IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, Plaintiff and Respondent, v. SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al., Defendants and Respondents;	Case No. S243042 Sixth Dist. No. H043426 Santa Clara Super. Ct. No. 16-CV-292595
RIVER PARK HOSPITALITY, Real Party in Interest and Petitioner; MORGAN HILL HOTEL COALITION, Real Party in Interest and Respondent.	

OPENING BRIEF OF PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL

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

LEONE & ALBERTS
2175 N. California Blvd., Suite 900
Walnut Creek, CA 94596
Tel: (925) 974-8600
Fax: (925) 974-8601
Email: lleone@leonealberts.com
kalberts@leonealberts.com

Attorneys for Plaintiff and Petitioner
CITY OF MORGAN HILL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL, Plaintiff and Respondent, v. SHANNON BUSHEY, AS REGISTRAR OF VOTERS, etc., et al., Defendants and Respondents;	Case No. S243042 Sixth Dist. No. H043426 Santa Clara Super. Ct. No. 16-CV-292595
RIVER PARK HOSPITALITY, Real Party in Interest and Petitioner; MORGAN HILL HOTEL COALITION, Real Party in Interest and Respondent.	

OPENING BRIEF OF PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL

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

LEONE & ALBERTS
2175 N. California Blvd., Suite 900
Walnut Creek, CA 94596
Tel: (925) 974-8600
Fax: (925) 974-8601
Email: lleone@leonealberts.com
kalberts@leonealberts.com

Attorneys for Plaintiff and Petitioner
CITY OF MORGAN HILL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

QUESTION PRESENTED

In its order granting review, this Court directed the parties to address the following question:

> 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 general plan, when the result of the referendum—if successful—would leave intact the existing designation that does not conform to the amended general plan?

(Order granting Petitions for Review, dated August 23, 2017.) For the many reasons that follow, the answer is no.

INTRODUCTION

California's statewide approach to land use—requiring localities to create and implement land use general plans to guide long-term growth and conservation to promote regional coordinated planning and prevent haphazard and random growth and development —only works because the State also mandates that all subsequent land use decisions, including zoning, be consistent with the general plan. By nature, this requirement necessitates that as the general plan is amended or a new one is adopted, zoning ordinances may have to be amended or enacted to meet the Legislature's consistency mandate. (Cal. Gov. Code § 65860, subd. (c).) Otherwise, any existing zoning that is inconsistent with the new plan is rendered invalid by the preemptive effect of Government Code section 65680 ("Section 65860").[1]

Once the locality has enacted an ordinance to cure any inconsistent zoning, it cannot thereafter reenactment the old, inconsistent ordinance; nor even place an initiative on the ballot for voters to approve restoring that previous inconsistent zoning. Nonetheless, here, Respondent and Real

[1] All subsequent references are to the Government Code unless otherwise specified.

Party in Interest Morgan Hill Hotel Coalition ("Hotel Coalition") is trying to do by referendum exactly what Petitioner City of Morgan Hill ("City") cannot do by legislation or initiative. Specifically, the Hotel Coalition has submitted a referendum petition seeking to repeal the newly enacted consistent zoning ordinance, and reestablish previous zoning which is inconsistent with City's new general plan. The local electorate's reserved legislative power exercised by referendum does not extend beyond City's legislative and initiative power in such a manner. Nor, does the referendum power permit voters to cause a local entity to violate California law regarding a statewide concern.

For nearly forty years, since the decision in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, every city, county, voter, property owner and court that has faced this situation has understood that such a referendum was invalid and courts could and would remove such referenda from the ballot. And many more courts, including this one, have cited the *deBottari* line of cases with approval when deciding related issues. Yet, in this case, the Sixth District Court of Appeal ("Sixth District") cast aside both stare decisis and the legal analysis universally followed by California courts, deciding simply that the long-established reasoning was "flawed."

However, the Sixth District's reasoning in this case is the "flawed" reasoning. Its holding is premised on a series of five interrelated factors, each one of which is contrary to the plain language of Section 65860, this Court's previous interpretation of Section 65680, the policies inherent in the State's Planning and Zoning Law, and/or the trial court's undisputed findings of fact.

Moreover, adoption of the Sixth District's decision would abrogate a clear, bright line test capable of consistent, uniform application by cities, counties, voters, property owners and courts across the State, with a situational rule, ill-suited to practicalities of real world application. The

Sixth District's rule is so uncertain in its interpretation of Section 65860, that the various constituents could not apply it consistently or uniformly. The results patchwork of results would is completely contrary to the fundamental policies underlying the statewide concerns at issue in the Planning and Zoning law.

For these reasons, as discussed in greater detail below, this Court should overturn the decision of the Sixth District below.

FACTUAL AND PROCEDURAL BACKGROUND

A. The History of the Subject Property and the Referendum.

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

Prior to November 19, 2014, the Subject Property's General Plan land use designation was "Industrial," and its zoning was "ML-Light Industrial." (Id.) On November 19, 2014, the Morgan Hill City Council amended the City's General Plan to change the land use designation for the Subject Property to "Commercial." (Id.) No one, including the Hotel Coalition, challenged the General Plan amendment by writ, referendum or initiative. Therefore, as of November 19, 2014, the Subject Property's "ML-Light Industrial" zoning was inconsistent with its "Commercial" General Plan land use designation. (Id. at 61.)

Following the General Plan amendment, the Subject Property's owner, Real Party in Interest and Respondent River Park Hospitality, Inc. ("River Park"), applied for a zoning amendment to change the Subject Property's zoning to "General Commercial." (Id. at 60.) The Hotel

Coalition opposed the zoning change at various public hearings. On April 1, 2015, the City Council enacted Ordinance No. 2131, which changed the Subject Property's zoning to "General Commercial," and made it consistent with its Commercial General Plan land use designation. (Id. at 60-61; 64, 116, 276.)

On May 1, 2015, the Hotel Coalition filed a petition for referendum seeking to repeal Ordinance No. 2131 and revive the parcel's "ML-Light Industrial" zoning. (Id. at 115, 123, 482.) Despite the Court of Appeal's statement that the purpose of the Referendum was limited to preventing a hotel on the Property, the undisputed evidence in the record demonstrates that maintaining the Property's industrial zoning was a main, if not the main, stated purpose of the Referendum's intent to repeal the "General Commercial" zoning.[2] (See JA, at 480, 482, stating "VOTE NO because industrial land is scarce in Morgan Hill. Industrial land creates lucrative careers and opportunities for our residents. Our community needs additional technology and manufacturing jobs rather than forcing residents to commute north to the peninsula. City Council tried to rezone a three-acre parcel of industrial land to help an out-of-town developer build another hotel. . . . Voters rejected the City Council's decision to rezone the land from industrial to commercial by signing a petition. . . .") Based on this determination, the trial court found that through the Referendum, the Hotel Coalition urged voters to maintain the Property's industrial zoning. (See JA, at 485:10-13.)

B. Procedural Background.

On March 11, 2016, City brought an action in the Superior Court of Santa Clara County (the "Superior Court") of seeking an alternative and

---

[2] Both the City and River Park filed Petitions for Rehearing regarding this factual misstatement. (City Petition for Rehearing, pp. 4-6; River Park Petition for Rehearing, pp. 4-5) The court of appeal denied both petitions without comment. (See court of appeal order date June 23, 2017.)

peremptory writ to remove the Referendum from the ballot on the grounds that the Referendum was invalid pursuant to Section 65860 (because if successful it would result in zoning that was inconsistent with the City's General Plan. (JA, Vol. I at 13.) On March 29, 2016, the Superior Court, relying on *deBottari*, granted City's petition. (JA, Vol. II at 484-487.) In its ruling, the trial court found that "judicial review and action [on a ballot proposition] may be appropriate in the presence of a clear showing of invalidity of the proposed measure."

> The Court finds that such a showing of invalidity has clearly been made by Petitioner [City], and has not been rebutted by Real Party in Interest [Hotel Coalition]. It is not disputed that the current zoning in question is inconsistent with the City's General Plan – and therefore, presumptively invalid. . . . [W]ere the voters to reject the ordinance, that would leave in place an inconsistent- and legally invalid - zoning designation. This result would be the same as if the measure to be submitted to the voters asked whether to "enact" inconsistent, legally invalid zoning, and it is precisely the result urged by Real Party in Interest [Hotel Coalition].

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

The Hotel Coalition timely filed a notice of appeal on April 1, 2016. (Id. at 495.) On May 30, 2017, the Sixth District issued a published decision overturning the Superior Court's writ of mandate and rejecting *deBottari* as "flawed." (*City of Morgan Hill v. Bushey* (2017) 12 Cal. App.5th 34, 41-43.) The court held that "a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (*Id.* at 37-38.) "The new zoning ordinance will be valid, notwithstanding the referendum, so long as 'the new measure is

essentially different from the rejected provision and is enacted not in bad faith, and not with intent to evade the effect of the referendum petition. . . .' (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 678).) Consequently, the existence of section 65860 does not establish the invalidity of Coalition's referendum." (*Bushey, supra,* 12 Cal.App.5th at 42.) However, the Sixth District exempted from its decision situations where a referendum challenged the only available consistent zoning. (*Id.* at 42, n.5.)

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

ARGUMENT

I. STANDARD OF REVIEW.

This Court interprets constitutional and statutory provisions *de novo*. (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 415, 432). However, this Court reviews the trial court's express and implied findings of fact under the substantial evidence standard. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.)

II. THE PRESUMPTION IN FAVOR OF THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWER IS REBUTTABLE BY A DEFINITE INDICATION THAT THE LEGISLATURE INTENDED TO RESTRICT THAT RIGHT IN MATTERS OF STATEWIDE CONCERN.

The issues presented in this case involve the intersection of fundamental public policies – the local electorate's reserved legislative power and the State's police power with respect to matters of statewide concern as embodied in the Planning and Zoning Law. In the California Constitution, the people reserved to themselves legislative power exercised through initiatives and referendums. (Cal. Const., Art. II, §11.) As this Court stated in *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776, "it is 'the duty of the courts to jealously guard this right of the people'

[citation] .... It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right to local initiative or referendum be not improperly annulled." (*Id.* [citations omitted].)

However, this presumption in favor of the local electorate's reserved legislative power is rebuttable. (*Id.*, at 776.) It is axiomatic that the local electorate's power to enact and approve legislation through the referendum and initiative process is equal to the local government's legislative power. (*Lesher Communications, Inc.,* 52 Cal.3d at 540; *Merritt v. City of Pleasanton* (2001) 89 Cal.App.4th 1032, 1035.) If a city is prohibited from exercising their legislative power in a certain way or in a certain area, because it would conflict with existing State statutes, then the people are also prohibited from exercising their legislative power as well. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 920-921.) Therefore, "the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern," can restrict the local electorate's reserved legislative power. (*DeVita, supra,* 9 Cal.4th at 776.)

A State statute preempts the local electorate's reserved legislative power when it concerns matters of statewide concern and contains a definite indication of the Legislature's intent to restrict the electorate's legislative discretion. (*Id.*) The Legislature evidences such intent either by an absolute ban on legislative discretion or by delegation of discretion solely to city councils or county boards of supervisors. (*Id.*; see also, *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 (an absolute ban, i.e., "No general tax shall be imposed, extended, or increased" would have been a clear indication of the intent to restrict the electorate's legislative power); *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501, 505 (Legislature's use of "city council" and "board of supervisors" is strong indication of intent to restrict local

initiative and referendum power).) Therefore, to answer the question presented by this case, the Court has to examine Section 65860 to determine if the Legislature intended it to restrict the local electorate's reserved legislative powers on a matter of statewide concern.

III. THE PLANNING AND ZONING LAW PREEMPTS ALL LOCAL LEGISLATIVE DISCRETION, INCLUDING THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWER, ON A MATTER OF STATEWIDE CONCERN – CONSISTENCY OF LAND USE REGULATIONS AND DECISIONS WITH CITY'S GENERAL PLAN.

While in California planning and zoning have traditionally been considered "municipal affairs," cities and counties derive their police power from the state and a municipality's planning or zoning decision can and often does have substantial impact beyond its borders. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 608.) The regional or statewide impacts of a municipality's planning decisions gives the Legislature the constitutional authority to limit the power local electorate's reserved legislative powers in this area if it chose to do so. (*DeVita, supra*, 9 Cal. 4th at 784.) In examining whether the Legislature has done so, this Court has found that it has – when it "mandate[ed] the development of a [general] plan, specif[ied] the elements to be included in the plan, and impos[ed] on the cities and counties the general requirement that land use decisions be guided by that plan. (*Id.* at 783.) This Court explained the Legislature's legitimate state interest in requiring such long range planning in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110 as follows:

> The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly

> progress. Thus, it has provided not only for the adoption of general plans but also regional plans (§ 65060 et seq.), specific plans (§ 65450 et seq.), district plans (§ 66105 et seq.), and a comprehensive plan for the conservation of San Francisco Bay (§ 66650 et seq.). In addition, the voters recently passed an initiative measure providing the mechanism for adoption of plans to preserve and protect the state's coastline. (Pub. Resources Code, § 27000 et seq.)

(*Selby Realty, supra,* 10 Cal.3d at 120.)

In 1971, in response to the "deleterious consquences of haphazard community growth in the state, the Legislature made a series of legislative changes that transformed a municipality's general plan from an "interesting study" to a "constitution for future development." (*DeVita*, *supra*, 9 Cal. 4th at 772-773.) As this Court explained, "The general plan consists of a 'statement of development policies ... setting forth objectives, principles, standards, and plan proposals.' (Gov. Code, § 65302.) The plan must include seven elements--land use, circulation, conservation, housing, noise, safety and open space--and address each of these elements in whatever level of detail local conditions require (*id.*, § 65301). General plans are also required to be 'comprehensive [and] long[]term' (*id.*, § 65300) as well as 'internally consistent' (*Id.*, § 65300.5.) The planning law thus compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions." (*DeVita, supra*, 9 Cal.4th at 773.) Additionally, "[f]or the first time, proposed subdivisions and their improvements were required to be consistent with the general plan (Gov. Code, § 66473.5 [formerly in Bus. & Prof. Code, § 11526]), as were zoning ordinances (Gov. Code, § 65860). [citation] Moreover, charter cities were no longer completely exempt from the requirements of the planning law; the State mandated that charter cities adopt general plans with the required mandatory elements. (Gov. Code, § 65700, subd. (a); [citation].)" (*Id.*, at 772.) This Court has further explained that:

> . . . now "'[t]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.'" [citation]; see [Gov. Code] §§ 65359 [requiring that specific plans be consistent with the general plan], 66473.5 [same with respect to tentative maps and parcel maps], 65860 [same with respect to zoning ordinances], 65867.5, subd. (b) [same with respect to development agreements].)

(*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 153.)

As this Court has explained on numerous occasions, "the keystone of regional planning is consistency -- between the general plan, its internal elements, subordinate ordinances, and all derivative land-use decisions." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572-573 (citing *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *Orange Citizens, supra,* 2 Cal.5th at p. 153; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540-541; *DeVita, supra,* 9 Cal. 4th at 772-773).) This consistency requirement is the "linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.) Without it, a general plan would return to nothing more than an "interesting study" and the State's legitimate interest in preventing random and haphazard community growth and development through considered deliberative long term regional planning would be completely undermined. Thus, although the Legislature has only imposed "minimal restrictions" on local discretion over planning and zoning decisions, those minimal restrictions are not trivial or mere technical trivialities to be cast aside.

IV. THE LEGISLATURE PREEMPTED THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWERS TO BOTH ADOPT AND MAINTAIN A ZONING ORDINANCE THAT IS INCONSISTENT WITH A CITY'S OR COUNTY'S GENERAL PLAN.

Therefore, clearly Section 65860, which requires consistency between a city's or county's general plan and its zoning ordinances advances a statewide concern. So the next question is did the Legislature in enacting Section 65860 intend to preempt the local electorate's reserved legislative powers.

The question in this case involves the local electorate's exercise of its reserved power through a referendum. Regularly across cities and counties are confronted with referendum petitions challenging a zoning ordinance that would enact consistent zoning following a General Plan amendment, which rendered the existing zoning inconsistent. These petitions are almost always submitted by opponents to the property owner's planned development for the parcel in question. In *deBottari*, the referendum proponents opposed medium, as opposed to low density, housing. (*deBottari, supra,* 171 Cal.App.3d at 1207-1208.) In the case at bar, the Hotel Coalition opposed a new hotel and the loss of industrial land in the City. (JA, Vol. II at 480, 482.) In these situations, if the referendum proponents were successful and the electorate repealed the new consistent zoning, the parcel's inconsistent zoning ordinance would be revived and remain in effect until some unknown future time when either the city or the electorate adopted new valid zoning.

A. Section 65860 Preempts the Local Electorate's Reserved Legislative Power when It Enacts Inconsistent Zoning by an Initiative.

This Court has already examined this question in the context of the local electorate's exercise of its reserved power through an initiative. In *Lesher*, this Court held that a zoning ordinance enacted by the voter's

through an initiative, which was inconsistent with the city's general plan was invalid *ab initio*, from the beginning: "A zoning ordinance that conflicts with a general plan is invalid at the time it is passed." *Lesher Communications, Inc., supra,* 52 Cal.3d at 544). Neither a city council nor the voters have the legislative power to enact zoning ordinances that are inconsistent with the city's General Plan and violate the Zoning and Planning Law, Section 65860. (*Id.* at 547.) Therefore, this Court held that the inconsistent ordinance was invalid and upheld the trial court's issuance of a writ of mandate to compel its invalidation.

B. Nearly Forty Years of Appellate Precedent Holds That a Referendum, Like the One Here, that Would Revive Inconsistent Zoning Is Invalid.

Although this is the first time this Court has addressed Section 65860's preemptive effect on local referenda, two districts of the Court of Appeal have examined this issue. The Fourth District first reviewed a referendum seeking to repeal an ordinance enacting consistent zoning following amendment of a general plan almost 40 years ago in *deBottari.*[3] *deBottari* established a bright line rule that has guided cities, counties, voters and courts for decades. The electorate cannot by referendum repeal zoning for a parcel that is consistent the city's or county's general plan, when if the referendum is successful, the parcel would be left with inconsistent zoning. The Fourth District held that:

> In section 65860, subdivision (a), the Legislature mandated that all zoning shall be consistent with the general plan. In section 65860, subdivision (c), the Legislature added muscle to the provision by requiring that any ordinance which becomes *inconsistent* with a general plan *must* be brought into conformity. Subdivision (c) provides: "In the event that a zoning ordinance becomes inconsistent with the general plan

[3] Nine years later, the Fourth District followed and reaffirmed *deBottari*, in *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868.

> 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." To further ensure consistency in land use decisions, the Legislature provided in section 65860, subdivision (b), that "[any] resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a)." (See *City of Los Angeles* v. *State of California, supra*, 138 Cal.App.3d at p. 531.)
>
> A zoning ordinance inconsistent with the general plan at the time of its enactment is "invalid when passed." (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704 [179 Cal.Rptr. 261].)
>
> In view of the foregoing, we conclude that the invalidity of the proposed referendum has been clearly and compellingly demonstrated. Repeal of the zoning ordinance in question would result in the subject property being zoned for the low density residential use while the amended plan calls for a higher residential density.

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

C. In this Case, the Sixth District's Decision Expressly Rejected *deBottari* and Directly Contradicted the Fourth District Regarding the Issues at the Heart of the Consistency Requirement in the Planning and Zoning Law and the Proper Exercise of the Electorate's Reserved Legislative Power.

The court below disagreed with *deBottari* and held "that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (*Id.* at 37-38.) In rejecting the *deBottari* line of cases, the Sixth District described its sister court's reasoning as "flawed." (*Bushey, supra*, 12 Cal.App.5th at p. 42.)