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IN THE SUPREME COURT OF CALIFORNIA

AIDS HEALTHCARE FOUNDATION,
Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,
Defendants and Appellees.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B303308

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

1. The federal Fair Housing Act (FHA) allows plaintiffs to challenge housing policies that have a disparate impact on residents of color—that is, "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (*Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2513 (*Inclusive Communities*).) California's Fair Employment and Housing Act (FEHA) also encompasses disparate-impact claims, and its scope is at least as broad as the federal FHA.

If a city approves large-scale development projects in a given neighborhood, this policy may have the predictable effect of fueling gentrification, thereby reducing the supply of affordable housing in a way that disparately impacts residents of color. When a plaintiff alleges that a city's policy will have this adverse effect, is the city immune from disparate-impact liability under FEHA and the FHA unless the policy itself constitutes a barrier to fair housing that "*affirmatively* prevented the building of or removed affordable housing," as the Court of Appeal held here in its published decision, or may a plaintiff state a claim based on the broader discriminatory effect of the city's policy, as other authority allows?

2. In its published decision, the Court of Appeal adopted a novel pleading requirement for disparate-impact claims, requiring allegations that the challenged policy affirmatively

prevented constructing affordable housing or affirmatively removed such housing, yet affirmed the denial of leave to amend the initial complaint, in conflict with the general requirement that a plaintiff should be allowed at least one amendment. Should the court have allowed plaintiff at least one chance to amend its complaint to meet the new requirement?

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

As recent events confirm, centuries of discrimination have created ongoing and significant disparities for communities of color seeking their rightful place in the American dream. This petition raises a fundamentally important question of whether historically discriminated against minorities have any remedy under fair housing law for policies that effectively drive them out of certain communities. As the Ninth Circuit has explained:

> Today, the policy to provide fair housing . . . remains as important as ever. . . . [H]ousing segregation both perpetuates and reflects this country's basic problems regarding race relations: educational disparities, police-community relations, crime levels, wealth inequality, and even access to basic needs such as clean water and clean air. In this country, the neighborhood in which a person is born or lives will still far too often determine his or her opportunity for success. As the Supreme Court recognized, the [Fair Housing Act] must play a "continuing role in moving the Nation toward a more integrated society" and a more just one.

(*Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir.2016) 818 F.3d 493, 503 (*Avenue 6E*).)

> The essential premise of [a fair housing] disparate impact claim " 'is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.' "

(*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1420 (*Sisemore*).)

> Urban renewal . . . means Negro removal.

(James Baldwin, 1963.)

Affordable housing and racial justice are issues of obvious statewide importance. This case involves both, because the Court of Appeal's published opinion imposes new barriers for communities of color and other victims of discrimination to challenge housing policies that force minorities to leave "desirable" neighborhoods for good. From Oakland to Los Angeles, cities across California are working to spur development of new housing, but all too often, these changes disproportionately displace longtime residents of color. Sometimes a city's policy will *directly* destroy affordable housing; other times, a city may *directly* block new affordable housing. More often, though, the effect of a city's policies will be less direct but just as consequential. By fueling gentrification through approval of upscale housing developments and other amenities, a city's policies may have the predictable and inevitable effect of

pricing out low-income residents in the surrounding area—often disproportionately displacing residents of color from their longtime communities. The primary issue presented in this petition is whether state and federal fair housing statutes will continue to address the practical reality of disparate-impact discrimination and reach this latter form of discrimination, or, as the Court of Appeal held in its published decision, these fair housing statutes are to be narrowly construed to bar such claims based on a newly announced standard for pleading a prima facie case of disparate-impact discrimination.

FEHA is intended to redress discriminatory impacts that are the effects of government housing policies, even if those effects are not intentional. (See Gov. Code, § 12955.8, subd. (b).) Since at least 2007, California has recognized the standard for pleading an initial prima facie case of disparate-impact discrimination sufficient to withstand demurrer:

> To present a prima facie disparate impact case . . . . "a plaintiff must show at least that the defendant's actions had a discriminatory effect. [Citations.] Discriminatory effect means that 'the conduct of the defendant actually *or predictably results in [prohibited] discrimination*.' "

(*Sisemore*, *supra*, 151 Cal.App.4th at p. 1420, emphasis added; see *id.* at pp. 1421, 1427 [applying this standard to FEHA claim and reversing trial court's order sustaining demurrer].)

In 2013, the U.S. Department of Housing and Urban Development (HUD) issued regulations setting out the standard

for pleading a prima facie case of disparate-impact discrimination under the FHA:

> The charging party . . . has the burden of proving that a challenged practice caused *or predictably will cause a discriminatory effect*.

(24 C.F.R. § 100.500(c)(1), emphasis added.) "A practice has a discriminatory effect where it actually or *predictably results in a disparate impact* on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." (24 C.F.R. § 100.500(a), emphasis added.)[1]

In 2015, the U.S. Supreme Court confirmed the consensus position of HUD and all federal courts of appeals that the FHA, like FEHA, prohibits disparate-impact discrimination. (*Inclusive Communities*, *supra*, 135 S.Ct. at pp. 2518-2519.) This decision also left HUD's regulations, definitions, prima facie standard, and burden-shifting approach intact. And because FEHA's

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[1] Once this initial pleading burden is met, the case then reverts to the familiar burden-shifting approach, where the defendant may overcome this prima facie case by proving a legitimate, nondiscriminatory reason for the act, and the plaintiff may overcome this if she can prove the challenged practice could be served by another practice that has a less discriminatory effect. This is similar for both the FHA, and FEHA. (See *Sisemore*, *supra*, 151 Cal.App.4th at p. 1423.) The term "prima facie" may refer both to the allegations necessary to withstand a demurrer and to the plaintiff's initial evidentiary burden. (See *id.* at p. 1417, fn. 15.) This petition generally uses the term to refer to the pleading stage.

protections are at least as broad as the FHA's, *Inclusive Communities* left in place *Sisemore*'s interpretation of FEHA.

Here, the City of Los Angeles approved four large-scale projects (the Projects) that will transform a neighborhood known as the Hollywood Center. The City itself has identified residents of this area—half of whom are Black, Latino, or Asian American—as being at high risk of displacement. Plaintiff AIDS Healthcare Foundation (AHF), a nonprofit healthcare provider based in the neighborhood, sued, alleging that the City's approval of the Projects would have the predictable effect of driving up rents and disproportionately displacing Latino and Black residents.

The trial court held that AHF failed to state a claim, and the Court of Appeal affirmed in a published decision. Departing from settled authority that mandates a common-sense look at the discriminatory *effects* of a policy, not the specific form that policy takes, the Court of Appeal adopted a novel and highly restrictive approach to disparate-impact claims like this one. Under the Court of Appeal's holding, a city can defeat a claim at the pleading stage without leave to amend even once unless its policy "*affirmatively* prevented the building of or removed affordable housing." (Typed opn. 21.) This pleading requirement conflicts with FHA regulations and federal case law, and it has no basis in FEHA or the case law interpreting that statute.

Unless this court intervenes, many city housing policies will effectively go unchallenged. When a city makes a policy decision to encourage gentrification in a given neighborhood, the

city may be able to prove a legitimate rationale justifying that decision. If so, the city will ultimately prevail on the merits. But under the Court of Appeal's decision, the litigation will never even get past the pleading stage—that is, unless the city's policy happens to meet one of the Court of Appeal's two formalistic criteria that depart from the text and purpose of the governing statutes and regulations and conflict with the approach taken in past cases. And without the prospect of a serious legal challenge, cities will have fewer incentives to consider racial equity when they make their planning decisions.

This will have a dramatic impact on the rights of minorities in California. It is estimated that there are over 150,000 homeless people in California. California has the highest percentage of households in the country that are housing "burdened," meaning they spend more than 30% of their income on rent or mortgages.

It is clear there is a crisis of affordable housing in California. It is equally clear that part of the solution to this seemingly intractable problem will be the construction of hundreds of thousands, if not millions of units of new housing. There are many legislative proposals, such as the recently proposed SB 50, to encourage this process and make it "easier" and "faster" and "more efficient."

Much of this housing will be built in existing neighborhoods, which will radically transform them—their character, their relative wealth, their affordability, their demographics. Government planning and policy may attempt to

facilitate this, with the predictable effect of making some neighborhoods and areas more employment-friendly, amenity-rich, and desirable.

Many governments will see this as beneficial, as merely adding benefits and amenities, and opportunities for residents to enjoy. However, as seen time and time again, the inevitable and predictable result will be that many people will find themselves priced out of their own neighborhoods which have become more attractive due to government policy and project approval. All too often, these are poorer people, people of color. All too often, they will disproportionately bear the cost of solving this social problem—being displaced from their neighborhoods and having to find new housing and communities to make way for wealthier, whiter residents who are willing and able to pay more to live there—while developers and people of means will reap all the benefits from upscale housing and amenities in better and more desirable neighborhoods.

Here, the Court of Appeal has now barred the courthouse door to challenge this very real harm. It has rejected the existing prima facie framework at the pleading stage, and narrowed the ability of people to protect and vindicate their rights. The ability to challenge something this obviously and predictably unfair and burdensome has now been taken away.

At minimum, review should be granted to permit AHF to have even one chance to amend its complaint. In addition to creating a new novel pleading requirement for disparate-impact claims, the Court of Appeal's published decision also affirmed the

trial court's denial of even one chance to amend the complaint to show how AHF still can state a claim even under this wrong new standard. Having a published opinion that gives a green light to circumventing the liberal right to amend further creates mischief in the law and should be addressed.

STATEMENT OF THE CASE

A. Statement of Facts.

Between March 2016 and June 2019, the City of Los Angeles approved the construction of four multi-use development projects (the Projects) within a one mile radius in the Hollywood Center neighborhood of Los Angeles. (Typed opn. 5-8.) When complete, the Projects will occupy over 2.86 million square feet of space, and will include:

- Over 2,150 housing units that will be sold or rented at market rates.
- Over 362,000 square feet of office space and retail space for stores, bars, restaurants, a movie theater, a supermarket, gym, and a refurbished music and entertainment venue (the Palladium).
- Over 52,000 square feet of public parks and courtyards, as well as an undetermined number of square feet for a public "pedestrian paseo" for outdoor events. (Typed opn. 5-8.)

The combined Projects will add a total of only 182 units designated as "low income" "moderate income" or "workforce" housing. (Typed opn. 10.) One project will demolish 84 units of existing rent-stabilized housing. (Typed opn. 7.)

The approval of the Projects is part and parcel of implementing the City's "Hollywood Community Plan." It is the intent of this Plan to make the Hollywood Center neighborhood a more attractive and desirable place to live and work. "The Community Plan describes the Hollywood Center as the 'focal point of the Community,' and states it 'shall function . . . as the commercial center for Hollywood and surrounding communities . . . and as an entertainment center for the entire region.' " (Typed opn. 8.)

When approving the Projects the City claimed that the amenities of the Projects would accrue to the benefit of the current residents of the neighborhood, as at least one project will be " 'a high quality development that reinforces the iconic character of Sunset Boulevard, thereby enhancing the existing concentration of housing and amenities that serve nearby residents, the City, and which caters to tourists.' " (Typed opn. 9.)

The Hollywood Center neighborhood is approximately 50% white, 32% Hispanic/Latino, 12% Asian, and 6% Black or African American. (Typed opn. 11.) However, Hispanic/Latino residents are disproportionately lower income, with both median household and per capita income far below the County medians. (*Ibid.*) Over two-thirds of Latino households are classified as "low income (income at 80% or below of the County median income), and 44% of Latino households are classified as "very low income" (income at or below 50% of the County median). (*Ibid.*) In addition, about half of Latino households already are "rent-

burdened," meaning they already spend over 30% of their household income on rent. (*Ibid.*)

The City is fully aware that actions such as approving the Projects will have impacts on the neighborhoods in which they are located. Prior to approval of the Projects, the City was aware that the Hollywood Center neighborhood was experiencing high levels of change, and the risk and pressure of current residents being displaced was labeled "Very High." (Typed opn. 10-11.)

AHF brought suit against the City under the federal FHA and California's FEHA, asserting that approval of the Projects as constituted will have an unlawful disparate impact on Black and Latino residents of Hollywood Center, and result in increased segregation of the neighborhood. (Typed opn. 12.)

AHF asserts that the City's policies to make the neighborhood " 'the commercial center for Hollywood and surrounding communities . . . and [] an entertainment center for the entire region' " (typed opn. 8) by adding thousands of units of market rate housing (which itself will be largely unaffordable to current residents and minorities), and hundreds of thousands of square feet of stores, restaurants, office space for employment, public parks and other amenities, predictably will increase demand by people to live in the neighborhood and realize these benefits. This predictably will increase the cost of housing in an area which is already at a very high risk for displacement, and will disproportionately burden Black and Latino residents, who are already disproportionately low and lower income, and rent burdened. This will leave them unable to afford to live in the

neighborhood and be displaced at a disparate rate from white residents. (See typed opn. 8-12.)

AHF asserted that under 42 U.S.C. section 3604(a) and Government Code section 12955, subdivision (k), the housing in the neighborhood will be "unavailable" to persons based on race. The use of land use practices to achieve this discrimination also is prohibited by FEHA, Government Code section 12955, subdivision (*l*). The neighborhood itself also predictably will become more segregated, another form of housing discrimination.

B. Procedural History.

The City, and the developers of the Projects as real parties in interest, filed demurrers to the complaint. The trial court sustained the demurrers on the grounds that AHF failed to state a cause of action under the FHA and FEHA, that claims against certain projects were barred by applicable statute of limitations, and that AHF's claims were barred by res judicata. (Typed opn. 14-15.)[2]

The Court of Appeal upheld the trial court's dismissal on the ground AHF failed to state a claim under the FHA and FEHA, finding AHF did not allege facts to establish a prima facie case of disparate-impact discrimination. (Typed opn. 16-26.) It

[2] AHF had previously brought individual actions against the Projects for irregularities in the approval process in violation of the California Environmental Quality Act (CEQA), Public Resources Code Section 21000 et seq.

did not reach the trial court's other grounds for dismissal. (Typed opn. 26.)[3]

LEGAL ARGUMENT

I. Review Is Necessary to Decide Whether Disparate-Impact Claims Addressing Affordable Housing Require the Plaintiff to Allege a Policy That Directly Prevents the Building of or Removes Affordable Housing.

A. Disparate-Impact Liability Is Intended to Be a Broad Remedy to Counteract an Intractable Social Problem.

Racial discrimination is one of this country's most pervasive problems, touching virtually every segment of American life, and manifesting itself in deep and unexpected ways. "Recognition of disparate-impact claims is consistent with the FHA's central purpose. [Citations.] The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. *See* 42 U.S.C. § 3601 ('It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States'); H.R. Rep., at 15 (explaining the FHA 'provides a clear national policy against discrimination in housing')." (*Inclusive Communities*, *supra*, 135 S.Ct. at p. 2521.)

Because the harm of discrimination ultimately falls on the person discriminated against, disparate-impact discrimination claims focus on the effect of a policy, not its form or intent.

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[3] No petition for rehearing was filed. (See Cal. Rules of Court, rule 8.504(b)(3).)

Because discriminatory effects can occur in so many situations, disparate-impact analysis and protection must necessarily be as broad and diverse as these effects:

> Disparate impact provides a remedy in two situations that disparate treatment may not reach. First, "[i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification." *Id.; see also Huntington Branch, N.A.A.C.P. v. Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (noting that "clever men may easily conceal their motivations" and that disparate-impact analysis is needed because "[o]ften, such [facially neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied"). Second, disparate impact not only serves to uncover unconscious or consciously hidden biases, but also targets "artificial, arbitrary, and unnecessary barriers" to minority housing and integration that can occur through unthinking, even if not malignant, policies of developers and governmental entities. *Tex. Dep't of Hous.*, 135 S.Ct. at 2522. In this way, disparate impact "recognize[s] that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

(*Avenue 6E*, *supra*, 818 F.3d at 503.)

B. AHF Pled a Prima Facie Case of Disparate-Impact Discrimination Under Existing Rules and Precedent.

1. The Legal Standard for a Prima Facie Claim of Disparate Impact Under FHA and FEHA Prior to the Opinion Below.

Prior to the opinion below, the standard for pleading a prima facie case of disparate-impact discrimination was well-established. The HUD regulations for this pleading standard are set out in 24 C.F.R section 100.500. To withstand a demurrer, a complaint need allege evidence that (1) a government policy (2) caused or predictably will cause a discriminatory effect on a protected class:

> § 100.500 Discriminatory effect prohibited.
>
> (a) *Discriminatory effect.* A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race. . . . .
>
> (c) Burdens of proof in discriminatory effects cases.
>
> (1) The charging party . . . has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

This standard is expressly adopted by the FEHA in Government Code section 12955.6, which provides that "[n]othing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair

Housing Amendments Act of 1988 and its implementing regulations (24 C.F.R. 100.1 et seq.)."

Consistent with FEHA and the HUD regulations, *Sisemore*, *supra*, 151 Cal.App.4th at page 4120 adopted this pleading standard:

> To present a prima facie disparate impact case . . . "a plaintiff must show at least that the defendant's actions had a discriminatory effect. [Citations.] Discriminatory effect means that 'the conduct of the defendant actually or predictably results in [prohibited] discrimination.' "

Finally, in 2015, the U.S Supreme Court in *Inclusive Communities*, *supra*, 135 S.Ct. 2507, confirmed that the FHA covers disparate-impact discrimination and prohibits "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (*Id.* at p. 2513.) The Supreme Court cited the HUD standards for establishing a prima facie disparate-impact claim, and did not overrule them or in any way suggest they were no longer operative, leaving them intact. (*Id.* at pp. 2514-2515.)

2. AHF's Complaint Properly Alleged a Prima Facie Case Under This Prior Standard.

AHF's complaint established a prima facie case by alleging the existence of the City's policies and practices, and their predictable disparate impact on people of color in a particular part of Hollywood based upon statistical evidence, academic research, and the City's own analysis of the neighborhood at

issue. Based on these allegations, AHF asserted that the effect of the government policies in approving the Projects predictably will be to displace Black and Latino residents at a disproportionate rate. (Typed opn. 11-12.) The burden of the policies—displacement from the neighborhood—will fall more heavily on minority residents than on white residents. These policies also will have the effect of making the neighborhood more segregated, as poorer minorities are priced out and leave, and more affluent whites move in. (See typed opn. 13.)

Under existing case law, this was enough to state a claim. In *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly* (3d Cir. 2011) 658 F.3d 375 (*Mt. Holly*), a prima facie claim of disparate-impact discrimination was made out with respect to a development plan that would demolish currently affordable units, and replace them with some deeded affordable units and over 500 market rate units. (*Id.* at p. 379.) It was alleged that African American residents, who generally had lower incomes than white residents, would be displaced by the demolition and disproportionately unable to afford the anticipated market rate prices of the new housing. (*Id.* at p. 382.)

In *Mhany Management v. County of Nassau* (2d Cir. 2016) 819 F.3d 581 (*Mhany*), a prima facie claim was made out with respect to a zoning decision that disallowed multi-unit housing, on the allegation that minorities would be disproportionately unable to afford the anticipated price of the larger single dwelling units (*Id.* at p. 617.)

Similarly, in *Avenue 6E*, *supra*, 818 F.3d 493, a developer sought to rezone an undeveloped parcel of land to allow smaller lot sizes. A prima facie case was made out with respect to a zoning decision refusing to rezone it to allow building on smaller minimum parcels than current zoning mandated. It was alleged this prevented the building of denser and presumed "more affordable" housing, disproportionately affecting Latinos. (*Id.* at p. 508.)

In each of these cases, the proposed plans would have resulted in the creation of additional housing units, more than existed before. Despite this, prima facie cases were sufficiently alleged that minorities would be disproportionately unable to afford these new units, based on the projected price of the new housing.

AHF's prima facie claim is the same as these cases. It is entirely predictable that when a government implements a policy of increasing market rate housing that already is disproportionately unaffordable, and upgrading and increasing the employment, tourist, and recreational opportunities and amenities in a neighborhood, to make it more desirable to live in, work in, and visit, living in that neighborhood will become more desirable, and the costs of living in that neighborhood will increase. While approval of the Projects will result in the creation of more housing, the net impact and effect of the approvals is to make the housing in the Hollywood Center neighborhood less affordable, disproportionately impacting and displacing minorities.

3. The Court Of Appeal Introduces a New Standard for Establishing a Prima Facie Case of Disparate-Impact Discrimination, Conflicting with the HUD Regulation, *Sisemore*, and FEHA.

However, in the opinion below the Court of Appeal abandoned the prima facie pleading standard set out in the HUD regulations, FEHA, and *Sisemore*, and inserted its own standard based on its reading of the U.S. Supreme Court's *Inclusive Communities* decision. Stricken from the original standard is the requirement that AHF must allege a policy or practice that "caused or predictably will cause a discriminatory effect" as per 24 C.F.R section 100.500.[4] In its place, the Court of Appeal states that AHF must allege a policy "that is an artificial, arbitrary, and unnecessary barrier to fair housing" (typed opn. 18, emphasis and alterations omitted), citing *Inclusive Communities*, *supra*, 135 S.Ct. at pp. 2522, 2524.

The Court of Appeal then found that the Project approvals do not create a barrier to fair housing, because the approvals do not restrict affordable housing or eliminate housing, and thus themselves are not a barrier to fair housing. (Typed opn. 22-25.)

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[4] The Court of Appeals expressly states that it "need not address the parties' causation arguments [AHF's assertion that the City's policy "predictably will cause a discriminatory effect on a protected class]." (Typed opn. 22, fn. 14.)

C. The Court of Appeal's New Pleading Standard Misreads *Inclusive Communities*. Even Assuming It Is Valid, AHF Has Met It.

The opinion below finds justification for its new prima facie pleading standard primarily in this language in *Inclusive Communities*, *supra*, 135 S.Ct. at page 2522:

> Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. [Citation.] The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

(See typed opn. 17.) However this language from *Inclusive Communities*, consistent with years of disparate-impact analysis, focuses on the discriminatory effects of a policy, and not whether the policy is directly or is itself a barrier to fair housing. It also is consistent with the U.S. Supreme Court's statement on the same page of the decision that disparate impact is broadly remedial, in that it can ferret out actions that are neutral in application or have indirect effects, but nevertheless have discriminatory outcomes:

> Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as

> disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

(*Inclusive Communities*, *supra*, 135 S.Ct. at p. 2522.) A full reading of *Inclusive Communities* does not support the standard announced in the opinion below. This is buttressed by the fact that, as discussed, other courts post-*Inclusive Communities* have not adopted the Court of Appeal's standard.

Even assuming the new standard announced by the Court of Appeal is proper, AHF has made out a prima facie case. In concluding that the approval of the Projects is not itself a barrier to fair housing, the opinion below attempts to distinguish this case and the cases cited and relied on by AHF (*Mt. Holly, Mhany, Avenue 6E*) by arguing that government action in the cited cases "directly" reduced affordable housing, while the City's approvals in the instant case "indirectly" affected affordable housing, if at all.

The Court of Appeal states that each of the cited cases "decreas[es] the availability of affordable housing" (typed opn. 20) by approving the destruction of affordable housing or applying a "land use law effectively to preclude construction of affordable housing in the area." (Typed opn. 22.) In the instant case, however, the Court of Appeal claims the City is not placing "actual restrictions on housing," because the City's "approval of the Projects themselves do not impose higher rents, do not physically reduce the number of available affordable housing units, and do not preclude the development of affordable housing

units" because those predictable effects of the approvals and the Projects—higher rents and the reduction in the number of affordable housing units—"rest[] in the hands of private third parties," who will make the housing unaffordable through private transactions. (Typed opn. 23.)

This is a distinction without a difference, because in the cited cases the Court of Appeal attempts to distinguish, the higher costs and lack of affordable units *also will be due to the actions of third parties.* In each of those cases, like here, the challenged government policy would have resulted in more housing units than had previously existed, and in no case did the government mandate the price or rental cost of the proposed housing. However, even though the government did not mandate higher costs in those cases, that will be the inevitable, predictable result, and it was actionable.

The actual cost or rent of the housing in the cited cases—and thus any barrier to affordable housing—"rests in the hands of private third parties" negotiating theses costs, with consideration of "other socio-economic forces" in mind, as well. There is no guarantee in the three cases that the proposed housing will *in fact* be unaffordable—affordability will be determined through private negotiations based upon prevailing and anticipated socio-economic trends and events, exactly as the Court of Appeal claims will occur in the instant case.

However, despite the fact there was no guarantee or mandate that that the new housing be unaffordable, the courts in the three cited cases found it eminently predictable that

government policies at issue—limiting the number of housing units that could otherwise be built, or mandating larger housing units—would result in, and have the effect of, the housing being unaffordable to low-income people. It is the *effect* of the government policy, not its form, that is actionable.

The same is true here. While there is no guarantee or mandate that the housing in the Hollywood Center neighborhood become unaffordable, it is eminently predictable that deliberate, intentional decisions to make an area more desirable to live in by creating thousands of units of luxury housing and millions of square feet of attractive amenities (i.e., achieving the actual goal of the Hollywood Plan) will result in housing becoming unaffordable to low-income people. (See *Munoz-Mendoza v. Pierce* (1st Cir. 1983) 711 F.2d 421, 427 (opn. of Breyer, J.) [explaining that it "cannot seriously be contended that a commercial complex of this scale will not create a material impact on housing demand in neighborhoods adjacent to it. . . . We do not see how to avoid the conclusion that Copley Place at least will cause several years of higher rents and more displacement than would have occurred in its absence."].) Although *Munoz-Mendoza* addressed standing to sue, rather than the substantive allegations required to state a claim under fair housing law, then-Judge Breyer's opinion reflects an awareness that courts cannot turn a blind eye to the reality of gentrification.

Like in *Munoz-Mendoza*, the City's policies here predictably will have a material impact on demand for housing in the Hollywood Center neighborhood. Indeed, that is the City's intent,

to attract people and increase demand, and make Hollywood Center:

- The focal point of the Community
- The commercial center for Hollywood and surrounding communities
- An entertainment center for the entire region

(Typed opn. 8.) Further, the City is aware that these steps will further speed up gentrification and dislocation in the area, because their own Indices show this area is at high risk of displacement due to development. (Typed opn. 10-11.)

The City cannot avoid responsibility for this predicted and intended disparate effect by hiding behind terms like "socio-economic forces" and "private third parties." Just as the governments in the cited cases could not take steps to limit the amount of housing and then disclaim playing any role in the price of that housing, here the City cannot take steps to make the neighborhood a more desirable place to live, and then disclaim playing any role in the price of housing in that neighborhood. As stated in *Avenue 6E*, *supra*, 818 F.3d at p. 503, such subterfuge is precisely what FHA disparate-impact discrimination is designed to expose and root out.

D. The Court of Appeal's Decision Rejects the Framework for Pleading a Prima Facie Claim of Disparate-Impact Discrimination Laid Out by *Sisemore*, Thereby Creating a Conflict in the Law That This Court Should Resolve.

Sisemore, 151 Cal.App.4th at page 1420 utilized the standard for pleading a prima facie case of disparate-impact discrimination found in federal regulations and the FEHA itself:

> To present a prima facie disparate impact case under the federal statute (the FHA), "a plaintiff must show at least that the defendant's actions had a discriminatory effect. [Citations.] Discriminatory effect means that 'the conduct of the defendant actually or predictably results in [prohibited] discrimination.' "

By contrast, the Court of Appeal here, while recognizing that the federal regulations have been "left intact" by the decision in *Inclusive Communities* (typed opn. 22, fn. 14), nevertheless introduces a new and different standard for pleading a prima facie case. Under the opinion below, a plaintiff is now required to plead facts sufficient to establish that a government policy "is an artificial, arbitrary, and unnecessary barrier to fair housing." (Typed opn. 18-19.)

This change in standard thus changes the focus for discrimination purposes from the *effect* of a policy—does the policy result in a disparate impact—to the *form* of the policy—does the policy affirmatively destroy or prevent fair housing (typed opn. 21) and/or is it itself the barrier to fair housing (typed opn. 22, fn. 14).

Sisemore, the HUD regulation, and FEHA capture the heart of disparate-impact discrimination, which properly focuses on discriminatory effects. Under the Court of Appeal's approach, however, a plaintiff must allege a barrier to fair housing that takes a particular form. The application of these two standards will have very different outcomes in similar factual scenarios—and because the Court of Appeal's decision is at odds with *Sisemore*, state trial courts will be forced to choose between the two divergent approaches. This Court should thus grant review to resolve this conflict and restore uniformity in this area of the law.

E. Review Is Also Necessary to Ensure the Uniform Application of FEHA in Both State and Federal Courts.

The sole basis for the Court of Appeal's decision is its reading of *Inclusive Communities*, as it applies to the FHA. From there, the Court applied its reading of *Inclusive Communities* to the FEHA based on its understanding that the FHA and the FEHA are "substantially equivalent." (Typed opn. 16, fn. 12.) However, while the statutes are similar, and seek to address similar problems, they are not identical nor coextensive. FEHA has a number of provisions that make it clear that court decisions interpreting the FHA do not necessarily define it, and certainly do not diminish or narrow its protections.

First, as stated above, Government Code section 12955.6 makes the FEHA's protections at least as broad as the

protections set out in the federal regulations, and may be broader:

> Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 and its implementing regulations (24 C.F.R. 100.1 et seq.). . . . This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.

The Court of Appeal's decision not only abandons the requirements for establishing a prima facie case set out in 24 C.F.R. section 100.500, it also narrows the protection of that rule by imposing an additional criteria—that a government policy affirmatively and directly act as a barrier to fair housing—not found in the regulations.

Similarly, the Court of Appeal's movement from alleging facts establishing a discriminatory effect on fair housing to affirmatively and directly creating a barrier to fair housing seems to run afoul of FEHA itself. Government Code section 12955.8, subdivision (b) states:

> Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that *has the effect, regardless of intent*, of unlawfully discriminating on the basis of race. . . . (emphasis added)

Further, Government Code section 12955, subdivision (*l*) expressly states that a public land use practice may be the basis for a disparate-impact claim, and further states that such practices are not limited to affirmative, direct barriers to fair housing. Under that provision, it is an unlawful practice:

> To discriminate through public or private land use practices, decisions, and authorizations because of race. . . . Discrimination includes, *but is not limited to*, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law . . . that make housing opportunities *unavailable*. (emphasis added)

Under AHF's allegations, the land use practices of approving the Projects, and amending of zoning requirements in order to allow the Projects to proceed as planned, are making housing opportunities unavailable. However, the opinion below expressly limits FEHA to actions that directly make housing opportunities unavailable.

Because courts usually treat and analyze FEHA claims as either subsidiary or identical to FHA claims, as the Court of Appeal did here (typed opn. 16, fn. 12), it is likely that the Court of Appeal's decision will lead to inconsistent, non-uniform analysis, application, and outcomes for FEHA disparate-impact claims in state court and federal court.

Two of the cases relied on by AHF, *Avenue 6E* and *Mhany*, were decided post-*Inclusive Communities*. *Avenue 6E*, a Ninth

Circuit decision, did not adopt the new prima facie standard articulated by the Court of Appeal, instead relying on the traditional HUD regulation framework:

> Developers' allegations, accepted as true, support the inference that "the [City's] decision does arguably bear more heavily on racial minorities."
>
> . . . .
>
> [D]iscriminatory zoning practices violate the FHA even if they only "*contribute* to 'mak[ing] unavailable or deny [ing] housing' " to protected individuals.

(*Avenue 6E*, *supra*, 818 F.3d at pp. 508-509, emphasis in original.) Similarly, *Mhany* also was decided after *Inclusive Communities*, and maintained the prima facie and burden-shifting approaches set out in the federal regulations:

> The Second Circuit has outlined a burden-shifting test for a disparate impact claim. Under this test, a plaintiff must first establish a prima facie case by showing, "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."

(*Mhany*, *supra*, 819 F.3d at p. 617.) As shown above, since the Court of Appeal treated FEHA and the FHA as identical, these federal cases already cast doubt on whether the Court of Appeal's

decision was correct as to its interpretation of the FHA, and thus FEHA. It is clear that federal case law will continue to develop in this area, as more litigants file housing discrimination cases in federal court, and it is entirely likely that the *Avenue 6E* and *Mhany* pleading standard will continue. Moreover, because federal courts are not bound by California Court of Appeal decisions regarding federal law (and because *Sisemore* is a state case consistent with *Avenue 6E* and *Mhany*, making the Court of Appeal's decision nonbinding as to state law), it is entirely possible if not predictable that a schism between federal court treatment of FEHA and state court treatment will occur, where federal courts treat FEHA disparate-impact claims consistent with *Avenue 6E* and *Mhany* and *Sisemore*, and state courts consistent with the opinion below. This schism can occur not only regarding the appropriate standard to use for assessing a prima facie case of disparate-impact discrimination, but the same factual allegations as AHF's may lead to different results.

This outcome—that AHF's and similar claims state a prima facie case under FEHA in federal court but not state court—is not farfetched. As set out in *Munoz-Mendoza*, *supra*, 711 F.2d 421, federal courts have already found that gentrification predictably will lead to dislocation of local residents. Moreover, a California state trial court has already found that allegations substantially identical to AHF's regarding another development project established a prima facie case under the FHA and FEHA

(*Crenshaw Subway Coalition v. City of Los Angeles*, Los Angeles Sup. Ct. Case No. BS174553.)[5]

State law should be clear and uniform whether it is applied in state court or federal court. By granting review now, this court can settle whether FEHA encompasses AHF's claim, as well as settle the standard for establishing a prima facie case under FEHA, and ensure the law and outcomes are uniform in both state and federal courts.

II. In the Alternative, Leave to Amend Should Have Been Granted. The Court of Appeal's Refusal to Permit Even One Amendment Conflicts with Well Settled Law.

"Only rarely should a demurrer to an initial complaint be sustained without leave to amend." (*Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240.) Instead, "denial of leave to amend is appropriate only when it conclusively appears that there is no possibility of alleging facts under which recovery can be obtained." (*Ibid.*) Thus, when a trial court sustains a demurrer to plaintiff's initial complaint, denial of leave to amend is an abuse of discretion "[u]nless the complaint shows on its face that it is incapable of amendment." (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303.)

When AHF filed its initial complaint, both the City and real parties in interest filed demurrers. (See typed opn. 12, 14.) At

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[5] While this case cannot be cited as authority, it does show that the scenario has already occurred, further establishing the need for review.

the hearing on the demurrers, counsel for AHF explained why the trial court's legal analysis was incorrect and why, in any event, AHF could amend its complaint to state a claim. (RT 15-16.) Even so, the trial court sustained the demurrers without leave to amend. (Typed opn. 14.) The Court of Appeal affirmed that decision. (Typed opn. 27-28.) As a result, AHF has never had a chance to amend its initial complaint.

If this Court grants review of the first issue presented, it should also grant review to decide—if necessary—whether AHF should have been given leave to amend its initial complaint. In other words, if this Court holds that the Court of Appeal correctly defined the pleading requirement for disparate-impact claims, this Court should consider whether AHF nevertheless deserved at least one chance to satisfy that requirement.

Alternatively, even if this Court denies full review, it should grant review and transfer the case back to the Court of Appeal with instructions to reconsider its decision affirming the denial of leave to amend. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d).)

Because the trial court sustained demurrers to AHF's *initial* complaint, it was not AHF's burden to show a reasonable possibility of successful amendment. (See *Eghtesad v. State Farm General Insurance Company* (June 29, 2020, A147481) __ Cal.App.5th __, 2020 WL 3496797, at *3 [explaining distinction between the standard for initial complaints and later complaints].) Even though it did not have the burden to do so, AHF *did* articulate how it could amend its complaint. As the

Court of Appeal acknowledged, AHF explained that it could "plead more robust statistics regarding the disparate impact of displacement on Latinos." (Typed opn. 27; see AOB 72.) AHF also argued that if *Inclusive Communities* implicitly created a new pleading standard for disparate-impact claims, as the City contended, then AHF had been "pleading in a vacuum" and deserved a chance to amend its complaint in light of that new standard. (ARB 70; see ARB 68-71.) As discussed, the Court of Appeal announced a new pleading standard, purportedly based on *Inclusive Communities*, yet it denied AHF even one opportunity to meet that standard. When, as here, the sufficiency of the complaint turns on novel legal issues, leave to amend should be especially liberal. (See *Sanowicz v. Bacal* (2015) 234 Cal. App. 4th 1027, 1044 [leave to amend was proper, even though not requested in the trial court, "given that the legal issue considered was without precedent"].)[6]

In addition, counsel for AHF explained that the complaint could be amended to bolster AHF's allegations that the City's

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[6] For instance, the Court of Appeal held that a city's policy may be a barrier to fair housing if it "physically removes affordable housing to make way for more expensive housing or other uses," and it acknowledged that "the Crossroads project will result in the destruction of an existing rent-stabilized apartment building" to make way for a much larger complex that includes 845 market-rate units. (Typed opn. 20, 24; see typed opn. 6-7.) Yet the Court of Appeal held that the City's approval of this project was not a barrier to fair housing because there would be a small net increase in affordable units on the site. (Typed opn. 24.) On remand, AHF could develop allegations to show why that small net increase does not insulate the City from liability.

policy perpetuates segregation. (Typed opn. 27-28, fn. 17.) Perpetuation of segregation is a standalone theory of housing discrimination that focuses on "harm to the community generally by the perpetuation of segregation." (*Huntington Branch, N.A.A.C.P. v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, 937, aff'd in part sub nom. *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.* (1988) 488 U.S. 15.) Thus, regardless of disparate impact on minority groups, a city's practice has an unlawful discriminatory effect if it "creates, increases, reinforces, or perpetuates segregated housing patterns." (24 C.F.R. § 100.500(a).)

The Court of Appeal dismissed AHF's suggestion, indicating it believed a policy that makes one "area less segregated and more socioeconomically diverse" cannot possibly perpetuate segregation. (Typed opn. 27-28, fn. 17.) As with the court's treatment of disparate impact, however, that view of housing segregation ignores how gentrification works in practice. Even if Hollywood Center becomes more integrated, the City's policy will predictably displace poor residents of color to already-segregated low-income neighborhoods in other parts of the city. (See Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification* (2016) 85 Fordham L. Rev. 1189, 1219 [observing that the "perpetuation of segregation theory" is "salient in the context of gentrification, which often results in secondary displacement to other low-income neighborhoods"].) AHF deserves at least one chance to develop its perpetuation-of-segregation allegations.

CONCLUSION

For the reasons explained above, this court should grant the petition for review.

July 27, 2020

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 7,930 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: July 27, 2020

/s/ Thomas A. Myers
Thomas A. Myers

AIDS Healthcare Foundation

v.

City of Los Angeles, et al.

Opinion

June 15, 2020

Filed 6/15/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AIDS HEALTHCARE FOUNDATION, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents; CH PALLADIUM, LLC et al., Real Parties in Interest and Respondents.	B303308 Los Angeles County Super. Ct. No. 19STCP03387

APPEAL from a judgment of dismissal of the Superior Court of Los Angeles County, Robert S. Draper, Judge. Affirmed.

AIDS Healthcare Foundation, Thomas A. Myers, Arti L. Bhimani, Liza M. Brereton; Strumwasser & Woocher and Beverly Grossman Palmer for Plaintiff and Appellant.

Office of the Los Angeles City Attorney, Michael N. Feuer, Terry Kaufmann-Macias, John W. Fox, Jennifer Tobkin, Kathryn Phelan, Kabir Chopra, Craig Takenaka, Mei-Mei Cheng, Elaine Zhong; Burke, Williams & Sorensen, Charles E. Slyngstad, Nicholas J. Muscolino; Best, Best & Krieger and

Christi Hogin for Defendants and Respondents City of Los Angeles and the Los Angeles City Council.

Latham & Watkins, James L. Arnone and Benjamin J. Hanelin for Real Parties in Interest and Respondents CH Palladium, LLC, CH Palladium Holdings, LLC and 5929 Sunset (Hollywood), LLC.

DLA Piper, A. Catherine Norian, Kyndra Joy Casper, Andrew Brady and Karen L. Hallock for Real Party in Interest and Respondent CRE-HAR Crossroads SPV, LLC.

Glaser Weil Fink Howard Avchen & Shapiro, Patricia L. Glaser, Joel Klevens and Alexander J. Suarez for Real Party in Interest and Respondent 6400 Sunset, LLC.

INTRODUCTION

This appeal concerns four separate multi-use development projects within a one-mile radius along Sunset Boulevard in Hollywood. After filing unsuccessful petitions for writ of mandate challenging the approval of two of the projects under various land use laws,[1] appellant AIDS Healthcare Foundation (AHF) sued the City of Los Angeles and the Los Angeles City Council (collectively, City) for violating the federal Fair Housing Act (the FHA) and the state Fair Employment and Housing Act (FEHA) based on a disparate-impact theory of liability. AHF now alleges the City's approval of the four "upscale" developments will cause housing prices in the area to rise and disproportionately

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[1] AHF filed separate petitions for writ of mandate to challenge the projects under CEQA, the Los Angeles City Charter and Municipal Code, and other zoning and land use laws. Final judgments have been entered against AHF on two of its challenges and its other two petitions await trial.

displace Black and Latino residents who no longer will be able to afford to live there.

The City and Real Parties in Interest—the projects' owners and developers—separately demurred to AHF's complaint. The trial court sustained the demurrers without leave to amend after finding AHF failed to state a cause of action for violation of the FHA or FEHA, the statute of limitations barred the complaint as to three of the projects, and the doctrine of res judicata and prohibition against basing two lawsuits on a single cause of action precluded the action.

We conclude the trial court correctly found AHF cannot assert a cause of action under the FHA and FEHA based on its alleged disparate-impact theory of liability and affirm the judgment on that basis alone.

FACTS AND PROCEDURAL BACKGROUND

Consistent with the applicable standard of review, we draw our statement of facts from the allegations in the complaint and matters properly subject to judicial notice.[2] (*Blank v. Kirwan*

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[2] The trial court properly took judicial notice of several court documents and City records. Our summary includes facts stated in those documents. On appeal, Real Parties in Interest 5929 Sunset (Hollywood), LLC and CRE-HAR Crossroads SPV, LLC filed a joint motion requesting we take judicial notice of court records from the related petitions for writ of mandate AHF and others filed against them. AHF did not oppose the motion. We now grant the joint motion and take judicial notice of the identified documents. (See Evid. Code, § 452, subd. (d) ["Judicial notice may be taken of . . . [r]ecords of [ ] any court of this state."]; § 453 [court "shall" take judicial notice of a matter specified in Evidence Code section 452 on request of a party if the party provides notice to the adverse party and provides the court with "sufficient information to enable it to take judicial notice of the matter"].)

(1985) 39 Cal.3d 311, 318; *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 240.) We treat as true " 'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank*, at p. 318.)

1. *AHF*

AHF is a nonprofit organization based in Los Angeles that provides medicine and advocacy to over 1,250,00 people in 43 countries. Many of AHF's clients are at risk of homelessness and are in extremely low to moderate income households. AHF's "Housing is a Human Right" project advocates for housing policies that reduce homelessness, protect racial minorities, and avoid or reduce gentrification. AHF also provides affordable housing to lower-income people in the Los Angeles area through its Healthy Housing Foundation.

2. *The Real Parties in Interest*

The Real Parties in Interest (real parties) are four unrelated real estate developers that each applied for and secured entitlements from the City to develop four different mixed-use development projects along Sunset Boulevard in an area of Hollywood known as the "Hollywood Center." The projects are known as: the Palladium project, the Sunset Gordon project, the Crossroads project, and the 6400 Sunset project (collectively, the Projects).[3]

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[3] The Palladium project belongs to real parties CH Palladium, LLC and CH Palladium Holdings, LLC (Palladium); the Sunset Gordon project belongs to real party 5929 Sunset (Hollywood), LLC (Sunset Gordon); the Crossroads project belongs to real party CRE-HAR Crossroads SPV, LLC (Crossroads); and the 6400 Sunset Project belongs to real party 6400 Sunset, LLC (6400 Sunset).

a. *The Palladium Project*

The Palladium project is a 28-story, 927,354 square foot development consisting of an 86-foot high, 800,000 square foot parking "podium" and a pair of "luxury residential towers" with 731 condominium units and 24,000 square feet of restaurant/bar and retail space. The proposed site is on two surface lots located alongside and behind the Hollywood Palladium music and entertainment building. The project will restore the Palladium building and also include 33,800 square feet of landscaped public courtyards. Ninety-five percent of the dwelling units will be sold or rented at market rate and five percent (about 37) of the units will be reserved for " 'households earning between 50 and 120 percent of the area's median income.' "

The City approved the project on March 22, 2016 after holding public hearings. In April 2016, AHF filed a petition for writ of mandate challenging the Palladium project's approvals. The trial court entered judgment on the pleadings on some of AHF's claims and separately denied AHF's petition on the remaining causes of action. On August 29, 2019, the Court of Appeal affirmed the trial court's judgment, and the Supreme Court denied AHF's petition for review on November 13, 2019.

b. *The Sunset Gordon Project*

The Sunset Gordon project is a 22-story, 324,693 square foot mixed-use development on about 1.65 acres. It includes a four-story parking podium, a luxury residential tower with 299 apartments, 46,100 square feet of restaurant/bar, retail, and office space, and a 18,962 square foot public park. Of the 299 apartments, five percent (15 units) are set aside for very low income residents, and five percent (15 units) are set aside for

workforce housing.[4] The remaining apartments are market rate units.

Sunset Gordon purchased the property in 2011 after the original developer and owner went bankrupt. In 2015, it applied to the City to re-entitle the project. After holding public hearings, the City approved the Sunset Gordon project on December 12, 2018.

On January 15, 2019, Coalition to Preserve L.A. filed a petition for writ of mandate challenging the Sunset Gordon project. AHF joined the lawsuit as a petitioner in an amended petition alleging additional causes of action.[5] On December 13, 2019, the trial court denied the petition as to the original six causes of action brought by Coalition to Preserve L.A. Trial on the causes of action added by the amended petition is yet to be conducted.

c. *The Crossroads Project*

The Crossroads Project is a 1,381,000 square foot mixed-use development on about 8.34 acres at the edge of the Crossroads of the World complex. It consists of a 26-story hotel, an eight-story parking podium, 95,000 square feet of office space, and 190,000 square feet of restaurant/bar, retail, and commercial space. It includes 18 proposed restaurants, a supermarket, a 30,000 square foot movie theater, a private gym, publicly

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[4] Although not alleged in the complaint, according to the City's Notice of Determination for the Sunset Gordon project, of which the court took judicial notice, the project also included 15 moderate income units.

[5] On October 15, 2019, the trial court granted Coalition to Preserve L.A.'s motion for leave to add AHF as a petitioner and to file the amended petition. The amended petition was not filed until December 17, 2019, however.

accessible courtyards, and a "pedestrian paseo" for outdoor events.

The project also includes 950 dwelling units: 89 percent (845) are market-rate units and 11 percent (105) are reserved for very low income residents. The project will demolish an apartment building with 84 units of existing rent-stabilized housing. Forty units are to be reserved for former tenants of the demolished apartments who qualify as very low income households.

In November 2016, Governor Brown certified the Crossroads project as an Environmental Leadership Development Project (ELDP) under the Jobs and Economic Improvement Act of 2011, Public Resources Code section 21178 et seq. The City approved the project on January 22, 2019.

On February 19, 2019, AHF and another entity filed a petition for writ of mandate challenging the City's approval of the Crossroads project.[6] The trial court denied the petition. On July 26, 2019, the Court of Appeal dismissed AHF's appeal as untimely. The Supreme Court denied AHF's petition for review on October 16, 2019.

d. The 6400 Sunset Project

The 6400 Sunset project is a 26-story, 231,836 square foot development with a six-story parking podium, a luxury residential tower with 200 dwelling units, and 7,000 square feet of restaurant/bar and retail space. The development is proposed on a lot "looming over the historic ArcLight Cinerama Dome." Ninety-five percent of the project's dwelling units (190) will be sold or rented at market rates and five percent of the units

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[6] Crossroads filed a notice of related case in this action. The trial court granted it and found the earlier petition was the lead case.

(10) will be set aside for very low income residents. The City approved the project on June 25, 2019.

On July 22, 2019, AHF and Coalition to Preserve L.A. filed a petition for writ of mandate challenging the City's approval of the 6400 Sunset project. The trial has not yet taken place.

3. *Hollywood Center*

a. *The Hollywood Community Plan*

In 1988, the City Council of the City of Los Angeles adopted the Hollywood Community Plan "to provide an official guide to the future development of the Community." The Community Plan describes the Hollywood Center as the "focal point of the Community," and states it "shall function . . . as the commercial center for Hollywood and surrounding communities . . . and as an entertainment center for the entire region." The Community Plan provides that "[f]uture development [in the Hollywood Center] should be compatible with existing commercial development, surrounding residential neighborhoods, and the transportation and circulation system." It "especially encourage[s]" "[d]evelopments combining residential and commercial uses" in this area.

The Community Plan was implemented "to promote an arrangement of land use, circulation, and services which will encourage and contribute to the economic, social and physical health, safety, welfare, and convenience of the Community . . .; guide the development, betterment, and change of the Community to meet existing and anticipated needs and conditions; balance growth and stability; reflect economic potentials and limits, land development and other trends; and protect investment to the extent reasonable and feasible." Its objectives include to (1) "coordinate the development of Hollywood with that of other parts of the City," including, "the development of Hollywood as a major center of population,

employment, retail services, and entertainment"; (2) "designate lands at appropriate locations for the various private uses and public facilities in the quantities and at densities required to accommodate population and activities"; (3) "make provision for the housing required to satisfy the varying needs and desires of all economic segments of the Community"; (4) "promote economic wellbeing and public convenience through: [¶] (a) allocating and distributing commercial lands for retail, service, and office space in quantities and patterns based on accepted planning principles and standards."

The City found each Project is "consistent with and/or will help to implement one or more of the" Community Plan's objectives and goals. The City also found the Projects "to be consistent with the goals, objectives, and policies of the General Plan Framework," including its objective to "[r]einforce existing and encourage the development of new regional centers that accommodate a broad range of uses that serve, provide job opportunities, and are accessible to the region, are compatible with adjacent land uses, and are developed to enhance urban lifestyles." The Projects are located in an area designated as a "Regional Center."

For example, the City found the Palladium project consistent with the above goals and objectives because it "would enliven the Hollywood Center area by contributing to the Regional Center's identity through the replacement of surface parking with the provision of new housing and commercial uses in a high quality development that reinforces the iconic character of Sunset Boulevard, thereby enhancing the existing concentration of housing and amenities that serve nearby residents, the City, and which caters to tourists."

Together, the four Projects will net 2,096 new housing units with 182 of those units reserved for very low, low, and moderate-income households.

b. *Gentrification/Demographics*[7]

In 2015, the City was awarded a grant to create a team "to study gentrification[8] from a data-driven perspective." According to the City Manager at the time, the City's goal was " 'to take advantage of something that's clearly positive: neighborhoods seeing more private investment—and [to] ensure the current residents and businesses in those neighborhoods enjoy the benefits.' " (Emphasis omitted.) The team created "two tools to evaluate the potential for displacement and neighborhood change": the " 'Los Angeles Index of Displacement Pressure' " and the " 'Los Angeles Index of Neighborhood Change.' "[9]

According to those indices, which take into account several metrics, the neighborhoods in and around the Projects' sites have had "high levels of change" from 2000 to 2014, reflecting "the fact that gentrification in this area has begun, and will be exacerbated by the Projects." Based on the City's Index of

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[7] The complaint spends several paragraphs describing the factors of gentrification and causes of displacement, and their effects, as stated by various academic studies and analyses. We do not repeat those studies here.

[8] The complaint defines "gentrification" as " 'a simultaneously spatial and social practice that results in "the transformation of a working-class or vacant area of the central city into middle-class residential or commercial use" – meaning the influx of both capital (real estate investment) and high-income or – educated residents.' "

[9] Displacement, according to the complaint, occurs " 'when households are forced to move out of their neighborhood.' "

Displacement Pressure, the area surrounding the Projects has a " 'Very High' rate of displacement pressure," making the "residents in the area around the Project[s] at 'risk' of displacement."

In the part of Hollywood where the Projects are located, 32 percent of residents are Hispanic or Latino, 12 percent are Asian, and 6 percent are Black or African American. Twenty-one percent of the Latino population in the area live below the poverty rate. The median household income for Latino residents is $44,492, less than the county-wide median of $57,952, and the per capita income for Latino residents is $17,241 versus $30,798 county-wide.[10] "Over two-thirds of Latino households are classified by the Department of Housing and Urban Development as 'low income' (income at 80% or below of the County median income), and 44% as 'very low income' (at or below 50% of County median)." About "half of all Latino renter households are rent-burdened, spending over 30 percent of their household income on rent." The "significant" disparity "between non-Hispanic whites and Latino per capita income . . . show[s] that Latino residents will more likely be impacted and displaced by the Projects."

"The approvals of the Projects involve at least three of the [four] factors that lead to gentrification and displacement: they add amenities in the form of improved retail and restaurant facilities in a more attractive shopping center; they add productivity by providing office space and additional jobs in the hotel and retail/restaurant facilities; and they provide access throughout the LA area through the nearby Metro stations. . . . Even though the amenities and productivity may benefit the

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[10] AHF drew its statistics from the U.S. Census Bureau's American Community Survey Public Use Microdata Area for the Projects' location within the 90028 zip code.

area, without appropriate mitigation, these features are likely to result in displacement of the current local community." Based on, among other things, the area's " 'Very High' " risk of displacement, "the amenities and productivity that the Project[s] will bring to the area which are shown to cause gentrification-related displacement, and the already rent-burdened status of the Black and Latino population, the Projects are likely to have a disparate impact on Black and Latino residents by increasing the likelihood that these residents will be displaced from the homes in which they currently reside."

4. *The complaint*

AHF filed its complaint against the City and City Council on August 8, 2019, alleging two causes of action: (1) violation of the FHA, 42 U.S.C. § 3601 et seq., and HUD regulations, 24 C.F.R. § 100.1 et seq. (2020); and (2) violation of FEHA, Gov. Code, § 12955 et seq. The complaint challenges the City's decisions to permit construction of the Projects "without providing adequate measures to ensure that the Projects would not displace protected minorities, as required by the [FHA] and [FEHA]." AHF alleges the City approved the Projects "without including measures that will address the displacement of Black and Latino residents, such as requiring sufficient affordable housing be included in the Projects, or by requiring the provision of other permanent affordable housing elsewhere near the Project[s]."

In support of its FHA claim, AHF alleges the "approval of the Projects and the terms of their respective Conditions of Approval constitute policies of the City . . ." which will disparately impact Black and Latino residents through "the gentrification of the surrounding community by the construction of a large number of residential housing units that are unaffordable to the vast majority of current Black and Latino

residents of the surrounding neighborhood." AHF alleges the City's determinations about what community benefits should be included in the development agreements for the Projects are "policy determination[s] made by the City in agreeing to the terms of each" project's development agreement, rendering "the approval of the Projects . . . a facially-neutral policy under the FHA."

The complaint asserts the City made findings that the Projects were consistent with previously adopted City policies, including the Hollywood Community Plan, the General Plan Amendment, and the Community Redevelopment Area for the Hollywood Redevelopment Area. AHF alleges those listed policies "cause the disparate impacts identified in th[e] Complaint because [they] encourage development that, like the Projects, has the effect of displacing lower income Black and Latino residents by providing amenities like 'high quality' restaurants, retail, and entertainment options that make the neighborhood more attractive to higher income residents, while only providing housing that is unaffordable to the vast majority of the current Black and Latino residents. The Projects' operation will lead to rising rents and increase the likelihood that current residents will be displaced from their homes in the neighborhoods around the Projects without housing affordable to these residents within the Projects themselves." Because the approval of the Projects "has an unjustified discriminatory effect on members of minority communities" and "perpetuates segregated housing patterns because of race, color, or national origin," the approval of the Projects "violates the FHA as implemented through the HUD Regulations." AHF makes similar allegations in support of its FEHA cause of action.

AHF asks the court to void the City's "approvals"[11] of the four projects and enjoin the City and Real Parties from "taking any action to implement the Projects" or to construct them "until such time as the City Council has issued approvals without a discriminatory effect as required by the FHA and FEHA, which approvals include measures that adequate [*sic*] mitigate for the future displacement of Black and Latino residents."

5. *The demurrers and judgment*

The City and real parties filed separate demurrers to the complaint. The Crossroads real party also filed a separate motion for an order confirming the case is subject to California Rules of Court, rules 3.2220 et seq. and 8.700 et seq., that govern ELDP litigation (ELDP rules).

The trial court heard oral argument on November 15, 2019. After hearing argument, the court sustained the demurrers without leave to amend and filed its final written ruling that same day. The court found the complaint failed to state a cause of action against the City or the real parties under the FHA and FEHA. The court also concluded AHF's causes of actions as to the Crossroads, Palladium, and Sunset Gordon projects were barred by the statute of limitations, and the case as it relates to all four Projects was barred on res judicata (or related) grounds. Finally, the trial court granted Crossroads' ELDP motion. On

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[11] The "approvals" AHF challenges include "(a) an Environmental Impact Report [(EIR)] and various Errata[,] (b) a General Plan Amendment, (c) Zone and Height District Changes, (d) a Conditional Use for Alcohol, (e) a Finding of Convenience and Necessity for an Offsite Alcohol License, and Conditional Use Permits for on-site alcohol consumption, (f) a Zoning Administrator's Interpretation specifying front, rear and side yards, (g) a Site Plan Review, and other associated entitlements."

December 13, 2019, the trial court entered judgment in favor of the City and real parties.

AHF appealed within the time prescribed by the ELDP rules. Palladium, Sunset Gordon, and Crossroads filed a joint respondents' brief and joined in the City's respondent's brief. The City also joined in part of the joint respondents' brief. 6400 Sunset joined in the City's respondent's brief.

DISCUSSION

1. *Standards of review*

"On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1181.) "[W]e give the complaint a reasonable interpretation, and read it in context." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) "[W]e examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer." (*Consumer Cause, Inc. v. Arkopharma, Inc.* (2003) 106 Cal.App.4th 824, 827.)

We also "must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando*, *supra*, 31 Cal.4th at p. 1081.)

2. *The complaint fails to state a cause of action for violation of the FHA and FEHA as a matter of law*

a. *Disparate-impact theory of liability*

The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." (42 U.S.C. § 3604(a).) "A dwelling can be made otherwise unavailable by, among other things, action that limits the availability of affordable housing." (*Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly* (3d Cir. 2011) 658 F.3d 375, 381 *(Mt. Holly*).) The statute was enacted to "eradicate discriminatory practices within [the housing] sector of our nation's economy." (*Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) __ U.S. __, __ [135 S.Ct. 2507, 2521] (*Inclusive Communities*).)

AHF alleges a disparate-impact claim under both the FHA and FEHA.[12] A disparate-impact claim challenges "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (*Inclusive Communities, supra,* 135 S.Ct. at p. 2513; 24 C.F.R. § 100.500(a) (2020) ["A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color . . . or national origin."].)

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[12] The Legislature sought to make FEHA substantially equivalent to the FHA and its amendments. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1421, 1420.) "Accordingly, '[c]ourts often look to cases construing the FHA . . . when interpreting FEHA.' " (*Id.* at p. 1420.) We address, as the parties and trial court did, the two claims together and intend our references to the FHA also to cover FEHA.

Disparate-impact claims are cognizable under both the FHA and FEHA. (*Inclusive Communities*, at p. 2525; *Sisemore, supra*, 151 Cal.App.4th at p. 1423.) Suits challenging "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. . . . reside at the heartland of disparate-impact liability." (*Inclusive Communities,* at pp. 2521-2522.)

Although the Supreme Court in *Inclusive Communities* recognized disparate-impact liability under the FHA, it cautioned that the "FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." (*Inclusive Communities, supra*, 135 S.Ct. at p. 2522.) The Court thus held "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.' " (*Id.* at pp. 2522, 2524.)

The Court also explained, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." (*Inclusive Communities, supra,* 135 S.Ct. at p. 2523.) The Supreme Court directed courts to "examine with care whether a plaintiff has made out a prima facie case of disparate impact . . . . A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." (*Ibid.*)

The Supreme Court emphasized these "limitations on disparate-impact liability . . . are also necessary to protect

potential defendants against abusive disparate-impact claims." (*Inclusive Communities, supra*, 135 S.Ct. at p. 2524.) Finally, the Court noted "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that 'arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e].' " (*Ibid*.)

With these principles in mind, we consider AHF's alleged theory of disparate-impact liability.

b. *AHF has not alleged a policy that is an "artificial, arbitrary, and unnecessary barrier[ ]" to fair housing*

AHF initially contends the complaint alleges the existence of a policy or practice, challenging the City's argument that the alleged policy is too vague or constitutes the lack of a policy. As articulated by AHF, "the City's specific implementation of the Hollywood Community Plan and its approval of these four major projects constitutes various policies and decisions." It contends the City approved the Projects after "numerous negotiations [and] determinations," including zoning waivers and the granting of conditional use permits, and imposing certain "conditions," all of which constitute "policy decisions, made to implement the Hollywood Community Plan."

We agree that AHF has sufficiently alleged the existence of a City policy or practice, at this early pleading stage. For example, in *Mhany Management v. County of Nassau* (2016) 819 F.3d 581, 619 (*Mhany*), the Second Circuit concluded a City's decision to rezone an area for single family dwellings rather than multi-family dwellings—that affected one piece of property—fell "within a classification of a 'general policy,' " where the zoning change involved months of hearings and meetings, consideration of objections, and the passage of a local law. (See also *Avenue 6E Investments, LLC v. City of Yuma* (D.Ariz. Jan. 29, 2018, 2:09-cv-00297 JWS) 2018 U.S. Dist. Lexis 14913 at *19-20 (*Avenue 6E*)

[finding a city was "setting policy" in an area by denying a rezoning request to allow for smaller lots; denial "involved hearings and discussions as to how neighboring developments in the area would be affected and also directly resulted in a change to the adjacent property's zoning to ensure future development in that area was reserved for the largest lots"].)

The complaint makes similar express and implied allegations about the City's approval of the Projects to revitalize the area. AHF alleges the approval process for the Projects was "lengthy," and included debate "in public hearings and in written communications" about what "community benefits" should be included as part of the development agreements (presumably between the City and the Projects' developers). AHF also alleges the City approved the Projects, including granting various land use entitlements, to "aid in the implementation" of the City's existing land use policies, including the Hollywood Community Plan, the General Plan Amendment, and the Community Redevelopment Area for the Hollywood Redevelopment Area. Accepting these allegations as true, the City's approval of the Projects made in the context of implementing its land use plans can be classified as a policy.

Whether the complaint alleges a policy that is an " 'artificial, arbitrary, and unnecessary barrier[ ]' " to fair housing is another matter. In essence AHF alleges the City's implementation of its land use policy by approving "these four large, upscale, multiuse projects within a one-mile radius"—without requiring measures to mitigate against the displacement of minority residents—creates a barrier to fair housing because the Projects will lead to gentrification and thereby drive rents up, disparately displacing Latino and Black residents who will be unable to afford the higher rents.

The City contends there is no barrier to housing for the court to remove because its approval of the Projects creates housing—both market rate and income-restricted units.[13] We do not agree that the creation of housing alone is an absolute shield from disparate-impact liability. After all, in *Mhany*, the city's decision to rezone an area for single-family dwellings—instead of multi-family housing—opened the door for the construction of housing where none had existed due to the area's former public zone designation. (*Mhany, supra*, 819 F.3d at pp. 589, 597-598.) But there, the city's shift from zoning for multi-family to single-family housing *decreased* the availability of affordable housing in the area, which disparately impacted minorities. (*Id.* at pp. 598, 619-620.)

Nevertheless, as the City argues, its alleged discriminatory policy is missing a key feature of the policies examined in the cases relied on by AHF: the City's approval of the Projects neither prohibits the construction of affordable housing in the area nor physically removes affordable housing to make way for more expensive housing or other uses.

AHF relies on *Mhany, supra*, 819 F.3d 581; *Avenue 6E, supra*, 2018 U.S. Dist. Lexis 14913; and *Mt. Holly, supra*, 658 F.3d 375. In *Mhany*, the zoning decision *prevented* the building of multi-family dwellings thereby decreasing the availability of housing for minorities where affordable housing already was scarce. (*Mhany*, at pp. 588, 620.) The court of appeals thus affirmed the district court's finding that the plaintiffs established a prima facie case of disparate-impact liability under the FHA.

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[13] As alleged by AHF, the City's approval of the Projects will result in a net increase of 2,096 residential units, at least 182 of which will be income-restricted.

(*Id.* at p. 620.) In other words, the restriction on the development of multi-family housing created a barrier to fair housing.

Similarly, in *Avenue 6E*, the city's denial of a developer's request to rezone an area to allow for smaller lots prevented the building of affordable or moderately priced homes that allegedly "exclude[d] Hispanic homebuyers from [the] area." (*Avenue 6E, supra*, 2018 U.S. Dist. Lexis 14913 at *3-5, 18, 24 [denying city's motion for summary judgment on plaintiffs' disparate-impact claim under the FHA].) Finally, in *Mt. Holly*, the Third Circuit reversed an order granting summary judgment on residents' disparate-impact claim under the FHA where their township implemented a redevelopment plan that "would eliminate existing homes in [a neighborhood], occupied predominately by low-income residents, and replace them with significantly more expensive housing units." The replacement housing was "well outside the range of affordability for a significant portion of the African-American and Hispanic residents." (*Mt. Holly, supra*, at pp. 377, 379-380 [concluding district court misapplied standard to determine whether residents could establish a prima facie disparate-impact case].)

In other words, in all of these cases the defendant's policy *affirmatively* prevented the building of or removed affordable housing in areas where minority residents were disproportionately affected. The City's approval of the Projects here does not. AHF responds it has alleged a barrier to housing for a protected class because the Projects will (1) demolish existing "rent-controlled housing occupied by a significant number of minorities"; (2) create housing "disproportionately unavailable and unaffordable to a protected group"; and (3) "cause[ ] the disproportionate displacement of a protected group by making surrounding housing unaffordable (thus eliminating previously existing affordable housing)." Assuming

the truth of these allegations, AHF has not alleged the City's approval of the Projects—and its decisions and implementation of land use policies that went with it—is *itself* a barrier to fair housing as *Inclusive Communities* requires.[14]

i. AHF has not alleged the City's policy restricts affordable housing

First, AHF has not alleged the City has restricted the building of affordable housing in the area through zoning, an ordinance, or other land use decision, as part of its approval of the Projects. AHF does not allege, for example, that the City applied a zoning or other land use law effectively to preclude construction of affordable housing in the area, as in *Mhany's* restriction on multi-family dwellings or *Avenue 6E's* lot-size restrictions. Moreover, in both *Mhany* and *Avenue 6E*, the cities were faced with development proposals requiring a less restrictive zoning designation to enable the construction of more affordable housing than the ultimate designations allowed. AHF does not suggest the City's approval of the Projects prevented a competing development from constructing affordable housing.

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[14] In discussing causation, AHF argues that, for purposes of establishing a prima facie case, the HUD regulations—left intact by *Inclusive Communities*—require it to allege only that the City's policy "predictably will cause a discriminatory effect on a protected class." (Citing 24 C.F.R. § 100.500(c)(1).) While we need not address the parties' causation arguments, *Inclusive Communities* made clear "[g]overnmental . . . polices are *not* contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.' " (*Inclusive Communities, supra*, 135 S.Ct. at p. 2524, italics added.) Accordingly, as part of its prima facie case, AHF must plead the City's policy itself is the barrier to fair housing.

Second, AHF has not alleged what *actual* restrictions the City's approval of the Projects places on access to affordable housing. Instead, under AHF's gentrification theory, the City's development policy has disproportionately limited the availability of housing to Latinos by "making surrounding housing unaffordable." AHF theorizes the "upscale" Projects will revitalize the area causing rents to rise as higher-earning residents are attracted to the developments. Latinos will be disproportionately displaced from the area as they no longer will be able to afford their current housing and cannot afford the new market rate housing the Projects will create.

Assuming the Projects will cause a rise in surrounding rents and disproportionately impact Latinos as AHF portends, AHF has not alleged the City's implementation of its land use plan is the barrier to affordable housing. Rather, the anticipated barrier to affordable housing rests in the hands of private third parties. AHF alleges the possibility of private landowners raising rents as property values in the area increase when the Projects are built. Of course, landlords could raise rents—or not—due to other socio-economic forces, too. Nonetheless, the City's land use decisions and policies associated with its approval of the Projects themselves do not impose higher rents, do not physically reduce the number of available affordable housing units, and do not preclude the development of affordable housing units. In the absence of the City placing actual restrictions on housing, we cannot conclude the City's approval of the Projects is actionable under the FHA or FEHA based on the reduction of affordable housing units as a result of private actors' anticipated increase of rents due to the revitalization of the area stemming from new development.

ii. The City's approval of the Projects does not eliminate housing

AHF alleges minorities disproportionately will be unable to afford most of the new housing the Projects will construct, but that new housing will not eliminate existing housing. The market rate housing the Projects will build does not replace existing, occupied housing: the Palladium project will be built on an empty parking lot; the Sunset Gordon project will re-open an already built tower that has sat vacant for about three years with empty housing units; the Crossroads project creates new income-restricted units with a net increase in affordable housing; and the 6400 Sunset project will be built on a lot with no current housing units. Accordingly, the new market rate units will not displace current residents who cannot afford them because they do not replace existing affordable units.

As AHF alleges, and the City does not dispute, the Crossroads project will result in the destruction of an existing rent-stabilized apartment building. The 84 rent-stabilized units slated for demolition, however, will be *replaced* with 105 units restricted for very-low income households.[15] Rather than *reduce* available affordable housing, the replacement of the existing building will *increase* the number of affordable housing units on that site. And, 40 of those new units will be reserved for former tenants of the demolished building. In stark contrast to *Mt. Holly*, the City's policy does not remove existing affordable

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[15] The City notes that units subject to its rent stabilization ordinance are not income restricted. (L.A. Mun. Code, ch. 15, § 151.00 et seq.) The ordinance protects tenants from excessive rent increases, but allows "landlords to re-set rent to market rates in several circumstances, including, when units are voluntarily vacated." (See, e.g., *id*., § 151.06(C)1.(a).) The new construction not only will add 21 affordable units to the area, but the 84 units replaced with income-restricted units arguably will be more affordable than they are now.

housing to make way for less affordable housing; thus it cannot be classified as a barrier to housing under the FHA.[16]

iii. AHF seeks to impose a new development policy on the City, rather than to eliminate one

Finally, as we have noted, the "FHA is not an instrument to force housing authorities to reorder their priorities." (*Inclusive Communities, supra*, 135 S.Ct. at p. 2522.) Here, the remedy AHF seeks—the halting of the Projects until the City initiates measures to mitigate the effects of gentrification—is precisely the type of remedy *Inclusive Communities* explained the FHA was not intended to impose. AHF would have the court force the City to "reorder" its development priorities by requiring,

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[16] Moreover, in the February 2019 Crossroads petition for writ of mandate, AHF litigated and lost its contention that the City did not sufficiently mitigate the loss of affordable housing from the demolition of the rent-stabilized building, and that the project failed to provide sufficient affordable housing. In denying the petition, the superior court found AHF's "evidence of affordable housing shortages in the [Hollywood Redevelopment Area] is lacking." The trial court concluded that, "even if Petitioners substantiated a severe affordable housing shortage," the Community Development Law provisions relating to providing affordable housing as part of a redevelopment project "did not compel the City to condition the [Crossroads project's] approvals on the inclusion of more affordable housing." Rather, the statute in question, Health and Safety Code section 33413, requires the City to produce the required number of income-restricted housing units *anywhere* within the Hollywood Redevelopment Area—not the Crossroads project's site itself—within the City's discretion. And, because the redevelopment agency's implementation plan does not expire until May 7, 2027, the City has another seven years to satisfy the requirement.

for example, additional affordable housing to be built within or near the Projects, as opposed to some other area.

Rather, disparate-impact liability under the FHA should "solely 'remov[e] . . . artificial, arbitrary, and unnecessary barriers.' " (*Inclusive Communities, supra*, 135 S.Ct. at p. 2524.) Eliminating the City's alleged "offending" policy—its approval of the Projects—would not make affordable housing more available to minorities, however. As we have discussed, the Projects add affordable housing units to the area's existing supply. Thus, declaring the City's approval of the Projects void will serve only to *reduce* the number of existing income-restricted housing units, rather than provide greater access to affordable housing, as contemplated by the FHA.

No one disputes the existence of gentrification or its potential ill effects. But, in the absence of a policy that actually limits the availability of affordable housing, AHF's remedy is to petition the City or the Legislature to enact laws or policies to counteract the future effects of gentrification. The FHA and FEHA, however, were designed not to *impose* land use policies on public and private actors, but rather to *eliminate* those policies that are barriers to fair housing. AHF has not alleged such a policy exists here.

Because we conclude the City's approval of the Projects is not actionable as a matter of law under the FHA or FEHA on the ground it does not constitute a policy that is an artificial, arbitrary, or unnecessary barrier subject to disparate-impact liability, we need not consider the parties' other arguments or the other grounds on which the trial court sustained the demurrers. Having affirmed the judgment, we also need not consider AHF's contention the trial court erred when it confirmed this action is subject to the ELDP rules.

3. *The trial court did not abuse its discretion by denying AHF leave to amend*

When a demurrer is sustained without leave to amend, the plaintiff bears the burden of proving there is a reasonable possibility of amendment. To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The assertion of an abstract right to amend does not satisfy this burden. (*McKelvey v. Boeing North American, Inc*. (1999) 74 Cal.App.4th 151, 161.) Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1408.) Allegations must be factual and specific, not vague or conclusory. (*Cooper v. Equity Gen. Insurance Co.* (1990) 219 Cal.App.3d 1252, 1263-1264.)

Here, AHF has set forth vague or conclusory factual allegations to satisfy its burden of showing that there is a reasonable possibility that it can amend the legal effect of its complaint. For example, while it states it can plead more robust statistics regarding the disparate impact of displacement on Latinos, it offers no specific allegations to support the possibility of amendment and no legal authority showing the viability of new or amended causes of action.[17] Indeed, in its reply brief,

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[17] At oral argument AHF's counsel suggested it could amend its complaint to plead additional facts to support the complaint's conclusory allegation that the City's "approval of the Projects . . . perpetuates segregated housing patterns" in violation of the FHA. Arguably, some Latino residents in the area will be unable to afford the market rate units in the Projects' new "upscale"

AHF asks *this cour*t to "provide guidance" as to what additional evidence may be required under *Inclusive Communities*. Of course, the burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. (*Gould v. Maryland Sound Industries, Inc*. (1995) 31 Cal.App.4th 1137, 1153.)

DISPOSITION

The judgment is affirmed. In the interests of justice, the parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.

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buildings. But AHF has not said how the unaffordability of the new units *perpetuates* segregation in the area when currently a disproportionate number of the residents are minorities. Put differently, AHF offers no specific facts explaining how making the area *less* segregated and more socioeconomically diverse violates the FHA or FEHA.

PROOF OF SERVICE

AIDS Healthcare Foundation v. City of Los Angeles et al.
Case No. S_____
Court of Appeal Case No. B303308

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On July 27, 2020, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

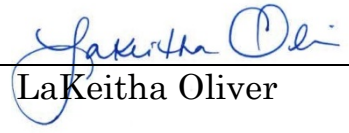
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with AIDS Healthcare Foundation's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 27, 2020, at Los Angeles, California.



LaKeitha Oliver

SERVICE LIST
AIDS Healthcare Foundation v. City of Los Angeles et al.
Case No. S_____
Court of Appeal Case No. B303308

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Individual / Counsel Served	Party Represented
Hon. Robert S. Draper Stanley Mosk Courthouse Department 78 111 North Hill Street Los Angeles, CA 90012 (213) 633-0152	Trial Court Judge Case No. 19STCP03387 ***Hard Copy via U.S. Mail***
Office of the Clerk California Court of Appeal Second Appellate District, Division 3 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 (213) 830-7000	Case No. B303308 ***Electronic Copy*** via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) – California Rules of Court, Rule 8.5000(f)(1)