IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, Plaintiff and Respondent, v. SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al., Defendants and Respondents;	Case No. S243042 Sixth Dist. No. H043426 Santa Clara Super. Ct. No. 16-CV-292595
RIVER PARK HOSPITALITY, Real Party in Interest and Petitioner; MORGAN HILL HOTEL COALITION, Real Party in Interest and Respondent.	

REPLY BRIEF OF PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL

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INTRODUCTION

This case is not about what Appellant Hotel Coalition thinks it is. It has nothing to do with the right to referendum writ large: whether zoning is subject to the referendum power (it is), or whether the voters have the right to a referendum when the city council chooses one among a series of legislative possibilities (they do), or whether the People's reserved legislative power is co-extensive with that of the legislative body (it is). Rather, this case turns on a question of state-law preemption that arises on the facts present here: whether the voters can repeal the current, fully enacted zoning ordinance in favor of its predecessor, when the predecessor ordinance conflicts with state law. No, they cannot.

An enacted ordinance is the law, and it can only be changed by amendment or repeal. Both the city council and the local electorate hold those legislative powers, but neither may use its power to contravene state law. Here, that is exactly the result that would flow from a successful referendum, which is why it must be removed from the ballot. Were the voters to repeal Ordinance No. 2131, they would necessarily restore its predecessor ordinance in its place, and that ordinance is no longer consistent with state law. For this reason, both the electorate and the city council can amend the existing ordinance, but neither can simply repeal it.

Government Code section 65860, subdivision (a) requires without exception that zoning be consistent with the governing general plan. Zoning that is not consistent with the general plan is invalid as a legal matter, and ineffective as a practical matter: all subsequent decisions about the permitted use of the property require that the use also be consistent with the general plan and the zoning designation. (*Resource Defense Fund v. City of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.) Where the zoning is itself inconsistent with the general

plan, there is no proposed use that can satisfy both requirements, and all possible development is stymied.

Yet that is the precise effect that the proposed referendum would have. And worse: this referendum would not only restore inconsistent zoning, but affirmatively

prohibit the City from adopting lawful, consistent zoning for a full year thereafter. Appellant argues, and the lower court assumed that disapproving the current ordinance by referendum would do no more than send the city council right back to the drawing board, where it would choose a different commercial zoning designation that would bring its zoning back into compliance with the general plan, just without allowing hotels. But that is not what would happen. For a full year after the election, the city council would be legally prohibited from enacting any zoning ordinance that meaningfully conflicted with the voters' reasons for disapproving the initial ordinance. In this case, although the Hotel Coalition now denies it, the record shows that this referendum, as presented to the voters, has the affirmative intent to preserve industrial zoning in addition to prohibiting hotel use. Accordingly, if the referendum succeeded, it would not only restore invalid and ineffective zoning, but impose a year-long de facto moratorium on commercial zoning, which is the only zoning consistent with the general plan. Forcing the City to forego functional zoning for such a long period seems like the very definition of "unreasonable" time. No matter which way the Court turns it, this referendum should not be permitted to stand.

ARGUMENT

Just as a legislative body cannot repeal an ordinance and revive an unlawful predecessor ordinance without curing the latter's illegality, neither can the electorate use its legislative power in that manner. Nothing Appellant has said in its brief, and nothing Appellant could say, changes that.

I. THE VOTERS LACK THE POWER TO REPEAL THE EXISTING ZONING ORDINANCE AND RESTORE ITS PREDECESSOR, WHICH NO LONGER COMPLIES WITH STATE LAW.

This Court has already held that the preemptive effect of state law precludes the local electorate from exercising its initiative power to enact a zoning ordinance that conflicts with its general plan, in violation of Government Code section 65860. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 547.) The same problem arises, and the same result obtains, when the electorate uses its referendum power to repeal an amended zoning ordinance in favor of a predecessor ordinance that conflicts with the general plan.

To try to avoid this conclusion, the Hotel Coalition argues that if the referendum proceeds and the local electorate disapproves Ordinance No. 2131, the voters will not really be exercising a legislative power to change the law. Rather, they will just fail to approve a "proposed ordinance," and it will not become law as a result. (Appellant's Br. at 38-39.) On this view, the industrial zoning remains undisturbed, but the voters' referendum will not have caused the state law conflict. That is not how the referendum power works.

A. The Subject Of A Referendum Is An Ordinance That Has Already Become Law.

Despite Appellant's assertion to the contrary, laws subject to the People's referendum power have not merely been proposed, but adopted as law. As this Court has made unmistakable, "the constitutional referendum is not part of the enactment process in the Legislature, but operates after that process has done its work and has produced a statute enacted by a bill passed by the Legislature. For the same reason such a statute requires no approval by the voters to become law: it will automatically take effect unless a timely referendum petition is filed." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 241 [internal quotation marks omitted].)

Article II, section 11 of the Constitution extends the referendum power to matters of local government, where the subject of a referendum is an enacted ordinance rather than a statute. Section 9237 of the Elections Code describes a local referendum petition as "protesting the adoption of an ordinance," not "proposed ordinance" still awaiting enactment. And should the Hotel Coalition have any lingering doubt on this point, a referendum proponent is required to print "Referendum Against an Ordinance Passed by the City Council" at the top of each page of its referendum petition. (Elec. Code § 9238, subd. (a).) The Hotel Coalition's own petition says exactly that. (Joint Appendix ("JA"), Vol. I, 119.)

B. A Successful Referendum Is A Voter Repeal That Restores The Predecessor Ordinance.

Where a law has already been enacted, it will remain the law unless it is repealed. Accordingly, when the electorate disapproves an ordinance, it does not merely avoid its enactment, but instead exercises its power of repeal. (See, e.g., *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035, fn. 3 [a referendum is a voter repeal].) A legislative body must likewise use its repeal power to unseat a law it has already adopted, including when it has a received a referendum petition but would rather not submit its ordinance to the voters. (Elec. Code § 9241.)

The Hotel Coalition relies on *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765 to support its claim that a successful referendum merely prevents a legislative act from becoming law, akin to exercising a veto, and is not a repeal. The relevant passage in that case provides:

> The power of referendum is simply *not* the power to *repeal* a legislative act. Under the 1911 amendment, the power was to "'adopt or reject any act, or section or part of any act, passed by the Legislature.'" [citation] Under current article II, section 9, "'The referendum is the power of the electors to approve or reject statutes. . . .'" The power is the same as the Legislature's approval of a bill. (*Assembly* v. *Deukmejian, supra*, 30

> Cal.3d at p. 656.) The power is to determine whether a legislative act should *become* law. (*Ibid.*) It is not to determine whether a legislative act, once effective, should be repealed.

(*Id.* at pp. 780-781 [emphasis in original].) *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, upon which the *Midway Orchards* court relied, provides this further explanation:

> The referendum is the power of the electors to approve or reject statutes. . . ." (Cal. Const., art. II, § 9, subd. (a).) As the Secretary of State has pointed out, "In a Referendum, Voters are asked to Approve the Bill which the Legislature has enacted ('Yes' Vote) or to Disapprove ('No' Vote). . . . The question which is put to the voters is 'Shall (the bill) Become Law? (Yes or No).'" (Memo. from Sect. of State's office to county clerks and registrars of voters (Sept. 24, 1981).) Approval of the referendum is approval of the bill."

(*Ibid.* at 656.)

These discussions are plainly contrary to the governing constitutional and statutory language, as well as this Court's explanation of the referendum power in *Guardino*, *supra*, 11 Cal.4th at 241, but only because they are imprecise. In these cases, each court sought to make the point that the law under its consideration was stayed prior to a referendum election and therefore was not yet in effect, but each conveyed this correct conclusion with an incorrect formulation, mistaking the effect of a stay for incomplete enactment. Because of this error, and in light of the weight of contrary authority, neither can serve as persuasive authority for the Hotel Coalition's argument that the voters, if they reject Ordinance No. 2131, are merely declining to change the law. They are doing the opposite: repealing the law as it already exists.

C. The Stay On The Effective Date Of The Referended Ordinance Merely Creates The Appearance Of Maintaining The Status Quo, When In Fact The Voters Are Using Their Repeal Power To Restore The Status Quo Ante.

The Hotel Coalition also argues that a voter repeal merely maintains the status quo, because the repealed ordinance was stayed when the referendum petition was filed and therefore never took effect. But staying the effective date of an ordinance subject to referendum, as required by Elections Code section 9237, does not alter the fact that a voter repeal is an affirmative exercise of legislative power that the voters cannot undertake when that changes the law.

Staying an ordinance does not affect its validity. Rather, a stay merely maintains the status quo as a practical matter while the underlying legal relationships get decided. (*County of Sacramento v. Superior Court* (1982) 137 Cal.App.3d 448, 455-56 [noting that stay of enforcement of an ordinance preserves the status quo until the underlying merits can be adjudicated].) Thus, while the stay may give the appearance that nothing has changed, in fact the status quo changes markedly when the voters pass a referendum, because they thereby repeal the current law in favor of its predecessor.

D. The People And The City Council Have The Same Legislative Discretion And Face The Same Limitations On Its Exercise.

The Hotel Coalition complains throughout its brief that removing the referendum from the ballot will unlawfully deprive the electorate of the full scope of legislative power enjoyed by the city council. It argues that the city council's discretionary ability to choose among various commercial zoning options leads inexorably to the conclusion that the local electorate must have the same discretion to reject the council's "first choice of zoning" and return the issue to the council to make a different choice. This argument both depends upon a false equivalency and, more important, fails to engage the actual issue.

The City agrees entirely that the local electorate enjoys the same full sweep of legislative power as does its representative body. Each could, and the council did, choose among the available zoning designations that are consistent with the general plan and enact the one they thought best.[1] The issue here has a finer point, because the power to make a choice and the power to reject that choice are not the same. While both the Council and the electorate have co-extensive power to do the former, they also face the same restrictions on their power to do the latter. Neither body can reject the ordinance and reinvigorate the prior, unlawful ordinance, at least not without amending it to conform to state law. If there is an actual disparity between the legislative authority granted to the People and the city council in this case, the Hotel Coalition has not identified it.

II. THE REFERENDUM AT ISSUE IN THIS CASE WOULD MAKE IT IMPOSSIBLE TO ENACT A LAWFUL, OR EVEN JUST A FUNCTIONAL ZONING ORDINANCE WITHIN A "REASONABLE TIME."

The Hotel Coalition also seeks to support its referendum by arguing that a successful referendum would merely set the City back to zero, and the city council could still—within the "reasonable time" contemplated by subdivision (c) of Government Code section 65860—provide for lawful, consistent zoning by enacting any of the remaining commercial zoning designations that do not permit hotel use. This is misleading.

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[1] The Coalition's claim that there were a "dozen" available zonings is incorrect, because a legally valid zoning designation must be consistent with all of the applicable legal requirements, and most of the commercial zoning choices are not available for the particular property under the Municipal Code. Appellant misconstrues the City's point as an assertion that a referendum is barred because the City had no choice but to enact the ordinance it did, rendering the zoning choice an administrative rather than legislative act. That is incorrect. The City agrees that the zoning decision was an exercise of legislative discretion that would normally be subject to referendum.

Election Code section 9241 prohibits a legislative body from re-enacting a disapproved ordinance, or any other ordinance inconsistent with the intent of the referendum, for one year after a referendum election. (*Rubalcava v. Martinez* (2007) 158 Cal. App. 4th 563, 573.) The Hotel Coalition is not candid when it insists in its brief that the only purpose of the referendum is to prevent hotel use. (Appellant's Br. at 32.) It has no evidence that this is so, and in fact cites only to its prior arguments, which assert that the referendum has twin purposes: to prevent development of another hotel, and to preserve industrial zoning in an effort to attract large employers. (E.g., JA, Vol. II, 383.) But the Hotel Coalition's description of its own intent, even if it were fully candid, is not controlling in determining which ordinances the city council could enact following the referendum election. Rather, the intent of the voters would control. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7 [explaining that the proponent's intent may be considered only in the absence of other indicia of voter intent, such as the ballot arguments].)

Accordingly, a court would determine voter intent with reference to the ballot measure argument that the Hotel Coalition submitted to the City to be included in the voter information materials for the referendum election. (JA, Vol. II, 480.) The ballot argument begins: "VOTE NO because industrial land is scarce in Morgan Hill." (*Id.* at 482.)

It urges that Morgan Hill needs industrial zoning to attract more technology and manufacturing jobs, and even claims that the desire to keep an industrial zoning designation is what motivated voters to sign the referendum petition. (*Ibid.*) From the vantage point of the Hotel Coalition's business interests, it makes sense that it would want to attract more large employers to fill its existing hotel rooms on weeknights as well as block development of a competitor's hotel. As it wrote in its presentation to the city council when the council was considering Ordinance No. 2131, "Office or industrial complex

with Fortunate [sic] 500 tenant is ideal." (Morgan Hill Hotel Coalition Presentation, dated March 18, 2015, attached as Exhibit A to Plaintiff And Respondent City Of Morgan Hill's Motion For Judicial Notice In Support Of Its Reply Brief, filed herewith.) These twin interests likewise shed light on the Hotel Coalition's preference for pursuing this referendum, which would restore industrial zoning, rather than an initiative, which it could pursue to amend the city council's choice of zoning to a different commercial zoning designation preferred by the voters.

Accordingly, the Hotel Coalition's argument that this referendum would allow the city council to turn around and enact other commercial zoning is subterfuge. There is no commercial zoning that would be consistent with the electorate's understanding that the referendum would preserve industrial zoning. Rather, this referendum would act as a one-year moratorium on consistent zoning, and prevent any possible development whatsoever. That does not fit the definition of "reasonable time" in Government Code section 65860(c), and the Court should not countenance that result.

III. PERMITTING THIS REFERENDUM TO REMAIN ON THE BALLOT WOULD CONTRAVENE THE PUBLIC INTEREST.

Although it asks that the referendum be removed from the ballot, the City itself has no stake in the ultimate zoning designation of the parcel. It is not before the Court seeking to "rezone the land for the benefit of a real estate speculator." (Appellant's Br. at 9) Whether the parcel is zoned commercial or industrial or something else is for the policymakers—whether the electorate or their representatives on the city council—to decide. Rather, the City's interest is in safeguarding its proper functions as a local government: giving effect to the lawful decisions of its policymakers, performing its administrative duties efficiently, conserving public resources, acting within the scope of its authority under state law, and honoring the state constitution. All of those interests are

implicated in this case, and each of them counsels in favor of removing this referendum from the ballot.[2]

And as the Court has observed, an improper ballot measure does not serve the electorate. "The presence of an invalid measure on the ballot . . . 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." (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697.)

The Hotel Coalition has other, lawful ways to use the initiative and referendum powers that do not injure these public interests. Should the Court remove its referendum from the ballot, all it loses is the right to pursue a simple repeal of Ordinance No. 2131, just like the city council, and for the same reasons. Although the right to referendum must be protected from unjustified intrusion, here the limitation is justified. The People do not have the right to use their local legislative power in a manner that conflicts with state law, and they are not injured by being deprived of a right they do not have.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeal and order the referendum removed from the ballot. Alternatively, should the Court conclude that further fact-finding regarding the intent of the referendum is required, the City requests that the Court remand the case to the Superior Court with instructions that promote a swift and certain resolution of this controversy.

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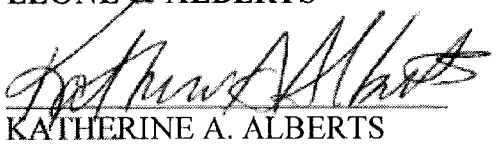
[2] If the Court considers the issue, it should also deny the Hotel Coalition's request for attorney's fees as a "private attorney general." Even if the Court were to agree with the Hotel Coalition's position, the Coalition is acting in service of its members' commercial interests as the businesses that stand to gain, and is able to rely on their resources for this litigation.

Dated: December 11, 2017

LEONE & ALBERTS



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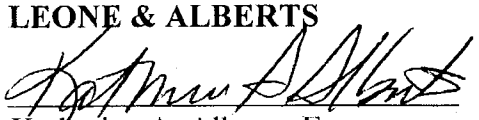
RULE 8.204(c) CERTIFICATION

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing Respondent's Reply Brief is proportionately spaced in Times New Roman 13-point type and contains 3,534 words as counted by Microsoft word-processing software.

Dated: December 11, 2017

LEONE & ALBERTS



Katherine A. Alberts, Esq.
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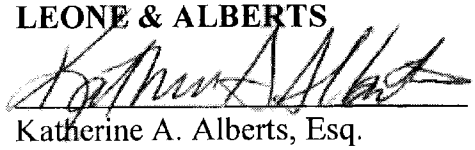
STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before the Supreme Court.

Dated: December 11, 2017

LEONE & ALBERTS



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Re: City of Morgan Hill v. Shannon Bushey, et al.
California Supreme Court Case No.:S243042
Court of Appeal Case No.: H043426

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City of Walnut Creek, State of California. I am over the age of 18 years and not a party to the within cause; my business address is 2175 N. California Blvd., Suite 900, Walnut Creek, California.

On December 11, 2017, I served the following documents:

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VIA MAIL

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Walnut Creek, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and depositing each envelope(s), with postage thereon fully prepaid, in the mail at Walnut Creek, California.

VIA OVERNIGHT MAIL/COURIER

[X] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service, or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence/documents for overnight mail or overnight courier service, and that it is to be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

VIA FACSIMILE

[ ] By arranging for facsimile transmission from facsimile number 925-974-8601 to the above listed facsimile number(s) prior to 5:00 p.m. I am readily familiar with my firm's business practice of collection and processing of correspondence via facsimile transmission(s) and any such correspondence would be transmitted via facsimile to the designated numbers in the ordinary course of business. The facsimile transmission(s) was reported as complete and without error.

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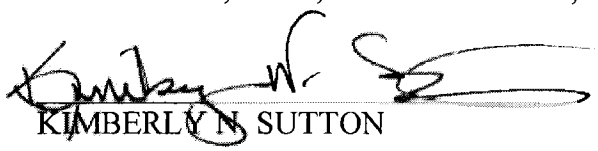
[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and causing each envelope(s) to be hand-served on that day by D&T SERVICES in the ordinary course of my firm's business practice.

VIA ELECTRONIC SERVICE – California Rules of Court, Rule 8.212(c)(a)

[ ] By electronically filing the document through TrueFiling, per California Rules of Court, Rule 8.212(c)(a), all requirements are satisfied.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 11, 2017, at Walnut Creek, California.



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