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OPINION	:	No. 79-712
of	:	November 1, 1979
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SUBJECT: "SPECIAL TAXES"—Fees imposed by a local agency pursuant to Government Code section 66484 of the Subdivision Map Act do not constitute "special taxes" since they are special assessments, and thus do not require approval of two-thirds of the qualified electors prior to imposition.

The Honorable John V. Briggs, Senator, Thirty-fifth District, has requested an opinion on the following question:

Do the fees imposed by a local agency pursuant to Government Code section 66484 of the Subdivision Map Act constitute "special taxes" within the meaning of section 4 of article XIIIA of the California Constitution thus requiring approval of two-thirds of the qualified electors prior to imposition?

CONCLUSION

The fees imposed by a local agency pursuant to Government Code section 66484 of the Subdivision Map Act do not constitute "special taxes" within the meaning of section 4 of article XIIIA of the California Constitution since they are special assessments, and thus do not require approval of two-thirds of the qualified electors prior to imposition.

ANALYSIS

Government Code section 66484[1] (hereinafter "section 66484") is part of the Subdivision Map Act (Gov. Code, § 66410 *et seq.*) and provides a mechanism whereby a local agency (city or county) may, as a condition to approval of a final subdivision map or a building permit, obtain from a subdivider or permittee funds to defray the cost of constructing bridges over waterways, railways, freeways, and canyons, or constructing major thoroughfares. Section 66484 has many prerequisites and conditions, but in simplified terms, it requires the subdivider or permittee to pay, as a "fee," that portion of the costs of such bridges or thoroughfares as will be a benefit to the land being subdivided or subject to the building permit.

Section 4 of article XIIIA of the California Constitution provides:

> "Cities, Co unties 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."

The question presented is whether section 66484 fees constitute a special tax within the meaning of article XIIIA, section 4, and if the ordinance imposing such fees is enacted after the effective date of article XIIIA (July 1, 1978), whether it requires approval of the vote of two-thirds of the qualified electors in the adopting city or county. It is our conclusion from an analysis of section 66484, the purpose and intent of article XIIIA and many court decisions dealing with various types of taxes and exactions, that section 66484 fees constitute special assessments and are not special taxes within the meaning of section 4 of article XIIIA.

1. What Are Taxes?

The courts have frequently attempted to analyze whether a particular governmental exaction is a tax, the result frequently depending on the purpose for which the analysis is being made as opposed to the purpose of the exaction. This has often resulted in confusion of terms and results.

Thus, a tax has often been broadly defined:

> "A tax, in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the legislature, for

[1] Government Code section 66484 is set forth in Appendix A.

> public purposes . . . ." (*City of Madera v. Black* (1919)181 Cal. 306, 310; see also *Doyle v. Austin* (1874) 47 Cal. 353, 361; *Dare v. Lakeport City Council* (1970)12 Cal. App. 3d 864, 868*; Linnell v. State Dept. of Finance* (1962) 203 Cal. App. 2d 465, 469; 46 Cal. Jur. 2d, Taxation § 2, p. 481.)

Further, it makes no difference what label is given to a particular exaction. (*Flynn v. San Francisco* (1941) 18 Cal. 2d 210, 214–215.) Rather, whether it is a tax for a particular purpose will depend on an examination of the incidence of the exaction and the language used in the authorizing statute or ordinance:

> "It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents, and from the natural and legal effect of the language employed in the statute. (*Ingels v. Riley* (1936) 5 Cal. 2d 154, 159; see also *Ainsworth v. Bryant* (1949) 34 Cal. 2d 465, 473.)

Often such an examination will lead to the conclusion that the exaction is not a tax at all. (See *Cedars of Lebanon Hosp. v. County of L. A.* (1950) 35 Cal. 2d 729, 747 (flood control district assessment not a tax); *Trumbo v. Crestline Lake Arrowhead Water Agency* (1967) 250 Cal. App. 2d 320, 322 (standby water charge not a tax); *Linnell v. State Dept. of Finance, supra* (parking fee at state college is not a tax).)

The courts and the Legislature have used a variety of terms to describe a particular exaction, such as license fee (see, e.g., *Weekes v. City of Oakland* (1978) 21 Cal. 3d 386, 391, discussing an Oakland ordinance); license tax (e.g., *Flynn v. San Francisco, supra*, discussing charter provisions for a "license tax"); excise tax (e.g., *Associated Homebuilders v. City of Livermore* (1961) 56 Cal. 2d 847, 852, discussing a sewer connection fee); fees (e.g., *Oakland v. E. K. Wood Lumber Co*. (1930) 211 Cal. 16, 25, discussing "wharfage fee"); charge, toll, impost or duty *(City of Madera v. Black, supra,* discussing a monthly sewage rate or charge); special tax (e.g., *Hunt v. Mayor & Council of Riverside* (1948)31 Cal. 2d 619, 628; sales tax not a special tax within meaning of charter); or assessment (*City of Los Angeles v. Offner* (1961)55 Cal. 2d 103, 108 discussing connection charge for sewer outfall facilities).[2] In each case, however, it is necessary to examine the exaction and the purpose for which the examination has been made by the courts. (*Crawford v. Herringer* (1978) 85 Cal. App. 3d 544, 548–549.) Thus, the courts have reached such conclusions as a monthly sewage rate or charge is a tax, toll, impost or duty within the constitutional provision giving jurisdiction to the superior court (*City of*

[2] The Legislature in Statutes 1979, chapter 397 (A.B. 618) used the terms "charges," "assessments," and "special taxes" in the hill authorizing the levying of such exactions for purposes of raising revenue to pay for fire and police protection services.

Madera v. Black, *supra*), while concluding that flood control district assessment is not a tax for purposes of California Constitution article XIIIA, section 14 4/5 [now § 28] which section provides for a tax on insurance companies (*Northwestern Etc. Co. v. St. Bd. of Equal.* (1946) 73 Cal. App. 2d 548, 553), or for purposes of the constitutional welfare exemption of article XIIIA section 4(b). (*Cedars of Lebanon Hospital v. County of L. A., supra.*) (And see list noted in *Crawford v. Herringer, supra*.)

In light of what is acknowledged by the courts as some confusion in the use of terms (*County of Fresno v. Malmstrom* (1979) 94 Cal. App. 3d 974, 983) and the need to examine a particular exaction in a specific context, we shall briefly analyze the purpose of article XIIIA, attempt to discern whether any categories of exactions are outside the purposes of the tax limitations contained in that constitutional provision, and then measure the section 66484 fees against such categories.

2. Purpose of Article XIIIA

The California Supreme Court, in upholding the constitutionality of article XIIIA as adopted by the electorate in June 1978 as an initiative measure, made several observations about the purpose and intent of article XIIIA that are pertinent here. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208.)

> ". . . [T]he new article changes the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing powers of state and local governments." (*Id.* at 218.)

The court noted that article XIIIA[3] contains four features: Section 1 of the article limits the tax rate applicable to real property, with one exception for pre-existing voter approved indebtedness (§ 1(b)), while section 2 places a restriction on assessed value of real property. Further, section 3 imposes restrictions on the method of changing state taxes. Finally, section 4, the one applicable to this discussion, places a restriction on local taxes. (*Id.* at 220.) In discussing whether the initiative proposition as a whole meets the single-subject requirement, the court said:

> ". . . Our analysis of article XIIIA convinces us that the several elements of that article satisfy either standard [of the single-subject test] in that they are both reasonably germane to, *and* functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief.

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[3] The first three sections of article XIIIA read:

"SEC. 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1 %) of the full cash value of such property. The one percent (1 %) tax to be collected by the counties and apportioned according so law to the districts within she counties.

"(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

"SEC. 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under 'full cash value' or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property nor already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. For purposes of this section, the term 'newly constructed' shall not include real property which is reconstructed after a disaster, as declared by the Governor, where the fair market value of such real property, as reconstructed, is comparable to its fair market value prior to the disaster.

"(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for she area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.

"SEC. 3. 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 elected to each of the two houses 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."

". . . Although petitioners insist that these four features constitute separate subjects, we find that each of them is reasonably interrelated and interdependent, forming an interlocking 'package' deemed necessary by the initiative's framers to assure effective real property tax relief. Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes. Although sections 3 and 4 do not pertain solely to the matter of *property* taxation, both sections, in combination with sections 1 and 2, are reasonably germane, and functionally related, to the general subject of property tax relief." (*Id.* at 230-31.)

". . . Each of the four basic elements of article XIIIA was designed to interlock with the others to assure an effective tax relief program. (*Id.* at 232.)

The court of appeals in the recent case of *County of Fresno v. Malmstrom, supra*, 94 Cal. App. 3d at 980 concluded:

"First, we are of the opinion that a major thrust of article XIIIA is aimed at controlling ad valorem property taxes . . . ."

In 62 Ops. Cal. Atty. Gen. 254, 256 (1979) in analyzing section 4 of article XIIIA, we noted the rules of interpretation for construing an initiative constitutional provision as set forth in the *Amador Valley* case:

"The generally accepted rules for construing constitutional provisions may be summarized as follows: (1) a liberal, practical and common-sense approach should be taken, (2) the natural and ordinary meaning of the words used should be followed, (3) the apparent intent of the framers should be fulfilled and absurd results avoided, and (4) interpretations by the Legislature and administrative agencies and the ballot summary, arguments and analysis should be considered in determining the probable meaning of uncertain language. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal. 3d 208, 245–246.)"

In light of these authorities, we reach one paramount conclusion as to the scope of section 4 of article XIIIA. Section 4 is intended to act as a device to stop any circumventing of the property tax relief provided by sections 1 and 2. Thus, any exaction imposed by a local government agency must be measured by this purpose of section 4. If this exaction is designed to raise revenue for the benefit of the taxing agency, it must he carefully scrutinized to see if it either (1) is a prohibited ad valorem tax on real property or a

transaction or sales tax on the sale of real property, or (2) a special tax requiring a two-thirds vote of the qualified electors. Conversely, if the purpose and effect of the exaction is not to raise revenue for the benefit of the governmental agency as distinguished from the persons or property from whom or which it is exacted, it may well be beyond the proscription of section 4.

With that general and admittedly imprecise guideline, we shall examine one category of exaction which appears to include the fees in question, that of special assessments, and note that such fall outside the restrictions of section 4.

3. Special Assessments

The recent case of *County of Fresno v. Malmstrom, supra*, held that assessments made under the Improvement Act of 1911 (Sts. & Hy. Code, § 5000 *et seq.*) and the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 *et seq*.) were not taxes within the meaning of sections 1 and 4 of article XIIIA, and therefore neither the one percent tax rate limitation of section 1 nor the voter approval requirement of section 4 was applicable. The essence of the court's reasoning was that since special assessment improvements are for the benefit of the property against which the cost is assessed, the assessments are not, and traditionally have not been, considered taxes. The court even analogized assessments as being "more in the nature of loans to property owners for improvements benefiting their property, with bonds representing that loan and secured by the property itself." *Id*. at 980, fn. 2.)

Many California court decisions have held that property assessments for improvements which are of benefit solely to the property assessed, in contrast to general ad valorem property taxes, are not taxes at all. (See, e.g., *Cedars of Lebanon Hosp. v. County of L. A., supra,* 35 Cal. 2d at 747; *Los Angeles Co. F. C. District v. Hamilton* (1917) 177 Cal. 119, 129; *County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal. App. 3d 364, 379–380; *County of San Bernardino v. Flournoy* (1975) 45 Cal. App. 3d 48, 51-52. And see 6 Ops. Cal. Atty. Gen. 147, 148 (1945).) This is so despite the fact that the source of governmental power to levy special assessments is '. . . the same power as that exerted in the levy of an ordinary tax for governmental purposes. . . .' (*Inglewood v. County of Los Angeles* (1929) 207 Cal. 697, 703.)

Perhaps the best exposition of the difference between a property tax and an assessment and the requirements of an assessment are contained in *Northwestern Etc. Co. v. St. Bd. of Equal., supra:*

> "A tax is an assessment levied on the person or the property involved and hence the terms have often been confused, but there is a difference that

may be determined from the language and legal effect of the particular statute involved. . . ."

"'There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes and a assessment levied for improvements made under special laws of a local character.' (*Inglewood v. County of Los Angeles*, 207 Cal. 697, 702 (280 P. 360); . . . ." (*Id*. at 551.)

". . . A special assessment is taxation in the sense that it is a distribution of that which is originally a public burden. Clearly, however, a special or local assessment is not a tax in the sense of a tax to raise revenue for general governmental purposes. Taxes for revenue, or "general taxes" as they are sometimes called by distinction, are the exactions placed upon the citizen for the support of the government paid to the state as a state, the consideration of which is protection or public service by the state, whereas special or local assessments, sometimes called 'special taxes,' are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area. To enumerate significant differences between a special assessment and a tax, it may he observed: (1) A special assessment can be levied only on land; (2) a special assessment cannot (at least in many states) be made a personal liability of the person assessed; (3) a special assessment is ordinarily based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment, rather than a tax, notwithstanding the statute calls it a tax. It has been ruled that a special assessment is not, in the constitutional sense, a tax at all.' (48 Am. Jur., pp. 565–567, § 3; . . . .)" (*Id.* at 552.)

The California Supreme Court has noted that:

" . . . Special assessments can be levied only on the specific property benefited and not on all the property in the district . . . . The basis of the imposition of a special assessment is the benefit inuring to the property assessed . . . ." (*Anaheim Sugar Co. v. County of Orange* (1919) 181 Cal. 212, 216.)

If the exaction is for the ". . . benefit [of] the members of the taxing district in common with the public and not merely as individual property owners . . . ." (*Id.* at 217), or if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. (*City of Los Angeles v. Offner, supra*, 55 Cal. 2d at 108.)

> " . . . 'The compensating benefit to the property is the warrant, and the sole warrant, for the legislature to impose the burden of a special assessment. [Citation.] The improvement must confer a special benefit upon the property assessed. [Citation.]' . . . ." (*Id.* at 112; see also *Roberts v. City of Los Angeles* (1936) 7 Cal. 2d 477, 490.)

It should be noted, however, that the basis of determining the benefits to a particular parcel of property may be done by a variety of methods, so long as it is reasonable (*Jeffrey v. City of Salinas* (1965) 232 Cal. App. 2d 29, 44), and may be determined on an ad valorem basis under some circumstances. (*County of Santa Barbara v. City of Santa Barbara, supra,* 59 Cal. App. 3d at 380.) (See also 58 Ops. Cal. Atty. Gen. 200, 202 (1975).)

As noted above, the court in *County of Fresno v. Malmstrom, supra*, has concluded that section 4 of article XIIIA does not apply to 1911 and 1913 Improvement Act assessments since they are special assessments and not taxes. (94 Cal. App. 3d at 984-985.) We reach the same conclusion, with slightly different reasoning. Since special assessments as defined and discussed by the courts must be for the benefit of the assessee's property, and not for the benefit of the general public other than incidentally, we conclude that assessments are not the type of exaction that can be used as a mechanism for circumventing the property tax relief provided by sections 1 and 2 of article XIIIA. As the *Offner* and *Roberts* cases, *supra*, note, if the assessment results in revenue above the cost of the improvement or is of general public benefit, it is no longer a special assessment, but is a tax. (See *Harrison v. Board of Supervisors* (1975) 44 Cal. App. 3d 852, 857.) This being so, it is our opinion that an exaction which meets the requirements of a special assessment is not a tax within the meaning of the provisions of section 4 of article XIIIA.

4. Section 66484 Fees

Our final task is to examine the section 66484 fee.[4] Although denominated a fee and imposed as part of a regulatory scheme (Subdivision Map Act), the exaction imposed by section 66484 has all the earmarks of a special assessment: (1) It apportions the cost of a *future* (but previously planned) improvement on a benefit basis; (2) it levies against the subdivider's or builder's land only so much of the cost as is attributable to the benefits inuring to the applicant's land; (3) the funds acquired by the fee are to be segregated and

[4] We are, in this opinion examining only the fees exacted by Section 66484.

used solely for the designated improvements or reimbursement for costs incurred for the improvements; and (4) it contains a typical assessment protest procedure (although we express no opinion as to whether such is mandatory for an assessment). It lacks only the assessment bond and annual levy features usually found with special assessments. In view of the fact that the section 66484 mechanism requires all the money attributable to the subject lands in advance, such features are not needed.

In short, the exaction of section 66484 is designed to build improvements of benefit to subdivided property and charge against that property no more than the share of the costs attributable to that benefit. As such, it cannot, in our judgment, be used to circumvent the property tax relief provided by sections 1 and 2 of article XIIIA. It is therefore our opinion that the fee exacted by section 66484 does not constitute a tax within the meaning of section 4 of article XIIIA.[5]

APPENDIX A

> "A local ordinance may require the payment of a fee as a condition of approval of a final map or as a condition of issuing a building permit for purposes of defraying the actual or estimated cost of constructing bridges over waterways, railways, freeways, and canyons, or constructing major thoroughfares.
>
> "Such local ordinance may require payment of fees pursuant to this section if:
>
> "(a) The ordinance refers to the circulation element of the general plan and, in the case of bridges, to the transportation or flood control provisions thereof which identify railways, freeways, streams or canyons for which bridge crossings are required on general plan or local roads and in the case of major thoroughfares, to the provisions of such circulation element which identify those major thoroughfares whose primary purpose is to carry through traffic and provide a network connecting to the state highway system; provided, such circulation element, transportation or flood control provisions have been adopted by the local agency 30 days prior to the filing of a map or application for a building permit.

[5] It is apparent that the section 66484 fees are not ad valorem taxes on real property since they are not levied on an ad valorem basis, nor are they a "transaction tax or sales tax on the sale of real property," since the exaction is not dependent upon or related to any sale of real property. The fees do not thus appear to be proscribed by section 4 of article XIIIA.

"(b) The ordinance provides that there will he a public hearing held by the governing body for each area benefited. Notice shall be given pursuant to Section 65905 of the Government Code. In addition to the requirements of Section 65905 of the Government Code, such notice shall contain preliminary information related to the boundaries of the area of benefit, estimated cost and the method of fee apportionment. The area of benefit may include land or improvements in addition to the land or improvements which are the subject of any map or building permit application considered at such proceedings.

"(c) The ordinance provides that at such public hearing, the boundaries of the area of benefit, the costs, whether actual or estimated, and a fair method of allocation of costs to the area of benefit and fee apportionment are established. The method of fee apportionment, in the case of major thoroughfares, shall not provide for higher fees on land which abuts the proposed improvement except where the abutting property is provided direct usable access to the major thoroughfare. A description of the boundaries of the area of benefit, the costs, whether actual or estimated, and the method of fee apportionment established at the hearing shall be incorporated in a resolution of the governing body, a certified copy of which shall be recorded by the governing body conducting the hearing with the recorder of the county in which the area of benefit is located. Such apportioned fees shall be applicable to all property within the area of benefit and shall be payable as a condition of approval of a final map or as a condition of issuing a building permit for such property or portions thereof. Where the area of benefit includes lands nor subject to the payment of fees pursuant to this section, the governing agency shall make provision for payment of the share of improvement costs apportioned to such lands from other sources.

"(d) The ordinance provides that payment of fees shall not be required unless the major thoroughfares are in addition to, or a reconstruction of, any existing major thoroughfares serving the area at the time of the adoption of the boundaries of the area of benefit.

"(e) The ordinance provides that payment of fees shall not be required unless the planned bridge facility is an original bridge serving the area or an addition to any existing bridge facility serving the area at the time of the adoption of the boundaries of the area of benefit. Such fees shall not be expended to reimburse the cost of existing bridge facility construction.

"(f) The ordinance provides that if, within the time when protests may be filed under the provisions of such ordinance, there is a written protest, filed with the clerk of the legislative body, by the owners of more than one-half of the area of the property to be benefited by the improvement, and sufficient protests are not withdrawn so as to reduce the area represented to less than one-half of that to be benefited, then the proposed proceedings shall be abandoned, and the legislative body shall nor, for one year from the filing of that written protest, commence or carry on any proceedings for the same improvement or acquisition under the provisions of this section.

"Nothing in this section shall preclude the processing and recordation of maps in accordance with other provisions of this division if proceedings are abandoned.

"Any protests may be withdrawn by the owner making the same, in writing, at any time prior to the conclusion of a public hearing held pursuant to the ordinance.

"If any majority protest is directed against only a portion of the improvement then all further proceedings under the provisions of this section to construct that portion of the improvement so protested against shall be barred for a period of one year, but the legislative body shall not be barred from commencing new proceedings not including any part of the improvement or acquisition so protested against. Nothing in this section shall prohibit the legislative body, within such one-year period, from commencing and carrying on new proceedings for the construction of a portion of the improvement so protested against if it finds, by the affirmative vote of four-fifths of its members, that the owners of more than one-half of the area of the property to be benefited are in favor of going forward with such portion of the improvement or acquisition.

"Fees paid pursuant to an ordinance adopted pursuant to this section shall be deposited in a planned bridge facility or major thoroughfare fund. A fund shall be established for each planned bridge facility project or each planned major thoroughfare project. If the benefit area is one in which more than one bridge is required to be constructed, a fund may be so established covering all of the bridge projects in the benefit area. Moneys in such fund shall he expended solely for the construction or reimbursement for construction of the improvement serving the area to be benefited and from which the fees comprising the fund were collected, or to reimburse the local agency for the cost of constructing the improvement.

"An ordinance adopted pursuant to this section may provide for the acceptance of considerations in lieu of the payment of fees.

"A local agency imposing fees pursuant to this section may advance money from its general fund or road fund to pay the cost of constructing the improvements and may reimburse the general fund or road fund for such advances from planned bridge facility or major thoroughfares funds established to finance the construction of such improvements.

"A local agency imposing fees pursuant to this section may incur an interest-bearing indebtedness for the construction of bridge facilities or major thoroughfares; provided that the sole security for repayment of such indebtedness shall be moneys in planned bridge facility or major thoroughfares funds.

"The term 'construction' as used in this section includes design, acquisition of right-of-way, administration of construction contracts and actual construction.

"Nothing in this section shall be construed to preclude a county or city from providing funds for the construction of bridge facilities or major thoroughfares to defray costs nor allocated to the area of benefit."

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