



San Francisco's 911 Emergency Response Fee (ERF) 10 Years Later

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History

- 1989 Loma Prieta Earthquake
- 2001 Shootings at 101 California Street
- Weakness in City's emergency communications system
- City needed whole new emergency communications system

History, Continued

- City needed new revenue source to fund improvements to the City's emergency communications system
- Board of Supervisors wanted source that could be enacted before lengthy process of getting voter approval

Legislative Findings Supporting ERF

- Telephone subscribers place great demand on 911 communication system
- Subscribers should pay some costs of improvements that will benefit them
- It is fair to allocate costs per access line basis because every line gives benefit

Legislative Findings Supporting ERF

- Trunk line gives subscriber 5x benefit of a single access line
- Marginal benefit of additional lines diminishes and justifies cap per subscriber per service location
- Costs related to exempt subscribers should be covered by another source (17%)

Initial ERF Terms

- Charged on local service, including wireless
- \$.50 per access line & \$1.25 per trunk line
- Maximum per subscriber per service location = \$10,000/year
- Exempt: lifeline subscribers, payphones, hospitals, government entities

Initial ERF Terms, Continued

- Funded only capital costs, including debt service
- Funded 911 Communication System
 - Land and facility
 - Call delivery, call processing, call dispatching hardware & software
- Did not fund emergency responders
- Did not fund hardware & software serving administrative purposes

Current ERF Terms

- \$1.75 per access line
- \$13.13 per trunk line
- \$236.25 per high capacity trunk line
- Trunk line rate increased from 5x to 7.5x
- High capacity trunk line added at 135x (18x)
- Fee applies to wireless subscribers with “place of primary use” in San Francisco under Mobile Telecommunications Sourcing Act

Current ERF Terms, Continued

- Covers 800 MHZ public safety radio system
- Covers operating costs of 911 system
- Covers costs of backup system
- Does not fund emergency responders or hardware & software serving admin purposes
- Expected to generate \$23 million in FY 2003-04

Collection

- Providers of local telephone service serve as agents for collection
- Providers must file returns and remit fee revenues monthly
- Failure to remit creates debt to City with interest and penalties

Key Legal Issues

- Is ERF a fee or a tax?

Is it valid under Prop 13?

- Can local government charge fee for general governmental services?

Would new ERF be valid under Prop 218?

**Proposition 13 Legal Standard
(Cal. Constitution Article XIII A)
Government Code § 50076**

- Charge that does not exceed reasonable cost of providing service or regulation for which it is charged
- And is not levied for general revenue purposes
- Is not a tax requiring voter approval

Unlawful Tax vs. Valid Fee

- Proposition 13 cases distinguish from taxes
 - special assessments on property
 - development fees
 - police power regulatory fees
 - standby charges
 - user fees
- ERF is a hybrid: standby charge and user fee

ERF is not Unlawful Tax Under Prop 13

- Charged only to people who benefit from 911 communication system
- Revenues do not exceed cost of service
- Proceeds fund only 911 Communication System
- Rates bear reasonable relationship to feepayer's benefit

Do all charged telephone subscribers really benefit from the funded 911 service?

- Some subscribers never call 911
- Some subscribers call 911 for others
- Some callers are not subscribers
- But user fee on callers to 911 would:
 - be high
 - deter calls that could save lives and property
 - be hard to collect
- And immediate access to emergency service benefits all subscribers

California law upholds benefit established on standby theory

- City of Glendale v. Trondsen (1957)
- Russ Building Partnership v. CCSF (1987)
- Health & Safety Code §5471
- Government Code §50078
- Government Code §66712

**Would new ERF be valid under
Proposition 218?**

Proposition 218 (California Constitution XIII D)

- Requires voter approval of any fee imposed on a parcel or on a person as an incident of property ownership
- Bans use of property-related fees for general governmental purposes

ERF does not Violate Prop 218 Ban on Fees for General Governmental Service

- ERF is not imposed on real property or incident to property ownership
- Local telephone subscribers do not necessarily own property where they receive wire line service
- Wireless subscribers do not necessarily own place of primary use

Cities can impose charges for core government services

- U.S. v. City of Huntington does not govern
- Gov. Code §53978
- Gov. Code §50078
- Gov. Code §66712

Other Legal Issues

- Does ERF apply to voice over internet?
- Application of current language may depend on business model
 - Is service local telephone service?
 - Is provider a service supplier?

Other Legal Issues

- Does Public Utilities Code §799 apply?
 - Protects utilities from collecting invalid local taxes
 - Protects utilities from costs arising from refunds
 - Requires 60+ day notice to utility of changes affecting collections
 - Requires 90+ day notice to utility of new tax
 - Applies to Charter Cities

San Francisco Advice: Don't Be Greedy

- Consider rough proportionality standard in Ehrlich v. Culver (1996)
- Ensure that all costs relate to benefits provided to telephone subscribers
- Minimize exemptions: apply fee to wireless subscribers

San Francisco Advice: Don't Be Greedy

- Use another revenue source for costs attributable to exempt subscribers
- Give yourself a margin of error on cost recovery
- Make your ordinance defensible on its face



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10 YEARS LATER**

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SAN FRANCISCO'S 911 EMERGENCY RESPONSE FEE: 10 YEARS LATER

I. INTRODUCTION

For the last ten years, San Francisco has imposed an Emergency Response Fee ("911 fee") on telephone subscribers to defray the cost first to upgrade and then to operate the City's emergency communications system for handling 911 calls for emergency police, fire and medical services. This paper discusses the development and implementation of the 911 fee, examines the key legal issues raised by the 911 fee, and suggests some of the considerations that city attorneys may wish to keep in mind in advising a client that is considering a similar fee.

II. DEVELOPMENT OF SAN FRANCISCO'S EMERGENCY RESPONSE FEE

In the early 1990's, San Francisco's emergency communications system was outdated and in a state of serious disrepair. While the City's emergency response system was generally coordinated by the Police Department, Police, Fire and Emergency Medical Services ("EMS") each had its own emergency communications operations located in separate, seismically unsound facilities. Major emergencies, including the 1989 Loma Prieta earthquake and the tragic shootings at the 101 California Street building in 1991 only underscored the City's need for a centralized, seismically sound, and technologically up-to-date facility.

In response to this urgent need, the Board of Supervisors passed legislation in 1993 imposing the City's 911 fee (San Francisco Business and Tax Regulations Code Article 10A, attached as the Appendix to this paper).¹ The 911 fee as originally enacted only recovered the capital costs incurred in constructing and equipping a new centralized emergency communications system, including construction of a new 911 communications facility (defined as "Project costs" in the ordinance (§751(l)). Subsequent amendments to the fee allow the City to use proceeds from the fee for constructing a backup facility and to operate, repair and maintain the 911 communications system (defined as "Operating costs" in the ordinance (§751(k)).

The 911 fee ordinance includes detailed findings concerning the Board of Supervisors' determination of the need for a centralized emergency communications facility and a computer-aided dispatch system, as well as the justification for funding these activities through a fee imposed on telephone subscribers. The Board found that the fee is the most practical and equitable revenue mechanism to finance the new system. (§752(c)). Because telephone subscribers would reap most of the benefit from the

¹ All subsequent ordinance citations are to the San Francisco Business and Tax Regulations Code unless otherwise specified.

improved system, the Board decided to impose the fee on those subscribers. (§752(c)). Since each telephone line can access the 911 communications system, the Board found that it is appropriate to impose the fee on a per-line basis, with certain limitations and exceptions. (§752 (d)-(g)).

The heart of the ordinance consists of Sections 753 (which imposes the fee) and 755 (which sets the actual rate). The fee is imposed “on every person who maintains access to the 911 communications system by subscribing to local telephone service within the City and County of San Francisco.” (§753(a)). Local telephone service is defined to include wireless service. (§751(j)). The current fee is \$1.75 per month per line, \$13.13 per month per trunk line, and \$236.25 per month per high capacity trunk line. The fees for the trunk lines are higher because these lines provide for increased access to the 911 communications system. The relationship between the rates is based on information from the California Public Utilities Commission, the Federal Communications Commission, and the City’s Department of Telecommunications and Information Services.

Based on this information, the Board of Supervisors has determined that on average, a trunk line provides 7.5 times the access to the 911 communications system as that provided by a single access line, and that a high capacity trunk line provides 18 times the access provided by a trunk line, or 135 times the access provided by a single line. (§752(c)). The fees are set accordingly. In recognition that the incremental benefit derived from each additional line with 911 access diminishes as the total number of lines increases, the maximum fee per subscriber per service location is capped. (§753(b)).

Section 754 exempts “lifeline” customers, telephone companies, nonprofit hospitals and educational organizations, coin-operated telephones, and any person where the imposition of the fee would violate the state or federal constitutions or preemptive laws. The last exemption is intended to exempt governmental entities. The exemptions track similar exemptions from other federal and state charges, making collection of the fee simpler and less expensive for the telephone companies. In provisions that are key to ensuring that the 911 fee is a fee rather than a special tax, the ordinance makes clear that the costs of providing 911 standby service to all exempt subscribers must be paid from a source other than the fee revenues. (§§752(g); 752.2(e)).

The fee is collected by telephone service providers and transmitted monthly to the City Tax Collector. (§757). This approach has proved to be an effective and efficient collection mechanism for the City. When the 911 fee was first adopted, it allowed Pacific Bell to recover its initial costs of collecting the fee. The ordinance was subsequently amended to remove this authority so that new local service providers would come to view collection costs as a cost of doing business. In addition, the City has not allowed service providers to recover additional collection costs resulting from changes to the fee. The fee proceeds are maintained in a special fund, and may only be used for the eligible project and operating costs for the 911 communications system. (§753(d)).

III. LEGAL ISSUES

San Francisco's 911 fee was adopted prior to the passage of Proposition 218 and has not been the subject of a legal challenge. Nonetheless, the imposition of a fee on telephone ratepayers in order to defray the costs of providing emergency communications service raises two central questions: (1) whether the fee is a special tax, a special assessment, or a fee; and (2) whether a municipality may impose a fee as opposed to a tax to defray its costs in providing core governmental services such as emergency dispatch for police, fire, and ambulance services?

This paper concludes the 911 charge is a fee because: (1) the service charge is imposed on a rate payer who benefits from a service, (such as a phone user with access to the 911 communications system); (2) the amount raised does not exceed the cost of the service provided, i.e. the costs of the 911 system; (3) the proceeds of the charge are strictly restricted to funding the costs of the 911 system and thus not for general revenue purposes; (4) the rate imposed on rate payers bears a fair and reasonable relationship to the payers' burden on, or benefit from the service; and (5) the charge is not imposed on real property or incidental to the ownership of real property, and thus may be imposed by the legislative body without voter approval. In addition, this paper concludes that cities may impose fees to recover the costs of core governmental services.

A. Is the 911 charge a tax or a fee?

1. Proposition 13, Proposition 218 and Fees

Under California law, the validity of a fee is governed by Proposition 13 (Cal. Const. art. XIII A) and Proposition 218 (Cal. Const. Art. XIII D). Prop. 13, adopted by the voters in 1978, inter alia, restricts the ability of cities to impose special taxes by mandating a two-thirds voter approval requirement. (Cal. Const. Art. XIII A, Sec. 4). A "special tax" has been defined as a tax levied for a specific purpose rather than for general governmental revenue. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3rd 47, 47). Government Code Section 50076 excludes from the term "special tax" as used in Art. XIII A, Sec. 4, "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged, and which is not levied for general revenue purposes." Thus a fee is a charge that is: (1) restricted to the specific activity that it funds, that is it is "not levied for general revenue purposes;" and (2) "does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged."

A charge generating revenue that exceeds the reasonable cost of the service or regulatory activity, or which is imposed for general revenue purposes is vulnerable to challenge as a general or special tax unless the tax has been approved respectively by a majority (general tax) or two-thirds (special tax) vote of the people.

Prop. 218, passed by the voters in 1996, imposes further restrictions on the ability of cities to impose fees. While longstanding case law creates a broader definition, under Prop. 218, a “fee” is defined as “any levy other than an ad valorem tax, special tax, or an assessment, imposed by an agency *upon a parcel or upon a person as an incident of property ownership*, including a user fee or a charge for a property-related service.”² (Cal. Const. Art. XIID, Sec. 2(e)[emphasis added]). A “property-related service” in turn is defined as “a public service having a direct relationship to property ownership.” (Cal. Const. art. XIID, Sec. 2(h)). Fees for electrical or gas service are not deemed fees imposed as an incident of property ownership. (Cal. Const. Art. XIID, Sec. 3(b)). Any fee imposed as an incident of property ownership must be approved by a majority vote, although charges for sewer, water, and refuse collection are excluded from this requirement. (Cal. Const. Art. XIID, Sec. 6(c)). In addition, Prop. 218 bans the use of property-related fees to fund general governmental services. (Cal. Const. Art. XIID, Sec. 6(b)(5)).

It is well-established that a special benefit assessment is not a tax for purposes of Proposition 13. (*Knox v. Orland* (1992) 4 Cal.4th 132, 141; *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 161-162; *County of Fresno v. Malmstrom* (1979) 94 Cal.App. 3d 974, 983-984). While the adoption of Proposition 218 in 1996 imposed specific procedural requirements for enacting special benefit assessments and fees for property-related services, Proposition 218 did not alter the law concerning the differences between taxes and other revenue raising devices such as special benefit assessments or fees. (See, *Apartment Association of Los Angeles County v. City of Los Angeles*, supra, 24 Cal.4th 830, 836-837 [reiterating that a special benefit assessment is not a tax in the post-Prop. 218 environment]). Accordingly, while Prop. 218 bars cities from imposing fees on real property for general governmental services, it does not otherwise affect the ability of cities to impose a fee that is not property-related.

2. Types of Fees.

Post-Prop. 13 cases considering challenges to fees have recognized several different types of fees. In *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, the supreme court recognized “three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.” (*Id.*, at 874). But courts have also recognized “standby charges” (*Keller v. Chowchilla Water District* (2000) 80 Cal.App. 4th 1006), and “user fees” (*Isaac v. City of Los Angeles* (1998) 66 Cal.App. 4th 586, 697). The distinctions between the various types of fees in the cases are not always clear, and the *Sinclair* court even noted that the three categories it had identified may overlap in a given case.

Thus, it is not necessary to “pigeonhole” a fee into a particular category. In *Kern County Farm Bureau v. County of Kern* (1994) 19 Cal.App. 4th 1416, plaintiffs challenged as a special tax an assessment based on square footage imposed on

² Such fees will be referred to in this paper as “property-related fees.”

agricultural land in order to fund the county's cost of landfill operations due to waste from agricultural land. The court upheld the charge as a valid service or user fee, as well as a valid special assessment, and explicitly recognized that a "revenue measure may have attributes of more than one of the traditional revenue devices, and may be valid despite the measure's 'hybrid' nature." (*Id.* at 1422).

So where does the 911 fee fit within this scheme? It is not a development fee or a regulatory fee, but it shares characteristics of the other categories. While not a special assessment on real property, the 911 fee may nonetheless be viewed conceptually as a type of standby charge on telephone subscribers for the benefit of access to the 911 communications system. Similarly, while the 911 fee is not a conventional standby charge, since it is not imposed on real property, like a standby charge, it is imposed to cover the cost of a service that all citizens need to be able to rely on even though they may never or rarely use it. The 911 fee also resembles a user fee, although unlike the more common user fees, it is not imposed only on those persons who actually initiate contact with the 911 communications system. Rather, it is imposed on all telephone subscribers based on the premise that each subscriber benefits from access to the system and could use it at any time.

In essence, like the charge in *Kern County*, the 911 fee is a hybrid of these fees. Regardless of how the fee is characterized, the standards imposed by courts in evaluating fees challenged as special taxes are similar, although development impact fees that are not legislatively imposed must meet a more rigorous standard.³ (See, *Ehrlich v. Culver City* (1996) 12 Cal.4th 854, 865-866, requiring showing of a "reasonable relationship" between the fee and the cost of the facility attributable to the development, and "rough proportionality" between the amount of the fee and the effects of the development). A valid user fee must not exceed the reasonable cost of providing the service or regulatory activity, and must not be used for general revenue purposes. (*Isaac v. City of Los Angeles*, supra, 66 Cal.App. 4th 586, 597). In addition, the *Isaac* court recognized that user fees are generally related to the cost of the service provided, and are on-going, rather than one-time, charges. (*Id.*).

In *Sinclair Paint Co. v. State Board of Equalization*, supra, the supreme court established a similar standard for regulatory fees; the fee must not exceed the reasonable cost of providing the service for which the fee is charged or addressing a problem that the activity of the fee payer caused, and must not be levied for unrelated revenue purposes. (15 Cal.4th at 876, citing *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375). In addition, the costs must be apportioned among the fee payers so that each payer's charges "bear a fair or reasonable relationship to the payer's burden on, or benefit from the regulated activity" (*Sinclair* at 878, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1146). Likewise, a special assessment must not exceed the special benefit to the property being assessed, and must be apportioned among properties according to the share of the benefit

³ As explained in Section IV, below, San Francisco has chosen to follow this more rigorous standard in justifying the City's 911 fee.

that the property receives. (*Knox v. City of Orland*, supra, 4 Cal.4th 132, 142; *Harrison v. Board of Supervisors* (1975) 44 Cal.App. 3d 852, 857).

3. Is a 911 Fee a Property-Related Fee under Prop. 218?

A 911 fee could be challenged on the ground that it is a property-related fee subject to Prop. 218's voter approval requirement. Such a challenge would likely be based on the argument that the 911 fee is a utility fee analogous to the utility fees mentioned in Prop. 218. The argument would be that while fees for electrical and gas service are specifically excluded from property-related fees, and fees for sewerage, water, and refuse collection are exempted from the voter approval requirement (but otherwise still considered property related fees for Prop. 218 purposes), the 911 fee is a similar fee that is not included in the exceptions from either property-related fees, or from the voter approval requirement. See, *Richmond v. Shasta Community Services District* (2004) 32 Cal. 4th 409, 426, recognizing the Legislative Analyst's conclusion in the Prop. 218 ballot pamphlet that "[f]ees for water, sewer, and refuse collection probably meet the measure's definition of property-related fee."

A court that considers the 911 fee as being similar to water, sewerage or refuse collection services is unlikely to conclude that the fee is a property-related fee and therefore subject to Prop. 218's voter approval requirements because there are strong arguments to the contrary. First, the cases interpreting Prop. 218 have generally construed the meaning of "property-related fee" quite narrowly. In *Apartment Association of Los Angeles County v. City of Los Angeles*, supra, 24 Cal.4th 830, the supreme court held that inspection fee imposed on all private landlords is not a property-related fee, as it is only imposed on property owners who choose to rent out their property. Likewise, in *Richmond v. Shasta Community Services District*, supra, the court held that a water connection fee levied on property owners who applied for a new water service connection was not a property-related fee because the fee is triggered by the property owner's decision to seek water service. (32 Cal.4th 409, 427).

Second, while telephone service is not included among the utility services exempted from the definition of "property-related services" in Prop. 218, the 911 fee may be distinguished from other utility charges because it is imposed on persons with telephone service whether or not they own property within the city. Prop. 218 need not provide a specific exemption applicable to the fee because Prop. 218 does not apply on its face to fees that are not property-related. Moreover, telephone service may be distinguished from other utility services such as water and sewer service because it does not have the same nexus to the property, at least with respect to wireless telephone service. Not only are wireless phones typically used in locations away from one's own property; but some users may not even keep or use their wireless phone on their property. Instead they may keep the phone in another location such as an automobile or on their person. Further, unlike the 911 fee, legislation authorizing other types of municipal utility charges typically enables the city to obtain a lien against the property in cases of nonpayment, strengthening the nexus between the fee and the property.

Third, as with the fees at issue in the *Richmond* and *Apartment Association* cases, an individual property owner may avoid the fee by declining to have telephone service.

For these reasons, we believe a court would likely conclude that a 911 fee is not a property-related fee subject to voter approval procedures under Prop. 218.

4. Benefit to Rate Payers.

The central question is whether the fee payer (or its activities) benefit from the public activity funded by the fee proceeds. A challenger might argue that the City is not providing telephone service, and the telephone service customer may never use the City's 911 service. Indeed, in many instances, the person placing the 911 call is not the person in need of emergency services. The witness to a crime or accident who places such a call may not even know the identity of the person in need of services.

Essentially, the 911 system is a community-wide network accessible to anyone who has access to a telephone. Clearly, the City could impose a user fee on those persons actually placing call to the 911 system since there is no question that such persons benefit from, and are using the system. Such a fee mechanism, however, would present significant practical issues and public policy problems. The fee would be extremely high, and would therefore likely discourage legitimate use of the system by citizens who could not afford the fee. Such a fee would likewise discourage disinterested witnesses from calling for assistance for others when they observe emergencies. Moreover, it would not address the fact that the person making the call is not always the person receiving emergency service, and often not the subscriber of service to the telephone from which the call was placed. In addition, collection of the fee would likely be difficult or impossible in many cases.⁴ Thus, imposing the operating costs of the 911 system on the subscribers responsible for the telephone from which the call was placed would be unduly burdensome and impractical. Access to a 911 system benefits all persons who can access the system since anyone may have the need to make a 911 call at any time.

A public entity can use assessments or standby charges to fund those types of services that citizens do not regularly use but all need to be able to rely on, or may potentially use in the future. California law authorizes a range of such charges. See, *Keller v. Chowchilla Water District*, supra, 80 Cal.App. 4th 1006, upholding a standby charge for water service; Health & Safety Code §5471, authorizing standby fees for water and sewerage; Government Code §50078, authorizing assessments for fire suppression; Government Code §66712, authorizing assessments for improvement district within community service district for various purposes, including police and ambulance service. While the 911 fee is not imposed on property, it is much like a standby charge, as the fee payer is being compelled to pay for the availability of the service.

⁴ A fee imposed only on actual users could be hundreds of dollars per call.

The fact that a fee payer may not actually use the service or benefit provided by the fee does not by itself render the fee invalid. (*Russ Building Partnership v. City and County of San Francisco* (1987) 199 Cal.App. 3d 1496). In *Russ Building Partnership*, the court upheld San Francisco's Transit Impact Development Fee ("TIDF"), imposed on developers in the downtown area to offset the impact of increased development on public transportation. The TIDF is based on a general trip generation rate per square foot of office space. That rate is legislatively imposed. The court upheld the fee even though the fee applies regardless of whether the people drawn to the new development actually use public transportation. Similarly, in *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, the court upheld a fee for trash collection service added to electricity bills, even though there was no evidence that the plaintiff rate payer used the service.

Since a public entity can impose a special benefit assessment against real property owners for standby emergency fire and ambulance service, why may not a public entity impose a fee on telephone subscribers to be used to pay for standby emergency communications services? As with the standby fees and special benefit assessments described above, the costs of 911 emergency communications services are spread among those who have access to the service or benefit. In an epistemological sense, there is a greater connection between the telephone user and the access to telephone standby emergency communications services than between property ownership and fire or ambulance service. While some emergency services are dispatched as a result of automatic alarms, virtually all other calls come from telephones, whereas a significant number of emergency services calls for fire, police, and ambulance services do not involve protection of property. Instead, property ownership is a convenient and fair vehicle to allocate the burden of financing the standby fire protection service and collect the fee. Property ownership provides a sufficient nexus.

Moreover, the Legislature has concluded that property ownership is an adequate nexus for local governments to impose fees for fire or police protection fees. Government Code §53978 authorizes special taxes for police and fire protection, but also includes a provision explicitly not prohibiting "any other fee, charge, or tax . . . for fire prevention or protection services or police protection services as provided by other provisions of law." (Gov. Code §53978(f)). While this statute contemplates taxes, the Legislature made it clear that it did not intend to preclude fees that comply with the applicable law.

Finally, fee payers who have the ability to access the 911 system benefit from its existence because they may have a need at any time to use the system. An updated and dependable 911 system, by improving emergency response times and efficiency, may reduce crime rates, increase personal security and enhance property values.

5. Fair and Reasonable Relationship Between Fee and Rate Payer.

A municipality needs to be able to show that the fees imposed "bear a fair or reasonable relationship to the payer's burden on, or benefit from the regulated activity

...” (*Sinclair Paint Co. v. State Board of Equalization*, supra, 15 Cal. 4th at 878, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1146). The proportionality of the fee does not need to be established on an individual basis. (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 373-374 [upholding flat fee on all rental units in the city to defray cost of rent control hearings]. Instead, proportionality should be “measured collectively to assure that the fee is indeed regulatory and not revenue raising.” (*California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App. 4th 935, 948 [upholding flat fee for environmental review on persons submitting project proposals to the Department of Fish and Game even though actual costs of review varied widely between projects]; see also *Apartment Association of Los Angeles County v. City of Los Angeles*, supra, 24 Cal.4th 830 [upholding inspection fee imposed on all residential rental property owners rather than just on those who are actually subject to inspection]).

Thus, while imposing the cost of the 911 communications system on telephone subscribers is not a perfect fit, the law does not require perfection. Persons coming into the City and using the 911 communications system are not assessed the fee. If the call is made from a residence, office or hotel, however, the fee is paid by the person or business providing the phone. If the call is placed from a pay phone, it is exempt from the fee and subsidized by the City. (§744(c)). While persons with cell phone service from another jurisdiction that use their cell phone to place a call have “escaped” the fee, by the same token, residents of the city imposing the fee may end up using the 911 system in another jurisdiction which may have no fee as well; we do not believe this limited circumstance undermines the validity of the fee.

6. Capital vs. Operating Expenses.

Arguably, some of the cases upholding fees for governmental services and statutes authorizing standby charges can be distinguished on the ground that they involve a one-time charge for capital costs, in contrast to a charge imposed on an ongoing basis for operating costs. For purposes of the distinction between fees and taxes, however, there does not appear to be any basis for distinguishing between a one-time fee for services or an ongoing fee. The *Kern County* case involved ongoing fees and special benefit assessments are also typically ongoing.

Nor is there a basis in the law for limiting a 911 fee to capital costs. While many of the cases upholding municipal fees and assessments have involved charges for capital costs, charges encompassing operating expenses for new and existing facilities have also been upheld. The fee at issue in *Russ Building Partnership* specifically encompassed operating costs. Likewise, an assessment for ongoing park maintenance expenses was upheld in *Knox v. Orland*, supra, 4 Cal.4th 132. In addition, both Health & Safety Code §5471, addressing sewerage and water service charges, and Government Code §50078, addressing fire suppression charges, allow assessments to encompass operating costs. Further, landscape and lighting districts are typically authorized to recover operating expenses.

Accordingly, we believe that the better view is that a properly-documented 911 fee is defensible as a valid fee under Article XIII A, Sec. 4 of the California Constitution.

B. Imposing a Fee for Core Governmental Services.

There is no question that police and fire services are fundamental core government services. (*United States v. City of Huntington* (4th Cir. 1993) 999 F.2d 71 [concluding federal facilities were immune from municipal service fee covering, *inter alia*, police and fire services, because fee amounted to a tax from which federal facilities are immune];⁵ Cal. Const. Article XIII D, Sec. 6(b)(5) [prohibiting fees on property owners for general governmental services such as police and fire]). Emergency communications services are an obvious component of providing these services. In *City of Huntington*, the court rejected the City’s argument that a “municipal services fee” imposed by the city on owners of commercial and residential buildings was a user fee, pointing out that under this theory, “virtually all of what are now considered ‘taxes’ could be transmuted into ‘user fees’ by the simple expedient of dividing what are generally accepted as taxes into constituent parts, eg., a ‘police fee.’” (999 F.2d 71 at 74).

City of Huntington, however can be easily distinguished from the circumstances surrounding the 911 fee. The fee in that case was an involuntary fee imposed on property owners based on the square footage of their buildings. There was no indication that the fee was tied to the cost of services provided. Nor was there any indication that the ordinance attempted to apportion the fee according to each fee payor’s proportionate share of the burden.

In addition, California law suggests that a municipality is not required to finance core governmental services such as fire protection or emergency communications services through the imposition and collection of taxes, but may instead use additional funding sources other than taxes to pay for these services. Government Code §50076 excludes from the term “special tax” as used in Art. XIII A, Sec. 4 of the California Constitution, “any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged, and which is not levied for general revenue purposes,” and thus imposes no requirement that the fee not be for core government services. Moreover, as discussed above, Government Code §53978, while authorizing special taxes for fire, police and ambulance services, explicitly states that the statute does not limit or prohibit “any other fee, charge, or tax, or any license or service fee” for fire or police protection services. (Govt. Code §53978(f)).

Thus, using a fee to pay for core government services such as fire protection is simply another use of non-tax revenue sources to fund those services. We have found no

⁵ The *Huntington* court was concerned with the distinction between fees and taxes under federal law for purposes of determining federal immunity from local taxation. The court’s conclusion that the fee amounted to a tax for these purposes is based entirely on federal law, and has no bearing on whether such a charge should be considered a fee or a tax for purposes of Articles XIII A and XIII D of the California Constitution.

California authority that would bar such a fee on the ground that it funded core governmental services. In *Fenton v. City of Delano* (1984) 162 Cal.App. 3d 400, the court held that a municipal fee imposed on users of gas, electricity, telephone and cable television for purposes of funding municipal services including police and fire protection was in reality a tax and not a fee. But that case may be distinguished from the 911 fee, because the “fee” went into the city’s general fund, and there was no indication that the amount of the fee was tied to the cost of services or that the fee was apportioned among fee payers according to each fee payer’s proportionate share of responsibility for the standby and service demands. Indeed, from the opinion it appears that the ordinance imposing the “fee” followed none of the standards normally applicable to a fee. It did not even attempt to show how the consumption of gas, electric and telephone service contributed to the general demand for municipal services, including police protection.

Instead, the language in Government Code §50076 defining a fee as “any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged, and which is not levied for general revenue purposes,” the language in Government Code §53978 indicating that it is not intended to prohibit fees for police or fire services, and the specific regulation in Prop. 218 of only property-related fees for general governmental services suggests that California law imposes no bar to a fee for such services not incidental to property ownership. See, *Richmond v. Shasta Community Service District*, supra, 32 Cal. 4th 409, 428 (concluding that water connection fee, including a fire suppression charge, is not a property-related fee running afoul of Prop. 218’s prohibition on property-related fees).

Consistent with this view, a range of non-tax revenue mechanisms for funding core governmental services have been upheld. See, e.g., *Kaufman & Broad Central Valley v. City of Modesto* (1994) 25 Cal.App. 4th 157 (development impact fee for financing police and fire facilities, among other improvements); *Russ Building Partnership v. City and County of San Francisco*, supra, 199 Cal.App. 3d 1496 (development fee for impacts on public transit); *Kern County Farm Bureau v. County of Kern*, supra, 19 Cal.App. 4th 14160 (assessment on agricultural land for access to landfills); *Keller v. Chowchilla Water District*, supra, 80 Cal.App. 4th 1006 (standby charge for water service); see also, Health & Safety Code §5471, authorizing standby fees for water and sewerage; Government Code §50078, authorizing assessments for fire suppression; Government Code §66712, authorizing assessments for improvement district within community service district for various purposes, including police and ambulance service; Streets & Highways Code §§5000 et seq., authorizing assessments for broad range of street and public improvements; and Streets & Highways Code §§22500 et seq., authorizing assessments for landscape and lighting districts.

While none of these revenue mechanisms are considered fees, they nonetheless share with fees the need for a fair and reasonable relationship between the fee imposed and the benefit received. Thus, we conclude that the better view is that municipalities are not barred from imposing a fee for core governmental services.

IV. SO YOU WANT ONE TOO? SOME PRACTICAL CONSIDERATIONS FOR CITIES CONSIDERING A 911 FEE.

Based on San Francisco's experience with its 911 fee, there are several points that cities considering a 911 fee ordinance should pay close attention to. Do not assume that just because San Francisco's 911 fee has not been challenged that your city will not be challenged if you adopt a similar fee. As discussed above, the validity of a 911 fee is a complex issue, and highly dependent on the specific facts in play. In addition, the telecommunications landscape was very different when San Francisco's fee was first adopted in 1993. At that time, there was only one local service provider, who grudgingly agreed to go along with the proposed fee, and wireless service was an exotic luxury item for most people. A city seeking to implement a 911 fee in 2004 will be dealing with a much larger range of stakeholders and interests than San Francisco encountered in 1993, at the dawn of the telecommunications revolution.

First, while the minimum standard for a legally-defensible 911 fee is a fee that meets the "fair and reasonable relationship" standard as discussed above, in San Francisco, we have applied the more stringent nexus and rough proportionality standard set forth in *Ehrlich v. Culver City*, supra, (12 Cal.4th 854, 865-866) in working with City departments to justify costs that may be recovered through the fee. We have chosen to do this for two reasons. First, the stricter standard helps to prevent departmental officials from overreaching when presented with a new funding source, and second, the stricter standard gives the City a wider margin of error in the event that the fee is challenged.

Second, when establishing the scope of the fee, the goal should be to spread the burden of the fee broadly and evenly across the spectrum of eligible fee payers. Thus, since wireless callers make a substantial share of the calls to 911, the fee should include wireless telephone service as well as traditional service. In addition to broadening the base of fee payers and reducing the burden on individual fee payers, extending the fee to wireless service will also serve to enhance the defensibility of the fee from attack as a property related fee under Prop. 218.

Third, the definition of costs that are subject to the fee is critical. Carefully consider the scope of the fee and the relationship between the costs that will be covered and the benefit to the fee payers. In these trying fiscal times, it may be tempting to overreach. As important is the need to work closely with the appropriate departments to ensure that the costs for which they are seeking recovery are clearly within the scope of what is authorized. Departmental staff who are not fully cognizant of these limitations may include in their proposed plans equipment or activities that are not legitimately part of the emergency communications process. While the 911 fee may be a welcome new source of revenue, departments should not treat it as the proverbial candy store. You should request that your clients prepare a detailed explanation of the programs and equipment for which they are seeking to use the fee revenues. If you are not well-versed in emergency communications systems and related technology, you may need to sit down

with your clients and go line by line through their proposal to make sure that you understand how each proposed component fits into the overall picture. Are those computers dedicated to emergency dispatch, or does the fire department also use them for personnel scheduling? What percentage of the use of the mobile terminals is actually for dispatch? That software is used for monitoring the condition of patients in transit by EMS; why is it relevant to emergency dispatch? Has the city telecommunications office adequately documented its projections of costs for maintaining and troubleshooting the 911 system? Then there are less technical issues. Does that janitorial services contract only cover the part of the building used for emergency communications? Are the amounts allocated for city attorney time limited to 911 emergency communications issues?

Chances are, a number of the departmental proposals will either not be appropriate for inclusion, or will need to be adjusted to reflect only that portion which is demonstrably part of the emergency communications system. Careful analysis now of the costs covered by the fee could avoid serious problems later if your fee is challenged.

Fourth, when developing the fee, the city will need to determine the total cost of providing 911 service, as well as the costs eligible for recovery through the fee. In order to determine the costs eligible for recovery, ineligible costs attributable to exempt categories of fee payers should be backed out. In order to ensure that none of the fee revenue is used to pay for that portion of costs that are attributable to exempt subscribers, you should document the city's determination of the number of exempt telephone subscribers and the source of funding for the exempt subscribers' share of costs. Under San Francisco's ordinance, data on the percentage of exempt costs are reviewed annually.

Fifth, as with any controversial fee, do not attempt to obtain 100% cost recovery. In the event of litigation, opponents of the fee could establish miscalculations or erroneous assumptions in your client's cost determinations. Try to have your client accept a lower level of recovery. A level of cost recovery around 70% should provide a reasonable margin of error.

Sixth, pay close attention to the findings in any proposed legislation. The defensibility of your legislation will be enhanced by developing detailed findings specific to your city and its needs and circumstances.

Finally, keep in mind that there is considerable lead time required in order for telephone service providers to program their computers and take the other steps necessary to collect the fee. In addition to practical considerations, be aware that Public Utilities Code Section 799(6) provides a minimum of 90 days from the date that the service provider receives written notice of the charge before it can be required to begin collecting the charge.⁶ Be sure to take this consideration into account when developing timelines and the effective date of your fee legislation.

⁶ While Public Utilities Code Section 799 imposes a variety of requirements on local governments asking utilities to collect local *taxes*, San Francisco has taken the cautious approach of assuming that the requirements of that section could be interpreted as applying to fees as well.

V. CONCLUSION

The emergency response fee can be a useful tool for raising revenue to help fund an important service. If your city is considering a 911 fee, however, you should pay close attention to the development of the fee legislation, and be aware that imposing such a fee is not without risk.

As explained above, we believe the 911 charge is a fee rather than a special tax because: (1) the service charge is imposed on a rate payer who benefits from a service, (such as a phone user with access to the 911 communications system); (2) the amount raised does not exceed the cost of the service provided, i.e. the costs of the 911 system; (3) the proceeds of the charge are strictly restricted to funding the costs of the 911 system and thus not for general revenue purposes; (4) the rate imposed on rate payers bears a fair and reasonable relationship to the payers' burden on, or benefit from the service; and (5) the charge is not imposed on real property or incidental to the ownership of real property, and thus may be imposed by the legislative body without voter approval.

APPENDIX:
SAN FRANCISCO BUSINESS AND TAX REGULATIONS
CODE
ARTICLE 10A

This is the end of this presentation. Click any where to return to the main menu.