ReedSmith

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CITY OF RIALTO
2017 OCT 30 PM 3:08
RECEIVED
CITY CLERK

Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3659
Tel +1 415 543 8700
Fax +1 415 391 8269
reedsmith.com

October 24, 2017

Via Certified Mail

Barbara A. McGee
City Clerk
City of Rialto
290 W. Rialto
Rialto, CA 92376

Re: Measure U Business License Tax Refund
APNs: 0258-051-07, 0258-051-21 and 0258-051-31

Dear Ms. McGee:

Attached please find the City of Rialto's Claim Form for Damages to Persons or Property. In this form, we seek a refund of $3,673,171.00 for Kinder Morgan SFPP L.P.'s payment of the Measure U Business License Tax. The tax paid relates to three parcels: Parcel Number 0258-051-07 located at 2359 S. Riverside Avenue; Parcel Number 0258-051-21 located at 271 E. Slover Avenue; and Parcel Number 0258-051-31 located at 2319 S. Riverside Avenue. The details supporting the claim for damages are set out in the attachment to the Claim Form and the supporting documents included with the form. Please call me if you have any questions.

Sincerely,

Phillip Babich

PB:ra

cc Robb Steel
City of Rialto Business License Division

CITY OF RIALTO
LIABILITY
CLAIM FOR DAMAGES TO PERSON OR PROPERTY

CITY CLERK'S DATE STAMP

CITY OF RIALTO

2017 OCT 30 PM 3:08

RECEIVED
CITY CLERK

1. *Claims for death, injury to person, or to personal property must be filed not later than six (6) months after the occurrence (Gov. Code §911.2).*
2. Claims for damages to real property must be filed not later than one (1) year after the occurrence (Gov. Code §911.2).
3. READ ENTIRE CLAIM FOR BEFORE FILING
4. ATTACH SEPARATE SHEETS, IF NECESSARY, TO GIVE FULL DETAILS

RETURN TO:
Rialto City Clerk's Office
Mail: 150 S. Palm Ave., Rialto, CA 92376
Address: 290 W. Rialto Ave., Rialto, CA 92376

CLAIMANT INFORMATION:

SFPP, L.P.
FULL NAME

N/A
DATE OF BIRTH

N/A
HOME ADDRESS INCLUDING CITY, STATE & ZIP

( )
HOME TELEPHONE NO.

1001 Louisiana Street, Houston, TX 77002
BUSINESS ADDRESS INCLUDING CITY, STATE & ZIP

(773) 369-1000
BUSINESS TELEPHONE NO.

ADDRESS AT WHICH CLAIMANT DESIRES TO RECEIVE NOTICES OR COMMUNICATIONS REGARDING THIS CLAIM (if different from home address provided above):

John Lynn Smith (Reed Smith LL)
101 Second St., Ste 1800
San Francisco, CA 94105

1. WHEN DID DAMAGE OR INJURY OCCUR? DATE: See attached TIME: ☐ AM ☐ PM

2. PLACE OF ACCIDENT (OCCURRENCE) BE SPECIFIC – *Describe fully and (if applicable) locate on diagram on reverse side of this sheet. Where appropriate, give street names and addresses, measurements and landmarks.*

See attached

3. HOW DID DAMAGE OR INJURY OCCUR?

See attached

4. WERE POLICE AT THE SCENE? ☐ YES ☒ NO WERE PARAMEDICS AT THE SCENE? ☐ YES ☒ NO

5. WHAT PARTICULAR ACT OR OMISSION DO YOU CLAIM CAUSED THE INJURY OR DAMAGES? *Give the name of the city/town employee causing the injury or damage, if known.*

See attached

6. GIVE TOTAL AMOUNT OF CLAIM *Include estimate of amount of any prospective injury or damage* $ See attached

HOW WAS THE ABOVE AMOUNT COMPUTED? *Be specific, list doctor bills, repair estimates, etc.* ***Please attach 2 estimates.***

DAMAGES INCURRED TO DATE:

Item/Date: See attached Amount: $

Item/Date: Amount: $

TOTAL AMOUNT CLAIMED AS OF PRESENTATION OF THIS CLAIM: $ See attached

ESTIMATED PROSPECTIVE DAMAGES, AS FAR AS KNOWN:

Item/Date: _____ Amount: $_____

Item/Date: _____ Amount: $_____

TOTAL ESTIMATED AMOUNT PROSPECTIVE DAMAGES: $_____

7. **WITNESSES TO DAMAGE OR INJURY** *List all persons known to have information (attach additional pages, if necessary)*

NAME: N/A

ADDRESS: _____

TELEPHONE: (___) _____

NAME: _____

ADDRESS: _____

TELEPHONE: (___) _____

CITY OF RIALTO
2017 OCT 30 PM 3:09
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CITY CLERK

8. **IF INJURED, PROVIDE NAME, CONTACT INFORMATION AND DATE/TIME DOCTOR(S) OR HOSPITAL(S) VISITED:**

NAME: _____

ADDRESS: _____

TELEPHONE: (___) _____

DATE: _____ TIME: _____ ☐ AM ☐ PM

NAME: _____

ADDRESS: _____

TELEPHONE: (___) _____

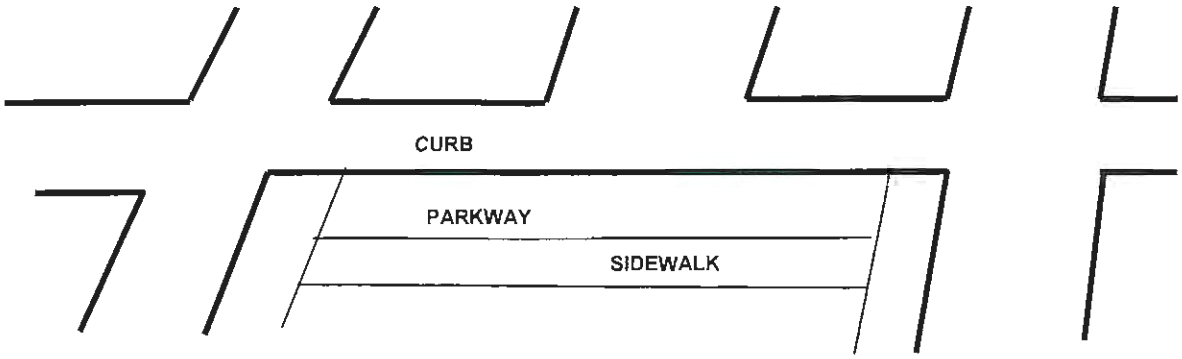
DATE: _____ TIME: _____ ☐ AM ☐ PM

9. **PLEASE READ THE FOLLOWING CAREFULLY:**

For all vehicle accident claims, place on the following diagram, the names of streets, including NORTH, EAST, SOUTH AND WEST directions. Indicate place of accident by "X" and by showing house numbers or distances to street corners.

If a city/town vehicle was involved, designate by letter "A" location of the City/Town vehicle when you first saw it, and by "B" location of yourself or your vehicle when you first saw City/Town vehicle; location of City/Town vehicle at time of accident by "A-1" and location of yourself or your vehicle at the time of the accident by "B-1" and the point of impact by "X".

⇨ ***NOTE: IF THE DIAGRAM BELOW DOES NOT FIT THE SITUATION, PLEASE ATTACH A PROPER DIAGRAM SIGNED BY THE CLAIMANT.***



I HAVE READ THE FOREGOING CLAIM AND KNOW THE CONTENTS THEREOF; AND CERTIFY THAT THE SAME IS TRUE OF MY OWN KNOWLEDGE EXCEPT AS TO THOSE MATTERS WHICH ARE HEREIN STATED UPON MY INFORMATION AND BELIEF; AND AS TO THOSE MATTERS I BELIEVE THEM TO BE TRUE.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Phillip H Babick

SIGNATURE OF CLAIMANT OR AGENT

PHILLIP H. BABICK

TYPE OR PRINT NAME

10/24/17

DATE

ATTORNEY FOR CLAIMANT

RELATIONSHIP TO CLAIMANT

NOTE: PRESENTATION OF A FALSE CLAIM IS A FELONY (CA PENAL CODE 72)
RETURN CLAIM TO: RIALTO CITY CLERK'S OFFICE – 150 S. PALM AVE., RIALTO, CA 92376

Kinder Morgan SFPP L.P.
Claim Form for Refund for the
September 20, 2017 Payment of the U Business License Tax

Petitioner claims a refund in the amount of $3,673,171.00,[1] which is the amount it paid under protest to the City of Rialto on September 20, 2017, for Rialto's unlawful Measure U Business License Tax codified in Rialto Mun. C. Sec. 5.04.028 (the "Measure U Tax"). It claims a refund based on the following grounds:[2]

- The tax violates the commerce clause because does not fairly apportion Petitioner's activities in Rialto. See *Container Corp. of America v. Franchise Tax Bd.* (1983) 463 U.S. 159;
- The tax violates the commerce clause because it fails the internal consistency test. See *Oklahoma Tax Cmm'n v. Jefferson Lines, Inc.*, 514 US 175 (1995);
- The tax discriminates against interstate commerce. See *Container Corp. v. Franchise Tax Board*, 463 US 159 (1983);
- The tax discriminates against intrastate commerce. *See Union Oil. Co. of California v. City of Los Angeles*, 79 Cal.App.4th 383 (2000);
- The tax is not fairly related to the services provided by Rialto. *See Commonwealth Edison Co. v. Montana*, 453 US 609 (1981);
- The tax violates Government Code § 37101;
- As a property tax, the Measure U Tax runs afoul of the California Constitution, which requires that property be taxed uniformly—either on an ad valorem basis, "at the same percentage" of fair market value or based on an authorized "value standard other than fair market value."—because the tax does not fairly apportion Petitioner's activities in Rialto. Cal. Const., art. XIII § 1.
- The tax discriminates against pipelines in violation of California Constitution Article XIII § 19.
- The tax was not passed by two-thirds vote of the electorate as required by Article XIII D of the California Constitution;
- The tax violates the Equal Protection Clause of the United States and California Constitutions;
- The tax violates the due process clause;
- The tax violates the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code §§ 7200, *et seq.*); and
- The tax is confiscatory. *Fox Bakersfield Theatre Corp. v. City of Bakersfield,* 36 Cal.2d 136 (1950).

The Petitioner is entitled to a refund of taxes because the Measure U Tax violates the California Constitution and United States Constitutions as discussed above.

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[1] A copy of the checks that Petitioner provided to the City of Rialto are attached at Tab 1.

[2] Petitioner also incorporates by reference all the arguments that it raised in its September 15, 2017 appeal of the Measure U Tax. The appeal letter is attached at Tab 2.

TAB 1

Kinder Morgan Inc. as Paying Agent

No. 336924

Check Date: 09/18/2017

(100006907)

CITY OF RIALTO, 150 SOUTH PALM AVENUE, RIALTO CA 92376

Description	Voucher #	Date	PO Number	Gross Amount	Discount Amount	Net Amount Paid
PMTREQ2017BUSLICTAX PLEASE RETURN CHECK TO TERRI TIEDEMANN X 38859 - DO NOT MAIL	13452872	07/27/17		$3,673,171.00	$0.00	$3,673,171.00
Detach at Perforation Before Depositing Check 100006907			Totals	$3,673,171.00	$0.00	$3,673,171.00

KINDER MORGAN

Kinder Morgan Inc. as Paying Agent
1001 Louisiana Ste 1000
Houston, TX 77002

Wells Fargo Bank Ohio, N.A.
115 Hospital Drive
Van Wert, OH 45891
56-382/412

Check No. 336924

Check Date
09/18/2017

Check Amount
$ *3,673,171.00

PAY *Three Million Six Hundred Seventy Three Thousand One Hundred Seventy One AND 00/100*

TO THE ORDER OF
CITY OF RIALTO
150 SOUTH PALM AVENUE
RIALTO CA 92376

100006907

K. Daug

Authorized Signature

⑈0000336924⑈ ⑆041203824⑆960004994⑆

TAB 2

ReedSmith

John Lynn Smith
Direct Phone: +1 415 659 4863
Email: jlsmith@reedsmith.com

Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3659
Tel +1 415 659 8700
Fax +1 415 391 8269
reedsmith.com

September 15, 2017

VIA CERTIFIED FIRST CLASS U.S. MAIL
RETURN RECEIPT REQUESTED

Mr. Robb Steel
Assistant City Administrator/Development
Services Director
Development Services Department
City of Rialto
Business Licensing Division
150 South Palm Avenue
Rialto, CA 92376

Re: Appeal of Measure U Tax Assessment
Claim for Refund of Measure U Taxes Paid

Dear Mr. Steel:

Our client SFPP, L.P. ("SFPP") has received the most recent assessment of the business license tax on wholesale liquid fuel storage facilities passed in November 2014 under Measure U and now contained in Rialto Municipal Code Section 5.04.028 ("Measure U tax"). SFPP has filed with the City of Rialto (the "City") similar appeals in the past and has recently filed a notice of appeal in the matter of *SFPP v. City of Rialto*, San Bernardino County Superior Court case no. CIVDS1603260.

In prior years, SFPP has paid the Measure U tax under protest. SFPP's lawsuit was premised, in part, on a procedural stipulation entered into between SFPP, the City , and other parties situated similarly to SFPP. That stipulation confirmed that SFPP had exhausted its administrative remedies to file an action in court. The stipulation is attached to this letter as Exhibit A. [1] Moreover, the City and other parties contesting the Measure U tax, including SFPP, entered into an Escrow Agreement covering disputed Measure U tax payments. (See Exhibit B)

INTRODUCTION

The purpose of this correspondence is threefold:

1) To appeal the Measure U tax assessments in the amount of $3,673,171.00 dated July 27, 2017, and served on September 5, 2017, under Rialto Municipal Code Section 5.04.040 (Exhibit C)

[1] SFPP also believes that its earlier assessment in 2015 may have included a duplicate or erroneous assessment for tanks located at 2359 S. Riverside resulting in an overpayment of $1,848,000.

2) To request an adjustment of the tax under Rialto Municipal Code Section 5.04.055, on grounds set forth below, and

3) To assert we are entitled to a refund of any Measure U taxes paid under Chapter 1 of the Rialto Municipal Code.

The following discussion details the grounds for the relief we request.

GROUNDS FOR RELIEF

The Measure U tax is illegal because it: (1) is an illegal property tax in violation of the California Constitution; (2) discriminates against state assessees in violation of the California Constitution; (3) violates the Commerce Clause; (4) violates Government Code Section 37101 and its requirement of proportionality; (5) violates Article 13D of the California Constitution as an illegal property-related charge; (6) violates the Equal Protection Clause; (7) violates the Due Process Clause and (8) violates Bradley-Burns as a nonuniform use tax.

I. The Measure U tax is an illegal property tax.

Although the City of Rialto ("City" or "Rialto") considers the Measure U business license tax an excise tax, it is actually an illegal property tax. The California Constitution requires that property be taxed uniformly—either on an ad valorem basis, "at the same percentage" of fair market value or based on an authorized "value standard other than fair market value."[2] Here, the tank farms are already subject to ad valorem property taxes. The Measure U tax is an additional property tax, which means that SFPP is paying more than the uniform rate. As one court aptly put it: "Excise taxes are not subject to the California constitutional provisions restricting imposition of property taxes ... and, therefore, municipalities have an obvious incentive to attempt to relabel their property taxes as excise taxes to evade those provisions."[3] In essence, if the Measure U tax is deemed a property tax, then SFPP would be taxed at a higher rate than the uniform rate paid by other property taxpayers, which the California Constitution prohibits.[4]

To determine whether a tax is an excise tax or a property tax, a court must make that determination "by its incidents, and from the natural and legal effect of [its] language. . . ."[5] "The nomenclature is of minor importance, for the court will look beyond the mere title or the bare legislative

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[2] Cal. Const., art. XIII, § 1.

[3] *Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1089.

[4] In this case, we are not challenging the right of municipalities to levy non-uniform special taxes that may be considered property taxes, such as parcel taxes. *See Heckendorn v. City of San Marino* (1986) 42 Cal. 3d 481. Such taxes require a two-thirds vote of the electorate and must be imposed for a specific purpose. Here, Measure U tax is a general tax and it is well settled that general property taxes cannot violate the uniformity required by article XIII, section 1 of the California Constitution. *See City of Oakland v. Digre* (1988) 205 Cal.App.3d 99.

[5] *Flynn v. City and County of San Francisco* (1941) 18 Cal.2d 210, 214.

assertion that the provision is for a license [i.e. an excise tax] to see and determine the real object, purpose and result of the enactment."[6]

Courts have held that, "[a]t the most general level, a property tax is a tax whose imposition is triggered merely by the ownership of property. An excise tax, by contrast, is a tax whose imposition is triggered not by ownership but instead by some particular use of the property or privilege associated with ownership, such as the transfer of the parcel to a new owner."[7] Said differently, "the target of an excise tax can always avoid taxation by not engaging in the privilege taxed, while a landowner pays taxes whether he uses his property or not."[8]

Several California cases have examined whether certain excise taxes are property taxes in disguise. These cases all support classification of the Measure U tax as a property tax.

In *City of Oakland,* the City imposed a tax on each parcel of property within city limits; the tax rate was based on the size of the property and type of structure (residential or commercial).[9] The Court classified this tax as a property tax because it was imposed on all property whether or not the property was used or lay vacant, and because it was imposed whether or not the property was a residential or commercial development.[10] The tax was also classified as a property tax because it failed to apportion the tax by the type and extent of municipal services used.[11]

In *City of San Francisco,* the city imposed a business license tax on owners of certain vehicles; the fee was based on the size and type of vehicle or on a vehicle's seating capacity.[12] The city also imposed an ad valorem property tax on the same vehicles.[13] The Court found that the business license tax "depended entirely on the factor of ownership; no mention is made of use or operation of the vehicles ...."[14] Moreover, the Court stated "the same persons paid taxes on their vehicles twice, to the same taxing power, during the same period, based each time upon ownership of the same property, and each time for the same purpose, namely, revenue."[15]

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[6] *Id.* at 214-215.
[7] *Thomas*, 53 Cal.App.4th at 1088-1089.
[8] *City of Oakland*, 205 Cal.App.3d at 109. The *City of Oakland* case contains a lengthier discussion of these factors: "Generally, a property tax taxes ownership per se without conditions. In contrast, an excise tax is 'a tax on the exercise of one of the incidences of property ownership,' such as the ability to transfer or devise property or the ability to use, store, or consume it. Stated another way, the excise tax is a tax on the privilege of exercising the taxed incident of ownership. Since the property tax taxes ownership in all its incidents, the tax is levied without regard to the use to which the property is put. Accordingly, a property tax is generally due and payable annually at a set time. An excise tax, on the other hand, is generally due and payable only when the taxed privilege is exercised, and is therefore 'proportioned according to the extent of the privilege enjoyed.' A property tax generally triggers no personal liability, but is secured by the property taxed; an excise tax results in a personal debt. " *Id.* at 106.
[9] *Id.* at 103.
[10] *Id.* at 106.
[11] *Id.* at 108.
[12] *City of San Francisco,* 18 Cal.2d at 214.
[13] *Id.* at 212.
[14] *Id.* at 214.
[15] *Id.* at 215.

However, the Court noted that "[t]his is a very different thing from one tax upon property and another upon the business, though the latter may indirectly reach the property."[16] As such, the Court found that this business license tax violated article XIII, section 1 of the California Constitution because it imposed an additional or double property tax.[17]

In *City of East Palo Alto,* the Court of Appeal struck down a local parcel tax on grounds that it was a property tax—not an excise tax as the city argued. There, the circumstances were similar to those presented here: "[T]he City discovered a shortfall in revenues."[18] And "[i]n order to make up the shortfall, in 1989, the City took action to impose a new parcel tax on all real property owners ...."[19] The voters approved the parcel tax "by a bare majority and not by a two-thirds vote."[20] The ordinance levied a tax "based upon mere ownership and type of real property, and not on any separate incident to property ownership, such as the sale or transfer of the property, as would have been the case for an allowable excise tax on real property transfers."[21] The Court concluded that just as in *City of Oakland,* the tax was "not a proper excise tax, because it simply taxes property owners for the mere ownership of property, and is not imposed as a valid excise tax would be on any of the incidents of ownership, such as sale, transfer, rental, special use of certain city services, and so on."[22]

In the instant case, the Measure U tax is a property tax based on the following factors articulated in the cases cited above. It is imposed on:

> [A]ny person engaged in the business of owning operating, leasing, supplying or providing a wholesale liquid fuel storage facility shall pay an annual business license tax of up to One Dollar ($1.00) per year for each One (1) cubic foot of liquid fuel storage capacity.[23]

There are several reasons why it should be considered a property tax.

First, one need do nothing beyond merely owning the tank facility to be subject to the tax, based on Measure U's own terms. This is because the plain language of the ordinance indicates that the tax is imposed not only on persons engaged in the business of "operating" or "leasing" a "wholesale liquid fuel storage facility," but also on persons merely "owning" the facility. Thus, it is a tax on "mere ownership"—a key factor weighing in favor of the tax being a property tax.

Second, like a property tax, the Measure U tax is measured based on the size of a taxpayer's property, not the exercise of a business privilege. Although the levy is styled as a privilege tax—on persons "engaged in the business" of "owning[24] operating, leasing, supplying or providing a wholesale

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[16] *Id.* at 215-216.
[17] *Id.*
[18] *City of East Palo Alto*, 53 Cal.App.4th at 1087.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1086.
[22] *Id.* at 1088.
[23] Rialto Municipal Code ("RMC") § 5.04.028. Adopted in City of Rialto Ordinance No. 1556 (Dec. 9, 2014).
[24] It is unclear what is meant by being "engaged in the business of owning."

liquid storage facility," the application of the tax belies this characterization. In reality, it is a facility tax measured by storage capacity of the tanks—the size of SFPP's property—regardless of the extent to which any business privilege is exercised. So although the Measure U tax is denominated as a business license tax, it is really a tax on ownership of the tanks by certain types of businesses—a property tax.

With only two exceptions, all business license taxes in Rialto are measured by gross receipts. The first exception is building contractors, who annually pay either $100, or $79 plus an administrative fee of $37.20. The second exception is warehouses—also in the storage business—who pay a flat annual rate of $50 plus an administrative fee of $37.50. This amount is without regard to the size of the warehouse.

Before Measure U, SFPP was also assessed based on gross receipts. Because the tax is now measured by the storage capacity of the tanks—a fixed number—the tax itself is a fixed number as well. In other words, unlike an excise tax, the Measure U tax does not concern itself with whether or to what extent one exercises a business privilege. The tax is measured by property size and is the same regardless of the level of business activity or the level of city services one uses.

Consider the following example: Company A, Company B and Company C all own storage tank facilities of equal size in the City of Rialto. Company A decides not to hold it out for lease and simply owns the property during the tax year. Company B holds it out for lease and is unable to find a tenant. Company C leases the facility to Company D, which operates the facility. What are the respective tax liabilities of the companies? The answer is they all pay the same amount of tax—measured by the storage capacity of the tanks.

Company A pays tax on the full storage capacity of the tank, just for owning the facility—even though Company A makes a conscious decision not to put the facility to economic use. Company B pays tax on the full storage capacity of the tank regardless of its inability to lease it to an operator. In other words, although Company B wants to conduct business, it is unable to do so and generates no receipts of any kind. But it still pays a tax based on the size of its property.

In the case of Company C's tank farm, tax is paid twice on the full storage capacity of the tank farm—regardless of the amount of receipts C generates from the lease to D and regardless of the receipts D generates from operation of the facility. In essence, this is a tax on the facility. In contrast, those engaged in the business of leasing commercial property, including those renting storage facilities, pay the Rialto business license tax as measured by their gross receipts.[25]

Accordingly, the tax is set and can only change if the City Council reduces the rate or the taxpayer decreases the size of the tanks, which is not economically feasible—regardless of whether one operates or leases the facility and regardless of whether any liquid fuel is stored in the tanks or sold. It is not in any way proportioned to the amount of activity a business conducts. Instead, it is measured by the size of the taxpayer's property. This is another reason why the Measure U tax is a property tax.

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[25] http://www.rialtoca.gov/documents/downloads/Business_Licensing_Fees.pdf

While excise taxes are measured by the proportion of the privilege exercised, the *City of Oakland* case contrasted property taxes, which are fixed and collected at a set time every year.[26] This is also the case with the Measure U tax. It is payable once a year, and is a fixed amount subject to verification by city officials of the tanks' storage capacity and subject to the discretion of the City Council in setting the rate. In this respect, the City is acting in a way analogous to the local assessor collecting a property tax. A local assessor values the property once per year. And although the property tax is fixed based on the valuation of the subject property, here, the size of the tank is a proxy for the property value.

Third—and on a related note—as the *City of Oakland* court succinctly stated, the "most telling flaw" of the Oakland tax is "the question of the proportionality of the tax to the use of city services."[27] So too is the case with Rialto. In its various descriptions of Measure U, City officials cite the need to have the oil companies contribute their fair share to city services. The preamble to the resolution establishing the new tax states that the funds will be used to avoid "continued deferral of essential capital and maintenance projects, including street maintenance, park enhancements and expansion, and general facility maintenance and expansion ...." It goes on to state that "further deterioration of City roads, parks and other public facilities will continue unless new sources of revenues are realized ...."[28] A memo from the City Attorney to the City Council states that it "has been considering alternatives to raise revenues which could be used by the City to offset impacts related to tank farm businesses, including traffic, mutual aid, public safety access and response, and groundwater, as well as for general revenue."[29]

The Rialto city budget for 2015-2016 anticipates about $3 million in business license tax revenues from all Rialto businesses ***combined.*** The Measure U tax—levied against only four taxpayers—is projected to raise $12 million, by the City's own estimates.[30] So four taxpayers will now pay nearly four times the amounts collected from ***all businesses*** in the previous year. There can be no serious argument that the tank farms require city services in an amount greater than four times the ***total*** for all other Rialto businesses. An equally shocking statistic is that the Rialto city budget is roughly $60 million. Thus, the Measure U tax results in a 20 percent increase to the entire city budget. There is no justification for these four taxpayers to contribute 20 percent of the City's budget.

The problem is exacerbated when considering the difference between "'essential' services such as police and fire protection and 'elective' services not automatically enjoyed by all residents, such as parks, libraries, museums and youth centers."[31] Not only is the City incapable of proving that the taxpayers' "impacts" on essential services are in proportion to the amount of tax the City demands, it is equally at a loss to show how the taxpayers enjoy non-essential services such as parks, which are explicitly mentioned on the list of expenditures for the revenue this illegal tax would generate.

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[26] *City of Oakland*, 205 Cal.App.3d at 104, 107.
[27] *Id.* at 108.
[28] City of Rialto, Resolution No. 6580.
[29] City of Rialto, Legislation Text, File # 14-460. Letter to Mayor and City Counsel from Fred Galante, City Attorney.
[30] City of Rialto, Transcript of January 13, 2015 City Council Meeting, p. 3.
[31] *City of Oakland*, 205 Cal. App. 3d at 108.

There is no evidence of any attempt on the part of Rialto to quantify the economic impact of the tank farms on municipal services. Nor is there any evidence that the four tank farm businesses need a level of city services equal to four times the amount for all other businesses combined. In short, the tax is grossly disproportionate.

In sum, the Measure U Tax is a property tax—not a business license tax. Because it is a property tax in addition to the regular property tax that SFPP is already paying, the Measure U tax violates the uniformity requirement for property taxes mandated by article XIII, section 1.

II. The Measure U tax discriminates against state assessed companies in violation of the California Constitution.

Under Article XIII, section 19 of the California Constitution ("Section 19"), certain regulated businesses, such as railway, telegraph, telephone and gas and electric utility companies, pipelines and other inter-county properties ("state assessees"), cannot be subject to a higher tax rate than other business corporations.[32] The Measure U tax violates this protection because it taxes state assessed pipeline companies at a much higher level than all other companies subject to the Rialto business license tax, except the three other taxpayers subject to the Measure U tax.

As noted above, "the maximum tax rate authorized by Measure U is one dollar ($1.00) per year per cubic foot of storage capacity. The actual annual tax rate would be established by City Council resolution not to exceed the rate authorized by Measure U, and the increased tax could be, but is not required to be, phased in."[33] In its December 9, 2014 meeting, the City Council voted to approve the maximum rate.[34] Using the City's own estimates, the annual taxes for the four taxpayers affected by Measure U will increase from roughly $120,000 collectively, to a collective burden of $12 million annually. This is roughly four times the $3 million paid by *all* business license taxpayers in 2014, the last year before Measure U took effect.

It should also be noted that SFPP would pay a tax under Measure U of roughly 100 times more than they paid before the measure's passage. This would equate to a one-year increase of 10,000% targeted against these state-assessed companies. No other businesses within the City's jurisdiction will suffer a tax hike anywhere near this amount.

To further illustrate just how onerous the Measure U tax is, consider that the second highest business license tax rate is for professionals—a distant second—who are charged $154 on their first $100,000 of gross receipts (0.154%) and then $100 for every additional $100,000 in gross receipts

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[32] Cal. Const., art. XIII, § 19 provides the State Board of Equalization with assessment jurisdiction over certain property as follows: "The Board shall annually assess (1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity. This property shall be subject to taxation to the same extent in the same manner as other property. *No other tax or license charge* may be imposed on these companies which *differs* from that imposed on mercantile, manufacturing, and other business corporations." (Emphasis added.)

[33] Rialto City Attorney Impartial Analysis of Measure U Rialto 2014 Tank Farm Storage Measure.

[34] City of Rialto, Transcript of January 13, 2015 City Council Meeting, pp. 2-3.

(0.1%).[35] In order for the business license tax to equal $12 million—the annual amount the four oil companies have to pay—under the professional rate, these four taxpayers would need to generate roughly $12 billion dollars in revenue attributable solely to the City of Rialto.

The State Board of Equalization ("Board"), which is charged with annual assessment of pipeline company property, determined the value of *all of SFPP's property in California to be only $446 million* as of January 1, 2015.[36] SFPP is responsible for about 75% of the $12 million in tax and would thus need to generate $9 billion a year under the professional rate to trigger its $9 million share of the tax—using every piece of pipeline property it owns in California—property that is worth 5% of the revenue that would trigger such a tax. Said differently, SFPP would need to generate gross receipts only within the City of Rialto in an amount 20 times the value of all of its California property.

In short, Measure U's gross disparate treatment of state assessed companies is exactly the type of discriminatory taxation Section 19 was meant to address.

III. The Measure U tax is illegal because it violates the Commerce Clause.

Under the U.S. Supreme Court decision *Complete Auto Transit, Inc. v. Brady,* the following four factors must be present in order for a state tax affecting interstate commerce to be valid under the federal Commerce Clause: (a) the tax must be applied to an activity that has a substantial nexus with the state; (b) the tax must be fairly apportioned to activities carried on by the taxpayer in the state; (c) the tax must not discriminate against interstate commerce; and (d) the tax must be fairly related to the services provided by the state.[37] The Measure U tax is illegal because it fails to satisfy three out of the four factors – the tax is not fairly apportioned, discriminates against interstate (and intrastate) commerce, and is not fairly related to the services provided by the City of Rialto.

A. The Measure U Tax is illegal because it is not fairly apportioned to SFPP's activities in Rialto.

Unapportioned business license taxes affecting interstate commerce are illegal. The Measure U tax is imposed against interstate businesses such as SFPP. In *Complete Auto*, the U.S. Supreme Court held that a state tax affecting interstate commerce must, among other things, be fairly apportioned to activities carried on by the taxpayer in the state to be valid under the Commerce Clause.[38] In order to pass constitutional muster, the apportionment formula may not be inherently or intrinsically arbitrary.[39] In order to be fairly apportioned, a tax must pass two tests: (1) an external consistency test – the factors used in the apportionment formula must reflect a reasonable sense of how income is generated; and (2) an internal consistency test – the formula must be such that, if applied by every jurisdiction, it would

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[35] City of Rialto, Schedule of Fees, Business Licensing, Updated June 18, 2014.
[36] http://www.boe.ca.gov/proptaxes/pdf/PropValues2015.pdf
[37] *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 277-279, 287.
[38] *Id.*
[39] *Underwood Typewriter Co. v. Chamberlain* (1920) 254 U.S. 113, 121; *Hans Rees' Sons, Inc. v. State of North Carolina ex rel. Maxwell* (1931) 283 U.S. 123, 133.

result in no more than all of the unitary business's income being taxed. [40] The Measure U tax fails both tests.

1. The Measure U tax fails the external consistency test.

The Measure U tax fails the external consistency test because it neither relates in any reasonable way to SFPP's business activities in Rialto nor reflects a reasonable sense of how income is generated. In *Container Corp. of America v. Franchise Tax Board*, the U.S. Supreme Court explained a taxpayer can demonstrate that "there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise ... by proving that the income apportioned to California under the statute is out of all appropriate proportion to the business transacted in that state."[41] The Court also looks to "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing State."[42]

Although the California Constitution does not have a specific "Commerce Clause," the California Supreme Court has held that other provisions of the California Constitution combine "to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction."[43] These cases found that local business license taxes that differentiated between in-city manufacturers and out of city manufacturers violated the "Commerce Clause" using federal Commerce Clause analysis.

For example, in *City of Los Angeles v. Shell Oil Co.*, the California Supreme Court examined a city business tax on wholesale gasoline delivered from an in-city bulk terminal to retailers outside the city. Relying on the federal Commerce Clause analysis, the California Supreme Court struck down the city's apportionment formula because it purported to reach "gross receipts other than those 'directly attributable to ... selling activities carried on in the city.'" [44]

In *Ferran v. City of Palo Alto*, the court examined a license tax on laundering businesses which was measured by the number of employees at the plant or the place of laundering.[45] The court found this tax violated the Commerce Clause because the tax was measured by a purely extraneous event (i.e., the number of employees) that had no relation to the nature of business done in Palo Alto.[46] Similarly in *Security Truck Line v. City of Monterey*, the court examined a city tax imposed on each truck making

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[40] *Container Corp. of America v. Franchise Tax Bd.* (1983) 463 U.S. 159, 169; *see also Exxon Corp v. Wisconsin Dept. of Revenue* (1980) 447 U.S. 207, 220 (the U.S. Constitution requires there to be a "'rational relationship between the income attributed to a state and the intrastate values of the enterprise'" [quoting *Mobil Oil Corp. v. Commissioner of Taxes* (1980) 445 U.S. 425, 436].

[41] *Container Corp.*, 463 U.S. at 180-181 (internal quotations omitted, quoting *Exxon Corp.*, 447 U.S. at 220 and *Hans Rees' Sons*, 283 U.S. at 135).

[42] *Oklahoma Tax Com'n v. Jefferson Lines, Inc.* (1995) 514 U.S. 175, 185.

[43] *City of Los Angeles v. Shell Oil Co.*(1971) 4 Cal. 3d 108,124; *General Motors Corp. v. City of Los Angeles* (1971) 5 Cal.3d 229, 238.

[44] *Shell Oil Co.*, 4 Cal. 3d at 126, quoting *City of Los Angeles v. Belridge Oil Co.* (1957) 48 Cal.2d 320, 324.

[45] *Ferran v. City of Palo Alto* (1942) 50 Cal.App.2d 374, 375-376.

[46] *Id.* at 382-383.

deliveries during the fish hauling season.[47] The taxpayer had its place of business outside the city and its business required the taxpayer to use different trucks for each delivery. The consequence of the tax was that if one truck made one hundred deliveries during the season, the maximum tax was $13.50 for that truck. But, if the carrier used one hundred different trucks to make one hundred deliveries (like the taxpayer), then the carrier was required to pay $13.50 for each truck.[48] The court found this tax to be capricious, arbitrary, and discriminatory because the measure of tax (the number of individual trucks making deliveries) was an extraneous event that has no relation to the amount of business done in the taxing city.[49]

Like the cases above, the Measure U tax has no relation to the quantum of business conducted in Rialto. First, recall that the Measure U tax is based on the storage capacity of the tanks – $ 1.00 per one cubic foot of liquid fuel storage capacity.[50] By its very nature, a tax based on the size of property within a jurisdiction does not speak to the level of business activity that a taxpayer conducts within the taxing jurisdiction's borders. The Measure U tax does not depend upon the exercise of any particular privilege and as a business license tax, it bears no relation nor even attempts to relate to the amount of activity carried on within the City of Rialto.

Second, while the Measure U tax is imposed on "owning" or "operating" a liquid fuel storage facility, it does not account for where the fuel is actually sold or to whom. Accordingly, the tax is "out of all appropriate proportion to the business transacted" by SFPP in Rialto.[51] In *Hans Rees' Sons, Inc.*, the U. S. Supreme Court struck down an apportionment method where 66 percent to 85 percent of the taxpayer's income was attributed to North Carolina, while a separate analysis showed an attribution of no more than 21 percent to the state. In striking down this formula, the court held the apportionment method "operate[d] so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."[52]

Similarly, in this case, there is no proper "match" of income generated from Rialto to the measure of tax. The constitutional violation in this case is far more egregious than in *Hans Rees' Sons* because the Measure U tax is simply unapportioned. It does not account for sales into interstate commerce or take into account other properties owned by a taxpayer. For example, apportionment of a taxpayer's gross receipts based on property within Rialto divided by property everywhere would represent at least an attempt to properly reflect business activity within Rialto based on a pro rata share of its overall enterprise. For the tax to reasonably relate to a taxpayer's business activities in Rialto, we would need to take the total gross receipts of a taxpayer, then apportion those receipts based on the level of activity conducted within Rialto and then take that apportionment percentage and multiply it by the storage capacity of the tanks. But to use the entire capacity of the tanks—regardless of whether any fuel is sold, completely fails to measure the tax based on the level of a taxpayer's business activity in the City.

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[47] *Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441.
[48] *Id.* at 453-454.
[49] *Id.*
[50] RMC § 5.04.028.
[51] *Hans Rees' Sons*, 283 U.S. at 135.
[52] *Id.* at 134.

Further, the facts in the record prove the Measure U tax was not even intended to take into consideration a taxpayer's degree of business activity in Rialto, but is an arbitrary number to make up for budget shortfalls.[53] The Measure U tax will be set year by year, not by business activity, but by the political judgment of the City Council as to the amount of tax revenue needed.[54] Accordingly, the Measure U tax will be simply a plug-in figure of revenue to balance the budget, and that is not a fairly apportioned tax.

2. The Measure U tax fails the internal consistency test.

The Measure U tax also fails the internal consistency test–the formula must be such that if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed.[55] To be internally consistent, a tax must be structured so that multiple taxation would not result if every state imposed an identical tax.[56] In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the U.S. Supreme Court also described the internal consistency test as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with intrastate commerce. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.[57]

In *American Trucking Associations, Inc. v. Scheiner*, the U. S. Supreme Court examined Pennsylvania's unapportioned flat taxes imposed on the use of its roads.[58] The Court found the taxes failed the internal consistency test because the state did not provide immunity for payment of similar

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[53] City of Rialto, Resolution 6580, states Measure U was called to "increase revenues without placing a burden on the residents of the City of Rialto ...."

[54] Because Measure U authorizes the City Council to raise taxes up to a certain amount, it may violate separation of powers and/or article XIII C's prohibition on tax increases without voter approval. In other words, the voters cannot delegate the duty to raise taxes to the City Council by giving them carte blanche to raise taxes up to a certain point. This is analogous to an unlawful delegation of legislative authority in violation of the separation of powers. Since the electorate serves in a legislative capacity when voting to raise taxes [*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th220, 253) by analogy, it cannot delegate that power to the executive branch (City Council), any more than the Legislature can authorize the Governor to raise taxes up to a certain point. This attempted circumvention of voter approval is invalid under Proposition 218 (article XIII C) as well as under the doctrine of separation of powers.

[55] *Container Corp.*, 463 U.S. at 169.

[56] *Goldberg v. Sweet* (1989) 488 U.S. 252, 261.

[57] *Oklahoma Tax* Com'n, 514 U.S. 175, 185; *see also Goldberg* 488 U.S. at 261, stating that a court must focus on the text of the challenged ordinance and hypothesize a situation in which another state has imposed the identical ordinance.

[58] *American Trucking Associations v. Scheiner* (1987) 483 U.S. 266.

taxes paid to other states and because the tax was not apportioned based on a neutral factor (such as extent of road use) that made state lines irrelevant.[59] More recently in *American Trucking Associations, Inc. v. State*, the New Jersey Supreme Court also struck down a flat fee collected from transporters of hazardous waste, reasoning that if the fee was replicated by other states, interstate carriers would be subject to multiple fees while intrastate carriers would only be subject to one fee.[60]

Just like Pennsylvania's and New Jersey's flat taxes discussed above, the Measure U tax fails the internal consistency test because it is not apportioned based on any factor – neutral or not. If every state (or city) adopted a tax regime like Rialto, a taxpayer with storage tanks in multiple states (or cities) would have to pay a tax on the storage capacity of the tanks in each of those states (or cities), regardless of where the taxpayer actually sold the fuel stored in the tanks. Because an identical ordinance imposed by other jurisdictions would result in multiple taxation, the Measure U tax also fails the internal consistency test.

B. The Measure U Tax is illegal because it discriminates against interstate and intrastate commerce.

1. The Measure U Tax discriminates against interstate commerce.

In order to comport with the requirements of the Commerce Clause, an apportionment formula must also not result in discrimination against interstate or foreign commerce.[61] Closely in line with the internal consistency test, this principle requires that an apportionment formula not differ so substantially from methods of allocation used by other jurisdictions such so as to produce double taxation of the same income.[62] In fact, in the interstate context, the anti-discrimination requirement does not amount to much more than the need for fair apportionment.[63]

Because there is no apportionment or even an attempt to measure the level of activity that should be subject to taxation, the Measure U tax is in effect a "flat tax."[64] In *Scheiner,* the U. S. Supreme Court recognized that flat taxes discriminate against interstate commerce. Specifically, in the context of a state's flat tax for the use of its road, the Court stated the unapportioned flat taxes "penalize some travel within the free trade area" and "threaten the movement of commerce by placing financial barriers around the State ...."[65] The Court went on to state that if "each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."[66] The Court pointed to a line of cases invalidating unapportioned flat taxes to illustrate the principle that flat taxes discriminate in favor of intrastate businesses because "the very nature of the market that interstate operators serve prevents them from making full use of the

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[59] *Id.* at 283-284.
[60] *American Trucking Associations , Inc. v. State* (N.J. 2004) 852 A.2d 142.
[61] *Container Corp.*, 463 U.S. at 170; *Mobile Oil Corp.*, 445 U.S. at 444.
[62] *Container Corp.*, 463 U.S. at 170-171.
[63] *Id.* at 171.
[64] The U. S. Supreme Court has found the license fees at issue which bore "no relation to the volume of business done" were in "flat amounts." *McGoldrick v. Berwind-White Coal Mining Co.* (1940) 309 U.S. 33.
[65] *Scheiner,* 483 U.S. at 284.
[66] *Id.*

privilege of doing business for which they have paid to the State," placing interstate operators at a financial disadvantage to intrastate operators.[67] Moreover, the Court explained that flat taxes can "divide and disrupt" the interstate market because if adopted by multiple jurisdictions, the tax would place much heavier burden on an interstate operator than an intrastate operator.[68]

Measure U Tax fits squarely into this discussion. It is a flat tax with complete disregard for a taxpayer's business activity or receipts in Rialto. It discriminates against interstate commerce because if other states imposed a similar tax, taxpayers like SFPP that store and sell fuel in more than one state will be subject to multiple taxes while a competitor that only stores and sells fuel in one place will only be subject to the tax once.

The U.S. Supreme Court has also found taxes subjecting nonresident businesses to higher tax rates than those applied to local businesses equally offensive and violative of the Commerce Clause.[69] In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, Mississippi imposed a tax on out-of-state laundries for the privilege of soliciting business in the state. Under that taxing scheme, laundries not licensed in Mississippi had to pay $50 for each truck used to pick up and deliver laundry whereas their in-state counterparts only had to pay $8 per truck. The Court found this tax contravened the Commerce Clause because it obstructed the flow of interstate commerce.[70]

Similarly, the Measure U Tax subjects nonresident oil companies to higher tax rates than local businesses. In practice, the Measure U Tax only applies to four out-of-state oil companies—SFPP, Equilon, Phillips 66, and Tesoro. No other companies are subject to this tax. These four companies collectively pay in total four times what the entire business license tax revenue program was worth the year before. Simply put, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[71] Clearly, these four companies, all domiciled outside of Rialto and California, are being singled out for the benefit of local businesses and residents.[72]

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[67] *Id.* at fn. 16.
[68] *Id.* at 285 & fn. 20.
[69] *Memphis Steam Laundry Cleaner v. Stone, Inc.*(1952) 342 U.S. 389.
[70] *Id.* at 394-395
[71] *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon* (1994) 511 U.S. 93, 99; *see also Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263, 273.
[72] In fact, no other businesses, except warehouses and contractors, are subject to a flat fee for business activities in Rialto. As to warehouses, RMC §5.14.020 states: "For purposes of generating more revenue for the city, every person, corporation or association of persons engaged in the operation of a warehouse or distribution facility shall be licensed and the requisite fee paid, whether formulated by the prior year's gross receipts, or calculated using the square footage of the facility, as chosen by the applicant." RMC. §5.14.060 also states in pertinent part: "The license fee for operating, conducting or carrying on such warehouse is an amount set from time to time by city council resolution per calendar year." As to contractors, RMC §5.56.040 states: "The rate of license fee for contractors and subcontractors shall be determined from time-to-time by resolution of the city council."

2. The Measure U Tax discriminates against intrastate commerce.

As discussed above, California courts have used the federal Commerce Clause analysis to prohibit taxes that unfairly discriminate against intercity businesses. Several California appellate courts have struck down municipal business licenses because they discriminated against intrastate commerce.

In *Union Oil Co. of California v. City of Los Angeles*, the court examined the city's payroll tax and business license tax scheme. Under the city's ordinance, a taxpayer located within the city and who paid payroll tax was exempt from the business license tax. But, the exemption did not apply to intercity or interstate taxpayers performing the same activity in the city.[73] The court held this alternative taxing scheme violated intrastate commerce because it subjected taxpayers operating in multiple locations to multiple taxes (payroll and business license taxes) whereas local taxpayers were subject to only one tax (business license tax).[74]

Similarly in *General Motors Corp. v. City of Los Angeles*, the city had a separate tax on selling and a separate tax on manufacturing.[75] While local manufacturers paying the manufacturing tax were exempt from the selling tax, this exemption did not apply to out-of-city manufacturers. The court held this taxing scheme was unconstitutional because it discriminated against intrastate commerce.[76]

While the Measure U tax is not an alternative taxing scheme directly subjecting intercity taxpayers to multiple taxes or exempting an in-city taxpayer, the tax is nevertheless targeted specifically against four intercity taxpayers that engage in intrastate commerce through their operation of product pipeline and storage facilities in California. No one else pays this tax. In fact, the resolution placing Measure U on the ballot explicitly stated the purpose of Measure U was to "increase revenues without placing a burden on the residents of the City of Rialto ...."[77] For all practical purposes, the Measure U tax specifically subjects four intercity oil companies to a tax that is not imposed on any local companies. This is the hallmark of intrastate discrimination.

C. The Measure U tax is illegal because it is not fairly related to the services provided by Rialto.

The Measure U tax is not fairly related to the services provided by Rialto. In *Commonwealth Edison Company v. Montana*, the U.S. Supreme Court addressed the relevant inquiry under this prong of the Commerce Clause analysis.[78] In that case, Montana imposed a 30 percent severance tax on the value of coal mined in the state.[79] The taxpayers argued the tax violated the Commerce Clause, relying heavily on the fourth prong of the *Complete Auto* test – the tax was not fairly related to the services provided by the state. The Court stated the relevant test under this prong is whether "the *measure* of the tax [is] reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer

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[73] *Union Oil Co. of Cal. v. City of Los Angeles* (2000) 79 Cal.App.4th 383, 387.
[74] *Id.* at 388-389.
[75] *General Motors Corp.v. City of Los Angeles* (1995) 35 Cal.App.4th 1736.
[76] *Id.* at 1743-1749, 1752.
[77] City of Rialto, Resolution 6580.
[78] *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609.
[79] *Id.* at 612-613.

in the State that may properly be made to bear a 'just share of state tax burden ....'"[80] Moreover, "incidence of the tax *as well as its measure* [must be] tied to the earnings which the State ... has made possible ...."[81] The Court held Montana's coal tax satisfied this test. Because the tax was measured as a percentage of the value of the coal removed from the state, the tax was in "proper proportion" to the taxpayers' activities in Montana and their "enjoyment of the opportunities and protections" afforded by the state in connection with those activities.[82]

Unlike the coal tax in *Commonwealth Edison Company*, the Measure U tax is not reasonably related to the extent of the taxpayer's activities in Rialto. The storage capacity of tank farms in Rialto has no relation to the taxpayer's activities within Rialto nor is it an accurate measure of the taxpayer's earnings attributable to Rialto.

Further, the excessive nature of the Measure U tax is unrelated to any benefits the tank farms may receive from the City of Rialto or any burdens the business may impose on Rialto city resources. By the City's own admission, the tax on the four Rialto tank farm operators went from $120,000 per year collectively, to $12 million. The entire Rialto Business License Tax program collected $3 million the year before Measure U went into effect.[83] But it would be absurd to assert that the tank farm operators enjoyed four times the benefit or created four times the burden on city resources of all other Rialto businesses combined. In fact, in *Sprout v. City of South Bend*, the U.S. Supreme Court stated that a flat tax "could hardly have been designed as a measure" of the benefits provided by the state.[84] Moreover, city revenues generated from this massive tax increase are expected to account for 20 percent of Rialto's total annual revenue —that is, 20 percent from all sources, such as property tax, sales tax, and all other business licenses taxes and fees.

IV. The Measure U tax is illegal because it violates California Government Code Section 37101.

California Government Code section 37101 requires that business license taxes reflect the proportion of economic activity attributable to the taxing jurisdiction. It states, in pertinent part, as follows:

> (a) The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city, including shows, exhibitions, and games. [....]
> (b) Any legislative body, including the legislative body of a charter city, that levies a license tax pursuant to subdivision (a) upon a business operating both within and outside the legislative body's taxing jurisdiction, ***shall levy the tax so that the measure of tax fairly reflects that proportion of the taxed activity actually carried on within the taxing jurisdiction.***[85]

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[80] *Id.* at 626.
[81] *Id.* (citation and internal quotation marks omitted).
[82] *Id.* (citation and internal quotation marks omitted).
[83] City of Rialto, Fiscal Year 2014-2015 Adopted Budget, at 167-168.
[84] *Sprout v. City of South Bend* (1928) 277 U.S. 163, 170.
[85] Cal. Gov. Code § 37101 (emphasis added).

In *Brabant v. City of South Gate*, the California Court of Appeal held that a city license tax imposed on real estate brokers was void because, among other things, there was no apportionment of tax "as to the quantum of the transaction actually done in the taxing city."[86] While the city argued the tax was a legitimate exercise of the city's taxing power under Government Code section 37101, the court noted the tax must, among other things, be fairly related to the proportion of taxed activity actually taking place within the taxing jurisdiction.[87]

Similarly, the Measure U tax violates Government Code section 37101 because the measure of the tax does not fairly reflect the proportion of the SFPP's activities carried on within Rialto. In stark contrast with almost every other type of business in Rialto that pays taxes based on a percentage of gross receipts,[88] the Measure U tax is measured on the storage capacity of the tanks. A tax based on the size of property within Rialto simply has no relation to the business activity that a taxpayer conducts within Rialto's borders.

V. The Measure U tax is illegal because as a property related fee or charge, it was not passed by two-thirds vote of the electorate as required under Article XIII D of the California Constitution.

Article XIII D of the California Constitution ("Article 13D") governs fees "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[89] As a way of background, in 1996, California voters approved Proposition 218, which added articles XIII C and XIII D to the state Constitution.[90] Proposition 218 restricted local governments attempting to raise funds from property owners to four methods: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a "fee" or "charge" for property related services.[91]

While the Measure U tax was designed as a general tax, the "tax" is in fact a property related fee or charge as defined under Article 13D. The fee or charge imposed under Measure U is invalid because it was enacted without the requisite two-thirds vote of the electorate residing in the affected area as required under Article 13D.[92]

A fee or charge[93] is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed ... upon a parcel or upon a person as an incident of property ownership, including a user fee or

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[86] *Brabant v. City of South Gate* (1977) 66 Cal. App. 3d 764, 771.
[87] *Id.*
[88] Again, the only two exceptions are contractors and warehouses. (RMC §§ 5.14.020, 5.56.040).
[89] Cal. Const., art. XIII D, §§1, 2, subd. (e).
[90] *See Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 682.
[91] Cal. Const. art. XIII D, § 3; *Howard Jarvis Taxpayers Ass'n. v. City of Fresno* (2005) 127 Cal.App.4th 914, 918.
[92] A general tax increase only requires a simple majority vote of the electorate. Cal. Const. art. XIII C §6, subd (c). Measure U was placed on the ballot for the November 4, 2014 election, where it was narrowly approved –by a tally of 4,437 to 4,176, a total of 261 votes (51.52% to 48.48%).
[93] Because the term "fee" or "charge" is used interchangeably, we will use the term "fee."

charge for a property related service."[94] According to the California Supreme Court, the hallmark of a property related fee is that "it applies only to exactions levied solely by virtue of property ownership."[95]

In *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*, the California Supreme Court examined whether an inspection fee imposed on owners of all residential rental property fell within the scope of Article 13D as a fee incident of property ownership.[96] The court held the inspection fee was not "subject to the constitutional strictures" because it burdened the owners not as owners of property but as owners of a business, i.e., as a landlord.[97] If these owners no longer operated the rental business, they would not be subject to the fee.

In *Richmond v. Shasta Community Services District*, the property owners challenged the constitutionality of a fire suppression fee that was charged as part of a water connection fee imposed by a water district.[98] The property owners argued the fee satisfied the definition of a "fee or charge" under Article 13D and as such, that fee was prohibited by Article 13D which states "[n]o fee or charge may be imposed for general governmental services including, but not limited to ... fire ... services ... ."[99] The court disagreed, stating the fee is not imposed simply by virtue of property ownership, but is instead imposed as an incident of the owners' voluntary decision to request water service.[100] However, the court distinguished the connection fee from a fee for an ongoing water service through an existing connection. According to the court, the latter is a fee imposed as an incident of property ownership because "it requires nothing other than normal ownership and use of property."[101] In *Bighorn-Desert View Water Agency v. Verjil*, the California Supreme Court expanded on the *Richmond* decision and stated that all charges for water delivery after the initial connection are charges for property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee.[102]

In *Pajaro Valley Water Management Agency v. Amrhein,* the California Court of Appeal found that a groundwater augmentation fee constituted a "fee or charge" under Article 13D and held the fee was invalid because it did not conform to the requirements of Article 13D.[103] Based on *Richmond* and *Bighorn*, the court in *Pajaro* reasoned the groundwater augmentation fee was property related; the prior two cases made clear that fees such as water delivery fees are imposed as incident of property ownership because water usage is intimately connected with property ownership.[104] Here, the court found that a charge based on extraction of water from the ground is even more intimately connected with property ownership than the mere receipt of delivered water.[105]

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[94] Cal. Const., art. XIII D, § 2, subd. (e).
[95] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.
[96] *Id.* at 841-843.
[97] *Id.* at 842.
[98] *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409.
[99] Cal. Const., art. XIII D, § 6, subd. (b)(5); *Richmond*, 32 Cal.4th at 425.
[100] *Richmond*, 32 Cal.4th at 426.
[101] *Id.* at 427.
[102] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217.
[103] *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1384, 1393.
[104] *Id.* at 1391.
[105] *Id.*

The fee imposed under Measure U is levied solely by virtue of property ownership. Unlike the inspection fee in *Apartment Association* and the connection fee in *Richmond*, Measure U imposes a fee on owners of storage tanks for simply owning the property—it makes no difference whether the owner is in the business related to tank farms. The fact the ballot analysis for Measure U characterizes the fee as a "business license tax on businesses engaged in owning, operating, leasing, supplying or providing one or more wholesale liquid fuel storage facilities" is inapposite. The fee is only applicable to four taxpayers that own liquid fuel storage facilities. It does not matter whether these taxpayers are engaged in the business of operating, leasing, supplying or providing the storage tanks; as long as they own the tanks, they are subject to the fee under Measure U. It does not even matter whether they use the tanks or not because the rate of the fee is based on storage capacity, not actual use of the tanks.

The facts under this case point even more strongly to a property related fee than the water delivery fee discussed in *Bighorn* and the groundwater augmentation fee in *Pajaro*. While the fees in those cases were imposed on delivery and extraction of water, the fee at issue in this case is more than "intimately connected with property ownership" because it is charged on the ownership of the property itself and measured by the storage capacity of that property. As the court stated in *Richmond*, the fee under Measure U "requires nothing other than normal ownership ... of property."[106]

Because the fee under Measure U is imposed as an incident of property ownership (*i.e.*, ownership of the tanks), it must satisfy the constitutional requirements imposed under Article 13D. With certain exceptions inapplicable here, a fee imposed as an incident of property ownership requires approval by either (1) majority of the property owners of the property subject to the fee or charge; or (2) a two-thirds vote of the electorate residing in the affected area.[107]

Here, there is no question that a majority of the property owners of the property subject to the fee or charge—four out-of-state oil companies—the only owners of the storage tanks subject to the fee imposed under Measure U—did not approve the fee. Accordingly, under Article 13D, Section 6(c), Measure U was required to be approved by the two-thirds vote of the electorate residing in Rialto. This requirement was not satisfied because Measure U was passed only by a very narrow margin—51.52 percent to 48.48 percent.[108]

VI. The Measure U tax violates the Equal Protection Clause.

The Fourteenth Amendment of the federal Constitution and article I, section 7, of the California Constitution provide that no person shall be denied equal protection of the laws.[109] "These constitutional provisions require that persons who are similarly situated receive like treatment under the law and that statutes may single out a class for distinctive treatment only if that classification bears a rational relationship to the purposes of the statute. Thus, if a law provides that one subclass receives

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[106] *Richmond*, 32 Cal.4th at 427.
[107] Cal. Const., art. XIII D, § 6, subd. (c). The fee imposed by Measure U also does not satisfy the procedural requirements set forth under Article XIII D, Section 6, subdivisions (a) and (b).
[108] Courts have held that the text, history, and purpose of Proposition 218 supports the conclusion that registered voters comprise the "electorate." *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 778-779.
[109] U.S. Const., 14th Amend., § 1; Cal. Const., srt. I, § 7.

different treatment from another class, it is not enough that persons within that subclass be treated the same. Rather, there must be some rationality in the separation of the classes."[110]

To determine whether a classification bears a rational relationship to the purposes of the statute, two requirements must be met. First, "courts will look for a rational basis for the class of persons selected to pay the tax" (the rational basis test).[111] Second, "the classification must bear a reasonable relation to a legitimate governmental purpose. Arbitrary and capricious classifications are not permitted."[112] Also, the "persons who are to *pay* the tax must be a 'reasonably justifiable subclassification' of persons; otherwise, 'the operation of the tax must be such as to place liability therefor equally on all members of the class.'"[113]

In *Britt v. City of Pomona,* the city of Pomona enacted a Transient Occupancy Tax in 1965 which assessed a tax on "transients" which was defined as one who occupied "lodging" for 60 days or less.[114] Immediately prior to 1987, the city amended that provision to reduce the 60-day period to 30 days. In 1987, the city again amended the provision, deleting any reference to the time-period requirement such that the tax was imposed on anyone who occupied a portion of a "hotel." This resulted in all persons living in hotels paying this tax regardless if they were there for a short or indefinite period.[115] In 1988, the city changed the name of the tax to "Occupancy Tax," changed references to "transient" to "lodger," and exempted any person living in a hotel under a tenancy contract.[116]

The plaintiffs in *Britt* lived in an apartment, boarding house, and motel in Pomona and intended to stay there indefinitely.[117] The plaintiffs filed suit against the city, arguing that the 1987 and 1988 versions of the tax violated the federal and California Equal Protection Clause.[118] Specifically, the plaintiffs alleged that the tax imposed a burden on one group (transients) and not on another group (nontransients) and such burden affects transients without any rational basis reasonably related to a valid governmental purpose.[119] Furthermore, plaintiffs argued that the tax, "on its face, was overinclusive and, as applied, was both overinclusive and underinclusive" and thus, was "arbitrary and impermissible."[120] The California Court of Appeal agreed with the plaintiffs.[121] First, the court held that there was no rational basis for the subclassifications of persons selected by the city to pay the 1987 and 1988 transient occupancy taxes (e.g., persons who live in "transient-type" accommodations).[122] The court reasoned that "[t]hey make a classification which, from the standpoint of the plaintiffs and the other persons required to pay those taxes, is not reasonable. While plaintiffs' circumstances (economic

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[110] *Britt v. City of Pomona* (1990) 223 Cal.App.3d 265, 274.
[111] *Id.*
[112] *Id.*
[113] *Id.* (quoting *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282, 285-286.
[114] *Id.* at 269-270.
[115] *Id.*
[116] *Id.* at 271-272.
[117] *Id.* at 270-271.
[118] *Id.* at 273.
[119] *Id.* at 271.
[120] *Id.*
[121] *Id.* at 277-278.
[122] *Id.* at 277.

or otherwise) may prevent them from renting apartments and houses, their basic needs are the same as those of persons who do live in these more traditional forms of housing and who do not have to pay the taxes."[123]

The court further noted that the analysis set forth in *Kelly v. City of San Diego* equally applied to this case.[124] In *Kelly,* the city enacted an ordinance that required persons who resided in trailers in the city of San Diego to pay a tax of 10 cents per day, while no such tax was imposed on transients living in hotels or lodging houses or persons without property taxable by San Diego who occupied furnished apartments and furnished houses.[125] Holding that the ordinance was discriminatory and void, the Court of Appeal reasoned that "[w]hat might be the basis of a valid division of owners into classes cannot serve as the foundation for a lawful classification of an entirely different class ... ."[126] The court further stated that "[t]he license tax involved here has nothing to do with the ownership of property. It is a charge imposed on the right of certain people to occupy a certain kind of dwelling that affords some protection from the elements. It is a tax on occupancy. The house, apartment, hotel or lodging furnishes protection from the elements as does the trailer. We can see no valid distinction, for the purpose of classification, between the occupancy of a trailer and the occupancy of a permanent structure except perhaps the greater comfort and convenience of the latter and the higher rent paid."[127]

Similarly, there is no difference between the tanks used by companies like SFPP to store liquid fuel and those used by retail gas stations. The only difference between the two is that, for the former, the tanks are located above ground whereas, for the latter, the tanks are located below ground. Both tanks, however, are used to store liquid fuel. Despite the fact that these companies are all similarly situated and that the only real distinction between the two is the former sells on a wholesale basis while the latter sells on a retail basis, the City of Rialto has enacted Ordinance No. 1556 which arbitrarily subclassifies companies owning, operating, leasing, supplying, or providing wholesale liquid storage facilities and imposes a tax on those companies at a substantially higher rate than the tax imposed on retail gas stations. Because of this, there is no rational basis for the subclassification of companies selected by the City of Rialto to pay the Measure U tax.

And there is no reasonable relation between the subclassification and the City of Rialto's stated purposes for the tax. In *Britt,* the court further found that there was no reasonable relation between the subclassification and the proffered legislative purposes.[128] Specifically, the court reasoned that the city's classification of transient-type accommodations was not rationally related to the achievement of the legitimate governmental objectives set out by the city.[129] The court noted, inter alia, that, "while the tax helps pay for the services which the City provides to persons who reside within its boundaries, those same services are provided to all persons who occupy housing not owned by them, whether they live in

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[123] *Id.*
[124] *Id.*at 275 (citing *Kelly v. City of San Diego* (1944) 63 Cal.App.2d 638).
[125] *Kelly,* 63 Cal.App.2d at 640-641.
[126] *Id.* at 644.
[127] *Id.* at 643-644.
[128] *Britt,* 223 Cal.App.3d at 277.
[129] *Id.*

transient-type housing or not. Yet, the tax is imposed on only a portion of those persons and therefore does not treat similarly situated persons equally."[130]

Similarly, the City of Rialto has stated that the Measure U tax will generate revenues that will be used for city service needs and yet the tax is imposed only on a portion of companies that store liquid fuel and thus does not treat similarly situated persons equally. In Ordinance No. 1556, the stated purpose for the Measure U tax is: "to raise revenue for general fund expenditures. Examples of some general fund expenditures includes: obtaining, providing, operating, maintaining and expanding essential fire and police protection services facilities and equipment; paying the salaries and benefits for new personnel needed to restore and expand essential services; and for such services, expenses, capital improvements and other general city expense, as determined by the City Council within the Council discretion for general fund expenditures." In the "Argument in Favor of Measure U," proponents of the tax argued that these facilities cost the City considerably for emergency equipment, personnel, and planning. However, the reality is that retail gas stations that use similar liquid fuel storage facilities also cost the City considerably for emergency equipment, personnel, and planning. There is no real difference between the two, and their respective burdens on the city are substantially similar. The Measure U tax is imposed on only a portion of those companies and therefore does not treat these similarly situated companies equally.

Based on the above, it is clear that Ordinance No. 1556 violates the federal and California Equal Protection Clause because there is no rational basis for the subclassification of companies selected by the City of Rialto to pay the tax and such classification is not rationally related to the achievement of the legitimate governmental objective set out by the City of Rialto for this tax.

VII. The Measure U tax violates the Due Process Clause.

The Fourteenth Amendment of the federal Constitution and article I, section 7 of the California Constitution provide that no person may be deprived of life, liberty, or property without due process of law.[131] Federal and state courts have held that due process of law is violated by "'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[132] To pass muster, a statute must (1) give fair notice of the practice to be avoided, and (2) provide reasonably adequate standards to guide enforcement.

In *Britt,* the plaintiffs argued that both the 1987 and 1988 versions of the transient occupancy tax were vague.[133] First, the plaintiffs alleged that, in the 1987 version, the text of the law appears to be directed at true transients, but in fact applied to all persons living in the hotels, even those living under a fee interest in the hotel.[134] The plaintiffs further argued that the ordinance contained circular

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[130] *Id.* at 277-278.
[131] U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.
[132] *Britt,* 223 Cal.App.3d at 278 (quoting *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391).
[133] *Id.* at 278-279.
[134] *Id.*

definitions.[135] For example, the definition of "transient" was one who occupied a "hotel" but the definition of "hotel" was a structure which was occupied or intended to be occupied by "transients." Therefore, based on those problems, the court held that one could reasonably conclude that the 1987 version of the tax did not give fair notice of who exactly was to pay the tax nor did it provide reasonably adequate standards to guide enforcement.[136]

The *Britt* court further found that the 1988 version contained the same vagueness problems plus additional ones.[137] For example, although this version excluded lodgers who occupied the hotel on a tenancy basis, the court found that a lodger could be a longtime occupant of a hotel and still not live there on a tenancy basis.[138] The court also noted that the 1988 tax was vague because it established a conclusive presumption with respect to the duty to pay the tax without defining an important term ("transient lodging accommodations") used in the language of the ordinance which established the presumption.[139] Accordingly, the court held that the ordinance violated the federal and California Due Process Clause because it failed to give fair notice of who exactly was to pay the tax and did not provide reasonably adequate standards to guide enforcement.[140]

Similarly, the ordinance underlying the Measure U tax fails to give fair notice of who exactly was to pay the tax and did not provide adequate standards to guide enforcement. Like the ordinance at issue in *Britt,* Ordinance No. 1556 is vague as it fails to define many significant terms. The Measure U tax is imposed on "[a]ny person engaged in the business of owning, operating, leasing, supplying or providing a wholesale liquid fuel storage facility" and such person "shall pay an annual business license tax of up to One Dollar ($1.00) per year for each One (1) cubic foot of liquid fuel storage capacity."[141] The only term defined in the ordinance is "fuel." "Fuel" is defined as "all combustible gases and liquids suitable for the generation of power, heat or energy for propulsion of motor vehicles, whether refined petroleum, coal or synthetically produced or manufactured. Fuel includes all types of gasoline, gasoline blendstocks, diesel, heating oil, kerosene, ethanol, propane, natural gas, and any bio-fuels manufactured, defined or derived from plant based cellulose or other carbon based materials."[142]

Although "fuel" is defined, several other terms are not defined, such as "person," "wholesale liquid fuel storage facility," and "liquid fuel storage capacity." These terms/phrases are necessary for one to determine if they are in fact subject to the tax and for the county to know who is liable for the tax. Therefore, because the ordinance is vague, it fails to give fair notice of who exactly is to pay the tax, and fails to provide reasonably adequate standards for the City to guide enforcement. Accordingly, Ordinance No. 1556 violates the federal and California Due Process Clause.

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[135] *Id.* at 279.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 280.
[139] *Id.*
[140] *Id.* at 279-280.
[141] City of Rialto, Ordinance No. 1556.
[142] *Id.*

VIII. The Measure U Tax Violates State Law Restricting Local Taxes on Storage or Use of Tangible Personal Property.

California imposes a use tax upon the storage, use, or other consumption of tangible personal property.[143] Under the Bradley-Burns Uniform Local Sales and Use Tax Law,[144] local governments are also entitled to impose a use tax so long as, among other things, the provisions of the local use tax are identical to those in the state use tax law and the local government contracts with the State Board of Equalization to perform all functions incident to the administration and operation of the local use tax ordinance.[145] Under Bradley-Burns, the Board cannot administer and shall terminate its contract to administer any local sales or use tax if the local government imposes a sales or use tax in addition to the sales and use taxes permitted by Rev. & Tax Code §§ 7202 and 7203. (Rev. & Tax. Code § 7203.5.)

Whereas the state use tax only applies to tangible *personal* property, the use tax imposed by Measure U applies to certain *real* property.[146] Measure U therefore creates nonuniformity between the state use tax, which only taxes personal property and the City's use tax regime, which now taxes certain real property.[147] This violation has two consequences under California law: (1) Section 7203.5 requires that the Board cancel its contract with the City for administration of the City's Bradley-Burns use tax; (2) Because general law cities such as Rialto "do not have the authority to impose separately administered local sales and use taxes which do not conform to the Bradley-Burns Uniform Local Sales and Use Tax Law"—such as Measure U—"whether or not there is an operative county uniform sales tax ordinance administered by the State Board of Equalization," the City must refund any taxes collected under this unlawful regime.[148]

CONCLUSION

The Measure U tax is illegal because it: (1) is an illegal property tax in violation of the California Constitution; (2) discriminates against state assessees in violation of the California Constitution; (3) violates the Commerce Clause; (4) violates Government Code Section 37101 and its requirement of proportionality; (5) violates Article 13D of the California Constitution as an illegal property-related charge; (6) violates the Equal Protection Clause; (7) violates the Due Process Clause and (8) violates Bradley-Burns as a nonuniform use tax. We also contend it is a confiscatory tax.

For these reasons, we respectfully request that the City grant our appeal, withdraw the Measure U tax assessments and refund any amounts paid.

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[143] Rev. & Tax. Code § 6201.
[144] Rev. & Tax Code § 7200 et seq.
[145] Rev. & Tax. Code §§ 7202-7203.
[146] Liquid fuel storage tanks are real property. See Rev. & Tax Code § 104(c) ("real property" and "real estate" include "improvements"); and Rev. & Tax. Code § 105(a) ("improvements" include all "All buildings, structures, fixtures, and fences erected on or affixed to the land").
[147] See also Rev. & Tax. Code § 7203 (local governments may impose a complementary tax upon the storage, use or other consumption of "tangible *personal* property"). (Emphasis added.)
[148] Attorney General Opinion No. 70-51, 1970 Cal. AG LEXIS 78; 53 Ops. Cal. Atty. Gen. 292
October 30, 1970

Sincerely,

John Lynn Smith
Reed Smith LLP
Counsel for SFPP., L.P.

ReedSmith

TAXPAYER STATEMENT

The undersigned is the "employee of the business having the highest level of day to day knowledge of and responsibility for the information" relating to the Rialto Business License Tax within the meaning of Section 5.04.040.C.iv of the Rialto Municipal Code. We reserve the right to submit additional facts, grounds for relief and points and authorities in support of our position.

Dated: Sept 15, 2017

SFPP, L.P.

Jeffrey R. Hulbert
Director-Accounting (Pacific Region)

EXHIBIT A

MEASURE U PROCEDURAL STIPULATION

The parties to this agreement are the CITY OF RIALTO ("City") on the one hand, and PHILLIPS 66 COMPANY, S.F.P.P., L.P./KINDER MORGAN, EQUILON ENTERPRISES/SHELL PRODUCTS US, and TESORO PETROLEUM (collectively "Companies") on the other hand. "City" and "Companies" shall collectively constitute the "Parties" to this stipulation.

WHEREAS, on or around September 3, 2015 City issued tax assessment notices to Companies pursuant to Rialto Municipal Code § 5.04.028 (adopted as Measure U by the voters at the November 4, 2014 election), Rialto Ordinance No. 1556, and Rialto Resolution No. 6685; and

WHEREAS, Companies dispute the legality of the assessments issued on or around September 3, 2015 and have filed claims and appeals with City seeking refunds of the amount paid or to be paid by Companies to City for those assessments; and

WHEREAS, Companies have paid under protest to City some or all of the amounts sought by City in those assessments, an amount expected to total in the millions of dollars;

WHEREAS, Companies' claims challenge the legality of the tax imposed by Measure U; and

WHEREAS, Companies have filed administrative appeal and claim documents with City requesting cancellation of the assessments and claiming refunds of amounts paid; and

WHEREAS, Companies' appeal and claim documents set forth in detail their respective grounds for challenging the legality of the Measure U tax; and

WHEREAS, the parties desire to resolve the underlying merits of the legality of the Measure U tax efficiently, without incurring unnecessary legal fees and costs;

THE PARTIES DO HEREBY stipulate and agree as follows:

1. City agrees that the appeal and claim documents Companies have filed meet the requirements of Chapter 1.14 of the Rialto Municipal Code and Government Code Sections 910 and 915.

2. City agrees that the 45-day period within which to respond to the Companies' claims has expired and thus these claims are deemed denied under Rialto Municipal Code Section 1.14.60 and Government Code Section 912.4.

3. City thus agrees that Companies have exhausted all administrative remedies.

4. This agreement may be signed in counterpart originals, and facsimile or scanned PDF signatures shall be deemed to be original signatures.

Dated: January 5, 2016

CITY OF RIALTO

By: _____

Print: _____

Dated: January __, 2016

PHILLIPS 66 COMPANY

By: _____

Print: _____

Dated: January __, 2016

S.F.P.P., L.P./KINDER MORGAN

By: _____

Print: _____

Dated: January __, 2016

EQUILON ENTERPRISES, L.P./SHELL

By: _____

Print:_____

Dated: January __, 2016

TESORO PETROLEUM

By:_____

Print:_____

APPROVED AS TO FORM BY COUNSEL:

Dated: January 4, 2016

ALESHIRE & WYNDER, LLP

By: FRED GALANTE
JUNE S. AILIN
Counsel for City of Rialto

Dated: January __, 2016

NIELSEN, MERKSAMER, PARRINELLO, GROSS & LEONI, LLP

By: KURT R. ONETO
CHRISTOPHER E. SKINNELL
Counsel for Phillips 66 Company

Dated: January __, 2016

REED SMITH, LLP

By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for S.F.P.P., L.P/Kinder Morgan

Dated: January __, 2016

REED SMITH, LLP

By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for Equilon Enterprises, L.P./Shell

Dated: January __, 2016

MANATT, PHELPS & PHILLIPS, LLP

By: RONALD B. TUROVSKY
JEFFREY A. MANNISTO
Counsel for Tesoro Petroleum

2. City agrees that the 45-day period within which to respond to the Companies' claims has expired and thus these claims are deemed denied under Rialto Municipal Code Section 1.14.60 and Government Code Section 912.4.

3. City thus agrees that Companies have exhausted all administrative remedies.

4. This agreement may be signed in counterpart originals, and facsimile or scanned PDF signatures shall be deemed to be original signatures.

Dated: January __, 2016

CITY OF RIALTO

By:_____

Print:_____

Dated: January 4, 2016

PHILLIPS 66 COMPANY

By: Kerry Creager

Print: Kerry Creager

Dated: January __, 2016

S.F.P.P., L.P./KINDER MORGAN

By:_____

Print:_____

Dated: January __, 2016

EQUILON ENTERPRISES, L.P./SHELL

By:_____

2. City agrees that the 45-day period within which to respond to the Companies' claims has expired and thus these claims are deemed denied under Rialto Municipal Code Section 1.14.60 and Government Code Section 912.4.

3. City thus agrees that Companies have exhausted all administrative remedies.

4. This agreement may be signed in counterpart originals, and facsimile or scanned PDF signatures shall be deemed to be original signatures.

Dated: January 5, 2016

CITY OF RIALTO

By: _____

Print: _____

Dated: January __, 2016

PHILLIPS 66 COMPANY

By: _____

Print: _____

Dated: January __, 2016

S.F.P.P., L.P./KINDER MORGAN

By: _____

Print: _____

Dated: January 14, 2016

EQUILON ENTERPRISES, L.P./SHELL

By: _____

Print: _____

Dated: January 4, 2016

TESORO PETROLEUM

By: _____

Print: ALAN AU - MANAGING COUNSEL

APPROVED AS TO FORM BY COUNSEL:

Dated: January __, 2016

ALESHIRE & WYNDER, LLP

_____

By: FRED GALANTE
JUNE S. AILIN
Counsel for City of Rialto

Dated: January __, 2016

NIELSEN, MERKSAMER, PARRINELLO, GROSS & LEONI, LLP

_____

By: KURT R. ONETO
CHRISTOPHER E. SKINNELL
Counsel for Phillips 66 Company

Dated: January __, 2016

REED SMITH, LLP

_____

By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for S.F.P.P., L.P/Kinder Morgan

Dated: January __, 2016

REED SMITH, LLP

_____

EXHIBIT B

MEASURE U ESCROW AGREEMENT

The parties to this agreement are the CITY OF RIALTO ("City") on the one hand, and PHILLIPS 66 COMPANY, S.F.P.P., L.P./KINDER MORGAN, EQUILON ENTERPRISES/SHELL PRODUCTS US, and TESORO PETROLEUM (collectively "Companies") on the other hand. "City" and "Companies" shall collectively constitute the "Parties" to this escrow agreement.

WHEREAS, on or around September 3, 2015 City issued tax assessment notices to Companies pursuant to Rialto Municipal Code § 5.04.028 (adopted as Measure U by the voters at the November 4, 2014 election), Rialto Ordinance No. 1556, and Rialto Resolution No. 6685; and

WHEREAS, Companies dispute the legality of the assessments issued on or around September 3, 2015 and have filed claims and appeals with City seeking refunds of the amount paid or to be paid by Companies to City for those assessments; and

WHEREAS, Companies have or will shortly pay under protest to City some or all of the amounts sought by City in those assessments, an amount expected to total in the millions of dollars; and

WHEREAS, page 11 of the City of Rialto Fiscal Year 2015/2016 Annual Budget states that "By law, if taxpayers pay the Measure U tax under protest, the funds will have to be held in escrow until a settlement agreement is reached"; and

WHEREAS, Companies' claims challenge the validity of the tax imposed by Measure U, and the legal resolution of Companies' claims is expected to take several years; and

WHEREAS, Companies have a collective concern that even if they should prevail in their litigation and obtain a judicial order granting their claims for refund, City might be unable to pay; and

WHEREAS, because of the foregoing, Companies were prepared to seek a judicial order seeking an escrow of the Measure U funds subject to Companies' claims in an escrow account that was segregated from City's General Fund and all other funds;

THE PARTIES DO HEREBY stipulate and agree as follows:

1. City agrees to place Measure U funds received from Companies in 2015, and in all subsequent years until this agreement is terminated by the Parties ("Measure U Funds" or "MUF"), in an escrow account which is separately segregated from City's General Fund and all other funds.
2. City further agrees that until this agreement is terminated by the Parties, it will not commingle the MUF with any other funds, spend the MUF, or encumber the MUF in any manner (including securing a loan with the MUF).
3. In consideration for City's segregation of the MUF and forbearance from spending or otherwise encumbering the MUF, Companies agree not to pursue their judicial remedies to impose a mandatory escrowing of Measure U Funds.
4. The Parties further agree that this agreement terminates upon the earliest of the following: either (1) a judgment that is final following the expiration of any time to seek further appellate review or final appellate determination of the claims raised by Companies ("final judgment") resolving all of the claims in City's favor; (2) City's payment of the full amount claimed by Companies as refunds due; or (3) if the final judgment orders only a partial refund, payment by City of the amount ordered to be refunded.
5. This agreement may be signed in counterpart originals, and facsimile or scanned PDF signatures shall be deemed to be original signatures.

Dated: October __, 2015

CITY OF RIALTO

By: _____

Print: DEBORAH ROBERTSON

Dated: September __, 2015

PHILLIPS 66 COMPANY

By: _____

Print: _____

Dated: September __, 2015

S.F.P.P., L.P./KINDER MORGAN

By: _____

Print: _____

Dated: September __, 2015

EQUILON ENTERPRISES, L.P./SHELL

By: _____

Print: _____

Dated: September __, 2015

TESORO PETROLEUM

By: _____

Print: _____

Dated: September __, 2015

CITY OF RIALTO

By: _____

Print: _____

Dated: September 22, 2015

PHILLIPS 66 COMPANY

By: Kerry Creager

Print: Kerry Creager

Dated: September __, 2015

S.F.P.P., L.P./KINDER MORGAN

By: _____

Print: _____

Dated: September __, 2015

EQUILON ENTERPRISES, L.P./SHELL

By: _____

Print: _____

Dated: September 23, 2015

TESORO PETROLEUM

By: _____

Print: ALAN AU - MANAGING COUNSEL

Dated: September __, 2015

CITY OF RIALTO

By:_____

Print:_____

Dated: September __, 2015

PHILLIPS 66 COMPANY

By:_____

Print:_____

Dated: September 23, 2015

S.F.P.P., L.P./KINDER MORGAN

By: [signature]

Print: Gary L. Peim

Dated: September __, 2015

EQUILON ENTERPRISES, L.P./SHELL

By:_____

Print:_____

Dated: September __, 2015

TESORO PETROLEUM

By:_____

Print:_____

Dated: September __, 2015 CITY OF RIALTO

By:_____

Print:_____

Dated: September __, 2015 PHILLIPS 66 COMPANY

By:_____

Print:_____

Dated: September __, 2015 S.F.P.P., L.P./KINDER MORGAN

By:_____

Print:_____

Dated: September 22, 2015 EQUILON ENTERPRISES, L.P./SHELL

By:_____

Print: Wade Phillips, Sr. Tax Counsel

Dated: September __, 2015 TESORO PETROLEUM

By:_____

Print:_____

APPROVED AS TO FORM BY COUNSEL:

Dated: October 27, 2015 — ALESHIRE & WYNDER, LLP

By: FRED GALANTE
JUNE S. AILIN
Counsel for City of Rialto

Dated: September __, 2015 — NIELSEN, MERKSAMER, PARRINELLO, GROSS & LEONI, LLP

By: KURT R. ONETO
CHRISTOPHER E. SKINNELL
Counsel for Phillips 66 Company

Dated: September __, 2015 — REED SMITH, LLP

By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for S.F.P.P., L.P/Kinder Morgan

Dated: September __, 2015 — REED SMITH, LLP

By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for Equilon Enterprises, L.P./Shell

Dated: September __, 2015 — MANATT, PHELPS & PHILLIPS, LLP

By: RONALD B. TUROVSKY
JEFFREY A. MANNISTO

APPROVED AS TO FORM BY COUNSEL:

Dated: September __, 2015 ALESHIRE & WYNDER, LLP

By: FRED GALANTE
JUNE S. AILIN
Counsel for City of Rialto

Dated: September 22, 2015 NIELSEN, MERKSAMER, PARRINELLO, GROSS & LEONI, LLP

By: KURT R. ONETO
CHRISTOPHER E. SKINNELL
Counsel for Phillips 66 Company

Dated: September __, 2015 REED SMITH, LLP

By: MARDIROS H. DAKESSIAN
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Counsel for S.F.P.P., L.P/Kinder Morgan

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By: MARDIROS H. DAKESSIAN
JOHN L. SMITH
Counsel for Equilon Enterprises, L.P./Shell

Dated: September 22, 2015 MANATT, PHELPS & PHILLIPS, LLP

By: RONALD B. TUROVSKY
JEFFREY A. MANNISTO
Counsel for Tesoro Petroleum

EXHIBIT C

CITY OF RIALTO

150 SOUTH PALM AVENUE
RIALTO, CALIFORNIA 92376

RCVD 9-7-17
137 CONFIRMED

Kinder Morgan - SFPP LP.
2359 S. Riverside Ave.
Bloomington, CA
92376

HVT-PMP 92316

City of Rialto
California

July 27, 2017

Kinder Morgan- SFPP L.P.
2359 S. Riverside Avenue
Bloomington CA 92376
APN: 0258-051-31

Re: City of Rialto Business License Tax for Wholesale Liquid Fuel Storage Facilities located at 2359 S. Riverside Avenue – Notice of Assesssment

Dear Kinder Morgan- SFPP L.P.:

On November 4, 2014, the electorate of the City of Rialto approved Measure U and enacted a liquid fuel storage tax. Measure U is a business license tax on wholesale liquid fuel storage facilities located within the City.

On December 9, 2014, the Rialto City Council certified the election results and adopted Ordinance No. 1556 providing that any person engaged in the business of owning, operating, leasing, supplying or providing a wholesale liquid fuel storage facility shall pay an annual business license tax. On January 13, 2015, the City Council adopted Resolution No. 6685, which set the amount of the business license tax on wholesale liquid fuel storage facilities at one dollar ($1.00) per year per cubic foot of liquid fuel storage capacity.

Thank you for submitting the Business License Application and Supplemental Information Form received on 4/22/2015. Aerial photos and legal records indicate there are three addresses at the facility: 271 E. Slover Avenue, 2359 S. Riverside Avenue and 2319 S. Riverside Avenue and two Assessor's Parcel Numbers 0258-051-21 and 0258-051-31. Based on the Supplemental Information Form for the calendar year 2015, the Wholesale Liquid Fuel Storage Tax for the facility is $3,673,171 for 21 tanks (see enclosed Aerial Photo) totaling 3,673,171 cubic feet at a rate of $1.00 per cubic foot. Please remit the tax within 21 days of the date of this Notice of Assessment to:

City of Rialto
Business Licensing Division
150 S. Palm Avenue
Rialto, CA 92376

If there are any tanks listed in your Supplemental Application Information for Business License for Liquid Fuel Storage Facilities form you will not be using in calendar year 2017 such that you contend such tank(s) should not be subject to the business license tax under Ordinance No. 1556, you must submit the following supporting documents ("Unused Tank Documents"):

(1) A brief cover letter stating which tanks will not be used in calendar year 2017 , where each tank is listed and identified by tank number, address, terminal, and/or location, and the capacity of the tank in cubic feet and barrels;

(2) Any and all supporting documents identifying the unused tank by its tank number;

(3) Any and all supporting documents identifying the unused tank by its address, terminal, and/or location;

(4) Any and all supporting documents identifying the dimensions of the tank, including, but not limited to, full capacity in cubic feet and barrels.

Please submit your Unused Tank Documents within 10 days of the date of this Notice of Assessment to:

City of Rialto
Business Licensing Division
150 S. Palm Avenue
Rialto, CA 92376

Upon receipt of your submission, the City will reassess the Wholesale Liquid Fuel Storage Tax for your facilities, and send you a revised Notice of Assessment letter.

In accordance with Chapter 5.04.040 of the Rialto Municipal Code (RMC), you will have ten (10) ten days from the date of this Notice of Assessment to file an appeal. The RMC Chapter is included with this letter for your reference.

Should you have any questions, please do not hesitate to contact Gina M. Gibson, Business Licensing Division at ggibson@rialtoca.gov or call (909) 820-2517. Thank you in advance for your prompt payment.

Sincerely,

Robb Steel
Assistant City Administrator/Development Services Director
Development Services Department

Enclosures


271 E. Slover (portion)-2359 S. Riverside Avenue-2319 S. Riverside Avenue

Rialto Municipal Code Chapter 5.04.040

- Assessment of business license tax.

A. Notice of Assessment. Whenever the collector determines that any business license tax is due or may be due to the city from any business under this code, the collector may make an assessment of such business license tax and notify the business so assessed. The notice of assessment shall separately set forth the amount of the business license tax due and the amount of any penalties accrued to the date of the notice of assessment. The notice of assessment also shall notify the business of its right to appeal the assessment.

B. Service of Notice of Assessment. The notice of assessment shall be served upon the business so assessed by personal service or first class mail, postage prepaid, upon the individual who signed the business license application, or an individual identified in the business license application, or the individual who signed a statement under penalty of perjury at the address of the business contained in the business license application or in a statement required under this code, or to such other address registered by the business with the collector for the purpose of receiving notices pursuant to this code. For the purpose of this section, service of the notice of assessment shall be deemed complete at the time of personal service or deposit in the United States mail.

C. Notice of Appeal. Within ten days of date that service of the notice of assessment is complete, the business so served may appeal the assessment as provided herein. The notice of appeal shall be in writing and (i) identify the assessment and/or penalties being appealed, (ii) set forth the grounds of the appeal in particularity including any supporting documentation, (iii) specify the relief requested and (iv) signed by an officer, owner or employee of the business having the highest level of day to day knowledge of and responsibility for the information required by this code. The filing of a notice of appeal shall subject the business to the jurisdiction of the collector and the city administrator. The notice of appeal shall be served upon the collector by personal service or first class mail, postage prepaid, at the address on the notice of assessment. For the purpose of this section, service of the notice of appeal shall be deemed complete at the time of personal service or deposit in the United States mail.

D. Waiver of Appeal. If the business so assessed fails to request an appeal or fails to satisfy these appeal requirements within the time specified, the appeal right of the business so assessed shall be deemed waived, the proceedings prescribed by this section shall be deemed exhausted, and the amount of the assessment shall be final and immediately due and payable to the city plus penalties and interest as provided by this code, which shall continue to accrue until paid. The city shall have the right to bring an action in any court of competent jurisdiction to collect the amount of the assessment plus penalties and interest.

E. Time of Hearing on Appeal. The collector shall cause the appeal to be set for hearing before the city administrator not later than forty-five days after the date of receipt of the notice of appeal. Notice of the time and place of the hearing shall be served, by first class mail, postage prepaid, upon the business not later than fifteen days before the date set for the hearing and such notice may designate the documents required to be produced by the business no later than seven days before the hearing.

F. Record on Appeal. Upon receipt of a notice of appeal, the collector shall prepare the record on the subject matter of the appeal including the notice of assessment, the notice of appeal and the documents submitted by the business in response to the collector's request for

production under subsection E of this section. The collector also shall prepare a written response to the notice of appeal. The record on appeal and the response (except the business's documents produced under subsection E of this section) shall be served upon the business at least five days prior to the appeal hearing before the city administrator in the manner provided in subsection E of this section.

G. Hearing on Appeal. The hearing prescribed by this section shall be before the city administrator who shall preside over the hearing and make all ruling thereon; and the city administrator may be assisted by the city attorney. The business may submit such evidence relevant to the grounds specified in the notice of appeal; and the business shall bear the burden of proof thereon. The collector may submit such evidence relevant to the grounds specified in the notice of appeal. The city administrator may make inquiries of the business and the collector including their witnesses and documents. The city administrator may require the presentation of additional evidence by the business or the collector including the production of any documents. The hearing on appeal shall be limited to the grounds specified in the notice of appeal; and the city administrator may not consider any grounds not specified in the notice of appeal. The hearing may be continued from time to time by the city administrator. At the conclusion of the presentation of evidence at the hearing, the city administrator may require the business and the collector to submit a written summary of its case with sufficient time therefore before rendering a decision on the notice of appeal. At the conclusion of the presentation of evidence or the submission of written summaries as determined by the city administrator, the hearing shall be deemed completed.

H. Notice of Decision on Appeal. After completion of the hearing, the city administrator may affirm the assessment or decrease the assessment, in whole or in part, as the evidence may require. Within fifteen days after the hearing is completed, the city administrator shall issue a written notice of decision to the business and the collector, which shall be mailed to the business in the manner provided in subsection E of this section, including a copy of the affidavit or certificate of mailing to the business, on which date the decision on appeal shall be final.

I. Review of Decision on Appeal. Judicial review of the decision on appeal may be had pursuant to Code of Civil Procedure Section 1094.5 but only if a petition for writ of mandate is filed within the time limits specified in Code of Civil Procedure Section 1094.6. The notice of decision also shall notify the business that the time within which judicial review must be sought is governed by Code of Civil Procedure Section 1094.6.

J. Effect of Delay. Failure of the collector to comply with the times prescribed herein or any failure of the city administrator to complete any procedures within the times stated shall not affect the validity of any proceedings.

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Sent To: ROP STEEL - DEV. SVCS - CITY OF RIALTO

Street, Apt. No.; or PO Box No.: 150 SOUTH PALM AVE.

City, State, ZIP+4: RIALTO, CA 92376

PS Form 3800, August 2006 — See Reverse for Instructions