TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 09-903
of	:	December 27, 2011
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THE HONORABLE LOUIS B. GREEN, COUNTY COUNSEL FOR THE COUNTY OF EL DORADO, has requested an opinion on the following question:

Are the charges required to be collected by cities, counties, and cities and counties under section 18931.6 of the California Health and Safety Code validly levied regulatory fees, or do they constitute an unlawful tax?

CONCLUSION

The charges required to be collected by cities, counties, and cities and counties under section 18931.6 of the California Health and Safety Code are validly levied regulatory fees, and do not constitute an unlawful tax.

ANALYSIS

The California Building Standards Law[1] requires the California Building Standards Commission (Commission) to review and, when appropriate, approve building standards proposed or adopted by state agencies.[2] In addition, the Commission is required to adopt and publish building standards (including "green building standards"[3]) to govern situations where no state agency has the authority or expertise to propose them.[4] Funds for carrying out these duties are available to the Commission from the Building Standards Administration Special Revolving Fund.[5]

Health and Safety Code section 18931.6 requires cities, counties, and cities and counties to collect a fee from all applicants for building permits. This fee is "assessed at the rate of $4 per $100,000 in valuation," as determined by local building officials. The local entity may retain up to 10 percent of the fees it collects to pay for administrative costs and code enforcement education. The balance is to be transmitted to the Commission for deposit in the Building Standards Administration Special Revolving Fund; the Commission may reduce the rate of the fee if the Commission determines that a lesser amount is adequate.[6] The question presented requires us to determine whether the

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[1] Health & Safety Code §§ 18901-18949.31. All further references to the Health and Safety Code are by section number only.

[2] § 18930.

[3] These are published as the California Green Building Standards Code, the purpose of which is "to improve public health, safety and general welfare by enhancing the design and construction of buildings through the use of building concepts having a reduced negative impact or positive environmental impact and encouraging sustainable construction practices." 24 Cal. Code Regs. tit. 11, § 101.2 (also known as Cal. Green Bldg. Stands. Code or CALGreen Code).

[4] §§ 18930.5, 18934.5.

[5] See § 18931.7 (establishing fund, and stating "emphasis [is] placed on the development, adoption, publication, updating, and educational efforts associated with green building standards").

[6] Section 18931.6 reads in its entirety:

> (a) Each city, county, or city and county shall collect a fee from any applicant for a building permit, assessed at the rate of four dollars ($4) per one hundred thousand dollars ($100,000) in valuation, as determined by the local building official, with appropriate fractions thereof, but not less than

charges assessed by section 18931.6 are "fees," or whether they are "taxes" levied in contravention of Proposition 13's two-thirds majority voting requirement.

In 1978, by initiative, California voters added article XIII A—commonly known as Proposition 13—to the state Constitution. Its stated purpose was to provide real property tax relief in an "interlocking package"[7] consisting of a real property tax rate limitation, a real property assessment limitation, a restriction on state taxes, and a restriction on local taxes.[8]

Section 3 of article XIII A restricts the enactment of new state taxes by prescribing that:

> From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members . . . of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

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one dollar ($1).

(b) The city, county, or city and county may retain not more than 10 percent of the fees collected under this section for related administrative costs and for code enforcement education, including, but not limited to, certifications in the voluntary construction inspector certification program, and shall transmit the remainder to the commission for deposit in the Building Standards Administration Special Revolving Fund established under Section 19831.7.

(c) The commission may reduce the rate of the fee upon determining that a lesser amount is sufficient to maintain the programs established under this part.

[7] *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 872 (1997).

[8] Cal. Const. art. XIII A, §§ 2-4.

Section 4 of article XIII A imposes similar restrictions on local entities, providing that:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.[9]

Our task involves both statutory and constitutional construction. The principles of constitutional construction are similar to those governing statutory construction: in interpreting a law's provisions, our paramount task is to ascertain the intent of those who enacted it.[10] To determine that intent, we look first to the language of the law's text, giving the words their ordinary meaning. If the language is clear, there is no need for further construction. If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent."[11] "[W]e also look to legislative history to confirm our plain-meaning construction of statutory language."[12]

Several arguments have been made to us in support of the view that the charges required by section 19831.6 are unconstitutional taxes. First, it is contended that the prescribed assessments are based not on the cost of services or commodities being provided to the payer, but rather on the market value of the project in question (at the rate of $4 per $100,000 in valuation). Second, it is contended that building permit applicants do not receive a "specific," "direct," or "peculiar" benefit or service from the state in return for the charge, because the Commission undertakes no additional work as a result of the application, nor would it be saved work if the property owner submitted no

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[9] We are not concerned with Proposition 218 of 1996, which limited the power of local governments to impose property taxes.

[10] *Prof. Engrs. in Cal. Govt. v. Kempton*, 40 Cal. 4th 1016, 1037 (2007); *Hunt v. Super. Ct.*, 21 Cal. 4th 984, 1000 (1999); *Wilcox v. Birtwhistle*, 21 Cal. 4th 973, 977 (1999). When construing an initiative, "[a]bsent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and [we] may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." *Lesher Communs., Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 543 (1990).

[11] *Prof. Engrs. in Cal. Govt. v. Kempton*, 40 Cal. 4th at 1037; *Hunt v. Super. Ct.*, 21 Cal. 4th at 1000; *Wilcox v. Birtwhistle*, 21 Cal. 4th at 977.

[12] *Hughes v. Pair*, 46 Cal. 4th 1035, 1046 (2009) (internal quotes and citations omitted).

application at all. Third, it is contended that the statutory charges are collected in the same amounts regardless of whether the applicant's project is within the jurisdiction of the state's Department of Housing and Community Development or the State Fire Marshal, and, we are told, most local building permit applications are for projects that will be inspected by the locality's own building and fire inspectors.

Relying on *Sinclair Paint Company v. State Board of Equalization*,[13] some commenters argue that a revenue-raising measure imposed to support an abstract social benefit is a tax, and therefore unlawful unless the measure received the constitutionally mandated two-thirds majority vote of the Legislature—which Senate Bill 1473 (2009), the legislative measure of which section 18931.6 is a part, did not. By the same token, it is argued, a government charge for a service or benefit may not be characterized as a "fee," and therefore exempt from the two-thirds vote requirement, unless it is exacted in return for a specific benefit conferred or a privilege granted directly to the payer.[14] Therefore, it is argued, the charges under discussion here, which are applied to the development and adoption of green building standards, are invalid taxes rather than valid fees because they confer no specific benefit upon the payers.

After careful consideration of these arguments, and of the judicial decisions in this area, we reach a different conclusion. We believe that the charges in question are valid fees, not invalid taxes. In particular, we believe that a closer reading of the *Sinclair* opinion, including a comparison of the *Sinclair* facts to those presented here, compels the conclusion that the charges are valid regulatory fees imposed under the police power.

The Court in *Sinclair* observed "that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts."[15] The Court accordingly undertook an independent review of the facts in that case.[16] Citing *Shapell Industries, Inc. v. Governing Board*,[17] the Court noted

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[13] 15 Cal. 4th 866 (1997).

[14] *See also Isaac v. City of Los Angeles*, 66 Cal. App. 4th 586, 597 (1998) (to be valid, a fee may be charged "only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided.").

[15] 15 Cal. 4th at 874. We note that Proposition 26, the so called Supermajority Vote to Pass New Taxes and Fees Act, which was passed by the voters on the November 2010 ballot, now defines "tax" as "any levy, charge, or exaction of any kind imposed by the State," except as otherwise provided. Proposition 26, however, pertains to taxes adopted after January 1, 2010, and is, therefore, not applicable to section 18931.6.

[16] *Id.*

that "[t]axes are raised for the general revenue of the governmental entity to pay for a variety of public services."[18] Acknowledging that "[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges," the Court nevertheless stated unambiguously that "compulsory fees may be deemed legitimate fees rather than taxes."[19]

As the *Sinclair* court noted, three categories of assessments have been recognized as permissible fees—distinguishable from "special taxes"[20]—and may, therefore, be enacted without regard to the two-thirds voting requirement of Proposition 13. These are: (1) *special assessments*, based on the value of benefits conferred on property; (2) *development fees*, exacted in return for permits or other government privileges; and (3) *regulatory fees*, imposed under the police power.[21] These categories may overlap in a given case.[22] Because a charge may have characteristics of more than one type of fee, determining whether it is a tax, a special assessment, a development fee, or a regulatory fee requires an inquiry beyond its label—a factor that can be easily manipulated—and into its actual underlying purpose.[23]

Special assessments are charges imposed by a local district upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein.[24] Special

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[17] 1 Cal. App. 4th 218, 240 (1991).

[18] *Sinclair Paint Co.*, 15 Cal. 4th at 874 (citations omitted).

[19] *Id.* (citations omitted).

[20] "[S]pecial taxes" are taxes levied for a specific purpose rather than for general governmental purposes. *City and Co. of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982); *see also* Govt. Code § 50076 (for purposes of Cal. Const. art. XIII A, § 4, "special tax" 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.").

[21] *Cal. Bldg. Indus. Assn. v. San Joaquin Valley Air Pollution Control Dist.*, 178 Cal. App. 4th 120, 131-132 (2009).

[22] *Sinclair Paint Co.*, 15 Cal. 4th at 874.

[23] *See San Marcos Water Dist. v. San Marcos Unified School Dist.*, 42 Cal. 3d 154, 163 (1986) (superseded on other grounds by Govt. Code § 54999).

[24] *San Marcos Water Dist.*, 42 Cal. 3d at 161. Similarly, charges assessed on businesses within a business improvement district, in amounts reasonably reflecting the

assessments on property, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not "special taxes."[25]

Development fees are charges imposed in return for building permits or other governmental privileges, and are valid so long as the amount of the fee bears a reasonable relationship to the development's probable costs to the community and benefits to the developer.[26] A development fee is defined as "a monetary exaction other than a tax or special assessment . . . that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ."[27] For fees that are imposed "as a condition of approval of a development project," a local agency must also identify the purpose and intended use of the fee, and determine the reasonable relationship between the fee and the development project.[28]

Regulatory fees have a wider scope than other development fees. "A regulatory fee is enacted for purposes broader than the privilege to use a service or to obtain a permit. Rather, the regulatory program is for the protection of the health and safety of the public."[29] Such fees, like other forms of development or user fees, "must not exceed the reasonable cost of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation; they may not be levied for unrelated purposes."[30] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation."[31] However, regulatory fees do not need to be as narrowly tailored as fee-for-service charges; they may properly include not only the direct costs of enforcing the regulation, but also all of the incidental costs to the public associated with the regulated

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value of the benefits conferred by the improvements, are not "special taxes." *Evans v. City of San Jose*, 3 Cal. App. 4th 728, 737-738 (1992).

[25] *Sinclair Paint Co.*, 15 Cal. 4th at 875.

[26] *Id.* at 875.

[27] Govt. Code § 66000(b).

[28] *Id.* at § 66001(b).

[29] *Cal. Assn. of Prof. Scientists v. Dept. of Fish & Game*, 79 Cal. App. 4th 935, 950 (2000).

[30] *Isaac*, 66 Cal. App. 4th at 596; *see also Sinclair Paint Co.*, 15 Cal. 4th at 876.

[31] *San Diego Gas & Elec. Co. v. San Diego Co. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1146, n. 18 (1988).

matter, and for the administration and maintenance of a system of supervision and enforcement.[32] Regulatory fees may be valid even in the absence of a perceived benefit flowing directly to the fee payers if a benefit is conferred upon persons or entities affected by the regulated activities.[33]

In *Sinclair*, the Supreme Court considered whether charges assessed on persons contributing to environmental lead contamination, pursuant to the Childhood Lead Poisoning Prevention Act of 1991, were permissible regulatory fees or improper taxes. The Act imposed fees on manufacturers and "other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead."[34] Fees were calculated according to formulas intended to capture the person's "market share" responsibility for lead contamination.[35] Proceeds from the fees supported the Act's "program of evaluation, screening, and follow-up" of children at risk of being affected by lead exposure.[36]

Ultimately, the Supreme Court ruled that the Childhood Lead Poisoning Prevention Act charges were lawful regulatory fees, even though they did not directly benefit the persons who paid the fees, but instead were intended for the benefit of children at risk of lead poisoning.[37] The *Sinclair* opinion concluded that, "Viewed as a 'mitigating effects' measure, [the lead fee] is comparable in character to similar police power measures imposing fees to defray the actual or anticipated effects of various business operations."[38] Examples of valid regulatory fees cited in the *Sinclair* opinion included rental unit fees imposed to support a hearing process for rental housing disputes;[39] fees charged to sellers of alcoholic beverage sellers to support a pilot project

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[32] *See United Bus. Commn. v. City of San Diego*, 91 Cal. App. 3d 156, 165-166 (1979); *see also* 92 Ops.Cal.Atty.Gen. 51, 52 (2009).

[33] *See Pennell v. City of San Jose*, 42 Cal. 3d 365, 375 n. 11 (1986).

[34] *Sinclair Paint Co.*, 15 Cal. 4th at 872 (citing Health & Saf. Code § 105310(a)).

[35] *Id.* at 872.

[36] *Id.* at 871.

[37] *Id.* at 880-881.

[38] *Id.* at 877.

[39] *Pennell*, 42 Cal. 3d at 375.

to address public nuisances associated with alcohol sales;[40] and fees for inspecting and correcting certain on-premises advertising.[41]

Here, we believe that the green-building-standards fees may properly be characterized as regulatory fees, which are "not dependent on government-conferred benefits or privileges."[42] As in *Sinclair*, the fees under consideration are designed, not to provide a benefit to the fee payers, but to support a program that addresses the societal costs of the fee payers' economic activities. Commerce in lead-containing products contributes to lead poisoning in children who are exposed to those products. Building developments that do not comply with green building standards contribute to air and water pollution and greenhouse gas emissions through inefficient uses of water and energy. As in *Sinclair*, the fees are regulatory in nature because they defray the effects of the relevant business operations—in this case, building construction and development.

Based upon the information provided for our consideration, we cannot say that the charges authorized by section 18931.6 exceed the reasonably necessary expense of the regulatory effort or, for that matter, the reasonable value of the benefits conferred by the green building standards program they support. These charges underwrite the development, adoption, and implementation of building standards, including green building standards, which the Legislature has determined are of public concern. The assessments are projected to cover the costs of the program. If the charges generate excess revenues, the section authorizes adjustments to reduce the amount of the charge.

For all of the foregoing reasons, we conclude that the charges required to be collected by cities, counties, and cities and counties under section 18931.6 of the California Health and Safety Code are intended principally for the protection of the health and safety of the public and are, therefore, validly levied regulatory fees and do not constitute an unlawful tax.

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[40] *City of Oakland v. Super. Ct.*, 45 Cal. App. 4th 740, 760-762 (1996).

[41] *United Bus. Commn.*, 91 Cal. App. 4th at 166-168.

[42] *Sinclair Paint Co.*, 15 Cal. 4th at 875.