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LOCAL ATTEMPTS TO BAN DISCRIMINATION IN RENTAL HOUSING AGAINST FAMILIES WITH CHILDREN: AVOIDING THE PREEMPTION BARRIER*

At least five cities and one county in California have banned adults-only rental housing by local ordinance. Although California has no legislation at the state level explicitly prohibiting landlords from discriminating against families with children, several of these local ordinances have been challenged on the ground of state preemption. This Comment analyzes the validity of the local ordinances. After examining the sources and limitations of the power of local governments to enact ordinances of this nature and the California statutes which address discrimination in housing, the author concludes the local ordinances are neither preempted by, nor in conflict with, existing state law.

INTRODUCTION

Families¹ with children face widespread discrimination in the California rental housing market.² The percentage of available rental units which do not accept children of any age is as high as 70% in at least one California city.³ This practice of discrimination, coupled with the current low vacancy rate in rental housing,⁴

* The author wishes to thank Professor John Winters and Professor Charles Wiggins for their suggestions and guidance in the preparation of this Comment.

1. The term "family," as used herein, refers to any household consisting of at least one person who has legal custody of one or more minor children living with that person.

2. THE FAIR HOUSING PROJECT OF THE CENTER FOR NEW CORPORATE PRIORITIES, *The Extent and Effects of Discrimination Against Children in Rental Housing* (June, 1979) (preliminary findings of a study of six California cities) [hereinafter cited as FAIR HOUSING PROJECT].

3. Sample surveys of newspaper advertisements for available apartments in Los Angeles, Fresno, San Diego, and San Jose reveal that of the buildings surveyed in these cities, 70%, 50%, 64%, and 67%, respectively, allow no children of *any* age. *Id.* at 1. In San Francisco, however, where a local ordinance prohibits discrimination against persons with minor children in rental housing, only 12% of the apartment buildings surveyed would not allow children of any age. *Id.*

4. In July, 1979, the overall vacancy rate in rental housing in California was below 3%. *Evening Tribune*, July 20, 1979, § F (Building), at 10, col. 1. In some ar-

has caused a housing problem of crisis proportions for families with children.⁵ Several localities have been prompted to pass ordinances prohibiting discrimination in rental housing against families with children to alleviate the problem in their communities.⁶ However, conflicting decisions at the trial court level have created much uncertainty as to whether cities and counties in California can validly pass such ordinances.⁷ San Francisco's ordinance⁸ successfully withstood a challenge that it was preempted by state law.⁹ The ordinance passed by Santa Clara County,¹⁰ however, recently failed to withstand a similar challenge.¹¹ Resolution of

eas of the state the vacancy rate was as low as 1%. *Id.* A 5% vacancy rate is considered healthy by most rental experts. *Id.*

5. See FAIR HOUSING PROJECT, *supra* note 2, at 1-3.

6. See BERKELEY, CAL., MUNI. CODE chs. 13.24.010-.070 (1975); SAN FRANCISCO, CAL., POLICE CODE art. 1.2, §§ 100-108 (1976); DAVIS, CAL., CITY CODE ch. 12A, art. III, §§ 12A-17 to -22 (1979); SANTA MONICA, CAL., MUNI. CODE ch. 7, art. IV, §§ 4700-4705 (1979); LOS ANGELES, CAL., MUNI. CODE ch. IV, art. 5.5, §§ 45.50-.55 (1980); Santa Clara County, Cal., Ordinance NS-628 (Feb. 20, 1979). The Berkeley, San Francisco, Davis, Los Angeles, and Santa Monica ordinances each contain a section which sets forth the findings leading to enactment of the ordinance. Section 13.24.010 of the Berkeley ordinance provides, in relevant part:

A. After public hearings with the reception of testimony and documentary evidence, the city council finds that discrimination against families with minor children in the leasing and renting of housing accommodations exists within the city. The council further finds that the existence of such discrimination poses a substantial threat to the health and welfare of a sizable segment of the community, namely families with minor children.

B. The council finds that a shortage of housing suitable for families with minor children exists within the city. The council further finds that a low vacancy rate exists in all rental housing throughout Berkeley. The addition of discrimination against families with minor children to the above two factors creates an untenable situation for the children of Berkeley.

BERKELEY, CAL., MUNI. CODE ch. 13.24.010 (1975).

7. Telephonic interview with William L. Owen, City Attorney, Davis, California (August 16, 1979). Mr. Owen advised the Davis City Council, prior to its passage of a local ordinance which prohibits discrimination in rental housing on the basis of age, parenthood, pregnancy, or presence of a minor child, that there could be a substantial preemption problem in light of the fact that the Santa Clara County ordinance was determined to be invalid on grounds of state preemption. Nevertheless, the City Council passed the ordinance in September, 1979. See note 6 *supra*.

8. SAN FRANCISCO, CAL., POLICE CODE art. 1.2, §§ 100-108 (1976).

9. *People v. Papa*, No. 714007 (Super. Ct., San Francisco County, April 22, 1977) (demurrer overruled). The term "preemption," as used herein, refers only to preemption of local ordinances by state general law.

10. Santa Clara County, Cal., Ordinance NS-628 (Feb. 20, 1979).

11. *San Jose Country Club Apartments v. County of Santa Clara*, No. 422070 (Super. Ct., Santa Clara County, May 8, 1979) (preempted by California Health and Safety Code §§ 35700-35745 and California Civil Code § 51), *appeal docketed*, No. 1 Civ. 47586 (Ct. App., 1st Dist., Div. 2, May 14, 1979).

The question of whether Berkeley's ordinance is preempted by the Rumford Act is currently being litigated. *Hayes v. Snider*, No. 528538-9 (Super. Ct., Alameda County, filed Dec. 21, 1979). The procedural background of the *Hayes* case is rather interesting. The complaint was initially filed in municipal court where the judge sustained a demurrer to the first cause of action, for declaratory and injunctive relief and for damages for discriminatory publication in violation of the Berke-

the question of whether localities can validly act in this area is particularly important because existing state law, as presently construed, does not prevent a landlord from either refusing to rent to, or evicting, families with children.¹²

Although much has been written about possible constitutional

ley ordinance, on the ground the ordinance was preempted by Health & Safety Code §§ 35700-35745, particularly § 35743. *Hayes v. Snider*, No. 242897 (Mun. Ct., Berkeley-Albany Judicial Dist., Alameda County, May 29, 1979). The case was later transferred to superior court, however, after the municipal court judge ruled that, since the complaint was basically one for injunctive relief, she did not have jurisdiction. Telephonic interviews with James M. Hunt, attorney, Oakland, California (Jan. 4, 1980) and Sharon Mosley, attorney, Oakland, California (Jan. 16, 1980).

12. See *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971) (landlord's policy of refusing to rent to families with male children over the age of five does not violate the Unruh Act); *Dunaway & Blied, Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA L. REV. 21, 48 (1979).

The question of whether a landlord's refusal to rent to families with children violates the Unruh Act, CAL. CIV. CODE § 51 (West Supp. 1979), the Rumford Fair Housing Act, CAL. HEALTH & SAFETY CODE §§ 35700-35745 (West 1973 & Supp. 1979), or denies due process and equal protection is currently before the California Supreme Court. The supreme court granted a hearing in *Marina Point, Ltd. v. Wolfson*, 98 Cal. App. 3d 140, 158 Cal. Rptr. 669 (1979), *hearing granted*, No. L.A.31199 (Cal. Sup. Ct., Dec. 6, 1979) after the court of appeal affirmed a judgment for the plaintiff in an unlawful detainer action on the grounds that plaintiff's refusal to renew defendants' lease, because they had had a child, did not violate the Unruh Act, the Rumford Fair Housing Act, or the defendants' constitutional rights.

If the California Supreme Court should reverse *Marina Point* on the ground that the Rumford Act prohibits landlords from refusing to rent to families with children, which is doubtful, it is clear that local ordinances which prohibit such discrimination would be preempted. See text accompanying note 65 *infra*. However, a decision by the supreme court either affirming *Marina Point* or reversing it on the ground that discrimination in rental housing against families with children is prohibited by the Unruh Act would leave open the question whether cities and counties in California can prohibit this form of discrimination by local ordinance. Although the steps to be followed in analyzing the validity of the local ordinances would be the same as outlined in this Comment in either of these cases, it is possible the conclusions reached would differ if the Unruh Act is held to cover this form of discrimination. See note 87 *infra*. See also text accompanying note 112 *infra*.

Thus far, attempts to address the problem of discrimination in rental housing against families with children on the state level have all been unsuccessful. In 1977, Senate Bill 359, which would have amended the Unruh Civil Rights Act to prohibit discrimination in rental housing against families with children, was introduced by Senators David Roberti and Peter Behr. S.B. 359, Cal. Legis., 1976-77 Reg. Sess. (introduced Feb. 23, 1977). This bill was defeated in the Senate Local Government Committee on May 9, 1977. When the bill was reconsidered in January, 1978, it came within four votes of the number needed for passage in the California State Senate.

On March 9, 1978, Senators Roberti and Sieroty introduced a bill which would have prohibited discrimination in rental housing on the basis of age. S.B. 1688,

and statutory grounds for preventing landlords from refusing to rent to families with children,¹³ the question of whether a city or county in California can validly act to prevent this discriminatory practice has not been addressed. This Comment focuses on that question by identifying and analyzing the legal issues involved in determining the validity, in California, of local ordinances which prohibit discrimination in rental housing against families with children. First, the sources and limitations of a city's or county's power to enact local ordinances of this nature are discussed. Sec-

Cal. Legis., 1977-78 Reg. Sess. (introduced Mar. 9, 1978). Senate Bill 1688 would have added §§ 37200-37208 to the California Health and Safety Code. *Id.*

Shortly after Senate Bill 1688 was introduced in the senate, Assemblyman Roos introduced Assembly Bill 2979 and Assembly Bill 3000 on March 20, 1978. A.B. 2979, Cal. Legis., 1977-78 Reg. Sess. § 54400 (1978); A.B. 3000, Cal. Legis., 1977-78 Reg. Sess. § 6 (1978). Each of these bills contained a provision which would have made it unlawful "to terminate the rental of housing accommodations based upon the age of the tenant or the presence of children in his or her household, unless the facilities are unsafe for such tenant or children." *Id.* However, both bills died in committee.

The most recent attempt to ban adults-only rentals at the state level was Senate Bill 440. This bill, which would have amended the Unruh Civil Rights Act by adding §§ 51.8, 51.9 and 52.5 to the Civil Code, was introduced by Senators Roberti, Greene and Sieroty. S.B. 440, Cal. Legis., 1978-79 Reg. Sess. (introduced Feb. 22, 1979). This bill would have made it unlawful to discriminate in rental housing based on the tenancy or potential tenancy of a person with a minor child, but would not have affected housing accommodations designed and operated exclusively for senior citizens or retirees, mobile home parks, or dormitories designed exclusively for the use of single or unmarried students which were operated by public or private colleges or universities, *id.* § 2, and would have allowed a landlord to establish, as an affirmative defense, that the housing accommodation was not safe for the minor child. *Id.* § 3. However, Senate Bill 440, like its predecessors, failed to gain the votes necessary for passage in the senate.

If Senate Bill 440 had passed, California would have become the eighth state to enact a statute specifically addressed to prohibiting discrimination in rental housing against families with children. See ARIZ. REV. STAT. ANN. §§ 33-1317 (West Supp. 1978); DEL. CODE ANN. tit. 25, § 6503 (1975); ILL. ANN. STAT. ch. 80, §§ 37-38 (Smith-Hurd 1966 & Supp. 1979); MASS. GEN. LAWS ANN. ch. 151B, § 4.11 (West Supp. 1979); MICH. COMP. LAWS ANN. § 37.2502(1) (West Supp. 1979); N.J. STAT. ANN. §§ 2A: 170-192 (West 1971); N.Y. REAL PROP. LAW §§ 236-237 (McKinney 1968). For an analysis of the effectiveness of the Illinois statute and a comparison of the provisions of six of the state statutes, see O'Brien & Fitzgerald, *Apartment for Rent—Children Not Allowed: The Illinois Children In Housing Statute—Its Viability and A Proposal For Its Comprehensive Amendment*, 25 DE PAUL L. REV. 64 (1975).

13. See Dunaway & Blied, *Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA L. REV. 21 (1979); O'Brien & Fitzgerald, *Apartment for Rent—Children Not Allowed: The Illinois Children In Housing Statute—Its Viability and a Proposal For Its Comprehensive Amendment*, 25 DE PAUL L. REV. 64 (1975); Travaglio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L. J. 295 (1979); Note, *Housing Discrimination Against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559 (1977-1978); Comment, *Landlord Discrimination Against Children: Possible Solutions to a Housing Crisis*, 11 LOY. L.A. L. REV. 609 (1977-1978).

ond, the Rumford Fair Housing Act¹⁴ and the Unruh Civil Rights Act¹⁵ are examined to determine whether local ordinances which prohibit discrimination in rental housing against families with children are invalid because they either conflict with, or are expressly preempted by, either of these state laws. Finally, state legislation in the field of discrimination in housing is viewed as a whole to determine whether the legislature has preempted the field by implication.

CONSTRAINTS ON LOCAL POWER TO BAN ADULTS-ONLY HOUSING

In general, cities in California are organized under either general law or charter.¹⁶ The California Constitution grants every city in California, whether general law or charter, the police power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*."¹⁷ In addition, the constitution provides for municipal home rule¹⁸ by granting cities the power to adopt charters which permit them to "make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."¹⁹ The pri-

14. CAL. HEALTH & SAFETY CODE §§ 35700-35745 (West 1973 & Supp. 1979).

15. CAL. CIV. CODE § 51 (West Supp. 1979).

16. By a majority vote of its electors, a city may adopt a charter and thus become a charter city. CAL. CONST. art. XI, § 3. The California Constitution also grants charter cities home rule power. CAL. CONST. art. XI, § 5(a). Cities that do not adopt charters are governed by the general law of the state. CAL. GOV'T CODE § 34102 (West 1968).

17. CAL. CONST. art. XI, § 7 (emphasis added).

18. The term "home rule" describes not only the state or condition of local autonomy, but also one specific method for distributing power between local and state governments. Sandalow, *The Limits of Municipal Power Under Home Rule: A Rule for the Courts*, 48 MINN. L. REV. 643, 644-45 (1963-64).

19. CAL. CONST. art. XI, § 5(a). The California Constitution also permits a county and all cities within it to consolidate as a charter city and county. CAL. CONST. art. XI, § 6(a). Accordingly, a charter city and county has the same powers as a charter city, under article XI, § 5, with respect to municipal affairs. The term "city" when used herein to refer to a charter city is therefore also meant to include a charter city and county as defined by article XI, § 6.

The city charter and the federal and California constitutions are the only restrictions on a charter city's power to deal with municipal affairs. A. VAN ALSTYNE, CALIFORNIA CONSTITUTION REVISION COMMISSION BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT 236 (undated) (prepared for the California Constitution Revision Commission). For an extensive discussion of the protective function of municipal affairs, see Sato, "*Municipal Affairs*" in California, 60 CALIF. L. REV. 1055 (1972).

mary distinction between general law and charter cities is this additional grant of power to charter cities over "municipal affairs."²⁰ Because charter city ordinances which regulate "municipal affairs" prevail over conflicting state laws,²¹ a charter city ordinance which prohibits discrimination in rental housing against families with children will be valid if the subject of the regulation is a municipal affair. Alternatively, if ensuring the availability of rental housing to families with children is not a purely municipal affair, a charter city ordinance of this nature would be invalid, as would an ordinance enacted by a general law city, if "in conflict with general laws." Accordingly, the scope of the terms "municipal affairs" and "in conflict with general laws" must be examined.

Municipal Affairs

The initial problem in determining whether an ordinance which prohibits landlords from discriminating against families with children regulates a municipal affair is that the term "municipal affairs" cannot be precisely defined.²² The term generally refers to matters of internal or local concern. However, the constitutional concept of municipal affairs is flexible.²³ Matters that at one time were of strictly local concern may later be controlled by general state law if they become matters of state interest.²⁴

When a question arises as to whether a charter city ordinance prevails over general law, the court must decide whether the subject matter of the ordinance is a municipal affair or one of statewide concern.²⁵ The legislative purpose in enacting a general law which evidences an intent to preempt the field will be given great weight by the court.²⁶ However, the mere fact "that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs."²⁷

Local governments have a particular interest in ensuring that

20. See CAL. CONST. art. XI, § 5(a).

21. CAL. CONST. art. XI, § 5(a). See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 292 n.11, 384 P.2d 158, 168 n.11, 32 Cal. Rptr. 830, 840 n.11 (1963). But cf. Sato, "Municipal Affairs" in California, 60 CALIF. L. REV. 1055, 1094-97 (1972) (suggesting that it is not clear from the legislative history of the municipal affairs amendment to the constitution whether charter city *police power measures* that deal with municipal affairs are immunized from legislative interference).

22. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969).

23. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

their residents are adequately housed.²⁸ Nevertheless, in the event of a conflict between state law and a charter city ordinance, it is doubtful a court would view the problem of discrimination in rental housing against families with children as one of purely municipal concern.²⁹ Several factors lead to this conclusion. First, in the Housing Financial Discrimination Act of 1977,³⁰ the legislature declared that the subject of housing is "of vital statewide importance to the health, safety, and welfare of the residents of the state."³¹ While this declaration is not controlling as to whether housing is a matter of statewide concern,³² it is persuasive evidence that the subject of housing, in general, is not of merely local concern. Second, the lack of adequate housing in cities where discrimination in rental housing against families with children is extensive may restrict the freedom of families with children to move from one city within California to another. The fact that the effects of this discriminatory practice may extend beyond municipal boundaries further indicates that the matter is not a *purely* municipal affair.³³ Because questionable cases are resolved in favor of the legislative power of the state,³⁴ charter cities probably

28. Both the San Francisco and Berkeley ordinances which prohibit discrimination against families with children are based on findings that:

The overall effect of such discrimination is to encourage the flight of families from the city and to further diminish family-oriented neighborhoods. It has an overall detrimental effect on the composition of the city, the stability of neighborhoods, the preservation of family life within the city, the living conditions of our children, the quality of our schools, and the viability of our children's activities and organizations.

SAN FRANCISCO, CAL., POLICE CODE art. 1.2, § 100 (1976); BERKELEY, CAL., MUNI. CODE ch. 13.24.010(c)-.010(d) (1975) (relevant language identical). *See* DAVIS, CAL., CITY CODE ch. 12A, art. III, § 12A-17 (1979); SANTA MONICA, CAL., MUNI. CODE ch. 7, art. IV, § 4700(c) (1979).

29. *Cf.* Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 141, 550 P.2d 1001, 1010, 130 Cal. Rptr. 465, 474 (1976) (rent control is not a municipal affair, even when the purpose is to prevent exploitation of a housing shortage through excessive rent charges); *Ex parte* Daniels, 183 Cal. 636, 639, 192 P. 442, 444 (1920) (regulation of traffic on a public street may be of special interest to the people of a municipality, but it doesn't follow that it is a municipal affair); 40 OP. CAL. ATT'Y GEN. 114, 115 (1962) (provision of equal housing opportunities is a matter of *statewide* concern).

30. CAL. HEALTH & SAFETY CODE §§ 35800-35883 (West Supp. 1979).

31. *Id.* § 35801.

32. *See* Bishop v. City of San Jose, 1 Cal. 3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969).

33. *See, e.g.,* City of Los Angeles v. Dept. of Health, 63 Cal. App. 3d 473, 479-80, 133 Cal. Rptr. 771, 774 (1976) (not a municipal affair because subject matter "transcends municipal boundaries").

34. Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960). *But see* Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 132-33, 155 Cal. Rptr. 435, 441 (1979).

cannot avoid conflict or preemption challenges under the shield of municipal home rule.

“Conflict” Between Police Power Ordinances and General Law

Municipal home rule only exempts those charter city ordinances that relate to municipal affairs from the “conflict with general laws” restriction of article XI, section 7 of the California Constitution.³⁵ However, “local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature.”³⁶ Thus, charter cities may enact ordinances within their municipal boundaries, under their police power, on matters of statewide concern as long as the ordinances are not “in conflict with general laws.”³⁷ All ordinances enacted by general law cities and counties are also subject to the restriction that they may not “conflict with general laws.”³⁸ The limitations imposed on the exercise of a city’s or county’s police power by this restriction are therefore important in determining the validity of local ordinances that prohibit landlords from discriminating against families with children.

The scope of the police power authorized by article XI, section 7 of the California Constitution is as broad as the police power of the state legislature.³⁹ However, cities and counties cannot act beyond their municipal boundaries under this grant of police power, although they may legislate on matters that are not local in nature.⁴⁰ In addition, local police power ordinances must yield if they conflict with general laws.⁴¹

The courts have held that a local ordinance will be invalidated because it is “in conflict with general laws” if: (1) the local regulation directly conflicts with general laws, either by permitting that which is prohibited by state law, or forbidding that which is

35. See *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969) (dictum). For the relevant text of article XI, § 7 see text accompanying note 17 *supra*.

36. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969) (dictum).

37. See CAL. CONST. art. XI, § 7.

38. *Id.* See text accompanying notes 16-20 *supra*.

39. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140, 550 P.2d 1001, 1009, 130 Cal. Rptr. 465, 473 (1976).

40. *Id.*

41. The scope of the term “general laws” is not clear. It is usually interpreted to mean state laws. See, e.g., THE GOVERNOR’S COMMISSION ON THE LAW OF PRE-EMPTION, REPORT AND RECOMMENDATIONS 3 (1967). It is not clear whether the term includes decisional law. See note 106 and accompanying text *infra*.

permitted by state law;⁴² (2) the local regulation duplicates state law;⁴³ (3) the state legislation expresses the intent to occupy the entire field of regulation, to the exclusion of local regulation;⁴⁴ or, (4) the legislature has adopted a general scheme for regulation of the subject and has therefore impliedly preempted local regulations although it has not expressly occupied the entire field.⁴⁵ Accordingly, a local ordinance prohibiting discrimination in rental housing against families with children will be invalid only if it directly conflicts with or duplicates existing state law, or if it attempts to impose additional requirements in a field that is fully occupied, either expressly or impliedly, by general law.⁴⁶ If no direct conflict or duplication exists and the field of regulation has not been fully occupied by the state, the general rule is that

where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such *new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality* and which are not in themselves unreasonable.⁴⁷

POSSIBLE BASES FOR INVALIDATION OF LOCAL ORDINANCES

Two California statutes which address discrimination in housing, the Rumford Fair Housing Act⁴⁸ and the Unruh Civil Rights Act,⁴⁹ served as the bases for a successful preemption challenge of a local ordinance which banned discrimination in rental housing against families with children.⁵⁰ To withstand a similar challenge, a city or county must demonstrate that local regulation in this area is not "in conflict" with these statutes, but, rather, is

42. *Ex Parte Daniels*, 183 Cal. 636, 645-46, 192 P. 442, 446-47 (1920) (also express declaration of legislature's intent to preempt).

43. *See Pipoly v. Benson*, 20 Cal. 2d 366, 370-71, 125 P.2d 482, 484-85 (1942).

44. *Ex Parte Daniels*, 183 Cal. 636, 643, 192 P. 442, 445 (1920) (local ordinance was also in direct conflict with general law).

45. *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

46. *See Lancaster v. Municipal Court*, 6 Cal. 3d 805, 807-08, 494 P.2d 681, 682, 100 Cal. Rptr. 609, 610 (1972).

47. *Mann v. Scott*, 180 Cal. 550, 556, 182 P. 281, 283-84 (1919) (emphasis added).

48. CAL. HEALTH & SAFETY CODE §§ 35700-35745 (West 1973 & Supp. 1979).

49. CAL. CIV. CODE § 51 (West Supp. 1979).

50. *See San Jose Country Club Apartments v. County of Santa Clara*, No. 422070 (Super. Ct., Santa Clara County, May 8, 1979) (preliminary injunction against enforcement of Santa Clara County ordinance issued; legislature occupied the field of discrimination in housing by Health & Safety Code §§ 35700-35745 and Civil Code § 51), *appeal docketed*, No. 1 Civ. 47586 (Ct. App., 1st Dist., Div. 2, May 14, 1979). Whether the Rumford Act has preempted the Berkeley ordinance is a question that is currently being litigated. *See note 11 supra*.

only in aid and furtherance of their purpose. Each of these statutes will be examined, in turn, to determine the scope of its coverage and the possible grounds it may provide for invalidating local ordinances that prohibit landlords from discriminating against children. The merits of each possible challenge will also be discussed. The Rumford Act and the Unruh Act will then be analyzed in conjunction with other state legislation to determine whether the legislature has impliedly preempted the field of discrimination in housing.

The Rumford Fair Housing Act

The Rumford Fair Housing Act⁵¹ specifically prohibits discrimination⁵² in both public and private housing accommodations⁵³ on the basis of race, color, religion, sex, marital status, national origin, or ancestry.⁵⁴ The Act is to be liberally construed to carry out

51. CAL. HEALTH & SAFETY CODE §§ 35700-35745 (West 1973 & Supp. 1979). The Hawkins Act, which was the precursor of the Rumford Act, applied only to publicly assisted housing accommodations and was added by 1959 Cal. Stats., ch. 1681, § 1, at 4074. The Act added Part 5 to Division 24 of the Health & Safety Code. Part 5, as enacted, was entitled "Discrimination in Publicly Assisted Housing." In 1963, the Hawkins Act was repealed and the Rumford Fair Housing Act was added by 1963 Cal. Stats., ch. 1853, § 2, at 3823. The new Part 5 of Division 24 of the Health & Safety Code was entitled "Discrimination in Housing." The Rumford Act initially covered, in addition to publicly assisted housing accommodations: (1) dwellings containing five or more units; (2) persons subject to the provisions of the Unruh Civil Rights Act as it applies to housing accommodations; and (3) financial institutions which receive applications for financial assistance to purchase, organize, or construct housing accommodations. In 1977, the Rumford Act was amended to include all public and private housing accommodations within its coverage. CAL. HEALTH & SAFETY CODE § 35720 (West Supp. 1979). The heading of the Act was amended, by 1977 Cal. Stats., ch. 1187, § 1, at 1187, to read "Fair Housing Law."

52. CAL. HEALTH & SAFETY CODE § 35710(d) (West Supp. 1979).

The term "discrimination" includes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provision of inferior terms, conditions, privileges, facilities, or services in connection with such housing accommodations; includes the cancellation or termination of a sale or rental agreement; and includes the provisions of segregated or separated housing accommodations. The term "discrimination" does not include refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household.

Id.

53. *Id.* § 35710(f). As used in the Rumford Act, however, the term "housing accommodation" does not include any accommodations operated by non-profit religious, fraternal, or charitable associations or corporations where the accommodations are being used in furtherance of the primary purpose or purposes for which the association or corporation was formed. *Id.*

54. *Id.* § 35720.

the public policy against housing discrimination that is embodied in its provisions.⁵⁵ However, section 35742 of the Act provides that “[n]othing contained in this part shall be construed to prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry.”⁵⁶

Because age is not among the specifically enumerated types of discrimination that the Rumford Act prohibits, local ordinances cannot be “in conflict” with the Act by duplication unless one of the specifically enumerated categories is broadly construed to encompass age discrimination. One commentator has argued that the liberal construction provision might allow courts to construe the category of “marital status” so as to extend the prohibitions of the Act to discrimination against children.⁵⁷ The legislative history of the Rumford Act indicates, however, that this construction is contrary to legislative intent. Shortly before the Rumford Act was amended⁵⁸ to add sex and marital status as prohibited bases of discrimination, Legislative Counsel was asked to render an opinion as to whether it would be a violation of the amended Act for a landlord to restrict occupancy to adults.⁵⁹ In a published opinion, Legislative Counsel opined that a landlord who restricted occupancy based on “whether an occupant is an adult or a minor, without regard to an occupant’s sex or marital status” would not violate the Rumford Act, as long as the policy was consistent.⁶⁰

In a given case and as a factual matter, a restriction on the basis of the number of occupants permitted, or on the basis of whether an occupant is an adult or a minor, could indirectly operate to deny occupancy to persons of a certain marital status, by reason of the relationship between numbers and ages of persons and their marital status. For example, restricting occupancy to one person would operate to deny occupancy to a married couple living together, and restricting occupancy to adults would operate to deny occupancy to a married couple with children who are minors. Nevertheless, we think that the provisions of the bill are limited to prohibiting the selection for occupancy directly on the basis of sex or marital status, and would not be construed to prohibit the selection for occupancy on some other basis which might, in a given case, correlate with a certain sex or marital status.⁶¹

55. *Id.* § 35744 (West 1973).

56. *Id.* § 35742 (West Supp. 1979).

57. Comment, *Landlord Discrimination Against Children: Possible Solution to A Housing Crisis*, 11 *LOY. L.A.L. REV.* 609, 624-28 (1977-1978).

58. The Act was amended in 1975 to add the terms “sex” and “marital status.” *Law of Sept. 30, 1975, ch. 1189, § 1, 1975 Cal. Stats. 2942.*

59. 75 *ASSEMBLY J.* 5856, 5856, *Op. Legis. Counsel No. 12964* (May 29, 1975).

60. *Id.*

61. *Id.* at 5858.

Duplication of the provisions of the Rumford Act does not appear to be a possible basis for challenging the validity of local ordinances which prohibit landlords from discriminating against families with children since the Rumford Act does not address that form of discrimination.⁶² The Act does, however, contain a section in which the legislature expressly provided that it intended to preempt local regulations.⁶³ This express declaration of an intent to preempt the field was successfully used to challenge the Santa Clara County ordinance.⁶⁴

Section 35743 of the Rumford Act provides:

As it is the intention of the Legislature to occupy the whole field of regulation *encompassed by the provisions of this part*, the regulation by law of discrimination in housing *contained in this part* shall be exclusive of all other laws banning discrimination in housing by any city, city and county, county, or other political subdivision of the State. Nothing contained in this part shall be construed to, in any manner or way, limit or restrict the application of Section 51 of the Civil Code.⁶⁵

The focus of the potential preemption problem posed by this express declaration of an intent to preclude local regulation is, necessarily, on the scope of the "field" the legislature intended to occupy.⁶⁶ The court that invalidated the Santa Clara County ordinance broadly interpreted the term "field", as used in section 35743, to mean the field of "discrimination in housing."⁶⁷ Defining the field in such broad terms, however, ignores the legislature's express intent to occupy the field of regulation "encompassed by

62. The California Supreme Court is currently considering the question of whether the Rumford Act prohibits discrimination in rental housing against families with children. *Marina Point, Ltd. v. Wolfson*, 98 Cal. App. 3d 140, 158 Cal. Rptr. 669 (1979), *hearing granted*, No. L.A.31199 (Cal. Sup. Ct., Dec. 6, 1979). See note 12 *supra*. In light of the legislative history of the Act and the language of Health & Safety Code § 35742, it is unlikely the supreme court will construe the Rumford Act to prohibit discrimination against families with children. See text accompanying notes 56-61 *supra*.

63. CAL. HEALTH & SAFETY CODE § 35743 (West 1973).

64. See note 11 and accompanying text *supra*.

65. CAL. HEALTH & SAFETY CODE § 35743 (West 1973) (emphasis added). Section 51 of the Civil Code, as referred to in § 35743, is the Unruh Civil Rights Act. See text accompanying note 82 *infra*.

66. A court's decision to define the relevant "field" narrowly, rather than broadly, will often prevent a local ordinance from being "in conflict with general laws." Courts have frequently adopted a narrow construction of the field the legislature has occupied where the question was whether the field had been occupied by implication. See, e.g., *Yuen v. Municipal Court*, 52 Cal. App. 3d 351, 125 Cal. Rptr. 87 (1975); *Gleason v. Municipal Court*, 226 Cal. App. 2d 584, 38 Cal. Rptr. 226 (1964). When the legislature has attempted to expressly occupy a field but there is a question as to the scope of the field occupied, the courts would have the same flexibility in defining the relevant "field."

67. See *San Jose Country Club Apartments v. County of Santa Clara*, No. 422070 (Super. Ct., Santa Clara County, May 8, 1979) (the field of discrimination in housing has been occupied by the legislature), *appeal docketed*, No. 1 Civ. 47586 (Ct. App., 1st Dist., Div. 2, May 14, 1979).

the provisions of *this part*.”⁶⁸ “[T]his part” refers to Part 5 as added to Division 24 of the Health and Safety Code.⁶⁹ Part 5 only prohibits discrimination in housing on the bases specifically enumerated in section 35720.⁷⁰ Therefore, the field the legislature intended to occupy would appear to be properly characterized as discrimination in housing on the basis of race, color, religion, sex, marital status, national origin, or ancestry.⁷¹ However, although the legislature used language of limitation in defining the field it intended to occupy, it appears to have attempted to preempt all local regulation in the broader field of “discrimination in housing” by providing that the regulations in Part 5 “shall be exclusive of all other laws banning *discrimination in housing*.”⁷²

Whether the legislature preempted the broader field of discrimination in housing or the narrower field of discrimination on the bases specifically enumerated in section 35720 of the Act is a question of statutory construction. The fundamental rule of statutory construction is that the intent of the legislature must be ascertained to effectuate the purpose of the statute.⁷³ In addition, in interpreting particular words, phrases, or clauses in a statute, “the entire substance of the statute or that portion relating to the subject under review should be examined in order to determine the scope and purpose of the provision containing such words, phrases or clauses.”⁷⁴

The legislature has declared that the purpose of the Rumford Act is to provide effective remedies to eliminate discrimination in housing on any of the specifically enumerated prohibited bases.⁷⁵

68. CAL. HEALTH & SAFETY CODE § 35743 (West 1973) (emphasis added).

69. Part 5 was added by 1963 Cal. Stats., ch. 1853, § 2, at 3823. The heading of Part 5 was amended to read “Fair Housing Law” by 1977 Cal. Stats., ch. 1187, § 1, at 3885.

70. CAL. HEALTH & SAFETY CODE § 35720 (West Supp. 1979). See text accompanying notes 53-56 *supra*.

71. See 60 OP. CAL. ATT’Y GEN. 44 (1977) (opining that Health & Safety Code § 35743 has preempted the “field of discrimination in housing on the basis of race, color, religion, sex, marital status, national origin or ancestry”); 44 OP. CAL. ATT’Y GEN. 65, 66 (1964) (assumed that the proposed affidavits of nondiscrimination would be limited to prohibiting only the same conduct as prohibited by Health & Safety Code §§ 37500-37545). But see 42 OP. CAL. ATT’Y GEN. 114 (1963) (Rumford Act preempts field of discrimination in housing).

72. CAL. HEALTH & SAFETY CODE § 35743 (West 1973) (emphasis added).

73. *Select Base Materials v. Board of Equalization*, 51 Cal. 2d 640, 645, 335 P.2d 672, 675 (1959).

74. *West Pico Furniture Co. v. Pacific Finance Loans*, 2 Cal. 3d 594, 608, 469 P.2d 665, 675, 86 Cal. Rptr. 793, 803 (1970).

75. CAL. HEALTH & SAFETY CODE § 35700 (West Supp. 1979).

The scope of the Act is limited accordingly.⁷⁶ Administrative remedies are provided by the Rumford Act for persons discriminated against on the basis of race, color, religion, sex, marital status, national origin, or ancestry.⁷⁷ The legislature's intent to preclude local regulation of discrimination in housing on any of these bases is understandable because aggrieved persons are afforded an adequate remedy under the statute. It is not as easy, however, to discern any purpose that would be served by precluding cities and counties from dealing with housing problems that stem from a discriminatory practice not included within the scope of the Rumford Act.⁷⁸

A construction of section 35743 which would limit both the field occupied and the field of local regulation that is preempted to that of discrimination in housing on the basis of race, color, religion, sex, marital status, national origin, or ancestry is in accordance with the legislature's use of language of limitation. It also coincides with both the purpose and scope of the Rumford Act. Furthermore, this construction would reject the notion, which is implicit in the argument that the legislature intended to preempt local legislation in the entire field of discrimination in housing, that the legislature has impliedly sanctioned discrimination in housing on any basis not prohibited by the Rumford Act.⁷⁹

76. *Id.* § 35720.

77. *Id.* §§ 35730-35739. The State Fair Employment Practice Commission and the Division of Fair Employment Practices in the Department of Industrial Relations are empowered to prevent and eliminate violations of the Rumford Act. CAL. HEALTH & SAFETY CODE § 35731 (West Supp. 1979). If, after a hearing, the Commission finds that a person has engaged in a practice made unlawful by the provisions of the Rumford Act, the Commission issues a cease and desist order. *Id.* § 35738. In addition, the Commission has the power to order the violator to take such other actions as will effectuate the purpose of the Act, including renting the housing accommodation to the aggrieved person if it is available. *Id.* § 35738(1). A civil suit may be brought under the Rumford Act only in those instances where the division either determines that no accusation will issue or fails to issue an accusation within 150 days after filing of the complaint. *Id.* § 35731(d).

78. For a discussion of the possibility that the legislature has enacted a general scheme for the regulation of discrimination in housing and has therefore preempted the entire field by implication, see text accompanying notes 122-34 *infra*.

79. This notion, that the legislature impliedly sanctions conduct which it has not prohibited, was rejected by the California Supreme Court in *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). Although there was no express declaration of legislative intent to preempt the field of gambling, the defendant in *Hubbard* argued that by expressly prohibiting certain types of gambling the legislature had impliedly preempted the field and local ordinances which prohibited betting on other types of games of chance were therefore invalid. The court, however, stated:

Since the general laws do not make illegal all forms of gambling, or even all forms of gaming, they cannot be said to occupy either field to the exclusion of the exercise of local police power, unless we adopt the negative type of argument inherent in defendant's contention, that is, that by making specific acts illegal the Legislature intended all other acts of similar

Clearly, a city or county which has enacted an ordinance prohibiting discrimination in rental housing against families with children must be prepared, when faced with a challenge of express preemption, to convince the court that it should adopt this construction of section 35743. A city or county which prevails on this issue, however, must be further prepared to rebut challenges to the validity of the local ordinance that may arise from either the Unruh Civil Rights Act or from all legislation in the field of discrimination in housing when viewed as a whole.

The Unruh Civil Rights Act

California, like most states,⁸⁰ has a civil rights act designed to prohibit certain acts of private discrimination. California's Unruh Civil Rights Act⁸¹ provides, in relevant part: "All persons within the jurisdiction of this state are free and equal and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."⁸²

The Unruh Act has been applied to discrimination in housing because the term "business establishments" has been broadly construed to include landlords engaged in the rental of real property.⁸³ The Unruh Act "includes within its scope owners of triplexes, owners of duplexes, owners of non-owner occupied sin-

character to be of such innocent character that no local authority might adopt a contrary view. To adopt such a view (for which no authority has been presented) would be to fly in the face of the well-settled doctrine that the use of specific words and phrases connotes an intent to exclude that which is not specifically stated. By limiting the general statutes to regulation or prohibition of specifically enumerated activities, the Legislature did not intend to prevent local authority from legislating on those subjects in regard to which the former are silent.

Id. at 126-27, 396 P.2d at 814, 41 Cal. Rptr. at 398.

Contra, In re Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (legislature has determined by implication that certain sexual activity shall not be criminal).

80. For a discussion of several of the various state civil rights statutes, see Note, *Housing Discrimination Against Children: the Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559, 572-75 (1977-1978).

81. CAL. CIV. CODE § 51 (West Supp. 1979).

82. *Id.*

83. *Newby v. Alto Riviera Apts.*, 60 Cal. App. 3d 288, 300, 131 Cal. Rptr. 547, 555 (1976) (landlord operates a business establishment when he rents residential units); *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 703, 98 Cal. Rptr. 644, 645 (1971) (apartment complexes are business enterprises within the meaning of the Unruh Act).

gle family dwellings, and any other owners of housing accommodations, as defined in the Rumford Fair Housing Act whose accommodations are offered for sale, rent, or lease for income or gain.”⁸⁴ Unlike the Rumford Act, which only prohibits discrimination on the bases specifically enumerated in the Act,⁸⁵ the Unruh Act’s “identification of particular bases of discrimination . . . is illustrative rather than restrictive.”⁸⁶ Thus, of the two Acts, the Unruh Act presents a stronger basis for challenging the validity of local ordinances because of the expansiveness of its scope.⁸⁷

The California Supreme Court, in *In Re Cox*,⁸⁸ stated that the history and language of the Unruh Act disclosed “a clear and large design to interdict *all arbitrary discrimination* by a business enterprise.”⁸⁹ The petitioner in *Cox* had been ordered to

84. 56 OP. CAL. ATT’Y GEN. 546 (1973). *But see* Hill v. Miller, 64 Cal. 2d 757, 759, 415 P.2d 33, 34, 51 Cal. Rptr. 689, 690 (1966) (no cause of action under Unruh Act for eviction from residential property owned by defendant on account of race); Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309, 317 (1962) (“[N]ot all persons who rent their property to others can be held to operate business establishments.”).

85. See text accompanying notes 51-54 *supra*.

86. *In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970).

87. Although persuasive arguments have been made for extending the protection of the Unruh Act to prohibiting discrimination in rental housing against children, see Comment, *supra* note 13, at 613-23, the only court to directly address this question determined that it was not a violation of the Act for a landlord to refuse to rent to families with boys over the age of five. See notes 94-96 and accompanying text *infra*. The analysis in this Comment of the effect of the Unruh Act on the validity of local ordinances which prohibit discrimination in rental housing against families with children is based on the present interpretation of the Act. It should be noted, however, that the question of whether it is a violation of the Unruh Act for a landlord to refuse to rent to families with children is currently before the California Supreme Court. *Marina Point, Ltd. v. Wolfson*, 98 Cal. App. 3d 140, 158 Cal. Rptr. 669 (1979), *hearing granted*, No. L.A.31199 (Cal. Sup. Ct., Dec. 6, 1979); see note 12 *supra* and note 99 *infra*. If the supreme court should reverse the decision in *Marina Point* on the ground that the protection of the Unruh Act does extend to prohibiting discrimination in rental housing against families with children, the steps to be followed in analyzing the validity of local ordinances which prohibit such discrimination would be the same as outlined in this Comment, see text accompanying notes 104-23 *infra*, although it is possible the result of the analysis would differ. See, e.g., text accompanying note 112 *infra*.

88. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

89. *Id.* at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27 (emphasis added). In reaching the conclusion that the Unruh Act should be given an expansive reading, the California Supreme Court cited two cases in which the precursor of the Unruh Act had been judicially construed, *Orloff v. Los Angeles Turf Club, Inc.*, 36 Cal. 2d 734, 227 P.2d 449 (1951) and *Stoumen v. Reilly*, 37 Cal. 2d 713, 234 P.2d 969 (1951). Prior to 1959, California Civil Code § 51 read:

All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodations or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

leave a shopping center evidently⁹⁰ because he was associating with a person with long hair who was dressed in an unconventional fashion.⁹¹ The petitioner was arrested when he refused to leave and was charged with violating an ordinance which prohibited persons from remaining on business premises after being notified to leave.⁹² Petitioner asserted that the shopping center could not arbitrarily exclude him from the premises. Although the *Cox* court interpreted the Unruh Act as prohibiting all arbitrary discrimination by business establishments, the court explained that the broad proscription of the Act is not absolute:

In holding that the Civil Rights Act forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer, we do not imply that the establishment may never insist that a patron leave the premises. Clearly, an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business. A business establishment may, of course, promulgate *reasonable department regulations* that are rationally related to the services per-

CAL. CIV. CODE § 51 (West 1954) (amended 1959, 1961, 1974).

The precursor of the Unruh Act was interpreted in *Orloff* as prohibiting the exclusion of a patron from a race track merely because he had acquired a reputation as a man of immoral character. 36 Cal. 2d at 741, 227 P.2d at 454. In *Stoumen*, the court held that the plaintiff's liquor license could not be suspended simply because homosexuals patronized his bar and restaurant. The court stated that "[m]embers of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause.' . . ." 37 Cal. 2d at 716, 234 P.2d at 970.

The *Cox* court stated that the decisions in *Orloff* and *Stoumen* had "established that the Civil Rights Act prohibited all arbitrary discrimination in public accommodations." 3 Cal. 3d at 214, 474 P.2d at 997, 90 Cal. Rptr. at 29. Since the legislature was presumed to be aware of the decisions in *Orloff* and *Stoumen* at the time it amended the Act in 1959 and the legislative history did not indicate that the legislature intended to disregard the rule of public policy stated in those decisions, the court determined that the legislature did not intend to limit the scope of the Unruh Act to prohibit discrimination only on the enumerated bases. 3 Cal. 3d at 216, 474 P.2d at 998, 90 Cal. Rptr. at 31. *But see* Dunaway & Blied, *supra* note 13, at 26-30 (questioning the court's reliance on *Orloff* and *Stoumen* for the proposition that the Unruh Act prohibits all arbitrary discrimination by business establishments). *Cf. id.* at 30 (suggesting that the legislature rejected the holding in *Cox* that the Unruh Act prohibits all "arbitrary" discrimination by adding "sex" to the prohibited bases of discrimination when it amended the Act in 1974).

90. The petitioner, in *Cox*, was before the court on a pre-trial writ of habeas corpus. Therefore, no findings of fact had yet been made as to whether the petitioner had been excluded on an arbitrary basis or a reasonable one.

91. 3 Cal. 3d at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.

92. *Id.* at 210 n.2, 474 P.2d at 994 n.2, 90 Cal. Rptr. at 26 n.2. It was necessary for the supreme court to interpret the Unruh Act because the ordinance expressly provided that it would not be effective if its application would violate the Unruh Act. *Id.*

formed and the facilities provided.⁹³

In *Flowers v. John Burnham & Co.*,⁹⁴ the court examined the applicability of the Unruh Civil Rights Act to discrimination in rental housing against families with children. Although recognizing that the Unruh Act, as interpreted by *Cox*, prohibits *arbitrary* discrimination by landlords,⁹⁵ the *Flowers* court concluded that a landlord's policy of excluding all boys over the age of five was *not* arbitrary "[b]ecause the independence, mischievousness, boisterousness and rowdiness of children vary by age and sex."⁹⁶ It has been suggested that this decision cannot be reconciled with *Cox* because the "[d]etermination of whether a particular exclusionary practice constitutes an arbitrary form of discrimination depends upon whether the practice can be termed 'a reasonable department regulation.'⁹⁷ Thus, the argument has been made that prohibiting children as a class from housing, as in *Flowers*, is, in itself, arbitrary discrimination under *Cox* because *Cox* only allows reasonable regulations of conduct on the business premises, not "exclusion of patrons merely because such patrons *may* act in a certain manner on the business premises."⁹⁸

Ultimately the controversy about whether it is a violation of the Unruh Act for a landlord to discriminate against families with children may be settled when the California Supreme Court renders its decision in *Marina Point, Ltd. v. Wolfson*.⁹⁹ At the pres-

93. *Id.* at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31 (emphasis added and footnotes omitted).

94. 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971).

95. *Id.* at 703, 98 Cal. Rptr. at 645.

96. *Id.* "Sex" was not added to the Unruh Act as a prohibited basis of discrimination until three years after *Flowers* was decided. 1974 Cal. Stats., ch. 1193, § 1, at 2568 (current version at CAL. CIV. CODE § 51 (West Supp. 1979)).

97. Comment, *supra* note 13, at 616.

98. *Id.* at 619. Dictum in *Cox* supports the argument that the Unruh Act prohibits class exclusions. The *Cox* court stated:

In ultimately determining whether the shopping center did rely upon a reasonable ground in requesting petitioner to quit the premises, the trial court will bear in mind that the shopping center has generally opened the premises to the public. . . . The shopping center may no more exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.

3 Cal. 3d 205, 217-18, 474 P.2d 992, 1000, 90 Cal. Rptr. 24, 32 (1970) (footnotes omitted). *But cf.* *Newby v. Alto Riviera Apts.*, 60 Cal. App. 3d 288, 300-01, 131 Cal. Rptr. 547, 556 (1976) (landlords may impose more stringent standards than owners of businesses that are more open to the general public); 61 OP. CAL. ATT'Y GEN. 320, 322 (1978) (*Cox* and *Flowers* "suggest that it is reasonable for some businesses with particular needs, such as the need to maintain a quiet environment, to impose limitations on access by youthful patrons").

99. 98 Cal. App. 3d 140, 158 Cal. Rptr. 669 (1979), *hearing granted*, No. L.A.31199 (Cal. Sup. Ct., Dec. 6, 1979). See note 12 *supra*. The Wolfsons' lease contained a provision that children under the age of 18 were prohibited unless prior written

ent time, however, *Flowers* is the controlling law on this question.¹⁰⁰ The California Attorney General has interpreted the *Flowers* decision as suggesting that the Unruh Act does not prohibit landlords from regulating tenancy by age to the extent that it relates "to qualities generally undesirable in apartment house tenants, both from the standpoint of the landlord's property interests and the rights of other tenants to peaceful enjoyment of the premises."¹⁰¹ It is therefore clear that the Unruh Act, as it is presently interpreted, does not prevent landlords from either refusing to rent to, or evicting, families with children.¹⁰²

Because the Unruh Act has been interpreted to prohibit arbi-

consent of the lessor was obtained. 98 Cal. App. 3d at 143, 158 Cal. Rptr. at 671. During the term of the lease, the Wolfsons had a son. *Id.* at 144, 158 Cal. Rptr. at 671. They renewed the lease without informing their landlord that they had had a child. *Id.* After the landlord learned of the presence of the child in the apartment, the Wolfsons were informed their lease would not be renewed again. *Id.* Negotiations between the parties resulted in extensions of the lease for several months. *Id.* The unlawful detainer action was filed when the Wolfsons failed to vacate at the end of the extended lease period. *Id.* As an affirmative defense in the unlawful detainer action, the Wolfsons contended that "landlords are constitutionally and statutorily prohibited from discriminating against children." *Id.* at 144-45, 158 Cal. Rptr. at 671-72.

There was no evidence that the Wolfsons' son had either disturbed other tenants or caused any physical damage to the premises. *Id.* at 145, 158 Cal. Rptr. at 672. The landlord, however, did produce evidence that the apartment complex lacked facilities for children. *Id.* In addition, evidence showed that, prior to the adoption of the adults-only policy, other children had created problems on the premises. *Id.* Expert testimony was also used to demonstrate that children *generally* cause increased maintenance costs. *Id.*

The trial court found plaintiff's policy of excluding children was "rationally related to the lack of facilities for children and to the noise and damage caused by children, and proceeds from a reasonable economic motive." *Id.* at 146, 158 Cal. Rptr. at 672. The trial court rejected the Wolfsons' statutory and constitutional arguments and awarded possession of the premises to plaintiff landlord. *Id.* The case was initially appealed to the appellate department of the superior court. That court determined the trial court should have balanced the rights of families with children against those of persons who wish to avoid children to determine the reasonableness under the Unruh Act of the landlord's policy of excluding children. *Marina Point, Ltd. v. Wolfson*, No. Civ. A 14120 (App. Dep't Super. Ct., Los Angeles County, Dec. 21, 1978) (opinion and judgment). The case was to be returned to the municipal court but the court of appeal transferred the matter to itself pursuant to rule 62(a) of the California Rules of Court. The court of appeal then affirmed the judgment of the trial court.

100. Because the granting of a hearing by the supreme court in *Marina Point* supersedes the decision of the court of appeal in that case, *Flowers* is the only case in which a court of appeal has addressed this question.

101. 61 OP. CAL. ATT'Y GEN. 320, 321 (1978); 59 OP. CAL. ATT'Y GEN. 70, 72 (1976).

102. See also notes 12 & 87 *supra*.

trary discrimination in the sale or rental of real property,¹⁰³ the Act can be viewed as general law operating within the field of discrimination in housing. The Act, however, does not expressly preempt local regulations.¹⁰⁴ Local ordinances which prohibit discrimination in rental housing against families with children will therefore be invalid only if they directly conflict with, or duplicate, the Unruh Act, or if the field in which they operate has been preempted by implication.

A challenge to the validity of local ordinances on the grounds that they either directly conflict with the Unruh Act or duplicate it can only succeed if the term "general laws," as used in article XI, section 7,¹⁰⁵ is construed to include decisional law, as well as statutory law.¹⁰⁶ For it is only by judicial interpretation and expansion of the literal language of the Unruh Act¹⁰⁷ that the Act can be considered as operating in the field of discrimination in housing. The following analysis assumes that a court looks not only to the language of the statute, but also to the way the statute has previously been interpreted, to determine whether a local ordinance attempts to regulate in the same field as the state legislation.

A local ordinance duplicates general law if it prohibits the same act prohibited by the state law,¹⁰⁸ or if it uses the same language as the state law.¹⁰⁹ This basis for the invalidation of local ordinances usually occurs when both the state law and the local ordinance proscribe certain conduct as criminal, since in that situation there is an "inevitable conflict of jurisdiction."¹¹⁰ Nevertheless, it has been extended to a situation where no double jeopardy problem was presented since neither the ordinance nor the general law was penal in nature.¹¹¹

103. See text accompanying notes 83-89 *supra*.

104. See text accompanying note 82 *supra*.

105. CAL. CONST. art. XI, § 7.

106. This question was raised, but not answered, in *Chavez v. Sargent*, 51 Cal. 2d 162, 339 P.2d 801 (1959), where the court stated that "[n]o case has been found which discusses the question whether an ordinance which conflicts, not with statutory, but with decisional, law on a subject of statewide concern, violates the requirement . . . that local regulations must not conflict with 'general laws'." *Id.* at 177, 339 P. 2d at 810.

107. See text accompanying notes 83-84 *supra*.

108. *In re Mingo*, 190 Cal. 769, 771, 214 P. 850, 851 (1923); see *In re Moss*, 58 Cal. 2d 117, 121, 373 P.2d 425, 427, 23 Cal. Rptr. 361, 363 (1972) (concurring opinion); *Pipoly v. Benson*, 20 Cal. 2d 366, 370, 125 P.2d 482, 485 (1942) (ordinance is invalid if it is "substantially identical").

109. It is doubtful that a local ordinance which prohibits discrimination in rental housing against families with children would ever exactly duplicate the language of the Unruh Act since the ordinances use prohibitory language.

110. *Pipoly v. Benson*, 20 Cal. 2d 366, 371, 125 P.2d 482, 485 (1942).

111. *Chavez v. Sargent*, 52 Cal. 2d 162, 177 n.3, 339 P.2d 801, 810 n.3 (1959).

A local ordinance which prohibits discrimination in rental housing against families with children could be viewed as duplicating the prohibitions of the Unruh Act only if *Cox* were interpreted to hold that class exclusions by business establishments are, necessarily, arbitrary discrimination within the meaning of the Unruh Act. If *Cox* were interpreted to forbid class exclusions, the local ordinance could be said to prohibit the same act that is forbidden by the Unruh Act. Both the Unruh Act and the local ordinance would prohibit landlords from refusing to rent to a family, or evicting a family, simply because of the potential tenancy of minor children.¹¹² But the decision in *Flowers* demonstrates that *Cox* has not been interpreted to prohibit class exclusions. Instead of focusing on "deportment regulations that are rationally related to the services performed and the facilities provided,"¹¹³ the *Flowers* court appeared to focus on whether there was a rational basis for the landlord's exclusionary policy.¹¹⁴ Since discrimination against children in rental housing is not considered to be arbitrary discrimination within the meaning of the Unruh Act, as presently construed, a challenge to the validity of local ordinances on the ground they duplicate the provisions of the Act would clearly fail.¹¹⁵

Similarly, a local ordinance should be able to withstand a challenge that it directly conflicts with the provisions of the Unruh Act. A local ordinance will be in direct conflict with general law if it forbids conduct that is expressly permitted by general law. Therefore, resolution of the question of a direct conflict, in this situation, hinges on the word "permitted." The Unruh Act has been judicially construed as prohibiting all *arbitrary* discrimination by business establishments.¹¹⁶ This is not the same, however, as saying that all discrimination which is not considered arbitrary is *permitted* under the Unruh Act.¹¹⁷ The general rule is that "if the state's preemption of the field or subject is not com-

112. Under this interpretation of *Cox*, landlords would be allowed to establish rules to prevent *any* tenant from damaging property or disturbing other tenants because rules of this nature would merely be regulations of conduct on the premises.

113. *In re Cox*, 3 Cal. 3d 205, 217, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970).

114. See text accompanying note 96 *supra*; 61 OP. CAL. ATT'Y GEN. 320, 321 (1978).

115. See also note 87 *supra*.

116. *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

117. Cf. note 79 *supra*.

plete, local supplemental legislation is not deemed conflicting to the extent that it covers phases of the subject which have not been covered by state law.”¹¹⁸ Thus local ordinances which prohibit landlords from discriminating against families with children should not be considered to directly conflict with the Unruh Act. Instead, since the Unruh Act is a general civil rights law aimed at ensuring full and equal accommodations to all persons,¹¹⁹ the local ordinances should be viewed as additional regulations which are in aid and furtherance of the Act.¹²⁰

Preemption by Implication

An express declaration of legislative intent to occupy a field is not always necessary to preempt local regulations in the same field.¹²¹ If state legislative action in a field is so extensive in scope that it constitutes a general scheme for the regulation of the subject, a court may find the legislature has occupied the field by implication.¹²² The California Supreme Court, in *In re Lane*,¹²³ stated that the legislature’s intent to occupy a field by implication is determined by looking at the whole purpose and scope of the legislative scheme, as well as the language used.¹²⁴ The applica-

118. *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 541, 469 P.2d 353, 356-57, 86 Cal. Rptr. 673, 676-77 (1970) (quoting *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 8-9, 56 Cal. Rptr. 853, 858 (1966)).

119. See text accompanying note 82 *supra*.

120. See text accompanying note 47 *supra*. For a discussion of the advantages and disadvantages of prohibiting discrimination in rental housing against children at the local, rather than the state, level see *Dunaway & Blied, supra* note 13, at 49; Note, *supra* note 13, at 575-76.

121. See text accompanying note 45 *supra*.

122. *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962); *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

123. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

124. *Id.* at 102-03, 372 P.2d at 899, 22 Cal. Rptr. at 859. It is not exactly clear what test the California Supreme Court considers to be the correct test for determining whether the legislature has impliedly preempted a certain field. In *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P. 2d 930, 76 Cal. Rptr. 642 (1969), the supreme court, after citing the *Lane* test with approval, relied on three tests established in *In re Hubbard*, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 399 (1964), to determine whether the legislature had preempted the entire field of weapons control by implication. 70 Cal. 2d at 859-66, 452 P.2d at 935-40, 70 Cal. Rptr. at 647-52. The *Galvan* court, however, failed to discuss the fact that the *Hubbard* tests were originally enunciated in the context of a discussion of the power of chartered cities to enact regulations in respect to *municipal affairs* and were *not* used by the *Hubbard* court to determine whether the legislature had impliedly preempted the field of gambling. In fact, the *Hubbard* court examined the *purpose and scope* of state legislation in the field of gambling to determine whether a local gambling ordinance was preempted by state legislation. See *In re Hubbard*, 62 Cal. 2d 119, 123-27, 396 P.2d 809, 811-14, 41 Cal. Rptr. 393, 395-98 (1964). After holding that the ordinance was not preempted, the *Hubbard* court went on to discuss the validity of the local ordinance under the municipal affairs concept. As part of this discussion, the court stated:

tion of this "test" for implied preemption of a field, however, is often result-oriented.¹²⁵ If there is no overriding need for state control of the subject and existing state law does not adequately meet local needs, courts frequently adopt a narrow definition of the field in which the state has acted to sustain local regulation of

[C]hartered counties and cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 398-99. As Professor Sato has pointed out, since the *Hubbard* court initially determined the preemption question, the entire discussion of the power of chartered cities and counties to regulate municipal affairs was dicta. See Sato, "Municipal Affairs" in *California*, 60 CALIF. L. REV. 1055 (1972).

A further question about relying on the tests enunciated in *Hubbard* as the proper tests for determining whether a field has been preempted by implication arises from the fact that, several months after the *Galvan* decision, the supreme court rejected the suggestion in *Hubbard* that the legislature could determine, simply by dealing with a subject on a statewide basis, whether a subject was a municipal or state affair. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969). Accordingly, the supreme court overruled any statements to the contrary that were contained in the municipal affairs discussion in *Hubbard*. *Id.* Nevertheless, the supreme court has since cited the *Hubbard* tests with approval as to when local regulations which do not regulate municipal affairs will be preempted by implication. See *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 141, 142, 550 P.2d 1001, 1010, 1011, 130 Cal. Rptr. 465, 474, 475 (1976).

Although this Comment used the test set forth in *Lane* to analyze whether local ordinances which prohibit discrimination in rental housing against families with children have been preempted by implication, for the following reasons it is clear the same conclusions would be reached under the *Hubbard* tests. First, because discrimination in rental housing against families with children is not specifically addressed by state law, it cannot be said that the state law fully occupies the field of discrimination in housing. See text accompanying notes 129-34 *infra*. Second, the language of existing state legislation in the field of discrimination in housing does not clearly indicate that "a paramount state concern will not tolerate further or additional local action," *In re Hubbard*, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 399 (1964), with respect to forms of discrimination not covered by the state legislation. See text accompanying notes 65-71 & 82 *supra* and notes 129-34 *infra*. Furthermore, local ordinances of this nature would be beneficial to the extent they make it easier for families with children to move from one city to another by ensuring them equal opportunity in the rental housing market. Thus it cannot be said that the local ordinances adversely affect transient citizens.

125. See, e.g., *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 130-33, 155 Cal. Rptr. 435, 440-41 (1979).

the subject.¹²⁶ The recent case of *Gluck v. County of Los Angeles*¹²⁷ supports this conclusion. In *Gluck*, the court of appeal examined the line of California cases that have addressed the implied preemption question. Based upon this examination, the court concluded that “[t]he common thread of the [implied preemption] cases is that *if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance* against an attack of state preemption.”¹²⁸

The legislature has affirmatively acted to prevent discrimination in housing on the basis of blindness or physical handicap.¹²⁹ In addition, the Rumford Act provides an elaborate regulatory scheme to prevent discrimination in housing on the basis of race, color, religion, sex, marital status, national origin or ancestry.¹³⁰ The purpose of the Unruh Act, which is the other main statute in the area of discrimination in housing, is to ensure full and equal accommodations by prohibiting all arbitrary discrimination in business establishments.¹³¹ On its face, the Unruh Act does not even address discrimination in housing. It is only by virtue of the fact that the courts have liberally construed the Act that its scope has been considered broad enough to address arbitrary discrimination by landlords.¹³² The scope of the legislation in the field of discrimination in housing, while extensive, is clearly not all-inclusive. This is demonstrated by the fact that there are currently no remedies available at the state level to families who find themselves excluded from a significant portion of the rental housing market simply because they have children.

Both the purpose and the limited scope of the existing legislation indicate that, although the legislature has occupied the narrower field of discrimination in housing on the bases enumerated in the Rumford Act or in Civil Code section 54.1, there is no preemptive scheme in the broader field of “discrimination in housing.” Furthermore, the presumption should be against a finding of implied preemption of the field¹³³ because the nature and extent

126. See note 65 *supra*.

127. 93 Cal. App. 3d 121, 155 Cal. Rptr. 435 (1979).

128. *Id.* at 133, 155 Cal. Rptr. at 441.

129. CAL. CIV. CODE § 54.1(b) (West Supp. 1979). Section 54.1(b)(1) provides, in relevant part, that “[b]lind persons, visually handicapped persons, deaf persons, and other physically disabled persons shall be entitled to full and equal access . . . to all housing accommodations offered for rent, lease, or compensation in this state . . .” *Id.*

130. See note 77 *supra*.

131. *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

132. See, e.g., *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 703, 98 Cal. Rptr. 644, 645 (1972).

133. See text accompanying note 128 *supra*.

of the problems posed by discrimination in rental housing against families with children vary between urban and rural areas, and even from one urban area to another.¹³⁴ Therefore, a significant local interest will be served by allowing local regulation in this area. Until the legislature recognizes and comprehensively deals with this subject, those cities and counties that find themselves faced with severe housing shortages for families with children, as a result of this practice of discrimination, must be permitted to attack the problem on the local level.

CONCLUSION

The Santa Clara County ordinance which prohibits discrimination in rental housing against families with minor children has recently been invalidated on grounds of state preemption. An analysis of California legislation in the area of housing discrimination indicates, however, that local ordinances of this nature should not be subject to challenge on preemption grounds because the legislature has not fully occupied, either expressly or by implication, the entire field of discrimination in housing. In addition, neither the Rumford Act nor the Unruh Act has been interpreted as addressing the problem of discrimination in rental housing against families with children. As a result, local ordinances cannot be said to either duplicate, or directly conflict with, existing state law.

The cities and counties that have passed, or are considering passing, local ordinances to protect families with children from housing discrimination have been prompted to take action because serious housing problems for families with children exist within their communities. Courts should give great weight to this purpose of addressing local needs when considering challenges to the validity of such ordinances.

CYNTHIA GLANCY

134. A lobbyist for the California Association of Realtors has argued that the availability of apartments for families in cities such as Sacramento indicates that the issue of discrimination in rental housing against families with children is one which should be addressed at the local level. *Los Angeles Times*, June 27, 1978, § 4 (View), at 4, col. 1. *See* note 3 *supra*. *But cf.* FAIR HOUSING PROJECT, *supra* note 2, at 3 (suggesting that since the findings of the study were so consistent among the cities studied, the results of the study could be generalized for all of California).

