Case No. 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.

After a Decision by the Court of Appeal of the State of California
Sixth Appellate District, Case No. H043026
Superior Court of the State of California
County of Santa Clara
Civil Case No. 16-CV-292595

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

Thomas B. Brown, Bar No. 104254
BURKE, WILLIAMS & SORENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Telephone: 510.273.8780
Facsimile: 510.839.9104

Attorneys for Amicus Curiae,
LEAGUE OF CALIFORNIA CITIES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520(f), amicus curiae the League of California Cities respectfully requests leave to file the accompanying brief of amicus curiae in support of the City of Morgan Hill. This application is timely made within 30 days after the filing of the reply brief on the merits.

II. INTEREST OF THE AMICUS CURIAE

The League of California Cities ("League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The reason the League has determined to weigh in on this case is simple. California cities, and their elections officials, are charged with processing referenda that would invalidate zoning ordinances adopted by elected City Councils. Cities must in some cases determine the legal validity of referenda challenging land use legislation adopted by elected City Councils, and then implement the zoning that results from such referenda. The decision by the Sixth District unsettles a rule that provided clear guidance on these points for cities for over 30 years, and forces them to choose between the inconsistent rules set down by the Fourth and Sixth District Courts of Appeal.

The League does not at this point advocate for one result or rationale over another. But it has a clear interest in asking the Court to review and provide guidance on the issues raised in the case, and the implications of how this Court resolves those issues.

III. CONCLUSION

The League respectfully requests that the Court accept the accompanying brief for filing in this case.

Dated: January 4, 2018

BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Thomas B. Brown*
Thomas B. Brown
Attorneys for Amicus Curiae,
LEAGUE OF CALIFORNIA CITIES

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF MORGAN HILL

I. INTRODUCTION

The decision of the Fourth District Court of Appeal in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204 ("*deBottari*") has provided a "bright line" rule upon which amici and its members have relied since 1985. The decision of the Sixth District rejecting the *deBottari* bright line rule unsettles the law. The resulting inconsistency between the two cases implicates important policies enacted by the California Legislature to not only require that zoning be consistent with general plans, but also to promote certainty and finality in land use planning and decision making, especially with respect to the development of housing. While the League does not advocate for or against either *deBottari* or the decision of the Sixth District in this case, the League urges the Court, in resolving the conflict between the two, to consider how best to respect those policies.

II. ARGUMENT

A. The League And Its Member Cities Have Relied On The *deBottari* "Bright Line" Rule For Over 30 Years.

For over 30 years the League, and its members and officials, have been guided by the "bright-line" rule established by the Fourth District Court of Appeal in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204 ("*deBottari*"). *deBottari* concluded that when a city's or a county's voters exercise their constitutional right (Cal. Const. art. II, § 9) to subject zoning legislation to referendum, the resulting zoning must by state law (Government Code § 65860) be consistent with the city's or county's general plan. *deBottari* held that a referendum that, if approved by the voters, would result in zoning that was inconsistent with a City's General Plan was invalid.

This Court has cited *deBottari* with approval on several occasions. (*Orange Citizens For Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141, 153; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-571.) The Fourth District's subsequent decision in *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868 relied on *deBottari* in announcing the same rule. In the 32 years since *deBottari* was decided, no case has suggested its result and rationale were incorrect. Every leading municipal law and land use text book describes *deBottari* as the law in California. (See Cecily T. Barclay & Matthew S. Gray, Curtin's California Land Use & Planning Law, pp. 43, 48, 377–78 (34th ed. 2014); James Longtin, Longtin's California Land Use, sections 2.02[2], 2.38, 2.40, 2.42, 3.53, 11.72[3], 11.74 pp. 204–06, 209, 328, 1047, 1049 (2d ed. 1987); Cont. Ed. Bar, The California Municipal Law Handbook, sections 3.86, 3.113, 3.123 (2017).)

The decision of the Sixth District Court of Appeal, in rejecting *deBottari*, unsettles a rule that the League and its member cities and their elections officials have understood and followed for over 30 years. The *deBottari* rule provided clear guidance that a zoning referendum is invalid if it would result in a general plan inconsistency.

B. This Case Involves Not Only The Constitutional Right Of Referendum, But Also The Legislative Requirements That Zoning Be Consistent With General Plans, And That Land Use Decisions Not Be Subject To Uncertainty Or Delay.

This case implicates three important issues: the right of referendum, and the legislative requirements that zoning be consistent with the general plan and that land use decisions not be subject to uncertainty or delay.

1. The Constitutional Right Of Referendum.

The voter's right to initiative and referendum has been recognized by this Court as "one of the most precious rights of our democratic process." (*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) This fundamental right is guaranteed in the California Constitution, Article 2, Section 11, and "is generally coextensive with the legislative power of the local governing body." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.) This fundamental right has been jealously guarded by the courts. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 501; *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 41.)

Nevertheless, the right of initiative and referendum is not absolute, and is subject to limitations on its exercise. As this Court has said, although the right "must be construed liberally to promote the democratic process," it is subject to the same constitutional limitations and rules of construction as are other statutes. (*Lesher Communications, Inc. v. City of Walnut Creek*, *supra*, 52 Cal.3d 531, 540.)

Thus, initiatives and referenda must, for example, be consistent with a city's or county's general plan. (*Lesher Communications*, *supra*, 52 Cal.3d 531, 541; California Municipal Law Handbook (Cal CEB), § 3.113, p. 273.) Similarly, they may not intrude on matters of statewide concern that are preempted by the state. (See *Voters For Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 779; California Municipal Law Handbook (Cal CEB), § 3.111, p. 272.)

2. The Legislative Interest In Promoting General Plan Consistency And Avoiding Uncertainty And Delay In Land Use Decisions.

The Legislature has made explicit its command that zoning (and indeed all land use decisions) be consistent with general plans. (See

Government Code § 65860.) This Court thus has emphasized the importance of the general plan in local land use decision-making. To that end, this Court has characterized the general plan as the "constitution for all future developments within the city or county." (*Orange Citizens For Parks and Recreation v. Superior Court*, *supra*, 2 Cal.5th 141, 152.) "The propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d 553, 571.) "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*, *supra*, 52 Cal.3d 531, 544.) "The requirement of consistency ... infuse[s] the concept of planned growth with the force of law." (*Orange Citizens*, *supra*, 2 Cal.5th at 153.)

The Legislature also has emphasized its desire to promote certainty and avoid delay in land use planning and decision-making. (Government Code § 65009(a)(3).) Such certainty is required to "alleviate the chilling effect on the confidence with which property owners and local governments can proceed with projects." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.) In stressing the need for certainty and timeliness in land use planning generally, the Legislature has focused on the severe housing crisis in the state. (Government Code §§ 65009(a)(1), 65589.5(a)(1); 65583(c)(2); Health and Safety Code § 50003(a); *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 441.)

C. In Resolving The Conflict Between *deBottari* and The Decision Of The Sixth District, The League Urges This Court To Consider And Promote Those Legislative Interests.

The League urges this Court, in resolving the conflict between the decision of the Sixth District and *deBottari*, to do so in a manner that

promotes the Legislature's interests in general plan consistency and certainty and timeliness regarding land use decisions. Thus, the League urges a rule that will not result in California cities facing similar cases in which their zoning will be inconsistent with their general plans for indeterminate periods of time. As the parties have recognized, during those periods, the ability of property owners subject to such inconsistent zoning to use and develop their land will be under a cloud until the inconsistency is resolved. The Sixth District's ruling leaves open the possibility of successive referenda, each proposing inconsistent zoning, thereby effectively halting any new use of land that is the subject of the dispute. The Legislature surely intended no such outcome.

While this case involves commercial/industrial zoning and development, the League urges the Court also to consider how it will affect residential development to address the state's housing crisis. It is beyond serious debate that when a referendum results in zoning that is inconsistent with a general plan's residential designation, the inconsistency creates a cloud that can frustrate the Legislature's emphatic desire that local governments promote, not delay, the development of housing to address the statewide crisis. A property owner subject to a referendum challenging the amendment of a zoning ordinance to bring it into consistency with an amended general plan designation allowing the development of housing will be in a limbo in which residential development is precluded. Again, the League urges this Court, in resolving the conflicting appellate decisions here, to consider how best to serve the Legislature's desire to promote housing.

The League also submits that while this Court has instructed that the electorate's right of referendum is to be jealously guarded, that right must be exercised in a timely manner, and at the earliest opportunity. The League thus urges the Court to adopt a rule that encourages those members

of the electorate opposed to a legislative policy judgment to amend a general plan to exercise their referendum right sooner, immediately after the city or county amends the general plan, not later when the city subsequently amends its zoning to make it consistent with the amended general plan. The League submits that this Court's ruling should discourage not only delay and uncertainty, but also, potentially, gamesmanship in the exercise of the right of referendum.

III. CONCLUSION

For the foregoing reasons, the League respectfully requests this Court resolve the conflict between *deBottari* and the decision of the Sixth District in this case in a manner that considers and promotes the legislative interests that accompany the right of referendum.

Dated: January 4, 2018

BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Thomas B. Brown*
Thomas B. Brown
Attorneys for Amicus Curiae,
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE

California Rules of Court 8.204(c)

Pursuant to California Rules of Court 8.204(c), I certify that the foregoing **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF and AMICI CURIAE BRIEF of LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES** was produced on a computer and contains 1,964 words, including footnotes, according to the word count of the computer program used to prepare the Application.

Executed on January 4, 2018 at Oakland, California

/s/ Thomas B. Brown
THOMAS B. BROWN

OAK #4853-1987-3364 v3

PROOF OF SERVICE

I, Teresa L. Beardsley, declare:

I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On January 5, 2018, I served a copy of the within document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below, AND through the *TrueFiling* website at www.truefiling.com, the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Louis A. Leone Katherine Ann Alberts Leone & Alberts 2175 North California Blvd., Suite 900 Walnut Creek, CA 94596 Tel: 925.974.8600 / Fax: 925.974.8601 Email: lleone@leonealberts.com; kalberts@leonealberts.com	Attorneys for Plaintiff and Respondent, City of Morgan Hill
Donald Alan Larkin Office of the City Attorney 17575 Peak Avenue Morgan Hill, CA 95037-4128 Tel: 408.778.3490 Email: donald.larkin@morganhill.ca.gov	
Danielle Luce Goldstein Office of the County Counsel 70 West Heading St., Fl.9., East Wing San Jose, CA 95110 Tel: 408.299.5906 Email: danielle.goldstein@cco.sccgov.org	Attorney for Defendant and Respondent, Shannon Bushey
Scott D. Pinsky Law Offices Gary M. Baum 19925 Stevens Creek Blvd., Suite 100 Cupertino, CA 95014 Tel: 408.833.6246 / Fax: 408.540.1210 Email: spinsky@earthlink.net	Attorney for Defendant and Respondent, Irma Torrez

Thomas P. Murphy Jolie Houston Berliner Cohen Ten Almaden Blvd., 11th Floor San Jose, CA 95113 Tel: 408.286.5800 / Fax: 408.998.5388 Email: tpm@berliner.com	Attorneys for Real Party in Interest and Respondent, River Park Hospitality
Asit S. Panwala Attorney at Law 4 Embarcadero Center, Suite 1400 San Francisco, CA 94111 Tel: 415.766.3526 / Fax: 415.402.0058 Email: asit@panwalalaw.com	Attorneys for Real Party in Interest and Appellant, Morgan Hill Hotel Coalition
Jonathan Randall Toch Attorney at Law P.O. Box 66 Morgan Hill, CA 95038 Tel: 408.762.9702 Email: tochlawfirm@gmail.com	

In addition, also on January 5, 2018, I served a copy of the within document(s):

☒ by placing the document(s) listed above in a sealed GSO envelope and affixing a pre-paid air bill, addressed as set forth below, and causing the envelope to be delivered to a GSO agent for delivery.

Superior Court of California, Santa Clara County 191 North First Street San Jose, CA 95113 Tel: 408.882.2100	Trial Court, Case No. CV292595
Sixth District Court of Appeal 333 West Santa Clara St., Suite 1060 San Jose, CA 95113 Tel: 408.277.1004 Email: Sixth.District@jud.ca.gov	Appellate Court, Case No. H043426

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 5, at Oakland, California.

Teresa L. Beardsley

Teresa L. Beardsley