MEMORANDUM OF LAW

DATE: October 17, 1985

TO: Kathleen Mathers, Business License Administrator

FROM: City Attorney

SUBJECT: Exemption of Security Pacific National Bank from Business Improvement Area Fees

By memorandum dated April 30, 1985, you requested our advice whether Security Pacific National Bank was exempted by Revenue and Taxation Code section 23182 from business area improvement fees. You have advised us that banks are exempt from the business license tax, but the City considers them to be subject to business area improvement fees.

You indicated that there are two branch banks claiming exemption. One is located in the Hillcrest Business Improvement District created by Ordinance No. O-16230, adopted June 25, 1984, and the other is located in the Gaslamp Quarter Business

Improvement District created by Ordinance No. O-16139, adopted January 4, 1982. Both ordinances were adopted pursuant to the Parking and Business Area Improvement Law of 1979, Stats. 1979, Ch. 372, as codified in Streets and Highways Code Sec. 36500, et seq. (hereafter also referred to as the Parking and Business Area Improvement Law of 1979.) Each ordinance provides for a fee to be paid by all businesses within the district for parking and related improvements.

It is our conclusion that each of these branch banks is subject to the annual business area improvement fee. Our conclusion is based on the fact that these fees are assessments against property for services and improvements rather than taxes, and the banks are therefore not exempted from payment by Revenue and Taxation Code section 23182.

Revenue and Taxation Code section 23182 now provides in pertinent part as follows:

> The franchise tax imposed under this part upon banks and financial corporations is in lieu of all other taxes and licenses, state, county and municipal, upon the said banks and financial corporations except taxes upon their real property, local utility

user taxes, sales and use taxes, state energy resources surcharge, state emergency telephone users surcharge, and motor vehicle and other registration license fees and any other tax or license fee imposed by the state upon vehicles, motor vehicles or operation thereof. (Emphasis added.)

The franchise tax was originally created in 1949 by Stats. 1949, Ch. 557, as a tax in lieu of all other taxes, except taxes upon real property. The underlined portions of the quoted section were added to the original section effective September 29, 1979 as an urgency measure by Stats. 1979, Ch. 1150. The 1979 amendment to section 23182 added additional taxes and surcharges from which banks were not exempted, but it also did not address business area improvement assessments and fees under either the Parking and Business Improvement Area Law of 1979 or other laws.

The Parking and Business Improvement Area Law of 1979 authorizes cities to levy fees against all types of businesses in areas to be defined by ordinance to improve traffic circulation and access to the businesses within the business district by providing parking facilities and other civic amenities. The 1979 law codified in Streets and Highways Code section 36500, et seq.,

was also made effective on July 27, 1979 as an urgency measure. The predecessor to this 1979 law was the Parking and Business Area Improvement Law of 1965, enacted by Stats. 1965, Ch. 241, and codified in Streets and Highways Code section 36000 et. seq. It is still effective, not having been repealed by the 1979 Act.

Though the 1965 and 1979 Business Improvement Area laws are similar, the 1965 law referred to the fees therein imposed as "taxes", whereas the 1979 law referred to the fees therein imposed as "assessments and charges". This is of significance since the legislature amended Revenue and Taxation Code section 23182 after having added the Business Improvement Area Law of 1979 to the Streets and Highways Code and chose not to include assessments within its exemption provisions. It is surmised that the 1979 business improvement area legislation was in response to the "Proposition 13" constraints on taxes enumerated in California Constitution article XIII A, section 4, because of the

distinctions made between "taxes" and "assessments" in the 1965 and 1979 acts. Streets and Highways Code section 36504 now specifically provides that the "assessment" is for the purpose of obtaining funds to construct physical improvements to benefit a district.

The distinction in these various statutes between "taxes" and

"assessments" is both one of definitional applicability as well as constitutional validity. An assessment that is in effect a tax would not only be subject to the exemption provisions of Revenue and Taxation Code section 23182, but it may also be invalid after adoption of "Proposition 13" unless it was enacted by vote of the electorate, rather than by ordinance of the City Council.

The essential nature of an "assessment" is that the charge or fee is based on a benefit conferred upon real property. This distinction exists even if the fee is called a "tax". See Northwestern Mut. Life Ins. Co. v. St. Bd. of Equalization, 73 Cal.App.2d 548, 166 P.2d 917 (1946), hearing denied, May 16, 1946, which held that an assessment is not a tax, regardless of how described.

In Northwestern Mut. Life Ins. Co., supra, the Fourth District Court of Appeal ruled that an insurance company could not deduct flood control taxes from gross premiums for purposes of determining net income upon which taxes due to the State Board of Equalization were computed under former California Constitution article XIII, section 14. The court reasoned, citing cases, that flood control taxes were assessments concerning benefits conferred upon real property owned by the corporation, and thus were not "taxes" even though described as

such by the enabling statute. The court further stated that unless the Constitution specifically provided for "assessments" as well as taxes to be allowed as deductions, charges in the nature of assessments, no matter how described, cannot be deducted. Id. at 554.

In the case of business area improvement fees established in the Hillcrest and Gaslamp business districts, the fees are to defray the cost of acquisition, construction or maintenance of parking facilities for the benefit of the area, the decoration of public places, the promotion of public events, and the furnishing of music and the general promotion of business, all within the area. See Ordinance No. O-16139 N.S. and O-16230 N.S. Such purposes are the basis for statutorily classifying the fee as an assessment rather than a tax because of the direct benefit to the property in the district. Streets and Highways Code section

36504; Northwestern Mut. Life Ins. Co. v. St. Bd. of Equalization supra at 552.

Further, assessments on real property that are bonafide assessments and charges for services and improvements to that property have also sustained challenges under Proposition 13 that they were taxes and thus invalid without a vote of the general electorate. J.W. Jones Companies v. City of San Diego, 157

Cal.App.3d 745, 203 Cal. Rptr. 580 (1984); City Council (San Jose) v. South, 146 Cal.App.3d 320, 194 Cal. Rptr. 110 (1983); See also Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal.App.3d 545, 169 Cal.Rptr. 391 (1980).

Thus, to the extent that Streets and Highways Code section 36500 authorizes, and San Diego City Ordinances No. O-16139 N.S. and O-16230 N.S. impose, charges on real property for benefits conferred within that district, Revenue and Taxation Code section 23182 would not be applicable. We therefore conclude that the banks may be charged the applicable fees established by ordinance.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

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