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

OPENING BRIEF OF REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.

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ATTORNEYS FOR REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.

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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I. 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?

II. INTRODUCTION.

California's Planning and Zoning Law, Government Code section 65000 et seq., mandates that every city and county adopt a comprehensive, longterm general plan for the physical development of the city of county. A local government's general plan sits atop a hierarchy of local government law regulating land use; it is the constitution or charter for future development. As such, land use ordinances and land-use decisions must be consistent with the general plan: "[T]he keystone of regional planning is consistency—between the general plan, its internal elements, subordinate ordinances, and all derivative land use decisions." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572.)

At the same time, California's Constitution reserves to the voters the rights of initiative and referendum. The initiative is the power of the electorate to propose and adopt statutes directly; the referendum is power of the electors to approve or reject statutes. Although these "reserve" powers are set forth in California's constitution, it is settled the Legislature may restrict their local exercise in matters of statewide concern, just as the Legislature may limit a local legislative body's discretion by statutory mandate.

In *Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, this Court held that a local electorate may not use its reserve power of

initiative to adopt zoning that was inconsistent with their city's general plan. This case raises the related issue of whether a city's electorate may use its referendum power to maintain intact zoning that has become inconsistent with the city's general plan upon the general plan's amendment. Two cases have provided opposite answers to this question. In *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, the court held that a referendum challenging an ordinance that adopted zoning consistent with a city's amended general plan was invalid where the referendum, if successful, would result in zoning inconsistent with the general plan. In this case, the court of appeal held that a referendum challenging a municipal ordinance conforming a parcel's zoning to the parcel's general plan land use designation is not invalid even though the referendum, if successful, would result in inconsistent zoning, if the city remained free to then select another consistent zoning.

This Court should reject the court of appeal's decision in this case and reaffirm the rule of *deBottari*. As discussed below, the court of appeal's decision is contrary to the provisions of the Planning and Zoning Law and would undercut the policies of general plan supremacy and early certainty in land use regulation embodied in that law. The court of appeal's decision would additionally inject substantial uncertainty into local land use planning. It would also give rise to substantial delays in the adoption of consistent zoning and impede the achievement of general plan land use policies and goals. It would enable city's voters, by rejecting consistent zoning, to choose inconsistent zoning, which by statewide statute the local government itself could not do. It would encourage indirect, downstream challenges to general plan land use choices as they are implemented, rather than when those choices are first made upon the adoption or amendment of the general plan itself. However, to ensure planning certainty and to give force to the concept

of comprehensive planning itself, attacks on general plan policies and land use choices should be brought when they are established, not when they are implemented.

In contrast, the rule of *deBottari* is consistent with the Planning and Zoning Law, as well as this Court's decision in *Lesher*. It would promote the requirement of consistency and the supremacy of general plan policies. It would foster certainty in planning. At the same time, the *deBottari* rule leaves fully intact the voters' ability to legislate by initiative concerning land use matters at the local level by, for example, adopting alternative consistent zoning or amending their city's general plan. Local voters also retain the ability to use the referendum power to reject general plan policies and land use choices when they are adopted.

For 35 years, *deBottari* has provided a bright line rule to guide cities and counties, property owners, voters, and the courts. This Court should reaffirm that rule and reverse the judgment of the court of appeal.

III. STATEMENT OF THE CASE

A. Factual Background

River Park owns a vacant parcel of land at 850 Lightpost Parkway in Morgan Hill. (Joint Appendix [JA], 60.) The parcels to the south are designated for commercial use in the general plan of the City of Morgan Hill (City), whereas the parcels to the north, east, and west are designated in the general plan for industrial use. (*Ibid.*) River Park's property lies next to U.S. 101, about one-half mile from the Cochrane Road-101 highway ramps. (*Ibid.*)

In November 2014, the City amended its general plan specifically to change the land use designation for River Park's parcel from "ML-Light Industrial" to "Commercial." (JA 60.) It is undisputed that there was no

referendum challenge to the general plan amendment. In April 2015, the City's city council approved ordinance no. 2131 (O-2131), which would change the parcel's zoning from ML-Light Industrial to "CG-General Commercial," a zoning designation that was consistent with the amended general plan and that would permit a hotel on the parcel. (JA 60-61.)

On May 1, 2015, Real Party in Interest and Appellant Morgan Hill Hotel Coalition (Hotel Coalition) submitted a referendum petition challenging O-2131. (JA 115, 119.) The purpose of the referendum, according to its proponent's ballot arguments, was to prevent the development of a hotel on River Park's parcel and to preserve industrial land. (JA 480-482.)[1] Consistent with this ballot argument, in the trial court the Hotel Coalition asserted that its intent was to restrict hotel development and to preserve industrial land. (JA 386:1-2.) It is undisputed, and the Hotel Coalition has acknowledged, that ML-Light Industrial zoning is inconsistent with the River Park parcel's land use designation under the City's amended general plan. (Reporter's Transcript on Appeal (RT), p. 4:22-23.)

In July 2015, the City stopped processing the referendum because it believed that it would enact zoning that was inconsistent with the City's general plan. (JA 65, 69-99.) Later, in February 2016, the City called for a June 2016 special election to submit the referendum to the voters. (JA 65,

[1] In its decision, the court of appeal described the purpose of the referendum as being solely to prevent the development of a hotel on the parcel. (*City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, 38 (*City of Morgan Hill*).) In petitions for rehearing, the City and River Park pointed out that a purpose of the referendum was also to preserve industrial uses. (City Petition for Rehearing, pp. 4-6; River Park Petition for Rehearing, pp. 4-5.) The court of appeal denied both rehearing petitions without comment. (See court of appeal order dated June 23, 2017.)

100-104.) It also authorized a lawsuit to have the referendum judicially determined to be legally invalid and removed from the ballot. (JA 18.)

B. Procedural Background

In March 2016 the City filed a petition for a writ of mandate in the trial court seeking to remove the referendum from the June 2016 ballot. (JA 13.) On March 29, 2016, the trial court granted the City's petition. (JA 485.) Relying on *deBottari*, *supra*, 171 Cal.App.3d 1204 (discussed in Section V(A)(4)(a), below), the trial court ruled that the City had shown the invalidity of the referendum by demonstrating that "the current zoning in question is inconsistent with the City's General Plan—and therefore presumptively invalid." (*Ibid.*) The trial court ordered the referendum to be removed from the ballot and that O-2131 be certified as duly adopted and effective. (JA 486.)

The court of appeal reversed. It stated: "We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (Slip op. at * 2.) As noted, both the City and River Park filed petitions for rehearing challenging the court of appeal's factual recitation and reasoning. (Petitions for Rehearing.) The court of appeal denied the petitions. (See court of appeal order of June 23, 2017.)

IV. STANDARD OF REVIEW.

The dispositive facts are undisputed and the issue presented is one of law. Therefore, as the parties agreed below (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 39), the standard of review is de novo.

V. ARGUMENT

A. The Relevant Constitutional, Statutory, and Decisional Background.

1. The Supremacy of the General Plan in Land Use and Development Decision-Making.

In the State Planning and Zoning Law, Government Code section 65000 et seq., the Legislature has mandated that every county and city adopt a "comprehensive, longterm general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Government Code § 65300.)[2] The "combined effect" of the Planning and Zoning Law is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with the general plan." (*Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880.) The general plan is effectively the "constitution for all future developments" within the city or county. (*Goleta Valley*, *supra*, 52 Cal. 3d 553, 570, citing *deBottari*, *supra*, 171 Cal.App.3d at 1212-1213 and other cases.) In adopting general plans, local governments must "confront, evaluate and resolve competing environmental, social and economic interests." (*Id.* at 571.)

"The process [of general plan adoption or amendment] is structured to transcend the provincial. Public participation and hearings are required at every stage, in order to obtain an array of viewpoints." (*Goleta Valley*, *supra*, 52 Cal.3d at p. 571; *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 154.) As this Court stated in *Orange Citizens*,

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[2] Unless otherwise indicated, subsequent statutory references are to the Government Code.

"[t]he process of drawing up and adopting [these] revisions often becomes, essentially, a 'constitutional convention' at which many different citizens and interest groups debate the community's future." (*Id.* at 152, quoting Fulton & Shigley, Guide to California Planning (4th ed. 2012) p. 118.)(internal quotations omitted) During the preparation or amendment of the general plan, the local planning agency must provide opportunities for the involvement of citizens, public agencies, civic, education, and other community groups, and others through public hearings and other appropriate means. (*Orange Citizens, supra,* 2 Cal.5th at 152 -153; § 65351.) Planning commissions must hold at least one public hearing and make a written recommendation to the legislative body, and legislators must hold at least one public hearing before acting on that recommendation. (*Orange Citizens, supra*, 2 Cal.5th at 153; §§ 65353–65356.)

The general plan itself must "comprise an integrated, internally consistent and compatible statement of policies for the adopting agency" (§ 65300.5). It must also include development policies, "diagrams and text setting forth objectives, principles, standards, and plan proposals" (§ 65302), and seven predefined elements—land use, circulation, conservation, housing, noise, safety, and open space. (§§ 65302(a)–(g), 65303.) The Planning and Zoning Law specifies detailed requirements for elements of the general plan. (§§ 65302(a)–(g); §65583.)

A fundamental requirement in the Planning and Zoning Law is that local land use and development decisions must be consistent with the locality's general plan. As this Court recently reaffirmed, "the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." (*Orange Citizens, supra,* 2 Cal.5th at 153.) "[T]he requirement of

consistency ... infuse[s] the concept of planned growth with the force of law." (*Id.* at 153, quoting *deBottari*, *supra*, 171 Cal.App.3d at 1213.) It is the "linchpin of California's land use and development laws ...." (*deBottari*, *supra*, 171 Cal.App.3d at 1213.)

A zoning ordinance is consistent with an adopted general plan if "[t]he various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan." (Section 65860(a)(2).) In addition, the ordinance must further the objectives and policies of the general plan and not obstruct their attainment. (See *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879, citing *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.)

The Legislature has enacted various statutes to ensure the supremacy of the general plan in land use decision-making. Section 65359 requires that specific plans be consistent with the general plan. Under Section 66473.5, tentative maps and parcel maps must likewise be consistent with the general plan. Section 65867.5(b) mandates the same with respect to development agreements].) Of particular relevance to this case, Section 65860(a) provides that "[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city ...." In Section 65860(c), the Legislature required any zoning ordinance that becomes inconsistent with a general plan must be brought into conformity: "In the event that a zoning ordinance becomes inconsistent with the general plan by reason of amendment to such a plan, or to any element of such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."

As the "constitution" or "charter" for future development (*Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540), a local government's general plan sits atop a hierarchy of local government law regulating land use. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773). Below the general plan is any adopted specific for a given area, which provides "for the systematic implementation of the general plan for all or part of the area covered by the general plan." (§ 65450.) Under Section 65454, "[n]o specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." Below the general plan and any specific plan are the zoning laws, which regulate the geographic allocation and allowed uses of land. (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.) As noted, Section 65860 requires that zoning designations be consistent with the local government's general plan. Under Section 65455, zoning ordinances must also be "consistent with the adopted specific plan[,]" if any, for the covered area.

2. The Initiative and Referendum Powers.

In 1911, the California Constitution was amended to provide for initiatives and referenda. (*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591) The initiative and referendum amendment referred to the initiative and referendum as powers reserved by the people. (*Ibid.*; *id.* at n. 7.) The rights of initiative and referendum are commonly referred to as "reserve" powers. (*Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563.)

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal.Const., art. II, § 8, subd. (a).) The initiative process allows the people to enact statutes in the same manner as the Legislature and is not restricted in subject

matter. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675 ["power of the people through the statutory initiative is coextensive with the power of the Legislature"]; *Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 157-58, citing *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728, 730-731.)

"The referendum is the power of the electors to approve or reject statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9, subd. (a).) In a referendum, the voters are asked to approve (by a "yes" vote) or disapprove (by a "no" vote) a measure which the Legislature or local government has enacted. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 656.) The voters exercise their referendum power to veto statutes and ordinances enacted by their elected legislative bodies before those laws become effective. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 713-714.) In contrast to initiatives, referenda do not enact law; nor may they address certain subjects. (*Referendum Committee*, *supra*, 184 Cal.App.3d at 157.)

The California Constitution provides that "[t]he initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." (Cal.Const., art II, § 11(a).) The Legislature has adopted statutory procedures governing the exercise of the initiative and referendum powers. With respect to the referendum power as exercised by the voters of a city, Elections Code section 9235 stays the effective date of most city ordinances for 30 days. During this 30-day period, city voters may circulate a referendum petition. (*Id.* at § 9237.) If the city receives a "petition protesting the adoption of an ordinance" that has been signed by at least 10 percent of the city's voters, the

effective date of the ordinance is suspended and the city must reconsider it. (*Ibid.*) Upon reconsideration, the city may either repeal the ordinance in its entirety or submit the ordinance to the voters. (*Id.* at § 9241.)[3]

Legislative bodies are prevented from effectively nullifying the referendum power by voting to enact a law identical to a recently rejected referendum measure. (*Deukmejian*, supra, 30 Cal.3d at 678, citing *Gilbert v. Ashley* (1949) 93 Cal.App.2d 414, 415-416; *In re Stratham* (1920) 45 Cal.App.436, 439-440.) Elections Code section 9241 provides that "[i]f the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters." The new measure is invalid unless it is "essentially different" from the rejected provision and is enacted "not in bad faith, and not with intent to evade the effect of the referendum petition...." (*Deukmejian*, *supra*, 30 Cal.3d at 678.) In determining whether a later enacted city ordinance violates the provisions of Elections Code section 9241, a court asks whether the second legislative enactment is essentially the same as the first. (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1110.) In deciding whether a new measure is "essentially the same" or "essentially different," the court focuses on the features that gave rise to popular objection to the challenged measure. (*Ibid.*)

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[3] The Elections Code contains similar provisions pertaining to the exercise of the referendum power by county voters. (See, e.g., Elections Code sections 9140, 9144-9145.)

3. The Legislature May Limit the Local Reserve Power in Areas of Statewide Concern, and It has Done So When the Exercise of that Power would Contravene the Requirement of General Plan Consistency.

The Legislature has the power to restrict local referenda, which it may do as part of the exercise of its plenary power to legislate in matters of statewide concern. (*Voters for Responsible Retirement. v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 776-777.). "[T]he initiative and referendum power [cannot] be used in areas in which the local legislative body's discretion [is] largely preempted by statutory mandate." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776; see also *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 920 ["[I] f the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative"].) Thus, the electorate's initiative and referendum authority "is generally coextensive with the legislative power of the local governing body...." (*DeVita, supra,* 9 Cal.4th at 775.) Any presumption in favor of the right of initiative is rebuttable upon a definite indication that the Legislature, in the exercise of its power to preempt local legislation in matters of statewide concern, has intended to restrict that right. (*Id.* at 776.) The same applies to the right of referendum. (See *Voters for Responsible Retirement, supra,* 8 Cal.4th at 777 [finding unmistakable legislative intent to bar the referendum power over an ordinance relating to the implementation of a memorandum of understanding between a county and its employees].) This is so even though the courts will apply a liberal construction to the referendum power if it is challenged and "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Id.* at 779.)

This Court has applied Section 65860 to hold that a local electorate may not exercise its reserve power to adopt by initiative a zoning ordinance that was inconsistent with a city's general plan. In *Lesher, supra,* 52 Cal.3d 531, a city's voters had passed an initiative limiting municipal growth. (*Id.* at 535-536.) The plaintiffs challenged the measure, asserting in part that the measure was a land use ordinance that operated as a zoning ordinance and that it was inconsistent with the city's general plan. (*Id.* at 537.) The Court agreed, concluding that the measure was in the nature of a zoning ordinance and that it was inconsistent with the city's general plan. Citing *deBottari* and *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, as well as Section 65860, the Court stated that "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan." (*Id.* at 541.) The Court went on to hold, again relying on *deBottari*, that the initiative measure was invalid at the time it was passed. (*Id.* at 544.) The Court reasoned that "[t]he court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance." (*Ibid.*) Thus, in *Lesher* this Court concluded that Section 65860's consistency requirement preempted the power of a local electorate to put in place by initiative zoning that was inconsistent with a city's general plan.

4. Three Intermediate Courts of Appeal have Addressed whether Section 65860's Requirement of General Plan Consistency Restricts the Local Voters' Referendum Power.

This case raises, for the first time in this Court, the question of whether Section 65860 likewise preempts the power of the electorate to use