

OCTOBER 19, 2018

LAW ALERT

M David Kroot

Lynn Hutchins

Karen M. Tiedemann

Thomas H. Webber

Dianne Jackson McLean

Michelle D. Brewer

Jennifer K. Bell

Robert C. Mills

Isabel L. Brown

James T. Diamond, Jr.

Margaret F. Jung

Heather J. Gould

William F. DiCamillo

Amy DeVaudreuil

Barbara E. Kautz

Erica Williams Orcharton

Luis A. Rodriguez

Rafael Yaquián

Celia W. Lee

Dolores Bastian Dalton

Joshua J. Mason

Eric S. Phillips

Elizabeth R. Klueck

Jeffrey A. Streiffer

Daniel S. Maroon

Justin D. Bigelow

Nahal Hamidi Adler

Aileen T. Nguyen

San Francisco

415 788-6336

Los Angeles

213 627-6336

San Diego

619 239-6336

Goldfarb & Lipman LLP

POWER TO THE PEOPLE

The California Supreme Court has decided an important case on the relationship between the referendum power and local land use decisions. In a landmark opinion broadly interpreting the people's referendum power, the Supreme Court held that even if a referendum challenging a zoning ordinance amendment creates a temporary inconsistency between a city's zoning ordinance and its general plan, the referendum must be allowed to proceed. The Court held that to hold otherwise would "eviscerate" local electors' right to weigh in via referendum, and that the court's duty is to "jealously guard" the initiative and referendum powers. (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1084, 1078 (*Morgan Hill*).)

1. CASE FACTS

In 2014, Morgan Hill amended its general plan to change the land use designation of a vacant parcel from industrial to commercial to allow the development of a hotel. Thereafter, the City approved a zoning ordinance amendment to conform with the property's general plan designation, and rezoned the parcel from "Light Industrial" to "General Commercial."

In response to the zoning ordinance amendment, the Morgan Hill Hotel Coalition, supported by over 4,000 signatures, petitioned for a referendum challenging the amendment. The City initially placed the referendum on the ballot for a special election, but then changed its mind and sued to remove the referendum from the ballot and certify the zoning ordinance.

Relying on *deBottari v. City Council* (1985) 171 Cal.App.3d 1204 disapproved of by *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th

1068 (*deBottari*), the trial court held in favor of Morgan Hill and ordered that the referendum be removed from the ballot. The Court of Appeal reversed. It expressly disagreed with *deBottari's* holding that referendums are always invalid if they reject a zoning ordinance enacted to bring a property's zoning designation into compliance with the jurisdiction's general plan.

2. THE SUPREME COURT'S HOLDING

The Supreme Court agreed with the Court of Appeal that a referendum can invalidate a zoning ordinance amendment approved by a local jurisdiction to achieve compliance with the general plan, so long as there are other general-plan-compliant zoning designations available that would be consistent with the results of the referendum. The Court held that although state law may preempt the power of referendum and initiative when there is a definite indication of the legislature's intent to do so, there was no such indication here. Instead, the Court held that where a city can still implement one of multiple approaches to achieve consistency between the zoning ordinance and the general plan, the zoning ordinance is best understood as the product of a discretionary policy choice about the proper use of the land.

Section 65860(a) of the Government Code requires a city's zoning ordinances to be consistent with its general plan. The Court relied, however, on section 65860(c), which provides an exception to the consistency rule. Under section 65860(c), following a general plan amendment, a zoning ordinance may temporarily differ from the general plan, so long as the zoning ordinance is amended within a "reasonable time."

Significantly, the Court expressly disapproved of the *deBottari* decision and longstanding land use consistency principles governing the relationship between a city's general plan and its zoning ordinances. In a broad interpretation of the referendum right, the Court held that even if there are no current zoning configurations available consistent with the general plan and referendum, the referendum is still valid if the City can create new zoning designations, or the City has any other means—including altering the general plan—to attain such consistency, all within a "reasonable time."

Section 65860(c) does not define what constitutes a "reasonable time" for a zoning ordinance to be out of compliance with a general plan. Relying, in part, on the legislature's failure to adopt a competing version of section 65860(c), which would have imposed a 90-day time limit, the Court held that determining what constitutes a reasonable time depends upon the context. Here, the Court concluded that a reasonable time includes the time necessary to bring at least one referendum challenge, and to rectify the inconsistency

between the zoning ordinance and the general plan in a manner that complies with the referendum.

3. IMPLICATIONS FOR CITIES

The *Morgan Hill* decision removes any doubt that, in land use matters, California courts will continue to tip the scales in favor of the people's power of initiative and referendum, even when the result could create an inconsistency between zoning and the general plan. Accordingly, if a city has more than one zoning configuration to implement a general plan or any other means of achieving consistency, then courts likely will permit referendums resulting in temporary inconsistent zoning, unless the general plan is so proscriptive that the city has no other means of achieving compliance.

For more information on this case or any of the issues discussed above, please contact Barbara E. Kautz, Dolores Bastian Dalton, Eric S. Phillips, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

To receive Law Alerts by e-mail, please visit:

[Goldfarb & Lipman News and Blog](#)

