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.