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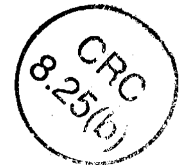

SUPREME COURT
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Deputy

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. ________________ Sixth Dist. No. H043426 Santa Clara Super. Ct. No. 16-CV-292595
RIVER PARK HOSPITALITY, Real Party in Interest and Respondent; MORGAN HILL HOTEL COALITION, Real Party in Interest and Appellant.	

CITY OF MORGAN HILL'S 2nd PETITION FOR REVIEW

LOUIS A. LEONE (SBN: 099874)
*KATHERINE A. ALBERTS (SBN: 212825)
LEONE & ALBERTS
2175 N. 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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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LOUIS A. LEONE (SBN: 099874)
*KATHERINE A. ALBERTS (SBN: 212825)
LEONE & ALBERTS
2175 N. 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

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City of Morgan Hill, a municipality, Petitioner and Plaintiff 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) 12 Cal.App.5th 34 (issued May 30, 2017, Court of Appeal No. H043426). A copy of the Slip Opinion ("Slip Op.") is attached hereto.

I. QUESTIONS PRESENTED

1. When a city or county amends a parcel's General Plan land use designation, does Government Code section 65860 render a parcel's previously consistent, but now inconsistent, zoning invalid and ineffective immediately upon amendment of the General Plan?

2. Does Government Code section 65860, which prohibits zoning ordinances that are inconsistent with a city's or county's general plan, preempt the electorate's exercise of their legislative power through referendum to repeal an ordinance enacting consistent zoning, when if successful, the resulting zoning would be inconsistent with the city's or county's general plan?

II. GROUNDS FOR REVIEW

In this case, the Sixth District Court of Appeal issued a published decision that directly contradicts *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, a 37 year old precedent that has been cited with approval by this Court in *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 and *Orange Citizens for Parks & Recreation v. Superior Court (2016)* 2 Cal.5th 141. The Sixth District "disagreed with" the Fourth District calling its reasoning in *deBottari* "flawed." (Slip Op. at pp. 2, 8.) The underlying factual scenario is the same in both cases and is one that regularly and repeatedly occurs in cities and counties across California.

A city or a county amends its General Plan to change the land use designation for a specific parcel. Upon enactment of the General Plan amendment, the parcel's then existing zoning becomes inconsistent with the

General Plan in violation of Government Code section 65860(a). The legislative body then passes a zoning ordinance to make the parcel's zoning consistent with the General Plan.

Opponents of the property owner's development plan for the parcel then submit a referendum petition challenging the new consistent zoning, because it would allow the property owner's planned use for the parcel. Submission of the referendum petition automatically prevents the new zoning ordinance going into effect and leaves the parcel with inconsistent zoning for an unknown amount of time up to three years, at worst case.

The question in this case and in *deBottari* is: does the consistency requirement in Government Code section 65860 render the referendum petition invalid, because if the referendum is successful, the parcel will be left with inconsistent zoning? In other words, can the electorate use their legislative power to reject consistent zoning when doing so would leave the parcel with inconsistent zoning?

For the past 37 years, *deBottari* provided cities, counties and courts a bright line rule to follow regarding how to handle this situation. The Fourth District in *deBottari* said the electorate cannot use its legislative power in this manner, because the referendum petition would leave the parcel with inconsistent, and therefore invalid, zoning. As such, it held that the referendum petition was invalid and should not be placed on the ballot. Therefore, cities and counties knew they had to place the referendum on the ballot under the Elections Code, but then could bring an action to have it removed from the ballot. Lower courts knew that such referendum petitions were invalid and could be removed from the ballot. Voters who researched the law prior to circulating their petition knew that a safer route to achieve their goals would be to exercise their legislative power through an initiative to choose their preferred consistent zoning.

The Sixth District in this case, on the other hand, said the electorate could use its legislative power to reject consistent zoning, even when the result would be

inconsistent zoning. It disagreed with the Fourth District calling its reasoning in *deBottari* "flawed." First the Sixth District interpreted Government Code section 65860(a) as only invalidating newly enacted inconsistent zoning. It found that zoning was initially consistent, but became inconsistent by amendment of the General Plan, was governed by Government Code section 65860(c). Since subsection (c) gave a legislative body a reasonable time to enact consistent zoning, the Sixth District held that the newly inconsistent zoning was not invalid. Thus, when a successful referendum petition repealed the city council's first choice of consistent zoning, it did not "enact" or maintain invalid zoning for the parcel. The Sixth District reasoned that this inconsistent zoning was still "valid" and the city council still could adopt other consistent zoning. The Sixth District then noted that this new consistent zoning would be valid so long as it did not contain the same characteristics of the rejected consistent zoning that gave rise to the referendum petition. Therefore, it held that the referendum petition was not invalid and could not be removed from the ballot.

As this Court stated in *Lesher Communications, Inc. v. City of Walnut Creek*:

> [P]ersons 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. The 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 Communications, Inc. v. City of Walnut Creek*, *supra*, 52 Cal.3d at p. 544.) The direct conflict between *deBottari* and the Sixth District's decision in this case destroys the certainty of the law that this Court in *Lesher* stated was of the utmost importance.

If the Court does not rectify the conflict by providing clear guidance on the conflicting issues of these cases, cities and counties will be forced to choose to follow one precedent or the other. And given the rights at issue, regardless of

which precedent they choose, the city or county will be sued, either by the voters for invalidating the referendum or by the property owner for leaving the parcel with inconsistent zoning. Once in court, the lower courts will also be left without any clear guidance resulting in inconsistent and contradicting judgments across the state regarding vital property rights and the electorate's reserved legislative powers.

Thus, 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.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The History of the Subject Property and the Referendum

At issue in this case is the zoning of a vacant parcel of land located at the 850 Lightpost Parkway in the City of Morgan Hill ("Subject Property). (Joint Appendix, ("JA") Vol. I. at 60). The parcels to the south are designated for commercial land use in the City's General Plan. The parcels to the north, east and west are designated for industrial land use in the City's General Plan. (Id.) The Subject Property is adjacent to U.S. 101 about half a mile from the Cochrane Road-101 highway ramps. (Id.)

Prior to November 19, 2014, the Subject Property's General Plan land use designation was Industrial and its zoning was ML-Light Industrial. (Id.) On November 19, 2014, the Morgan Hill City Council amended the City's General Plan to change the land use designation for the Subject Property to Commercial. (Id.) Therefore as of November 19, 2014, the Subject Property's ML-Light Industrial zoning was inconsistent with its Commercial General Plan land use designation. (Id. at 61.)

Following the General Plan amendment, the Subject Property's owner, Real Party in Interest/Respondent River Park Hospitality, Inc. ("River Park"), applied for a zoning amendment to change the Subject Property's zoning to General Commercial from ML-Light Industrial. (Id. at 60.) On April 1, 2015, the City Council adopted Ordinance No. 2131, which changed the Subject Property's zoning to General Commercial and made it consistent with its Commercial General Plan land use designation. (Id. at 60-61; 64, 116, 276.)

On May 1, 2015, before Ordinance No. 2131 and the General Commercial zoning became effective, Appellant Morgan Hill Hotel Coalition ("Hotel Coalition") filed a petition for referendum seeking to repeal Ordinance No. 2131 and maintain the parcel's ML-Light Industrial zoning. (Id. at 115, 123.) Appellant's stated purpose of the Referendum was to preserve industrial land in the City of Morgan Hill and to prevent the development of a competitor hotel on parcel by River Park. (JA Vol. II at 480, 482.)

Thereafter, the City Council adopted a Resolution accepting the Morgan Hill City Clerk's Certificate of Examination and Sufficiency as to the Referendum. (JA Vol. I at 65, 116; Vol. II at 291-293). On July 15, 2015, the City Council further considered its response to the Referendum and based on *deBottari,* concluded that allowing the Referendum to go to a vote and, potentially, become law would enact zoning that was inconsistent with the City's General Plan. Therefore, the City Council decided to discontinue processing the Referendum. (JA Vol. I at 65, 93).

On February 17, 2016, the City Council reconsidered its possible actions in response to the Referendum (JA Vol. II at 404-405) and adopted Resolution No. 16-032 directing the City Clerk to place the Referendum on the ballot of the June 7, 2016 election. (JA Vol. I at 65, 101-104.) It also authorized the filing of the instant lawsuit to have the Referendum nullified as legally invalid and removed from the ballot. (Id.)

B. Procedural Background

On March 11, 2016, City brought an action against Shannon Bushey, the Registrar of Voters for Santa Clara County, and Irma Torrez, City Clerk for the City of Morgan Hill, seeking an alternative and peremptory writ to remove the Referendum from the ballot and to certify Ordinance No. 2131. (JA Vol. I at 13.) On March 29, 2016, the superior court, relying on *deBottari*, granted City's petition. (JA, Vol. II at 484-487.) 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. (Id. at 485.) The superior court went on to hold:

> [W]ere the voters to reject the ordinance, that would leave in place an inconsistent – and legally invalid – zoning designation. This result would be the same as if the measure to be submitted to the voters asked whether to "enact" inconsistent, legally invalid zoning, and it is precisely the result urged by Real Party in Interest [Hotel Coalition]."

(Id.) The court ordered that the referendum be removed from the ballot and that Ordinance No. 2131 be certified "as duly adopted and effective immediately . . . ." (Id. at 486.)

The Hotel Coalition timely filed a notice of appeal on April 1, 2016. (Id. at 495.) On May 30, 2017, the Sixth District Court of Appeal issued a published decision overturning the superior court's writ of mandate and rejecting *deBottari* as "flawed." (Slip Op. at 8-9.) The Sixth District held 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 1) "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." (Id. at 8.)

C. Petitions For Rehearing

Both the City and River Park filed a Petition for Rehearing. On June 23, 2017, the Court of Appeal denied both Petitions for Rehearing.

IV. ARGUMENT

A. Consistency and Certainty Are Two Paramount Requirements For Proper Administration and Implementation of the Planning and Zoning Law.

As this Court has explained on numerous occasions, "the keystone of regional planning is consistency -- between the general plan, its internal elements, subordinate ordinances, and all derivative land-use decisions." (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at pp. 572-573 citing *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *deBottari v. City Council, supra*, 171 Cal.App.3d at pp. 1210-1213.) This Court has further explained that:

> Until 1971, the general plan was "'just an "interesting study," '" which did not bind local land use decisions. (*deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1211.) But now "'[t]he 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 at p. 570, quoting *Resources Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; see [Gov. Code] §§ 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].) "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 at p. 544.)

(*Orange Citizens for Parks & Recreation v. Superior Court, supra,* 2 Cal.5th at p. 153.) Therefore, a city or county cannot approve any use for a parcel that is

inconsistent with the parcel's zoning, which must be consistent with any applicable Specific Plan, which both must be consistent with General Plan.

In order to meet this consistency requirement, however, cities, counties, courts and property owners must know what development must be consistent with; the policies of the General Plan and the requirements of the ordinances implementing those policies must be clear and certain.

> A general plan and its specific plans have been described as a "yardstick"; one should be able to "take an individual parcel and check it against the plan and then know which uses would be permissible." "[P]ersons 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."

(*Id.* at pp. 159-160.)

These keystone principles of consistency and certainty are greatly undermined by the direct conflict between *deBottari* and this case. Without resolution and clarity from this Court, cities, counties, courts and property owners will have to make land use decisions based on uncertain and opposing law and thereby render inconsistent and conflicting decisions on an ad hoc basis. This is not the planned, consistent studied approach contemplated by the Planning and Zoning Law.

B. The Sixth District's Opinion in this Case and the Fourth District's Opinion in *deBottari* Directly Contradict Each Other Regarding the Issues that Go to the Heart of the Consistency Requirement in the Planning and Zoning Law and the Proper Exercise of the Electorate's Reserved Legislative Power.

Regularly across California cities and counties are confronted with referendum petitions challenging a zoning ordinance that would enact consistent zoning following a General Plan amendment, which rendered the existing zoning inconsistent. These petitions are almost always submitted by opponents to the property owner's planned development for the parcel in question. In *deBottari*, the referendum proponents opposed medium, as opposed to low density, housing. In

the case at bar, the Hotel Coalition opposed a new hotel and the loss of industrial land in the City.[1] In these situations, if the referendum proponents were successful and the electorate voted against the new zoning, the parcel's zoning would remain inconsistent with the applicable General Plan.

deBottari established a bright line rule that has guided cities and counties for decades. The electorate cannot by referendum repeal zoning for a parcel that is consistent the city's or county's general plan, when if the referendum is successful, the parcel would be left with inconsistent zoning. The Fourth District Court of Appeal held that:

> A zoning ordinance inconsistent with the general plan at the time of its enactment is "invalid when passed." (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704 [179 Cal.Rptr. 261].)
>
> In view of the foregoing, we conclude that the invalidity of the proposed referendum has been clearly and compellingly demonstrated. 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. Notwithstanding this fact, plaintiff urges that the voters should be permitted to enact an inconsistent zoning ordinance because section 65860, subdivision (c), provides for a "reasonable time" within which an inconsistent zoning ordinance may be brought into conformity with an amended general plan. Thus, plaintiff points out, even if the referendum were approved the council would have a "reasonable time" within which to rectify the inconsistency.
>
> Plaintiff readily concedes some remedial action by the council would then be required. Plaintiff suggests that the council would have three options: (1) reenact the zoning amendment that the voters had overturned; (2) enact some alternative zoning scheme which is consistent with the general plan; and (3) amend the amended general plan to conform to the zoning ordinance preferred by the voters.

[1] In its decision, the Sixth District described the purpose of the referendum as only to prevent the development of a hotel on the Subject Property. (Slip op. at pp. *2-3.) The City in its Petition for Rehearing informed the court that this was a misstatement of fact as the purpose of the referendum was also to preserve industrial land in the City. (City Petition for Rehearing at pp. 4-8.)

> 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.

(*deBottari v. City Council, supra,* 171 Cal.App.3d at pp. 1212-1213.)

In this case, the Sixth District Court of Appeal "disagreed with *deBottari*" calling the Fourth District's reasoning "flawed." (Slip Op. at pp. 2, 8.) The Sixth District found the Hotel Coalition's referendum valid, based on reasoning that contradicted the Fourth District's interpretation of Gov. Code, § 65860 and the validity of the parcel's inconsistent zoning if the electorate voted in favor of the Referendum and repealed the consistent zoning:

> "[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).) "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." ([Gov. Code] § 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. [Ordinance No. 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 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 [Ordinance No. 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 [Ordinance No. 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 [Ordinance No. 2131].

* * * *

The Fourth District's reasoning in *deBottari* is flawed. 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. 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.

(Slip Op. at pp. 5-6, 8.)

These two published decisions present completely opposite guidance to cities, counties, courts and voters in California on important provisions of Zoning and Planning Law and the power of the electorate when exercising its reserved legislative power through referenda.

One of the concerns addressed by the Sixth District is the deference given to the voters' exercise of their reserved legislative power. The Fourth District in *deBottari* addressed this point as well, and again reached the opposite conclusion. It held that Government Code section 65860's mandate for zoning consistent with the general plan was one of those mandates that preempted the local electorate's exercise of its legislative power through referendum.

> Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts. Nor are we persuaded that a zoning ordinance inconsistent with the general plan constitutes little more than a mere technical infirmity. On the contrary, the requirement of consistency is the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law. We are not persuaded that this principle must now be sacrificed on the altar of an invalid referendum.

(*deBottari v. City Council*, *supra*, 171 Cal.App.3d at p. 1213.) Thus, *deBottari* informed the electorate that if it wanted to use its legislative power to change a city's or county's choice of consistent zoning to replace inconsistent zoning, it should use its power through an initiative to choose the consistent zoning district it preferred.

C. The Sixth District and the Fourth District Reached Opposite Conclusions Regarding Whether Zoning Made Inconsistent By a General Plan Amendment is Invalid, and thus, the Development Status of Parcels with Such Newly Inconsistent Zoning Is Unclear.

The first conflict between these two published decisions concerns the validity of inconsistent zoning that becomes inconsistent due to amendment of the General Plan. The Zoning and Planning Code, Government Code section 65860, states:

> (a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:
>
> (1) The city or county has officially adopted such a plan.
> (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.
>
> (b) Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). . . .
>
> (c) In 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. . . .

(Gov. Code, § 65860.)

The Fourth District in *deBottari* interpreted Government Code section 65860(a) to invalidate any zoning that was inconsistent with the General Plan upon enactment. When presented with the argument that Government Code section 65860(c) meant that zoning made inconsistent by amendment of the General Plan was still valid, because the City had a reasonable time to make the zoning consistent, the Fourth District rejected this contention outright.

> Notwithstanding this fact, plaintiff urges that the voters should be permitted to enact an inconsistent zoning ordinance because section 65860, subdivision (c), provides for a "reasonable time" within which an inconsistent zoning ordinance may be brought into conformity with an amended general plan. Thus, plaintiff points out, even if the referendum were approved the council would have a "reasonable time" within which to rectify the inconsistency.
>
> 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.

(*deBottari v. City Council*, *supra*, 171 Cal.App.3d at p. 1212.)

This Court then took this holding in *deBottari* a step further in *Lesher* and held that:

> A zoning ordinance that conflicts with a general plan is invalid at the time it is passed. (*deBottari v. City Council*, *supra*, 171 Cal.App.3d at p. 1212; *Sierra Club v. Board of Supervisors*, *supra*, 126 Cal.App.3d at p. 704.) **The 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 Communications, Inc. v. City of Walnut Creek*, *supra*, 52 Cal.3d at p. 544 (emphasis added).) Because the preemptive effect of Government Code section 65860 invalidates an inconsistent zoning ordinance, it seems only logical that this preemptive effect would invalidate any inconsistent zoning regardless whether it was inconsistent when enacted or made inconsistent by amendment of the General Plan.

The Sixth District in this case, however, disagreed with this logic, with *deBottari*, and by extension *Lesher*. It concluded that because Government Code section 65860(c) gives the city or county a reasonable time to make consistent zoning rendered inconsistent by amendment of the General Plan, the newly inconsistent zoning was not immediately invalid upon amendment of the General Plan. Instead, it remained valid, even if inconsistent, until the City adopted consistent zoning.

Given these two conflicting published decisions, city and county officials are left with no clear guidance regarding whether zoning that is made inconsistent with the General Plan due to a General Plan amendment is invalid, still valid, or only valid until a "reasonable time" has passed without the city or county enacting consistent zoning. Again, *deBottari* established a bright line test – inconsistent

zoning is invalid. But the Sixth District's interpretation of Government Code section 65860 creates a myriad of conflicting and confusing questions.

For example, if the newly inconsistent zoning is not invalid, does that mean it is still effective so as to govern development decisions regarding the parcel despite its inconsistency with the General Plan? Can the city or county approve a development plan or building permit for a use that is consistent with the General Plan but non-conforming to the inconsistent zoning? Must the city or county issue a building permit that authorizes construction of buildings the use of which could be inconsistent with the General Plan but is authorized by the inconsistent zoning?

How long is a "reasonable time" to leave a parcel with inconsistent, and arguably ineffective, zoning? A month? A few months? A year? Two years? Even though "reasonableness" is usually an objective standard, in the context of development and property rights, shouldn't be a subjective standard? And if so, how can city or county officials proper administer development in a uniform and consistent manner across all similarly situated property owners in their jurisdiction? And who decides what is a reasonable time? The city? The property owner? The courts?

The Sixth District's interpretation of Government Code section 65860 creates many more questions than it answers, and places cities, counties, property owners and courts in the impossible position of not knowing whether inconsistent zoning created by General Plan amendment is valid and effective for guiding development, zoning and building decisions.

As discussed above, consistency is the lynch pin of California land use law; all land use decisions must be consistent with the General Plan. Therefore, it would seem that at a minimum inconsistent zoning is ineffective. It cannot be given any effect to guide decisions regarding development of the parcel. Yet, the Sixth District held differently. As such, this Court should grant this petition for review to bring clarity back to this keystone issue of California Planning and Zoning Law.

D. Referendums Such As the One At Issue Pit the Electorate's Reserved Power Against Property Owner's Property Rights, And Thus This Court Must Resolve the Conflict At Issue So As to Give Cities, Counties and Courts a Legal Path to Follow In Balancing These Important Rights.

The conflict between the decision in this case and *deBottari* also places cities and counties in a precarious predicament when presented with a referendum challenging their choice of consistent zoning. Does the law invalidate the referendum such that the city or county can seek to have the referendum removed from the ballot so the consistent zoning can go into effect? Or does the law require the city or county to go forward with the election on the referendum, despite the fact that doing so will leave the parcel and its property owner without consistent zoning? Or does the validity of the referendum turn on whether the city or county has the ability to enact other consistent zoning designations?

If the first is true as established by *deBottari*, then the proper legal course is clear. The referendum is invalid and should not be placed before the voters. A voter who wants to challenge the city's or county's choice of consistent zoning should exercise their reserved legislative power through an initiative to select the consistent zoning they prefer.

However, if the second option is true, as held in the case at issue, then the city and county must leave a parcel without consistent zoning until the election, which could be two years away, and possibly for a year after that if the referendum is successful in repealing the consistent zoning. And depending on the correct interpretation of Government Code section 65860(c), that inconsistent zoning will either be invalid and ineffective or valid and effective to drive development and use of the property during this possible three year time period. Property owners will have no clear legal use of their property to guide their development choices for up to three years. Or longer if the opponents to their development are free to submit

successive referendum petitions to each of the city or county's selections of consistent zoning.

But if the last option is true and the validity depends on the availability of alternative consistent zoning choices, how many other choices must exist before the referendum becomes invalid? One? Two? Three? Does it matter if none of the available choices are actually appropriate for the parcel in question? And who decides the appropriateness of the allegedly available alternative consistent zoning districts? The city or county? The court? If it is the court, does that violate separation of powers?

Does it matter that the stated purpose of the referendum as set forth in the ballot materials submitted by the proponent is to preserve a use for the parcel that is inconsistent with its General Plan land designation? Pursuant to the stay provisions in the Elections Code, this stated purpose would preclude the city or county from enacting any consistent zoning for a year after the election if the referendum is successful in repealing the consistent zoning. Therefore, the electorate is effectively using its legislative power to mandate inconsistent zoning for at least one year. Isn't this one year mandate akin to "enacting" inconsistent zoning in violation of Government Code section 65860(a)? Or is one year a "reasonable time" under 65860(c) for a city or county to leave a property owner without consistent and effective zoning?

All of this confusion completely eradicates one of the fundamental requirements of the Planning and Zoning Law – certainty. As this Court stated in *Lesher*:

> [P]ersons 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. The 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 Communications, Inc. v. City of Walnut Creek*, *supra*, 52 Cal.3d at p. 544; see also *Orange Citizens for Parks & Recreation v. Superior Court, supra,* 2 Cal.5th at pp. 159-160.) Now only this Court can provide property owners, city and county officials, courts, and voters, the certainty these important issues necessitate.

E. Joinder in Arguments Contained in Petition for Rehearing of River Park Hospitality, Inc.

Pursuant to California Rules of Court, rule 8.200(a)(5), the City joins in and adopts by reference the Petition for Review filed by River Park Hospitality, Inc.

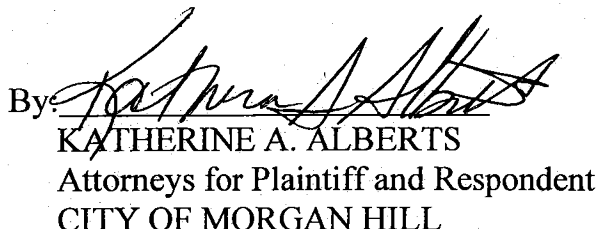
V. CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Review and substantively review the Sixth District's Decision in this case in order to resolve the conflict it creates with *deBottari* and bring clarity to these legal questions of broad public importance, affecting the rights and powers cities and counties, property owners, and voters throughout California.

Dated: July 10, 2017

Respectfully submitted,

LEONE & ALBERTS



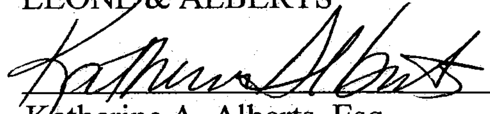
By: KATHERINE A. ALBERTS
Attorneys for Plaintiff and Respondent
CITY OF MORGAN HILL

RULE 8.204(c) CERTIFICATION

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing Petition for Review is proportionately spaced in Times New Roman 13-point type and contains 6,279 words as counted by Microsoft word-processing software.

Dated: July 10, 2017

LEONE & ALBERTS



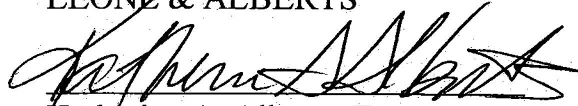
Katherine A. Alberts, Esq.
Attorneys for Plaintiff and Respondent
CITY OF MORGAN HILL

STATEMENT OF RELATED CASES

Petitioner City of Morgan Hill is not aware of any related cases pending before the Court of Appeal or this Court

Dated: July 10, 2017

LEONE & ALBERTS



Katherine A. Alberts, Esq.
Attorneys for Plaintiff and Respondent
CITY OF MORGAN HILL

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]

[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.

H043426

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Theodore C. Zayner
Attorneys for Plaintiff and Respondent, City of Morgan Hill:	Katherine A. Alberts Louis A. Leone Ionan Mondescu Leone & Alberts Donald Alan Larkin Office of the City Attorney
Attorneys for Defendant and Respondent, Shannon Bushey, as Registrar of Voters, etc.:	James R. Williams County Counsel Steve Mitra Assistant County Counsel Danielle Luce Goldstein Deputy County Counsel
Attorney for Defendant and Respondent, Irma Torrez, as City Clerk, etc.:	Scott D. Pinsky Law Offices of Gary M. Baum
Attorneys for Real Party in Interest and Respondent, River Park Hospitality:	Jolie Houston Thomas P. Murphy Berliner Cohen, LLP
Attorneys for Real Party in Interest and Appellant, Morgan Hill Hotel Coalition:	Asit S. Panwala Law Office of Asit Panwala Jonathan Randall Toch J. Randall Toch, Attorney at Law

City of Morgan Hill v. Bushey, as Registrar of Voters, etc. et al.
H043426

Re: City of Morgan Hill v. Shannon Bushey, et al.
California Supreme Court Case No.:________
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 July 10, 2017, I served the following documents:

CITY OF MORGAN HILL'S PETITION FOR REVIEW

COUNSEL FOR MORGAN HILL HOTEL COALITION
Asit S. Panwala
Law Office of Asit Panwala
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

COUNSEL FOR REAL PARTY IN INTEREST RIVER PARK HOSPITALITY
Jolie Houston, Esq.
Berliner Cohen LLP
10 Almaden Blvd., Eleventh Floor
San Jose, CA 95113

COUNSEL FOR DEFENDANT IRMA TORREZ
Gary Baum, Esq.
Scott Pinsky, Esq.
Interim City Attorney
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037-4128

COUNSEL FOR RESPONDENT/ DEFENDANT SHANNON BUSHEY
Danielle L. Goldstein, Esq.
Deputy County Counsel
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
9th Floor, East Wing
San Jose, CA 95110

COURT OF APPEALS
Clerk of the Court
Sixth District Court of Appeal
333 West Santa Clara Street. Suite 1060
San Jose, CA 95113

SUPERIOR COURT
Clerk of the Court
Honorable Theodore C. Zayner
Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

VIA MAIL

[X] 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

[ ] 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.

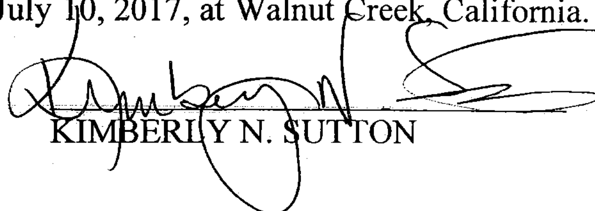
VIA HAND-DELIVERY

[ ] 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)

[X] 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 July 10, 2017, at Walnut Creek, California.



KIMBERLY N. SUTTON

Re: **City of Morgan Hill v. Shannon Bushey, et al.**
California Supreme Court Case No.:________
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 July 12, 2017, I served the following documents:

CITY OF MORGAN HILL'S PETITION FOR REVIEW (W/ATTACHED DECISION)

COUNSEL FOR MORGAN HILL HOTEL COALITION
Asit S. Panwala
Law Office of Asit Panwala
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

COUNSEL FOR REAL PARTY IN INTEREST RIVER PARK HOSPITALITY
Jolie Houston, Esq.
Berliner Cohen LLP
10 Almaden Blvd., Eleventh Floor
San Jose, CA 95113

COUNSEL FOR DEFENDANT IRMA TORREZ
Gary Baum, Esq.
Scott Pinsky, Esq.
Interim City Attorney
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037-4128

COUNSEL FOR RESPONDENT/ DEFENDANT SHANNON BUSHEY
Danielle L. Goldstein, Esq.
Deputy County Counsel
Office of the County Counsel
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70 West Hedding Street
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SUPERIOR COURT
Clerk of the Court
Honorable Theodore C. Zayner
Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

VIA MAIL

[X] 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

[ ] 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.

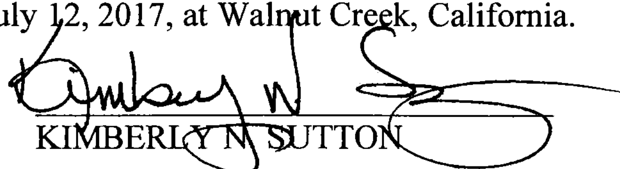
VIA HAND-DELIVERY

[ ] 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 July 12, 2017, at Walnut Creek, California.



KIMBERLY N. SUTTON