IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H043426
Superior Court, Santa Clara County
Case No. 16-CV-292595

REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.'S SUPPLEMENTAL BRIEF UNDER CRC RULE 8.520(D)

JOLIE HOUSTON, CASB 171069
*THOMAS P. MURPHY, CASB 121251
BERLINER COHEN, LLP
TEN ALMADEN BOULEVARD
ELEVENTH FLOOR
SAN JOSE, CALIFORNIA 95113-2233
TELEPHONE: (408) 286-5800
FACSIMILE: (408) 998-5388
jolie.houston@berliner.com
tom.murphy@berliner.com

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

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I. INTRODUCTION.

Real Party in Interest and Respondent River Park Hospitality, Inc. (River Park) respectfully submits its supplemental brief under California Rules of Court Rule 8.520(d) to address new authorities that were not available in time to be included in its briefs on the merits. Those authorities are the decision of Division Four of the First Appellate District in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657 and California Attorney General Opinion No. 17-702 (April 27, 2018).

II. ARGUMENT.

A. *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657.

In *Save Lafayette*, *supra*, 20 Cal.App.5th 657, Division Four of the First District held that local voters could use the referendum power to challenge an ordinance that rezoned a parcel of land to conform its zoning designation to the City of Lafayette's amended general plan. In so ruling, the court relied on and largely followed the Sixth District's reasoning in the instant case. For the reasons River Park and the City of Morgan Hill have argued in their prior briefing, this Court should not follow Sixth District's rule and instead affirm the rule of *deBottari v. City Council* (1985) 171 Cal.App.3d 1204.

The *Save Lafayette* case does contain some additional reasoning, beyond the Sixth District's rationale in this case, which River Park wishes to address. Specifically, the court in *Save Lafayette* suggested that the result of a referendum rejecting a zoning ordinance adopted to conform inconsistent zoning to an amended general plan "simply stresses the need for a city to amend its general plan and any conflicting zoning ordinance at the same time, in order to avoid the result of creating an inconsistent zoning ordinance." (*Id.* at 669.)

However, the Planning and Zoning Law, Government Code section 65000 et seq., does not require that conforming zoning be adopted at the same time a general plan is amended. Government Code section 65862 does allow hearings on general plan amendments and zoning changes to occur at the same time. It also encourages the concurrent processing of general plan amendments and zoning changes so as to expedite processing of development applications. But that provision also expressly grants local agencies the discretion to adopt zoning changes after the general plan is amended. As River Park noted in its Reply Brief on the Merits, as a practical matter after a general plan amendment the adoption of conforming zoning changes may take time, especially where there are large-scale general plan amendments. (River Park Reply, p. 16.) Moreover, because the general plan is a planning document, it is natural that its implementation by rezoning would come after general plan policies are chosen.

From the standpoint of a property owner who wishes to develop a new land use that is inconsistent with the property's current general plan designation, it may be important to see if the city desires to consider such a general plan change to allow the proposed use before seeking to rezone the property. In part, this is because a rezoning application may call for the city's consideration of site- or project-specific information, such as a particularized environmental review, architectural plans, and plans detailing densities, specific uses, hours of use, parking, the number of affordable housing units, and similar requirements. The preparation of such materials can entail considerable effort and expense. A property owner's or developer's concerns about whether to proceed with a full rezoning application, absent a general plan designation permitting a project in the first place, are thus entirely legitimate.

In addition, *Save Lafayette* is factually distinguishable from the instant case. The *Save Lafayette* opinion gives no indication as to whether a purpose of the referendum at issue was to preserve an inconsistent land use. In this case, the purposes of the referendum, according to its proponents and the Hotel Coalition, were to preserve industrial land and to prevent hotel use (JA 385-386, 480-482), but industrial use of River Park's parcel would be inconsistent with the City of Morgan Hill's amended general plan. The approval of the referendum at issue in this case, if successful, would prevent the City Council from again attempting to adopt consistent commercial zoning for at least a year after the referendum. This is because a new commercial zoning ordinance would not be "essentially different" from the rejected measure, which sought to preserve industrial land. (See Elections Code section 9241 [rejected ordinance may not be enacted by legislative body for a period of one year]; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 678 [new measure invalid unless "essentially different" from rejected provision]; *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1110 [in deciding whether a new measure is "essentially the same" or "essentially different" the court focuses on the features that gave rise to popular objection to the challenged measure].) This would deprive the Morgan Hill City Council of any discretion to adopt consistent zoning during that time, thwarting Government Code section 65860's consistency mandate. It would also defeat the policy of the City of Morgan Hill's general plan to allow commercial use. The court in *Save Lafayette* neither confronted nor addressed such circumstances.

B. Attorney General Opinion No. 17-702 (April 27, 2018).

Attorney General Opinion No. 17-702, issued April 27, 2018 (the Attorney General Opinion), addresses whether the power of referendum

applies to a resolution by the City of Hollister approving the execution of an agreement to sell real property for development pursuant to an approved long-range property management plan for disposing a dissolved redevelopment agency's property. Such a plan is required by Health & Safety Code section 34191.5, subdivision (b).

The Attorney General Opinion determined that the power of referendum did not apply, for a number of reasons. As particularly relevant to this case, the Attorney General Opinion focused on the potential consequences of referendum.[1] It stated that "in determining whether referendum power exists as to a particular matter, 'it is settled that consideration must also be given to the consequences of applying the rule.'" (Attorney General Opinion, p. 8, quoting *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839.) The Attorney General Opinion went on to explain how the potential consequences of a referendum indicated that the referendum power could not apply to the resolution under consideration:

> That the referendum power cannot apply here is perhaps best demonstrated by its potential consequences. If Hollister's resolution were subject to referendum, the disposition and development of the property pursuant to the approved long-range plan could potentially never happen. The electorate could indefinitely prevent the sale of the property for development (as set forth in the approved long-range plan) by rejecting every attempt by Hollister to implement the plan That would completely thwart the redevelopment dissolution law's purposes to dispose of redevelopment agencies' property expeditiously in order to fund core government services. It would also conflict with the statutory requirement that the dissolved agencies' property be disposed of as provided in a long-range property management

[1] The Attorney General Opinion also determined that the referendum power did not apply because the resolution at issue was administrative rather than legislative in character. (Attorney General Opinion, pp. 8-9.)

> plan approved by a successor agency's oversight board and the Department of Finance.
>
> In short, referendum would frustrate the essential goals of the redevelopment dissolution law.

(Attorney General Opinion, p. 10.)

Similarly, if the local referendum power were to apply to a zoning ordinance that conforms inconsistent zoning to an amended general plan then general plan consistency would, at best, be delayed (possibly substantially) and at worst potentially never achieved at all. The local electorate could indefinitely prevent the adoption of consistent zoning by rejecting a city's every attempt to adopt such zoning. This would frustrate Government Code section 65860's consistency mandate as well as the achievement of general plan policies. Moreover, it would undercut the core principle of general plan supremacy itself by allowing indirect attacks on general plan policies as they are implemented by consistent zoning. Like the resolution at issue in the Attorney General Opinion, the potential consequences of applying the local referendum power to a conforming zoning ordinance militate against its application here.

III. CONCLUSION.

For over 30 years, *deBottari* has afforded a bright line rule to guide cities and counties, property owners, voters, and the courts. The Court should reaffirm the rule of *deBottari* and reverse the judgment of the court of appeal.

Dated: May 18, 2018

RESPECTFULLY SUBMITTED,

BERLINER COHEN, LLP

By _____

JOLIE HOUSTON
THOMAS P. MURPHY
ATTORNEYS FOR REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.520(c)(1), counsel for Real Party and Respondent River Park Hospitality, Inc. states that, exclusive of this certification, the cover, the tables, any signature block, and any attachment, this Real Party and Respondent River Park Hospitality, Inc.'s Supplemental Brief Under CRC Rule 8.520(d) contains 1,394 words, as determined by the word count of the computer program used to prepare the brief.

Dated: May 18, 2018

RESPECTFULLY SUBMITTED,

BERLINER COHEN, LLP

By _____
THOMAS P. MURPHY

CITY OF MORGAN HILL V. SHANNON BUSHEY, ET AL./MORGAN HILL HOTEL COALITION VS. RIVER PARK HOSPITALITY, INC.

CALIFORNIA SUPREME COURT CASE NO. S243042

COURT OF APPEAL SIXTH APPELLATE DISTRICT CASE NO. H043426

SANTA CLARA SUPERIOR COURT CASE NO. 16-CV-292595

PROOF OF SERVICE

I, Karishma Borkar, declare under penalty of perjury under the laws of the United States that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, and my business address is Ten Almaden Boulevard, Suite 1100, San Jose, California 95113-2233. On May 18, 2018, I served the following document(s):

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ATTORNEYS FOR APPELLANT/REAL PARTY IN INTEREST MORGAN HILL HOTEL COALITION: ASIT S. PANWALA LAW OFFICE OF ASIT PANWALA 4 EMBARCADERO CENTER, SUITE 1400 SAN FRANCISCO, CA 94111 TELEPHONE: 415-766-3526 asit@panwalalaw.com	**COUNSEL FOR CITY OF MORGAN HILL:** KATHERINE ALBERTS LEONE & ALBERTS 2175 N. CALIFORNIA BLVD., SUITE 900 WALNUT CREEK, CA 94596 kalberts@leonealberts.com
COUNSEL FOR REGISTRAR OF VOTERS: DANIELLE GOLDSTEIN SANTA CLARA COUNTY COUNSEL OFFICE 70 W. HEDDING STREET	**COUNSEL FOR IRMA TORREZ:** SCOTT D. PINSKY LAW OFFICES OF GARY M. BAUM MORGAN HILL CITY ATTORNEY'S OFFICE 17575 PEAK AVENUE

FLOOR 9, EAST WING SAN JOSE, CA 95110 danielle.goldstein@cco.sccgov.org	MORGAN HILL, CA 95037 pinsky1750@gmail.com
COUNSEL FOR REGISTRAR OF VOTERS: JAMES R. WILLIAMS COUNTY COUNSEL SANTA CLARA COUNTY COUNSEL OFFICE 70 W. HEDDING STREET FLOOR 9, EAST WING SAN JOSE, CA 95110	**COUNSEL FOR REGISTRAR OF VOTERS:** STEVE MITRA ASSISTANT COUNTY COUNSEL SANTA CLARA COUNTY COUNSEL OFFICE 70 W. HEDDING STREET FLOOR 9, EAST WING SAN JOSE, CA 95110
ATTORNEYS FOR APPELLANT/REAL PARTY IN INTEREST MORGAN HILL HOTEL COALITION: JONATHAN RANDALL TOCH, ESQ. P. O. BOX 66 MORGAN HILL, CA 95038 tochlawfirm@gmail.com	**COUNSEL FOR CITY OF MORGAN HILL:** DONALD ALAN LARKIN OFFICE OF THE CITY ATTORNEY 17575 PEAK AVENUE MORGAN HILL, CA 95037 donald.larkin@morganhill.ca.gov
SIXTH DISTRICT COURT OF APPEALS 333 W. Santa Clara St # 1060, San Jose, CA 95113	**SANTA CLARA SUPERIOR COURT (Attn: Appeals Unit)** 191 N. 1st Street San Jose, CA 95113
COUNSEL FOR LEAGUE OF CALIFORNIA CITIES AMICUS CURIAE Thomas B. Brown Burke, Williams & Sorensen, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612	

I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business.

Executed on May 18, 2018, at San Jose, California.

Karishma Borkar