

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, a municipality,

Plaintiff/Respondent,

vs.

SHANNON BUSHEY, REGISTRAR OF
VOTERS FOR SANTA CLARA
COUNTY, et al.,

Respondents/Defendants.

MORGAN HILL HOTEL COALITION, an
unincorporated association,

Real Party in Interest/Appellant.

RIVER PARK HOSPITALITY, INC.;

Real Party in Interest/Respondent.

**APPELLANT MORGAN HILL
HOTEL COALITION'S
SUPPLEMENTAL BRIEF**

(Supreme Court Rule 8.520(d))

CASE NO.: S243042

SIXTH DISTRICT NO.: H043426

SUPERIOR COURT NO.: 16CV292595

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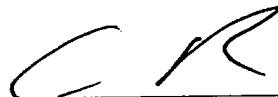
**TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE;
THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA
SUPREME COURT; AND ALL PARTIES AND THEIR ATTORNEYS OF
RECORD:**

Pursuant to Rule 8.520(d) of the Supreme Court, Appellant and Real Party in Interest Morgan Hill Coalition seeks to file a supplemental brief limited to new authorities, new legislation or other matters not available in time to be included in the party's brief on the merits. The First District Court of Appeal in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, issued a decision relevant to this case on February 21, 2018. The decision became final on March 23, 2018.

The City of Morgan Hill proposes to change the Zoning Code in a manner that would reduce the number of commercial zoning districts available should a referendum take place, and the voters reject the city's choice of zoning. The proposed legislation is relevant to factual record and the arguments made previously.

Both the *Save Lafayette* decision and the proposed changes to the Zoning Code occurred after briefs on the merits were filed. Thus, the Hotel Coalition seeks to file a supplemental brief.

Dated: May 18, 2018



Asit Panwala
Attorney for Appellant and Real
Party in Interest, Morgan Hill
Hotel Coalition

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INTRODUCTION

The First District Court of Appeal (“First District”) recently supported the Sixth District Court of Appeal’s reasoning in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 669. The First District explicitly rejected *DeBottari v. City of Norco* (1985) 171 Cal.App.3d 1204 (“*deBottari*”), and accepted *City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34 (“*Bushey*”), by holding that a referendum that seeks to challenge a zoning ordinance maintains the status quo rather than enacting inconsistent zoning. *Id.*

Additionally, the City of Morgan Hill (“City”) is considering new legislation that will reduce the number of commercial zoning districts from twelve to five. In the City’s initial draft of the updated zoning code, the City eliminated “CO-administrative-office,” a commercial zoning district that the Morgan Hill Hotel Coalition (“Hotel Coalition”) advocated for as an alternative to prior to litigation. The four commercial zoning districts in the City’s initial proposal would each permit hotel use, and would have frustrated the purpose of the referendum. Subsequently, the City’s staff report recommended that the City Council continue to maintain “CO-administrative office” within its zoning code. The City has resolved to adopt the staff’s recommendation.¹

¹ On May 16, 2018, the City Council resolved to incorporate the staff’s recommendations into the proposed updated zoning code. *See* Request for Judicial Notice ¶4. The City Council plans to vote on the updated zoning code with the amendments suggested by the staff on June 6, 2018. *Id.*

MEMORANDUM OF LAW

- I. THE FIRST DISTRICT ADOPTED THE REASONING IN *BUSHEY* AND HELD THAT A REFERENDUM SEEKS TO PREVENT A ZONING ORDINANCE FROM TAKING EFFECT RATHER THAN ENACT ONE

In *Save Lafayette*, the First District confronted the same issue as the Sixth District did in this case, and held that the electorate has the right to reject a zoning district adopted to cure the inconsistency between the general plan and zoning. *Save Lafayette, supra*, at 669. In *Save Lafayette*, the city relied upon *deBottari*, and claimed that the failure to approve the zoning ordinance would return the parcel to its previous zoning, thereby *creating* an inconsistency with the recently amended general plan. *Id.* at 662. The First District explicitly rejected *deBottari* and adopted the reasoning in *Bushey*. *Id.* at 667.

The First District found that a “referendum challenging the enactment of a zoning ordinance does not enact anything.” *Id.* at 667 (citing *Bushey, supra*, 12 Cal.App.5th at 41-42). It stated that if the voters approve the ordinance at a referendum then there would be no conflict with the general plan, and if they did not, the city could conceivably enact another zoning ordinance in its place consistent with the general plan. *Id.* at 667. The First District found that if the electorate rejects the proposed ordinance, it merely preserves the status quo. *Id.* at 669. The First District also noted that Division One had supported that reasoning in *Merritt v. City of Pleasanton* (2001) 89 Cal.App.4th 1032, 1037 (where failure

to pre-zone land to conform with the general plan maintained the status-quo). *Id.* at 667-68.

The First District further addressed the issue of whether the appellants should have contested the general plan amendment rather than seek a referendum on the zoning ordinance. *Id.* at 669. It noted that the City's position that the voters' failure to object to general plan amendment served as a waiver of their objection to the zoning change was unsupported by legal authority. *Id.*

II. THE PROPOSED ZONING CODE ALSO PROVIDES FOR AN ALTERNATIVE COMMERCIAL ZONING DISTRICT THAT DOES NOT PERMIT HOTEL USE

The Hotel Coalition has argued that the existence of other commercial zoning districts allows the City to choose another zoning district should the voters reject their first choice. Joint Appendix ("JA") at 393; Appellant's Opening Brief at 34-35. The Sixth District in reversing the trial court, likewise noted the zoning district chosen by the City was "one of a number of available consistent zonings," and thus the City was free to choose another if the electorate rejected its first choice. *Bushey, supra*, at 42. The City previously argued that the number of other commercial zoning districts was irrelevant. JA at 475. However, the City conceded that there was at least one other commercial zoning district ("CO-administrative office) that did not permit hotel use. City's Petition for Rehearing at 14.

While the case is pending before the Supreme Court, the City seeks to update its zoning code. Its initial proposal contained only four commercial zoning

districts, each permitting hotel use. *See* Request for Judicial Notice on Supplemental Brief, Exhibit One. It also sought to eliminate “CO-administrative office.” *Id.* at 2. The subsequent staff reports to the City Council recommended that the City retain “CO-administrative office.” *See* Request for Judicial Notice on Supplement Brief, Exhibit Two at 4. At the City Council meeting, the City resolved to incorporate the staff’s recommendations. *See* Request for Judicial Notice on Supplemental Brief, ¶4. Thus, “CO-administrative office” will remain in the zoning code.² Thus, the Hotel Coalition asserts that the electorate has the right to exercise the power of referendum because at least one other commercial zoning district that does not permit hotel use remains in the zoning code.

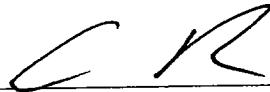
² The Hotel Coalition does not expect that the City would remove “CO-administrative office” from the zoning code, but if the City does, it would severely undermine the right to referendum when the status quo should remain while the Supreme Court decides the matter.

CONCLUSION

Appellant Morgan Hill Hotel Coalition requests the Court affirm the decision of the Sixth District Court of Appeal. The Hotel Coalition also requests that the Court order that Appellant recover its costs and may seek its attorney's fees by motion in the trial court, and other relief it deems just and fair.

Dated: May 18, 2018

LAW OFFICE OF ASIT PANWALA



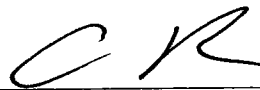
Asit S. Panwala
Randall Toch
Attorneys for Appellant and Real Party
In Interest Morgan Hill Hotel Coalition

VERIFICATION

Pursuant to California Rules of Court Rule 8.504(d)(4), I hereby certify that the forgoing Appellant Morgan Hill Hotel Coalition's Supplement Brief is in Times New Roman 13-point font and contains 1,723 words as counted by Microsoft Word.

Dated: May 17, 2018

LAW OFFICE OF ASIT PANWALA



Asit Panwala, Esq.
Attorney for Real Party in Interest and
Appellant Morgan Hill Hotel Coalition

City of Morgan Hill v. Shannon Bushey, etc., et al.,
Supreme Court No. S243042
Court of Appeal No. H043426
Superior Court No. 16-CV-292595

PROOF OF SERVICE

I, ASIT S. PANWALA, hereby state:

I am over eighteen years of age and not a party to the above action. My business address is 4 Embarcadero Center, Suite 1400, San Francisco, California 94111.

On May 18, 2018, I served the following documents:

**APPELLANT MORGAN HILL HOTEL COALITION'S
SUPPLEMENTAL BRIEF**

by serving the following parties via True Filing E-Service.

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I also placed a copy of the **APPELLANT MORGAN HILL HOTEL COALITION'S**

SUPPLEMENTAL BRIEF in a sealed envelope with first-class US mail postage in

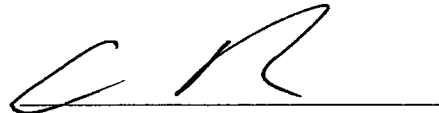
United States Postal mailbox affixed and addressed to:

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Clerk of the Court
The Honorable Theodore Zayner
191 N. First Street
San Jose, CA 95113

Sixth District Court of Appeals
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I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on May 18, 2018, at San Francisco, California.



Asit S. Panwala