

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, a
municipality,

Plaintiff and Respondent,

v.

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

Defendants and Respondents.

RIVER PARK HOSPITALITY,

Real Party in Interest and
Respondent.

MORGAN HILL HOTEL COALITION,

Real Party in Interest and
Appellant.

Case No. S243042

Sixth Dist. No. H043426

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

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

**RIVER PARK HOSPITALITY, INC.'S REPLY TO ANSWER TO
PETITIONS FOR REVIEW**

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HOSPITALITY, INC.

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River Park Hospitality, Inc. a California corporation (River Park), Real Party in Interest in the trial court and Respondent on appeal, respectfully submits its reply to the answer of Morgan Hill Hotel Coalition (Hotel Coalition) to the petitions for review of River Park and the City of Morgan Hill (City).

I. INTRODUCTION.

The Hotel Coalition does not directly dispute that this case presents both of the grounds for review set forth in California Rules of Court Rule 8.500(b)(1). Instead, it urges that *deBottari v. City of Norco* (1985) 171 Cal.App.3d 1204 was “poorly reasoned” and that the Sixth District’s decision was correct. However, it cannot draw a principled distinction between the decision of Division Two of the Fourth District in *deBottari* and this case, in which the Sixth District expressly criticized and rejected the rule of *deBottari*. And, although the Hotel Coalition suggests that *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, decided by a different division of the Fourth District, somehow undermines *deBottari*, even if that were true—and is not—the *Chandis* case would simply add to the uncertainty in the published decisional law.

As shown, this case presents an ideal vehicle to resolve the split of authority and to declare what the law should be on the important issue this case presents. The Court should grant review to give guidance to cities and counties, landowners, and voters throughout California. Such guidance is necessary in light of the uncertainty in the law due to the conflict between *deBottari* and *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, on the one hand, and the Sixth District’s decision in this case.

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II. ARGUMENT.

A. The *Chandis* Case Does Not Affect the Grounds for Review.

In its answer to the petitions for review, the Hotel Coalition first tries to downplay the split of authority that this case creates by pointing to a case decided by Division Three of the Fourth District, *Chandis, supra*, 52 Cal.App.4th 475. The Hotel Coalition claims that the *Chandis* decision undermined *deBottari* by holding that a “rule declaring that voters cannot reject a one of several choices would render the exercise of the power of referendum meaningless.” (Answer, p. 11.) However, *Chandis* is of no assistance to the Hotel Coalition.

As an initial point, *Chandis* was decided by Division Three of the Fourth District, not Division Two of the Fourth District, which decided *deBottari*. (Cal.Const., Art. VI, section 3 [each division “has the power of a court of appeal ...”].) Therefore, even if the Hotel Coalition were correct in claiming *Chandis* to be at odds with the rule of *deBottari* in some way, that fact would simply exacerbate the split of authority on the issue presented and the uncertainty in the decisional law.

In any event, the Hotel Coalition wrongly reads *Chandis* as undermining *deBottari*. For one thing, the consistency statute at issue in this case, Government Code section 65860, broadly provides that city and county zoning ordinances “shall be consistent with the general plan” However, as the court in *Chandis* noted, Government Code section 65860 did not apply to the rejection by referendum of a proposed specific plan, as occurred in *Chandis*. (*Chandis, supra*, 52 Cal.App.4th at 479, 485.) Instead, the court in *Chandis* looked to Government Code section 65454, which states that “[n]o specific plan may be *adopted or amended* unless the proposed plan or amendment is consistent with the general plan.” (Italics added.) The

Chandis court was not faced with the adoption or amendment of an inconsistent specific plan. Since *Chandis* concerned the application of a different consistency statute than the one at issue here, on different facts, the case is inapposite.

B. Review Is Necessary to Secure Uniformity of Decision.

The Hotel Coalition cannot dispute that in this case the Sixth District took the *deBottari* and *City of Irvine* decisions head on and expressly disagreed with their reasoning and holdings. (Slip op. at * 8.) The Hotel Coalition tries to sidestep the clear split of authority this case creates by suggesting that in *deBottari* there were no other available zoning designations. In fact, one cannot conclude, from the *deBottari* decision itself, that the City of Norco had no alternative zoning designations available to it. Also, the Sixth District did not distinguish *deBottari* on this basis. Rather, it stated “[w]e disagree with *deBottari* ...[,]” “[w]e must confront *deBottari*, as the superior court relied on it, and City continues to rely on it[,]” and “[t]he Fourth District’s reasoning in *deBottari* is flawed... .” (Slip op at ** 2, 7-8.)

Nor did the Sixth District “distinguish[] the facts of *deBottari* in its decision when it expressed no opinion as to the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan[,]” as the Hotel Coalition claims. (Answer, p. 16.) To the contrary, in expressly confronting, and rejecting, the reasoning and rule of *deBottari*, the Sixth District implicitly recognized that *deBottari* was not materially distinguishable from this case. Indeed, no such distinction can be drawn on the basis that in *deBottari* the City of Norco had no alternative zoning designations available to it (which is not shown) whereas the City in this case purportedly has such other zoning designations.

Also, in *deBottari*, the court rejected the argument that, if the referendum were successful, the City of Norco could adopt new, consistent zoning scheme. (*deBottari, supra*, 171 Cal.App.3d at 1212.) There is no difference in principle between requiring a local government to resolve a continuing inconsistency with its general plan after a successful referendum challenge by adopting a different zoning designation, on the one hand, and adopting a new “zoning scheme,” on the other. At the least, in either case the local government would have to affirmatively act to eliminate the inconsistency.

The Hotel Coalition makes much of the *deBottari* court’s characterization at points of the referendum in that case as “enacting” inconsistent zoning. However, the court in *deBottari* clearly understood the facts before it, and the rule of *deBottari* must be read in light of those facts. In stating its ultimate conclusion that the invalidity of proposed referendum had been demonstrated, the *deBottari* court reasoned that “[r]epeal of the zoning ordinance in question would result in the subject property being zoned to the low density residential use while the amended [general] plan calls for a higher residential density.” (*deBottari, supra*, 171 Cal.App.3d at 1211-1212.)

C. Review is Necessary to Settle Important Questions of Law.

Finally, the Hotel Coalition does not disagree that the issue presented by this case is broadly consequential to cities, counties, voters, and property owners across California. As River Park noted in its petition for review, the decision in this case implicates important issues concerning the proper scope of the legislative power over land use and development when it is exercised not by elected representatives but by the voters. The decision also raises important issues impacting policies favoring early certainty in zoning matters. (See River Park Petition for Review at pp. 14-16.) The Hotel

Coalition itself dwelt at length in the court of appeal on the importance of voters' referendum power, although it failed to acknowledge that the electorate's referendum power is no more unbounded than is the legislative power when it is exercised by elected representatives. (See, e.g., Appellant's Opening Brief, pp. 15-18; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776 [local electorate's right to initiative and referendum is generally co-extensive with the legislative power of the local governing body].) The Hotel Coalition would thus presumably agree that the published decision in this case raises issues of broad public importance.


III. CONCLUSION.

The court of appeal's decision creates a conflict and uncertainty in the decisional law. It also affects the rights and powers of cities and counties, property owners, and voters throughout California. It would have far-reaching and harmful consequences. Therefore, the Court should grant review.

Dated: August 7, 2017

RESPECTFULLY SUBMITTED,
BERLINER COHEN

By



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


CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 85204(d)(1), counsel for Respondent River Park Hospitality, Inc. states that, exclusive of this certification, the cover, and the tables, this Reply to Answer to Petitions for Review contains 1,356 words, as determined by the word count of the computer program used to prepare the brief.

Dated: August 7, 2017

RESPECTFULLY SUBMITTED,

BERLINER COHEN

By 
THOMAS P. MURPHY

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

3 CALIFORNIA SUPREME COURT CASE NO. S243042

4 COURT OF APPEAL SIXTH APPELLATE DISTRICT CASE NO. H043426

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

6 PROOF OF SERVICE

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

9 I am a citizen of the United States, over the age of eighteen years, and not a party to the
10 within action. I am an employee of Berliner Cohen, and my business address is Ten Almaden
11 Boulevard, Suite 1100, San Jose, California 95113-2233. On AUGUST 7, 2017, I served the
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13 **RIVER PARK HOSPITALITY, INC.'S REPLY TO ANSWER TO PETITIONS FOR
14 REVIEW**

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I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business. Executed on August 7, 2017, at San Jose, California.



Debra Troy