



STATE BOARD OF EQUALIZATION  
PROPERTY AND SPECIAL TAXES DEPARTMENT  
450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064  
916 445-4982 • FAX 916 323-8765  
www.boe.ca.gov

BETTY T. YEE  
Acting Member  
First District, San Francisco

BILL LEONARD  
Second District, Sacramento/Ontario

CLAUDE PARRISH  
Third District, Long Beach

JOHN CHIANG  
Fourth District, Los Angeles

STEVE WESTLY  
State Controller, Sacramento

RAMON J. HIRSIG  
Executive Director

October 26, 2005

TO INTERESTED PARTIES:

PROPOSED PROPERTY TAX RULE 23.2,  
VALUATION OF INTERESTS IN PUBLICLY OWNED PORTS AND HARBORS

In Letter To Assessors 2005/051, we disseminated a draft of proposed Property Tax Rule 23.2, *Valuation of Interests in Publicly Owned Ports and Harbors*. Interested parties were invited to provide comments on the proposed rule. Enclosed is a matrix summarizing the comments received.

An interested parties meeting will be held on November 17, 2005 to discuss the comments submitted on the proposed rule. The meeting will begin at 9:30 a.m. at the Board's headquarters in Sacramento, 450 N Street, Room 122. Subsequently, the proposed rule is tentatively scheduled for discussion before the Board's Property Tax Committee at the January 31, 2006 meeting.

All documents regarding this project will be posted to the Board's website at [www.boe.ca.gov/proptaxes/portsharbors05.htm](http://www.boe.ca.gov/proptaxes/portsharbors05.htm). If you plan to attend the interested parties meeting on November 17, please advise Ms. Sherrie Kinkle at [sherrie.kinkle@boe.ca.gov](mailto:sherrie.kinkle@boe.ca.gov) or 916-322-2921.

Sincerely,

/signed/

Dean R. Kinnee, Chief  
Assessment Policy and Standards Division

DRK:sk  
Enclosure

**COMMENTS ON  
PROPOSED PROPERTY TAX RULE 23.3  
VALUATION OF INTERESTS IN PUBLICLY OWNED PORTS AND HARBORS**

No.	Source	Comment
1	<p>Jonathan Clay, Carpi &amp; Clay Joseph J. Haraburda, Oakland Metropolitan Chamber of Commerce Ellen Joslin Johnck, Bay Planning Coalition Jerry Desmond, Jr, Desmond &amp; Desmond Bruce A. McIntosh, J. W. Silveira Jennifer Stettner, ConocoPhillips Marc Madden, Schnitzer Steel Industries, Inc. Tim Leonoudakis/David Gottlieb, San Francisco Parking, Inc. Richard L. Wilson, Morton Salt, Morton International, Inc. Mike Radak, Hnjin Shipping Co. John D. Bowe, American President Lines, Ltd., and Eagle Marine Services, Ltd. Phillip T. Wright, Zim American Integrated Shipping Services Co Steven K. Hathaway, The California Yacht Club in Marina del Rey John Kennelly, Toyota Motor Sales, U.S.A., Inc. and Toyota Logistics Joseph Cheng, Transmeridian Warehouse, Inc. Russell J. Hammer, Los Angeles Area Chamber of Commerce Jerry A. Bridges, Port of Oakland Sandy Waters, KaiserAir, Inc. Jim Falaschi, Jack London Square Partners Richard A. Ghio, Anthony's Seafood Group Jeffrey J. Sibley, United Intermodal Services, Inc. Greg Edwards, Norske Skog Canada (USA), Inc.</p>	<p>Current Tax Rule 21 provides all California taxpayers with a stated term of possession in publicly leased property the protection of a presumption that the term of possession is that which is stated in their lease. This presumption can be overcome only by "clear and convincing evidence" to the contrary. However, Rule 23.2, as proposed, would single-out those possessory interests in ports and harbors to be subject to a lesser standard of proof, a mere "preponderance of the evidence," which would make it easier for a County Assessor to increase their taxes. This is unfair and would treat these leases differently from every other kind of written agreement and real property right that a tenant may have in other government-owned property under the law.</p> <p>There is no stated reason for the pursuit of this punitive proposal. The proposition that "the unique nature of publicly owned ports and harbors requires the application of specialized appraisal techniques" is vague and not supported by facts. There seems to be no basis, other than the desire of county assessors to capture more revenue, for this disparate treatment.</p> <p>The burden to impose taxes based on possession beyond one's legal right to do so currently, and appropriately, requires Assessors to overcome an explicit lease term by an extraordinary evidentiary standard. We are concerned that once the Board treats one group of stated-term lessors of public property this way, it will set a bad precedent for future actions that may undermine Rule 21 at the expense of taxpayers.</p>

No.	Source	Comment
1 Cont	<p>T. R. Lee, West Basin Container Terminal LLC</p> <p>Kent Ying, Evergreen America Corporation</p> <p>Roger J. Zampell, Hilton San Diego Convention Center, LLC</p> <p>James V. Frazier, Pacific Mobile Repair Services, Inc.</p> <p>Thomas J. Frazzetta, Fritz Maritime Agencies</p> <p>Hector Arroyo, Harroyo Enterprises</p> <p>Yuji Yamamoto, International Transportation Services, Inc.</p> <p>Ken Ezo, Chemoil Corporation</p> <p>Eric Woodhouse, RMC/Cemex</p> <p>Jo Ann Ortiz, Astro-Aire Enterprises</p> <p>Edgar M. Buttner, Trustee</p> <p>Yuji Yamamoto, TransBay Container Terminal, Inc.</p> <p>Derrell Kelso, Jr., Onions Etc.</p> <p>Teri Nagler, ABC Barge &amp; Equipment</p> <p>Pamela Smithhart, TJ Enterprises, Corp.</p> <p>Allison Lee Raper, Nielsen Beaumont Premier Yachtworks</p> <p>Michael B. Porte, TraPac, Inc.</p> <p>John Hampton, Metroplitan Stevedore Company</p> <p>Teri Nagler, Catalina Classic Cruises</p> <p>Douglas A. Tilden, Marine Terminals Corporation</p> <p>Robert S. MacIntosh, Blue &amp; Gold Fleet</p> <p>Pei Pei Wang, Windes &amp; McClaughry</p> <p>Edward Horng, Seaside Transportation Services</p> <p>Scott J. Dionne, Windes &amp; McClaughry</p> <p>Leonard Campbell, Leonard Campbell, Inc.</p> <p>Lance G. Adams, Windes &amp; McClaughry</p> <p>Phil Lobred, H&amp;M Landing</p> <p>Rodney R. Lawley, A Plus Material Recycling</p>	

No.	Source	Comment
1 Cont	<p>Robert A. Curry, Sr., California Cartage Company, Inc.</p> <p>Wallace Baldwin, City Building, Inc. (CBI)</p> <p>Captain William Greig, San Francisco Bar Pilots</p> <p>Arthur J. Merrick, Long Beach Container Terminal, Inc.</p> <p>Jeff Burgin, Pasha Stevedoring &amp; Terminals L.P.</p> <p>Judy Spinelli, Sequoia Education, Inc.</p> <p>Ronald Calkins, West Coast Valve Services</p> <p>Charles Sadoski, Crescent Warehouse Company, Ltd.</p> <p>John S. Logg, East Bay Hotel LP</p> <p>Kjell Karlsen, Sea Launch Company, LLC</p> <p>Mike Billington, Pacific Inter-Club Yacht Associate of Northern California</p> <p>Stan Gabara, Pasha Automotive Services</p> <p>Robert Gorman, Northern California Marine Association</p> <p>Jordan Rodgers, Clipper Yacht Co. LLC</p> <p>Juan Acosta/Jalene Forbis/Wayne Horiuchi, California Railroad Industry</p> <p>Steven K. Hathaway, California Yacht Club</p> <p>Charles Sadoski, SSA Terminals (Long Beach), LLC</p> <p>Thomas A. Jacobsen, Jacoben Pilot Services, Inc.</p> <p>Mansoor Alyeshmerni, Ski Run Marina</p> <p>Linda Leathers, Cabrillo Isle Marina</p> <p>Chuck Krause, Oakland Marinas</p> <p>Jeri Dunham, Ventura Isle Marina</p> <p>Alan Sharp, Big Bear Marina LLC</p> <p>Shaun McMahan, Shelter Cover Marina</p> <p>Douglas A. Houghton, Harley Marine Services</p>	

No.	Source	Comment
1 Cont	<p>Tess Jones, Riverbank Holding Company, LLC</p> <p>Bill Chase, Ballena Isle Marina</p> <p>Delroy Sibblis, Delroy's Deli</p> <p>Joan M. Seaton, Peter's Landing Marina</p> <p>Dave Bendorf, TraPac, Inc.</p> <p>Rich Howe, Shasta Lake Resorts</p> <p>Herb Hall, Marina Recreation Association</p> <p>Charles Sadoski, Crescent Terminals</p> <p>Charles Sadoski, Pacific Maritime Services, LLC</p> <p>Charles Sadoski, SSA Pacific, Inc.</p> <p>Charles Sadoski, SSA Terminals, LLC</p> <p>Keizo Kurahara, TraPac, Inc.</p> <p>Larry Bennett, Total Terminals International, LLC</p> <p>Zhang Bing, China Shipping (North America) Holding Co., Ltd.</p> <p>Brent Takao, TraPac, Inc.</p> <p>David Bennett, "K" Line America, Inc.</p> <p>Frank Pisano, TraPac, Inc.</p> <p>R. A. Smith, Westar Marine Services</p> <p>Kelly Lam, Western Marine Safety Services Association</p> <p>Hideyuki Sadamatsu, TraPac, Inc.</p> <p>Robert Shahnazarian, American Marine Corporation</p> <p>Scott Axelson, TraPac, Inc.</p> <p>Melvin Lin, Trans Ocean Carrier, Inc.</p>	
2	Wm. Gregory Turner, BP	<p>In 2002, the Board unanimously adopted amendments to Property Tax Rule 21 that were recommended by the Board's Property Tax and Legal staffs and were subsequently approved by the Office of Administrative Law. Rule 21 provides all California taxpayers with clear rules concerning the treatment of possessory interests for purposes of property taxation. In particular, Rule 21 presumes that the term of possession in publicly leased property is the stated term of possession. Of course, the county assessor can overcome the presumption by showing clear and convincing evidence that the private possessor and public owner have agreed otherwise; however, the presumption ensures clear guidelines that preclude the type of arbitrary and unpredictable</p>

No.	Source	Comment
2 Cont		<p>assessment that resulted from assessor standards which were prevalent prior to the Board's adoption of Rule 21.</p> <p>Unfortunately, Rule 23.2 proposes an exception to Rule 21 for leases of property in publicly owned ports and harbors that lowers the presumption to a mere preponderance of evidence and eliminates the requirement of <i>American Airlines v. County of Los Angeles</i> (upon which Rule 21 is based) that any party challenging the "stated term of possession" in an agreement establishing a possessory interest provide that an "understanding" to extend or otherwise modify the stated term exists. The proposed rule would not require the assessor to provide that the parties agreed to modify the contract at all but only show through "custom and practice" that the taxpayer may get a new agreement and stay longer than the term stated in the existing contract. This not only violates <i>American Airlines</i>, it will also ensure that these taxpayers are assessed for property rights they don't have.</p> <p>While section (b)(1) of the proposed rule states that publicly owned ports and harbors are unique, there is no additional information or analysis explaining why they are unique or otherwise justifying the Board adopting a special rule for possessory interests in publicly owned ports and harbors which runs counter to established law on the treatment of possessory interests. We don't believe there is a rationale for discriminating against possessory interests in publicly owned ports and harbors. In which case, Rule 23.2 will stand as a significant erosion to Rule 21.</p>
3	<p>Mark L. Mann, BAE Systems San Diego Ship Repair Inc., and BAE Systems San Francisco Ship Repair Inc.</p>	<p>Under current Rule 21, the stated term of possession is presumed to be the term of possession for purposes of valuing the possessory interest unless the assessor can show by "clear and convincing evidence" that the parties have modified the written lease with an oral agreement to extend the stated term.</p> <p>Proposed Rule 23.2 would change the burden of proof required to overcome the presumption that the term of possession stated in the lease is the term of possession to be applied in valuing the possessory interest, in the case of any port or harbor owned by the federal government, the State of California, or any of its political subdivisions. The provisions of the proposed rule would apply to the valuation of taxable possessory interests that are interests created by a written agreement for the lease of terminals, cargo handling facilities, offices, retail facilities, automobile parking lots, storage and maintenance facilities, and other buildings and land in publicly owned ports and harbors. Thus, if proposed Rule 23.2 is adopted, the presumption of the term of possession stated in the lease could be overcome by a preponderance of the evidence in the case of a port property, but only upon the showing of clear and convincing evidence in the case of a</p>

No.	Source	Comment
3 Cont		<p>non-port property.</p> <p>This is the third attempt by assessors to lower the standard of evidence required to vary the stated lease term. In 2002 when Rule 21 was last amended, assessors argued for language to be included in Rule 21 giving assessors greater discretion in establishing the term of possession. The Board rejected this assertion by the assessors. Again, in September 2003, the assessors through the CAA formally petitioned the Board to request a lowering of the evidentiary threshold under Rule 21 from "clear and convincing evidence" to a "preponderance of the evidence." Again, the Board denied the assessor's petition. Now, after two strikes, this issue has again been brought before the Board in the form of proposed Rule 23.2. The assessors are apparently seeking a third opportunity to increase the taxes of certain holders of possessory interests. Proposed Rule 23.2 should not be adopted by the Board for several reasons, including the following:</p> <ol style="list-style-type: none"> <li>1. Proposed Rule 23.2 would violate the Equal Protection Clause of the U.S. Constitution.</li> <li>2. Proposed Rule 23.2 would violate California Constitution Article XIII, Section 1(a). Pursuant to Section 1(a), all property must be assessed at the same percentage of fair market value.</li> <li>3. Violation of Standard for Modification of a Written Agreement. The standard in California for modifying a written agreement based on an oral agreement of the parties is "clear and convincing evidence."</li> </ol>
4	Bob Poole, Western States Petroleum Association	<p>WSPA disagrees with and opposes proposed Property Tax Rule 23.2 for the following reasons.</p> <ol style="list-style-type: none"> <li>1. Reliance on facts outside of the stated term in the document creating the possessory interest produces a <u>lack of uniformity in possessory interest assessments</u>. Proposed Rule 23.2 sets aside the provisions of existing Rule 21(d). The BOE approved these provisions only a few years ago following an interested parties process that fully explored the issues raised by Rule 23.2. Under that existing rule, if the instrument creating a taxable possessory interest states a specific term of possession, that stated term is deemed the "reasonably anticipated term of possession" for valuation purposes, unless it can be shown by clear and convincing evidence that the parties have mutually agreed to a term of possession different from the stated term of possession. The rule has a strong public policy purpose in preventing the taxation of the value of the governmental reversionary interest, which is exempt, either under the Supremacy Clause of the United State Constitution or California Constitution, Article XIII, Section 3.</li> </ol> <p>Proposed Rule 23.2 drastically changes the standard for</p>

No.	Source	Comment
4 Cont		<p>determining the term of possessory interests in ports and harbors. The proposed rule allows assessors to ignore the stated term of possession as set out in the written document creating the taxable possessory interest and to rely, instead, on subjective and possibly irrelevant criteria to determine the term of possession for valuation purposes.</p> <p>WSPA contends that introducing extraneous factual considerations into the determination of the term of possession, such as those set forth in paragraph (d)(2) of proposed Rule 23.2, will return the assessment and valuation of possessory interests to the chaotic state which existed before the enactment of Rule 21(d) in 2002. Prior to that date, the methods for assessing possessory interests varied from one county to the next depending upon the weight individual assessors gave to criteria other than the stated term of possession set forth in the document creating the possessory interest.</p> <p>2. The law requires that a "clear and convincing evidence" standard be used where the primary factual determinant is set forth in a written agreement between a public entity and a private possessor. Where the term of possession is set forth in a written document, any departure from the stated term can only occur upon presentation of clear and convincing evidence to the contrary</p> <p>3. There is no reason to enact a special rule for determining the term of possession for possessory interests situated in publicly owned ports and harbors. Possessory interests located in ports and harbors do not differ in any significant way from those located elsewhere. By creating a special classification of property taxpayers without providing any reason for doing so, Rule 23.2 runs afoul of the constitutional protections set forth in the U.S. Constitution and the California Constitution, including the Equal Protection Clause and the Commerce Clause. Moreover, the proposed rule, if enacted, will violate the requirement that all similarly situated property in California be assessed uniformly.</p>
5	Teresa Casazza, Cal-Tax	<p>Cal-Tax believes this issue has been well settled when the Board adopted the existing possessory interest rules. There is no reason why publicly owned ports and harbors should be treated differently. Current Property Tax Rule 21 provides all California taxpayers with a stated term of possession in publicly leased property the protection of a presumption that the term of possession is that which is stated in their lease. The presumption can be overcome by "clear and convincing evidence" to the contrary. This proposal would change the rules only for ports and harbors to a much lesser standard of proof, requiring only a "preponderance of the evidence." This proposal can have the effect of chilling maritime leases in California. We believe this is a threat to California's business climate.</p>

No.	Source	Comment
6	Michael Jacob, Pacific Merchant Shipping Association	<p>The members of PMSA, responsible for 90% of California's containerized trade, and other stakeholders in our port communities are committed to maintaining a competitive and vibrant maritime economy in our state. Proposed Property Tax Rule 23.2 would hamper our relative competitiveness and threaten the health of our ports, their tenants, and California taxpayers. This proposed tax rule is especially damaging because it will dampen the phenomenal multiplier effects of investing in California's ports: for every dollar spent within the physical port confines, two dollars in economic benefit are conferred on the economy at-large, and for every job created on port property, two Californians become employed.</p> <p>Current Tax Rule 21 is fair as it provides all California public property tenants with the protection of a presumption that the term of possession is that which is stated in their lease. This presumption recognizes the fundamental concept that one's tax liability on a possessory interest should be based upon one's legal right of possession of the interest that is sought to be taxed. This presumption can rightfully only be overcome by "clear and convincing evidence" to the contrary.</p> <p>However, Rule 23.2, as proposed, would single-out those possessory interests in ports and harbors to be subject to a lesser standard of proof, a mere "preponderance of the evidence." This is unfair as it would treat these leaseholders differently from every other lessee of publicly owned property in the state. Moreover, it would fly in the face of the reason why Rule 21 was implemented, to acknowledge the limitations placed on the real property rights that a tenant may have in government-owned property under the law.</p> <p>There is no stated purpose for the pursuit of this punitive proposal in the draft rule or the circulated staff reports. The proposition is put forward that "the unique nature of publicly owned ports and harbors requires the application of specialized appraisal techniques," however, this assertion is obliquely vague, so overly generalized as to not mean anything of consequence, and it is not supported by any facts, assertions, or defensible findings. There seems to be no legal or technical basis for this disparate treatment of property.</p> <p>We question the unstated premise that the property right that port and harbor tenants have under their leases is different from every other kind of real property right that a tenant may have in other government-owned property.</p> <p>We deny assertions by proponents of Rule 23.2 that California's ports and harbors are of a uniform mind when it comes to leases and that port and harbor tenants are monolithic and non-competitive beneficiaries of current tax law.</p>

No.	Source	Comment
6 Cont		<p>As described, the proposed rule, while punitive and arbitrary with respect to dynamic ports, would be a potential death knell for those ports that are not particularly benefiting from enhanced competition.</p> <p>Rule 23.2 is unconstitutional. Port and harbor tenants are, by virtue of their location and operations, primary instrumentality of interstate and foreign commerce. By singling out such tenants for a more stringent standard of tax valuation than tenants of other types of public property, Rule 23.2 discriminates on its face against interstate and foreign commerce. Because the Commerce Clause of the United States Constitution invalidates state taxes which discriminate against interstate and foreign commerce, Rule 23.2, in addition to being unwise and unfair, is legally defective.</p>
7	John D. Cahill, Rodi Pollock	<p>We vigorously oppose Section (d) of the proposed rule and particularly subdivision (1) of that section.</p> <p>Under the existing rule pertaining to possessory interests, if the instrument creating a taxable possessory interest states a specific term of possession, that term is deemed the "reasonably anticipated term of possession" for valuation purposes, unless it can be demonstrated by clear and convincing evidence that the parties have reached a mutual agreement that the term of possession is shorter or longer than the stated term of possession.</p> <p>The import of Section (d)(1) of the proposed rule is to drastically change that standard for possessory interests in ports or harbors and permit assessors to ignore the stated term of possession as set out in the written document creating the taxable possessory interest and rely on other criteria to determine the term of possession for valuation purposes. This revision in the proposed rule expands or broadens the power of the assessor to such an extent, that if such power is exercised, it will result in great uncertainty for taxpayers as to the basis for determining a term of possession different from the stated term of possession. More importantly, it will result in increased litigation (to the detriment of both the taxpayer and the county) over what criteria is sufficient to justify the assessor's determination that the term of possession should be other than that stated in the written document creating the possessory interest. These documents are generally negotiated agreements between the port and the taxpayer and, as such, set out the clear intent of the parties.</p> <p>The proposed rule also changes the standard or quality of proof required to determine the "reasonably anticipated term of possession" for port or harbor possessory interests where the stated term is not used by the assessor. Under the existing rule governing possessory interests, the quantum of proof is by "clear and convincing evidence," not the lesser standard of "by a preponderance of the evidence" which is proposed in</p>

No.	Source	Comment
7 Cont		<p>the new Rule 23.2. This proposed change again broadens the power of the assessor in that he or she may rely on evidence of a lesser quality and quantity of proof than now exists in determining the "reasonably anticipated term of possession." Since the term of possession in valuing a taxable possessory interest has a huge impact on the taxable value of such interest, the assessor should be held to the stricter evidentiary standard before he or she reaches a determination of the term of possession other than the stated term.</p> <p>We also question whether a separate rule is appropriate for possessory interests in publicly owned ports and harbors versus other types of possessory interests. There is nothing unique about those type of possessory interests to justify a different standard of value from all other forms of possessory interests. There is <u>no</u> – repeat – <u>no</u> justification for treating them differently.</p>
8	Rick Auerbach, Los Angeles County Assessor	<p>I would like to voice my strong support for this proposed rule for the following reasons:</p> <ol style="list-style-type: none"> <li>1. It allows the assessors to utilize sound appraisal judgment and relevant market information rather than be strictly limited to contractual provisions in determining the reasonably anticipated terms of possession for properties located in publicly owned ports and harbors. The proper establishment of a reasonably anticipated term of possession is an essential element in determining a fair market value, just as are economic rent, economic expenses and the capitalization rate. This will eliminate the current inherent conflict with Section 110 of the Revenue and Taxation Code and the disparate treatment provided for leases with month-to-month terms or unspecified terms of possession for such properties.</li> <li>2. It establishes a clearly defined evidentiary standard for assessors, property owners, and local assessment appeals boards to consider in determining the reasonably anticipated terms of possession for properties in publicly owned ports and harbors. This preponderance of evidence standard is currently utilized in Rules 2 and 321.</li> <li>3. Ports and harbors are valuable and extremely costly real property assets that involve coordinated efforts by both the public entity and private lessees (shipping companies) to sustain economic viability. The harbor infrastructure is planned, built, and operated jointly with public and private input. This infrastructure is supported and maintained by complex revenue-sharing agreements, arranged and agreed between the public entity and the private shipping companies. The public entity supplies all of the land and most of the improvements, and the operator uses these facilities for their economic benefit, a classic taxable possessory interest.</li> <li>4. The public entity and the shipping company have a business relationship—they both need each other to continue</li> </ol>

No.	Source	Comment
8 Cont		<p>operating. The harbor would be an economic failure without the shipping company, and the shipping company would have no business without a place to dock. It is for their mutual best interests that their working relationships continue indefinitely.</p> <p>5. Harbor properties are in high demand, scarce and extremely difficult to duplicate.</p> <p>6. Most harbor agreements are written for long terms.</p> <p>7. Most harbor agreements are extended or renewed with the current shipping company before the agreement reaches the termination date and without the public entity going out to bid. This avoids any business disruptions for both the public and private entities. The shipping company has a virtual perpetual possessory interest.</p> <p>I believe the rule is needed to prevent an unwarranted reduction in assessments for selected businesses. In this county, some of these reductions would exceed 50%. In addition, the rule will properly guide and instruct assessors on an important valuation parameter for these particularly valuable real property interests.</p>