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 ANSWER BRIEF

CASE NO.: S243042

SIXTH DISTRICT NO.: H043426

SUPERIOR COURT NO.: 16CV292595

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QUESTION PRESENTED

Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum-if successful-would leave intact the existing zoning designation that does not conform to the amended general plan?

INTRODUCTION

The right to referendum is enshrined in the California Constitution in Article 2, § 9. The California Constitution was amended in 1911 to provide the voters with the ability to exercise oversight over legislation passed by local government. This Court has held that zoning is a legislative act subject to referendum. *See Yost v. Thomas* (1984) 36 Cal.3d 561, 571. The consistency requirement of Government Code § 65860[1] cannot serve as a basis for denying to voters their Constitutional power to approve or reject a local zoning ordinance so long as the local government had a choice of different zoning districts to comply with the state-mandated consistency requirement. The City of Morgan Hill ("City") exercised its legislative discretion by choosing a specific zoning district from among a dozen possibilities. Thus the voters have the Constitutional right to reject that choice even if the City is required to subsequently adopt another zoning district.

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[1] Subsequent statutory references are to the Government Code unless otherwise specified.

Voters exercised their Constitutional rights by signing a petition for referendum regarding a proposed zoning ordinance for a 3.39-acre parcel owned by River Park Hospitality ("River Park"). The petition called for the City to either repeal its proposed Ordinance No. 2131-New Series ("Ordinance-2131") or to seek voter approval before it may become effective. Ordinance-2131 was the an attempt to change zoning that had become inconsistent as the result of a recent general plan amendment. However, rather than allow the voters to exercise their Constitutional power to approve or reject the City's choice of zoning, the City instead seeks to prevent an election and asserts that voter approval is unnecessary.

The purpose of the referendum power is to allow voters to prevent local governments from exercising their discretion to favor special interests. U.C. Hastings Scholarship Repository, Voter Information Guide for 1911, General Election. "[T]he power of referendum guarantees to the citizens an ultimate check on legislative power." *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 779. In this case, the referendum power provides the voters with the right to reject the City's attempt to rezone land for the benefit of a real estate speculator.

The City had twelve different commercial zoning districts from which to choose in amending the zoning. Each of those twelve zoning districts permit different types of uses, but all twelve are consistent with general plan use designation of commercial. A rule, which prevents voters from rejecting one of many choices, would render the right to referendum meaningless.

Appellant Morgan Hill Hotel Coalition ("Coalition") urges this Court to protect the Constitutional right of voters to exercise their power of referendum. If the voters approve the referendum measure, then the City's choice of zoning will become effective and the issue is moot. If the measure fails, then the lawfully enacted, but inconsistent zoning would simply remain until the City chooses another zoning district that conforms to the amended general plan.

STATEMENT OF FACTS

In 2010, the City's general plan's land use element was updated and established policies to serve as the basis for day-to-day decision making for land use for the next twenty years. Joint Appendix ("JA") at 145. That general plan update envisioned the undeveloped 3.39-acre parcel ("Parcel") located at Lightpost Way and Madrone Parkway, and the land surrounding it on the North, East and West side would all remain industrial. JA at 159.

In January of 2014, River Park applied for a general plan amendment for the Parcel. JA at 401:8-11. The amendment sought to change the general plan's land use designation from industrial to commercial. JA at 401:8-11. The Parcel is zoned "ML-light industrial." JA at 17.

On November 19, 2014, the City amended the general plan's land use designation for the Parcel from industrial to commercial. JA at 130-31. However, the zoning for the Parcel remained "ML-light industrial." On December 8, 2014, River Park purchased the Parcel. JA at 465. For several months, the City and River Park allowed the land use inconsistency to exist without concern.

On March 18, 2015, the City Council passed the first reading of Ordinance-2131, which proposed to amend the zoning designation of the Parcel from "ML-light industrial" to "CG-general commercial." JA at 116. Hotel use is permitted with a conditional use permit on land zoned "CG-general commercial." JA at 410. The Coalition opposed the ordinance because two other hotels would be built soon, increasing the supply of hotel rooms by over twenty percent. JA at 383:8-13. The Coalition also complained that industrial land, which is meant to attract companies and create career opportunities for the residents of Morgan Hill, should not be rezoned for another hotel. JA at 383:8-13. The reading of the ordinance passed by a three to two vote despite the public comments against it. JA at 116.

On April 1, 2015, the City Council again heard public comments against Ordinance-2131, but narrowly adopted the ordinance by a three-to-two vote. JA at 121-22; 301. Ordinance-2131 states it will take effect after thirty days pursuant to section six of the statute. JA at 121.

On May 1, 2015, the Coalition filed a petition for referendum ("Petition") against Ordinance-2131 and submitted more than 4,000 signatures. JA at 295. On May 15, 2015, the City Clerk issued a certificate of examination and sufficiency after determining that there were approximately 2,500 valid signatures from registered voters from Morgan Hill. *Id.* The Petition states that in accordance with "California Elections Code, Section 9237, should the ordinance not be repealed by the City Council it must be submitted to the voters at the next regular election or a at a special election called for that purpose." JA at 119.

On July 15, 2015, the City Council voted to direct the City Clerk to discontinue processing the Petition. JA at 93. It did so, without a court order. *Id.* River Park then prepared a conditional use permit application to build a hotel. JA at 452. In the fall of 2015, River Park, under the mistaken belief that the Parcel had been rezoned for hotel use, listed the Parcel for sale at twice it had paid for it a year earlier. JA at 463-65.

On January 13, 2016, the Coalition filed a petition for writ of mandamus compelling the City of Morgan Hill to repeal Ordinance-2131, or place it on the ballot for voter approval.[2] JA at 401:17-25 (Superior Court No. 16CV290097).

On February 17, 2016, the City Council reviewed staff reports that provided alternatives for the Parcel such as choosing another commercial zoning district that does not permit hotel use. JA at 404-5. At that meeting, the Coalition suggested that the City repeal its choice of zoning and choose another commercial zoning district that does not permit hotel use in order to remedy the inconsistency. Reporter's Transcript of Hearing ("RT") at 6:1-13; 15:2-7.[3] Morgan Hill Municipal Code Chapter 18 provides for twelve commercial zoning districts including, but not limited to, "administrative office," "service/commercial," and "light commercial/residential." JA at 407-31. Thus, the City has eleven other

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[2] The Coalition's petition for writ of mandamus action settled after the trial court issued its ruling in this case. The settlement required the City to reimburse the Coalition for attorneys' fees and it expressly excluded any right to appeal the trial court's decision in this second case.

[3] The transcript mistakenly includes a "not" before the other zoning options that the Coalition asked the City to consider in place of "CG-general commercial."

commercial zoning districts that it could consider in lieu of "CG-general commercial." *Id.* The City Council also considered amending the general plan land use designation from commercial back to industrial. JA at 405.

On March 2, 2016, the City Council passed a resolution to submit the referendum to the voters at a special municipal election scheduled for June 7, 2016. JA at 101-03. The proposed referendum measure states: "Shall the ordinance amending the zoning designation of a 3.39 acre site located at the Northeast corner of the intersection of Madrone Parkway and Lightpost Way from the ML-Light Industrial district to the CG-General Commercial (APN 726-33-026) be adopted?" JA at 319. The City then initiated legal action to remove the measure from the ballot. JA at 101-03. The electorate has not had an opportunity to vote on the measure.

STATEMENT OF THE CASE

On March 11, 2016, the City filed an action against Shannon Bushey ("Bushey"), the Registrar of Voters for Santa Clara County, and Irma Torrez, City Clerk for Morgan Hill, for an alternative and peremptory writ and declaratory relief to remove the measure from the ballot and certify Ordinance-2131. JA at 13-325.

On March 18, 2016, the Coalition filed an opposition to City's request for alternative and peremptory writ and declaratory relief. JA at 375-431. It argued that the right to referendum is a Constitutional right and zoning is subject to referendum. JA at 387-88. By filing a petition for referendum, the zoning change

did not become effective pursuant to the stay provision of the Elections Code § 9237. JA at 391-92. The Coalition also argued that if the voters rejected the City's first choice of zoning, the status quo (lawfully enacted) zoning would remain in effect until the City adopts another one of the commercial zoning districts within its zoning scheme. JA at 391-95. Thus, the Government Code's consistency requirement and the Elections Code's one-year prohibition on enacting the same statute would each be satisfied, as the City would select another commercial zoning district that does not permit hotel use. JA at 393.

On March 18, 2016, Santa Clara County Counsel replied on behalf of Bushey, Registrar of Voters, and that the Registrar did not take a position on the question of whether or not the referendum should remain on the ballot.[4] JA at 433-44. However, Bushey warned that there are strict time deadlines for finalizing the ballot for printing. JA at 434-35.

On March 22, 2016, River Park replied that there is a need for certainty in zoning, and it had incurred fees and costs because of its mistaken belief that the zoning had changed. JA at 446-453.

On March 24, 2016, the Hotel Coalition replied that River Park knew the Parcel was zoned industrial when it bought it, and thus it could not complain the zoning was not changed for its benefit. JA at 456-64. It also noted that River Park

[4] The Registrar of the Voters has also filed a brief in this matter in the Supreme Court taking no position.

had not received any permits, and thus it had no legal expectation that it may build a hotel on the site. JA at 457-58.

In its reply, the City argued that it was irrelevant that the City could remedy the inconsistency by choosing another commercial zoning district if the voters failed to approve the City's first choice of zoning. JA at 475. The City never contested that there were eleven other commercial zoning districts available. JA at 467-77. Rather, it argued that the number of potential choices was irrelevant. JA at 475. Instead, the City argued that it could not choose another commercial zoning district for a year because the true purpose of the referendum was to preserve industrial land. JA at 476. The City based its position upon an unpublished ballot argument and claimed that the Coalition *misstated* the *true* purpose of the referendum. JA at 476. The unpublished ballot argument lists multiple reasons why the voters should reject the measure: the city does not need a new hotel, the developer would receive a financial windfall of $2 million dollars, and the City spent $75,000 trying to help the developer. JA at 482.

At the hearing, the parties agreed that the existing "ML-light industrial" zoning is inconsistent with the general plan land use designation of commercial. RT at 4:22-23. The Coalition argued that voters may *reject* one of many choices that would conform to the amended general plan. RT at 5:4-15.

Relying upon *deBottari*, the trial court held "that the result of the voters' rejection of the proposed – and consistent – ordinance would be a zoning inconsistent with the City's general plan - and thus clearly invalid." JA at 485; *see*

deBottari v. City of Norco ("*deBottari*") (1985) 171 Cal.App.3d 1204, 1212-13. The trial court did not make any findings regarding the purpose of the referendum. JA at 484-87. The trial court concluded that a compelling showing had been made that the proposed referendum is invalid and ordered it removed from the ballot. JA at 484-87. The Coalition appealed. JA at 495.

The Sixth District Court of Appeal ("Sixth District") reversed the trial court. *City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, 43. It held found that the reasoning in *deBottari* is flawed and ruled that a referendum does not enact legislation. *City of Morgan Hill at* 42. "A referendum that rejects an ordinance simply maintains the status quo." *Id.* at 42. Thus, a referendum cannot violate Section 65860, which prohibits the enactment of an inconsistent zoning ordinance. *Id.* at 42. Further, "section 65680 permits *maintenance* of inconsistent zoning pending selection of a consistent zoning." *Id.* Thus the Sixth District held that, "section 65860 does not automatically render invalid a preexisting zoning ordinance that became inconsistent only after a subsequent general plan amendment." *Id.*

The Sixth District also found that the City's discretion to adopt zoning was not preempted by Section 65860's mandate that the parcel's zoning be consistent with the general plan, because Section 65860 did not require the City to adopt "CG-general commercial." *Id.* at 40. "[I]t was 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 the City or the electorate from

rejecting the one selected by the City."[5] *Id.* at 41. Thus, the Sixth District held that Petitioner failed to establish that the proposed referendum is clearly invalid and reversed the trial court. *Id.* at 42.

The City and River Park then petitioned for a rehearing. In its petition, the City conceded that it has six other commercial zoning districts that do not permit for hotel use, but argued that those districts were not suitable for the Parcel's location. City's Petition for Rehearing at 8-12. However, the City also conceded that there is at least one commercial zoning district that would conform to the amended general plan, does not allow for hotel use, and may be suitable for the Parcel's location. *Id.* at 11. The Sixth District denied the petitions for rehearing.

MEMORANDUM OF LAW

I. STANDARD OF REVIEW IS DE NOVO

The issue is one of law requiring *de novo* review. *Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.

II. THE RIGHT TO EXERCISE THE POWER OF REFERENDUM IS ENSHRINED IN THE CALIFORNIA CONSTITUTION

The power of referendum was established in the California Constitution by amendment of article IV, § 1 in 1911 (hereafter 1911 Amendment). *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 776 (citing *Association Home Builders, etc., Inc., v. City of Livermore* (1976) 13 Cal.3d 582, 591). The

[5] The Sixth District expressed no opinion on the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan. *Id.* at 42, fn 4.

1911 Amendment reserved to the People the right to enact legislation by initiative and challenge legislation by referendum. It states in pertinent part:

> "[T]he people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature...[¶] The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law...This section is self-executing, but legislation may be enacted to facilitate its operation, *but in no way limiting or restricting either the provisions of this section or the powers herein reserved.*" *Midway* at 776-77 [citations omitted] (italics added).

The right to referendum is the power to "adopt or reject any act, or section or part of any act, passed by the Legislature." *Midway* at 780. The 1911 Amendment expressly states that legislation may not limit or restrict the right to referendum to adopt or reject any legislative act. Cal. Const. Art. IV, § 1.

The right to exercise the power of referendum is now found in Article II, § 9 of the California Constitution. It states "the referendum is the power of the electors to approve or reject statutes except urgency states, statutes calling for elections and statutes providing for tax levies or appropriation for usual current expenses of the state." Cal. Const. Art. II, § 9(a). "The powers of initiative and referendum may be exercise by the electors in *each city* or county..." Cal. Const. Art. II, § 11(a) (italics added).

A. The 1911 Amendment Allows Voters To Pass Judgment Upon Acts Of The Legislature And To Prevent Objectionable Measures From Taking Effect

The electorate voted on Proposition 7 on October 10, 1911, adding the 1911 Amendment to the California Constitution. California Secretary of State, "California Statement of Vote, 1911." Assemblyperson William Clark and Senator Lee Gates provided ballot arguments in favor of the Amendment. U.C. Hastings Scholarship Repository, Voter Information Guide for 1911, General Election. The proponents argued that the law would reflect the will of the People if power were given to the People to pass judgment upon the actions of the legislature, and to prevent objectionable measure from taking effect. *Id.* They also argued that it would be "unsafe and profitless for legislators to bargain with private interests or to violate the people's rights; because the people have the power of ratification or rejection." *Id.* The Proposition passed with 76% of the vote. Ballotpedia.org, California Initiative and Referendum, Proposition 7. The reasons for the referendum are demonstrated by this case in which the City is placing the monetary interest of a single developer over the will of the People.

B. Referenda Do Not Enact Legislation Unlike An Initiative

The right to referendum is the power of the electors to approve or reject statutes enacted by their legislators. *Assembly v. Deukemejian* (1982) 30 Cal.3d 636, 656-57. Referenda do not enact law and may not address certain subjects. *City of Morgan Hill* at 39. In contrast, the electorate may legislate on any subject

by initiative. *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728. Thus, the fundamental difference is that voters may challenge a statute by referendum, but to enact their own statute, they must do so by initiative.

An ordinance is not effective for a period of thirty days after its final passage to enable the electorate to challenge the ordinance. Elections Code § 9235.[6] Statutory exceptions to referendum become effective immediately upon passage by the legislature. *Id.* A petition for referendum in a city with the population of Morgan Hill must be signed by 10% of the registered voters and filed with the city clerk within thirty days of the final passage of the ordinance. Elections Code § 9237.[7] 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." *Id.* (italics

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[6] Elections Code § 9235 states: "No ordinance *shall become effective until 30 days from and after the date of its final passage*, except: (a) An ordinance calling or otherwise relating to an election. (b) An ordinance for the immediate preservation of the public peace, health or safety that contains a declaration of, and the facts constituting, its urgency and is passed by a four-fifths vote of the city council. (c) Ordinances relating to street improvement proceedings. (d) Other ordinances governed by particular provisions of state law prescribing the matter of their passage and adoption." (italics added).

[7] Elections Code § 9237 states: "If a petition protesting the adoption of an ordinance and circulated by a person who meets the requirements of section 102, is submitted to the election official of the legislative body of the city in his or her office during normal office hours, as posted within 30 days of the date the adopted ordinance is attested to by the city clerk or secretary of the legislative body, and is signed by not less than 10 percent of the voters of the city according to county election official's last official report of registration to the Secretary of State...the *effective date of the ordinance shall be suspended* and the legislative body *shall reconsider* the ordinance." (italics added).

added). If the legislative body does not entirely repeal the ordinance, the legislative body shall submit the ordinance to the voters. Election Code § 9241.[8] The ordinance *shall not* become effective unless a majority of the voters approve it. *Id.* (italics added). The election must be held at either a regular or special election not less than 88 days after the legislative body orders the measure to be placed on the ballot. *Id.*

C. The Courts Must Construe The Referendum Power Liberally Because It Is A Power Reserved To The People

Courts have found that the reserve powers of initiative and referendum are "one of the most precious rights of our democratic process." *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563. "Since under our theory of government all the power of government resides in the people, the power of initiative is commonly referred to as a 'reserve' power and it has long been our judicial policy to apply a *liberal* construction to this power wherever it is challenged in order that the right be not improperly annulled." *Id.* at 563-64 (italics added). If doubts can reasonably be resolved in favor of the use of this reserve power, our courts will

[8] Elections Code § 9241 states: "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, either at the next regular municipal election called for that purpose...or at a special election called for that purpose...the *ordinance shall not become effective* until a majority of the voters voting on the ordinance 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 or disapproval by the voters." (italics added).

preserve it.[9] *Id.* Courts have declared that it is their duty to jealously guard this right of the People. *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33, 41. Thus, Courts will narrowly construe provisions that would burden or limit the exercise of that power. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936-37 (this Court narrowly read "local government" in a manner that did not place restrictions on the electorate).

This Court has stated that "it is usually more appropriate to review constitutional and other challenges to the ballot propositions or initiative measures *after* an election rather than to *disrupt the electoral process by preventing* the exercise of the people's franchise, in the absence of some clear showing of invalidity."[10] *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 (italics added).

III. ZONING IS A LEGISLATIVE ACT SUBJECT TO REFERENDUM EVEN IF THE ACT SEEKS TO COMPLY WITH STATE LAW

This Court has held that zoning is subject to referendum even when a municipality seeks to comply with a statewide law. *Yost v. Thomas* (1984) 36 Cal.3d 561, 571. In *Yost*, the city council had adopted zoning measures and argued that the California Coastal Act provided blanket immunity from the voters'

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[9] "Courts have taken judicial notice of the fact that a large cross-section of the citizenry entertains the opinion that the government is no longer representative of the people. It takes outlandish resources to mount a campaign for office....one counter balance to this trend is to give vitality to the initiative power. *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 257-58.

[10] The Coalition argued the City's suit was premature, but given the resources and time spent on this issue, we now consent to hearing the matter on its merits.

referendum power. *Id.* at 565. The city claimed that the zoning changes at issue in that case were not subject to referendum because the city merely implemented a land use plan mandated by the California Coastal Commission, a statewide agency. *Id.* The California Coastal Act of 1976 is a statewide statute proscribing land use planning for the entire coastal zone of California. *Id.* The California Coastal Act has policies and goals that local governments must comply with. *Id.* This Court noted that state regulation of a matter does not necessarily preempt the power of local voters to act through initiative and or referendum. *Id.* at 571 (citing *Hughes v. City of Lincoln* (1965) 232 Cal.App.2d 741, 745).

In *Yost*, this Court examined whether the California Coastal Act explicitly preempted local planning or referred to the referendum and initiative powers. *Id.* at 571. The Act did neither. *Id.* This Court then discussed whether or not the legislature intended to circumscribe the right to initiative and referendum from the Act's general provisions, and concluded that the Coastal Commission's ability to reject zoning ordinances, which do not conform to a certified land use plan do not render the city's zoning decisions administrative. *Id.* at 571-72. Local governments have discretion in "establishing and creating land use plans, to zone one piece of land to fit any of the acceptable uses under the policies of the California Coastal Act, and to be more restrictive than the Act." *Id.* at 572. Therefore, the Court held that the "*wide discretion* afforded to a local government showed that the city acted *legislatively,* and its actions are subject to the normal referendum procedure." *Id.* at 573 (italics added); *see also DeVita v. County of*

Napa (1995) 9 Cal.4th 763, 776 (upholding the right of the People to change the general plan by initiative because the state had not largely preempted the local legislative body's discretion by statutory mandate).

A. Local Governments Exercise Discretion Under Section 65860

Similarly, cities have *wide discretion* in creating their zoning schemes. They create and establish their own general plans and zoning districts. The Legislature declared its "intention was to provide only a minimum of limitation in zoning and planning law so that cities and counties may exercise the maximum degree of control over local zoning matters." Section 65800.[11] In Morgan Hill, the City had numerous choices when it attempted to comply with the consistency requirement of Section 65860.[12] The statewide requirement that the City amend the zoning to be consistent with the general plan within a reasonable period of time does not dictate which specific zoning district the City should select for the Parcel. This is hardly an "absolute ban" on legislative discretion. City's Opening Brief at 23. The City clearly exercised legislative discretion in choosing "CG-general commercial" from among the twelve commercial zoning districts available

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[11] Section 65800 states: "It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city....the Legislature declares that in enacting this chapter it is its intention to provide only a *minimum of limitation* in order that *counties and cities may exercise the maximum degree of control over local zoning matters*." (italics added).

[12] Even the City concedes that at least six of the commercial zoning districts do not allow for hotel use. City's Opening Brief at 44.

under its zoning scheme to remedy the inconsistency between the general plan and zoning.[13] The City also exercised discretion in amending the general plan without concurrently amending the zoning despite the state's strong statutory preference to do so. *See* Section 65862.[14] Thus, the City cannot claim that Section 65860 preempted their discretion in the matter.

The holding in *Yost* clearly applies as both the California Coastal Act and Section 65860 imposes statewide requirements on local government, but local governments also retain legislative discretion. Thus, Ordinance-2131 is clearly subject to referendum under this Court's reasoning in *Yost.*

B. Zoning Ordinances Are Not Effective Immediately Because They Are Subject To Referendum

Zoning ordinances do not fall into the statutory exceptions to referendum listed in California Constitution. *See* Cal. Const. Art. II, § 9(a). Ordinances that are beyond the referendum power become effective immediately. Elections Code § 9235; *see also Voters For Responsible Retirement v. Trinity County* (1994) 8 Cal.4th 765, 780. Section Six of Ordinance-2131 states that the ordinance will not be effective for a period of thirty days, suggesting that the City understood that the

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[13] The City also exercised discretion even if there were one other commercial zoning district available. On February 16, 2016, the City considered repealing the ordinance and choosing another commercial zoning district, and decided otherwise.

[14] Section 65862 provides in pertinent part: "It is the intent of the Legislature, in enacting this section, that local agencies *shall, to the extent possible, concurrently* process applications for general plan amendments and zoning changes which are needed to permit development so as to expedite processing of such applications." (italics added).

zoning ordinance was subject to referendum when it was proposed. JA at 121.

C. Legislative History Of Section 65860 Does Not Restrict The Right To Referendum

The legislative history of Section 65860 is silent on the issue of whether or not the legislature intended to preempt the initiative and referendum powers. City's Motion for Judicial Notice, Legislative History of Section 65860. Courts presume, absent a clear showing of the Legislature's intent to the contrary, that the city's legislative decisions are subject to referendum. *DeVita* at 775. The absence of any reference to the reserve powers of initiative or referendum in the legislative history of Section 65860 strongly suggests that the legislature did not intend to limit or burden the powers reserved to the People.[15]

IV. THE VOTERS' EXERCISE OF THE POWER OF REFERENDUM SHOULD BE CO-EXTENSIVE WITH THE LEGISLATIVE POWER OF THE CITY

Courts have recognized that the People's power to exercise the right to referendum and initiative is generally co-extensive with the power of legislature. *DeVita* at 776. This principle limits the People from enacting by initiative what may not be enacted by the legislature. *Lesher* at 545-46. *Cf. California Cannabis* at 936-37. Referenda do not enact legislation, and so the notion that referendum power is co-extensive with the power of the legislature is a question of whether the

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[15] *Cf. Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 545-46 (holding that the consistency requirement prevented the electorate from enacting a zoning ordinance by initiative that was inconsistent with the general plan). However, the mandates of Section 65860 also prevented the city from doing the same. *Id.* at 547. Here, the City had the power to reject Ordinance-2131, and thus the electorate should also have the power to do so. *See* Section IV.

local legislative body's discretion was largely preempted by statutory mandate. *See Housing Authority v. Superior Court* (1950) 35 Cal.2d 550, 557-58.

Section 65860 did not mandate that the City adopt Ordinance-2131. If the City Council could reject the ordinance, then the electorate must also have that same power. If the City concedes that it exercised discretion when it voted upon Ordinance-2131, then *Yost* applies and the act is subject to referendum. However, the City claims that the adoption of Ordinance-2131 was akin to an administrative act required by the consistency requirement of Section 65860. City's Opening Brief at 23-24. The City disingenuously claims it had no choice but to adopt the ordinance because it claims that Section 65860 is an "absolute ban" on legislative discretion. *Id.*

The City narrowly adopted Ordinance-2131 with two of its members voting against it. By its own argument, the City voted on a measure when the consistency requirement rendered that vote meaningless because it *was required* to approve the ordinance.[16] *Id.* (Section 65860 mandates consistency and prohibits inconsistency without exception); Respondent City's Answer Brief to the Court of Appeal at 26. If Section 65860 is an "absolute ban" on legislative discretion, then why did the City Council hold a vote?

The right to referendum in this case provides the electorate with the same choice that the City Council considered on April 1, 2015; whether to approve or

[16] By the City's own argument, two of its members exceeded their legislative authority by rejecting the measure.

disapprove of Ordinance-2131. The electorate's power is no greater than the City in this regard, but eliminating their right to referendum would severely lessen their power in comparison to the City.

V. THE PETITION FOR REFERENDUM PREVENTED ORDINANCE-2131 FROM BECOMING EFFECTIVE, AND THUS THE ZONING OF THE PARCEL REMAINS "ML-LIGHT INDUSTRIAL"

Once the Petition was timely filed and certified, the effective date of Ordinance-2131 *shall be* suspended and the legislative body *shall reconsider* it. Elections Code § 9237.

A. Courts Have Upheld The Stay Provision Of Elections Code § 9237

Courts have consistently upheld the stay provision of the Elections Code § 9237 because the power of referendum is simply *not* the power to *repeal* a legislative act, it is the power of the electors to approve or reject statutes. *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 780-81.

The *Midway* court held that neither state statutes nor local ordinances subject to referendum go into effect during the time permitted for the filing of a referendum petition. *Id.* at 780 (citing *Busch v. Turner* (1945) 26 Cal.2d 817, 823; *Norlund v. Thorpe* (1973) 34 Cal.App.3d 672, 675). The purpose of deferring the effective date of the ordinance is to preserve the right of referendum. *Norland* at 675. Thus, the ordinances at issue were never effective. *Midway* at 783. "Good legislation and bad legislation, beneficial legislation and ill-considered legislation all are subject to the effect of a referendum stay." *Lindelli v. Town of San*

Anselmo (2003) 111 Cal.App.4th 1099, 1111. Thus, the effective date of Ordinance-2131 has been suspended and the zoning for the Parcel remains "ML-light industrial."[17] The zoning of the Parcel *never changed.*

B. Ordinance-2131 *Shall Not* Become Effective Until A Majority Of Voters Approve It

Elections Code § 9241 requires the City to submit the ordinance to the voters and prevents it from becoming effective until a majority of voters approve it. By challenging the ordinance, the electorate prevented it from becoming law until they approve it by a majority vote. That requirement serves as veto power over laws the electorate finds objectionable. The significance of the Elections Code §§ 9237 and 9241 is that the zoning for the Parcel was never changed. If voters fail to approve Ordinance-2131, then no change has taken place because of the stay provision and the subsequent failure to gain approval from a majority of voters. It is as if nothing has happened. Disapproval of the measure would simply maintain the *status quo.*

VI. VOTERS MAY REJECT THE CITY'S CHOICE OF ZONING WHEN OTHER ZONING DISTRICTS ALSO CONFORM TO THE RECENT GENERAL PLAN AMENDMENT

In the context of land use, a referendum allows voters to reject the City's first choice of zoning, and thereby require the City to go back to its zoning scheme

[17] On February 23, 2016, the City Planner agreed that the zoning of the Parcel remains "ML-light industrial." JA at 398.

and choose another zoning district that also conforms to the general plan.[18] It is distinguishable from an initiative in that it allows the City to replace the rejected choice with another as long as it is not essentially the same.

The City and River Park seek to eliminate the right to referendum because they argue that Ordinance-2131 *must be* enacted in order to remedy the inconsistency between the zoning and the general plan. City's Opening Brief at 33-34; River Park's Opening brief at 24-27. They also contend that it is irrelevant that other zoning districts exist that also conform to the amended general plan. City's Opening Brief at 33-34; River Park's Opening Brief at 23. They highlight that the general plan is the "constitution for all future development," and thus maintaining inconsistent zoning even temporarily is not a legally valid option. City' Opening Brief at 33-34; River Park's Opening brief at 32-33. Furthermore, they argue that no other zoning district may remedy the inconsistency because the Hotel Coalition's primary purpose is to preserve industrial land. City's Opening Brief at 41-42; River Park's Opening Brief at 24.

Their arguments fail to recognize that the City cannot rely upon an inconsistency it created as a means to immunize its legislative act from referendum, that the purpose of the Petition is to prevent hotel use on the Parcel, and that a rule preventing voters from rejecting one of many choices would render

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[18] The City's zoning scheme includes all of the possible zoning districts found in its Municipal Code. *See Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 455-56 (zoning scheme is the totality and hierarchy of all zoning districts available).

the right to referendum illusory. Their contention that the voters cannot exercise their right to referendum because the City's choice of zoning is one that already conforms to the newly amended general plan undermines the very notion of a referendum.

A. The City's Legislative Act Should Not Be Immune From Referendum When It Attempts To Remedy The Inconsistency It Created

The City failed to heed the strong statutory preference to change both the general plan and zoning concurrently. *See* Section 65862. First, the City amended only the general plan, leaving behind zoning that became inconsistent as a result of the amendment. JA at 130-31. The City now argues that an inconsistency it created will continue to exist unless it is allowed to deny its constituents their Constitutional right to referendum. The City's failure to follow Section 65862 should not be a pathway for it to enact zoning without oversight.

If the city is allowed to do so, other municipalities will be incentivized to ignore Section 65862, and tactically amend the general plan first in order to take advantage of this rule. This will allow municipalities to make controversial land use decisions without worrying about a referendum challenge.[19] Cities should not be allowed to create an inconsistency that they can advantageously use to deprive the voters of their Constitutional right to referendum.

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[19] The City concedes that referendum petitions challenging a zoning ordinance after a recent general plan amendment are a regular occurrence. *See* City's Petition for Rehearing at 11.

B. The Purpose Of The Petition Is To Prevent Hotel Use

The purpose of the Petition is to prevent Hotel use. The Coalition opposed Ordinance-2131 because hotel use is permitted under "CG-general commercial" zoning. JA at 410. The City had already approved plans to build two other hotels that would increase the supply of hotel rooms by over 20%. JA at 383:8-13. Rezoning the Parcel to "CG-general commercial" would give River Park to gain an unfair competitive advantage because it would have paid considerably less than market value for commercial land. *See* JA at 463-65. (River Park listed the Parcel for twice as much as it paid when it believed it was rezoned for hotel use). Before litigation commenced in this case, the Coalition suggested repealing Ordinance-2131 and choosing another commercial zoning district that did not permit for hotel use. RT at 6:1-13; 15:2-7.[20]

The City disingenuously claims that the trial court found that the purpose of the Petition was to preserve industrial land.[21] City's Brief at 2, 41-42. The trial court's decision did not make any findings regarding the purpose of the Petition. JA at 484-87. Rather the trial court found that *rejecting* Ordinance-2131 is the same as *legally enacting* inconsistent zoning and hence invalid zoning. JA at

[20] The transcript mistakenly includes a "not" before the other zoning options that the Coalition asked the City to consider.

[21] The Court also stated at the hearing, "I'm not going to make a ruling based upon my assumption or anybody's speculation or argument about the true purpose of the referendum." RT 15:27-16:1.

485:11-13. It appears that the City is conflating the outcome if voters reject the ordinance – the parcel's industrial zoning remains, with the underlying reason for why voters would reject the ordinance – there is no need for another hotel in Morgan Hill.

The City relies upon an unpublished ballot argument submitted a year after the Petition was filed to argue that the Coalition's *true* purpose is to preserve industrial land. City's Opening Brief at 2. The unpublished ballot argument provides countless reasons to disapprove of Ordinance-2131. JA at 482. However, the primary reason listed in the ballot argument is to prevent the development of another hotel as two other hotels are opening soon, and providing a financial windfall to the developer is unfair. *Id.*

River Park also argues that the purpose of the referendum was to preserve industrial land. River Park's Opening Brief at 24. However, River Park's president declared that the "referendum is nothing more than an anti-competitive effort brought by the Morgan Hill Hotel Coalition to delay and/or prevent my proposed hotel from being built, limit the local hotel competition, and protect market share..." JA at 452:20-23. River Park's president never mentions that he believes the purpose of the Petition is to preserve industrial land. *Id.* The Sixth District also found that the "stated purpose of the referendum was to prevent development of a hotel on the parcel."[22] *City of Morgan Hill* at 38.

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[22] While the Sixth District's finding is useful in understanding which zoning districts may be prohibited for a period of one year pursuant to Elections Code

C. There Are Eleven Other Commercial Zoning Districts In The City's Zoning Scheme Including Several That Do Not Permit Hotel Use

The City's Municipal Code has twelve commercial zoning districts. JA at 407-31. The City chose one to the exclusion of the others, but does not challenge that each of the eleven other commercial zoning districts also conform to the recent general plan amendment. *City of Morgan Hill* at 41 ("it is undisputed that the City could have selected any of a number of consistent zoning districts to replace the Parcel's inconsistent zoning"). Instead, the City argues that their existence is irrelevant or would prevent them from enacting another commercial zoning district for a year. JA at 475-76.

The City contested the existence of other commercial districts for the first time in a petition for rehearing filed in the Sixth District. City's Petition for Rehearing at 8-12. However, the City had waived any argument to the contrary by conceding the existence of other commercial zoning districts in the trial court and in its brief to the Court of Appeal. JA at 475; Respondent City's Brief to Court of Appeal at 28-29. Regardless, the City now concedes that there were six commercial zoning districts that do not permit hotel use, and at least one commercial zoning district that the City believes may be appropriate for the location, conforms to the recent general plan amendment and does not permit hotel

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§ 9241, we note that a petition for referendum is not required to have a purpose, and it is very difficult to discern the intent of each person who signed it.

use.[23] City's Petition for Rehearing at 11-12. The issue is not one of how many choices the City had, but rather that it is exercised choice in selecting one.

The City and River Park also argued that the purpose of the Petition was to preserve industrial land use, and therefore the City could not chose another commercial zoning district for one year. City's Brief at 2, 41-42; River Park's Opening Brief at 24. They claim that the City's inability to choose another zoning district for a year invalidates the referendum. *Id.* Their entire argument rests on the premise that the purpose of the Petition is to preserve industrial land use, which for the reasons discussed above is not the case.

Second, the right to argue that the City is circumventing the stay provision of Elections Code § 9237 should belong to the party bringing forth the petition, not the city. The test for violating the stay provision is whether the second statute enacted by the legislature is essentially the same as the first. *Lindelli* at 1110. Enacting a commercial zoning district such as "CO-office administrative" is not the same as "CG-general commercial" because the former would not allow River Park to develop a hotel while the latter would. Ironically, the City argues that the one-year limitation found in Elections Code § 9237 allows them to ignore the other provisions of the Elections Code including the voter requirement of § 9241. This Court should refrain from reading the statutes in a manner that would render sections meaningless and allow municipalities to ignore them.

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[23] The City is referring to the zoning district of "CO-office administrative."

D. The *Chandis* Court Held That A Rule Declaring That Voters Cannot Reject One Of Several Choices Would Render The Exercise Of The Power Of Referendum Meaningless

The Fourth District held that a "rule declaring that voters cannot reject a *proposed specific plan* falling within the parameters of the city's general plan would render the exercise of the power of referendum meaningless." *Chandis at* 482 (italics added). The City of Dana Point had adopted a general plan which designated the Headlands as a specific plan area, with guidelines on the number of residences and hotels allowed and designating over 61 acres of open space. *Id.* at 479-80. Several years later, the plaintiffs submitted a specific plan that satisfied the requirements of the general plan including the open space element. *Id.* at 480. The city council approved the specific plan, and additionally amended the general plan only to extent of modifying the open space element. *Id.* However, petitions for referenda were timely filed and the specific plan and general plan amendment were placed on the ballot for voter approval. *Id.* The voters failed to support the measures, and the plaintiffs sued because their proposed specific plan along with the general plan amendment conformed to Dana Point's general plan for the Headlands. *Id.* at 481-82. The plaintiffs argued that the electorate's rejection of the specific plan was invalid because it violated the requirement land use regulations be consistent with the city's general plan. *Id.* at 484.

The *Chandis* Court explained that the specific plan and general plan amendment *never became effective* because the petitions were timely filed. *Id.* at 482. Thus, the *Chandis* Court held that the "subsequent rejection by the voters

simply maintained the status quo; it did not repeal a specific plan previously adopted by the city council." *Id.* at 482-83. The Court also observed that Dana Point had considered eleven development alternatives other than the one they adopted. *Id.* at 482.

The plaintiffs relied upon *deBottari* and the consistency requirement in Section 65000 et seq. to argue that the Court should invalidate the referendum measures because no development is inconsistent with a general plan calling for development. *Id.* at 484-85. Nevertheless, the *Chandis* Court did not invalidate the outcome of the referenda because it held that rejection of a proposed specific plan only maintains the status quo of no development *temporarily* pending another choice. *Id.* at 485 (italics added). The *Chandis* Court held that the failure to approve the measure is not an "enactment of a land use proposal at odds with the general plan." *Id.* Thus, the Fourth District's holding in *Chandis* contradicted its previous reasoning in *deBottari.*

This Court should adopt the reasoning in *Chandis* as it allows the voters to challenge legislative discretion. Both the City and Dana Point had numerous choices when it selected one conforming to the amended general plan. Even if the referendum results in maintaining zoning that has become inconsistent after a subsequent general plan amendment, that zoning is merely temporary pending another adoption of another zoning district. The City and River Park conceded the existence of other commercial zoning districts that also conform to the general plan and prevent hotel development. Inherent in the right to reject a zoning

ordinance is the right of the voters to require the City to choose another zoning district that also conforms to the general plan. Thus, this Court should not adopt a rule that would render the right to referendum illusory.

E. The City Plays Word Games And Argues Rejecting The Ordinance Restores, Revives Or Re-Enacts Inconsistent Zoning

Referenda either approve or reject legislation proposed by the legislature before they became effective. *Assembly* at 657. The City however plays word games and suggests that when an electorate rejects a proposed ordinance by referendum, it "repeals a properly enacted ordinance and it revives or re-enacts the ordinance it superseded." City's Brief at 28. First, the electorate does not have the power to repeal, only to approve or reject the proposed ordinance. *Midway* at 780-81. Second, the existing ordinance is not restored, revived nor re-enacted because Elections Code § 9237 stays the effective date of the adopted measure. It has been uniformly held that a statute "has no force whatsoever until it goes into effect." *Hersh v. State Bar of California* (1972) 7 Cal.3d 241, 245. Here, the Elections Code prevented Ordinance-2131 from becoming effective until a majority of voters approved it. Elections Code § 9241; *see also Assembly* at 656 (holding that Article II, Section 10(a)'s language in the Constitution that a challenged statute that is approved by the voters takes effect the day after the election would be unnecessary if it were already in effect). Thus, the existing ordinance remains in place and has not been superseded. *Midway* at 780; *Chandis* at 482-83. The City argues that "enact" and "reject" are distinctions without

substantive merit.[24] *Id.* at 29. Their argument fails to understand the difference between initiatives and referenda.

F. Lawfully Enacted Zoning That Becomes Inconsistent As A Result Of A General Plan Amendment Is Not Invalid

The City and River Park argue that the zoning of the Parcel that has become inconsistent as a result of a recent general plan amendment is invalid. City's Opening Brief at 24; River Park's Opening Brief at 20. Legally enacted zoning does not automatically become invalid because the general plan is amended. *City of Morgan Hill* at 40.

If, as the City claims, a general plan amendment can *render* preexisting zoning invalid, then the City's general plan amendment sanctioned the existence of invalid zoning, and thus its amendment is illegal. Rather, Section 65860(c) should apply as the purpose of that subdivision is to "ensure an orderly process of brining the regulatory law into conformity with a new or amended general plan..."[25] *Lesher* at 546.

The City and River Park argue that Section 65680(c)'s provision of reasonable time to amend zoning that has become inconsistent with the general plan is not available to the City if the voters reject the City's first choice of zoning.

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[24] This is the legal equivalent of "up is down" and "down is up."

[25] Section 65860(c) states: "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 ordnance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

City's Opening Brief at 25; River Park's Opening Brief at 22. There is no authority or legislative history supporting this position. Furthermore, Courts must read statutes broadly to jealously guard powers reserved to the People, rather than narrowly to burden or limit those powers. Both the Fourth District and the Sixth District found that the consistency requirement did not invalidate a preexisting zoning ordinance that became inconsistent only after a general plan amendment. *Chandis* at 485; *City of Morgan Hill* at 43. Thus, it is apparent that Section 65860(c) provides a means by which the City may amend the zoning of the Parcel should the electorate reject its first choice of zoning.

G. The Consistency Requirement Will Be Satisfied Within A Reasonable Period Of Time Regardless Of Whether The Voters Approve Ordinance-2131

If the electorate approves the City's choice of zoning then Ordinance-2131 will become effective the following day. Cal. Const. Article II, Section 10(a). If the measure fails, then the City may rely upon Section 65860(c) and choose another commercial zoning district that prevents hotel development and conforms to the recent general plan amendment. The City could do the latter within a reasonable time as it may consider another zoning district once the election is held.[26] Referendum elections may take place as soon as 88 days after the City orders it on the ballot. Elections Code § 9241.

[26] Courts have not yet defined a reasonable time under Section 65860(c).

River Park complains of the diminished value of the land and the prolonged uncertainty regarding available uses of the land due to the referendum. River Park's Opening Brief at 28-29. However, River Park bought industrial land with hopes that the City would change the zoning to permit hotel use. An owner of undeveloped land has no vested right in more valuable zoning, which may have been anticipated or zoning of the highest and best use of the property. *See Gilliland v. County of Los Angeles* (1981) 126 Cal.App.3d 610, 617. Additionally, the delay in determining the possible uses for the Parcel is due to the City. First, the City discontinued processing the Petition rather than order the measure on the ballot. When the City finally acquiesced and placed the measure on the ballot, it filed an action to remove it, thereby preventing the electorate from voting.[27]

H. Failing To Object To The General Plan Amendment Or Legislating By Initiative Is Not A Waiver/Substitute For The Constitutional Right To Referendum

The right to referendum is a Constitutional right. Article II, § 9(a). River Park claims that failing to object to a general plan amendment is an implied waiver to a subsequent legislative act of amending zoning. River Park's Opening Brief at 38. In many instances, the electorate may not anticipate how a parcel will be used until after the general plan has been amended, but before the zoning has changed. Within the general plan designation of commercial, there are many permitted uses such as shopping center, restaurants and office buildings. JA at 407-31. Or the

[27] River Park joined in the City's application to order the Registrar toremove Ordinance-2131 from the ballot. JA at 445.

City may change the general plan with no pending application for use permits leaving voters in the dark as to how the land will ultimately be used. It is the Court's duty to jealously guard the referendum power as to each legislative act. Failing to object to a general plan amendment should therefore be insufficient to challenge the subsequent legislative act of zoning.

The City contends that the electorate could have attempted to change the zoning by initiative. City's Opening Brief at 33. There is no authority to support that the right to initiative may serve as a substitute for the right to referendum. Both powers were added by Constitutional amendment in 1911 because both are reserved to the People.

VII. FOLLOWING *DEBOTTARI* WOULD CHANGE A REFERENDUM INTO AN INITIATIVE

The City and River Park urge this Court to adopt the rule that the referendum measure would *enact* zoning inconsistent with the amended general plan if the electorate *rejected* the ordinance, and is therefore invalid. City's Opening Brief at 22-24; River Park's Opening Brief at 36-39. They rely upon *deBottari* to support their position. *debottari* at 1213; *see also City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868. The Sixth District found the reasoning in *deBottari* is "flawed" because a referendum cannot *enact* an ordinance. *City of Morgan Hill* at 42. Instead, a "referendum that *rejects* an ordinance simply maintains the status quo." *Id.* The Sixth District disagreed with *deBottari* and held that preexisting zoning that becomes inconsistent as a

result of subsequent amended general plan is not invalid and may be amended in accordance with Section 65860(c). *Id.*

A. There Were No Other Zoning Districts Available In *deBottari* That Would Conform To The Recent General Plan Amendment

In *deBottari*, the city of Norco ("Norco") amended the general plan for a parcel of property consisting of approximately forty acres from residential/agricultural to residential low-density (3-4 units per acre). *deBottari* at 1207. The developer subsequently requested that the city council rezone property from "R-1-18" to "R-1-10," so that he may build single-family homes on 10,000 square feet lots instead of 18,000 square feet lots. *Id.* Norco adopted the ordinance to change the zoning as requested by the developer, but a petition for referendum was timely filed. *Id.* at 1208. Norco refused to repeal the ordinance or place the referendum measure on the ballot. *Id.* The proponents of the referendum petitioned the court for a writ compelling Norco to place the referendum measure on the ballot, but the trial court denied it. *Id.* The Fourth District heard the case on appeal. *Id.*

The Fourth District failed to mention the existence of other low-density zoning districts that would also conform to the amended general plan if the voters did not approve the zoning ordinances. Either one did not exist or because the purpose of the petition was to prevent the development of homes on smaller plots, it did not matter. The proponents of the referendum suggested that Norco had three options if the measure failed: re-enact the zoning that had been disapproved,

enact a new zoning scheme, or force the city to amend the general plan. *Id.* at 1213. The proponents never mentioned that Norco may adopt another low-density zoning district that would satisfy their petition and conform to the general plan, so it should be inferred that none existed within the zoning scheme.

B. The *debottari* Court Erroneously Held That Rejecting A Proposed Zoning Ordinance Would Enact Inconsistent Zoning That Could Not Be Rescued by Section 65860(c)

The *deBottari* Court fashioned an extraordinary remedy and found that if the electorate rejects the proposed zoning ordinance, the electorate actually enacts zoning inconsistent with the general plan, which renders it invalid. *Id.* at 1212-13. The deBottari Court's analyzed the case as if the referendum repealed a lawfully enacted zoning ordinance and then re-enacted the same ordinance after the general plan had been amended. The *deBottari* Court found that Section 65860(c) did not provide a means for remedying the inconsistency because it viewed the referendum as the enactment of an inconsistent zoning ordinance. *Id. Debottari* is poorly reasoned because the Fourth District treated the referendum as if it were an initiative. Thus, the Fourth District concluded that Norco had properly refused to submit the referendum to the electorate. *Id.* at 1213.

C. The City's Zoning Scheme Has Twelve Different Commercial Zoning Districts, And Thus This Court Should Permit The Voters To Reject The City's First Choice Of Zoning

In this case, the City's zoning scheme includes twelve different commercial zoning districts, which permit many different types of commercial uses. JA at 407-31. If the voters ratify Ordinance-2131, it becomes effective the following

day. Cal. Const. Aritcle II, Section 10(a). However, if the voters reject Ordinance-2131, the City will be able to select another commercial zoning district that does not permit hotel use, but is consistent with the recently amended general plan. The City would not need to enact a new zoning scheme, or amend the general plan because the existence of other commercial zoning districts within its current zoning scheme.

This Court should not fashion a rule upon the unique set of facts present in *deBottari*. Local governments exercise discretion when they choose a zoning district to replace one that has become inconsistent as a result of a recent general plan amendment. Under the rule urged by the City and River Park, the voters *would never have* any power to reject that choice. The electorate would lack the ability to exercise their Constitutional power to prevent legislators from enacting zoning ordinances that benefit special interests. This Court should affirm the the Sixth District's holding that the electorate may reject a zoning designation adopted by a local municipality to conform to general plan amendment, even if such rejection merely maintains the existing zoning designation that has become inconsistent until the municipality chooses another pursuant to Section 65860(c).

VIII. COURT SHOULD AWARD ATTORNEY'S FEES AND COSTS TO THE COALITION IN ACCORDANCE WITH THE CODE OF CIVIL PROCEDURE § 1021.5

The Coalition should recover attorney's fees and costs incurred in this matter from both the City and River Park pursuant to Code of Civil Procedure §

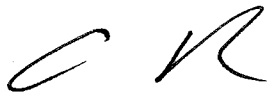
1021.5 because the Coalition's actions resulted in the enforcement of an expressly reserved and Constitutional right affecting the public interest-the electorate's right to exercise the power of referendum. The Coalition requests it may seek attorney fees by motion in the trial court pursuant to California Rules of Court 3.1702(c).

CONCLUSION

For the foregoing reasons, Appellant Coalition requests that this Court affirm the decision of the Sixth District Court of Appeal and reverse the Superior Court's order granting City's petition. The Coalition also requests that the Court order that Appellant recover its costs and that it may seek attorney's fees by motion in the trial court, and any other relief it deems just and fair.

Dated: November 16, 2017

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 Answer Brief is in Times New Roman 13-point font and contains 10,576 words as counted by Microsoft Word.

Dated: November 16, 2017

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 November 16, 2017, I served the following documents:

MORGAN HILL HOTEL COALITION'S ANSWER BRIEF

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

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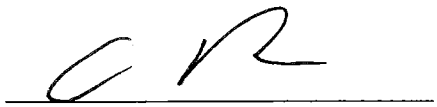
I also placed a copy of the **MORGAN HILL HOTEL COALITION'S ANSWER BRIEF** in a sealed envelope with first-class US mail postage in United States Postal mailbox affixed and addressed to:

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

Sixth District Court of Appeals
Clerk of the Court
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on November 16, 2017, at San Francisco, California.



Asit S. Panwala