
The Historical Context

- Proposition 26 is the latest entry onto the continuum of restrictions begun by the voters in 1978
- Proposition 26 will be interpreted in the context of these various restrictions



Voter-Approved Restrictions on Local Government Revenue-Raising

- *Proposition 13 (1978)*: Property tax rate limited to 1% plus bonded debt; Legislative control of property tax allocation; “special taxes” require 2/3 voter approval
- *Proposition 62 (1984)*: Eliminated “real property transfer tax”; “general taxes” in general law cities require majority voter approval
- *Proposition 218 (1996)*: General taxes require majority voter approval; special taxes require 2/3 voter approval; voters can reduce/repeal assessments, fees, and charges; created “property-related fee” as a new kind of fee requiring majority (voter) fee-payer approval

Restrictions on Local Government Fees: “Reasonable” and “Related to Benefit or Privilege”

- Authority to impose fees comes from the “**police power.**” The police power is the inherent reserved power of the state to subject individual rights to reasonable regulations for the general welfare
- “Fees, charges, and rates must be **reasonable, fair, and equitable** in nature and proportionately representative of the costs incurred by the regulatory agency

The Voters' Intent: Taxes disguised as Fees

- “Fees couched as ‘regulatory’ but which **exceed** the reasonable costs of actual regulation....”
- Fees that are “simply imposed to raise revenue for a ***new program*** and are not part of any licensing or permitting program”

Sinclair Paint v. State Board of Equalization

What is being “regulated?”

- The Childhood Lead Poisoning Prevention Act of 1991: Those who used lead in the manufacturer of paint should bear a fair share of the cost of mitigating the resulting adverse health impacts of their lead-producing products.
- The Court of Appeal opinion: *“Placing the factors distinguishing taxes and fees along a continuum, we conclude the monies paid by Sinclair pursuant to the Act are more like taxes than fees. There is nothing on the face of the Act to show the fees collected are used to regulate Sinclair.... The Act does not require Sinclair to comply with any other conditions; it merely requires Sinclair to pay what the Department determines to be its share of the program cost.”*
- The Supreme Court opinion [“mitigating effects” fee]: *“From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less “regulatory” in nature than the initial permit or licensing programs that allowed them to operate.”*

Regulatory Fees

What is the purpose of the fee?

- **Regulatory fees – Purpose:** To achieve certain public policy goals.

Fee may not exceed the reasonable costs of carrying out the “purpose and provisions of the regulation.”

- **Development fees – Purpose:** To defray all or a portion of the cost of public facilities related to the development project.

There must be a reasonable relationship between fee’s use and type of project; and between need for public facility and type of development project on which fee is imposed

Exception (3): Reasonable Regulatory Costs

(3) **reasonable regulatory costs** for issuing licenses and permits; performing investigations, inspections, and audits; administrative enforcement and adjudication

For example: business license; sales tax audits; enforcing code violations

What are “legitimate” regulatory fees?

- *“Don't be misled by opponents of Proposition 26. California has some of the strongest environmental and consumer protection laws in the country. Proposition 26 preserves those laws and PROTECTS LEGITIMATE FEES SUCH AS THOSE TO CLEAN UP ENVIRONMENTAL OR OCEAN DAMAGE, FUND NECESSARY CONSUMER REGULATIONS, OR PUNISH WRONGDOING, and for licenses for professional certification or driving”* [Argument in favor of Proposition 26 from the Voters' Pamphlet]
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Key Words

- **Reasonableness**: Commensurate with impact or commensurate with cost?
- **Connection [Nexus]**: Direct or Indirect?

It's your choice

- Fix the problem yourself or
- Pay a fee to have someone else fix the problem

For example...

- ✓ Affordable housing (*Trinity Park, L.P. v. City of Sunnyvale*)
- ✓ Greenhouse gas emissions (*CBIA v. San Joaquin Valley APCD*)

Burden of proof

A local government bears the burden of proving that:

- levy is not a tax
- amount only covers **reasonable costs** of the activity
- the manner in which those costs are allocated bear a **fair or reasonable relationship** to the payor's **burdens on, or benefits received** from the activity

Back to *Sinclair Paint*

- “[T]o show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a **fair or reasonable relationship to the payor's burdens on or benefits** from the regulatory activity.’ ”

More questions than answers

- How does this change the law?
- Does this add “reasonable costs” requirement to Exceptions (4) through (7)?
- Does this mean that a “regulatory fee” under exception (3) is not a “tax” if it bears reasonable relationship to “burdens on” the government activity?

Where things stand today

A bit of Irony

- Prohibit rather than regulate
- Unfunded Mandates

Some things are clear

- Fees for services must be reasonable and related to who is receiving the service
- Fees for products must be reasonable and related to who is receiving the product
- Charges imposed as a condition of property development are exempt*
- Fines and penalties for violating the law are exempt
- Prop 218 assessments and property-related fees are exempt

* Mitigation Fee Act fees vs. other conditions

Some things are not so clear

- What's included in the “regulatory costs” for issuing licenses and permits, performing investigations, inspections?
- What limitations are there, if any, on charges for entrance to or use of local government property?
- What, if anything does the burden of proof language add to exceptions (3) – (7)

Next Steps

- Publication of LCC *Guide to Proposition 26* 05/11
- Litigation, no doubt
- Review and, if necessary, re-define “regulatory programs”
- Evaluate fees before increasing or extending
- Be reasonable