

City of Brisbane

Agenda Report

To: City Council via City Manager
From: Administrative Services Director
Subject: Increase of Business License Tax on Tank Farm
Date: CONTINUED FROM CITY COUNCIL MEETING OF 9/17/12

Purpose:

Provide services needed and required by the community while ensuring the long-term financial stability of the organization.

Recommendation:

Direct staff to begin the process of placing an increase in the business license tax on tank farms on the November 2013 ballot.

Background:

During the budget discussions for FY 2012/2013 City Council directed staff research the possibility of increasing the business license tax on the Tank Farm. Caroline Cheung researched how other entities throughout the nation taxed similar types of businesses. As the memo from the City Attorney states although this research was far-reaching it was not exhaustive. The research turned up two instances where there was some type of capacity charge for this type of business. The City Attorney has also researched relevant case law and has provided his findings in the attached memo.

Discussion:

Based on findings of staff the question before City Council is; does the City Council want to place an increase in the business license tax on tank farms on the November 2013 ballot? If so what should be the amount of the increase?

If the increase was placed on the ballot in November of 2013 it could be a general tax used for all General Fund purposes including police, fire, maintenance, and recreation programs. The ballot measure would only need a simple majority for approval.

The question of the amount would be the next question to answer. A rate of \$0.22 per cubic foot would provide approximately \$1,000,000 in revenue.

Fiscal Impact:

An increase in the rate charged per cubic foot for storage would be a benefit to the long-term financial stability of the City.

Measure of Success

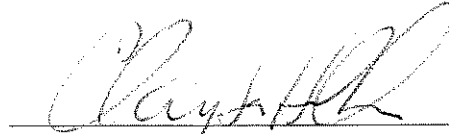
The City can maintain the programs and services it provides for the community.

Attachments:

Memo from City Attorney dated September 13, 2012



Stuart Schillinger
Administrative Services Director



Clay Holstine
City Manager

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MEMORANDUM

TO: Brisbane City Council
FROM: Hal Toppel, City Attorney
RE: Increase of Business License Tax on Tank Farm
DATE: September 13, 2012

The question has been raised as to whether the City can substantially increase the amount of business license tax payable by Kinder Morgan ("K-M"), as owner and operator of the tank farm located in Brisbane. As discussed in more detail below, the City does have the authority to increase the tax, subject to compliance with the election requirements of Proposition 218, and although the amount of the tax does not need to satisfy a test of reasonableness, it cannot be raised to the point of being confiscatory.

K-M owns the storage tanks, pipelines, and related facilities at the tank farm but does not own the actual gasoline that is received, stored, and distributed at this facility. In recent years, K-M has obtained a business license from the City and has paid a fee based upon its gross receipts. The annual fee paid in 2011 was \$1,069 and in January, 2012, another license fee was paid in the amount of \$1,082. It should be noted that the City also received business license fees, of a much greater amount, from gasoline companies storing and receiving fuel at the tank farm. For example, Chevron and Conoco Phillips each paid \$36,260 as business license fees for 2012 (unfortunately, Conoco Phillips has now left town).

The Brisbane Business License Tax Ordinance, as contained in Chapter 5.20 of the Municipal Code, imposes two forms of license fees. There is a gross receipts tax which is a graduated amount that increases with each higher tax bracket, similar to the federal income tax. Alternatively, the tax could be based upon the number of employees for certain businesses, which is payable if this amount is determined to be greater than the license fee calculated on gross receipts. See BMC §15.20.010. As a separate form of license tax, BMC Sections 5.20.020 through 5.20.240 impose fixed fees (usually small) upon particular businesses, which remain the same regardless of gross receipts. For example, contractors (\$25), secondhand dealers (\$150), and taxicabs (\$5 per vehicle).

There is no business license tax in Chapter 5.20 that specifically applies to the operation of a gasoline storage facility in the City. The closest thing to this category of business is BMC §5.20.010.C, which establishes the following fee for "storage facilities":

Any person engaged in the business of operating, leasing, supplying or providing storage facilities not covered in subsection B of this section [tax based on number of employees], shall pay an annual business license tax that is the greater of \$.10 per square foot of storage space, or that which would be due under subsection A [the regular gross receipts tax].

In my opinion, this storage facilities fee cannot readily be imposed upon the storage tanks at the tank farm. Subsection 5.20.010.C is clearly directed at warehouses, having a size and capacity measured by square footage, and not gasoline storage tanks, having a size and capacity measured by cubic feet. It could be argued that the "square footage" of the tank farm is the footprint of each storage tank on the ground, which may have little relationship to the actual capacity of the tank in terms of volume and certainly would yield only a minimal fee.

So if the City wants to increase the business license tax charged to the tank farm, we need a new ordinance specifically defining the manner in which such tax will be determined. Given a choice between a gross receipts tax and a fixed amount, staff would recommend a fixed amount based upon the capacity (i.e. cubic feet) of the storage tanks available for use during any tax year. This approach would avoid the unpredictability of annual gross receipts as well as the additional staff time required for administration of a gross receipts tax. The tax would be a simple calculation of a dollar amount per cubic foot of storage space available at the tank farm.¹ Although it would be appropriate to allow adjustment in capacity based upon whether a particular storage tank is or is not in service during any tax year, the total capacity would remain relatively stable and easy to determine. The tax would be determined by usable *capacity* and not the quantity of product actually being stored in any tank, nor would K-M's gross receipts from the operation of the facility be relevant. A fixed fee based only on Brisbane's local storage capacity should also avoid the argument that the tax must be prorated to reflect the overall interstate and intrastate business conducted by K-M in other jurisdictions, which is an issue commonly associated with a gross receipts tax.

We have searched for any similar business license tax on fuel storage tanks that may have been adopted by other jurisdictions. Although this search was not exhaustive, we did find two cities having such tax. Sparks, Nevada adopted a "bulk storage" license fee for "bulk storage of fungible goods" in the amount of \$80 per year and \$2.78 per year for each 1,000 cubic feet of "storage capacity available."² The only California city we found having a tax on storage tanks was Yorba Linda, which imposes a license tax for "carrying on the business of petroleum storage tank farm." The tax is a modest \$2.50 for each tank under 50,000 barrels; \$5.00 for each tank 50,000 to 100,000 barrels; and \$7.50 for each tank over 100,000 barrels. While the fee amounts in these ordinances are small, they do serve as examples and precedents of a business license fee being separately imposed upon a tank farm which is measured by the capacity of the storage tanks.

¹ For example, according to the K-M website and other information we have obtained, there are 21 storage tanks at the Brisbane tank farm having a total storage capacity of 618,000 barrels. A barrel is equal to 55 gallons and one cubic foot is equal to 7.48 gallons. So doing the math results in a total capacity at the tank farm of 4,544,117.65 cubic feet.

² As applied to the Brisbane tank farm, this formula would result in a total tax of \$12,712.66, based upon a total capacity of 4,544,117.65 cubic feet of storage capacity.

Government Code Section 37101 and Business and Professions Code Sections 16000-1604 authorize a city to levy a business license tax for revenue and regulatory purposes. Where a business is operating both within and outside the city, the tax must be prorated to fairly reflect the proportion of the taxed activity actually conducted within the city. Although there is a substantial volume of litigation involving local business license taxes, most of these cases deal with the issue of pro-ration of taxes charged to a business operating both within and outside the city. The pro-ration is intended to avoid duplicate taxation by other jurisdictions based upon the same activity.³

Unlike a tax on gross receipts, a fixed tax on storage capacity is determined solely by the physical improvements located at the tank farm and is not dependent upon any activity or business conducted elsewhere. The City is not taxing the movement of products through the storage tanks, nor is it taxing any revenue received by K-M from business conducted at the Brisbane tank farm (as distinguished from revenue attributable to other sources). The City should therefore be able to argue that all of the litigation pertaining to gross receipts is irrelevant. Thus, it would be the City's position that no objection to the tax can be based upon constitutional claims that the tax imposes an unlawful burden on either interstate commerce or intrastate commerce.

The City would still need to satisfy the procedural requirements of Proposition 218 in order to adopt a new or increased business license tax on the tank farm. Since the tax is intended to augment the General Fund and would not be dedicated to any specific purpose, it would be a general tax that is subject to approval by a majority of Brisbane voters. The election must be conducted at the same time as an election at which members of the City Council would be elected, which means that the earliest time this measure can be placed on the ballot is the election scheduled for November, 2013.

There should also be no constitutional objection to the fact that the City is taxing one business differently than another business. This has always been a feature of the Brisbane Business License Tax ordinance and similar ordinances adopted by other cities. The courts have long recognized that cities may establish different classes of businesses without violating the equal protection clauses of the state and federal constitutions. As stated in *City of Berkeley v. Oakland Raiders*, 143 Cal. App. 3d 636 (1983), wherein the court upheld a tax on professional sports events that was higher than the tax on other businesses and exempted certain types of sporting events from the tax:

"The power of legislative bodies to make classifications of persons or property for the purpose of taxation is very broad. ... Business taxes are presumed to be rationally based if any conceivable state of facts exists to support them. ... Businesses, occupations and the entertainment industry may properly be subdivided and classified separately for license tax purposes. ... No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes

³ See, e.g., *City of San Jose v. Ruthroff & Englekirk Consulting Structural Engineers, Inc.*, 131 Cal. App. 3d 462 (1982) (company performing only 12 hours of service in the city out of 220 hours spent on the project cannot be charged full license fee); *Security Truck Line v. City of Monterey*, 117 Cal. App. 2d 441 (1953) (business license tax discriminatory and invalid because it was not based upon taxable events occurring in the city); *Ferran v. City of Palo Alto*, 50 Cal. App. 2d 374 (1942) (tax measured by number of employees working at plant outside of the city was invalid).

have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary."

In this case, the "class" being taxed is gasoline storage tanks. When grouped together in a tank farm, this business presents issues that distinguish it from other businesses conducted within the City, including enhanced measures for fire protection, potential air quality impacts, traffic hazards created by daily movement of numerous tanker trucks, and the visual blight created by the facility itself. The environmental, economic, and aesthetic cost of these impacts to the City should put this use into a class by itself.

Which brings us to the final question of magnitude. If the City has the legal authority to impose a separate business license tax on the tank farm and assuming such tax is duly approved by a majority of the voters, is there a legal limit on the amount of the tax? In other words, does the tax need to satisfy some form of reasonableness test? The courts have ruled that the answer is No. One of the leading cases on this issue is *Fox Bakersfield Theatre Corporation v. City of Bakersfield*, 36 Cal. 2d 136 (1950), where the California Supreme Court upheld a business license tax on places of amusement or entertainment which resulted in the plaintiffs paying a much larger tax than other businesses in the city. The court concluded that:

"The law is not, as plaintiffs suggest, that there is a requirement of reasonableness of amount of excise taxes levied for revenue by a municipal corporation in addition to the restrictions imposed by the uniformity and equal protection provisions of the Constitution. ... It follows, therefore, that short of being confiscatory or prohibitory, there is no rule of law that requires that a tax be reasonable in amount, for the power of taxation is a vital legislative function ... and there can be no basis for a court to invalidate an exercise of that power other than the Constitutions, state or federal. It has been so held. ... [cases cited]."

I have found no cases invalidating a business license tax on the ground that the amount of the tax is "confiscatory" or effectively prohibits the taxpayer from conducting its business. This would appear to be a factual question, to be determined on a case by case basis, that would take into account the size and nature of the business, the amount of the tax as a percentage of the total revenue derived from the conduct of the business at that location, and the effect of the tax on the overall economic viability of the business. The analysis should also consider whether the activity being taxed serves a larger purpose within the business organization, perhaps by performing some critical local function that does not constitute a separate profit center but still has substantial value for operations conducted outside of the city.

The amount of any proposed tax to be placed before the voters is a policy decision to be made by the City Council. A balance needs to be drawn between the goal of substantial revenue and the goal of successfully defending the tax against a legal challenge that it is confiscatory. The uncertainty can be reduced or eliminated by a negotiated agreement between the City and K-M on the proposed amount of the tax. K-M could be reminded that the City initially agreed to locate the tank farm in Brisbane with the expectancy that it would produce tax revenue for the General Fund. That benefit has never been realized. Perhaps K-M is now willing to address this issue, short of litigation.