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 of the State of California 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

ANSWER TO PETITION FOR REVIEW
[Request To Take Judicial Notice, and Opposition to Petitioner's Request To Take Judicial Notice, Filed Concurrently Herewith]

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

I. INTRODUCTION

This is the third attempt by cities of California to seek redress from this Court to expand the scope of their transient occupancy tax ("TOT") ordinances, rather than presenting the issue to the voters as required by the California Constitution. By its plain terms, the City of San Diego's (the "City") TOT ordinance limits the imposition of tax to the "Rent charged by the Operator." Under the definitions provided in the ordinance, the "Rent charged by the Operator" is the amount charged by the *proprietor* of the hotel (the "Operator") for "*occupancy*" – *i.e.*, the right to use or possess a hotel room. Respondent online travel companies ("OTCs") are not proprietors of hotels, as the City concedes, and thus the amounts they charge for their reservation services are not amounts charged by the "Operator" for "Occupancy." As the trial court and a unanimous Court of Appeal determined, those amounts are not subject to tax under the plain language of the City's ordinance.

Nevertheless, unhappy with the Court of Appeal's decision, and reluctant to undertake the "difficult and costly" process of amending its tax laws as required by the California Constitution, the City through this Petition is misusing California's writ review procedure in an effort to reargue the merits of its TOT claims against the OTCs. In so doing, the City concocts an "important question of law" and a "change" in doctrine where none exists. The City has not presented an issue appropriate for review by this Court. Its Petition for Review should be denied.

San Diego Must Be Held To The Express Terms Of Its Ordinance

As this Court repeatedly has made clear, a taxing authority can only impose tax in accordance with the express terms of the tax statute it chose to enact. This fundamental rule is in recognition of the reality that a government's exercise of its sovereign taxing power imposes burdens on private citizens, takes their property, and has great potential for governmental abuse. Similar considerations led the voters of California to enact Proposition 218, which amended the California Constitution to further ensure that taxes – specifically including hotel taxes – cannot be expanded at the whim of the municipal government. Instead, under Proposition 218, local governments are prohibited 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 accordance with these principles, the City must be held to the express terms of its TOT ordinance ("Ordinance") when seeking to impose TOT obligations and liability on the OTCs.

The City enacted its Ordinance in 1964.[1] The Ordinance imposes tax obligations and liability only on the "transient" and hotel "operator," and imposes tax only on the "Rent charged by the Operator." (Ct. Appeal, 3/27/14 Op., (the "Opinion") at 2-3, quoting Ordinance.) "Rent" is defined as "[t]he total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room ...." (*Id.* at 2.) In accordance with these express terms, since the Ordinance's enactment, the City asserted

[1] The Ordinance is codified at Chapter 3, Article 5, Division 1 of the San Diego Municipal Code. All emphasis in quotations herein is added, and internal citations omitted, unless otherwise indicated.

TOT liability only against transients and hotel operators in the City, and imposed tax only on the amount charged by, and paid to, the hotel operator for a transient's occupancy of a room. Thus, when a reservation is booked through an OTC, the hotel operator remits TOT to the City on the amount it actually charges and receives as compensation for providing occupancy of a room to the transient. (*Id.* at 4.)

The OTCs provide comparative information about airlines, hotels and rental car companies on their websites, and allow customers to book reservations with such travel providers. (Op. at 3.) OTCs are not hotel operators, as the City concedes. (*Id.* at 3 & 18 n.14.) Accordingly, the OTCs do not have tax obligations and liability, and the amount they charge customers and retain for their online services is not "Rent charged by the Operator."

Nevertheless, through this lawsuit, and the underlying assessments, the City sought to go beyond the Ordinance's express terms to (i) impose tax obligations and liability on OTCs retroactively (*id.* at 5), even though they are not "Transients" or hotel "Operators;" and (ii) impose tax on the amount an OTC charges a customer and retains for using its online services to book a reservation for a hotel room, even though those amounts are not "Rent charged by the Operator" "for the Occupancy of a room." (*Id.*)

In response to the City's attempt to evade the plain meaning of its Ordinance, the OTCs first pursued an administrative appeal, and then petitioned the Superior Court for a writ of mandamus. (*Id.*) The Superior Court, the Hon. Elihu M. Berle presiding, issued a writ of mandate ordering that the administrative ruling upholding the assessments be vacated, and the assessments set aside. (*Id.*) The City appealed. (*Id.*)

The Court of Appeal affirmed. Adhering to the express terms of the City's Ordinance, the Court of Appeal unanimously upheld the trial court's conclusion that "under the plain language of the appellant City of San Diego's (City) TOT ordinance, the OTCs have no TOT obligations or liability." (*Id.* at 2.)

The Court Of Appeal Properly Held San Diego's Ordinance Does Not Apply To The OTCs

In its Opinion, the Court of Appeal recognized that the City "must be held to the express terms of [its] tax statute." (*Id.* at 7.) After performing its "first task" of "examin[ing] the words of the ordinance," the Court concluded "the words of ordinance do not reveal an intent to tax the service fees and markups charged by the OTCs." (*Id.* at 7.) Under the "plain meaning" of the Ordinance's express terms, the amount subject to tax is limited to "rent charged by the hotel operator." (*Id.* at 8.) The Court held "the OTCs cannot be considered to be operators of [] hotels," and "therefore the OTCs' service charges and markups are not within the scope of the City's ordinance." (*Id.* at 9.) In so ruling, the Court explained the contrary constructions proffered by the City are "defeated by the plain language of the ordinance," which mandates that "TOT may only be collected on the rent charged by the operator." (*Id.* at 15.)

The City's Petition reveals nothing more than dissatisfaction with the Court's "plain meaning" construction of its Ordinance, which it claims defeats the supposed intent of the Ordinance to tax all amounts paid by transients in a room reservation transaction. But the Court correctly rejected this assertion, noting that while the Ordinance's "intent to impose a tax on transients," "from the statute's plain language that the tax is limited [to] the amount of rent charged by the hotel operator to the transient." (Op. at 18.)

Thus, the City is left to protest the Court's refusal to go *outside* the Ordinance's express terms to impose tax liability on the OTCs based on a theory that the OTCs are somehow "agents" of the hotels. This supposed ground for review is contrary to and untethered from the Ordinance's express terms, and is based on the City's rejected construction that tax is due on the "retail rate" the transient paid for the reservation booking. (*Id.* at 1.) As the Court of Appeal held, the City's construction ignores, and is premised upon a fundamental misstatement of, the Ordinance's express terms setting forth the tax base as solely "Rent charged by the Operator." (Op. at 2.)[2]

In its effort to obtain review by this Court, the City is left where its Petition begins – appealing to the purse by asserting the transient occupancy tax is an important source of revenue. (Pet. at 3-4.) The City goes one step further, and asserts that because other California cities have enacted similar tax ordinances, the decision "impacts the budgets of public entities across the State." (*Id.* at 3.) This Court properly rejected the same arguments when it denied the petitions for review filed by the cities of Anaheim and Santa Monica (*see* OTCs' Request To Take Judicial Notice ("OTCs' RJN") Ex. 11); of course, the amount at issue alone does not create an "important question of law." Nor does the City's desire for additional tax revenue justify expanding the plain language of a tax statute, contrary to

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[2] Further, the City's wholesale/retail construct is disingenuous. The City does not seek to impose tax on the "retail rate" the OTC allegedly charges for the room as "agent" of the hotel. Instead, the City seeks to impose tax on both the "retail rate" – *i.e.*, the room rate charged by the hotel plus the margin charged by the OTC for its services – *plus* the OTCs' separately stated service fees. Nowhere does the City explain how imposing tax on those service fees is consistent with its argument that it seeks to impose tax on the "retail rate" charged for the room.

the California Constitution and all canons of statutory construction.

In Citing Its Prior Unpublished Decisions In These Coordinated Actions, The Court of Appeal Properly Relied Upon The "Law of the Case" Exception To Rule 8.1115(a)

The City's attempt to manufacture legal issues of statewide significance relating to the "law of the case" doctrine is a contrivance that also does not merit review. This argument takes two forms (*see* Pet. at 5-6), and both fail.

First, the City argues that the Court of Appeal erred in referencing its own prior decisions in the *Santa Monica* and *Anaheim* actions[3] as "law of the case," and that hundreds of other California municipalities will be bound by the Court's purported "law of the case" holding as to TOT ordinances. Instead, in response to the City's petition for rehearing, the Court of Appeal added a footnote to its decision explaining that under the circumstances of these coordinated actions, citing those decisions was permissible under Rule of Court 8.1115(b)(1), the "law of the case" exemption to Rule of Court 8.1115(a), which is the general rule prohibiting citation of unpublished decisions. (Op. n.4.)[4]

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[3] *In re Transient Occupancy Tax Cases*, Case No. B236166 (Cal. App. 2 Dist. 2012) (Santa Monica) (OTCs' RJN Ex. 10); *In re Transient Occupancy Tax Cases*, Case No. B230457 (Cal. App. 2 Dist. 2012) (Anaheim) (OTCs' RJN Ex. 9). This Court rejected both cities' Petitions for Review. *In re Transient Occupancy Tax Cases*, No. S207192, *review denied* (CA. Sup. Ct., January 23, 2013) (OTCs' RJN Ex. 11).

[4] The Court's added footnote reads, in its entirety:

> Pursuant to California Rules of Court, rule 8.1115, subdivision (b), this court may cite and rely upon an unpublished case when it is relevant as law of the case. The unpublished opinions that we cite in this opinion are part of the same single coordinated proceedings as this case, captioned "In re Transient Occupancy Tax Cases (No. JCCP 4472)". The coordinated transient occupancy tax cases necessarily share common questions of fact and law. (Code Civ. Proc., § 404.) Under the circumstances, we cite these unpublished opinions as law of the case. (See *Kowis v. Howard* (1992) 3 Cal. 4th

(cont'd)

Although the City argued in its petitions for rehearing that citation to the *Anaheim* and *Santa Monica* opinions violated Rule 8.1115(a), it does not make that argument to this Court. As the City now appears to concede, the Court's reference to the *Anaheim* and *Santa Monica* opinions was consistent with the rules it cited governing coordinated proceedings, which aim to prevent inconsistent orders and judgments in cases involving common questions of law and fact. (*See* Op. at 4 n.4 (citing Cal. Civ. Proc. Code §404)). *See also* Cal. Civ. Proc. Code §§ 404, 404.1.

Further, the Court of Appeal's analysis demonstrates that it did *not* rely on the *Anaheim* and *Santa Monica* decisions as binding "law of the case." Instead, the Court thoroughly examined the language of San Diego's own Ordinance and held that it does not impose TOT obligations or liability on the OTCs. In so doing, it discussed the "logic" and reasoning of the *Anaheim* and *Santa Monica* decisions where the statutory provisions were "similar." (*See* Op. at 9.) But it did not bind San Diego to those holdings as "law of the case." The City's speculation that the Court of Appeal will blindly apply its past decisions to these coordinated proceedings as "law of the case" in any future appeals is belied by its track record of individually analyzing each of the three ordinances presented to it to date.

Second, the City exaggerates the nature of the Court's reference to the "law of the case doctrine," describing it as a "holding" in a published case that decisions in coordinated actions are binding law of the case in

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(cont'd from previous page)

888, 892-893 ["The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal.'"])

other coordinated actions. From that fictitious holding, the City then posits dire consequences beyond the context of these TOT cases. The City's straw man argument does not justify review.

As a threshold matter, the City cannot be heard to complain about the Court of Appeal publishing the Opinion and creating binding precedent, since the City itself – represented by outside counsel who purport to represent "numerous" California municipalities[5] – *requested* publication for this precise purpose. (OTCs' RJN Ex. 14 (Appellants' Pet. for Rehearing & Request for Publication (March 20, 2014)), at 4.)

More importantly, the City misstates the context and manner in which the Court of Appeal mentioned the "law of the case" exemption to Rule 8.1115(a). The Court did not hold that the *Santa Monica* and *Anaheim* decisions were law of the case as to San Diego. Instead, it invoked the "law of the case" exception to the general rule prohibiting citation to unpublished decisions. It did not set forth a new or expanded application of the "law of the case" doctrine; it merely provided a rationale for citation to unpublished decisions under the unique circumstances of this case. And even if this Court were to disagree with this limited holding, the remedy would be to depublish the Opinion (or depublish footnote 4). The remedy is not review of the merits of the Opinion by this Court.

The City's Petition should be denied.

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[5] *See* Larson Albert LLP, http://www.lalitigationlawyers.com/lawyer-attorney-1364032.html (lasted visited May 21, 2014) ("Represented as co-counsel numerous California municipalities ....").

II. BACKGROUND

A. The Unopposed Coordination of Los Angeles and San Diego Actions, and The Addition Of Three Later Add-On Actions

On December 30, 2004, the City of Los Angeles filed the first action in California seeking to hold the OTCs liable for hotel occupancy tax. (*See* OTCs' RJN Ex. 1 (Los Angeles Class Action Complaint).) On February 9, 2006, the City of San Diego – represented by the same outside counsel as the City of Los Angeles – filed its action against the OTCs. (*See* OTCs' RJN Ex. 2 (San Diego Complaint).)

On April 19, 2006, the Chief Justice of California and Chair of the Judicial Council signed an Order Assigning Motion Judge and Setting Date for Hearing. (*See* Petitioner's Request to Take Judicial Notice ("Petitioner's RJN") Ex. A.) On July 3, 2006, the coordination motion judge signed its Recommendations Regarding Coordination and Order on Stay Request, in which it determined the Los Angeles and San Diego actions were complex and recommended the cases be coordinated before the Los Angeles Superior Court. (*Id.* Ex. C.) Coordination was not opposed by any party. (*Id.* Ex. C ¶ 2.) The judge further designated the Court of Appeal, Second Appellate District, as the reviewing court. (*Id.* Ex. C ¶ 3.) Thereafter, by order dated July 21, 2006, the Presiding Judge assigned a Los Angeles Superior Court judge as coordination trial judge for JCCP 4472. (Petitioner's RJN Ex. D.)

The OTCs successfully demurred to the complaints on the grounds that Los Angeles and San Diego failed to exhaust their administrative remedies. (*See* OTCs' RJN Exs. 4 & 5.) The cases were stayed pending exhaustion. (*Id.*)

In the meantime, actions involving the cities of Anaheim and Santa Monica were coordinated as add-on cases to JCCP 4472 on May 4, 2009, and August 31, 2010 respectively. (*See* Petitioner's RJN Exs. E & G.) Neither of those cities opposed coordination. (*Id.*) Over the objection of the City and County of San Francisco, the court ordered actions involving San Francisco coordinated into JCCP 4472. (Petitioner's RJN Ex. F; OTCs' RJN Ex. 6.)

Both Anaheim and Santa Monica were represented by the same outside counsel as San Diego here. In each of those actions, the coordination trial judge (Hon. Carolyn B. Kuhl) analyzed the city's respective TOT ordinance, and held that neither ordinance imposed tax obligations or liability on the OTCs, and that the amounts the OTCs charge and retain for their services is not taxable. (OTCs' RJN Exs. 7 & 8.) In separate unpublished decisions, the Court of Appeal analyzed each city's ordinance and upheld the coordination trial judge's rulings. (OTCs' RJN Exs. 9 (Anaheim decision) & 10 (Santa Monica decision).)

B. San Diego Assessed TOT Against The OTCs And The OTCs Administratively Appealed

In October 2007, San Diego began TOT audits of the OTCs and later issued TOT assessments against the OTCs, which each OTC timely appealed. (JA2:412.)[6] The hearing was held in early 2010, and the hearing officer issued his decision in May 2010. (*Id.*) The hearing officer affirmed $21.264 million in assessments against the OTCs. (*Id.* at 222-223.)

[6] Citations to the Joint Appendix are designated "JA" followed by tab and page numbers.

C. The Superior Court Vacated The San Diego Assessments

On September 6, 2011, after extensive briefing and oral argument, the Superior Court granted the OTCs' Motion for Judgment Granting Writ of Mandate, and denied San Diego's cross motion.

After noting the facts were essentially undisputed, the court described the OTCs' business operations: (i) "the OTC contracts with hotels for the right to sell occupancy privileges to the transients; (ii) the OTC books room reservations "through [its] Internet site" and "charges ... a marked-up retail price for the room plus certain taxes and fees;" (iii) the OTC then "remits to the hotel the wholesale price of the room and the [TOT], based on the wholesale price paid to the hotel." (*Id.* at 1200.)

The court, citing the City's Ordinance, explained that tax is imposed "on transients for the privilege of occupancy in hotels," and is a "percent of the 'rent charged by the operator' to the transient for the privilege of occupancy in hotel." (*Id.* at 1199.)

The court ruled OTCs do not have "control over the hotel or ... the right to run the business of the hotel," and thus, are not hotel "operators." (*Id.* at 1214.) Having ruled the OTCs are not "operators," of hotels, the court concluded:

> 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 this court concludes that the OTCs are not operators of the hotels, the amount that the OTCs charge for their reservation services [is] not part of the rent.

(*Id.* at 1222.)

The court issued a writ of mandate ordering the hearing officer to vacate his ruling in favor of San Diego, issue a new ruling that the OTCs are not liable for TOT, and set aside San Diego's assessments.

D. The Court of Appeal Affirmed The Order Vacating The San Diego Assessments

The Court of Appeal also accepted that the facts of the case were "essentially undisputed" and focused on the interpretation of the TOT ordinance. (Op. at 6.) The interpretation of a tax statute is governed by well-settled rules of statutory construction that mandate (i) where "the language of the statute is clear and unambiguous, there is no need for statutory construction;" and (ii) that a "taxing authority must be held to the express terms of a tax statute." (*Id.* at 6-7, quoting *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988) and *Agnew v. State Bd. of Equalization*, 21 Cal. 4th 310, 327 (1999).) In accordance with those governing rules, the Court focused on the express terms of the City's Ordinance, and held that "the words of the ordinance do not reveal an intent to impose a tax on the service fees and markups charged by the OTCs." (Op. at 7.)

First, the Court looked to the Ordinance's tax imposition provision, which states "For 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." (Op. at 7, quoting Ord. § 35.0103.) The Court explained that "[t]here is no provision imposing any tax liability on any entity other than the hotel operator or the transient." (Op. at 8.) Thus, the Court held that "from the statute's plain language[,] the tax is limited. It may only be imposed on the amount of rent charged by the hotel operator to the transient." (Op. at 18.)

As the Court explained, "[t]he City concedes that OTCs are not transients, and that OTCs are not hotel operators." (Op. at 18.) The Court held that "[b]ecause the City's ordinance imposes tax only on rent charged

by the operator, it does not reach amounts charged by the OTC for its services." (Op. at 9.)

The Court then performed a detailed analysis of the statutory definition of "rent," concluding "items are not taxable unless they are charged by the hotel operator. The OTC service fees are not charged by the hotel operator, therefore they are not taxable." (Op. at 10.) Simply, as expressly defined in the Ordinance, "rent" "cannot be interpreted to include as part of the tax base any and all service charges imposed upon the transient." (Op. at 14.)

The Court explained, its "plain language interpretation ... fully comports with the stated intent of the ordinance" to impose a tax on transients: "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 on the amount of the rent charged by the hotel operator to the transient. [Accordingly,] there is simply no basis for the imposition of TOT liability on the OTC." (Op. at 18.)

III. THE CITY'S PETITION SHOULD BE DENIED BECAUSE NO GROUNDS FOR REVIEW EXIST IN THIS CASE.

California Rule of Court 8.500(b) sets forth the limited grounds under which this Court may review a decision of a Court of Appeal:

> The Supreme Court may order review of a Court of Appeal decision: (1) When necessary to secure uniformity of decision or to settle an important question of law; (2) When the Court of Appeal lacked jurisdiction; (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or, (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

Cal. R. Ct. 8.500(b). "The petition must explain how the case presents a ground for review under rule 8.500(b)." Cal. R. Ct. 8.504(b)(2).

The City argues review should be granted as to "important questions of law," because (i) "the TOT question presents a uniform issue of statewide importance," and (ii) the Court of Appeal's decision will "automatically constitute 'law of the case' as to the other coordinated actions." (Pet. at 4, 5-6.) In so doing, the City seeks to manufacture grounds for review where none exist. Instead, each of the City's purported issues presented underscores that its Petition is merely a continuation of its effort to impose tax in a manner contrary to its Ordinance's express terms.

A. The Court Of Appeal's Plain Meaning Construction Of The City's Transient Occupancy Tax Ordinance Does Not Provide A Ground For Review.

As shown above, the Opinion adheres to the plain meaning of the terms of San Diego's Ordinance. This plain meaning construction of the City's Ordinance adheres to the rules governing statutory construction set forth by this Court in *Lungren, Agnew*, and *Pioneer Express*. (*Supra* at 12.) As the Court of Appeal held, this plain meaning construction is fatal to the City's tax claims.[7]

San Diego's arguments otherwise simply rehash the merits arguments the Court considered and correctly rejected. And none justifies review by this Court. *People v. Davis*, 147 Cal. 346, 348 (1905)(holding that mere error is insufficient to warrant review by this Court).

1. The Court Correctly Construed the Phrase "Rent Charged By The Operator" To Include Only Amounts Charged By The Hotel Operator For The Room Rental.

[7] The rules governing statutory construction further mandate that any doubts as to the meaning of tax statute "are *construed most strongly against the government*, and in favor of the citizen." (Op. at 7, quoting *Pioneer Express*, 208 Cal. at 687.) Thus, even if the City had proffered a contrary construction of its Ordinance that is reasonable (it did not), then, at best, this contrary construction would result in an ambiguity that must be resolved in the OTCs' favor, thereby still defeating the City's tax claims.

The City argues the Court erred by reasoning that "'rent' charged' means 'rent received' by hotels." (Pet. at 23.) Of course, this argument ignores the key limiting language of the Ordinance, which only taxes the "Rent charged *by the Operator*." Ord. at § 35.0103. In any event, the City misstates the Court of Appeal's (and the trial court's) construction.

As the Court explained, "The hotels are not giving away the rooms for free. They are *charging* transients to occupy their hotel rooms." (Op. at 10 n.10 (emphasis in original).) And further, "As the City admits, the hotel operators contractually allow the OTCs to collect the rent that the hotels charge for occupancy." (*Id.* at 15 n.12.) "Whether that rent is charged directly by the hotel or indirectly through a third party – the OTC – its numeric value does not change." (*Id.* at 17.) Thus, the Court applied the plain meaning of the term "Rent charged by the Operator," and concluded that in a merchant model transaction, the hotel charges the rent, which is collected by the OTC. (*Id.* at 16-17.)

Relatedly, the City argues the Court's construction is erroneous because the customer cannot obtain the right to occupancy unless he pays the OTCs' margin and service fees, and therefore the amounts charged by OTCs for the services must be *deemed* "'rent charged' by the hotel" and included in the tax base. (Pet. at 24-25.) The Court of Appeal also correctly rejected this argument.

To start, it is not true that customers must pay an OTCs' margin and service fees in order to book a hotel room reservation. (*See* Pet. at 7.) Customers can always avoid an OTC's fee by booking directly with the hotel, instead of using the OTC's online services.

In any event, it does not change the result here. For a reservation booked through an OTC, "the Rent charged by the Operator" is the rate

charged by the hotel for "Occupancy," *i.e.*, for the "use or possession, or the right to the use or possession, of any room ... in any Hotel." Ord. § 35.0102. The total amount charged by the "Operator" "for the privilege of Occupancy in any Hotel" is *not* the total amount paid by the Transient to anyone for anything, but rather is the amount charged by the hotel Operator itself for "use or possession, or the right to the use or possession" of a room. *Id.* § 35.0103. The Ordinance's express terms do not impose tax on the additional amount an OTC charges the customer and retains as compensation for its online facilitation services and the Court of Appeal correctly held as much:

> The provisions that actually impose the tax specifically limit the tax base to "Rent Charged by the Operator." (§§ 35.0103, 35.0104; 35.0105; 35.0106; 35.0108.) The OTC service charges are *not* "charged by the Operator." They are charged by the OTC. Therefore, those charges are not taxed ....

(Op. at 14.)

The City claims the margin collected and retained by the OTCs for their online service can be deemed "Rent charged by the Operator" of the hotel because by contract, hotels will not allow OTCs to offer rooms for less than the hotel's own best available price. (Pet. at 26-27.) The City misstates the uncontroverted evidence as set forth in the hearing officer's factual findings: As the hearing officer found, through their websites, the OTCs offer available hotel rooms to the public at the retail price," which is set by the OTCs and is "greater than the wholesale price." (JA4:199.) The contracts merely set a floor, but the OTCs generally can charge what they want for their margin, and any parity with the rates offered by the hotels is a result of market forces, not the hotel contracts. (JA1:199.)

Moreover, to the extent hotel-OTC contracts contain a rate parity provision, such a contractual provision does not transform amounts charged

by OTCs into amounts charged for Occupancy by the "Operator" of the hotel. Only the Operator possesses the physical space to be occupied, and thus only the rate charged by the Operator is the amount charged for Occupancy and subject to tax. The margin and service fee charged by the OTCs for their services simply is not "Rent charged by the Operator" for Occupancy.

Finally, the City brushes over the fact that the OTCs also charge service fees that are set entirely by the OTC. (*See* Pet. at 9; JA4:200.) Not even the City argues the hotel sets the amount of the OTCs' service fees. This concession is fatal; if the City really believed that the reason it can tax the "retail rate" is because that rate is set by the hotel, the City would not also be seeking tax on the OTCs' service fees, which the hotel undisputedly does not set.

2. The City's Effort To Evade The Ordinance's Express Terms Through Reliance On Supposed General "Agency Principles" Does Not Give Rise To An "Important Question Of Law."

The City asserts the Court of Appeal erred in rejecting the City's arguments that even if the OTCs cannot be held liable for TOT under the terms of the Ordinance, they can nonetheless be liable as "agents" (or "rental agents") of the hotels. (*See* Pet. at 27-28.) Again, this argument fails to give rise to an "important question of law." The Court of Appeal correctly adhered to the Ordinance's plain terms, which limit the tax base to the "Rent charged by the Operator":

> We find that we need not address the OTCs' potential liability for TOT under the various labels listed by the City. Even if the OTCs were liable for TOT under any of these labels, they would only be liable for TOT on the rent charged by the operator – not on the fees that the OTCs themselves charge.

(Op. at 17.)

The City's attempt to recast the OTCs as "rental agents" does not change the definition of "Rent" or the amount taxed. Thus, the argument provides no basis for review by this Court.

3. This Court Should Not Grant Review For The Purpose Of Relieving The City From The Obligations Imposed Upon It By The California Constitution Pursuant To Proposition 218

The City complains that review is warranted so it and other California cities can avoid the "difficult and costly" process of submitting to the voters amendments to their ordinances aimed at reaching new taxpayers, as required by Proposition 218. This complaint is self-refuting; evasion of Proposition 218's requirements is not a basis for review by this Court.

By that Proposition, the California Constitution was amended to prohibit 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's Office, Understanding Proposition 218, ch. 1. ("LAO Analysis").

> In approving Proposition 218, the voters declared that local governments have subjected taxpayers to excessive tax, assessment, ... increases that ... frustrate the purposes of voter approval for tax increases [in Proposition 13].... This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

State of California, Ballot Pamphlet, Gen. Elec. (1996) text of Prop. 218, § 2; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2006 supp.) foll. art. XIII C, § 1, at p. 73. The local "general purpose" taxes that

Proposition 218 was intended to curtail include "most notably ... *hotel*, business license, and utility user taxes." LAO Analysis, supra, ch. 1.

Through its new, expanded constructions, the City seeks to "impose" and "increase" its tax to apply to new and different entities and revenue amounts. After years of collecting the 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 online services. This reinterpretation would "impose" or "increase" the tax by applying it to additional businesses and a "larger tax base" of revenues.

However, instead of submitting to the voters amendments to its Ordinance to cover OTCs and other third party intermediaries, the City asks this Court to accept review and relieve it from the "difficult and costly process of amending" its Ordinance as required by the California Constitution. (Pet. at 21.) This motivation for seeking review by this Court is made even more clear by the California League of Cities' amicus brief, which says that if the Court of Appeal decision holding OTCs do not owe the TOT "is correct, it is no answer to say that cities and counties may simply amend their ordinances ..." because Proposition 218 and other amendments impose "difficult" requirements for expanding taxes. In other words, the cities would have this Court overturn a *correct* decision so that they may circumvent the voter approval that Proposition 218 was specifically intended to ensure.

Compliance with the California Constitution may be burdensome, but the voters of California expressly imposed this burden on California's local governments because they were frustrated by "the methods by which local governments exact revenue from taxpayers without their consent." State of California, Ballot Pamphlet, Gen. Elec. (1996) text of Prop. 218, § 2; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2006 supp.) foll. art. XIII C, § 1, at p. 73. This Court should decline the City's request to "impose, extend and increase" the TOT through judicial activism rather than voter approval.

B. Cases Nationwide Are In Accord With The Court Of Appeal's Opinion.

Having conceded the Court's ruling is "consistent" with relevant California authority (Pet. at 15), the City asserts review is appropriate because the "TOT issue" is of "national importance." (*Id.* at 32.) However, the City does not and cannot show that the fact that other state courts are considering the OTCs' liability for tax under their own particular local hotel ordinances means that review of *this* case involving San Diego's Ordinance would settle an "important question of law."

Further, while the City asserts the issue is "being litigated in cases across the country," it is able to cite to only a handful of cases in which tax obligations actually were imposed on OTCs. That is because the courts nationwide that have examined whether the OTCs are subject to liability under a TOT statute or ordinance that limits liability to hotels, hotel "operators" or hotel "vendors," have overwhelmingly concluded that the OTCs are *not liable* for hotel taxes because they do not "operate" hotels. *See, e.g., City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 649 (6th Cir. 2012) (OTCs do not "perform the functions of an operator or proprietor");

Pitt County v. Hotels.com, L.P., 553 F.3d 308, 313 (4th Cir. 2009) (OTCs "are not operators of the hotels whose rooms they offer to the public on the internet").[8] Other courts have similarly ruled the OTCs are not liable for tax because they lack "sufficient control of the property to be entitled to grant possessory or use rights" and "do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers." *Alachua Cnty. v. Expedia, Inc.*, 110 So. 3d 941, 946 (Fla. Dist. Ct. App. 2013); *City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706, 714-15 (Tex. App. 2011) (OTCs, unlike hotels, do "not have rooms or occupancy" as even city conceded "the OTCs do not have the right to use or possess hotel rooms"); *City of Birmingham v. Orbitz, LLC*, 93 So. 2d 932, 935-36 (Ala. 2012) (upholding trial court's ruling that "the [OTCs] are not engaged in the business of renting or furnishing any room or rooms in any hotel"); *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 714 (Mo. 2011) (OTCs "not liable" because they do "not provide sleeping rooms"); *Louisville/Jefferson County Metro. Gov't v. Hotels.com, L.P.*, 590 F.3d 381 (6th Cir. 2009) ("[T]he [OTCs] in the present case do not physically control or furnish the rooms they advertise.").

Simply, the weight of authority is overwhelmingly in favor of the OTCs, not the taxing authorities. However, in every case, it is the express

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[8] *See also Bowling Green v. Hotels.com, L.P.*, 357 S.W.3d 531, 533 (Ky. Ct. App. 2011) ("The OTCs d[o] not provide physical accommodations ...."); *City of Goodlettsville v. Priceline.com Inc.*, 844 F. Supp. 2d 897, 902 (M.D. Tenn. 2012) ("The OTCs ... do not physically provide possession of any hotel rooms to consumers; and they do not assign the particular room in which a consumer may stay for a given booking."); *City of Orange, TX v. Hotels.com, L.P.*, 1:06-CV-00413, 2007 WL 2787985, at *6 (E.D. Tex. Sept. 21, 2007) (OTCs are "web-based providers, [] not buildings in which a member or members of the public may, for consideration, obtain sleeping accommodations.").

terms of the TOT statute or ordinance at issue that is controlling. Thus, while the TOT "issue" may be important in various jurisdictions throughout the nation, that is not a reason for this Court to review the Court of Appeal's decision as to San Diego's TOT Ordinance.

In citing to a handful of cases, the City makes no attempt to establish how or why those rulings are relevant to resolving the issue of statutory construction presented here. Indeed, the City concedes the express terms of the ordinances at issue in those cases are "different from those at issue here." (Pet. at 33.) None of the cases cited by the City involved ordinances that include the "operator" limitation, and thus, none is relevant to, much less informative of, how to construe the phrase "Rent charged by the Operator" at issue here. While other jurisdictions may have enacted ordinances that impose tax on "the bargain struck" by the customer or otherwise on the total amount paid by the customer, the City did not. Rather, as held by the Court below, "[t]he provisions that actually impose the tax limit the tax base to 'Rent charged by the Operator.'" (Op. at 14.)

The City nevertheless asserts the "logic" reflected in those ordinances should be imported into its own Ordinance to impose tax on the total amount a customer pays. (Pet. at 33.) But the City cannot impose tax by proxy, substituting "logic" from other out-of-state ordinances in place of the taxing scheme reflected by the express terms of the Ordinance it enacted. As the Court of Appeal made clear, under California's long-established rules of statutory construction, the City "must be held to the express terms of" its Ordinance. (Op. at 7.)

C. Review Is Not Warranted By The Court Of Appeal's Citation To The Decisions In The Coordinated Anaheim And Santa Monica Proceedings.

Finally, the City argues that this Court should grant review because in response to the City's petition for rehearing, the Court of Appeal added footnote 4 to the Opinion, which explained it was permissible to reference two of its prior decisions in the same coordinated proceedings under the "law of the case" exception to the general rule prohibiting citation to unpublished decisions, Rule of Court 8.1115(a). (Pet. at 35-40.) The City's arguments fail because (a) the Court of Appeal did not err in referencing those two prior decisions, in *Anaheim* and *Santa Monica*; (b) as shown above, the Court of Appeal did not apply those decisions to San Diego as binding "law of the case." Nor does the Court's inclusion of footnote 4 in a published decision mark a change in law of the case doctrine. The inclusion of footnote 4 in the Opinion does not merit review by this Court.

First, under the unique circumstances of these coordinated proceedings, the Court of Appeal was permitted to cite to the *Anaheim* and *Santa Monica* decisions. In its petition for rehearing, the City had argued the Court violated Rule 81115(a) by citing the unpublished *Anaheim* and *Santa Monica* decisions. (*See* Pet. at 16-17.) But *the City itself cited and extensively discussed the Anaheim and Santa Monica decisions in its own briefing to the Court of Appeal* (*see* OTCs' RJN Exs. 9 & 10), and now (rightly) seems to have dropped the argument that those citations were erroneous.

Rather, as San Diego now appears to concede, the Court of Appeal's reference to the *Anaheim* and *Santa Monica* opinions was consistent with rules governing coordinated proceedings, which the Court of Appeal cited.

(*See* Op. at 4 n.4 (citing Cal. Civ. Proc. Code §404).) Those rules specify that coordination is appropriate to "promote the ends of justice" where "the common question of fact or law is predominating and significant to the litigation" considering, among other things, "the disadvantages of duplicative and inconsistent rulings, orders, or judgments ...." Cal. Civ. Proc. Code § 404.1. It is self-evident that a court cannot avoid inconsistent orders and judgments if it is prohibited from referring to its own prior decisions in the same coordinated proceedings.[9]

The City itself previously recognized the propriety of citing the *Anaheim* and *Santa Monica* decisions in these coordinated proceedings when it repeatedly cited and discussed them in its own Opening and Reply Briefs submitted to the Court of Appeal. (OTCs' RJN Ex. 12 (Appellant's Opening Brief) at 15, 16, 17, 25, 36 and 37; *id.* Ex. 13 (Appellant's Reply Brief at 1, 2, 5, 12, 14, 15, 23, 30, 31, 32, 34, 36, 44).[10] Indeed, the City

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[9] To the extent the coordination rules – aimed at avoiding inconsistent rulings – could be read as inconsistent with Rule 8.1115(a), the coordination rules prevail. The Code of Civil Procedure authorizes the Judicial Council to "provide by rule the practice and procedure for coordination of civil actions in convenient courts," "[n]otwithstanding any other provision of law." Cal. Civ. Proc. Code § 404.7. The Judicial Council, in turn, has specified in the California Rules of Court that the rules governing coordinated proceedings prevail over other inconsistent rules of general applicability. *See* Cal. R. Ct. 3.504(a) & (b) (these rules "prevail over conflicting general provisions of law. To the extent that the rules in this chapter conflict with provisions of law applicable to civil actions generally, the rules in this chapter prevail, as provided by Code of Civil Procedure section 404.7").

[10] Under the doctrine of invited error, "where a party by his conduct induces the commission of error, he is estopped from asserting it as a grounds for reversal on appeal." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 403 (1999). "The doctrine rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court." *People v. Upshaw*, 13 Cal. 3d 29, 34 (1974). The doctrine requires "affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party." *People v. Majors*, 18 Cal. 4th 385, 408-09 (1998). Here, the City strategically chose

(cont'd)

strategically elected to embrace those decisions, arguing they *supported* its construction of the TOT Ordinance. (*See e.g.,* OTCs' RJN Ex. 12 (Appellant's Brief) at 37.) For example, in its Reply, the City noted the Court of Appeal "correctly and succinctly [stated the rule] in the *Anaheim* decision" and requested that the Court use the same reasoning and apply it to San Diego. (OTCs' RJN Ex. 13 (Appellant's Reply Brief) at 44.) The City cannot invite the Court of Appeal to rely upon and reach a result consistent with an unpublished decision but then fault the Court when it accepts that invitation.

Equally disingenuous is the City's argument that the Court of Appeal's decision to publish the Opinion is a reason for this Court to take review, because *San Diego itself requested publication.* The City argued "this Court's reasoning and analysis should be published to allow all similarly situated California municipalities to evaluate their TOT ordinances and claims and to advance arguments to this Court based on citable authority." (OTCs' RJN Ex. 14 (Appellants' Pet. for Rehearing & Request for Publication (March 20, 2014)), at 4.) The Court did exactly as the City requested.

The City argues at great length why the procedural posture of this case renders application of the law of the case doctrine inappropriate. (Pet. at 35-40) (arguing *inter alia* that there was no "merger" of the coordinated cases.) This is a red herring. Although the Court of Appeal cited the "law of the case" exemption to the general rule prohibiting citation of unpublished decision, the analysis in the decision demonstrates the Court of

(cont'd from previous page)
to cite to the unpublished decisions to bolster its own argument; it cannot now assert citation of those decisions was reversible error.

Appeal did *not* in fact rely on the *Anaheim* and *Santa Monica* decisions as binding "law of the case." Instead, as shown above, the Court of Appeal thoroughly examined the language of San Diego's own Ordinance and held that it does not impose TOT obligations or liability on the OTCs.

Here, the Court of Appeal began its opinion by analyzing the Ordinance individually, holding that the language of the statute did not impose a tax on the OTCs. (Op. at 2.) The Court then noted that in some instances, it had applied the same reasoning in the preceding *Anaheim* and *Santa Monica* opinions as it was employing in San Diego. For example, as the Court explained its analysis with respect to the San Diego Ordinance, it described the Anaheim case and the plain meaning of the Anaheim ordinance, and noted "[t]he same logic applies here.... We therefore hold, as we did with the similar Anaheim ordinance, that the OTCs' service charges and markups are not within the scope of the City's ordinance." (Op. at 9.) Thus, while the Court noted the language and logic in each case was "similar," it analyzed the San Diego Ordinance on its own terms.

The crux of the City's argument is that many other jurisdictions have ordinances that are similar to San Diego's. The City's purported analysis of these provisions is inappropriate for judicial notice, for the reasons set forth in the OTCs' separately filed Opposition to the City's Request for Judicial Notice. Further, it shows at most that the ordinances may have one or another similar term, but not that the entire ordinance is identical.

The reality is that a total of five California jurisdictions have assessed the OTCs for TOT, and those are the five jurisdictions that have cases coordinated into this JCCP action (Anaheim, Santa Monica, San Diego, Los Angeles, and San Francisco). About 40 more jurisdictions initiated audits of the OTCs, but those audits have been dormant for several

years. *See* Priceline Group Form 10-K for fiscal year ending December 31, 2013, found at http://ir.pricelinegroup.com/secfiling.cfm?filingID=1075531-14-7&CIK=1075531 (last visited May 21, 2014). This is hardly the parade of cases the City speculates will be impacted by the Opinion.

But assuming the City is correct that many other jurisdictions use the same key language as San Diego, the City has offered no reason to believe the Court of Appeal would blindly apply the doctrine of law of the case to any future appeals presented. To the contrary, the Court of Appeal has in each of the three decisions it has rendered, analyzed the ordinance at issue on its own terms, whether similar or different from the ordinances at issue in prior decisions.

Similarly unavailing is the City's argument that review is warranted because all future cases may end up with the same appellate panel and may be decided in a similar manner. (*See* Pet. at 22, 28-29.) Such a result is precisely the point of the coordination rules. *See* Cal. Civ. Proc §404.1, §404.2. By the City's logic, this Court would be compelled to hear appeals from *every* JCCP action because by definition they will impact multiple parties and the result could be the same for each of them. This position is untenable.

Under the unique circumstances presented here, citation to previous appellate decisions in these coordinated proceedings was not only permissible but proper.

Second, contrary to the City's contention, the Court did not hold that the decision in one coordinated proceeding is "automatically" "law of the case" in other coordinated proceedings. Rather, the Court merely held that under the circumstances of these coordinated proceedings, it was appropriate to invoke the "law of the case" exception to the general rule

prohibiting citation to unpublished decisions. This is a much more limited holding than the City argues, and does not change the "law of the case" doctrine.

However, if this Court were to disagree, the remedy is not review of the merits of the substantive decision. Rather, this Court may deny the petition and order depublication (perhaps only of footnote 4). *See* Supreme Court of California Internal Operating Practices and Procedures § IV.

IV. CONCLUSION

For the foregoing reasons, the City's Petition for Review should be denied.

Dated: May 27, 2014

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), the attached brief, including footnotes, consists of 8393 words as counted by the Microsoft Word word-processing program used to generate the brief. The brief was typed using Times New Roman proportionally spaced font in 13-point typeface.

Dated: May 27, 2014

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: 
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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 3300, Los Angeles, California 90071.

On **May 27, 2014**, I served the foregoing document described as:

ANSWER TO PETITION FOR REVIEW

on the interested parties in this action addressed as follows:

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

Executed on **May 27, 2014,** at Los Angeles, California.

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