

City of Brisbane

Agenda Report

To: Mayor and Members of the City Council

From: Michael Roush, City Attorney

Meeting Date: February 15, 2018

Subject: Settlement of Litigation filed by SFPP (Kinder Morgan) against the City of Brisbane

Recommendation

Approve the attached Settlement Agreement concerning pending litigation filed by SFPP against the City of Brisbane and approve the attached Amendment to Lease in a final form as approved by the City Attorney.

Background

SFPP, L.P., part of Kinder Morgan, is an energy infrastructure company engaged in the transport and storage of fuels and chemicals. Pipelines carrying fuel products bring fuel to SFPP's terminal in Brisbane, where it is off-loaded into storage tanks, may be blended with various fuel additives, and is then picked up by fuel tankers and transported to locations at which the fuel is sold or used. SFPP is the only business of this type in the City. SFPP pipelines also deliver jet fuel directly to San Francisco Airport.

For many years, SFPP was paying a business tax to the City based on its gross receipts of approximately \$5.3 million per year. The amount of gross receipts was reported by SFPP as part of that process. The City never questioned or audited the amount of gross receipts reported by SFPP because the structure of the gross receipts tax is such that the potential increase in tax revenue that could result from an audit was not great enough to justify the expense of the audit.

As a result of the "Great Recession," the City suffered a decline in revenues from all sources. The City reduced spending, primarily through employee attrition and reductions in services. The City also began looking for ways to increase revenues.

The City's efforts to increase its revenues also included a tax on liquid storage facilities, which was submitted to the voters as Measure T, a general tax measure, in 2013. The tax was to be measured by the capacity of liquid storage tanks and was projected to provide approximately \$400,000 in annual revenue if the tax rate, which was to be set periodically by the City Council, were set at the maximum allowed by Measure T. The appeal of measuring the tax by the capacity of the tanks is that it appeared to be a reasonably objective and verifiable method of determining the amount of the tax which the voters could comprehend.

Measure T was approved by the affirmative vote of approximately 77% of the voters and became effective in 2014. It has been codified in the City's municipal code as section 5.20.011.

On March 4, 2016, SFPP filed a lawsuit against the City, challenging the validity of the tax and seeking a refund. To date, SFPP has paid the City \$1,070,000 pursuant to Measure T. With the

trial date coming up, the City and SFPP engaged in good faith negotiations to resolve the matter. The City Council met in closed session several times to consider various settlement proposals and to provide direction to its legal counsel concerning SFPP's proposals. As a result, the parties reached settlement as reflected in the attached Settlement Agreement. As described below, the Agreement calls for the City's lease with SFPP for the City's Corporation Yard, located on SFPP property, to be extended for 10 years, from 2027 to 2037, at a rate of \$1/year, subject to certain conditions.

Discussion

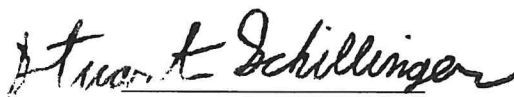
The salient terms of the settlement agreement are as follows:

1. The City will retain the business license taxes previously paid by SFPP, in the amount of \$1,070,000
2. For 2017, the tax rate will be set by the City Council pursuant to the existing Ordinance in an amount that is equivalent of 3.5 cents per barrel. For example, if the volume of barrels were 7.5 million, as they were in 2016, the tax would be \$262,500.
3. For 2018, the tax rate will be set at an amount equivalent to 4 and 1/3 cents per barrel. Again, assuming the volume were 7.5 million barrels, the tax would be \$325,000.
4. For 2019, the tax rate will be set at an amount that is equivalent to 5 and 1/3 cents per barrel. Assuming the volume were 7.5 million barrels, the tax would be \$400,000.
5. At the 2019 municipal election, the voters will be asked to approve an ordinance changing the manner in which the tax is calculated. The proposed ordinance will provide the tax will be up to 6 cents per barrel dispensed over the rack in the preceding calendar year with a maximum tax not to exceed \$400,000; if the voters approve the tax, it will be calculated that way in subsequent years, beginning in 2020.
6. The documentation that SFPP provides to the City concerning the barrels dispensed over the rack will include access to raw data and the City will have the right to audit such data.
7. The lease of the corporation yard (SFPP owns the property) will be extended for 10 years from 2027 to 2037 at the current rent of \$1/year if the proposed ordinance is approved by the voters. The amendment to the lease is also attached, the final form of which will be approved by the City Attorney.
8. The lawsuit will be stayed pending the outcome of the vote; if the voters do not approve the ordinance, the lawsuit will continue.

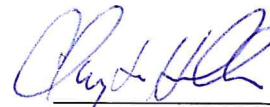
The City Council has indicated in closed session that this is fair and reasonable settlement and ensures the City with a constant income stream for the foreseeable future assuming the voters approve the Ordinance in 2019.



Michael Roush
City Attorney



Stuart Schillinger
Administrative Services Director



Clay Holstine
City Manager

Attachments:

1. Mutual Release and Settlement Agreement with Attachment
2. Extended Lease Agreement