Case No. 218400

IN THE SUPREME COURT OF CALIFORNIA

In re TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA,
Petitioner,

v.

HOTELS.COM, L.P., et al.,
Respondents.

After an Opinion by the Court of Appeal, Second Appellate District, Division Two, Case No. B243800

On Appeal from the Superior Court for the County of Los Angeles
The Hon. Elihu M. Berle, Judge of the Superior Court, Department 323
Los Angeles County Superior Court Case No. JCCP 4472

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In affirming judgment, the Court of Appeal properly rejected Petitioner City of San Diego's ("San Diego" or "City") attempt to go outside the bounds of its tax ordinance to impose Transient Occupancy Tax ("TOT") liability on the Respondent Online Travel Companies ("OTCs"). This Court should do the same.[1]

As this Court has made clear, a taxing authority may not impose tax obligations and liability beyond a tax statute's express terms, and any ambiguity in a tax statute must be construed strongly against the taxing authority and in favor of the citizen. These fundamental rules are essential because a government's exercise of its taxing power imposes burdens on citizens, takes their property, and has great potential for abuse. These same considerations led California's voters to enact Proposition 218, which amended the California Constitution to further ensure that general taxes – specifically including "hotel" occupancy taxes – cannot be broadened without voter approval. (Cal. Const., art. XIII C, § 2.) These rules doom San Diego's case.

This appeal turns on the express terms of San Diego's TOT Ordinance ("Ordinance"), which imposes tax on "the privilege of Occupancy." The Ordinance focuses entirely on "Occupancy" and the two parties to its transfer – the "Transient" who obtains Occupancy of the room, and the hotel "Operator" who provides it. The Ordinance imposes TOT obligations and liability only on those two persons, and taxes only the

[1] Respondent OTCs are Hotels.com, L.P., priceline.com Incorporated (n/k/a The Priceline Group Inc.), Travelweb LLC, Expedia, Inc., Hotwire, Inc., Hotels.com G.P., LLC, Travelocity.com, LP, Site59.com, LLC, Orbitz, LLC, Trip Network, Inc. (d/b/a/ Cheaptickets.com), and Internetwork Publishing Corp. (d/b/a/ Lodging.com).

"Rent" – the amount for the Transient's "Occupancy" – "charged *by the Operator*."[2]

These express terms are dispositive. The City has conceded the OTCs are neither Transients nor Operators. Rather, the OTCs are intermediaries between travelers and airlines, hotels and rental car companies. The OTCs do not operate airlines, hotels, or rental car companies; instead, they operate websites on which they provide comparative information about such travel providers, and help customers request and pay for reservations from those providers. Because they are neither Transients nor Operators, the OTCs have no tax obligations or liability under the Ordinance.

Until this case, San Diego asserted TOT obligations and liability against only hotel Operators on the amount they charge for Occupancy, and not OTCs or other travel intermediaries on any additional amounts they charge a customer for their own services. However, in 2006, the City filed a complaint, and then audited and assessed the OTCs, alleging that, in addition to the actual hotel Operators, each OTC also is the "Operator" of every hotel in the City from which any of its customers obtain room reservations, and that the additional amounts the OTC charges a customer for its services also are taxable "Rent charged by the Operator."

The Superior Court granted the OTCs' petitions for a writ of mandamus and set aside the assessments. The court ruled (i) the OTCs are not Transients or Operators, and therefore have no TOT obligations or liability; and (ii) the OTCs' added charges to customers for their services

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[2] The Ordinance is codified at Chapter 3, Article 5 of the San Diego Municipal Code: §§ 35.0101-35.0138. All emphasis in quotations is added, and internal citations omitted, unless otherwise indicated.

are not taxable "Rent charged by the Operator."

San Diego reversed course on appeal, conceding the OTCs are *not* hotel "Operators" under the Ordinance, and that *the hotel* is the Operator in an OTC "merchant model" transaction.[3] As the Court of Appeal recognized, the City's concession is fatal to its case. Because the OTCs are neither Transients nor hotel Operators, there simply is no basis for imposing TOT liability on the OTCs. Therefore, the court correctly affirmed judgment for the OTCs.

Judgment also was correctly affirmed because, unlike the amount "charged by the Operator" for the Transient's "Occupancy," the additional amounts an OTC charges a customer for its services are not taxable "Rent charged by the Operator."

Before this Court, the City again has conceded:

- The Ordinance's express terms impose obligations and liability only on "Transients" and "Operators";
- The OTCs are neither "Transients" nor "Operators";
- Only the Hotel is the "Operator" in an OTC merchant model transaction;
- The only amount subject to tax is "the rent charged by the hotel for transferring the privilege of Occupancy" to the Transient (Op. Br. 2).

One need go no further. These concessions compel affirmance.

Having conceded the dispositive issues, the rest of the City's

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[3] While the OTCs use several different business models, the only one at issue is the "merchant model." In "merchant model" transactions, "[t]he OTCs handle all financial transaction related to the hotel reservations, and become the merchant of record." (*TOT Cases* (2014) 225 Cal.App.4th 56, 61 (hereafter *TOT Cases*).)

Opening Brief is an attempt to end-run the Ordinance's express limiting terms. The City primarily argues that the Ordinance must be construed to effectuate an implied intent to impose tax on the total amount charged to a Transient in a reservation transaction, regardless of by whom or for what. But this supposed *implied* intent directly conflicts with the intent evidenced by the Ordinance's *express* terms, which impose tax only on the amount "charged *by the Operator*" to the Transient for "Occupancy" of a room, and not amounts charged to a Transient by *anyone else* for *anything else*. None of the provisions the City cites purports to alter that express limitation, repeated six times in the Ordinance.

San Diego then contends the additional amounts the OTC charges a customer for its services should be treated *as if* they are "Rent charged by the Operator." But again, doing so is contrary to the Ordinance's express terms.

First, San Diego asserts that under the OTCs' contracts with hotels, the hotel "dictate[s]" the entire amount charged in the room reservation transaction, and, therefore, the additional amounts the OTC charges a customer for its services are also taxable "Rent charged by the Operator." But that assertion is directly contrary to the very contractual provisions the City cites, as well as the hearing officer's factual findings, which make clear the OTC, not the hotel, "sets," charges, and receives those additional amounts, and does so on its own behalf. Those amounts therefore are not "charged by the Operator."

Second, San Diego asserts that the additional amounts the OTC charges for its services are attributable to the hotel, and, thus, are taxable "Rent charged by the Operator," because the OTC functions as the hotel's agent. But the hearing officer found, and the City concedes, at most, an

OTC does so only to collect the rent the hotel is charging for Occupancy, along with tax on that rent, and remit those amounts to the hotel. Thus, only those amounts can be attributed to the hotel Operator, not the additional amounts the OTC charges a customer on its own behalf.

San Diego is left repeatedly asserting that the additional amounts the OTC charges for its services "should" be subject to tax. But, again, a taxing authority may not impose tax obligations and liability beyond a statute's express terms. If the City desires to impose TOT obligations and liability on persons *other than* hotel Operators, or impose tax on amounts *not* "charged by the Operator," it must convince its electorate to enact amendments that explicitly do so. Under Proposition 218, it is the voters' province to weigh the economic and policy interests implicated by so broadening the TOT. If San Diego could instead expand its tax by administrative fiat, then taxing authorities statewide could do so with every tax statute, and against every taxpayer, business or individual.

Judgment for the OTCs should be affirmed.

SAN DIEGO'S TRANSIENT OCCUPANCY TAX ORDINANCE

There can be no dispute about San Diego's "Transient Occupancy Tax" Ordinance's express terms. Its "purpose" is to "impose[] a tax on Transients." (§ 35.0101(a).) As its title reveals, it achieves this purpose by imposing a tax on "Occupancy."

"Occupancy" is defined as "the *use or possession*, or the right to the use or possession, *of any room … in any Hotel* …." (§ 35.0102.) A "Hotel" is "any *structure* … occupied, or intended or *designed for Occupancy, by Transients* for dwelling, lodging, or sleeping purposes, and is held out as such to the public." *Ibid.* Thus, "[f]or the privilege of *Occupancy* in any *Hotel* located in The City of San Diego, each *Transient*

is subject to and shall pay a tax in the amount of six percent (6%) of the *Rent charged by the Operator*." (§ 35.0103.)

The Ordinance therefore focuses exclusively on the two parties to the exercise of that privilege – the "*Transient*" who obtains occupancy of the hotel room, and the hotel "*Operator*" who provides it. The City asserts the Ordinance is "laser-focused" on the "Transient" (Op. Br. 3), but the Ordinance refers to the hotel "Operator" *eighty-five* times.

A "Transient" is "any Person who *exercises Occupancy*, or is *entitled to Occupancy*, by reason of concession, permit, right of access, license, or other agreement for a period of less than one (1) month." (§ 35.0102.) An "Operator" is the one who owns or possesses and runs a Hotel that provides "Occupancy" of rooms to Transients:

> the Person who is the *proprietor* of the *Hotel*, ... whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other capacity. "Operator" includes a *managing agent* ... of any type or character, other than an employee without management responsibility.

Ibid.

The Ordinance provisions stating the amount subject to tax further reflect its exclusive focus on "Occupancy" and the two parties to its transfer – the "Transient" and hotel "Operator." Tax is imposed only on "the *Rent charged by the Operator*." (§ 35.0103.)

The City Council amended the Ordinance four times to increase the tax, and each time reaffirmed that tax is imposed only on "the Rent charged by the Operator." (§§ 35.0104, 35.0105, 35.0106, 35.0108; see § 35.0107.)

"Rent" is defined as:

> the total consideration *charged to a Transient* as shown on the guest receipt *for the Occupancy of a room*, ..., in a Hotel. ... "Rent" *includes charges for* utility and sewer hookups, equipment ..., and *in-room services* .... "Rent"

> includes all receipts, cash, credits, property, and services of any kind or nature without any deduction therefrom.

(§ 35.0102.)

The Ordinance imposes tax obligations and liability only on the "Transient" and "Operator." The tax is a "debt owed by each Transient" (§ 35.0110(a)); the "Transient shall pay [the] tax imposed ... to the Operator of the Hotel" (§ 35.0110(b)); and (iii) if the Transient does not do so, the City "may require that the tax be paid directly to the City Treasurer" (§ 35.0110(e)).

All remaining obligations and liability are imposed *solely* on the hotel "Operator." Each "Operator" "shall collect" and "remit" the tax, or cause the tax to be collected and remitted. (§§ 35.0112, .0114(a), .0124(a), (b).) Each "Operator" "renting occupancy to transients" must "register" with the City, obtain a "Transient Occupancy Registration Certificate," and post it "on the [Hotel] premises." (§ 35.0113(a).) The "Operator" must (i) "maintain its financial and accounting records"; (ii) "account separately for ... taxable and nontaxable Rents and for taxes collected"; (iii) account for "[t]he costs of additional goods and services, which are not Rent" (§ 35.0112(f)-(h)); and (iv) use the same basis for accounting for "keeping books and records" that it uses for "reporting and remitting" (§ 35.0114(i)).

The Ordinance's administrative enforcement provisions also focus *solely* on the hotel "Operator." The Operator must "keep and preserve" all "business records as may be necessary to determine the amount of tax for which the *[O]perator* is liable for collection and payment to the City." (§ 35.0121.) The City Treasurer may "inspect" the "Operator's" "business records" and "apply auditing procedures necessary to determine the amount of tax due to the City." (*Ibid.*) If an "[O]perator" "fail[s] or refuse[s] to

collect" or "remit" the tax, the Treasurer "shall ... *assess* the tax and penalties ... *against the [O]perator.*" (§ 35.0117(a), (c).) An "Operator" may request a hearing to challenge the assessment, and must be given notice of the final "determination and the amount of such tax and penalties" imposed. (§ 35.0118(a)-(e).)

STATEMENT OF THE CASE

A. The San Diego Action Is Part Of A Coordinated Proceeding.

In December 2004, the City of Los Angeles filed an action in Los Angeles Superior Court alleging that, under its TOT ordinance, each OTC is the "Operator" of every hotel from which any of its customers obtains a reservation using the "merchant model," and as the Operator, is liable for TOT on the added amounts it charges a customer. (2JA10:407.) Los Angeles alleged the same claims on behalf of a purported class of all California cities with a TOT ordinance imposing tax liability on hotel "operators," and tax on the "rent charged by the operator." (*Ibid.*)

San Diego, a putative class member represented by the same outside counsel, then filed its own complaint, also alleging that, under its substantively identical ordinance, the OTCs are hotel "Operators" liable for TOT and their additional charges are taxable "rent charged by the Operator." (2JA10:407.) Because the two cases share common questions of fact and law, they were coordinated through the Judicial Council and assigned to the Hon. Carolyn B. Kuhl in Los Angeles Superior Court. (*Ibid.*) The court sustained the OTCs' demurrers, ruling both cities must exhaust administrative procedures under their ordinances. (*Ibid.*)

B. The Anaheim Action: The Court Of Appeal Affirmed Judgment For The OTCs.

Following dismissal, the same outside counsel that represents San

Diego and Los Angeles decided to use a different putative class member, the City of Anaheim, as the "test case" for their theory that the OTCs could be held liable for TOT as hotel "Operators." (2JA10:407.) Thus, Anaheim was the first city to audit and assess the OTCs as purported "Operators" under its substantively identical TOT ordinance. (*In re Transient Occupancy Tax ("TOT") Cases* (Anaheim), Case No. B230457 (Nov. 1. 2012) (hereafter *Anaheim* Opn.) at p. 4 (unpub.).)

A hearing officer selected by Anaheim upheld the assessments. The OTCs petitioned for writs of administrative mandamus. (*Anaheim* Opn. at p. 4.) Those actions were added-on to this coordinated proceeding, and transferred to Judge Kuhl. (*Ibid.*)

Judge Kuhl, accepting the hearing officer's findings of fact, granted the OTCs' petition and set aside the assessments, ruling (i) the OTCs are not hotel "operators"; and (ii) the added amounts charged and retained by the OTCs for their services are not taxable rent "charged by the operator." (*Anaheim* Opn. at pp. 5-6.)

The Court of Appeal affirmed on both grounds: "Under the plain meaning of the ordinance, the *OTCs cannot be considered to be operators* of the hotels for which they provide room reservations .... Therefore the *service fees and markups* that they charge to transients are *not 'charged by an operator.'*" (*Anaheim* Opn. at p. 10.) On January 23, 2013, this Court denied Anaheim's petition for review.[4]

C. The San Diego Administrative Action.

In the meantime, San Diego audited and assessed the OTCs, again

[4] The same Court of Appeal panel affirmed judgment against the City of Santa Monica, which sought to impose TOT liability on OTCs under its ordinance. (*TOT Cases* (Santa Monica), Case No. B236166 (Nov. 1, 2012).) This Court denied Santa Monica's petition for review on January 23, 2013.

asserting that each OTC is a hotel "Operator," and that an OTC's additional amounts are taxable "Rent charged by the Operator." (2JA10:412; 10AR, T.39, p. 236.) A hearing officer selected by San Diego upheld assessments totaling more than $21 million.

The hearing officer made the following findings of fact: The OTCs use "the internet to advertise hotels and complete transactions between customers and hotels for reserving rooms." (1JA4:198.) The OTCs "contract with hotels" for the right to advertise room reservations, and "handle all financial transactions related to the hotels reservations, and ... become the 'merchant of record.'" (1JA4:199.) The hotel sets and charges a "wholesale price" for the room; and the OTC sets the "mark-up" or "margin" that is added to that price before the customer is charged for the room, as well as an additional fee "for the services rendered by the OTCs to their customers." (1JA4:199, 200.) After the customer "appear[s] at the hotel[] and check[s] in," the hotel "send[s] the OTC[] a bill for (1) the wholesale price[] of the room[], and (2) the actual TOT required to be paid by the hotels for those rooms based on the wholesale price charged to the OTCs." (1JA4:201.) The OTC then forwards the billed amount to the hotel, which remits the TOT to the City. (*Ibid.*)

Despite factual findings that make clear the OTCs do not possess or control the premises of any hotel, the hearing officer concluded (a) each OTC is somehow the "Operator" of every hotel from which any customers book any reservations using the OTC's merchant model; and (b) the additional amounts the OTC charges for its services are taxable "rent charged by the operator." (1JA4:208-10, 217.)

D. <u>The Superior Court Set Aside San Diego's Assessments</u>.

The OTCs petitioned for writs of administrative mandamus.

(6JA19:1201.) San Diego, in its pleadings and briefing to the Superior Court, continued to assert that the OTCs are hotel "operators," and that the OTCs' additional amounts are "Rent charged by the Operator." (2JA9:372, 381.) The Superior Court, the Hon. Elihu M. Berle now presiding, granted the OTCs' petitions, denied San Diego's cross-petitions, and issued a writ vacating the hearing officer's decision and setting aside the assessments. (8JA26:1702.)

The court explained that the Ordinance's express terms impose tax liability and obligations only on "Transients" and hotel "Operators," and tax only "the '*rent charged by the operator*' to the Transient for the privilege of occupancy 'in any hotel'" – a limitation "repeated six times." (6JA19:1199, 1210.) "Operator" is limited to the "proprietor" or "managing agent" of a hotel. (6JA19:1210.) By their plain meaning, "operator" and "proprietor" "have in common the concept of a person or entity that controls and runs ... a hotel." (6JA19:1213, citing dictionaries.) The court, based on the hearing officer's "findings of fact," determined the OTCs do not have "the right to run the business of the hotel," and, thus, are not hotel "proprietors." (6JA19:1199-220.)[5]

The court held that "managing agent" refers only to the "type of agency relationship" where the agent has the "discretion" to make "decisions that will ultimately determine corporate policy." (6JA19:1218-220, citing cases.) The OTCs are not "managing agents," as none has "the right to manage any hotel or to exercise operational authority over a hotel, much less set corporate policy for any hotel." (6JA19:1220.) "Instead,

[5] The OTCs did not challenge, and the Superior Court accepted, the hearing officer's factual findings, but not any conclusions of law mislabeled as factual findings. (6JA19:1203.)

they run their own websites and perform online sales functions for the hotels, which is a very limited function far away from corporate policy decision making." (6JA19:1221.)

Finally, the court concluded the additional amounts the OTC charges for its services are not subject to tax:

> The phrase "*charged by the operator*" ... *limits the tax base* to those amounts that are charged by the operator for the privilege of occupancy. Since ... the *OTCs are not operators of the hotels*, the amount that the OTCs charge for their reservation services [is] *not part of the rent.*

(6JA19:1222.)

E. The San Diego Appeal: The Court Of Appeal Affirmed Judgment For The OTCs.

As one of the coordinated cases, San Diego's appeal was assigned to the same panel as *Anaheim*. Although the City sued the OTCs as alleged "Operators," audited and assessed them as "Operators," and then defended those assessments on that basis before the hearing officer and Superior Court, the City reversed course on appeal. The City finally conceded the OTCs are not hotel "Operators," but asserted the OTCs "need not be" Operators to be liable under the Ordinance. (App. Br. 39.)

Instead, the City argued the OTCs should be held liable for TOT on the entire amount charged to a customer in a reservation transaction because the OTC sets the additional amounts it charges for its services, and directly charges the customer's credit card. (App. Br. 40.) The Court of Appeal rejected the City's attempt to impose TOT obligations and liability contrary to the Ordinance's express terms.

The court explained that San Diego's Ordinance, "[l]ike the Anaheim ordinance," imposes tax only on "the rent charged by the hotel operator," and "makes ... clear that the tax obligations are imposed only on

transients and hotel operators." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 64.) The Ordinance simply includes no provision "imposing any tax liability on any entity other than the hotel operator or the transient." (*Ibid.*) Presented with the same facts, the court reaffirmed and adopted the "logic" of its *Anaheim* decision, and held, "under the plain meaning" of the Ordinance's express terms, the "OTCs cannot be considered to be operators – proprietors or managing agents – of the hotels for which they provide rooms reservations." (*Id.* at p. 65.)

Adhering to the Ordinance's "Rent charged by the Operator" limitation, the court also held: "[T]he words of the ordinance do not reveal an intent to impose a tax on the service fees and markups charged by the OTCs." (*TOT Cases*, *supra*, 225 Cal.App.4th at pp. 63-64.) A court cannot "enlarge the scope of the tax to embrace matters not included in the specific language of the statute," and thus "the OTCs' service[] charges and markups are not within the scope of the City's ordinance." (*Id.* at p. 65.)

Therefore, the court concluded the City's concessions "that OTCs are not transients, and that OTCs are not hotel operators" were fatal to its case; in light of them, "there is simply no basis for imposition of TOT liability on the OTC[s]." (*TOT Cases*, *supra*, 225 Cal.App.4th at pp. 72-73.)[6]

STATEMENT OF FACTS

The facts, as found by the hearing officer, and summarized by the Court of Appeal, are not in dispute:

The OTCs "publish comparative information about airlines, hotels,

[6] During San Diego's appeal, Judge Berle issued judgments for the OTCs in two other actions in this coordinated proceeding, rejecting San Francisco and Los Angeles' attempts to impose TOT liability on the OTCs. (Resp. Br. 1.) Appeals in those cases are stayed pending this Court's decision here.

and rental car companies on their websites[, and] allow consumers to book reservations with these different travel providers." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 60.) Pursuant to their contracts with hotels, OTCs assist a customer in obtaining, and prepaying for, a reservation from a hotel. (*Id.* at p. 61.)

Under those contracts, the OTC does not (i) own, possess, operate, or manage hotels; (ii) buy, resell, or lease hotel rooms; (iii) maintain an inventory or block of rooms; (iv) possess or obtain the right to occupy any rooms; or (v) have a right or ability to take and transfer possession of any rooms to anyone. (See p. 10, *ante*.)

When a customer books a reservation through an OTC's merchant model, the total amount the OTC charges a customer's credit card is typically displayed in two components. The first, referred to as the "Room Rate," is the Rent the hotel is charging for providing Occupancy of a room to the Transient (the "wholesale" price), plus an amount the OTC sets and charges as compensation for its services (the "margin," together with the Room Rate, the "retail" price). (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 61.) The second component combines two items: the "Tax Recovery Charge," which is based on the "wholesale price" charged by the hotel, and a service "fee" charged by the OTC for its services. (*Ibid.*) The "wholesale price" is then "charged by the hotel to the OTCs," along with the TOT owed by the hotel on that amount, and the hotel remits that tax to the City. (*Ibid.*)

STANDARD OF REVIEW

Because neither San Diego nor the OTCs challenged "the *factual* bases for the administrative decision[]" before the Superior Court, the parties "waived or abandoned" the right to do so, and this Court must

"accept that the administrative [factual] findings were supported by the evidence." (*Environmental Protection Information Center v. Cal. Dept. Forest and Fire Protection* (2008) 44 Cal.4th 459, 479.) However, like the courts below, this Court reviews *de novo* all issues of law, including construction of the Ordinance. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

ARGUMENT

I. THE RULES GOVERNING CONSTRUCTION OF TAX STATUTES COMPEL AFFIRMANCE

This Court is tasked to ascertain the intent of the legislative body so as to effectuate the purpose of the law. (*Select Base Materials, Inc. v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645 (hereafter *Select Base*).) To determine that intent, a court examines the statute's express terms. (*Cal. Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) Where the statute's language is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; see *In re Derrick B.* (2006) 39 Cal.4th 535, 539 ["To determine ... intent, [a court] first turn[s] to the words of the statute, giving them their usual and ordinary meaning. When the statutory language is clear, [one] need go no further."].) Further, a statute should be construed "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Select Base*, *supra*, 51 Cal.2d at p. 645.)

Because the power to tax is the power to destroy, special rules further govern construction of tax statutes:

> In every case involving the interpretation of statutes levying taxes it is the established rule *not to extend their provisions, by implication, beyond the clear import of the language* used, *or to enlarge their operations* so as to embrace matters not

> specifically pointed out. In *case of doubt they are construed most strongly against the government*, and in favor of the citizen.

(*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687 [quoting *Gould v. Gould* (1917) 245 U.S. 151, 153].) These rules are in place to prevent taxing authorities from extending their tax laws in novel or discretionary ways. (*Ibid.*) Simply, a taxing authority must be held to the express terms of a tax statute as enacted. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 327.)

Moreover, under Proposition 218, the California Constitution prohibits a local government from "impos[ing], extend[ing] or increas[ing] any general tax unless and until that tax is submitted to the electorate and approved by a majority vote." (Cal. Const., art. XIII C, § 2.) "In general, the intent of Proposition 218 [was] to ensure that all taxes ... are subject to voter approval." (Legis. Analyst, Understanding Proposition 218 (Dec. 1996) ch. 1 (hereafter LAO Analysis).)

In approving Proposition 218, the voters declared that "[t]his measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, pp. 108-09, § 2, reprinted at 2A West's Ann. Cal. Const. (2006 supp.) Historical Notes, foll. art. XIII C, § 1, p. 73.) The local "general purpose" taxes Proposition 218 was intended to curtail include "most notably ... *hotel*, business license, and utility user taxes." (LAO Analysis, *supra*, ch. 1.)

Thus, consistent with the ambiguity rule, any effort to enlarge the scope of a tax statute to impose liability on additional persons or a broader tax base must be explicitly approved by voters.

As shown below, these rules compel affirmance here.

II. JUDGMENT SHOULD BE AFFIRMED BECAUSE THE OTCS HAVE NO TAX OBLIGATIONS OR LIABILITY UNDER THE ORDINANCE

A. The Ordinance Imposes Tax Obligations And Liability Only On "Transients" And Hotel "Operators."

The Ordinance imposes tax on "the *privilege of Occupancy*." (§ 35.0103.) The Ordinance focuses exclusively on the "Transient" who obtains Occupancy of the room, and the hotel "Operator" who provides it. (See p. 6, *ante*.) The *only* persons with any obligations or liability under the Ordinance are the "Transient" and the "Operator." (See p. 7, *ante*.)

A "Transient" is "any person who *exercises Occupancy*[] or is *entitled to Occupancy*." (§ 35.0102.) The tax is a "debt owed by each Transient," who must pay the tax to the hotel Operator. (§ 35.0110(a)(b) & (e).)

An "Operator" is "the proprietor of the Hotel" or its "managing agent," *i.e.*, one who owns or possesses and runs a Hotel that provides Occupancy. (§ 35.0102.) Each "Operator" must "register" with the City, obtain a "Transient Occupancy Registration Certificate," and post it "on the [Hotel] premises." (See p. 7, *ante*.) Only the Operator is required to "collect" the tax from the Transient and "remit" it to San Diego, or "cause" that to happen. (§§ 35.0112, .0114, .0124.) If an Operator fails to collect or remit the tax, the "City shall require the Operator to pay the tax." (§ 35.0112(b), .0117(a).) The Ordinance's administrative enforcement provisions also focus solely on the hotel "Operator," and authorize the City to audit and assess only "Operators" for TOT allegedly not collected or remitted. (See p. 7, *ante*.)

As the Court of Appeal concluded, "[t]he ordinance ... makes it clear that the tax obligations are *only imposed on transients and hotel*

operators. There is *no provision* imposing any tax liability on any entity other than the hotel operator or the transient." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 64.) The City does not challenge this conclusion.

B. San Diego Concedes The OTCs Are Neither "Transients" Nor Hotel "Operators."

Because the Ordinance's express terms impose tax obligations and liability only on Transients and hotel Operators, the dispositive question here is whether the OTCs are either; if not, they have no obligations or liability under the Ordinance.

San Diego itself has answered this question: It concedes the OTCs do not obtain Occupancy, and thus are not Transients. (E.g., Op. Br. 8.) It further concedes on appeal that the OTCs are not "Operators," and only the hotel is the Operator in an OTC transaction. (See p. 12, *ante*; Op. Br. 2.)

These concessions alone compel affirmance of judgment for the OTCs. As the Court of Appeal recognized: "The City concedes that OTCs are not transients, and that the OTCs are not hotel operators. Under the circumstances, there is *simply no basis for the imposition of TOT liability on the OTC*." (*TOT Cases*, *supra*, 225 Cal.App.4th at pp. 72-73.)

Indeed, San Diego's concessions mean there was never any basis for issuing assessments to the OTCs. The City is wrong when it says Ordinance Section 35.0117 authorizes it "to audit OTCs and to assess them for any room tax." (Op. Br. 23.) That Section empowers the City Treasurer to audit and assess only hotel "Operators": "City Treasurer shall forthwith assess the tax and penalties ... *against the [O]perator*." (§ 35.0117(a).)

The City assessed the OTCs based on the assertion that each is the "Operator" of every hotel from which any OTC customer obtains a

reservation, and that the additional amounts it charges a customer are taxable "Rent charged by the Operator." The City now admits that assertion was false; the OTCs are not hotel "Operators." Thus, the City is asking this Court to reinstate assessments for which there was no basis under the Ordinance to issue in the first place.[7]

III. JUDGMENT ALSO SHOULD BE AFFIRMED BECAUSE THE AMOUNT AN OTC CHARGES A CUSTOMER FOR ITS SERVICES IS NOT "RENT CHARGED BY AN OPERATOR" SUBJECT TO TAX

San Diego's concession that the OTCs are not Operators is fatal to its case for a second reason. The Ordinance imposes tax "in the amount of [10.5%] of the *Rent charged by the Operator*." (§§ 35.0103, .0104, .0105, .0106, .0108.) Thus, the tax base is expressly limited to the "Rent charged by the Operator." Because the City concedes the OTCs are not Operators, the additional amount an OTC charges a customer for its services cannot be taxable "Rent *charged by the Operator*."

Moreover, not all amounts a hotel Operator charges are subject to TOT – only "*Rent* charged by the Operator." "Rent" is defined as:

> the total consideration *charged to a Transient* as shown on the guest receipt *for the Occupancy of a room*, or portion thereof, in a Hotel .... "Rent" *includes charges for* utility and sewer hookups, equipment, (such as rollaway beds, cribs and television sets, and similar items), and *in-room services* (such as movies and other services not subject to California taxes), valued in money, whether received or to be received in money, goods, labor, or otherwise. "Rent" includes all receipts, cash, credits, property, and services of any kind or nature without any deduction therefrom.

(§ 35.0102.)

Under the first sentence of the definition, Rent includes only the

[7] For these reasons, the OTCs submit review was improvidently granted, and the petition should be dismissed. (Cal. Rules of Court, rule 8.532(c); see *People v. Bobo* (1992) 4 Cal.Rptr.2d 763 [dismissing review and ordering Court of Appeal opinion re-published].)

consideration "charged by the Operator" to the Transient "*for the Occupancy* of a room." Under the second sentence, added charges for items and services provided by the Operator to the Transient are for Occupancy, and therefore included in Rent, *only if* the items and services are for use "*in-room*." The third sentence provides, no matter the method and means of payment by the Transient, the full amount charged by the Operator for Occupancy is taxed.

The hearing officer found the hotel sets the amount it charges for a Transient's Occupancy of a room (the "wholesale" price), and the OTC collects that amount from the customer (along with the tax the hotel will owe on that amount), and then remits it to the hotel. (1JA4:200-01.) That amount is the "Rent" – the amount for the Occupancy of a room – "charged by the [hotel] Operator."

The hearing officer also found that, under the OTCs' contracts with hotels, the OTC sets the additional amounts it charges a customer for its services to obtain a reservation from a hotel. (See p. 10, *ante*.) Those additional amounts are the OTC's "margin" (its charge on top of the "wholesale" price set by the hotel) and an additional service "fee." (1JA4:199, 200.) Under the OTCs' contracts with hotels, the hotel does not set, charge, receive, or have any interest in, the OTC's additional amounts; the OTC charges and retains those amounts on its own behalf. (1JA4:201.)

Thus, the Superior Court concluded the additional amounts the OTC charges for its services are not taxable "Rent" because they are not "consideration *charged by an operator* for accommodations." (6JA19:1222.) And the Court of Appeal correctly affirmed, because the Ordinance taxes only the amount "charged by the hotel operator," and "contains language limiting the taxable rent to the amount charged *for the*

occupancy of a room." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 65, emphasis in original.) Accordingly,

> [b]ecause the City's ordinance imposes tax only on rent charged by an operator, it does not reach *amounts charged by the OTC for its services* .... We therefore hold, as we did with the similar Anaheim ordinance, that the OTC's service[] charges and markups are *not within the scope of the City's ordinance*.

(*Ibid.*)

This ground too compels affirmance of judgment for the OTCs.

IV. THE ORDINANCE'S EXPRESS TERMS FORECLOSE SAN DIEGO'S ATTEMPT TO IMPOSE TAX ON ANY AMOUNT THAT IS NOT "RENT CHARGED BY THE OPERATOR"

A. San Diego Cannot Trump The Ordinance's Express "Rent Charged By The Operator" Limitation With A Supposed Implied Intent To Tax More Than That Amount.

San Diego concedes the Ordinance's express terms impose tax only on the "rent charged by the hotel for transferring the privilege of occupancy to the customer." (Op. Br. 2.) But San Diego asserts this language must be construed to carry out an implied intent to impose tax on the total amount charged to a Transient in a reservation transaction, regardless of by whom or for what. (*Id.* at p. 3.) This supposed *implied* intent, however, directly conflicts with the intent evidenced by the Ordinance's *express* terms, which impose tax only on the amount "charged by the Operator" to the Transient for providing Occupancy of a room, and not amounts charged to Transients by *anyone else* or for *anything else*. (See p. 19, *ante*.)

San Diego first asserts the intent to tax everything is implied by the Ordinance's "Purpose and Intent" section (§ 35.0101(a)), which it contends makes the "Transient" the "exclusive focus of the room tax." (Op. Br. 29.) But that section merely states the City's intent is to impose a "tax[] on Transients." It says nothing about what *amount* is taxed. The sections that

do, impose tax only on the "Rent charged by the Operator." (See p. 6, *ante*.) The Ordinance's "exclusive focus" is on the Occupancy of a room, and the two parties to its transfer – not just the "Transient," but also the hotel "Operator," who is mentioned eighty-five times, including in each of the six provisions stating the amount taxed. (See p. 6, *ante*.)

San Diego next asserts an intent to tax the total "consideration charged to the customer" – regardless of by whom or for what – is implied because the Ordinance's "trigger and purpose" is the Transient's "purchase of Occupancy." (Op. Br. 30.) But again, such an intent is contrary the Ordinance's express "Rent charged by the Operator" limitation.

Finally, citing section 35.0112, San Diego contends there is an implied intent to tax the total amount because the "taxable moment" occurs when the Transient is charged for Occupancy. (Op. Br. 31.) But that section merely requires that an Operator ensure tax is collected from the Transient when "Rent" is paid. The section says nothing about the amount taxed.

Thus, the Court of Appeal correctly rejected San Diego's attempt to broaden the tax base to fulfill a supposed implied intent to tax amounts beyond the Ordinance's express limiting terms:

> We understand the statute's intent to impose a tax on transients; however, we also understand from the statute's plain language that the tax is limited. It may only be imposed upon the amount of rent charged by the hotel operator to the transient.

(*TOT Cases*, *supra*, 225 Cal.App.4th at p. 72.) This "plain language interpretation" "fully comports with the stated intent of the ordinance." (*Ibid.*)

B. San Diego Cannot Rewrite The "Rent Charged By The Operator" Limitation To Tax Other Amounts.

Unable to escape the "Rent charged by the Operator" limitation, San Diego impermissibly rewrites it to achieve its desired outcome.

First, San Diego attempts to redefine "Rent charged by the Operator" by arguing the plain meaning of "charge" is the "amount of money demanded of someone wanting to acquire something." (Op. Br. 40.) However, the sentence does not use the noun "charge," but rather the verb "charged." The very dictionary the City cites defines the verb "charge" as "to demand (an amount) as a price from someone *for* a *service* rendered." (Oxford Dict. Online (2014).) And the noun "charge" is "[a] price asked *for* goods or *services*." (*Ibid.*) Thus, by its express terms, the Ordinance taxes only the price "charged [*i.e.*, demanded] by the *Operator*" *for* the *service* of providing *Occupancy* of a room, and nothing more.[8]

As the Court of Appeal recognized, "[t]he OTC service charges are *not* charged by the Operator." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 69.) "In the merchant transactions at issue, no mark-up or service fee imposed by the OTC is ever charged by the hotel operator." (*Id.* at p. 70.) Thus, the "[a]dditional fees charged only by the OTCs for their services cannot be included in th[e] taxable base." (*Ibid.*)

Second, San Diego asserts the Ordinance defines Rent as "the *total* consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room ... *without any deduction therefrom*." (Op. Br. 10, 42; ellipsis in original; emphasis in original at p. 42.) But San Diego

[8] The City complains a Transient may not be able to obtain Occupancy directly from the hotel for the "wholesale" price it charges in a merchant model transaction (Op. Br. 41). But even if so, only the "Rent charged by the Operator" is taxable, and, in a merchant model transaction, that amount is the hotel's "wholesale" price.

cannot rewrite the definition of Rent by ellipsis. The text before the ellipsis is from the *first sentence* of the definition, while the text after the ellipsis is from the *third sentence*. By splicing the two fragments together, San Diego creates a new sentence. (*Id.* at p. 42.) But "without any deduction" does not modify the first two sentences – the first provides that "Rent" is limited to the *Operator's* charge to the Transient for *Occupancy*, and the second provides that the only added charges that are for Occupancy are those for "*in-room*" items or "services." (See p. 20, *ante*.)

The third sentence, which includes the phrase "without any deduction," only addresses *forms* of payment for Occupancy (hence the inclusion of "cash" and "credits"), and as the Court of Appeal recognized, "cannot be interpreted to read 'Rent includes all *charges for* any services of any kind. If the drafters had intended 'rent' to include charges for any and all services paid for by the transient, it would have included language specifying such an intent." (*TOT Cases*, *supra*, 225 Cal.App.4th at pp. 67-68, emphasis in original.) In any event, "regardless of how the term Rent is defined," only amounts "charged by the Operator" can be taxed; thus, the OTCs' "services charges" are not taxed. (*Id.* at p. 69.)

Moreover, the Ordinance does not impose tax on the total amount "shown on the guest receipt." (Op. Br. 43.) Indeed, in seeking this Court's review, San Diego recognized the reference to the guest receipt in the "Rent" definition "*do[es]n't matter*" – the first sentence in the definition would mean the same with or without it – "the consideration charged *for the occupancy* of space in a hotel." (Pet. 20 fn. 7.)

Moreover, the Ordinance contemplates goods and services not subject to tax may be sold as part of a package and not broken out on the Operator's guest receipt: "The costs of additional goods and services,

which are not Rent, but which may be sold as a package ... shall be accounted for ...." (§ 35.0112(h).) Thus, the tax base may or may not be the entire amount shown on a guest receipt. And, again, "even if the term 'rent' could be read expansively to include items not specifically listed in the definition, those items are not taxable unless they are *charged by the hotel operator*." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 66.)

C. San Diego Cannot Treat The Amount An OTC Charges A Customer And Retains For Its Online Travel Services *As If* It Were "Rent Charged By The Operator."

Cabined by the Ordinance's express "Rent charged by the Operator" limitation, San Diego asserts the additional amounts the OTC charges a customer for its services *should* nonetheless be treated *as if* they are "Rent charged by the Operator." That assertion is contrary to the Ordinance's express terms and the hearing officer's factual findings.

1. Rate Provisions In The OTCs' Contracts With Hotels Do Not Transform The Additional Amounts An OTC Charges For Its Services Into "Rent Charged By The Operator."

It is undisputed that the additional amounts an OTC charges for its services are not *actually* charged by the hotel Operator. In an attempt to evade this reality, San Diego points to what it calls "rate parity" provisions in certain OTC-hotel contracts to assert that the hotel "dictate[s]" the total amount the OTC must charge to the Transient, and, therefore, the additional amounts an OTC charges for its services are "indirectly" charged by the hotel and subject to tax. (Op. Br. 3, 13, 31-32.) San Diego's argument fails for four reasons.

First, San Diego's assertion that fifty-nine of the sixty-three "standard merchant model contracts" include a "rate parity" provision "dictating" the amount an OTC can charge for its services (Op. Br. 13 fn. 9)

is incorrect and misleading. In OTC-hotel contracts, when used, the label "rate parity" primarily describes provisions requiring the *hotel* to charge a "net rate" on par with the "net rate" it charges to other intermediaries.[9] These provisions merely ensure the OTC is treated as favorably as other intermediaries by the hotel, and do not address how much an OTC can charge a customer for its services. In reality, only thirty-eight of the sixty-three contracts cited by the City include a provision that even discusses how much an OTC can charge a customer for its services.[10]

Moreover, the City distorted the record by excluding twenty-eight of the OTC-hotel contracts in the record, many of which concern the opaque "merchant model" that some OTCs use for most or all of their transactions. In the opaque model, no "room rate" is shown to the customer; rather the customer "bids" for a reservation at a price *the customer sets*. (1JA4:207.) Including those contracts, only 41 of the 91 – 45% – include a provision that even discusses how much an OTC can charge a customer for its services. Thus, the City's argument – that such provisions allow the hotel to "dictate" the additional amounts charged by an OTC for its services – can have no application to the *majority* of contracts in the record.

Second, none of the thirty-eight contracts cited by the City that do include such a provision allow the hotel to "dictate" the additional amounts an OTC charges for its services. As San Diego concedes, those provisions are designed merely to ensure that the "room rate" shown to customers by the OTC is not less than the rate offered to customers by the hotel on its

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[9] (See, e.g., 16AR, T.57, p. 907; 17AR, T.62, p. 988; 39AR, T.284, p. 12241; 40AR, T.294, pp. 6289, 6292.)

[10] Thus, the City's assertion that 93.6% of the contracts it cites include such a provision is incorrect – only 60% do.

own website, because the hotel and OTCs are competitors for customers seeking reservations. (Op. Br. at p. 15 fn. 10.) Under these provisions, the OTC merely agrees to charge a "minimum" amount as *its* margin above the amount the hotel is charging for Occupancy. (Op. Br. 13.) Those provisions make clear the OTC, not the hotel, "determines" or "sets" the OTC's margin.[11] As San Diego admits, the OTC is free to set its "margin" higher than the minimum, constrained only by "the practicalities of competition," *i.e.*, market forces. (*Id.* at p. 15 fn. 11.) Nothing in those provisions transforms the OTC's margin into an amount set, charged, and received by the hotel for Occupancy.[12]

Moreover, the cited rate provisions say nothing about how much an OTC can charge for its service fee. This point alone refutes the City's assertion that these provisions allow the hotel to dictate the entire amount charged in a reservation transaction. Indeed, the City contends "as a result of the mark up and fees charged by the OTC," the customer typically "pays more" when using an OTC's services than when booking directly with a hotel. (*Id.* at p. 46 fn. 22.)

Third, whatever San Diego meant by asserting that hotels "dictate" the amount the OTC charges for its services, its counsel recently represented to the Hawaii Supreme Court that it *did not* intend to suggest in its Opening Brief to this Court that the hotel sets the OTC's margin and service fee. (See OTCs' Request for Judicial Notice.)

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[11] (See, e.g., 16AR, T.57, pp. 904-05; 16AR, T.58, p. 937; 17AR, T.65, p. 1025; 18AR, T.85, pp. 1371-72; 19AR, T.93, pp. 1542-43.)

[12] San Diego concedes the OTCs do not possess rooms or "obtain any right of room occupancy" (Op. Br. 7-8), and thus, the additional amounts an OTC charges and retains for its services cannot be "Rent" – consideration charged "for Occupancy" – because the OTC has no Occupancy to provide.

Fourth, any assertion that the *hotel* charges the additional amounts the OTC charges for its services is contrary to the hearing officer's findings. The hearing officer found that under the OTCs' contracts with hotels, each hotel sets the "wholesale price" – the amount the hotel is charging for a Transient's Occupancy of a room, and the OTC sets its own "margin" and service "fee." (See p. 10, *ante*.) The hotel does not set, charge, receive, or have any interest in or right to, those additional amounts; the OTC sets, charges, and receives them on its own behalf. (See p. 10, *ante*.) Those additional amounts are not "charged by the Operator," directly or indirectly.

Indeed, during the administrative process, San Diego argued that under the hotel contracts "the OTCs exert broad transactional control" and set the "price paid by the transient." (10AR, T.39, pp. 236-39.) In other words, the City then acknowledged the reality it now seeks to obscure – the OTC, not the hotel, controls the additional amounts it charges customers for its services in a room reservation transaction, and charges them on its own behalf. The City's opposite assertions then and now highlight its struggles to concoct a way to tax the OTCs under an Ordinance that plainly does not apply to them.

Before the Court of Appeal, San Diego went so far as to contend that because the OTC is the one directly charging the customer's credit card, "the hotel charges *nothing* to the transient" in a merchant model transaction. (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 66 fn. 10, emphasis in original.) "Counsel for the City stressed on this point considerably during oral argument, insisting repeatedly that the hotel operators are charging *nothing* during the transaction at issue." (*Ibid.*, emphasis in original.) The court rejected this "absurd" notion, explaining that the "price set by the OTCs includes the amount paid to the hotel for occupancy of its rooms, plus a

markup for the OTCs' services." (*Ibid.*)

San Diego's opposite assertion to this Court – that the hotel indirectly charges *everything*, including the OTC's additional amounts for its services, is equally absurd. The City's attempt to find support in the Court of Appeal's refutation of its prior, opposite assertion (Op. Br. 32) is disingenuous. As the court explained, the OTC's additional amounts are not charged by the Operator:

> The hotels are not giving away rooms for free.... The hotels are in the business of making money by charging transients for occupancy of their rooms.... [T]he reality [is] that the wholesale room rate – which the hotel ultimately receives from the OTC pursuant to the contractual agreement between those entities – is in fact *charged by the hotel.* The OTC service fees are not.

(*TOT Cases*, *supra*, 225 Cal.App.4th at p. 66 fn. 10, emphasis in original.)

2. The Timing Of When The Hotel Receives The Rent It Charges For A Transient's Occupancy Does Not Transform The Additional Amounts An OTC Charges For Its Services Into "Rent Charged By The Operator."

San Diego asserts the total amount charged to the Transient should be treated *as if* charged by the hotel, because the hotel does not receive its "cut" until after the reservation transaction. (See, e.g., Op. Br. 2, 3-4, 17, 20.) But, as the hearing officer found, under the OTCs' hotel contracts, the hotel sets the "wholesale" price – the amount it is charging for providing Occupancy to a Transient – before the Transient's reservation transaction. (See p. 10, *ante*.) San Diego concedes the amounts the hotel and OTC each receive are "contractually-agreed" upon. (Op. Br. 2.) That the hotel Operator receives the Rent after the reservation transaction, does not change the Ordinance's express edict that the only amount taxed is the "Rent charged by the Operator."

San Diego's "three transactional step" construct of a merchant model

transaction reflects this reality. (Op. Br. 13.) Under the "first step," the OTC's contract with the hotel, and the hotel sets its charge for providing Occupancy before the reservation transaction. (*Ibid.*) The "second step," the reservation transaction, involves charging the Transient the hotel's preset Rent (and TOT on that amount), as well as the additional amounts the OTC charges for its services. (*Id.* at p. 20.) The "third step" involves the OTC remitting the hotel's preset Rent (along with the TOT) to the hotel upon being invoiced. (*Id.* at pp. 20-21.)

As the Court of Appeal determined:

> [N]one of the City's arguments regarding the timing and means of collection can change the plain meaning of the statute. The OTCs' markup and services fees cannot be considered "Rent charged by the Operator."

(*TOT Cases*, *supra*, 225 Cal.App.4th at p. 72.)

3. That The OTC By Contract Collects The Hotel's "Rent," And Tax On That Amount, Does Not Transform The OTC's Additional Amounts Into "Rent Charged By The Operator."

Finally, San Diego asserts that the OTCs "function as the hotels' agents," and therefore the additional amounts the OTC charges a customer are attributable to the hotel, and, thus, taxable "Rent charged by the Operator." (Op. Br. 33.) This assertion is refuted by the very case the City cites, which makes clear that the only acts attributable to a principal are those performed by an agent "within the scope of his authority." (*Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 630.)

The hearing officer found the OTC is, at most, a hotel's agent for the limited purpose of collecting the amount charged by the hotel for providing Occupancy of a room, plus the tax the hotel will owe on that amount.

(1JA4:207.)[13] San Diego concedes the OTCs are not "general agents" of hotels, but rather, only "with respect to the particular duties they have undertaken to perform." (Op. Br. 53 fn. 29.) Thus, the scope of any purported OTC agency is limited to "charging and collecting" the hotel's "wholesale" price and tax on that amount. (*Id.* at p. 33.) Only those amounts are collected on the hotel's behalf, and therefore can be attributed to the hotel. As the Court of Appeal explained, even if the OTCs are limited agents, the only amount subject to tax is the "rent charged by the operator," not "the fees that the OTCs themselves charge." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 72.)

Ignoring this reality, San Diego argues the total amount charged to the Transient by the OTC must be attributed to the hotel because "the entirety of what [the agent] collects is deemed collected on behalf of the principal." (Op. Br. 34.) But the two cases it cites say no such thing.

In *Groves v. City of Los Angeles* (1953) 40 Cal.2d 751, this Court relied on the Insurance Code (not general principles of agency law), which it held required that any amount charged for insurance must be considered charged by the principal – the insurance company – and thus could not be subject to additional premium tax as the agent's revenue. The Insurance Code provision at issue imposes tax on the "gross receipts" of an insurer, and not merely on the amount actually charged by the insurance company

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[13] The hearing officer did not conclude the OTCs are fiduciary agents of hotels, as opposed to agents in the colloquial sense of an intermediary performing contractual obligations. Nothing in his factual findings would support such a conclusion. (See *Elayyan v. Sol Melia, S.A.* (N.D. Ind. 2008) 571 F.Supp.2d 886, 892 ["[The hotel] does not control the content of [the OTCs'] websites, which are targeted at a worldwide audience. The online booking services are not agents of [the hotel] nor do they work exclusively for [the hotel], and [the hotel] does not control these online booking services."].)

for a specific service. (*Id.* at pp. 753-54.) In contrast, the Ordinance imposes tax only on the amount "charged by the Operator" for "Occupancy."

And in *Scholastic Book Clubs, Inc. v. State Bd. of Equalization* (1989) 207 Cal.App.3d 734, the court answered only whether "use of California's teachers and school librarians to solicit sales from California students constitutes a sufficient nexus for the imposition of ... use taxes." (*Id.* at p. 740.) The court said nothing on the amount subject to tax, much less that any amount collected by an agent, whether inside or outside the scope of its agency, was attributable to a principal.

V. ONLY THE HOTEL OPERATOR COULD BE LIABLE FOR ANY ADDITIONAL TAX IF OWED

As demonstrated above, the additional amounts charged by an OTC for its services are not subject to TOT because they are not "Rent charged by the Operator." (See pp. 19-21, *ante*.) But even if those amounts could be taxed, the only person that could be assessed and held liable for tax on those amounts is the hotel "Operator," not the OTC. (See p. 17, *ante*.) "There is no provision [in the Ordinance] imposing any tax liability on any entity other than the hotel operator or the transient." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 60.) This is true even though the Ordinance expressly contemplates that an "operator" may use a third party to "collect" tax from a Transient: an Operator shall "collect or *cause to be collected* the [TOT] due from a transient." (§ 35.0124(a).)

A. The OTCs' Contracts With Hotels Are Not A Basis For Imposing Liability On The OTCs Under The Ordinance.

San Diego contends that even though OTCs are not the Operators, they could be held liable under the Ordinance for tax if owed on their additional amounts, based on their contracts with hotels. The City's effort

to expand the Ordinance's reach has no basis in those contracts or law.

1. The Hotel's Contractual Delegation Of The Collection Of The Hotel's "Rent," And Tax On That Amount, Is Not A Basis For Imposing Liability On OTCs Under The Ordinance.

San Diego asserts the OTCs would be liable under the Ordinance for any additional tax if owed even though they are not Operators because, pursuant to their contracts with hotels, the OTCs are "solely responsible" for the "payment of room tax on the full room rate" or any tax "determined to be due and owing. (Op. Br. 47.) This argument fails for two reasons.

First, San Diego's characterization of the relevant contract provisions is a fiction. For example, one contract it cites merely obligates the *hotel* to "remit any and all taxes" owed on the amount it charges for providing Occupancy to the Transient (the "wholesale rate").[14] Another provides the OTC will remit *to the hotel* the amount the hotel charges for providing Occupancy to the Transient (and tax the hotel will owe on that amount), and, *as between those parties*, the OTC will be "solely responsible" financially "if any" tax is assessed on the additional amounts the OTC charges a customer for its services.[15] A third states the OTC will remit *to the hotel* the amount the hotel charges for Occupancy (and tax on that amount), and that the OTC is "solely responsible" for remitting tax (to either the hotel or the taxing authority) on the additional amounts the OTC charges a customer for its services, *if a determination* is made that tax is owed on that amount.[16] The remaining contracts the City cites (Op. Br. 47 fn. 23) say nothing different.

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[14] 16AR, T.57, p. 914.

[15] 16AR, T.58, p. 937.

[16] 17AR, T.68, pp. 1114, 1125.

The contracts cited *do not* purport to assign to the OTC any tax obligations or liability under any jurisdiction's tax ordinance, much less make the OTC "solely responsible" for remitting tax to any authority. Rather, the contracts merely (i) provide the *hotel* will receive and remit tax owed on the amount the hotel charges for Occupancy; and (ii) assigns financial responsibility as *between those two private contracting parties* if tax is later determined to be owed on the additional amounts the OTC charges for its services. *Nothing* in the contracts purports to delegate any obligations or liability a hotel has under any jurisdiction's statute or ordinance, much less purport to transform the OTC into an entity with tax obligations and liability under any ordinance where none otherwise exists.

Second, even if the contracts purported to do so, a contract between private parties cannot empower San Diego to impose obligations and liability on persons beyond what is authorized by the Ordinance's express terms. A private contract cannot expand the scope of a statute or ordinance any more than it could it restrict it. (*Alpha Beta Food Markets, Inc. v. Retail Clerks Union Local 770* (1955) 45 Cal.2d 764, 771 ["[R]equirement under the law" cannot be "varied or evaded by private contract."].)

2. The City Cannot Impose Liability On OTCs Under The Ordinance As A Supposed Third-Party Beneficiary Of The OTCs' Hotel Contracts.

San Diego contends it may, under the Ordinance, "directly enforce the OTCs' collection and remittance duties" under the OTCs' contracts with hotels as a third-party beneficiary. (Op. Br. 49.) The City's argument, which it never asserted at any stage below, also fails for two reasons.

First, San Diego is not a third-party beneficiary to those contracts under the very two cases it cites. A third-party beneficiary exists only where a contract was "made *expressly for the benefit of a third person.*"

(*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064.) "[T]he contracting parties *must have intended* to benefit that third party and such intent appears on the terms of the contract." (*Ibid.*) "The test ... is whether an *intent* to benefit a third person appears from the terms of the contract. If the terms of a contract *necessarily require* the promisor to *confer a benefit* on a third person, then the contract, and hence the parties thereto, contemplate a benefit to a third party." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232 (hereafter *Prouty*).) Accordingly, the contract's express terms must manifest an intent to necessarily confer a benefit on a third party.

San Diego asserts it is a "third-party beneficiary" of the contracts because their purpose is to "make sure that the City receives all taxes owed." (Op. Br. 49.) But, as shown, the provisions it cites merely provide that the *hotel* will remit tax on the amount the *hotel* charges for Occupancy, and assign financial responsibility, as between the two private contracting parties, *if* tax is later determined to be owed on the OTC's additional amounts. (See p. 34, *ante*.) *Nothing* in any of the cited contracts reflects an "express intent" to "*necessarily require*" that a benefit be conferred on the City. Either tax is owed under the Ordinance or it is not; the division of financial responsibility between the private contracting parties for any potential tax liability is for their benefit, not the City's.

At most, San Diego could argue that the contracts incidentally benefit the City, but that is not enough, as held in the very case it cites:

> [A] third party who is only incidentally benefitted by performance of a contract is not entitled to enforce it. [T]hat [one] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment.

(*Prouty*, *supra*, 121 Cal.App.4th at p. 1233.)

San Diego also contends it is a third-party beneficiary under the contracts because the OTCs have become "primary obligors" on a debt owed by the hotels to the City. (Op. Br. 50.) But under the very cases the City cites, one only becomes a primary obligor by formally assuming a known debt obligation of another party (such as an existing mortgage), and thereby becoming the "principal debtor." (E.g., *Parrish v. Greco* (1953) 118 Cal.App.2d 556, 561.) The OTCs have not assumed any known debt obligation owed by hotels to the City under any of the contractual provisions the City cites.

Second, even if San Diego were a third-party beneficiary of the OTCs' contracts with hotels, the cases the City cites make clear that any cause of action as such a beneficiary would be for breach of contract, not a basis for imposing tax obligations and liability *under the Ordinance*. (See *Prouty*, *supra*, 121 Cal.App.4th at p. 1233; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.) The City never asserted such a cause of action against the OTCs (JA8:314-327), and cannot now do so.

3. Indemnity Provisions In The OTCs' Contracts With Hotels Are Not A Basis For Imposing Liability On The OTCs Under The Ordinance.

San Diego also seeks to impose tax liability on the OTCs under the Ordinance based on indemnification provisions in the OTCs' contracts with hotels. (Op. Br. 51.) Again, the contracts are no help to the City.

An indemnity provision is an agreement to pay a loss of another if later incurred. (See Oxford Dict. Online (2014) [an "indemnity" is "security or protection against a loss or other financial burden"].) That is precisely what the indemnification provisions are here. For example, in one contract the City cites, the OTC agrees to reimburse the hotel against "liabilities, costs, damages, and expenses" incurred from the failure to pay

tax if owed on the additional amounts the OTC charges customers.[17] In another, the OTC agrees to reimburse the hotel against "losses, liabilities, costs, damages, and expenses" incurred from the failure to pay any tax determined to be owed on those additional amounts.[18] In a third, the OTC agrees to reimburse the hotel if it is required to pay tax assessed on those additional amounts.[19] The remaining contracts San Diego cites are the same in substance. (Op. Br. 51 fn. 28.)

Under these provisions, the OTC agrees to reimburse the hotel if the hotel is required to pay tax on the additional amounts the OTC charges a customer. These provisions provide no basis for San Diego to assess and impose TOT liability on the OTCs under the Ordinance.

San Diego contends California Civil Code section 2777 provides such a basis, again an argument not raised below. But that section is not implicated by the indemnity provisions here.

Section 2777 states "[o]ne who indemnifies another *against an act to be done* by the latter, is liable jointly with the person indemnified, and separately, to every person *injured by such act*." (Op. Br. 51.) Thus, that section applies only where the indemnitor agreed to indemnify the indemnitee for an act to be done by the indemnitee. Accordingly, in *Bryan v. Banks* (1929) 98 Cal.App.748, 755-56, cited by San Diego, a third-party beneficiary had a claim against indemnitors that had agreed to perform an act to be done by the indemnitee – make payments on the indemnitee's promissory note to a third party, and failed to do so.

Here, the OTC has not agreed to pay TOT to any tax authority on a

[17] 16AR, T.52, p. 865.
[18] 16AR, T.60, p. 967.
[19] 18AR, T.85, p. 1380.

hotel's behalf, or indemnify the hotel if the OTC fails to do so. Rather, the OTC merely has agreed to reimburse the hotel, if the hotel is later required by a taxing authority to pay tax on the OTC's additional amounts.

B. California Civil Code Section 2344 Is Not A Basis For Imposing Liability On The OTCs Under The Ordinance.

San Diego last argues that, if additional tax is owed, section 2344 is a "statutory basis" for imposing obligations and liability on the OTCs *under the Ordinance* as limited purpose "agents" of hotels. (Op. Br. 52.) But the Ordinance's express terms impose TOT obligations and liability only on three types of designees of the hotel "proprietor" – a "managing agent," "resident manager," or "resident agent." (§ 35.0102.) The City has never asserted the OTCs are "*resident* managers" or "*resident* agents," and concedes they are not "managing agents." (Op. Br. 53 fn. 29.)

Nothing in the Ordinance imposes tax obligations and liability on non-managing "agents." Nothing prohibits a hotel Operator from contracting with a third party to collect rent or taxes on its behalf; again, the Ordinance contemplates an Operator doing so. (See p. 17, *ante*.) But as the Court of Appeal recognized, "[t]here is no provision imposing any tax liability on any entity other than the hotel operator or the transient." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 64.) Nothing in section 2344 empowers San Diego to look *outside* the Ordinance to impose liability *under* the Ordinance.

Moreover, under section 2344 an agent's liability is limited to only amounts it received for the benefit of its principal:

> If an agent receives anything *for the benefit of his principal*, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand ....

(Civ. Code, § 2344.)

Again, under the hearing officer's factual findings, the only amounts the OTC collects for the hotel are the amount the hotel charges for providing Occupancy to a Transient, plus the tax on that amount. (See p. 10, *ante*.) San Diego already receives that tax from hotels. (Op. Br. 2.) Thus, the OTC has not received any money, *i.e.*, tax, for the hotel's benefit to which the City is entitled. For this reason too, section 2344 is inapplicable.

San Diego asserts the OTCs' service "fees" "can be characterized as unpaid room taxes" owed to the City. (Op. Br. 53.) But that assertion conflicts with the hearing officer's factual finding that the OTCs only charge and collect tax on the rent charged by the hotel for providing occupancy, and not on the additional amounts (the margin and service fee) the OTC charges for its services. (See p. 10, *ante*.) And again, the OTC sets, charges, and receives those additional amounts on its own behalf, not the hotel's. (See p. 10, *ante*.)

VI. EVEN IF THE ORDINANCE WERE AMBIGUOUS, THE OTCS' CONSTRUCTIONS MUST BE ADOPTED

As the Court of Appeal recognized, this Court has made clear that if there is any "doubt" as to the plain meaning of a tax statute's express terms, the statute must be "construed most strongly against the government, and in favor of the citizen." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 63.) Therefore, even if the Ordinance also were reasonably susceptible to the City's contrary constructions, the OTCs would still be entitled to judgment, because any ambiguity in a tax statute resulting from two competing reasonable constructions must be construed strictly against the taxing authority, and in favor of the citizen. (See pp. 15-16, *ante*, citing cases.)

The OTCs' constructions, adopted by the Superior Court and

affirmed by the Court of Appeal, are compelled by the plain meaning of the Ordinance's express terms. At minimum, they certainly are *reasonable*, and, therefore, must be adopted: "If the interpretation ... sought by the [taxpayer] is reasonable, it *must ... be adopted.* It is of no moment that ... a contrary construction might also be reasonably permissible." (*Hospital Service of Cal. v. City of Oakland* (1972) 25 Cal.App.3d 402, 406 (hereafter *Hospital Service*).)[20] Thus, either way, plain meaning or ambiguity rule, judgment for the OTCs should be affirmed.[21]

San Diego's contrary constructions though are not reasonable. That the City has continuously shifted its constructions of the Ordinance's express terms merely underscores that they do not unambiguously impose tax obligations and liability on the OTCs. Rather, as shown, those constructions do violence to the Ordinance's express terms and its entire scheme. Indeed, the City's current constructions would require this Court to effectively rewrite the eighty-five provisions that are expressly limited to

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[20] "Taxpayer" was inserted in the above quotation because *Hospital Service* was applying the exact converse rule that an *exemption* "must be construed liberally in favor of the taxing authority, strictly against the claimed exemption." (*Hospital Service*, *supra*, 25 Cal.App.3d at p. 405.) The rule for exemptions simply flips the ambiguity rule that applies to all other provisions in a tax statute *against the taxing authority*; both rules are applied in the same manner. (See *Alpha Therapeutic Corp. v. County of L.A.* (1986) 179 Cal.App.3d 265, 270 ["While taxing statutes are to be construed in favor of the taxpayer, exemptions are to be narrowly construed in favor of the state."].)

[21] Even absent the tax ambiguity rule, where, as here, "a statute is susceptible of several interpretations, one of which raises serious constitutional problems, [courts] will construe the statute, if possible, to avoid those problems." (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 177.) The Court of Appeal recognized that Anaheim's attempt to impose TOT liability on OTCs raised constitutional issues, including "the applicability of Proposition 218" and "significant due process concerns that arise from the fact that [Anaheim] seeks to impose the TOT for a seven-year period in which the OTCs had no notice that [Anaheim] considered them subject to the tax." (*City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 832.)

the hotel "Operator."

San Diego asserts this Court should do so because it "makes no sense" to tax only the amount the Operator charges to the Transient for providing Occupancy. (Op. Br. 41.) Indeed, the City goes so far as to assert there is "*no possible* justification" for not taxing the entire amount charged to a customer. (*Id.* at pp. 3, 29.) But it is reasonable for a legislative body to enact a local tax based on the amount the local business (the hotel) that provides the local amenity taxed (occupancy of a room), charges the person who receives it for doing so. (See *Pomona v. State Bd. of Equalization* (1959) 53 Cal.2d 305, 311 [affirming imposition of tax based on business activity "in the city"].)

As Judge Kuhl explained when construing Anaheim's substantively identical TOT ordinance:

> The purpose and structure of the [TOT] [is] a privilege tax based on commercial activity taking place in the City .... The hotel transaction is taxed ... because the hotel's physical location is in the City. The revenue gained by the entity that provides the physical location (hotel) for occupancy within the City ... is the amount paid to the hotel. It is not unreasonable to base a local tax on the revenue of the commercial business that provides the local amenity.

(2JA10:437-38.)

The City complains that the Court of Appeal's plain meaning constructions of the Ordinance would produce a different tax outcome under the OTCs' "merchant model" than under the OTCs' agency model; the City asserts the total amount charged to the customer must be the tax base to achieve a uniform tax outcome under both models. (Op. Br. 11-12.) However, as San Diego concedes (*id.* at p. 12), in a merchant model transaction, the hotel charges a lower amount for occupancy of a room. Because the Ordinance's express terms impose tax only on the

consideration "charged by the Operator" for Occupancy, in a transaction where the hotel charges less, the tax is less.

As the Court of Appeal recognized, "[i]t makes sense that the tax is lower on a transaction where the hotel charges and receives less rent." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 71.) There is consistency across all booking channels. Whether the customer obtains a reservation through the merchant model, the agency model, or directly from the hotel, the hotel is liable for TOT on the amount it charges and receives for providing Occupancy.

San Diego is left to assert the total amount charged to the Transient regardless of by whom or for what "*should*" be the tax base. (Op. Br. 41.) That San Diego now disagrees with the legislative choices expressed in the Ordinance as enacted is of no moment. Nor, of course, is its desire for more tax revenue.

VII. IF SAN DIEGO WANTS TO IMPOSE TAX LIABILITY AND OBLIGATIONS ON NON-OPERATORS, OR TAX ON AMOUNTS THAT ARE NOT "RENT CHARGED BY THE OPERATOR," IT MUST AMEND ITS ORDINANCE WITH VOTER APPROVAL

If San Diego desires to impose TOT obligations and liability on persons other than Transients or Operators, or impose tax on amounts not "charged by the Operator" for Occupancy, it must convince its electorate to enact amendments that explicitly do so, as required by Proposition 218. (See p. 16, *ante*.)

As this Court held, Proposition 218 should be liberally construed to "effectuate its purpose of limiting local government revenue and enhancing taxpayer consent." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448.) "It is not an onerous requirement that local governments seek taxpayers' consent before

subjecting them to new and increased taxes. And even if it were, that is what the California Constitution requires. If cities find this burden too great, their recourse is to convince the voters of the need for constitutional change." (*Jacks v. City of Santa Barbara* (Feb. 26, 2015, No. B253474) 2015 Cal.App.LEXIS 178, *20-21.) San Diego cannot, as it seeks to do here, bypass the electorate and amend its Ordinance by administrative fiat or through judicial action.

Indeed, a proscribed tax "increase" includes any agency decision that "[r]evises the methodology by which the tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." (Gov. Code § 53750(h)(1)(B); see *AB Cellular LA, LLC v. City of L.A.* (2007) 150 Cal.App.4th 757, 761-63 [striking down agency's attempt to introduce a new "variable" into its tax calculation method without voter approval: "A taxing methodology must be frozen in time until the electorate approves higher taxes"]; 81 Ops.Cal.Atty.Gen. 104, 1998 Cal. AG LEXIS 38, at *1 (Mar. 5, 1998) [flood district must obtain voter approval before imposing storm drain tax on new tax base].)

Through its new, expanded constructions, the City seeks to "increase" its tax by changing its calculation methodology to include new entities and revenue amounts. After years of collecting TOT only on the "Rent charged by the Operator" for "Occupancy," the City now reinterprets its Ordinance to expand those express terms to capture new revenue – the amount OTCs charge a customer and retain as compensation for their services. Instead of submitting to the voters amendments to expand the Ordinance's reach to OTCs and other travel intermediaries, the City purports to impose liability on the OTCs by changing its long-standing constructions of the Ordinance. This it cannot do.

VIII. THE COURT OF APPEAL PROPERLY CONSIDERED ITS PRIOR DECISIONS IN THIS COORDINATED PROCEEDING

In affirming judgment for the OTCs, the Court of Appeal considered its prior *Anaheim* decision in this coordinated action. The court would have been remiss not to. A fundamental purpose of coordination is to avoid inconsistent rulings and decisions in actions that share questions of law and fact. (See Code Civ. Proc., §§ 404.1, 404.2; *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 814.) That is why the coordination judge is required to specify "the court having appellate jurisdiction of the coordinated actions." (Cal. Rules of Court, rule 3.505(a).) It is imperative that the same appellate panel consider its prior decisions in the coordinated proceeding that involve common issues of fact or law to ensure inconsistent rulings are avoided.

The court closely examined the Ordinance's express terms and concluded it "us[es] language similar to that found in the Anaheim ordinance," which also imposes liability only on "operators" (defined as the hotel "proprietor" or its "managing agent"), and imposes tax only on the "consideration charged by an operator." (*TOT Cases*, *supra*, 225 Cal.App.4th at pp. 64-65.) The court examined the facts regarding the OTCs' merchant model, and determined they too are substantively identical to those in *Anaheim*. (*Id.* at p. 70.) Having determined A (the ordinance) and B (the relevant facts) are substantively identical in two actions in this coordinated proceeding, the court held that its result – C – must be the same. (*Id.* at p. 65.)

The court did not suggest it was constrained by *Anaheim*, but rather reiterated the soundness and persuasiveness of the logic expressed there, and, thus, the "same logic applies here." (*TOT Cases*, *supra*, 225

Cal.App.4th at p. 65.) The court, citing *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-93, explained that the logic of its *Anaheim* decision (A + B = C) would apply throughout the coordinated proceeding, "both in the lower court and upon subsequent appeal." (*TOT Cases*, *supra*, 225 Cal.App.4th at p. 60 fn. 4.)

That the court's *Anaheim* decision is unpublished does not change the imperative that it be considered in subsequent cases in the coordinated proceeding. The court did not certify its *Anaheim* decision for publication because it apparently determined it would only be relevant within the coordinated proceeding, and not of continuing public interest. (Cal. Rules of Court, rule 8.1105(c).)

San Diego does not contend the Court of Appeal should have turned a blind eye to its *Anaheim* decision; rather, the City too recognized the imperative that the court consider it. Indeed, in the very first two sentences of the City's argument to that court, the City discussed Anaheim and Santa Monica's ordinances and the court's decisions construing them. (App. Br. 15.) The City argued its Ordinance – A – was different from Anaheim's in a way that dictated a different result – C – here. (*Id.* at p. 37.) As shown, the court correctly disagreed. But the City cannot complain that the court considered the *Anaheim* decision and undertook the same analysis; the City invited it to do so.[22]

Rather, San Diego complains that, in doing so, the court *cited* its *Anaheim* decision. But, again, the City repeatedly did so in its Opening Brief to that court. (See App. Br. 15, 16, 37.) The City cannot complain

[22] The court also mentioned its *Santa Monica* decision in the coordinated action (see p. 9, *ante*), but only in passing, as that city's ordinance does not use the "operator" language.

that the court did so too.

Whether under the statute and rules governing coordinated proceedings, or the "law of the case" doctrine, a Court of Appeal panel in a coordinated proceeding must be able to consider its prior decisions in the coordinated proceeding that involved common issues of fact or law, whether published or not. San Diego's proposed blanket rule to prohibit the citation of an unpublished decision within a coordinated proceeding would effectively require the Court of Appeal to publish every decision in such a proceeding, regardless of whether the court believed the decision meets the standard for publication set forth in Rule 8.1105(c). Such a construction would ill serve the coordination process or that Rule.[23]

In the end, San Diego's complaint about the Court of Appeal citing its prior *Anaheim* decision (after San Diego did) is much ado about nothing. Even if the court erred in citing to its *Anaheim* decision, doing so resulted in no harm to San Diego, much less reversible error.

The City does not assert the court would have reached a different result here had it not done so. The court expressly reaffirmed the soundness of its logic in its *Anaheim* decision, and, thus, clearly would have reached the same decision here if it had not cited that decision. Moreover, the points for which the court considered that decision – the meaning of "Operator" and the effect of the "charged by the Operator" limitation – are not challenged by San Diego before this Court.

In any event, the hearing officer's factual findings were not

[23] San Diego cites a number of cases addressing the law of the case doctrine in "consolidated" actions. (Op. Br. 56-58.) But as it concedes, coordination and consolidation are "not the same." (*Id.* at p. 56 fn. 31.) These cases do not address application of the doctrine in coordinated actions.

challenged below, and the legal issues are now before this Court for *de novo* review.[24]

CONCLUSION

For all the above reasons, judgment for the OTCs should be affirmed.

[24] If this Court nevertheless chooses to address the issue and concludes the Court of Appeal's citing of its prior decision was error, the proper remedy would be to order that court to modify its published opinion to omit its reference, not reversal on the merits.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), the text of Respondents' Answer Brief on the Merits in Case Number S218400, excluding tables and attachments, consists of 13,961 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: March 17, 2015

SKADDEN, ARPS, SLATE,
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PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 300 South Grand Avenue, Suite 3400, Los Angeles, California 90071.

On **March 18, 2015**, I served the foregoing document described as:

RESPONDENTS' ANSWER BRIEF ON THE MERITS

on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **(BY US MAIL)** I am readily familiar with the firms' practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 18, 2015,** at Los Angeles, California.

Nandi Berglund
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