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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| STEVEN TRAVIS, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>COUNTY OF SANTA CRUZ,<br><br>Defendant and Respondent. | H029771<br><br>(Santa Cruz County Super. Ct. No. CV136570) |

## INTRODUCTION

In 1982 the Legislature enacted Government Code 65852.2, the so-called "Second Unit Statute," in recognition of the statewide need for affordable housing. (Stats. 1982, ch. 1440, § 1, subds. (a), (c).) The Second Unit Statute encourages local governmental entities to adopt ordinances allowing for the creation of second units in single-family residential zones. (Gov. Code, § 65852.2, subd. (a).) If a local entity does not adopt its own ordinance governing second units, an applicant for a second unit can obtain a permit by complying with the requirements set forth in the state Second Unit Statute. (Gov. Code, § 65852.2, subd. (b).) Under this statutory scheme, if the local entity has passed an ordinance pursuant to Government Code section 65852.2, subdivision (a), the criteria contained in the local ordinance apply rather than the state requirements contained in subdivision (b) of section 65852.2. The Legislature has accorded local government

considerable discretion in adopting ordinances allowing and governing second units. (Gov. Code, § 65852.2, subd. (a).)

In accordance with the Second Unit Statute (Gov. Code, § 65852.2, subd. (a)), Santa Cruz County (the County) has enacted a Second Unit Ordinance, codified at Santa Cruz County section 13.10.681 of the County Code (the Ordinance). The Ordinance allows property owners to construct " 'affordable second dwelling units' " on property in single-family residential zones, but it imposes certain restrictions on the use of those second units. (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 763.) Among other things, the Ordinance limits the amount of rent that can be charged and restricts occupancy to family members, low income households, or moderate income households that include at least one senior citizen. (County Code, § 13.10.681, subd. (e).) The question whether the County can lawfully impose these rent and occupancy restrictions on a permit allowing a second unit under its Ordinance is the focus of the dispute before us in this appeal.

In 1999 the County issued appellant Stephen Travis a development permit to construct a second unit on his property, which is zoned for single-family residential use. The rental and occupancy restrictions contained in the Ordinance were imposed as conditions on his permit. Appellant refused to accept the permit, contending that these conditions were unlawful. In a petition for a writ of mandate he challenged the limitation on the amount of rent that can be charged for the second unit, contending that this was a form of rent control that has been preempted by the state Costa-Hawkins Rental Housing Act. (Civ. Code, § 1954.50 et. seq.) He further challenged the preference given to moderate-income households with a senior citizen, and the condition that the second unit be occupied by households of low and moderate income, contending that those conditions were discriminatory, in violation of the Unruh Civil Rights Act (Civ. Code, § 51, et seq.) and Government Code section 65008. Additionally appellant has raised a claim that the occupancy limitations imposed by the Ordinance amount to an unconstitutional invasion of his privacy rights.

Resolution of appellant's claims that these conditions may not lawfully be imposed on his permit for a second unit requires that we consider the purpose and effect of various state statutes, including the Second Unit Statute summarized above (Gov. Code, § 65852.2); the Costa-Hawkins Rental Housing Act (Civ. Code, §§ 1954.50-1954.535); the Unruh Act (Civ. Code, § 51, et. seq.); and Government Code section 65008, which prohibits discrimination in zoning and land use decisions by local entities. As always, we are mindful of our role as an intermediate Court of Appeal. We interpret the language of the relevant statutes, guided by the rules of statutory construction and the legislative history where applicable, and we defer to authoritative Supreme Court precedent under the doctrine of stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consistent with our prior opinion in this case, and with our interpretation of the Second Unit Statute and related statutes, we believe that the County, in allowing a second unit on property otherwise zoned for only one unit, may reasonably regulate the use of the second unit, so long as the restrictions imposed are not otherwise unlawful. (*Travis v. County of Santa Cruz* (Dec. 6, 2004, H021541) [nonpub. opn.].) We set forth our conclusions as to appellant's specific claims as follows.

***The Costa-Hawkins Rental Housing Act***

The Costa-Hawkins Rental Housing Act (the Costa-Hawkins Act), enacted in 1995 and contained in Civil Code sections 1954.50 through 1954.535, expressly permits landlords statewide to set the initial rent for dwelling units constructed after February 1, 1995. (Civ. Code, § 1954.52, subd. (a)(1).) It thus exempts such units from local rent control laws. Appellant contends that the limitation imposed by the Ordinance on the amount of rent he can charge for a second unit on his property conflicts with, and is therefore preempted by, the Costa-Hawkins Act. However, the Costa-Hawkins Act expressly provides for an exception to the general provision exempting newly constructed units from rent control, in cases where the owner receives some incentive or other consideration from the local entity in exchange for agreeing to restrictions promoting affordable housing. (Civ. Code, § 1954.52, subd. (b).) Consideration can be in the form

of a "density bonus," meaning an increase over the otherwise allowable residential density under the applicable zoning. (Gov. Code, § 65915, subd. (g).)

Appellant argues that the County's Ordinance does not provide him any density bonus because he is already entitled to construct a second unit under the requirements set forth in the state Second Unit Statute. (Gov. Code, § 65852.2, subd. (b).) However, since the County has adopted a second unit ordinance, under the state statutory scheme the requirements of the local ordinance govern rather than the state requirements. (Gov. Code, § 65852.2, subd. (a).) By allowing a second unit to exceed the maximum density for the lot, the local entity is providing a density bonus to the property owner. We believe this constitutes consideration for the owner's promise to accept rent regulation. We therefore conclude that the condition imposed by the Ordinance restricting the rent that can be charged for the second unit falls within the exception to the Costa-Hawkins Act contained in Civil Code section 1954.52, subdivision (b).

***Age Discrimination Under The Unruh Act and Government Code Section 65008***

The Unruh Civil Rights Act (Civ. Code, §§ 51 et seq., hereafter the Unruh Act) prohibits arbitrary discrimination in business establishments on the basis of specified classifications. It specifically prohibits discrimination in housing on the basis of age, except where the housing is designed and constructed to meet the physical and social needs of senior citizens, in which case such housing may be established and preserved for seniors only. (Civ. Code, §§ 51.2, 51.3.) Similarly Government Code section 65008 provides that any local land use or zoning action is null and void if it denies housing to any individual or group of individuals on the basis of age. (Gov. Code, § 65008, subd. (a)(1).) The Government Code also makes specific exception for housing designed to meet the needs of senior citizens, within the meaning of sections 51.2 and 51.3 of the Unruh Act. (Gov. Code, § 12955.9.) The second units allowed by the County's Ordinance do not qualify for seniors-only housing under these statutes.

Appellant argues that under the Unruh Act and Government Code section 65008 the only exception to the general prohibition against age discrimination in housing is where the housing is specially designed for senior citizens; thus any other form of

preference on the basis of age is unlawful discrimination. As related to the Ordinance, appellant argues that it is unlawful under these statutes to impose a condition of occupancy where households of moderate income that include a senior citizen qualify to rent the second unit and households of moderate income that do not include a senior citizen are excluded. We believe this contention is supported by the statutes themselves and by courts that have interpreted them. We therefore find that the County may not lawfully impose a condition of occupancy on appellant's second unit permit that is based on the age of the prospective tenants.

***Income-based Occupancy Restrictions--Government Code Section 65008***

Government Code section 65008 provides that any zoning or land use action by a local entity is null and void if it denies housing to an individual or group of individuals because of "[t]he intended occupancy of any residential development by persons or families of low, moderate, or middle income." (Gov. Code, § 65008, subd. (a)(3).)[1] Appellant contends that the condition imposed by the Ordinance restricting occupancy of the second unit to households of low and moderate income violates this statute. We reject appellant's interpretation of this statute, which runs contrary to its underlying purpose of facilitating the creation of affordable housing. (Stats. 1984, ch. 1691, § 1.) In enacting Government Code section 65008, the Legislature intended to address a problem of "statewide concern" by prohibiting "discriminatory practices that *inhibit* the development of housing for persons and families of low, moderate and middle income." (Gov. Code, § 65008, subd. (h), italics added.)[2] The condition imposed by the Ordinance in this case promotes, rather than inhibits, the development of affordable housing. We therefore conclude that, in allowing a property owner to construct a second dwelling unit on property otherwise zoned for one single-family residence, the County may lawfully impose a condition restricting such housing to low and moderate income households.

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[1] Government Code section 65008 has been amended, effective January 1, 2007, to include persons or families of "very low" income, in addition to "low, moderate, or middle income." (Stats. 2006, ch. 578, § 8.)

[2] See footnote 1, *ante.*

***Constitutional Right of Privacy***

Appellant claims that the conditions imposed by the Ordinance on his second unit development permit are an unconstitutional violation of his privacy rights. Appellant did not raise this claim in the initial writ proceeding in 1999. Consequently it was not included in our discussion of this case in either of our prior two opinions (*Travis v. County of Santa Cruz* (July 25, 2002, H021541) [nonpub. opn.] [dis. opn. of Bamattre-Manoukian, J.]; *Travis v. County of Santa Cruz, supra,* (filed Dec. 6, 2004)), or in the Supreme Court's opinion discussing the application of statutes of limitations to the various claims at issue. (*Travis v. County of Santa Cruz, supra,* 33 Cal.4th 757.) The Supreme Court concluded that, although appellant's facial challenges to the Ordinance were time-barred, appellant could proceed with that part of his action that challenged the conditions applied to his permit. (*Id.* at p. 776.) We understand this to mean that appellant was entitled to proceed to trial on the claims he had raised below that were initially found by the trial court to be barred by statutes of limitations. Our remand to the trial court did not include directions specifically limiting the claims to be addressed in the further proceedings. However, we believe such a limitation was implied. We conclude that appellant's claim that his privacy rights were violated by the conditions imposed by the Ordinance was not properly before the trial court. We therefore do not address the merits of this claim.

***Disposition Summary***

In sum, we find that the rental and income restrictions imposed by the County's Ordinance are lawful conditions that may be imposed on a permit allowing the construction of a second dwelling unit on property otherwise designated in the County's zoning and general plan for one single-family residence. However, we conclude that the condition limiting occupancy based on the age of the prospective tenant constitutes a violation of the Unruh Act (Civ. Code, §§ 51.2, 51.3) and Government Code section 65008 and is therefore unlawful. We will therefore reverse the trial court's denial of appellant's petition for a writ of mandate and remand the matter with directions that the

trial court grant the writ of mandate with respect only to the condition imposing occupancy restrictions based on age.

## BACKGROUND

Travis owns property in an unincorporated area of Santa Cruz County, consisting of one parcel that is 5.6 acres in size, zoned for single family residential use. It is designated by the County's general plan as "mountain-residential" property, with a maximum density of one dwelling per ten acres. On February 16, 1999, Travis applied to the County for a permit to convert a single family dwelling that was under construction into a 1200 square-foot second dwelling unit, and for the construction of a new primary dwelling on the property. The County issued a development permit signed April 30, 1999, approving the conversion of the 1200 square-foot dwelling under construction into a second unit, and imposing certain conditions on its use, pursuant to Santa Cruz County Code, section 13.10.681, known as the Second Unit Ordinance.

### *The Ordinance*

The Ordinance provides that one second unit can be constructed on any parcel in a residential zone if various requirements are met, including lot size, location, design, setbacks, parking, and available utilities. (County Code, § 13.10.681, subds. (c), (d).) Travis's proposed second unit met these requirements. The Ordinance further provides for occupancy and rent restrictions, which are set forth in subdivision (e) of County Code section 13.10.681, as follows:

"(e) Occupancy Standards. The following occupancy standards shall be applied to every second unit and shall be conditions for any approval under this section:

"(1) Occupancy Restrictions. The maximum occupancy of a second unit may not exceed that allowed by the State Uniform Housing Code, or other applicable state law, based on the unit size and number of bedrooms in the unit. Rental or permanent occupancy of the second unit shall be restricted for the life of the unit to either: [¶] (A) Households that meet the Income and Asset Guidelines established by the Board of Supervisors resolution for lower income households; or [¶] (B) Senior households, where one household member is sixty-two (62) years of age or older, that meet the Income and

Asset Guidelines requirements established by Board resolution for moderate or lower income households; or [¶] (C) Persons sharing residency with the property owner and who are related by blood, marriage, or operation of law, or have evidence of a stable family relationship with the property owner. [¶] . . . [¶]

"(4) Rent Levels. If rent is charged, the rent level for the second unit, or for the main unit, if the property owner resides in the second unit, shall not exceed that established by the Section 8 Program of the Department of Housing and Urban Development (HUD) or its successor, or the rent level allowed for affordable rental units pursuant to Chapter 17.10 of the County Code, whichever is higher."

Subdivisions (e)(5), (e)(6) and (e)(7) of the Ordinance require that the property owner obtain a certificate of eligibility from the County prior to the second unit being occupied, that the property owner make periodic status reports to the County, and that a declaration of the restrictions be recorded against the title to the property, which would be binding on all successors in interest. (County Code, § 13.10.681, subds. (e)(5), (6), (7).)

***The Writ Proceedings***

Travis refused to accept the development permit conditioned upon the restrictions imposed pursuant to the Ordinance. On May 14, 1999, he filed an administrative appeal challenging the occupancy and rent conditions, which was denied by the Deputy Zoning Administrator of the County Planning Department on June 21, 1999.

On September 9, 1999, Travis and co-petitioners Stanley and Sonya Sokolow filed a petition for a writ of mandate. They sought removal of the conditions imposed on their development permits pursuant to the Ordinance and further sought to compel the County to repeal or amend the Ordinance, to cease imposing the rental and occupancy conditions, to compensate second unit owners for lost rents or fines assessed, and to record a document expunging all deed restrictions imposed under the Ordinance. They asserted claims that the rent restrictions were preempted by California's Costa-Hawkins Act (§§ 1954.50-1954.535), that the occupancy restrictions unlawfully discriminated on the basis of age or income in violation of the Unruh Act (§ 51.2) and Government Code

section 65008, and that the deed restrictions constituted a regulatory taking in violation of the Fifth Amendment to the United States Constitution.

The trial court denied the petition, finding that all of plaintiffs' "facial" challenges to the Ordinance, including their preemption claims, were barred by the 90-day statute of limitations in Government Code section 65009. The court further found that Travis's claim that the occupancy and rent restrictions constituted a regulatory taking of his property was timely but not meritorious. As to the Sokolows, the court found that their petition was untimely as to all of their claims because they had not acted within 90 days of the final decision on their permit. Travis and the Sokolows appealed.

***Our First Opinion, filed July 25, 2002 (H021541)***

In our first opinion in this case, a divided panel affirmed the trial court's order. (*Travis v. County of Santa Cruz, supra*,(filed July 25, 2002.) The majority found that all of plaintiffs' claims were "facial" challenges to the County's Ordinance, that the 90-day statute of limitations in Government Code section 65009, subdivision (c)(1)(B) applied, and that all of plaintiffs' preemption claims were time-barred. Plaintiffs petitioned for review.

***The Supreme Court's Opinion in Travis v. County of Santa Cruz (2004) 33 Cal.4th 757***

The Supreme Court granted review and filed its opinion on July 29, 2004. (*Travis v. County of Santa Cruz, supra*, 33 Cal.4th 757.) The high court found that plaintiffs' claims encompassed both "facial" and "as-applied" challenges to the Ordinance. As to the parties' facial claims that various state statutes preempted the Ordinance and gave rise to a duty on the part of the County to repeal or amend the Ordinance, or to cease enforcing it in the future, the court found that all of these claims seeking to nullify the Ordinance itself were time-barred. Preemption claims based on statutes in effect at the time the Ordinance was adopted in 1982, such as Government Code section 65008, were subject to the 90-day statute of limitations in Government Code section 65009,

subdivision (c)(1)(B), which ran from the date the Ordinance was adopted.[3] Preemption claims based on statutes enacted *after* the Ordinance, such as sections 51.2 and 51.3 of the Unruh Act, enacted in 1984, and the Costa-Hawkins Act, enacted effective January 1, 1996, were governed by a three-year statute of limitations, running from the date the assertedly preemptive state statute became effective. (Code Civ. Proc., § 338, subd. (a).)[4] Since the petition for a writ of mandate was filed in September of 1999, it was not timely as to plaintiffs' claims that either of these later enacted statutes preempted and nullified the Ordinance. (*Travis v. County of Santa Cruz, supra*, 33 Cal.4th at pp. 772-774.)

Insofar as the action sought to remove or invalidate the conditions imposed by the Ordinance on the plaintiffs' development permits, the court found that the 90-day statute of limitations contained in Government Code section 65009, subdivision (c)(1)(E) applied, and ran from the date the permit issued.[5] Applying this statute, the court found that Travis's claims were timely but the Sokolows' were not. Travis was therefore entitled to proceed with those claims challenging the application of the Ordinance to his permit, and in the context of that action he could raise issues regarding the validity of the Ordinance. (*Travis v. County of Santa Cruz, supra,* 33 Cal.4th at p. 769.)

Because this court in its initial opinion had affirmed the trial court's judgment solely on the basis of the statute of limitations, without addressing the trial court's determination that Travis's regulatory taking claim was without merit, the Supreme Court remanded the matter to this court to decide that issue.

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[3] This statute applies to actions to "attack, review, set aside, void, or annul the decision of a legislative body to adopt . . . a zoning ordinance." (Gov. Code, § 65009, subd. (c)(1)(B).)

[4] This statute of limitations applies to "[a]n action upon a liability created by statute . . . ." (Code Civ. Proc., § 338, subd. (a).)

[5] This statute applies to actions "to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." (Gov. Code, § 65009, subd. (c)(1)(E).)

***Our Opinion filed December 6, 2004 (H021541)***

In our opinion filed December 6, 2004 (*Travis v. County of Santa Cruz*, *supra*, (filed Dec. 6, 2004), we addressed the regulatory taking claim and found that the conditions imposed by County's Ordinance on Travis's development permit did not constitute a taking of his property. We then remanded the matter to the trial court, with the following directions.

"As to plaintiff Travis only, his as-applied challenge to County's imposition of conditions on his second unit permit was timely. On remand, Travis is entitled to have this challenge heard in the trial court on its merits. Travis's attack on the ordinance itself is barred by the three-year statute of limitations contained in Code of Civil Procedure section 338, subdivision (a). All of the claims of plaintiffs Stanley and Sonya Sokolow are barred by applicable statutes of limitations. The trial court's determination that the application of County's second unit conditions to Travis's property did not constitute an unconstitutional taking of property is affirmed." (*Travis v. County of Santa Cruz*, *supra*, (filed Dec. 6, 2004))

***Proceedings on the Writ Petition On Remand***

On remand, the trial court received new written argument from the parties and after a hearing issued a written decision on November 17, 2005. The court found that the rent and occupancy conditions imposed on Travis's development permit for a second unit did not violate the Costa-Hawkins Act, the Unruh Act, or Government Code section 65008. In addition to the claims previously at issue, Travis articulated a new claim contending that the conditions imposed on his development permit violated his constitutional right to privacy. The court addressed and rejected this claim on the merits, after noting that it did not appear from the record that Travis had previously raised this claim, either at the administrative proceeding or in the initial writ petition. Travis has appealed and we accepted briefing from the Sokolows as amicus curiae.

## ARGUMENT

### I. Are the Rent Level Restrictions Imposed Pursuant to the Second Unit Ordinance Preempted by the Costa-Hawkins Act?

Because this question involves purely statutory interpretation, our review is de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 423.) By the same token, the question whether state law preempts a local ordinance is a question of law, subject to de novo review. (*Horton v. City of Oakland* (2000) 82 Cal.App.4th 580, 584.) State law preempts local legislation if the local ordinance "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 423.)

The Costa-Hawkins Act, passed in 1995, provides that "notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit about which any of the following is true: (1) It has a certificate of occupancy issued after February 1, 1995." (Civ. Code, § 1954.52, subd. (a)(1).) It is generally agreed that the Costa-Hawkins Act "preempts local rent control by permitting landlords to set the initial rent for vacant units." (*Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 130; *Bullard v. San Francisco Residential Rent Stabilization Bd.* (2003) 106 Cal.App.4th 488.) "[I]ts terms apply to all property in California." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1119.)

Appellant argues that in enacting the Costa-Hawkins Act, the Legislature clearly intended to fully occupy the area of rent control law. To the extent that the conditions imposed by the County's Ordinance regulated and limited the rent level that could be charged for his second unit, appellant argues that such limitations directly conflict with the state law. Thus the rent level restriction is invalid.

Respondent contends that the Ordinance can be reconciled with the Costa-Hawkins Act because it does not constitute rent control law, but instead is a zoning law regulating new development. It is contained within the zoning ordinances of the County

and its purpose, as stated, is "to provide needed housing for County residents and to further the housing goals of the Housing Element of the County General Plan." (County Code, § 13.10.681, subd. (a).) Respondent argues that the goal of the Ordinance was not to impose rent control but to ensure availability of housing for those of lower or moderate income, consistent with the State's affordable housing mandate.

"Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.]" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934.)

Applying this "plain meaning rule" of construction (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744), the language of the statutory provision in Civil Code section 1954.52, subdivision (a)(1), quoted above, clearly describes a state-wide mandate that an owner of real property "may establish the initial and all subsequent rental rates" for a dwelling that has a certificate of occupancy after February 1, 1995. (Civ. Code, § 1954.52, subd. (a)(1).) In our view, the mandatory rent level restrictions imposed by the County's Ordinance on appellant's permit, which were to continue for the life of the second unit, appear to be in direct conflict with this general provision of the state statute, and thus would be preempted by it.

This does not decide the preemption issue, however. In subdivision (b) of Civil Code section 1954.52, the Legislature set forth an exception to the general provision of the Costa-Hawkins Act, and the question whether this exception applies to the circumstances before us is the focus of the argument here. Subdivision (b) of Civil Code section 1954.52 provides that "[s]ubdivision (a) does not apply where the owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code." (Civ. Code,

§ 1954.52, subd. (b).) Chapter 4.3 of division 1 of title 7 of the Government Code is entitled "Density Bonuses and Other Incentives," and is referred to as the state density bonus law. The statutes contained therein describe a program whereby a developer who agrees to include in a proposed development a certain percentage of units reserved for low or moderate income families can obtain a density bonus from the local entity, meaning an increase over the otherwise maximum allowable residential density under the applicable zoning. (Gov. Code, § 65915, subd. (g).)[6] The density bonus law is one of several state statutes reflecting "an important state policy to promote the construction of low income housing and to remove impediments to the same." (*Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 770.) "It does so by rewarding a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." (*Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1263.)

Appellant argues that the exception to the general provision of the Costa-Hawkins Act, contained in subdivision (b) of Civil Code section 1954.52, does not apply to the rental restrictions imposed by County's Second Unit Ordinance because the construction of a second unit is not a housing development, within the meaning of Government Code section 65915. The density bonus provisions of Government Code section 65915 apply to "housing developments consisting of five or more dwelling units." (Gov. Code, § 65915, subd. (g)(5).) Appellant contends that because the second unit does not qualify as a housing development, it does not fall within the exception to the Costa-Hawkins Act contained in Civil Code section 1954.52, subdivision (b).

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[6] We are aware of recent legislation amending Government Code section 65915. (Stats. 2005, ch 496, § 2, eff. Jan. 1. 2006.) We do not believe the amendments affect the substantive issues discussed herein. We decline to take judicial notice of this legislation, the legislative history, or a newsletter published by the California Housing Law Project, as amicus has requested in a Second Request for Judicial Notice. We will, however, use the current designations of the subdivisions in this statute.

Respondent argues that the language of this exception does not limit its application only to the types of development described in Government Code section 65915. Instead, the statute refers to *any* agreement between the owner and the local entity "in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code." (Civ. Code, § 1954.52, subd. (b).) In other words, the reference to the density bonus statute is for the purpose of identifying the "forms of assistance" that are specified in that statute. These include not only a density bonus, but also a reduction in site development standards, approval of mixed-use zoning, and any other incentives or concessions that will result in cost reduction. (Gov. Code, § 65915, subd. (*l*).)

Again, we find that the application of the rule of statutory interpretation known as the "plain meaning rule" governs here and resolves this issue. The language of Civil Code section 1954.52, subdivision (b), clearly reflects that the reference to the density bonus law contained in "Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code" was in order to identify the forms of assistance that can constitute consideration for a property owner's agreement to accept rent control. As we understand it, the Costa-Hawkins Act, while imposing broad limitations on local rent control, provided an exception in any case where the owner of the real property has agreed to restrictions on rent in exchange for "financial contribution" or "other forms of assistance" from the local entity. (Civ. Code, § 1954.52, subd. (b).) The apparent purpose of this exception was to allow for programs promoting low-income housing. The Second Unit Ordinance in this case is such a program. The language of the statute does not limit the exception contained in section 1954.52, subdivision (b), to developments of five units or more, or to any particular number of units. We can discern no public purpose in interpreting the statute in such a way. And we are confident that if the Legislature intended the exception in section 1954.52, subdivision (b) to apply only to housing developments as that term is described in Government Code section 65915, it could easily have so provided. It did not do so, and appellant's remedy is to seek an amendment of the statutory language from the Legislature.

Appellant raises two additional arguments as to why the exception contained in Civil Code section 1954.52, subdivision (b), does not apply to the circumstances before us. First, appellant argues that there is no "contract" between him and the County. (Civ. Code, § 1954.52, subd. (b).) Secondly, appellant argues that there is no consideration offered in exchange for accepting the rental restrictions. He contends the County's permit allowing him to construct a second unit does not provide him a "density bonus" because he is already entitled to construct a second unit under the state Second Unit Statute. (Gov. Code, § 65852.2.)

As to appellant's first contention, he argues that his application for a permit for a second unit and the County's issuance of the development permit do not constitute a "contract," within the meaning of Civil Code section 1954.52, subdivision (b), because he has not signed and accepted the permit. While this may be true, if appellant wishes to proceed with construction of the second unit, he can do so only under County's development permit, including the conditions and restrictions attached thereto, which he will be obliged to accept. We believe this is the type of contract between a property owner and a public entity that was contemplated by the exception to the Costa-Hawkins Act set forth in Civil Code section 1954.52, subdivision (b). Of course the contract is not a valid one if, as appellant contends in this appeal, the conditions the County seeks to impose are not supported by consideration or are otherwise unlawful.

Lastly, we turn to appellant's contention that the County's issuance of a development permit for a second unit does not provide a density bonus, or any other incentive or concession, in consideration for the property owner's acceptance of the rent restrictions. Appellant and amicus contend there is no "bonus" provided by the permit because, in the absence of County's Ordinance, appellant would be entitled to construct a second unit under the state Second Unit Statute. (Gov. Code, § 65852.2, subd. (b).)

Appellant's contention that the state Second Unit Statute entitles him to a second unit on his property as a matter of right fails to take into account that the statute sets forth three options. 1) The local entity may adopt its own second unit ordinance and establish its own criteria and standards for second units. (Gov Code, § 65852.2, subd. (a).) 2) If

the local entity does not adopt its own ordinance regarding second units, the state requirements contained in Government Code section 65852.2, subdivision (b), apply and if the applicant meets these requirements, the local entity must approve the second unit. 3) The local entity may adopt an ordinance banning *all* second units in single-family zoned areas, but if it does so it must make certain findings that such units would have adverse impacts. (Gov. Code, § 65852.2, subd. (c).) We believe that under this statutory framework, it is clear that if the local entity chooses to adopt its own second unit ordinance, the criteria contained in that ordinance will apply rather than the state requirements. (See *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330; *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963.) Thus appellant's argument that he would be able to construct his second unit under the state statute if the local ordinance were not in existence does not aid his cause because the local ordinance *is* in existence and it controls.

Appellant made a similar argument in his first appeal, in connection with his claim that the conditions imposed by the Ordinance constituted a taking of his property. He contended that he had a right to have a second unit on his property by virtue of the state Second Unit Statute, and that the County's restrictions prevented him from exercising this right, resulting in a taking of his property. We addressed this claim in our previous opinion in this matter, where we found as follows:

"California's second-unit statute, recognizing a state-wide need for affordable housing, encourages local governments to enact their own ordinances allowing and regulating second units in residential zones where they otherwise would be prohibited. (Gov. Code, § 65852.2, subd. (a).) It is only where local government has *not* passed a second-unit ordinance that the statute requires the local entity to grant a conditional use permit for any second units which meet the requirements enumerated in the statute. (Gov. Code, § 65852.2, subd. (b).) Where the local government has passed an ordinance, the criteria contained in that ordinance apply rather than the state requirements. (Gov. Code, § 65852.2, subd. (a).) Thus even if Travis has fully complied with the state requirements for second units contained in Government Code section 65852.2,

subdivision (b), this does not automatically entitle him to have a second unit." (*Travis v. County of Santa Cruz, supra*, (filed Dec. 6, 2004).)

We further found that "if local government passes an ordinance, it has considerable discretion under subdivision (a) of section 65852.2, to regulate second units. (*Desmond v. County of Contra Costa [, supra,]* 21 Cal.App.4th 330.) As the court observed in *Desmond,* 'section 65852.2, subdivision (a), which applies to local agencies that have adopted ordinances providing for the creation of second units, contains broadly permissive language on the standards that a local government may impose on applications for [second] units.' (*Id.* at p. 341.) For instance, the local ordinance may provide that second units 'do not exceed the allowable density for the lot upon which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot.' (Former Gov. Code, § 65852.2, subd. (a)(3).)[7] Since County's second-unit ordinance in this case provided for increased density over the existing zoning designation, and other incentives not required by the state statute, County could require the permit applicant to agree to reasonable conditions in exchange for accepting these benefits." (*Travis v. County of Santa Cruz, supra*, (filed Dec. 6, 2004).)

Appellant and amicus argue that these observations are not the law of the case because they were part of the discussion of a different issue in our prior opinion. They contend further that both the state Second Unit Statute and the County Ordinance have been amended since the first trial in this case. (Stats. 2002, ch. 1062, § 2; County Ordinance No. 4727, June 24, 2003.) The amendments abolished any discretionary procedure to approve applications for second units. The statute now provides that a local agency receiving an application for a second unit under a local ordinance shall consider that application "ministerially without discretionary review or a hearing." (Gov. Code, § 65852.2, subd. (a)(3).) Similarly, if a property owner applies for a second unit under

[7] This statute is now contained in subdivision (a)(1)(C) of Government Code section 65852.2.

the requirements of the state statute, the local entity shall "approve or disapprove the application ministerially without discretionary review." (Gov. Code, § 65852.2, subd. (b)(1).) Consistent with these amendments, the Ordinance now provides that "second units shall be processed in accordance with the requirements of Government Code Section 65852.2" and further provides that, unless the property is within the coastal zone, "[n]o public hearing shall be required for the development of a second unit within a residential zone district or on land designated residential in the General Plan." (County Code, § 13.10.681, subd. (b).) Appellant takes the position that these amendments, by providing that approval of a second unit is a ministerial act, clarify that a property owner has an absolute entitlement to construct a second unit.

First, although our previous discussion of the interplay between the state Second Unit Statute and the County's Ordinance pertained to a different issue under review, we believe the same reasoning applies here. Even if appellant has complied with the requirements for a second unit set forth in the state Second Unit Statute, he does not have an absolute right to have a second unit because the County Ordinance, rather than the state statute governs here. Furthermore, as the court explained in *Desmond v. County of Contra Costa*, *supra*, 21 Cal.App.4th 330, the state statute contains "broadly permissive" language regarding the criteria that local entities may adopt in their second unit ordinances. (*Id.* at p. 341.) The local entity *may* permit second units in some areas of its jurisdiction, based on criteria that "*may* include, but are not limited to" water, sewer and traffic considerations. (Gov. Code, § 65852.2, subd. (a)(1)(A), italics added.) "The necessary implication of this provision is that a local agency may forbid the creation of second units in other areas." (*Desmond v. County of Contra Costa*, *supra*, 21 Cal.App.4th at p. 341.) The local ordinance *may* impose standards on second units that " '*include, but are not limited to* parking, height, setback, lot coverage, architectural review, and maximum size of a unit.' " (Gov. Code, § 65852.2, subd. (a)(1)(B), italics added.) "This language clearly contemplates that local agencies may impose *additional* standards on the creation of residential second units." (*Desmond*, *supra*, 21 Cal.App.4th at p. 341.) And the local entity *may* provide that the second units "do not exceed the

allowable density for the lot upon which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot." (Gov. Code, § 65852.2, subd. (a)(1)(C).) "The implication of this language is that a local agency may also decline to make such a determination, in its discretion." (*Desmond, supra,* 21 Cal.App.4th at p. 341.)

The 2002 amendments to the state Second Unit Statute, and the 2003 amendment to the County's Ordinance, did not limit the discretion of the local agency to develop criteria and standards for second units in its jurisdiction in adopting its own ordinance. Rather the amendments affected only the procedure by which an applicant could obtain a permit for a second unit, expediting the process by providing that the local agency act ministerially on the permit application rather than engage in a procedure involving review hearings. These changes do not give appellant any greater rights to construct a second unit. They simply provide that if the criteria in the local ordinance are complied with, or the state requirements in the absence of a local ordinance, the permit will issue without further proceedings.

In sum, Government Code section 65852.2 accords a local entity broad discretion to impose various criteria on second units in the adoption of its local ordinance, including requiring consistency with the general plan and zoning designations and providing that second units not exceed the allowable density for the lot upon which the second unit is located. (Gov. Code, § 65852.2, subd. (a)(1)(C).) It follows that the issuance of a permit to allow a second unit, where the existing general plan designation would allow only one residence, results in a density bonus to the property owner. This constitutes consideration in exchange for the conditions imposed on appellant's development permit that restricted rental levels to those consistent with housing for individuals with low and moderate incomes. The development permit, should appellant accept it and proceed with constructing his second unit, would therefore be a contract that comes within the exception to the Costa-Hawkins Act contained in Civil Code section 1954.52, subdivision (b). The rent restrictions imposed by the Ordinance are thus not preempted by the Costa-Hawkins Act.

## II. Does the Condition Imposed by the Second Unit Ordinance Creating a Preference for Senior Citizens Discriminate on the Basis of Age, in Violation of the Unruh Act and Government Code Section 65008?

Appellant argues that the occupancy condition imposed on his second unit permit that allows a moderate-income household with a senior citizen to rent the unit, but excludes all other moderate-income households that do not include a senior citizen, constitutes unlawful age discrimination under California's Unruh Civil Rights Act (Civ. Code, § 51, et seq.) and Government Code section 65008. As we have noted, our interpretation of statutory provisions is de novo. (*People ex rel. Lockyer v. Shamrock Foods Co., supra,* 24 Cal.4th at p. 423.)

The Unruh Civil Rights Act, codified at Civil Code section 51, et seq., prohibits arbitrary discrimination in California business establishments on the basis of specified classifications. (Civ. Code, § 51.) It generally provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities privileges or services in all business establishments of any kind whatsoever." (Civ. Code, § 51, subd. (b).) Although section 51 of the Unruh Act does not include age as a category, section 51.2 specifically prohibits discrimination in housing on the basis of age, by providing that section 51 "shall be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age." (Civ. Code, § 51.2, subd. (a).) Furthermore, Government Code section 65008 provides that no local governmental entity may act to deny housing, including tenancy, to any individual or group of individuals on the basis of age. (Gov. Code, § 65008, subd. (a)(1).)

At the outset, respondent contends that the Unruh Act does not apply in this case because the County is not a "business establishment." (Civ. Code, §§ 51, subd. (b), 51.2, subd. (a).) In *Burnett v. San Francisco Police Department* (1995) 36 Cal.App.4th 1177, 1192, the court held that "[n]othing in the Act precludes *legislative bodies* from enacting ordinances which make age distinctions among adults." As appellant points out,

however, a federal district court in *Gibson v. County of Riverside* (2002) 181 F.Supp.2d 1057, expressly disagreed with *Burnett.* The court in *Gibson* found that California Supreme Court authority did not support such a narrow view of the Unruh Act and concluded, based on state law, that "persons and entities who are not themselves 'business establishments' are subject to the prohibitions imposed by section 51." (*Id.* at p. 1090.) Thus local entities cannot make legislative enactments that result in discrimination in violation of the Unruh Act. (*Id.* at p. 1093.) This interpretation is consistent with Government Code section 65008, which prohibits local entities from making zoning or land use decisions that discriminate on the basis of the same categories set forth in the Unruh Act.[8] In the circumstances here, which involve claims of discrimination in housing, we believe the County's Ordinance is subject to the Unruh Act.

Appellant argues that the County's Ordinance discriminates on the basis of age in that it creates a preference in housing favoring people over the age of 62 by providing less restrictive income eligibility requirements for households including a person of that age. Respondent argues that preferential treatment that is not "arbitrary, invidious or unreasonable" is not unlawful discrimination, particularly "*where strong public policy exists in favor of such treatment.*" (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1043, italics in original.) Respondent relies on cases that have upheld, against challenges under the Unruh Act, programs providing a preferential interest rate for senior citizens (*ibid.*), or offering discount movie tickets to seniors. (*Starkman v. Mann Theatres Corp.* (1991) 227 Cal.App.3d 1491.) In *Starkman,* the court recognized that "many elderly persons have limited incomes." (*Id.* at p. 1498.) Thus discounts or preferences for the elderly "are justified by social policy considerations as evidenced by legislative enactments." (*Id.* at p. 1499.) In *Sargoy,* the court observed that the Unruh Act should not be interpreted to invalidate "every discount or preference

[8] An amendment to Government Code section 65008, effective January 1, 2007, specifically refers to the categories listed in the Unruh Act. (Stats. 2006, ch. 888, § 2.5.)

offered senior citizens." Such an application of the Act, the court wrote, "would have a profound impact on the quality of life enjoyed by senior citizens throughout this State," and "would only serve to pervert the good intentions of the Unruh Civil Rights Act." (*Sargoy, supra,* 8 Cal.App.4th at p. 1049.) Respondent argues that these same considerations apply here.

While respondent's argument is a compelling one, our review of the law leads us to reject it, for several reasons. First, the circumstances of the case before us distinguish it from the cases relied upon by respondent. The case before us involves age discrimination in housing, which is expressly prohibited by the Unruh Act, with one narrowly-tailored exception, as we explain further below. Also, the limitation operates in this case to provide a housing opportunity to a senior household with moderate income while otherwise limiting occupancy to low-income households. We acknowledge that the Legislature has recognized the need for affordable housing for senior citizens. (See Gov. Code, §§ 65852.150, 65852.1.)[9] But we are not convinced that a preference offered to seniors who have higher income than other prospective tenants is rationally based on the special needs of senior citizens recognized in the law.

Furthermore, the Supreme Court has held in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, that laws providing any preferential treatment to one favored group over another are discriminatory. That case involved hiring practices in public contracts that favored certain minorities. The court in *Hi-Voltage* found that preferential treatment is a form of discrimination. " '[D]iscriminate' means 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)' (Webster's New World Dict. (3d college ed. 1988) p. 392); 'preferential' means giving 'preference,' which is 'a giving of priority or advantage to one person ... over others.' (*Id.* at p. 1062.)" (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th at pp. 559-

[9] Government Code section 65852.1, the so-called "Granny Unit" statute, has been repealed effective January 1, 2007. (Stats. 2006, ch. 888, § 6.)

560.) The court concluded that the program discriminated by giving advantage to certain classes of people over others.

The principal reason we reject respondent's argument that the age restriction in the Ordinance is simply a valid preference, rather than unlawful discrimination, is because the Legislature, while generally prohibiting age-based discrimination in housing, has carved out a specific exception "[w]here accommodations are designed to meet the physical and social needs of senior citizens, . . ." (§ 51.2, subd. (a).) In such a case, the business or agency "may establish and preserve that housing for senior citizens, pursuant to section 51.3." (*Ibid.*) Section 51.3 describes in further detail a program to "establish and preserve specially designed accessible housing for senior citizens." (§ 51.3, subd. (a).) In order to qualify as a "senior citizen housing development" the housing must be "developed, substantially rehabilitated, or substantially renovated for, senior citizens." (§ 51.3, subd. (b)(4).) The second unit contemplated by the Ordinance in this case does not qualify as senior citizens housing pursuant to section 51.3, and thus does not come within the exception to the general prohibition against age-based discrimination in housing contained in section 51.2.

We agree with appellant that the statutory scheme reflected in Civil Code sections 51.2 and 51.3 evidences an intent that compliance with these sections be the exclusive means by which housing can be preserved for seniors without violating the Unruh Act. This interpretation is supported by the express intent contained in Civil Code section 51.4, where the Legislature declared that "the requirement for specially designed accommodations in senior housing under Sections 51.2 and 51.3 . . . ensures that housing exempt from the prohibition of age discrimination is carefully tailored to meet the compelling societal interest in providing senior housing." (Civ. Code, § 51.4.) Courts have also adopted an interpretation consistent with this Legislative intent. For instance, in *Park Redland Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, the court found that a homeowners' association could not lawfully restrict occupancy in a development to people 45 years or older. The court wrote that the Unruh Act "prohibits arbitrary discrimination, both benign and improperly intentioned, against minorities or

majorities. Furthermore, to bring age discrimination under the one exception to the Unruh Act as yet sanctioned by California courts, the discrimination must occur (1) to meet the special needs of senior citizens, and (2) it must take place in the context of housing designed especially for the elderly." (*Id.* at p. 94.)

Two federal cases addressing a Riverside ordinance further support appellant's position. Riverside County enacted an ordinance imposing seniors-only zoning on large areas of the county, restricting occupancy of dwelling units within those areas to individuals of 55 years or older. The first case discussing this ordinance focused on Government Code section 65008. (*Gibson by Gibson v. County of Riverside* (9th Cir. 1997) 132 F.3d 1311 (*Gibson by Gibson*).) Government Code section 65008, which is part of the general provisions of California's planning and land use law, contained in title 7 of the Government Code, provides that any planning or zoning action by a local governmental entity "is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of any of the following reasons: . . ." Among the reasons listed are "(1) [t]he race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability or age of the individual or group of individuals." (Gov. Code, § 65008, subds. (a)(1).) In *Gibson by Gibson*, the court found that this statute was "clear on its face" and rendered Riverside's age-based zoning restrictions " 'null and void.' " (*Gibson by Gibson, supra*, 132 F.3d at p. 1313.)[10]

In the second case, *Gibson v. County of Riverside, supra,* 181 F.Supp.2d 1057, the federal district court addressed, among other issues, the claim that the Riverside ordinance violated the Unruh Act. Relying on California Supreme Court authority (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 744; *O'Connor v. Village Green*

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[10] In emergency legislation passed in 1996, the Legislature amended Government Code section 65008 to add subdivision (e), exempting Riverside County's existing zoning ordinances from the general provisions of section 65008, subdivision (a)(1). (Stats. 1996, ch. 295, § 1.) The Ninth Circuit court in *Gibson by Gibson* found that, although the general provisions of section 65008 nullified the Riverside ordinance, this legislative amendment excepting Riverside County was valid.

*Owners Assn.* (1983) 33 Cal.3d 790, 792), the court found, as a matter of law, that the Riverside ordinance violated the basic tenets of the Unruh Act, because it set forth a policy that prohibited persons who were not a certain age "from enjoying the full and equal advantages of buying or renting property" in the zoned areas of the county. (*Gibson v. County of Riverside, supra,* 181 F.Supp.2d. at p. 1093.) This, the court found, violated the Unruh Act's prohibition against age-based discrimination, *unless* the local ordinance qualified for the exemption set forth in sections 51.2 and 51.3 of the Act for senior housing. The court then found that Riverside County's zoning ordinance did not satisfy the requirements of section 51.3 for housing that may be lawfully reserved for senior citizens. The court therefore concluded that the Riverside ordinance was invalid. (*Ibid.*)[11]

Respondent argues that the Riverside ordinance is distinguishable from the County's Ordinance because the County's Ordinance does not arbitrarily exclude *all* people under a certain age, or families with children, from housing opportunities in widespread areas of the county. Unlike the cases discussed above, there is no "complete and absolute" exclusion of any age groups. (See *Sunrise Country Club Assn. v. Proud* (1987) 190 Cal.App.3d 377, 382.) However, although the Ordinance before us does not exclude all persons who are not senior citizens, and its reach is not so widespread as the Riverside ordinance, it nonetheless creates an age-based distinction as to who may enjoy the benefits of the second unit housing. The effect of this condition is to provide the opportunity for housing for moderate-income households with a senior, while all other moderate income households are absolutely excluded. Under *Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal. 4th 537, this distinction in treatment is a preference favoring one group of individuals over another that constitutes arbitrary

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[11] As with Government Code section 65008, the Unruh Act was also amended in 1996 to specifically exempt the County of Riverside from its general provisions. (§§ 51.2, subd. (c); 51.3, subd. (j).) A new section was added to the Unruh Act, setting forth separate requirements for a senior citizen housing development that apply only to Riverside County. (§ 51.11; Stats. 1996, ch. 1147, § 6.)

discrimination. The second unit allowed by the Ordinance does not fall within the statutory exception to the Unruh Act, because it is not specifically designed to meet the needs of senior citizens. (Civ. Code, § 51.2.) We therefore conclude that the age-based occupancy limitation imposed by the Ordinance is unlawful, both under the Unruh Act and under Government Code section 65008.

### III. Are The Income-Based Restrictions Invalid Under Government Code Section 65008?

As we have discussed with respect to the claim of age discrimination, Government Code section 65008 prohibits a local governmental agency from passing any ordinance that denies housing to any individual or group of individuals on the basis of certain classifications. (Gov. Code, § 65008, subd. (a)(1).) It also prohibits the denial of housing to any individual or group of individuals because of "[t]he intended occupancy of any residential development by persons or families of low, moderate, or middle income." (Gov. Code, § 65008, subd. (a)(3).)[12]

Amicus argues that the County's Ordinance discriminates on the basis of income, in violation of Government Code section 65008, subdivision (a)(3), by excluding middle income families while providing housing for families of low and moderate income. Amicus points out that the statute prohibits local entities from passing laws discriminating against "families of low, moderate, *or middle* income." (Gov. Code, § 65008, subd. (a)(3).) We believe that amicus misinterprets the meaning of this provision. The language of the statute prohibits any local enactment that results in the denial of housing because of "the intended occupancy of any residential development by persons or families of low, moderate, or middle income." (Gov. Code, § 65008, subd. (a)(3).) In other words, local entities may not act to *discourage* the development of housing intended for low, moderate, or middle income families. This does not mean that low, moderate, and middle income families must be treated identically in local enactments providing housing for these groups.

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[12] See footnote 1, *ante.*

Appellant's and amicus's contention that the income-based conditions imposed by the Ordinance are discriminatory under Government Code section 65008 runs directly contrary to the statute's stated purpose, which is to encourage the creation and preservation of affordable housing. The statute was intended to combat "discriminatory practices that inhibit the development of housing for persons and families of low, moderate, and middle income, . . . ." (Gov. Code, § 65008, subd. (h).)[13] In a 1984 amendment to the statute, the Legislature found that housing assistance was needed statewide, in part to "facilitate . . . the creation of new housing units affordable to income households," and that such assistance was "in the public interest." (Stats. 1984, ch. 1691, § 1.) Furthermore, the Legislature has recognized that "[t]he provision of housing affordable to extremely low, moderate-income households requires the cooperation of all levels of government." (Gov. Code, § 65580, subd. (c).) Accordingly, local governmental entities are required in the housing element of their general plans to implement programs that will "[a]ssist in the development of adequate housing to meet the needs of low- and moderate-income households." (Gov. Code, § 65583, subd. (c)(2)[14]; see also § 65589.5.) The Santa Cruz Ordinance is such a program. It supports state policy promoting the creation and preservation of affordable housing by providing that the allowance of a second unit on single-family residential property be conditioned on limiting occupancy to households with low or moderate income.

## IV. Appellant's Claim That the Conditions Imposed by the Ordinance Violated His Constitutional Right to Privacy

This claim was articulated for the first time in briefing when the case was retried in 2005 following our remand to the trial court. By that time, appellant had not only challenged the conditions imposed on his permit in an administrative appeal, but he had also petitioned the superior court for a writ of mandate, appealed that decision to this

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[13] See footnote 1, *ante.*

[14] This statute was amended, effective January 1, 2007, to add "extremely low" and "very low" income households. (Stats. 2006, ch. 891, § 2.)

court, petitioned for review in the Supreme Court, and submitted further argument to this court upon remand from the Supreme Court. Throughout this history of the case, appellant never raised the claim that his constitutionally protected privacy issues were violated by virtue of the conditions imposed on his development permit.

Appellant contends that he made the general argument in his administrative appeal and in his writ petition that the permit conditions violated his constitutional rights. He argues that this general pleading preserved other constitutional claims, including his privacy claim. We disagree. The claims at issue in this case were developed in the first writ proceedings in 1999. At that time appellant had the opportunity to raise any number of constitutional claims, consistent with his general pleadings, but the only constitutional claim at issue was his takings claim. Because no privacy claim was at issue, there was no discussion of such a claim in the analysis of the applicable statutes of limitations, either in this court's prior opinion or in the Supreme Court's opinion in this case.

Under these circumstances, we agree with the County that appellant's privacy claim could not be added to this case for the first time on remand, and it is therefore not properly before us now. The Supreme Court's opinion in *Travis v. County of Santa Cruz*, *supra*, 33 Cal.4th 757, divided appellant's claims between those that challenged the Ordinance on its face and those that were "as-applied" challenges. The court decided that appellant could proceed with the trial of his as-applied challenges, and remanded the case to this court for resolution of the one constitutional issue, whether the conditions imposed by the Ordinance constituted a taking of appellant's property. We decided against appellant on this issue and then reversed and remanded the matter back to the trial court so that the court could hear appellant's as-applied challenges on the merits, in accordance with the Supreme Court's opinion. "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 657.) Here, although our remand did not specifically delineate the issues that were properly the subject of the

further proceedings, we believe it was implied that the claims be limited to those that had been previously raised. We therefore do not reach the merits of appellant's privacy claim.

**DISPOSITION**

The trial court's order denying appellant's petition for a writ of mandate is reversed. The case is remanded to the trial court with directions that the trial court grant the writ of mandate with respect only to the condition imposed by the County's Ordinance that limits occupancy of a second unit based on the age of the prospective tenants.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

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MCADAMS, J.