Case No. S280000

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OLYMPIC AND GEORGIA PARTNERS, LLC
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
Defendant and Appellant.

After a Decision by the Court of Appeal,
Second Appellate District, Division 8, Case No. B312862

On Appeal from the Los Angeles County Superior Court,
Case No. BC707591
The Honorable Malcolm H. Mackey

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA PARTNERS, LLC

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TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Under California Rules of Court, Rule 8.520(f), the Council On State Taxation ("COST") respectfully requests permission to file the attached brief as *amicus curiae* in support of Plaintiff/Appellant Olympic and Georgia Partners, LLC ("Olympic"). COST states that (1) no party or counsel for any party in the pending appeal authored the proposed *amicus* brief in whole or in part; (2) no party or counsel for any party has made a monetary contribution intended to fund the preparation of submission of the brief; and (3) no other person or entity, other than the *amicus curiae,* its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of the brief.

INTEREST OF *AMICUS*

COST is a nonprofit trade association based in Washington, D.C. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, its membership includes around 500 of the largest multistate corporations and other businesses engaged in interstate and international business and represents industries doing business in every state across the country. COST members employ a substantial number of Californians, own extensive property in California, and conduct substantial business in California.

COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multijurisdictional business entities. In furtherance of this objective, COST has participated as *amicus curiae* in many significant federal and state tax cases since its formation, including in California courts considering important state and local tax issues, such as *California Cannabis Coalition v. City of Upland*, 245 Cal.

App. 4th 970 (2016) and *926 North Ardmore Avenue, LLC v. County of Los Angeles*, 3 Cal.5th 319 (2017).

Counsel for COST has reviewed the briefings submitted to this Court by the parties to date and has determined it is important for COST to provide the Court with information that has bearing on the issues before the Court.

It is alarming that the Defendant/Appellant, the County of Los Angeles (the "County") seeks to expand the property tax base to improperly include intangible property. Like most states, California historically has excluded intangible assets from property taxation. Recognizing this historical exclusion and case precedents, the Second District Court of Appeals below properly excluded Olympic intangible assets from the tax assessment.

Although there are three disputed intangible assets – a cost reimbursement (valued at $80 million), a one-time key money payment (valued at $36 million), and certain intangible hotel enterprise assets (valued at $34 million) – this amicus brief focuses on those assets most concerning to COST's memberships, namely the County's assessment of the cost reimbursement and the intangible enterprise assets.

Including these intangibles in the property tax assessment is troublesome, not only because it runs afoul of California law and its jurisprudence, but also in light of key economic and policy considerations, fundamental to the purposes for excluding intangible property from property taxation, that apply to multiple states. COST's *amicus* brief provides additional context and analysis from a national perspective critical to an informed decision in the present case at hand.

Therefore, COST respectfully requests permission to file the attached *amicus* brief.

Dated: December 29, 2023 Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

By: ______________________________
Charles J. Moll III
Attorney for *Amicus Curiae*
Council On State Taxation

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BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA PARTNERS, LLC

INTRODUCTION

Because the California Constitution and the Revenue and Taxation Code exempts intangible assets and rights from property taxation, any lawful assessment methodology must remove the fair market value of the intangibles from the assessed value. This case concerns whether the County of Los Angeles ("County") abided by this legal mandate to exclude the value of intangible property when it assessed the JW Marriott and Ritz-Carlton L.A. Live Hotel ("Hotel"), owned by Olympic and Georgia Partners, LLC ("Olympic"), and operated pursuant to a management agreement by Marriott Hotel Services, Inc. and the Ritz-Carlton Hotel Company, LLC ("Hotel Managers"). Olympic contends that the County's assessment failed to exclude the full value of three intangible items: (1) a financial incentive promised by the City of Los Angeles ("City") as a tax reimbursement (cost reimbursement); (2) the "key money" payment made by the Hotel Managers to secure the management contract; and (3) intangible assets and rights connected to the Hotel's enterprise activity (hotel enterprise assets), specifically the Hotel's franchise affiliations with Marriott and Ritz-Carlton, its assembled and trained workforce, and its food and beverage operations.

This *amicus curiae* focuses on the County's failure to fully remove the value of the first and third intangible items—the cost reimbursement and the hotel enterprise assets—from the Hotel's assessed value. With regard to the first issue, the County's attempt to include the cost reimbursement in the property tax assessment is a profound shift in California law and established case precedents that have interpreted the California Constitution and California statutes in a harmonious way. This departure would drastically expand California's taxation of intangible assets and rights such as tax rebates and incentives, in a manner that is not supported by California law, and would result in newfound uncertainty and unpredictability in the State's property tax regime. Given the unique challenges associated with taxing intangible assets under a property tax scheme, such departure will undoubtedly lead to inconsistencies and contradictions that are inherently unfair to taxpayers.

It also is important to recognize the various economic, policy, and practical considerations behind the exclusion of intangible assets, such as the cost reimbursement at issue in this case. Assessing financial incentives such as the cost reimbursement would inhibit investment that was otherwise not economically feasible. At times, like here, creating a business enterprise (such as the Hotel) privately, without any governmental financial support can be prohibitively expensive and economically unviable. If such incentives are included in property tax assessments, ultimately that would prove counterproductive because it would result in a significant increase in the amount of the financial incentive required to compensate for the additional property tax liability. This could stifle economic growth and development in the City and other locations in California, frustrating the purpose of governmental financial support programs to encourage economic development. Excluding intangible assets also promotes uniformity and fairness – taxing these types of intangible assets as part of real property would result in double taxation as the income generated from these assets is often already subject to income and/or capital gains taxes. Thus, the Second District Court of Appeal ("Second District") properly rejected the County's assessment of the cost reimbursement. *See Olympic & Georgia Partners, LLC v. Cnty. of L.A.,* 90 Cal. App. 5th 100, 109 (2023).

On the second issue addressed here, even the County agrees that the franchise affiliations, assembled and trained workforce, and food and beverage operations are "nontaxable enterprise assets" and that their values must be removed from the Hotel's property tax assessment. Opening Brief on the Merits ("Cty. Open. Br."), at 22. But the County asserts that, following the so-called "Rushmore method," deducting the management and franchise fees that Olympic pays to the Hotel Managers from the Hotel's income stream is sufficient to completely exclude the value of the hotel enterprise assets from the assessment.[1] *Id*. The Second District unanimously disagreed with the County's use of the Rushmore method, concluding that the County's treatment of the hotel enterprise assets was "in error" because only deducting management and franchise fees from the Hotel's income stream failed to fully exclude the value of the intangible hotel enterprise assets from a tax assessment. *Olympic*, 90 Cal. App. 5th at 111-112.

The Second District's holding that the Rushmore method does not reliably remove the value of nontaxable enterprise assets from the assessment of a property like the Hotel, not only reflects a cogent understanding of how the principles of property tax assessment apply in the context of hotel properties, but also is in accord with Rule 8 in the State Board of Equalization's ("SBE") binding Property Tax Regulations, the SBE's authoritative interpretation of Rule 8 in the Assessors' Handbook ("AH") § 502, the consistent precedent of the California Courts of Appeal, and the emerging trend among courts in other jurisdictions. For all these reasons, this Court should affirm the Second District's rejection of the Rushmore method.

This case serves as a critical opportunity for the Court to reinforce the importance of California's well-established exclusion of intangible

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[1] The "Rushmore method" subtracts management fees and franchise tax fees from the Hotel's revenue and capitalizes the remaining revenue to determine real estate value.

assets from property taxation, and the Court should uphold the Second District's decision, exclude the value of the cost reimbursement from the Hotel's property tax assessment, and reject the County's Rushmore method.

BACKGROUND

I. Legal Background

A. Intangible assets and rights must be excluded from a property's assessed unit value.

This Court has long interpreted Article XIII, Section 2 of the California Constitution to exempt all forms of intangible property from taxation, with some exceptions not relevant to this case.[2] *See Roehm v. Orange Cnty.*, 32 Cal. 2d 280, 284-285 (1948); *Elk Hills Power, LLC v. Bd. of Equalization*, 57 Cal. 4th 593, 607 (2013). Reflecting this constitutional command, the Legislature has affirmatively exempted "[i]ntangible assets and rights" from taxation in Sections 110(d) and 212(c) of the Revenue and Taxation Code.

This mandate that intangible assets and rights be exempt from taxation is not always easy to apply in property tax assessments of hotels and similar commercial properties that host significant business or enterprise activity.[3] An assessor must value a property subject to taxation "at its full value," defined by statute as the "fair market value" or "full cash value" of the property. Cal. Rev. & Tax. Code §§ 401, 110.5. As this Court has made clear, "'market value' for assessment purposes is the value of the property when put to beneficial or productive use," not the "salvage or scrap value" that "may remain after the property is demolished, melted

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[2] The exceptions are limited to a few enumerated intangible assets in the California Constitution. (Cal. Const., art. XIII, § 2 ("notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, or mortgages" and "any legal or equitable interest therein".)

[3] Enterprise activity "occurs when a business engages in the sale of goods or services." State Bd. of Equalization, AH § 502, *Advanced Appraisal*, at 160.

down, or otherwise reduced to its constituent elements." *Michael Todd Co. v. Cnty. of L.A.*, 57 Cal. 2d 684, 696 (1962).

With certain commercial operations, like hotels, that operate on-site businesses, the component assets utilized in that enterprise include both tangible and intangible assets, and the "beneficial or productive use of tangible property" may "depend upon the possession of intangible rights and privileges." *Elk Hills*, 57 Cal. 4th at 612 (quoting *Roehm*, 32 Cal. 2d at 285). Accordingly, the Legislature has provided that "[t]axable property may be assessed and valued by assuming the presence of intangible assets or rights necessary to put the taxable property to beneficial or productive use." Cal. Rev. & Tax. Code §§ 110(e), 212(c).

At the same time, because intangible property is exempt from taxation, the Legislature expressly requires that "the value of intangible assets and rights"—in particular those "relating to the going concern value of a business using taxable property"—"shall not enhance or be reflected in the value of taxable property." Cal. Rev. & Tax. Code §§ 110(d)(1), 212(c).

In this Court's summary of the interaction of Sections 110 and 212(c), an assessor appraising a property of a business operation that includes both taxable property and nontaxable intangible property may enhance the valuation of taxable property, "not by including *the value* of intangible assets in the valuation," as that would violate Sections 110(d)(1) and 212(c), "but simply by *assuming the presence* of intangible assets when valuing the taxable property put to beneficial or productive use." *Elk Hills*, 57 Cal. 4th at 615. To the extent that the assessor's valuation reflects a direct valuation of the intangible assets themselves, "the fair market value of those assets must be removed …." *Id.*

B. If the income approach to valuation is used, income directly attributable to intangible assets and rights must be completely removed from the income stream to be capitalized.

One recognized method of valuing property for purposes of tax assessment is the income or income capitalization approach. *See Elk Hills*, 57 Cal. 4th at 604; 18 Cal. Code Regs., tit. 18, § ("Rule") 8. The underlying assumption of the income approach is that property is purchased for the income that it will produce. Hence, a property's value depends upon the income stream that it is expected to produce. *See* SBE, AH § 501, *Basic Appraisal* 97 (2002). More specifically, as the property tax rules promulgated by the SBE explain, a property's value can be estimated as "[t]he amount that investors would be willing to pay" for the property in order to acquire "the right to receive the income that the property would be expected to yield, with the risks attendant upon its receipt." Rule 3.

To calculate a property's value following this approach, an assessor first "estimates the future income stream a prospective purchaser could expect to receive" from the property, often by referring to the net income actually generated by the property, and then "discounts that amount to a present value by use of a capitalization rate." *Elk Hills*, 57 Cal. 4th at 604 (quoting *GTE Sprint Commc'ns Corp. v. Cnty. of Alameda*, 26 Cal. App. 4th 992, 996 (1994)). This capitalization rate is the "anticipated rate of return on and of the investment" in the property. AH § 501, at 102.

Commonly, the net income used is based upon rent, although net income derived from the operations on the property also may be used. *See, e.g.,* Rule 8. However, the regulation warns: "income derived from operation is the more likely to be influenced by managerial skills and may arise in part from non-taxable property or other sources. When income from operating a property is used, sufficient income shall be excluded to provide a return on working capital and other non-taxable operating assets…" Rule 8(e).

The essential idea behind this method of discounting the property's net income stream by a capitalization rate to arrive at an estimate of the property's value is most easily illustrated by the simplest form of the income approach, namely *direct capitalization*. The Assessors' Handbook § 501 issued by the SBE explains that "capitalization is the process of converting an expected income into an indicator of value." AH § 501 at 93. The Handbook further describes direct capitalization as a way of "convert[ing] a single year's income estimate into a value indicator [for the property being assessed] in one step . . . by dividing the income estimate by a capitalization rate." *Id*. at 101. In essence, the SBE is equating the income generated by the property being assessed with the investment return on the property at the expected rate of return given by the capitalization rate. From this, the capital sum that an investor would be willing to invest to purchase the property can be calculated, representing the property's estimated present market value.

In the context of using the income approach to assess a commercial property, this Court has recognized that "intangible assets like the goodwill of a business, customer base, and favorable franchise terms or operating contracts all make a direct contribution to the going concern value of the business," which will be reflected in the property's income stream. *Elk Hills*, 57 Cal. 4th at 618. Hence, to comply with Section 110(d)(1)'s command that the value of "intangible assets and rights relating to the going concern value… shall not enhance or be reflected in the value of the taxable property," the portion of the income stream directly attributable to these intangible enterprise assets must be quantified and deducted. *Id*. at 615, 618-619. Failure to quantify the fair market value of intangibles that directly enhance that income stream, and to exclude this value prior to assessment, will result in the value of intangible enterprise assets being "improperly subsumed" in the valuation, in violation of Sections 110(d)(1) and 212(c). *See id.* at 618-619.

II. Factual and Procedural Background

Facing a deteriorating downtown, the City sought to have a hotel developed adjacent to its unprofitable convention center to support conventions and to revitalize its downtown. Olympic's Answer to County's Opening Br. ("Olympic An. Br."). Unfortunately, there was insufficient private economic benefit to developing a hotel because the cost to do so outweighed the economic benefits to a potential developer. *Id*. Consequently, to incentivize development, the City solicited Olympic's predecessor to develop the Hotel with a cost reimbursement arrangement. *Id*. Specifically, the City invested the transient occupancy taxes paid to the City by Hotel guests, and separately contracted to provide a portion of those taxes (the cost reimbursement) to Olympic's predecessor. *Id*. When Olympic purchased the Hotel from its predecessor, the cost reimbursement right was conveyed to Olympic as a separate, unrecorded assignment, *Id*. at 19 with a "quantifiable fair market value" of $80 million. *Id*. at 10, 42. The cost reimbursement transferred to Olympic is "a separate stream of income" from the operations of the Hotel, and is an intangible right provided by the City as a financial incentive to develop and build the Hotel. *Id.* at 47.

The developed Hotel is now a full-service hotel complex in downtown Los Angeles, built to service the Los Angeles Convention Center. *Olympic*, 90 Cal. App. 5th at 103. While Olympic owns the Hotel, the Hotel Managers – Marriott and Ritz-Carlton – contracted to operate and manage the Hotel in exchange for a percentage of the Hotel's gross revenues and cash flows, which Olympic pays to them as management and franchise fees. *Id*.

Once construction of the Hotel was completed in 2010, the County assessed the Hotel for property tax purposes. *Id*. at 105. In valuing the Hotel, the County used the income approach. *Id*. at 102.

Olympic disputed the County's assessment before the Los Angeles County Assessment Appeals Board ("Board"), arguing that the County unlawfully failed to exclude income attributable to nontaxable intangible assets and rights from the assessment. *Id*. at 105. Of relevance to the issues addressed by this *amicus* brief are Olympic's contentions that the County's assessment improperly included the cost reimbursement valued at $80 million and improperly subsumed $36 million in value from hotel enterprise assets.

The Board correctly determined that the $80 million cost reimbursement was an intangible. Nonetheless, it still held that the cost reimbursement was includable as "an intangible asset of real property that runs with the land is associated with ownership of the property." *Id*.

Olympic also identified three hotel enterprise assets subsumed in the assessment. First, Olympic receives intangible "flag and franchise" benefits from its management agreement with the Hotel Managers, such as the customer goodwill accompanying the Marriott and Ritz-Carlton trademarks, the Hotel Managers' experience and expertise in operating and managing hotels, and Olympic's access to the Marriott and Ritz-Carlton reservation systems, websites, and loyalty programs. Olympic presented evidence before the Board from Mary O'Connor, a business valuation expert, who valued the benefits to the Hotel from its franchise affiliation with the Hotel Managers at $17 million. *Id*. at 104, 105. Second, Olympic receives an income stream from the food and beverage operations at the Hotel, such as the Hotel's two restaurants, pool bar, 24-hour in-room dining, and banquet operations. Based on O'Connor's analysis, Olympic estimated the value of the Hotel's food and beverage operations at $13 million. *Id*. at 104. Third, Olympic enjoys benefits from having an assembled workforce of more than 800 trained employees with a below-average turnover rate at the Hotel. Olympic valued this intangible asset at $4 million. *Id*. at 104-105.

The Board agreed with the County's assessment of the Hotel, and declined to remove these intangible income streams when applying the income approach. As to the value of the franchise affiliation with the Hotel Managers and the assembled and trained workforce, the Board ruled that the income from these assets need not be quantified and excluded from the assessment because these assets "are the property of [the Hotel Managers], not of [Olympic]," and because there was "no compelling evidence to isolate the potential Flag and Franchise and Workforce value from the real estate value." *Id*. at 105-106. As to the enterprise value from the food and beverage operations at the Hotel, the Board rejected Olympic's valuation as unreliable. *Id*. at 106.

Olympic then sought review of the Board's decision in the Superior Court, which affirmed the Board's holding on the cost reimbursement, but ruled for Olympic on the enterprise assets, agreeing that the value attributable to these intangible assets must be deducted from the assessment. The Superior Court remanded this issue to the Board to determine the value of these assets and remove them from the assessment. *Id*.

On appeal, the Second District correctly disagreed with the inclusion of the cost reimbursement in the assessed value, and noted that unlike the *Elk Hills* case, "Olympic has articulated this basis for valuation, which the parties agree was $80 million … [and] the Board did find it was an intangible asset." *Id*. at 110.

Regarding the hotel enterprise assets at issue, the Second District rejected the Board's reasoning that the value of the franchise affiliation and the assembled workforce need not be removed from the assessment because they are assets owned by the Hotel Managers rather than Olympic. Even assuming that these intangible assets are not owned by Olympic, that would not change the immunity of these intangible assets from direct property taxation under California law. *Id*. at 111. The court also found O'Connor's analysis of the hotel enterprise assets "credible," but determined that the Board had simply dismissed this analysis as unreliable "without meaningful explanation." *Id*. Accordingly, the Second District concluded that "[t]he trial court properly required the Board to ascertain and deduct the value" of the hotel enterprise assets. *Id*. at 112.

In reaching this conclusion, the Second District also considered and rejected an argument by the County that its assessment did in fact identify and remove the value of Olympic's interest in the franchise affiliations and assembled workforce by using a method associated with Stephen Rushmore: to completely account for and remove the value of the franchise affiliations and assembled workforce from the Hotel's net operating income, the County assessor deducted the management and franchise fees Olympic paid to the Hotel Managers. *See id.* The Second District disagreed with the County's argument, concluding that the Rushmore method is "incorrect" and "illogical" because a hotel owner like Olympic would expect to receive some profit or return from entering into a management agreement. But if the management and franchise fees are "so high as to account completely for all intangible benefits to a hotel owner," the owner would receive no return and hence have no business reason to accept the management agreement. *Id*.

STANDARD OF REVIEW

This *amicus* brief focuses on the dispute between Olympic and the County regarding the treatment of intangibles in the County's assessment of the Hotel on (1) the cost reimbursement inclusion in the assessment, and,

(2) the hotel enterprise assets and, whether the County's use of the Rushmore method was sufficient to fully remove the value of the hotel enterprise assets to Olympic from the income stream to be capitalized. Where, as here, the taxpayer "attacks the validity of the valuation method itself," as opposed to the assessor's application of an otherwise valid valuation method, the disputed issue is a question of law subject to de novo review. *Elk Hills*, 57 Cal. 4th at 606.

ARGUMENT

I. The Cost Reimbursement Was Properly Excluded from Property Taxation

The County in its briefing conflates the inclusion in the Hotel's income of cancellation fees, which are directly related to the Hotel's operations, with the cost reimbursement. County of Los Angeles' Reply Brief on the Merits ("Cty. Reply Br."), at 16-17. To the contrary, the cost reimbursement was an incentive for building the Hotel that was otherwise not financially feasible without the cost reimbursement. It should not be misidentified as an income stream directly related to the operation of the Hotel. The cost reimbursement is not received for the operation of the Hotel, but it was proffered by the City to provide developers with a financial incentive to build the Hotel. As noted in *Elk Hills*, "the value of intangibles that directly enhance that income stream cannot be subsumed in the valuation of taxable property ([Rev. & Tax. Code] § 110(d)(1)), and must be deducted from the [valuation] prior to assessment…." *Id.* at 618. Similar to a liquor license that allows a bar to operate and generate revenue, the cost reimbursement is an intangible that enabled the Hotel's income stream (by incentivizing the building of the Hotel). Like the liquor license, the cost reimbursement similarly should be excluded from property taxation.

The County's contentions should be rejected.

A. The Cost Reimbursement is an Intangible Asset with a Separate Quantified Value.

The cost reimbursement, as an economic development tool, reflects the value to and desire of the City to revitalize downtown Los Angeles with a robust conference center. Olympic An. Br., at 40-41. The proper characterization of the cost reimbursement is as a non-taxable intangible asset or right granted by the City to incentivize development of an uneconomic business enterprise in exchange for substantial economic and social benefits to the City and the local population. *Id*. at 35, 40-44. While the investment in the building of the Hotel would not have taken place without the incentive, the cost reimbursement is an unrecorded standalone agreement, does not run with the land, and does not govern any instruments conveying the Hotel. *Id*. at 47 (citing AR-0352 at 1292:7-12). Further, the cost reimbursement arrangement does not give the City any recognized property interest rights. *Id*. at 40-47.

The Second District, adhering to and reinforcing California's jurisprudence and legal framework on the exclusion of intangible assets, appropriately resolved the specific issues at hand. The Second District aptly applied three doctrinal steps underpinning the modern law of California property taxation—*Roehm v. County of Orange*, 32 Cal.2d 280 (1948), *GTE Sprint Communications Corp. v. County of Alameda,* 26 Cal. App. 4th 992 (1994), and *Elk Hills Power, LLC v. Board of Equalization*, 57 Cal.4th 593 (2013). *Id.* at 106-109. Under this jurisprudence, the Second District found that the cost reimbursement must be subtracted from the Hotel valuation. *Id.* at 109-110. The Second District found that regardless of "[w]hether the subsidy [cost reimbursement] runs with the land," the analysis and holding in *Elk Hills* requires the deduction of the cost reimbursement because the asset is an intangible that was "directly necessary to the productive use of the property", and both parties agreed to its $80 million valuation. *Id.* at 110-111. The Second District's legal reasoning is sound and is harmonized with the California Constitution and California statutes regarding the exclusion of intangible assets. Cal. Const., art. XIII, § 2; Rev. & Tax. Code §§ 212, 110(d), -(e), -(f). This analysis also is thoughtfully presented by Olympic. Olympic An. Br., at 27-48.

This Court should affirm the Second District's analysis and application of California law on property taxation. Clear guidance on the application of *Elk Hills* is necessary, along with confirmation that intangible assets, even when using an income approach (versus a replacement cost approach), are excludable as non-taxable intangible assets. *See* Richard Smith, *Deducting Intangible Asset Value for Property Tax Purposes: How "Necessary Intangibles" Are Treated in Two Recent Cases*, Property Tax Litigation Insights, Willamette Management Associates, Spring 2014, https://willamette.com/insights_journal/14/spring_2014_4.pdf (a critique of *Elk Hills* as it relates to excluding intangible assets using the income approach).

B. The Exclusion of Cost Reimbursements from Property Taxation is Aligned with the Economic, Policy, and Practical Considerations for Excluding Intangible Assets.

As a matter of longstanding policy, COST seeks fair and equitable property tax systems. Our policy position on property taxes provides that:

> State and local property tax systems must be fairly administered and tax burdens equitably distributed among taxpayers. A property tax system that is inefficient or that disproportionally falls upon business is not equitable and will negatively impact a state's business tax climate.
>
> COST, *Fair and Equitable Tax Systems*, https://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/fair-and-equitable-property-tax-systems.pdf (last visited December 13, 2023).

Applying the fair and equitable property tax system principle to intangible property, the COST policy position notes "intangible property, such as trade names, customer relationships and goodwill, should not be included in the property tax base because such property is associated only with the management of business and the measurement of such value is extremely subjective." *Id.* Further, as illustrated in this case, if economic incentives are subject to property tax, the costs to the City and other locations in California that provide these incentives will necessarily increase to account for the increased property tax costs added on by county assessors. While the City is seeking to encourage investment in a particular location within its jurisdiction, the County is improperly subjecting the City's incentive to property taxation. This frustrates the goal of the City's economic incentive tools to encourage development within the City. Including this intangible in the valuation base is improper and will only make other financial incentives provided by the State and its local governments more costly.

II. The Rushmore method cannot be squared with the State Board of Equalization's regulations.

Before this Court, the County maintains that the Rushmore method of deducting management and franchise fees from the Hotel's income stream completely accounts for and removes the value of the hotel enterprise assets that Olympic contends were improperly subsumed in the County's assessment. Cty. Open. Br., at 51-52. The County also presses the argument that, because the hotel enterprise assets are owned by the Hotel Managers rather than Olympic, removing the value generated by these assets from the income stream to be capitalized would give Olympic an improper "tax reduction." *Id.* at 57-59. But it turns out that this argument is simply a variant of the argument that the Rushmore method is sufficient to remove all nontaxable intangible value from the assessment of the Hotel.

Regardless as to who owns the intangible, a portion of the income stream used to value the Hotel was generated by the intangibles. Indeed, the County accepts that the value of the hotel enterprise assets to Olympic *as a franchisee* must be removed, but insists that using the Rushmore method entirely removes *that* value. Cty. Reply Br., at 41-42. The Second District properly rejected the County's position.

A. Rule 8 recognizes that when using the income approach, assessors must factor in the expected return <u>on</u> enterprise assets to fully exclude the value of such assets.

The Legislature has authorized the SBE to prescribe rules and regulations to govern local tax assessors. *Torres v. S.F. Assessment Appeals Bd. No. 1*, 89 Cal. App. 5th 894, 899 (2023); *see* Cal. Gov. Code § 15606(c) (delegating to the SBE the power to "[p]rescribe rules and regulations to govern . . . assessors when assessing"). Pursuant to this authority, SBE promulgated regulations referred to as the Property Tax Rules. Rule 8, which concerns the income approach to property valuation, expressly provides that "[w]hen income from operating a property"—that is, income flowing from enterprise activity—is used to estimate the future income of the property, "sufficient income shall be excluded" from the income estimate to be capitalized "to provide a return on . . . nontaxable operating assets." Rule 8(e).

The Rushmore method flouts this requirement in Rule 8(e). As the Second District observed, the Rushmore method assumes that the expense to a hotel owner of management and franchise fees is equivalent to the complete value of the intangible benefits the owner derives from the associated management and franchise agreement. *Olympic*, 90 Cal. App. 5th at 112. But in fact, even if the management fee somehow was directly related to all of the intangible assets utilized in the hotel business, nevertheless basic economic theory dictates that the value of the intangible assets must exceed the amount of management and franchise fees. The rational hotel owner also will expect a return on the intangible assets in question. By simply deducting the management and franchise fees from hotel's operating income, the Rushmore method fails to exclude "sufficient income" to account for this expectation of earning a return on investment, in violation of Rule 8(e).

Because the Rushmore method is incompatible with Rule 8(e), it is an invalid assessment method. The Property Tax Rules are binding on local tax assessors and assessment appeals boards. *See* Rule 1. Moreover, as formal regulations issued pursuant to the agency's substantive rulemaking powers, the Property Tax Rules "have the dignity of statutes." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 10 (1998); *see also Wallace Berrie & Co. v. State Bd. of Equalization*, 40 Cal. 3d 60, 65 (1985). Courts may not disturb a Rule unless it exceeds the lawmaking authority delegated by the Legislature, or it is not reasonably necessary to implement the purposes of the property tax statutes. *Yamaha*, 19 Cal. 4th at 10-11. Here, the County does not suggest—nor could it—that either of these conditions are met and does not contest the validity of Rule 8(e). Since the Rushmore method cannot be squared with a binding and valid regulation issued by the SBE, it must be rejected as legally incorrect.

B. The Assessors' Handbook § 502 confirms that the Rushmore method is inconsistent with Rule 8.

That the Rushmore method cannot be reconciled with Rule 8(e) of the Property Tax Rules is confirmed by the Assessors' Handbook § 502, *Advanced Appraisal* (2015), which the SBE publishes pursuant to its authority to "[p]repare and issue instructions to assessors." Cal. Gov. Code § 15606(e). Citing Rule 8(e), the SBE instructs in its Assessors' Handbook § 502 that, when the income approach to valuation is used, "[t]he value of intangible assets and rights cannot be removed by merely deducting the related expenses from the income stream to be capitalized." AH § 502, at 162, 162 n.142. To explain its reasoning, the SBE observes that investors expect "both a return *of* their investment (a recapture of the investment) and return *on* their investment (a yield on the investment)." *Id*. at 162 n.143 (emphasis added). But merely deducting the expenses associated with an intangible asset from the income stream to be capitalized "does not allow for a return on the capital expenditure" on that asset. *Id*. at 162. The method of simply deducting expenses therefore does not remove sufficient income from the income stream to be capitalized to fully account for, and exclude, the value of intangible assets.

When the SBE applies this interpretation of Rule 8(e) in the context of hotel valuation, it concludes that "the deduction of a management fee from the income stream of a hotel does not recognize or remove the value attributable to the business enterprise that operates the hotel." AH § 502, at 162. The SBE thus expressly rejects the core premise of the Rushmore method, which is precisely that the deduction of management and franchise fees from the hotel income stream to be capitalized is sufficient to wholly remove the value of the related enterprise assets.

The County asserts that the AH § 502 is wrong, and suggests a paper from the International Association of Assessing Officers ("IAAO") should be followed instead. Cty. Open. Br., at 63, 66. But the SBE, not the IAAO, is <u>the</u> agency authorized by California law to prescribe rules, regulations, and instructions to promote uniform assessment practices among the counties in the State. Gov't. Code §15606(c)-(g).

This Court should defer to the SBE's conclusion, as expressed in the Assessors' Handbook § 502, that the Rushmore method violates Rule 8(e) and is therefore an invalid valuation method. That Handbook was duly adopted by the SBE after considering extensive discussion from various parties, including the California Assessor's Association. AH § 502, p. i.;

see also Cty. Open. Br., at 67. While the assessors' handbooks are not regulations with the force of law, California courts "accord[] great weight" to them "in interpreting valuation questions." *Church v. San Mateo Cnty. Assessment Appeals Bd*., 52 Cal. App. 5th 310, 323 (2020) (quoting *Sky River LLC v. Cnty. of Kern*, 214 Cal. App. 4th 720, 735 (2013)). Courts give even greater deference to Assessors' Handbooks where, as here, they lay out the SBE's interpretation of its own regulations, "since an agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." *See Yamaha*, 19 Cal. 4th at 12. Indeed, this Court itself has relied upon AH § 502's Chapter 6 concerning the treatment of intangible assets and rights. *Elk Hills, supra*, at 615, 620-21.

C. The Courts of Appeal have consistently held that the Rushmore method does not reliably exclude the full value of intangible assets from a hotel's assessed unit value.

The Second District's holding and reasoning below rejecting the Rushmore method reflects the unbroken precedent of the Courts of Appeal. In every case in which a hotel owner has challenged the assessment of its property on the ground that the use of the Rushmore method failed to fully exclude the value attributable to intangible assets, the Courts of Appeal have concluded that the value of hotel enterprise assets cannot reliably be excluded merely by deducting management and franchise fees from the income stream to be capitalized.

In *SHC Half Moon Bay, LLC v. Cnty. of San Mateo*, 226 Cal. App. 4th 471 (2014), the taxpayer challenged San Mateo County's property tax assessment of a hotel owned by the taxpayer but managed by a hotel management company in exchange for a fee. As here, the taxpayer alleged that the county's assessment, conducted using the income approach, inflated the value of the hotel by improperly subsuming nontaxable intangible assets. *Id*. at 476. And as here, the county argued in defense of its assessment that the assessor had in fact excluded the value of the nontaxable intangible assets by "deduct[ing] the management and franchise fee" from the hotel's income stream, in accordance with "the Rushmore Method." *Id*. at 478.

The First District Court of Appeal disagreed with the county, holding that "the deduction of the management and franchise fee from the hotel's projected revenue stream"—the Rushmore method—failed to reliably identify and exclude all nontaxable intangible assets. *Id*. at 490. Because the Rushmore method only succeeds in removing *some* but not *all* of the value attributable to intangible enterprise assets, a tax assessor cannot rely on the method to fulfil its duty to wholly exclude the value of intangible assets from a property's unit valuation. As the *SHC Half Moon Bay* court put it, the county's "reliance on the deduction of the management and franchise fee," and its refusal to actively "identify and value certain intangible assets" was "akin to paying 'lip service to the concept of exempting intangible assets from taxation.'" *Id*. at 492 (quoting *GTE Sprint*, 26 Cal. App. 4th at 1005).

The First District Court of Appeal disavowed the Rushmore method even more squarely in *SHR St. Francis, LLC v. City & County of San Francisco*, declaring it a "legally incorrect" method to "exclude the value of nontaxable, intangible assets from the assessed value of a hotel." 94 Cal. App. 5th 622, 629 (2023). As in the present litigation and in *SHC Half Moon Bay*, the taxpayers challenged the assessment of a hotel that they owned but that was operated by a hotel management company pursuant to a management agreement. *SHR St. Francis*, 94 Cal. App. 5th at 630. Among the issues disputed was whether the deduction of the management fees that the taxpayers paid to the hotel management company from the hotel's income stream was sufficient to fully remove the value of the nontaxable management services. *Id*. at 635. The taxpayers specifically argued that because the challenged assessment "only deduct[ed] the management fees" to determine the hotel's net operating income, it "did not account for the return on [the management] agreement." *Id*. As a result, the assessment improperly subsumed value attributable to the management agreement, a nontaxable intangible asset. *Id*.

As the *SHR St. Francis* court suggested, the assessment method the taxpayers objected to was a more modest variant of the Rushmore method, since the tax assessor did not claim that the deduction of management and franchise fees would account for the value of any and all intangible enterprise assets, but only of the value attributable to the management agreement itself. *Id*. at 636 n.7. But even this modest variant of the Rushmore method, the court concluded, was a "legally erroneous methodology." *Id*. at 635 (quoting *DFS Group, L.P. v. Cnty. of San Mateo*, 31 Cal. App. 5th 1059, 1074 (2019)). The *SHR St. Francis* court reasoned that "income from a nontaxable, intangible asset like the management agreement should typically include both a return of and a return on that asset." *Id*. at 636. Accordingly, merely deducting management fees from the hotel's income stream—that is, deducting the expenses associated with the management agreement—"does not remove [the] *full* value [of the agreement] from the assessed value of the property" since that does not allow for a return on the taxpayer's investment in the management agreement. *Id*. While the court's reasoning deferred to the SBE's position as set out in Rule 8(e) and the Assessors' Handbook § 502, the court also found this position independently persuasive "from a business standpoint." *Id*.

III. Contrary to the County's assertion, the income approach's application of a capitalization rate does not remedy the flaws of the Rushmore method.

The County insists that—contrary to all this authority—the Rushmore method actually *does* fully exclude the value of intangible enterprise assets from the valuation of the hotel property, once the income approach is properly understood. But its arguments fail.

As explained *supra*, the Second District below, the First District Court of Appeal in *SHR St. Francis*, and the SBE in the Assessors' Handbook § 502 all agree that deducting from a hotel's income stream the expenses to the hotel owner associated with the hotel's enterprise activities—specifically the fees paid to the managers contracted to oversee and operate the hotel's business activities—is insufficient to remove the full value of intangible enterprise assets, because that value must also include the return on investment that the hotel owner expected from entering into the management agreement.

The County contends that this reasoning reflects "a fundamental misunderstanding of how the income approach works," because by "us[ing] . . . a capitalization rate to value an income stream," the income approach already "provides for both a return of and a return on an investment." Cty. Open. Br., at 53. That is, the County seems to be asserting that the Rushmore method's device of deducting only the expenses associated with a hotel's enterprise activities from the income stream to be capitalized is sufficient to exclude the full value of enterprise assets from the final assessment because the subsequent step of discounting the income stream by a capitalization rate remedies the failure to initially account for the hotel owner's expected investment return on the enterprise assets.

To support its assertion, the County points to selected statements in the assessors' handbooks touching on the capitalization rate that assessors use to discount a property's projected income stream to a present value under the income approach. Some of these statements, when wrenched from their context, may appear to align with the County's position. But when properly understood, they in fact provide no support for the assertion that the use of a capitalization rate under the income approach remedies the defects in the Rushmore method identified by the SBE and the Courts of Appeal.

First, the statements quoted by the County may appear to suggest that a capitalization rate *necessarily* captures an investor's return on capital—but on closer examination, they are simply admonitions to assessors using the income approach to set *specific* capitalization rates high enough to accurately account for investors' expectation of a return on their investments. As explained *supra*, the capitalization rate for a property subject to assessment should reflect the "anticipated rate of return on and of the investment" in the property if it is to accurately discount the property's income stream to a present value. AH § 501, at 102. The quoted statements caution assessors not to neglect the element of a return on investment when setting the capitalization rate. Thus, the SBE explains that "[a]n investor's expected return *must* include both an economic reward and a recovery of invested capital." Cty. Open. Br., at 54 (quoting AH § 502, at 62) (emphasis added). This echoes the SBE's instruction to assessors in Assessors' Handbook § 501 that the "capitalization rate . . . *must* provide for both the return of the portion of the investment that declines in value (the investment amortization or recapture) and for the return on the investment (the yield)." AH § 501, at 100 (emphasis added). Far from making the absurd suggestion that *any* capitalization rate an assessor might choose *necessarily* accounts for return of and return on investment, the SBE is instructing assessors that, in order for the capitalization rate itself to be valid, it must capture both return of and return on investment when setting the rate.

Second, the fact that an accurate capitalization rate must capture both return of and return on investment is simply irrelevant to whether, *prior* to the application of a capitalization rate, the assessor has fully excluded all value attributable to intangible enterprise assets from the income stream *to be capitalized*. The flaw in the Rushmore method that the SBE and the Courts of Appeal detected relates to the income estimate to be capitalized: merely deducting management and franchise fees from a hotel's operating income does not exclude from the income estimate all value attributable to the hotel's intangible enterprise assets, because that value must exceed the fees the owner pays for the management and operation of the hotel's businesses, as otherwise the owner would receive no return on investment for the hotel's enterprise assets.

This flaw in using the Rushmore method to arrive at an income estimate for a hotel property is in no way remedied by the subsequent application of an accurate capitalization rate to discount this projected income to a present value—regardless of the accuracy of the capitalization rate, the wrong amount of income is being capitalized. It is thus the County, not the SBE and the Courts of Appeal, that labors under a fundamental misunderstanding of how the income approach works.

IV. The emerging trend across other jurisdictions similarly disfavors the Rushmore method.

A. Out-of-state precedent embracing the Rushmore method is dated and unpersuasive.

While courts in a few states have blessed the Rushmore method as a way of excluding the value of intangible enterprise assets when assessing a full-service hotel using the income approach, these precedents either are decades-old and/or provide no reasoned basis for departing from the consistent rejection of the Rushmore method by the SBE and the California Courts of Appeal.

For example, in *Glenpointe Associates v. Township of Teaneck*, 10 N.J. Tax 380 (1989), the New Jersey Tax Court endorsed the Rushmore method in considering a challenge by the owner of a full-service hotel to the hotel's property tax assessment. The court observed that "[o]ne method of separating the real estate and business interest in hotel valuation is to extract from hotel revenues the fee paid by the owner to a management company pursuant to a management contract" and approved this technique (that is, the Rushmore method) as "reasonable"—but the court provided no reasoning in support of that conclusion. *Id*. at 391.

The Kansas Court of Appeals likewise approved the Rushmore method without any substantive review of the method on its merits. In *Marriott Corp. v. Board of County Commissioners of Johnson County*, the owner of a full-service convention hotel challenged the hotel's tax assessment on the specific ground that the assessor's use of the "Rushmore model of appraisal . . . inflate[d] the value of the real estate by including nontaxable business value in the totals." 25 Kan. App. 2d 840, 843 (1999). Professing itself "not possessed of the expertise to declare the Rushmore model defective," the court affirmed the validity of the Rushmore method based only on Stephen Rushmore's general credentials in the field of hotel valuation and the fact that the method had been "accepted in a number of litigated matters." *Id*. at 844.

Even when out-of-state courts have articulated substantive reasoning for accepting the Rushmore method, they have not addressed the specific defect in the economic assumptions underlying the method identified by the SBE and the California Courts of Appeal. Thus, when the New Jersey Tax Court revisited the issue of the Rushmore method's validity, it defended the method against the charge that deducting management and franchise fees does not reliably exclude above-market returns due to superior management skill and reputation with customers. *See Chesapeake Hotel LP v. Saddle Brook Twp*., 22 N.J. Tax 525, 528-532 (2005). The court reasoned that any such superior management or goodwill would presumably command "a premium in the franchise and management fees charged to the property owner," such that the Rushmore method is "self-adjusting" with respect to variations in management skill and customer goodwill. *Id*. at 533.

Whatever the merits of the New Jersey court's reasoning, it focuses only on one potential criticism of the Rushmore method, namely that it does not reliably account for variations in managerial skill and customer goodwill attached to particular franchise affiliations. It does not address the key defect that California authorities have discerned in the Rushmore method: that it fails to exclude the full value of hotel enterprise assets because that value encompasses not only the expense to the owner of entering into a management contract, which is captured by the deducted fees, but also the expectation of a return on investment for agreeing to such a contract. *See* Rule 8(e) ("When income from operating a property is used, sufficient income shall be excluded to provide a return on … nontaxable operating assets….").

Indeed, the *Chesapeake Hotel* court itself acknowledged the limited scope of its treatment of the Rushmore method, cautioning that its analysis was based solely on "consideration of the reasoning and supporting data addressed in the record" of that particular case, and "should not be understood as a definitive pronouncement on appraisal practices designed to extract real estate value from the assets of a business." *Id*. at 535-536.

B. Where courts have recently analyzed the Rushmore method, they have disfavored it as flawed.

By contrast, courts in two different states have recently given sustained consideration to the validity of the Rushmore method—and both have disfavored the method as an unreliable flawed approach to removing nontaxable value from the assessment of a full-service hotel.

The Florida Fifth District Court of Appeal recently examined the Rushmore method in connection with a challenge by Disney to a property tax assessment of a full-service resort property; Disney argued that the assessment erroneously failed to exclude the value of certain intangibles connected with the business activities conducted on the resort property, including the value of an "assembled workforce" and of "brand/copyright/goodwill." *Singh v. Walt Disney Parks & Resorts US, Inc.*, 325 So. 3d 124, 127-128 (Fla. Dist. Ct. App. 2020).

The Florida court agreed, holding that "[b]y taking a percentage out of a business's net income for management and franchise fee expenses, without first removing intangible business value from that gross income stream, the Rushmore method does not remove all business value from an assessment." *Id*. at 130-131. In reaching that conclusion, the court noted with approval the argument that the Rushmore method does not "account for an economic return on investment because no rational economic actor would franchise their business or hire management to earn merely a return of their investment" rather than also "a profit on their investment." *Id*. at 129.

Even more recently, the Minnesota Tax Court examined the validity of the Rushmore method—which it called the "Management Fee Approach"—in considering a tax assessment challenge by the owner of a full-service convention hotel operated by Hyatt Corporation pursuant to a hotel management agreement. *See 1300 Nicollet, LLC v. Cnty. of Hennepin*, 2022 WL 829605, at *4-*5 (Minn. Tax Mar. 16, 2022), *aff'd*, 990 N.W.2d 422 (Minn. 2005). The court specifically compared the Rushmore method with the "Parsing Income Approach," under which an assessor actively quantifies the value attributable to intangible assets and rights and removes this value from the income stream to be capitalized. *Id*. at *6-*7.

Surveying precedents from across various state jurisdictions, the Minnesota court discerned "mounting skepticism of the Management Fee Approach and increasing reliance on the Income Parsing Method as the better way to address intangible assets." *Id*. at *12. The court agreed with this emerging trend against the Rushmore method, concluding that this technique "does not credibly address intangible assets," because there is no plausible explanation for how the deduction of management and franchise fees alone could reliably exclude the value of "any and all possible intangible assets" in a hotel's operating income stream. *Id*. at *13, *7. Echoing the reasoning of the California Court of Appeal in *SHC Half Moon Bay*, the Minnesota court found "no persuasive explanation concerning how the deduction of management fees alone could accomplish so many tasks." *Id*. at *13.[4]

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[4] The Minnesota Supreme Court subsequently declined to "adopt a rule that absolutely precludes the use of the management fee method [i.e., the Rushmore method] when valuing full-service hotels." *Bloomington Hotel Invs., LLC v. Cnty. of Hennepin,* 993 N.W.2d 875, 886 (Minn. 2023). The *Bloomington* decision did not address the central issue here – whether the Rushmore method violates Rule 8 because it does not provide for a return on the intangible. In any event, the *Bloomington* decision did not bless the Rushmore method, but simply acknowledged that, because "assessing the value of properties … is an inexact science," there was no "clear current consensus among appraisal authorities" that the Rushmore method fails to exclude income from food and beverage and other business value "in *every case*." *Id*. (emphasis added). Indeed, in *Bloomington*, the Minnesota Supreme Court reiterated its prior affirmance of the Minnesota Tax Court's decision in *1300 Nicollet*, denying that there was any "unreconcilable conflict" between its refusal to absolutely reject the Rushmore method and the tax court's reasoning in *1300 Nicollett*, which "*preferred*" the income parsing method over the Rushmore method. *Id*. at 866 n.7. Even after *Bloomington*, therefore, Minnesota law disfavors—even if it does not categorically reject in every case—the Rushmore method.

In sum, as the Minnesota Tax Court aptly observed in *1300 Nicollet*, while states may be divided on whether the Rushmore method is a valid approach to isolating and excluding the value attributable to intangible hotel enterprise assets, the emerging trend tilts toward skepticism of this approach and a preference for methods that actively seek to estimate, and then remove from the income stream, the fair market value of enterprise assets. The California Courts of Appeal are aligned with this cross-jurisdictional trend. This Court should not act to disturb that alignment.

CONCLUSION

To comply with the California Constitution, Revenue and Taxation Code Sections 110(d) and 212(c), and this Court's precedent, a property tax assessment of a property like the Hotel must exclude all value attributable to intangible assets and rights from the valuation of the property. Thus, in the context of assessments using the income approach, the income streams attributable to those intangible assets and rights – here the cost reimbursement and business enterprise assets – must be excluded from the income to be capitalized. Moreover, Rule 8 commands that those income streams be sufficient to provide for a return on the amounts invested in those assets. The SBE and the California Courts of Appeal have properly recognized this, and that the Rushmore method fails to reliably accomplish the assessor's duty to fully exclude intangible values. This consistent position of the California authorities aligns with the emerging cross-jurisdictional trend and is supported by a sound understanding of the income approach.

For all these reasons, the Court should affirm the Second District decision on the issues of excluding the cost reimbursement and the hotel enterprise assets from the Hotel's assessed value.

Dated: December 29, 2023

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

By: ______________________________
Charles J. Moll III
Attorney for *Amicus Curiae*
Council On State Taxation

CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 8,575 words as counted by the Microsoft Word software program used to prepare this brief. Cal. Rules of Court, Rule 8.204(b), (c).

Dated: December 29, 2023 MCDERMOTT WILL & EMERY LLP

By: Charles J Moll III

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PROOF OF SERVICE

Olympic and Georgia Partners LLC v. County of Los Angeles
California Supreme Court, Case No. S280000

I, Barbara J. Sommars, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 415 Mission Street, Suite 5600, San Francisco, CA 94105. On December 29, 2023, I caused to be served a copy of the following document:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA PARTNERS, LLC

on the persons listed below by the following means:

☒ **By TrueFiling**. I caused the above document to be electronically served on counsel of record by using TrueFiling's e-service, and all interested parties registered by e-service for this case.

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☒ **By U.S. Mail** by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

Honorable Malcolm Mackey Los Angeles Superior Court Stanley Mosk Courthouse 111 N. Hill Street, Dept. 55 Los Angeles, CA 90012	*Judge of the Superior Court of Los Angeles County*
Peter Michaels Law Office of Peter Michaels 3220 N Street, NW, #164 Washington, DC 20007 Telephone: (510) 547-0255 Email: peter@pmichaelslaw.com	*Attorneys for Amici Curiae Solar Energy Industries Association; Large-scale Solar Association*

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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 December 29, 2023, at San Francisco, California.

Barbara J. Sommars

Barbara J. Sommars

Case No. S280000

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

OLYMPIC AND GEORGIA PARTNERS, LLC
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
Defendant and Appellant.

After a Decision by the Court of Appeal,
Second Appellate District, Division 8, Case No. B312862

On Appeal from the Los Angeles County Superior Court,
Case No. BC707591
The Honorable Malcolm H. Mackey

**NOTICE OF ERRATA REGARDING
APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
AND *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE
TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA
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NOTICE OF ERRATA

McDermott Will & Emery LLP respectfully submits this Notice of Errata to add the State Bar Number for Charles J. Moll III to the caption pages of the Application for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief of Council On State Taxation in Support of Olympic and Georgia Partners, LLC. Copies of those corrected caption pages are attached hereto.

Dated: December 29, 2023

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

By: Charles J Moll III

Charles J. Moll III
Attorney for *Amicus Curiae*
Council On State Taxation

PROOF OF SERVICE

Olympic and Georgia Partners LLC v. County of Los Angeles
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☒ **By U.S. Mail** by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

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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 December 29, 2023, at San Francisco, California.

Barbara J. Sommars

Barbara J. Sommars

CORRECTED CAPTION PAGES

Case No. S280000

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OLYMPIC AND GEORGIA PARTNERS, LLC
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
Defendant and Appellant.

After a Decision by the Court of Appeal,
Second Appellate District, Division 8, Case No. B312862

On Appeal from the Los Angeles County Superior Court,
Case No. BC707591
The Honorable Malcolm H. Mackey

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA PARTNERS, LLC

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***AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF OLYMPIC AND GEORGIA PARTNERS, LLC**

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