COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203	
COURT OF APPEALS, STATE OF COLORADO Judges Navarro, Taubman and Roy Appeals Court Case No. 13CA0779 DISTRICT COURT, City and County of Denver, Case No. 2012CV1446	**▲ COURT USE ONLY ▲**
Petitioners: CITY AND COUNTY OF DENVER, COLORADO; CARY KENNEDY, in her official capacity as the Manager of Finance of the City and County of Denver; and BILL SPECKMAN, in his official capacity as Hearing Officer designated by the Manager of Finance, vs. **Respondents:** EXPEDIA, INC.; HOTELS.COM, L.P.; HOTWIRE, INC.; ORBITZ, LLC; TRIP NETWORK, INC. (d/b/a CHEAPTICKETS.COM); PRICELINE.COM, INCORPORATED; TRAVELWEBB LLC; TRAVELOCITY.COM LP; and SITE59.COM, LLC.	Supreme Court Case No. 2014SC634
Attorney for Colorado Municipal League: Geoffrey T. Wilson, #11574 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Phone: 303-831-6411 E-mail: gwilson@cml.org **Attorney for Colorado Association of Ski Towns:** [To be inserted]	

BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE AND COLORADO ASSOCIATION OF SKI TOWNS IN SUPPORT OF PETITIONER, CITY AND COUNTY OF DENVER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32 applicable to *amicus* briefs, including all formatting requirements set forth in these rules. The undersigned certifies that this brief complies with C.A.R. 28(g), in that it contains 3,063 words.

/s/ Geoffrey T. Wilson
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The Colorado Municipal League ("CML" or the "League") and the Colorado Association of Ski Towns ("CAST"), by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amicus curiae* in support of Petitioner, City and County of Denver ("Denver" or "the City").

INTEREST OF AMICUS CURIAE

CML was formed in 1923. The League is a non-profit, voluntary association of 266 of the 271 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 100 home rule municipalities, 165 of the 171 statutory municipalities and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

CAST is an organization of 28 municipalities and four counties whose economies are largely dependent upon the ski industry and tourism. Members include the mayors, managers and council members of the resort towns. CAST was formed in part to recognize that resort communities face unique challenges in providing municipal services to residents and visitors. CAST members use the power of the coalition to seek support for legislation that will benefit and sustain the mountain communities. CAST supports actions that keep its communities livable, protect the pristine environment, and promote community-based land use,

mass transit, affordable housing, and sustainable tourism. CAST often works in cooperation with the League to ensure that the needs to resort communities are addressed.

The outcome of this appeal may have significant implications on whether the Respondent Online Travel Companies ("OTCs") can avoid collecting and paying lodging taxes to Colorado's cities and towns when consumers purchase lodging through "merchant model" transactions with the OTCs. As described below, the Court of Appeals' interpretation and application of Denver's Lodger's Tax Ordinance, Denver Rev. Mun. Code § 53-166, *et seq.* ("Ordinance"), is a case of first impression and a potential "bellwether" case for lodger's tax ordinances across the state. Participation by CML and CAST is intended to provide the Court with a statewide municipal perspective because the outcome of this case will likely have an impact on numerous cities and towns in Colorado with similar lodging ordinances to Denver—that is, cities or towns with ordinances which require vendors that sell or furnish lodging to consumers in Colorado to collect and pay lodging taxes based on the full price paid by the consumer.

STATEMENT OF THE CASE AND ISSUES PRESENTED

The City has effectively presented the factual background of the case, which is incorporated by reference, and the Court granted certiorari review of the following two issues:

1. Whether the court of appeals erred in concluding the online travel companies ("OTCs") can avoid collecting and paying taxes under Denver's Lodger's Tax Ordinance simply because OTCs do not physically provide hotel rooms to consumers.

2. Whether the court of appeals erred in holding that the OTCs' mandatory markups and service fees are exempt from Lodger's Tax because they are not part of the purchase price of the rooms.

ARGUMENT

The City provides several distinct arguments is support of its appeal, and CML and CAST will not reiterate every aspect of the City's Opening Brief. Rather, CML and CAST wish to reinforce the widespread and significant impact the decision of the Court of Appeals may have beyond the specific facts of this case. The potential widespread impact arises from the Court's key holding that the OTCs are not "vendors" under Denver's Ordinance because the Court concluded that the OTCs—engaging in "merchant model" transactions—merely serve as

intermediaries "for facilitating hotel reservations" between hotels and travelers. *See* Op. ¶30. Despite the plain language in the Ordinance defining a "vendor" as "a person making sales of or furnishing lodging to a purchaser in the city," the Court of Appeals determined that the OTCs do not "furnish" lodging within the meaning of the Ordinance. Op. ¶¶39-53 (discussing Denver Rev. Mun. Code §§ 53-170(2) and (4)).

First, as discussed below, the Court of Appeals' labored construction of Denver's Ordinance contradicts the City's stated intent to tax the purchase of lodging within Denver. By failing to give effect to Denver's legislative intent, the Court of Appeals' decision undermines the local legislative process relied upon by every city and town throughout Colorado. Next, numerous cities and towns in Colorado have lodger's tax ordinances similar to Denver's Ordinance that require all vendors that "furnish" lodging to collect and pay lodging taxes. If the Court of Appeals' decision stands, it will undercut the ability of each of these communities to collect these taxes as intended by the operative language in their ordinances—most of which were enacted many years ago and have functioned without controversy until the OTCs came along and started ignoring the intent and re-interpreting settled language and definitions for the OTCs' own benefit. Finally, the restrictions imposed by the Taxpayer's Bill of Rights, Colo. Const. art. X, § 20

("TABOR"), will further impact the ability of these communities to amend their existing ordinances or adopt new ones to ensure that the full lodging tax is captured from the OTCs.

A. Statutory Construction of Municipal Ordinances Should Not Undermine the Clear Intent of the Ordinance

The process by which courts interpret and apply municipal ordinances—particularly tax ordinances—is of great interest and importance to Colorado cities and towns. Every day, communities across Colorado draft, consider, deliberate and enact ordinances that establish policy and law. In every instance, the central tenet relied upon by these communities is that the courts will interpret and apply these ordinances consistently based on their plain language to give effect to the drafter's intent. *See Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003) (noting that "a tax statute is no different than any other statute"). Indeed, the legislative process demands as much, to avoid endless debate and worry that all of that work will be undermined someday by crafty forces seeking to avoid the law by giving new and unintended meaning to the words and phrases used. These communities expect that their ordinances will be construed as a whole in order "to give consistent, harmonious, and sensible effect to all of its parts." *See Cendant Corp. & Subsidiaries v. Dept. of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009) (citing *Jefferson County Bd. of County Comm'rs v. S.T. Spano*

Greenhouses, Inc., 155 P.3d 422, 424 (Colo. App. 2006)). Most importantly, these communities expect that the ordinances will not be construed in such a way that defeats the obvious intent of the drafters or renders part of the Ordinance either meaningless or absurd. *See People v. Berry*, 292 P.3d 954, 957 (Colo. App. 2011); *Stevinson Imps., Inc. v. City & County of Denver,* 143 P.3d 1099, 1103 (Colo. App. 2006).

In fact, in Denver, the City has codified its own requirements for statutory construction into the Revised Municipal Code. *See* Denver Rev. Mun. Code § 1-3 ("The provisions of this Code shall **be liberally construed to effect the purposes expressed therein or implied from the expressions thereof**. In case of doubt or ambiguity in the meaning of such provisions, the general shall yield to the particular. Reference for interpretation and construction **shall tend to further the accomplishment of the elimination of the particular mischiefs for which the provisions were enacted**. Words shall be construed according to the context and the approved usage of the language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning." (emphasis added)); *see also* Denver Rev. Mun. Code § 53-170 ("The following words and phrases when used in this article, **unless the context otherwise requires**, shall have the meanings given to them in

this section." (emphasis added)). In other words, the City has made clear to anyone looking to its Revised Municipal Code that a "reasonable" interpretation is **not simply any proposed alternative** reading, but reasonableness requires that the interpretation be rooted in the purpose behind the code provision at issue and further the intent of the City.

While Denver addresses this issue in detail in its Opening Brief (and these arguments will not be repeated here), CML and CAST must reiterate that the Court of Appeals' statutory construction appears to defeat the intent of the otherwise clear and unambiguous ordinance. Specifically, the broad language of Denver's Ordinance is clearly intended to impose a tax on the total purchase price paid for lodging in Denver—regardless of whether a customer purchases lodging from the OTCs' websites, the hotel's own website, or in person at a Denver hotel, and regardless of whether the total purchase price is paid to an OTC or hotel.[1] *See AT&T Com. of the Mountain States, Inc. v. Charnes*, 778 P.2d 677 (Colo. 1989)

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[1] *See* Denver Rev. Mun. Code § 53-167(a) ("It is hereby declared to be the legislative intent of the city council that, for the purposes of this article, every person who purchases in the city any lodging is exercising a taxable privilege."); § 53-167(b) ("It is hereby declared to be the legislative intent of the city council that, for the purposes of this article, every vendor who shall make a sale of lodging to a purchaser in the city shall collect the tax imposed by this article to the total purchase price charged for such lodging furnished . . . ."); § 53-171 ("There is hereby levied and shall be collected and paid a tax by every person exercising the taxable privilege of purchasing lodging as in this article defined.").

(affirming the "longstanding principle of statutory construction which provides that a statute written in general terms applies to subjects or activities which come into existence after adoption of the statute"). Yet, through its 35-page analysis of the Denver Ordinance, the Court of Appeals repeatedly relies on a strained, hyper-technical reading of Denver's Ordinance to ultimately reach the conclusion that a tax may not be imposed on the total purchase price charged through the OTC's "merchant model" transactions.[2] Op. ¶66.

By observing that the OTCs serve as intermediaries that mark up the price of lodging (Op. ¶30), the Court of Appeals missed the plain, simple and practical reality that consumers purchase the right to use hotel rooms from the OTCs. That is the key taxable event set forth in the Ordinance,[3] and is indistinguishable from a purchase that occurs directly from the hotel (but for the OTCs effort to designate a portion of the total purchase price as a "service fee"). Whether a consumer purchases the right to use the same room directly from the hotel or through the

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[2] Presumably, the lodging tax may still be imposed on the discounted wholesale rates that the OTCs pay hotels for the rooms (which the OTCs admit to owing and do, in fact, remit). But, remarkably, it appears that the Court of Appeals' analysis leaves open that question based on its holding that the OTCs are not "vendors" subject to the Ordinance.

[3] *See* Denver Rev. Mun. Code §§ 53-167, 53-171(a) and 53-173(a).

OTCs, and pays the same total price, the lodging tax collected and paid to the City should not be impacted.

But here, if the Court of Appeals' decision stands, that is exactly what happens. The OTCs' "merchant model" transactions would consistently result in lower lodging taxes collected and paid to the City than identical consumer transactions directly with hotels. *See* Opening Br. at 35 (examples of different tax collections based on same purchase price paid). Nothing in the Ordinance would suggest that Denver ever contemplated or intended such an absurd result—a result that provides the OTCs with a windfall in untaxed lodging revenue, and undermines any notion of a consistent and reasonable application of the Ordinance.

Similarly, while the OTCs urge that the City is now working to extend a new tax to the OTCs through its existing Ordinance, these basic examples make clear that OTCs have it completely backward. Lodging and lodging tax ordinances in Denver (and throughout Colorado) long preceded the existence of OTCs, and it is the OTCs now working to avoid a tax that has been collected and paid on the purchase of lodging for decades. Moreover, it appears that the OTCs have engaged in uniform practices across the state, and its disingenuous for them to now argue that they were operating in good faith under some "reasonable interpretation" of Denver's Ordinance.

B. This Case Will Impact Numerous Colorado Cities and Towns

As noted by the Court of Appeals, over the past few years, cities and towns around the country have discovered the OTCs' systematic practice of refusing to pay local lodging taxes on the full price of "merchant model" transactions, and are now seeking to collect. Op. ¶3 (citing James A. Amdur, Annotation, *Obligation of Online Travel Companies to Collect and Remit Hotel Occupancy Taxes,* 61 A.L.R. 6th 387 (2011)). As reflected by this action and at least one other matter pending in Summit County, the cities and towns in Colorado are no different. *See Town of Breckenridge v. Colorado Travel Company, LLC, et al.*, Case No. 2011CV420 (class action claims). There is no question that this action has become the lead case in Colorado to address the taxable nature of the OTCs' "merchant model" transactions.

Attached as Exhibit A is a detailed chart showing the operative language from the lodger's tax ordinances currently on record for dozens of Colorado cities and towns. Not surprisingly, given the fairly common practice of communities borrowing statutory language from other Colorado communities, the language and core provisions of these lodger's tax ordinances are strikingly similar to Denver's Ordinance. While the language is not identical across all of these ordinances, and the Court of Appeals' decision will not be binding in each instance, there is no

question that the Court of Appeals' decision here will play a significant role in any interpretation or application of those ordinances as they are enforced across the state. To put it more bluntly, the OTCs are likely to be emboldened by the Court of Appeals' decision (and have already cited the case in defense of the *Town of Breckenridge* class action case[4]) and will continue to refuse payment of local lodging taxes across the state—giving rise to new tax challenges and litigation in the face of otherwise unambiguous ordinances. This is particularly true given the Court of Appeals' focus on the definition of "vendor" in Denver's Ordinance, and what it means under the Ordinance to "furnish" lodging. Again, this language (or substantially similar language) is present in numerous lodger's tax ordinances throughout Colorado. *See* Ex. A (identifying similar provisions and definitions across twenty-eight Colorado communities).[5]

Not only could the Court of Appeals' decision substantially impact existing or potential lodging tax revenue in each of these communities (the amount at issue

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[4] In its opposition to this Court granting the City's Petition for Writ of Certiorari, despite criticizing CML's position as "speculation" that this decision may have an impact on other cases, the OTCs have vigorously argued for that exact result. *See Town of Breckenridge,* Summit Cnty. Dist. Ct. Case No. 2011CV420, OTCs' Motion for Summary Judgment, filed Dec. 1, 2014.

[5] This list originated from an index recently tendered to the Court in the *Town of Breckenridge* matter in support of class certification. The list is not intended to be exhaustive, but demonstrates the widespread use of similar (if not identical) language used in lodger's tax ordinances across the state.

in Denver alone is more than $8,000,000), but the secondary costs of litigating disputes with OTCs could be tremendous. Combined, the economic consequences of the Court of Appeals' decision for Colorado cities and towns could measure tens of millions of dollars. Given this potential impact—well beyond the facts of this case—it is critical that this Court construe the Ordinance consistent with its purpose and intent, and reverse the decision of the Court of Appeals.

C. TABOR Deepens the Impact of this Case if the Court of Appeals' Decision Stands

In most cases involving adverse decisions concerning statutory interpretation and ambiguous statutory provisions, the simple answer is to modify or enact a new ordinance to correct or clarify the offending language. While such a change is rarely given retroactive effect, ordinarily this approach can at least resolve the ambiguity going forward. In fact, the Court of Appeals suggested this possibility here. *See* Op.¶64. However, given that local tax laws may be impacted, TABOR presents a substantial obstacle to any such quick fix.

Subsection (4)(a) of TABOR mandates the cities and towns in Colorado obtain voter approval for new taxes or any change in existing tax policy:

> [D]istricts must have voter approval in advance for ... **any new tax**, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or **a tax**

> **policy** change directly causing a net tax revenue gain to any district.

Colo. Const. art. X, § 20(4)(a) (emphasis added). Under this provision, any modification to an existing tax ordinance to capture an additional tax that was not previously captured is likely to trigger this provision of TABOR—requiring a local election to approve the new ordinance. *Id.*; *see, e.g.*, *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 242 (Colo. App. 2008).

Here, if the so-called "service fees" and "markups" charged by the OTCs are deemed by the courts as exempt from existing lodger's tax ordinances, any effort by communities to change these ordinances to capture these "new" lodging taxes would require voter approval. While an argument could be made that clarifying an existing tax ordinance to give effect to its original intent does not trigger TABOR as a "new tax" or "tax policy change," the mere possibility that TABOR applies makes any such clarifying changes unrealistic for most of the small cities and towns that are potentially impacted here. This Court is undoubtedly familiar with the controversies and complexities of TABOR, and the extensive history of litigation in Colorado surrounding its meaning and effect. The possibility of a TABOR challenge or litigation is not something any community in Colorado can or should take lightly.

By pointing out the impact of TABOR, CML and CAST do not contend that the existence of TABOR should somehow change the rules of statutory construction, or that the obstacles in changing tax laws under TABOR should sway a different result here. Rather, we wish to highlight for the Court's benefit that there is no easy fix to Denver's Ordinance or any other similar ordinances in Colorado to address the purported ambiguities identified by the Court of Appeals. Because of this, the stakes in this case are much higher than a typical matter involving issues of statutory interpretation, and it's important that the Court get it right.

CONCLUSION

For the reasons set forth here and in the City's Opening Brief, CML and CAST urge the Court to reverse the Court of Appeals and uphold important principles of statutory interpretation, give effect to the clear intent and plain meaning of the City's lodger's tax ordinance, and protect against a widespread fallout this decision could have on similar ordinances throughout the state.

Respectfully submitted this 20th day of October, 2015.

COLORADO MUNICIPAL LEAGUE

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CERTIFICATE OF SERVICE

I hereby certify that on 20th day of October, 2015, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE AND COLORADO ASSOCIATION OF SKI TOWNS IN SUPPORT OF PETITIONER, CITY AND COUNTY OF DENVER** was served via ICCES on the following individuals:

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