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Santa Cruz Wins First Proposition 26 Case

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The first published appellate case to apply 2010's Proposition 26 was filed July 17, 2012 by the San Jose Court of Appeal. Proposition 26 defines all local government revenues as taxes requiring voter approval unless one of seven stated exceptions applies. *Griffith v. City of Santa Cruz* found a rental housing registration and inspection fee was not a tax, but a valid licensing and permitting fee.

The case was brought by Harold Griffith, a non-lawyer representing himself, who is an apartment owner, a small-government conservative, and a frequent litigant of revenue measures imposed in the Santa Cruz area. Santa Cruz's ordinance requires registration and inspection of rental housing to enforce housing codes and to prevent slum housing. The appellate court found no preemption by the State housing law because enforcement of state building standards does not conflict with those standards. The Court also found no privacy violation because inspections either had the tenant's consent or were authorized by a warrant issued by a court.

Earlier cases hold that landlords have no privacy interests in their tenants' homes. The Court found no violation of equal protection because, although distinctions between homeowners and renters require some justification to avoid improper classifications based on wealth, the City rationally concluded that limiting inspections to rental housing was appropriate given that the majority of housing code violations occur there.

The Court had little difficulty rejecting a challenge to the fees under 1996's Proposition 218, the Right to Vote on Taxes Act, because the California Supreme Court had decided this very issue in a 2001 decision involving Los Angeles: *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*.

Of most interest is the Court's treatment of the Proposition 26 claim. The parties did not argue, and the Court therefore does not consider, whether Proposition 26 could apply retroactively to an ordinance adopted in September 2010 — before the November 2010 effective date of Proposition 26. Colantuono & Levin won that point recently for the City of Redding in a challenge to a payment in lieu of taxes to its general fund from its electric utility and expects to defend that victory soon in the Court of Appeal in Sacramento.

The Court concluded that Santa Cruz's fee was expressly exempted from Proposition 26's new definition of "tax" by the measure's exemption for:

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

This decision is helpful because it provides some sense of the scope of this exception. Santa Cruz's fee covered these costs: inspecting and reinspecting units, documenting violations, advising property owners of needed corrections, referrals to code enforcement, registration of units, and administering landlord self-certifications. The program funded salaries for two inspectors, one administrative assistant and other, unde-

fined "administrative expenses." In addition, "implementation would require 'supervisory support and support from staff of other departments [such as Finance and Fire.]'" This suggests the exception will be applied broadly and practically. Discussing the provision of Proposition 26 that imposes the burden of proof on the City, the Court noted:

> This language repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax.

The Court cites a 1988 decision of the San Diego Court of Appeal involving the San Diego Air Pollution Control District's fees on SDG&E for air quality enforcement and the 1997 California Supreme Court decision in the *Sinclair Paint* case, which Prop. 26 was intended to overturn. The Court also relied on a 2011 decision of the California Supreme Court under Proposition 13 (which defines excessive fees as special taxes requiring ⅔ voter approval) regarding fees the State Water Resources Control Board imposed on those who own water rights. That decision had stated:

> The scope of a regulatory fee is somewhat flexible and is related to the overall purposes of the regulatory governmental action …. The question of proportionality is not measured on an individual basis. Rather it is measured collectively, considering all rate payors.

In the present case, Santa Cruz's evidence showed the fee was expected to produce annual revenues of $327,000 — $6,000 more than anticipated costs. The City sought to justify the excess by a declaration of its planning director who stated his "opinion that the total costs [the] City would incur in implementing the Ordinance would be 'equal to or greater than the fee(s) levied on rental property owners.'" This showing was sufficient because Mr. Griffith did not provide contrary evidence and because the inference that unaccounted-for supervision costs would cover the $6,000 gap is reasonable.

The decision may also have been influenced by the relatively small fees in issue: $45 per unit per year for registration, $20 per unit per year for inspections, and $107 per hour for inspections. The Court concluded:

> Considered collectively, the fees are reasonably related to the payors' burden upon the inspection program. The largest fees are imposed upon those who properties require the most work. We conclude that the declaration of [the planning director], combined with the fee schedule itself, show that the scheme imposes valid regulatory fees consistent with the requirements of Proposition 26.

This case provides early guidance about Proposition 26 from which we can draw these conclusions:

- The licensing and permitting exception will be applied practically and cover a reasonable range of costs attendant to regulatory programs.
- The burden to prove that fees will not exceed cost is not an overwhelming standard and reasonable decisions supported by evidence will be sustained.
- *Sinclair Paint* and other cases involving regulatory fees under Proposition 13 (which governments tended to win) will apply in construing Proposition 26.

This provides a nice start on the road to a better understanding of Proposition 26. Further developments are due next year when the Redding case mentioned above and a challenge to Los Angeles County's plastic-bag ban are likely to be decided. As always, we'll keep you posted!

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