



**PROPOSITION 26:
HOW IT AFFECTS
LOCAL GOVERNMENT**

Patrick Whitnell
General Counsel
League of California Cities



What Proposition 26 Does

- Defines regulatory fees as taxes.
- Local regulatory fees are special taxes and require a 2/3 vote to adopt a fee or extend or increase an existing fee.
- Proposition 26 for local government fees took effect November 3, 2010.

[What Proposition 26 Does]

- Prop. 26 does not apply to existing fees in place prior to November 3, 2010, unless those fees are to be extended or increased.
- Prop. 26 doesn't apply to fees that fall within any of the 7 exemptions listed in Prop. 26.
- Each fee needs to be examined individually to determine whether a particular exception applies

[What Proposition 26 Does]

- “As used in this article, “tax” means any levy, charge or exaction of any kind imposed by a local government, except the following:”

[Exemptions]

- ***Specific Benefit Exemption***

- Examples: Planning permits, police permits, street closure permits, parking permits in restricted zones--to the extent that the privilege is not provided to those not charged, and the fee does not exceed the reasonable costs of service to the local government.

[Exemptions]

- ***Specific Government Service or Product Exemption.***
 - Examples: user fees including for water, sewer, gas, electric, recycling, refuse -to the extent that the privilege conferred by the service or product is not provided to those not charged, and the fee does not exceed the reasonable costs of service to the local government.

Exemptions

- ***Permits and Inspections Exemption***

- Examples: permits for regulated commercial activities; CEQA/EIS, plan check, fire, building, health, environmental, safety permits--where the costs do not exceed the reasonable regulatory costs to the local government for issuing the license or permit.

[Exemptions]

- ***Local Government Property Exemption.***
 - Examples: facility rental, on and off-street parking, tolls, franchise fees, tipping fees, etc.

[Exemptions]

- ***Penalty for Illegal Activity Exemption.***

- Examples: fines, code enforcement fees and penalties, late payment fees, interest charges and other charges for violation of the law.

[Exemptions]

- ***Property Development Exemption.***
 - Examples: construction permits, development impact fees, fees imposed to remedy the effects of the fee payor's operation that are imposed as a condition of property development.

[Exemptions]

- **Proposition 218 Exemption**

- Examples: assessments on real property for special benefit conferred, fees imposed upon a parcel or a person as an incident of property ownership

[Resources]

- The City Attorneys' Department of the League of California Cities has drafted a guide that is available on the League's website.
- www.cacities.org/prop26guide

[Special Benefit Exemption]

- This exception has three parts:
 - A charge imposed for a specific benefit conferred or privilege granted;
 - A benefit conferred or privilege granted that is not provided to those not charged;
 - A charge that does not exceed the local agency's reasonable costs.

Special Benefit Exemption

- Free Or Discounted Services?
 - Does this mean that no one can be charged for a benefit or privilege if any other person receives it for free—League’s position is that it does not
- Tipping Fees?
 - *City of Dublin v. County of Alameda (1993)*
 - League’s position is that tipping fees fall within the special benefit exemption as well as the local government property exemption and the Prop. 218 exemption if the fee is part of the refuse collection rate

Specific Government Service or Product Provided

■ Definition

- A charge **imposed** for a specific government service or product
- provided directly to the payor that is not provided to those not charged, and
- which does not exceed the reasonable costs to the local government of providing the service or product.

Specific Government Service or Product Provided

- What does “imposed” mean?
 - Is the charge in connection with a service the provision of which is a statutory purpose of the local agency; or the agency is collecting a fee imposed by the state;
 - Is the charge established by arm’s length voluntary contract negotiations?

Permits and Inspections

- What does this cover?
 - Funding of rule making costs that is included in the fee (League's position)
 - Other general regulatory costs— investigations, inspection, audits, and enforcement (League's position)
 - Grocery bag fees? Currently subject to litigation in County of Los Angeles

Use of Government Property

- A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property
- The statutory context does not provide direction on the application of Proposition 26 to solid waste “franchises” except to the extent that (1) a city franchise is referred to as a “contract;” or (2) a county franchise is an acknowledged arms-length negotiation. Neither appears to “impose” a fee.

Use of Government Property

- AB 939 fees—fees to fund county-wide integrated waste management plans
- Fees in place prior to November 3, 2010 are not subject to Prop. 26, which does not apply retroactively
- Fees adopted after November 3, 2010 need to be carefully examined to determine if they fall within one or more of the exemptions

Fines and Penalties

- “A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of **a violation of law**”
- The League’s position is that “violation of law” can be read broadly to include agency ordinances, regulations and policies and not just state statutes or local ordinances.

[Litigation]

- City of Redding—Payment in Lieu of Taxation (PILOT)
- County of Los Angeles—Grocery bag fee
- City of Santa Cruz—Court of Appeal found rental unit inspection fee exempt from Proposition 26

[FUTURE CONCERNS]

- Pushing the envelope and looking for loopholes
 - Important to remember the voter's intent in passing Proposition 26
 - *“Fees couched as “regulatory” but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenues for a new program and are not subject to any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.”*