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

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

PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL'S SUPPLEMENTAL BRIEF UNDER CRC RULE 8.520(D)

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ATTORNEYS FOR PLAINTIFF AND
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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.	Case No. S243042 Sixth Dist. No. H043426 Santa Clara Superior Court Case No. 16-CV-292595
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The City of Morgan Hill hereby submits this supplemental brief under California Rule of Court 8.520(d) to address new authorities, new legislation, and other matters that were not available at the time the City filed its brief on the merits.

I. ARGUMENT

A. The recently issued opinion in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, demonstrates that, when applied to residential zoning, referendum of a zoning ordinance implementing a general plan policy may impede compliance with state law.

On February 21, 2018, the 1st District Court of Appeal issued a decision in the case of *Save Lafayette v. City of Lafayette*, (2018) 20 Cal.App.5th 657, *reh'g denied (Mar. 15, 2018).* In *Lafayette*, the City amended the general plan land-use designation for a 22-acre area of land, changing the designation from "Administrative Professional Office" to "Low Density Single Family Residential." *Id.* at p. 661. "After the general plan amendment became effective and could no longer be challenged," the City adopted an ordinance changing the zoning designation from Administrative Office to a residential zoning district that allows up to 2 units per acre. *Id.* Following adoption of the zoning ordinance, opponents of the change submitted a referendum petition challenging the zone change. *Id.* at p. 662. Because the referendum, if successful, would result in the zoning being inconsistent with the general plan, the city council refused to reconsider the ordinance or place the referendum on the ballot. *Id.*

Rejecting *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, and instead relying on the opinion in the instant case (*City of Morgan Hill*

v. Bushey (2017) 12 Cal.App.5th 34), the *Lafayette* Court held that "the City erred in failing to present the referendum to the voters." *Id.* at p. 669–670. Discussing the potential implications of a referendum, the Court opined that:

> "If the ordinance is submitted to a vote, the voters may vote to have it be enacted, causing no conflict with the general plan. Alternatively, if the voters vote against it and it must be repealed, then the city council could conceivably enact another zoning ordinance in its place that is consistent with the general plan. Appellants suggest the City could select another zoning option such as Low Density Residential (LR-5)."

Id. at p. 667. In other words, using the referendum process, the voters could force the City to downzone properties, reducing housing density.[1]

B. Fifteen new housing laws became effective on January 1, 2018, which increase the need for cities to promote certainty and avoid delay in land use planning.

The *Lafayette* decision is particularly concerning in light of the fifteen new housing bills, which became effective on January 1, 2018.[2] The new legislation was adopted in response to an unprecedented housing crisis in California. The legislature has determined that "[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including

[1] The *Lafayette* opinion states that higher-density housing was allowed under the prior Administrative Office general plan designation. *Id.* at p. 661. This does not change the fact that the referendum would further reduce the allowed housing density.

[2] The fifteen bills are AB 72, AB 73, AB 571, AB 678, AB 879, AB 1397, AB 1505, AB 1515, AB 1521, SB 2, SB 3, SB 35, SB 166, SB 167, and SB 540.

farmworkers, is a priority of the highest order." AB 1397 (Gov. Code, § 65580).

One of the fifteen new bills, "The Housing Accountability and Affordability Act" (SB 35) amended Government Code section 65400 to require every city to report on compliance with their general plan. The report must include extensive details, including the total number of housing units allowed and produced in each income category. Gov. Code § 65400(a)(2)(H). If a city fails to meet its "share of the regional housing need" for any income category, a developer may be entitled to "streamlined, ministerial approval" of a housing development. Gov. Code §§ 65913.4(a), 65913.4(a)(4)(A).

More importantly, "[i]n the event that objective zoning, general plan, or design review standards are mutually inconsistent, a development shall be deemed consistent with the objective zoning standards pursuant to this subdivision if the development is consistent with the standards set forth in the general plan." Gov. Code § 65913.4(a)(5)(B). This means that a referendum that maintains an inconsistency with the general plan would be ineffective, at least as to property designated for housing. Because the general plan—and not the zoning regulations—would control development, zoning regulations intended to preserve the historic character of a location, provide design consistency, or otherwise maintain the character of a community would be ineffective. The lack of applicable development standards could have a permanent, negative impact on the vitality and character of California cities and counties. Further, even if the referendum ultimately fails, and the zoning is made consistent, the mere fact of a referendum may maintain the inconsistency for more than a year while the agency waits for a general election. At any time during this inconsistency,

a developer could take advantage of the relaxed standards, regardless of the will of the voters.

The *Lafayette* opinion implies that consistency problems could be resolved by processing general plan amendments and zoning changes concurrently. See *Lafayette, supra* at p. 669. But concurrent approval is not always practical in the context of housing. For example, Government Code section 65583 contains extensive requirements that must go into the housing element of a general plan. Only after the housing element is adopted, is the housing element of the general plan submitted to the California Department of Housing and Community Development (HCD) for certification. Gov. Code §65585. If the housing element is not certified the local agency must correct any deficiencies. If the agency does not correct deficiencies, HCD "may notify the Office of the Attorney General that [the agency] is in violation of state law . . ." Gov. Code, § 65585(j). Setting aside the time needed to develop zoning standards to implement the housing element of a general plan, and the impracticality of doing so simultaneously with a general plan update, it would be wasteful and inefficient to adopt a zoning ordinance implementing a housing element that may or may not be approved and enforceable. By adopting Government Code section 65862, the legislature recognized that concurrent adoption of general plan amendments and zoning ordinances is not always practical or desirable.[3]

[3] In fact, the legislature has adopted specific timelines for zone changes to implement the housing element of a general plan. See e.g. Gov. Code §65583(c)(1)(A). Further, the possibility of a referendum could prevent a local agency from meeting those deadlines.

If a site is not developed at the density provided in the general plan, SB 166 requires the local agency to identify new sites for housing development. Specifically, SB 166 amended Government Code section 65863, requiring a local agency that approves development with fewer units by income category than identified for that parcel in its housing element to either make findings supported by substantial evidence that remaining identified sites can absorb the additional needs, or it must "identify and make available" additional adequate sites within 180 days. Gov. Code §65863(c)(2). Referenda of zoning ordinances to bring them into consistency with a general plan could effectively prevent compliance with these provisions by delaying or prohibiting a local agency from developing housing consistent with an approved general plan housing element.

C. The Attorney General has opined that referenda that impede an agency's ability to comply with state law are invalid.

The Attorney General recently opined that referenda that serve to prevent local governments from complying with state law are invalid. See Attorney General Opinion No. 17-702 (Cal. A.G. Apr. 27, 2018). The Attorney General found that the City of Hollister's "resolution approving the execution of an agreement to sell real property for development, pursuant to an approved plan for disposing a dissolved redevelopment agency's property, is not subject to referendum." In reaching that opinion, the Attorney General stated:

> "That the referendum power cannot apply here is perhaps best demonstrated by its potential consequences. If Hollister's resolution were subject to referendum, the disposition and development of the property pursuant to the approved long-range plan could potentially never happen. The electorate

> could indefinitely prevent the sale of the property for development (as set forth in the approved long-range plan) by rejecting every attempt by Hollister to implement the plan. That would completely thwart the redevelopment dissolution law's purposes to dispose of redevelopment agencies' property expeditiously in order to fund core government services. It would also conflict with the statutory requirement that the dissolved agencies' property be disposed of as provided in a long-range property management plan approved by a successor agency's oversight board."

A long-range property management plan is an adopted policy, approved by the state, that ensures disposal of former redevelopment property is conducted expeditiously in accordance with state law. Similarly, the housing element of a general plan is an adopted policy, approved by the state, that is intended to ensure that cities meet their share of the regional housing need expeditiously and in accordance with state law. See Gov. Code §§65583, 65585.

In this case, referendum of the City's zoning ordinance would thwart state law requiring general plan consistency. Further, while housing law is not implicated in this case, the *Lafayette* opinion demonstrates how the application of *Morgan Hill* to allow a referendum of residential zoning implementing a general plan can indefinitely delay or prevent conformity, conflicting with the requirements and objectives of state housing law.

II. CONCLUSION

For more than 30 years, *deBottari* has provided a bright-line rule that promotes certainty and avoids delay in land-use planning. The 6th District's opinion in the instant case has the opposite impact. The implications of this case go beyond whether hotel owners can referend a zoning change to prevent competition. Recent developments in case law and legislation make clear that the 6th District's holding is not only inconsistent with state

law, but has the potential to prevent achievement of important state objectives.

Dated: May 18, 2018 Respectfully Submitted,

By: _____
Donald A. Larkin Attorney for Plaintiff
and Respondent CITY OF MORGAN HILL

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204 (c)(1), counsel for Petitioner City of Morgan Hill states that, exclusive of this certification, the cover, the tables, any signature block, and any attachment, this Supplemental Brief Under California Rules of Court Rule 8.520(d) contains 2,140 words, as determined by the word count of the computer program used to prepare the brief.

Dated: May 18, 2018 Respectfully Submitted,

By: _____
Donald A. Larkin Attorney for Plaintiff
and Respondent CITY OF MORGAN HILL

City of Morgan Hill v. Shannon Bushey, et al./Morgan Hill Hotel Coalition v. River Park Hospitality, Inc.

California Supreme Court Case No: S243042

Court of Appeal Sixth Appellate District Case No: H043426

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

PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 17575 Peak Avenue, Morgan Hill, California 95037.

On May 18, 2018, I served the following document(s) described as **PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL's Supplemental Brief under CRC Rule 8.520(d)** on the interested parties in said action by placing a true copy thereof in an envelope addressed as follows:

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I caused such envelope to be deposited in the United States mail at Morgan Hill, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the organization's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed May 18, 2018, at Morgan Hill, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kathleen Bailey