S243042

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, a municipality,

Plaintiff and Respondent,

v.

SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al.,

Defendants and Respondents.

RIVER PARK HOSPITALITY,

Real Party in Interest and Respondent.

MORGAN HILL HOTEL COALITION,

Real Party in Interest and Appellant.

Case No. _____

Sixth Dist. No. H043426

Santa Clara Superior Court
Case No. 16-CV-292595

SUPREME COURT
FILED

JUL 10 2017

Jorge Navarrete Clerk

Deputy

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H043426
Superior Court, Santa Clara County
Case No. 16-CV-292595

RIVER PARK HOSPITALITY, INC.'S PETITION FOR REVIEW

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RESPONDENT RIVER PARK
HOSPITALITY, INC.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, a municipality, Plaintiff and Respondent, v. SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al., Defendants and Respondents.	Case No. _____ Sixth Dist. No. H043426 Santa Clara Superior Court Case No. 16-CV-292595
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River Park Hospitality, Inc. a California corporation ("River Park"), Real Party in Interest in the trial court and Respondent on appeal, respectfully petitions for review of the decision of the Sixth District Court of Appeal in *City of Morgan Hill v. Bushey* (2017) 5 Cal.App.4th 34 (issued May 30, 2017, Court of Appeal No. H043426), a copy of which is attached hereto.

I. QUESTION PRESENTED.

Must a city's voters be allowed to challenge by referendum a municipal zoning ordinance adopted in order to conform the city's zoning of property to its general plan where the result of the referendum, if successful, would be that the property's zoning is inconsistent with the city's general plan?

II. INTRODUCTION.

This case presents both of the grounds for review set forth in California Rules of Court Rule 8.500(b)(1): (1) the court of appeal's published decision creates a conflict in long-established case law, so that review is necessary to secure uniformity of decision, and (2) this case concerns legal questions of broad public importance, affecting the rights and powers cities and counties, property owners, and voters throughout California.

In its decision, the Sixth District expressly criticized, and declined to follow, the decision of Division Two of the Fourth District in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1212-1213. (Slip op. at ** 2, 7-8 ["We disagree with *deBottari* … ." "We must confront *deBottari*, as the superior court relied on it, and City continues to rely on it." "The Fourth District's reasoning in *deBottari* is flawed."]) The Sixth District also rejected the decision of Division Three of the Fourth District in *City of Irvine*

v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, stating that it "suffers from the same flaw" as *deBottari*. (Slip op. at * 8, n. 4.) The decisions in *deBottari, City of Irvine*, and in this case all addressed the question of whether a city must submit an otherwise qualified referendum to the voters where the result of the referendum, if successful, would be that a property's zoning is inconsistent with the city's general plan. The courts in *deBottari* and *City of Irvine* held that a city whose zoning is required to be consistent with its general plan may properly decline to present such a measure to the voters. In this case, the court of appeal held that such a city *must* do so. Review is therefore necessary to secure uniformity of decision in the published case law.

Moreover, because this case raises issues concerning the scope of the voters' right of referendum to exercise the legislative power on matters of local zoning, it involves legal questions of broad importance throughout California. Cities, counties, property owners, the voters, and the lower courts all deserve certainty in the law concerning the reach of the referendum power over land use and zoning. Review is thus also necessary to settle an important question of law.

For these reasons, and as discussed below, the Court should grant review of the court of appeal's decision in this case.

III. STATEMENT OF THE CASE

A. Factual Background

River Park owns a vacant parcel of land at 850 Lightpost Parkway in Morgan Hill. (Joint Appendix [JA], 60.) In November 2014, the City of Morgan Hill (City) amended its general plan to change the land use designation for River Park's parcel from "ML-Light Industrial" to "Commercial." (*Ibid.*) In April 2015 the City's city council approved

ordinance no. 2131 (O-2131), which would change the parcel's zoning from ML-Light Industrial to "CG-General Commercial," a zoning designation that was consistent with the amended general plan and that would permit a hotel on the parcel. (JA 60-61.) On May 1, 2015, the Morgan Hill Hotel Coalition (a Real Party in Interest in the trial court and Appellant in the court of appeal) submitted a referendum petition challenging O-2131. (JA 115, 119.) The stated purpose of the referendum, according to its proponent's ballot arguments, was to prevent the development of a hotel on River Park's parcel and to preserve industrial land. (JA 480-482.)[1] In July 2015, the City discontinued processing the referendum because it believed that it would enact zoning that was inconsistent with the City's general Plan. (JA 65, 69-99.) Later, in February 2016, the City called for a June 2016 special election to submit the referendum to the voters. (JA 65, 100-104.) It also authorized an action to have the referendum nullified as legally invalid and removed from the ballot. (JA 18.)

B. Procedural Background

In March 2016 the City filed a petition for a writ of mandate in the trial court seeking to remove the referendum from the June 2016 ballot. (JA 13.) On March 29, 2016, the trial court granted the City's petition. (JA 485.) Relying on *deBottari*, it ruled that the City had shown the invalidity of the referendum by demonstrating that "the current zoning in question is

[1] In its decision, the court of appeal described the purpose of the referendum solely as being solely to prevent the development of a hotel on the parcel. (Slip op. at **2-3.) In petitions for rehearing, both the City and River Park pointed out that a purpose of the referendum was also to preserve industrial uses. (City Petition for Rehearing, pp. 4-6; River Park Petition for Rehearing, pp. 4-5.) The court of appeal denied both rehearing petitions without comment. (See Order dated June 23, 2017, attached.)

inconsistent with the City's General Plan—and therefore presumptively invalid." (*Ibid.*) The trial court ordered the referendum to be removed from the ballot and that O-2131 be certified as duly adopted and effective. (JA 486.)

On appeal, the Sixth District reversed. It stated: "We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (Slip op. at * 2.) As noted, both the City and River Park filed petitions for rehearing challenging the court of appeal's factual recitation and reasoning. (Petitions for Rehearing.) The court of appeal summarily denied both petitions. (See Order of June 23, 2017.)

IV. ARGUMENT

A. Why Review is Necessary.

The Legislature has mandated that every county and city adopt a "comprehensive, longterm general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Government Code § 65300.)[2] The general plan is effectively the "constitution for all future developments" within the city or county. (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal. 3d 553, 570, citing *deBottari*, *supra*, 171 Cal.App.3d at 1212-1213 and other cases.) A fundamental requirement is

[2] Unless otherwise indicated, subsequent statutory references are to the Government Code.

that "[a] zoning ordinance shall be consistent with a city or county general plan … ." (Section 65860 (a).) "[T]he requirement of consistency … infuse[s] the concept of planned growth with the force of law." (*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal. 5th 141, 153, quoting *deBottari*, *supra*, 171 Cal.App.3d at 1213.) It is the "linchpin of California's land use and development laws … ." (*deBottari*, *supra*, 171 Cal.App.3d at 1213.) As this Court recently reaffirmed, "the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." (*Orange Citizens*, *supra*, 2 Cal.5th at 153.)

Over 30 years ago, Division Two of the Fourth District held in *deBottari* that a city could refuse to place before the voters a referendum challenging a zoning ordinance that the city had adopted in order to conform its zoning to its general plan, where the zoning of affected property had become inconsistent with the city's amended general plan by the general plan's amendment. In so holding, the *deBottari* court relied on Section 65860(a), which provides that "[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974." (*deBottari*, *supra*, 171 Cal.App.3d at 1211-1212.) The court concluded that the proposed referendum need not be submitted to the voters because its invalidity had been clearly and compellingly demonstrated. (*Id.* at 1212.) It reasoned that "[r]epeal of the zoning ordinance in question would result in the subject property being zoned to the low density residential use while the amended [general] plan calls for a higher residential density." (*Ibid.*) The court rejected the argument of the referendum's proponents that under Section 65860(c), which provides for a "reasonable time" within which an inconsistent zoning ordinance may be brought into conformity with an

amended general plan, the city was free to enact some alternative zoning scheme that would be consistent with the general plan. (*deBottari*, *supra*, 171 Cal.App.3d at 1212.)

Later, in *City of Irvine*, *supra*, 25 Cal.App.4th 868, Division Three of the Fourth District similarly held that a referendum that sought to repeal a consistent zoning ordinance in favor of inconsistent zoning was invalid. In doing so, the court in that case applied the rule of *deBottari* to a charter city that had adopted a requirement of general plan consistency in its municipal code.[3]

Over the years, this Court has relied on *deBottari* multiple times. For example, in *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544, the Court addressed the validity of an initiative measure in the nature of a zoning ordinance limiting municipal growth that was inconsistent with a city's general plan. Citing *deBottari*, the Court held that "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan." (*Id.* at 541.) See also *Citizens of Goleta Valley*, *supra*, 52 Cal. 3d at 572 [citing *deBottari* for the proposition that "the keystone of regional planning is consistency -- between the general plan, its internal elements, subordinate ordinances, and all derivative land-use decisions"]; *Orange Citizens*, *supra*, 5 Cal.5th at 153 ["[T]he requirement of consistency ... infuse[s] the concept of planned growth with the force of law"].)

[3] Although a general law city (such as the City) is subject to the provisions of the statewide zoning law, a charter city is not so bound unless it adopts such provisions by charter or ordinance. (*City of Irvine*, *supra*, 25 Cal. App. 4th at 875.)

In this case, the court of appeal explicitly confronted, and rejected, the holding of *deBottari.* As noted, it stated that "a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (Slip op. at *2.) The court of appeal's decision rested on its view of the effect of Sections 65860(a) and (c). It reasoned that "[t]he electorate may not utilize the *initiative* power to *enact* a zoning inconsistent with a general plan because section 65860 precludes enactment of a zoning that is inconsistent with a general plan." (Slip op. at *6.)(emphasis in original) But, the court of appeal continued, "[S]ection 65860 permits the *maintenance* of inconsistent zoning pending selection of a consistent zoning. (*Ibid.*)(emphasis in original) Therefore, according to the court of appeal, "[t]he electorate's exercise of its referendum power to reject or approve City's attempt to select a consistent zoning for the parcel simply continued that permitted maintenance of inconsistent zoning. The referendum does not seek to *enact* anything." (*Ibid.*)(emphasis in original) The court of appeal went on to characterize the reasoning of *deBottari* and *City of Irvine* as "flawed" because

> [U]nlike an initiative, a referendum cannot 'enact' an ordinance. A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate section 65860, which prohibits the enactment of an inconsistent zoning ordinance. Section 65860 does not automatically render invalid a preexisting zoning ordinance that becomes inconsistent only after a subsequent general plan amendment.

(Slip op. at *8.)

There is no avoiding the decisional conflict among the intermediate appellate courts that the court of appeal's decision in this case creates. The courts in *deBottari* and *City of Irvine* held that the electorate may not be presented with a referendum that offers a choice between zoning that is consistent with a city's general plan, on the one hand, and zoning that is inconsistent, on the other. The court of appeal in this case held that, in the face of an otherwise qualified referendum petition, the voters *must* be put to such a choice. The court of appeal in its decision takes *deBottari* and *City of Irvine* head on, and rejects their reasoning as flawed based on its own, differing interpretation of the effect of Sections 65860(a) and (c). (Slip op. at *8.) The court of appeal's decision overturns over 30 years of certainty in the case law. Review is thus necessary to secure uniformity of decision in the published case law.

The court of appeal's published decision in this case additionally warrants review because it concerns matters of broad public importance throughout California. The decision addresses the proper scope of the legislative power over land use and development when it is exercised not by local agencies but by the voters. Cities and counties as well as voters seeking to exercise the referendum power need to know the limits of that power to pass on ordinances adopted to conform the existing zoning of property to amended or newly adopted general plans. Moreover, as this Court said in *Lesher*, "persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act pursuant to the law, and courts must be able to ascertain a law's validity and to enforce it." (*Lesher*, *supra*, 52 Cal.3d at 544.) As a result of the decision in this case, it is now unclear whether or when cities and counties must place on the ballot referenda that would, if

successful, result in property being zoned inconsistent with a general plan. This case thus further implicates the interests of local governments and property owners in certainty in zoning.

The question that this case raises is one likely to recur, as it has been addressed three times so far in published decisions.

Finally, this case was decided as a matter of law on an undisputed record. The issue presented is one that is joined directly. The case is therefore an ideal vehicle to answer the question presented and to resolve the split of authority among the intermediate California appellate courts. There is no reason to delay resolving that conflict. Indeed, any such delay would be harmful because cities and counties, property owners, voters, and courts throughout California will not know which view of the law is correct and how to govern themselves accordingly. The Court should therefore grant review.

B. The Court of Appeal's Decision Should Be Reversed.

The court of appeal's decision in this case, including its rejection of *deBottari*, *supra*, 171 Cal.App.3d 1204 and *City of Irvine*, *supra*, 25 Cal.App.4th 868, rested on its conclusion that Section 65860 does not invalidate existing zoning that becomes inconsistent with a general plan as a result of the amendment of the general plan. The court of appeal reasoned that because Section 65860(c) permits the maintenance of inconsistent zoning for a reasonable time, the inconsistent zoning is not automatically rendered invalid. (Slip op. at *5.) However, the court of appeal's construction of Section 65860 is incorrect. It is unsupported by that statute's text and purpose. It is also at odds with this Court's view of the effect of that statute. It would additionally frustrate the policy of early certainty in land

use matters that the Planning and Zoning Law, Section 65000 et seq., embodies.

1. The Court of Appeal's Decision Rests on an Incorrect View of the Effect of Government Code Section 65680 When Zoning is Made Inconsistent by General Plan Amendment

In its decision, the court of appeal stated that "section 65860 only prohibits the enactment of an inconsistent zoning ordinance" whereas "[a] referendum that rejects an ordinance simply maintains the status quo." (Slip op at *8.) The court of appeal further stated that "[s]ection 65860 does not automatically render invalid a preexisting zoning ordinance that became inconsistent only after a subsequent general plan amendment." (*Ibid.*) Based on this conclusion, the court of appeal rejected as flawed the court's reasoning in *deBottari, supra,* 171 Cal.App.3d 1204, in which Division Two of the Fourth District held that a city need not present to the voters a referendum whose passage would result in property being zoned in a manner inconsistent with the city's general plan because the invalidity of the proposed referendum under Section 65860 had been "clearly and compellingly demonstrated." (*deBottari*, *supra*, 171 Cal.App.3d at 1212.) Instead, the court of appeal in this case ruled that "section 65860 permits the maintenance of inconsistent zoning pending selection of a consistent zoning" and "[t]he electorate's exercise of its referendum power to reject or approve City's attempt to select a consistent zoning for the parcel simply continued that permitted maintenance on inconsistent zoning." (Slip op at *6.)

However, on its face Section 65860 does not prohibit only the "enactment" of an inconsistent zoning ordinance, as the appellate court in this case suggested. (Slip op. at * 8 ["A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate section 65860,

which prohibits the *enactment* of an inconsistent zoning ordinance"].)(emphasis in original) Rather, Section 65860(a) simply provides generally that county or city zoning ordinances shall be consistent with the general plan of the county or city.

The fact that Section 65860(c) allows a city a "reasonable time" to make zoning consistent with a new or amended general plan does not mean that inconsistent zoning remains either valid or effective after the inconsistency arises. To the contrary, a general law city such as the City cannot allow a property to be developed in a manner that is inconsistent with the general plan at any time. As this Court recently stated, "[t]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements ... see §§ 65359 [requiring that specific plans be consistent with the general plan], 66473.5 [same with respect to tentative maps and parcel maps], 65860 [same with respect to zoning ordinances], 65867.5, subd. (b) [same with respect to development agreements]." (*Orange Citizens, supra,* 2 Cal.5th 141, 153.)(internal quotations and citations omitted). This overarching requirement that development be consistent with the applicable general plan means that zoning made inconsistent by a general plan amendment cannot be enforced once the inconsistency arises. Like the void zoning ordinance adopted by initiative in *Lesher*, which this Court held could not be given legal effect (*Lesher*, *supra*, 52 Cal.3d at 544), ML-Light Industrial zoning on River Park's parcel was also rendered without legal effect at the time it became inconsistent with the general plan because the property may no longer be developed for new industrial uses.

Moreover, "[t]he obvious purpose of [Section 65860] subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity

with a new or amended general plan, *not to permit development that is inconsistent with that plan.*" (*Lesher*, *supra*, 52 Cal. 3d 531, 546.)(emphasis added) This statement of Section 65860(c)'s procedural purpose cannot be read to suggest that development may be allowed under the inconsistent zoning until some "reasonable time" of uncertain length elapses. Instead, the purpose of Section 65860(c) indicates that, when a city or county adopts a new or amended general plan, the preemptive effect of Section 65860 operates immediately to make any newly inconsistent zoning ineffective as soon as the inconsistency arises. Thus, even if Section 65860(c) permits the maintenance of inconsistent zoning pending selection of consistent zoning, as the court of appeal concluded (slip op. at *6), the inconsistent zoning does not remain legally effective or enforceable in the meantime. A procedural provision such as Section 65860(c) should not be interpreted so as to nullify Section 65860(a)'s basic consistency requirement.

In addition, in *Lesher*, *supra*, 52 Cal.3d 531, 544, this Court addressed the preemptive effect of the Planning and Zoning Law on an initiative that sought to adopt a zoning ordinance inconsistent with a city's general plan. In holding the zoning ordinance to be invalid, the Court stated that "[a] zoning ordinance that conflicts with a general plan is invalid at the time it is passed." (*Lesher*, *supra*, 52 Cal. 3d at 544.) As noted, this Court cited *deBottari* for that proposition, even though *deBottari* had concerned the validity of a proposed referendum that offered a choice between consistent zoning and existing inconsistent zoning rather than an initiative seeking to adopt inconsistent zoning in the first instance. The Court in *Lesher* went on to state that "[t]he court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the

ordinance." (*Lesher*, *supra*, 52 Cal. 3d at 544.) The reasoning of *Lesher* as well as the purpose of the consistency requirement to ensure general plan supremacy in development matters should apply equally to both newly adopted inconsistent zoning, as in *Lesher*, as well as to zoning that becomes inconsistent when the general plan is amended, as in *deBottari* and in this case.

In its decision, the court of appeal pointedly stated that the zoning challenged by referendum was "one of a number of available consistent zonings." (Slip op. at 8.) However, the court of appeal did not explain why the purported existence of other available zonings should be significant to its analysis. Given the language of Section 65860 and its preemptive purpose, the existence of alternative consistent zonings should not bear on the proper interpretation of Section 65860 and its preemptive effect on existing zoning rendered inconsistent by a general plan amendment. As this Court stated in *Lesher*, "[t]he validity of the ordinance under which permits are granted, or pursuant to which development is regulated, may not turn on possible future action by the legislative body or electorate." (*Lesher*, *supra*, 52 Cal. 3d at 544.)

Nor can *deBottari* be distinguished from this case on the basis that the City's council had other zoning options. In *deBottari* the court rejected the referendum proponents' analogous contention that if the referendum was successful the city council was free to enact some alternative zoning scheme. (*deBottari*, *supra*, 171 Cal.App.3d at 1212.)

In addition, Section 65860's consistency requirement would presumably bar the City's city council from repealing O-2131 in favor of a zoning designation inconsistent with the City's general plan. Yet the court of appeal's decision in this case would countenance that same result, if the

legislative power were exercised not by the city council but by the voters. However, the local electorate's right to initiative and referendum "is generally co-extensive with the legislative power of the local governing body ... ." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776.) Therefore, the legislative power over local affairs should be circumscribed by Section 65860's consistency requirement in the same way, no matter whether it is exercised by the voters by referendum petition or by the voters' elected representatives.

And, although the local electorate's right to referendum may, like its power of initiative, be set forth in the California Constitution (*ibid.*), there is no point "in putting before the people a measure which they have no power to enact." (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697.) Indeed, "[t]he presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*Ibid.*) Such concerns arise equally regardless of whether the measure arises by initiative or referendum.

2. The Court of Appeal's Decision would Impede Well-Established Policies Promoting Early Certainty in Land Use and Zoning Matters and Lead to Far-Reaching, Harmful Results.

Finally, the court of appeal's reading of Section 65860 would increase uncertainty in zoning and land use, contrary to policies inherent in the Planning and Zoning Law. As this Court observed in *Lesher*, "persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act

pursuant to the law, and courts must be able to ascertain a law's validity and to enforce it." (*Lesher*, *supra*, 52 Cal.3d at 544.) The court of appeal's interpretation of Section 65860 would lock inconsistent zoning in place for months if not years pending a vote on a referendum challenging consistent zoning. During that time any property covered by the inconsistent zoning would be without any valid or effective zoning, and no new development would be permitted in the affected zone. And, should the voters reject a consistent zoning ordinance in favor of existing inconsistent zoning, one could imagine multiple referenda challenging successive attempts to adopt consistent zoning ordinances. The period of uncertainty may also be prolonged by the operation of Election Code section 9241, which prohibits a municipality from re-enacting "essentially the same" zoning for one year after a referendum.

The Planning and Zoning Law is replete with provisions intended to prevent extended uncertainty in the available uses of property. (See, e.g., Section 65860(b) [90-day limitations period for actions to enforce compliance with Section 65860's consistency requirement]; Section 65009 [90-day and one-year limitation period for certain actions or proceedings challenging local zoning and planning decisions; Section 66499.37 [90-day limitations period to challenge decisions concerning subdivisions].) The Court's interpretation of Section 65860 is at odds with this clear policy of early certainty in land use matters that the Planning and Zoning Law reflects. The court of appeal in this case erred in holding to the contrary.

In short—and irrespective of whether the City had available to it other consistent zoning that it might have adopted-- the referendum in this case is invalid because it offers voters only a choice between valid zoning and zoning that is without legal effect under Section 65860 because it is

inconsistent with the general plan. As such, the trial court could properly decline to allow it to be submitted to the voters. (*deBottari*, *supra*, 171 Cal.App.3d at 1210.)

V. JOINDER IN AND INCORPORATION BY REFERENCE OF PETITION FOR REVIEW OF CITY OF MORGAN HILL.

Pursuant to California Rules of Court Rule 8.504(e)(3), River Park joins in and adopts by reference the arguments of the City of Morgan Hill (City) in its Petition for Review.

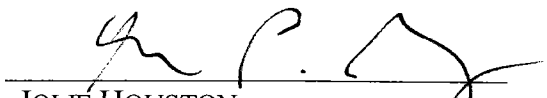
VI. CONCLUSION.

The court of appeal's decision creates a conflict in the decisional law. Moreover, it would affect the rights and powers of cities and counties, property owners, and voters across the state, and have far-reaching and harmful consequences. Therefore, the Court should grant review.

Dated: July 10, 2017

RESPECTFULLY SUBMITTED,

BERLINER COHEN

By 

JOLIE HOUSTON
THOMAS P. MURPHY
ATTORNEYS FOR REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY. INC.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 85204(d)(1), counsel for Respondent River Park Hospitality, Inc. states that, exclusive of this certification, the cover, and the tables, this Petition for Review contains 4,628 words, as determined by the word count of the computer program used to prepare the brief.

Dated: July 10, 2017

RESPECTFULLY SUBMITTED,

BERLINER COHEN

By _____
THOMAS P. MURPHY

Filed 5/30/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF MORGAN HILL,

Plaintiff and Respondent,

v.

SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al.,

Defendants and Respondents;

RIVER PARK HOSPITALITY,

Real Party in Interest and Respondent;

MORGAN HILL HOTEL COALITION,

Real Party in Interest and Appellant.

No. H043426
(Santa Clara
Super. Ct. No. CV292595)

Appellant Morgan Hill Hotel Coalition (Coalition) appeals from the superior court's order granting a mandate petition brought by respondent City of Morgan Hill (City) and removing from the June 2016 ballot Coalition's referendum challenging City's ordinance changing the zoning for a parcel owned by respondent River Park Hospitality (River Park). Although Coalition's referendum had properly qualified for placement on the ballot, City claimed that the referendum was invalid because, if the electorate rejected the ordinance, it would *create* an inconsistency between the zoning for the parcel and the

general plan's land use designation for the parcel. On appeal, Coalition contends that a referendum that seeks to prevent a zoning change from taking effect does not *create* an inconsistency with a general plan's land use designation but merely maintains the preexisting status quo. The superior court relied on *deBottari v. City Council* (1985) 171 Cal.App.3d 1204 (*deBottari*) in rejecting Coalition's position. We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning.

I. Background

This case concerns a vacant parcel at 850 Lightpost Parkway in Morgan Hill owned by River Park. The land use designation for this parcel in City's general plan was "Industrial" until November 2014. In November 2014, City amended its general plan to change the land use designation for this parcel to "Commercial."[1] The parcel's zoning was "ML-Light Industrial" before the November 2014 general plan amendment and remained unchanged after the general plan amendment.

In April 2015, City's city council approved Ordinance no. 2131 (O-2131). O-2131 would have changed the parcel's zoning from ML-Light Industrial to "CG-General Commercial." The "General Commercial" zoning would have permitted a hotel on the parcel. "General Commercial" is just one of a number of commercial zoning districts in City. On May 1, 2015, Coalition submitted a timely referendum petition challenging O-2131. The stated purpose of the referendum was to prevent the

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[1] City's general plan recognizes three different commercial land use designations: Commercial, General Commercial, and Non-Retail Commercial.

development of a hotel on the parcel. On May 20, 2015, City adopted a resolution accepting a certificate of sufficiency as to the referendum. In July 2015, City "discontinue[d] processing" the referendum because City believed that the referendum "would enact zoning that was inconsistent with" City's general plan. City nevertheless recognized that it could change the parcel's zoning to "Highway Commercial" rather than "General Commercial" and be consistent with the general plan's "Commercial" land use designation for the parcel.

In February 2016, City reconsidered its position. It passed a resolution calling for a June 2016 special election to submit the referendum to the voters. At the same time, it authorized the filing of an action to have the referendum "nullified as legally invalid and removed from the ballot." City filed this action in March 2016 seeking to remove the referendum from the June 2016 ballot.

On March 29, 2016, the superior court, relying on *deBottari*, granted City's petition. It found that City had established the "invalidity" of the referendum by showing that "the current zoning in question is inconsistent with the City's General Plan—and therefore presumptively invalid." The court ordered that the referendum be removed from the ballot and that O-2131 be certified "as duly adopted and effective immediately . . . ." Coalition timely filed a notice of appeal on April 1, 2016.[2]

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[2] River Park claims that the notice of appeal is flawed because it states that the appeal is from a March 30 order, rather than a March 29 order, and it identifies the case number as "16CV292295" instead of "16CV292595." The latter claim is incorrect. The copy of the notice of appeal in the clerk's transcript (which is file-stamped) correctly identifies the case number as "16CV292595." A copy of the notice of appeal (which is not file-stamped) in the joint appendix misstates the case number as "16CV292295." Because the filed copy of the notice of appeal has the correct case number, it is not flawed in this respect. The superior court's order was dated March 28 and filed on March 29. It is true that the notice of appeal states that the appeal is from a "March 30, 2016" order, but River Park admits that it was not misled by this slight error.

II. Analysis

The parties agree that we exercise de novo review because the facts are undisputed and the only issue is one of law.

"The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9.) "The referendum process allows the voters to veto statutes and ordinances enacted by their elected legislative bodies before those laws become effective. [Citation.] Referenda do not enact law and may not address certain subjects. In contrast, the electorate may legislate on any subject by initiative." (*Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 157-158.) If a referendum petition challenging an ordinance is timely filed and certified to be sufficient, "the effective date of the ordinance shall be suspended and the legislative body shall reconsider the ordinance." (Elec. Code, § 9237.) "If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters . . . . The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it. If the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body

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"The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) "[N]otices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) Since the superior court issued no order in this case on March 30, respondents could not possibly have been misled or prejudiced by this slight flaw in the notice of appeal. We reject River Park's challenges to the validity of the notice of appeal.

or disapproval by the voters." (Elec. Code, § 9241; see *Rossi v. Brown* (1995) 9 Cal.4th 688, 697.)

"[T]he rezoning of land is a legislative act [citation] subject to referendum [citation]." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 570.) "A zoning ordinance shall be consistent with a city or county general plan . . . ." (Gov. Code, § 65860, subd. (a).)[3] "A zoning ordinance that conflicts with a general plan is invalid at the time it is passed." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544 (*Lesher*).) However, "[i]n the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended." (§ 65860, subd. (c).) "The obvious purpose of subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan . . . ." (*Lesher*, at p. 546.)

In this case, City's ML-Light Industrial zoning for the parcel did not automatically become invalid in November 2014 because that zoning was consistent with City's general plan prior to the general plan amendment. Instead, City had "a reasonable time" under section 65860, subdivision (c) to amend the zoning of the parcel to make it consistent with the general plan. O-2131 was City's attempt to do so. The question before us is whether the voters could validly utilize the power of referendum to reject City's chosen method of making the parcel's zoning consistent with the general plan.

"[T]he local electorate's right to initiative and referendum is guaranteed by the California Constitution . . . and is generally co-extensive with the legislative power of the local governing body. . . . [¶] . . . [However,] the initiative and referendum power [cannot] be used in areas in which the local legislative body's discretion [is] largely

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[3] Subsequent statutory references are to the Government Code unless otherwise specified.

preempted by statutory mandate." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776.)

City claims that the electorate's referendum power cannot be used to reject O-2131, because City's discretion with respect to the zoning of the parcel was preempted by section 65860's mandate that the parcel's zoning be consistent with City's general plan. The problem with this argument is that section 65860 did not require City to adopt O-2131. It preempted City from enacting a new zoning that was inconsistent with the general plan, but it did not preclude City from exercising its discretion to select one of a variety of zoning districts for the parcel that would be consistent with the general plan. Since City retained this discretion, section 65860 did not preclude the electorate from exercising its referendum power to reject City's choice of zoning district in O-2131.

City puts misplaced reliance on cases concerning the *initiative* power. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 919 [initiative]; *Lesher, supra*, 52 Cal.3d at p. 541 [initiative]; *Legislature v. Eu* (1991) 54 Cal.3d 492 [initiative]; *Mervynne v. Acker* (1961) 189 Cal.App.2d 558 [initiative].) The electorate may not utilize the *initiative* power to *enact* a zoning inconsistent with a general plan because section 65860 preludes enactment of a zoning that is inconsistent with a general plan. (*Lesher*, at p. 541.) However, section 65860 permits the *maintenance* of inconsistent zoning pending selection of a consistent zoning. Here, City permissibly maintained the inconsistent zoning of the parcel after the November 2014 amendment of the general plan. The electorate's exercise of its referendum power to reject or approve City's attempt to select a consistent zoning for the parcel simply continued that permitted maintenance of inconsistent zoning. The referendum does not seek to *enact* anything. Since it is undisputed that City could have selected any of a number of consistent zoning districts to replace the parcel's inconsistent zoning, section 65860 did not preclude City or the electorate from rejecting the one selected by City in O-2131.

We must confront *deBottari*, as the superior court relied on it, and City continues to rely on it. In *deBottari*, the City of Norco amended its general plan to change the land use designation for a parcel "from residential/agricultural (0-2 units per acre) to residential-low density (3-4 units per acre)." Two weeks after the general plan amendment, Norco adopted an ordinance to rezone the parcel "from 'R-1-18' to 'R-1-10.'" The new zoning ordinance changed the minimum lot size required for single family homes on the parcel from 18,000 square feet to 10,000 square feet, which was consistent with the general plan amendment. (*deBottari*, *supra*, 171 Cal.App.3d at pp. 1207-1208.) A timely and sufficient referendum petition was submitted challenging the zoning change. However, Norco refused to repeal the zoning change or place the referendum before the voters because it claimed that the repeal of the zoning change "would result in the subject property being zoned inconsistently with the amended general plan, contrary to Government Code section 65860, subdivision (a)." The proponents of the referendum unsuccessfully challenged Norco's refusal in the superior court and then appealed to the Fourth District Court of Appeal. (*deBottari*, at p. 1208.)

On appeal, the Fourth District concluded that "the invalidity of the proposed referendum has been clearly and compellingly demonstrated" by the existence of section 65860. (*deBottari*, *supra*, 171 Cal.App.3d at p. 1212.) The Fourth District reasoned: "Repeal of the zoning ordinance in question would result in the subject property being zoned for the low density residential use while the amended plan calls for a higher residential density." It rejected the proponents' argument that section 65860, subdivision (c) permitted Norco to "enact some alternative zoning scheme which is consistent with the general plan" if the voters rejected the zoning change. (*Ibid.*) "Unfortunately, all of the options offered by plaintiff beg the question of whether the voters, *ab initio*, have the right to enact an invalid zoning ordinance. Clearly, section 65860, subdivision (c), was enacted to provide the legislative body with a 'reasonable time' to bring zoning into *conformity* with an amended general plan. It would clearly distort the purpose of that

provision were we to construe it as affirmatively sanctioning the enactment of an *inconsistent* zoning ordinance." (*Id.* at pp. 1212-1213.) The Fourth District concluded that Norco had properly refused to submit the referendum to the voters. "[T]he referendum, if successful, would enact a clearly invalid zoning ordinance. Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts." (*Id.* at p. 1213.)

The Fourth District's reasoning in *deBottari* is flawed.[4] As we have already explained, unlike an initiative, a referendum cannot "enact" an ordinance. A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate section 65860, which prohibits the *enactment* of an inconsistent zoning ordinance. Section 65860 does not automatically render invalid a preexisting zoning ordinance that became inconsistent only after a subsequent general plan amendment. Where, as here, an ordinance attempts to resolve that inconsistency by replacing the inconsistent zoning with a consistent zoning that is just one of a number of available consistent zonings, the legislative body is free to choose one of the other consistent zonings if the electorate rejects the legislative body's first choice of consistent zonings.[5] The new zoning ordinance will be valid, notwithstanding the referendum, so long as "the new measure is 'essentially different' from the rejected provision and is enacted 'not in bad faith, and not with intent to evade the effect of the referendum petition' . . . ." (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 678.) Consequently, the existence of section 65860 does not establish the invalidity of Coalition's referendum.

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[4] The Fourth District's decision in *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, which simply relied on *deBottari*'s rationale, suffers from the same flaw. (*Id.* at pp. 874-875.)

[5] We express no opinion on the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan.

III. Disposition

The superior court's order granting City's petition is reversed. On remand, the superior court is directed to enter a new order denying City's petition. Coalition shall recover its costs on appeal.[6]

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[6] In its reply brief, Coalition requests attorney's fees under Code of Civil Procedure section 1021.5. Coalition has not filed a motion for attorney's fees or any supporting documentation. Appellate attorney's fees may be sought by motion in the trial court. (Cal. Rules of Court, rule 3.1702(c).)

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Theodore C. Zayner
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Court of Appeal, Sixth Appellate District
Daniel P. Potter, Clerk/Administrator
Electronically FILED on 6/23/2017 by B. Miller, Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CITY OF MORGAN HILL,
Plaintiff and Respondent,
v.
SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc. et al.,
Defendants and Respondents;
MORGAN HILL HOTEL COALITION,
Real Party in Interest and Appellant;
RIVER PARK HOSPITALITY,
Real Party in Interest and Respondent.

H043426
Santa Clara County No. CV292595

BY THE COURT*:

Respondents' City of Morgan Hill and River Park Hospitality's petitions for rehearing are denied.

Dated 06/23/2017 _____ Acting P.J.

*Before Elia, Acting P.J., Bamattre-Manoukian, J., and Mihara, J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, a municipality, Plaintiff and Respondent, v. SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al., Defendants and Respondents.	Case No. _____ Sixth Dist. No. H043426 Santa Clara Superior Court Case No. 16-CV-292595
RIVER PARK HOSPITALITY, Real Party in Interest and Respondent. MORGAN HILL HOTEL COALITION, Real Party in Interest and Appellant.	

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H043426
Superior Court, Santa Clara County
Case No. 16-CV-292595

CERTIFICATE OF SERVICE

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CITY OF MORGAN HILL V. SHANNON BUSHEY, ET AL./MORGAN HILL HOTEL COALITION VS. RIVER PARK HOSPITALITY, INC.

COURT OF APPEAL SIXTH APPELLATE DISTRICT CASE NO. H043426

SANTA CLARA SUPERIOR COURT CASE NO. 16-CV-292595

PROOF OF SERVICE

I, Debra Troy, declare under penalty of perjury under the laws of the United States that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, and my business address is Ten Almaden Boulevard, Suite 1100, San Jose, California 95113-2233. On JULY 10, 2017, I served the following document(s):

RIVER PARK HOSPITALITY, INC.'S PETITION FOR REVIEW

in the following manner:

		by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, from the sending facsimile machine telephone number of (408) 938-2577. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.
X		by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.
		Or by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below, as indicated.
		by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
		by e-mail or electronic transmission. I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

CLERK OF THE COURT OF APPEAL COURT OF APPEAL, SIXTH APPELLATE DISTRICT 333 W. SANTA CLARA STREET SAN JOSE, CA 95113	CLERK OF THE SUPERIOR COURT SANTA CLARA SUPERIOR COURT 191 N. FIRST STREET SAN JOSE, CA 95113
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I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business. Executed on July 10, 2017, at San Jose, California.

Debra Troy