

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 TO THE LEAGUE OF  
CALIFORNIA CITIES' AMICUS  
BRIEF**

CASE NO.: S243042

SIXTH DISTRICT NO.: H043426

SUPERIOR COURT NO.: 16CV292595

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  
P.O. 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

Introduction.....	5
Memorandum of Law.....	6
I.    The Existence Of Other Zoning Districts That Would Likewise Be Consistent With A Recent General Plan Amendment Is A Bright Line Rule For Protecting The Right To Referendum.....	6
A. Courts Only Need To Determine Whether Other Consistent Zoning Districts Exist .....	7
B. This Court Has Never Cited <i>DeBottari</i> For The Proposition That Voters Cannot Reject One Of Many Choices.....	7
II.   The City Has Created The Uncertainty and Delay Rather Than The Electorate’s Right to Referendum.....	9
III.  The League Fails To Provide Any Evidence That Referendum Measures Will Prevent Affordable Housing.....	11
IV.  Courts Have Never Found An Implied Waiver Of A Constitutional Right To Referendum.....	12
Conclusion.....	14
Verification.....	15

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Pages</b>
<i>Avco Community Developers v. South Coast Regional Commission</i> (1976) 17 Cal.3d 785.....	11
<i>California Building Industry Association v. City of San Jose</i> (2015) 61 Cal.4 <sup>th</sup> 435.....	12
<i>Citizens for Goleta Valley v. Board of Supervisors of Santa Barbara County</i> (1990) 52 Cal.3d 553.....	7-8
<i>City of Morgan Hill v. Bushey</i> (2017) 12 Cal.App.5th 34.....	6
<i>deBotarri v. City of Norco</i> (1985) 171 Cal.App.3d 1204.....	<i>Passim</i>
<i>Leshar Communications, Inc., v. City Walnut Creek</i> (1990) 52 Cal.3d 531.....	8-9
<i>Orange Citizens For Parks and Recreation v. Superior Court</i> (2016) 2 Cal.5th 141.....	7
<i>Spindler Realty Corp. v. Monning</i> (1966) 243 Cal.App.2d 255.....	11
<b>Constitution</b>	
Article IV, § 1 (1911 Amendment) .....	13
<b>References</b>	
Ballotpedia.org, California Initiative and Referendum, Proposition 7.....	13
<b>Statutes</b>	
Elections Code § 9237.....	9
Elections Code § 9241.....	9-10
Government Code § 65860.....	8
Government Code § 65860(c).....	8
Government Code § 65862.....	9, 13
Government Code § 65009(c)(1).....	12

Government Code § 65589.5(d)(2).....12  
Health and Safety Code § 50003.....12

## INTRODUCTION

When 2,500 electors in the City of Morgan Hill signed a petition for referendum with respect to a proposed zoning ordinance, they expected to be able to exercise their right to approve or reject the measure. However, rather than allowing an election, the City of Morgan Hill (“City”) “discontinued processing” the petition for referendum, although it was timely and sufficient. After the Hotel Coalition filed an action for a writ of mandamus, the City subsequently placed the zoning ordinance on the ballot, only to file an action to remove it. The uncertainty and delay in this matter has been due to tactics taken by the City to prevent a referendum vote. Voters have not been able to exercise their right to approve or reject Ordinance No. 2131.

The League of California Cities (“League”) argues for the rule set forth by the Fourth District Court of Appeal in *deBottari v. City of Norco* (1985) 171 Cal.App.3d 1204 (“*deBottari*”) because the League claims that it is a bright-line rule, which prevents delay and promotes finality.<sup>1</sup> The League suggests that the development of affordable housing will be affected if the Court adopts the Sixth District Court of Appeal’s (“Sixth District”) rule. The League fails to recognize that the Sixth District’s rule is also a bright-line rule, that the delay and uncertainty in this case are due to the actions of the City, and failed to provide any evidence to believe that referendum measures will stymie affordable housing. Lastly, the

---

<sup>1</sup> The League officially takes no position, but clearly prefers the *deBottari* rule to the rule established by the Sixth District.

League concedes that it is the role of the Courts to jealously guard the Constitutional right to referendum, and yet the League suggests that this Court adopt a rule whereby voters waive their right to exercise the power of referendum as to any subsequent zoning ordinance if they did not file a petition for referendum against the general plan amendment.

### **MEMORANDUM OF LAW**

#### **I. THE EXISTENCE OF OTHER ZONING DISTRICTS THAT WOULD LIKEWISE BE CONSISTENT WITH A RECENT GENERAL PLAN AMENDMENT IS A BRIGHT LINE RULE FOR PROTECTING THE RIGHT TO REFERENDUM**

The rule set forth by the Sixth District in this matter is a bright line rule and consistent with the underlying principle that voters should be allowed to express their approval or rejection of legislative action.

The Sixth District held that statutory requirement of consistency did not “preclude the City from exercising its discretion to select one of a variety of zoning districts for the parcel that would be consistent with the general plan.” *See City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, 40-41. The consistency requirement did not require the City to adopt Ordinance No. 2131. *Id.* at 40. “Since City retained this discretion, section 65860 did not preclude the electorate from exercising its referendum power to reject the City’s choice of zoning district in O-2131.” *Id.* at 41. The Sixth District noted that the City is free to choose one of the other consistent zonings if the electorate rejects their first choice of consistent zoning. *Id.* at 42.

A. Courts Only Need To Determine Whether Other Consistent Zoning Districts Exist

Under the Sixth District's rule, Courts would only need to determine whether the zoning scheme provides for a variety of consistent zoning districts (at least one other) under the general plan's land use designation to rule on whether the referendum power could be used to reject the City's choice of zoning.<sup>2</sup>

B. This Court Has Never Cited *DeBottari* For The Proposition That Voters Cannot Reject One Of Many Choices

The League argues that *deBottari* has been the law for more than thirty years, and this Court has cited it favorably. *See* League's Amicus Brief at 7-8. However, the bright line rule in *deBottari* is not only poorly reasoned, but also prevents voters from exercising their Constitutional rights. *See* Hotel Coalition's Answer Brief at 42-45. When this Court has cited *deBottari*, it has never cited it for the principle that voters cannot reject one of several choices available to legislature. Rather in *Orange Citizens*, this Court cited it for the proposition that the general plan is more than just "interesting study," and that "the requirement of consistency...infuse[s] the concept of planned growth with the force of law." *Orange Citizens For Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141, 153. In *Citizens of Goleta Valley*, the Court cited it for the proposition that the "general plan is the constitution for future developments." *Citizens for Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553,

---

<sup>2</sup> Given that zoning schemes are codified and readily available online, one could easily determine if there are other zoning districts that are also consistent with the general plan land use designation.

570-71. The Hotel Coalition does not challenge that the zoning of the parcel must be changed to one that is consistent with the general plan as amended within a reasonable period of time. Rather, the Hotel Coalition challenges the notion that the City may make that decision without any Constitutionally mandated check upon its power by the electorate. There are eleven other commercial zoning districts available to the City should the voters disapprove of the City's first choice. Joint Appendix ("JA") at 407-31. Additionally, the Hotel Coalition has strongly urged the City to consider other commercial zoning districts such as "CO-administrative-office" that would conform to the recent general plan amendment. See Reporter's Transcript of Hearing on March 24, 2015, at 15: 2-7.<sup>3</sup> Thus, the Hotel Coalition's disagreement with the City is not whether the zoning should be amended to conform with the general plan, but which of the twelve commercial zoning districts should be chosen.

In *Leshar*, this Court distinguished between enacting zoning inconsistent with the general plan and hence invalid when passed, from zoning that became inconsistent as a result of a general plan amendment and must be brought into conformity with the general plan (§ 65860). *Leshar Communications, Inc., v. City Walnut Creek* (1990) 52 Cal.3d 531, 541. This matter is clearly an inconsistency that arises from a recent general plan amendment, and thus the City has a

---

<sup>3</sup> As noted previously, the transcript mistakenly includes "not" before the other zoning options that the Hotel Coalition asked the City to consider in place of "CG-general commercial."

reasonable period of time to remedy it pursuant to Government Code § 65860(c).<sup>4</sup> See Hotel Coalition’s Answer Brief at 40-41. Thus, the League’s reliance upon *Leshner* to support the rule in *deBottari* is misplaced.

II. THE CITY HAS CREATED THE UNCERTAINTY AND DELAY RATHER THAN THE ELECTORATE’S RIGHT TO REFERENDUM

The League argues that certainty and timeliness regarding land use decisions favor the rule espoused by the *deBottari* Court. See League’s Amicus Brief at 11. A petition for referendum must be filed within thirty days of the legislative enactment with signatures from more than ten percent of the registered voters in a city the size of Morgan Hill. See Elections Code 9237.<sup>5</sup> Referendum elections may take place as soon as 88 days after the City orders it on the ballot. Elections Code § 9241.<sup>6</sup> Thus, referendums may be held fairly quickly. The delay

---

<sup>4</sup> The parties agree that the inconsistency was created when the City amended the general plan land use designation from industrial to commercial while leaving the zoning of “ML-light industrial” in place. Government Code § 65862 expresses a strong preference to amend both at the same time.

<sup>5</sup> 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.”

<sup>6</sup> 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 occurring not

and uncertainty in this case is due to the City's unwillingness to place the challenged ordinance on the ballot for voter approval or to allow the voters to cast their ballots. On May 1, 2015, the Hotel Coalition filed its petition for referendum. JA at 295. The City discontinued processing the petition on July 15, 2015, despite the city clerk's issuance of examination and sufficiency. JA at 93; JA at 295. On March 2, 2016, the City agreed to place the ordinance on the ballot only after the Hotel Coalition filed an action to compel it to do so. JA at 401:17-25; JA at 101-03. On that same day, the City also initiated legal action to remove the measure from the ballot thereby preventing an election from taking place. It is ironic to describe the delay in this matter as one due to the electorate's right to exercise the power of referendum. Rather, it is the City and River Park Hospitality ("River Park") that have prolonged uncertainty for the parcel by refusing to hold the referendum.<sup>7</sup>

The League also suggests that successive referenda will effectively halt any new use of land that is the subject of dispute. *See* League's Amicus Brief at 11. However, the requirements for a referendum are not easy to meet. It is a daunting task to collect signatures from more than ten percent of the registered voters within thirty days. The notion that successive referenda would be filed is far-

---

less than 88 days after the order of the legislative body, or at a special election called for the purpose, not less than 88 days after the order of the legislative body. The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it..."

<sup>7</sup> River Park urged the City to "discontinue processing" the petition and filed briefs in support of the City's legal action to remove it from the ballot.

fetched. Additionally, the Hotel Coalition supports amending the zoning of the parcel to “CO-administrative office,” which is consistent with a general plan land use designation of commercial, and thus the City may adopt another zoning ordinance without delay.<sup>8</sup>

Furthermore, “certainty” does not compel this Court to provide the landowner with the best and most valuable use of his land unless permits were issued. *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 797; *Spindler Realty Corp. v. Monning* (1966) 243 Cal.App.2d 255, 267-68. No permits have been issued.<sup>9</sup> River Park cannot complain that its parcel has not been rezoned to permit hotel use because it bought land zoned “ML-light industrial,” that does not permit hotel use. River Park took a calculated risk that a future zoning change would allow hotel use on the industrial parcel it had purchased, but it has no legal right to demand the zoning change it seeks.

### III. THE LEAGUE FAILS TO PROVIDE ANY EVIDENCE THAT REFERENDUM MEASURES WILL PREVENT AFFORDABLE HOUSING

The League also argues that following the rule by the Sixth District in this case may affect residential development to address the state’s housing crisis. *See* League’s Amicus Brief at 11. The California state legislature has declared a need

---

<sup>8</sup> In fact, the City may repeal Ordinance No. 2131, and instead enact an ordinance amending the zoning to “CO-administrative office” without holding a referendum, if it was truly interested in certainty and avoiding delay.

<sup>9</sup> Declaration of Rich Buikema In Support of Opposition to Morgan Hill Coalition’s Writ of Supersedeas, May 3, 2015, ¶ 3.

for housing that low and moderate-income families can afford more than thirty years ago (Health and Safety Code § 50003), and yet the League fails to provide evidence that referendum measures have prevented municipalities from doing so.<sup>10</sup>

Second, the notion that voters would reject an ordinance that promotes affordable housing is merely speculative and fails to provide a reason to limit a Constitutional right to exercise the power of referendum.

The thirty-day time limit for a filing a petition for referendum is much shorter than the time limit provided by the Government Code to attack, review, set aside, void or annul a legislative body's decision to adopt or amend a zoning ordinance to create affordable housing. Government Code § 65009(c)(1). With respect to emergency shelters, "inconsistency with the zoning ordinance or general plan shall not constitute a specific and adverse impact on public health or safety," that would prevent a shelter from opening. Government Code § 65589.5(d)(2). Thus, the League's arguments regarding delay do not apply in the context of affordable housing or emergency shelters.

#### IV. COURTS HAVE NEVER FOUND AN IMPLIED WAIVER OF THE CONSTITUTIONAL RIGHT TO REFERENDUM

Lastly, the League admits that the right to referendum should be jealously guarded, but then argues the electorate's failure to object to a general plan amendment should constitute an implied waiver of their Constitutional right to

---

<sup>10</sup> Typically, affordable housing is created by requiring a development to set aside 15% of its units for affordable housing rather than by re-zoning land specifically for affordable housing. *See e.g., California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, 449.

referendum. *See* League's Amicus Brief at 11-12. The Constitutional right to referendum passed by a 1911 Amendment to the Constitution with more than 76% of the vote. Ballotpedia.org, California Initiative and Referendum, Proposition 7. One hundred years later, the League's suggestion that this Court should find that there is an implied waiver or estoppel of the Constitutional power of referendum is without any legal foundation. There are many reasons why the electorate may not oppose a change the general plan land use designation, but have an objection to the specific zoning amendment sought by their municipality.<sup>11</sup> *See* Hotel Coalition's Answer Brief at 41-42. The Court should protect the voters right to exercise their power of referendum rather than adopt the position that their right is waived without their knowledge, consent, or any warning.

---

<sup>11</sup> *See also* Hotel Coalition's Answer Brief at 31 that the City's failure to follow the preference to amend both the general plan and zoning at the same time as expressed in Government Code § 65862 should not inure to its benefit.

## CONCLUSION

For the foregoing reasons, Appellant Hotel Coalition requests that this Court affirm the decision of the Sixth District Court of Appeal and reverse the Superior Court's order granting City's petition. The Coalition also requests that the Court order that Appellant recover its costs and that it may seek attorney's fees by motion in the trial court, and any other relief it deems just and fair.

Dated: February 15, 2018

LAW OFFICE OF ASIT PANWALA



---

Asit S. Panwala  
Randall Toch  
Attorneys for Appellant and Real Party  
In Interest 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 Answer Brief To The League of California Cities’ Amicus Brief is in Times New Roman 13-point font and contains 2,858 words as counted by Microsoft Word.

Dated: February 15, 2018

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 94111.

On February 15, 2018, I served the following documents:

**MORGAN HILL HOTEL COALITION'S ANSWER BRIEF TO THE  
LEAGUE OF CALIFORNIA CITIES' AMICUS BRIEF**

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 Pinsky  
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 THE LEAGUE OF CALIFORNIA CITIES' AMICUS BRIEF** 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

**Thomas B. Brown**  
Counsel for the League of California Cities  
BURKE, WILLIAMS & SORENSEN, LLP  
1901 Harrison Street, Suite 900  
Oakland, CA 94612-3501

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on February 15, 2018, at San Francisco, California.

A handwritten signature in black ink, consisting of a stylized 'A' followed by a cursive 'P' and 'W'.

---

Asit S. Panwala