

City of Brisbane

Agenda Report

TO: Mayor and City Council

FROM: Hal Toppel, City Attorney

SUBJECT: Property Tax Administration Fee Dispute with County -
Proposed Tolling Agreement

DATE: For Council Meeting on January 5, 2009

City Council Goals:

To provide for effective and efficient delivery of City services.

To promote intergovernmental opportunities that enhances services and/or reduces cost of operations and services to city residents.

Purpose:

The purpose of the Tolling Agreement is to preserve the respective rights of the parties by suspending the running of any applicable statute of limitations on the filing and prosecution of claims during the period required for the state-wide legal issues to be resolved.

Recommendation:

Approve the proposed Tolling Agreement and authorize the Mayor to execute the Agreement on behalf of the City.

Background:

The County assesses and collects all of the property taxes in the County. It then allocates these taxes to the various government entities in the County – cities, school districts, special districts, ERAF (the Educational Revenue Augmentation Fund), and the County itself. The County is allowed to charge each entity that receives property taxes that entity's share of the costs the County incurs in assessing, collecting, and allocating these taxes. This is called the Property Tax Administration Fee, or "PTAF." The amount of PTAF an entity is charged is directly proportional to the amount of property taxes the County collects for it. The PTAF is deducted from each entity's property tax allocation and is added to the County's property tax allocation. Schools and ERAF are not charged PTAF.

Instead, the cost of collecting property taxes for schools and ERAF are borne by the County.

In the 2003-04 and the 2004-05 fiscal years, the Legislature implemented the "Triple Flip" and the "VLF Swap." Under the Triple Flip, ¼ point (0.25%) of the sales tax that had been received by cities went to the State. The State then made the cities whole by diverting property taxes from ERAF into the Sales and Use Tax Compensation Fund, from which cities are then compensated for the lost sales tax. The "VLF Swap" arose out of the reduction in the Vehicle License Fee, or VLF. When the state reduced the VLF, at first it made up the lost revenues to the cities with the VLF backfill – a direct payment from the State's general fund to cover the lost revenues. The VLF Swap then replaced this backfill by again diverting property taxes from ERAF, this time into the Vehicle License Fee Property Tax Compensation Fund, from which cities are compensated for the lost VLF. The Legislature provided that beginning in the 2006-07 fiscal year, the counties could charge the cities for the administrative cost of implementing the Triple Flip and the VLF Swap.

In the 2006-07 fiscal year, the counties increased the PTAF they charge to cities. The increase, however, was more than just the cost of implementing the Triple Flip and the VLF Swap. It also included the cost of assessing, collecting, and allocating the property taxes that are collected for ERAF and then diverted to the Sales and Use Tax Compensation Fund and the Vehicle License Fee Property Tax Compensation Fund and used to reimburse the cities for the sales tax and VLF lost to the State. For the City of Brisbane, the amount of the increase in the 2006-07 fiscal year was \$8,039. This increase will likely grow a little each year.

Discussion:

Cities throughout the State of California have raised the argument that PTAF should not include the property taxes that are allocated to ERAF, but then used to compensate the City for the sales tax and VLF taken by the state. The League of California Cities' tax specialist has agreed. The cities have claimed that the counties' interpretation is inconsistent with the purposes of the Triple Flip and VLF Swap legislation, which was to make cities and counties whole after the State took their sales tax and VLF. The Legislature was cognizant that the counties would incur additional costs associated with the Triple Flip and VLF Swap calculations, and it specifically authorized counties to charge cities for the incremental costs of shifting these funds, but the counties are trying to recover more than the amount authorized by state law.

The City Attorneys in San Mateo County have worked collectively to establish a unified position and legal representation for asserting the PTAF claim against the County. A qualified attorney was selected to represent all of the cities and Brisbane's individual agreement with the attorney was approved by the City Council on June 16, 2008. This attorney has now filed a separate claim against the County for each of the cities. The legal fees and costs for this representation are allocated among all of the cities based upon the amount being claimed by each city. The amount claimed by Brisbane for the 2006-2007 fiscal year is \$8,039, which represents 2.3% of the total claimed by all of the cities in the County.

Because lawsuits have now been filed by at least two cities in Southern California, all of the city attorneys and county counsel agreed that it would simply be a waste of time and money for the same issue to again be litigated in San Mateo County. By having the parties execute a "tolling agreement," the clock would be stopped on the running of time limitations in which litigation needs to be commenced or pursued. All of the claims would be preserved and the parties would simply wait for the legal issue to be resolved in the pending lawsuits. At a minimum, this would require an initial decision by a trial court and review by the Court of Appeals. Further review by the California Supreme Court is possible.

The Tolling Agreement now being presented to the City Council has been approved as to form by all of the city attorneys and the County Counsel. A separate agreement would be signed by each city, but all of the agreements are identical.

Fiscal Impact:

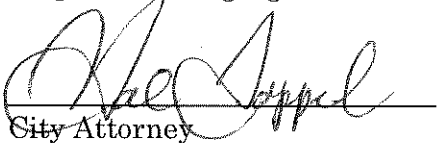
Brisbane's share of the legal cost thus far has been very small and the Tolling Agreement will avoid additional costs being incurred until a final judicial determination of the legal issue has been rendered – probably not for several years, at the earliest. An additional claim will be filed each fiscal year and the Tolling Agreement will be amended to include that claim as well. The cost of this paperwork will be nominal.

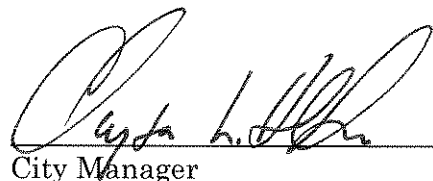
Measure of Success:

If the courts agree with the cities' argument, there would be a refund of property tax administration fees charged by the County. For the 2006-2007 fiscal year alone, such amount would be \$8,039. If the County continues its present practice, additional amounts will accrue each fiscal year.

Attachments:

Proposed Tolling Agreement.


City Attorney


City Manager

**AGREEMENT BETWEEN THE COUNTY OF SAN MATEO AND
THE CITY OF BRISBANE TO TOLL STATUTES OF LIMITATIONS FOR
CLAIMS REGARDING PROPERTY TAX ADMINISTRATION FEES**

WHEREAS, the City of Brisbane (the “City”) and the County of San Mateo (the “County”) (collectively, the “Parties”) may become involved in litigation regarding the County’s calculation of the property tax administration fees (the “PTAF”) as related to the Triple Flip (Rev. & Tax Code § 97.68) and the Vehicle License Fee swap (Rev. & Tax Code § 97.70) that the County charges the City, pursuant to the Revenue and Taxation Code, beginning in the fiscal year 2004-2005;

WHEREAS, conflicting legal opinions as to the calculation of the PTAF have been rendered by various state and local agencies and their counsel;

WHEREAS, the City filed a claim against the County on or about June 27, 2008, seeking a refund of the amount of PTAF that the City claims the County overcharged the City in the 2006-2007 and 2007-2008 fiscal years and the County has not yet formally denied the claim;

WHEREAS, the County contends that it may have undercharged the City for the PTAF in the 2004-2005 and 2005-2006 fiscal years;

WHEREAS, the City and County are aware that other cities and counties in other areas of the State are involved, or may become involved, in litigation concerning the calculation of the PTAF;

WHEREAS, the Parties desire to avoid litigation in order to allow for additional time to evaluate the law as it develops on this state-wide issue;

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. The Parties agree to toll the applicable statutes of limitations for either party to file a claim, complaint, or petition against the other with respect to the calculation of the PTAF, including, but not limited to, the applicable statutes of limitations for the City to file a complaint or petition seeking a refund or reallocation to the City of the PTAF that the City contends the County overcharged the City for the 2006-2007 and 2007-2008 fiscal years, which the City contends resulted in an under-allocation of property taxes to the City; and including, but not limited to, the applicable statutes of limitations for the County to file a complaint, petition, or administrative claim seeking an increase or reallocation to the County of the PTAF the County contends the County may have undercharged the City in the 2004-2005 and 2005-2006 fiscal years.

2. This tolling agreement does not revive any statute of limitations period or deadline that expired before the effective date of this tolling agreement. This tolling agreement applies solely to those claims that could be alleged as of the effective date of this tolling agreement in either (i) an administrative claim to the County or the City pursuant to the applicable provisions of the Government Claims Act and/or a County or City ordinance or (ii) a lawsuit. The tolling agreement does not apply to any claims that could not be alleged as of the

effective date of this tolling agreement in an administrative claim to the County or the City pursuant to the applicable provisions of the Government Claims Act and/or any County or City ordinance or in a lawsuit.

3. The purposes of this tolling agreement are to avoid litigation and to permit the Parties additional time to evaluate the law as it develops on this state-wide issue.

4. The City and the County agree not to file any claims and not to initiate or participate in litigation against each other related to the PTAF for the 2004-2005, 2005-2006, 2006-2007, and 2007-2008 fiscal years while this agreement is in effect.

5. The tolling period for the City and the County extends from the effective date of this tolling agreement until the earlier of the following:

- a. The expiration of forty-five (45) days from the date one Party ("the terminating party") delivers to the other Party via certified mail and facsimile at the addresses and facsimile machine numbers set forth in Section 8 below, written notice that the terminating party desires to terminate this tolling agreement, and is in fact terminating this tolling agreement; or
- b. July 1, 2012.

6. This agreement constitutes the entire understanding of the Parties with respect to the tolling of the City's and the County's claims as set forth in Section 1 above, and correctly states the rights, duties, and obligations of each Party as of the effective date of this agreement. Any prior understandings, promises, negotiations, or representations between the parties not expressly stated in this document are not binding.

7. Subsequent modifications of this agreement, including but not limited to the extension or amendment of the agreement, shall not be valid or effective unless set forth in writing and signed by the Parties. The Parties anticipate that they are likely to amend this Agreement to include claims brought by the City regarding the calculation of PTAF for the 2008-2009 fiscal year and further fiscal years.

8. Notices under this agreement, including specifically notice under Section 5.a above, shall be given as follows:

- a. To the City, notice shall be given to both the City Attorney and to the attorney specially representing the City in this matter, Benjamin P. Fay, at the following addresses:

City Attorney
City of Brisbane
50 Park Place
Brisbane, CA 94005
Fax: (415) 467-4989

Benjamin P. Fay
Jarvis, Fay, Doporto & Gibson, LLP
475 14th Street, Suite 260
Oakland, CA 94612
Fax: (510) 238-1404

- b. To the County, notice shall be given to the County Counsel at the following address:

Michael P. Murphy
County Counsel of the County of San Mateo
400 County Center, 6th Floor
Redwood City, CA 94063
Fax: (650) 363-4034

9. The Parties agree that this agreement shall be effective upon its execution by both Parties. The Parties further agree that the County will deny the City's claim on the date immediately preceding its execution of the Agreement.

10. Each of the undersigned hereby represents and warrants that he or she is authorized to execute this agreement on behalf of the respective parties to this agreement.

11. This tolling agreement may be executed in counterparts, and each fully executed counterpart will be considered an original document.

FOR THE COUNTY OF SAN MATEO

Dated: _____

By: _____
Michael P. Murphy
County Counsel of the County of San Mateo

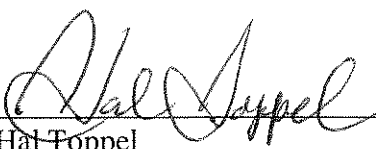
FOR THE CITY OF BRISBANE:

Dated: _____

By: _____
A. Sepi Richardson
Mayor of the City of Brisbane

Approved as to form for the City of Brisbane:

Dated: _____

By:  _____
Hal Toppel
City Attorney of the City of Brisbane