IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

OPENING BRIEF OF PLAINTIFF AND RESPONDENT CITY OF MORGAN HILL

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QUESTION PRESENTED

In its order granting review, this Court directed the parties to address the following question:

> 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 general plan, when the result of the referendum—if successful—would leave intact the existing designation that does not conform to the amended general plan?

(Order granting Petitions for Review, dated August 23, 2017.) For the many reasons that follow, the answer is no.

INTRODUCTION

California's statewide approach to land use—requiring localities to create and implement land use general plans to guide long-term growth and conservation to promote regional coordinated planning and prevent haphazard and random growth and development —only works because the State also mandates that all subsequent land use decisions, including zoning, be consistent with the general plan. By nature, this requirement necessitates that as the general plan is amended or a new one is adopted, zoning ordinances may have to be amended or enacted to meet the Legislature's consistency mandate. (Cal. Gov. Code § 65860, subd. (c).) Otherwise, any existing zoning that is inconsistent with the new plan is rendered invalid by the preemptive effect of Government Code section 65680 ("Section 65860").[1]

Once the locality has enacted an ordinance to cure any inconsistent zoning, it cannot thereafter reenactment the old, inconsistent ordinance; nor even place an initiative on the ballot for voters to approve restoring that previous inconsistent zoning. Nonetheless, here, Respondent and Real

[1] All subsequent references are to the Government Code unless otherwise specified.

Party in Interest Morgan Hill Hotel Coalition ("Hotel Coalition") is trying to do by referendum exactly what Petitioner City of Morgan Hill ("City") cannot do by legislation or initiative. Specifically, the Hotel Coalition has submitted a referendum petition seeking to repeal the newly enacted consistent zoning ordinance, and reestablish previous zoning which is inconsistent with City's new general plan. The local electorate's reserved legislative power exercised by referendum does not extend beyond City's legislative and initiative power in such a manner. Nor, does the referendum power permit voters to cause a local entity to violate California law regarding a statewide concern.

For nearly forty years, since the decision in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, every city, county, voter, property owner and court that has faced this situation has understood that such a referendum was invalid and courts could and would remove such referenda from the ballot. And many more courts, including this one, have cited the *deBottari* line of cases with approval when deciding related issues. Yet, in this case, the Sixth District Court of Appeal ("Sixth District") cast aside both stare decisis and the legal analysis universally followed by California courts, deciding simply that the long-established reasoning was "flawed."

However, the Sixth District's reasoning in this case is the "flawed" reasoning. Its holding is premised on a series of five interrelated factors, each one of which is contrary to the plain language of Section 65860, this Court's previous interpretation of Section 65680, the policies inherent in the State's Planning and Zoning Law, and/or the trial court's undisputed findings of fact.

Moreover, adoption of the Sixth District's decision would abrogate a clear, bright line test capable of consistent, uniform application by cities, counties, voters, property owners and courts across the State, with a situational rule, ill-suited to practicalities of real world application. The

Sixth District's rule is so uncertain in its interpretation of Section 65860, that the various constituents could not apply it consistently or uniformly. The results patchwork of results would is completely contrary to the fundamental policies underlying the statewide concerns at issue in the Planning and Zoning law.

For these reasons, as discussed in greater detail below, this Court should overturn the decision of the Sixth District below.

FACTUAL AND PROCEDURAL BACKGROUND

A. The History of the Subject Property and the Referendum.

At issue in this case is the zoning of a vacant parcel of land located at the 850 Lightpost Parkway in the City of Morgan Hill ("Subject Property"). (Joint Appendix ("JA"), at 60). The parcels to the south are designated for commercial land use in the City's General Plan. The parcels to the north, east and west are designated for industrial land use in the General Plan. (Id.) The Subject Property is near U.S. 101 about half a mile from the Cochrane Road-101 highway ramps. (Id.)

Prior to November 19, 2014, the Subject Property's General Plan land use designation was "Industrial," and its zoning was "ML-Light Industrial." (Id.) On November 19, 2014, the Morgan Hill City Council amended the City's General Plan to change the land use designation for the Subject Property to "Commercial." (Id.) No one, including the Hotel Coalition, challenged the General Plan amendment by writ, referendum or initiative. Therefore, as of November 19, 2014, the Subject Property's "ML-Light Industrial" zoning was inconsistent with its "Commercial" General Plan land use designation. (Id. at 61.)

Following the General Plan amendment, the Subject Property's owner, Real Party in Interest and Respondent River Park Hospitality, Inc. ("River Park"), applied for a zoning amendment to change the Subject Property's zoning to "General Commercial." (Id. at 60.) The Hotel

Coalition opposed the zoning change at various public hearings. On April 1, 2015, the City Council enacted Ordinance No. 2131, which changed the Subject Property's zoning to "General Commercial," and made it consistent with its Commercial General Plan land use designation. (Id. at 60-61; 64, 116, 276.)

On May 1, 2015, the Hotel Coalition filed a petition for referendum seeking to repeal Ordinance No. 2131 and revive the parcel's "ML-Light Industrial" zoning. (Id. at 115, 123, 482.) Despite the Court of Appeal's statement that the purpose of the Referendum was limited to preventing a hotel on the Property, the undisputed evidence in the record demonstrates that maintaining the Property's industrial zoning was a main, if not the main, stated purpose of the Referendum's intent to repeal the "General Commercial" zoning.[2] (See JA, at 480, 482, stating "VOTE NO because industrial land is scarce in Morgan Hill. Industrial land creates lucrative careers and opportunities for our residents. Our community needs additional technology and manufacturing jobs rather than forcing residents to commute north to the peninsula. City Council tried to rezone a three-acre parcel of industrial land to help an out-of-town developer build another hotel. . . . Voters rejected the City Council's decision to rezone the land from industrial to commercial by signing a petition. . . .") Based on this determination, the trial court found that through the Referendum, the Hotel Coalition urged voters to maintain the Property's industrial zoning. (See JA, at 485:10-13.)

B. Procedural Background.

On March 11, 2016, City brought an action in the Superior Court of Santa Clara County (the "Superior Court") of seeking an alternative and

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[2] Both the City and River Park filed Petitions for Rehearing regarding this factual misstatement. (City Petition for Rehearing, pp. 4-6; River Park Petition for Rehearing, pp. 4-5) The court of appeal denied both petitions without comment. (See court of appeal order date June 23, 2017.)

peremptory writ to remove the Referendum from the ballot on the grounds that the Referendum was invalid pursuant to Section 65860 (because if successful it would result in zoning that was inconsistent with the City's General Plan. (JA, Vol. I at 13.) On March 29, 2016, the Superior Court, relying on *deBottari*, granted City's petition. (JA, Vol. II at 484-487.) In its ruling, the trial court found that "judicial review and action [on a ballot proposition] may be appropriate in the presence of a clear showing of invalidity of the proposed measure."

> The Court finds that such a showing of invalidity has clearly been made by Petitioner [City], and has not been rebutted by Real Party in Interest [Hotel Coalition]. It is not disputed that the current zoning in question is inconsistent with the City's General Plan – and therefore, presumptively invalid. . . . [W]ere the voters to reject the ordinance, that would leave in place an inconsistent- and legally invalid - zoning designation. This result would be the same as if the measure to be submitted to the voters asked whether to "enact" inconsistent, legally invalid zoning, and it is precisely the result urged by Real Party in Interest [Hotel Coalition].

(Id.) The Superior Court ordered the referendum removed from the ballot and Ordinance No. 2131 certified "as duly adopted and effective immediately . . . ." (Id. at 486.)

The Hotel Coalition timely filed a notice of appeal on April 1, 2016. (Id. at 495.) On May 30, 2017, the Sixth District issued a published decision overturning the Superior Court's writ of mandate and rejecting *deBottari* as "flawed." (*City of Morgan Hill v. Bushey* (2017) 12 Cal. App.5th 34, 41-43.) The court held 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.) "The new zoning ordinance will be valid, notwithstanding the referendum, so long as 'the new measure 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. . . .' (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 678).) Consequently, the existence of section 65860 does not establish the invalidity of Coalition's referendum." (*Bushey, supra,* 12 Cal.App.5th at 42.) However, the Sixth District exempted from its decision situations where a referendum challenged the only available consistent zoning. (*Id.* at 42, n.5.)

Both City and River Park filed Petitions for Rehearing. On June 23, 2017, the Court of Appeal denied both Petitions.

ARGUMENT

I. STANDARD OF REVIEW.

This Court interprets constitutional and statutory provisions *de novo*. (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 415, 432). However, this Court reviews the trial court's express and implied findings of fact under the substantial evidence standard. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.)

II. THE PRESUMPTION IN FAVOR OF THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWER IS REBUTTABLE BY A DEFINITE INDICATION THAT THE LEGISLATURE INTENDED TO RESTRICT THAT RIGHT IN MATTERS OF STATEWIDE CONCERN.

The issues presented in this case involve the intersection of fundamental public policies – the local electorate's reserved legislative power and the State's police power with respect to matters of statewide concern as embodied in the Planning and Zoning Law. In the California Constitution, the people reserved to themselves legislative power exercised through initiatives and referendums. (Cal. Const., Art. II, §11.) As this Court stated in *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776, "it is 'the duty of the courts to jealously guard this right of the people'

[citation] .... It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right to local initiative or referendum be not improperly annulled." (*Id.* [citations omitted].)

However, this presumption in favor of the local electorate's reserved legislative power is rebuttable. (*Id.*, at 776.) It is axiomatic that the local electorate's power to enact and approve legislation through the referendum and initiative process is equal to the local government's legislative power. (*Lesher Communications, Inc.,* 52 Cal.3d at 540; *Merritt v. City of Pleasanton* (2001) 89 Cal.App.4th 1032, 1035.) If a city is prohibited from exercising their legislative power in a certain way or in a certain area, because it would conflict with existing State statutes, then the people are also prohibited from exercising their legislative power as well. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 920-921.) Therefore, "the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern," can restrict the local electorate's reserved legislative power. (*DeVita, supra,* 9 Cal.4th at 776.)

A State statute preempts the local electorate's reserved legislative power when it concerns matters of statewide concern and contains a definite indication of the Legislature's intent to restrict the electorate's legislative discretion. (*Id.*) The Legislature evidences such intent either by an absolute ban on legislative discretion or by delegation of discretion solely to city councils or county boards of supervisors. (*Id.*; see also, *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 (an absolute ban, i.e., "No general tax shall be imposed, extended, or increased" would have been a clear indication of the intent to restrict the electorate's legislative power); *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501, 505 (Legislature's use of "city council" and "board of supervisors" is strong indication of intent to restrict local

initiative and referendum power).) Therefore, to answer the question presented by this case, the Court has to examine Section 65860 to determine if the Legislature intended it to restrict the local electorate's reserved legislative powers on a matter of statewide concern.

III. THE PLANNING AND ZONING LAW PREEMPTS ALL LOCAL LEGISLATIVE DISCRETION, INCLUDING THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWER, ON A MATTER OF STATEWIDE CONCERN – CONSISTENCY OF LAND USE REGULATIONS AND DECISIONS WITH CITY'S GENERAL PLAN.

While in California planning and zoning have traditionally been considered "municipal affairs," cities and counties derive their police power from the state and a municipality's planning or zoning decision can and often does have substantial impact beyond its borders. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 608.) The regional or statewide impacts of a municipality's planning decisions gives the Legislature the constitutional authority to limit the power local electorate's reserved legislative powers in this area if it chose to do so. (*DeVita, supra*, 9 Cal. 4th at 784.) In examining whether the Legislature has done so, this Court has found that it has – when it "mandate[ed] the development of a [general] plan, specif[ied] the elements to be included in the plan, and impos[ed] on the cities and counties the general requirement that land use decisions be guided by that plan. (*Id.* at 783.) This Court explained the Legislature's legitimate state interest in requiring such long range planning in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110 as follows:

> The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly

> progress. Thus, it has provided not only for the adoption of general plans but also regional plans (§ 65060 et seq.), specific plans (§ 65450 et seq.), district plans (§ 66105 et seq.), and a comprehensive plan for the conservation of San Francisco Bay (§ 66650 et seq.). In addition, the voters recently passed an initiative measure providing the mechanism for adoption of plans to preserve and protect the state's coastline. (Pub. Resources Code, § 27000 et seq.)

(*Selby Realty, supra,* 10 Cal.3d at 120.)

In 1971, in response to the "deleterious consquences of haphazard community growth in the state, the Legislature made a series of legislative changes that transformed a municipality's general plan from an "interesting study" to a "constitution for future development." (*DeVita*, *supra*, 9 Cal. 4th at 772-773.) As this Court explained, "The general plan consists of a 'statement of development policies ... setting forth objectives, principles, standards, and plan proposals.' (Gov. Code, § 65302.) The plan must include seven elements--land use, circulation, conservation, housing, noise, safety and open space--and address each of these elements in whatever level of detail local conditions require (*id.*, § 65301). General plans are also required to be 'comprehensive [and] long[]term' (*id.*, § 65300) as well as 'internally consistent' (*Id.*, § 65300.5.) The planning law thus compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions." (*DeVita, supra*, 9 Cal.4th at 773.) Additionally, "[f]or the first time, proposed subdivisions and their improvements were required to be consistent with the general plan (Gov. Code, § 66473.5 [formerly in Bus. & Prof. Code, § 11526]), as were zoning ordinances (Gov. Code, § 65860). [citation] Moreover, charter cities were no longer completely exempt from the requirements of the planning law; the State mandated that charter cities adopt general plans with the required mandatory elements. (Gov. Code, § 65700, subd. (a); [citation].)" (*Id.*, at 772.) This Court has further explained that:

> . . . now "'[t]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.'" [citation]; see [Gov. Code] §§ 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 for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 153.)

As this Court has explained on numerous occasions, "the 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, 572-573 (citing *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *Orange Citizens, supra,* 2 Cal.5th at p. 153; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540-541; *DeVita, supra,* 9 Cal. 4th at 772-773).) This consistency requirement is the "linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.) Without it, a general plan would return to nothing more than an "interesting study" and the State's legitimate interest in preventing random and haphazard community growth and development through considered deliberative long term regional planning would be completely undermined. Thus, although the Legislature has only imposed "minimal restrictions" on local discretion over planning and zoning decisions, those minimal restrictions are not trivial or mere technical trivialities to be cast aside.

IV. THE LEGISLATURE PREEMPTED THE LOCAL ELECTORATE'S RESERVED LEGISLATIVE POWERS TO BOTH ADOPT AND MAINTAIN A ZONING ORDINANCE THAT IS INCONSISTENT WITH A CITY'S OR COUNTY'S GENERAL PLAN.

Therefore, clearly Section 65860, which requires consistency between a city's or county's general plan and its zoning ordinances advances a statewide concern. So the next question is did the Legislature in enacting Section 65860 intend to preempt the local electorate's reserved legislative powers.

The question in this case involves the local electorate's exercise of its reserved power through a referendum. Regularly across cities and counties are confronted with referendum petitions challenging a zoning ordinance that would enact consistent zoning following a General Plan amendment, which rendered the existing zoning inconsistent. These petitions are almost always submitted by opponents to the property owner's planned development for the parcel in question. In *deBottari*, the referendum proponents opposed medium, as opposed to low density, housing. (*deBottari, supra,* 171 Cal.App.3d at 1207-1208.) In the case at bar, the Hotel Coalition opposed a new hotel and the loss of industrial land in the City. (JA, Vol. II at 480, 482.) In these situations, if the referendum proponents were successful and the electorate repealed the new consistent zoning, the parcel's inconsistent zoning ordinance would be revived and remain in effect until some unknown future time when either the city or the electorate adopted new valid zoning.

A. Section 65860 Preempts the Local Electorate's Reserved Legislative Power when It Enacts Inconsistent Zoning by an Initiative.

This Court has already examined this question in the context of the local electorate's exercise of its reserved power through an initiative. In *Lesher*, this Court held that a zoning ordinance enacted by the voter's

through an initiative, which was inconsistent with the city's general plan was invalid *ab initio*, from the beginning: "A zoning ordinance that conflicts with a general plan is invalid at the time it is passed." *Lesher Communications, Inc., supra,* 52 Cal.3d at 544). Neither a city council nor the voters have the legislative power to enact zoning ordinances that are inconsistent with the city's General Plan and violate the Zoning and Planning Law, Section 65860. (*Id.* at 547.) Therefore, this Court held that the inconsistent ordinance was invalid and upheld the trial court's issuance of a writ of mandate to compel its invalidation.

B. Nearly Forty Years of Appellate Precedent Holds That a Referendum, Like the One Here, that Would Revive Inconsistent Zoning Is Invalid.

Although this is the first time this Court has addressed Section 65860's preemptive effect on local referenda, two districts of the Court of Appeal have examined this issue. The Fourth District first reviewed a referendum seeking to repeal an ordinance enacting consistent zoning following amendment of a general plan almost 40 years ago in *deBottari.*[3] *deBottari* established a bright line rule that has guided cities, counties, voters and courts for decades. The electorate cannot by referendum repeal zoning for a parcel that is consistent the city's or county's general plan, when if the referendum is successful, the parcel would be left with inconsistent zoning. The Fourth District held that:

> In section 65860, subdivision (a), the Legislature mandated that all zoning shall be consistent with the general plan. In section 65860, subdivision (c), the Legislature added muscle to the provision by requiring that any ordinance which becomes *inconsistent* with a general plan *must* be brought into conformity. Subdivision (c) provides: "In the event that a zoning ordinance becomes inconsistent with the general plan

[3] Nine years later, the Fourth District followed and reaffirmed *deBottari*, in *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868.

> 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." To further ensure consistency in land use decisions, the Legislature provided in section 65860, subdivision (b), that "[any] resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a)." (See *City of Los Angeles* v. *State of California, supra*, 138 Cal.App.3d at p. 531.)
>
> A zoning ordinance inconsistent with the general plan at the time of its enactment is "invalid when passed." (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704 [179 Cal.Rptr. 261].)
>
> In view of the foregoing, we conclude that the invalidity of the proposed referendum has been clearly and compellingly demonstrated. Repeal of the zoning ordinance in question would result in the subject property being zoned for the low density residential use while the amended plan calls for a higher residential density.

(*deBottari v. City Council, supra,* 171 Cal.App.3d at pp. 1212-1213.)

C. In this Case, the Sixth District's Decision Expressly Rejected *deBottari* and Directly Contradicted the Fourth District Regarding the Issues at the Heart of the Consistency Requirement in the Planning and Zoning Law and the Proper Exercise of the Electorate's Reserved Legislative Power.

The court below disagreed with *deBottari* and held "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.) In rejecting the *deBottari* line of cases, the Sixth District described its sister court's reasoning as "flawed." (*Bushey, supra*, 12 Cal.App.5th at p. 42.)

It criticized the Fourth District's conclusion that a referendum would "enact a clearly invalid zoning ordinance," because a referendum rejecting an ordinance does not "enact" an ordinance at all, but instead, according to the court, simply maintains the status quo. Moreover, it held Section 65860 does not invalidate zoning that is rendered inconsistent by amendment of the general plan. Therefore, valid, albeit inconsistent, remains in place as the status quo until the city or the electorate enact valid consistent zoning – whenever that happens.

In reaching this conclusion, the Sixth District interpreted Government Code section 65860(a) as only invalidating newly enacted inconsistent zoning. It found that zoning, which was initially consistent, but became inconsistent by amendment of the General Plan, was governed by Government Code section 65860(c). It then interpreted subsection (c) as not invalidating the newly inconsistent zoning, because it gave a legislative body a reasonable time to enact consistent zoning following a general plan amendment.

Finally, the court noted that Section 65860 did not restrict City's discretion in adopting consistent zoning, and therefore, it reasoned, Section 65860 did not preempt the local electorate's reserved legislative power to reject City's choice of consistent zoning through referendum. The Sixth District then noted that this new consistent zoning would be valid so long as it did not contain the same characteristics of the rejected consistent zoning that gave rise to the referendum petition. Therefore, it held that the referendum petition was valid and could not be removed from the ballot.

D. Proper Interpretation of Section 65860, This Court's Decision In *Lesher* and the Fundamental Requirement of Consistency and Certainty With Respect to Zoning Dictate that the Court Should Reject the Sixth District's New Rule in this Case in Favor of the *deBOTTARI* Rule.

As discussed above, determining of whether Section 65860 preempts the right of referendum requires analysis of the statute itself for a "definite indication" that the Legislature intended to preempt the local electorate's reserved legislative power. Courts use standard rules of statutory construction to conduct this analysis, and as demonstrated below, once undertaken, it is clear that the Fourth District's holding and reasoning in *deBottari* should be upheld and adopted by this Court, while the Sixth District's holding and reasoning in this case should be rejected in their entirety.

1. The Sixth District's Conclusion that Section 65860's Preemptive Effect Does Not Invalidates a Zoning Ordinance Made Inconsistent by Amendment of the General Plan Is Contradicted by the Plain Language of Section 65860.

The first supporting conclusion of the Sixth District's decision is that Section 65860 does not automatically invalidate an inconsistent zoning ordinance, such as the ML Light Industrial zoning at issue, that was consistent with the General Plan when originally enacted, but rendered inconsistent by a later General Plan amendment. In reaching this conclusion, the Sixth District interpreted Government Code Section 65860(a) ("Subsection (a)") as only prohibiting the enactment of new inconsistent zoning, such as through an initiative. Subsection (a) completely contradicts and eviscerates this interpretation. Subsection (a) invalidates a zoning ordinance the moment it becomes inconsistent with the General Plan, regardless of the inconsistency derives from amendment of the General Plan or the zoning ordinance itself.

The first step in interpreting a statute is to look to the plain language of the statute to determine legislative intent. Section 65860 states, in pertinent part:

> (a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:
>
> (1) The city or county has officially adopted such a plan.
>
> (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.
>
> (b) Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a)....
>
> (c) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.
>
> (d) Notwithstanding Section 65803, this section shall apply in a charter city of 2,000,000 or more population to a zoning ordinance adopted prior to January 1, 1979, which zoning ordinance shall be consistent with the general plan of the city by July 1, 1982.

(Cal Gov Code § 65860.)

The language of Subsection (a) – "County or city zoning ordinances shall be consistent with the general plan of the county or city . . ." – is an absolute ban on legislative discretion. It does not distinguish between how or when the zoning ordinance became inconsistent with the general plan. It mandates consistency and prohibits inconsistency without exception. As this Court stated in *California Cannabis Coalition*, such an absolute ban is a clear indication that the Legislature meant to preempt the local electorate's reserve legislative power along with a city's or county's legislative power. (*California Cannabis Coalition, supra,* 3 Cal. 5th at 943.)

Furthermore, as construed by this Court in *Lesher*, Section 65860 by its mere existence invalidates any zoning ordinance that is inconsistent with the general plan: "The 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 (emphasis added.)

This self-executing preemptive effect precludes the Sixth District's conclusion that only invalidates newly enacted inconsistent zoning ordinances. For it is well-settled that a "local [ordinance] in conflict with general law is void. Conflict exists if the [ordinance] duplicates, contradicts or enters an area fully occupied by general law." (*IT Corp. v. Solano County Board of Supervisors* (1991) 1 Cal.4th 81, 90 (citations omitted).) Here regardless of whether the inconsistent zoning ordinance is newly enacted or became inconsistent due to amendment of the general plan, as soon as the inconsistency arises, it contradicts Subsection (a), and therefore, is invalid and void.

2. The Sixth District's Finding that Section 65860 Authorizes the Maintenance of Inconsistent Zoning Following Amendment of the General Plan Is Similarly Not Supported by the Statutory Language or this Court's Previous Interpretation of that Language.

Another main supporting tenet of the Sixth District's decision in this case is its finding that Government Code Section 65860(c) ("Subsection (c)") saved the former zoning ordinance from invalidity and authorized the maintenance of inconsistent zoning. This interpretation, however, is also contrary to the plan language of Section 65860.

Subsection (c) states: "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a

reasonable time so that it is consistent with the general plan as amended." "Shall be amended" mandates that a city or county to make inconsistent zoning ordinances consistent with newly amended general plans. This is the exact opposite of permitting maintenance of such newly inconsistent zoning ordinances.

Moroever, the Sixth District's conclusion that because the Legislature allowed a "reasonable time" to bring make the newly inconsistent zoning consistent, it authorized the maintenance of inconsistent zoning – not the invalidation of such zoning – is likewise without statutory support. The plaintiff in *deBottari* made the same argument as the Sixth District in this case -- "the voters should be permitted to enact an inconsistent zoning ordinance because section 65860, subdivision (c), provides for a "reasonable time" within which an inconsistent zoning ordinance may be brought into conformity with an amended general plan. Thus, plaintiff points out, even if the referendum were approved the council would have a "reasonable time" within which to rectify the inconsistency." (*deBottari*, 171 Cal.App.3d at 1212.) The Fourth District soundly rejected this reasoning:

> Plaintiff readily concedes some remedial action by the council would then be required. Plaintiff suggests that the council would have three options: (1) reenact the zoning amendment that the voters had overturned; (2) enact some alternative zoning scheme which is consistent with the general plan; and (3) amend the amended general plan to conform to the zoning ordinance preferred by the voters.
>
> 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.

This Court in *Lesher* also addressed the issue of whether subsection (c)'s allowance of a reasonable time adopt consistent zoning precluded a finding that an inconsistent zoning ordinance was invalid. (*Lesher, supra*, 52 Cal.3d at 545-546.) This Court rejected the Sixth District's argument, and reached the same conclusion as the *deBottari* court: "The obvious purpose of 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 the plan." (*Id.*) Moreover, this Court held that Section 65860 compels a local government to bring a zoning ordinance "that was originally consistent but has become inconsistent" into conformity with its general plan when it has become inconsistent due to a general plan amendment. (*Id.*, 541 (emphasis added).) Although the Court in support of this conclusion relied on Section 65860 as a whole and did not specifically cite to subsection (c), it is clear from the underlined language above that the Court was referring to the mandate of subsection (c) in its interpretation of Section 65860. Consequently, this Court's precedent also precludes the Sixth District's finding that subsection (c) or any other provision of Section 65860 authorizes the maintenance of inconsistent zoning.

The legislative history of subsection (c) supports the conclusion of this Court in *Lesher* and the Fourth District in *deBottari* and further exposes the error in the Sixth District's contrary conclusion. The Legislature first enacted the zoning consistency requirement in 1971 as part of the effort described above to give a general plan the force of law. (1971 Stats., Chapter 1446, sec. 12, attached as Exhibit A to Petitioner City of Morgan Hill's Request for Judicial Notice filed in support herewith ("RJN").) Section 65860 as originally enacted gave local bodies until January 1, 1973 to adopt a general plan and amend its zoning ordinances to conform to that

plan. (Id.) Subsection (c) was not part of Section 65860 as originally enacted.

Then in June 1973, by Senate Bill 594, the Legislature amended the Planning and Zoning Law in order to give local governments additional time to adopt compliant general plans and meet the zoning consistency requirements. (Governor's File regarding Senate Bill No. 594 (enacted June 29, 1973 as an urgency measure) at pp. 1-2, attached as Exhibit B to the RJN.) The deadline to adopt compliant general plans was extended from June 30, 1973 to December 31, 1973 and the deadline to make zoning ordinances consistent with those compliant general plans in Section 65860, subsection (a) was extended to January 1, 1974. (Id.)

Senate Bill 594 also added subdivision (c), providing that zoning inconsistencies with general plan amendments had to be cured within a "reasonable time." (SB 594, as amended June 27, 1973, attached as Exhibit C to the RJN.) Subdivision (c) was taken from a competing measure, Assembly Bill No. 1864, and originally provided that an amendment had to take place within 90 days. (Assembly Daily Journal, 1973-74 Regular Session, p. 3856, attached as Exhibit D to the RJN.) Another provision of AB 1864 adopted into SB 594 provided that when general plans were amended, the public hearing on zoning amendments had to take place at least two weeks later. (Id.)

The Legislature enacted Senate Bill No. 594 in response to concerns voiced by the League of California Cities regarding cities' great difficulties in meeting the prior deadline for completing general plan elements and amending zoning ordinances in light of the new EIR requirement imposed by CEQA. (RJN, Ex. B; California Office of Intergovernmental Management, Council on Intergovernmental Relations, Statement On Deadlines For Open Space and Conservation Elements, SB 594 (May 8, 1973), attached as Exhibit E to the RJN.) Therefore, presumably in light of

local government concern about unworkable deadlines, and in recognition of the fact that the timing of zoning hearings would differ on a case-by-case basis, subsection (c) was added to Section 65860, but the original 90 day deadline became the "reasonable time" requirement.

From this legislative history it is clear that Subsection (c) was enacted to address issue related to the procedural timing of bringing zoning ordinances into conformity with newly amended general plans. The Legislature in no way intended for Subsection (c) to validate or rescue inconsistent zoning from Subsection (a)'s preemptive and absolute ban. Moreover, the Legislature only extended the deadline to make all zoning ordinances consistent with the general plan by six months. That deadline applied regardless of whether a local government had to enact entirely new zoning ordinances or only had to amend previously adopted ones to make them consistent with a newly adopted or amended general plan. Therefore, Subsection (c) was not a saving clause or safe harbor from the specific January 1, 1974 deadline.

As held in both *Lesher* and *deBottari,* by enacting Subsection (c) the Legislature merely established an orderly timing process for bringing regulatory law into conformity with a new or amended general plan. Neither the language of Section 65860 nor the legislative history supports the Sixth District's conclusion that the Legislature intended Subsection (c) to save inconsistent zoning from Subsection (a)'s invalidating proscription and allow the maintenance of such inconsistent zoning. Subdivision (c) may give local governments a temporary defense from suit, but it does not transform an invalid ordinance into a valid one, and it does not permit the electorate to revive a superseded inconsistent zoning ordinance.

3. The Sixth District's Objection to *deBottari's* Use of the Word "Enacted" Is Not Grounds for Rejecting Its Holding Because When the Electorate Rejects an Ordinance by Referendum, They Repeal a Properly Enacted Ordinance and Revive, or "Re-enact," the Ordinance it Superseded.

One of the main reasons the Sixth District rejects *deBottari* is the Fourth District's use of the word "enact" when describing a referendum's effect on the previous inconsistent zoning:

> The Fourth District's reasoning in *deBottari* is flawed. As we have already explained, unlike 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.

As discussed above, Section 65860 clearly prohibits maintenance of inconsistent zoning. Regardless, however, the Sixth District's objection to use of the word "enact" in reference to a referendum elevates form over function, is contradicted by the technical legal mechanism by which a referendum operates and is therefore a distinction without substantive merit.

According to the Sixth District, a referendum may proceed under these circumstances because the electorate's vote to reject a the new zoning ordinance is a do-nothing power to maintain the status quo. This view, however, mistakes the procedural effect of a stay, which keeps a superseded law in effect pending a vote, for the electorate's true constitutional power is to accept or reject a law that the local legislative body has already fully enacted.

As this Court has explained, an ordinance is already a "perfect law" when it is adopted, not when it becomes effective. (*County of Los Angeles v. Lamb* (1882) 61 Cal. 196, 198 ["The statute ... was a perfect law when it was approved ... clothed with all the force and strength that the legislative power could invest it with."].) Moreover, "the constitutional referendum is not part of the enactment process in the Legislature, but operates after that process has done its work and has produced 'a statute enacted by a bill passed by the Legislature.' [Cal. Const., art II, § 9, subd. (b)]." (*Santa*

Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 241.) "For the same reason such a statute requires no approval by the voters to become law: it will automatically take effect unless a timely referendum petition is filed." (*Ibid.*)

Accordingly, when the voters reject an ordinance by referendum, they are engaged in an exercise of their constitutionally reserved legislative power to invalidate, or repeal, an existing ordinance and restore full legal effect to the ordinance that the legislative body had superseded by enactment of the challenged ordinance. If this appears to be "maintaining the status quo," that is only because the stay on the challenged ordinance masks the fact it has already replaced the prior ordinance. Rejection by referendum affirmatively repeals existing law; it is not a failed attempt to enact one.

This Court has acknowledged the common imprecision in terms when discussing referenda. For example, in rejecting the argument that a voter approval requirement fit the constitutional definition of "referendum," this Court was unmoved by the petitioner's reliance on two U.S. Supreme Court decisions and two of its own opinions in which the respective courts used the word "referendum" to describe analogous voter approval requirements. (*Guardino*, *supra*, 11 Cal. 4th at p. 243.) Dubbing it a "label of convenience," the Court explained that the term served merely as a "shorthand" to signify the broader meaning it has in "common speech," as "any kind of popular vote or plebiscite on a public question or measure." (*Ibid.*) Simply calling these voter approval mechanisms "referendums" did not make them so in a constitutional sense, particularly since that question was neither considered nor decided in those opinions. (*Ibid.*, citing *People v. Banks* (1993) 6 Cal.4th 926, 945.)

Similarly, in the parlance of the referendum power, "reject" takes on a technical meaning akin to repeal. This can be confusing, because with the

stay in place, it does not look like an active repeal. Perhaps unsurprisingly, there is often imprecision in the case law, and the tendency to use the technical terms in a non-technical way does not help. When *deBottari* used the word "enact," it was wrong as a technical matter, but not in the non-technical sense of approving, ratifying, authorizing or taking an action to make a law – in this instance, it is just the prior law that the electorate was "enacting" by reviving it.

It cannot honestly be argued that the *deBottari* court, the *City of Irvine* court nine years later, or this Court in *Lesher, Citizens of Goleta Valley, DeVita and Orange Citizens,* when it relied on *deBottari*, all used the word "enact," because they thought that by a referendum the electorate "enacted" an ordinance just like it would by its initiative power. Courts are presumed to know the law. (*Swain v. Swain* (1967) 250 Cal.App.2d 1, 7.) The law governing referendums, including the stay of the effect of the challenged ordinance has been the same since before *de Bottari* was decided through to the present day.[4] Therefore, obviously the Fourth District and this Court understood the technical legal points discussed above regarding the repeal of the previous ordinance by enactment of the challenged ordinance alone, the effect of the stay to maintain the effectiveness of the previous ordinance, despite the fact it was technically superseded by the enactment of the challenged ordinance. And furthermore, the courts knew that if by the referendum, the electorate rejected and therefore, repealed the challenged ordinance, it also legally revived the superseded ordinance that nonetheless had been in effect during the stay. It is no wonder none of the courts explained this esoteric technical point of law. It is confusing and does not change the end result. The law is

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[4] See, *Assembly of State of Cal. v. Deukmejian* (1982) 30 Cal.3d 638, 656, where the Court explains the suspending effect of the filing of a petition for Referendum. This case was decided before *deBottari* and therefore, clearly the newly adopted ordinance in *deBottari* was similarly suspended.

meant to be accessible to everyone. "Enact" as used in *deBottari* and adopted by this Court in reference to *deBottari's* holding conveys the technical legal complexities with one word that everyone understands. By exercising their legislative power to reject the challenged ordinance by a referendum, the electorate is also using that power to return the state of law to the superseded ordinance. While they are technically reviving or re-enacting the previous superseded ordinance, they are also "approving" or "ratifying" it in a non-technical sense.

Legislative power cannot be used to enact, revive, re-enact, approve, or maintain illegal ends - so whether the initiative power is used to "enact" as opposed to "maintain" a new zoning designation, the end result is the same – invalid legislation.

4. The Sixth District's Determination that the Availability of Other Consistent Zoning Choices Proved that Legislature Did Not Intend to Section 65860 to Preempt the Local Electorate's Right to Referendum Is Misconstrues the Legislative Discretion Being Exercised and the Legislature's Restriction on that Discretion.

One of the other main reason supporting the Sixth District's decision and its rejection of *deBottari* is its conclusion that because Section 65860 did not restrict the City's choice of consistent zoning designations, it does not preempt the electorate's ability to reject the City's choice of consistent zoning districts. While at first blush this proposition seems logical, its faults are exposed upon further examination.

The Sixth District's focus on Section 65860's effect on the City's discretion to pick a consistent zoning is misplaced, because that discretion is not analogous to the legislative discretion being exercised by the electorate in the Referendum. The Referendum does not ask the electorate to choose amongst various consistent zoning districts. Moreover, it does not reject the City's choice of consistent zoning in favor of one of the other consistent commercial districts. If it did, it would be an initiative, not a

referendum. It is already well-settled that the local electorate can exercise their reserved legislative power through an initiative to enact another consistent zoning district instead of the one chosen by a local governing body. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596; *Lesher*, 52 Cal. 3d at 541.)

Rather as discussed above, by the Referendum, the electorate is repealing the previously enacted consistent zoning and reviving – i.e. legally re-enacting – invalid inconsistent zoning. Therefore, the proper question is whether Section 65860 preempts the legislative power to affirmatively revive and re-enact inconsistent zoning. The answer is clearly, "Yes." Subsection (a) is an outright ban on zoning that is inconsistent with the general plan. It does not distinguish between how or when the inconsistency arises, how long it has existed or what means are available to correct the inconsistency.

A zoning ordinance that conflicts with the State Planning and Zoning Law is void, (*IT Corp., supra,* 1 Cal.4th at 90), and a void ordinance cannot be given effect (*Lesher, supra,* 52 Cal. 3d at 544). Therefore, the Legislature has preempted both the City's and the electorate's discretion to enact, revive or maintain zoning that is inconsistent with the General Plan. It is invalid and has no effect. "This self-evident proposition is necessary if a governmental entity and its citizens are to know how to govern their affairs. . . . The 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." (*Id.*)

The availability of other consistent zoning options has nothing to do with the antecedent question of whether the referendum can proceed. The legal bar to the referendum lies solely in the constitutional inability of the local electorate to revive an ordinance that no longer complies with state

law. That bar is no lower and no higher whether the city council can enact other consistent zoning ordinances or not.

5. The Sixth District's Decision Contradicts and Undermines the Key Public Policies of Certainty and Consistency that Are Fundamental to California Planning and Zoning Law.

Lastly, even if the existence of other choices could somehow empower the local electorate to revive an ordinance that was void due to its conflict with preemptive state law—or perhaps tempt a court to overlook the problem, as the Sixth District seems to have done—pinning the propriety of a referendum to the availability of other zoning choices would be an undesirable rule.

As discussed above, it is through the required adoption of a general plan, its mandatory elements, and the consistency requirement for all land use decisions from specific plans through to zoning ordinances that the Legislature has chosen to advance is legitimate statewide concern of orderly long range regional planning and the prevention of random, haphazard community growth and development. Moreover, the consistency requirements in the Planning and Zoning Law are what give the general plan the force of law. Without the consistency requirements, general plans would return to their status as merely interesting studies. Therefore, a city or county cannot approve any use for a parcel that is inconsistent with the parcel's zoning, and that zoning must be consistent with any applicable Specific Plan or other land use approval, which all must be consistent with General Plan.

In order to meet this consistency requirement, however, cities, counties, courts and property owners must know what development must be consistent with; the policies of the General Plan and the requirements of the ordinances implementing those policies must be clear and certain.

> A general plan and its specific plans have been described as a "yardstick"; one should be able to "take an individual parcel

> and check it against the plan and then know which uses would be permissible." "[P]ersons 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."

(*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 159-160.) The same is true with respect to zoning. A property owner should be able to determine the permitted uses of its property by simply referring to the Municipal Code provisions for the property's zoning district, without having to conduct a legal analysis as to whether that zoning is consistent with the General Plan.

The Legislature has reinforced this fundamental policy of certainty in a variety of different enactments in the Planning and Zoning Law. For example, statutes of limitations to challenge land use and zoning decisions are measured in days, as opposed to years, to facilitate quick resolution of land use and zoning disputes and "provide certainty for property owners and local governments regarding decisions made pursuant to [the Planning and Zoning Law]." (Gov. Code §65009; see also Gov. Code §66022). See also, e.g., Gov. Code §65864 (developer agreements provide certainty to *inter alia* prevent waste of resources and escalation of housing and development costs to consumer"); Gov. Code §66030 (establishing a mediation process for certain planning and zoning disputes, because "lawsuits can delay development, add uncertainty and cost to the development process, make housing more expensive, and damage California's competitiveness").)

Certainty with respect to zoning decisions is also necessary because of the uniformity requirement inherent in zoning jurisprudence.

> A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare.

> [Citations.] If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.

(*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517–518.)

> If a zoning scheme is like a contract, the uniformity requirement is like an enforcement clause, allowing parties to the contract to challenge burdens unfairly imposed on them or benefits unfairly conferred on others. . . . By creating an ad hoc exception to benefit one parcel in this case—an exception that was not a rezoning or other amendment of the ordinance, not a conditional use permit in conformance with the ordinance, and not a proper variance—the county allowed this "contract" to be broken. . . . [T]he county simply let one parcel and owner off the hook. In light of the key role played by the requirement of uniformity in a zoning scheme, the parcel's neighbors had a right to expect that this would not happen.

(*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1009.)

Without certainty, the policy of uniformity will be undermined. Without clear dictates and regulations to apply, local governments and courts will be unable to make uniform decisions, and as such, will inevitable breach the "contract" necessary for proper administration of a zoning scheme.

Rather than promoting certainty and uniformity, the Sixth District's new rule completely undermines these important policies. The Sixth District created a situational rule, ill-suited to practicalities of real world application that will likely to spawn frequent litigation against local governments. For example, the Sixth District's interpretation of Government Code section 65860 as not invalidating inconsistent zoning created by General Plan amendment and as authorizing the maintenance of

such inconsistent zoning for "a reasonable time" creates many more questions than it answers.

One of the main pressing questions is -- if the newly inconsistent zoning is not invalid, does that mean it is still effective so as to govern development decisions regarding the parcel despite its inconsistency with the General Plan? Can the city or county approve a development plan or building permit for a use that is consistent with the General Plan but non-conforming to the inconsistent zoning? Must the city or county issue a building permit that authorizes construction of buildings the use of which could be inconsistent with the General Plan but is authorized by the inconsistent, but valid, zoning? While one can argue based on this Court's precedents that land use decisions must be consistent with the General Plan, such that the use in the General Plan will prevail over inconsistent zoning (see, e.g. *Orange Citizens, supra*, 2 Cal.5th 141), no clear precedent exists regarding issuance of a building permit when no land use approval is required. Issuance of a building permit is a ministerial act so long as the plans meet the requirements of the Building Code and the Zoning Code, and a city cannot refuse to issue a permit in that situation. But if the intended use of the buildings is approved by the inconsistent, "but valid," zoning, does the city have to issue the building permit when doing so would clearly violate and undermine its general plan? If the property owner relies on the permit and begins construction, is the inconsistent "but valid" use vested such the city can be estopped from claiming that the use violated the zoning code? Or would the rule of *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813 apply to allow the city to revoke the building permit and force compliance with the use required by the general plan, because the zoning was invalid at the time the permit was issued? Obviously different cities or counties, and even different staff members within a city or county could and would reach different conclusions regarding various property's and

approvals. Consequently, instead of decreasing litigation, the Sixth District's rule would greatly increase it leaving the courts to decide these questions – also without any certain guidance.

Another uncertainty created by the Sixth District's decision is how long is a "reasonable time" to leave a parcel with inconsistent, and arguably ineffective, zoning? A month? A few months? A year? Two years? Even though "reasonableness" is usually an objective standard, in the context of development and property rights, shouldn't be a subjective standard? And if so, how can city or county officials proper administer development in a uniform and consistent manner across all similarly situated property owners in their jurisdiction? And who decides what is a reasonable time? The city? The property owner? The courts? And if a property is left without any effective zoning for an "unreasonable" amount of time, and a property owner is deprived all economic use of the property – has a regulatory taking occurred by action of the referendum and no fault of the local governing body?

As such, the Sixth District's interpretation of Government Code section 65860 creates many more questions than it answers, and places cities, counties, property owners and courts in the impossible position of not knowing whether inconsistent zoning created by General Plan amendment is valid and effective for guiding development, zoning and building decisions.

On the other hand, the *deBottari* rule is a bright line rule that cities, counties, property owners, voters and the courts can apply quickly, uniformly and with much more certainty. Once the inconsistency arises, regardless of how or when, the zoning ordinance is invalid and void. A void ordinance cannot govern any land use, zoning or building permit decision. Courts and local governments will have clear guidelines about how to respond to a referendum challenging the adoption of consistent zoning. More importantly, the electorate is on notice that if they challenge the city's

adoption of new consistent zoning by referendum, the referendum is invalid and will be removed from the ballot. Therefore, the electorate will also be on notice that the proper way to change a local government's selection of consistent zoning is by initiative.

Given the need for uniformity, consistency and certainty in administration of planning and zoning laws at both the State and local levels, this Court should reject the appellate court's holding and affirm the black line rule established by *deBottari*, followed by this Court, and applied by the Superior Court to invalidate the Hotel Coalition's Referendum and certify Ordinance 2131 as effective immediately.

V. REMOVING THIS REFERENDUM FROM THE BALLOT WILL NOT DEPRIVE THE PEOPLE OF THEIR RESERVED LEGISLATIVE POWER OVER ZONING.

Before the Sixth District, the Hotel Coalition argued that the holding in *deBottari* improperly infringed on the electorate's right of referendum, because it would eliminate the electorate's ability to reject a city's choice of consistent zoning after amendment of the general plan. In essence, the Hotel Coalition argues that invalidating the Referendum in this case would eliminate the electorate's ability to reject the City's choice of consistent zoning in favor of another consistent zoning. The Hotel Coalition's argument is both legally and factually incorrect.

First, as a matter of law, the electorate's reserved legislative power, whether exercised through initiative or referendum, is subject to constitutional and statutory limitation. (*Lesher, supra,* 52 Cal. 3d at 543, n.10 (citing *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674).) Based on this well settled principle, this Court held that "[e]nforcing compliance with those overriding limitations on the exercise of the power in no way denies the right of [the reserved legislative powers]." (*Id.*) Therefore, enforcing Section 65860's prohibition against inconsistent zoning in no way denies the local electorate its right of referendum or initiative.

Even more importantly, however, the Hotel Coalition's contention is just factually wrong. Even if it cannot reject the City's choice of consistent zoning through a referendum, the local electorate can still exercise its reserved legislative power to reject the City's choice of consistent zoning and force the adoption of its choice of consistent zoning. First, it could have submitted a referendum to the amendment of the general plan. Failing to do this, however, does not foreclose the electorate's ability to bring about its two stated purposes behind the Referendum. To change the Property's use back to industrial, the electorate could amend the Property's general plan land use designation by an initiative. And with respect to compelling adoption of a consistent commercial zoning that does not allow hotels, it could use an initiative to amend the Property's zoning to its choice of consistent zoning.

Courts generally presume voters are aware of existing law. (*California Cannabis Coalition, supra*, 3 Cal. 5th at 934.) Therefore, it is not onerous or unduly burdensome to require that they choose the proper vehicle to exercise their reserved legislative power to legally effect their desired result without violating the Legislature's preemptive restrictions on their legislative power.

To hold otherwise would needlessly and drastically undermine the State's ability to enforce the consistency requirements and property owner's right to valid, certain and clear legal guidelines regarding the development and use of its property.

> Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts. Nor are we persuaded that a zoning ordinance inconsistent with the general plan constitutes little more than a mere technical infirmity. On the contrary, the requirement of consistency is the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law. We are not persuaded that this

principle must now be sacrificed on the altar of an invalid referendum.

(*deBottari, supra,* 171 Cal.App.3d at 1213.)

IV. IF THE COURT DECIDES TO UPHOLD THE SIXTH DISTRICT'S DECISION IN GENERAL, THE RESULT IN THIS CASE SHOULD BE OVERTURNED AS THE SIXTH DISTRICT FAILED TO UPHOLD THE TRIAL COURT'S FACTUAL FINDINGS IN A MANNER THAT INVALIDATES THE REFERENDUM IN THIS CASE, EVEN UNDER THE SIXTH DISTRICT'S NEW GENERAL RULE.

The Sixth District's holding is based almost entirely on the premise that if the voters reject the City Council's choice of consistent zoning by passing the Referendum, the City Council would still be able to exercise its legislative discretion to choose from "any number" of other zoning designations that would be both consistent with the General Plan and valid under the stay provisions of Elections Code section 9241. The Sixth District expressly recognizes just how critical the existence of remaining legislative discretion is to its holding: "We express no opinion on the validity of a referendum challenging an ordinance that chooses the only available zoning that is consistent with the general plan." (*Bushey, supra,* 12 Cal. App.5th at 42, n.5.) By this admission, the Court concedes that the elimination of this discretion would present a completely different factual scenario to which its reasoning could not apply.

However, the Court bases its conclusion that the necessary legislative discretion exists in this matter on two material misstatements of fact. The first is that the stated purpose of the Referendum was only to prevent the development of a hotel on the Subject Property. (*Id.* at 38.) This finding, however, overturns the Superior Court's factual finding that by the Referendum the Hotel Coalition was seeking to have the Property zoned in a manner inconsistent with the General Plan, i.e. industrial. (JA at 485:11-13.) Before the Sixth District, the Hotel Coalition stated that the facts were

undisputed and only *de novo* review applied. The Hotel Coalition did not directly challenge the trial court's factual finding; and therefore, the Sixth District erred in substituting its own factual determination for the trial court's finding. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-713 (appellate court erred in failing to give deference to trial court's findings of fact).)

Moreover, if the Sixth District applied the substantial evidence rule, it violated that rule by ignoring clear undisputed and undisputable evidence in the record establishing that the stated purpose of the Referendum was also to preserve the Subject Property's industrial zoning (JA at 480, 482.) in favor of the unsupported assertions of the Hotel Coalition in its briefing.

Once this critical fact is added to the Sixth District's reasoning, it eliminates the City's ability to adopt any commercial zoning designation, because any zoning designation other than an industrial zoning designation would be essentially the same as the challenged Ordinance and would evade the intended effect of the Referendum in violation of Elections Code section 9241. Thus, the Referendum if successful would legislatively approve for at least one year inconsistent and invalid zoning in violation of Section 65860. Under *Lesher*, and this Court's precedents regarding the scope of the local electorate's reserved legislative powers, the Hotel Coalition cannot use its referendum rights to violate State law in this manner.

The second material misstatement of fact is that "any number" of consistent zoning designations exist in the Morgan Hill Municipal Code ("MHMC") from which the City Council could choose. (*Bushey, supra,* 12 Cal.App.5th at 41.) This finding appears to be based on the Hotel Coalition's (again unsupported) assertion that if the Referendum passed, the City could choose from many of the other 11 commercial zoning designations that do not allow hotels. (See, e.g. Appellant's Opening Brief,

p. 29-30.) While the relevant Municipal Code sections are in the record (JA at 407-431), the Hotel Coalition did not cite to them or present any analysis or legal argument regarding which of the commercial zoning districts are essentially different from the Referendum; and of those essentially different districts, which are appropriate for the Subject Property. Moreover, the Hotel Coalition did not present this analysis to the Superior Court below. To be candid, neither did the City because of the clear undisputable stated purpose of the Referendum to preserve the Subject Property's industrial zoning, and the Hotel Coalition's failure to present any analysis of the City's Zoning Code. The Hotel Coalition, as appellant below, did not meet its burden of proof on this fact, and therefore, the Court should not adopt such a critical factual finding. This alone is grounds for overturning the Sixth District's decision, for without a variety of other consistent zoning ordinances to choose from, the appellate court's reasoning as applied to the facts at bar falls apart. The fact that this critical issue was not evaluated in light of a complete factual record dictates that the Court should not uphold the Sixth District's ruling as applied to this case.

Moreover, even a cursory facial analysis of the City's commercial zoning districts demonstrates the fallacy of the Sixth District's assertion that "any number" of other consistent zoning districts existed for the Property. Rather, at most, the City's alternative "choice" would be limited to one zoning district, and it is questionable based on the plain text of that zoning regulation whether the Subject Property would qualify for that zoning, so as to be an "available" consistent zoning designation.

This conclusion is based on a plain reading of the Municipal Code sections in the record. The sections of the Municipal Code the Hotel Coalition submitted to the Superior Court as the City's commercial zoning districts[5] are located at Joint Appendix at pages 407- 431. Of these 12

[5] The City's General Plan land use designations have a straight forward naming relationship with their conforming zoning

purported commercial zoning districts, six (6) allow hotel uses: CG General Commercial, MHMC section 18.22.030(F), "Motels, hotels and other similar lodging facilities" (*id.* at 410); CL-R Light Commercial Residential, MHMC section 18.25.030(H), "Lodging Facilities" (*id.* at 415); HC Highway Commercial, MHMC section 18.26.020 (*id.* at 417); SRL-B Sports Recreation and Leisure District B, MHMC section 18.27.040(C) "Motels, hotels and other similar lodging facilities" (*id.* at 419); TUD Theme Unit Development, MHMC sections 18.28.020(A), 18.28.030(E) "Motels" and "any other use which the planning commission finds will be similar in nature to" motels (*id.* at 421); and CS Service Commercial District, MHMC section 18.32.030(K), "all C-G general commercial district uses," such as motels, hotels and other similar lodging facilities (*id.* at 428). Therefore, these six districts are clearly not available as they conflict with one of the stated purposes of the Referendum.

Another two (2) – GF Downtown Ground Floor Overlay District and CC-R Central Commercial/Residential District - by their express terms only apply to parcels in downtown Morgan Hill. MHMC sections 18.23.010, 18.24.010. (*Id.* at 411-412). The Subject Property is located within half a mile of the Highway 101/Cochrane Road interchange. (JA, Vol. I at 60.) A quick review of any map shows that the Subject Property is not in downtown Morgan Hill. Therefore, these two districts are not "available consistent zoning districts."

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designations. (JA, Vol. I, 61.) Zoning designations identified as commercial designations apply to sites with a commercial General Plan designation. (*Ibid.*) Some of the zoning designations the Hotel Coalition claims as commercial districts do not conform to this City rule. See, e.g. MHMC Section 18.27 SRL Sports Recreation and Leisure District (JA, Vol. II, 418) and MHMC Section 18.28 TUD Theme Unit Development District (*id.* at 421). Therefore, it is unclear that they are actually available "commercial" zoning districts. In this Petition, the City assumes they are actually available because there is no evidence to the contrary in the record.

Similarly, two (2) other districts, CN Neighborhood Commercial and SRL-A Sports Recreation and Leisure District A are restricted to parcels located next to certain specified land uses – those adjacent to or surrounded by residential districts in the case of Neighborhood Commercial, and those supporting low intensity sports, recreation and leisure uses adjacent to or nearby agricultural or open space districts. (MHMC sections 18.20.010, 18.27.010(A); JA, Vol. II at 407, 419.) The Subject Property is not adjacent to or surrounded by any of these land use designations. It is surrounded by Commercial and Industrial uses. (JA, Vol. I at 60.) Therefore, based on the express text of the zoning regulations, the Subject Property cannot be zoned either Neighborhood Commercial or Sports Recreation and Leisure A. That means there are only two (2) remaining possible "available consistent zoning districts."

Of those two remaining "districts", one (1) – PD Planned Development Overlay District - is not a separate district at all, but an overlay that applied in addition to any type of base zoning district. (MHMC section 18.30.010; JA, Vol. II at 424.) Therefore, it clearly is not a separate available consistent zoning district.

Finally, the last remaining possible available zoning district is CO Administrative Office District. While this district does not specifically appear to allow hotels, it also is not entirely clear that the Subject Property is within the scope of parcels that can be zoned Administrative Office. MHMC section 18.34.010 states that the purpose of this zoning district is "to provide an area where professional, general commercial offices and limited personal services may develop in close relationship with each other outside of other commercial districts." (JA, Vol. II at 429.) A reasonable interpretation of "outside other commercial districts" would be that any parcel zoned Office Administrative cannot be near or adjacent to other

commercial districts, but rather must be separate from those more general commercial zones. As such, it is questionable whether this is an "available" consistent district.

However, assuming for the sake of argument that it is, one available alternative zoning district is a FAR, FAR cry from "any number" of available zoning districts. When the choice of available alternative districts is limited to one, the City Council is not left with any discretion. A choice of one consistent zoning is not a choice.

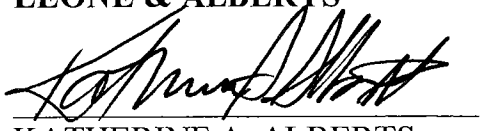
Therefore, correction of the Sixth District's material misstatements of fact eviscerates the supposed remaining legislative discretion that is the key necessary factor supporting the appellate court's holding. Elimination of the City Council's discretion by the Referendum destroys the applicability of the Sixth District's new general rule to this case, places this case in the category of cases that the Sixth District expressly stated it was not deciding and dictates reversal of the appellate court's decision in this case.

CONCLUSION

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

Dated: October 16, 2017

LEONE & ALBERTS



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RULE 8.204(c) CERTIFICATION

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing Opening Brief is proportionately spaced in Times New Roman 13-point type and contains12,003 words as counted by Microsoft word-processing software.

Dated: October 16, 2017

LEONE & ALBERTS

Katherine A. Alberts, Esq.
Attorneys for Plaintiff and
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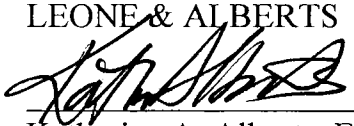
CITY OF MORGAN HILL

STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before the Supreme Court.

Dated: October 16, 2017

LEONE & ALBERTS



Katherine A. Alberts, Esq.
Attorneys for Respondent
CITY OF MORGAN HILL

Re: **City of Morgan Hill v. Shannon Bushey, et al.**
California Supreme Court Case No.:S243042
Court of Appeal Case No.: H043426

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City of Walnut Creek, State of California. I am over the age of 18 years and not a party to the within cause; my business address is 2175 N. California Blvd., Suite 900, Walnut Creek, California.

On October 16, 2017, I served the following documents:

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VIA MAIL

[X] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at

Walnut Creek, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and depositing each envelope(s), with postage thereon fully prepaid, in the mail at Walnut Creek, California.

VIA OVERNIGHT MAIL/COURIER

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service, or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence/documents for overnight mail or overnight courier service, and that it is to be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

VIA FACSIMILE

[ ] By arranging for facsimile transmission from facsimile number 925-974-8601 to the above listed facsimile number(s) prior to 5:00 p.m. I am readily familiar with my firm's business practice of collection and processing of correspondence via facsimile transmission(s) and any such correspondence would be transmitted via facsimile to the designated numbers in the ordinary course of business. The facsimile transmission(s) was reported as complete and without error.

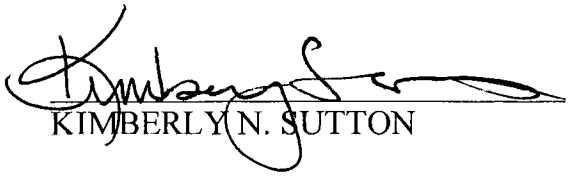
VIA HAND-DELIVERY

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and causing each envelope(s) to be hand-served on that day by D&T SERVICES in the ordinary course of my firm's business practice.

VIA ELECTRONIC SERVICE – California Rules of Court, Rule 8.212(c)(a)

[ ] By electronically filing the document through TrueFiling, per California Rules of Court, Rule 8.212(c)(a), all requirements are satisfied.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 16, 2017, at Walnut Creek, California.



KIMBERLY N. SUTTON