SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b)) TRANSIENT OCCUPANCY TAX CASES Included actions: PRICELINE.COM INCORPORATED and TRAVELWEB LLC v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244120 EXPEDIA, INC. v. CITY OF ANAHEIM, CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244175 TRIP NETWORK, INC et al. v. CITY OF ANAHEIM, CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244232 ORBITZ, LLC v. CITY OF ANAHEIM et al., Orange County Superior Court Case No.: 30-2009-00244240 TRAVELOCITY.COM LP et al., v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244139 HOTELS.COM, L.P. v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244176 HOTWIRE, INC v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244195	Case No. JCCP 4472 OPINION AND ORDER ON THE ONLINE TRAVEL COMPANIES' MOTION FOR JUDGMENT GRANTING WRIT OF MANDATE AND THE CITY OF ANAHEIM'S MOTION TO DENY ONLINE TRAVEL COMPANIES' WRITS OF ADMINISTRATIVE MANDAMUS

These cases concern taxes, interest, and penalties in the amount of $21,326,881.30 assessed by Respondent City of Anaheim ("City" or "Anaheim") on Petitioners, which are online (*i.e.,* internet) travel companies ("OTCs").[1] The taxes were assessed based upon Anaheim's Municipal Code, which states that "[f]or the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." (Anaheim Mun. Code § 2.12.010). This tax is known as the "transient occupancy tax." The OTCs appealed the City's tax assessment. In February 2009, a Hearing Officer for the City found that the OTCs were subject to the Anaheim Municipal Code ("Code" or "ordinance") and thus owed transient occupancy taxes (and associated interest and penalties) to the City.

In these actions, the OTCs petition this court to issue a writ of mandate overturning the 2009 decision of the City's Hearing Officer ("Decision")[2] in favor of Respondent. The City has filed a motion to deny the writ. The OTCs ask this court to determine (1) whether each OTC is an "operator" of hotels under the Code; and (2) whether the total amount collected by each OTC is "rent" subject to the transient occupancy tax. The OTCs also contend that the City's assessments are barred in part by a three-year statute of limitations and equitable doctrines of laches and estoppel. The City has asked this court to determine (1) whether the Hearing Officer proceeded in the manner required by law; (2) whether the Decision is supported by the findings; and (3) whether the findings are supported by the evidence.

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[1] The OTC Petitioners are Priceline.com Inc., Travelweb LLC; Expedia, Inc.; Hotwire, Inc.; Hotels.com, L.P.; Travelocity.com, L.P.; Site59.com, LLC; Orbitz, LLC; Trip Network, Inc. (d/b/a/ Cheaptickets); and Internetwork Publishing Corp. (d/b/a Lodging.com).

[2] The Hearing Officer's Decision, issued Jan. 28, 2009, is located in the Administrative Record at ANA-ADMIN 11557-11610. Further citations will be to the page numbers (1-54) in the Decision.

The court has considered all of the briefs, evidence, objections, and arguments presented on behalf of all parties. For the reasons stated below, the court grants the OTCs' Motion for Judgment Granting the Writ of Mandate and denies the City's Motion to Deny the OTCs' Writs of Administrative Mandamus.

I. FACTUAL AND PROCEDURAL SUMMARY

Stated briefly, traditionally hotels have sold directly to consumers the privilege of occupying hotel rooms for a specified period of time. Anaheim, like many municipalities, taxes this local commercial transaction by imposing a transient occupancy tax on the rental of hotel rooms that are physically located within the boundaries of the municipality.

More recently, the efficient access to broad customer markets through the internet has been exploited by internet-based travel companies. These OTCs offer hotel rooms or packages of travel services to a world-wide audience of internet users. Hotels have utilized the OTCs as a mechanism for price differentiation and marketing. While hotels continue to offer rooms directly to travelers at rates determined by the hotel, hotels also negotiate wholesale rates for blocks of rooms, allowing the OTCs to resell the privilege of occupying those rooms at rates determined by the OTC. The issue in this case is how Anaheim's transient occupancy tax applies to a hotel room rental transaction through an OTC.

As the OTCs' counsel stated at oral argument on the current motions, there essentially is no dispute as to the facts concerning the OTCs' mode of doing business. The facts found by the Hearing Officer as set forth in his written Decision are as follows:

1. The City of Anaheim (City) is a California charter city that imposes a transient occupancy tax pursuant to AMC Chapter 2.12. It is a privilege tax.
2. The Online Travel Companies (OTCs) collect and publish travel-related information on the internet and provide for the making of hotel reservations for customers on the internet. They do business on a nationwide scale and provide for the making of reservations at hotels and motels in the City.
3. On May 23, 2008, the City issued estimated assessments of transient occupancy tax to the OTCs. These have been supplanted by revised assessments.
4. The OTCs timely appealed the City's tax assessment by serving Applications for Hearing on the City.
5. The operations and business model utilized by the OTCs that is the subject matter of the City's application of the transient occupancy tax is referred to as the merchant model.
6. Pursuant to the merchant model, the OTCs contract with hotel operators for the ability to make rooms available (through reservations) to consumers (transients) by way of their websites. The OTCs then charge a higher rate to the customer on his or her credit card. That rate (retail price) is presented to the consumer as three line items: the room price, taxes and fees, and the combined total price. The discounted room rate negotiated by the hotels and OTCs is called the wholesale price. The OTCs act as the merchant of record in these transactions by establishing the room pricing, charging the consumer's credit card, and establishing cancellation policies. Once the consumer completes the transaction with the OTC, he or she can check in and out of the hotel without paying any additional money for the room.
7. Under the merchant model, the OTCs and hotels share customers, the customer only pays the OTC for the hotel room rental, only the OTC knows all the amounts charged to the transient, and upon arrival at the hotel, the transient gets the room key and makes arrangement to pay for incidentals to occupy the hotel room.
8. Pursuant to contracts between the OTCs and hotels, the OTCs market hotel rooms to transients and then handle all financial aspects of the rental. The hotels supply the rooms to the transients. Contractually and in actuality, they work together to rent and supply rooms to customers.
9. Pursuant to the contracts between the hotels and OTCs, the hotels supply rooms for marketing and rental by the OTCs which results in the OTC performing pricing, collecting, advertising, determining the markup and the retail price, and

collecting consideration for the room from the transient, functions typically associated with a hotel operator.

10. Under contracts between the OTCs and the hotels, the OTCs usually incorporate the hotel's cancellation policy into the contract between the OTC and the transient, provide customer support services and call in centers for the transient, and (contractually) commit to a prohibition of disclosing the wholesale rate to transients. The OTCs provide a room confirmation and room receipt to the transient. The transient does not receive a rental receipt from the hotel.
11. The evidence shows that, in many instances, the OTCs admit that they "sell" (i.e. rent) hotel rooms to transients rather than "facilitate" reservations as set forth in much of their current wording to describe what they do.
12. Pursuant to the merchant model, the room rate paid by the transient is composed of a net rate or wholesale rate, as negotiated between the hotel and OTC, and a mark up of approximately 20 to 40% of the net rate. The transient is not informed of the net rate for the room. The OTC and hotels do not want transient to be able to calculate (reverse engineer) the net rate. The transient knows the amount he or she is paying to the OTC for a room; the net rate is an unknown amount to the customer. Under this pricing arrangement, the OTCs use the net rate to calculate the transient occupancy tax, instead of the room rate paid by the transient.
13. The OTCs do not occupy hotel rooms. The net rate, which is the tax basis used by the OTCs (and through the OTCs the hotels which remit the collected tax) for the transient occupancy tax is the room cost incurred by the OTCs, who don't occupy the room. . . .

(Decision at 26-28 (footnote omitted).)

The City initiated administrative proceedings against the OTCs on October 10, 2007 for failure to collect and/or remit transient occupancy taxes to the City. (*Id.* at 50.) On May 23, 2008, the City issued estimated assessments against the OTCs covering an eight-year audit period. (*Id.* at 4, 49.) These assessments "evolved over time from estimated to actual based on the provision and exchange of real data between the parties and a related meet and confer process." (*Id.* at 4.) Pursuant to Anaheim Code section 2.12.060, the OTCs appealed the assessments by way of Applications for Hearing filed in

June, 2008. (*Id.* at 50.) The Hearing Officer and the parties agreed to a bifurcated proceeding by which liability issues would be adjudicated first, followed, if necessary, by adjudication of the amounts of tax due. (*Id.* at 2.) The appeal hearings took place on eight days over the period of August through December, 2008. (*Id.* at 1.) The OTCs and the City submitted briefing, declarations, depositions, documentary evidence and expert testimony, and both sides had opportunity for direct and cross examination. (*Id.*)

The Hearing Officer's Decision, dated January 28, 2009, determines that each OTC is liable for payment of a transient occupancy tax based on the total amount paid by customers to the OTCs (except for cancellation/change fees). (*Id.* at 53-54.) The total amount of the assessment for all OTCs that were parties to the proceeding is $21,326,881.30. The Hearing Officer found that each OTC is both "the proprietor" and the "managing agent" of every hotel in the City for which it books any room reservation. (*Id.* at 17-26). The Hearing Officer determined that the total amount an OTC charges a customer for its online reservation services is taxable "rent" charged by the "operator" under the City's transient occupancy tax.

The OTCs filed timely Petitions for Writ of Mandate in the Orange County Superior Court. The City contended that the OTCs were not entitled to challenge the tax unless they first paid the totality of the assessment, but the Orange County Superior Court trial judge disagreed, and that ruling now has been affirmed on appeal. (*Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825.) Subsequently, the OTCs sought to have the Orange County Superior Court proceedings included in the Transient Occupancy Tax Cases, Judicial Council Coordination Proceeding No. 4472, then pending before this

court. This court granted the request to have the Orange County writ challenges included in these coordinated proceedings as "add-on" cases.

The City filed a Motion to Deny Online Travel Companies' Writs of Administrative Mandamus, and the OTCs filed a Motion for Judgment Granting Writ of Mandate. Briefing on these motions was coordinated, and the court heard oral argument on both motions simultaneously.

II. LEGAL ANALYSIS

A. Standard of Review

Petitioners seek a writ of mandate pursuant to Code of Civil Procedure section 1094.5. Review under this statute "is limited to the record compiled by the administrative agency, and the agency's findings of fact must be upheld if supported by 'substantial evidence.'" (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977, *quoting* Code Civ. Proc. § 1094.5(c).) As noted above, however, the facts concerning operation of the OTCs, their relationship with their customers and their contracts with hotels are essentially undisputed. The issue, rather, is the correct interpretation of the Anaheim ordinance and its application to the undisputed facts.

The parties dispute whether and to what extent deference is owed to the Hearing Officer's construction of the Anaheim ordinance.[3] The analysis of the Court of Appeal in *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, is instructive on this point. In *Duncan* the Court of Appeal considered a petition for writ

[3] The OTCs urge this court to conclude that, in reviewing administrative decisions on writ of administrative mandamus, a court *always* reviews questions of law *de novo*, without deference to the administrative agency's construction of the statute. However, on close consideration of the authorities cited by the OTCs, they stand rather for the proposition that an appellate court reviews *de novo* a trial court's legal determinations. (*See Scottish Rite Cathedral Ass'n v. City of Los Angeles* (2007) 156 Cal.App.4th 108, 115; *Schutte & Koerting, Inc. v. Regional Water Quality Control Bd.* (2007) 158 Cal.App.4th 1374, 1384; *Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1288.)

of mandate challenging an administrative determination by the Director of the Department of Industrial Relations. The Director had found that receipt of federal tax credits does not constitute a payment out of public funds within the meaning of Labor Code section 1720(b), so as to require a construction project receiving such tax credits to pay prevailing wages to workers on the project (as would be required for public works projects). (*Id.* at 298-299.) The Court of Appeal considered the issue presented to be the correct interpretation of Labor Code section 1720. (*Id.* at 294.)

Although the Court of Appeal ultimately ordered that the writ be denied (thus agreeing with the position taken by the Director), the Court gave no deference to the Director's interpretation of the relevant statute. The Court of Appeal applied the general principles set forth in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, in order to determine whether the Director's ruling was "the equivalent of an established administrative interpretation of a statute by the official responsible for administering that statute, and thus a quasi-legislative rule entitled to our deference." (*Duncan, supra,* 162 Cal.App.4th at 302, *citing Yamaha, supra,* 19 Cal.4th at 6-11.)

First, the Court of Appeal considered whether the position of the Director was one that had endured for some period of time, because "judicial deference to an administrative interpretation is extended if the interpretation is long-standing, consistent, and if the interpretation was contemporaneous." (*Duncan, supra,* 162 Cal.App.4th at 303.) Because the Director's determination was less than two years old, and because that determination reversed a prior position taken by the Director, the Court of Appeal held that the administrative interpretation was not entitled to deference. (*Id.* at 303.)

In addition and "most importantly," the Court of Appeal noted that the issue presented was "a pure one of statutory interpretation," and thus "involve[d] the quintessential judicial function." (*Id.* at 304.) Although an agency's interpretation may be considered by a court and "[d]epending on the context, it may be helpful, enlightening, even convincing," it also "may sometimes be of little worth." (*Id.*, *citing Yamaha, supra,* 19 Cal.4th at 7-8.) In the final analysis, while the Court of Appeal considered the administrative interpretation of the relevant statute, the Court did not "extend that interpretation any particular deference." (*Duncan, supra,* 162 Cal.App.4th at 304.) Because there was "no factual dispute, only the question of how [the relevant] statute is to be construed and applied," the Court exercised its "independent judgment" on that question. (*Id.*)

Following *Duncan*, while accepting the Hearing Officer's factual findings, this court determines that the Decision's interpretation of the Anaheim ordinance is not entitled to any particular deference. This court therefore exercises its independent judgment on the issue of statutory construction presented. There is no showing that the City previously had interpreted the ordinance in the context of transactions by companies offering internet travel services, or that there was a longstanding administrative practice with respect to collection of transient occupancy taxes from similarly situated entities. Therefore, the conclusions of the Hearing Officer do not reflect any administrative expertise with respect to regulation of the transaction in question.

JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App.4th 1046, relied on by the City, is not to the contrary. That case expressly recognizes that "pure issues of law are always subject to independent appellate court

review." (142 Cal.App.4th at 1058, footnote 11.) In *JKH Enterprises,* the court reviewed an administrative hearing officer's decision as to whether a worker was an employee or an independent contractor, a decision requiring application of a multifactor test in which there is no "single determinative factor . . . ." (*Id.* at 1054-55.) This issue, which would be presented to a jury in another context,[4] called for a "substantial evidence" standard of review. By contrast, the task of determining the meaning of the terms "rent," hotel "proprietor" and "managing agent," as used in the Anaheim ordinance, is at the center of the province of the judicial branch.

B. Properly Interpreted, Anaheim's Ordinance Does Not Impose a Tax Based on the Retail Price of Hotel Rooms Offered by the OTCs

1. Overview of the Structure of the Ordinance

As stated by the Hearing Officer in his Decision, the transient occupancy tax is a privilege tax – it is a tax based on the privilege of occupying a hotel room in the City of Anaheim for less than 30 days. Although the tax is imposed on the transient, the tax scheme is not operated independently of the hotel. The hotel is burdened with the duty of collecting the tax and transmitting it to the City. If the hotel fails in its duty to collect the tax, it must, nevertheless, pay from its own funds the amount of the tax that should have been collected.

The definition of the tax focuses on the locus of commercial activity taking place in the City of Anaheim. Section 2.12.010 of the Anaheim Code provides: "For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." Although the Code does not expressly state that "any hotel" is limited to hotels physically located in Anaheim, the ordinance

[4] *See* CACI 3704.

states the negative proposition that the tax shall *not* be imposed upon occupancy that is "beyond the power of Anaheim to impose the tax." (Anaheim Mun. Code § 2.12.015.) There is no dispute that only occupancy in hotels located in Anaheim generates tax liability to Anaheim.

The taxable event is focused on non-permanent occupancy of a physical living space. A "transient" is defined as a person who, for thirty days or less, "exercises occupancy, or is entitled to occupancy, of any room, space, lot, area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral." (*Id.* § 2.12.005.100.) A "hotel" is defined as "any structure or portion thereof, which is occupied by persons for lodging or sleeping purposes for periods of less than thirty consecutive days . . . ." (*Id.* § 2.12.005.040.)

As stated in section 2.12.010 of the ordinance (quoted above), the tax is calculated based on a percentage "of the rent." Under the Anaheim Code, rent is not defined in terms of the amount paid by the transient; rather, it is calculated based on the amount charged by the hotel operator. "'Rent' means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (*Id.* §2.12.005.080.) However, if the hotel operator is not able to collect what it charges, it does not owe tax on the uncollectable portion. (*Id.*)

The definition of the term "operator" is important in the structure of the Code, both because "rent" is defined in terms of the consideration charged by an operator for

accommodations, and because the ordinance places responsibility for collection and payment of rent on the hotel operator.

> "Operator" means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both. For purposes of the notice and appeal provisions of this chapter only, "operator" shall also include any managing employee or employee in charge of the hotel.

(*Id.* §2.12.005.050.) The "operator" of the hotel is obligated to "collect the tax to the same extent and at the same time as the rent is collected from every transient." (*Id.* §2.12.020.010.) The amounts for rent and tax are to be separately stated, and each transient is to be "tendered a receipt for payment from the operator with rent and tax separately stated thereon." (*Id.*) Taxes collected by the operator are to be "held in trust by such operator" until they are paid to the City. (*Id.* §2.12.040.010.) The operator is required to file a return and pay the full amount of the tax to the License Collector on the last business day of each month. (*Id.* §2.12.030.010.)

2. "Rent" Is Consideration Charged by an "Operator" and the OTCs Are Not "Operators"

The central issue in the dispute between the parties is whether the "rent" on which the Anaheim transient occupancy tax is calculated is the amount charged by the hotel to the OTC, or the amount charged by the OTC to the person who occupies the hotel room (the transient). As stated above, "rent" is "the consideration *charged by an operator* for accommodations." (*Id.* §2.12.005.080 (emphasis added).) The City argues that the OTCs

should be considered to be hotel "operators" within the meaning of the ordinance, because the functions performed by the OTCs are those of a proprietor of the hotel or those of a managing agent of the hotel.

In construing a statute, courts "first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) The words of the statute must be considered within the context of the statutory scheme of which they are a part, and the various parts of the statute must be harmonized by considering the particular words, clause or section in the context of the statute as a whole. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388; *Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1120.)

The definitional section of the Anaheim transient occupancy tax ordinance uses the words "operator" and "proprietor" as synonyms. Thus, "'[o]perator' means any person, corporation, entity, or partnership which is the proprietor of the hotel . . . ." (Anaheim Mun. Code §2.12.005.050.) "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-22.) The dictionary definition of "operator" is "a person or company that runs a business or enterprise." (*Compact Oxford English Dictionary* (accessed online at www.askoxford.com/concise_oed.) The same source defines the word "proprietor" as "the owner of a business" or "a holder of property." (*Id.*) These words have in common the concept of a person or entity that controls and runs a business, in this case, a hotel.

The context in which these words are used in the statute confirms this construction. The statute states that the word "operator" means the proprietor of the hotel

"whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or in any other capacity." (Anaheim Mun. Code §2.12.005.050.) Each of the enumerated types of ownership interests (owner, lessee, etc.) could entail the ability to control and run a hotel. Within the context of the statutory scheme, the apparent purpose of the list of types of ownership interests is to ensure that the entity responsible for controlling and running the business is held responsible for an operator's responsibilities under the transient occupancy tax ordinance, regardless of the formal capacity in which the entity is entitled to run the business.

OTCs do not control and run hotels. The Hearing Officer's factual findings list several functions performed by OTCs with respect to resale of hotel rooms. OTCs "contract with hotel operators for the ability to make rooms available (through reservations) to consumers (transients) by way of their websites." (Decision at 27 (footnote omitted).) OTCs "market hotel rooms to transients and then handle all financial aspects of the rental." (*Id.*) The OTCs determine the amount paid by the consumer for the hotel room (that is, the OTCs determine the mark-up they will charge for the room and for the OTCs own reservation services), but the amount the hotel receives for the room is determined by the hotel "as negotiated between the hotel and the OTC." (*Id.* at 28.)

None of these facts comprise incidents of control of a hotel or give the OTCs the right to run the business of a hotel. The hotel controls the production of the product sold (the hotel room and accompanying amenities), the quantity of production, the quality of production, the channels of distribution of the product (*i.e.*, whether and what quantity of rooms will be made available through a particular intermediary) and the pricing of the

product (whether sold directly to the consumer or to an intermediary). Certainly, given the laws of supply and demand, the price at which the OTCs choose to resell rooms is a factor in determining the number of hotel rooms sold and occupied. However, the same could be said with respect to a book publisher's sale of books through a bookstore. The fact that the bookstore determines the resale price does not make the bookstore the owner of the publishing house or give it the right to run or control the business of the publishing house.[5]

The City argues that the phrase "or in any other capacity" as used in the definition of "operator" opens up that definition to include entities to which a hotel owner delegates some part of the functions of running a hotel business. There are two problems with this argument.

First, the phrase "whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or in any other capacity," is not used to designate entities that necessarily are proprietors. Rather, inclusion of the phrase ensures that the entity functioning as a proprietor is considered to be an operator regardless of the legal basis on which the entity's right to control rests. For example, a person running a hotel as a debtor in possession (or in another capacity, such as receiver) cannot disclaim the duty to collect and remit transient occupancy taxes on the ground that the person is not an owner. (*See City of San Diego v. DeLeeuw* (1993) 12 Cal.App.4th 10, 12-13 (under the San Diego transient occupancy tax ordinance, which includes language defining "operator" similar to that construed here, a partnership was the "operator" of the

[5] The usefulness of this analogy should not be overstated. Books are subject to a sales tax. A transient occupancy tax is structured and enforced differently. The point here is only that the ordinance in question defines "operator" in terms of controlling and running a business, and the right to resell a company's product is not understood in ordinary usage to comprise incidents of ownership and control of the company.

hotel and a general partner was jointly responsible for the partnership debts, including unpaid transient occupancy taxes).) However, if the holder of an enumerated right (*e.g.*, lessee) does *not* have the right to control the business of running the hotel, that person is not considered an operator. For example, a lessee of a portion of a hotel is not necessarily a proprietor; the lessee may only be running a restaurant and room service in the hotel. Thus, the enumeration of capacities does not take away from or change the meaning of the word "proprietor" or its synonym "operator."

Second the OTCs do not have a "capacity" that is anything like the terms listed. When a statute uses a list or catalogue of items, "a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*In re Corrine W.* (2009) 45 Cal.4th 522, 531 (citations omitted).) The list of capacities in which a hotel might be operated consists of types of ownership interests. Some of the capacities listed involve real property rights (*e.g.*, lessee) while others provide control by contractual agreement (*e.g.*, licensee). As determined by the Hearing Officer, OTCs have the right to "market hotel rooms to transients and then handle all financial aspects of the rental." (Decision at 27.) The right to market a hotel room or rooms at a time determined by the hotel owner and for consideration (paid to the hotel by the OTC) determined by the hotel owner is of an entirely different character than the right of a lessee or debtor in possession to run the general business of a hotel (*i.e.*, to act as a proprietor).

3. *The OTCs Are Not "Managing Agents" and Thus Do Not Take on the Duties of an "Operator"*

The City argues, in the alternative, that the OTCs are responsible for collecting transient occupancy taxes on the amount of their retail price to the consumer because they are "managing agents" within the meaning of the Anaheim ordinance. The term "managing agent" is used in the section of the ordinance that defines hotel "operator." It states: "Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both." (Anaheim Mun. Code §2.12.005.050.)

Under the language of this provision, a "managing agent is "deemed an operator" when the operator "performs its functions" through the managing agent. The City reads this provision as though it said that a managing agent is deemed an operator when the operator performs *some of* its functions through the managing agent, or when the operator performs *tax-related functions* through the managing agent. But in order to give the ordinance the construction urged by the City, it would be necessary to add words to the statute to specify that "its functions" does not mean the hotel operator's functions, but rather means only some hotel operator functions, or some hotel operator functions pertaining to tax collection and enforcement. The rules of statutory construction, however, forbid construing a statute in a manner that requires the addition of words that the enacting body did not use. (*See Ross v. Long Beach* (1944) 24 Cal.2d 258, 260.)

The apparent purpose of the reference to "managing agent" in the structure of the ordinance is to define persons who stand in the shoes of the hotel operator with respect to responsibility for collecting and remitting transient occupancy taxes to the City. Plainly the ordinance does not mean to impose such liability on a mere agent of the operator. Employees are agents of a corporate entity, but the ordinance expressly excludes employees from being considered managing agents, even if they are involved in carrying out the tax collection functions of the hotel operator. Moreover, the ordinance imposes an operator's responsibilities not on mere agents, but rather on *managing* agents. A statute must be read so as to give meaning, where possible, to each word. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249; *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Thus, "managing agent" may not be interpreted in a way that reads the word "managing" out of the statute.

In 1992 when the current Anaheim transient occupancy tax ordinance was enacted, the term "managing agent" had an accepted meaning under California law. The California legislature had used the term "managing agent" to define the type of agency relationship that was sufficient for attributing the consequences of an agent's wrongful conduct to a corporate employer for purposes of imposing punitive damages on the employer. (Cal. Civ. Code § 3294.) The California courts had explained that the "critical inquiry" in determining whether an employee or agent is managerial is "the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823; *accord Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174, 193.) Thus it is reasonable to interpret use of the term "managing agent" in the Anaheim ordinance

consistent with its meaning under California law as determined prior to enactment of section 2.12.005.050. (*See People v. Jones* (2001) 25 Cal.4th 98, 109 (presuming that when a legislative body uses a term that has a long-standing judicial construction, the legislature intends to incorporate that meaning).)

The facts found by the Hearing Officer do not support a conclusion that the OTCs exercised discretion in making decisions that would ultimately determine the hotels' corporate policies. The Hearing Officer found that the OTCs perform functions in pricing and marketing hotel rooms. (Decision at 27-28.) He placed great emphasis on the OTCs' ability to set the retail price for the rooms it resells. However, the OTCs' function in repricing rooms does not determine the hotels' corporate policies with respect to pricing. The hotels themselves determine how much revenue they will receive from the sale of hotel rooms, including hotel rooms marketed by the OTCs. As the Hearing Officer found, the hotels receive a "net rate or wholesale rate, as negotiated between the hotel and the OTC . . . ." (*Id.* at 28.) That is, each hotel determines the amount it is willing to receive for rental of a hotel room on a particular date. The OTCs have no discretion to determine the price at which the hotels are willing to sell their product and therefore no control of the hotels' corporate pricing policies.

With respect to marketing, the hotels determine whether to provide rooms for resale by the OTCs, how many rooms to make available and when to make them available. The OTCs have no control over these aspects of the hotels' marketing practices. The hotels determine their own policies with respect to cancellation of a reservation. As the Hearing Officer found, "the OTCs usually incorporate the hotel's cancellation policy into the contract between the OTC and the transient . . . ." (*Id.*) The

OTCs have the ability to advertise and market the number of rooms the hotels see fit to make available for marketing through this channel. But the Hearing Officer's decision did not make any findings suggesting that the OTCs can bind the hotels through advertising representations made by the OTCs or that the OTCs can in some other way bind the hotels with respect to their corporate marketing policies.

At most the Hearing Officer's findings would allow a conclusion that the OTCs are agents of the hotels for purposes of marketing a portion of the hotels' production (such portion having been determined by each hotel). But a mere agency relationship is not enough for shifting or sharing tax responsibilities under the Anaheim ordinance. Rather, the ordinance imposes such responsibility only on managing agents, agents who have been delegated sufficient discretion to allow them to make corporate policy. Based on the facts found by the Hearing Officer, the OTCs do not have the attributes of managing agents for the hotels.

The Hearing Officer found that the OTCs are "collection agents for rent" and that they charge and collect transient occupancy taxes from consumers. (*Id.* at 25.) Again, however, the City ordinance does not define an "operator" to include the proprietor's agent for collection of transient occupancy taxes. Employees who are the hotel's agents for collection of taxes are expressly excluded from the definition of "operator." (Anaheim Mun. Code §2.12.005.050.) In order to give a reasonable meaning to use of the phrase "managing agent," something more than mere agency is required for an entity to be considered an "operator."

In sum, based on the Hearing Officer's factual findings, and giving the words of the Anaheim ordinance their ordinary meaning in context, the OTCs cannot be found to

be hotel "operators," hotel "proprietors" or "managing agents" of a hotel. Because the City Code defines "rent" as "the consideration charged by an operator for accommodations," the amount charged by the OTCs is not "rent." Rather, the "rent" for use of a hotel room is the amount charged by the hotel to the OTC for the accommodation. The Hearing Officer acted contrary to law in assessing a tax based on the consideration charged by the OTCs, transactional intermediaries who are not operators, proprietors or managing agents of a hotel.

4. The Documentation and Collection Requirements of the Ordinance Do Not Require or Suggest a Different Interpretation of the Ordinance

The Hearing Officer expressed concern that "because the OTC collects all funds from the transient for hotel room rental and transient occupancy taxes, it is the only entity that can satisfy the provision of [section 2.12.020.010] that 'Each operator shall collect the tax to the same extent as the rent is collected from every transient.'" (Decision at 19.) But it is a logical fallacy to conclude, as the Hearing Officer apparently did, that because a hotel operator is responsible for collecting rent and taxes from transients, any entity that collects rent and taxes from a transient must be an operator (or a managing agent).[6]

Nothing in the section cited by the Hearing Officer suggests that the operator is precluded from delegating rent collection to an agent that is not a managing agent. Indeed, as discussed above, employees of the operator are expressly excluded from the definition of "managing agent," yet a hotel operator may well collect rent and taxes

[6] Principles of formal logic demonstrate that when the statement "If A then B" is a true statement, it is incorrect to conclude that the converse, "If B then A" must be true. Thus, "If an entity is a hotel operator, then it must collect transient occupancy tax," is a true statement; but it is a logical fallacy to conclude that the converse, "If an entity collects transient occupancy tax, then it must be a hotel operator," therefore is necessarily true. Yet the Hearing Officer accepted this reasoning.

through its employees. Nothing in the ordinance appears to preclude the hotel from selecting an independent contractor or other intermediary to perform certain rent collection functions.

Importantly, if the operator chooses to collect rent and taxes through an employee or other agent, the operator remains responsible for payment of the taxes to the City, even if the employee or agent fails to perform its agency functions properly (*i.e.,* fails to collect the taxes). (*See* Anaheim Mun. Code §2.12.030.010 (an operator is responsible for filing a return and for remitting the "full amount of the tax").) There is no dispute that the hotels did collect and remit transient occupancy taxes for rooms marketed by the OTCs. The only dispute in this case concerns whether the tax collected and remitted by the hotels was properly based on the amount paid by the hotels to the OTCs. Contrary to the Hearing Officer's reasoning, the language of the ordinance placing responsibilities on hotel operators for collection and remittance of the transient occupancy taxes does not suggest that the OTCs must be considered hotel "operators."

A similar fallacy is inherent in the Hearing Officer's conclusion that, because neither the hotel nor the OTC provides the transient with a receipt that complies with the ordinance, the OTC must be an operator. The Hearing Officer reasoned:

> The evidence presented shows that, under the merchant model, the transient receives a receipt from the OTC stating the room rate, an amount for "tax recovery charges and fees," and a total amount. No comparable receipt comes from the hotel. Accordingly, the OTC is acting as an operator under the ordinance of the City. AMC 2.12.020.010 requires the operator to tender a receipt for rent and taxes to the transient.

(Decision at 19.) Section 2.12.020.101 of the ordinance provides: "The amount of the rent and the tax thereon shall be separately stated from all other amounts on all receipts

and books of record of the hotel, and each transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon." The Hearing Officer found that the hotel did not furnish a receipt in compliance with this requirement. The Hearing Officer also found that the receipt furnished to the consumer by the OTC set forth an amount for "tax recovery charges and fees," but did not separately state the tax as required by the Code.

One cannot logically conclude, however, that because a hotel operator is required to furnish a receipt specifying the amount of taxes, therefore any entity that furnishes a receipt of some sort to the consumer must be an operator. The definition of "operator" in the ordinance is not "one who furnishes a receipt." Rather, the entity that meets the definition of an operator is responsible for taking steps to ensure that the required receipt is furnished.

The administrative determination that is challenged in this litigation does not seek to penalize anyone for record-keeping violations. This lawsuit is about how the tax is calculated, not about whether a hotel operator or managing agent violated the ordinance by failing to give the consumer a receipt that complies with the ordinance. Nor does this litigation include a claim on behalf of consumers that they were misled by the receipts furnished by the OTCs.

Although the hotels' contracts with the OTCs preclude the OTCs from disclosing the wholesale price of the rooms (*i.e.*, the rent charged by the hotel operator), this negotiated contract provision is for the benefit of the hotels that wish to keep the wholesale price confidential. The rent charged by the hotel operator (the wholesale price) was disclosed to the City, because the hotels used that price to calculate the tax they

remitted to the City. As stated above, the City does not contend that the hotels failed to pay taxes based on the amount they charged the OTCs for rooms. The hotels obviously know the amount of the rent they charged for the rooms marketed through the OTCs, but the City has not sought in this litigation to require the hotels to disclose that amount to the consumer (or to require any particular change in the documentation provided to consumers who rent rooms that are resold by the OTCs).

The record-keeping requirements of the Code are relevant only insofar as they cast light on the inquiry whether the OTCs are "operators" and thus must remit transient occupancy taxes on the consideration they charge. Although the hotels may not have taken steps to comply with the Code requirements regarding receipts to consumers, this fact does not suggest a finding that the OTCs must be found to be "operators" under the statutory scheme.

5. *Interpretation of the Ordinance Based on Its Plain Language Does Not Lead to "Absurd" Results*

The result of the statutory interpretation outlined above is consistent with the purpose and structure of the transient occupancy tax as a privilege tax based on commercial activity taking place in the City of Anaheim. The hotel transaction is taxed by the City of Anaheim 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 of Anaheim 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. Based on the language of the City's ordinance, Anaheim has done just that.

Of course, a local entity could, as a matter of policy and drafting, construct a different scheme for taxation of transient occupancy. If a city decided to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and related services) there seems to be no reason why such a tax scheme could not be drafted and considered.[7]

The Hearing Officer concluded that an interpretation of the ordinance that bases the transient occupancy tax on the amount charged by the hotel would lead to absurd results. The Hearing Officer considered the following hypothetical: "[A] hotel or hotel chain [could establish] a wholly owned subsidiary corporation in a different municipality to handle all of its reservation and booking inquiries. The hotel could then provide rooms to the subsidiary at an extremely cheap price and the subsidiary could sell them to consumers at a much higher rate. In this way, the Company would be able to provide accommodations to customers without having to charge the customers the . . . tax on the amount the customers actually pay for the room." (Decision at 20, *quoting City of Charleston v. Hotels.com LP* (D.S.C. 2007) 520 F.Supp.2d 757, 766.)

Despite the Hearing Officer's concern, it is not necessary to skew the interpretation of the Anaheim ordinance in order to protect the City from the type of abuse suggested by the hypothetical. The hotel in the hypothetical is engaged in a collusive transaction with its subsidiary, charging "an extremely cheap price" to the benefit of its subsidiary, not a price determined in an arms-length transaction. The abuse represented by the hypothetical is not that the hotel is marketing rooms through a third

[7] The Hearing Officer opined that the "ultimate and definitive target of the Anaheim ordinance is its aim on the transient to pay the transient occupancy tax based on what the transient occupant pays for the privilege of occupancy." (Decision at 26.) This conclusion is not supported by the structure of the statute, which makes the transient pay a tax based on a percentage "of the rent." As discussed at length above, "rent" is "consideration charged by an operator."

party, but that it is marketing rooms within its own corporate structure. By doing so, the hotel in the hypothetical is purporting to characterize as "rent" consideration charged in a collusive transaction that sets a non-market price for a room. There is no evidence in the record that the prices charged by hotels to the OTCs are collusive prices. To the contrary, the Hearing Officer found that the prices charged by hotels to OTCs are set in negotiated transactions. The hotels certainly have no motive to set prices that favor the OTCs at the hotels' expense.

Sham transactions intended to evade taxes always present an enforcement challenge. For example, a hotel may purport to rent a hotel room for a low price to a customer who then pays an undisclosed kickback to the hotel. However, the hypothetical does not cast light on how the ordinance should be interpreted in light of the facts presented here – arms-length commercial transactions between hotels and marketing entities that resell hotel rooms with no further consideration flowing to the hotels.

The Hearing Officer also reasoned that an interpretation of the ordinance basing the tax on the amount charged by the hotel would lead to absurd results because two customers paying the same amount for a hotel room might pay a different tax. (Decision at 21.) However, in this hypothetical, the hotel *received* a different amount for the hotel rooms in the two transactions – it received a lower amount of revenue from the transaction arranged through the OTC than it received from the transaction the hotel arranged directly with a customer. Insofar as the transient occupancy tax is based on the consideration charged and received[8] by the operator, the structure of the tax represents a rational choice by the taxing agency.

[8] As discussed above, uncollectible rent is not taxed under section 2.12.005.080 of the ordinance.

The City also argues that Anaheim could not have anticipated the way in which the resale of hotel rooms on the internet has become possible, and that the ordinance should be construed so as to account for the changed circumstances in the way hotel rooms now are marketed. (*See also* Decision at 17: "[T]he City's position [is] that the current view of proprietor-owner is a product of changed circumstances and is therefore broader, being someone who takes care of the occupant concerning a key function of the hotel.")) Changed circumstances, however, do not provide a basis for a court to rewrite a statute. When interpreting statutes a court is limited to following the legislature's intent "as exhibited by the plain meaning of the actual words of the law," and the court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801 (quotation omitted).)

Particularly where a taxing agency has not anticipated a new revenue opportunity, the court may not act to fill what might be perceived as a "gap" in tax coverage. Creation of a larger tax rate or a larger tax base requires voter approval pursuant to Proposition 218 and its implementing legislation. (*See ABCellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) "A taxing methodology must be frozen in time until the electorate approves higher taxes. . . . The Proposition 218 voters rebelled against local government taxes that are moving targets." (*Id.* at 761-762.) Judicial interpretation must not be used as a means to avoid these restrictions.

6. Cases From Other Jurisdictions Interpreting Other Municipalities' Ordinances Are Neither Binding Nor Persuasive Precedent

In a section of the Hearing Officer's Decision captioned "Context of the Current Dispute," the Hearing Officer emphasized that the practices of the OTCs in relation to hotels are consistent nationwide. The Hearing Officer seemed to consider that how a transient occupancy tax relates to those practices should be resolved on a uniform, nationwide basis as well. Similarly, the City relies heavily on reasoning from out-of-state authorities construing the transient occupancy tax statutes of a variety of municipalities across the nation. Indeed, the OTCs, in their turn, cite cases from other jurisdictions that interpret other cities' transient occupancy taxes.

Even if the out-of-state and federal authorities considered the same statutory language as that used in the Anaheim ordinance, the reasoning and outcome of those cases would not be binding on this court. More importantly, the cases cited construe other statutes that use different language. Even though all of the ordinances considered in these cases may fit into the generic category "transient occupancy tax," there is no uniform state law code or other standardized template that would justify a conclusion that all "transient occupancy taxes" are likely to have the same structure or be based on identical principles.

Moreover, the fact that the OTCs have a uniform set of practices nationwide does not mean that municipalities must adopt a uniform approach to taxation of the transactions in which the OTCs participate. Apparently the OTCs have been able to adjust their financial dealings to the different tax *rates* applicable to rental of rooms located in different municipalities. Nothing in the record in this case suggests that this

court should defer to the decisions of other jurisdictions in order to make commercial life easier for the OTCs.[9]

Review of the cases relied on by the City demonstrates some of the differences that make the foreign jurisdictions' cases inapposite as a basis for interpreting the Anaheim ordinance. In *City of Charleston v. Hotels.com, LP* (D.S.C. 2007) 520 F.Supp.2d 757, the federal district court denied a motion to dismiss because the transient occupancy tax at issue was imposed on companies "in the business of 'furnishing' accommodations." (*Id.* at 768.) The ordinance at issue did not use the terms "operator," "proprietor" or "managing agent."

In *City of Fairview Heights v. Orbitz, Inc.* (S.D.Ill. 2006) 2006 U.S.Dist.LEXIS 47085, the federal district court refused to dismiss a complaint against the OTCs based on a transient occupancy tax ordinance that defined a hotel "owner" to include anyone "'receiving consideration for the rental of [a] hotel or motel room.'" (*Id.* at *15, *quoting* Fairview Heights, Ill., Code § 36-2-1(B).) The structure of a municipal ordinance that defines a hotel owner in terms of whether an entity receives consideration for renting a hotel room presents a very different issue of statutory interpretation from that presented in this case. (*See also Leon County v. Hotels.com, L.P.* (S.D.Fla. 2006) 2006 WL 3519102 (denying the OTCs' motion to dismiss with respect to a tax "to be 'charged by the person receiving the consideration for the lease or rental'").)

The ordinance at issue in *City of Goodlettsville v. Priceline.com, Inc.* (M.D.Tenn 2009) 605 F.Supp.2d 982, provided that the transient occupancy tax was to be collected

[9] In several post-argument filings, the City and the OTCs have sought to bring to this court's attention developments with respect to whether or not other municipalities' transient occupancy taxes apply to the OTCs. For the reasons stated above, the court has not found the authorities accompanying these filings helpful in the interpretive task currently before this court.

and remitted by "'all operators who . . . charge for occupancy within a hotel'" in the municipality. (*Id.* at 993 *quoting* Goodlettsville City Code § 5-504.) The Anaheim ordinance does not use this language. Moreover, in that case the term "operator" was defined to include a "'joint venture . . . or any other group or combination acting as a unit'" (*id.* at 994, footnote 8, *quoting* Goodlettsville City Code § 5-501(5)), a provision that also is absent from the ordinance at issue in this case. The federal district court relied on these provisions in refusing to grant the OTCs' motion to dismiss.

It should be noted that all of the above decisions reflect trial court decisions refusing to grant a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6.) In a similar procedural setting, the federal trial court in *City of San Antonio v. Hotels.com* (W.D.Tex. 2007) 2007 U.S.Dist. LEXIS 39757, held that whether the OTCs were entities operating, managing or controlling any hotel was a question of fact based on the allegations of the complaint in that case.[10]

It must be conceded that the *reasoning* adopted by some of the cases cited above may be considered to be in conflict with this court's analysis. However, these out-of-state decisions are not binding on a California court, and this court does not find their reasoning persuasive based on the analysis set forth above.

C. Conclusion

The Decision of the Hearing Officer cannot stand because it is contrary to law, having incorrectly construed the Anaheim ordinance. Properly interpreted based on the plain language of its provisions, the Anaheim ordinance does not impose a transient occupancy tax based on the retail price of hotel rooms rented by or through the OTCs.

[10] The transient occupancy tax considered in *City of San Antonio* also varied significantly from the Anaheim ordinance insofar as the San Antonio ordinance imposed the tax on the "consideration paid" for a hotel room. (*Id.*)

The OTCs' arguments based on the statute of limitations, laches and estoppel are moot in light of the above holding.

ORDER

For the reasons set forth above, the OTCs' Motion for Judgment Granting the Writ of Mandate is granted. The Hearing Officer's Decision is hereby set aside pursuant to California Code of Civil Procedure section 1094.5. The City's Motion to Deny the OTCs' Writs of Administrative Mandamus is denied.

DATED: February 1, 2010

Carolyn B. Kuhl

CAROLYN B. KUHL
Judge of the Superior Court