IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MORGAN HILL,

Plaintiff and Respondent,

vs.

SHANNON BUSHEY, 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.

SUPREME COURT NO.: S243042
COURT OF APPEAL. NO.: H043426
SUPERIOR COURT NO.: 16-CV-292595

MORGAN HILL HOTEL COALITION'S ANSWER TO PETITIONS FOR REVIEW

ASIT S. PANWALA (SBN: 224118)
LAW OFFICE OF ASIT PANWALA
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111
(415) 766-3526; asit@panwalalaw.com

J. RANDALL TOCH (SBN: 124547)
TOCH LAW FIRM
PO BOX 66
MORGAN HILL, CA 95038
(408) 762-9712; tochlawfirm@gmail.com

Attorneys for Appellant/Real Party In Interest
MORGAN HILL HOTEL COALITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

The Morgan Hill Hotel Coalition, real party in interest in the trial court, and Appellant on appeal, answers the petitions for review of the decision of the Sixth District Court of Appeal in *City of Morgan Hill v. Bushey, et al.*, (2017) 12 Cal.App.5th 34 (issued May 30, 2017, Court of Appeal No. H043426).

I. QUESTION PRESENTED

1. Whether the reserve power provides the voters with the opportunity to reject one zoning district for another if they both equally conform to the recent general plan amendment?

II. INTRODUCTION

The right to exercise of the power of referendum is a Constitutional right that more than two thousand five hundred registered voters sought to exercise when they signed a petition for referendum ("Petition"). The Petition required the City of Morgan Hill ("City") to repeal Ordinance No. 2131 or seek voter approval. The exercise of the power of referendum is enshrined in the Article 2, Section 9 of the California Constitution, and codified in Election Code §§ 9237 and 9241. Ordinance No. 2131 would amend the zoning for a parcel located at 850 Lightpost Way ("Parcel") from "ML-light industrial" to "general commercial." The City had previously amended the general plan's land use designation from "industrial" to "commercial," leaving behind inconsistent zoning. It attempted to remedy the inconsistency by passing Ordinance No. 2131. The Morgan Hill Hotel Coalition ("Coalition") timely filed a petition for referendum preventing the ordinance from becoming effective. The City argued that voters would *enact* an invalid statue if

they failed to approve the measure because the Parcel would remain "ML-light-industrial." The City has eleven other commercial zoning districts to choose from should the voters reject the City's first choice of zoning. The Sixth District Court of Appeal agreed with the Coalition that a referendum that seeks to prevent a zoning change from taking effect *does not create* an inconsistency with the general plan's land use designation. Disapproval of the measure merely maintains the pre-existing status quo until the City chooses another commercial zoning district. The Sixth District Court of Appeal noted that referendums do not *enact* laws; they merely approve or disapprove of legislation enacted by legislators before they become effective. Thus, the Sixth District Court of Appeal affirmed the reserve power of the people to exercise the power of referendum and ordered the Superior Court to deny the City's petition.

III. STATEMENT OF FACTS

In January of 2014, River Park Hospitality ("River Park"), an out-of-town developer, applied for a general plan amendment for a 3.39 acre undeveloped parcel ("Parcel") located at Lightpost Way and Madrone Parkway in Morgan Hill, California. Joint Appendix ("JA") at 401:8-11. The Parcel is surrounded by industrial land on the north, east and west side, and commercial on the south side. JA at 132. The amendment sought to change the general plan's land use designation from industrial to commercial. JA at 401: 8-11. The proposed

amendment was not submitted to the City's then active General Plan Task Force for consideration.[1]

On November 19, 2014, the City amended the general plan solely for the Parcel from industrial to commercial. JA at 130-31. The zoning for the Parcel, however, remained "ML-light industrial." *Id.*

For several months, an inconsistency between the general plan and the zoning designation existed. On March 18, 2015, the City Council passed the first reading of Ordinance No. 2131, which would change the zoning designation from "ML-light industrial" to "general commercial." JA at 116. Hotel use is allowed with a conditional use permit on land zoned "general commercial." JA at 410. The Coalition opposed the ordinance because two new hotels would open soon, thereby increasing the supply of comparable hotel rooms by over twenty percent. JA at 383: 9-13. Although the City Council heard public comments against the Ordinance No. 2131 again on April 1, 2015, the City Council narrowly adopted the ordinance by a three to two vote. JA at 121-22; 301.

On May 1, 2015, the Coalition filed the Petition. JA at 295. The City Clerk issued a certificate of examination and sufficiency after determining that there were approximately 2,500 valid signatures from registered voters. *Id.* Subsequently, the City passed a resolution accepting the City Clerk's certificate of

---

[1] One day after the Sixth District Court of Appeal issued its opinion, the civil grand jury of Santa Clara County issued a report criticizing the City for failing to submit all proposed general plan amendments to the General Plan Task Force.

[2] The City continues to argue that the purpose of the referendum is to preserve industrial land solely based on a proposed ballot argument that was never

examination and sufficiency. JA at 291-92. The Petition states that in accordance with "California Election 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 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. River Park then prepared a conditional use permit application to build a hotel on the Parcel. JA at 452-53. In the fall of 2015, River Park listed the Parcel for sale for twice as much as 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 to repeal Ordinance No. 2131 or place it on the ballot. JA at 385:15-21 (Superior Court No. 16-CV-290097).

On February 17, 2016, the City Council reviewed staff reports that provided other alternatives such as selecting another commercial zoning district for the Parcel that does not permit hotel use. JA at 404-5. Morgan Hill Municipal Code provides for twelve different types of commercial zoning districts including "administrative office," "service/commercial," and "light commercial/residential," that the City may chose from that would conform to the general plan, but do not permit hotel use. JA at 407-31. The Coalition has urged the City multiple times to consider another commercial zoning district prior to litigation. Reporter's Transcript of Hearing on March 24, 2016 ("RT") at 6:1-13; 15:2-7 (note the transcript mistakenly includes a "not" before the other zoning options that the

Coalition asked the City to consider). The City instead adopted a resolution directing the City Clerk to place Ordinance No. 2131 on the June 7, 2016 ballot, but then also authorized the filing of a suit to have the referendum measure removed. JA at 101-3.

On March 2, 2016, the City passed a resolution to submit the referendum to the voters at a special municipal election to be held on June 7, 2016. JA at 319. The proposed referendum measure states: "Shall the ordinance amending the zoning designation of 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?" *Id.* The voters never had an opportunity to vote on the measure.

IV. STATEMENT OF CASE

On March 11, 2016, the City sued Shannon 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 referendum measure from the ballot and to certify Ordinance No. 2131. JA at 13-325. The City argued that to allow the voters to reject Ordinance No. 2131 would leave a zoning district that is inconsistent with the general plan, and therefore invalid by operation of law. JA at 18, ¶19.

On March 18, 2016, the Coalition filed an opposition to the City's request for alternative and peremptory writ and declaratory relief. JA at 375-431. The Coalition argued that the right to exercise the power of referendum is a

Constitutional right that should not be curtailed. JA at 387-89. The Coalition asserted that if the voters reject the measure, it would simply maintain the status quo rather than *enact* an invalid law. JA at 391-93. It also noted that the City could choose another commercial zoning district to bring the Parcel into conformity with the general plan even if the measure failed. JA at 393-94. Thus, the Coalition argued that the City Council's selection of zoning after a general plan amendment should not be immune from exercise of the power of referendum. JA at 391.

The City, in its reply, argued that it was irrelevant that the City could remedy the inconsistency between the general plan and zoning by choosing another commercial zoning district if the measure failed. JA at 475.

On March 29, 2016, the trial court issued a decision granting the peremptory writ and declaratory relief sought by the City to remove the measure from the election ballot and certify Ordinance No. 2131 "as duly adopted and effective immediately." JA at 484-87. The trial court's decision relied upon *deBottari v. City of Norco* (1985) 171 Cal.App.3d 1204.

On April 1, 2016, the Hotel Coalition filed a notice of appeal. JA at 495-96.

On May 30, 2017, the Sixth District Court of Appeal issued a published decision overturning the Superior Court's writ of mandate and declaratory relief. The Court found that the stated purpose of the referendum was to prevent the development of a hotel on the Parcel.[2] *Slip Op.* at 2-3. The Court held that

[2] The City continues to argue that the purpose of the referendum is to preserve industrial land solely based on a proposed ballot argument that was never

Government Code § 65860's mandate that the Parcel's zoning must be consistent with the general plan only prevented the City from *enacting* new zoning that was inconsistent with the general plan. *Id.* at 6. The City has "a reasonable time" under Government Code § 65860(c), to amend the zoning of the Parcel to make it consistent with the recently amended general plan. *Id.* at 5. The Court held that the "referendum does not seek to *enact* anything," and that it is "undisputed that the City could have selected any of a number of consistent zoning districts to replace the parcel's inconsistent zoning." *Id.* Thus, the Court held that the consistency requirement did not preclude the electorate from exercising its referendum power to reject the City's choice of zoning. *Id.* at 6.

The Sixth District Court of Appeal further stated that the "Fourth District's reasoning in *deBottari* is flawed," because a referendum cannot *enact* an ordinance. *Id.* at 8. It stated that a referendum that rejects an ordinance simply maintains status quo, and cannot violate Government Code § 65860, which prohibits the enactment of an inconsistent zoning ordinance.[3] *Id.* at 8. The Sixth District Court of Appeal pointed out that the City could choose another commercial zoning district if their first choice failed to gain approval from the voters. *Id.*

---

published and submitted a year after the petition was filed that listed many arguments to disapprove of the ordinance including water usage, oversupply of hotel rooms, and failure to bring lucrative jobs. JA at 482.

[3] The zoning for Parcel remains "ML-light industrial." No one argued that the zoning had changed as a result of Ordinance No. 2131.

The City's and River Park's petitions for rehearing in the Court of Appeal were denied.[4]

V. ARGUMENT

A. The Fourth District Undermined *DeBottari* In *Chandis* By Holding That A Rule Declaring That Voters Cannot Reject One Of Several Choices Would Render The Exercise Of The Power Of Referendum Meaningless.

The City's and River Park's petitions for Supreme Court review rely heavily on the argument that there is a split between the Fourth and Sixth District on the issue of whether the voters may reject the City's choice of zoning after an amendment to the general plan. Their petitions fail to inform the Court that the Fourth District Court of Appeal has undermined *deBottari* in a subsequent decision.[5]

In *Chandis*, the Fourth District Court of Appeal held that a "rule declaring that voters cannot reject a *proposed specific plan* falling within the parameters of the city's general plan would render the exercise of the power of referendum meaningless." *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 482 (italics added). The City of Dana Point had adopted a general plan which designated the Headlands as a specific plan area, with guidelines on the number of

---

[4] In the City's petition for rehearing, it argued for the first time that the Court's finding that there were other commercial zoning districts that would conform to the general plan was false even though it did not argue otherwise and instead argued that the existence of other commercial zoning districts was irrelevant. City's Petition for Rehearing at 8-13; City's Reply Brief at 28-31; JA at 475-76.

[5] *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868 relied heavily upon *deBottari*. The Sixth District stated that it suffered from the same flaws as *deBottari*. *Slip Op.* at 8, fn 4.

residences and hotels allowed and designating over 61 acres of open space. *Id.* at 479-80. The plaintiffs submitted a specific development plan that satisfied the requirements of the aforementioned general plan including the open space. *Id.* at 480. The city council approved the specific plan, and additionally amended the general plan only to extent of modifying the open space element. *Id.* However, petitions for referendums were timely filed and placed on the ballot requiring voter approval. *Id.* However, the voters failed to support the measures, and the plaintiffs sued because their proposed specific plan along with the general plan amendment conformed to Dana Point's general plan for the Headlands. *Id.* at 481-82.

Dana Point considered eleven development alternatives other than the one they adopted. *Id.* at 482. The *Chandis* Court clarified that the specific plan and general plan amendment *never became effective* because the petitions were timely filed. *Id.* at 482. Thus, the *Chandis* Court held that the "subsequent rejection by the voters simply maintained the status quo; it did not repeal a specific plan previously adopted by the city council." *Id.* at 482. Both the plaintiffs in *Chandis* and the City and River Park in this case cited *deBottari* and argued that the consistency requirement of Government Code § 65000 et. seq. would invalidate the referendum. *Id.* at 484-85; JA at 19. However, *Chandis* held that the rejection of a proposed specific plan only maintains the status quo of no development temporarily pending another choice. *Id.* at 485. No development is not consistent with a general plan calling for development, but the *Chandis* Court did not invalidate the referendum because of it. The reasoning of the Fourth District in

Chandis and Sixth District in *City of Morgan Hill* is the same-voters should be allowed to disapprove of one choice among many that conform to the general plan.

B. Government Code § 65860 Allows For A Reasonable Period Of Time To Remedy Inconsistency Created In Zoning When The General Plan Is Amended.

The City and River Park also request review because the Sixth District Court of Appeal refused to find that the zoning for the Parcel was invalid. City's Petition for Review at 4; River Park's Petition for Review at 10-14; *Slip op*. at 5. The Sixth District's decision is consistent with Government Code § 65860 and this Court's holding in *Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531.

The City created the inconsistency it complains of when it amended the general plan for the Parcel without amending the zoning.[6] For almost six months, the zoning of the Parcel remained "ML-light industrial" after the City amended general plan. The zoning is not invalid, but rather it was lawfully enacted, but currently inconsistent with the general plan. River Park argued that the Sixth District Court of Appeal is wrong because inconsistent zoning is neither legally effective nor enforceable, and thus nullifies the consistency requirement. River Park's Petition for Review at 12. It argues that the voters cannot disapprove of the City's choice of zoning because doing so would keep the pre-existing zoning in

[6] Government Code § 65862 expresses a preference to have both the zoning and general plan changed concurrently. To the extent that City is accurate that this factual scenario repeatedly occurs, it suggests that cities tactically do so to curtail the right of the people to exercise the power of referendum.

place until another ordinance is adopted. River Park's argument leads to the conclusion that the failure to file a petition for referendum for a general plan amendment waives away the People's right to file a petition for referendum for a subsequent change in zoning. Their argument fails to recognize that under Government Code § 65860(c), cities are provided a reasonable time to cure the inconsistency in zoning after a general plan has been amended. For example, when the City Council voted, it could have rejected Ordinance No. 2131 and then considered and approved another commercial zoning district. Likewise if the voters failed to approve Ordinance No. 2131 in a referendum, the City may consider another commercial zoning district that does not allow for hotel use. Under both scenarios, the City would be complying with the mandate of Government Code § 65860(c) to amend the zoning within a reasonable period of time. The delay in re-zoning the Parcel is due to the City because it first discontinued the Petition without placing it on the ballot, and then sued to remove it from the ballot.[7]

The Sixth District's ruling is also consistent with this Court's ruling in *Lesher*. In *Lesher*, the Supreme Court construed a successful voter initiative as a zoning ordinance, and found it was inconsistent with the general plan. *Lesher* at 543-44. As a result, the ordinance was invalid at the time it was passed because it violated the consistency requirement of Government Code § 65860. *Id.* at 544. As

[7] River Park requested that the City discontinue the Petition and joined the City in its request to remove the referendum measure from the ballot.

the Sixth District pointed out, *Lesher* stands for the proposition that the electorate may not utilize the *initiative* power to *enact* a zoning inconsistent with the general plan. *Slip op.* at 6. The City's reliance on cases concerning the initiative power is misplaced. *Id.* Notably, this Court in *Lesher* distinguished when a zoning ordinance is invalid upon enactment from when the zoning ordinance was valid at the time it was enacted, but later became inconsistent because of an amendment to the general plan. *Id.* at 545-46. In *Lesher*, this Court stated that Government Code § 65860(c) applies to the latter, and thus it also applicable here. *Id.*

C. The *DeBottari* Court Found A Referendum *Enacts* Legislation Because No Other Zoning Districts Were Available That Conformed To The Amended General Plan

The City relied on *deBottari v. City of Norco* to argue that the referendum would *enact* invalid zoning. (1985) 171 Cal.App.3d 1204; *see also City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868. After the city of Norco had amended general plan from residential/agricultural to residential low density, it attempted to rezone the land to allow single-family homes on 10,000 square feet lots. *deBottari* at 791-92. Essentially, it rezoned the land to allow three to four units per acre rather than zero to two. *Id.* Although the City approved the ordinances changing the zoning, petitions for referendum were timely filed. *Id.*

The *deBottari* Court found itself in a bind. If it allowed the measure to be voted on and it failed, there were only three options possible: re-enact the zoning that had been disapproved, enact a new zoning scheme, or force the city to change

the general plan.[8] *Id.* at 795. All three choices went beyond the court's power to order and would have violated the doctrine of separation of powers by legislating on behalf of the city. The court did not discuss the possibility of choosing another residential low density zoning designation that would also conform to the amended general plan. Therefore, one should conclude that was not an option. The *deBottari* Court in a poorly reasoned decision concluded that rejecting the ordinance was *enacting* invalid zoning and would violate the consistency requirement. *Id.* at 795. As illogical as it is, the *deBottari* court concluded that a referendum *enacts* new legislation.

However, courts have subsequently held that a referendum where the measure fails merely *retains* the status quo rather than *enacting* new legislation. *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765; *Chandis* at 482; *Merritt v. City of Pleasanton (*2001) 89 Cal.App.4th 1032. More importantly, *deBottari* is not applicable because eleven other commercial zoning designations that exist in Morgan Hill that would also conform with the amended general plan whereas none are discussed in *deBottari*. The Sixth District likewise distinguished the facts of *deBottari* in its decision when it expressed no opinion as to the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan. *Slip Op.* at 8, fn 5. Thus, the Respondents'

[8] "Zoning scheme" is the entire constellation of zoning districts that exist within a city. *Lockard v. City of Los Angeles* (1949) 3 Cal.2d 253. Thus, the Court considered whether it should ordered the City of Norco to create new zoning districts, which suggests that there were no other districts that were consistent with the amended general plan.

reliance on *deBottari* is misplaced as the Fourth District's decisions in that case applied to a unique set of facts that have been undermined in subsequent decisions.

VI. CONCLUSION

The Sixth District Court of Appeal is correct when it held that referendums do not *enact* legislation and voters should be able to reject one choice of zoning if another equally conforms to a general plan amendment. The Constitutional right of the voters to exercise the power of referendum should be affirmed. This Court should deny review of this matter.

Dated: July 28, 2017

Respectfully submitted,
LAW OFFICE OF ASIT PANWALA

Asit Panwala
J. Randall Toch
Attorneys for Real Party in Interest and
Appellant Morgan Hill Hotel Coalition

VERIFICATION

Pursuant to California Rules of Court Rule 8.504(d)(4), I hereby certify that the forgoing Appellant Morgan Hill Hotel Coalition's Opposition to Petitions for Review is in Times New Roman 13-point font and contains 4,034 words as counted by Microsoft Word.

Dated: July 28, 2017

LAW OFFICE OF ASIT PANWALA

Asit Panwala, Esq.
Attorney for Real Party in Interest and
Appellant Morgan Hill Hotel Coalition

City of Morgan Hill v. Shannon Bushey, etc., et al.,
Supreme Court No. S243042
Court of Appeal No. H043426
Superior Court No. 16-CV-292595

PROOF OF SERVICE

I, ASIT S. PANWALA, hereby state:

I am over eighteen years of age and not a party to the above action. My business address is 4 Embarcadero Center, Suite 1400, San Francisco, California 94l11.

On July 28, 2017, I served the following documents:

MORGAN HILL HOTEL COALITION'S ANSWER TO PETITIONS FOR REVIEW

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

Katherine Alberts
Counsel for City of Morgan Hill
Leone & Alberts
2175 N. California Blvd., Suite 900
Walnut Creek, CA 94596

Danielle Goldstein
Counsel for Registrar of Voters
Santa Clara County Counsel Office
70 W. Hedding Street
Floor 9, East Wing
San Jose, CA 95110

Jolie Houston
Counsel for River Park Hospitality
Berliner Cohen
10 Almaden Blvd., Floor 11
San Jose, CA 95113

Thomas Murphy
Counsel for River Park Hospitality
Berliner Cohen
10 Almaden Blvd., Floor 11
San Jose, CA 95113

Donald Larkin
Counsel for City of Morgan Hill
Office of the City Attorney
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037

Scott Pinksy
Counsel for Irma Torrez
Office of Gary M. Baum
19925 Stevens Creek Blvd. Suite 100
Cupertino, CA 95014

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

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

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

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on July 28, 2017, at San Francisco, California.

Asit S. Panwala