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.

RIVER PARK HOSPITALITY,

Real Party in Interest and Respondent.

MORGAN HILL HOTEL COALITION,

Real Party in Interest and Appellant.

Case No. S243042

Sixth Dist. No. H043426

Santa Clara Superior Court
Case No. 16-CV-292595

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

OPENING BRIEF OF REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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I. 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?

II. INTRODUCTION.

California's Planning and Zoning Law, Government Code section 65000 et seq., mandates that every city and county adopt a comprehensive, longterm general plan for the physical development of the city of county. A local government's general plan sits atop a hierarchy of local government law regulating land use; it is the constitution or charter for future development. As such, land use ordinances and land-use decisions must be consistent with the general plan: "[T]he keystone of regional planning is consistency—between the general plan, its internal elements, subordinate ordinances, and all derivative land use decisions." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572.)

At the same time, California's Constitution reserves to the voters the rights of initiative and referendum. The initiative is the power of the electorate to propose and adopt statutes directly; the referendum is power of the electors to approve or reject statutes. Although these "reserve" powers are set forth in California's constitution, it is settled the Legislature may restrict their local exercise in matters of statewide concern, just as the Legislature may limit a local legislative body's discretion by statutory mandate.

In *Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, this Court held that a local electorate may not use its reserve power of

initiative to adopt zoning that was inconsistent with their city's general plan. This case raises the related issue of whether a city's electorate may use its referendum power to maintain intact zoning that has become inconsistent with the city's general plan upon the general plan's amendment. Two cases have provided opposite answers to this question. In *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, the court held that a referendum challenging an ordinance that adopted zoning consistent with a city's amended general plan was invalid where the referendum, if successful, would result in zoning inconsistent with the general plan. In this case, the court of appeal held that a referendum challenging a municipal ordinance conforming a parcel's zoning to the parcel's general plan land use designation is not invalid even though the referendum, if successful, would result in inconsistent zoning, if the city remained free to then select another consistent zoning.

This Court should reject the court of appeal's decision in this case and reaffirm the rule of *deBottari*. As discussed below, the court of appeal's decision is contrary to the provisions of the Planning and Zoning Law and would undercut the policies of general plan supremacy and early certainty in land use regulation embodied in that law. The court of appeal's decision would additionally inject substantial uncertainty into local land use planning. It would also give rise to substantial delays in the adoption of consistent zoning and impede the achievement of general plan land use policies and goals. It would enable city's voters, by rejecting consistent zoning, to choose inconsistent zoning, which by statewide statute the local government itself could not do. It would encourage indirect, downstream challenges to general plan land use choices as they are implemented, rather than when those choices are first made upon the adoption or amendment of the general plan itself. However, to ensure planning certainty and to give force to the concept

of comprehensive planning itself, attacks on general plan policies and land use choices should be brought when they are established, not when they are implemented.

In contrast, the rule of *deBottari* is consistent with the Planning and Zoning Law, as well as this Court's decision in *Lesher*. It would promote the requirement of consistency and the supremacy of general plan policies. It would foster certainty in planning. At the same time, the *deBottari* rule leaves fully intact the voters' ability to legislate by initiative concerning land use matters at the local level by, for example, adopting alternative consistent zoning or amending their city's general plan. Local voters also retain the ability to use the referendum power to reject general plan policies and land use choices when they are adopted.

For 35 years, *deBottari* has provided a bright line rule to guide cities and counties, property owners, voters, and the courts. This Court should reaffirm that rule and reverse the judgment of the court of appeal.

III. STATEMENT OF THE CASE

A. Factual Background

River Park owns a vacant parcel of land at 850 Lightpost Parkway in Morgan Hill. (Joint Appendix [JA], 60.) The parcels to the south are designated for commercial use in the general plan of the City of Morgan Hill (City), whereas the parcels to the north, east, and west are designated in the general plan for industrial use. (*Ibid.*) River Park's property lies next to U.S. 101, about one-half mile from the Cochrane Road-101 highway ramps. (*Ibid.*)

In November 2014, the City amended its general plan specifically to change the land use designation for River Park's parcel from "ML-Light Industrial" to "Commercial." (JA 60.) It is undisputed that there was no

referendum challenge to the general plan amendment. In April 2015, the City's city council approved ordinance no. 2131 (O-2131), which would change the parcel's zoning from ML-Light Industrial to "CG-General Commercial," a zoning designation that was consistent with the amended general plan and that would permit a hotel on the parcel. (JA 60-61.)

On May 1, 2015, Real Party in Interest and Appellant Morgan Hill Hotel Coalition (Hotel Coalition) submitted a referendum petition challenging O-2131. (JA 115, 119.) The purpose of the referendum, according to its proponent's ballot arguments, was to prevent the development of a hotel on River Park's parcel and to preserve industrial land. (JA 480-482.)[1] Consistent with this ballot argument, in the trial court the Hotel Coalition asserted that its intent was to restrict hotel development and to preserve industrial land. (JA 386:1-2.) It is undisputed, and the Hotel Coalition has acknowledged, that ML-Light Industrial zoning is inconsistent with the River Park parcel's land use designation under the City's amended general plan. (Reporter's Transcript on Appeal (RT), p. 4:22-23.)

In July 2015, the City stopped processing the referendum because it believed that it would enact zoning that was inconsistent with the City's general plan. (JA 65, 69-99.) Later, in February 2016, the City called for a June 2016 special election to submit the referendum to the voters. (JA 65,

[1] In its decision, the court of appeal described the purpose of the referendum as being solely to prevent the development of a hotel on the parcel. (*City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, 38 (*City of Morgan Hill*).) In petitions for rehearing, the City and River Park pointed out that a purpose of the referendum was also to preserve industrial uses. (City Petition for Rehearing, pp. 4-6; River Park Petition for Rehearing, pp. 4-5.) The court of appeal denied both rehearing petitions without comment. (See court of appeal order dated June 23, 2017.)

100-104.) It also authorized a lawsuit to have the referendum judicially determined to be legally invalid and removed from the ballot. (JA 18.)

B. Procedural Background

In March 2016 the City filed a petition for a writ of mandate in the trial court seeking to remove the referendum from the June 2016 ballot. (JA 13.) On March 29, 2016, the trial court granted the City's petition. (JA 485.) Relying on *deBottari*, *supra*, 171 Cal.App.3d 1204 (discussed in Section V(A)(4)(a), below), the trial court ruled that the City had shown the invalidity of the referendum by demonstrating that "the current zoning in question is inconsistent with the City's General Plan—and therefore presumptively invalid." (*Ibid.*) The trial court ordered the referendum to be removed from the ballot and that O-2131 be certified as duly adopted and effective. (JA 486.)

The court of appeal reversed. It stated: "We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (Slip op. at * 2.) As noted, both the City and River Park filed petitions for rehearing challenging the court of appeal's factual recitation and reasoning. (Petitions for Rehearing.) The court of appeal denied the petitions. (See court of appeal order of June 23, 2017.)

IV. STANDARD OF REVIEW.

The dispositive facts are undisputed and the issue presented is one of law. Therefore, as the parties agreed below (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 39), the standard of review is de novo.

V. ARGUMENT

A. The Relevant Constitutional, Statutory, and Decisional Background.

1. The Supremacy of the General Plan in Land Use and Development Decision-Making.

In the State Planning and Zoning Law, Government Code section 65000 et seq., the Legislature has mandated that every county and city adopt a "comprehensive, longterm general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Government Code § 65300.)[2] The "combined effect" of the Planning and Zoning Law is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with the general plan." (*Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880.) The general plan is effectively the "constitution for all future developments" within the city or county. (*Goleta Valley*, *supra*, 52 Cal. 3d 553, 570, citing *deBottari*, *supra*, 171 Cal.App.3d at 1212-1213 and other cases.) In adopting general plans, local governments must "confront, evaluate and resolve competing environmental, social and economic interests." (*Id.* at 571.)

"The process [of general plan adoption or amendment] is structured to transcend the provincial. Public participation and hearings are required at every stage, in order to obtain an array of viewpoints." (*Goleta Valley*, *supra*, 52 Cal.3d at p. 571; *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 154.) As this Court stated in *Orange Citizens*,

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[2] Unless otherwise indicated, subsequent statutory references are to the Government Code.

"[t]he process of drawing up and adopting [these] revisions often becomes, essentially, a 'constitutional convention' at which many different citizens and interest groups debate the community's future." (*Id.* at 152, quoting Fulton & Shigley, Guide to California Planning (4th ed. 2012) p. 118.)(internal quotations omitted) During the preparation or amendment of the general plan, the local planning agency must provide opportunities for the involvement of citizens, public agencies, civic, education, and other community groups, and others through public hearings and other appropriate means. (*Orange Citizens, supra,* 2 Cal.5th at 152 -153; § 65351.) Planning commissions must hold at least one public hearing and make a written recommendation to the legislative body, and legislators must hold at least one public hearing before acting on that recommendation. (*Orange Citizens, supra*, 2 Cal.5th at 153; §§ 65353–65356.)

The general plan itself must "comprise an integrated, internally consistent and compatible statement of policies for the adopting agency" (§ 65300.5). It must also include development policies, "diagrams and text setting forth objectives, principles, standards, and plan proposals" (§ 65302), and seven predefined elements—land use, circulation, conservation, housing, noise, safety, and open space. (§§ 65302(a)–(g), 65303.) The Planning and Zoning Law specifies detailed requirements for elements of the general plan. (§§ 65302(a)–(g); §65583.)

A fundamental requirement in the Planning and Zoning Law is that local land use and development decisions must be consistent with the locality's general plan. As this Court recently reaffirmed, "the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." (*Orange Citizens, supra,* 2 Cal.5th at 153.) "[T]he requirement of

consistency ... infuse[s] the concept of planned growth with the force of law." (*Id.* at 153, quoting *deBottari*, *supra*, 171 Cal.App.3d at 1213.) It is the "linchpin of California's land use and development laws ...." (*deBottari*, *supra*, 171 Cal.App.3d at 1213.)

A zoning ordinance is consistent with an adopted general plan if "[t]he various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan." (Section 65860(a)(2).) In addition, the ordinance must further the objectives and policies of the general plan and not obstruct their attainment. (See *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879, citing *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.)

The Legislature has enacted various statutes to ensure the supremacy of the general plan in land use decision-making. Section 65359 requires that specific plans be consistent with the general plan. Under Section 66473.5, tentative maps and parcel maps must likewise be consistent with the general plan. Section 65867.5(b) mandates the same with respect to development agreements].) Of particular relevance to this case, Section 65860(a) provides that "[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city ...." In Section 65860(c), the Legislature required any zoning ordinance that becomes inconsistent with a general plan must be brought into conformity: "In the event that a zoning ordinance becomes inconsistent with the general plan by reason of amendment to such a plan, or to any element of such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."

As the "constitution" or "charter" for future development (*Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540), a local government's general plan sits atop a hierarchy of local government law regulating land use. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773). Below the general plan is any adopted specific for a given area, which provides "for the systematic implementation of the general plan for all or part of the area covered by the general plan." (§ 65450.) Under Section 65454, "[n]o specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." Below the general plan and any specific plan are the zoning laws, which regulate the geographic allocation and allowed uses of land. (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.) As noted, Section 65860 requires that zoning designations be consistent with the local government's general plan. Under Section 65455, zoning ordinances must also be "consistent with the adopted specific plan[,]" if any, for the covered area.

2. The Initiative and Referendum Powers.

In 1911, the California Constitution was amended to provide for initiatives and referenda. (*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591) The initiative and referendum amendment referred to the initiative and referendum as powers reserved by the people. (*Ibid.*; *id.* at n. 7.) The rights of initiative and referendum are commonly referred to as "reserve" powers. (*Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563.)

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal.Const., art. II, § 8, subd. (a).) The initiative process allows the people to enact statutes in the same manner as the Legislature and is not restricted in subject

matter. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675 ["power of the people through the statutory initiative is coextensive with the power of the Legislature"]; *Referendum Committee v. City of Hermosa Beach* (1986) 184 Cal.App.3d 152, 157-58, citing *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728, 730-731.)

"The referendum is the power of the electors to approve or reject statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9, subd. (a).) In a referendum, the voters are asked to approve (by a "yes" vote) or disapprove (by a "no" vote) a measure which the Legislature or local government has enacted. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 656.) The voters exercise their referendum power to veto statutes and ordinances enacted by their elected legislative bodies before those laws become effective. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 713-714.) In contrast to initiatives, referenda do not enact law; nor may they address certain subjects. (*Referendum Committee*, *supra*, 184 Cal.App.3d at 157.)

The California Constitution provides that "[t]he initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." (Cal.Const., art II, § 11(a).) The Legislature has adopted statutory procedures governing the exercise of the initiative and referendum powers. With respect to the referendum power as exercised by the voters of a city, Elections Code section 9235 stays the effective date of most city ordinances for 30 days. During this 30-day period, city voters may circulate a referendum petition. (*Id.* at § 9237.) If the city receives a "petition protesting the adoption of an ordinance" that has been signed by at least 10 percent of the city's voters, the

effective date of the ordinance is suspended and the city must reconsider it. (*Ibid.*) Upon reconsideration, the city may either repeal the ordinance in its entirety or submit the ordinance to the voters. (*Id.* at § 9241.)[3]

Legislative bodies are prevented from effectively nullifying the referendum power by voting to enact a law identical to a recently rejected referendum measure. (*Deukmejian*, supra, 30 Cal.3d at 678, citing *Gilbert v. Ashley* (1949) 93 Cal.App.2d 414, 415-416; *In re Stratham* (1920) 45 Cal.App.436, 439-440.) Elections Code section 9241 provides that "[i]f the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not 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." The new measure is invalid unless it is "essentially different" from the rejected provision and is enacted "not in bad faith, and not with intent to evade the effect of the referendum petition...." (*Deukmejian*, *supra*, 30 Cal.3d at 678.) In determining whether a later enacted city ordinance violates the provisions of Elections Code section 9241, a court asks whether the second legislative enactment is essentially the same as the first. (*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. (*Ibid.*)

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[3] The Elections Code contains similar provisions pertaining to the exercise of the referendum power by county voters. (See, e.g., Elections Code sections 9140, 9144-9145.)

3. The Legislature May Limit the Local Reserve Power in Areas of Statewide Concern, and It has Done So When the Exercise of that Power would Contravene the Requirement of General Plan Consistency.

The Legislature has the power to restrict local referenda, which it may do as part of the exercise of its plenary power to legislate in matters of statewide concern. (*Voters for Responsible Retirement. v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 776-777.). "[T]he initiative and referendum power [cannot] be used in areas in which the local legislative body's discretion [is] largely preempted by statutory mandate." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776; see also *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 920 ["[I] f the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative"].) Thus, the electorate's initiative and referendum authority "is generally coextensive with the legislative power of the local governing body...." (*DeVita, supra,* 9 Cal.4th at 775.) Any presumption in favor of the right of initiative is rebuttable upon a definite indication that the Legislature, in the exercise of its power to preempt local legislation in matters of statewide concern, has intended to restrict that right. (*Id.* at 776.) The same applies to the right of referendum. (See *Voters for Responsible Retirement, supra,* 8 Cal.4th at 777 [finding unmistakable legislative intent to bar the referendum power over an ordinance relating to the implementation of a memorandum of understanding between a county and its employees].) This is so even though the courts will apply a liberal construction to the referendum power if it is challenged and "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Id.* at 779.)

This Court has applied Section 65860 to hold that a local electorate may not exercise its reserve power to adopt by initiative a zoning ordinance that was inconsistent with a city's general plan. In *Lesher, supra,* 52 Cal.3d 531, a city's voters had passed an initiative limiting municipal growth. (*Id.* at 535-536.) The plaintiffs challenged the measure, asserting in part that the measure was a land use ordinance that operated as a zoning ordinance and that it was inconsistent with the city's general plan. (*Id.* at 537.) The Court agreed, concluding that the measure was in the nature of a zoning ordinance and that it was inconsistent with the city's general plan. Citing *deBottari* and *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, as well as Section 65860, the Court stated that "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan." (*Id.* at 541.) The Court went on to hold, again relying on *deBottari*, that the initiative measure was invalid at the time it was passed. (*Id.* at 544.) The Court reasoned that "[t]he court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance." (*Ibid.*) Thus, in *Lesher* this Court concluded that Section 65860's consistency requirement preempted the power of a local electorate to put in place by initiative zoning that was inconsistent with a city's general plan.

4. Three Intermediate Courts of Appeal have Addressed whether Section 65860's Requirement of General Plan Consistency Restricts the Local Voters' Referendum Power.

This case raises, for the first time in this Court, the question of whether Section 65860 likewise preempts the power of the electorate to use

the referendum power to leave in place zoning that has become inconsistent with the general plan upon the general plan's amendment. As next discussed, three intermediate courts of appeal decisions have addressed that issue in *deBottari*, *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, and in the instant case.

(a) *deBottari.*

Over 30 years ago, Division Two of the Fourth District held in *deBottari* that a city could refuse to place before the voters a referendum challenging a zoning ordinance that the city had adopted in order to conform its zoning to its general plan, where the zoning of affected property had become inconsistent with the city's amended general plan by the general plan's amendment.

In *deBottari*, the City of Norco amended a general plan designation for certain property from residential/agricultural to residential/low density. Shortly after, the City of Norco amended its zoning code by adopting two zoning ordinances to conform it to the amended general plan. Norco residents circulated referendum petitions challenging the zoning amendments. The city clerk certified that the petitions were in proper form and contained the required number of signatures of registered Norco voters. However, Norco's council refused either to repeal the challenged ordinances or to submit a referendum to the voters.

On appeal from the trial court's denial of a petition for a writ of mandate to compel the council to either repeal the ordinance or to submit the issue to the voters, the court of appeal in *deBottari* first ruled that preelection judicial review would be appropriate upon a compelling showing that the substantive provisions of the referendum were clearly invalid. (*deBottari*, *supra*, 171 Cal.App.3d at 1210.) The court went on to determine that the

referendum before it was clearly invalid. In so holding, the court relied on Section 65860(a), which provides that "[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974." (*deBottari, supra*, 171 Cal.App.3d at 1211-1212.) It also pointed to Section 65860(c), by which "the Legislature added muscle to [Section 65860(a)] by requiring that any ordinance which becomes *inconsistent* with a general plan *must* be brought into conformity." (*Ibid.*)(emphasis in original) The court concluded that City of Norco did not need to submit the proposed referendum to the voters because its invalidity had been "clearly and compellingly demonstrated." (*Id.* at 1212.) It reasoned that "[r]epeal of the zoning ordinance in question would result in the subject property being zoned to the low density residential use while the amended [general] plan calls for a higher residential density." (*Ibid.*) It observed that "[w]ere the voters to repeal the zoning amendment at issue here, the result unquestionably would be a zoning ordinance inconsistent with the amended general plan." (*Id.* at 1210). The court in *deBottari* characterized its holding as "repeal of the ordinances would result in a 'clearly invalid' zoning scheme ... ." (*Id.* at 1210, n. 1.)

The court in *deBottari* rejected the argument of the referendum's proponents that under Section 65860(c) the city would have a "reasonable time" within which to rectify the inconsistency if the referendum were approved. (*deBottari, supra*, 171 Cal.App.3d at 1212.) Conceding that some remedial action would be required, the plaintiff suggested that the city had three options: (1) reenact the zoning amendment that the voters had overturned; (2) enact some alternative zoning scheme that was consistent with the general plan, and (3) amend the amended general plan to conform to the zoning ordinance preferred by the voters. (*Ibid.*) The court responded:

> Unfortunately, all of the options offered by plaintiff beg the question of whether the voters, *ab initio*, have the right to enact an invalid zoning ordinance. Clearly, section 65860, subdivision (c), was enacted to provide the legislative body with a "reasonable time" to bring zoning into *conformity* with an amended general plan. It would clearly distort the purpose of that provision were we to construe it as affirmatively sanctioning the enactment of an *inconsistent* zoning ordinance.

(*Ibid.*)(emphasis in original)[4]

Over the years, this Court has relied on *deBottari* multiple times. As noted, in *Lesher, supra,* 52 Cal.3d 531, the Court addressed the validity of an initiative measure in the nature of a zoning ordinance limiting municipal growth that was inconsistent with a city's general plan. Citing *deBottari*, the Court held that "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed." (*Id.* at 544.) The Court was doubtless aware that *deBottari* had involved a challenge to a referendum, rather than an initiative measure, such as was at issue in the case before it. A fair reading of *Lesher* and its reliance on *deBottari* is that the Court viewed *deBottari* as standing for a rule that a local electorate may not use its reserve power, whether exercised by referendum or initiative, in a manner that would result in an inconsistent zoning scheme. (See also *Citizens of Goleta Valley*, *supra*, 52 Cal. 3d at 572 [citing *deBottari* for the proposition that "the keystone of

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[4] Although the court in *deBottari* used the phrase "enactment" of an inconsistent zoning ordinance to describe to the consequences of a successful referendum challenge, the court clearly understood the facts before it, and its holding must be read in light of those facts. In stating its ultimate conclusion that the invalidity of proposed referendum had been demonstrated, the court reasoned that "[r]epeal of the zoning ordinance in question would result in the subject property being zoned to the low density residential use while the amended [general] plan calls for a higher residential density." (*deBottari*, *supra*, 171 Cal.App.3d at 1211-1212.)

regional planning is consistency -- between the general plan, its internal elements, subordinate ordinances, and all derivative land-use decisions"]; *Orange Citizens*, *supra*, 5 Cal.5th at 153 ["[T]he requirement of consistency ... infuse[s] the concept of planned growth with the force of law"].)

(b) *City of Irvine*.

In *City of Irvine*, *supra*, 25 Cal.App.4th 868, Division Three of the Fourth District similarly held that a referendum that sought to repeal a consistent zoning ordinance in favor of inconsistent zoning was invalid. In doing so, the court in that case applied the rule of *deBottari* to a charter city that had adopted a requirement of general plan consistency in its municipal code.[5]

(c) *City of Morgan Hill v. Bushey*.

In this case, the court of appeal explicitly rejected the holding of *deBottari*. It stated that "a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 37-38.) The court of appeal's decision rested on its view of the effect of Sections 65860(a) and (c). It reasoned that "[t]he electorate may not utilize the *initiative* power to *enact* a zoning inconsistent with a general plan because section 65860 precludes enactment of a zoning that is inconsistent with a general plan." (*Id.* at

[5] Although a general law city (such as the City) is subject to the provisions of the statewide zoning law, a charter city is not so bound unless it adopts such provisions by charter or ordinance. (*City of Irvine*, *supra*, 25 Cal.App.4th at 875.)

41.)(emphasis in original) But, the court of appeal continued, "[S]ection 65860 permits the *maintenance* of inconsistent zoning pending selection of a consistent zoning. (*Ibid.*)(emphasis in original) Therefore, according to the court of appeal, "[t]he electorate's exercise of its referendum power to reject or approve City's attempt to select a consistent zoning for the parcel simply continued that permitted maintenance of inconsistent zoning. The referendum does not seek to *enact* anything." (*Ibid.*)(emphasis in original) The court of appeal went on to characterize the reasoning of *deBottari* and *City of Irvine* as "flawed" because

> [U]nlike an initiative, a referendum cannot 'enact' an ordinance. A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate section 65860, which prohibits the enactment of an inconsistent zoning ordinance. Section 65860 does not automatically render invalid a preexisting zoning ordinance that becomes inconsistent only after a subsequent general plan amendment.

(*Id.* at 42.)

B. The Court Should Reject the Holding of the Court of Appeal and Reverse Its Judgment.

The court of appeal's decision in this case, including its rejection of *deBottari*, *supra*, 171 Cal.App.3d 1204 and *City of Irvine*, *supra*, 25 Cal.App.4th 868, rested on its conclusion that Section 65860 does not invalidate existing zoning that becomes inconsistent with a general plan as a result of the amendment of the general plan. The court of appeal reasoned that because Section 65860(c) permits the maintenance of inconsistent zoning for a reasonable time, the inconsistent zoning is not automatically rendered invalid. (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 40.) However, the court of appeal's construction of Section 65860 is incorrect. It is unsupported by that statute's text and purpose. It is also at odds with this

Court's view of the effect of that statute. It would additionally impair the general plan and frustrate the policies of general plan supremacy and early certainty in land use matters that the Planning and Zoning Law embodies. Therefore, the Court should reject the holding of the court of appeal and reverse its judgment.

1. The Court of Appeal's Decision Rests on an Incorrect Interpretation of Government Code Section 65680 and Its Effect When Zoning is Made Inconsistent by General Plan Amendment

In its decision, the court of appeal stated "section 65860 only prohibits the enactment of an inconsistent zoning ordinance" whereas "[a] referendum that rejects an ordinance simply maintains the status quo." (*City of Morgan Hill, supra*, 12 Cal.App.5th at 42.) The court of appeal further stated "[s]ection 65860 does not automatically render invalid a preexisting zoning ordinance that became inconsistent only after a subsequent general plan amendment." (*Ibid.*) Instead, according to the court of appeal, "section 65860 permits the maintenance of inconsistent zoning pending selection of a consistent zoning" and "[t]he electorate's exercise of its referendum power to reject or approve City's attempt to select a consistent zoning for the parcel simply continued that permitted maintenance on inconsistent zoning." (*Id.* at 41.) As next discussed, the court of appeal's reading of Section 65860 fails under scrutiny.

(a) Section 65860(c) Does Not Validate Zoning Made Inconsistent with a General Plan by General Plan Amendment, or Permit Its Enforcement.

As an initial point, on its face Section 65860 does not prohibit only the "enactment" of an inconsistent zoning ordinance, as the appellate court suggested. (*City of Morgan Hill, supra*, 12 Cal.App.5th at 42 ["A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot

violate section 65860, which prohibits the *enactment* of an inconsistent zoning ordinance"].)(emphasis in original) Rather, Section 65860(a) simply provides generally that "[c]ounty or city zoning ordinances shall be consistent with the general plan of the county or city."

The fact that Section 65860(c) allows a city a "reasonable time" to make zoning consistent with an amended general plan does not mean that inconsistent zoning remains either valid or effective after the inconsistency arises. To the contrary, a general law city such as the City cannot exercise discretion to allow a property to be developed in a manner that is inconsistent with the general plan, at any time. As this Court recently stated, "[t]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements ... see §§ 65359 [requiring that specific plans be consistent with the general plan], 66473.5 [same with respect to tentative maps and parcel maps], 65860 [same with respect to zoning ordinances], 65867.5, subd. (b) [same with respect to development agreements]." (*Orange Citizens, supra,* 2 Cal.5th 141, 153.)(internal quotations and citations omitted). Similarly, local governments "cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans." (*Land Waste Management. v. Contra Costa County Board of Supervisors* (1990) 222 Cal. App. 3d 950, 957-58, citing *Orinda Association v. Board of Supervisors*, *supra*, 182 Cal.App.3d at 1162, fn. 10; *Neighborhood Action Group*, *supra*, 156 Cal.App.3d at 1184 [conditional use permit invalid where use not consistent with valid general plan].) A contrary rule would allow local governments to impair if not void their general plans by simply rendering noncomplying land use decisions.

The overarching requirement that development be consistent with the applicable general plan means that zoning made inconsistent by a general plan amendment cannot be the basis for a discretionary land use decision once the inconsistency arises. Like the void zoning ordinance adopted by initiative in *Lesher*, which this Court held could not be given legal effect (*Lesher*, *supra*, 52 Cal.3d at 544), ML-Light Industrial zoning on River Park's parcel also lost effect once the inconsistency arose because the City could no longer approve the development of the property for new industrial uses without amending its general plan.

Moreover, as this Court stated in *Lesher*, "[t]he obvious purpose of [Section 65860] subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan, *not to permit development that is inconsistent with that plan.*" (*Lesher*, *supra*, 52 Cal. 3d 531, 546.)(emphasis added) This statement of Section 65860(c)'s procedural purpose cannot be read to suggest that development may be allowed under the inconsistent zoning until some "reasonable time" of uncertain length elapses. Instead, this purpose of Section 65860(c) indicates that, when a city or county adopts a new or amended general plan, the preemptive operation of Section 65860 causes any newly inconsistent zoning to lose effect or become unusable as soon as the inconsistency arises. Thus, even if Section 65860(c) permits the maintenance of inconsistent zoning pending selection of consistent zoning for pending selection of consistent zoning, as the court of appeal concluded (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 41), the inconsistent zoning does not retain its legal effectiveness or enforceability in the meantime. The court of appeal did not address the effectiveness of inconsistent zoning pending action to conform it to a general plan. In any event, a procedural provision such as Section

65860(c) should not be interpreted so as to nullify Section 65860(a)'s basic consistency requirement or to upend the hierarchy of California local land use laws.

In addition, in *Lesher*, *supra*, 52 Cal.3d 531, 544, this Court addressed the preemptive effect of the Planning and Zoning Law on an initiative that sought to adopt a zoning ordinance inconsistent with a city's general plan. In holding the zoning ordinance to be invalid, the Court stated "[a] zoning ordinance that conflicts with a general plan is invalid at the time it is passed." (*Lesher*, *supra*, 52 Cal. 3d at 544.) As noted, this Court cited *deBottari* for that proposition, even though *deBottari* had concerned the validity of a proposed referendum that offered a choice between consistent zoning and existing inconsistent zoning rather than an initiative seeking to adopt inconsistent zoning in the first instance. The Court in *Lesher* went on to state that "[t]he court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance." (*Lesher*, *supra*, 52 Cal.3d at 544.) The reasoning of *Lesher* as well as the purpose of the consistency requirement to ensure general plan supremacy in development matters should apply equally to both newly adopted inconsistent zoning, as in *Lesher*, as well as to zoning that becomes inconsistent when the general plan is amended, as in *deBottari* and in this case.

Finally, on its face Section 65860(c) applies only to zoning that becomes inconsistent with a general plan by a general plan amendment. The statute does not address zoning that is kept inconsistent by a successful referendum rejecting consistent zoning. Section 65860's allowance of "a reasonable time" in which to conform inconsistent zoning to an amended

general plan does not directly apply to the maintenance of inconsistent zoning by referenda in the first place. There is no basis in the language of Section 65860(c) to assume, as the court of appeal apparently did, that Section 65860(c) would continue to afford a locality "a reasonable time" to adopt consistent zoning after a successful referendum challenge to a consistent zoning ordinance.

(b) The Existence of Currently Available Alternative Consistent Zoning Designations, although Not Present Here, would Not Support the Court of Appeal's Rule of Decision.

In its decision, the court of appeal pointedly stated that the zoning challenged by referendum was "one of a number of available consistent zonings." (*City of Morgan Hill, supra*, 12 Cal.App.5h at 42.) Cautioning that it "express[ed] no opinion on the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan" (*ibid.*, n.5), the court of appeal professed to limit its holding: "We ... hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning." (*Id.* at 37-38.) However, even if the record supported the court of appeal's view that the City had presently available to it alternative zonings that were consistent with the general plan that it could adopt should the referendum succeed—which it does not—that circumstance would not justify the court of appeal's departure from the rule and reasoning of *deBottari*.

First, to be a currently available zoning designation following a successful referendum, the alternative zoning must be "essentially different"

from the rejected measure that can be enacted "not in bad faith, and not with intent to evade the effect of the referendum." (*Deukmejian, supra*, 30 Cal.3d at 678.) The determination of whether subsequent legislation is "essentially the same" as a rejected measure involves a comparison of the terms of the challenged and subsequent legislation, "focusing on the features that gave rise to popular objection." (*Lindelli, supra*, 11 Cal.App.4th at 1111.)

In this case, the purposes of the referendum, according to its proponents and the Hotel Coalition, were to preserve industrial land in Morgan Hill and to prevent development of a hotel on River Park's property. (JA 385-386, 480, 482.) But, the general plan designation for River Park's parcel was no longer industrial; it was general commercial. (JA 60.) To conform to the general plan, any subsequent zoning for River Park's parcel after a successful referendum would have to be consistent with the parcel's commercial general plan designation. At the same time, however, any commercial zoning, even one that did not allow a hotel on the property, would be at odds with the referendum's purpose to preserve industrial uses in Morgan Hill. Because the purpose of the referendum to preserve industrial land, under Elections code section 9241 the City therefore could not adopt alternative, consistent commercial zoning for at least a year if the referendum were successful. Hence, at least for one year from the referendum vote, there are no presently available alternative consistent zonings, despite the court of appeal's statement that "General Commercial" "is just one of a number of available consistent zonings ... ." (*City of Morgan Hill, supra*, 12 Cal.App.5th at 42.) (As discussed in Section VI(B)(2)(a), below, this prospect of prolonged inconsistent zoning is also at odds with policies of early certainty in land use regulation embodied in the Planning and Zoning Law.)

However, even if the challenged zoning were in fact only one of a number of available consistent zonings, which is not the case, the court of appeal did not explain why the purported existence of other available zonings should be significant to its analysis. Given the language of Section 65860 and its preemptive purpose, the presence of alternative consistent zonings should not bear on the proper interpretation of Section 65860 and its preemptive effect on existing zoning rendered inconsistent by a general plan amendment. As this Court stated in *Lesher*, "[t]he validity of the ordinance under which permits are granted, or pursuant to which development is regulated, may not turn on possible future action by the legislative body or electorate." (*Lesher*, *supra*, 52 Cal.3d at 544.) And, in *deBottari* the court rejected the referendum proponents' analogous contention that if the referendum was successful the city council was free to enact some alternative zoning scheme in word apt to this case:

> [A]ll of the options offered by plaintiff beg the question of whether the voters, *ab initio*, have the right to enact an invalid zoning ordinance. Clearly, section 65860, subdivision (c), was enacted to provide the legislative body with a "reasonable time" to bring zoning into conformity with an amended general plan. It would clearly distort the purpose of the provision were we to construe it as affirmatively sanctioning the enactment of an *inconsistent* zoning ordinance."

(*deBottari*, *supra*, 171 Cal.App.3d at 1212.)(emphasis in original)

(c) The Court of Appeal's Decision would Allow Local Voters to Exercise their Legislative Power in a Manner that is Contrary to the Statewide Mandate of General Plan Consistency and Not Permitted to the Local Government.

Section 65860's consistency requirement would bar the City's city council from repealing O-2131 and putting in its place a zoning designation inconsistent with the City's general plan that would contravene Section

65860(a). (See *Neighborhood Action*, *supra*, 156 Cal.App.3d at 1184, citing *Woods v. Superior Court* (1981) 28 Cal.3d 668, 679 [agency lacks discretion to promulgate a regulation which is inconsistent with the governing statute].) Yet the court of appeal's decision in this case would countenance that same result, if the legislative power were exercised not by the city council but by the voters.

As noted, the local electorate's right to initiative and referendum "is generally co-extensive with the legislative power of the local governing body ...." (*DeVita, supra,* 9 Cal.4th at 775-776.) Therefore, the legislative power over local affairs should be circumscribed by Section 65860's consistency requirement in the same way, no matter whether it is exercised by the voters by referendum petition or by the voters' elected representatives. Nothing in Section 65860 suggests that the consistency requirement operates differently depending on whether the legislative power is invoked by the local government or by the locality's voters. Nor does anything in Section 65860 indicate that a city may, once it has amended an inconsistent zoning ordinance to conform to its general plan, then change its mind and repeal the consistent ordinance, so as to restore the inconsistency. Under Section 65860(c) a city plainly has no discretion to allow an inconsistent zoning ordinance to stand indefinitely.

As noted, the initiative and referendum power cannot be used in areas in which the local legislative body's discretion is largely preempted by statutory mandate. (*DeVita, supra,* 9 Cal.4th at 775-776.) Below, the court of appeal concluded that the City council's discretion was not preempted because it purportedly retained the discretion to choose a different, consistent zoning. (*City of Morgan Hill*, *supra*, 12 Cal.App.5th at 40-41.) However, by adopting O-2131, the City had *already* adopted consistent zoning, as Section

65860(c) required it to do. Therefore, the relevant question was whether the City's city council had the discretion to *repeal* O-2131, when to do so would result in inconsistent zoning, not whether it earlier could have chosen other consistent zoning designation, amended its zoning scheme, or taken some other action in the first instance. As shown, it did not have such discretion. Therefore, the electorate likewise could not exercise the referendum power to reject, and effectively repeal, O-2131.

The City's city council's inability to repeal a consistent zoning ordinance in favor of inconsistent zoning also meant that the council could not exercise the choice that Elections Code section 9241 requires a city to make when presented with a valid referendum petition, namely, either to repeal the challenged measure or to put the referendum on the ballot.

And, although the local electorate's right to referendum may, like its power of initiative, be set forth in the California Constitution, there is no point "in putting before the people a measure which they have no power to enact." (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697.) Indeed, "[t]he presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*Ibid.*) The reserve power of local voters is important and to be protected, but it may not be used to override the Legislature's clear statewide mandate of general plan supremacy.

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2. The Court of Appeal's Rule of Decision Would, if Adopted Statewide, Lead to Far-Reaching and Harmful Results.

If adopted throughout California, the holding of the court of appeal in this case would lead to far-reaching and harmful consequences. It would increase uncertainty in zoning and land use, contrary to policies inherent in the Planning and Zoning Law. It would additionally impair the general plan as a "constitution" governing local land use and planning and impede the implementation of the policy choices and goals that the general plan embodies. It would deprive cities, property owners, and voters of the bright line certainty that the rule of *deBottari* has afforded them for more than 35 years. In its place, the court of appeal's decision would substitute a rule that is inimical to the achievement of general plan goals. Moreover, the application of that rule would be uncertain and dependent on a city's particular factual circumstances. The court of appeal's rule of decision is thus not only at odds with Section 65860's consistency command, but its general application would foster uncertainty and frustrate the policies of the Planning and Zoning Law.

(a) The Court of Appeal's Ruling would Forestall Early Certainty in Zoning and Land Use, Contrary to the Policies Inherent in the Planning and Zoning Law.

As this Court observed in *Lesher*, "persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act pursuant to the law, and courts must be able to ascertain a law's validity and to enforce it." (*Lesher*, *supra*, 52 Cal.3d at 544.) The court of appeal's decision would foster potentially prolonged uncertainty regarding available uses of land that would

undercut the Legislature's goal of achieving early certainty in land use regulation.

The Planning and Zoning Law is replete with provisions intended to prevent extended uncertainty concerning the available uses of property. (See, e.g., Section 65860(b) [90-day limitations period for actions to enforce compliance with Section 65860's consistency requirement]; Section 65009 [90-day and one-year limitation period for certain actions or proceedings challenging local zoning and planning decisions; Section 66499.37 [90-day limitations period to challenge decisions concerning subdivisions].) In Section 65009 the Legislature expressly declared that legal actions or proceedings challenging decisions of local governments have "a chilling effect on the confidence with which property owners and local governments can proceed with projects." This chilling effect justified short limitations periods for challenges to local zoning and planning decisions.

This policy favoring early certainty in land use regulation also appears in Section 65754, which requires that a local government bring its general plan into compliance with the law within 120 days of an adverse court decision finding no substantial compliance, and that the local government then conform its zoning to the now-complaint general plan within 120 days.

The court of appeal's interpretation of Section 65860 would lock inconsistent zoning in place for months if not years pending a vote on one or more referenda challenging ordinances adopted to conform zoning to the general plan. During that time any property covered by the inconsistent zoning would be without any valid or usable zoning, and no new development would be permitted in the affected zone. The effects on developers and property owners would be severe. Property owners would be unable to develop their property. At the least, it would be uncertain what

development and uses may be allowed, even those which are consistent with the general plan. Developers would assume an increased risk on their investments and incur carrying and opportunity costs, such as the financial hardship that River Park has sustained in this case. (JA 452-453 [describing impacts of delay and uncertainty].)

In this case, the City had determined that the proposed rezoning to River Park's property was compatible with the goals, objectives, policies, and land use designation of the amended general plan (JA 312.) As the staff report concerning the rezoning to allow the development of a full service hotel noted, the development of the site consistent with the proposed land use designation would support development of a revenue-generating business serving local and regional residents while also supporting the City's tourism goals. (JA 317.) The rezoning and development of River Park's parcel for hotel use would serve the City's general plan policies of encouraging a variety of commercial development, locating tourist and recreation oriented commercial development along the freeway, and promoting development of businesses that would have a positive fiscal impact to the City. (JA 315-316.)

Moreover, there seems to be no reason in principle why the rule that the court of appeal applied in this case would be limited by the number of currently available consistent zoning designations, since the city council could simply create additional consistent zonings in any event. Thus, the prospect of multiple challenges by referenda under the court of appeal's rule of decision, and resulting continuation of inconsistent zoning, would be entirely open-ended.

The period of uncertainty may also be prolonged by the operation of Election Code section 9241, which prohibits a municipality from re-enacting

"essentially the same" zoning for one year after a referendum. In this case, for example, as discussed, the purposes of the referendum, according to its proponents and the Hotel Coalition, were to preserve industrial land in Morgan Hill and to prevent development of a hotel on River Park's property. (JA 385-386, 480, 482.) But because the general plan designation for the parcel was no longer industrial, no consistent zoning could be enacted for at least a year if the referendum were successful, since any other commercial zoning, even one that did not allow a hotel on the property, would be at odds with the referendum's purpose to preserve industrial uses in Morgan Hill.

The court of appeal also reasoned that Section 65860(c) "permits the *maintenance* of inconsistent zoning pending selection of a consistent zoning ...." (Slip op. at 6.)(emphasis in original) This reading of Section 65860(c) places no clear limit on the length of time during which an inconsistency is permissible. However, one cannot construe Section 65860(c)'s requirement that cities and counties bring zoning made inconsistent by general plan amendment into conformity within "a reasonable time" to allow the prolonged or open-ended continuation of inconsistent zoning. Such an interpretation would be contrary to the Legislature's intention that general plan consistency be achieved promptly, as reflected in Section 65754. "Every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Moore v. Panish* (1982) 32 Cal.3d 535, 541.) In effect, the court of appeal read Section 65860(c) backwards—the purpose of that statute is to require consistency between zoning and general plan designations, not to permit inconsistency. And, under the Court's statement of the purpose of Section 65860(c) in *Lesher*, one should not construe that provision to allow inconsistent zoning to be "maintained" so as to permit new development or

increased use under the inconsistent zoning. (*Lesher*, *supra*, 52 Cal.3d at 546.)

Finally, the application of the court of appeal's rule of decision more generally in California would be problematic beyond the facts of this case. It may not be clear in given circumstances whether some alternative consistent zoning is available after a successful referendum. In each instance, Election Code section 9241's bar on the re-adoption of zoning that is "essentially the same" as the zoning a city's voters have rejected would require an assessment of whether any potential alternative consistent zoning designation is the same as the rejected zoning, in light of the features of the rejected zoning that gave rise to popular objection to it. (*Lindelli*, *supra*, 111 Cal.App.4th at 1110.) At the least, there may be serious questions concerning whether subsequent remedial legislation is "essentially the same" as a measure rejected by referendum. The rule applied by the court of appeal is thus fact dependent, and correspondingly uncertain in application. As a result, questions surrounding subsequent efforts to adopt consistent zoning would doubtless engender litigation over the validity of such measures. The court of appeal's decision is thus doubly at odds with the clear policy of early certainty in land use matters that the Planning and Zoning Law reflects.

(b) The Court of Appeal's Decision would, if Adopted Statewide, Frustrate the Rule of General Plan Supremacy and Impede the Implementation of General Plan Policies, including those Mandated by the Legislature.

The court of appeal's decision would not only frustrate the policy of early certainty in land use matters. It would also allow a city's voters to impair their city's general plan by maintaining inconsistent zoning and preventing the development of consistent uses, for an uncertain length of time. This would be contrary to the requirement of achieving prompt

consistency with the general plan and, indeed, undercut the supremacy of the general plan. It would additionally work against the achievement of the policy goals embodied in the general plan. It would stymie, potentially for a significant time, the realization of the policy choices and tradeoffs that the local government made in adopting the general plan. To that extent, the general plan would cease to be "a constitution for all future development." (*Goleta Valley, supra,* 52 Cal.3d at 570.)

In fact, the referendum in this case, if successful, would *require* that inconsistent zoning remain in place. At least for a period of time, this would prevent the City from complying with its statutory duty under Section 65860 to bring its zoning into compliance with its general plan. This would be contrary to Section 65860(a), which commands consistency and does not permit the adoption of zoning ordinances that are inconsistent with the governing general plan. (See *Lesher, supra*, 52 Cal.3d at 545-546.) The City would then have to adopt new consistent zoning (or amend its general plan) so as to eliminate the inconsistency. Then, of course, the City's remedial action would be subject to a new referendum challenge. One can imagine a determined anti-development citizens group or a business competitor, successful in one referendum challenge, mounting additional attacks by referendum against *any* consistent zoning ordinance the City may later adopt, simply to forestall new development. Indeed, under the court of appeal's view, successive referenda could take place at least as long as there remain presently existing alternative consistent zoning designations. The referendum power could thus potentially be used to maintain inconsistent zoning over a period of years. This is inimical to the core precept of general plan supremacy.

In effect, a referendum challenging zoning that implements general plan policy concerning the use of land would amount to an indirect attack on the general plan itself. This is because such a referendum contests the allowance of uses that are consistent with the general plan. The court of appeal's decision, if applied statewide, would give rise to attacks on the policies of general plans through challenges to the legislative implementation of those policies in zoning laws.

In this case, the general plan was amended as to a single parcel specifically in a manner that would allow River Park to build and operate a hotel on the property. It may be presumed that the City conducted hearings and solicited public input as the Planning and Zoning Law required. It is undisputed that no one, including the Hotel Coalition, challenged the general plan amendment directly by referendum petition, at the time the City determined the appropriate uses on River Park's parcel. However, it is appropriate to encourage that challenges to general plan policies as to the uses of property be brought at an early stage, when the general plan itself is being debated and enacted, rather than by a subsequent attack on the general plan as it is being implemented through the adoption of conforming zoning. (See *Land Waste Management v. Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950, 957 [policies embodied in the general plan are "legislatively implemented by local agencies through zoning ordinances"].)

The delay and uncertainty occasioned by the referendum challenging the commercial zoning designation of River Park's parcel has not only caused hardship to River Park, but it has for a substantial time effectively voided the property's general plan designation.

More generally, encouraging downstream challenges throughout California by adopting the court of appeal's decision allowing referenda on

legislation that conforms inconsistent zoning is harmful because it casts general plan policies, including those mandated by the Legislature, into uncertainty. This in turn would make it risky, difficult, and costly for cities, property owners, and other stakeholders to plan and develop property. As noted, a city's general plan must contain a variety of elements, land use, circulation, conservation, housing, noise, safety, and open space. (§§ 65302(a)-(g), 65303.) The Planning and Zoning Law specifies detailed requirements for some of these elements. By way of example, the mandatory housing element must include standards and plans for housing sites by which a city that "shall endeavor to make adequate provision for the housing needs of all economic segments of the community." (§ 65580; *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, 444.) A city's housing element must analyze and quantify the city's existing and projected housing needs for all income levels, including the city's share of the regional housing need (§ 65582 (b). It must also include a multiyear schedule of actions the local government is undertaking to meet these needs. (§§ 65583–65588.) The municipality must additionally make adequate provision for the housing needs of all economic segments of the community, … and to [i]dentify actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's share of the regional housing need for each income level …." (§65583(c)(1)) and to "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households." (*Id.* at (c)(2).) These and requirements applicable to the other general plan elements contain the Legislature's direction concerning how localities are to conduct land use planning.

In light of such requirements, a city must engage in considerable analysis and planning, and make numerous policy choices, in order to comply with the Planning and Zoning Law. The municipality must involve the public and stakeholders in that process to great extent. Insofar as indirect challenges to those policy choices occur downstream, when the policies are actually implemented (as by the adoption of zoning ordinances), available land uses become uncertain. The deleterious consequences of such uncertainty include increased cost and risk to developers, with a loss of the confidence or ability needed to proceed with projects, as well as the potential failure to achieve general plan policies, including those that are legislatively mandated. Moreover, localities and stakeholders would waste time, effort, and public resources in the adoption of general plans or general plan amendments whose policies, professed to be supreme, are effectively impaired or nullified by later challenge to implementing zoning ordinances.

C. The Court Should Adopt the Rule of *deBottari* and Hold that a City's Voters May Not Use the Referendum Process to Challenge the City's Zoning Designation when the Referendum, if Successful, would Leave Intact Zoning that is Inconsistent with the City's General Plan.

The Court should not only reject the court of appeal's rule of decision for the reasons stated, but it should reaffirm the rule of *deBottari*, which is consistent with the language and purpose of the Planning and Zoning Law, including Section 65860. In addition, the *deBottari* rule would promote general plan consistency. It would also afford a bright line rule to guide cities and counties, developers, the courts, and others. And, it would avoid the harmful consequences that would otherwise flow from application of the court of appeal's decision.

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1. *deBottari*'s Holding is Consistent with the Statutory Language and Purpose of Section 65860 and would Promote Consistency with the General Plan as well as General Plan Supremacy.

Section 65860(a) commands that a city's or county's zoning be consistent with its general plan designation. Section 65860(c) requires that a city or county amend its zoning to make it consistent with an amended general plan. The express requirement that newly inconsistent zoning be brought into conformity with a city's or county's amended general plan indicates that the Legislature was particularly concerned that there be ongoing consistency with the general plan. At the same time, the Legislature understood that there needed to be a way to bring newly inconsistent zoning into conformity when a general plan was adopted or amended. Therefore, Section 65860 requires that inconsistent zoning be brought into conformity "within a reasonable time." As this Court explained in *Lesher*, "[t]he obvious purpose of [Section 65860] subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan, not to permit development that is inconsistent with that plan." (*Lesher*, *supra*, 52 Cal.3d 531, 546.) The *deBottari* rule serves this purpose of ensuring that zoning consistency will be achieved in an orderly manner because it preserves consistent zoning that has been adopted to conform to an amended general plan and does not permit the replacement of consistent zoning with inconsistent zoning.

Moreover, although Section 65860 does not specify what constitutes a "reasonable time," the Planning and Zoning Law makes clear that the Legislature intended that inconsistent zoning be promptly brought into conformity with an amended general plan. As noted, Section 65754 requires that a city or county conform its zoning to a general plan that has brought

into compliance with state law after an adverse court decision within 120 days. Section 65754 indicates the Legislature's clear intention that inconsistent zoning not remain in place for more than a short time. What constitutes a "reasonable time" under Section 65860(c) must be assessed in light of the Legislature's manifest purpose that localities achieve general plan consistency promptly. (See *Moore*, *supra*, 32 Cal.3d at 541 [statute should be construed with reference to the whole system of law of which it is a part].) By avoiding the delay in achieving general plan consistency that would necessarily attend one or more referendum challenges, the *deBottari* rule promotes ongoing consistency and minimizes any period of inconsistency. At the same time, under *deBottari*, a city's voters could not effectively void a general plan designation by making a successful indirect challenge to consistent zoning legislation.

2. The Rule of *deBottari* would Allow the Voters to Continue to Exercise Their Reserve Powers Over Municipal Land Use Choices.

Under the rule of *deBottari*, the voters fully retain their reserve power to legislate land use matters by initiative. If, for example, a city's voters wish to adopt a consistent zoning designation that is different from the zoning that their city council would like to adopt, they may to utilize their initiative power to do so by initiative. (Under *Lesher*, *supra*, 52 Cal.3d 531, of course, the voters may not then exercise their initiative power to put in place zoning that does not conform to the general plan.)

Apart from retaining their initiative power over land use, the voters may also exercise their referendum power over municipal land use matters by attacking the adoption of, or amendment, their city's general plan directly. As discussed, the policy of certainty in land use regulation is best furthered by encouraging challenges to decisions concerning municipal land use

policies to be made at the time of the amendment of a general plan that establishes the policies, rather than when those policies are implemented by enacting consistent zoning legislation. Thus, the rule of *deBottari* would maintain general plan supremacy and planning certainty, even as it allows the voters to continue to exercise their reserve powers over municipal land use choices.

3. The *deBottari* Rule Also Encourages Prompt Certainty in Zoning and Offers a Bright-Line Rule that Avoids Harmful Consequences.

For 35 years, the *deBottari* case has provided a bright line rule to guide cities, property owners, local voters, and the courts when confronted with a referendum that, if successful, would result in the maintenance of inconsistent zoning. As shown, the court of appeal's rule of decision would inject uncertainty into the effect of general plans and the process of implementing general plan goals. Whether alternative consistent zoning designations are presently available if a referendum is successful, as application of the court of appeal's rule may (or may not) require is, as discussed, dependent on a city's particular circumstances as well as the purpose of the referendum at issue. Cities, property owners, voters, and the courts could no longer look to the general plan as affording planning certainty, and as controlling, where its policies may be challenged not just when they are adopted but when they are legislatively implemented through the adoption of consistent zoning. In promoting certainty in land use planning and regulation, the *deBottari* rule avoids such harmful consequences. As this Court said in *Lesher*, "persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act pursuant to the

law, and courts must be able to ascertain a law's validity and to enforce it." (*Lesher*, *supra*, 52 Cal.3d at 544.)

VI. CONCLUSION.

For the foregoing reasons, the Court should reaffirm the rule of *deBottari* and reverse the judgment of the court of appeal.

Dated: October 6, 2017

RESPECTFULLY SUBMITTED,

BERLINER COHEN

By _____

JOLIE HOUSTON
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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, the quotation of the issues, any signature block, and any attachment, this Opening Brief of Respondent River Park Hospitality, Inc. contains 11,600 words, as determined by the word count of the computer program used to prepare the brief.

Dated: October 6, 2017 BERLINER COHEN

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 October 6, 2017, I served the following document(s):

OPENING BRIEF OF REAL PARTY IN INTEREST AND RESPONDENT RIVER PARK HOSPITALITY, INC.

in the following manner:

		by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, from the sending facsimile machine telephone number of (408) 938-2577. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued by the transmitting facsimile machine.
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		by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
		by e-mail or electronic transmission. I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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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 October 6, 2017, at San Jose, California.

Karishma Borkar