



Proposition 26 Has Potentially Significant Implications for the Building Industry

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California voters last week approved Proposition 26, a far-reaching amendment to the California Constitution with potentially significant implications for the building industry. While most pre-election attention focused on Prop 26's requirement that regulatory fees adopted by the state Legislature or state agencies be approved by a supermajority 2/3 vote of the Legislature, Prop 26 also imposes a 2/3 *voter approval* requirement on regulatory fees adopted by local and regional agencies.

Regulatory fees are monetary exactions imposed on regulated industries ostensibly to pay for the adverse impact of industry activity on public health or the environment. State regulatory fees authorized by the Legislature have proliferated following a California Supreme Court case (*Sinclair*), which held that such fees are not taxes, and therefore not subject to the California Constitution's 2/3-vote requirement for adopting or increasing State taxes. Recently, local and regional governmental entities have also begun to adopt these so-called *Sinclair* fees—some imposed on the building industry. For example, the San Joaquin Valley Air Quality District adopted an Indirect Source Rule (ISR) fee to mitigate the impact of auto emissions “generated” by vehicular trips associated with new development. The California Building Industry Association unsuccessfully challenged the ISR as an invalid development impact fee, but a Court of Appeal ruled the fee is not a development impact fee because air districts do not “approve” or “condition” development projects, and went on to uphold the ISR as a valid regulatory fee. Following the Court's decision, the Bay Area Air Quality Management District (BAAQMD) last year approved moving ahead with a similar ISR fee. With the passage of Prop 26, however, BAAQMD's planned ISR fee—as well as other fees contemplated by agencies that do not possess the traditional police power authority to approve and condition property development, will be subject to challenge unless approved by the 2/3 vote of the relevant local electorate.

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