NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

TENDERLOIN HOUSING CLINIC, INC., **Plaintiff and Respondent,** **v.** **BHAZUBHAI C. PATEL,** **Defendant and Appellant.**	**A077469/A080669** **(City and County of S.F. Super. Ct. Nos. 921307/974667)**

I.

INTRODUCTION

These consolidated appeals[1] involve the continuing efforts of the Tenderloin Housing Clinic, Inc. (THC) to enforce provisions of the City of San Francisco's (the City) Residential Hotel Unit Conversation and Demolition Ordinance (HCO) against the Beach Motel, which is owned by Bahzubhai C. Patel (Patel). (See S.F. Admin. Code, ch. 41 ["HCO"] §§ 41.1 et seq.)[2] The HCO seeks to preserve the City's dwindling stock of hotel units available for residential use by strictly regulating the demolition and conversion of residential hotel units to other uses. (HCO, § 41.2.) The central issue in each of these appeals concerns the preemptive effect of the

[1] On January 21, 1998, this court granted THC's request to consolidate appeal No. A077469 and appeal No. A080669 for oral arguments and decision. In each case, we have granted the City's application to file an amicus curiae brief in support of THC. (See rule 14, Cal. Rules of Court.)

[2] The 1990 version of the HCO was in effect during the underlying proceedings and will be the version relied upon in this opinion unless otherwise noted.

Ellis Act (Gov. Code § 7060 et seq.),[3] which prohibits public entities from compelling owners of residential property, such as Patel, "to offer, or to continue to offer, accommodations in the property for rent or lease." (§ 7060.)

In the matter before us, the Ellis Act preemption issue presents itself in two separate but related cases involving THC and Patel. The first appeal, No. A077469, stems from Patel's desire to dissolve a stipulated injunction entered into in 1991 to resolve litigation filed by THC enforce the residential rental requirements of the City's HCO. The stipulated injunction essentially enjoined Patel from renting rooms at the Beach Motel for a term of less than seven days and was designed to ensure that Patel would rent exclusively to residential tenants in conformance with the HCO. The Honorable William J. Cahill first entered an order dissolving the injunction after concluding that Patel had an unqualified right to remove his property from the residential rental market under the Ellis Act. However, upon THC's request for reconsideration, Judge Cahill provisionally reinstated the injunction so that its legal effect could be conclusively resolved in subsequent proceedings. On appeal, Patel claims Judge Cahill erred in granting THC's motion for reconsideration and reinstating the injunction.

In the second appeal, No. A080669, we consider THC's appeal and Patel's cross-appeal from the judgment rendered by the Honorable Mary C. Morgan after a nonjury trial of THC's claim that Patel persistently rented rooms at the Beach Motel to overnight guests in violation of the City's HCO and the parties' stipulated injunction. The fundamental issues presented by Patel's cross-appeal in No. A080669 involve several rulings made with respect to the preclusive effect given to the parties' 1991 stipulated injunction. In all respect we affirm the trial courts' rulings made with respect to the preclusive effect given to the parties' 1991 stipulated injunction. In all respects we affirm the trial courts' rulings in both underlying cases.

II.

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[3] All undesignated statutory references are to the Government Code.

FACTUAL AND PROCEDURAL BACKGROUND

The property at the center of this controversy is the Beach Motel, a family-owned and operated 20-unit motel located near Ocean Beach in the Sunset District of San Francisco, California. The controversy has a long and acrimonious history and presently involves whether the City's HCO continues to restrict the use of this property to long-term residential rentals.

In 1979, the City's board of supervisors enacted a temporary moratorium on the demolition or conversion of residential hotel units. (HCO, § 41.3(g).) The moratorium was in response to a serious housing shortage for low-income and elderly residents caused by the conversion of residential hotels to nonresidential hotels or condominiums. (HCO, § 41.3(a)(c).) In 1981, the board replaced the moratorium with the HCO. The HCO's stated objective was to alleviate the "adverse impact on the housing supply and on displaced low income, elderly and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." (HCO, § 41.2.)

The 1981 HCO provide for a survey to classify all of the City's hotel and motel rooms as either "tourist" or "residential" based on their actual use on September 23, 1979. The HCO only regulated changes after that date. (HCO, (HCO, §§ 41.5, 41.6.) Thus, if rooms were rented to tourists before September 23, 1979, the HCO allowed unlimited tourist use after that date. Conversely, if rooms were used for residential purposes before that date, the HCO governed their continued use and conversion. In 1982, shortly after the HCO was enacted but before Patel acquired any interest in the Beach Motel, the superintendent of the City's Bureau of Building Inspection determined that the Beach Motel contained 20 residential units and 0 tourist units as defined in the HCO, and issued a certificate of use authorizing the rental of 20 residential units and 0 tourist units. This determination was never challenged and is conclusive in these proceedings. (HCO, § 41.6(g).)

The HCO places exacting restrictions on owners of hotel and motel units that have been classified as residential. If a property owner wishes to convert residential units to other uses, such as short-term tourist rentals, a permit is required. (HCO, § 41.20(a)(1).) A conversion permit will be granted only if the owner agrees to provide "one-for-one replacement of the units to be converted." (HCO, § 41.13(a).) The replacement housing may be provided by 1) construction new residential hotel rooms limited to that use, 2) rehabilitating existing residential hotel units, or 3) contributing a substantial "in-lieu" fee to construct new units. (HCO, §§ 41.12; 41.13; 41.14.)

The City's HCO has been the subject of numerous lawsuits, and the California Courts of Appeal have upheld the ordinance against claims that it violates the principles of due process and equal protection (*Terminal Plaza Corp.* v. *City and County of San Francisco* (1986) 177 Cal. App. 3d 892, 907-908), that the ordinance effects an unconstitutional taking of property without just compensation (*id*. at p. 912; *Bullock* v. *City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 1089), and that it regulates an area of exclusive municipal concern (*City of Santa Monica* v. *Yarmark* (1988) 203 Cal. App. 3d 153, 165-168).

When the HCO was amended in 1990, it defined certain types of tax-exempt organizations as "interested parties," permitting them to bring enforcement actions against regulated hotel owners and operators. (HCO, § 41.20(e).) These sections not only granted THC standing to enforce the HCO, but provided it a unilateral right to recover attorney fees. (See HCO, § 41.20(e).) In the summer of 1990, THC filed civil actions against hotel owners that it believed were violating the HCO, including Patel. THC's complaint specifically alleged "that within three years of the date of filing this Complaint, and continuing to the present, [Patel] offered to rent and rented 'residential units' in the premises to persons other than permanent residents, primarily tourists, in excess of the number permitted by and in violation of the

Ordinance." The second cause of action alleged that Patel's violation of the HCO constituted an unfair business practice for which an injunction and restitution was requested.

This lawsuit was concluded when Patel and THC stipulated to the entry of a judgment permanently enjoining Patel "from renting or offering to rent any room at the Beach Motel,…for a term of tenancy less than seven (7) days;…" The judgment specifically permitted Patel to rent rooms at the Beach Motel by the day between May 1 and September 30 under certain specified conditions. The language of the judgment basically tracked the language of the City's HCO which allowed, in limited circumstances, tourist use of residential units during the summer months, May 1 through September 30, of each year. ((HCO, § 41.19(a)(3).)

On December 13, 1995, THC filed a new complaint against Patel. The complaint alleged Patel had rented "'residential units' in the premises to persons other than permanent residents, primarily tourists,…in violation of the prior judgment and the Hotel Conversion Ordinance." The complaint further alleged that as a result of these acts, Patel had engaged in unfair business practices. The complaint sought appointment of a receiver to operate the Beach Motel, restitution of unlawful profits, and attorney fees. While the 1995 action was pending, Patel caused to be recorded a notice of intent to invoke his right to withdraw the Beach Motel from residential rental use under the Ellis Act. (See § 7060.4, subd. (a).)

The Ellis Act was passed in response to the California Supreme Court decision in *Nash* v. *City of Santa Monica* (1984) 37 Cal. 3d 97, 109. In *Nash*, the high court upheld provisions of the Santa Monica City Charter which prohibited the owner of rental housing from removing controlled rental units from the housing market by demolition, conversion, or other means absent a removal permit from the Santa Monica Rent Control Board. The expressed legislative intent in enacting the Ellis Act was to "supersede any holding or portion of any holding in *Nash*…to the extent that the holding, or portion of the holding, conflicts with this chapter so as to permit landlords to go out of business." (§ 7060.7.)

On August 22, 1996, shortly after Patel invoked his rights under the Ellis Act, he filed a motion to dissolve the 1991 stipulated injunction limiting rentals at the Beach Motel to long-term residential tenants and to modify the prior judgment accordingly. Patel argued that circumstances had materially changed since the injunction was entered because he had withdrawn the Beach Motel from residential rental use under the Ellis Act. He urged the court to "determine that the state law preempts the HCO, and now precludes the THC from enforcing the HCO against the Beach Motel" warranting the court's exercise of its inherent equitable power to dissolve the injunction.

On November 13, 1996, the court entered an order granting Patel's motion to dissolve the permanent injunction and modify the prior judgment on the ground that Patel's invocation of the Ellis Act gave him the unqualified right to remove the Beach Motel from the residential rental market free of the impediments imposed by the HCO. However, on December 20, 1996, the court entered an order granting "in part" THC's motion to reconsider and reinstated the injunction without prejudice to Patel raising his preemption argument in THC's pending enforcement action. The trial court's grant of reconsideration is the subject of appeal No. A077469.

In January 1997, a nonjury trial was held on THC's enforcement action against Patel. This action is the subject of appeal No. A080669. At the conclusion of trial, the court made extensive findings of fact and conclusions of law. The key findings and conclusions are as follows:

1) The stipulated judgment which had been entered in THC's prior enforcement action against Patel, enjoining Patel from renting rooms at the Beach Motel for a term of less than seven days in accordance with the City's HCO, prevented Patel from asserting certain affirmative defenses challenging the HCO in the instant prosecution alleging its violation.

2) Since April 12, 1991, Patel consistently rented rooms at the Beach Motel to overnight guests in violation of the prior judgment and the HCO. Furthermore, Patel made false reports to the City, kept a secret set of books to conceal his violations of the HCO, lied to the City in promising compliance with the HCO, produced false documents and information in discovery, and lied under oath in a manner that conflicted with the records he kept and submitted to the City.[4]

3) The HCO's requirement that owners of residential units either replace the units they desire to remove from the market with comparable residential units or pay a fee to the City "is tantamount in forcing [owners] to remain in the residential rental business" in violation of the Ellis Act. Consequently, the court held that "[Patel] need not comply with the Hotel Conversion Ordinance after July, 1996, due to his withdrawal from the residential hotel business under the Ellis Act [on that date]."

4) Patel was required to make restitution to the City in the amount of $31,169.36 for his unlawful business practices in renting to overnight guests from April 12,1991, through July 9, 1996, in violation of the prior judgment and the HCO.

5) The authorized use of the Beach Motel is ultimately and independently governed by local land use restrictions contained in the City's planning code. The Beach Motel is located in a district zoned "Residential, Mixed: Low Density" (RM-1). The operation of a commercial motel renting rooms on a nightly basis is not a permitted use in an RM-1 district, unless the motel use is a legal nonconforming use. Whether the daily rental of motel rooms at the Beach Motel violates the City planning code is the subject of a separate, contested adversarial proceeding in the City and County of San Francisco v. Patel, San Francisco Superior Court (1996) No. 981581. As the trial

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[4] We are informed by Patel's appellate counsel that on May 28, 1998, Patel entered a plea of no contest to perjury charges brought by the San Francisco District Attorney with regard to his testimony in this proceeding.

court noted, nothwithstanding Patel's success in freeing his property from the restraints imposed by the City's HCO, "[i]t remains to be seen whether Patel can meet the requirements" of the applicable zoning laws in converting his property to other uses.

Most of these findings are unchallenged in appeal No. A080669. In the main appeal, THC contends the courts erred in finding that the HCO's conversion requirements are preempted by the Ellis Act and therefore ceased to be a viable restriction on Patel's ability to use the Beach Motel for purposes other than providing residential housing after July 9, 1996, the date of Patel's Ellis Act filing. In Patel's cross-appeal, he questions the court's determination that the stipulated judgment and injunction entered as a result of THC's 1990 enforcement action estops him from raising certain affirmative defenses contesting the validity of the HCO in THC's subsequent 1995 enforcement action. Because Patel's Ellis Act preemption issue proves significant for the ultimate disposition of both appeals, we resolve it at the outset.

III.

DISCUSSION

A. Ellis Act Preemption Issue

Patel's "core position" in each of these consolidated cases is his belief that the HCO's conversion requirements are preempted by the Ellis Act and thereby cease to be a viable restriction on his ability to use the Beach Motel for purposes other than providing housing for long-term residential tenants. As we shall explain, in each case before us, the court applied well-settled principles and properly concluded that the Ellis Act fully preempts the field of substantive controls regarding the removal of rental housing and that it prohibits local regulatory schemes, such as the HCO, that imposes "a prohibitive price" as a condition for going out of the rental business. (*Javidad* v. *City of Santa Monica* (1988) 204 Cal. App. 3d 524, 531.)

A local land use regulation is preempted by the Ellis Act only if the regulation "compel[s] the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease."[5] (§ 7060, subd. (a).) As our colleagues in Division Three recently explained, "The purpose of the Ellis Act is to protect a landowner's rights to leave the rental housing market without hindrance from the government." (*First Presbyterian Church* v. *City of Berkeley* (1997) 59 Cal. App. 4th 1241, 1256.) Therefore, property owners "who comply with its terms [should be allowed] to go out of the residential rental business by evicting their tenants and withdrawing all units from the market, even if the landlords could make a fair return, the property is habitable, and the landlords lack approval for future use of the land." (*City of Santa Monica* v. *Yarmark, supra,* 203 Cal. App. 3d at p. 165.)

In substance, section 41.20, subdivision (1) of the HCO makes it unlawful to "[c]hange the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert…" The permit is conditioned upon the property owner making one-for-one replacement of the units being converted in one of three ways: 1) by constructing new residential hotel units; 2) by rehabilitating existing residential hotel units; or 3) by paying a fee to the City in an amount equal to site acquisition costs and a percentage of the cost of building comparable replacement units. (HCO, §§ 41.12, 41.13, 41.14.) At the time relevant here, the in-lieu fee was 80 percent of the replacement cost plus site acquisition costs. (See HCO, § 41.13, subd. (a)(4).)

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[5] At the outset we reject THC's argument, made for the first time on appeal, that Patel is not entitled to the protection of the Ellis Act because the documents submitted with his Ellis Act filing indicated there were no residential tenants in occupancy at the Beach Motel at that time. THC reasons: "Since the units were not occupied by tenants, there were no 'residential rental units' at the property. Hence, there were no units to withdraw from rental use." (See §7060, subd. (b).) First, THC has failed to cite the record showing that it presented this argument before the trial court. Moreover, this issue is not reflected in any of the court's rulings. THC is therefore precluded from raising this theory for the first time on appeal. (*Hepner* v. *Franchise Tax Bd*. (1997) 52 Cal. App. 4th 1475, 1486.) Secondly, none of the authorities cited by THC support such an unusual and unlikely intention on the part of the Legislature.

The requirements imposed by the HCO before a property owner can withdraw from the residential housing business serve as a classic example of the type of local regulations which have consistently been invalidated by the courts as extracting too heavy a price on the exercise of rights conferred by the Ellis Act. In arguing the restrictions imposed by the HCO survive Patel's Ellis Act withdrawal, THC fails to squarely address, let alone distinguish, the holding in *Bullock* v. *City and County of San Francisco, supra,* 221 Cal. App. 3d 1072. In *Bullock*, the court was presented with the identical question presented in this appeal – whether the conditions imposed by the HCO of "either furnishing comparable units in the same quantity as the units converted, or making a substantial 'in lieu' payment to a fund maintained by the City" in order to go out of the residential housing business is permitted under the Ellis Act. (*Id*. at p. 1099, fn. Omitted.) After reviewing the existing case law discussing the preemptive effect of the Ellis Act, the court held there was "no principled basis" for distinguishing the HCO's conversion requirements from similar requirements held to be preempted because they "'impermissibly condition[]the landlord's right to go out of business on compliance with requirements not found in the [Ellis] Act…'" (*Id*. at p. 1100, quoting *Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App. 3d at pp. 530-531.)

Concerning the burden imposed by the HCO's one-for-one replacement requirements, the *Bullock* court stated: "Plaintiff has, in no uncertain terms and in accordance with the procedures established by the City, advised the City of his intent to depart the business of renting residential home units…The Ellis Act does not permit the City to condition plaintiff's departure upon the payment of ransom." (*Id.* at pp. 1100-1101.) The court rejected the City's argument that requiring owners of residential units to replace removed unites or pay an in-lieu fee to the City falls within the Ellis Act's definition of permissible mitigation. The court held that under the Ellis Act, a departing landlord cannot be compelled to "make expenditures that benefit society at large.: (*Id.* at p. 1101.) The court concluded that the requirements imposed by the HCO in order

to convert from residential uses to other uses were preempted by the Ellis Act and "cannot be used to impede plaintiff's departure from the residential hotel business." (*Id.* at p. 1102.)

In resolving the preemption issue in Patel's favor, Judge Morgan reasoned that the HCO's removal provisions were preempted by the Ellis Act because "[r]equiring Patel, after July 9, 1996, to comply with HCO Section 41.20, and not rent to tourists for seen days or less, after having withdrawn from the residential rental market, is tantamount to forcing him to remain in the residential rental business. In light of the conflict, HCO Section 41.20, as applied to Patel and the Beach Motel after July 9, 1996, is preempted by the Ellis Act. [Citations.]" In so holding, the court observed that HCO section 41.13 "requiring one-for-one replacement is virtually identical to the provisions in the earlier version of the HCO which the [*Bullock*] [c]ourt held was preempted by the Ellis Act."

We agree with the trial court that the burdensome conditions imposed by the challenged portions of the City's HCO impermissibly infringe on a property owner's "unfettered right" under the Ellis Act to remove units from the rental market by imposing "requirements not found in the Act." (*City of Santa Monica* v. *Yarmark, supra*, 203 Cal. App. 3d at p. 165; *Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App. 3d at p. 530.) As such, they are in direct conflict with judicial precedent authorizing property owners to withdraw from rental business under the Ellis Act.

For instance in the *City of Santa Monica* v. *Yarmark, supra*, 203 Cal. App. 3d 153, the court held that the Ellis Act preempted a local municipal ordinance requiring property owners to obtain a permit before removing rental units from the housing market, to the extent that it placed conditions on the right to withdraw from the rental business. (*Id*. at p. 157.) As a result of *Yarmark*, the landlord in *Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App,. 3d 524, was permitted to evict all of his tenants. However, his application for an apparently ministerial demolition permit was denied because he had not obtained a permit before evicting his tenants.

The court held that this permit requirement was identical to the requirement invalidated in *Yarmark* because it conflicted with the Ellis Act. In the court's view, the City's "continued adherence to the removal permit requirement after the Legislature has spoken flouts the will of that body in adopting the Act." (*Id*. at p. 531.) The court refused to uphold the permit requirement as a legitimate land use control regulating the *subsequent use* of property, finding instead that it impermissibly burdened a property owner's right to withdraw from the rental business under the Ellis Act. (*Id*. at pp. 530-531.)

The reasoning of these cases was invoked in *Channing Properties* v. *City of Berkeley* (1992) 11 Cal. App. 4th 88, 97-99, where this division invalidated Berkeley's requirement that property owners provide lengthy notice and relocation assistance to all displaced tenants before being allowed to withdraw from the rental housing market. (See also *Los Angeles Lincoln Place Investors, Ltd.* V. *City of Los Angeles* (1997) 54 Cal. App. 4th 53, 64 [invalidating a local ordinance conditioning the issuance of a demolition permit on property owners' agreement to sign a covenant restricting the future use of the land]; *First Presbyterian Church* v. *City of Berkeley*, *supra*, 59 Cal. App. 4th at pp. 1241, 1253 [striking down a neighborhood preservation ordinance conditioning a demolition permit on the housing needs of the affected neighborhood and the construction of at least the same number of housing units as the demolished structure].)

THC's briefing in these consolidated appeals contains extended discussions on whether or not the HCO can be characterized as analogous to a zoning or planning directive which purports to regulate the subsequent use of the property following its removal from the rental market. These arguments are focused on whether the HCO's conversion requirements fall within the language of section 7060.1, subdivision (b) of the Ellis Act, setting out areas where local entities are explicitly permitted to legislate. This section provides that nothing in the Ellis Act diminishes "any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, *including, but not limited to,*

planning, zoning and subdivision map approvals." (Italics added; see also § 7060.71(1) [nothing in the Ellis Act is intended to interfere with "local governmental authority over land use."]) THC argues that because the HCO's restriction on overnight rentals operates "the same as residential zoning," it falls within the exception carved out by section 7060.1, subdivision (b), exempting local land use restrictions from preemption under the Ellis Act.

We reject THC's premise that if the HCO can be shown to share certain attributes with residential zoning that the HCO must automatically be found to be consistent with the Ellis Act under section 7060.1, subdivision (b). That premise is wrong. Section 7060.1, subdivision (b) and section 7060.7 have been interpreted to "authorize continued local land use controls to the extent they *comport* with the [Ellis] Act." (*Javidzad* v. *City of Santa Monica, supra,* 204 Cal. App. 3d at p. 530, original italics.) It has been recognized that through the enactment of these sections, the Ellis Act "contains explicit boundaries, leaving areas for local control in a fashion *consistent with its terms*." (*City of Santa Monica* v. *Yarmark, supra*, 203 Cal. App. 3d at p. 167, italics added.) Consequently, the test for determining whether actual conflict exists between a local land use control and the Ellis Act is whether, under the circumstances of each particular case, the local land use control stands as an obstacle to accomplishment and execution of the full purposes and objectives of the Ellis Act. It necessarily follows that, to the extent a local land use control interferes with the manner in which the Legislature intends the Ellis Act to operate, it is preempted – even where it shares common characteristics with traditional planning and zoning. (See, e.g., *First Presbyterian Church* v. *City of Berkeley, supra,* 59 Cal. App. 4th at pp. 1249, 1252-1253 [striking down a *zoning ordinance* which compelled continued residential rental use].)

Therefore, the pertinent inquiry in determining whether the HCO can be vindicated as representing a reasonable exertion of local governmental authority over land use consistent with 7060.1, subdivision (b), has been framed by the court in *First Presbyterian Church* v. *City of*

Berkeley, *supra*, 59 Cal. App. 4th 1241 as whether it promotes legitimate land use interests "based on criteria having nothing to do with maintenance of residential units in the rental market." (*Id*. at p. 1249.) On the other hand, preemption occurs if the purpose of the HCO is "to maintain or enhance the residential rental housing needs of the City." (*Id*. at p. 1255.) As already noted, the HCO's stated objective is to alleviate the "adverse impact on the housing supply and on displaced low income, elderly and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." (HCO, § 41.2.) Therefore the provision of the HCO are clearly in conflict with the Ellis Act and are facially preempted, notwithstanding section 7060.1, subdivision (b).

At oral argument, THC stressed its position that nothing in the Ellis Act prohibits the HCO from regulating the subsequent use of property following its removal from the rental market. THC's position suggests that it is permissible to effectively block the property owner's exit for the residential rental market by placing special restrictions on withdrawn property not equally applicable to similarly zoned buildings. Judge Morgan rejected this argument in reasoning we find persuasive: "Continued application of HCO Section 41.19 [restricting nonresidential and tourist use] to the Beach Motel would effectively require Patel to remain in the residential business forever. According to the HCO, once the units have been classified as residential, they may be used only for that purpose, with the exception of temporary tourist use. As applied to Patel, this is not regulation of a 'subsequent use' of the Beach Motel as a tourist hotel. It is continued regulation of the Beach Motel as a residential hotel…This clearly infringes on Patel's right under the Ellis Act to go out of the residential rental business. HCO Section 41.19 thus conflicts with the Ellis Act and is preempted by it."

Consonant with the trial court's reasoning, courts have consistently prohibited a local government from evading the Ellis Act by imposing special restrictions on property *after* the decision is made to withdraw from the residential housing market. Our decision is guided by *Los*

Angeles Lincoln Place Investors, Ltd. v. *City of Los Angeles, supra*, 54 Cal. App. 4th 53. The ordinance at issue in *Lincoln Place* expressly conditioned the grant of a demolition permit on the City's approval for future use of the land. The court found this restriction "did not purport to regulate the *subsequent* use of the property *following its withdrawal from the rental market*. [Citation]" (*Id*. at p. 63, italics added.) Instead, the ordinance conflicted directly with the Ellis Act because the "practical effect of the ordinance is that the plaintiffs will be compelled to remain in the rental business at that location. Rather than simply allowing them to go out of the rental business the City is attempting to impose 'a prohibitive price on the exercise of the right' under the Ellis Act." (*Id*. at p. 64, quoting *Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App. 3d at p. 531.)

In *Javidzad*, the court rejected as "an absurdity" the claims that the Ellis Act was intended to do nothing more than protect the landowner's right to go out business by evicting tenants and that it was not intended to encompass a local ordinance which had the effect of precluding redevelopment of the property. (204 Cal. App. 3d at pp. 530-531.) The court found that a Santa Monica ordinance, which governed the demolition, conversion and alteration of units previously used for residential rental purposes, inconsistent with the Ellis Act and rejected Santa Monica's argument that it was merely a land use regulation which purported to regulate the subsequent use of property following its removal from the rental market. (*Id*. at p. 530.) Similarly, in *First Presbyterian Church* v. *City of Berkeley, supra*, 59 Cal. App. 4th 1241, the court struck down provisions of a neighborhood preservation ordinance which placed conditions on residential construction and demolition. The court found the goal "of each of these conditions is to keep the affected residential units or their equivalents in the rental housing market if at all possible," thereby necessarily infringing on a landlord's decision to go out of the rental housing business. (*Id*. at p. 1253.)

Here, the special use restrictions imposed by the HCO on property designed as residential do not merely regulate its subsequent use following its removal from the rental market, as THC contends, but instead have the practical effect of impeding an owner's right to go out of the rental business, thus directly conflicting with the core right guaranteed by the Ellis Act. Clearly, the practical effect of these provisions impede an owner's right to go out of the residential business as much as the use controls invalidated in *Los Angeles Lincoln Place Investors, Ltd., First Presbyterian Church and Javidzad*. Consequently, they may not be used to further leverage Patel into continuing to provide residential rental housing.

We next consider THC's argument, echoed by the City as amicus curiae, that if the trial courts' analysis on the Ellis Act issue is upheld, it will have a serious adverse impact on the ability of the cities and counties to apply generally applicable land use controls totally unrelated to the preservation or loss of residential housing. In making these arguments, an obvious attempt is being made to blur the requirements of the HCO and the requirements of the City's planning code.

The present case does not concern the City's planning code or whether under the existing zoning laws and its nonconforming use provisions, Patel has the right to convert his residential units to tourist use. Whether the daily rental of motel rooms at the Beach Motel violates the City's planning code is the subject of a separate, contested adversarial proceeding in the City and County of San Francisco v. Patel, San Francisco Superior Court (1996) No. 981581. This case was not part of the underlying proceedings and it is not before us.[6] Instead, the issues in these appeals are limited to whether under the Ellis Act Patel could remove his property from the

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[6] The question of whether the Beach Motel is entitled to be recognized as a lawful, nonconforming use under the City's planning and zoning laws, as Patel has consistently maintained, could not possibly have been determined in these proceedings for the simple reason that no party to these proceedings has standing to enforce the City's planning and zoning restrictions. Local law vests exclusive authority to enforce the City planning code in the planning department and the City zoning administrator. (S.F. City Planning Code, § 176(b); S.F. Charter § 4.105). The City was not a party to the proceedings underlying these appeals.

HCO's residential use restrictions without first complying with its conversion requirements. While the City might have other grounds for denying or conditioning Patel's ability to rent to overnight guests, our sole determination here is that it cannot rely on the preempted provisions of its HCO to do so. Therefore, we do not address whether freeing the Beach Motel from the restrictions imposed by the HCO will entitle Patel to any particular replacement land use, nor do we exempt him from complying with all local planning and zoning laws, including compliance with all of the City's relevant approval processes. As in *Javidzad*, the invalidation of the HCO's conversion restrictions "in no way impairs the City's power to regulate the subsequent use of the property." (204 Cal. App. 3d at p. 531.)

To reiterate, there can be no serious question but that the requirements found in the City's HCO allowing Patel to withdraw residentially designated units from the housing market, such as providing replacement housing or paying an in-lieu fee to the City, are leverage devices to require him to remain in the residential housing business. The trial court in both underlying cases correctly saw these requirements for what they are – attempts to impose a prohibitive price on the exercise of rights under the Ellis Act. (*Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App. 3d at p. 531.) We therefore conclude the trial courts in both appeal No. A077469 and appeal No. A080669 correctly found the requirements set out in HCO sections 41.19, 41.20, 41.12, 41.13 and 41.14 preempted as in direct conflict with the Ellis Act.

B. Reconsideration of Order Dissolving 1991 Stipulated Injunction

Patel filed appeal No. A077469 based on Judge Cahill's order on reconsideration reinstating the parties' 1991 stipulated injunction prohibiting rentals at the Beach Motel for less than seven days except in narrowly defined circumstances. Patel claims that the order granting THC's motion for reconsideration and reinstating the injunction must be vacated because 1) Patel's 1996 Ellis Act filing entitled him to avoid compliance with the stipulated injunction's requirements that he rent only to long-term residential tenants; therefore, no legal basis existed

for keeping the injunction in place; and 2) the trial court was without jurisdiction to reconsider its original order dissolving the stipulated injunction because THC failed to support its motion for reconsideration with any "new or different facts, circumstances, or law" as required by Code of Civil Procedure section 1008.[7]

At the time Patel moved to dissolve the 1991 stipulated injunction, THC's enforcement action against Patel was pending but had not yet gone to trial. On November 13, 1996, the court granted Patel's motion to dissolve the permanent injunction and modify the judgment, based on changed circumstances due to Patel's formal withdrawal of the Beach Motel from the residential rental market under the Ellis Act. The court explained its ruling as follows: "At the time the stipulation judgment regarding the Beach Motel were entered, [Patel] had not yet invoked his rights under the Ellis Act, Government Code, § 7060. In June, 1996, [Patel] invoked the Ellis Act, and therefore [Patel] has chosen to refrain permanently from operating the Beach Motel as a residential hotel. [Citations.] In light of this change in circumstances, the court now finds that ends of justice would be served by dissolving the April 4, 1991, permanent injunction previously entered herein, and modifying the judgment accordingly." The court's reasoning fully comports with our own analysis of the Ellis Act preemption issue.

THC, joined by the City as amicus curiae, thereafter moved for reconsideration of the court's order, relying on a case that had been filed on November 25, 1996, by Division Four of

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[7] Code of Civil Procedure section 1008 provides, in pertinent part, the following: "(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party or written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order…[¶] (e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals or previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

the First Appellate District, *City and County of San Francisco* v. *Bullock* (1996) 50 Cal. App. 4th 1738 (*Bullock II*).[8] It was argued that the court's decision in *Bullock II* represented significant new authority because it "'defines the scope of the land use regulation preempted by the Ellis Act'" as not exempting the property owner from complying with generally applicable land use controls, such as those set out in the City's planning code, which are totally unrelated to the preservation of residential housing.

When the motion for reconsideration was argued in the trial court, the court's comments revealed its concern, based in part on the reasoning in *Bullock II*, that Patel might attempt to use his Ellis Act filing and the court's subsequent dissolution of the parties' stipulated injunction as support for the immediate rental to overnight guests in derogation of applicable zoning laws. It was also pointed out that preclusive effect of the judgment and stipulated injunction entered as a result of the parties' settlement of the 1991 action would be a central issue in the THC's pending enforcement action. With the injunction dissolved, the court was concerned that history would be erased. Upon reconsideration, the court stated, "I think dissolving the permanent injunction here was too drastic a step for me to take." The text of the court's order, granting "in part" THC's motion to reconsider the court's previous order dissolving the permanent injunction, reveals that the court was basically deferring the decision as to whether or not the injunction should be dissolved to the pending enforcement proceedings.

Patel's argument in appeal No. A077469, reduced to its essential elements, is that the court was without jurisdiction to reconsider its previous order dissolving the parties' stipulated injunction under Code of Civil Procedure section 1008 because the "new law" relied upon by THC was irrelevant and in any event, did not represent a significant change in the law justifying reconsideration.

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[8] The California Supreme Court subsequently denied review of *Bullock II* on February 19, 1997, however, the opinion was ordered not to be officially published.

As this division has repeatedly noted, "Section 1008 governs reconsideration of court orders whether initiated by a party or the court itself. 'It is the exclusive means for modifying, amending or revoking an order. *That limitation is expressly jurisdictional*.' [Citation.]" (Gilbert v. AC Transit (1995) 32 Cal. App. 4th 1494, 1499, italics added; see opinions from this division in *Pazderka* v. *Caballeros Dimas Alang, Inc*. (1998) 62 Cal. App. 4th 658,670; *Garcia* v. *Hejmadi* (1997) 58 Cal. App. 4th 674, 688; *Baldwin* v. *Home Savings of America* (1997) 59 Cal. App. 4th 1192, 1199.) The jurisdictional effect of Code of Civil Procedure section 1008 has been stated as follows: "According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon 'new or different facts, circumstances, or law.'" (*Gilbert* v. *AC Transit, supra*, 32 Cal. App. 4th at p. 1500.)

The decisions relied upon by THC in support of its argument that the provisions of section 1008 are not jurisdictional (*Gailing* v. *Rose, Klein & Marias* (1996) 43 Cal. App. 4th 1570, 1579; *Bernstein* v. *Consolidated American Ins. Co*. (1995) 37 Cal. App. 4th 763, 774) have been expressly found to be unpersuasive by this court. (See *Garcia* v. *Hejmadi, supra*, 58 Cal. App. 4th at pp. 691-692, fn. *; *Baldwin* v. *Home Savings of America*, *supra*, 59 Cal. App. 4th at p. 1200, fn. 9.)

Nevertheless, the jurisdictional prerequisites for granting a motion for reconsideration here were not met. THC's motion comported with "the clear legislative intent to restrict motions to reconsider to circumstances where a party offers the court some fact or authority that was not previously considered by it." (*Gilbert* v. *AC Transit, supra*, 32 Cal. App. 4th at p. 1500.) In support of its motion, THC presented a case that was recently decided and could not have been provided to the trial court prior to its initial ruling. (See *Baldwin* v. *Home Savings of America, supra*, 59 Cal. App. 4th at p. 1200 [motions for reconsideration based on different law subject to diligence requirement].) A trial court has broad discretion in determining what is or what is not a "change of law" warranting reconsideration under Code of Civil Procedure section 1008, which

should not be second-guessed at the appellate level. (*International Ins. Co*. v. *Superior Court* (1998) 62 Cal. App. 4th 784, 788.) Therefore, the court had jurisdiction under section 1008 to grant THC's motion for reconsideration and to reinstate the parties' stipulated injunction so that its continuing legal effect could be conclusively decided in THC's pending enforcement action.

As already noted, in the resolution of THC's 1995 enforcement action, the court found that "Patel may assert the Ellis Act as defense as of July 9, 1996" which, in practical effect, dissolved the parties' stipulated injunction as of that date. This leads to the obvious question of how Patel was aggrieved by the trial court's earlier order reinstating the parties' stipulated injunction on reconsideration pending the enforcement action. In attempting to describe how his interests were injuriously affected, Patel advances the dubious proposition that if the court's original order dissolving the parties' 1991 stipulated injunction had been allowed to stand, it would have mooted THC's pending claim that starting in 1991, he continually violated the HCO and the parties' injunction. He further asserts that if the stipulated injunction had remained dissolved, it would have had no preclusive effect in the pending enforcement proceeding.

We reject Patel's underlying assertion that his invocation of the Ellis Act in 1996 wholly nullified the 1991 judgment and related injunction. At most, as the trial court recognized, Patel's 1996 Ellis Act filing represented a change of circumstances so as to render dissolution of the injunction and modification of the judgment just and equitable *from that date forward*. We are unconvinced that Patel was entitled to escape any type of coercive sanction for violating the terms of the parties' injunction *up until that date*. A contrary ruling could effectively defeat the coercive function of injunctive orders. A party would be able to ignore injunctive orders and still avoid paying any fines or incurring other sanctions by a fortuitous change of circumstances prior to any action by the court on enforcement proceedings.

C. Preclusive Effect of Prior Judgment

The only issue in Patel's cross-appeal in appeal No. A080669[9] involves the preclusive effect of the 1991 judgment and related stipulated injunction. The trial court held that the 1991 stipulated injunction and judgment precluded relitigation of certain defenses. Specifically, the court found Patel was precluded by the prior judgment from arguing: 1) that the HCO facially violates substantive and procedural due process, 2) that Code of Civil Procedure section 1021 concerning attorney fees preempts the HCO's provision attorney fees, and 3) that Civil Code section 1954.27 concerning commercial rent control preempts HCO's conversion provisions.

However, the court held Patel was entitled to raise the affirmative defense that the Ellis Act preempts the HCO's conversion requirements. Patel did not exercise his right to withdraw the Beach Motel from the residential market pursuant to the Ellis Act until July 1996. therefore, the factual basis for this defense was not available to him in 1990, when the parties agreed to the stipulated judgment, and he was entitled to raise it in this new proceeding. We affirm the trial court's reasoning in all respects,[10] and in any event, determine that the arguments precluded by the trial court would not have altered the result of this proceeding.

The doctrine of res judicata bars the reassertion of issues "'which were raised or could have been raised, on matters litigated or litigable' [Citation.]" (*Henry* v. *Clifford* (1995) 32 Cal. App. 4th 315, 321' accord, *In re Marriage of Mason* (1996) 46 Cal. App. 4th 1025, 1028.) "In

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[9] As already noted, appeal No. A080669 primarily involves THC's appeal from the court's judgment after a nonjury trial on THC's 1995 enforcement action. THC's appeal basically challenges the trial court's conclusion that "[t]he Ellis Act clearly protects going out of the residential hotel business. Once out of this business, Patel is no longer subject to the HCO. [Citation.]" Our prior discussion of the Ellis Act preemption issue endorses the trial court's reasoning. We therefore reject the arguments made by THC in appeal No. A080669.

[10] We specifically endorse the trial court's finding that the prior judgment was final notwithstanding the facts 1) that it remained subject t to the inherent power of the court to modify its provisions; and 2) that appeal No. A077469 was pending at the time the consequences of the prior judgment were determined.

determining whether a matter is to be deemed decided by a prior judgment, the inquiry is whether the matter was within the scope of the prior action, and related to the subject matter and relevant to those issues, so that it could have been raised before. If so, the judgment is deemed conclusive on the matter even if it was not pleaded or argued. [Citation.]" (*Mobilehome West Homeowners Assn*. V. *Escondido Mobilepark West* (1995) 35 Cal. App. 4th 32, 48.) "'It is simply settled law that normally a stipulated judgment is given [res judicata] effect as to parties or their privies to the same extent as a judgment after a contested trial. [Citations.]'" (*Warga* v. *Cooper* (1996) 44 Cal. App. 4th 371,377, italics omitted; accord *Eichman* v. *Fotomat Corp*. (1983) 147 Cal. App. 3d 1170, 1177.)

Patel asserts that "[b]ecause the judgment and injunction were by way settlement and stipulation, the issues were not 'actually litigated," and the former judgment should have no preclusive effect in this case." As further explained in *Warga* v. *Cooper*, "'Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable.'" (44 Cal. App. 4th at pp. 377-378, quoting *Sutphin* v. *Speik* (1940) 15 Cal. 2d 195, 202.) Where, as here, a residential property owner enters into a judgment by which he agrees to limit the use of his property to long-term residential rentals, "that determination is binding in a subsequent action notwithstanding that a party may have failed to raise arguments against it which, if asserted, might have produced a different outcome. [Citations.]" (*Wittman* v.

Chrysler Corp. (1988) 199 Cal. App. 3d 586, 592; see also *Citizens for Open Access etc. Tide, Inc*. v. *Seadrift Assn*. (1998) 60 Cal. App. 4th 1053, 1064-1067.)

Accordingly, we agree with the trial court that the stipulated judgment precludes relitigation of issues that were actually raised in the pleadings of the first lawsuit, including Patel's defense that the HCO facially violated substantive and procedural due process. We also agree with the trial court that once the prior litigation was ended by the stipulated judgment, litigation was forever ended as to any defense which Patel *could have set up* to HCO's residential rental requirements, including the defense that Civil Code section 1954.27, the commercial rent control statute, preempts the restrictions imposed by the City's HCO. As the court noted, the commercial rent control statute was enacted in 1987, long before the parties entered into the 1991 stipulated judgment, therefore this defense was available during THC's first enforcement action if Patel had chosen to raise it.[11]

The trial court also noted Patel could have interposed his argument that the HCO's attorney fees provision (§ 41.20(e)) is preempted by Code of Civil Procedure section 1021 in the prior litigation, but he failed to do so. The trial court's written decision expressly mentions that "the stipulation signed by THC and Patel on April 9, 1991, which served as the basis of the [j]udgment, provided that Patel would pay $15,000 in attorney's fees…" Therefore, Patel had a full opportunity in the earlier action to present his Code of Civil Procedure section 1021 argument.

Moreover, we wholeheartedly agree with the trial court's conclusion that Patel was not barred from securing an adjudication of his claims relating to the preemptive effect f the Ellis Act. Although the Ellis Act was enacted in 1981, Patel did not avail himself of his right to invoke its protections until he gave formal notice to the City in July 1996. if subsequent events

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[11] Because we uphold the court's findings that Patel is barred from asserting this defense in these proceedings, this opinion omits any discussion of the commercial rent control statute, Civil Code section 1954.27, and its alleged preemptive effect on the City's HCO.

materially alter the facts underlying a stipulated judgment, a party is not precluded from pursuing fresh litigation. (See, e.g., *Landeros* v. *Pankey* (1995) 39 Cal. App. 4th 1167, 1174 [stipulated judgment in unlawful detainer action did not expressly preclude tenant in subsequent independent action from litigating issues of breach or warranty of habitability – unlawful detainer action did not involve breach over same time period involved in later action so tenant could not have raised the habitability issue in prior proceedings]. Patel's invocation of the Ellis Act on July 9, 1996, is a significant change in circumstance that justifies the court's revisiting the equities of continuing to impose the residential rental requirements of the HCO to the Beach Motel as required by the parties' stipulated judgment. As already noted, this defense proved successful and the trial court held that the HCO "as applied to Patel and the Beach Motel after July 9, 1996, is preempted by the Ellis Act." Consequently, the court ordered Patel to make restitution for violations of the HCO and the prior judgment only up until July 9, 1996, because after that date "Patel [was] no longer in the residential hotel business and thus need not comply with the HCO…"

As a practical matter, given our resolution of the issues in this appeal, it is difficult to see how the defenses excluded by the lower court would have altered the results of this proceeding. The issues Patel wished to litigate with regard to substantive and procedural due process and the preemptive effect f the commercial rent control statue were directed toward freeing his property from the use restrictions imposed by the HCO and the parties' stipulated judgment – something he successfully accomplished with his preemption argument based on the Ellis Act. The issue Patel wished to litigate with respect to Code of Civil Procedure section 1021 was designed to deprive THC of its right to attorney fees under the HCO – something the trial court itself did in completely denying THC's attorney fees request. Thus, in spite of the trial court's rulings, Patel achieved a favorable determination on all of the issues implicated by these barred defenses.

We briefly address the trial court's denial of Patel's motion for a new trial. In the motion for a new trial, Patel claimed there was "[n]ewly discovered, material evidence which bears directly on the issue of collateral estoppel,…" He submitted a supporting declaration claiming that the time he entered into the stipulated injunction in settlement of THC's 1990 enforcement action, he was still "formally represented by my counsel…" However, it was alleged that the date on the copy of the stipulation for entry of judgment for permanent injunction filed with the superior court was altered to appear as if the stipulated judgment was entered into on April 9, 1991, instead of April 5, 1991. Patel surmised that the alteration took place because on April 9, 1991, Patel substituted himself in pro per in place of his former counsel, whom he had discharged. Patel argues, "Despite the fact that Patel still had an attorney of record, THC obtained the stipulation directly from Patel. This fact raises serious doubts about the parties' manifest intent to be collaterally bound by the stipulated judgment." The court denied the motion for new trial, commenting "…I don't think a proper remedy is in this trial." This ruling is challenged on appeal.

A trial court's denial of a motion for new trial will not be disturbed on appeal unless a unmistakable abuse of discretion clearly appears. (*Stark* v. *City of Los Angeles* (1985) 168 Cal. App. 3d 276, 288.) As Witkin advises: "The presumptions on appeal are in favor of the order, and the appellate court does not independently redetermine the question whether an error was prejudicial, or some other ground was compelling. Review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on a strong affirmative showing of abuse of discretion. [Citations.]" (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 143, p. 644.)

We find no abuse of discretion. Patel does not dispute that the stipulation for entry of judgment for permanent injunction reflected his unmistakable intention to settle the lawsuit and enter into a binding agreement without the aid of his counsel. In fact, the stipulated judgment

contains the following language: "[Appellant] Bhazubhai C. Patel has had the opportunity to discuss the case and the Stipulation for Judgment with counsel. [Appellant] knowingly and voluntarily waives the right to be represented by counsel in this action, and [appellant] understands and freely agrees to the terms of this Stipulation for Judgment." The trial court could therefore have determined in its discretion that such evidence, even if new discovered, was not likely to produce a different result. (See *In re Marriage of Hasso* (1991) 229 Cal. App. 3d 1174, 1185.)

D. Belated Challenge to Monetary Award

In his reply brief in appeal No. A080669, Patel for the first time argues that the trial court's award of $31,169.36 to the City as "restitution of all unfair business practice from December 13, 1992 through July 9, 1996" was unjustified because there was no victim from whom a measurable amount had been wrongfully taken. (See Bus. & Prof. Code, § 17203.) Rulings made by the trial court which are not challenged in appellant's opening brief are deemed waived or abandoned and are not subject to review. (*In re Ricky H*. (1992) 10 Cal. App. 4th 552, 562; *Marketing West, Inc*. v. *Sanyo Fisher (USA) Corp*. (1992) 6 Cal. App. 4th 603, 607, fn. 1.) However, Patel claims this well-settled rule should not be applied here because the recent decision in *Day* v. *AT&T* (1998) 63 Cal. App. 4th 325 "changes the analysis in Unfair Practices Act cases."

We allowed the parties to submit further briefing to consider whether the *Day* opinion announced a new rule of law after Patel filed his opening brief, but before expiration of appellate jurisdiction, which would supply sufficient justification for Patel's failure to raise the issue in his opening brief. (*In re Marriage of Sheldon* (1981) 124 Cal. App. 3d 371, 382.) After consideration of the supplemental briefing, we concluded the *Day* opinion made no substantial change in the law affecting the restitution awarded in this case that would excuse Patel from not raising his challenge in a timely manner.

Day concerned a challenge against providers of telephone services alleging they had engaged in deceptive advertising practices by failing to disclose that telephone calls made with the prepaid telephone cards would be charged by rounding up to the next full minute. The *Day* court rejected a claim for disgorgement of profits resulting from this practice under Business and Professions Code section 17203 because the statutory scheme "operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice. (Day v. AT$T, supra, 63 Cal App. 4th at p. 339, original italics.) the court reasoned, "…[A] consumer who uses a prepaid phone card obtains the full value of what was paid for and therefore has given up nothing, regardless of whether he or she was improperly induced to purchase the card in the first place. Any attempt to calculate a monetary amount to be paid on behalf of those who purchased the cards would necessarily result in a refund or rebate of properly collected fees for services." (*Id.* at p. 340.)

We find nothing in the *Day* opinion that appears to be at variance with the broad and clear language of opinions, including recent opinions of our Supreme Court, sanctioning disgorgement of objectively measurable ill-gotten gains to a state or local governmental entity on behalf of a class of victims who were injured as a result of an unfair business practice. (See, e.g., *ABC Internat. Traders , Inc.* v. *Matsushita Electric Corp*. (1997) 14 Cal. 4th 1247,1268-1271.) In fact, the *Day* opinion specifically endorsed the case of *People* v. *Thomas Shelton Powers, M.D., Inc*. (1992) 2 Cal. App. 4th 330 (*Powers*), which is similar to the case reviewed here. (Day v. AT&T, supra, 63 Cal. App. 4th at p. 339.)

In *Powers*, suit was brought by the district attorney alleging certain property owners had committed unlawful business practices by selling condominium units designated as moderate income housing at a price in excess of that permitted by the City's subdivision code. In considering the legality of an order requiring the property owners to disgorge their illegal profits under Business and Professions Code section 17203, the *Powers* court rejected an argument

similar to the one made by here by Patel that, "a wrongdoer should be entitled to retain its illegal profits simply because there is no cognizable direct victim to be made whole." (Powers, supra, 2 Cal. App. 4th at p. 341.) The court stated: "[W]e find nothing in logic or in law supporting a theory that a wrongdoer should be entitled to retain its illegal profits simply because there is no cognizable direct victim to be made whole…[D]isgorgement [is] authorized so that illicit profits may be disgorged to some entity of party in a position to use it to correct, as much as possible, the harm wrought by the unfair practice…[T]he laws against unfair business practices were drafted in large part to prevent a wrongdoer from retaining the benefit of its illegal acts. That purpose would be frustrated if a party were entitled to retain its profits simply because it is difficult to specify the victim." (*Id*. at pp. 341-342.) We conclude this authority, which controls the issue attempted to be raised here, was extant at the time Patel's cross-appeal was taken. Therefore, Patel's belated challenge to the court's monetary award is not recognizable on appeal.

IV.

DISPOSITION

The judgment in both appeal No. A077469 and appeal No. A080669 are affirmed. Each party is to bear its own costs of appeal.

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Ruvolo, J.

We concur:

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Haerle, Acting P.J.

_____
Lambden, J.