."

2 First, the disabled are not a suspect class, and therefore the heightened strict scrutiny test  
3 does not apply. As the court held in United States v. Harris, 197 F.3d 870 (7th Cir. 1999){ TA \l  
4 "United States v. Harris, 197 F.3d 870 (7th Cir. 1999)" \s "US v. Harris" \c 8 }, legislatures do  
5 not have the power to create constitutional rights or declare a class of persons "suspect" under  
6 the U.S. Constitution. Id. at 875-876{ TA \s "US v. Harris" } (rejecting plaintiff's contention that  
7 the Americans With Disabilities Act "has created the disabled as a suspect class"). California  
8 courts have similarly held that the strict scrutiny test does not apply to the disabled because they  
9 are not a suspect class. Meredith v. WCAB, 19 Cal.3d 777, 780-781 (1977){ TA \l "Meredith v.  
10 WCAB, 19 Cal.3d 777 (1977)" \s "Meredith v. WCAB" \c 1 }; Marshall v. McMahan, 17  
11 Cal.App.4th 1841, 1851 (1993){ TA \l "Marshall v. McMahan, 17 Cal.App.4th 1841 (1993)" \s  
12 "Marshall v. McMahan" \c 1 }. Nor is there a fundamental right to adequate housing. Adams v.  
13 Superior Court, 12 Cal.3d 55, 61 (1974){ TA \l "Adams v. Superior Court, 12 Cal.3d 55 (1974)"  
14 \s "Adams v. Superior Court" \c 1 }, citing Lindsey v. Normet, 405 U.S. 56, 74 (1972){ TA \l  
15 "Lindsey v. Normet, 405 U.S. 56 (1972)" \s "Lindsey v. Normet" \c 8 }. Accordingly, the  
16 rational relation test must also apply to FEHA claims based on disability discrimination.

17 Second, the addition of a "source of income" anti-discrimination provision to several of  
18 the subdivisions of Section 12955{ TA \s "FEHA GC 12920" } was not intended to create a  
19 suspect class. In 1999, the California Legislature amended Sections 12921, 12955 and 12955.8{  
20 TA \s "FEHA GC 12920" } of the Government Code. Section 12955 was the only section which  
21 added discrimination on the grounds of "source of income" as a basis for a claim of housing  
22 discrimination. Section 12921{ TA \s "FEHA GC 12920" } was amended to add subdivision (b)  
23 to set forth a legislative statement of civil rights in the housing arena, and tellingly did not  
24 include "source of income" at all. And, most significantly here, Section 12955.8(b){ TA \s  
25 "FEHA GC 12920" } was also amended, but did not add a prohibition against "source of income"  
26 discrimination among the categories of prohibited acts subject to heightened scrutiny review.

1 Plaintiffs' attempt to apply Section 12955.8(b){ TA \s "FEHA GC 12920" } to its "source of  
2 income" arguments must therefore fail: the law does not even mention "source of income"  
3 discrimination as one of the bases of discrimination for which heightened scrutiny applies. The  
4 strict scrutiny provision of Section 12955.8,{ TA \s "FEHA GC 12920" } on its face, does not  
5 apply to "source of income" discrimination; therefore no statutory interpretation is required. See  
6 Rojo v. Kliger, 52 Cal.3d 65, 73{ TA \l "Rojo v. Kliger, 52 Cal.3d 65" \s "Rojo v. Kliger" \c 1 }  
7 (courts first examine language of the statute; if it is clear and unambiguous, there is no need to  
8 resort to statutory interpretation).

9 Section 12955.8 also does not apply to "source of income" discrimination under black  
10 letter law canons of statutory interpretation. Where the Legislature amends some provisions in a  
11 chapter, but not other parts of the same chapter, it is a strong indication that the Legislature does  
12 not intend the provision to apply to the unamended provisions. See People v. Weatherill, 215  
13 Cal.App.3d 1569, 1586{ TA \l "People v. Weatherill, 215 Cal.App.3d 1569" \s "People v.  
14 Weatherill" \c 1 }. If the Legislature had intended the strict scrutiny provisions of Section  
15 12955.8(b) to apply to "source of income" discrimination, it would have amended that section to  
16 include "source of income" discrimination.

17 Under the rational relation test, the City's conduct clearly was rationally related to the  
18 legitimate governmental interests of the exercise of their police powers to remedy the conditions  
19 of the downtown hotels, and not a pretext for "source of income" discrimination, and therefore  
20 overrides any discriminatory effect that may exist here (which is zero). As demonstrated above  
21 in the City's Interest discussion of the Arlington Heights{ TA \s "Arlington Heights" } factors,  
22 Section V(F)(3), above, the City's interests in code enforcement were rationally related to the  
23 legitimate governmental interests in exercising its police powers. Nor have plaintiffs shown that  
24 the City's code enforcement activities were a mere sham or that there was no "rational basis" in  
25 the record to support the code enforcement decisions. It is undisputed, and cannot be disputed,  
26 that the conditions in the downtown hotels were horrific, as supported by two civil grand juries.



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