

SUPREME COURT COPY

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 REPLY TO
SUPPLEMENTAL BRIEFS**

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

RECEIVED

MAY 23 2018

CLERK SUPREME COURT

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 REPLY TO
SUPPLEMENTAL BRIEFS**

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.....4

Memorandum of Law.....5

 I. The City Should Not Be Able To Limit The Right To Referendum
 By Choosing To Amend Zoning After A General
 Plan Amendment Rather Than At The Same Time.....5

 II. The Purpose Of The Referendum Is To Prevent Hotel Use As
 Evident By The Hotel Coalition’s Request That The City Adopt
 “CO-Administrative Office” To Comply With The Consistency
 Requirement.....7

 III. The Restrictions On Local Governments Found In The Housing
 Bill Do Not Apply To The Electors In Exercising Their Right To
 Referendum8

 IV. Attorney General’s Opinion No. 17-702 Cites *Bushey* For The
 Proposition That A Legislative Act Subject To Referendum... ..8

Conclusion.....9

Verification.....10

TABLE OF AUTHORITIES

Cases	Pages
<i>Associated Home Builders v. City of Livermore</i> (1976) 18 Cal.3d 582.....	6
<i>California Cannabis Coalition v. City of Upland</i> (2017) 3 Cal.5th 924.....	6, 8
<i>City of Morgan Hill v. Bushey</i> (2017) 12 Cal.App.5th 34.....	4, 7-8
<i>Mervynne v. Acker</i> (1961) 189 Cal.App.2d 558.....	6
<i>Rossi v. Brown</i> (1995) 9 Cal.4th 668.....	6
<i>Save Lafayette v. City of Lafayette</i> (2018) 20 Cal.App.5th 657.....	4-7
<i>Yost v. Thomas</i> (1984) 35 Cal.3d 561.....	8
 Statutes	
Elections Code § 9202.....	7
Elections Code § 9238.....	7
Government Code § 65862.....	5
Government Code § 65913.....	8
 Other Authorities	
California Attorney General Opinion No. 17-702 (April 27, 2018).....	4, 8

INTRODUCTION

Appellant and Real Party in Interest Morgan Hill Hotel Coalition (“Hotel Coalition”) submits this reply to the Supplement Briefs filed by Real Party in Interest River Park Hospitality, Inc. (“River Park”) and the Respondent City of Morgan Hill (“City”).

River Park argues that the First District Court of Appeal in *Save Lafayette* did not appreciate that cities may have a reason for failing amend the general plan and zoning at the same time. These reasons, however, do not justify limiting the right to referendum. River Park also tries to distinguish *Save Lafayette* by disingenuously claiming that the purpose of the referendum is to *restore* industrial land in addition to preventing hotel use.

The City argues that the new housing bills in some manner justify burdening the right to referendum, but fails to recognize that the housing bills are restrictions upon local governments, rather than upon the reserved powers of the electors.

Further, River Park argues that the Attorney General Opinion No. 17-702 (April 27, 2018) supports its position by suggesting that general plan consistency may never be achieved if the Court allows a referendum. However, that Opinion cites *City of Morgan Hill v. Bushey et al.* (2017) 12 Cal.App.5th 34 (“Bushey”) twice for the proposition that legislative acts are subject to the power of referendum. Ordinance No. 2131 is clearly a legislative act.

MEMORANDUM OF LAW

- I. THE CITY SHOULD NOT BE ABLE TO LIMIT THE RIGHT TO REFERENDUM BY CHOOSING TO AMEND THE ZONING AFTER THE GENERAL PLAN AMENDMENT RATHER THAN AT THE SAME TIME

In River Park's supplemental brief, it provides a myriad of reasons to explain a city's choice to amend zoning after a recent general plan amendment despite the strong statutory preference in Government Code § 65862 to do so at the same time. However, these reasons do not justify limiting the Constitution right to referendum that Courts are duty-bound to jealously guard. River Park's argument would allow cities to avoid a referendum by amending the general plan, wait until a petition for referendum cannot be filed, and then amend the zoning. *See Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 661-62. ("Save Lafayette") (City of Lafayette determined that its own zoning amendment was not subject to referendum under this reasoning).

River Park also suggests that the City of Morgan Hill ("City") may have taken time to amend zoning because it was developing general plan policies, but that was not the case, as the City only changed the general plan land use designation for a single three-acre parcel. Joint Appendix at 64.

The City argues that if the voters rejected the Lafayette's choice of zoning, then the voters would further reduce the housing density. *See City's Supplemental Brief* at 5, fn 1. Ironically, the City of Lafayette reduced the density of housing by

limiting housing to two units per acre from thirty-five by amending the general plan. *Save Lafayette* at 661. Thus, even if the voters rejected the Lafayette's ordinance, the city would presumably replace it with another low-density zoning district also limited to two units per acre. Thus, it is not the referendum that limits the housing density, but rather Lafayette's general plan amendment.

The Constitutional right of the People to exercise the power of initiative and referendum must receive the greatest deference, and thus this Court should not limit a Constitutional right to referendum because the city unilaterally chose to amend the zoning after the period to petition for referendum with respect to the general plan had expired. In *California Cannabis*, this Court stated, "we resolve doubts about the scope of the initiative power in its favor whenever possible, and we 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 (citing *Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591; *Rossi v. Brown* (1995) 9 Cal.4th 668, 696. The same should apply to the referendum power as the initiative and referendum are both described as "one of the most precious rights of our democratic process." *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563.

II. THE PURPOSE OF THE REFERENDUM IS TO PREVENT HOTEL USE AS EVIDENT BY THE HOTEL COALITION'S REQUEST THAT THE CITY ADOPT "CO-ADMINISTRATIVE OFFICE" TO COMPLY WITH THE CONSISTENCY REQUIREMENT

In trying to distinguish *Save Lafayette*, River Park states that the purpose of the referendum is both to preserve industrial space and prevent hotel use, and therefore the City would not be able to choose another zoning district for another year.¹ See River Park's Supplemental Brief at 6. However, the Sixth District Court of Appeal ("Sixth District") found that the purpose of the referendum was to prevent hotel use. *Bushey* at 38. The Sixth District denied City's and River Park's Petition for Rehearing on that issue. The Hotel Coalition has argued that the purpose of the referendum is to prevent hotel use in its answer brief, and pointed to its pre-litigation request that the City consider "CO-administrative office" as a commercial zoning district for the parcel that is both consistent with the general plan and prevents hotel use, but does not restore industrial land as evidence of its purpose. See Hotel Coalition's Answer Brief at 32-33; see also Reporter's Transcript of Hearing at 6:1-13; 15:2-7.²

¹ Notably, Elections Code § 9238 regarding Referendums omits any requirement that a purpose must be included on the petition, whereas Elections Code § 9202 regarding Initiatives does.

² The Reporter's Transcript mistakenly includes a "not" before the zoning districts that the Hotel Coalition asked the City to consider prior to litigation.

III. THE RESTRICTIONS ON LOCAL GOVERNMENTS FOUND IN THE HOUSING BILLS DO NOT APPLY TO THE ELECTORS IN EXERCISING THEIR RIGHT TO REFERENDUM

The City argues that the new housing bills justify limiting the right to referendum. *See* City's Supplemental Brief at 5-8. However, the new housing bills restrict local governments in preventing or slowing housing development. *See e.g.*, Government Code § 65913. However, this Court has held that restrictions that apply to local governments do not apply to the electors when exercising the power of initiative. *California Cannabis, supra*, at 948. The same should be true with respect to the power of referendum. Thus, the fifteen new housing bills mentioned by the City should have no bearing on this Court's decision.

IV. ATTORNEY GENERAL'S OPINION NO. 17-702 CITES *BUSHEY* FOR THE PROPOSITION THAT ANY LEGISLATIVE ACT IS SUBJECT TO REFERENDUM

River Park argues that Attorney General's Opinion No. 17-702 ("Opinion") supports the argument that zoning under these circumstances should be considered an administrative act that is not subject to referendum because of its "potential consequences." *See* River Park's Supplemental Brief at 7. However, the Opinion cites *Bushey* favorably. *See* Opinion at 5 at fn 12; 6 at fn 19. Furthermore, the Opinion never suggests that zoning is anything but a legislative act as this Court determined in *Yost. Yost v. Thomas* (1984) 35 Cal.3d 561, 571. River Park also warns that the "potential consequence" of allowing a referendum is that the electorate may reject a consistent zoning district indefinitely. *See* River Park's

Supplemental brief at 8. This fear is misplaced, as the city would simply choose another zoning district that is not opposed by the electorate. *See* Hotel Coalition's Answer Brief at 40-41.

CONCLUSION

Appellant Morgan Hill Hotel Coalition requests the Court affirm the decision of the Sixth District Court of Appeal. The Hotel Coalition also requests that the Court order that Appellant recover its costs and may seek its attorney's fees by motion in the trial court, and other relief it deems just and fair.

Dated: May 22, 2018

LAW OFFICE OF ASIT PANWALA



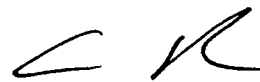
Asit S. Panwala
Randall Toch
Attorneys for Appellant and Real Party
In Interest Morgan Hill Hotel Coalition

VERIFICATION

Pursuant to California Rules of Court Rule 8.504(d)(4), I hereby certify that the forgoing Appellant Morgan Hill Hotel Coalition's Reply To Supplemental Briefs is in Times New Roman 13-point font and contains 2,017 words as counted by Microsoft Word.

Dated: May 22, 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 May 23, 2018, I served the following documents:

**APPELLANT MORGAN HILL HOTEL COALITION'S
APPLICATION TO FILE A REPLY TO THE SUPPLEMENTAL
BRIEFS, AND APPELLANT MORGAN HILL HOTEL
COALITION'S REPLY TO SUPPLEMENTAL BRIEFS**

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

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

I also placed a copy of the **APPELLANT MORGAN HILL HOTEL COALITION'S APPLICATION TO FILE A REPLY TO SUPPLEMENTAL BRIEFS AND APPELLANT MORGAN HILL HOTEL COALITION'S REPLY TO SUPPLEMENTAL BRIEFS** 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 May 23, 2018, at San Francisco, California.



Asit S. Panwala