

City and County of San Francisco



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MEMORANDUM

TO: Department Heads

FROM: City Attorney Dennis J. Herrera *DJH*  
Controller Ben Rosenfield *BR*  
Greg Wagner, Budget Director, Mayor's Office *GW*

DATE: November 17, 2010

RE: Impact Of Proposition 26: Initiative State Constitutional Amendment That Imposes A New Requirement For Voters To Approve Certain Local Fees And Charges

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On November 2<sup>nd</sup>, California voters approved Proposition 26, a State initiative constitutional amendment that affects the authority of both the State Legislature and local governments in the area of fees and taxes. The amendment creates a new definition of taxes encompassing various charges that the law previously treated as regulatory fees. Going forward, new or increased fees or charges that a local government seeks to impose, and that fall under Proposition 26's new definition of a tax, will be subject to voter approval. And in many instances voter approval will require a two-thirds supermajority because those fees or charges would be special taxes. Proposition 26 became effective on November 3, 2010.

The League of California Cities has prepared a short bulletin about the potential effects of Proposition 26. That bulletin, which is attached, provides a useful overview of Proposition 26, what local fees are not affected and recommendations in light of the uncertainty remains.

The immediate impact of Proposition 26 on San Francisco will be limited. First, the measure creates several specific exceptions from the new definition of a tax, and most City fees fall under those exceptions. Second, based on our preliminary review of the measure, and consistent with the attached League of California Cities bulletin and the State Legislative Analyst's summary of the measure, the adoption of Proposition 26 will not affect the ability of the City to continue to collect any fees or charges that the City adopted before November 2<sup>nd</sup>. Also, Proposition 26 should not curtail the City's ability to adjust existing fees or charges in the future where legislation that the City adopted before November 2<sup>nd</sup> already requires those adjustments—for instance, by providing for periodic cost of living adjustments.

Still, many unanswered questions remain about Proposition 26's meaning and scope. As suggested in the League of California Cities bulletin, San Francisco should proceed cautiously when considering adopting new fees or increasing or extending existing fees. Accordingly, before taking steps toward adopting a new fee or increasing or extending an existing fee, your department should first consult with the City Attorney's Office, Controller's Office and Budget Office so that we can review the proposal in light of Proposition 26 and other potentially applicable legal restrictions.

The Controller's Office and the Mayor's Budget Office, in coordination with the City Attorney's Office, will provide further information and guidance to departments about Proposition 26 in the context of instructions for next year's budget. Also, the City Attorney's Office will participate in the committee of lawyers that the League of California Cities has appointed to review the measure and will continue to advise the City on Proposition 26's impacts and significant developments in this evolving area of the law.

## League of California Cities Bulletin

11/8/2010

### Potential Effects of Prop. 26: Initial Considerations

There were significant positives for local government at the Nov. 2, statewide election, but one disappointment was the narrow passage of Proposition 26. Naturally questions occur about what this means for local government.

Prop. 26 applies to both state and local government, but in different ways. The text of the measure is online<sup>1</sup>.

For the state, it contains a new definition of state "taxes," which requires a two-thirds vote of the Legislature to impose new, or increase or extend existing, regulatory fees (with some exceptions) and to make a change to the state law which results in any taxpayer paying a higher tax. Regulatory fees could previously be adopted by a majority vote of the Legislature. The Legislature had previously taken the position that a "revenue neutral" change to the state law requires only a majority vote even if it meant a taxpayer would pay a higher tax. The new definition of state taxes means that regulatory fees and revenue neutral state law changes adopted by the Legislature between Jan. 1, 2010 and Election Day expire on Nov. 3, 2011, unless they are readopted as "taxes" by the Legislature with two-thirds vote.

For local governments, Prop. 26 establishes a similar, but not identical, definition of local "taxes," and requires two-thirds voter approval to impose new, or increase or extend existing; regulatory fees (with some exceptions). Previously, these fees could be adopted by city council majority vote. Unlike the provisions that apply to the state, Prop. 26 does not contain any provision that repeals pre-existing regulatory fees. The Legislative Analyst's Office analysis<sup>2</sup> also states the measure does not affect existing local regulatory fees unless they are to be increased or extended.

Which local fees are not taxes under Prop. 26? (This section references the California Constitution Article XIII C, section 1(e)(1)-(7).)

- A charge imposed as a condition of property development ("developer fees");
- Assessments and property-related fees (for example, water and sewer utility charges);
- A fine, penalty, or other charge imposed as a result of a violation of the law (for example, a parking citation or weed abatement lien);
- A charge for reasonable regulatory costs for issuing licenses and permits, performing investigations, inspections, and audits;
- A charge for entrance to or use of local government property;
- A charge to purchase, rent, or lease local government property;
- A charge imposed for a specific government service or product which does not exceed the reasonable costs of providing the service or product (for example: fee for recreation department class); and
- A charge imposed for a specific benefit conferred or privilege granted that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege (for example: fee for processing property development application).

<sup>1</sup> [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i891\\_initiative\\_09-0093.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i891_initiative_09-0093.pdf)

<sup>2</sup> [http://www.lao.ca.gov/ballot/2010/26\\_11\\_2010.aspx](http://www.lao.ca.gov/ballot/2010/26_11_2010.aspx)

Local officials no doubt will have many questions about how to interpret Prop. 26, but they will quickly discover a lack of definitive answers. That is because Prop. 26 plows broad new legal ground, is replete with vague terminology, contains numerous exceptions, and has limited intent language to guide interpretation. In the short term, we would advise cities to:

- **Expect Uncertainty:** Now that Prop. 26 has been adopted, the debate has begun on what it means to the state and local government, and its impacts on environmental and health-related fees. Various analyses have begun to circulate, and more will likely surface in the coming weeks. Legal challenges could emerge, legislation may be introduced to attempt to clarify provisions, and attempts may even be contemplated to alter or reverse the measure via a future initiative.
- **Proceed Cautiously When Adopting New Fees, or Increasing or Extending Existing Fees:** While there will be numerous opinions about how this measure can be interpreted, it is also important to avoid overreactions. Cities should:
  - Familiarize themselves with the text of the measure;
  - Identify those existing fees that are not considered taxes under Prop. 26; and
  - Identify any "regulatory fees" which, in consultation with your city attorney, would be clearly affected by this measure, meaning that a two-thirds voter approval would be required to increase or extend these fees.
- **Stay Tuned:** The League's City Attorneys' Department is convening a committee of attorneys to review the measure and consider how best to advise the League on questions of interpretation and application. The League will continue to monitor developments on this matter as they evolve.

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