

Speaker 1 ([00:01](#)):

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Brad Marsh ([00:17](#)):

It just so happens to be funded by a transient occupancy tax in this case, which makes it confusing, right? But if you take that away and you say to yourself, "It's just the government doing what the government does," I think it becomes a lot more simple.

Nikki Dobay ([00:35](#)):

Hello and welcome to GeTtin' SALTy, state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Portland, Oregon and Sacramento, California offices. I am pleased today to be joined by two of my GT SALTy colleagues, Brad Marsh, shareholder in our San Francisco office, and Colin Fraser, also a shareholder in our LA office. And we are here to do a property tax catch up, so thank you both for joining me.

Colin Fraser ([01:07](#)):

Thanks for having us.

Brad Marsh ([01:08](#)):

Yeah, thank you. Good to be here.

Nikki Dobay ([01:10](#)):

Awesome. Well, Brad, I'm going to start with you and tell us what's going on, what's hot in the property tax world as we move into the end of Q2 of 2025.

Brad Marsh ([01:22](#)):

Probably the hottest thing in the property tax world you're going to hear about from Colin in a minute, which is his recent Supreme Court oral argument in the OGP case. But there are a few pretty notable things that are happening right now that I think taxpayers should be aware of.

([01:36](#)):

One is that at the end of this year, the exclusion for active solar energy facilities is expiring in California. The state board has put out a letter to assessor explaining how that's going to work, but essentially the key component is that everyone needs to make sure that what they're installing is installed by 12/31/25. And hopefully you're getting your certificate of occupancy or certificate of mechanical completion or whatever it might be by that time.

([02:07](#)):

There is a bill pending that's related to this, which is SB 710. And that bill would extend the exclusion for just some limited solar things like on homes and sort of smaller commercial projects.

Nikki Dobay ([02:24](#)):

There was no effort to kind of try to get something like that in the budget or really get a more robust extension?

Brad Marsh ([02:31](#)):

No, it looks like there's sort of an agreement among the legislators that this is the end of the solar exclusion. It's been around a long time in California, so I think they just felt like with the state budget the way it is and everything else, this was about as good as they could do.

Nikki Dobay ([02:46](#)):

All right, so what else is hot?

Brad Marsh ([02:48](#)):

Another thing is people, especially people in California are probably familiar with this COVID initiative that came through called Proposition 19. And Proposition 19 did two things. One of it was sort of deal with base year value transfer so that people could move properties if they were over 55 in different counties and get around.

([03:12](#)):

The other thing they did is they changed the way the parent-child exclusion worked. And that's something that there's a bill pending on right now. The law requires that in order to receive the exclusion for what's called a family home and continue to have some sort of \$1 million plus property tax exclusion on your property, that you need to live in that property within 12 months of the death of a parent or grandparent.

([03:40](#)):

And that turned out to be a real problem for some people because of lengthy probates. So SB 284 aims to remedy that by allowing a little bit more time and taking the year from the date of the judicial decree rather than the death of the person, so that if there is a lengthy probate, you don't automatically fail the family farm exclusion or the family home exclusion.

Nikki Dobay ([04:09](#)):

Right. Any other items note before we get to the real hot topic here?

Brad Marsh ([04:14](#)):

I'm just going to try to hold your attention for one more, which is something that comes up every year in California, and it's one of the great things we actually have in our system. And that is that there is a taxpayer rights hearing coming up, Taxpayer Bill of Rights hearing coming up on August 20th, 2025 at 10:00 AM up in Sacramento. And it's a great time for folks to, if they'd like to appear, there's a lot of open comment that's available to make suggestions about how to improve it, the system. The state board is fully attentive and the taxpayer right advocate is there. So if you're in this zone, it's definitely something worth tuning in on.

Nikki Dobay ([04:57](#)):

Thank you for catching us up on those. Now, Colin, you've not been on the podcast, so welcome. We're very excited to have you. And you recently argued a pretty significant case here in California, Olympic

and Georgia Partners v. County of Los Angeles. So what the heck is going on in this case? Catch us up. What are the facts? And how'd you get to the Supreme Court so, I guess not so quickly, but get us going.

Colin Fraser ([05:27](#)):

Thanks for having me in the podcast, really excited to talk about this case. We've been handling this case for I would say eight or nine years now.

Nikki Dobay ([05:36](#)):

So not quick, but the process is working.

Colin Fraser ([05:40](#)):

Yeah, it takes some time to go through the administrative process and then all the courts that lead you to the California Supreme Court, so it's been a long road so far.

([05:49](#)):

It involves a property that a lot of people might be familiar with if they've seen the downtown skyline of Los Angeles. It's called the JW Marriott Ritz Carlton Hotel. It's a 54-story tower right near LA Live and the Crypto Center. And it involves three large and distinct issues that we've been litigating for a long time and that the Supreme Court finally decided it wanted to chime in on.

([06:17](#)):

The first issue, I would say is probably the one that's most interesting and novel. We don't have really much guidance at all in California on this. And it takes a little explanation, but what happened was the city of Los Angeles, which is distinct from the county that issues property tax assessments, the city really needed and wanted a large convention center hotel in downtown Los Angeles in the early 2000s. However, it realized and the developers who developed these sorts of buildings also realized that this business doesn't pencil out in the area. The cost of building a hotel like this would never justify the return on investment you'd get from operating it as a hotel.

([07:06](#)):

However, the city really wanted it to revitalize downtown, which in the early 2000s they believed was blighted and they thought there would be a lot of collateral benefits to the city and the public at large. It would benefit the city's convention center, which was sort of suffering because it didn't have a convention center hotel to support it. And it would help sort of rise the tide for all of the businesses and properties in downtown Los Angeles just by drawing in tourism, supporting the convention center, and helping the businesses that were around the area.

([07:41](#)):

So in order to make this development pencil out, the city offered to pay the developer a portion of what's called transient occupancy taxes that are paid by guests for the privilege of staying at the hotel, and they're paid from the guest to the city. So they worked out this deal and the transient occupancy taxes would be paid as a subsidy to help make this business pencil out at this location.

([08:13](#)):

That was the first big issue. And the question is that cash flow real property that should be assessed with the value of the hotel? Or is it an intangible asset that's not subject to property taxation? So that's the first issue.

([08:30](#)):

The second issue, we call this the key money issue. And what happened here is that Marriott and Ritz-Carlton paid \$46 million to the hotel owner for the right to manage the hotel over the course of 50 years. This is a common thing that happens in the industry to get these rights. And the question here is is that 36-million-dollar payment like a lease where the manager is paying for the right to operate a business at the property? Or is it a non-taxable intangible asset? Just like management agreements are, and just like any payment is that you would pay to receive an intangible asset.

[\(09:14\)](#):

The third issue we believe is of less interest to the court, but it concerns a methodology that you would use when doing an income approach valuation. And the methodology is used by taxing authorities and they claim that by deducting expenses associated with an intangible asset, you've removed the full value of that intangible asset from assessment. And this is called the Rushmore approach. So that's the third issue. And all told, we're talking about \$150 million a year in value that's being assessed to the owner.

Nikki Dobay [\(09:53\)](#):

So what did the court below say?

Colin Fraser [\(09:57\)](#):

Right, so we litigated this up to the Court of Appeal, which issued a decision in 2023. And the Court of Appeal sided with us on all three issues in sort of a short decision that really just cuts right to the issues. The court said that the transfer or the transient occupancy tax payment was a subsidy, that subsidies are intangible assets and subsidies are exempt from property taxation.

[\(10:29\)](#):

I should mention all the key money payment and the transient occupancy tax payment, they are subject to income tax. So it's not like this developer is getting a free ride avoiding taxes, they are paying income taxes on these revenue streams. So the TOT is a subsidy, so says the Court of Appeal, and it's not subject to property tax.

[\(10:52\)](#):

Turn to the key money payment, the Court of Appeal characterized this as a discount, the way you might get a rebate when you buy a car. And it said that the value of the management agreement was simply reduced by the value of the key money payment that was made to the hotel owners. That is not subject to property tax because it reduces the fair market value, it doesn't increase it, and so the court of appeal exempted it from taxation.

[\(11:19\)](#):

And then on the third issue, which is the Rushmore approach, the court said, sort of consistent with several other decisions that have been issued by the Court of Appeal over the last several decades, that the methodology is legally invalid. It doesn't work because anytime you make an investment, the investor requires two things, a return of its investment, you want to get your capital back, and a return on your investment, a profit. And while the Rushmore method of deducting expenses might account for the return of your investment, it doesn't and cannot account for a profit component. So some value associated with the intangible asset will remain subject to assessment if you use that approach, the approach is therefore invalid. And that was the Court of Appeals' decision on those three issues.

Nikki Dobay [\(12:10\)](#):

So all three issues have never been dealt with by the California Supreme Court?

Colin Fraser ([12:15](#)):

Never by the California Supreme Court. But one of the issues, Rushmore has been addressed by the Court of Appeal in, I would say four decisions, including the decision in this case by the Court of Appeal. And in all four of those decisions, the Rushmore approach has been rejected.

Nikki Dobay ([12:32](#)):

So do you have a sense of what specifically the court really wants to get at in this case? Obviously they're likely going to have to address all three issues, but where do you see this case? Why did the court come in and decide to take this case?

Colin Fraser ([12:49](#)):

It's always hard to know what the court is doing. I will say this, having appeared at oral argument about two Wednesdays ago in this case, the justices have great poker faces. They're hard to read. But my sense was that they didn't ask any questions about the Rushmore approach. So for what that's worth, they weren't interested in having oral argument on that issue.

([13:13](#)):

We did spend most of the oral argument, which combined between both parties lasted an hour, talking mostly about the transient occupancy tax payments and a little bit about the key money. It does appear that the court is, I wouldn't say struggling, but really trying to figure out a way to address the taxability or non-taxability of the transient occupancy tax payments.

([13:42](#)):

And it's a novel issue. Like I said earlier, they don't have a lot of guidance, although we did point the court to its decision in a very prominent property tax case called Elk Hills Power and argued that that would govern the non-taxability of the transient occupancy tax revenue.

Nikki Dobay ([14:03](#)):

And what does Elk Hills tell us?

Colin Fraser ([14:08](#)):

So Elk Hills is a very seminal decision in property tax dealing with a few different statutes that govern the non-taxability of intangible assets. And those statutes, they're drafted in a way that at first glance sort of seems to be contradictory. On the one hand, they say that the value of intangible assets cannot be assessed. And on the other hand, they say that the intangible assets can be assumed to exist when you're assessing property.

([14:41](#)):

And Elk Hills delved right into that apparent contradiction and explained why it's not contradiction. And what it held at a high level is that you can assume the presence of intangible assets so that your property isn't being assessed at scrap value. So for example, if you have a landfill or a power plant that requires permits or licensing from the government, those permits and licenses are intangible assets. But you can assume that they exist so that the property can continue functioning and therefore the property isn't valued as if it's worth nothing or just scrap. That's what it means to assume the presence.

([15:23](#)):

But the Elk Hills court held that even though you can assume the presence, what you cannot do is add the value of the intangible asset to the value of the property that you're trying to assess for property tax purposes. If you have, and the court is very clear on this, a quantifiable value, a discrete revenue stream that you can attribute to the intangible asset, it needs to be removed from assessment.

(15:49):

And important to that is it doesn't matter under this standard whether the value of the intangible asset is derived because of its connection to real property. Lots of intangible assets derive value because they're being used in connection with real property. Some of the examples we provided the Supreme Court are patents. A patent that is used in connection with a manufacturing facility allows that facility to generate value and generates value itself because of what's going on in the facility. But the patent doesn't become assessable as real property simply because of its connection to the real property.

(16:31):

And that's really the issue in this case because in the Olympic and Georgia Partners case, the county of Los Angeles is arguing that this transient occupancy tax payment stream derives value from the use of the hotel because the guests are paying the taxes to the city for staying in the hotel. And they use that link to say, "Well, this is like a lease payment. Or, in any event, it is derived from the use of the intangible asset in connection with real property and therefore needs to be assessed." And that's the argument that the county made at the Supreme Court during oral argument.

Nikki Dobay (17:12):

Brad, anything you want to chime in on here? I'm really not a property tax person, so I've got my big picture questions, but give me your thoughts here.

Brad Marsh (17:23):

Colin's done a great job of explaining it. You could tell that the court is not hearing 50 property tax cases a year, so they're struggling with some of the concepts at oral argument. But I do think that they're smart people and I'm very hopeful that they'll figure it out. It seems to me that it's sort of easier to explain these concepts in the abstract than it is by digging into sort of the actual facts of the case here.

(17:51):

And one of the analogies that we came up with, particularly on this hotel occupancy tax issue because that was the one that the judges seem most focused on, was this idea that sort of the government is always spending tax dollars to do whatever it thinks the public good is. So in this subsidy to create this hotel could have been funded by any mechanism. It could have been funded by a grant, it could have been funded by a different tax, it could have been funded by whatever. It just so happens to be funded by a transient occupancy tax in this case, which makes it confusing. But if you take that away and you say to yourself, "It's just the government doing what the government does," I think it becomes a lot more simple. The government is allowed to give subsidies to things and that subsidy is not assessable.

(18:44):

Yeah, so take an example. And in fact, this I think was an example that actually related to our client. The government gives people incentives all the time to improve their property. So low-flow toilets, energy-saving windows, stuff like that, they give people money all the time to do that. And nobody would argue that when a tax assessor comes along that they can't assess the new window or the toilet. But also, no one would say to you, "That \$50 per pane or \$40 per toilet subsidy you got," no one in their right mind would also say that that is subject to property tax because it's not the property. They're already

assessing the actual property. So we're really hoping that the Supreme Court can see that sort of differential and understand that concept.

Nikki Dobay ([19:39](#)):

And I did watch the argument and thought you did a great job, Colin. And it does, again, coming at this from more of an income and other type of transactional tax background, when you think of the property tax, it's on real property and should not be on intangibles. And this is kind of a battle we fight up in Oregon. I don't know if either of but centrally assessed properties in Oregon, intangibles are included. And we have a Supreme Court decision that now says that includes stock value. So we've gone a totally different way. Yeah, it's bad. We're trying to get the statute changed.

([20:20](#)):

But this seems to me to be a real slippery slope and to open the door, if the court agrees with the county, this kind of blows up the property tax base because now you can kind of throw everything in there if it's this, I think the wording, the language you used was derived from. That's kind worst case scenario.

Colin Fraser ([20:42](#)):

[inaudible 00:20:43] that. And one of the issues that we raised in briefing and at oral argument is that the county isn't offering a clear test that would avoid that result. They're offering this test that if an intangible asset derives value from its use or connection with real property, it becomes assessable. Under that test, it seems to me that all intangible assets, or at least the majority of them, would also become assessable.

([21:08](#)):

And there was a lot of discussion about this at oral argument. What is the test? And we ordered the court to apply the Elk Hills test and said, "That is the law of the land. It's a good test, let's apply it here."

([21:21](#)):

The county had a few alternatives at oral argument, one of which is that if an intangible asset that has a connection to real property is provided but also included with that provision of the intangible, there's any restriction on the real property, then, according to the county, that makes it assessable.

([21:44](#)):

And at oral argument, one of the questions that the court asks concerned a construction loan that included a limitation on the use of what you were going to develop at the property, which all construction loans include. And the county's attorney explained that under his test, yes, the construction loan would now be assessable as real property, which we found quite surprising, Brad and I. We don't think that's a good test to use. Construction loans are not assessable as real property.

([22:17](#)):

And we also kind of pointed the court to what the city was doing here. What was the city trying to obtain in exchange for this revenue stream? They weren't acquiring an interest in the real property. They weren't subsidizing the rent paid by any guests to stay at the real property. The guests pay either market rent or market rates for their rooms. The city wanted a specific kind of business, this large headquarters hotel. And the reason they wanted it is because it would benefit the public and the city, and so they were willing to pay for those benefits, which we characterize as intangible benefits.

([23:01](#)):

And we also pointed out that the value of the 1,001 rooms that are in this very large hotel is already being assessed. If not for this subsidy, you would have fewer rooms and the assessment would be smaller. So the subsidy allowed the development of a larger hotel business and the 1,001 rooms that resulted from it are all being assessed, nothing's escaping, just the intangible asset is just not subject to property taxation in the first place.

([23:33](#)):

And we also pointed out there's this cardinal principle of property taxation, it's called fair market value. And that looks not at the specific and unique nature of the property that you might be assessing, it looks at the market as a whole. And under this standard, if you have above market contracts or unique contracts, they don't become assessable. Even a lease that's above market does not become assessable in California if it's above market. You look at what the market rate is for similar properties in the area.

([24:02](#)):

And we point to, "Oh, look, this agreement between the city and the developer was the first of its kind in Los Angeles." And at the time of this case, there were only two similar agreements within the whole state of California and five within the United States in our record. So this was a unique arrangement, it doesn't reflect the fair market value. It's reflective of a unique arrangement that this developer was able to negotiate. So for that reason as well, it doesn't reflect fair market value

Nikki Dobay ([24:33](#)):

And a unique issue that the city was trying to address, having-

Colin Fraser ([24:37](#)):

Yes.

Nikki Dobay ([24:37](#)):

... nothing to do with the fair market value of the actual property at issue.

Colin Fraser ([24:43](#)):

Our point was that everyone recognized the property wasn't worth it, right? The property wasn't worth what it costs to build, and that's why the subsidy was required in the first place. And the subsidy has nothing to do with the value of the dirt or the architecture or any of these other attributes of the real property. It's an entirely separate thing.

Nikki Dobay ([25:05](#)):

So when should we expect the court to issue a decision?

Colin Fraser ([25:11](#)):

So oral argument was on June 4th. The court has 90 days from the date of oral argument to issue its decision.

Nikki Dobay ([25:21](#)):

It's fascinating rules. We have no limits in some of the other states. They just go on and on and on, so wow, okay.



Colin Fraser ([25:29](#)):

So yeah, 90 days. But the court can obtain an extension of that deadline if it wants to and believes it needs more time. So that's entirely possible, but it would be nice if there was a decision in 90 days,

Nikki Dobay ([25:42](#)):

Well, we will be waiting for that decision. And I think it's a really important issue. It sounds to me like could have some significant impacts for taxpayers, especially if the court goes what we believe to be the wrong way. All right, final thoughts before we get into the fun surprise non-tax question?

Colin Fraser ([26:03](#)):

[inaudible 00:26:06].

Nikki Dobay ([26:05](#)):

All right. Well, I've been scouring What question can I ask you two? So I found one. If you could have one of the following superpowers, which would you choose? Would you prefer to be able to fly or to be invisible? I think I'm going to go with be invisible because I don't know if I really want to fly around without an airplane around me, even though sometimes those are questionable. But I'll kick it to Brad looks really in thought. And Colin, I feel like you know the answer to this, so I'm going to go with Colin first.

Colin Fraser ([26:40](#)):

Fly. I'll fly over invisibility. I don't know what I would do with invisibility. The only thing that comes to mind is crimes. So I feel like it wouldn't be very-

Nikki Dobay ([26:51](#)):

[inaudible 00:26:53] bad one.

Colin Fraser ([26:54](#)):

It would not be very useful. So flying sounds like a lot of fun and I think I'd get a lot of enjoyment out of it. I'd go with flying.

Nikki Dobay ([27:01](#)):

All right, Brad?

Brad Marsh ([27:03](#)):

This one really beat me up hard.

Nikki Dobay ([27:08](#)):

That's the goal of these.

Brad Marsh ([27:10](#)):

At first I was like, "Invisibility, duh." Right? And then I had the same kind of thoughts as Colin. What was I going to do, rob security trucks or something? Well, I saw Groundhog's Day a little bit ago. But flying sounds pretty good, and even better if I can fly around the solar system like Superman.

Nikki Dobay ([27:33](#)):

Okay. Okay, so you want to go big. You want to go big for flying. Okay.

Brad Marsh ([27:38](#)):

There was no limitation on the flying in your question.

Nikki Dobay ([27:41](#)):

And I just want to put on the record, I do not intend to commit crimes if I actually can become invisible. That was not my goal. I just think it'd be fun to wander around and probably it might get old after a while because then you'd be like, "Oh, man, these are things I do not want to know."

Brad Marsh ([27:59](#)):

What are you going to do?

Nikki Dobay ([28:01](#)):

Hey, I don't know. I'll have to figure it out. But I won't commit crimes, I promise. I have an active bar license [inaudible 00:28:10] so I just want to have that on the record [inaudible 00:28:12].

Colin Fraser ([28:12](#)):

I didn't even mean to suggest that, now I did suggest that you were going to go off and do this-

Nikki Dobay ([28:21](#)):

Yeah, you guys one day, Nikki's gone and that if there's a crime tear that no one can solve, you'll be like, "Hm?"

Colin Fraser ([28:28](#)):

[inaudible 00:28:28] is missing some gold bullion.

Nikki Dobay ([28:29](#)):

Yes. Yes. All right. Well, thank you both for joining me and for talking about this case. And we'll be on the lookout for a decision in about three months hopefully.

([28:42](#)):

And thank you to the listeners. If you have any questions or comments, please leave those in the show notes. Contact information for Brad, Colin, and I will also be in the show notes. And I will be with you in a few weeks on the next GeTtin' SALTy.