The California Supreme Court's Decision In City of Morgan Hill v. Bushey Will Not End City Planning

Overview

In *City of Morgan Hill v. Bushey,* the California Supreme Court granted citizens the right to challenge zoning ordinances by referendum — even though a successful referendum would reject zoning that conformed with an amended general plan and leave inconsistent zoning in place.[1] *Bushey* resolved a tension between honoring the electorate's constitutional referendum power and state land use law requiring zoning be consistent with the general plan.[2] The decision held that the referendum power prevails when a government has some other means to achieve consistency between the zoning and the general plan.[3] This changes the law from previous Court of Appeal cases that held that electors could not reject a zoning ordinance that would resolve the inconsistency between the general plan and zoning.[4] Contrary to criticism that *Bushey* gives the electorate too much power to stymie city planning with repeated referendums, this article argues that *Bushey* correctly favors the electorate's referendum power.

Analysis

***Bushey* allows electors to challenge zoning amendments by referendum**

Under state law, a city or county must retain consistency between its general plan and zoning ordinances.[5] If a city amends its general plan without concurrently adjusting its zoning ordinances, it must adjust the zoning "within a reasonable time" to maintain consistency with the amended general plan.[6] State law thus anticipates a potential time gap between general plan amendments and concurrent zoning adjustments.

In November 2014, the City of Morgan Hill amended its general plan, changing the designation of a vacant parcel from "Industrial" to "Commercial." River Park

Hospitality sought to develop a hotel there, and needed both general plan and zoning ordinance adjustments because hotels were not permitted on parcels classified for industrial land use or zoning. After the general plan's amendment, the parcel's zoning remained classified as "ML-light industrial," creating an inconsistency. The city attempted to resolve this by adopting Ordinance no. 2131 in April 2015; the ordinance amended the parcel's zoning to "CG-general commercial," creating compliance with the general plan while also permitting hotel development.

On May 1, 2015, the Morgan Hill Hotel Coalition filed a referendum petition challenging the ordinance, which prevented the zoning ordinance from going into effect.[7] The city terminated the petition, arguing that a successful referendum would result in inconsistent zoning. The Hotel Coalition then sued to force the city to either hold a referendum or repeal the ordinance.[8] The city acquiesced and placed the referendum on the ballot, only to sue seeking to remove it. These events resulted in the *Bushey* action.

In the trial court, the Hotel Coalition argued that a successful referendum would only force the city to choose any other zoning district that denied hotel use while remaining consistent with the amended general plan. It contended that several other commercial zoning districts existed, and that the city could not immunize itself from referenda by selecting one of many choices that complied with the general plan. The city argued that a successful referendum would illegally enact inconsistent zoning and violate Government Code section 65860(a).

The trial court, relying on the Court of Appeal decision in *deBottari v. City of Norco*, found that "light industrial" zoning was invalid as a matter of law, and ordered the city to remove the referendum. The Court of Appeal reversed, holding that a referendum must be allowed when there other zoning designations exist that also comply with the general plan. Subsequently, the city petitioned for a rehearing, conceding that while there was one other zoning designation that it could possibly adopt under a successful referendum, the "other zoning designations" described by the Court of Appeal did not exist.

In the California Supreme Court, the city contended that no zoning designation existed that complied with the general plan while also prohibiting hotel use. The

state high court ruled that the referendum power against zoning ordinances must be protected so long as there existed "*some* other avenue for the City to change the zoning ordinance to comply with the general plan within a reasonable time."[9] Concurring justices suggested that the referendum should proceed even if the city needed to amend the general plan to achieve consistency.[10] This decision established that the referendum power prevails unless a city demonstrates that a successful referendum makes it impossible to achieve consistency between a zoning ordinance and the general plan.

After *Bushey,* legislative bodies have been indifferent to referendum results

After *Bushey,* the city rescinded the ordinance because River Park Hospitality no longer wished to develop a hotel on the parcel.[11] The city subsequently amended the general plan to "Commercial-Industrial." Under that designation and zoning, hotel use was not permitted, negating the need for a referendum. But as the city continues to push for hotel development, similar conflicts are likely to reemerge.

Indeed, a nearly-similar result has played out over the past year in Morgan Hill. On February 6, 2019, the city adopted ordinance no. 2295, amending the master development plan for Madrone Village Shopping Center to allow for hotel use. MMP Properties, Inc. proposed building two four-story hotels in the center — which happened to be across the street from the parcel litigated in *Bushey*. The Hotel Coalition sponsored another petition for referendum. The petition had enough signatures to qualify and was designated as Measure A on the March 3, 2020 election ballot. Sixty-seven percent of the voters rejected Measure A, turning down another attempt by the city to develop additional hotels.

***Bushey* may create serial rezoning battles, but only time will tell**

The situation in Morgan Hill exemplifies a concern expressed in *Bushey*: what could prevent serial rezoning battles? At oral argument, Justice Kruger wondered if Californians would see multiple referenda over a city's repeated attempts to deliver general plan consistency. She wondered what could result if voters serially rejected a city's attempts to adopt consistent zoning.

Serial rezoning battles may already be brewing in some locales. Morgan Hill's city

council has demonstrated a continued preference to rezone land for hotel development, despite repealing the ordinance rather than permitting the electorate to vote and losing a subsequent referendum challenge by a wide margin.[12] Only time will tell whether Morgan Hill will make a third attempt at rezoning land for hotel development.

Another potential battle is brewing in San Benito County, where the local supervisors adopted an ordinance rezoning four separate areas along Highway 101 for commercial and residential development. In an election on March 3, 2020 sixty percent of the voters rejected the zoning measure by referendum.[13] The county then adopted another zoning ordinance to permit commercial development at one of the four areas.[14] San Benito County's ordinance, however, may run afoul of state law. The referendum's proponents have sued, claiming that the two ordinances are similar enough to violate the Elections Code, which bars a legislative body from reenacting a referendum-repealed ordinance for at least one year.[15] No petition for referendum has been filed yet, and a temporary injunction is in place while the statewide quarantine makes signature collection impossible.[16] But if the ordinance survives the legal challenge, the ingredients for a serial rezoning battle appear to be in place.

Yet Justice Kruger's concern may be unwarranted — serial rezoning battles are unlikely because elections have consequences. The continued rezoning efforts described above show how the referendum power can drive a local government's attempts to adopt consistent zoning. But in the year since *Bushey*, these are the only such examples. Would a legislative body continue to rezone land in a way that was unacceptable to a majority of voters? Perhaps, but it seems foolhardy. Wouldn't other candidates challenge elected representatives at the next election if they continued to ignore the popular mandate? The referendum, as an element of the electorate's democratic powers, combines with the electorate's most basic power: to vote in public officials who will advance preferred policies.

Serial rezoning battles-by-referendum also require a group of citizens devoted to stop a legislative act. Petitioning for multiple referenda requires an extraordinary amount of resources.[17] Often, proponents must pay signature gatherers or rely on a large group of volunteers to collect signatures, and those signature drives can be

very expensive. Fatigue may also prevent citizens from repeatedly organizing to stop legislation.

These rezoning conflicts may also create other legal headaches. *Bushey* left unresolved the issue of whether serial referenda may violate the reasonable time period requirement mandating speedy compliance between zoning ordinances and a general plan. The *Bushey* court dodged this question, deciding that the time delay required to accommodate a single referendum was reasonable to cure the inconsistency between zoning and the general plan. But multiple referenda may not satisfy the reasonable time period requirement, because they necessarily take more time to resolve.

Bushey reduces the need for multiple referenda

Rather than limiting the analysis to whether other zoning designations exist that allow cities to cure a referendum-generated inconsistency, *Bushey* forces cities to analyze whether any other avenue exists for curing the inconsistency while holding a referendum. The concurring opinion in *Bushey* suggested that the cities can simply amend the general plan to achieve consistency. Although the general plan has been referred to in the past as the "constitution" for land use, it appears that legislative amendments to that constitution may now conform the general plan to zoning — to accommodate the referendum power.[18] *Bushey* actually reduces the likelihood of a serial rezoning battle between citizens and a legislative body because the legislative body could always amend its general plan back to its prior designation.[19]

Alternatively, legislative bodies can avoid these circumstances by simply amending both the general plan and zoning at the same time. Government Code section 65862 already expresses a strong preference for doing so, and *Bushey* now provides another incentive.

Conclusion

Bushey expanded the electorate's right to challenge zoning ordinance changes by referendum. This was a much-needed shift, especially considering the power gap that developers and large corporations have vis-à-vis ordinary citizens. In 1911, Californians reserved the referendum power to ensure that our legislative bodies did

not favor the few at the expense of the majority. Even during a referendum, developers and large corporations tend to have a large financial advantage over a group of citizens. And cities who see their actions challenged via referendum are able to draft ballot questions in a manner that favors the law,[20] and may also distribute information fliers discussing the referendum's consequences.[21] The California Supreme Court's decision in *Bushey* upholding the referendum power is a step in the direction of addressing these electoral inequities.

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[1] *City of Morgan Hill v. Bushey, et al*. (2018).

[2] Gov. Code § 65860(a) requires that "county or city zoning ordinances shall be consistent with the general plan…" General plans are akin to a "constitution" of land use planning; they often offer broad descriptions of how land may be used (such as "residential", "commercial", and "agricultural." Zoning is more granular and may permit or forbid specific uses within the larger category such as car dealership, restaurants, or grocery stores, depending upon how the city or county plans development.

[3] *Bushey*, *supra* note 1, at 1076.

[4] *deBottari v. City of Norco* (1985); *see also City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) (adopting *deBottari*'s reasoning). Another Court of Appeal panel in the Sixth District subsequently disagreed with *deBottari* in *Bushey.* The First District followed *Bushey* in *Save Lafayette v. Lafayette* (2018).

[5] Gov. Code § 65860(a)

[6] Gov. Code § 65860(c).

[7] It was too late to challenge the general plan amendment as more than thirty days

had passed: Elections Code § 9237 requires that a petition for referendum must be filed within thirty days of the adoption of the ordinance it seeks to challenge.

[8] The Hotel Coalition's action became moot after the trial court decided *Bushey*, and the parties settled the matter.

[9] *Bushey*, *supra* note 1, at 1090 (emphasis added).

[10] *Id.* at 1091–92 (conc. opn. of Chin, J., joined by Cantil-Sakauye, C.J.).

[11] Shortly after the California Supreme Court's decision, River Park Hospitality listed the parcel for sale.

[12] Morgan Hill claims hotels are needed to promote tourism and increase revenue to the general fund via transient occupancy tax.

[13] Ordinance no. 991 was listed as Measure A on the March 3, 2020, ballot.

[14] Chalhoub, *Supervisors Approve Commercial Rezoning*, SanBenito.com (Apr. 7, 2020) (after the referendum's success, the Board of Supervisors voted 4–1 to approve C–1 zoning for the "Betabel" site next to Highway 101).

[15] Elections Code § 9241 provides: "[i]f the legislative body . . . 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 be enacted by the legislative body for a period of one year after the date of its . . . disapproval by the voters"; *see also Rossi v. Brown* (1995) at 697.

[16] Chalhoub, *Judge Grants Temporary Suspension of Rezoning*, SanBenito.com (May 20, 2020).

[17] For example, a referendum petition must be adopted within thirty days of the legislative body adopting the legislation, and requires signatures from 10% of registered voters in cities with more than 1,000 people. Elections Code § 9237.

[18] This change implicitly reverses California Supreme Court precedent. Previously, the California Supreme Court invalidated an initiative because it amended the zoning and created an inconsistency with the general plan and violated Gov. Code §

65860(a). *Lesher Communications, Inc. v. City of Walnut Creek* (1990) at 545. The court noted that claimed that "[t]he Planning and Zoning Law does not contemplate changing general plans to conform to zoning ordinances. The tail does not wag the dog." *Id.* at 541.

[19] If *Bushey* existed at the time, the City of Irvine in *Irvine Citizens Against Overdevelopment* (1994)would have been forced to amend its general plan back to a previous designation. There existed no zoning classifications that would have been consistent with development needs and been acceptable to the referendum's proponents, which opposed development.

[20] For Measure A, Morgan Hill's City Council drafted a ballot question that stated that the rezoning would "generate new city revenue to pay for city services such as public safety, street repair, and other infrastructure." The trial court denied a petition for writ of mandamus, citing *Becerra v. Superior Court* (2017). *Becerra* held the drafter of the ballot question exercises judgment and discretion in discerning the primary purposes of the ordinance at issue. *Id.* at 975. The Court of Appeal denied the writ of mandate in an unpublished 2 to 1 decision.

[21] Cities rely on *Vargas v. City of Salinas* (2009) to make their views of a proposed measure known to residents; the courts do not equate using public resources to mount a campaign. For example, Morgan Hill sent a two-page flier discussing Measure A to every household that receives a water bill.