

San Francisco's Checkout Bag Fee Ordinance and the Problem of Proposition 26

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Introduction

In February of 2012, the San Francisco Board of Supervisors enacted the county's Checkout Bag Ordinance.¹ Designed to decrease the use of disposable checkout bags and mitigate their harmful environmental effects, the ordinance requires all retailers to charge ten cents per paper or reusable checkout bag distributed to their customers.² Fifteen months later, the California electorate passed Proposition 26 with fifty-two percent of the vote; the proposition added a definition of a "tax" to the California Constitution in order to recategorize certain regulatory fees.³ On its face, the amendment may seem like a semantic alteration to the state's constitution. But the effect of such a reclassification will undoubtedly affect state and local governments' ability to impose certain regulatory fees without prior authorization by the electorate.

Many commentators regarded the Checkout Bag Ordinance as codifying into law an environmental practice already observed by many residents of the County.⁴ Similar laws have been enacted in

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1. S.F., CAL., ENV'T CODE ch. 17, §§ 1702, 1703.5 (2012).

2. City and Cnty. of San Francisco, *Green Initiative: City's Expanded Checkout Bag Ordinance Takes Effect* (Oct. 4, 2012), http://www5.sfgov.org/sf_news/2012/10/green-initiative-citys-expanded-checkout-bag-ordinance-takes-effect.html.

3. CAL. SEC'Y OF STATE, OFFICIAL DECLARATION OF THE VOTE RESULTS ON NOVEMBER 2, 2010, STATE BALLOT MEASURES (2010), available at <http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf>.

4. Stacy Finz, *New SF Checkout Bag Law Takes Effect Oct. 1*, S.F. CHRON. (Sept. 21, 2012), <http://www.sfgate.com/business/article/New-SF-checkout-bag-law-takes-effect-Oct-1-3881509.php>.

seventy-five other communities throughout the State of California, and the habit of charging for carryout bags has been the norm across Europe for years.⁵ However, because the environmental enactment never received prior voter approval, Proposition 26 may render it unconstitutional.⁶

I. Legal Foundation of Proposition 26

A. Construction of Voter Initiatives

Constitutional provisions enacted by voter initiative are applied under the same principles governing statutory construction.⁷ In order to ascertain and effectuate the intended purpose of the law, a court will regard the ordinary meaning of the initiative's language as the best indication of the voting public's intent.⁸ If the proposition's plain meaning using the words' ordinary meanings will not result in irrational application, the court will presume the plain meaning of the constitutional provision reflects the voters' intent.⁹ However, if the proposition's words are ambiguous, the court will look to extrinsic evidence to elucidate the language's intended meaning.¹⁰

B. Pre-Sinclair Paint Voter Initiatives and Resulting Constitutional Authority

Historically, legislatures imposed fees that were either regulatory or service related in nature. Authority for state and local governments to impose regulatory fees derived from their police power, which is a government's inherent authority to make laws regulating otherwise lawful conduct in order to support the general welfare.¹¹ Authorizing statutes defined regulatory fees partially in the negative, as "a monetary exaction *other than a tax or special assessment*" that is charged to a person carrying on in an activity for the purpose of defraying the social cost of that activity.¹² For such a

5. *Id.*; San Francisco Dep't of the Env't, *Checkout Bag Ordinance*, SF ENVIRONMENT (Aug. 28, 2013), <http://www.sfenvironment.org/article/prevent-waste/checkout-bag-ordinance>.

6. Finz, *supra* note 4.

7. *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 239 (Cal. 2007).

8. *Id.* at 239, 241 (citing *People v. Rizo*, 22 Cal. 4th 681, 685 (2000)).

9. *Id.* at 239.

10. *Id.*

11. U.S. CONST. amend. X; CAL. CONST. art. XI, § 7; *Cnty. of Plumas v. Wheeler*, 87 P. 909, 911 (1906) (quoting in part *Ex parte Whitwell*, 32 P. 870 (1893)).

12. CAL. GOV'T CODE § 66000(b) (2007) (emphasis added).

regulatory fee to be lawful, the agency levying the fee must (1) identify the purpose of the fee;¹³ (2) demonstrate a reasonable relationship between the fee's use and its purported purpose;¹⁴ (3) demonstrate a reasonable relationship between the need for the fee's use and the activity upon which the fee is imposed;¹⁵ and (4) show that the fee is charged at a reasonable rate.¹⁶ However, these fees need not be imposed at a uniform rate.¹⁷

As opposed to regulatory fees, service fees are exactions charged to defray the governmental cost of providing a specific service to the public.¹⁸ Though authority to levy service fees can similarly be grounded in the police power, they are more often validated as inherent in the ability to guarantee the service, or as incidental to the privilege of enjoying the service.¹⁹

In 1978, California voters adopted Proposition 13, which added article XIII A to the California Constitution and generally (1) limited the rate of *ad valorem* taxes on real property, and the frequency of assessments on the value thereof; (2) required that "any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in method of computation" must be approved by two-thirds of the legislature; and (3) required two-thirds voter approval of special taxes imposed by cities and counties.²⁰ For purposes of Proposition 13, an *ad valorem* tax is determined based on the value of the real property on which the charge is levied.²¹ A special tax, alternatively, is one that is imposed for a defined and specified use.²² In response to *City and County of San Francisco v. Farrell*, which held that the special tax limitation imposed by Proposition 13 does not encompass taxes

13. CAL. GOV'T CODE § 66001(a) (2007).

14. *Id.*

15. *Id.*

16. *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133, 138 (1940).

17. *Id.*

18. LEAGUE OF CAL. CITIES, PROPOSITION 26 IMPLEMENTATION GUIDE (2011), available at www.cacities.org/Prop26Guide [hereinafter PROPOSITION 26 IMPLEMENTATION GUIDE].

19. *Carlton Santee Corp. v. Padre Dam Mun. Water Dist.*, 120 Cal. App. 3d 14, 26 (1981); PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 2 (citing *Durant*, 39 Cal. App. 2d at 137).

20. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equal'n*, 22 Cal. 3d 208, 218 (1978) (quoting in part CAL. CONST. art. XIII A, § 3 (amended 2010)).

21. CAL. CONST. art. XIII A, § 1.

22. *City and Cnty. of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982).

imposed for a general governmental purpose, California voters passed Proposition 62 in 1986.²³ The ballot measure established a simple majority voter approval requirement for general taxes in all California general law cities and counties.²⁴

In an effort to further close any loopholes in Proposition 13 and clarify the applicability of Proposition 62, California voters enacted Proposition 218 in 1996.²⁵ Proposition 218 added articles XIII C and XIII D to the California Constitution, which (1) require simple majority voter approval for general taxes in general law cities, charter cities, and counties, and (2) expand the definition of “special tax” to include any tax levied for a specific purpose, even if the moneys were placed in the government’s general fund.²⁶ However, a special tax still does not include “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.”²⁷

C. *Sinclair Paint Co. v. State Board of Equalization*

In *Sinclair Paint Co. v. State Board of Equalization*,²⁸ the California Supreme Court held that a regulatory fee imposed on manufacturers or persons contributing to lead contamination was not a tax, and therefore not subject to Proposition 13’s two-thirds voter approval requirement.²⁹ In 1991, the California Legislature enacted the Childhood Lead Poisoning Prevention Act by a simple majority vote.³⁰ The Act provided children, who were potential victims of lead

23. *Id.*; CAL. ENVTL. RES. EVALUATION SYSTEM, A PLANNER’S GUIDE TO FINANCING PUBLIC IMPROVEMENTS (1997), available at <http://ceres.ca.gov/planning/financing/chap1.html>.

24. See CAL. GOV’T CODE §§ 53720, 53723 (2013). A general law city is any city that has not adopted a charter. In effect, this means that the general law city is bound by California state law, regardless of whether the subject matter concerns a municipal affair. See LEAGUE OF CAL. CITIES, CHARTER CITIES: A QUICK SUMMARY FOR THE PRESS AND RESEARCHERS (2007), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/03/0384277b-0e15-4421-b252-052b3f5c5dcc.pdf>.

25. CAL. LEGIS. ANALYST’S OFFICE, UNDERSTANDING PROPOSITION 218 (1996), available at http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.pdf [hereinafter UNDERSTANDING PROPOSITION 218].

26. *Id.* at 31–33. In general, the voter approval requirement expands the statutory obligation on cities and counties established by Proposition 26, which excluded charter cities such as Los Angeles and San Francisco.

27. CAL. GOV’T CODE § 50076 (2013).

28. *Sinclair Paint Company v. State Bd. of Equalization*, 15 Cal. 4th 866 (1997).

29. *Id.* at 870–73.

30. *Id.* at 869.

poisoning, with evaluation, screening, and other related medically necessary services.³¹ These programs were supported entirely by fees assessed “on manufactures and other persons contributing to environmental lead contamination.”³² Fees were imposed on identifiable sources of lead contamination, and were assessed in accordance with the source’s market share responsibility of contamination.³³

Plaintiff Sinclair Paint Company (“Sinclair”) challenged the fee, claiming the Act was per se invalid because the charge was a tax, rather than a fee.³⁴ Defendant Board of Equalization contended that the Act imposed a regulatory fee, rather than a tax.³⁵ The question was whether the charge imposed by the Act is a tax under article XIII A, section 3 of the California Constitution or a fee that should be excepted from the two thirds-voter approval requirement.³⁶

There are three general categories of fees or assessments that may not be subject to the constraints of Proposition 13: (1) special assessments, which are based on the value of benefits conferred on the property; (2) development fees exacted in return for permits or other governmental privileges; and (3) regulatory fees that are imposed under the police power.³⁷ Special assessments and development fees are not taxes, so long as they are in an amount reasonably reflecting the value of the benefit conferred—or in the case of development fees, the privilege’s probable cost to the community.³⁸

Sinclair argued that because the fees are not imposed to reimburse the state for benefits or governmental privileges granted to the manufacturers, the fees are neither special assessments nor development fees.³⁹ However, the court found that the charges imposed by the Act were in fact regulatory fees, and therefore excepted from the general definition of a tax under Proposition 13.⁴⁰ A regulatory fee levied under the California Legislature’s police

31. *Id.*

32. *Id.* at 870–72.

33. *Id.* at 872.

34. *Id.* at 870.

35. *Id.*

36. *Id.* at 873.

37. *Id.* at 874.

38. *Id.* at 874–75.

39. *Id.* at 875.

40. *Id.* at 881.

power is not treated as a tax so long as the fee does not exceed the reasonable cost of providing services necessary to a regulation and is not levied for an unrelated revenue raising purpose.⁴¹ There need not be any benefit conferred on the fee payor, so long as the fee is only levied in the amount necessary to carry out the regulation's purpose.⁴²

The Act's fee provision qualified as a regulatory fee because it is an effect-mitigating measure meant to defray the actual or anticipated adverse effects of the payor's business operations.⁴³ Thus, the *Sinclair* court held that statutes requiring polluters or producers of contaminants to pay for mitigation and cleanup efforts are regulatory in nature.⁴⁴ By imposing fees of this nature, the Legislature is trying to regulate future behavior through deterrence, and the police power encompasses the ability to regulate past, present, and future behavior.⁴⁵ As opposed to a fee enacted for a privilege, service, or permit, a "regulatory program is for the protection of the health and safety of the public."⁴⁶

The court adopted the test set out in *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* for regulatory fees.⁴⁷ Under this test, the court held that a fee is a regulatory fee, rather than a tax, if the government can show (1) the estimated costs of the regulatory activity; and (2) that the costs are apportioned so that the payor's burden bears a fair and reasonable relationship to their burden on the regulatory activity.⁴⁸ However, if the primary purpose of a measure is to raise revenue and its regulatory effect is only incidental, then the imposition is a tax.⁴⁹ The court in *Sinclair* held that regulating lead contaminators, rather than raising revenue, was the primary purpose of the Act; the fact that the fee resulted in revenue for the state was irrelevant.⁵⁰

41. *Id.* at 876 (citing *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375 (1986)).

42. *Id.*

43. *Id.* at 877.

44. *Id.*

45. *Id.* at 877-78.

46. *Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game*, 79 Cal. App. 4th 935, 950 (2000).

47. *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132 (1988).

48. *Id.* at 1146.

49. *Sinclair Paint Co.*, 15 Cal. 4th at 880.

50. *Id.* at 881.

D. Proposition 26: Defining a “Tax”

In response to these “effect-mitigating regulatory fees,” the drafters of Proposition 26 intended to reclassify many of these fees designed to mitigate adverse health, environmental, and societal effects as taxes.⁵¹ As taxes, these charges will be subject to the voter approval requirements of article XIII C.⁵² Proposition 26 overturned the *Sinclair* decision by expanding article XIII C to the California Constitution to define a tax as:

[A]ny levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted 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 conferring the benefit or granting the privilege.

(2) 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.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) 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.

51. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 3.

52. *Id.*

- (6) A charge imposed as a condition of property development.
- (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.⁵³

Before the passage of Proposition 26, the definitions of “general tax” and “special tax” provided by Proposition 218 did not directly define what a “tax” was.⁵⁴ Instead, taxes were described in the negative.⁵⁵ As of November 2010, when Proposition 26 became effective, all charges, levies, or exactions enacted by local government must be subject to voter approval unless it fits within one of the seven exceptions listed above.⁵⁶

This definition of a tax invalidates impermissible revenue raising exactions, as well as the acceptable regulatory fees under *Sinclair*.⁵⁷ Under the pre-Proposition 26 regime, a benefit need not be conferred upon the payor of a fee, so long as the fee was reasonable and levied to further a legitimate regulatory interest.⁵⁸ Under the current system, any source of revenue for local government must be treated as a tax unless it falls within one of the seven exceptions.⁵⁹

II. San Francisco Environmental Code Chapter 17 and the Upshot of Proposition 26

A. The Plastic Bag Ban and Checkout Bag Charge Amendment

In March of 2007, the San Francisco Board of Supervisors voted to pass Ordinance number 80-71, known as the Plastic Bag Reduction Ordinance, which amended the San Francisco Environmental Code by adding Chapter 17, sections 1701 through 1709.⁶⁰ The effects of these amendments were to (1) require the use of compostable plastic,

53. CAL. CONST. art. XIII C, § 1(e).

54. UNDERSTANDING PROPOSITION 218, *supra* note 25, at 42–43.

55. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 4–5. *See also* CAL. GOV. CODE § 50076 (2013) (explaining, for example, that a fee is not a tax so long as it does not exceed the reasonable cost of providing a service).

56. *See* CAL. CONST. art. XIII C, § 1(e).

57. *Sinclair Paint Company v. State Bd. of Equalization*, 15 Cal. 4th 866, 880 (1997).

58. *Id.* at 876; *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1146 (1988).

59. CAL. CONST. art. XIII C, § 1(e); PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 6 (discussing definition of “levy, charge, or exaction”).

60. S.F., CAL., ENV'T CODE ch. 17, §§ 1701–09 (2007).

recyclable paper, and/or reusable checkout bags by grocery stores located in the City and County of San Francisco; and (2) provide penalties for violations. The ordinance was meant to lessen the environmental impact of disposable bags by reducing litter, waste, pollution, and contamination in recycling and composting programs.⁶¹

By February 2012, San Francisco enacted its Checkout Bag Ordinance, which amended section 1702 and added section 1703.5 to the San Francisco Environmental Code.⁶² The ordinance extended the plastic bag restriction from supermarkets and pharmacies to all retail stores,⁶³ and established a ten-cent charge for each checkout bag provided to customers.⁶⁴ The Proposition 26 tax analysis applies to the Ordinance because it requires consumers to pay for the use of checkout bags at all retail stores.⁶⁵

B. The Retroactivity Question

Since Chapter 17 was added to the San Francisco Environmental Code in 2007, three years before Proposition 26 came into effect, the issue of retroactive application must be addressed. An initiative will not be applied retroactively unless the measure expressly includes a retroactivity provision, or “it is very clear from extrinsic sources that the Legislature or the voters must have intended retroactive application.”⁶⁶ Though Proposition 26 contains an express retroactivity clause regarding state measures, no such provision exists as to local charges.⁶⁷ However, materials issued by the Legislative Analyst’s Office prior to the passage of Proposition 26 stated that fees or charges in existence prior to the November 2010 election will not be affected unless “the state or local government later increases or extends the fees or charges.”⁶⁸

61. San Francisco Dep’t of the Env’t, *supra* note 5.

62. S.F., CAL., ENV’T CODE ch. 17, §§ 1702, 1703.5 (2007).

63. S.F., CAL., ENV’T CODE ch. 17, § 1702 (2007).

64. S.F., CAL., ENV’T CODE ch. 17, § 1703.5 (2007).

65. See CAL. TAXPAYERS ASS’N, UNDERSTANDING PROPOSITION 26 5–6 (Aug. 15, 2011), available at <http://www.caltax.org/UnderstandingProposition26.pdf> [hereinafter UNDERSTANDING PROPOSITION 26].

66. *Strauss v. Horton*, 46 Cal. 4th 364, 470 (2009) (citing *Evangelatos v. Super. Ct.*, 44 Cal. 3d 1188, 1209 (1988)).

67. Compare CAL. CONST. art. XIII A, § 3(c), with CAL. CONST. art. XIII C, § 1.

68. CAL. LEGIS. ANALYST’S OFFICE, PROPOSITION 26 BALLOT PAMPHLET 5–6 (June 15, 2010), available at http://www.lao.ca.gov/ballot/2010/26_11_2010.pdf [hereinafter PROPOSITION 26 BALLOT PAMPHLET].

There seem to be two plausible ways to frame the Checkout Bag Ordinance with regard to the question of retroactivity: (1) as a new fee or charge that came into effect when the Ordinance was enacted in 2012; or (2) as an amendment to the existing Chapter 17 of the San Francisco Environmental Code. Under either interpretation, the charge will come within the purview of Proposition 26. If the fee is characterized as a new exaction that came into effect when the Ordinance was enacted, then it clearly falls under the scope of Proposition 26 as a “tax . . . [that must be] submitted to the electorate and approved” by a majority or two-thirds vote.⁶⁹ If the charge applied as an amendment to the existing law, rather than a new imposition, it would still be subject to article XIII C, section 2 of the California Constitution voter approval requirements as a charge increase or extension implemented after the Proposition’s passage.⁷⁰ Since the Checkout Bag Ordinance was enacted such that it comes within the intended scope of Proposition 26, it must be analyzed under articles XIII A and XIII C of the California Constitution.

C. Analyzing a Levy, Charge, or Exaction under Proposition 26

Analyzing a levy, charge, or exaction imposed by local government implicates a multi-step “tax test.”⁷¹ But because Proposition 26 defines a tax as any “levy, charge, or exaction,” a fee must qualify as one of those three before being reclassified as a tax.⁷²

There appears to be no meaningful difference among the terms levy, charge, and exaction. Although the first six exceptions provided in article XIII C, section 1, reference the word “charge”—and the seventh exception uses the terms “[a]ssessments” and “property-related fees”—article XIII C does not explicitly define any of these three terms.⁷³ However, article XIII D, adopted by Proposition 218, defines “fee” or “charge,” but not “levy” or “exaction.”⁷⁴ The California Supreme Court explained that contrary to the canons of constitutional construction, the two defined terms were not intended to be distinguished:

69. CAL. CONST. art. XIII C, § 2(b); *see* CAL. CONST. art. XIII C, § 2(d). Whether the charge is subject to simple majority or two-thirds approval depends on whether it is classified as a general or special tax, respectively.

70. PROPOSITION 26 BALLOT PAMPHLET, *supra* note 68, at 5–6.

71. UNDERSTANDING PROPOSITION 26, *supra* note 65, at 6.

72. CAL. CONST. art. XIII C, § 1(e).

73. *See id.*

74. *See* CAL. CONST. art. XIII D, § 2(e).

Because article XIII D provides a single definition that includes both “fee” and “charge,” those terms appear to be synonymous in both article XIII D and article XIII C. This is an exception to the normal rule of construction that each word in a constitutional or statutory provision is assumed to have independent significance. We use the terms interchangeably⁷⁵

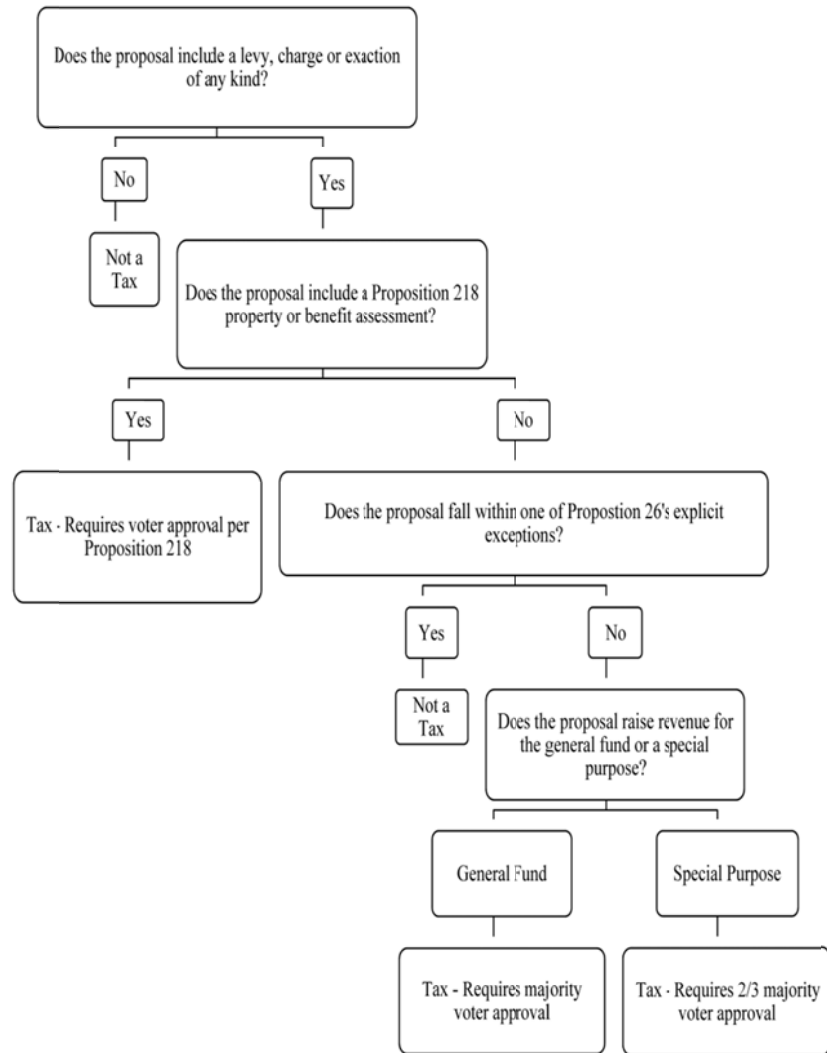
In light of the gloss that the California Supreme Court has placed over articles XIII C and XIII D of California’s Constitution, it can reasonably be inferred that levy, charge, and exaction should also receive the same synonymous interpretation. The phrase “levy, charge, or exaction of any kind” is likely intended by the Legislature to be interpreted expansively to include all sources of revenue “imposed by a local government” under article XIII C, section 1.⁷⁶

Once a prospective tax is characterized as a levy, charge or exaction, it may be analyzed under Proposition 26’s multi-step framework, summarized in the chart below:⁷⁷

75. *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 225 n.4 (2006) (citation omitted).

76. CAL. CONST. art. XIII C, § 1(e); PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 10.

77. *See* UNDERSTANDING PROPOSITION 26, *supra* note 65, at 6; *see also* PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 10.



D. Analyzing the Checkout Bag Fee Ordinance Under Proposition 26

Using the Proposition 26 framework to analyze San Francisco's checkout bag fee raises several legal questions with regard to the charge's classification as a fee or a tax. First, in determining whether the checkout bag charge must be treated as a tax or fee, this Note will

analyze the Ordinance under the relevant exceptions laid out in article XIII C, section 1, subdivision (e).⁷⁸ The checkout bag fee possibly implicates the exceptions in subdivision (e)(1) regarding fees for benefits and privileges conferred, and subdivision (e)(3) concerning fees for permit and inspection fees. This Note will then address whether the Ordinance includes a levy, charge, or exaction of any kind. The answer to this question cannot be assumed; if the checkout bag charge is not found to be a levy, charge, or exaction, the law does not come within the scope of Proposition 26 and will not be subject to voter approval. Though there are several conceivable proposals that would involve a benefit assessment or property-related charge—particularly those which will also fall within the exception laid out in article XIII C, section 1, subdivision (e)(7)—the checkout bag charge at issue here does not implicate Proposition 218. Accordingly, this Note will not address that issue.

1. *The Proposition 26 Burden of Proof*

In its final paragraph, Proposition 26 provides:

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.⁷⁹

This language imposes three distinct requirements upon the government: (1) that the levy, charge, or exaction is not a tax;⁸⁰ (2) that the amount is not more than necessary to reasonably cover the cost of the activity;⁸¹ and (3) that the manner in which the costs are

78. If the charge does not fit within one of the seven specified exceptions, then the analysis continues to the final question of whether the revenue is to be placed in the general fund or the special fund. However, if the analysis has reached this point, the charge is a tax and the final inquiry is necessary only to determine what percentage of the electorate is necessary to authorize its imposition.

79. CAL. CONST. art. XIII C, § 1(e).

80. *Id.* The government achieves this by showing that the levy, charge, or exaction fits into one of the seven enumerated exceptions.

81. *Id.*

allocated bears a fair or reasonable relationship to the payor's burden on or benefits received from the activity.⁸²

In litigation, the government will bear the burden to justify the fee.⁸³ However, Proposition 26 only requires the government to justify its revenue measures by a preponderance of the evidence, which is the lowest evidentiary standard.⁸⁴ Thus, although the government is saddled with the initial burden of proof, the requirement is not so harsh that the evidentiary burden should pose much of an issue during litigation.

2. *The Section 1, Subdivision (e)(1) Exception for Fees for Benefits and Privileges Conferred*

Article XIII C, section 1, subdivision (e)(1) of the California Constitution excludes from the definition of a tax:

A charge imposed for a *specific benefit conferred or privilege granted* 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 conferring the benefit or granting the privilege.⁸⁵

This exception imposes three requirements: (1) the charge must be imposed for a specific benefit conferred or privilege granted; (2) the benefit conferred or privilege granted must not be provided to those not charged; and (3) the charge must not exceed the local agency's reasonable costs.⁸⁶

If this second criterion is to be read literally, the language of Proposition 26 could require that no person "can be charged for a benefit or privilege if any other person receives it for free."⁸⁷ However, the "Findings and Declarations of Purpose" of Proposition 26 suggests otherwise.⁸⁸ The initiative was directed at preventing new taxes from being disguised as fees "in order to extract even more

82. *Id.*

83. *Id.*

84. MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION JURY INSTRUCTIONS § 2.02(B) (2d ed. 2013) (stating that a jury can make a finding by a preponderance of the evidence "when it is shown that the fact is more likely true than not true"); PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 45.

85. CAL. CONST. art. XIII C, § 1(e)(1) (emphasis added).

86. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 15.

87. *Id.*

88. *Id.* at 15–16.

revenue from California taxpayers without having to abide by . . . constitutional voting requirements.”⁸⁹ Well-settled case law also suggests that a literal reading of the second requirement may not be appropriate.⁹⁰ Historically, when regulatory fees that involve excess charges are used to help subsidize discounts to other fee payors, they are deemed to be taxes.⁹¹ Consequently, this first exception excludes from treatment as a tax a fee that covers the total cost of providing a benefit or privilege to the fee payors, so long as the charge does not also include a subsidy to provide free or discounted services to others.⁹²

By characterizing the retail store that is effectuating the checkout bag charge as an agent of the City, the payment arguably fits into the tax exception detailed in article XIII C, section 1, subdivision (e)(1). The exclusion provides a charge is not a tax if it is “imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged.”⁹³ Here, the benefit or privilege conferred by the County to the payor of the charge is the right to purchase and use paper bags at the point of sale.⁹⁴ Characterizing the right to purchase paper bags upon checkout from a retail store as a benefit or privilege is particularly convincing when considering that the County can ban paper checkout bags at any time.⁹⁵ Additionally, the exception requires that the charge “does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.”⁹⁶ Research conducted by the Los Angeles Department of Public Works indicated that the ten-cent charge is close to the actual average cost of providing the paper bag.⁹⁷

89. UNDERSTANDING PROPOSITION 26, *supra* note 65, at 14–15.

90. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 15–16.

91. *Id.*; *see, e.g.*, CAL. GOV'T CODE § 50076 (1979) (A “special tax [subject to the two-thirds voter approval requirement of Prop. 13 Art. XIII A, § 4] shall not include 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.”).

92. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 16.

93. CAL. CONST. art. XIII C, § 1(e)(1).

94. *See Schmeer v. Cnty. of Los Angeles*, 213 Cal. App. 4th 1310, 1315 (2013).

95. *See S.F., CAL., ENV'T CODE* ch. 17, §§ 1701–09 (2007) (establishing the San Francisco plastic checkout bag ban).

96. CAL. CONST. art. XIII C, § 1(e)(1).

97. L.A. DEP'T OF PUB. WORKS, AN OVERVIEW OF CARRYOUT BAGS IN LOS ANGELES COUNTY 36 (Aug. 2007), *available at* <http://ladpw.org/epd/pdf/PlasticBagReport.pdf>. The department's research also revealed that retailers budget for the cost of purchasing single use carryout bags, and if they are required to charge for the use of these

One problem, however, is that a court could classify the charge as a fee rather than a tax. For example, the exception requires that the charge “not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.”⁹⁸ If the charge cannot exceed the cost to the government conferring the benefit or privilege, one can reasonably infer that the government itself must grant the benefit or privilege. Here, the government is not granting any benefit; it is the retail establishment that is providing the privilege of purchasing a checkout bag at the point of sale to the payor.⁹⁹ Nor does it cost San Francisco any money to provide customers with a checkout bag. On its face, the Checkout Bag Ordinance does not satisfy two of the three requirements of the (e)(1) exception. First, the ten-cent charge is not imposed for a specific privilege conferred by the County. Second, the charge exceeds the County’s reasonable cost of providing the benefit (which, in this case, is nothing).¹⁰⁰

Even if the retail establishment is regarded as an agent of the County, and therefore the County is providing the checkout bags, a legitimate question still exists as to whether offering the bags is a benefit or privilege. Prior to the Ordinance, customers had an undisputed right to receive paper bags from retailers at the point of sale.¹⁰¹ The goal of the (e)(1) exception is to defray the cost to local government of providing a benefit or privilege to its constituency.¹⁰² However, even if the store is acting as the County’s agent, the cost to the local government is still nonexistent and the retailer wholly retains the ten-cent charge.¹⁰³ The fact that the County could have

bags, all consumers may end up paying less for goods purchased from the retailer. Because this benefit would extend to those who do not purchase a carryout bag, presumably because they bring their own, it may initially seem that the charge fails the second requirement of the exception (that the benefit conferred or privilege granted must not be provided to those not charged). However, as previously discussed, this language should not be read literally, but rather as requiring that the charge does not include a subsidy to provide free or discounted services to others. Since these consumers who are not paying the ten-cent fee are not receiving checkout bags (the benefit) at a discounted price, the fact that there is an incidental benefit to all consumers should not prevent the charge from falling within the scope of this Proposition 26 exclusion.

98. CAL. CONST. art. XIII C, § 1(e)(1).

99. See *Schmeer*, 213 Cal. App. 4th at 1327.

100. See CAL. CONST. art. XIII C, § 1(e)(1); see also *supra* note 97 (discussing the benefit conferred to non-payors).

101. See S.F., CAL., ENV’T CODE ch. 17, §§ 1701–09 (2007).

102. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 16.

103. Richard Doyle, *Memorandum Single Use Carryout Bag Charge*, SAN JOSE CITY ATTORNEY 2–3 (Dec. 2, 2010), available at http://www3.sanjoseca.gov/clerk/Agenda/20101214/20101214_0702.pdf.

outlawed the sale of paper carryout bags but failed to do so is likely not sufficient to characterize selling bags as a benefit or privilege. Proposition 26 should be construed to limit government's imposition of taxes and fees.¹⁰⁴ To characterize the County's failure to ban paper bags—rather than affirmatively providing them for sale when they were not before—as a benefit or privilege seems illogical in light of the initiative's purported purpose. As a matter of common sense, the privilege or benefit granted should be an affirmative act of the government to provide something that was not previously conferred or available.¹⁰⁵ To construe government's inaction as fitting within the scope of the (e)(1) exception to Proposition 26's definition of a tax would be to expand the County's ability to impose a tax or fee without voter approval. This interpretation seems inconsistent with the intent of Proposition 26.¹⁰⁶

Both proponents and opponents of the Checkout Bag Ordinance make valid legal arguments that fit within the (e)(1) exception to the definition of a tax. Applicability of the exception rests on the first and third elements, namely (1) whether the charge is imposed for a specific benefit or privilege, and (3) whether the charge exceeds the County's reasonable cost.¹⁰⁷ While the third element seems, in part, resolved by characterizing the retailer as an agent of the County, the first element is problematic. Characterizing the government's *inaction* as the County "providing a benefit to retail customers" is contrary to the stated purpose of Proposition 26. In other words, the purpose of Proposition 26 is to limit taxes chargeable by the government that escape the requirement of electoral approval.¹⁰⁸ For this reason, it seems unlikely that a court would interpret the (e)(1) exception so broadly as to classify the Checkout Bag Ordinance as a fee, rather than a tax.

104. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 3.

105. See *Benefit*, MERRIAM-WEBSTER (Apr. 7, 2013), <http://www.merriam-webster.com/dictionary/benefit> (defining a benefit as "an act of kindness," "useful aid," and "a service (as health insurance)"); *Privilege*, MERRIAM-WEBSTER (Apr. 7, 2013), <http://www.merriam-webster.com/dictionary/privilege> (defining a privilege as "a right . . . granted as a peculiar benefit, advantage, or favor").

106. See PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 3.

107. See CAL. CONST. art. XIII C, § 1(e)(1).

108. See PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 3.

3. *The Section 1, Subdivision (e)(3) Exception for Permitting and Inspection Fees*

Article XIII C, section 1, subdivision (e)(3) of the California Constitution excludes from the definition of a tax:

A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.¹⁰⁹

This exception covers a range of local government regulatory fees. The list of permitted regulatory costs is exhaustive, and includes issuing permits and licenses, performing investigations and audits and administrative enforcement and adjudication.¹¹⁰ Like the exception in subdivision (e)(1), fees within the scope of this exemption must be determined in relation to the local government's reasonable cost.¹¹¹

The courts will most likely determine the breadth of this exception—while taking into account the fact that Proposition 26 is the manifestation of dissatisfaction with *Sinclair Paint Co. v. State Board of Equalization*.¹¹² The court of appeal noted:

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.¹¹³

The California Supreme Court, however, held that simply because the fee was not part of the regulatory program, this did not preclude the state from requiring Sinclair to help mitigate its

109. CAL. CONST. art. XIII C, § 1(e)(3).

110. *Id.*; PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 29 (asserting that the list of acceptable regulatory costs is “a closed list,” since it does not include language like “including” or “such as” preceding the list of permitted regulatory costs).

111. *See* CAL. CONST. art. XIII C, § 1(e)(3).

112. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 30–31.

113. *Sinclair Paint Co. v. State Bd. of Equalization*, 44 Cal. App. 4th 1434 (1996), *vacated*, 15 Cal. 4th 866 (1997).

operation's impact on childhood lead poisoning.¹¹⁴ In light of the *Sinclair* court's decision and the voters' response in approving Proposition 26, a local agency should ask the following questions to determine whether a fee comes within the scope of the subdivision (e)(3) exception:

1. Is the fee payor regulated?
2. If so, what is the regulatory program?
3. Does the program involve the issuance of a license or permit or authorize or require an investigation, inspection or audit?¹¹⁵

The Checkout Bag Ordinance seems to satisfy the first two elements of this exception. Here, the fee could be characterized as regulating the payor by mitigating the effects that customers' use of checkout bags has on the County's landfill.¹¹⁶ However, it is difficult to conceive how the Ordinance—which requires retailers to charge ten-cents per carryout bag—involves “issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”¹¹⁷ In the Proposition 26 Implementation Guide, the drafters set forth examples that would satisfy the (e)(3) exception, such as imposing a licensing fee on businesses that sell alcohol, or establishing regulations requiring parking lot operators to comply with “best management practices.”¹¹⁸ Unlike the checkout bag fee, these projects involve government permission or administrative enforcement in exchange for the fee.¹¹⁹ With the ten-cent checkout bag charge, however, the fee is the program's end, rather than the means to achieve a regulatory or administrative goal.

Proposition 26's proponents' “Findings and Declarations of Purpose” states that “Proposition 26 preserves [environmental and consumer protection] 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

114. *Sinclair Paint Co.*, 15 Cal. 4th at 877.

115. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 31. See also CAL. CONST. art. XIII C, § 1(e)(3).

116. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 31.

117. CAL. CONST. art. XIII C, § 1(e)(3).

118. PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 31.

119. See *id.* at 32.

professional certification or driving.”¹²⁰ Though this statement might suggest that voters did not intend Proposition 26 to require electoral approval of environmental fees and charges, it is difficult to construe this exception as encompassing the San Francisco Checkout Bag Ordinance. The initiative was expressly passed in response to the court’s allowance of a similar environmental mitigation fee in *Sinclair Paint Co.*¹²¹ Further, ballot arguments such as the Proposition 26 “Findings and Declarations of Purpose” can only be used as an extrinsic aid for courts to determine the voters’ intent in adopting a ballot initiative.¹²² Since the voters’ intent in approving Proposition 26 is clear, this statement contained in the ballot arguments is immaterial in analyzing the checkout bag charge under the exception enumerated in subdivision (e)(3).

Subdivision (e)(3) seems to be even less effective at saving the San Francisco Checkout Bag Ordinance than the subdivision (e)(1) exception. It is difficult to characterize the charge as involving a license, permit, or the like because the ten-cent bag charge seems to comprise the entire project. Though mitigation is presumably the goal of the Ordinance, the (e)(3) exception appears directed at exempting from the definition of a tax any fee that must be levied in order to defray the cost of administrative enforcement. That element is clearly lacking here.

4. *The “Levy, Charge, or Exaction” Exemption*

The final, and most convincing argument, for the Checkout Bag Ordinance to avoid being classified as a tax is that the charge should not be considered a levy, charge, or exaction, and thus fails the initial inquiry of the Proposition 26 analysis.¹²³ In *Schmeer v. County of Los Angeles*, the court held that an ordinance similar to the San Francisco checkout bag fee was a fee and not subject to voter approval because the ten-cent charge was retained by the store, and therefore should not be characterized as a tax.¹²⁴ The ordinary meaning of the word “tax” refers to a “compulsory payment made to the government or

120. UNDERSTANDING PROPOSITION 26, *supra* note 65, at 18.

121. *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 870 (1997); PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 30–31.

122. *Calif’s for Political Reform Found. v. Fair Political Practices Comm’n*, 61 Cal. App. 4th 472, 485 (1998) (citing *Mobilepark W. Homeowners Ass’n v. Escondido Mobilepark W.*, 35 Cal. App. 4th 32, 42 n.6 (1995)).

123. *See supra* note 71 and accompanying text.

124. *Schmeer v. Cnty. of Los Angeles*, 213 Cal. App. 4th 1310, 1329 (2013).

remitted to the government in order to raise revenue.”¹²⁵ Though article XIII C, section 1, subdivision (e) of the California Constitution does not state that a levy, charge, or exaction must be payable to the charging government, it does require that the tax be “*imposed by a local government.*”¹²⁶ Because of the plain meaning of the term “tax,” coupled with the explicit language of article XIII C, section 1, subdivision (e), the *Schmeer* court concluded that Proposition 26 is ambiguous as to whether the charge must be payable to the government in order to be characterized as a tax.¹²⁷

The exceptions listed in article XIII C, section 1, subdivision (e) “all relate to charges ordinarily payable to the government, including charges imposed in connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees and real property assessments.”¹²⁸ The first three exceptions listed, as well as the final paragraph discussing the government’s burden of proof, require that the charge not exceed the “reasonable costs to the local government” of the benefit or service.¹²⁹ These provisions, therefore, do not contemplate a charge being excepted from the definition of a tax if it is paid to a non-governmental entity or person where such entity or person is incurring the program’s cost.¹³⁰ This suggests that the language, “levy, charge, or exaction of any kind imposed,” is limited to charges payable directly to the government, and that this construction was most consistent with the plain language meaning of the term “tax.”¹³¹

Neither the text of Proposition 26, nor the ballot pamphlet materials, suggests that the electorate intended the definition of a “tax” to include charges payable to a private entity or person.¹³² The California Legislative Analyst’s Office stated, “the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other

125. *Id.* at 1326; *see also* Cal. Farm Bureau Fed’n v. State Water Res. Control Bd., 51 Cal. 4th 421, 437 (2011) (“Ordinarily taxes are imposed for revenue purposes and not ‘in return for a specific benefit conferred or privilege granted.’”); *Sinclair Paint Co.*, 15 Cal. 4th at 874 (“[T]axes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.”).

126. CAL. CONST. art. XIII C, § 1(e) (emphasis added).

127. *Schmeer*, 213 Cal. App. 4th at 1326–27.

128. *Id.* at 1327 (citing CAL. CONST. art. XIII C, § 1(e)).

129. CAL. CONST. art. XIII C, § 1(e).

130. *Schmeer*, 213 Cal. App. 4th at 1327.

131. *Id.*

132. *Id.* at 1327–28.

societal or economic concerns.”¹³³ Examples provided of regulatory fees that would be reclassified as taxes under Proposition 26 each involved government use of funds for a specified purpose, implying that applicable fees should be payable directly to the government.¹³⁴ The Legislative Analyst’s Office’s analysis does not discuss any fees payable to a private person or entity, nor does it suggest that voters intended Proposition 26 to impact such charges.¹³⁵ Based on its statutory analysis, coupled with the ballot materials prepared by the California Legislative Analyst’s Office, the *Schmeer* court held that “any levy, charge, or exaction of any kind imposed by a local government . . . is limited to charges payable to, or for the benefit of, a local government.”¹³⁶

Perhaps the best argument against this reading of the “levy, charge, or exaction” requirement of article XIII C, section 1, subdivision (e) can be found in *Washington v. Confederated Tribes of Colville Indian Reservation*.¹³⁷ In this case, several American Indian tribes challenged the efforts of Washington State to tax various activities occurring on the plaintiffs’ reservations.¹³⁸ The court maintained, “taxes can be used for distributive or regulatory purposes, as well as for raising revenue.”¹³⁹ Once the revenue-raising requirement is removed from the definition of a tax, the analysis moves away from the logic detailed in *Schmeer*. Article XIII C, section 1, subdivision (e) provides that a “‘tax’ means any levy, charge, or exaction of any kind *imposed by* a local government.”¹⁴⁰ Nowhere in this introductory clause does it say the “levy, charge, or exaction” must be collected by the government.¹⁴¹ By employing the word’s ordinary meaning, a court may reasonably define a “tax” to include any charge that is established by the government’s authority,

133. California Legislative Analyst’s Office, *Proposition 26: Increases Legislative Vote Requirement to Two-Thirds for State Levies and Charges. Imposes Additional Requirement for Voters to Approve Local Levies and Charges With Limited Exceptions* (July 15, 2010), http://www.lao.ca.gov/ballot/2010/26_11_2010.aspx.

134. *Id.*

135. *Id.*; see also *Schmeer*, 213 Cal. App. 4th at 1328.

136. *Id.* at 1328–29.

137. *Wash. v. Confed. Tribes of Colville Indian Reservation*, 477 U.S. 134 (1980).

138. *Id.* at 139.

139. *Id.* at 158.

140. CAL. CONST. art. XIII C, § 1(e) (emphasis added).

141. See CAL. CONST. art. XIII C, § 1(e).

regardless of whether the government agency enjoys the resulting revenue.¹⁴²

Moreover, only three of the seven enumerated exceptions mention the government's reasonable cost of providing the service or benefit.¹⁴³ Under the default rules of statutory and constitutional construction, each word is assumed to have independent significance; the fact that four of the provisions included in Proposition 26 make no mention of compensating the government for the program's cost suggests that it is only a requirement when specifically provided.¹⁴⁴ If courts employ this interpretation of Proposition 26's language, the California Court of Appeal's decision in *Schmeer* will likely not save the San Francisco Checkout Bag Ordinance from being characterized as a tax.

Conclusion

Enacting the San Francisco Checkout Bag Ordinance was an uncontroversial act by the County's Board of Supervisors. However, the ambiguous and (mostly) unanalyzed language of Proposition 26 proves problematic for the ten-cent charge. Though none of the seven enumerated exceptions seem to convincingly encompass the Ordinance, the introductory clause may be the charge's savior. This issue is currently working its way through the State of California's court system. The ultimate question of whether Proposition 26 applies to the charge will likely depend on the California Supreme Court's interpretation of voter intent. The Court's interpretation of whether the electorate intended to require voter approval of environmental fees and charges will determine the success or failure of the Ordinance.

This question, along with similar inquires, will persist as the long-term impacts of Proposition 26 play out in California's Judiciary. The initiative's ambiguous language undoubtedly opens the door for courts to apply the constitutional provision expansively or narrowly, the effect of which will determine California's state and local governments' ability to impose regulatory fees without prior voter approval.

142. See *Impose*, MERRIAM-WEBSTER (Apr. 6, 2013) <http://www.merriam-webster.com/dictionary/impose> (defining impose as "establish[ing] or apply[ing] by authority"); see also PROPOSITION 26 IMPLEMENTATION GUIDE, *supra* note 18, at 16 n.23.

143. CAL. CONST. art. XIII C, § 1(e).

144. See *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 388 (1993).
