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**CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION**  
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DATE: March 25, 2011

TO: Dawn Dunn  
Program Manager  
Tobacco Prevention Settlement Program

FROM: Jerry F. Czuleger   
Senior Deputy County Counsel

RE: Impact of Proposition 26 on County's Tobacco Retailer License Fee

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### **Tobacco Retailer License**

Santa Barbara County Code Chapter 37A requires a retailer to obtain a tobacco retailer license before selling tobacco products. The purpose behind the tobacco retailer license is to reduce the sale of tobacco products to minors, by imposing sanctions on tobacco retailers who violate the laws prohibiting the sale of tobacco products to minors.

Chapter 37A was amended by the Board of Supervisors in November of 2010. The amendments included an increase in the tobacco retailer license fee. The fee was increased from \$30 per year to \$250 per year in the years 2011 and 2012 and \$435 for each subsequent year. The fee increase was based on a fee study prepared by the Santa Barbara County Public Health Department, which found that an annual fee of \$435 covered the actual costs of administering the licensing program, including issuance of the licenses, investigations and the administrative enforcement and adjudication of violations. The \$435 fee provides for full cost recovery, but does not exceed the actual regulatory costs of administering the tobacco retailer license program.

The amendment that increased the tobacco retailer license fee was approved by the Board of Supervisors on November 9, 2010 and became effective December 9, 2010.

State law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law. *Business and Professions Code §22971.3.*

### **Proposition 26**

On November 2, 2010, the voters of California approved Proposition 26, which became effective the following day. Proposition 26 amended the California Constitution by broadening the definition of "tax," for both state and local government levies. As amended, a "tax" is "any levy, charge, or exaction of any kind" imposed by the State or a local government, unless the charge falls within one of Prop 26's specific exceptions. If a levy, charge or exaction is determined to be a tax, then it may only be imposed if adopted in accordance with the Constitution which requires state taxes to be approved by a two-thirds vote of each house of the State Legislature, and local taxes to be approved by the electorate (majority approval for a "general tax", and two-thirds approval for "special taxes".)

If a levy, charge or exaction is not a tax, then it may be imposed by a local government and need not be voted upon by the electorate.

## Impact of Proposition 26 on County's Tobacco Retailer License Fee Increase

We have reviewed Proposition 26 and have determined that the charge for obtaining a County tobacco retailer license is a fee and not a tax. The tobacco retailer license fee is not considered to be a tax because it is covered by the third exception to Proposition 26, which reads as follows:

“As used in the article, “tax” means any levy, charge or exaction of any kind imposed by a local government, except the following:

..  
(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.” *Article XIII C of the California Constitution, Section 1(e)(3)*.

A charge that falls within one of the Proposition 26 exceptions will not be considered a tax, but is still subject to the procedural requirements for adopting fees/assessments. Proposition 26 maintains the requirement that a fee must not exceed the reasonable cost of the governmental activity. Proposition 26 provides that the amount of any fee must be “no more than necessary to cover the reasonable costs of the governmental activity, and the manner in which those costs are allocated to a payor bear a reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” *Article XIII C of the California Constitution, Section 1(e)(7)*. This standard is basically the same standard that applied prior to the approval of Proposition 26. See, (*United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, citing *County of Plumas v. Wheeler* (1906) 149 Cal. 758, 763, 766.).

The County’s tobacco retailer license fee covers the cost of issuing licenses, performing investigations, inspections and the administrative enforcement and adjudication of violations, and is therefore not a tax under Proposition 26. *Article XIII C of the California Constitution, Section 1(e)(3)*. Additionally, the amount of the fee is defensible because it is supported by the fee study, which establishes that the fee does not exceed the reasonable cost of the governmental activity.